STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0395

State of Minnesota,
Respondent,

vs.

Jerrad Chad Juhl,
Appellant

Filed November 26, 2018
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Brown County District Court
File No. 08-CR-16-1184

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Charles W. Hanson, Brown County Attorney, Breck Rolfsrud, Deputy County Attorney, New Ulm, Minnesota (for respondent)

Jacob M. Birkholz, Michelle Olsen, Birkholz & Associates, LLC, Mankato, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Schellhas, Judge; and Smith, John, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

RODENBERG, Judge

Appellant appeals from his convictions and sentences for five counts which include the offenses of solicitation of a child to engage in sexual conduct, agreeing to hire a minor for prostitution, and distributing material concerning sexual conduct to a child. He argues that the district court erred by denying his request to present an entrapment defense at trial, and that the district court erred when it sentenced him for multiple offenses arising from the same course of conduct. We affirm in part, reverse in part, and remand.

FACTS

On December 5, 2016, as part of a sting operation, an undercover law enforcement officer posted an advertisement in the "escort" section of Backpage.com.[1] The advertisement read, "I am a playful girl waiting for u! Come relax. And relax all the stress from ur day." The posting indicated that the female was 20 years old and included a phone number and a picture.

That evening, at approximately 5:52 p.m., appellant Jerrad Chad Juhl replied to the advertisement in a text message, indicating that he "was very interested." The undercover law enforcement officer answered, and asked "are you as board as I am 2-nite?"[2] Appellant asked how old the female was, and she replied, "16 how old ru" and "do my age matter to

[1] The undercover officer is male. He pretended during this "sting operation" that he was an underage female. References to the officer in this opinion therefore identify the officer using female pronouns.

[2] The officer testified that the texts were designed to appear as if they were written by a teenager. We use the misspellings and usage mistakes as they appear in the record.

you????" Appellant told the female that he was 43, and asked the female "are you ok with that?"

Appellant eventually attempted to arrange for the two to meet for sex later that night. The undercover officer told appellant that she was home alone because her mom was at a casino for the night. They discussed payment, and the officer asked appellant "do u think $150 is that ok??" and told appellant that "i did this once b4 with a older guy he gave me $300 he was nice."

Appellant continued to make plans to meet the female, and he eventually suggested that he could transfer money to a WalMart card to pay her. The officer told appellant that this proposal was problematic because, "I would have to ride my bike" to WalMart in order to get the money. The officer asked appellant if he had any "booze" and told appellant that "i want to part some tonight, cant you come to see me?"

Appellant again asked how old the female was and texted, "Are you really 16 it doesn't matter if you actually younger." The officer replied, "Almost 16 but I have done this once b4 why wont u cum to see me now???" Despite knowing that the female was "almost 16," appellant did not stop the text-message conversation. Appellant said, "I can transfer you money tonite" and that, if the female would take a check, he could probably go to her house that night. The officer texted that she had only a "savins account."

Appellant and the officer agreed to meet at what appellant thought was the female's mother's home. Law enforcement arrested appellant upon his arrival. Appellant had both alcohol and a checkbook with him.

The state charged appellant with six counts of prostitution-related offenses under Minn. Stat. §§ 609.324 and 609.352 (2016). Before trial, appellant gave notice of his intent to assert entrapment as a defense at trial. At a pretrial hearing, appellant's counsel sought a pretrial ruling on the sufficiency of the evidence to support an entrapment defense at trial. Appellant did not waive his jury-trial right. The district court concluded after a hearing that appellant's evidence and arguments were insufficient to allow the defense to go to a jury. Appellant's trial counsel requested reconsideration of this ruling, which the district court denied.

After a two-day trial, a jury found appellant guilty of (1) Prostitution—Engages in Prostitution, Hires, Offers, or Agrees to Sex – Reasonably Believes Age 13 to 16, Minn. Stat. § 609.324, subd. 1(b)(3); (2) Prostitution—Engages in Prostitution, Hires, Offers, or Agrees to Sex – Reasonably Believes Under Age 18, Minn. Stat. § 609.324, subd. 1(c)(3); (3) Solicitation of an Individual the Defendant Reasonably Believes to be a Child of 15 Years of Age or Younger to Engage in Sexual Conduct, Minn. Stat. § 609.352, subd. 2; (4) Electronic Solicitation of an Individual the Defendant Reasonably Believes to be a Child 15 Years of Age or Younger to Engage in Sexual Conduct, Minn. Stat. § 609.352, subd. 2a(1); (5) Electronic Solicitation of an Individual the Defendant Reasonably Believes to be a Child 15 years of Age or Younger to Engage in Sexual Conduct – Distribute Material, Language or Communication, Minn. Stat. § 609.352, subd. 2a(3).

