STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1070

State of Minnesota,
Respondent,

vs.

Damen Dean Smith,
Appellant.

Filed August 3, 2010
Affirmed in part, reversed in part, and remanded
Ross, Judge

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

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Melanie Ford, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Ross, Judge.

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

ROSS, Judge

Damen Smith appeals from his convictions and sentences for repeatedly abusing three of the four young children who lived in his home. Smith argues that the trial

judge's bias and a lack of unanimity in the jury verdicts invalidate his convictions. He also argues that the district court enhanced his sentence based on invalid factors and that he was sentenced multiple times for the same conduct. Because we see no evidence of judicial bias and because Smith did not object to the jury instructions, we affirm the convictions. But because some of the aggravating sentencing factors were improperly submitted to the jury and some of Smith's sentences may have punished identical conduct, we vacate the potentially duplicative sentences and remand for resentencing.

FACTS

Damen Smith lived in Duluth with J.E.S. and her four children, J.S., M.S., D.S., and C.S. Smith fathered the two youngest children, D.S. and C.S. Smith and J.E.S. began living together in 2002 when J.E.S. was pregnant with D.S. Smith's lengthy period of physically abusing J.S., M.S., and D.S. ended in September 2007, when J.S. was eight, M.S. was six, D.S. was four, and C.S. was one. J.E.S. brought M.S. to the emergency room and reported that he had hurt his arm falling off the couch. Doctors discovered that M.S. had a broken arm and multiple bruises on his body. Blood tests revealed elevated liver and pancreas function, and doctors detected injuries to M.S.'s abdomen suggesting blunt-force trauma. Child-protection authorities removed all four children from Smith and J.E.S.'s home and placed them in foster care.

After an investigation, the state charged Smith with eight counts of physical abuse of the three older children: first-degree assault, third-degree assault (past pattern of abuse), and malicious punishment of a child (great bodily harm) against M.S.; two counts of malicious punishment of a child against J.S. and D.S.; and three counts of domestic

assault by strangulation against J.S., M.S., and D.S. The complaint does not indicate the exact dates of the offenses. At trial, the state introduced testimony of many abusive acts.

Smith abused M.S. the most. M.S. testified that, "a long time ago," Smith held his head underwater in the bathtub because he was angry. He testified that Smith had choked him several times, including once on his birthday. The last time that Smith choked M.S., M.S. passed out. When M.S. awoke lying on the floor, Smith kicked him in his side. M.S. also testified that he had seen Smith choke both J.S. and D.S. M.S. testified that, most recently, Smith had pinched M.S.'s leg, punched him in the stomach twice, and twisted his arm until it broke. Smith told M.S. to tell his mother that he broke his arm by falling off the couch.

M.S.'s testimony of abuse was corroborated by his preschool teacher. M.S.'s teacher noticed a bruise on the side of M.S.'s forehead in October 2005. She reported that M.S. had not been to school for the previous six days and that when she asked him how he hurt his head, M.S. stated, "[M]y dad hit me."

Two physicians also corroborated M.S.'s testimony. Dr. Nancy Monaghan Beery was M.S.'s doctor from his birth until J.E.S. stopped bringing M.S. to her in September 2006. Beginning with M.S.'s scheduled examination in November 2002 when he was 16 months old and continuing during later examinations, Dr. Beery observed a series of injuries, including bruises on his forehead, face, cheek, chin, shoulders, back, upper buttocks, arms and legs, penis, and the top of his foot; a head injury supposedly from falling down 15 stairs; hip pain; cuts on his forehead and eyelid or eyebrow; a corneal abrasion; and bite marks on his back. After at least one of the examinations, Dr. Beery

made a report and referred M.S.'s mother J.E.S. to social services. J.E.S. was reluctant to involve a social worker.

