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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1187**

State of Minnesota,
Respondent,

vs.

Jonathan Evan Smallman,
Appellant.

**Filed July 7, 2025
Reversed and remanded
Smith, Tracy M., Judge**

Carlton County District Court
File No. 09-CR-23-121

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

Lauri A. Ketola, Carlton County Attorney, Carlton, 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; Johnson, Judge; and Smith,
Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this direct appeal from the judgment of conviction for five counts of possession
of child pornography, appellant Jonathan Evan Smallman argues that the district court erred
by sentencing him for all five offenses because the factual basis for his guilty plea

established that the offenses were committed as part of a single behavioral incident and did not establish that there were multiple victims. We conclude that Smallman's offenses were part of a single behavioral incident but that Smallman can nevertheless be sentenced for more than one offense because there was more than one victim. But, because the record does not establish that there were more than two victims, Smallman should have been sentenced for only two of the five offenses. We therefore reverse and remand for resentencing.

FACTS

Respondent State of Minnesota charged Smallman with five counts of possession of pornographic works involving minors under age 14, in violation of Minnesota Statutes section 617.247, subdivision 4(b)(3) (2022). In the complaint, the statement of probable cause alleged that a personal care attendant for Smallman's wife called the sheriff's office on January 18, 2023, and reported that the personal care attendant and Smallman's wife had looked at Smallman's phone on January 17, 2023, and discovered child pornography on it. The complaint stated that officers executed a search warrant on January 18. The charge descriptions in the complaint alleged that the counts took place "on or about January 17, 2023," although one count also included an "offense date" of "on or about" January 18, 2023.

Pursuant to a plea agreement, Smallman pleaded guilty to all five counts. At the plea hearing, the prosecutor questioned Smallman to establish a factual basis for his pleas as follows:

Q: I'd like you to think back to last January, 2023, maybe about January 18th. Sir, here in Carlton County—did you live here in Carlton County then?

A: Yes, sir.

Q: And did somebody you know, like a relative, go through a smart phone that you possessed, and by saying “go through,” they looked through some of your personal files on that phone, and did they find you to be possessing photographs of minors engaged in sexual activity with adults?

A: Yes. Yes, sir.

Q: You agree that you knowingly possessed those items on your smart phone?

A: Yes.

Q: I think later on law enforcement became involved, they might have searched your computers, hard drives, flash drives, other digital devices where they found some more of those—some more, what we'll call child pornography? Photographs with juveniles engaged in sexual activity?

A: Yes.

Q: All-in-all, did you possess at least five of those photographs?

A: Yes.

Q: Was there—was there many more of them, too?

A: Yes. I guess.

Q: And you're pleading guilty to five offenses, you do agree that you knowingly possessed those five?

A: Yes.

Q: And you resided, you lived in Carlton County when you possessed those?

A: Yes.

Defense counsel then questioned Smallman:

Q: Mr. Smallman, and maybe [the prosecutor] did cover this, the five Counts, you're acknowledging that the five Counts that you're pleading to did, in fact, involve minors who were clearly under the age of 14; correct?

A: Well, I didn't know. I didn't know what was on my phone at the time. I didn't know that those were on my phone, but I can't deny that they were found on the phone.

Q: Okay.

A: Yeah.

Q: There were many, many more images than just the five you're pleading to; is that right?

A: Yes, sir.

Q: And you're acknowledging in the Complaint and in the discovery it does indicate that there were many more than just five images of minors clearly under the age of 14, you acknowledge that?

A: Yes.

Q: Okay.

A: I didn't know anything about the cloud at the time. Those images were deleted long ago.

Q: Okay. You thought they had been deleted from your phone but they weren't; is that right?

A: Exactly, yes.

The district court accepted Smallman's plea of guilty to all five counts and scheduled a sentencing hearing.

At the sentencing hearing, the district court imposed separate sentences for all five counts. During the sentencing hearing, the prosecutor stated that Smallman "had over 1,200 images of children" and that, in those images, the National Center for Missing Children had identified "217 different verifiable series of children," representing distinct children. This information was presented only through the prosecutor's statement, without sworn testimony or documentary evidence. The prosecutor told the district court that, despite those numbers, the state would "stand by [the plea] agreement" because Smallman had been cooperative, appeared remorseful, had attended some therapy on his own initiative, and had the support of his wife, making him particularly amenable to probation as a downward dispositional departure. The state asked for a stayed sentence of 120 months.

The district court sentenced Smallman to concurrent stayed sentences and probation, based on accumulating criminal history points, as follows: for count 1, a 24-month sentence

and 5 years of conditional release, stayed for 5 years; for count 2, a 36-month sentence and 5 years of conditional release, stayed for 5 years; for count 3, a 60-month sentence and 5 years of conditional release, stayed for 5 years (a downward dispositional departure); for count 4, a 78-month sentence and 5 years of conditional release, stayed for 5 years (a downward dispositional departure); and for count 5, a 120-month sentence and 5 years of conditional release, stayed for 5 years (a downward dispositional departure).

