**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-1810**

State of Minnesota,
Respondent,

vs.

Mark Altenhofen,
Appellant.

**Filed December 23, 2008**
**Affirmed**
**Peterson, Judge**

Stearns County District Court
File No. K9-06-3887

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104; and

Janelle P. Kendall, Stearns County Attorney, 448 Administration Center, 705 Courthouse Square, St. Cloud, MN 56302 (for appellant)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

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

**PETERSON,** Judge

In this appeal from the district court's denial of his motion to vacate two of his three criminal-sexual-conduct convictions, appellant argues that convicting him of all three offenses violated Minn. Stat. § 609.04 (2006). We affirm.

## FACTS

Following a bench trial, appellant Mark Altenhofen was convicted of three counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342 (2006), for sexually abusing J.P.M., the 11-year-old son of his live-in girlfriend. Counts one and two each alleged violations of Minn. Stat. § 609.342, subd. 1(a), which provides that "[a] person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the complainant is under 13 years of age and the actor is more than 36 months older than the complainant." Count one alleged that an incident involving penetration occurred on August 9, 2006, and count two alleged that an incident involving penetration occurred on an unspecified date in July 2006.

Count three alleged that Altenhofen engaged in sexual penetration with J.P.M. in violation of Minn. Stat. § 609.342, subd. 1(h)(iii), which makes sexual penetration a first-degree offense if "the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual penetration, and . . . the sexual abuse involved multiple acts committed over an extended period of time." The complaint alleged that J.P.M. stated that incidents of abuse similar to the ones alleged in counts one and two "increased to about twice a week" when J.P.M.'s

family moved to the county where Altenhofen was prosecuted, and count three alleged that Altenhofen committed multiple acts of sexual abuse over an extended period of time between August 2001 and August 2006.

After he was found guilty on counts one, two, and three,[1] Altenhofen moved to vacate his convictions on counts one and two, arguing that these counts were included in the "multiple acts" for which he was convicted on count three. The district court determined that the three convictions "are not the result of a continuous and uninterrupted course of conduct" and that Minn. Stat. § 609.04 is not implicated. The court concluded that convictions on all three counts were permissible, denied Altenhofen's motion, and imposed concurrent sentences for each count. This appeal followed.

**D E C I S I O N**

Altenhofen challenges the district court's denial of his motion to vacate counts one and two and, alternatively, asks this court to vacate count three. Altenhofen argues that convicting him of all three counts violates Minn. Stat. § 609.04, subd. 1, which states:

> Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both. An included offense may be any of the following:
>
> (1) A lesser degree of the same crime; or
>
> (2) An attempt to commit the crime charged; or
>
> (3) An attempt to commit a lesser degree of the same crime; or
>
> (4) A crime necessarily proved if the crime charged were proved; or

[1] Altenhofen was also charged with two counts of first-degree criminal sexual conduct alleging that Altenhofen had caused J.P.M. to submit by using or threatening to use a knife in violation of subdivision 1(d). He was acquitted of both of these counts, and they are not relevant to this appeal.

> (5) A petty misdemeanor necessarily proved if the misdemeanor charge were proved.

Altenhofen argues that he cannot be convicted of both count three, which alleges multiple acts of abuse over an extended period of time, and counts one and two, which each allege a single incident of sexual abuse that occurred during that period. Altenhofen essentially contends that because the acts of sexual penetration in counts one and two occurred during the time period covered by count three, which requires proof of sexual penetration and multiple acts of sexual abuse over an extended period of time, he cannot be convicted on all three counts under Minn. Stat. § 609.04, subd. 1(4), because counts one and two are necessarily proved if count three is proved.

To determine whether an offense is an included offense, we examine the elements of the offenses, not the facts of the particular case. *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). "An offense is 'necessarily included' in a greater offense if it is impossible to commit the greater offense without committing the lesser offense." *Id.*

The elements of the offenses charged in counts one and two are that: (1) a person engaged in sexual penetration with another; (2) the complainant is less than 13 years old; and (3) the actor is more than 36 months older than the complainant. Minn. Stat. § 609.342, subd. 1(a). The elements of the offense charged in count three are that: (1) a person engaged in sexual penetration with another; (2) the actor has a significant relationship to the complainant; (3) the complainant was under 16 years old at the time of the penetration; and (4) the sexual abuse involved multiple acts committed over an extended period of time. *Id.*, subd. 1(h)(iii).

It is possible to commit the offense charged in count three without committing the offenses charged in counts one and two because a complainant can be less than 16 years old when the penetration occurred without being less than 13 years old and an actor can be less than 36 months older than the complainant. Because it is possible to commit the offenses charged in counts one and two without committing the offense charged in count three, the offenses are not included offenses under Minn. Stat. § 609.04, subd. 1(4). Similarly, it is possible to commit the offenses charged in counts one and two without committing the offense charged in count three because an actor can be more than 36 months older than the complainant without having a significant relationship to the complainant.

Furthermore, "the protections of section 609.04 will not apply if the offenses constitute separate criminal acts." *Bertsch*, 707 N.W.2d at 664. The district court found that J.P.M. was assaulted on August 9, 2006, and in July 2006 and "that a series of similar sexual assaults had begun at a considerably earlier date. J.P.M. reported a history of multiple sexual assaults, beginning when he was approximately 6 years old; therefore, according to his accounts, the sexual assaults would have beg[u]n in the year 2001, approximately." And in denying Altenhofen's motion to vacate the convictions on counts one and two, the district court concluded that although all three convictions were based on events that occurred between August 2001 and August 2006, the convictions "are not the result of a continuous and uninterrupted course of conduct." The district court found that Altenhofen's conduct was broken and sporadic, did not occur at substantially the same time and was fragmented, and the offenses did not manifest an

indivisible state of mind. *See Bertsch*, 707 N.W.2d at 664 (citing time and place of conduct and whether segment of conduct was motivated by effort to obtain a single criminal objective as factors considered when analyzing whether conduct is single behavioral incident). Because these findings demonstrate that Altenhofen's three convictions were based on three separate criminal acts, the district court did not err in concluding that Minn. Stat. § 609.04 does not apply to the convictions.[2]

**Affirmed.**

[2] Because we affirm Altenhofen's convictions, we do not reach his arguments regarding what should happen if we were to reverse and remand.