STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0599

State of Minnesota,
Respondent,

vs.

Gregory Allen Shartle,
Appellant.

Filed April 21, 2014
Affirmed
Bjorkman, Judge

Sherburne County District Court
File No. 71-CR-12-705

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Dawn R. Nyhus, Assistant County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Hooten, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant challenges his multiple sentences for possessing and disseminating child pornography, arguing that (1) the district court abused its discretion by denying his motion for a downward dispositional departure and (2) the district court erred by imposing multiple sentences on two of the dissemination convictions because they were part of the same behavioral incident. In a pro se supplemental brief, appellant also argues that the district court erred by imposing a conditional-release term that was not included in his plea agreement and exceeds the statutorily permitted duration. We affirm.

FACTS

An undercover FBI investigation revealed that appellant Gregory Shartle was using a peer-to-peer file-sharing program to disseminate thousands of pornographic images and videos, including numerous items involving children. Shartle was charged with 11 counts of disseminating child pornography and four counts of possessing child pornography. He pleaded guilty to three of the dissemination counts and two of the possession counts in exchange for the dismissal of the remaining charges and a presumptive sentence with the opportunity to argue for a downward dispositional departure. After considering Shartle's psychosexual evaluation, the presentence investigation report (PSI), and Shartle's statements at sentencing, the district court denied

Shartle's departure motion and imposed the presumptive sentence of 60 months' imprisonment, followed by five years of conditional release.[1] This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by imposing the presumptive sentence.

The district court must order the presumptive sentence unless "identifiable, substantial, and compelling circumstances" justify a downward departure. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *review denied* (Minn. Sept. 17, 2013). We review a district court's decision to grant or deny a departure from the presumptive sentence for abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). We will reverse a presumptive sentence only in rare cases. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

The appropriateness of a dispositional departure depends on the defendant as an individual, and "on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). Amenability to treatment in a probationary setting may support a dispositional departure. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Such amenability may be determined from numerous factors, including "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *Id.* But a district court is not obligated to depart even if mitigating factors are present. *State v. Wall*, 343

[1] The district court imposed concurrent sentences for the five convictions, according to *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981), with the third through fifth presumptive prison terms. At Shartle's request, the district court executed the presumptively stayed sentences on the other two convictions.

N.W.2d 22, 25 (Minn. 1984); *see also State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (stating that the district court need not explain its reasons for imposing the presumptive sentence).

Shartle argues that the district court abused its discretion by denying his departure motion because "it is abundantly clear" from his age (29), his family support, his cooperation, his military service, and his lack of prior criminal record that he is amenable to probation. We are not persuaded. Even if these facts would generally weigh in favor of probation, they do not mandate it. *See Wall*, 343 N.W.2d at 25 (holding that mitigating factors do not require departure); *see also State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (affirming denial of departure motion despite defendant's argument that *Trog* factors were present). Nor do they represent the whole picture here. The district court also considered evidence that Shartle has expressed doubt that he needs treatment, minimizes the seriousness of his conduct, and does not exhibit remorse or acknowledge the effect of his conduct. Shartle contends that his statement to the psychosexual evaluator that he does not believe he needs treatment was "a reaction to not knowing anything about treatment," not an indication that he is averse to treatment. But the district court was entitled to credit the opinions of the psychosexual evaluator and the probation agent who prepared the PSI that the statement indicates Shartle's unamenability to treatment in a probationary setting. *See id.* (noting, in support of district court's denial of dispositional departure, that the probation department recommended an executed sentence in part because defendant's defensiveness posed a barrier to sex-offender treatment).

