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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1253**

State of Minnesota,
Respondent,

vs.

Jason David Kohlwey,
Appellant.

**Filed July 22, 2019
Reversed and remanded
Florey, Judge**

Dakota County District Court
File No. 19HA-CR-17-4762

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Florey, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

In this direct appeal from the judgment of conviction, appellant argues that the district court erred in imposing three separate sentences for his child-pornography

convictions because the state failed to demonstrate that the offenses were committed as separate behavioral incidents or that they involved three different victims. Because the district court erred by concluding that the crimes involved separate behavioral incidents, and because we are unable to determine if the offenses involved distinct victims, we reverse and remand for the state to develop the record regarding whether the three counts involve separate victims, followed by a determination by the district court as to the applicability of the multiple-victim rule,¹ and, ultimately, resentencing.

FACTS

In December 2017, the state charged appellant Jason David Kohlwey with eight counts of possession of child pornography by a registered predatory offender, a violation of Minn. Stat. § 617.247, subd. 4(b) (2016). According to the complaint, on July 20, 2017, appellant’s probation officer conducted a search of appellant’s residence. Three thumb drives were discovered containing “hundreds of images of obvious child pornography.” According to the complaint, the National Center for Missing and Exploited Children issued a report determining that there were “23 named series containing identified victims from 185 image files.”

The eight-count complaint indicated that it was based upon “[e]ight specific child victims.” Each of the counts concerned an image or images from a named “series” of child pornography. Count one referred to the “California Shirt” series, count two referred to the

¹ The parties refer to the multiple-victim exception. The multiple-victim exception is not, strictly speaking, an exception. See *Munt v. State*, 920 N.W.2d 410, 418 (Minn. 2018). We therefore use the term multiple-victim rule in this opinion.

“CinderblockBlue” series, and count three referred to the “ClimbingFriend” series. The California Shirt series involved a teenaged victim, identified by the San Jose Police Department. The CinderblockBlue series involved a prepubescent teenaged girl identified by the Department of Homeland Security and Immigration and Customs Enforcement. The ClimbingFriend series involved a prepubescent teenaged girl identified by the San Diego District Attorney’s Office.

In April 2018, appellant pleaded guilty, under a “straight plea,” to counts one through three in exchange for a dismissal of the remaining counts. Although he acknowledged that the three counts involved different image series, and he agreed that the three images referenced in counts one through three depicted minors, he made no specific admission that the three counts involved different victims.

The district court sentenced appellant on count one to 36 months’ imprisonment, on count two to 45 months’ imprisonment, and on count three to 59 months’ imprisonment. The sentences were ordered to run concurrently. The district court found that “each count was a separate behavioral incident.” This appeal followed.

D E C I S I O N

Appellant argues that the record does not establish that his crimes were committed as part of “more than one behavioral incident.” The state agrees that the charges arose from a single behavioral incident. The district court erred by concluding otherwise.

A district court generally may not impose more than one sentence for multiple offenses committed in a single behavioral incident. *See* Minn. Stat. § 609.035, subd. 1 (2018). When the crimes at issue contain an intent element, as is the case here, we

determine whether the crimes were part of a single behavioral incident by considering whether they “occurred at substantially the same time and place,” and “whether the conduct was motivated by an effort to obtain a single criminal objective.” *See State v. Bakken*, 883 N.W.2d 264, 270, 272 (Minn. 2016) (quotations omitted) (concluding district court did not err in sentencing on multiple possession-of-child-pornography convictions). The state has “the burden of proving, by a preponderance of the evidence, that a defendant’s offenses were not part of a single behavioral incident.” *Id.* at 270. We review the district court’s findings of fact on the single-behavioral-incident question for clear error and its application of the law to those facts de novo. *Id.*

Here, there was no argument below from the state that the offenses occurred during separate behavioral incidents. The record does not establish the location where the possession offenses occurred, though the thumb drives were discovered in appellant’s basement closet. *See id.* (stating that a possession offense is “complete when the offender takes possession of the prohibited item”). There is also nothing in the record to suggest that appellant came into possession of the relevant images at different times or for different criminal purposes. *See id.* at 272 (relying on the varying times that the defendant came into possession of the pornography in determining that the offenses were not part of a single behavioral incident). The complaint indicates that all of the crimes occurred on or about July 20, 2017. Based on the record, the district court erred by concluding that the offenses were committed during separate behavioral incidents.

On appeal, the state concedes that the three counts at issue “were the same behavioral incident,” but argues that we should affirm the sentences “because each count

relates to a different victim,” or, alternatively, “remand for resentencing so that the district court can specifically address the multiple victim [rule].” Appellant does not challenge the accuracy of his plea, but rather requests a single sentence based upon the single behavioral incident, or, in the alternative, two sentences “because the record does not establish that the second and third count involved different victims.”

Although, pursuant to section 609.035, subdivision 1, a district court generally may not impose more than one sentence for multiple offenses committed in a single behavioral incident, the imposition of multiple sentences does not run afoul of section 609.035, subdivision 1, “when (1) the offenses involve multiple victims; and (2) the multiple sentencing does not unfairly exaggerate the criminality of the defendant’s conduct.” *State v. Rhoades*, 690 N.W.2d 135, 138 (Minn. App. 2004). Whether the multiple-victim rule applies is a legal issue subject to de novo review. *See State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006).

Appellate courts have applied the rule in instances where the existence of multiple victims is established by the record. *See, e.g., State ex rel. Stangvik v. Tahash*, 161 N.W.2d 667, 672-73 (Minn. 1968); *Rhoades*, 690 N.W.2d at 138-39. However, in this case, although the record suggests that counts one through three involved separate victims, nothing establishes that fact. For example, the eight-count complaint indicated that there were eight specific child victims, but one of the counts involved multiple child victims.

Given this court’s inability to determine with any certainty whether the counts at issue involved separate victims, the proper remedy is a remand. Further, given the posture and nature of this case, on remand, the state is permitted to develop the record regarding

whether the three counts involve separate victims. The district court never ruled on this issue. A revised presentence-investigation report, issued prior to sentencing, indicated that appellant could be sentenced on all three counts if it was determined that “each count relates to a different image/video, or separate behavioral incident.” At sentencing, when asked if there were any additions or corrections to the report, appellant’s counsel seemingly acknowledged that there were multiple victims. She asserted that appellant could only be sentenced on two of the counts “even when there’s multiple victims.” On appeal, without challenging the validity of his plea, appellant now argues that the counts did not involve separate victims. This issue can best be resolved through further development of the record. *See State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008) (permitting, on remand, further development of the sentencing record), *review denied* (Minn. July 15, 2008); *see also Rhoades*, 690 N.W.2d at 138 n.3, 140 (reversing sentence imposed for one count of possession of child pornography where state conceded that two convictions and sentences may have involved the same minor, and one of the sentences could therefore be vacated).

Following development of the record, the district court must determine the applicability of the multiple-victim rule and resentence appellant accordingly. If the district court concludes that the multiple-victim rule is applicable, the district court should also consider whether the imposition of multiple sentences “exaggerate[s] the criminality of [appellant’s] conduct.” *State v. Rieck*, 286 N.W.2d 724, 727 (Minn. 1979).

Reversed and remanded.