Smith brought M.S. to Dr. Beery's office for the last time in September 2006. M.S. had a "wasted appearance," with dark circles under his eyes and thin hair. He also had multiple areas of bruising on his left lower back, his left cheek, right cheek, forehead, both knees, the top of his foot, and the top of his head. Dr. Beery was concerned that M.S. either had cancer or had been abused. A skeletal survey revealed healing fractures to M.S.'s left femur and both of his wrists. Dr. Beery believed that M.S. likely had been abused. As a result, M.S. and his siblings were placed in foster care for several weeks, and Smith and J.E.S. never brought M.S. to Dr. Beery again.

Dr. Gretchen Karstens became M.S.'s pediatrician in October 2006. M.S. had a scar on the top of his left foot, and the nails of his index fingers and of his toes were in various stages of discoloration. The nail on his left hand had nearly fallen off. Dr. Karstens saw M.S. again in October to examine an injury to his right leg. M.S.'s right leg appeared normal, except Dr. Karstens observed a coin-sized bruise on the inside of each knee. In November, an emergency room doctor treated a cut on M.S.'s lip. Later that month, when M.S. returned to have stitches removed from his lip, Dr. Karstens observed a bruise on the back of M.S.'s left arm and a red area with some scabbing on the left side of his neck. In December, M.S. came in to urgent care for an injury to his left shoulder. Dr. Karstens saw M.S. in April 2007 to determine whether he was attaining a healthy weight. She noticed that M.S. had a scrape on his chin and a bruise on his left eye.

On September 22, 2007, M.S.'s mother brought him into the emergency room after he complained that his left arm hurt. She told Dr. Karstens that M.S. had been playing on the couch and fallen, possibly striking his arm on the couch. Emergency room personnel who observed that M.S.'s left arm was misshapen took x-rays and discovered that the arm was broken just above the elbow. M.S. also had multiple coin-shaped bruises on his body, including his left side, his chest, his right arm, his lower abdomen, the left side of his face, and his back. He had bite marks on his lower lip and an area of hair loss above his right ear, and his penis was bruised and had an abrasion on it. Blood tests conducted before surgery to reduce the fracture in M.S.'s arm indicated substantially elevated liver and pancreas function. A CAT scan showed a small tear in the right part of M.S.'s liver and a large amount of fluid in his abdomen. M.S.'s abdominal injuries were consistent with a violent impact and inconsistent with a fall from a couch.

J.S. and D.S. testified of multiple abusive acts by Smith against them and their siblings. J.S. testified that Smith had punched her on various occasions in her eye, in her face, in her stomach, on her arms, on her legs, and on her back, causing many bruises. She testified that Smith had choked her a dozen times and that when she passed out, Smith would punch her hard in the stomach as she regained consciousness. J.S. saw Smith choke both M.S. and D.S. Smith also kicked J.S and locked her in a dark basement. J.S. testified that Smith shot at the children with a pellet gun and that he shot her in the arms and head, resulting in bruises. The abuse occurred "pretty much anytime [J.S.] did a mistake," and J.S. believed that she "needed to just suck it up" because "that's how my life is going to be."

Testimony from school personnel corroborated J.S.'s testimony of lengthy abuse. In November 2003, J.S.'s preschool teacher noticed bruising on J.S.'s face. She asked J.S. what had happened, and J.S. stated that Smith had hit and kicked her. About a week later, J.S. came to school with a bruised, swollen lip that looked like it had been bleeding. J.S. made a motion with her fist to indicate to the teacher how Smith had hit her. In October 2005, J.S. told the assistant principal that Smith had hit her with a closed fist twice on her legs and once on her head with an open hand because J.S. wouldn't bring her mother's medicine to Smith. In March 2007, the health assistant at J.S.'s school observed a bruise on J.S.'s left cheek. J.S. claimed that she had gotten the bruise by scratching her cheek. Two weeks later, J.S. came to the health assistant asking for an ice pack to treat pain from a large bruise on her right cheek near her eye. J.S. said she had fallen and hit her head against the bathtub. The health assistant also noticed older bruises on J.S.'s left temple and behind her ear. Finally, in May 2007, J.S.'s second-grade teacher saw bruises on J.S.'s back, lip, and knees. J.S. claimed to have fallen on the playground.