Although appellant was not charged under Minn. Stat. § 609.494 (2016), the state argued at sentencing that section 609.494, subdivision 4, allows for consecutive sentences, and the district court convicted appellant of all five counts and sentenced all counts

consecutively. It granted a downward dispositional departure on count five, Minn. Stat. § 609.352, subd. 2a(3), Distribute via Electronic Communication Material that Relates/Describes Sexual Conduct to a Child, because the district court considered appellant to be particularly amenable to probation.

This appeal followed.

D E C I S I O N

I. The district court erred by failing to obtain a jury-trial waiver from appellant, but the district court's error was harmless beyond a reasonable doubt.

Appellant argues that the district court erred by denying him the opportunity to present the entrapment defense to a jury without obtaining a waiver of appellant's right to a jury trial.

Appellate courts review district court rulings on evidentiary issues for an abuse of discretion. *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). If the appellate court concludes that the district court erred, then it must determine whether the error was harmless. *Id.* "If a district court's evidentiary ruling is determined to be erroneous, and the error reaches the level of a constitutional error, such as denying the defendant the right to present a defense, our standard of review is whether the exclusion of evidence was harmless beyond a reasonable doubt." *State v. Smith*, 876 N.W.2d 310, 331 (Minn. 2016) (quoting *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003) (quotation omitted)). "A conviction will stand if the constitutional error committed was harmless beyond a reasonable doubt." *Atkinson*, 774 N.W.2d at 589. Here, because appellant did not waive his right to present the entrapment defense to a jury, and because the right to a jury trial is

a constitutional right, we review any error to determine whether it was harmless beyond a reasonable doubt.

Criminal defendants have "a constitutional right to a meaningful opportunity to present a complete defense." *Loving v. State*, 891 N.W.2d 638, 646 (Minn. 2017) (quotation omitted). But, a defendant's right to present a complete defense is not absolute. *Atkinson*, 774 N.W.2d at 589. "Courts may limit the scope of a defendant's arguments to ensure that the defendant does not confuse the jury with misleading inferences." *Id.*

A defendant asserting the entrapment defense has the option of presenting the issue to the jury as a factual issue or to the court as a matter of law. *State v. Balduc*, 514 N.W.2d 607, 611 (Minn. App. 1994). The entrapment defense is a predisposition-based defense which the jury must decide unless the defendant waives his jury-trial right and requests the district court to serve as the trier of fact on the entrapment issues. *State v. Ford*, 276 N.W.2d 178, 179 (Minn. 1979).

If the defendant chooses to have the court decide the issue, the defendant must waive his right to a jury trial on that issue as provided in Minn. R. Crim. P. 26.01, subd. 1(2). Minn. R. Crim. P. 9.02, subd. 1(6)(b). A defendant waiving his right to a jury trial must do so personally, in writing, or on the record in open court, after being advised by the court of the right to trial by jury. Minn. R. Crim. P. 26.01, subd. 1(2)(a). The court deciding the issue must make findings of fact and conclusions of law on the record supporting its decision. Minn. R. Crim. P. 9.02, subd. 1(6)(c).

The record here is unusual in that appellant's trial counsel moved the district court for a determination of the sufficiency of the evidence to support an entrapment defense,

but did not waive appellant's right to a jury trial. Trial counsel seems to have wanted the district court to determine whether it would give an entrapment instruction to the jury at trial based on the available evidence. This seems to have been a tactical decision designed to determine, before the case was tried, whether the district court would instruct the jury concerning an entrapment defense. But, while appellant was present at the omnibus hearing, neither appellant nor his counsel waived a jury trial on the entrapment issue.

The district court accommodated appellant's request—presumably made for tactical reasons—to determine before the jury trial whether the evidence supporting his entrapment defense was going to be sufficient to warrant an entrapment instruction. Appellant made no further offer of proof, and did not argue entrapment to the jury. But by not obtaining a jury trial waiver from appellant, the district court erred under Minn. R. Crim P. 26.01. The district court's order prohibited appellant from raising the defense at trial.

