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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0112**

State of Minnesota,
Appellant,

vs.

Kevin Alexander Johnson,
Respondent.

**Filed June 11, 2018
Affirmed
Rodenberg, Judge**

Dakota County District Court
File No. 19HA-CR-17-696

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

James C. Backstrom, Dakota County Attorney, Torrie J. Schneider, Assistant County Attorney, Hastings, Minnesota (for appellant)

Paul W. Rogosheske, Ryan J. Grove, Rogosheske, Rogosheske, & Atkins, PLLC, South St. Paul, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Jesson, Judge; and Florey, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

The state appeals respondent Kevin Alexander Johnson's gross-misdemeanor sentence for nonconsensual dissemination of private sexual images under Minn. Stat. § 617.261, subd. 1 (2016), arguing that the district court abused its discretion when it

granted respondent a downward durational departure from the sentencing guidelines. It argues that the record does not support the district court's finding that the offense was less onerous than usual, and that the district court erroneously relied on offender-related reasons to support the departure. Because the district court did not abuse its discretion when it found that respondent's offense was less onerous than usual, we affirm.

FACTS

Respondent pleaded guilty to one count of felony nonconsensual dissemination of private sexual images under Minn. Stat. § 617.261 (2016). Because it was committed "with intent to harass the person depicted in the image," satisfying the requirement of subdivision 2(b)(5), the offense was charged as a felony and not as a gross misdemeanor.

The complaint alleged that respondent and the victim had a romantic relationship. When the victim ended the relationship, respondent threatened to distribute nude images of the victim, which respondent had obtained from her via text message during their romantic relationship. Respondent followed through with this threat by placing two such images in an envelope, which he then gave to the victim's significant other.

Respondent pleaded guilty to the felony charge without any plea agreement. He admitted to disseminating two nude images of the female victim. He admitted that the victim did not consent to this and that she had sent him the images expecting that he would keep the images private. Respondent also admitted that he shared the images with the intent to harass the victim.

The presentence investigation report prepared after respondent's "straight plea" recommended a 12-month-and-1-day stayed prison sentence. This recommendation

conformed to the Minnesota Sentencing Guidelines. At sentencing, respondent's lawyer argued for a gross-misdemeanor disposition, despite the plea having been to a felony. Counsel argued that respondent had shown "extreme remorse," that his likelihood of future criminal behavior is "absolutely null," and that respondent had taken rehabilitative steps by, among other things, seeing a mental-health therapist. Respondent's counsel further argued that a downward durational departure was appropriate because Minn. Stat. § 617.261 is "meant for . . . revenge porn and for publicizing it on the Internet. Here, this was a voluntary . . . affair, and as . . . affairs happen, [it] died . . . [s]o, it is not the typical type of complaint of non-consensual dissemination that the statute was . . . meant for." Counsel also mentioned that respondent's counseling career would be limited by a felony conviction on his record, and that a gross-misdemeanor disposition might help preserve his career as a counselor. Finally, counsel emphasized that, although respondent and the victim had been coworkers, respondent was not the victim's supervisor and their romantic relationship did not start until after they were no longer coworkers.

The state argued for a stay of imposition of a felony sentence. It argued that respondent did not play a "passive" role in the crime, the victim was not the aggressor, and respondent's conduct could not be considered "less onerous" than the typical crime under the statute; therefore, a durational departure was not appropriate. It emphasized that Minn. Stat. § 617.261 clearly criminalizes respondent's behavior, and argued that the district court should not consider the legislative history behind the statute. Finally, it argued that respondent's remorse for his action did not rise to the level that could support a durational departure.

The district court sentenced respondent to serve 360 days in jail, all stayed, and placed appellant on probation for three years. This is a gross-misdemeanor sentence. *See* Minn. Stat. § 609.13, subd. 1(1) (2016). Probation terms included 260 hours of community service and no contact with the victim during the probation period. The district court stated at sentencing that it was aware of “some of [the] legislative history” of Minn. Stat. § 617.261, and noted that there was testimony from victims who had suffered from “revenge porn on the Internet, and certainly the questioning by the legislature did involve how they could craft a statute that would involve more safety for victims who are exposed to that.” The district court concluded that respondent’s crime was less onerous than usual because he delivered the images in a closed envelope to one person—the victim’s significant other—and did not post anything on the internet or otherwise provide the images to a “larger audience.”