D.S., the youngest of the three abused children, testified that Smith had choked him three times and that he had seen Smith choke M.S. and hurt J.S. D.S. also testified that he saw Smith twist M.S.'s arm and break it.

J.S. and D.S. were examined several days after M.S. went to the hospital for his broken arm. J.S. had bruises on her shins. D.S. had a "remarkable" bruise across the upper part of his sternum, a bruise on his upper left arm, and bruises on his leg.

In its closing arguments, the state reviewed the children's testimony regarding past abuse and the corroborating testimony of doctors and school staff. And the state detailed M.S.'s injuries observed by medical personnel on and shortly after September 22, 2007. Smith raised three defenses in his closing argument. The first was a general attack on the children's credibility. Second, Smith argued that he could not be blamed for "every bruise" and that J.S. was a "troubled girl" who was likely responsible for some of the children's injuries. And third, Smith argued that the state had not proven beyond a reasonable doubt that M.S.'s abdominal injury was sufficiently grave to constitute great bodily harm.

The jury found Smith guilty of all eight counts. It also found several aggravating factors: (1) the offenses were committed in the children's zone of privacy, (2) the facts of the case were more egregious than the typical abuse case, (3) the children were particularly vulnerable due to age, (4) the children were treated with particular cruelty, (5) Smith was in a position of trust, and (6) Smith was a violent offender. The court imposed a double durational departure for the first-degree assault conviction based on the children's particular vulnerability, Smith's position of trust, the fact that the crimes had occurred in the children's home, and the fact that Smith was a violent offender by virtue of his prior convictions for assault. The district court imposed separate sentences for each of Smith's eight convictions, for a total imprisonment of 354 months and five days.

Smith appeals.

D E C I S I O N

I

Smith argues that the district court deprived him of his right to an impartial judge, first by improperly participating in his plea negotiations and later by suggesting, and then ruling without an adequate legal basis, that he be restrained with a stun belt during the trial. Due process requires that a defendant receive a fair trial before an impartial judge who has no actual bias against the defendant or interest in the outcome of the case. *Bracy v. Gramley*, 520 U.S. 899, 904−05, 117 S. Ct. 1793, 1797 (1997); *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). A judicial proceeding may violate a defendant's due process right to a fair trial before an impartial judge if the judge actually harbors bias against the defendant, *see Bracy*, 520 U.S. at 905, 117 S. Ct. at 1797, or if the circumstances create an intolerable risk of bias, as when the judge has an interest in the outcome or a good reason to harbor personal animus against the defendant, *see Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2259−62 (2009). If a defendant has been deprived of a fair trial before an impartial judge, the remedy is reversal and a new trial. *State v. Dorsey*, 701 N.W.2d 238, 253 (Minn. 2005). Smith fails to convince us that the district court judge in his case was actually biased or that the circumstances created an intolerable risk of bias.

Smith first argues that the judge demonstrated bias by encouraging Smith to make an early decision on whether he would accept the state's plea bargain. We share Smith's concern about the propriety of the judge's participation in the plea negotiations but do not believe the judge demonstrated bias by this participation. Rather than demonstrating

bias, the judge's participation appears to have reflected his desire to achieve scheduling efficiency and certainty.

In early November 2008, the parties appeared in district court for a plea hearing. After Smith's counsel announced the plea agreement, Smith indicated to the judge that he would not accept it, and the proceeding concluded. At a motion hearing later that month, the judge told Smith that the next scheduled hearing would be Smith's last chance to reach a plea agreement with the state. The urging was problematic; the judge stated,