Nevertheless, and based on our careful review of the record, we conclude that the district court's error was harmless beyond a reasonable doubt.

Appellant argues on appeal that he produced sufficient evidence to support the entrapment defense because the state purposefully used the Backpage.com advertisement to lure unsuspecting people to commit a crime. Minnesota's entrapment law has two parts. *State v. Grilli*, 230 N.W.2d 445, 456 (Minn. 1975). First, a defendant has the burden to establish, by a fair preponderance of the evidence, that law enforcement induced his actions. *Id.* To establish inducement, a defendant must show that the state did something more than merely solicit the commission of a crime. *State v. Olkon*, 299 N.W.2d 89, 107 (Minn. 1980). This first element can be satisfied by showing persuasion, badgering, or

pressure by the state. *Id.* If a defendant cannot show that the state induced his actions, then the state does not need to prove the second element, that the defendant was predisposed to commit the crime. *Grilli*, 230 N.W.2d at 456.

Appellant asserts that he produced sufficient evidence at the pretrial hearing to satisfy the first part of the *Grilli* test because law enforcement induced him to commit the crime.[3] The record does not support appellant's argument. The text-message exchange between the undercover officer and appellant shows that the officer told appellant two times during the conversation that the person with whom appellant was exchanging text messages was not yet 16 years old. Appellant assured her that, even if she was younger, "it doesn't matter" to him and told her, "We will figure this out if you want too." Disclosure that he was texting with someone under the age of 16 did not stop appellant, and he continued the text-message conversation and continued making arrangements to pay the 15-year-old for sex. Appellant's continued texts to the officer included graphic details of what he would like to do to the female. When officers were arresting another individual and the texting in reply to appellant temporarily stopped, appellant continued to text, and sent a number of messages saying that he was still willing to see the female if she was still willing.

Appellant argues that "almost 16" could mean that the female was 17 or 18 and that the pictures sent by the officer made the female's age unclear. During the text-message

[3] Appellant produced no evidence and made no argument at trial concerning entrapment. Because of the unusual procedural posture of appellant's pretrial request, we do not regard the absence of evidence or argument concerning entrapment at trial to amount to a forfeiture of the issue.

conversation, the officer clearly indicated that the female was not yet 16. "Almost 16" means 15, not 17. The undercover officer purposefully used language that teenaged children use in text messaging to convey that the female was a teen. The officer misspelled words and used abbreviations for words such as that she "dont have a lic yet."

The text-message exchange shows that the female told appellant she was not yet 16 years old and that, rather than ending the conversation once he knew that information, appellant continued to make arrangements to hire the purported 15-year-old to engage in prostitution. Had appellant produced this same evidence at trial, and had the district court then declined to give an entrapment instruction to the jury, that would not have been erroneous. The record utterly fails to demonstrate any pressuring or badgering by the undercover officer. It is clear beyond doubt that appellant was willing to engage a 15-year-old child for sex without any pressure from the officer. Therefore, the district court's error was harmless beyond a reasonable doubt.

II. Appellant was not charged under Minn. Stat. § 609.494, and the exception to multiple sentences provided by that section has no application here.

The jury found appellant guilty of five prostitution and solicitation crimes arising from his text-message conversation with the undercover officer. Appellant argues that the district court erred in sentencing him consecutively on all five convictions because they arose out of the same behavioral incident.[4]

[4] Appellant does not argue on appeal that only one conviction was proper under Minn. Stat. § 609.04 (2016). Section 609.04 bars a district court from entering two convictions for one act when a single act violates multiple provisions of a statute. *State v. Spears*, 560 N.W.2d 723, 726 (Minn. App. 1997), *review denied* (Minn. May 28, 1997); *see also State v. Levie*, 695 N.W.2d 619, 626 (Minn. App. 2005) (noting that it is to appellant's benefit to have his

The district court determined that appellant could be sentenced for each offense, and appellant received separate sentences for each count.[5] At sentencing, the district court indicated that it intended to "Hernandize" the offenses.[6] As each offense was sentenced, it was included in the criminal history of the next offense being sentenced. As a result of how the district court sentenced and computed criminal history score, appellant's fifth-sentenced conviction, distribution of electronic communication relating to sexual conduct with a child, became a presumptive commitment to the commissioner of corrections. The

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convictions vacated pursuant to Minn. Stat. § 609.04 because "under Minn. Stat. § 609.035, relief can lead to sentencing on only one count, but the other convictions would remain on the books and become part of appellant's record"). We therefore do not address any section 609.04 issues. *See State v. Patzold*, 917 N.W.2d 798, 809 n.4 (Minn. App. 2018) ("Appellant does not argue on appeal that only one domestic-assault conviction was proper under Minn. Stat. § 609.04 (2016). We therefore do not consider that question."), *pet. for review filed* (Minn. Oct. 9, 2018).