The district court also noted that, although the sentence was a durational departure, respondent was particularly amenable to treatment, exhibited remorse, and accepted responsibility for his actions.

In its sentencing-departure report, the district court identified as support the offense-related factor that the “crime [was] less onerous than usual.” It also identified the offender-related reasons of “particularly amenable to probation” and “shows remorse/accepts responsibility” as supporting the departure

This sentencing appeal by the state followed.

DECISION

The state argues that the district court abused its discretion in granting respondent a durational departure from the sentencing guidelines. It argues that the record does not support the district court's finding that respondent's offense was less onerous than usual because the statute under which respondent was convicted is new and there are no comparable offenses against which to make a less-onerous-than-usual determination, that respondent's not having used the internet to disseminate the images does not make his offense less onerous than usual, and that respondent's dissemination of the images to only one person does not make his crime less onerous than usual. It also argues that the district court relied on improper, offender-based grounds as support for the downward durational departure.

I. The district court did not abuse its discretion in concluding the offense was less serious than the usual offense under Minn. Stat. § 617.261.

We first address whether the district court abused its discretion in concluding that respondent's conduct was less serious than a typical offense. “We ‘afford the [district] court great discretion in the imposition of sentences’ and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quoting *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999)). “A district court abuses its discretion when its reasons for departure are improper or inadequate.” *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017). An upward or downward departure must be supported by “substantial and compelling” reasons that the departure is more appropriate than the presumptive sentence. Minn. Sent. Guidelines 2.D.1.c (2016). Offense-related circumstances must show that the defendant's conduct “was significantly more or less

serious than that typically involved in the commission of the crime in question.” *State v. Stempfley*, 900 N.W.2d 412, 423 (Minn. 2017) (emphasis omitted). “If a district court’s reasons for departure are stated on the record, an appellate court must determine whether the stated reasons justify the departure.” *State v. Weaver*, 796 N.W.2d 561, 567 (Minn. App. 2011). “But first, this court must determine whether the reasons provided are legally permissible and factually supported by the record. We conduct a de novo assessment of the district court’s decision as to whether a valid departure ground exists, relying on the factual findings that support the decision.” *Id.* (citations omitted).

The statute under which respondent was convicted states:

It is a crime to intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part, when:

- (1) the person is identifiable:
 - (i) from the image itself, by the person depicted in the image or by another person; or
 - (ii) from personal information displayed in connection with the image;
- (2) the actor knows or reasonably should know that the person depicted in the image does not consent to the dissemination; and
- (3) the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy.

Minn. Stat. § 617.261, subd. 1.

Subdivision 2 provides that a violation of subdivision 1 is a gross misdemeanor, unless one of the factors identified in subdivision 2(b) is proved. One of the subdivision 2(b) factors is that the “actor disseminates the image with intent to harass the person depicted in the image.” *Id.*, subd. 2(b)(5). Another is that “the actor posts the image on a

Web site.” *Id.*, subd. 2(b)(4). The statute defines “dissemination” as “distribution to one or more persons, other than the person depicted in the image, or publication by any publicly available medium.” *Id.*, subd. 7(b).

We first determine whether the reason given by the district court for the downward durational departure is legally permissible and factually supported by the record. *Weaver*, 796 N.W.2d at 567. Here, the only offense-related mitigating factor on which the district court relied for the durational departure was that respondent’s crime was less onerous than usual. The district court primarily relied on respondent’s having delivered the images in a closed envelope to one person—the victim’s significant other—and respondent did not post the images on the internet or otherwise distribute the images more widely. The district court relied on its own purported knowledge of discussion of the statute by the legislature, which the district court recalled having been focused on protecting individuals from the circulation of their images on the internet. These purported recollections were identified in support of its conclusion that respondent’s dissemination of the images to one person in an envelope was not a “typical” crime under the statute. The district court also noted that respondent notified the victim in advance of his intent to deliver the images.

The district court’s stated reason for the downward durational departure, that the crime was less serious than usual, is legally permissible. *See Stempfley*, 900 N.W.2d at 415 n.5 (stating that a district court determines whether a durational departure is appropriate by “focus[ing] on the seriousness of the offense itself”). The record supports the district court’s factual finding that respondent delivered the images in an envelope to a single person and did not distribute them publicly, or to more individuals, using the internet

or another means. Further, Minn. Stat. § 617.261 provides a range of conduct constituting an offense under the statute from which the district court could have inferred respondent's conduct was less serious than the typical offense.

