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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1376**

Julian Onesimo Narvaez-Ramirez, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 26, 2018
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CR-14-22350

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant contends that the district court erred in granting an upward durational
departure on his sentence for second-degree criminal sexual conduct because the departure

was based on two aggravating factors—multiple forms of sexual contact and demonstrable bodily harm—both of which were invalid. Because the multiple forms of sexual contact factor did not duplicate an element of the offense and justifies the upward durational departure on the offense, we affirm.

FACTS

Appellant Julian Onesimo Narvaez-Ramirez began sexually abusing his daughter, W.N., when she was in third grade, and continued abusing her until the summer before she began sixth grade. The abuse started with Narvaez-Ramirez touching W.N.'s vagina with his hand on the outside of her clothing. On numerous occasions spanning several years, Narvaez-Ramirez touched W.N.'s vagina with his hand under her clothes, touched her vagina and butt with his penis, and made her touch his penis with her hand. He also sucked on her chest, leaving bruises that both her mother and brother observed. The abuse occurred in the home and at the family's restaurant, and the frequency of the abuse increased as time passed.

The state charged Narvaez-Ramirez with two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct. After trial, a jury convicted him of two counts of second-degree criminal sexual conduct, but acquitted him of the first-degree criminal sexual conduct counts. The first conviction, listed as Count 3 in the complaint, was for multiple acts of abuse where the victim was under 16 and the defendant has a significant relationship with the victim. Minn. Stat. § 609.343, subd. 1(h)(iii) (2012). The second conviction, Count 4, was for sexual contact with a

victim under 13 and the defendant is more than 36 months older than the victim. Minn. Stat. § 609.343, subd. 1(a) (2012).

After the district court received the jury's guilty verdicts, it held a sentencing trial, and provided the jury with a special verdict form containing two questions about aggravating sentencing factors. First, with regard to Count 3, the jury was asked: "did the defendant engage in multiple forms of sexual contact?" Second, as to Count 4, the jury was asked: "did the defendant cause demonstrable bodily harm to W.N.?" The jury answered yes to each question, and the district court sentenced Narvaez-Ramirez to 135 months plus 10 years of conditional release for Count 3, an upward durational departure from the 90-month presumptive sentence. Minn. Stat. § 609.343, subd. 2(b) (2012); Minn. Sent. Guidelines 4.B (2012). The district court determined that

[t]he factor [the jury] found on Count 3, multiple forms of contact, would be sufficient to justify the sentence that I've imposed.

I would note, though, that the additional aggravating factor of demonstrable injury, although it was attached to the Count 4 verdict, it does also apply to Count 3 since Count 4 was a lesser included of Count 3.

So, the demonstrable injury also does support the upward departure here.

The district court did not impose a sentence for Count 4 because it is a lesser-included offense of Count 3. See Minn. Stat. § 609.343, subd. 2(b); Minn. Sent. Guidelines 4.B.

Narvaez-Ramirez filed a petition for postconviction relief, which was denied, and he now appeals that decision.

DECISION

Aggravating Sentencing Factors

This court reviews the denial of a motion for postconviction relief and a sentence that departs from the sentencing guidelines presumptive range for an abuse of discretion. *Dillon v. State*, 781 N.W.2d 588, 594 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). But, “the question of whether the district court’s reason for the departure is ‘proper’ is treated as a legal issue.” *Id.* at 595. Thus, whether a reason for an upward departure is permissible is reviewed de novo, but the “district court’s decision to depart from the sentencing guidelines based on permissible grounds is reviewed for an abuse of discretion.” *State v. Grampre*, 766 N.W.2d 347, 350 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009); *see also State v. Soto*, 855 N.W.2d 303, 308 n.1 (Minn. 2014).

Narvaez-Ramirez argues that the district court’s use of multiple forms of sexual contact as a factor to justify the upward durational departure on his sentence was invalid because it duplicated the element of the offense that the sexual abuse must include multiple acts of sexual contact. *See* Minn. Stat. § 609.343, subd. 1(h)(iii). Multiple acts of sexual contact is not a valid reason to depart when committing multiple acts is an element of the offense. *State v. Abrahamson*, 758 N.W.2d 332, 338 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009). But, multiple acts of sexual contact is not the same as multiple forms of sexual contact because multiple forms of sexual contact refers to sexual contact

occurring in a variety of ways, not sexual contact occurring on multiple occasions. *See id.* at 338–39.