> My understanding of reading the case and looking through the file is you're looking at a maximum—and, again, I am not indicating, in any way, shape, or form, what I consider—what I might even consider the sentence to be, that's not appropriate, but it is understood that there is a maximum sentence you're looking at here, and that's about 44 years that you are looking at if you were convicted on everything . . . .
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> . . . .
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> What I want you to be very clear on is when you come back here December 12th, that's going to be your last opportunity to accept some sort of plea agreement with the state, whatever that plea agreement may be, if it's the one that they offered two weeks ago that you changed your mind on, I don't care what you do. I am just letting you know that after December 12th, if you get cold feet, I don't care. . . .
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> . . . .
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> [T]he only reason I am telling you this is because sometimes I have seen guys that think they're going to be able to work the system and work the prosecutor to get a plea on the day of the trial and maybe get a good plea agreement, that ain't happening in this case. . . . [W]e've got it set for trial in March of next year—you're not going to come in March 17th, the day of trial, and try to accept some sort of plea agreement. The only thing you could do at that point would be to plead up, plead guilty to every charge that's levied against you. Okay. So you're clear on that, right?

Smith argues that, by *sua sponte* imposing a "drop-dead" date for Smith to accept a negotiated guilty plea, the judge improperly participated in plea negotiations. The argument has significant merit. A judge's role in plea negotiations is limited to that of an independent examiner, and "[a]nytime a district court improperly injects itself into plea negotiations the guilty plea is per se invalid." *State v. Anyanwu*, 681 N.W.2d 411, 414−15 (Minn. App. 2004). The judge's deadline and ultimatum are the sort of blunt negotiating strategies that a prosecutor might employ to thwart the delaying and day-of-trial negotiating strategies that the judge perceived that a defendant might employ. We doubt that the judge could lawfully have carried out his threat to prevent Smith from entering into a post-deadline plea agreement with the state. A prosecutor may dismiss charges without leave of court. Minn. R. Crim. P. 30.01. Nothing in the Rules of Criminal Procedure authorizes the district court to reject a guilty plea on the ground that the defendant's delay in pleading has interfered with the court's calendar. *But see* Minn. R. Crim. P. 15.04, subd. 3(2) (providing that, in deciding whether to accept a plea agreement, the court can consider whether the guilty plea has "aided in avoiding delay in the disposition of other cases").

But even if the judge's actions were improper, Smith's argument falls short because it fails to explain how the judge's allegedly improper participation in the plea negotiations leads to a conclusion that the judge harbored bias against him. Smith asserts that the judge's comments suggested that the judge had prejudged his guilt. We cannot agree. At most, the judge's remarks suggested that he strongly wished that, if Smith planned to accept a plea bargain, he do so expeditiously. Although the manner of the

judge's attempt to induce Smith to make an early plea decision may have been improper, it did not implicate Smith's due process right to an impartial judge. And Smith does not allege that the attempted inducement had any actual impact on his decision to go to trial.

Smith's second judicial-bias argument is that the trial judge demonstrated partiality by improperly inviting the prosecution to request that Smith be restrained during trial and then ordering Smith to wear a stun belt without any reasonable basis. The challenged decision occurred before trial when the judge stated,

> Before we start [jury selection], there is one issue that I didn't discuss with counsel yet regarding security in the courtroom. Right now, as you can see, Mr. Smith is dressed in civilian attire. He does not have any sort of restraints upon him and I am not sure if the state is going to request that he have any sort of restraints at this time or not. I am kind of springing this on you guys, and I apologize. At this point, I am not going to have restraints on Mr. Smith. If the state does want to make an argument for it, we can do that tomorrow afternoon, and then you can certainly feel free to argue it.

After the first juror was questioned, the state moved to have Smith restrained during the trial. The judge granted the motion, ordering Smith to wear a stun belt for the remainder of the trial. The judge cited the seriousness of the charges; Smith's prior record, which included a first- and third-degree assault; the "highly volatile," emotional atmosphere that would prevail in this type of case; the fact that the children would be present in the courtroom; and Smith's size—5 feet 10 inches tall and 230 pounds.

