

*This opinion is nonprecedential except as provided by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
A25-0433**

State of Minnesota,
Respondent,

vs.

Hugo Alexander Monterroso Merida,
Appellant.

**Filed February 17, 2026
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Cottonwood County District Court
File No. 17-CR-22-249

Keith Ellison, Attorney General, Lisa Lodin, Assistant Attorney General, St. Paul, Minnesota; and

Deja L. Weber, Cottonwood County Attorney, Windom, Minnesota (for respondent)

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Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Ede, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Cottonwood County jury found Hugo Alexander Monterroso Merida guilty of first-degree criminal sexual conduct based on evidence that he sexually assaulted a young teenage girl. We conclude that the district court erred by ordering an upward durational sentencing departure based on an improper aggravating factor. We also conclude that the

district court did not err by denying Monterroso Merida's motion for a downward dispositional sentencing departure. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

In March 2022, 13-year-old M.B. began communicating with Monterroso Merida, a 27-year-old man, on Snapchat. Monterroso Merida told M.B. that he was 18 years old. M.B. knew that Monterroso Merida worked in construction because he sent her photographs of himself while he was at work.

On April 4, 2022, M.B. took her younger sister to a class at a community center in the city of Windom. M.B. remained at the community center to spend time with her friends. While there, M.B. received a message from Monterroso Merida, asking her whether she wanted to hang out. M.B. responded that she could not hang out. But Monterroso Merida sent her a message saying that he was "here." M.B. was confused because she had not told Monterroso Merida that she was at the community center, and she had not shared her location information with Monterroso Merida. M.B. looked outside and saw a truck belonging to a construction company, which she recognized from photographs Monterroso Merida had sent her over Snapchat.

M.B. went to the main floor of the community center to wait for her father. She saw Monterroso Merida, whom she believed to be the person she had been messaging. Monterroso Merida asked whether M.B. was the person he had been messaging, and M.B. said yes. M.B. walked away from Monterroso Merida, but he followed her to the third floor. Monterroso Merida grabbed M.B. by her arm, pulled her into an unlocked storage

room, and removed her pants and underwear. Monterroso Merida penetrated M.B.'s vagina with his mouth, fingers, and penis, and he penetrated her mouth with his penis.

Monterroso Merida stopped penetrating M.B. when they heard footsteps. A woman entered the storage room and saw M.B. and two piles of clothing on the floor, but the woman did not see Monterroso Merida because he was hiding. M.B. put on her own clothes, retrieved Monterroso Merida's clothing, and left the room. Shortly thereafter, Monterroso Merida appeared at the door with a bare chest and a beach towel wrapped around his waist and asked the woman about his clothes. The woman reported the incident to the police.

The state charged Monterroso Merida with two counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1a(e) (Supp. 2021), which prohibits sexual penetration or sexual contact with a person younger than 14 years old by a person more than 36 months older.

The case was tried to a jury on two days in August 2024. The state called five witnesses, including M.B. Monterroso Merida did not testify and did not call any witnesses or introduce any exhibits. In closing argument, the state urged the jury to find Monterroso Merida guilty of the first charge based on evidence of sexual penetration and guilty of the second charge based on evidence of sexual contact. *See* Minn. Stat. § 609.341, subds. 11, 12 (Supp. 2021).

The jury found Monterroso Merida guilty of both charges. In addition, the jury returned a special-verdict form in which it found two aggravating factors: first, that

Monterroso Merida subjected M.B. to multiple forms of penetration and, second, that M.B. was particularly vulnerable due to her age.

At sentencing, the state urged the district court to impose an upward durational departure. Monterroso Merida urged the district court to impose both a downward durational departure and a downward dispositional departure based on his age, his lack of a prior record, his cooperation and respect during court proceedings, his support from family and friends, and the economic and emotional impact his incarceration would have on his family. The district court imposed a sentence of 288 months of imprisonment, a double upward durational departure, on count 1. The district court did not adjudicate guilt on count 2. Monterroso Merida appeals.

DECISION

On appeal, Monterroso Merida challenges only his sentence. He argues that the district court erred by ordering an upward durational departure and by not ordering a downward dispositional departure.

The Minnesota Sentencing Guidelines prescribe presumptive sentences for felony offenses. Minn. Sent’g Guidelines 2.C (Supp. 2021). For any particular offense, a presumptive sentence is “presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.” Minn. Sent’g Guidelines 1.B.13 (Supp. 2021). Accordingly, a district court “must pronounce a sentence . . . within the applicable [presumptive] range, . . . unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (Supp. 2021); *see also State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008). “Substantial and compelling

circumstances are those demonstrating that the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotation omitted).

Before departing from a guidelines sentence, a district court first must determine whether “‘aggravating or mitigating circumstances are present’” and, if so, whether “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) (alteration in original) (quoting *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989), and Minn. Sent’g Guidelines 2.D.1). If substantial and compelling reasons exist, the district court has discretion to order a departure. *Soto*, 855 N.W.2d at 308; *Best*, 449 N.W.2d at 427. This court applies an abuse-of-discretion standard of review to a district court’s decision to depart or not depart from the presumptive sentence. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). We will affirm an upward or downward departure if the reasons for the departure “are legally permissible and factually supported in the record.” *Id.*

A. Upward Durational Departure

Monterroso Merida first argues that the district court erred by ordering an upward durational departure.

