MINNESOTA
SENTENCING GUIDELINES
COMMISSION

Child Pornography Charging and Sentencing Practices

April 9, 2020
Staff Presentation
Nate Reitz, MSGC Executive Director

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A Brief Primer on Sentencing Multiple Current Offenses

Minn. Stat. § 609.035	Concurrent sentencing	Consecutive sentencing
• General rule: only one sentence per behavioral incident • Exceptions include multiple victims • Separate behavioral incidents may get separate sentences	• Use *Hernandez* method ("Hernandizing") • Offense #1 is included in the criminal history score for Offense #2's sentence	• For Offense #2, permissive consecutive sentencing applies only if the presumptive sentence for Offense #1 is a prison commit • Offense #2: additional prison, but use zero criminal history score

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Single Course of Conduct/Multiple Victim Rule

- Multiple convictions for possession of multiple images, even if together on the same computer, may receive multiple sentences—
- When the images involve **multiple victims**
  - *State v. Rhoades*, 690 N.W.2d 135 (Minn. Ct. App. 2004)
- But, if sentencing concurrently, felony weights are assigned to only **two offenses**, per Guidelines § 2.B.1.e(2)

Illustration: Hernandizing multiple current child pornography offenses under the multiple-victim rule, starting with no criminal history

CSC	CP	SL	CHS 0	CHS 1	CHS 2	CHS 3	CHS 4	CHS 5	CHS 6+
1		A	12	13	14	15	19.5	25.5	30
2		B	7.5	9.2	10.8	12.5	16.3	21.3	25
3		C	4	5.2	6.3	7.5	9.8	12.8	15
2/3	U+, D+	D			5	5.8	7.6	9.9	11.7
4	U, D	E				5	6.5	8.5	10
4/5	P+	F				3.8	4.9	6.4	7
3	P	G					3.3	4.3	5

Separate Behavioral Incidents Rule

- Multiple convictions for possession of multiple images, even if together on the same computer, may receive multiple sentences—
- When the images were **downloaded at substantially different times** (e.g., days apart), and the offenses were not in furtherance of each other
  - *State v. Bakken*, 883 N.W.2d 264 (Minn. 2016)
- No limit on Hernandizing

Illustration: Hernandizing multiple current child pornography offenses as separate behavioral incidents, starting with no criminal history

CSC	CP	SL	CHS 0	CHS 1	CHS 2	CHS 3	CHS 4	CHS 5	CHS 6+
1		A	12	13	14	15	19.5	25.5	30
2		B	7.5	9.2	10.8	12.5	16.3	21.3	25
3		C	4	5.2	6.3	7.5	9.8	12.8	15
2/3	U+, D+	D			5	5.8	7.6	9.9	11.7
4	U, D	E				5	6.5	8.5	10*
4/5	P+	F				3.8	4.9	6.4	7
3	P	G					3.3	4.3	5

*Statutorily limited to 7 years for dissemination

Staff's Questions About Hernandizing & CP Possession

- Minnesota Sentencing Guidelines have been criticized as being too lenient toward child pornography
- In light of Hernandizing options available to prosecutor and judge, are child pornography guidelines as lenient as they appear?
- The Commission has learned that a typical child pornography collection is very large, and includes many images of children under age 13
- Is the effective presumptive range for typical possession actually 0 to 7 years, at the prosecutor's discretion?

P+	F				3.8	4.9	6.4	7
P	G					3.3	4.3	5

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Staff's Proposed Study Approach (Guidance Solicited)

HYPOTHESIS

- The degree to which prosecutors and judges choose probationary sentences for child pornography possessors and disseminators—through mitigated dispositional departures, plea agreements, and not employing available Hernandizing options—can inform the Commission's ranking decisions

SCOPE

- All child pornography possession & dissemination sentenced in 2018

EXAMINATION

- Starting and ending criminal history scores, and how widespread Hernandizing is now
- Dismissed charges, and whether they apparently could have been Hernandized
- Facts alleged in criminal complaints apparently supporting possible additional charges that could have been Hernandized
- Plea-bargaining and sentencing practices

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STATE OF MINNESOTA
IN COURT OF APPEALS
A04-525

State of Minnesota,
Respondent,

vs.

Jason Michael Rhoades,
Appellant.

Filed December 7, 2004
Affirmed in part, reversed in part, and remanded
Wright, Judge

Ramsey County District Court
File No. K2-03-3058

Mike Hatch, Attorney General, 1800 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Jeanne L. Schleh, Assistant County Attorney, Ramsey County Government Center, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102-1657 (for respondent)

John M. Stuart, State Public Defender, Susan Andrews, Assistant Public Defender, 2221 University Avenue Southeast, Suite 425, Minneapolis, MN 55414 (for appellant)

Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Stoneburner, Judge.