The parties dispute whether the judge's decision to restrain Smith was proper. A defendant should not be restrained "unless the trial judge has found such restraint reasonably necessary to maintain order or security. A trial judge who orders such

restraint shall state the reasons on the record outside the presence of the jury." Minn. R. Crim. P. 26.03, subd 2(c). Factors to consider in deciding whether to restrain a defendant include, but are not limited to, the seriousness of the charges, the defendant's temperament, the defendant's age and physical size, the defendant's criminal record, and the nature and security of the courtroom. *State v. Jones*, 678 N.W.2d 1, 22 (Minn. 2004). The judge acted within his discretion in granting the motion to restrain Smith. But even if he had abused his discretion, that conclusion would not necessarily indicate that the judge was biased against Smith. Smith fails to convince us that the judge's decision to restrain him was motivated by anything other than a desire to protect the safety of court personnel and witnesses.

II

Smith argues that he is entitled to a new trial because he was not convicted on unanimous jury verdicts. A guilty verdict must be unanimous. Minn. R. Crim. P. 26.01, subd. 1(5); *State v. Hart*, 477 N.W.2d 732, 739 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992). A conviction requires that all jurors agree that the defendant committed the act or acts that constitute each element of the charged crime. *See State v. Stempf*, 627 N.W.2d 352, 358 (Minn. App. 2001) (holding unanimity requirement was violated when state charged only one count of drug possession but introduced evidence of two acts of possession and argued that jury could convict without agreement on which act had occurred). "Where jury instructions allow for possible significant disagreement among jurors as to what [criminal] acts the defendant committed, the instructions violate the defendant's right to a unanimous verdict." *Id*. at 354.

Smith argues that because the prosecution introduced for each count evidence of multiple acts that could have supported a conviction on that count, he was entitled to an instruction that the jury must unanimously agree on which acts had been proven beyond a reasonable doubt and supported the convictions. But Smith did not request this instruction at trial or object to the instruction actually given. "A defendant's failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver" of the right to challenge instructions on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). We have discretion to review an unobjected-to error that is plain and affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *see also* Minn. R. Crim. P. 31.02 ("Plain errors . . . affecting substantial rights may be considered . . . on appeal although they were not brought to the attention of the trial court.").

While this court frequently reviews unobjected-to errors under the plain-error standard, in this case we exercise our discretion by declining to review the alleged error. We are persuaded by the state's argument that reviewing for plain error here would invite the strategic withholding of uncontroversial objections on matters that could be quickly and simply resolved by filing slightly amended charges, severing the existing charges, or providing a more specific instruction or special-verdict form. Any of these measures could have easily resolved at trial the objection that was not made, while resolving it on appeal could require an entire new trial in a case involving overwhelming evidence of guilt.

III

Smith argues that numerous sentencing errors require us to remand the case for resentencing. He first argues that the district court's failure to fully instruct the sentencing jury on the violent-offender aggravating factor denied him due process. He also argues that the district court erroneously asked the jury to decide whether aggravating factors existed rather than whether facts existed to support those factors, and that this error requires that the factors found by the jury be disregarded. And finally, he argues that the district court erred by imposing multiple sentences for convictions stemming from the same behavioral incidents. Because some of the aggravating factors were improperly submitted to the jury and some of Smith's sentences may have punished identical conduct, we reverse in part and remand for resentencing.

Incomplete Violent-Offender Instruction

Smith argues that he was deprived of due process because the district court failed to give the jury complete oral instructions on the violent-offender aggravating factor and supplied an incomplete definition of the factor on the special-verdict form. Minnesota Statutes section 609.1095 (2006) allows a court to depart from the sentencing guidelines if (1) the offender has two or more prior convictions for "violent crimes" and (2) the factfinder determines that the offender is a danger to public safety. Minn. Stat. § 609.1095, subd. 2. Qualifying "violent crimes" are listed in section 609.1095, subdivision 1(d). The district court presented the violent-offender factor to the jury by stating, "And then the sixth question is, is the defendant a violent offender, and then [the special-verdict form] outlines some factors for you to consider below that last question."

