STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2159

State of Minnesota,
Respondent,

vs.

Louis Leroy Russell,
Appellant.

Filed February 3, 2009
Affirmed
Hudson, Judge

Chisago County District Court
File No. 13-CR-06-1349

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Janet Reiter, Chisago County Attorney, Chisago County Government Center, 313 North Main Street, Room 373, Center City, Minnesota 55012-9663 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Collins, Judge.*

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

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

HUDSON, Judge

On appeal from his conviction of two counts of possession of child pornography, appellant argues that the district court abused its discretion when it: admitted evidence gathered pursuant to unreasonable searches; admitted evidence despite the wrong city being listed on the search warrant; admitted overly prejudicial evidence; and ruled that appellant could be impeached by a prior conviction. Appellant also argues that the district court erred when it sentenced appellant for two criminal counts stemming from the same behavioral incident and erred when it ranked appellant's offense as a severity level VII. We affirm.

FACTS

Appellant was released from prison on intensive supervised release in May, 2006. Upon release he signed a "conditions of release" form whereby he agreed to numerous conditions, including that he not purchase, possess, or allow in his residence sexually explicit materials. The reverse side of this form included other "standard conditions of release," notably the requirement that "[t]he offender will submit at any time to an unannounced visit and/or search of the offender's person, vehicle or premises by the agent/designee." This portion of the form was not signed by appellant, nor was a signature required. On June 5, 2006, appellant's supervised release corrections officer, Agent Bensami, made a routine visit to appellant's residence to give him a drug test. He noticed three videotapes on appellant's bed—two Disney tapes and one unmarked tape. Agent Bensami became suspicious because appellant's previous offense was second-

degree criminal sexual conduct involving a child under 13. When asked what was on the unmarked tape, appellant acted nervous, started breathing fast, and tried to grab the tape from Agent Bensami. Agent Bensami then asked appellant if he could play the tape and appellant consented. The videotape depicted sexual acts (penetration) between two adult men. Agent Bensami placed appellant under arrest for violating a condition of his release. During the arrest appellant stated, "I have a lot of tapes." Agent Bensami testified that appellant later gave him his keys and stated "[y]ou can search the house man; I have nothing to hide here."[1]

Agent Bensami then received necessary approval from his supervisor to return the following day to conduct a second search. Agent Bensami returned the next day by himself, but called police officers for assistance. This was for his own safety and because "[agents] work in conjunction with [l]aw [e]nforcement . . . if [agents] find anything odd we call for assistance." Agent Bensami also stated that he wanted officers present because they might discover child pornography. Two officers arrived, Officer Zerwas and Investigator Tougas. By the time the officers arrived, Agent Bensami had already begun searching for more "sexual tapes." He found more magazines with sexual content, and later (after the officers had arrived) child pornography was discovered. Officer Zerwas found several magazines, including one titled, "Boys at 11, Boys at 12, Boys at 13." It contained pornographic images of juvenile males. Once the child pornography

[1] Agent Bensami testified at the omnibus hearing that he went back to the apartment after the arrest to retrieve appellant's keys and medication, but later in the same hearing testified that appellant gave him the keys and consented to the search. Agent Bensami testified at trial that he did not recall how or when he came into possession of appellant's keys.

was discovered, which the officers deemed evidence of a new crime, the search was stopped in order to procure a search warrant.

Agent Bensami testified that the purpose of conducting the second search was to find further evidence of sexually explicit material. He stated that it is important to know if there is a large quantity of such materials because that can make a difference in determining the state of mind of the person. Investigator Tougas testified that police officers assist corrections agents in securing evidence and making sure it is handled, secured, and tagged properly, and that sometimes officers will even store it for the corrections agents in order to maintain the chain of custody.

