

*This opinion is nonprecedential except as provided by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
A21-0092**

State of Minnesota,
Respondent,

vs.

Mark Airen Mitchell,
Appellant.

**Filed October 25, 2021
Affirmed
Worke, Judge**

Olmsted County District Court
File No. 55-CR-20-1155

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rebecca Ireland, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his first-degree criminal-sexual-conduct convictions, arguing that the district court abused its discretion by imposing a double-upward sentencing departure. We affirm.

FACTS

In February 2020, a child born in 2012 (the victim) reported to her mother that appellant Mark Airen Mitchell, who lived with the victim's family, had sexually assaulted her. During a forensic interview, the victim disclosed that Mitchell sexually penetrated "her vagina with his fingers" and put "his 'personal' inside her butt." The victim reported that the assaults occurred frequently; the last one occurring in the winter of 2019. She also reported that Mitchell sexually assaulted her on February 15, 2020.

Mitchell was charged with two counts of first-degree criminal sexual conduct—penetration or contact with a person under 13 years of age. *See* Minn. Stat. § 609.342, subd. 1a (2016). The state moved for an upward sentencing departure based on the aggravating factor that Mitchell penetrated the victim in multiple ways.

In August 2020, Mitchell pleaded guilty to both counts of first-degree criminal sexual conduct. Mitchell waived his right to a jury determination on the issue of the aggravating factor for sentencing and admitted that there was a basis for the district court to impose an enhanced sentence.

The presumptive sentence for count one was 144 months in prison, with a range between 144 and 172 months. The presumptive sentence for count two was 180 months in prison, with a range between 153 and 216 months. The district court sentenced Mitchell on count one to 288 months in prison, a double-upward departure based on the aggravating factor of multiple forms of penetration. The district court sentenced Mitchell to a concurrent 216 months in prison on count two. The district court stated:

In this case, the first count spans a significant timeframe and Mr. Mitchell admitted to multiple forms of penetration during this time. The [c]ourt's reason for finding that there is a substantial and compelling reason to depart in his case is because by penetrating [the victim], using multiple forms of penetration, his conduct caused more damage to her than a typical single form of penetration that one would see in a first-degree criminal sexual conduct case.

This appeal followed.

DECISION

Mitchell argues that the district court abused its discretion by imposing a 288-month sentence, a double-upward departure, because this sentence unfairly exaggerates the criminality of his conduct. As the reviewing court, we are responsible for determining whether a sentence “is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court.” Minn. Stat. § 244.11, subd. 2(b) (2020).

In considering a district court's sentencing departure, we first review de novo whether the district court's reason for departing is permissible. *State v. Rabold*, 935 N.W.2d 902, 906 (Minn. App. 2019). Mitchell waived a jury determination on the existence of the aggravating factor and admitted that multiple forms of penetration support an enhanced sentence. Thus, Mitchell concedes that the district court's reason for departing is permissible. *See State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009) (stating that facts underlying a departure must be found by a jury or admitted by defendant).

Because Mitchell does not challenge the basis for the departure, we proceed to the next step of the analysis—whether the decision to depart was an abuse of the district court's

discretion. *See Rabold*, 935 N.W.2d at 906. Mitchell argues that the district court abused its discretion because the sentence “is disproportionate to the offense or unfairly exaggerates the criminality” of his conduct. *See State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007) (quotation omitted).

Here, the district court imposed a 288-month prison sentence, a double-upward departure, based on the aggravating factor that Mitchell, in assaulting the victim, committed multiple forms of penetration. Mitchell admitted that he “put [his] penis into the victim’s anal cavity” and “digitally penetrated [her] vagina with [his] fingers.”

Mitchell argues that his sentence is disproportionate to other sentences imposed for this offense. Mitchell cites *State v. Suhon*, in which the defendant was sentenced to an aggregate 278 months in prison after being convicted of committing repeated sexual assaults against his daughter over a span of several years. 742 N.W.2d 16, 19-20 (Minn. App. 2007), *rev. denied* (Minn. Feb. 19, 2008). But *Suhon* is different because the district court did not impose an upward durational departure; rather, the district court imposed permissive consecutive sentences for three separate convictions. *Id.* at 20.

In *State v. Adell*, the defendant was convicted of first-degree criminal sexual conduct and received an enhanced sentence based on the aggravating factor of multiple forms of penetration. 755 N.W.2d 767, 770 (Minn. App. 2008), *rev. denied* (Minn. Nov. 25, 2008). Similarly, the defendant received a double-upward departure resulting in a 288-month sentence. *Id.* This court determined that “[t]he aggravating factor of multiple forms of penetration alone justify[ed] a double-durational departure.” *Id.* at 776.

Because multiple forms of penetration is a permissible basis for an upward departure and because a double-upward departure is justified when the sole aggravating factor is multiple forms of penetration, the district court did not abuse its discretion in sentencing.

Affirmed.