

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2068**

State of Minnesota,
Respondent,

vs.

Thomas Joseph Incantalupo,
Appellant.

**Filed January 4, 2021
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CR-18-988

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

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Kevin C. Riach, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this sentencing appeal, appellant Thomas Joseph Incantalupo contends that the district court abused its discretion by imposing upward durational departures based on impermissible departure factors for his convictions of criminal sexual conduct. He also

argues that the upward durational departures are disproportionate to other sentences imposed for criminal-sexual-conduct crimes and unfairly exaggerate the criminality of the offenses. Because the district court sentenced Incantalupo based upon the admitted aggravating factor and the sentences were neither disproportionate nor an exaggeration of the criminality of the offenses, we affirm.

FACTS

In January 2018, respondent State of Minnesota charged Incantalupo, who was the victim's figure skating coach, with one count of criminal sexual conduct in the first degree and four counts of criminal sexual conduct in the third degree.¹ The state filed a notice of intent to seek an aggravated upward sentencing departure pursuant to Minn. Stat. § 244.10 (2018) and the Minnesota Sentencing Guidelines on the ground that Incantalupo subjected the victim to multiple forms of penetration.

Incantalupo pleaded guilty to one count of criminal sexual conduct in the first degree and one count of criminal sexual conduct in the third degree, admitted the aggravating factor, and waived his right to a *Blakely* hearing on that factor.² The plea petition provided that the parties would defer to the district court for sentencing. In response to questions from both attorneys and the district court, Incantalupo provided a factual basis for each count. For the first count, Incantalupo admitted that on June 16, 2017, he had sexual intercourse and oral sex with a 15-year-old girl at a hotel in Hennepin County, and

¹ The state filed an amended complaint in November 2018, which added two additional counts of criminal sexual conduct in the first degree and two additional counts of criminal sexual conduct in the third degree.

² *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

penetrated the girl with his fingers. He acknowledged that he knew the girl was 15 years old at the time of the conduct. For the second count, he admitted that on December 12, 2017, he was at the same hotel with the same girl, who was then 16 years old, and engaged in the same sexual acts as in June 2017. The district court reserved accepting the plea pending completion of a presentence investigation.

At the sentencing hearing, the court heard victim-impact statements from the victim and her parents, and the parties presented sentencing arguments. For the count of first-degree criminal sexual conduct, the state asked for a “double upward departure” of 288 months, and asked for the mandatory minimum sentence of 36 months for the count of third-degree criminal sexual conduct—to be served consecutively to the first sentence—for a total prison sentence of 324 months, which is 27 years. Incantalupo’s counsel argued for “12 years” and that “less would be appropriate.”

For the first-degree count, the district court ordered Incantalupo’s commitment to prison for 234 months and noted this was an “aggravated durational departure based on multiple forms of penetration being perpetrated during the offense” and was “approximately a 60 percent increase of 90 months over the presumptive sentence.” For the third-degree count, the district court ordered commitment to prison of 54 months and stated this was “an aggravated durational departure based on multiple forms of penetration being perpetrated during the offense” and “an 18-month aggravated duration or approximately 50 percent over the guideline because the guidelines are 36 months.” The district court ordered that the 54 months be served consecutively to the 234-month sentence for a total prison sentence of 288 months, or 24 years in prison. Incantalupo appeals.

DECISION

I. The district court did not rely on impermissible sentencing factors in imposing upward sentencing departures.

“A sentencing court can exercise its discretion to depart from the guidelines only if aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (emphasis omitted) (quotations omitted) (citations omitted). “[W]hether a particular reason for an upward departure is permissible is a question of law, which is subject to a de novo standard of review,” and a district court’s decision to depart based on permissible factors 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). As noted above, Incantalupo waived his right to a trial and admitted the aggravating factor of multiple forms of penetration.