Appellant conceded that the first search was permissible and only contested the second search and the final warranted search. The district court denied appellant's motion to suppress all evidence obtained prior to and after obtaining the search warrant. The district court found that appellant consented to the second search by signing a "conditions of release" form, and also by giving Agent Bensami the keys to his residence. The district court also found that the second search was proper and did not violate Department of Corrections search directives because those directives instruct agents to "conduct searches thoroughly, in a manner that discovers and preserves evidence and does not necessarily disturb the offender's effects or property," and the amount of sexually explicit material possessed by appellant would affect Agent Bensami's recommendation of consequences.

Finally, the district court also determined that although the search warrant listed the wrong city for appellant's address (Chisago City instead of Lindstrom), there was no

evidence that the same street address exists in Chisago City as it does in Lindstrom; the officers had just assisted Agent Bensami with a consensual search of the premises; it was unreasonable to think that the investigators would, after obtaining a signed warrant, search in Chisago City for a different residence with the same street address; the description was adequate for identification of the premises; and there was no serious risk that any other premises would be mistakenly searched.

A jury convicted appellant of two counts of possession of child pornographic work, in violation of Minn. Stat. § 617.247, subd. 4(a) (2004). The district court assigned a severity level of VII to appellant's offenses and sentenced appellant on both counts. This appeal follows.

D E C I S I O N

I

Appellant argues that the district court abused its discretion when it did not suppress evidence gathered during the second search of his residence or suppress evidence gathered during the subsequent warranted search of his residence. Appellant maintains that both searches violated the federal and Minnesota constitutions' protections against unreasonable searches and seizures. Appellant alternatively argues that both searches were invalid because police officers were present and assisted with the second search, and that appellant's signature on the "conditions of release" form was not sufficient to amount to a knowing, voluntary, and intelligent consent to search. The state contends that appellant consented to the second search of his residence. Specifically, the state points to the statements of Agent Bensami who testified that (1) in the midst of

arrest, appellant told him about additional tapes and movies; and (2) appellant later gave the agent his keys and stated "[y]ou can search the house man; I have nothing to hide here."

"We review de novo a district court's ruling on constitutional questions involving searches and seizures." *State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007). A reviewing court may independently review undisputed facts to determine, as a matter of law, whether evidence should have been suppressed. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

Minn. Const. art. I, § 10.

"[W]hen we interpret Article I, Section 10 of the Minnesota Constitution, decisions of the Supreme Court interpreting the Fourth Amendment are persuasive, although not compelling, authority." *In re Welfare of B.R.K.*, 658 N.W.2d 565, 577 (Minn. 2003). "[W]e are free to interpret the Minnesota Constitution as affording greater protection against unreasonable searches and seizures than the United States Constitution, but do not do so cavalierly." *Id.*

The United States Supreme Court held in *Griffin v. Wisconsin* that supervision of probationers is a "special need" of the state that "may justify departures from the usual warrant and probable-cause requirements." 483 U.S 868, 873–74, 107 S. Ct. 3164, 3168

(1987). Applying these principles, the court held that a warrantless search of a probationer's residence is reasonable when conducted under a state regulation that permits such searches if (1) the probation officer's supervisor approves the search; and (2) the officer has reasonable grounds to believe the residence contains contraband. *Id*. at 871–73, 107 S. Ct. at 3167–68. Later, in *United States v. Knights*, the Supreme Court adopted a totality-of-the-circumstances approach to determine whether probationer searches violate the Fourth Amendment. 534 U.S. 112, 118, 122 S. Ct. 587, 591 (2001).[2] "[T]he reasonableness of a search [wa]s determined by assessing, on the one hand, the degree to which [the search] intrude[d] upon an individual's privacy and, on the other, the degree to which [the search] [was] needed for the promotion of legitimate governmental interests." *Id*. at 118–19, 122 S. Ct. at 591 (quotation omitted).

It is clear that a person on supervised release is at least as restricted as a person on probation, and that a person on supervised release does "not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special" supervised release conditions. *Griffin*, 483 U.S. at 874, 107 S. Ct. at 3169 (quotation omitted); *United States v. Kills Enemy*, 3 F.3d 1201, 1203 (8th Cir. 1993). As with probationers, "there is a heightened need for close supervision of the convicted person's activities to protect society" as well as the person on supervised release. *Kills Enemy*, 3 F.3d at 1203.