S Y L L A B U S

An offender convicted of multiple counts of possession of child pornography as part of a single behavioral incident that involves images of multiple victims may be sentenced consecutively on each

count under the multiple-victim exception to Minn. Stat. § 609.035, subd. 1 (2002), unless the sentence imposed unfairly exaggerates the criminality of the offender's conduct.

O P I N I O N

WRIGHT, Judge

After pleading guilty to six counts of possession of child pornography and being sentenced in accordance with the terms of his plea agreement, appellant now challenges the multiple sentences that were imposed consecutively. Appellant and respondent agree that possession of the numerous pornographic images stored on appellant's computer was part of a single behavioral incident. Although a different child is depicted in each image, appellant argues that the multiple-victim exception permitting multiple sentences does not apply because (1) the children do not qualify as victims of the offense; and (2) the total sentence of 84 months' imprisonment exaggerates the criminality of his conduct. Respondent concedes that, because two of the pornographic images for which appellant was convicted and sentenced likely depict the same minor, one of the consecutive sentences imposed should be reversed without disturbing the remaining consecutive sentences. We affirm in part, reverse in part, and remand.

FACTS

In January 2002, St. Paul Police investigated a domestic disturbance at appellant Jason Michael Rhoades's home. During the investigation, police learned that Rhoades is a registered predatory sex offender who has been convicted twice of second-degree criminal sexual conduct involving a child. Police reports from Rhoades's prior offenses established that child pornography had been found on Rhoades's computer. Rhoades's probation officer notified police in January 2002 that, as a condition of his probation, Rhoades was barred from having access to the Internet and from any contact with a minor. During the course of the January 2002 investigation, police learned that Rhoades spent most of his free time on the Internet. As a result, a probation violation warrant was issued, and Rhoades turned himself in on January 8, 2002.

That day, Rhoades's cousin arrived at Rhoades's home with a list of property, including Rhoades's computer and other electronics, to be removed from Rhoades's residence. The police subsequently seized the computer from Rhoades's cousin and submitted the computer to the Minnesota Internet Crimes Against Children Task Force for a forensic examination. The forensic examination disclosed that a large number of files had been deleted from the computer on January 6, 2002.[1] The forensic examiner recovered from the computer approximately 100 files containing child pornography.

Rhoades was charged with ten counts of possession of child pornography, in violation of Minn. Stat. § 617.247, subds. 4(a), (b) (2002).[2] On October 21, 2003, Rhoades signed a plea agreement and pleaded guilty to counts I through VI. Pursuant to the plea agreement, each count was ranked as a level-four offense, and Rhoades agreed to receive a separate sentence on each count, to be served consecutively. The remaining counts would be dismissed at sentencing. With a criminal-history score of five and an offense level of four for count I, Rhoades agreed to a sentence of 27 months' imprisonment on that count and an additional year and one day for each subsequent count, to be served consecutively. The district court later adopted the recommendation of the presentence investigation report and reduced Rhoades's criminal-history score to four. This resulted in a sentence of 24 months' imprisonment for count I. The district court sentenced Rhoades to consecutive sentences, in conformity with the plea agreement, totaling 84 months' imprisonment. Counts VII through X were dismissed. This appeal followed.

ISSUE

Did the district court err in imposing separate, consecutive sentences, in accordance with the plea agreement, for the six counts of possession of child pornography?

ANALYSIS

Whether the possession of multiple pieces of child pornography involving different minors satisfies the multiple-victim exception to Minn. Stat. § 609.035, subd. 1 (2002), 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). A district court's decision to impose consecutive sentences

will not be disturbed on appeal absent a clear abuse of discretion. *Neal v. State*, 658 N.W.2d 536, 548 (Minn. 2003).

Although a district court ordinarily is precluded from imposing more than one sentence for multiple offenses committed in a single behavioral incident, Minn. Stat. § 609.035, subd. 1, a judicially created exception to this single-behavioral-incident rule permits the imposition of multiple sentences when (1) the offenses involve multiple victims; and (2) the multiple sentencing does not unfairly exaggerate the criminality of the defendant's conduct. *State v. Marquardt*, 294 N.W.2d 849, 850-51 (Minn. 1980).

In addressing the multiple-victim exception, the Minnesota Supreme Court has stated on more than one occasion that "the legislature did not intend in every case to immunize offenders from the consequences of separate crimes intentionally committed in a single episode against more than one individual." *State ex rel. Stangvik v. Tahash*, 281 Minn. 353, 360, 161 N.W.2d 667, 672 (1968); *see also State v. Rieck*, 286 N.W.2d 724, 727 (Minn. 1979) (quoting *Stangvik)*; *see State v. Briggs*, 256 N.W.2d 305, 306 (Minn. 1977) (same). The multiple-victim exception, however, is not a "purely mechanistic test" driven by the prosecution's exercise of its discretion in charging decisions. *See Marquardt*, 294 N.W.2d at 851. Rather, whether multiple sentencing unfairly exaggerates the criminality of the conduct is a judicial determination that serves as a check against unfettered prosecutorial discretion.