To order an upward durational departure, there must be “(1) a factual finding that there exists one or more circumstances not reflected in the guilty verdict or guilty plea, and (2) an explanation by the district court as to why those circumstances create a substantial and compelling reason to impose a sentence outside the range on the grid.” *State v. Rourke*,

773 N.W.2d 913, 919 (Minn. 2009). The sentencing guidelines provide a non-exclusive list of aggravating factors that may justify an upward departure. Minn. Sent’g Guidelines 2.D.3.b & cmt. 2.D.301 (Supp. 2021).

Monterroso Merida contends that one of the aggravating factors found by the jury—particular vulnerability due to age—is an improper reason for an upward departure and that the remaining aggravating factor—multiple forms of penetration—does not independently justify the district court’s departure.

1. Particular Vulnerability Due to Age

Monterroso Merida contends that particular vulnerability due to age is an improper sentencing departure factor because M.B.’s age is incorporated into an element of the offense of which he was convicted.

In general, an upward durational departure may not be based on “factors that the legislature has already taken into account in determining the degree or seriousness of the offense.” *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005). If the victim’s age is a factor that determines the degree or seriousness of the offense, the victim’s age, including any vulnerability due to age, may not be considered as an aggravating factor. *See Taylor v. State*, 670 N.W.2d 584, 589 (Minn. 2003).

The offense of which Monterroso Merida was convicted prohibits “penetration with anyone under 18 years of age or sexual contact with a person under 14 years of age . . . if . . . the complainant is under 14 years of age and the actor is more than 36 months older than the complainant.” Minn. Stat. § 609.342, subd. 1a(e). This statute is, as a practical matter, the same statute of which the appellant was convicted in *Taylor*, in which the

district court also departed upward based in part on the victim's particular vulnerability due to age. 670 N.W.2d at 585, 589 (citing Minn. Stat. § 609.342, subd. 1(a) (2002)). The supreme court concluded in *Taylor* that the victim's particular vulnerability due to age was an "inappropriate bas[i]s for departure where those facts were already taken into account by the legislature in determining the degree of seriousness of the offense." *Id.* at 589 (citing *State v. Hagen*, 317 N.W.2d 701, 703 (Minn. 1982); *State v. Peterson*, 329 N.W.2d 58, 60 (Minn. 1983); *State v. Johnson*, 327 N.W.2d 580, 583 (Minn. 1982)).

In its brief, the state does not attempt to argue that *Taylor* does not apply. At oral argument, the state's appellate attorney conceded that particular vulnerability due to age is not a valid aggravating factor in this case. Based on *Taylor*, we agree.

Thus, the district court erred by relying on the aggravating factor of particular vulnerability due to age.

2. Multiple Forms of Penetration

Monterroso Merida also argues that multiple forms of penetration is an improper aggravating factor in this case on the ground that there was "one brief and uninterrupted encounter in a single location," which "involved one continuous behavioral incident with no meaningful temporal separation or intervening circumstances."

Monterroso Merida cites no authority for the proposition that the multiple-forms-of-penetration aggravating factor applies only if there were multiple incidents. In *State v. Yartz*, 791 N.W.2d 138 (Minn. App. 2010), *rev. denied* (Minn. Feb. 23, 2011), this court noted the appellant's concession "that multiple forms of sexual penetration during a single behavioral incident is a valid departure ground." *Id.* at 146. In other cases, this court

typically has focused solely on whether the appellant engaged in multiple forms of penetration, without regard for whether multiple forms of penetration occurred during multiple incidents. *See, e.g., State v. Adell*, 755 N.W.2d 767, 773-75 (Minn. App. 2008), *rev. denied* (Minn. Nov. 25, 2008); *State v. Incantalupo*, No. A19-2068, 2021 WL 21594, at *2 (Minn. App. Jan. 4, 2021), *rev. denied* (Minn. Mar. 30, 2021); *State v. Alejo-Rubio*, No. A16-0689, 2017 WL 1208754, at *2 (Minn. App. Apr. 3, 2017), *rev. denied* (Minn. June 20, 2017); *Grimes v. State*, No. A10-613, 2011 WL 134946, at *2-4 (Minn. App. Jan. 18, 2011), *rev. denied* (Minn. Mar. 15, 2011); *cf. Hoversten v. State*, No. A22-1263, 2023 WL 3047986, at *3 (Minn. App. Apr. 24, 2023) (noting that “[t]his factor can apply even in cases . . . involving multiple acts committed over an extended period of time”); *see also* Minn. R. Civ. App. P. 136.01, subd. 1(c) (providing that nonprecedential opinions are “not binding authority” but “may be cited as persuasive authority”).

In this case, the jury found that Monterroso Merida subjected M.B. to multiple forms of penetration. The district court expressly noted the evidence that Monterroso Merida penetrated M.B. with his fingers, his mouth, and his penis, and that he “subjected her to multiple forms of oral and vaginal penetration.” The district court did not err by relying on the aggravating factor of multiple forms of penetration.

