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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1204**

State of Minnesota,
Respondent,

vs.

Damen Dean Smith,
Appellant.

**Filed April 23, 2012
Affirmed
Randall, Judge***

St. Louis County District Court
File No. 69DU-CR-07-6321

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Leslie E. Beiers, Assistant County Attorney,
Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Johnson, Chief Judge; and
Randall, Judge.

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

UNPUBLISHED OPINION

RANDALL, Judge

Appellant challenges the consecutive nature of his sentences, arguing that the sentence for his first-degree assault conviction is to be served concurrently with the sentences for his other convictions because, following remand by this court, the district court did not specifically pronounce that this sentence was to run consecutively. The district court, on the record, calculated the total number of months to be served. This total reflects consecutive sentences and the totality of the sentencing hearing is not unclear. We affirm.

FACTS

Following a trial by jury, appellant Damen Dean Smith was convicted of eight counts of child abuse, including one count of first-degree assault. The jury also found the existence of six aggravating factors. The district court sentenced Smith on each count, specifying that seven of the eight sentences, including the sentence for the first-degree assault conviction, were consecutive. The district court stayed the eighth sentence and ordered it concurrent.

Smith appealed his convictions and sentences to this court. We affirmed Smith's convictions but, because some of his sentences may have punished identical conduct and some of the aggravating factors were improperly submitted to the jury, we vacated four potentially duplicative sentences, narrowed the number of aggravating factors to three, and remanded for resentencing. *State v. Smith*, No. A09-1070, 2010 WL 3000016, at *1, *11 (Minn. App. Aug. 3, 2010), *review denied* (Minn. Nov. 16, 2010).

On remand, the district court sentenced Smith to a stayed term of 21 months' imprisonment, two consecutive terms of one-year-and-one-day imprisonment, and a final term, for the first-degree assault conviction, of 240 months' imprisonment. After pronouncing the sentence for Smith's first-degree assault conviction, the district court stated that this "would leave us with a total of, if I do my math right, 264 months and two days."¹ The district court later signed an amended warrant of commitment that listed Smith's sentence for his first-degree assault conviction as consecutive. This appeal followed.

D E C I S I O N

Smith argues that the sentence for his first-degree assault conviction is concurrent because, at resentencing, the district court failed to "specify" a consecutive sentence. Whether a district court sufficiently articulated its decision to impose a consecutive sentence is a question of law, which we review de novo. *See State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996) (statutory construction is subject to de novo review).

Where multiple sentences are involved, Minnesota law establishes a presumption of concurrent sentences; to impose a consecutive sentence, the district court must "specify" that a later sentence is to run consecutively. Minn. Stat. § 609.15, subd. 1 (2010). The district court's on-the-record pronouncement at sentencing is controlling as to whether a sentence is corrective or concurrent; a warrant of commitment is no

¹ Smith's original term of imprisonment was 354 months and five days, approximately seven and one half years longer than his post-remand term of imprisonment.

substitute. *State v. Rasinski*, 527 N.W.2d 593, 595 (Minn. App. 1995); *see generally State v. Staloch*, 643 N.W.2d 329, 331 (Minn. App. 2002).

Here, at resentencing, the district court did not use the exact terminology by stating that Smith's sentence for his first-degree assault conviction was consecutive. The district court did calculate Smith's cumulative term of imprisonment, on the record. This total reflects a consecutive sentence for Smith's first-degree assault conviction. The district court indicated, on the record, that it agreed with its initial upward departure, which was a consecutive sentence. On this record, although the explicit use of the term "consecutive"² is preferred, we find that the district court's pronouncement of sentence, at resentencing, for Smith's first-degree assault conviction meets the statutory standard of specificity for a consecutive sentence. *See* Minn. Stat. § 609.15, subd. 1.

Affirmed.

² Smith briefly argues that "consecutive sentencing for permissively consecutive offenses is not permissible when the court has given an upward durational departure on any current offense." For this proposition, Smith cites to a comment in the Minnesota Sentencing Guidelines. Examining this comment, we conclude that the limitation on imposing both a consecutive sentence and an upward durational departure applies only when the offenses involve a single victim and a single course of conduct. *See* Minn. Sent. Guidelines cmt. II.F.04 (2007). Here, the offenses involve three victims and multiple courses of conduct. Therefore, Smith's argument is without merit.