Smallman appeals.

DECISION

“A district court has great discretion in sentencing” *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). But appellate courts “may review the sentence imposed or stayed to determine whether the 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) (2024).

Smallman contends that the district court erred by imposing a separate sentence for each of his five convictions. He argues that the evidence at his plea hearing established that his offenses arose out of a single behavioral incident and that multiple sentences were therefore prohibited by Minnesota Statutes section 609.035 (2022 & Supp. 2023). And, he argues, although the multiple-victim rule permits separate sentences for offenses that arise out of a single behavioral incident when the offenses have different victims, the evidence here did not establish that there were multiple victims of his offenses. We address each argument in turn.

Single Behavioral Incident

Smallman argues that his multiple offenses occurred as part of a single behavioral incident and that the district court therefore erred by imposing more than one sentence.

“Minnesota Statutes § 609.035 generally prohibits multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident.” *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012) (quotation omitted). “The State bears the burden of establishing by a preponderance of the evidence that the conduct was not a single behavioral incident.” *State v. Degroot*, 946 N.W.2d 354, 365 (Minn. 2020). Until that burden is met by proof that the acts were “separate and distinct,” courts assume that an appellant’s acts were part of a single behavioral incident. *State v. Johnson*, 653 N.W.2d 646, 652 (Minn. App. 2002). “Whether the offenses were part of a single behavioral incident is a mixed question of law and fact, so [appellate courts] review the district court’s findings of fact for clear error and its application of the law to those facts de novo.” *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). Because the facts here are not disputed, our review is de novo.

When each of the offenses at issue includes an intent element, appellate courts determine whether the offenses were part of a single behavioral incident by considering “whether the offenses occurred at substantially the same time and place” and “whether the conduct was motivated by an effort to obtain a single criminal objective.” *Id.* (quotations omitted). This determination “is not a mechanical exercise” but instead, “requires an examination of all the facts and circumstances.” *Id.* (quotation omitted).

We begin with the timing of the offenses. Smallman argues that the plea colloquy did not establish that he possessed the five images on more than a single date, let alone at substantially different times. He acknowledges that the plea petition indicated two dates of possession: January 17 and 18, 2023.¹ But, he points out, the plea colloquy addressed only a single date—January 18. Therefore, he argues, the record shows either that the possession occurred on only a single date or that it spanned the two consecutive dates. In either case, he asserts, he possessed the images at substantially the same time. The state disagrees, contending that, although the plea colloquy addressed only January 18, the colloquy together with the plea petition established that Smallman possessed the images on two separate dates and that the offenses therefore did not occur at substantially the same time.

In his plea colloquy, Smallman admitted that, on “maybe about January 18th,” someone saw images of child pornography on his phone and that he knowingly possessed five images. He did not testify as to when he obtained the images.

In *Bakken*, the supreme court considered whether the appellant’s seven offenses of possessing child pornography occurred at substantially the same time for purposes of the single-behavioral-incident test. *Id.* The supreme court explained that, although a possession crime is a continuing offense, “it is complete when the offender takes possession of the prohibited item.” *Id.* Bakken’s offenses, the supreme court concluded, were completed on the dates that he downloaded and saved the images. *Id.* at 266, 270. Because the offenses occurred on separate days over the course of seven months, with the two closest-in-time

¹ As the state notes, the plea petition is not in the record.

offenses occurring five days apart, the supreme court decided that they occurred at substantially different times. *Id.* at 270.

Here, there is no evidence of when Smallman downloaded the images and when the offenses were completed. Smallman admitted only that he possessed the five images on “about January 18.” And, even considering any references to both January 17 and 18, no evidence suggests that, of the five images, any were possessed on one date and not the other. Under these facts and circumstances, Smallman’s offenses occurred at substantially the same time, which weighs in favor of the conduct being part of a single behavioral incident.

Next, we turn to the location of the offenses. Smallman argues that the images were found in the same place—his cellphone. He asserts that, while he agreed in his plea colloquy that law enforcement “might have searched” other digital devices and found images on those devices, that testimony was “equivocal and was not clarified or corrected” and did not establish that any of the five images underlying his convictions were found on a device other than his cellphone. The state counters that Smallman “agree[d] that images were, in fact, found on other devices” and that “it is clear that the images were established to have been found on multiple devices.”

The state’s argument is unpersuasive. In the plea colloquy, Smallman agreed to knowingly possessing five photographs on his phone. He did not agree that he knowingly possessed other images on other devices, nor did he agree that the five images he knowingly possessed also appeared on other devices. The evidence thus established that Smallman’s

possession of the images occurred in the same place—on his phone. The location factor therefore weighs in favor of his conduct being part of a single behavioral incident.