Both Rhoades and the state agree that the six offenses are part of a single behavioral incident. Rhoades, however, challenges the district court's application of the multiple-victim exception, which resulted in the imposition of a sentence on each offense of conviction. Thus, we consider whether Rhoades's offenses involved multiple victims and, if so, whether his sentences unfairly exaggerate the criminality of his conduct.

As an initial matter, Rhoades asserts that children depicted in child pornography are not victims for the purpose of a possession offense. The state counters that possession of child pornography harms the children depicted in the pornographic images. And the complaint describes with specificity the content of each of the counts and makes clear that at least five of the charged offenses involve the depiction of different children. The remaining counts are based on photographic images depicting

discrete additional acts against one of the same victims and multiple discrete acts against another victim.[3]

The statute criminalizing possession of child pornography, Minn. Stat. § 617.247 (2002), informs our analysis of whether the offense is a victimless crime. "A person who possesses a pornographic work or a computer disk or a computer . . . containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony."[4] Minn. Stat. § 617.247, subd. 4. One purpose of the criminal child-pornography statute is "to protect minors from the physical and psychological damage caused by their being used in pornographic work depicting sexual conduct which involves minors." Minn. Stat. § 617.247, subd. 1. Specifically as to possession of child pornography, the statute states:

> It is therefore the intent of the legislature to penalize possession of pornographic work . . . in order *to protect the identity of minors who are victimized* by involvement in the pornographic work, and *to protect minors from future involvement* in pornographic work depicting sexual conduct.

Id. (emphasis added).

The language of section 617.247 plainly establishes the legislature's intent to punish possession of child pornography as a crime that victimizes, or harms, the minor subject of the pornographic work. Indeed, the harm associated with possession of child pornography is twofold, (1) disclosure of the identity of the minor depicted in pornographic images and (2) perpetuation of the illicit use and exploitation of children. *See New York v. Ferber*, 458 U.S. 747, 759, 102 S. Ct. 3348, 3355-56 (U.S.N.Y. 1982). In its codified statement of intent, the legislature makes clear its view that the individual children depicted in the pornography Rhoades possessed are also victimized by the act of possession.

Rhoades also argues that the multiple-victim exception does not apply here because it applies only when the offender directly harms the victim. Because he possessed the child pornography, as opposed to producing it, Rhoades contends that he did not directly harm the subjects of the child pornography.

Rhoades's claim that the multiple-victim exception contains a direct-harm component is not compelled by the caselaw on which he relies. Indeed, the applicability of the multiple-victim exception

does not turn on the existence of direct harm to the victims in any of the cases cited. *See State v. Oates*, 611 N.W.2d 580, 587 (Minn. App. 2000) (affirming separate sentences for multiple assaults on multiple victims because the defendant fired "several shots in a crowded bar, with intent to kill one individual but heedless of the mortal risk posed to countless others"), *review denied* (Minn. Aug. 22, 2000); *see also State v. Wipper*, 512 N.W.2d 92, 95 (Minn. 1994) (affirming arson and murder convictions but vacating arson sentence because arson did not involve multiple victims). Accordingly, we conclude that Rhoades's conduct involved multiple victims as contemplated by the multiple-victim exception.[5]

We next consider whether the district court's decision to impose a separate, consecutive sentence for each count involving a different minor unfairly exaggerates the criminality of his conduct. "Consecutive sentencing of multiple felonies with multiple victims is permissive and within the broad discretion of the [district] court." *State v. Richardson*, 670 N.W.2d 267, 284 (Minn. 2003); *see also* Minn. Sent. Guidelines II.F.2 (providing that "[m]ultiple current felony convictions for crimes against persons may be sentenced consecutively to each other"). A district court's decision regarding permissive, consecutive sentencing will not be disturbed unless the resulting sentence unfairly exaggerates the criminality of the defendant's conduct. *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998).

A reviewing court determines whether consecutive sentencing unfairly exaggerates the criminality of the conduct by examining sentences in similar cases. *State v. Lee*, 491 N.W.2d 895, 902 (Minn. 1992); *see also* Minn. Stat. § 244.11, subd. 2(b) (2002) (authorizing an appellate court to "review the sentence imposed . . . to determine whether the sentence is . . . unreasonable, . . . excessive, [or] unjustifiably disparate"). An appellate court may modify a sentence in the interests of fairness and uniformity. *See State v. Norris*, 428 N.W.2d 61, 70-71 (Minn. 1988) (reducing sentence as unfair); *State v. Vazquez*, 330 N.W.2d 110, 112 (Minn. 1983) (upholding sentence as uniform with other similarly situated offenders). We base our decision on our collective, collegial experience in reviewing a large number of criminal appeals. *State v. Miller*, 488 N.W.2d 235, 241 (Minn. 1992).