[2] The totality-of-the-circumstances approach was adopted by the Minnesota Supreme court in *Anderson*, 733 N.W.2d at 138.

In Minnesota, warrantless searches of conditionally released offenders are statutorily authorized. Minn. Stat. §§ 244.05, subd. 6 (Supp. 2005), .14, subd. 4 (2004). In *Anderson*, the Minnesota Supreme Court held that a warrantless search of a probationer's home is valid where there is reasonable suspicion to believe that the defendant violated the conditions of his probation and that the probation conditions were validly imposed. 733 N.W.2d at 137–38. The court balanced the probationer's individual privacy rights against the state's legitimate interests using a totality-of-the-circumstances approach. *Id*. at 138.[3]

Reasonable suspicion

Reasonable suspicion requires "a sufficiently high probability that criminal conduct is occurring to make the intrusion on the [convicted person's] privacy interest reasonable." *Knights*, 534 U.S. at 121, 122 S. Ct. at 592. Reasonable suspicion is "more than an unarticulated hunch." *State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000). It is "'a particularized and objective basis for suspecting [a] person . . . of criminal activity.'"

[3] We note that *Anderson* cites *Griffin* and *Knights* with approval. 733 N.W.2d at 137. Under a *Griffin* analysis, the second search of appellant's apartment did not violate the Fourth Amendment because there is a state regulation that permits such searches and Agent Bensami knew facts which would support reasonable suspicion: appellant's possession of prohibited pornography (mixed with Disney tapes—possibly featuring young children); appellant's previous conviction for second-degree criminal sexual conduct involving a child under 13; appellant's statement that he had other videotapes; and appellant's behavior at the time of the first search. We reach the same conclusion under a *Knights* analysis. Upon balancing the intrusion on appellant's privacy (Agent Bensami and the officers opened and searched through many of appellant's closed storage containers) with the legitimate government interest in protecting children from exploitation in pornographic materials, we hold that the second search of appellant's apartment did not violate the Fourth Amendment. The importance of this governmental interest cannot be underestimated and outweighs any intrusion on privacy appellant may have endured.

State v. Martinson, 581 N.W.2d 846, 850 (Minn. 1998) (quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661 (1996) (other quotation omitted)). In arriving at a reasonable suspicion of criminal activity, an officer may make inferences and deductions that might elude an untrained person. *Appelgate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987). But the officer must demonstrate objective facts to justify that suspicion and may not base it upon a mere hunch. *State v. Cripps*, 533 N.W.2d 388, 391–92 (Minn. 1995). "Nervousness alone is not an objective fact, but rather a subjective assessment derived from the officer's perceptions." *State v. Tomaino*, 627 N.W.2d 338, 341 (Minn. App. 2001).

Here, appellant does not dispute that he violated a condition of his release by possession of an adult pornographic videotape. Rather, appellant disputes that the possession of that tape alone created the reasonable suspicion necessary for the second, warrantless search. We disagree with appellant's assessment that it was solely the tape that created reasonable suspicion to justify the second search. While it is true that appellant was in possession of a prohibited item under the conditions of his release, he also possessed the means by which to view the prohibited item. Moreover, there was a close proximity of time between appellant's supervised release and the discovery of this prohibited material, because appellant had only been out of prison for five days. In addition, Agent Bensami testified that appellant told him he possessed other tapes, as well; appellant does not dispute having made this statement. Agent Bensami noted that the prohibited pornography was found alongside Disney tapes (which possibly featured young children). Agent Bensami was aware that appellant's previous conviction was for

second-degree criminal sexual conduct involving a child under 13. These facts combined with appellant's behavior during the search (nervousness, rapid breathing, grabbing the tape from Agent Bensami) were sufficient to give Agent Bensami a particularized and objective basis for suspecting appellant of further criminal activity.

