nsiefIN THE SUPREME COURT OF IOWA
Supreme Court No. 22-0903

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KADIN JEFFREY MILLER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BOONE COUNTY
THE HONORABLE STEPHEN A. OWEN, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals, as it involves the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Kadin Jeffrey Miller appeals his sentences following his guilty pleas in two separate criminal cases. In the first case, Miller pled guilty to one count of harassment in the first degree; in the second, he pled guilty to one count of operating while intoxicated, first offense. Miller also appeals the district court's determination that his commission of the former crime was sexually motivated—a determination that requires him to register as a sex offender.

Course of Proceedings

The State accepts Miller's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Kadin Jeffrey Miller posted "revenge porn" of his ex-girlfriend online. AGCR114235 Written Guilty Plea (2/25/2022) at 3; App. 72.

He posted the video on Pornhub.[1] Sent. Tr. (5/25/2022) at 52:13–15; 79:10. As a result, Miller was charged with, and pled guilty to, a single count of harassment in the first degree, an aggravated misdemeanor, in violation of Iowa Code section 708.7(1)(*a*)(5). AGCR114235 Trial Information (4/15/2021); App. 43–44; AGCR114235 Written Guilty Plea (2/25/2022) at 1; App. 70. He admitted to these facts in his written guilty plea:

> That between May and July of 2019, I was in a relationship with [the victim]. Our relationship ended on bad terms. I had in my possession a video recording of [my ex-girlfriend] and myself engaged in sexual intercourse. On or about September of 2019, I posted the video on the internet. I knew [she] had not consented to the posting of the video. My intent was to get back at her for our relationship ending on bad terms by annoying her with the video being public. The video was posted while I was in Boone County, Iowa.

AGCR114235 Written Guilty Plea (2/25/2022) at 3; App. 72.

Importantly for purposes of this appeal, while Miller admitted having

[1] Wikipedia describes the ubiquity of the website: "Pornhub is a Canadian-owned internet pornography website. . . . As of November 2022, Pornhub is the 13th-most-trafficked website in the world and the second-most-trafficked adult website . . . ." *See* Wikipedia, the Free Encyclopedia, Pornhub, at https://en.wikipedia.org/wiki/Pornhub (last visited Jan. 17, 2023).

posted the video on Pornhub to "annoy" his ex-girlfriend, he did not concede his crime was sexually motivated. *Id.*

Miller's nonconsensual posting of the video on Pornhub did substantially more than annoy his ex-girlfriend. She described the trauma she suffered in a victim statement read in open court at Miller's sentencing hearing:

> Fast forward to 2020. I met [the man] who is now my fiancé. He was a co-worker of [Miller]'s . . . . In the very beginning of our relationship he asked me if I have ever consented to someone posting a video of me online. The obvious answer was no. He told me about [Miller] showing him this video of me at work. When I heard this, my heart all but stopped. I felt like I was going to pass out. I felt instantly sick. I was disgusted and embarrassed. The person I trust the most in this world saw me so vulnerable. Everything in my life after that day, that moment, went dark and numb.
>
> . . .
>
> I am numb. I am broken inside. Every aspect of my life has been affected by this. I can't sleep. I sought out therapy, and while it has helped me, it has done little to ease the pain that this has caused me. I can't trust anyone anymore. People I know have seen this video, people I see around town. People who have seen me at my place of work, people who know me from school. It is embarrassing and a very cruel disgusting feeling.

Sent. Tr. (5/25/2022) at 97:19–99:2.

During the pendency of his revenge porn case, Miller drove drunk, resulting in a second criminal case. *See* OWCR114992 Trial Information (5/25/2022); App. 67–69. Miller was charged with one count of operating while intoxicated, first offense, a serious misdemeanor, in violation of Iowa Code section 321J.2(2)(*a*), and one count of possession of a controlled substance (marijuana), second offense, a serious misdemeanor, in violation of Iowa Code section 124.401(5). *Id.* at 1; App. 67. He pled guilty to the count of operating while intoxicated. OWCR114992 Written Guilty Plea (5/26/2022) at 1; App. 74.