Incantalupo argues that the district court improperly relied on impermissible aggravating factors. At sentencing, the district court clarified it “cannot depart on the fact that there was a significant relationship . . . [n]or can [it] base on the fact that there is a breach of trust because that’s inherent in a significant relationship.” The district court did identify and discuss various sentencing factors including breach of trust, age, and lack of remorse, but indicated that it was “going to base the sentence on the facts of the two cases that [he] pleaded guilty to” and that “there are aggravated factors.” The district court also stated:

- “[Breach of trust] is an aggravating factor, but [the district court is] basing [its] departure on the one [aggravating factor] admitted, and that is multiple forms of penetration.”
- There were “aggravated factors” such as “multiple forms of penetration being perpetrated during both offenses that [Incantalupo] pleaded guilty to” and a “breach of trust” in the “significant relationship” Incantalupo had with the victim and victim’s family.
- [Multiple forms of penetration] is an aggravating factor regardless of the victim’s age, but the age of the victim at the time of the crime does make it more serious . . . if you have multiple penetration on a younger child.”
- “[T]his is not the type [of case] that would require a double departure, but it does require a significant departure, especially for the count when [the victim] was 15.”

The district court then found Incantalupo guilty of both counts and proceeded to sentence Incantalupo after entering the convictions.

The district court did not impose a departure on impermissible aggravating factors. The district court clearly identified “multiple forms of penetration” as the sole basis for departure for each count. A discussion of other aspects of a case during sentencing does not imply that the judge relied on those aspects in issuing its sentence. *State v. Adell*, 755 N.W.2d 767, 772 (Minn. App. 2008), *review denied* (Minn. Nov. 25, 2008) (concluding that district court’s “associated comments” of the case at sentencing did not justify reversal). Because Minnesota caselaw dictates that “[i]f the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed,” *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009), and because multiple forms of penetration is a legally permissible reason for an upward

departure, *see Adell*, 755 N.W.2d at 775-76 (stating that “multiple penetrations alone will generally justify a double . . . upward durational departure”), the judge’s references to other aspects of the case do not constitute a reversible error.

II. The district court’s sentence was not disproportionate and did not unfairly exaggerate the criminality of the offenses.

The Minnesota Sentencing Guidelines provide that in cases of criminal sexual conduct in the first degree, a defendant with a criminal-history score of zero who engages in a single act of sexual penetration is presumed to receive a sentence of 144 to 172 months in prison. Minn. Sent. Guidelines 4.B (2018). A defendant with a criminal history score of zero guilty of criminal sexual conduct in the third degree who engages in penetration with a minor child is presumed to receive a mandatory minimum sentence of 36 months in prison. *Id.*

“An appellate court will not interfere with a [district] court’s discretion in sentencing unless the sentence is disproportionate to the offense.” *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998). “A [district] court’s decision regarding permissive, consecutive sentences will not be disturbed unless the resulting sentence unfairly exaggerates the criminality of the defendant’s conduct.” *Id.* Appellate courts “review a district court’s determination of whether sentences exaggerate the criminality of the defendant’s behavior for abuse of discretion.” *State v. Alger*, 941 N.W.2d 396, 403 (Minn. 2020). “In determining whether a sentence has exaggerated the criminality of a defendant’s conduct, [appellate courts] take guidance from past sentences imposed on similarly situated defendants.” *See State v. Yang*, 774 N.W.2d 539, 563 (Minn. 2009). A sentence is