Validly imposed probation conditions

Appellant concedes that because he was on intensive supervised release, the initial search by Agent Bensami was proper.[4] But appellant argues that the police presence and assistance at the second search broadened the scope of that search such that it became a warrantless police search instead of a conditional release violation search.

The second search of appellant's residence was initiated by Agent Bensami, appellant's supervised release agent. Although Agent Bensami requested the assistance of police, Agent Bensami testified that he asked for their assistance in order to have additional security on the premises because he was not sure if friends of appellant would arrive. Agent Bensami further testified that he asked for police assistance in order to utilize their expertise in the inventory and protection of the evidence. Thus, it appears from the record that the police played a limited role. Although other police officers were also at appellant's residence, it was Agent Bensami who initiated the search and, hence,

[4] Both Minn. Stat. §§ 244.05, subd. 6, .14, subd. 4, authorize unannounced searches of offenders conditionally released on "intensive supervised release" and "intensive community supervision." The difference is that offenders released under Minn. Stat. § 244.05 (2004 & Supp. 2005) (intensive supervised release) *may* be subject to such release provisions, while offenders released under Minn. Stat. § 244.14 (2004) (intensive community supervision) are automatically subject to release conditions. Here, appellant was released pursuant to Minn. Stat. § 244.05. The Department of Corrections affirmatively imposed conditions of release upon appellant and he signed the conditions-of-release form.

the second search, like the first, was properly conducted pursuant to appellant's validly imposed conditions of release, and appellant has no Fourth Amendment right to be free from such a search.

Appellant also argues that his signature on the conditions of release form was not a knowing, voluntary, and intelligent consent for the warrantless search. While the issue of the warrantless search was raised to the district court, appellant did not challenge the validity of his consent. Appellant's memorandum in support of his motion to suppress focused on three arguments: (1) that Agent Bensami and the officers overstepped the boundaries of the Department of Corrections' guidelines for probation searches, (2) that the circumstances of the case did not create a "special need," which would allow the warrantless search, and (3) that the search warrant was defective. On this record, we conclude that appellant did not specifically raise the issue of whether his consent was knowing, voluntary, and intelligent, and he is precluded from raising this issue on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (noting that matters not argued to and considered by the district court will not be considered upon appeal).

The district court did not abuse its discretion when it permitted admission of evidence gathered pursuant to both the second, warrantless search and the subsequent warranted search of appellant's residence because there was reasonable suspicion to believe that appellant violated the validly imposed conditions of his release.

II

Appellant argues that the district court erred when it admitted evidence gathered pursuant to the search warrant, because the search warrant listed the wrong city. "When

reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The Fourth Amendment to the United States Constitution specifically requires a search warrant to "particularly describe[e] the place to be searched." U.S. Const. amend. IV. The Minnesota Constitution and Minnesota Statutes contain similar provisions. Minn. Const. art. I, § 10; Minn. Stat. § 626.08 (2004). The purpose of the particularity requirement is "to minimize the risk that officers executing search warrants will by mistake search a place other than the place intended by the magistrate." 2 W. La Fave, *Search and Seizure* § 4.5 (1978), quoted in *State v. Gonzales*, 314 N.W.2d 825, 827 (Minn. 1982) *and State v. Schnorr*, 346 N.W.2d 380, 382 (Minn. App. 1984). In *Gonzales*, the Minnesota Supreme Court recognized that "[n]ot all errors in the search warrant's description of the premises to be searched will invalidate a search pursuant to the warrant." 314 N.W.2d at 827. "The test for determining the sufficiency of the description of the premises is whether the description is sufficient so that the executing officer can 'locate and identify the premises with reasonable effort' with no 'reasonable probability that [other premises] might be mistakenly searched.'" *Id.* (quoting *United States v. Gitcho*, 601 F.2d 369, 371 (8th Cir. 1979) (alteration in original)). The court in *Gitcho* considered (1) whether the address given in the warrant, even if incorrect, still described the property; (2) whether the premises to be searched was adjacent to that described in the warrant and was under the control of the defendant; (3) whether the incorrect address described a place not in existence; (4) whether the correct portions of

the description limited the place to be searched; and (5) whether the premises intended to be searched had previously been under surveillance or was under surveillance while the warrant was obtained. 601 F.2d at 371–72.