The special-verdict form does not provide the list of the statutorily enumerated violent crimes.

The supreme court held in *State v. Peterson* that when the final charge given to the jury at the close of evidence does not include the presumption of innocence or the definition of proof beyond a reasonable doubt, the charge "dilute[s] the state's burden of proving all elements of each charge beyond a reasonable doubt" and denies a defendant due process of law. 673 N.W.2d 482, 487 (Minn. 2004). Smith relies on *Peterson* to argue that the district court's incomplete jury charge and instructions denied him due process and that the violent-offender factor must be disregarded in sentencing him. *Peterson* is inapposite. The existence of Smith's prior convictions was not a factual issue for the jury. Facts that form the basis for a departure must be submitted to a jury and proved beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301−04, 124 S. Ct. 2531, 2536−37 (2004). But whether a prior conviction occurred is not a fact question for a sentencing jury, *id.* at 301, 124 S. Ct. at 2536, and in any event Smith had already stipulated to his two prior convictions during trial. Smith provides no basis for us to disregard the violent-offender aggravating factor in his sentencing.

Aggravating Factors Improperly Found by Jury

Smith argues that the district court improperly submitted the remaining aggravating factors to the jury rather than asking the jury to determine whether facts existed to support those factors. In addition to the violent-offender factor, the district court asked the jury to determine whether the following aggravating factors existed: (1) that Smith committed the offenses in the children's zone of privacy, (2) that the facts of

the case were more egregious than usual, (3) that the children were particularly vulnerable due to age, (4) that Smith treated the children with particular cruelty, and (5) that Smith was in a position of trust as a caregiver. The jury found that all five factors existed. Smith argues that these factors are legal conclusions rather than facts for jury determination and, apparently, that their use as a basis for departure on his first-degree assault conviction violates *Blakely*.

The district court may depart upward when sentencing a defendant if "substantial and compelling circumstances" based on aggravating factors warrant it. Minn. Sent. Guidelines II.D; *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008). The sentencing guidelines contain a nonexclusive list of aggravating factors that may justify a departure. Minn. Sent. Guidelines II.D.2.b. Smith does not generally contest the challenged aggravating factors as bases to depart. Instead, he argues that because the court asked the jury to determine whether *the factors* existed rather than whether *facts* existed that would support the factors, the court erred by departing based on the factors.

State v. Rourke provides a sufficient basis for us to credit Smith's argument and hold that the district court improperly submitted the particular-cruelty factor to the jury in this case. 773 N.W.2d 913 (Minn. 2009). In *Rourke*, the supreme court held that the particular-cruelty aggravating factor is a "reason" for departure and not an additional fact for a *Blakely* jury and that the proper question for the jury is whether the state "has proven beyond a reasonable doubt the existence of additional facts . . . which support reasons for departure." *Id.*, at 921. We also hold that the jury's special-verdict determinations that Smith's case was particularly egregious and that the children were

particularly vulnerable due to their age are insufficient to support the corresponding aggravating factors. *See Carse v. State*, 778 N.W.2d 361, 373 (Minn. App. 2010) (holding, pursuant to *Rourke*, that special-verdict form that asked jury to determine whether victim was particularly vulnerable due to reduced physical or mental capacity could not support departure based on particular vulnerability because jury did not make specific fact findings to support conclusion that victim was particularly vulnerable), *review denied* (Minn. Apr. 20, 2010).

But *Rourke* does not extend so clearly to the remaining two aggravating factors the jury found—that the offense was committed in the children's zone of privacy and that Smith was in a position of trust as a caregiver. The state argues convincingly that these two factors found by the jury are essentially factual, such that they qualify as "additional facts" to support a departure under *Blakely*. For these two aggravating factors, the "reason for departure" and the "facts supporting the reason" are indistinguishable. The facially vague zone-of-privacy factor is saved by the special-verdict form's additional definition specifying that "zone of privacy" means "the home and the area that surrounds the victims' home." This definition is specific enough that the jury's affirmative answer to the interrogatory is effectively a finding that the offenses occurred in the children's home and surrounding area. The same is true of the position-of-trust factor; the jury's affirmative answer to this interrogatory was effectively a finding that Smith stood in a relationship of trust to the children as their caregiver.