Shartle next asserts that the district court abused its discretion by "completely disregard[ing]" his veteran status. We disagree. The record indicates that the district court was aware of and considered various aspects of Shartle's veteran status, including his service-related mental-health problems, and the treatment and medication he receives. And the only supporting authority Shartle cites in his principal brief is Minn. Stat. § 609.115, subd. 10 (2010).[2] That provision permits but does not require the district court to consider treatment options available to mentally ill veterans. Minn. Stat. §§ 609.115, subd. 10 (providing that district court "must" inquire as to veteran status and mental-illness diagnoses and "may" order PSI preparer to consult with a veterans affairs agency or obtain treatment information), 645.44, subd. 15 (providing that "may" is permissive) (2010). The district court considered Shartle's mental-health issues and treatment before concluding that he is not amenable to treatment in the community. On this record, we discern no abuse of discretion.

Finally, Shartle argues that probation is warranted because he has no previous criminal history and his presumptive sentence was executed only because the district court used the *Hernandez*[3] method for sentencing. We are not persuaded. First, Shartle

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[2] In support of his pro se argument that his veteran status and related mental illness warrant a probationary sentence, Shartle also cites Minn. Sent. Guidelines 3.F (Supp. 2011) and Minn. Stat. § 609.1055 (2010), and refers to a "VA COURT SYSTEM." We have carefully reviewed these authorities and agree that they support treatment, rather than incarceration, of mentally ill veterans. But none mandates a probationary sentence, particularly in circumstances when an offender is found not amenable to treatment.

[3] The *Hernandez* method permits sentencing a defendant for multiple offenses on the same day to increase the defendant's criminal-history score to reflect each conviction on which he or she is sentenced. *State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009).

relies on a provision of the sentencing guidelines that refers only to the general sentencing grid, not the sex-offender grid. *See* Minn. Sent. Guidelines 2.D.2.a.(4)(b) (Supp. 2011) (listing as mitigating factor simultaneous sentencing on multiple "severity level 3 or 4" offenses when "the offender received all of his or her prior felony sentences during one court appearance"). It therefore does not apply to child-pornography cases. Second, the district court expressly addressed Shartle's lack of prior criminal history, finding that it does not weigh in favor of probation because it is more reflective of Shartle's reclusive lifestyle than any acknowledgement of or respect for laws and social rules.

In sum, the record amply supports the district court's determination that Shartle is not amenable to probation. We conclude the district court did not abuse its discretion by denying his motion for a downward dispositional departure.

II. The district court properly sentenced Shartle on counts 1 and 4.

Under Minn. Stat. § 609.035, subd. 1 (2010), a district court generally may not impose multiple sentences for two or more offenses arising out of a single behavioral incident. *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012). But the supreme court has recognized that "the legislature did not intend section 609.035 to immunize offenders in every case from the consequences of separate crimes intentionally committed in a single episode against more than one individual." *Id.* (quotation omitted). Accordingly, a district court may impose multiple sentences for convictions arising out of a single behavioral incident if (1) the offenses involve multiple victims and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant's conduct. *State v.*

Marquardt, 294 N.W.2d 849, 850-51 (Minn. 1980). We review de novo whether the multiple-victim exception applies. *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006).

Shartle argues that the district court erred by imposing sentences on counts 1 and 4 because they relate to videos that law enforcement accessed on the same day, making them part of the same behavioral incident. The state counters that multiple sentences are justified because the videos depict different children, as in *State v. Rhoades*, 690 N.W.2d 135, 136, 139 (Minn. App. 2004) (holding multiple sentences warranted under the multiple-victim exception for simultaneous possession of multiple items of child pornography depicting different children). Shartle urges us to distinguish *Rhoades* because it involved possession, not dissemination. He contends that "the charge of dissemination is a more encompassing charge than possession and does, by the offense itself, include multiple images of pornographic work." We are not persuaded.

Dissemination encompasses the act of possession, and a conviction may be based merely on evidence that the defendant possessed and made available to the public some undefined quantity of child pornography. *See* Minn. Stat. §§ 617.246, subd. 1(f), .247, subds. 2(a), 3 (2010) (prohibiting dissemination of any "original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor"); *Bertsch*, 707 N.W.2d at 664-67 (reviewing dissemination conviction based on undefined "large volume" of child pornography). But a dissemination conviction also may be based on evidence that the defendant disseminated multiple specific items of child pornography, each implicating a distinct

victim. *See Bertsch*, 707 N.W.2d at 666 n.4 (noting that the state did not allege dissemination of "any specific files"). Accordingly, we conclude that when multiple dissemination convictions are based on distribution of multiple specific items of child pornography, that dissemination is indistinguishable for purposes of the multiple-victim exception from possession of multiple specific items of child pornography.