Here, an application of the *Gitcho* factors indicates that the address given in the warrant thoroughly described the property:

> 12275 Lake Lane, apartment 2. This apartment is located on the second story of a boarding house and shares a common bathroom and kitchen area with other apartments. The area to be searched would include only the private area identified as apartment or unit #2. [L]ocated in the City of Chisago City, County of Chisago, and State of Minnesota.

Further, the premises to be searched were not adjacent to that which was described in the warrant and the premises were under the control of the defendant; the incorrect address did not describe a place not in existence; the correct portions of the description limited the place to be searched; and the premises intended to be searched had never been under surveillance and were not under surveillance while the warrant was obtained.

Moreover, the warrant application contained a specific description of the residence and the items to be seized. The only incorrect information was the name of the city. In addition, the fact that the named city was two blocks away from the correct city does not raise a reasonable likelihood that another residence would mistakenly be searched because it was the same officer (Investigator Tougas) who applied for and executed the search warrant. Therefore, the district court did not err when it admitted evidence gathered pursuant to the search warrant.

III

Appellant argues that the district court abused its discretion when it permitted a videotape of a sexual act between adult males to be shown to the jury. Appellant argues that the probative value of playing the tape was substantially outweighed by the risk of prejudice. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). This court has allowed the submission of pornographic material for corroboration purposes, to assist the jury in placing the defendant's conduct in its proper and relevant context, and to enable evaluation of the defendant's denial. *State v. Wiskow*, 501 N.W.2d 657, 660 (Minn. App. 1993) (upholding admission into evidence of a pornographic magazine). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Minn. R. Evid. 403.

The videotape in question was found by Agent Bensami when he made the first, routine visit to appellant's residence. The videotape depicted sexual acts between adult males. Appellant argues that it was not relevant to the state's case or to either of the charges against him, and served no purpose other than to inflame the passion of the jury. The state argues that the videotape was probative because it assisted the jury in making a logical inference (i.e., the videotape was probative evidence that appellant possessed child pornography). We agree with appellant. The substance of the videotape was

gratuitous and was not in dispute, thus negating whatever probative value the tape may have had. The district court abused its discretion when it permitted the videotape to be shown to the jury.

However, appellant must show resulting prejudice. *See State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981) (stating that a conviction requires reversal "only when the error substantially influences the jury to convict"). "As an evidentiary error not affecting constitutional rights, improperly admitted underlying-facts evidence will not require reversal unless 'the error substantially influences the jury's decision.'" *State v. Valtierra*, 718 N.W.2d 425, 438 (Minn. 2006) (quoting *State v. Chomnarith*, 654 N.W.2d 660, 665 (Minn. 2003)).

Here, the state introduced a plethora of other sexually-related evidence found in appellant's residence. The jury viewed several pornographic magazines featuring children. The jury also heard the testimony of Investigator Tougas, who described photos contained on a disc seized from appellant's residence. This is significant evidence by which the jury could infer appellant's guilt. The district court abused its discretion when it allowed the state to show the adult pornographic videotape to the jury, but appellant has not demonstrated the requisite prejudice necessitating reversal.

IV

Appellant argues that the district court abused its discretion when it allowed him to be impeached by prior conviction. A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as are other evidentiary rulings, under a clear abuse of discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). Some

of the factors which the district court should consider in determining whether to restrict the use of prior crimes as impeachment evidence include:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 537–38 (Minn. 1978).