We observe that the district court, in departing, focused both on invalid factors and on the aggravating factors that we have just determined to be valid. In addition to the

violent-offender factor, the court based the departure on the children's vulnerability due to their young ages, the fact that Smith was in a position of trust as their caregiver, and the fact that many of the crimes occurred in the children's home. On remand, the district court should determine whether departure is warranted in the absence of the particular-cruelty, particular-egregiousness, and particular-vulnerability factors.

Multiple Sentences for Same Behavior

Smith argues finally that the district court erred by imposing multiple sentences for offenses stemming from single behavioral incidents.[1] When a single behavioral incident results in the violation of multiple criminal statutes, generally the offender may be punished for only one of the offenses. Minn. Stat. § 609.035, subd. 1 (2006). To determine whether a defendant's conduct is a single behavioral incident, courts consider (1) the conduct's time and place and (2) whether the conduct was "motivated by an effort to obtain a single criminal objective." *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000) (quotation omitted). "The state has the burden to establish by a preponderance of the evidence that the conduct underlying the offenses did not occur as part of a single behavioral incident." *Id.* at 841−42. Although Smith did not make this argument to the district court at sentencing, we consider it on appeal because section 609.035's protection cannot be waived. *See State v. Mendoza*, 297 N.W.2d 286, 288 (Minn. 1980).

Smith argues that because the state brought multiple counts of child abuse and introduced evidence of many potential assaultive acts, without electing or clarifying

[1] Smith argues alternatively that the district court erred by imposing his sentences out of order. Because our resolution of Smith's multiple-sentences argument moots his sentencing-order argument, we do not address it.

which of the assaultive acts supported each charge against him, the state cannot meet its burden of showing that he was not convicted and sentenced multiple times for single acts. He is correct. Of the offenses committed against M.S., the state cannot demonstrate on this record that Smith's first-degree assault and malicious punishment convictions were not based on the same criminal act or acts. Both offenses require intent and involve an element of great bodily harm. *Compare* Minn. Stat. § 609.221, subd. 1 (2006) (first-degree assault) *and* Minn. Stat. § 609.02, subd. 10 (2006) (defining "assault"), *with* Minn. Stat. § 609.377, subds. 1, 6 (2006) (malicious punishment of a child). It is therefore possible that the jury convicted Smith of both offenses based on M.S.'s broken arm or his abdominal injury, or both. If the jury did convict Smith twice for the same conduct, then the district court's sentences for those convictions would violate section 609.035.

The same is true of Smith's conviction for third-degree assault. A third-degree assault conviction requires proof of an intentional assaultive act. *See* Minn. Stat. § 609.02, subd. 10 (defining "assault"). In that regard, the definition of third-degree assault does not differ from first-degree assault and does not significantly differ from malicious punishment of a child. Beyond the basic requirement of an intentional assaultive act, the offenses vary. First-degree assault and malicious punishment of a child, as noted, include an element of great bodily harm. The version of third-degree assault that the state charged Smith with specifies no particular level of harm to the victim and includes an additional "past pattern of child abuse" element. *See* Minn. Stat. § 609.223, subd. 2 (2006). But the basic assaultive act that each of these three offenses requires could be satisfied by a single course of conduct—Smith's breaking M.S.'s arm,

for example—and the jury may have convicted Smith of all three of these offenses based on a single incident of abuse. His sentence for third-degree assault therefore violates section 609.035.

