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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1961**

State of Minnesota,
Respondent,

vs.

Angel Torrejon Ramirez,
Appellant.

**Filed November 16, 2020
Affirmed
Bratvold, Judge**

Ramsey County District Court
File No. 62-CR-17-5558

John J. Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

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

Considered and decided by Slieter, Presiding Judge; Bratvold, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

After appellant pleaded guilty to two counts of disseminating child pornography and
six counts of possessing child pornography, the district court convicted appellant of all

eight offenses and imposed stayed sentences for the two dissemination convictions and one possession conviction. For the five remaining possession convictions, the district court imposed executed concurrent sentences of 36 months in prison. At appellant's request, the district court executed all sentences. Appellant now challenges the district court's imposition of six concurrent sentences for the possession convictions. Because the district court properly applied the multiple-victim exception to the single-behavioral-incident rule and the sentences do not unfairly exaggerate the criminality of appellant's conduct, we affirm.

FACTS

In July 2017, the state charged appellant Angel Torrejon Ramirez with 15 counts of possessing pornographic work involving a minor under Minn. Stat. § 617.247, subd. 4(a) (2016). Later in February 2019, the state amended its complaint and added 14 counts of disseminating pornographic work involving a minor under Minn. Stat. § 617.247, subd. 3(a) (2016).

Ramirez reached an agreement with the state to plead guilty to two counts of child-pornography dissemination (counts one and two of the amended complaint) and six counts of child-pornography possession (counts 15 through 20 of the amended complaint). In exchange, the state agreed to dismiss the remaining 12 counts of dissemination and nine counts of possession at sentencing. The parties did not agree on a sentence, but agreed Ramirez could seek a dispositional or durational departure and the state would ask the district court to impose a sentence within the Minnesota Sentencing Guidelines.

At the plea hearing, Ramirez pleaded guilty as agreed, waived his trial rights, and provided a factual basis for the counts covered by the agreement. For the dissemination counts, Ramirez admitted that he sent child pornography to two other people. For the possession counts, Ramirez admitted to possessing six images and videos of child pornography. Ramirez agreed that “these aren’t all videos of the same child . . . there are six different children in regards to these [possession] counts.” The district court accepted the guilty pleas and referred Ramirez for a presentence investigation (PSI).

The PSI report recommended sentences within the guidelines. For the child-pornography-dissemination offenses, the PSI report recommended 24- and 36-month concurrent sentences, stayed for 10 years; for the child-pornography-possession offenses, the PSI report recommended 30-, 39-, 51-, 60-, 60-, and 60-month concurrent, executed sentences.

At the sentencing hearing, Ramirez acknowledged receiving the PSI report and argued his motion for a downward dispositional or durational departure, specifically requesting stayed sentences, with probation and 90 days in jail. Ramirez’s attorney explained that his criminal conduct “evolved,” starting when he “was looking at some sort of graphic crash screens and things like that. . . . sort of this extreme video website or Facebook page that he was looking at, and then [it] evolved into some. . . . pornographic work, and then it evolved into some child pornography.” Ramirez also submitted ten letters from family members, employees, friends, and soccer teammates, attesting to his good character.

The state argued against any departure. It submitted redacted screenshots from Ramirez's cell phone as sentencing exhibits, arguing the exhibits "just show[] what this pornography was." The state argued, "[t]he idea that this is less egregious completely ignores the sheer volume, [Ramirez]'s distribution, the horrifying content, and [Ramirez]'s attempts to get someone else to produce pornography like this." The state asked the district court to impose sentences following the guidelines for each conviction, totaling 60 months.

After hearing the parties' arguments, the district court stated, "[w]hat's troubling about this case, among many other things, is the nature of the specific pornography and the involvement of kids. I can't tell ages, but it looks like as young as 3 or 4, maybe even toddlers on some." The district court later continued,

I can't say that these crimes are less onerous than the usual possession of minor pornography or the usual dissemination of minor pornography because they are exactly that. In fact, they might be more—I don't know the right word for it—gross and serious pornography images than—sad to say that there might be an average child pornography.

The district court added, "I do think that it's very possible that you could be successful on probation, but it's not a case where I can find in good faith, and live with myself, substantial and compelling reasons to grant a dispositional departure."

The district court denied Ramirez's motion for a dispositional departure, and imposed guidelines sentences for the two dissemination convictions of 24- and 36-months and stayed execution (counts one and two). The district court granted Ramirez's motion for a durational departure for some of the possession convictions by imposing a stayed sentence of 30 months for count 15, and by imposing executed prison sentences of 36

months for the remaining counts 16 through 20. He received six criminal-history points for the possession charges. *See* Minn. Sent. Guidelines 2B.1.b (2016). Ramirez then requested execution of his stayed sentences, which the district court granted.

This appeal follows.