The statute defines "dissemination" as "distribution to one or more persons, other than the person depicted in the image, or publication by any publicly available medium." Minn. Stat. § 617.261, subd. 7(b). The range of conduct included in the definition of "dissemination" ranges from dissemination to a single person to world-wide publication on the internet. Respondent's conduct seems to have met the minimum conduct necessary to be "dissemination." See *State v. Leja*, 684 N.W.2d 442, 450 (Minn. 2004) (stating in dicta, "[w]e are mindful of the fact that typical does not mean minimal. It is quite possible that a typical offense, were we able to define it, would involve conduct much more extreme than the minimum conduct required to violate the applicable statute"). This statutory language supports the district court's conclusion that respondent's conduct, by providing the images to a single individual in a closed envelope, was less serious than a typical offense under the statute.

In both *State v. Felix* and *State v. Bauerly*, we concluded that an offense was more or less serious than a typical offense based on the conduct described in a criminal statute. In *State v. Felix*, we determined that an upward departure was justified based on the language used in the first-degree assault statute. 410 N.W.2d 398, 401 (Minn. App. 1987), review denied (Minn. Sept. 29, 1987). We concluded the departure was warranted because the assault involved "all" of the factors defining "great bodily harm" and not just one. *Id.* In *State v. Bauerly*, we looked to the range of monetary value for Severity Level III Theft

contained in the theft statute to affirm a downward durational departure. 520 N.W.2d 760, 763 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). We concluded that, where the amount of money stolen was significantly below the midrange point of the monetary range, that offense could properly be considered by the district court to be less serious than the typical offense. *Id.*

Respondent agrees that his conduct fits squarely within Minn. Stat. § 617.261.¹ *See Rund*, 896 N.W.2d at 534 (reasoning that where a defendant’s mental state “fits squarely” within the mens rea provided by the terroristic-threats statute, his mental state was not a proper reason for a downward durational departure). The issue here is whether respondent’s conduct is significantly less serious than other felonies committed under Minn. Stat. § 617.261. The district court found that it was, and the record reasonably supports that finding.

The state also argues that respondent’s conduct cannot be considered less serious than other offenses under the statute because this is the first such offense charged in Dakota County. Therefore, the state reasons, it is impossible for the district court to have reached this conclusion without other offenses for comparison. We are aware of no authority that supports the state’s contention that the first offense charged in a particular county—or in the state, for that matter—can never be a less-serious-than-usual offense because there is

¹ Respondent seemed to raise a constitutional-law issue at oral argument, suggesting that the statute’s breadth and vagueness has something to do with the issues before this court on appeal. This argument was not presented to the district court and was not raised in respondent’s briefing on appeal. We will not consider it now. *See State v. Williams*, 794 N.W.2d 867, 874 (Minn. 2011) (“We ordinarily do not consider issues raised for the first time on appeal, even when those issues are . . . challenges to the constitutionality of a statute.”).

no “usual.” Here, the district court considered respondent’s conduct and the overall range of conduct prohibited by the statute.²

The state further argues that the district court erroneously concluded that respondent’s not having used the internet to share the images does not render respondent’s conduct less serious, because some of the scenarios under Minn. Stat. § 617.261, subd. 2, giving rise to a felony-level sentence do not require the use of the internet. Conversely, respondent seems to contend that cases where images are not published on the internet are inherently less serious than the typical case. We disagree with both lines of reasoning. In our view, it is very possible that images disseminated without using the internet can have very damaging consequences for a victim, as the Minn. Stat. § 617.261, subd. 2, factors suggest. But it is also possible, as the district court determined here, that limited distribution of images might be less damaging than broader dissemination. The district court seems to have based its reasoning that respondent’s conduct was less serious than usual on respondent having given hard copies of the images to a single person in a “closed envelope,” rather than to a “larger audience.” This is precisely the sort of decision best left to the district court. *See State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001)

² Using the state’s reasoning, the first person to be convicted under a new statute would never receive a downward durational departure, but another person who later commits the exact same crime under the exact same circumstances might be eligible for a downward durational departure because it might by then be evident that that the conduct is less serious than a typical offense. This makes no sense. It also violates the policies underlying sentencing in Minnesota as articulated in the Minnesota Sentencing Guidelines: that sentencing should be “rational and consistent” and courts should seek to “reduce sentencing disparity and ensure that the sanctions imposed for felony convictions are proportional to the severity of the conviction offense and the offender’s criminal history.” Minn. Sent. Guidelines. 1.A (2016).