The district court held a single sentencing hearing for both of Miller's criminal cases. *See* Combined Sent. Order (5/25/2022); App. 85–90. Before sentencing, the district court held a separate hearing on the issue of sexual motivation, at which both the State and Miller presented evidence and argument. *See id.* at 1; App. 85.

The State presented three witnesses at the hearing. First, Officer John Mayse of the Boone Police Department testified that he had investigated Miller's posting of the video online, and was aware Miller's ex-girlfriend had not only not consented to the posting of the video online, but also had not consented to the recording of the video

at all. Sent. Tr. 64:12–65:16. Second, Andrew Leeck, who had worked with Miller and was engaged to the victim, testified about how Miller showed him the video in the fall of 2019, unsolicited, after it was already uploaded to Pornhub. *Id.* at 67:17–69:13. Leeck also testified about telling his fiancé about the video and how distressed it made her. *Id.* at 70:13–71:7. Finally, Amanda Moore testified that she assisted Miller's ex-girlfriend by documenting evidence of the video's existence on Pornhub. *Id.* at 71:16–73:23.

Miller presented a single witness at the hearing: Dr. Tracy Thomas, a forensic psychologist he retained to give an expert opinion on the issue of sexual motivation. *Id.* at 7:21–12:7. Dr. Thomas opined that she did not see any evidence Miller's criminal behavior was sexually motivated; rather, she testified, it was her belief Miller posted the video online as a way to lash out at his ex-girlfriend in anger. *Id.* at 23:5–26:9. Dr. Thomas testified that her opinion was based on her review of case-related documents and also on having met with Miller for three-and-a-half hours for a clinical interview and psychological testing. *Id.* at 15:17–18:18.

At sentencing, Miller requested a deferred judgment and probation on the harassment count and a suspended jail sentence and

probation on the OWI count. Sent. Tr. 80:2–22. The district court was not persuaded by Miller's argument and sentenced him to two years' imprisonment on the harassment count and one year of imprisonment on the OWI count, to be served consecutively. Sent. Tr. 109:1–24; 110:19–111:3; Combined Sent. Order (5/25/2022) at 1–3; App. 85–87. The district court also found Miller's act of posting the video of himself and his ex-girlfriend on Pornhub was sexually motivated and ordered that Miller register as a sex offender as a result. Sent. Tr. 105:17–106:12; Combined Sent. Order (5/25/2022) at 1–3; App. 85–87. Miller contends the district court erred in so finding, and further contends the district court erred in sentencing him to prison.

ARGUMENT

I. The district court's determination that Miller's crime was sexually motivated is supported by substantial evidence.

Jurisdiction

Appeals challenging the sentence imposed by a district court following a guilty plea satisfy the "good cause" requirement set forth in Iowa Code section 814.6(1)(*a*)(3). *State v. Damme*, 944 N.W.2d 98, 104–05 (Iowa 2020). The Iowa Court of Appeals has stated that a challenge to "the court's finding that the crime to which [a defendant]

pled was sexually motivated, thus requiring him to register as a sex offender" is a challenge to the defendant's sentence. *State v. Rigel*, No. 16-0576, 2017 WL 936135, at *3 (Iowa Ct. App. March 8, 2017). Thus, the State does not dispute there is good cause.

Preservation of Error

"[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court." *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review

Both alleged defects in the sentencing procedure and challenges to the sufficiency of evidence are reviewed for errors at law. *See State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1997); *State v. Crawford*, 972 N.W.2d 189, 202 (Iowa 2022).

Merits

Miller raises a series of arguments related to the district court's determination that his crime was sexually motivated. These arguments present slight variations on the same theme: because the State did not produce any evidence directly establishing sexual motivation, whereas Miller did produce expert testimony arguing the opposite, the district court's determination was in error. More specifically, Miller has presented the following variations of that

argument: (1) the record does not contain sufficient evidence to support a finding of sexual motivation; (2) the district court engaged in impermissible speculation to support its finding of sexual motivation; and (3) the finding of sexual motivation was unrelated to the criminal conduct at issue. The State will address each of these variations in turn.