The district court weighed the *Jones* factors and found that: the prior conviction had significant impeachment value (as to factor one); the close proximity of the new offense and appellant's discharge from prison for the prior conviction weighed in favor of probative value (as to factor two); both the present offense and the past conviction involved minors, a similarity which weighed in favor of admission (as to factor three); the fact that appellant's credibility was at issue (as to whether the pornographic materials belonged to him) weighed in favor of admission as well (as to factor five). The district court did not address the fourth factor (the importance of defendant's testimony). *See State v. Swanson*, 707 N.W.2d 645, 655–56 (Minn. 2006) (holding that the district court did not abuse its discretion in admitting prior convictions as impeachment evidence where four of the five *Jones* factors weighed in favor of admission).

The district court's analysis regarding the *Jones* factors was cursory, and it incorrectly analyzed the third factor. Factor three actually states that the greater the similarity of the crimes, the greater the reason to *not* permit use of the prior crime to impeach. *Jones*, 271 N.W.2d at 538. The district court reversed this when it stated that

in regard to factor three, "both of [the offenses] do involve minors and the similarity there . . . weigh[s] that factor heavily in favor of the State." On this record, we hold that the district court abused its discretion when it allowed appellant's prior conviction into evidence for impeachment purposes.

But this does not end our inquiry. We must further determine whether this abuse of discretion was harmless error. In completing a "harmless error impact" analysis, the inquiry is not whether the jury could have convicted the defendant without the error, but rather, what effect the error had on the jury's verdict, "and more specifically, whether the jury's verdict is 'surely unattributable' to [the error]." *State v. King*, 622 N.W.2d 800, 811 (Minn. 2001) (quoting *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997)). Appellate courts must look to the basis on which the jury rested its verdict and determine what effect the error had on the actual verdict. *Juarez*, 572 N.W.2d at 292.

Here, the jury viewed magazines containing pornographic images of children. These magazines were found in appellant's possession. The jury also heard testimony from a police officer regarding the nature of computerized pornographic images of children also found in appellant's possession. Because of the quantum and nature of this evidence, the erroneous admission of evidence of appellant's prior conviction likely had little or no effect on the jury's verdict.

V

Appellant argues that the district court abused its discretion when it sentenced appellant for two criminal counts stemming from the same behavioral incident (possession of child pornography). Appellant maintains that he should only have

received one sentence. 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). Minnesota's statutory double-jeopardy protection precludes multiple sentencing for conduct that is part of a single behavioral incident. Minn. Stat. § 609.035, subd. 1 (2004). But there is a court-created multiple-victim exception to that statute's limitation on multiple sentencing. The court may sentence on one offense per victim, even for conduct that is part of the same behavioral incident, as long as the overall sentence does not exaggerate the criminality of the defendant's conduct. *State v. Cole*, 542 N.W.2d 43, 53 (Minn. 1996).

Here, the state correctly relied on *State v. Rhoades*, 690 N.W.2d 135, 138–39 (Minn. App. 2004), and this court's holding that, as a matter of law, possession of multiple items of child pornography involving different minors satisfies the multiple-victim exception to Minn. Stat. § 609.035, subd. 1. The state also correctly distinguishes the multiple-victim nature of possession of child pornography from the "victimless" nature of possession of drugs (to which appellant compares his case). Here, *Rhoades* is controlling, and the district court did not abuse its discretion when it sentenced appellant to two criminal counts stemming from the same behavioral incident.

VI

Appellant argues that the district court violated his constitutional right to a jury trial and abused its discretion when it assigned a severity level of VII to his unranked

offenses.[5] Specifically, appellant argues that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), requires that the initial determination of the severity level must be made by a jury. We review a constitutional claim involving the right to a jury trial de novo. *State v. Hagen*, 690 N.W.2d 155, 157 (Minn. App. 2004).