Last, we consider whether Smallman’s five offenses were motivated by a single criminal objective. Smallman argues that the record supports that his possession conduct was motivated by the single criminal objective of “us[ing] pornography in order to satisfy a curiosity, need, or desire.” The state responds that the fact that Smallman possessed the images for the *same* purpose of satisfying his sexual needs does not mean that he possessed those images with a *single* criminal purpose.

In *Bakken*, the supreme court determined that, while Bakken might have had “the *same* criminal objective” of satisfying his sexual urges by downloading the separate images, his commission of seven separate possession crimes to satisfy those urges did not amount to “a *single* criminal objective” because “[the] offenses were completed at substantially different times,” rendering inapposite other cases in which an offender was determined to have a single criminal objective when committing multiple offenses within a discrete time period. *Id.* at 271 (citing *Langdon v. State*, 375 N.W.2d 474, 476 (Minn. 1985); *State v. Herberg*, 324 N.W.2d 346, 347, 349 (Minn. 1982)). The supreme court explained that whether offenses were committed at substantially different times is an independent factor from whether the offender was motivated by a single criminal objective but noted that “the timing of [the] offenses is relevant to determining whether the offender had a *single* criminal objective, or merely the *same* criminal objective.” *Id.* n.5 (comparing *Langdon*, 375 N.W.2d at 476, with *State v. Eaton*, 292 N.W.2d 260, 266-67 (Minn. 1980)). In light of that distinction and under the circumstances of this case—in which Smallman’s

possession occurred over the course of one or two days—we conclude that all five possession offenses were motivated by a single criminal objective.

Because none of the factors weigh in favor of a separate behavioral incident, the state failed to meet its burden to prove that Smallman’s separate possession crimes did not arise out of a single behavioral incident. *See Degroot*, 946 N.W.2d at 365. As a result, section 609.035 would preclude more than one sentence for that conduct. *See Ferguson*, 808 N.W.2d at 589. But, as we address next, section 609.035 does not prevent separate sentences for a single behavioral incident if the offenses involved different victims.

Multiple-Victim Rule

Smallman argues that the district court erred by imposing more than one sentence because the record does not support that the images he possessed depicted five different victims.

Under the multiple-victim rule, section 609.035 does not preclude multiple sentences for crimes arising out of a single behavioral incident when there are multiple victims. *State v. Alger*, 941 N.W.2d 396, 400 (Minn. 2020). The rationale is that “behavior that harms one victim is not the same *conduct* for purposes of section 609.035 as behavior that harms multiple victims.” *Id.* (emphasis added) (quotation omitted). Under the multiple-victim rule, courts may impose multiple sentences for 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.” *Id.* (quotation omitted). The rule “is not a purely mechanistic test driven by the prosecution’s exercise of its discretion in charging decisions.” *State v. Rhoades*, 690 N.W.2d 135, 138 (Minn. App. 2004) (quotation

omitted). Instead, courts must “examine the facts and circumstances of the crime.” *Alger*, 941 N.W.2d at 402. Whether the multiple-victim rule applies is a question of law, which appellate courts review de novo. *State v. Skipin the day*, 717 N.W.2d 423, 426 (Minn. 2006).

We have previously determined that the multiple-victim rule applies to multiple offenses of possessing child pornography as part of a single behavioral incident when the offenses involve images of different children. *Rhoades*, 690 N.W.2d at 136. In *Rhoades*, we explained that the possession of child pornography victimizes the minor depicted in the pornographic work. *Id.* at 139. We observed that the harm is twofold—through the disclosure of the minor’s identity by depiction in the pornographic works and through the “perpetuation of the illicit use and exploitation of children.” *Id.* In that case, we upheld separate sentences for each count of possession involving an image of a different victim, but we reversed the imposition of separate sentences for possession of two images of the same minor. *Id.* at 140.

Smallman argues that the record of his plea hearing lacks sufficient particularity to establish that there was more than one victim involved in the five counts. He asserts that the plea hearing did not include sufficient description of the victims or the depictions to establish that there were five different victims. He contends that, “[a]t most, the use of the term ‘minors’ [in the colloquy] could arguably justify the imposition of two sentences” but that “without more particularity, the record does not support such a finding.” The state counters that “although Smallman’s colloquy was nonspecific as to the individual identity of the victims for each count, it is clear that Smallman’s colloquy still established that more than one individual was a victim of his conduct.”

In the plea colloquy, Smallman agreed that he possessed at least five “photographs of minors engaged in sexual activity with adults.” But at no point in his plea colloquy did Smallman identify, or acknowledge depictions of, five different minors in the images that he possessed, and the state points to no other evidence in the record that establishes that five different children were depicted. The state therefore failed to establish that Smallman’s possession offenses involved five separate victims. But Smallman’s admission that the images at issue depicted “minors” did establish that there was more than one victim. We disagree with Smallman that more particularity was required to establish that fact. We conclude that the evidence did not support that there were five victims, but it did support that there were at least two. We therefore remand to the district court to vacate the sentences for three of the offenses and to resentence for two of the offenses, leaving intact the convictions for all five offenses.

Reversed and remanded.