(“A district court has great discretion in sentencing, and we may not substitute our judgment for that of the district court.”). The language of the statute and the record evidence reasonably support the district court’s finding that respondent’s conduct was less serious than usual. Although the record evidence might support a different finding than that reached by the district court, this does not render the finding erroneous. *See State v. Heath*, 685 N.W.2d 48, 57 (Minn. App. 2004) (reasoning that a factual finding by the district court is only clearly erroneous when unsupported by the record evidence).

Having determined that the district court’s reasons for departure are legally permissible and factually supported by the record, we turn to whether the district court’s stated reason justifies the departure. *Weaver*, 796 N.W.2d at 567. We review the district court’s sentencing decision for abuse of discretion. *Soto*, 855 N.W.2d at 307-08. Here, the district court based its conclusion that respondent’s offense was less serious than the typical offense on the fact that the images were only transmitted by respondent in a sealed envelope to one individual. Although there are no other cases under the statute to which we can compare the current offense, the statute’s definition of “dissemination” includes transmission of an image to one person, which appears to be among the least-serious sort of offense. As discussed, the record supports the district court’s factual findings. We conclude that the district court acted within its broad discretion in concluding that respondent’s conduct was less serious than the typical crime committed under Minn. Stat. § 617.261.³

³ Although the record is sufficient to support the district court’s less-serious-than-usual determination based on the limited distribution of these images, some of the statements made by the district court at sentencing are troubling. The district court mentioned that,

II. The district court erroneously considered offender-based factors in its sentencing decision, but because the downward durational departure was properly supported by an offense-based factor, this error does not require reversal.

We next address the district court’s use of offender-related factors to support its downward durational departure. A downward durational departure, like an upward-durational departure, may be supported by a single mitigating or aggravating factor. See *State v. Solberg*, 882 N.W.2d 618, 627 (Minn. 2016) (concluding that a single mitigating factor may support downward sentencing departure); *State v. Hicks*, 864 N.W.2d 153, 159 (Minn. 2015) (holding that a single aggravating factor may support upward sentencing departure). “Durational departures may be justified by offense-related reasons only.” *Rund*, 896 N.W.2d at 533. “Offender-related reasons—such as particular amenability to probation or treatment, remorse that does not reduce the seriousness of the offense, or age—are not legally permissible reasons for a downward durational departure.” *Id.*

Here, the district court relied on two offender-related factors on the departure report to support its downward durational departure: that respondent was “particularly amenable to probation” and “shows remorse/accepts responsibility.” Although not noted in the departure report, the district court also stated at the sentencing hearing that it considered the possible effect of a felony sentence on respondent’s occupation as supporting the departure.

although the crime of distributing these images “put a huge strain on [the victim’s] relationship with her boyfriend, but having this affair, I’m sure, put a strain on the relationship with her boyfriend, and it clearly led to the loss of [respondent’s] marriage relationship.” These and other victim-shaming comments are improper. The victim’s decisions did not cause, and she is not responsible for, respondent’s criminal conduct.

Respondent's amenability to probation has no bearing on this case—the guidelines sentence was probation. And remorse may support a durational departure only when it “could relate back and be considered as evidence bearing on a determination of the cruelty or seriousness of the [offender's] conduct.” *State v. McGee*, 347 N.W.2d 802, 806 n.1 (Minn. 1984). We see no record evidence indicating that respondent's remorse mitigates the seriousness of his conduct. The district court erroneously considered these offender-related factors.

The state contended at oral argument that the district court's consideration of improper reasons for departure influences our standard of review. However, caselaw indicates that we disregard the district court's reliance on incorrect factors when its decision may be upheld based on its reliance on at least one other, correct factor. *Solberg*, 882 N.W.2d at 624. Despite the district court's error in considering offender-related factors, a downward-durational departure may be supported by only a single mitigating factor. *Id.* at 627. The district court's conclusion that respondent's conduct was less serious than a typical offense sufficiently supports a downward durational departure here.

The question on appeal is not whether we would have sentenced respondent as the district court did. Instead, the question before us is whether the district court abused its discretion. *Soto*, 855 N.W.2d at 307-08. On this record, we cannot say that it did.

Affirmed.