D E C I S I O N

On appeal, Ramirez challenges only his sentences for the six child-pornography-possession convictions, and argues that the district court's decision to impose six concurrent sentences for possession of child pornography during a single behavioral incident unfairly exaggerates the criminality of his conduct. He asks this court to vacate five of his concurrent sentences for possession (counts 16-20), leaving one 30-month stayed prison sentence for count 15. Alternatively, Ramirez requests that this court affirm the 36-month executed sentence for count 16 and vacate four concurrent possession sentences for counts 17 through 20, arguing that the six-point increase in his criminal-history score unfairly exaggerates the criminality of his conduct.

First, we consider whether the single-behavioral-incident rule and the multiple-victim exception apply to Ramirez's sentences. Second, we determine whether the six separate sentences imposed for Ramirez's possession convictions unfairly exaggerate the criminality of Ramirez's conduct.

A. Ramirez's possession of multiple images of child pornography was a single behavioral incident involving multiple victims.

When a district court convicts a defendant for conduct that involves more than one crime, the district court usually may impose punishment for only one of those crimes. *See*

Minn. Stat. § 609.035, subd. 1 (2016). This is often called the “single-behavioral-incident” rule. *See State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). “[T]he overall design of [section 609.035] . . . is to prohibit double punishment and at the same time to insure that punishment for a single incident of criminal behavior involving a multiplicity of violations will be commensurate with the criminality of defendant’s misconduct.” *State v. Johnson*, 141 N.W.2d 517, 521-22 (Minn. 1966).

The parties agree that Ramirez’s possession of child pornography was a single behavioral incident. We also agree. Whether criminal behavior is a single behavioral incident depends on “factors of time and place . . . [and] whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective.” *Johnson*, 141 N.W.2d at 525. Ramirez pleaded guilty to possessing six child-pornography images on one day in one place, and it is unlikely that Ramirez had a different criminal objective for possessing each image of child pornography. Moreover, the state bears the burden of establishing that the underlying conduct did not occur as part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

The single-behavioral-incident rule has several exceptions, one of which is the multiple-victim exception. “[C]ourts are not prevented from giving a defendant multiple sentences for multiple crimes arising out of a single behavioral incident if: (1) the crimes affect multiple victims; and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant’s conduct.” *State v. Skipintheway*, 717 N.W.2d 423, 426 (Minn. 2006) (citing *State v. Marquardt*, 294 N.W.2d 849, 851 (Minn. 1980)). This court reviews de novo whether the multiple-victim exception applies. *See Skipintheway*,

717 N.W.2d at 426 (“Whether a defendant commits multiple-victim crimes is a question of law, which this court reviews de novo.”).

The multiple-victim exception applies to sentencing for multiple convictions of possessing child pornography when the crimes affected more than one victim. *State v. Rhoades*, 690 N.W.2d 135, 139 (Minn. App. 2004). We agree with the parties that this record establishes that Ramirez’s child-pornography-possession crimes involved multiple victims. Having determined that Ramirez’s criminal conduct satisfied the first step of the multiple-victim exception, we turn to the second step.

B. Ramirez’s six concurrent sentences for possessing child pornography do not unfairly exaggerate the criminality of his conduct.

Ramirez contends that the district court erred in imposing six concurrent sentences for his child-pornography crimes because the sentences unfairly exaggerate the criminality of his conduct. The state disagrees. On appeal, defendants bear the burden of showing a sentence unfairly exaggerates the criminality of their conduct. *State v. Hough*, 585 N.W.2d 393, 398 (Minn. 1998). This court reviews a district court’s decision to impose multiple sentences involving multiple victims for abuse of discretion, and will uphold the sentences so long as they do not unfairly exaggerate the criminality of the defendant’s conduct. *State v. Cruz-Ramirez*, 771 N.W.2d 497, 512 (Minn. 2009). “[W]hether multiple sentencing unfairly exaggerates the criminality of the [appellant’s] conduct is a judicial determination that serves as a check against unfettered prosecutorial discretion.” *Rhoades*, 690 N.W.2d at 138.

Ramirez recognizes that his six child-pornography-possession sentences run concurrently and do not enlarge the duration of his executed prison sentence. Instead, he argues that, by imposing six sentences, the district court increased his criminal-history score by six points for offenses that were a single behavioral incident and this unfairly exaggerates the criminality of his conduct. Ramirez relies on two prior opinions, which we discuss in turn.

