

*This opinion is nonprecedential except as provided by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
A21-1291**

State of Minnesota,
Respondent,

vs.

Diedrich Allen Middleton,
Appellant.

**Filed August 15, 2022
Affirmed
Johnson, Judge**

Brown County District Court
File Nos. 08-CR-18-428, 08-CR-18-489

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

Charles W. Hanson, Brown County Attorney, Daniel D. Kalk, Assistant County Attorney,
New Ulm, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leah C. Graf, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and John Smith,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant
to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Diedrich Allen Middleton was charged with eleven counts of criminal sexual conduct in three cases involving three different children. He pleaded guilty to two counts, and nine counts were dismissed. On appeal, he challenges the district court's imposition of a presumptive sentence for one of his two convictions. We conclude that the district court did not err in imposing the sentence and, therefore, affirm.

FACTS

In April and May of 2018, the state charged Middleton with multiple counts of criminal sexual conduct in three separate cases.

First, in case number 08-CR-18-428, the state charged Middleton with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2006), and four counts of second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a), (g) (2006). The state alleged that Middleton attempted to use his penis to penetrate the anus of his daughter, K.P., when she was three years old, and, later, groped her breasts, touched her vagina, and forced her to touch his penis when she was approximately nine years old.

Second, in case number 08-CR-18-459, the state charged Middleton with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2004). The state alleged that Middleton used his penis to penetrate the vagina of M.D., the daughter of Middleton's then-girlfriend, when she was three years old.

Third, in case number 08-CR-18-489, the state charged Middleton with four counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(b), (c), (e), (h)(iii), and one count of second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(h)(iii). The state alleged that Middleton forced K.S., the daughter of a man who was renting a room in Middleton's home, to engage in sexual contact on multiple occasions. The state also alleged that, when K.S. was nine years old, Middleton showed her pornographic videos and inappropriately touched her over her clothes. When she was between 13 and 14 years old, Middleton forced her to engage in sexual conduct with him on a weekly basis. The sexual conduct included the penetration of K.S.'s vagina and anus with Middleton's penis as well as dildos, other sex toys, and a beer bottle. On at least one occasion, Middleton choked K.S. to the point that she could not breathe. The state alleged that Middleton threatened K.S. with physical violence on more than one occasion and once shocked her with a cattle prod.

Approximately three years after the charges were filed, the state and Middleton entered into two plea agreements that resolved all 11 charges. In May 2021, in the third case, Middleton entered into an *Alford* plea¹ to one of the first-degree charges. The state

¹A defendant enters an *Alford* guilty plea if he maintains his innocence but has "clearly expressed his desire to enter the plea based on his belief that the State's evidence would be sufficient to convict him." *State v. Theis*, 742 N.W.2d 643, 647 (Minn. 2007) (citing *North Carolina v. Alford*, 400 U.S. 25, 38 (1970)). An *Alford* plea is valid in Minnesota so long as there is a "strong factual basis," the defendant has agreed "that the evidence is sufficient to support his conviction," and the district court "independently conclude[s] that there is a *strong* probability that the defendant would be found guilty of the charge to which he pleaded guilty, notwithstanding his claims of innocence." *Id.* at 649.

dismissed the four other counts and dismissed its then-pending motion for an aggravated sentence. The parties agreed to the imposition of an executed sentence of between 144 and 160 months of imprisonment, which is entirely within the presumptive sentencing range given Middleton's criminal-history score. *See* Minn. Sent. Guidelines IV (2007).

In June 2021, in the first case, Middleton entered an *Alford* plea to one of the second-degree charges. The state dismissed the four other counts in the first case and dismissed the second case in its entirety. The parties also agreed to a presumptive sentence in the first case that would run concurrently with the sentence imposed in the third case.

In July 2021, in the third case, the district court imposed a sentence of 160 months of imprisonment, the maximum length to which the parties agreed. The district court explained its reasoning as follows:

I think that this is a particularly egregious case. Its charge is sexual penetration or contact with a person under 13 by an actor more than 36 months older. There's a world of difference between a 12-year-old and a 3-year-old, and what we have here is several young women who were sexually abused in multiple ways, over multiple years, and I, I think that I would be remiss if I gave Mr. Middleton anything less than the maximum allowed by the parties' agreement in this case.

In the first case, the district court implemented the parties' agreement by imposing a presumptive 70-month prison sentence and ordering that it run concurrently with the 160-month prison sentence in the third case. Middleton appeals.

DECISION

Middleton argues that the district court erred by imposing the longest possible presumptive sentence, instead of a shorter presumptive sentence, for his conviction in the third case.

The Minnesota Sentencing Guidelines prescribe presumptive sentences for felony offenses. Minn. Sent. Guidelines II.C (2007). For any particular offense, the presumptive sentence is “presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.” Minn. Sent. Guidelines app. (2007). “The offenses within the Sentencing Guidelines Grids are presumptive with respect to the duration of the sentence.” Minn. Sent. Guidelines II.C. A district court may depart from the presumptive range only if “there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids.” Minn. Sent. Guidelines II.D.