reviewed with the understanding that “[a district court] judge sits with a unique perspective on all stages of a case, including sentencing, and the [district court] judge is in the best position to evaluate the offender’s conduct and weigh sentencing options,” *Hough*, 585 N.W.2d at 397, and that the district court has “broad discretion” in sentencing decisions, *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Incantalupo admitted to engaging in multiple forms of penetration for each count that he pleaded guilty to and that this admission meets the aggravating factor. Incantalupo argues, however, that “the combination of upward durational departure and consecutive sentencing have resulted in an excessive sentence that exaggerated the criminality of the conduct for which [he] pleaded guilty” and resulted in a disproportionate sentence. He asserts that “[c]omparing [his] aggravated 288-month sentence to other similar aggravated [criminal-sexual-conduct] sentences confirms that [his] sentence was disproportionate” and that “when a sentence falls so far outside the heartland of sentences for similar crimes, and instead falls within the heartland of sentences for more significant crimes, that sentence can fairly be said to exaggerate the defendant’s criminality.” “When reviewing whether a consecutive sentence unfairly exaggerates a defendant’s criminality, [appellate courts] are guided by past sentences received by other offenders for similar offenses.” *See Alger*, 941 N.W.2d at 403 (quotation omitted). We therefore look to sentences imposed in other cases where a defendant faced similar charges to determine whether this sentence was comparably excessive.

Incantalupo points to several cases in which a defendant was sentenced to less prison time than him despite being convicted of more counts, and several cases in which a

defendant received the same 288-month sentence as him for “more charges, more incidents of abuse, and/or more aggravating factors.” One such case is *State v. Bauer*, in which the defendant was sentenced to 288 months for three counts of criminal sexual conduct in the first degree. No. A07-1836, 2009 WL 112842, at *2 (Minn. App. Jan. 20, 2009), *review granted* (Minn. Mar. 31, 2009) (mem.), *remanded to* 2009 WL 2596077 (Minn. App. Aug. 25, 2009). In another case, *State v. Yartz*, the defendant was sentenced to 288 months for one count of first-degree criminal sexual conduct with six aggravating factors. 791 N.W.2d 138, 142 (Minn. App. 2010), *review denied* (Minn. Feb. 23, 2011). He also references, among others, *State v. Vance*, 765 N.W.2d 390, 391 (Minn. 2009) (288 months for two counts of criminal sexual conduct and two aggravating factors) and—in a case cited by the state as support for Incantalupo’s sentence—*Adell*, 755 N.W.2d at 779 (288 months based on one count of criminal sexual conduct in the first degree with same aggravating factor, with 30 separate incidents of penetration).

The state notes that the defendant in *Adell* received an even greater sentencing departure than Incantalupo despite being convicted of only one count of first-degree criminal sexual conduct and ultimately received 288 months—an upward departure of 144 months. *Id.* It also notes that Incantalupo received 234 months for the same count, or a departure of 90 months. The state also cites *State v. Benitez*, No. A14-2188, 2015 WL 9437512 (Minn. App. Dec. 28, 2015) (344 months based on one count of first-degree criminal sexual conduct with two aggravating factors), *review denied* (Minn. Mar. 29, 2016), and *State v. Lewis*, No. A12-1532, 2013 WL 3368431, at *1 (Minn. App. July 8, 2013) (240 months based on one count of first-degree criminal sexual conduct with one

aggravating factor, multiple forms of penetration), *review denied* (Minn. Sept. 17, 2013), as additional support that Incantalupo's sentence was proportionate.

The caselaw cited by both parties makes it clear that district courts have imposed a wide range of sentences for cases involving criminal-sexual-conduct charges and each case involved different aggravating factors, numbers of counts, and facts. This caselaw fails to demonstrate that Incantalupo's sentence was comparatively exaggerated or excessive. As previously mentioned, Minnesota caselaw dictates that "[m]ultiple penetrations alone will generally justify a double . . . upward durational departure," *Adell*, 755 N.W.2d at 775, and Incantalupo received less than a double upward durational departure for each offense. The facts of this case are serious—Incantalupo admitted to sexually abusing the minor victim at a hotel room on two occasions—and the district court stated that it was basing its sentencing decision on the facts supporting the two charges and the sole admitted aggravating factor. Having considered the broad discretion provided to district courts in sentencing and the facts of this case, we conclude the district court did not abuse its discretion in its sentence.

Affirmed.