Rather than challenge the validity of the aggravating factor in general, Narvaez-Ramirez argues that using multiple forms of sexual contact as an aggravating factor was invalid in his case because (1) “the evidence of multiple acts of contact was indistinguishable from multiple forms of contact,” and (2) the jury was not instructed as to the difference between form and act.

While Narvaez-Ramirez is correct that the same evidence was presented to the jury as supporting both the element of the offense and the aggravating factor, the same evidence supports both findings. W.N. testified that her father had sexual contact with her numerous times, and she testified about the variety of different ways that her father had sexual contact with her—including his sucking on her chest, touching her vagina, and making her touch his penis. During the guilt phase of the trial, the jury was only required to find that Narvaez-Ramirez committed multiple acts of sexual contact, regardless of whether such contacts were the same or different forms of contact, in order to reach a guilty verdict. *See* Minn. Stat. § 609.343, subd. 1(h)(iii). In her closing argument, the prosecutor explained to the jury that, in order to satisfy the multiple-acts element of the offense, the state had to prove that “the sexual abuse involved multiple acts committed over an extended period of time.” The prosecutor argued that the state met this burden of proof in that “[W.N.] . . . disclosed numerous sexual acts that her father committed against her.”

However, in the sentencing phase of the trial, the jury had to determine whether those multiple sexual contacts consisted of multiple forms of sexual contact. During the

sentencing phase, the prosecutor again described the variety of ways that Narvaez-Ramirez had sexual contact with W.N., and explained that each different way that Narvaez-Ramirez abused W.N. counted as a different form of sexual contact. While the prosecutor essentially presented the same evidence in the guilt phase of the trial as in the sentencing phase, the prosecutor did so for different purposes—and the jury was asked to make findings on different aspects of the evidence presented.

Narvaez-Ramirez’s second argument is that the jury was not instructed on the difference between form and act. But, “[n]o party may claim error for any instruction not objected to before deliberation,” and Narvaez-Ramirez did not object to the jury instructions or to the language of the special verdict form. *See* Minn. R. Crim. P. 26.03, subd. 19(4)(a); *State v. Cruz-Ramirez*, 771 N.W.2d 497, 506 (Minn. 2009). Moreover, multiple forms of contact is readily understandable without definition, and there is nothing in the record to support that the prosecutor’s closing argument confused the jury. We therefore conclude that the postconviction court did not err in denying Narvaez-Ramirez’s postconviction petition because the district court’s use of multiple forms of sexual conduct as an aggravating factor to upwardly depart was valid.

Because we conclude that multiple forms of sexual conduct was a valid aggravating factor, and because the district court determined that multiple forms of contact was sufficient to justify the sentence it imposed, we need not decide whether the demonstrable-bodily-harm factor is also valid. Even if the district court did err in relying on the demonstrable-bodily-harm factor, any error would be harmless. *See State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009) (“The United States Supreme Court has stated that ‘[w]hen

a reviewing court concludes that a district court based a departure on both valid and invalid factors, a remand is required *unless it determines the district court would have imposed the same sentence* absent reliance on the invalid factors.’” (emphasis added) (quoting *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035, 2053–54 (1996))).

Pro Se Arguments

Narvaez-Ramirez also makes several arguments in a pro se letter. He claims that the evidence was insufficient to sustain his conviction because W.N. lied, and requests a downward durational or dispositional departure. Assignments of error “based on ‘mere assertion’ and not supported by argument or authority [are] waived unless prejudicial error is obvious on mere inspection.” *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006), *aff’d*, 728 N.W.2d 243 (Minn. 2007). We will not consider these arguments because there are no obvious errors, the arguments were not raised before the postconviction court, and Narvaez-Ramirez’s letter does not discuss the facts or the law other than to accuse his daughter of lying—which is a jury question. *See* Minn. Stat. § 590.02, subd. 1(1) (2016) (“All grounds for relief must be stated in the petition or any amendment thereof.”); *see also Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) (“Because [petitioner] did not raise the claim in his postconviction petition and the postconviction court made no findings on the issue, we have no postconviction ruling to review.”).

Affirmed.