[5] The district court convicted and sentenced appellant for (1) prostitution – hires, offers, or agrees to hire; individual believes to be under the age of 16; penetration or contact under Minn. Stat. § 609.324, subd. 1(b)(3); (2) prostitution-actor hires or agrees to hire and reasonably believes under 18 but at least 16 under Minn. Stat. § 609.324, subd. 1(c)(3); (3) solicit child to engage in sexual conduct – prohibited act under Minn. Stat. § 609.352, subd. 2; (4) solicit child or believe to be a child through electronic communication to engage in sexual conduct under Minn. Stat. § 609.352, subd. 2a(1); (5) distribute via electronic communication material that relates/describes sexual conduct to a child under Minn. Stat. § 609.352, subd. 2a(3).

[6] "Hernandizing" is the colloquial term for the process described in the sentencing guidelines of determining an offender's criminal history when multiple offenses are sentenced on the same day before the same court. Minn. Sent. Guidelines II.B.1.e (2016). *See also State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981). Under that provision, multiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred. As each offense is sentenced, it is included in the criminal history of the next offense sentenced.

district court, departing downward from the sentencing guidelines, sentenced appellant to a stay of imposition on that offense.

Minn. Stat. § 609.035 prohibits the imposition of multiple sentences for offenses arising from a single behavioral incident and "contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted). "Whether an offense is subject to multiple sentences under Minn. Stat. § 609.035 is a question of law, which we review de novo." *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012). "Whether a defendant's offenses occurred as part of a single course of conduct is a mixed question of law and fact." *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). We review the district court's findings of historical fact under the clearly erroneous standard, but we review the district court's application of the law to those facts de novo. *State v. Sterling*, 834 N.W.2d 162, 167-68 (Minn. 2013). The state bears the burden of proving by a preponderance of the evidence that the conduct did not occur as part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000).

"Whether a defendant's multiple offenses occurred during a single course of conduct depends on the facts and circumstances of the case. Offenses are part of a single course of conduct if the offenses occurred at substantially the same time and place and were motivated by a single criminal objective." *Jones*, 848 N.W.2d at 533 (citation omitted). An appellate court will review the facts and circumstances of each case. *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997).

Here, appellant's actions were motivated by a single criminal objective, which was to hire the minor female to have sex with him. Appellant went to Backpage.com, responded to an advertisement for sex, and continued to arrange for and solicit sex, even after he believed that the female was 15. The record supports that appellant's offenses arose from a single course of conduct.

The state argues that multiple sentences are permissible here because Minn. Stat. § 609.494 is an exception to the general rule concerning punishment for multiple offenses that are "part of the same conduct." Minn. Stat. § 609.494, subd. 3. Minn. Stat. § 609.494 defines a criminal offense, when an actor "is an adult and solicits or conspires with a minor to commit a crime or delinquent act or is an accomplice to a minor in the commission of a crime or delinquent act." Minn. Stat. § 609.494, subd. 1. A defendant convicted under Minn. Stat. § 609.494 may also be sentenced for other offenses that arise out of the same conduct. Minn. Stat. § 609.494, subd. 3.

The state argues that the district court's consecutive sentencing is authorized by section 609.494 because the legislature intended consecutive sentences whenever minors are involved. But appellant was not charged with or convicted of a violation of section 609.494. There is no need to discern the legislature's intent because section 609.494 does not apply. We therefore reverse appellant's sentences and remand to the district court to vacate appellant's multiple sentences and to sentence appellant only for the most serious offense. *See State v. St. John*, 847 N.W.2d 704, 708 (Minn. App. 2014) (noting that section 609.035 contemplates that a defendant will be punished for the most serious offense because imposing up to the maximum punishment includes punishment for all offenses).

Appellant makes other arguments concerning his sentence, but, because we reverse his sentences and remand to the district court, we do not address those remaining arguments.

Affirmed in part, reversed in part, and remanded.