On the first count of possession of child pornography, Rhoades's criminal-history score of four was properly calculated based on his two prior convictions of second-degree criminal sexual conduct involving a minor. On the subsequent counts, Rhoades's criminal-history score reverted to zero, as

required by the sentencing guidelines. *See* Minn. Sent. Guidelines II.F ("For each offense sentenced consecutive to another offense(s), . . . a zero criminal history score . . . shall be used . . . ."). Further, Rhoades committed the offenses while on probation and accessed the pornographic images from the Internet, thereby violating conditions of his probation. Based on the facts established here, we conclude that imposition of consecutive sentences totaling 84 months' imprisonment does not unfairly exaggerate the criminality of Rhoades's conduct.

Because the state concedes that one of the images for which Rhoades received a consecutive sentence may involve a minor depicted in another image for which a sentence was imposed, the second sentence possibly relating to the same minor must be reversed. Accordingly, we affirm the district court's application of the multiple-victim exception and its imposition of consecutive sentences for five counts of conviction. We reverse the sentence imposed for one count and remand to the district court with instructions to vacate one of the consecutive sentences of one year and one day.

D E C I S I O N

Application of the multiple-victim exception was not erroneous, and imposition of consecutive sentences did not unfairly exaggerate the criminality of the conduct. Therefore, the district court did not err in imposing consecutive sentences for each count of possession of child pornography containing the image of a different victim. Imposition of separate sentences for possessing two pornographic images of the same minor was error.

Affirmed in part, reversed in part, and remanded.

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[1] At the guilty-plea hearing, appellant admitted that he deleted these files from his computer.

[2] This is an unranked offense under the Minnesota Sentencing Guidelines.

[3] The state concedes that construing the facts in the light most favorable to Rhoades, "one of the consecutive sentences could be vacated" because it is not clear from the record that the offense involved the depiction of a different child.

[4] "Pornographic work" is defined as "(1) an original or reproduction of a picture . . . involving a minor; or (2) any visual depiction . . . or computer-generated image . . . that: (i) uses a minor to depict actual or simulated sexual conduct[.]" Minn. Stat. § 617.246, subd. 1(f) (2002).

[5] In a recent opinion, this court concluded that the multiple-victim exception to Minn. Stat. § 609.035 applies to possession of multiple computerized images of child pornography. *State v. Bertsch*, 689 N.W.2d 276, ___, No. A04-177, slip op. at 30 (Minn. App. Nov. 30, 2004). The reasoning of *Bertsch* applies with equal force here.

c. Felony Decay Factor. In computing the criminal history score, a prior felony sentence or stay of imposition following a felony conviction must not be used if all the following, to the extent applicable, occurred before the date of the current offense:

(1) the prior felony sentence or stay of imposition expired or was discharged;

(2) a period of fifteen years elapsed after the date of the initial sentence following the prior conviction; and

(3) if the prior felony sentence was executed, a period of fifteen years elapsed after the date of expiration of the sentence.

d. Assigning Felony Weights – Previous Court Appearances Resulting in Multiple Sentences. Following are exceptions to including prior felonies in criminal history when multiple felony sentences were imposed in a previous court appearance:

(1) Single Course of Conduct / Multiple Sentences. When multiple sentences for a single course of conduct were imposed under Minn. Stats. §§ 152.137, 609.585 or 609.251, include in criminal history only the weight from the offense at the highest severity level.

(2) Single Course of Conduct / Multiple Victims. When multiple offenses arising from a single course of conduct involving multiple victims were sentenced, include in criminal history only the weights from the two offenses at the highest severity levels.

e. Assigning Felony Weights – Current Multiple Sentences. Multiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred. As each offense is sentenced, include it in the criminal history on the next offense to be sentenced (also known as "*Hernandizing*") except as follows:

(1) Single Course of Conduct / Multiple Sentences. When multiple current convictions arise from a single course of conduct and multiple sentences are

imposed on the same day under Minn. Stats. §§ 152.137, 609.585, or 609.251, the conviction and sentence for the "earlier" offense does not increase the criminal history score for the "later" offense.

(2) Single Course of Conduct / Multiple Victims. When multiple current convictions arise out of a single course of conduct in which there were multiple victims, weights are given only to the two offenses at the highest severity levels.

f. Prior Offense with Attempt, Conspiracy, or Other Sentence Modifier. When a prior offense included a sentence modifier, such as attempt, conspiracy, or other sentence modifier as described in section 2.G, the prior conviction must be given the same felony weight as a completed offense.

g. Prior Offenses with No Conviction. Assign no weight to an offense for which a judgment of guilty has not been entered before the current sentencing, such as a stay of adjudication or continuance for dismissal.

h. Non-Felony Sentence. When a prior felony conviction resulted in a non-felony sentence (misdemeanor or gross misdemeanor), the conviction must be counted in the criminal history score as a misdemeanor or gross misdemeanor conviction as indicated in section 2.B.3.

i. Total Felony Points. The felony point total is the sum of the felony weights. If the sum of the weights results in a partial point, the point value must be rounded down to the nearest whole number.