The Supreme Court held in *Blakely* that only a jury may find facts used to enhance a defendant's punishment beyond the statutory maximum. 542 U.S. at 303–04, 124 S. Ct. at 2537. In *State v. Shattuck*, the Minnesota Supreme Court applied *Blakely* and concluded that, for felonies other than first-degree murder, the presumptive sentence set forth in the Minnesota Sentencing Guidelines is the maximum sentence a judge may impose without further jury findings. 704 N.W.2d 131, 141 (Minn. 2005). Thus, an upward durational departure based on judicial findings of aggravating factors was held to violate the defendant's right to a trial by jury. *Id.*

But when unranked offenses are being sentenced, the sentencing judges shall exercise their discretion by assigning an appropriate severity level for that offense and specify on the record the reasons a particular level was assigned. Minn. Sent. Guidelines cmt. II.A.05. And the Minnesota Supreme Court has held that when assigning a severity level to unranked offenses, the sentencing court may take into consideration several factors including:

> the gravity of the specific conduct underlying the unranked offense; the severity level assigned to any ranked offense whose elements are similar to those of the unranked offense;

[5] At the time of appellant's offense, possession of child pornography was an unranked offense. Effective August 1, 2006, it became a severity level F or G offense on the new sex offender grid of the Minnesota Sentencing Guidelines.

> the conduct of and severity level assigned to other offenders for the same unranked offense; and the severity level assigned to other offenders who engaged in similar conduct. No single factor is controlling, nor is the list of factors meant to be exhaustive. Thus, while the sentencing court has discretion in sentencing for unranked offenses, information from the Sentencing Guidelines Commission on other offenders sentenced on the same or similar offenses can help guide the exercise of that discretion.

State v. Kenard, 606 N.W.2d 440, 443 (Minn. 2000) (footnote omitted).

We conclude that, based on the framework of the sentencing guidelines, the determination of the severity level in this case does not violate *Blakely* or *Shattuck*. First, this case does not involve an upward departure from the presumptive sentence. While the severity level is a value that goes into the calculation of the presumptive sentence, it is not a judicial finding of an aggravating factor. *Blakely* and *Shattuck* do not require that the initial determination of the presumptive sentence be made by a jury. The district court's determination of the severity level for an unranked offense is similar to the exercise of discretion by the guidelines commission in determining the severity level for the ranked offenses in the sentencing guidelines. Assigning a severity level to determine the presumptive sentence is not a sentencing departure and, therefore, not a violation of appellant's right to a jury trial.

Here, the district court applied the *Kenard* factors and at sentencing stated that it had thoroughly considered the situation. The district court took into account the gravity of the specific conduct that motivated the unranked offense, noting that:

> [T]his is a very serious offense, and it is even more serious when we consider the fact that [appellant] was on supervised release for Criminal Sexual Misconduct and had only been

> out of prison a matter of days . . . and . . . [is] a convicted criminal, a convicted pedophile and that within days of [his] discharge from prison [he had] already [begun] to accumulate that which stimulates [him] . . . [a]nd under the circumstances . . . this deserves a higher severity level, that being 7.

The district court also noted that this particular offense has been ranked by other judges throughout the state at a severity level VII.

The district court did not abuse its discretion when it made a reasoned decision and explicitly took into account several of the *Kenard* factors.

VII

Appellant raises a number of arguments in his pro se supplemental brief. These arguments were not raised in the district court, and therefore, we need not address these issues. *See Roby*, 547 N.W.2d at 357 (stating that generally, matters not argued to and considered by the district court will not be considered upon appeal). Appellant has, however, properly raised an argument concerning the applicability of Minn. Stat. § 609.035, subd. 1. But we have addressed and dismissed this argument in section V.

To summarize, we hold that the searches of appellant's residence were valid; the district court did not err when it admitted evidence pursuant to the search warrant; the district court's abuse of discretion by admitting overly prejudicial evidence was harmless error; the district court's abuse of discretion by admitting into evidence appellant's prior conviction was harmless error; the district court did not err when it sentenced appellant for two criminal counts stemming from the same behavioral incident; and the district court did not err in ranking appellant's offense as a severity level VII.

Affirmed.