This court has stated that “any sentence within the presumptive range . . . constitutes a presumptive sentence.” *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010). As a consequence, we “will not generally review a district court’s exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range.” *Id.* We may modify a presumptive sentence but only in “rare” cases and only if modification is supported by “compelling circumstances.” *Id.* (quotations omitted).

A.

Middleton contends that the district court erred for two reasons. He first contends that the district court misunderstood the offense of conviction when it imposed a sentence

for his first-degree conviction in the third case. His contention is based on the fact that, at the sentencing hearing, the district court referred to a charge of “sexual penetration or contact with a person under 13 by an actor more than 36 months older.” Middleton notes that the conviction for which he was sentenced in the third case is penetration or contact with a person less than 16 (not 13) years of age and that the complaint alleged that the victim, K.S., was more than 13 at the time of the offense. Middleton asserts, “Because the court misunderstood the offense before it for sentencing, it considered offense elements that were both legally irrelevant and absent from the factual record.” In response, the state acknowledges that the district court referred to a charge that is not the offense of conviction but contends that the district court properly based its sentence on the facts underlying the offense of conviction.

The record as a whole does not indicate that the district court misunderstood the offense of conviction when it imposed Middleton’s sentence. The district court stated that it had reviewed the pre-sentence investigation report, which correctly identified the offense of conviction as first-degree criminal sexual conduct involving a person under the age of 16. In addition, the district court judge signed the warrant of commitment, which correctly identified the offense of conviction. The district court’s misstatement during the sentencing hearing may have arisen from the fact that the 2006 version of section 609.342, subdivision 1, generally criminalizes conduct toward persons “under 13 years of age,” yet some paragraphs of that subdivision specifically criminalize conduct toward persons who are older than 13. *See* Minn. Stat. § 609.342, subd. 1(b), (h) (2006). We are not convinced

that the district court incorrectly sentenced Middleton for a crime committed against a person under the age of 13.

B.

Middleton also contends that the district court improperly based its sentence on conduct underlying other counts that were dismissed or on which a sentence was imposed. He bases this contention on the fact that the district court referred to “several young women,” which, Middleton asserts, implies that the district court considered the allegations concerning the children involved in the first and second cases.

In support of his argument, Middleton relies primarily on two supreme court opinions holding that, in imposing an upward durational departure from a presumptive sentence, a district court may not rely on conduct underlying other charges that either were not proved or were dismissed. *See State v. Cermak*, 344 N.W.2d 833, 837-39 (Minn. 1984); *State v. Womack*, 319 N.W.2d 17, 18-20 (Minn. 1982). These opinions do not apply to this case because the district court did not impose an upward durational departure. Rather, the district court imposed a sentence within the presumptive guidelines range. “A sentence within the range provided in the appropriate box on the sentencing guidelines grid is not a departure from the presumptive sentence.” *Delk*, 781 N.W.2d at 428-29. Accordingly, the applicable caselaw is the well-developed caselaw—consisting of opinions issued both before and after *Cermak* and *Womack*—that an appellate court “generally will not interfere with a sentencing court’s decision to impose a term within the presumptive sentence range.” *State v. Kangbateh*, 868 N.W.2d 10, 14 (Minn. 2015); *see also State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982); *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *Delk*,

781 N.W.2d at 428; *State v. Andren*, 347 N.W.2d 846, 848 (Minn. App. 1984). Middleton has not cited any caselaw for the proposition that a district court errs by considering conduct underlying dismissed charges when imposing a presumptive sentence. Thus, Middleton has not established that the district court erred by referring to conduct other than the conduct toward K.S. for which he pleaded guilty.

Even if we were to apply *Cermak* and *Womack* and conclude that the district court erred, we nonetheless would affirm the sentence imposed. If *Cermak* and *Womack* were extended to the imposition of a presumptive sentence, it would be appropriate to also extend supreme court caselaw that limits the remedy available under *Cermak* and *Womack*. The supreme court has held, in the context of an upward departure, that “[r]eversal is warranted only if . . . there is insufficient evidence to justify [the] sentence for the offense of which the defendant was convicted.” *State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009). Stated differently, “In deciding whether to affirm or remand, [an appellate court] must determine whether the district court would have imposed the same sentence absent reliance upon the improper . . . factor.” *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009). In *Stanke*, the “admitted facts” were “so extreme” that the supreme court concluded on appeal that the absence of improper considerations “would not change the court’s sentence on remand.” *Id.* at 829. Accordingly, the supreme court affirmed the erroneously imposed sentence without remanding. *Id.*

The facts underlying Middleton’s conviction of first-degree criminal sexual conduct in the third case are similarly extreme. Middleton admitted that, if the case were tried, the state would introduce sufficient evidence that he engaged in criminal sexual conduct

toward K.S. multiple times “over an extended period of time,” starting when she was 13 years old, that he sometimes penetrated her after she asked him to stop, that he once choked her while sexually assaulting her, and that he once used a beer bottle to penetrate her vagina. Thus, even if we were to apply *Cermak* and *Womack*, we would affirm Middleton’s sentence, which is within the presumptive range.

In sum, the district court did not err by imposing a presumptive sentence of 160 months of imprisonment for Middleton’s conviction of first-degree criminal sexual conduct in the third case.

Affirmed.