A. The record contains adequate evidence to establish Miller's crime was sexually motivated.

First, Miller argues the record does not contain sufficient evidence to support the district court's determination that his crime was sexually motivated. Appellant's Br. at 22.

Harassment in the first degree, in violation of Iowa Code section 708.7(1)(*a*)(5), is not by itself a sex offense. A person commits that particular crime when he:

> [d]isseminates, publishes, distributes, posts, or causes to be disseminated, published, distributed, or posted a photograph or film showing another person in a state of full or partial nudity or engaged in a sex act, knowing that the other person has not consented to the dissemination, publication, distribution, or posting.

Iowa Code § 708.7(1)(*a*)(5). Instead, the fact finder must make a separate determination that the specific criminal conduct at issue warrants placement on the sex offender registry:

> [f]or purposes of determining whether or not the person should register as a sex offender pursuant to the provisions of chapter 692A, the fact finder shall make a determination as provided in section 692A.126.

Id. § 708.7(5).

Chapter 692A.126, in turn, states that a person convicted of harassment in the first degree, in violation of Iowa Code section 708.7(1) "shall be required to register as provided in this chapter" if "a judge or jury makes a determination, beyond a reasonable doubt, that [the crime is] sexually motivated." *Id.* § 692A.126(1)(*f*). " 'Sexually motivated' means that one of the purposes for commission of a crime is the purpose of sexual gratification of the perpetrator of the crime." *Id.* § 229A.2(11); *see also id.* § 692A.101(29) (adopting same definition).

While Miller may technically be challenging the portion of his sentence requiring him to register as a sex offender, what he is really raising is a sufficiency challenge. *See State v. Chapman*, 944 N.W.2d 864, 871 (Iowa 2020); *see also* Appellant's Br. at 18 (recognizing

review utilizes legal standard for sufficiency claims). Appellate review of the sufficiency of evidence supporting a district court's determination that a crime was sexually motivated "is for substantial evidence." *Id.* "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). "Evidence raising only 'suspicion, speculation, or conjecture is not substantial.' " *State v. Huser*, 894 N.W.2d 472, 490 (Iowa 2017) (quoting *State v. Leckington*, 713 N.W.2d 218, 221 (Iowa 2006)).

Appellate courts reviewing sufficiency challenges "view the evidence in the light most favorable to the State, including all 'legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.' " *Crawford*, 972 N.W.2d at 202 (quoting *State v. Tipton*, 897 N.W.2d 653, 692 (Iowa 2017)). Because the law does not distinguish between direct and circumstantial evidence, "[a] defendant may be convicted solely on circumstantial evidence if it is sufficiently compelling to convince a judge or jury of the defendant's guilt beyond a reasonable doubt." *Tipton*, 897 N.W.2d at 692.

Where the district court is the fact finder, appellate courts review sufficiency challenges by viewing "all the evidence and the record in the light most favorable to the trial court's decision." *State v. Myers*, 924 N.W.2d 823, 826–27 (Iowa 2019) (quoting *State v. Hearn*, 797 N.W.2d 577, 580 (Iowa 2011)). All evidence on the record is considered when reviewing sufficiency-of-the-evidence challenges, not just that supporting the defendant's guilt. *Tipton*, 897 N.W.2d at 692. "In evaluating sufficiency-of-the-evidence claims, [appellate courts] will uphold a verdict if substantial evidence supports it." *Chapman*, 944 N.W.2d at 871 (quoting *State v. Trane*, 934 N.W.2d 447, 455 (Iowa 2019)).