In *State v. Rieck*, following the firebombing of a home, the jury found Rieck guilty of five counts of aggravated assault involving five victims, one count of arson, one count of possessing a firebomb, and one count of witness tampering involving a sixth victim. 286 N.W.2d 724, 725 (Minn. 1979). The district court imposed five consecutive sentences for the assault convictions, and three concurrent terms for the arson, possession, and witness-tampering convictions. *Id.* at 726. On appeal, Rieck argued, among other issues, that his sentences unfairly exaggerated the criminality of his conduct. *Id.* at 726-27. The supreme court upheld the five consecutive sentences for the assault convictions and the concurrent sentence for witness tampering, but overturned the arson and possession sentences as unfairly exaggerating Rieck's criminality. *Id.* at 727. The supreme court reasoned that the arson and possession offenses did not involve victims different from those involved in the assault and witness-tampering offenses. *Id.*

Ramirez contends that the supreme court's reversal of Rieck's arson and possession sentences was not based on an increased duration of his overall prison commitment. While this is accurate, it is incorrect to infer, as Ramirez implies in his brief to this court, that the supreme court vacated Rieck's arson and possession sentences because the sentence

increased his criminal-history score. Rather, the supreme court vacated the arson and possession sentences because they did not involve different victims.

In *Rieck*, the supreme court determined that five assault sentences “were proper because defendant knew, or should have known, that there would be multiple victims.” *Id.* at 727. The supreme court also affirmed the witness-tampering sentence because it involved another victim. *Id.* Similarly, Ramirez’s child-pornography-possession offenses involved six victims and his testimony at the plea hearing underscored this fact.

Ramirez also cites *State v. Brennan*, to argue that only one sentence is warranted for his six child-pornography-possession convictions. 674 N.W.2d 200 (Minn. App. 2004), review denied (Minn. Apr. 20, 2004). In *Brennan*, the defendant received two sentences for two convictions of possessing child pornography in two separate behavioral incidents. *Id.* at 203. On appeal, this court reversed and remanded the defendant’s sentences because the defendant had no notice of the upward durational departure. *Id.* at 208.

Ramirez is correct that the defendant in *Brennan* received one sentence for each separate behavioral incident—possession of child pornography on his work computer and possession of child pornography on his home computer. *Id.* at 203. But we do not know if *Brennan* involved multiple victims because the opinion does not discuss the multiple-victim exception. Thus *Brennan* does not guide this court’s analysis.

The state contends that this court should affirm, first arguing that Ramirez’s sentences do not unfairly exaggerate the criminality of his conduct because Ramirez benefited when the state dismissed 21 counts against him. We agree with Ramirez that our review focuses on the conduct underlying his convictions, and not on the benefit of the plea

bargain. *See generally State v. Barthman*, 938 N.W.2d 257, 270 (Minn. 2020) (noting that sentencing appeals consider conduct underlying defendant’s conviction, rather than conduct relating to another offense when reviewing a durational departure).

The state also argues Ramirez’s sentences align with sentences imposed for similar convictions, highlighting caselaw where this court has affirmed sentences for possessing child pornography involving multiple victims. A reviewing court “looks to the imposition of sentences in other cases to determine whether sentencing exaggerates the criminality of conduct.” *State v. Cole*, 542 N.W.2d 43, 53 (Minn. 1996) (citing *State v. Lee*, 491 N.W.2d 895, 902 (Minn. 1992)). By comparing Ramirez’s sentences with sentences in caselaw cited by the parties, this court applies “our collective, collegial experience in reviewing a large number of criminal appeals.” *Rhoades*, 690 N.W.2d at 140 (citing *State v. Miller*, 488 N.W.2d 235, 241 (Minn. 1992)).

In *Rhoades*, we considered whether the multiple-victim exception supported six consecutive sentences for six child-pornography-possession convictions, leading to 84 total months in prison. 690 N.W.2d at 137-40. We affirmed in part, upholding five consecutive sentences, reasoning that they did “not unfairly exaggerate the criminality of Rhoades’s conduct.” *Id.* at 140. We also reversed and remanded with instructions to vacate one of the consecutive sentences because it involved the same victim as another count. *Id.*¹

¹ The state relies on unpublished opinions affirming sentences for child-pornography possession under the multiple-victim exception. While the state makes a good argument for viewing these opinions as persuasive, we note they are not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c); *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 n.2 (Minn. 2009) (stating that “the unpublished Minnesota court of appeals decision does not constitute precedent”). For that reason, we do not discuss the unpublished opinions in

Rhoades gives us perspective on the sentence imposed in Ramirez’s case. Ramirez’s six separate 36-month prison sentences and the related six criminal-history points for six counts of child-pornography possession is a shorter overall prison commitment than the child-pornography sentences reviewed and upheld in *Rhoades*. And Ramirez’s sentences are concurrent, unlike the consecutive sentences that *Rhoades* upheld. Thus, we conclude that Ramirez’s sentences are in keeping with, or more lenient than, other sentences for child-pornography possession.

Ramirez cites no cases that persuade us that his sentences do not align with other sentences for similar criminal behavior. We conclude that while Ramirez’s child-pornography-possession crimes were a single behavioral incident, the multiple-victim exception applies to the sentences imposed. Because Ramirez has not shown that his sentences unfairly exaggerate the criminality of his conduct, his sentences are affirmed.

Affirmed.

detail but note that they aid us in considering “past sentences received by other offenders.” *Miller*, 488 N.W.2d at 241.