As to the offenses committed against J.S. and D.S., the state cannot establish that Smith's convictions for assault by strangulation and malicious punishment are not based on single occurrences against each child. Domestic assault by strangulation requires an "assault" by means of "strangulation." Minn. Stat. § 609.2247, subd. 2 (2006). "Strangulation" means "intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck." *Id.*, subd. 1(c) (2006). "Malicious punishment" requires "an intentional act . . . with respect to a child [that] evidences unreasonable force or cruel discipline that is excessive under the circumstances." Minn. Stat. § 609.377, subd. 1. These definitions are not mutually exclusive. There was evidence that Smith had choked both M.S. and J.S.; if the jury believed that the choking was done as punishment or discipline, then it could have convicted Smith for both offenses based on a single incident of choking.

The state concedes that the conduct underlying Smith's first-degree assault and malicious punishment of M.S. was unified in time and place but argues that the offenses had different criminal objectives. But neither offense required the prosecution to prove an objective, and there is no evidence that would establish different objectives for M.S.'s broken arm and his abdominal injury. As to Smith's third-degree assault conviction, the state argues that his underlying conduct could not have had a unity of time with the other offenses against M.S. because it was the only offense that involved a past pattern of child

abuse against the victim. But this argument fails because third-degree assault requires proof of an assaultive act, which could have been the broken arm or abdominal injury that the jury based its first-degree assault or malicious punishment conviction on. Finally, as to Smith's convictions for harming J.S. and D.S., the state argues that these offenses had different criminal objectives and, further, that it is unlikely that the jury convicted Smith of both malicious punishment and assault by strangulation of each child based on a single incident. But these conclusory contentions do not establish that the jury convicted Smith of these offenses based on separate incidents.

Because the state cannot demonstrate that these convictions were not tied to the same underlying conduct, and because there is no evidence of independent criminal objectives, the potentially redundant sentences must be vacated. "[S]ection 609.035 contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted). The supreme court has listed several factors to consider in comparing offenses to determine their relative seriousness: (1) the length of the sentences actually imposed by the district court; (2) the sentencing guidelines' severity-level rankings of the offenses; and (3) the maximum potential sentence for each offense. *Id.*

Of Smith's convictions for first-degree assault, malicious punishment of a child resulting in great bodily harm, and third-degree assault, the most serious offense by any measure is first-degree assault. The district court imposed a sentence of 206 months for

this offense compared to only 88 months for malicious punishment and 21 months stayed for third-degree assault. The severity levels of the three offenses are nine (first-degree assault), eight (malicious punishment), and four (third-degree assault). Minn. Sent. Guidelines V (2006). And the statutory maximums are twenty years, Minn. Stat. § 609.221, subd. 1; ten years, Minn. Stat. § 609.377, subd. 6; and five years, Minn. Stat. § 609.223, subd. 2, respectively. Smith's sentences for malicious punishment and third-degree assault of M.S. therefore must be vacated.

As between Smith's convictions for assaulting J.S. and D.S. by strangulation and his convictions for maliciously punishing them, the more serious offense is malicious punishment. The district court imposed the same sentences for both sets of convictions, and both crimes have a severity level of four under the Sentencing Guidelines. Minn. Sent. Guidelines V. But the version of malicious punishment that Smith was convicted of has a higher statutory maximum than domestic assault by strangulation. *See* Minn. Stat. § 609.377, subd. 3 (2006) (providing five-year maximum sentence for felony-enhanced malicious punishment); Minn. Stat. § 609.2247, subd. 2 (providing three-year maximum sentence for domestic assault by strangulation). Smith's two sentences for assaulting J.S. and D.S. by strangulation must therefore be vacated.

We vacate Smith's sentences for malicious punishment of M.S. resulting in great bodily harm, third-degree assault of M.S., and assaulting J.S. and D.S. by strangulation. And we remand to the district court for resentencing. On remand, the district court must determine whether a departure is still warranted, and if so to what extent, bearing in mind that the valid aggravating factors are that Smith was a "violent offender," that he

committed the offenses within the children's zone of privacy, and that he was in a position of trust as their caregiver.

Affirmed in part, reversed in part, and remanded.