Miller's sufficiency challenge is, in fact, merely an invitation to this Court to re-weigh the evidence and give more credit to his expert's testimony. But this misunderstands the nature of sufficiency review. The district court was not required to credit the opinion of Miller's retained expert simply because she opined on the issue and was not directly refuted by an equivalent State expert. *See, e.g.*, *Crow v. Simpson*, 871 N.W.2d 98, 105 (Iowa 2015) (explaining the fact finder "is free to accept or reject any testimony, including

uncontroverted expert testimony"). The district court specifically addressed its assessment of Dr. Thomas's testimony in open court:

> I think the more pressing issue today is whether Mr. Miller should be ordered to register as a sex offender. The court sits today as the finder of fact on that question. Let's first address Doctor Thomas' testimony.
>
> Doctor Thomas' testimony was that the posting of the video here today as Exhibit 1 was not sexually motivated. It had more to do with Mr. Miller's anger, upset, embarrassment, and ultimately took revenge against [his ex-girlfriend] for ending the relationship. Doctor Thomas identifies sexual motivation as gratification and, in fact, I think that's consistent with Iowa Code section 692A.101(29) and 229A.2(11). There the court must find the posting of the video was not for anyone else's sexual gratification other than the defendant's.
>
> I think the sort of revenge porn label is not applicable here. The question is sexual motivation, and the question is Mr. Miller's sexual motivation, if any, when he posted the video. Doctor Thomas testified that in her evaluation of Mr. Miller she found no evidence of paraphilic disorder which she defined in--and I am paraphrasing. I believe what is in the record would be unusual or harmful sexual interest.
>
> . . .
>
> Doctor Thomas several times indicates she found no evidence of sexual motivation here in the posting of the video by Mr. Miller. In her opinion, her expert opinion, I should

> say, Mr. Miller was motivated by revenge and discharge of his own negative emotions as it concerns [his ex-girlfriend].
>
> . . .
>
> In Doctor Thomas' opinion the question of whether [Miller's ex-girlfriend] consented to the recording or posting makes no difference in her conclusions.
>
> . . .
>
> I think there are some unanswered questions. How many times did Doctor Thomas meet with Mr. Miller with the nature of the assessments she did? What were the nature? I don't question her professional qualifications nor do I think they are any more weighty than any other evidence on the question of sexual motivation here. I think her expertise certainly has assisted the court, but it is the facts upon which the court must rely in making a determination.

Sent. Tr. 102:2–105:6.

The district court then went on to explain its view of the evidence, based on a combination of the content of Miller's guilty plea, the testimony of the State's witnesses, and reasonable inferences it drew from the evidence before it:

> Getting back to what I think the facts are, I think Mr. Miller planned this event. I think the evidence would show that he knew the relationship was having some difficulty. He was clearly having sexual intercourse with [his ex-girlfriend] for his sexual gratification at that

> time, and I think that carried on when he determined that he was going to distribute that video. I think the evidence establishes that beyond a reasonable doubt. I think it further establishes it by the fact that he posted it on a pornography web site where the only real purpose I can find for anyone going there would be sexual gratification, and he knew to go there so he could show it to Mr. Leeck. I think he is one of more than 1,300 views shown. I don't know what an accolades [sic] or accomplishments are. I am not that technically oriented, but I don't think you have to know what that means to see that Mr. Miller was taking satisfaction in that video on-line.

Sent. Tr. 105:17–106:10. The district court reiterated its findings and rationale in the written sentencing order:

> The court finds defendant's act in posting a video admitted as State's Exhibit 1 was sexually motivated. Defendant had his recording device in his hand as he had sexual intercourse with the victim. He began the recording when she was facing away from him and could not see him. The recording was taken while intercourse was underway and defendant's erect penis is visible. He later posted the video to a pornography website. Choosing a pornography website demonstrates defendant's continued interest in the sexually obscene content of the video. It was available to him over the course of time to satisfy his interest in the ongoing sexual content of the video for his sexual gratification. Showing it to a male friend also demonstrates his ongoing interest in sharing his sexual interest in the video with others. The Court made findings as

> more fully set out on the verbatim record taken herein.

Combined Sent. Order (5/25/2022) at 1; App. 85.