Shartle also argues that imposing multiple sentences unfairly exaggerates the criminality of his conduct. We disagree. When determining whether sentences unfairly exaggerate the criminality of a defendant's conduct, we review sentences imposed on other defendants in similar cases. *State v. Yang*, 774 N.W.2d 539, 563 (Minn. 2009). Shartle's concurrent sentences of 24 months' imprisonment for count 1 and 60 months' imprisonment for count 4 are no longer than similar offenders have received. *See Bertsch*, 707 N.W.2d at 662-63 (prison term of 48 months for single dissemination conviction based on "large collection" of publicly available child pornography); *State v. McCauley*, 820 N.W.2d 577, 583 (Minn. App. 2012) (concurrent prison terms of 102 months for two dissemination convictions). Moreover, punishing a person multiple times for disseminating multiple items of child pornography that involve different children is consistent with the express statutory purpose to protect each of those children from victimization. *See* Minn. Stat. § 617.247, subd. 1 (2010) (stating intent to "protect minors from the physical and psychological damage caused by their being used in pornographic work"); *Rhoades*, 690 N.W.2d at 139 (recognizing harm in the "perpetuation of the illicit use and exploitation of children"). It also is consistent with the rationale for the multiple-victim exception. *See Ferguson*, 808 N.W.2d at 590 (explaining that the multiple-victim

exception exists because a defendant who acts "with the intent to harm more than one person or by means likely to cause harm to several persons is more culpable than a defendant who harms only one person" (quotation omitted)). Shartle was convicted of disseminating two specific items of child pornography, affecting two identifiable victims.[4] The fact that he could have disseminated them simultaneously does not diminish the criminality of his conduct. On this record, we conclude the district court did not err by sentencing Shartle on both count 1 and count 4.

III. The district court properly imposed a five-year conditional-release term.

Minnesota law requires imposition of a conditional-release term any time the district court sentences a person to prison for possession or dissemination of child pornography. Minn. Stat. § 617.247, subd. 9 (2010). For a first offense, the conditional-release term is five years. *Id.*

In his pro se brief, Shartle argues that the district court should not have imposed the conditional-release term because his plea agreement negated such a term. We disagree. The district court did not have discretion to relieve Shartle of the conditional-release term. *See State v. Rhodes*, 675 N.W.2d 323, 327 (Minn. 2004) (recognizing that conditional-release term is statutorily mandated). At most, Shartle could have asked to withdraw his guilty plea based on his erroneous understanding that he would not be subject to a conditional-release term. *See Uselman v. State*, 831 N.W.2d 690, 694 (Minn.

[4] We observe that the state improperly focuses on the large number of pornographic files that Shartle actually disseminated. The record amply establishes, and Shartle does not dispute, the large scope of his disseminating conduct. But the sentences at issue here are for convictions based on dissemination of two specific items of child pornography; it is the criminality of that conduct that is at issue.

App. 2013) (holding plea withdrawal warranted because plea agreement indicated there would be no conditional-release term). But Shartle does not seek plea withdrawal; he seeks only to have the conditional-release term eliminated. He is not entitled to that relief.

Shartle also argues that the district court abused its discretion by imposing a conditional-release term of five years, rather than reducing the conditional-release term for each sentence so as not to exceed a total period of supervision longer than the statutory maximum. He appears to misread the phrase "[n]otwithstanding the statutory maximum sentence." Section 617.247, subdivision 9, unequivocally requires a five-year conditional-release term following any prison sentence for possession or dissemination of child pornography. We conclude the district court did not err by imposing the statutorily required five-year term.

Affirmed.