

*This opinion is nonprecedential except as provided by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
A24-2044**

State of Minnesota,
Respondent,

vs.

Chad Arthur Gilfillan,
Appellant.

**Filed December 22, 2025
Reversed and remanded
Ross, Judge**

Hennepin County District Court
File No. 27-CR-22-13999

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

Mary F. Moriarty, Hennepin County Attorney, Mark V. Griffin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Max B. Kittel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bond, Presiding Judge; Ross, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

Chad Gilfillan pleaded guilty to five counts of possessing child pornography. His testimony during the plea colloquy established that each count involved a different victim, but it did not specify when the offenses occurred. The district court applied *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981), “Hernandizing” each count and sentencing

Gilfillan to serve concurrent terms of 24, 36, 60, 78, and 102 months, followed by five years of conditional release. Gilfillan appeals, arguing that the district court erred by Hernandizing more than two counts because the record does not establish that the offenses arose from separate behavioral incidents. Because the state did not meet its burden to justify its application of *Hernandez*, the district court imposed an erroneous sentence. We therefore reverse and remand for resentencing.

FACTS

The state charged Chad Gilfillan in 2022 with five counts of possessing child pornography involving a minor under 14 years of age and five counts of possessing child pornography on an electronic device. *See* Minn. Stat. § 617.247, subd. 4(b)(3) (2021); Minn. Stat. § 617.247, subd. 4(a) (2021). The complaint identifies November 9, 2021, as the offense date for every count and describes each offense as occurring “on or about dates between 11/9/2021 and 12/2/2021.”

Gilfillan sought to plead guilty and filed a plea petition admitting to five counts of child-pornography possession involving a minor under 14 in exchange for the state’s agreement to dismiss the remaining counts. The following exchange occurred between the district court and Gilfillan at his plea hearing:

Q: [H]ow do you plead to count 1, possession of a pornographic work depicting a minor under the age of 14 years from on or about the range stated in the complaint, guilty or not guilty?

A: Guilty.

Q: How do you plead to count 2, same charge, *different date*, guilty or not guilty?

A: Guilty.

Q: How do you plead to count 3, same charge, *again a different date*, guilty or not guilty?

A: Guilty.

(Emphasis added.) The district court repeated the same question in substance regarding the remaining counts. Gilfillan had not yet been sworn in to testify.

Gilfillan then testified under oath to establish a factual basis for his plea. He testified that “[a]t some point” while he lived in St. Louis Park in November and December 2021, a person discovered multiple SIM cards among his possessions. Gilfillan testified that police “[e]ventually” obtained the SIM cards and that they contained two images and three videos of minors in sexual positions, each depicting a different victim under the age of 14. The district court reserved its decision of whether to accept Gilfillan’s plea, and it ordered a presentence investigation (PSI).

Hennepin County conducted the PSI and prepared a report. The report stated the county’s understanding of the plea deal was that, because “each count involves separate victims,” Gilfillan “shall be sentenced in order of Counts I – V, concurrent and Hernandezized.” The report recommended the following sentence: a stayed 24-month term on count one based on a criminal-history score of zero points; a stayed 36-month term on count two based on a score of 1.5 points rounded down to one; an imposed 60-month term on count three based on a score of three points; an imposed 78-month term on count four based on a score of 4.5 points rounded down to four; and an imposed 120-month term on count five based on a score of six points, all to run concurrently, followed by five years of conditional release. The district court sentenced Gilfillan as the county recommended,

except it imposed a 102-month sentence on the final count. And at Gilfillan’s request, the court executed the presumptively stayed sentence.

Gilfillan appeals.

DECISION

Gilfillan appeals from the district court’s sentence. We may correct an illegal sentence at any time. Minn. R. Crim. P. 27.03, subd. 9. A sentence based on an incorrect criminal-history score is illegal. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). Gilfillan specifically challenges the criminal-history score, which resulted from the district court’s decision to Hernandize his offenses. We consider *de novo* the legal issue of an appellant’s criminal-history-score calculation. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). Our *de novo* review leads us to reverse.