Contrary to Miller's assertions, the record does not lack circumstantial or direct evidence that speaks to Miller's intent. That he does not agree with the manner in which the district court apportioned weight to the evidence before it does not change the fact that when reviewing the evidence in the light most favorable to the State, a fact finder could reasonably conclude Miller posted a video of a sexual encounter with his ex-girlfriend to a popular pornography website for sexual gratification. *See State v. Qualls*, No. 15-1292, 2016 WL 4803776, at * 3 (Iowa Ct. App. Sept. 14, 2016) (finding sexual motivation where defendant claimed to have filmed victim while she was showering not for sexual arousal or gratification but rather "in an attempt to exact revenge for past occurrences between the two," and disregarding testimony of defendant's counselor who described the defendant's "feelings of helplessness and humiliation as a motivation for his actions"). There is no reasonable dispute that Miller engaged in a sex act with the victim, recorded that sex act, and later posted the sexually explicit video on a pornography website. It is a reasonable inference that because Miller recorded the video while

himself engaged in a sex act with the victim and because he posted the video on a heavily-trafficked pornography website, he possessed a sexual motivation when committing this crime. Miller's actions provide strong circumstantial evidence of his intent, and the district court did not err.

Miller's contention that affirming the district court would make Iowa Code section 708.7(1)(*a*)(5) "a sexual offense per se" is overblown. *See* Appellant's Br. at 25. The district court specifically identified Miller's decision to post the explicit video on Pornhub, thereby deriving pleasure from knowing that a great number of people would likely view himself and his ex-girlfriend engaged in sex acts, as being a critical fact in its analysis. There are a number of scenarios one can imagine where the outcome might have been different. For example, the analysis would presumably have been different had Miller distributed a photo of his ex-girlfriend in a state of partial nudity by directly emailing it to a group of her closest friends and family-members. Or the analysis may have been different had Miller posted the video on an online forum created and used to embarrass and harass victims instead of a website tailored specifically for pornography. Merely because the outcome here is a finding of

sexual motivation does not mean all convictions for this offense will reach the same result. The district court's findings were not erroneous.

B. The district court did not engage in unlawful speculation in making its determination Miller's crime was sexually motivated.

Next, Miller argues the district court engaged in unlawful speculation and unreasonable inferences to find his crime was sexually motivated. Appellant's Br. at 27–28. This is really just the flip side of his first argument and must similarly fail.

As explained above, the district court was the fact finder below, and was thus within the scope of its authority to draw reasonable inferences from the evidence before it. *See Crawford*, 972 N.W.2d at 202. Furthermore, "[b]ecause it is difficult to prove intent by direct evidence, proof of intent usually consists of circumstantial evidence and the inferences that can be drawn from that evidence. *State v. Adams*, 554 N.W.2d 686, 692 (Iowa 1996). *See also State v. Ernst*, 954 N.W.2d 50, 55 (Iowa 2021); *State v. Olson*, 373 N.W.2d 135, 136 (Iowa 1985). More specifically, "[t]he requisite intent to arouse or gratify the sexual desire of any person can be inferred from an accused's conduct, remarks, and all surrounding circumstances."

State v. Jorgensen, 758 N.W.2d 830, 837 (Iowa 2008). "[T]he State need not discredit every other potential theory to be drawn from circumstantial evidence" in order to prevail on a sufficiency challenge. *Ernst*, 954 N.W.2d at 57.

Again, as discussed earlier, the district court gave a detailed account of what it believed the evidence showed when it explained its determination that defendant was sexually motivated when posting the video online. All of the inferences the district court relied upon were reasonable, and were a necessary exercise for a fact finder attempting to determine Miller's intent and motivation. Further, as to Miller's specific assertion that the district court unreasonably inferred he was likely among the 1,300 views of the video, that assertion is directly refuted by the fact testimonial evidence was presented that Miller showed the pornographic video to others after it had been posted online. This is direct evidence that Miller viewed the video, and it bolsters the court's inference that Miller was likely to have viewed the video after posting it. There was no error.

C. The facts supporting the district court's finding of sexual motivation were related to the conduct prohibited under the harassment statute.