Comment

2.B.101. *The basic rule for computing the number of prior felony points in the criminal history score is that the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given for a felony level offense, no matter what period of probation is pronounced, before the current sentencing.*

2.B.102. *No partial points are given – thus, an offender with less than a full point is not given that point. For example, an offender with a total weight of 2½ would have 2 felony points.*

STATE OF MINNESOTA

IN SUPREME COURT

A14-2057

Court of Appeals — Lillehaug, J.
Took no part, Hudson, J.

State of Minnesota,

Respondent,

vs.

Filed: August 3, 2016
Office of Appellate Courts

Timothy John Bakken,

Appellant.

Lori Swanson, Attorney General, Saint Paul, Minnesota; and

Gregory A. Widseth, Polk County Attorney, Andrew W. Johnson, Assistant Polk County Attorney, Crookston, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. Minnesota Statutes § 617.247 (2014) authorized the State to charge appellant with a separate criminal count for each distinct "pornographic work" involving minors that appellant possessed, even though those works were stored on a single computer.

2. The conduct underlying appellant's offenses was not part of a single behavioral incident, and thus the district court did not err in imposing a sentence for each conviction.

Affirmed.

Considered and decided by the court.

O P I N I O N

LILLEHAUG, Justice.

Between November 2012 and June 2013, appellant Timothy Bakken downloaded, viewed, and saved to his computer's hard drive seven pornographic images of minors engaged in sexual conduct. He downloaded and saved these photographs on different days—one each on November 9, December 2, December 9, December 14, March 5, April 28, and June 4. Each photograph depicted a different minor. After police seized Bakken's computer and discovered the images, he was charged with seven counts of Possession of Pornographic Work Involving Minors, in violation of Minn. Stat. § 617.247, subd. 4(a) (2014).

Bakken pleaded guilty to all seven counts. In establishing the factual basis for the plea, he admitted that an individual he had met in an online chat room had sent him the images. He further admitted that, after the images were sent, he downloaded them, viewed them, and saved them on his computer's hard drive on the dates alleged in the complaint. Before sentencing, Bakken filed a motion in which he argued that (1) he could only be convicted and sentenced for one count of possession because the "unit of prosecution" in the statute is possession of the computer, rather than the individual

images stored on it, and (2) his offenses were part of a single behavioral incident. The district court denied Bakken's motion, ruling that the statute authorized the State to separately charge Bakken with possession for each pornographic image and that Bakken's offenses were not part of the same behavioral incident. Accordingly, the court imposed seven concurrent sentences, with the longest sentence being an executed term of 51 months in prison.[1]

Bakken appealed and the court of appeals affirmed. *State v. Bakken*, 871 N.W.2d 418, 420 (Minn. App. 2015). Because we conclude that Minn. Stat. § 617.247 authorized the State to charge appellant with a separate count for each distinct pornographic work that appellant possessed, and appellant's conduct in possessing the pornographic works was not part of a single behavioral incident, we affirm.

I.

We first consider whether the State could properly charge multiple counts of possession of child pornography under Minn. Stat. § 617.247. Whether a defendant commits one or more distinct offenses under a criminal statute depends on the statute's "unit of prosecution." *Sanabria v. United States*, 437 U.S. 54, 69-70 (1978) (quoting *United States v. Universal C.I.T. Credit Corp*., 344 U.S. 218, 221 (1952)). Violations of the same statutory provision may be charged multiple times in a single prosecution if the Legislature "intended the facts underlying each count to make up a separate unit of

[1] The sentencing guidelines range was 51-60 months. Had Bakken been convicted and sentenced on only one count, the presumptive sentence would have been a stayed term of 30 months.

prosecution." *United States v. Chipps*, 410 F.3d 438, 447 (8th Cir. 2005); *see also State v. Stith*, 292 N.W.2d 269, 273-75 (Minn. 1980) (holding that the statute authorized charging seven counts of securities fraud based on seven misrepresentations because the Legislature intended each misrepresentation to be a separate offense). Accordingly, we must consider the language of the statute criminalizing the possession of child pornography to determine whether the State was authorized to charge Bakken with seven separate counts of possession.

Minnesota Statutes § 617.247, subd. 4(a), provides: "A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony . . . ." Bakken contends that, because all of the pornographic works he possessed were stored on a single computer, the statute is ambiguous as to the unit of prosecution. He contends that in a factual scenario such as this one, the Legislature intended to authorize only a single charge for possession of the computer containing the works. This ambiguity, he asserts, requires that we apply the rule of lenity and construe the statute to authorize only a single charge. The State responds that the statute unambiguously authorizes the charging of a separate count for each distinct pornographic work a person possesses, regardless of where the work is stored.