Gilfillan maintains that the district court erred by Hernandizing more than two of his five counts, inflating his criminal-history score. The *Hernandez* sentencing method allows courts, when issuing a sentence on the same day addressing multiple offenses, to add the first offense or offenses sentenced into the criminal-history score for the sentence for the remaining offenses. *Hernandez*, 311 N.W.2d at 480–81; *see also Williams*, 771 N.W.2d at 521–22 (explaining the method). When Hernandizing counts arising from the same course of conduct but involving multiple victims, courts may incorporate the criminal-history score of only the two most-severe offenses. Minn. Sent’g Guidelines 2.B.1.e.2 (2021). Offenses arise from the same course of conduct when they occur “at substantially the same time and place and were motivated by a single criminal objective.” *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). The burden falls to the state to prove

by a preponderance of the evidence that multiple offenses did not occur as part of the same course of conduct. *State v. Williams*, 608 N.W.2d 837, 841–42 (Minn. 2000). The parties do not dispute that Gilfillan’s offenses involved five separate victims, so we turn to whether the state met its burden to establish that the offenses arose from separate behavioral incidents.

Our review informs us of three deficiencies. The first is that the state failed to establish that the offenses occurred at different times. Gilfillan’s plea testimony established only that he came into possession of the pornography “[a]t some point” while he lived in St. Louis Park during the last two months of 2021. He never offered any dates establishing when he downloaded or otherwise came to possess the pornography, and he did not say he acquired it on different dates. We are unmoved by the state’s characterization that the district court “specifically asked about different offense dates[.]” It is true that the district court provided the editorial guidance of “same charge, different date” while it led Gilfillan to offer a plea to each charge of the complaint. But the district court’s description of the charge and Gilfillan’s unsworn oral plea of guilty to each cannot substitute for the factual basis for a plea, which consists of the defendant’s sworn admissions and the record evidence that he expressly acknowledges under oath. *Rosendahl v. State*, 955 N.W.2d 294, 301 (Minn. App. 2021); *see, e.g., State v. Ecker*, 524 N.W.2d 712, 716–17 (Minn. 1994) (distinguishing the factual basis of straight pleas from *Alford* and *Norgaard* pleas); *Lussier v. State*, 821 N.W.2d 581, 585, 588–89 (Minn. 2012) (stating that grand-jury transcript may supplement plea colloquy where it was admitted at plea hearing and acknowledged by defendant); *State v. Trott*, 338 N.W.2d 248, 251–52 (Minn. 1983) (holding that the function

of the record during a guilty plea is to ensure that a defendant is not admitting to a more-serious crime). We hold that the state did not establish that Gilfillan's offenses occurred at different times.

We conclude, second, that the state failed to establish that Gilfillan's offenses occurred in different places. The state suggests that, because Gilfillan's child pornography was stored across multiple SIM cards, the offenses occurred in different places. But Gilfillan did not admit that the seized SIM cards all contained child pornography. Nor did he discuss which of them contained the material that was the subject of his guilty plea. And even assuming that the illicit materials were stored on different SIM cards, the negligible distinction between an image being stored in digital form on one card and a different image being stored on another card found in the same physical location within Gilfillan's home is too intangible for us to conclude that each image or video was kept in a different "place." *See State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (identifying the "place" where the defendant committed multiple child-pornography offenses as "his bedroom in his mother's house"). The state failed to meet its different-place burden.

And we hold, third, that the state failed to prove that the offenses did not share a criminal objective. The timing of the different offenses that serve a common purpose is probative as to whether they comprise a shared criminal objective. *Id.* at 271 n.5. The parties agree that these offenses served the same criminal objective of Gilfillan's sexual gratification. The state fails on this element by asserting that the offenses repeatedly served this objective over time. The assertion has no factual support since the state never established that Gilfillan came to possess the materials at different times. Given the state's

evidentiary failure, it has not rebutted the presumption that the offenses arose from the same behavioral incident.

We are not persuaded otherwise by the state's emphasis that the PSI report referenced an agreement to Hernandez sentencing and that Gilfillan did not argue that his behavior arose from a single behavioral incident. At most, this circumstantial evidence informs us that Gilfillan understood that the counts would be Hernandez. But his understanding does not relieve the state of its burden of proof.

Nor are we persuaded by the state's comparison of this case to *Bakken*, because the state overlooks the different evidentiary issues at play. The *Bakken* court held that the state proved that a defendant's child-pornography offenses were separate behavioral incidents because he admitted to downloading images on separate dates such that their repetition proved they served the same criminal objective multiple times. *Id.* at 270–72. But Gilfillan did not testify that he downloaded the material on different dates. *Bakken* is inapposite.

In sum, we hold that the state failed to prove that Gilfillan's offenses arose from separate behavioral incidents. The district court therefore erred by Hernandezing more than Gilfillan's two most-severe counts. We reverse and remand for resentencing.

Reversed and remanded.