Third, Miller again presents a slightly repackaged version of the same claim, arguing that "the sole issue before the court is whether [Miller] uploaded a video to the Internet for his own sexual gratification." Appellant's Br. at 33. More specifically, he argues "the State and the District Court seek to conflate different actions," merging his "videotaping [his ex-girlfriend], masturbating to the video, and strangers doing the same online, with the criminal act of publishing the video." *Id.* Thus, "[t]he court can only consider the sexual gratification of the offender and cannot consider the sexual gratification of anyone else." *Id.*

In support of his assertion, Miller argues his case is like *State v. Isaac*, 756 N.W.2d 817 (Iowa 2008). It is not like *Isaac*. In *Isaac*, the issue was "[w]hether a defendant's exposure of his genitals to another person was done for the purpose of arousing the sexual desires of himself or the viewer," which the Iowa Supreme Court explained "can be inferred from the defendant's conduct, his remarks, and the surrounding circumstances." *Id.* at 820. The Iowa Supreme Court

ultimately determined no such purpose could be inferred under the facts of that case:

> After examining the record in the present case, we find no conduct, remarks, or circumstances from which an inference can be drawn that the required purpose existed at the time [the defendant] exposed his genitals to [the officer]. [The officer] testified that [the defendant] had his back to the officer when the officer first spotted [defendant] outside [a woman]'s window. The officer stated he could not see [the defendant]'s penis at that point, but he believed [the defendant]'s right hand was in the area of [his] crotch. The officer testified that he then shone a flashlight on [the defendant] and yelled "police" at which point [the defendant] "turned his body towards [the officer], looked at [the officer], and then immediately took off running around the side of the building." The officer further testified that, when [the defendant] "turned and faced [the officer], he still had his hand down, and when he saw [the officer], his hand came off." The officer could not tell whether [the defendant]'s penis was erect.
>
> These facts do not support an inference that [the defendant] exposed himself to [the officer] to satisfy his or the officer's sexual desires. First of all, there are no facts indicating [the defendant]'s exposure of his penis to the officer was anything other than inadvertent, occurring as a result of [the defendant] turning in response to the officer's call. Secondly, [the defendant] immediately removed his hand from his crotch and fled. These actions suggest his sexual desires evaporated, rather than continued, when he was discovered by the

> officer. Finally, there was no evidence that [the defendant] became sexually aroused when he turned to face the officer or that he masturbated while exposing himself to the officer, circumstances and conduct that could support an inference that his exposure to the officer was sexually motivated.

Id. Miller does not present a similar case in which his unlawful conduct was inadvertent—the district court stressed he knowingly and purposefully posted the video of himself and his ex-girlfriend having sex on the internet, hoping other people would find it and view it.

Because the district court found, and substantial evidence supported, that Miller's criminal act of posting the explicit pornographic video on a heavily-trafficked pornography website was sexually motivated, Miller's argument must fail.

II. The district court did not rely upon speculation or unproven conduct when sentencing Miller.

Jurisdiction

Appeals challenging the sentence imposed by a district court following a guilty plea satisfy the "good cause" requirement set forth in Iowa Code section 814.6(1)(*a*)(3). *Damme*, 944 N.W.2d at 104–05. The State does not dispute good cause.

Preservation of Error

"[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court." *Lathrop*, 781 N.W.2d at 293.

Standard of Review

Alleged defects in the sentencing procedure are reviewed for errors at law. *See Witham*, 583 N.W.2d at 678. When a district court's sentence is within the statutory limits, its sentencing decision is reviewed for an abuse of discretion. *State v. Seats*, 865 N.W.2d 545, 552 (Iowa 2015). In other words, because "the decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor," the district court's choice of one sentencing option over another will not be disturbed unless "the decision was exercised on grounds or for reasons that were clearly untenable or unreasonable." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002).

Merits

Miller contends the district court abused its discretion at sentencing when it considered "facts, allegations, or offense that are not established by the evidence or admitted by the defendant."

Appellant's Br. at 35. This claim is, again, a slight variation of those others previously addressed.

Iowa Rule of Criminal Procedure 2.23(3)(*d*) requires that a sentencing court "state on the record its reason for selecting the particular sentence." The relevant factors when imposing a sentence include "the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of [the defendant's] reform." *State v. Hopkins*, 860 N.W.2d 550, 555 (Iowa 2015) (quoting *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999)).