Statutory interpretation presents a question of law that we review de novo. *State v. Smith*, 876 N.W.2d 310, 336 (Minn. 2016). The goal of statutory interpretation is to ascertain and effectuate the intent of the Legislature. Minn. Stat. § 645.16 (2014);

State v. Irby, 848 N.W.2d 515, 518 (Minn. 2014). When the words of a statute in their application to an existing situation are clear and free from all ambiguity, we give effect to the plain meaning of the law. *State v. Mauer*, 741 N.W.2d 107, 111 (Minn. 2007). But a statute is ambiguous if, as applied to the facts of the case, it is susceptible to more than one reasonable interpretation. *See State v. Schmid*, 859 N.W.2d 816, 820 (Minn. 2015). In determining whether the statute is ambiguous, we consider the "canons of interpretation" listed in Minn. Stat. § 645.08 (2014), and interpret the statute as a whole to "harmonize and give effect to all its parts," presuming that the Legislature "intended the entire statute to be effective and certain." *State v. Riggs*, 865 N.W.2d 679, 682-83 (Minn. 2015).

We conclude that Minn. Stat. § 617.247 unambiguously criminalizes *both* the possession of a pornographic work itself *and* the possession of a computer storing a pornographic work. Therefore, it was within the State's authority to charge Bakken with seven separate counts of possession for seven distinct pornographic works. The two items that the statute prohibits possessing—"a pornographic work" and "a computer . . . containing a pornographic work"—are linked in the statute by the word "or." Minn. Stat. § 617.247, subd. 4(a). The word "or" is typically read as disjunctive, requiring that only one of the possible factual situations linked by the "or" be present for the statute to be violated. *State v. Loge*, 608 N.W.2d 152, 155 (Minn. 2000). The plain language of the statute does not restrict the State's authority to bring charges when pornographic works are possessed by an individual and stored on a computer; rather, the statute criminalizes the possession of two different things.

This straightforward reading of the statute comports with our decision in *State v. Stith*, in which we confronted a strikingly similar question and came to the same conclusion. 292 N.W.2d 269. In *Stith*, the statute provided that a person could commit securities fraud in three ways: by employing a scheme to defraud, by engaging in a fraudulent business, or by making an untrue statement of material fact in connection with the sale of securities. *Id.* at 273. The State charged Stith with multiple counts, one count for each untrue statement. *Id.* Stith contended that, because his conduct satisfied all three provisions and he employed only a single scheme or business to defraud, the State could charge only one count of securities fraud. *Id.* at 274. We rejected that argument, noting that the use of the word "or" in the statute made the alternative methods of violating the statute disjunctive, which gave the State the authority to choose among the provisions in prosecuting Stith. *Id.*

As in *Stith*, the statute in this case can be violated in multiple ways. That the definitions of criminal activity may overlap does not require the State to charge the case in a way that is the most advantageous to the defendant. *See State v. Lee*, 683 N.W.2d 309, 315 (Minn. 2004) (noting that, when definitions of criminal offenses overlap, "the state has the discretion to charge a person with the offense which is best supported by the available evidence and which carries a penalty commensurate with the culpable acts involved").

In urging us to reach the opposite conclusion, Bakken argues that, when read as a whole, the statute is ambiguous as to the unit of prosecution because the "statute's first clause . . . allows a charge for possession of the work" whereas "the second clause" is

"plainly for possession of the medium." Accordingly, he contends, an interpretation that allows the State to charge separately for possession of individual works stored on a computer renders the second clause superfluous. *See Riggs*, 865 N.W.2d at 683 (stating that in determining whether a statute is ambiguous, we consider whether a particular interpretation will "give effect to all of [the statute's] provisions"). But that is not the case. Under the State's proffered reading, the second clause of the statute is not duplicative of the first; it criminalizes possession of a different item (the computer versus the work).

Appellant's surplusage argument assumes that, when a person possesses a computer that contains a pornographic work, the person necessarily possesses the pornographic work contained therein. That assumption is not always true. For instance, a person can possess a computer jointly with another, as with a roommate or spouse. *See Lee*, 683 N.W.2d at 316 n.7. Assume one person has password access to the illegal images, and the other does not, but knows that the images are on the computer. *See id.* (explaining that one constructively possesses contraband if he or she keeps the item in a place under his or her exclusive control, or if it can be shown that he or she consciously exercised dominion and control over the item). In that case, the latter person would violate the statute's second clause but not its first.