3. Whether Reversal is Required

Monterroso Merida last argues that the district court’s upward durational departure must be reversed because it was influenced in part by an improper aggravating factor, particular vulnerability due to age.

Monterroso Merida's argument raises the question whether, if a district court relies on one valid aggravating factor and one invalid aggravating factor, an appellate court should affirm the sentence or reverse and remand for resentencing. "In deciding whether to affirm or remand, we must determine whether the district court would have imposed the same sentence absent reliance upon the improper aggravating factor." *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009). "In doing so, we consider the weight given to the invalid factor and whether any remaining factors found by the court independently justify the departure." *Id.* A remand generally is required unless we determine that the district court would have imposed the same sentence absent reliance on the invalid factor. *State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009).

The record of the sentencing hearing indicates that the district court was concerned about both M.B.'s particular vulnerability due to her age and Monterroso Merida's engaging in multiple forms of penetration. The district court repeatedly referred to facts relevant to both of those factors. Notably, the district court repeatedly referred to M.B. as a "child" and described her as "young," "small," and "weaker than" Monterroso Merida. Meanwhile, the district court described Monterroso Merida as "a grown man" who was "working in construction." The district court commented that M.B. was at a place where parents "drop their children off for youth activities" and "assume that [it] is a safe place for them to be," and commented further that a "grown man . . . showing up at a youth center, taking a child to a room . . . and raping her is every parent's worst nightmare." Given these comments, we are unable to conclude that the district court would have imposed the same sentence based only on the multiple-forms-of-penetration factor, without consideration of

the particular-vulnerability-due-to-age factor. *See Vance*, 765 N.W.2d at 395; *Stanke*, 764 N.W.2d at 828; *see also State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010) (reversing and remanding because “the record does not permit us to conclude that the district court would have imposed the same sentence based on only the valid aggravating factor”).

Thus, we reverse and remand for resentencing, with instructions to the district court to determine, in its discretion, the appropriate sentence that should be imposed based on the single valid aggravating factor: multiple forms of penetration.

B. Downward Dispositional Departure

Monterroso Merida also argues that the district court erred by denying his motion for a downward dispositional departure from the presumptive sentence.

The sentencing guidelines provide a non-exclusive list of mitigating factors that may justify a downward departure. Minn. Sent’g Guidelines 2.D.3.a & cmt. 2.D.301 (Supp. 2021). Particular amenability to probation is one of the mitigating factors recognized in the sentencing guidelines as a basis for a downward dispositional departure. Minn. Sent’g Guidelines 2.D.3.a(7) (Supp. 2021). Particular amenability to probation is not established if the defendant is only somewhat amenable to probation. *Soto*, 855 N.W.2d at 308-09. Rather, the defendant must be “particularly” amenable to probation in a way that “distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure.” *Id.* at 309 (quotation omitted). In determining whether a defendant is particularly amenable to probation, a district court may consider, among other things, “the defendant’s age, his prior record, his

remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). “But the mere fact that a mitigating factor is present in a particular case does not obligate the court to place defendant on probation or impose a shorter term than the presumptive term.” *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (quotation omitted). Similarly, a district court need not discuss all the *Trog* factors if the district court denies a motion for a downward dispositional departure. *Id.* at 254.

Monterroso Merida contends that the district court erred by not giving proper weight to several *Trog* factors: his age, his lack of a prior criminal record, his cooperation during the proceedings, his support from family and friends, and his experience of cultural and personal hardships. The record shows that the district court considered the factors identified by Monterroso Merida. The district court acknowledged both Monterroso Merida’s age (30 years old) and lack of prior criminal history and stated that those two factors weighed in his favor. The district court explained that Monterroso Merida’s cooperation during the proceedings was a “non-factor” because his “attitude while in court has been fine” and there “hasn’t really been a lot that [he has] been asked to cooperate with.” The district court also noted that Monterroso Merida missed one court appearance but was present at all others.

On the other hand, the district court also determined that some *Trog* factors weighed against Monterroso Merida. The district court expressed its belief that Monterroso Merida’s family would not properly support him on probation because they seemed “oblivious” to the severity of the crime that he committed. The district court also stated

that Monterroso Merida had not expressed remorse for the harm caused by his offense. In addition, the district court stated that there was “no evidence” that Monterroso Merida would be particularly amenable to probation and treatment because, in the nearly three years since he confessed to the crime, he had been on pre-trial release but had taken no steps to obtain sex-offender treatment. Accordingly, the district court denied Monterroso Merida’s motion for a downward dispositional departure.

The district court’s reasons for not ordering a downward dispositional departure are consistent with the record, including Monterroso Merida’s testimony and the testimony of his wife. The district court did not abuse its discretion in the manner in which it weighed the relevant factors or in its ultimate decision to deny Monterroso Merida’s motion for a downward dispositional departure.

In sum, we affirm the district court’s denial of Monterroso Merida’s motion for a downward dispositional departure, reverse the district court’s grant of the state’s request for an upward durational departure, and remand for resentencing.

Affirmed in part, reversed in part, and remanded.