Conversely, "[a] court may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the accused committed the offense, or (2) the defendant admits it." *Witham*, 583 N.W.2d at 678. Because "[t]here is no general prohibition against considering other criminal activities by a defendant as factors that bear on the sentence to be imposed," "when a challenge is made to a criminal sentence on the basis that the court improperly considered unproven criminal activity, the issue presented is simply one of the sufficiency of the record to establish the matters relied on." *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000). If the sentencing court does

impermissibly consider such unproven or unprosecuted offenses, the sentence must be set aside and the case remanded for resentencing. *See State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982).

Miller relies on *State v. Fetner*, 959 N.W.2d 123 (Iowa 2021) to support this claim, but that case is fundamentally different. In *Fetner*, the district court heard both that the defendant used marijuana to self-medicate and that he ran a day care center. *Id.* at 135. The Iowa Supreme Court held it was improper for the district court to combine those two ideas and speculate that he had been under the influence of marijuana while at work without any evidence to support such speculation. *Id.* Here, by contrast, the district court was engaging in precisely the type of factfinding the Iowa Code contemplates: it was considering whether the evidence demonstrated, beyond a reasonable doubt, that one of the reasons Miller committed a crime was his own sexual gratification. In other words, Miller is not actually complaining that the district court considered unproven conduct; he is merely arguing a second time that the district court arrived at its determination using unlawful speculation and conjecture. The analysis and result should be the same as before. There was no error, and this Court should affirm.

III. The district court did not abuse its discretion by sentencing Miller to prison.

Jurisdiction

Appeals challenging the sentence imposed by a district court following a guilty plea satisfy the "good cause" requirement set forth in Iowa Code section 814.6(1)(*a*)(3). *Damme*, 944 N.W.2d at 104–05. The State does not dispute good cause.

Preservation of Error

"[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court." *Lathrop*, 781 N.W.2d at 293.

Standard of Review

Alleged defects in the sentencing procedure are reviewed for errors at law. *See Witham*, 583 N.W.2d at 678. When a district court's sentence is within the statutory limits, its sentencing decision is reviewed for an abuse of discretion. *Seats*, 865 N.W.2d at 552. In other words, because "the decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor," the district court's choice of one sentencing option over another will not be disturbed unless "the decision was

exercised on grounds or for reasons that were clearly untenable or unreasonable." *Formaro*, 638 N.W.2d at 724.

Merits

Finally, Miller contends the district court abused its discretion at sentencing for two distinct reasons: first, he argues the district court overlooked sentencing factors that were more favorable to him, instead focusing on the harm he had caused to others; and second, he argues there were "other, less invasive options" than the prison sentence imposed here which were both more appropriate and also objectively sufficient to fulfill the district court's sentencing objectives. Appellant's Br. at 42–43. He is wrong on both points.

Iowa Rule of Criminal Procedure 2.23(3)(*d*) requires that a sentencing court "state on the record its reason for selecting the particular sentence." The most important purpose of this requirement is to afford appellate courts "the opportunity to review the discretion of the sentencing court." *State v. Thompson*, 856 N.W.2d 915, 919 (Iowa 2014). As such, "[a]lthough the reasons need not be detailed, at least a cursory explanation must be provided to allow appellate review of the trial court's discretionary action." *State*

v. Barnes, 791 N.W.2d 817, 827 (Iowa 2010) (quoting *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000).

The relevant factors when imposing a sentence include "the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of [the defendant's] reform." *State v. Hopkins*, 860 N.W.2d 550, 555 (Iowa 2015) (quoting *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999)). Although the nature of the offense alone cannot be determinative in sentencing decisions, it is an important factor. *See Hopkins*, 860 N.W.2d at 555; *State v. McKeever*, 276 N.W.2d 385, 387–88 (Iowa 1979).