Moreover, appellant's proffered reading would require us to limit the first clause of the statute to incorporate only part of the statutory definition of "pornographic work." *See* Minn. Stat. § 617.246, subd. 1(f) (2014). That definition encompasses digital images of the type stored on appellant's computer and produced for viewing on a computer

monitor. *See id.*, subd. 1(f)(2) (defining "pornographic work," in part, as "any visual depiction, including any photograph [or] . . . picture . . . produced by electronic . . . means"). The theory offered by appellant—that when a work is stored on a computer, the State may no longer prosecute possession of the work itself—would require us to ignore the parts of the statutory definition of "pornographic work" that criminalize the possession of digital pornographic works themselves. We have "no opportunity to ignore part of the legislature's definition," *State v. Peck*, 773 N.W.2d 768, 773 (Minn. 2009), of "pornographic work."

Finally, our conclusion regarding the unit of prosecution is in accord with the way that foreign courts have viewed the same question. In states in which the applicable statute criminalizes possession of the pornographic work itself, as ours does, courts have regularly determined that possession of each individual pornographic work constitutes a separate offense. *See, e.g.*, *Peterka v. State*, 864 N.W.2d 745 (N.D. 2015).[2] Other foreign courts have concluded that their statutes criminalizing possession of child pornography are ambiguous as to the unit of prosecution, but typically only when the

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[2] *See also Fink v. State*, 817 A.2d 781 (Del. 2003); *State v. Fussell*, 974 So. 2d 1223 (La. 2008); *State v. Cobb*, 732 A.2d 425 (N.H. 1999); *Commonwealth v. Davidson*, 938 A.2d 198 (Pa. 2007); *State v. McKinney*, 699 N.W.2d 460 (S.D. 2005); *State v. Morrison*, 31 P.3d 547 (Utah 2001); *State v. Multaler*, 643 N.W.2d 437 (Wis. 2002).

In jurisdictions in which the applicable statute, by its terms, criminalizes possession only of the medium storing the pornographic work rather than possession of individual works themselves, the unit of prosecution is possession of the storage medium. *See United States v. Woerner*, 709 F.3d 527, 540 (5th Cir. 2013); *State v. Muhlenbruch*, 728 N.W.2d 212 (Iowa 2007).

statute in question, unlike ours, uses a collective or plural term in describing what is unlawful to possess. *See, e.g.*, *State v. Olsson*, 324 P.3d 1230 (N.M. 2014).[3]

In sum, because Minn. Stat. § 617.247 unambiguously criminalizes both possession of an individual pornographic work and possession of a storage system containing a pornographic work, the State had authority to charge Bakken with a count of violating the statute for each pornographic work he possessed.[4]

II.

We now turn to the question of whether the district court erred in determining that Bakken's criminal conduct was not part of a single behavioral incident. Subject to various exceptions, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2014). Thus, the law 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) (quoting *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn. 1986)). When, as here, all of the crimes at issue contain an intent element, we determine whether the crimes were part of a single behavioral incident by considering (1) whether "the offenses occurred at substantially the same time and place," *State v. Jones*, 848 N.W.2d 528, 533 (Minn.

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[3] *See also Girard v. State*, 883 So. 2d 717 (Ala. 2003); *State v. Liberty*, 370 S.W.3d 537 (Mo. 2012); *State v. Sutherby*, 204 P.3d 916 (Wash. 2009).

[4] Because the statute is unambiguous, the rule of lenity is inapplicable. *Loge*, 608 N.W.2d at 156.

2014), and (2) whether the conduct "was motivated by an effort to obtain a single criminal objective," *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011).

The State bears the burden of proving, by a preponderance of the evidence, that a defendant's offenses were not part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000). Whether the offenses were part of a single behavioral incident is a mixed question of law and fact, so we review the district court's findings of fact for clear error and its application of the law to those facts de novo. *Jones*, 848 N.W.2d at 533. Determining whether multiple offenses are part of a single behavioral incident is not a "mechanical" exercise, but rather requires an examination of all the facts and circumstances. *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997).

In this case, the parties agree that Bakken's seven offenses were committed in the same place: his bedroom in his mother's house in Polk County. Thus, we consider whether the offenses occurred at substantially the same time, and whether they were motivated by an effort to obtain a single criminal objective.

Because Bakken did not commit each of the possession crimes at substantially the same time, this factor weighs against him. Although a crime of possession is a continuing offense, *State v. Lawrence*, 312 N.W.2d 251, 253 (Minn. 1981), it is complete when the offender takes possession of the prohibited item, *see Bauer*, 792 N.W.2d at 828-29 (concluding that a possession offense and a controlled-substance-sale offense were committed at different times because the possession, though continuing, was completed before the sale offense occurred). Two of Bakken's offenses were completed 5 days apart, and other offenses were separated by over a month.

Bakken's offenses also were not committed to obtain a single criminal objective, which means this factor also weighs against him. In analyzing this factor, we examine the relationship of the offenses to one another. *Jones*, 848 N.W.2d at 533. We consider "whether all of the acts performed were necessary to or incidental to the commission of a single crime and motivated by an intent to commit that crime." *State v. Krampotich*, 282 Minn. 182, 186-87, 163 N.W.2d 772, 776 (1968).