The district court stated on the record its reasons for imposing a prison sentence:

> Mr. Miller is before the court today having pled guilty to two criminal offenses; harassment in the first degree, and aggravated misdemeanor, and operating while intoxicated, first offense, a serious misdemeanor. . . . Mr. Miller is 26 years of age. Review of the file indicates that he has a high school education. He has the support of family and other members of the community who are here with him in the courtroom today and who have submitted letters as exhibits presented by Mr. Miller here today as well. He has a criminal history which is on the lower end of minimal. Appears to be related more to substance abuse issues than anything. The criminal history on the file indicates he has a conviction for an

alcohol-related offense as well as [a] marijuana-related offense. . . .

. . .

Question now, what judgment and sentence should be in each of those two cases. . . . Again, Mr. Miller is 26 years of age, high school education. I think has support of family, friends, and others who know him. He does have some prior criminal history related to substance abuse. Of course, the sentence must address Mr. Miller's rehabilitation and the protection of the community.

Starting with the lesser of the two offenses. Operating while intoxicated, serious misdemeanor certainly carries with it some significant harm to this community. I have been doing this job as a judge and trial lawyer for about 26 years. If there is probably one of the most common offenses that occurs in Iowa, it is operating while intoxicated, first offense, which places the defendant, the community, innocent people at risk. OWI has certainly caused a significant degree of harm to defendants, to members of the community. It should not be taken lightly. And I think when a person recognizes they have some difficulties and refuses to deal with it and end up with criminal charges, it is an aggravating factor.

Mr. Miller would be deferral eligible on the harassment first. Again, he is a young person. I think [he] is employable if he is not currently employed. Seeking better employment and sources in his life. He makes a statement today to the court indicating that he is remorseful. Apologizes to [the victim]. Mr. Miller has clearly given some important thought to his statement of allocution today.

> The range of sentencing options before the court is fairly wide. . . . The court must also consider the nature of the offenses. The harassment in the first degree I think is causing [the victim], quite frankly, irreparable harm. My understanding of the testimony from her fiancé [ ] is this has quite frankly affected him in a tremendous way as well. I think there is no doubt that those who know [the victim]and know about this situation probably have all been affected, although it may seem unusual. I think we often forget that terms of incarceration or imprisonment or jail sentences do have rehabilitative effect on individuals. The legislature has provided for a minimum two-day jail sentence on the OWI I think as an example of the community's understanding of that and certainly the legislature's understanding of pronouncement of that statute. . . .

Sent. Tr. 101:10–1002:2; 106:12–109:1.

The first of Miller's sentencing arguments is defeated by reference to the district court's statements at sentencing. Contrary to Miller's assertions, the district court did not focus exclusively on the nature of his offenses while ignoring mitigating factors. The nature of Miller's offenses—and the resulting harm caused by his offenses—may have been the most important factor in the district court's decision-making process, but the district court explicitly considered other sentencing factors as well before imposing terms of imprisonment.

The second of Miller's arguments is incompatible with the legal standard applicable to reviewing sentencing decisions. As earlier stated, "the decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor," and the district court's choice of one sentencing option over another will not be disturbed unless "the decision was exercised on grounds or for reasons that were clearly untenable or unreasonable." *Formaro*, 638 N.W.2d at 724. Here, Miller essentially asks this Court to reverse the sentences imposed by the district court simply because he would have preferred other, more lenient sentences. But while Miller obviously would have preferred sentences which did not include prison time, the very nature of the sentencing process grants the district court discretion in choosing between lawful options, and the court here did not abuse its discretion by making a reasoned decision to refuse Miller the leniency for which he hoped. The district court was well within the boundaries of its sentencing discretion in deciding that the serious nature of Miller's criminal conduct justified terms of imprisonment.

Miller's sentences should be affirmed.

CONCLUSION

For the reasons stated above, Miller's sentences should be affirmed.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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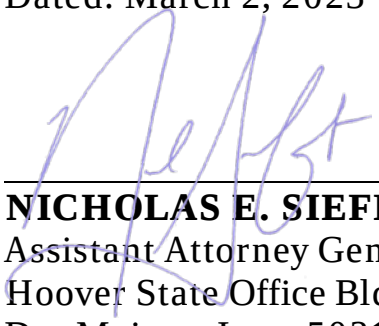

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