Even assuming that Bakken possessed each of the pornographic works to satisfy his sexual urges, the mere fact that he committed multiple crimes over time for the *same* criminal objective does not mean he committed those crimes to attain a *single* criminal objective. *See Soto*, 562 N.W.2d at 304 (explaining that when the defendant was convicted of selling cocaine on 4 different days over a 1-month period, although each sale was motivated by the same desire to profit, "[t]he separate sales were not motivated by a desire to obtain a single criminal objective" because a "criminal plan of obtaining as much money as possible is too broad an objective . . . within the meaning of section 609.035"); *State v. Eaton*, 292 N.W.2d 260, 266-67 (Minn. 1980) (explaining that when appellant was convicted of two counts of theft by swindle for acts occurring 3 days apart, the objective of "swindl[ing] as much as possible" was "too broad to be a single criminal goal").

Here, Bakken's offenses were not in furtherance of, or even incidental to, the successful completion of any of his other offenses. *See State v. Banks*, 331 N.W.2d 491, 494 (Minn. 1983) (concluding that a gun-possession offense and a fleeing-police offense were not part of the same behavioral incident because both offenses could be explained

"without necessary reference to the [other] offense"); *Mercer v. State*, 290 N.W.2d 623, 626 (Minn. 1980). And because Bakken's offenses were completed at substantially different times, other cases in which we have concluded that an offender had a single criminal goal in committing multiple offenses over a shorter, discrete time period are inapposite.[5] *See, e.g.*, *Langdon v. State*, 375 N.W.2d 474, 476 (Minn. 1985) (reasoning that defendant's "overall criminal objective" was "to steal as much money as he could that afternoon" by burglarizing several laundry rooms in the same apartment complex); *State v. Herberg*, 324 N.W.2d 346, 347, 349 (Minn. 1982) (reasoning that defendant's "underlying motivation remained the same" in committing four violent offenses against the same victim over the course of an afternoon).

Bakken, however, argues that when assessing whether possession offenses are part of a single behavioral incident, we should depart from our well-established test and instead adopt a new "flexible" one that "de-emphasizes" the factor of time, focusing only on the time when the defendant's possession of illegal items was discovered. He argues that such a test is necessary to address potential sentencing disparities attributable to overly aggressive prosecutorial charging decisions.

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[5] Of course, whether the offenses were committed at substantially the same time is an independent factor in the single-behavioral-incident determination. In cases in which an offender repeatedly commits the same offense, however, the timing of those offenses is relevant to determining whether the offender had a *single* criminal objective, or merely the *same* criminal objective. *Compare Langdon v. State*, 375 N.W.2d 474, 476 (Minn. 1985) (concluding that four burglaries of an apartment complex, committed on the same afternoon, were committed with a single "overall criminal objective"), *with Eaton*, 292 N.W.2d at 266-67 (concluding that two thefts, committed 3 days apart and by swindling the same victims, were not committed with a single criminal objective).

Certainly, the sheer number of pornographic works that some offenders possess may counsel the cautious exercise of prosecutorial discretion. But "[w]ithin the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement' " is acceptable so long as that selectivity is not discriminatory. *State v. Smith*, 270 N.W.2d 122, 124 (Minn. 1978) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). And as we said in *Stith*, "harsh results of the statute [can] be modified by the charging authorities, the trial judge through section 609.035 [if applicable], or general sentencing discretion." 292 N.W.2d at 275. Indeed, such sentencing discretion was actually exercised in this case: Bakken received 51 months in prison—the shortest sentence the court could impose without departing from the sentencing guidelines.

Bakken, though, argues that it is highly relevant to the "single behavioral incident" inquiry that his multiple possession offenses were discovered by law enforcement at the same time. In support of his argument, Bakken points to *State v. Carlson*, in which we held that possession of 29 obscene films, all discovered by police at the same time, could support only one sentence for possession of obscene material with intent to sell. 291 Minn. 368, 369-70, 381, 192 N.W.2d 421, 423, 429 (1971). That case is easily distinguishable, however, as there was no indication that the State could establish that the defendants possessed the films or offered them for sale at any time or place other than when and where they were discovered by police. When the offenses are committed is a factor in our section 609.035 determination. *See Mercer*, 290 N.W.2d at 626; *see also Banks*, 331 N.W.2d at 494 (concluding that the possession offense discovered upon arrest

for the fleeing-police offense were separate behavioral incidents). Here, by contrast, Bakken began his possession of the pornographic works at different times.

Therefore, because Bakken's offenses were completed at substantially different times, and because his conduct was not motivated by an effort to obtain a single criminal objective, the district court did not err in sentencing Bakken on each of the separate possession convictions.

Affirmed.

HUDSON, J., took no part in the consideration or decision of this case.