

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-1000**

State of Minnesota,  
Respondent,

vs.

James Martin Alger, Sr.,  
Appellant.

**Filed May 13, 2019  
Affirmed  
Smith, Tracy M., Judge**

Crow Wing County District Court  
File No. 18-CR-18-752

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota; and

Matti R. Adam, Special Assistant Crow Wing County Attorney, Grand Rapids, Minnesota  
(for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant  
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Smith, Tracy M., Judge; and  
Randall, Judge.\*

**S Y L L A B U S**

An offender may receive multiple sentences for violating the no-contact provisions  
of an order for protection (OFP) with respect to multiple persons protected by the

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

provisions, even if the violations arose out of a single behavioral incident, because each person protected by the no-contact provisions of an OFP is a victim of the crime of violating those provisions.

## **O P I N I O N**

**SMITH, TRACY M.**, Judge

Appellant James Alger Sr. was subject to an OFP prohibiting him from contacting his former girlfriend and their minor child. Pursuant to a plea agreement, Alger was convicted of and sentenced on two counts of violating the OFP—one count for each person protected by the order—after he engaged in prohibited conduct against both of them by going to a hotel where they were staying. In this direct appeal, he argues that his multiple sentences violate Minn. Stat. § 609.035 (2016) because the multiple-victim rule does not apply. We disagree and affirm.

## **FACTS**

In early February 2018, K.R.B. sought and received an ex-parte OFP against Alger from the Mille Lacs Band Court of Central Jurisdiction pursuant to 8 Mille Lacs Band Statutes (MLBS) § 406. The order forbade Alger from having contact with either K.R.B. or their minor child. While the ex-parte OFP was in effect, Alger met both K.R.B. and their minor child at a hotel; he testified that he met them in order to help them get a hotel room. He was arrested after police arrived at the hotel for a welfare check.

The state charged Alger with two counts of felony violation of an OFP.<sup>1</sup> It later amended the complaint, adding two counts of felony stalking. Alger pleaded guilty to two counts of felony violation of an OFP. In exchange, the state dismissed the stalking charges and agreed not to charge Alger for witness tampering or for violating a domestic abuse no contact order that had been issued after the violation of the OFP—offenses that he allegedly committed while he was in custody. The plea agreement called for a 36-month sentence.

The district court accepted the pleas, adjudicated Alger’s guilt on both counts, and sentenced him to 24 months’ imprisonment on the first count and 12 months’ imprisonment on the second count, to be served consecutively. Alger appeals, arguing that the district court erred by sentencing him to multiple consecutive terms of imprisonment.

## **ISSUES**

I. Did the district court err by sentencing Alger on two counts arising from a single behavioral incident in which he violated an order for protection by contacting two people protected by the order’s no-contact provisions?

II. Did the district court abuse its discretion by sentencing Alger to consecutive terms of imprisonment?

## **ANALYSIS**

“[I]f a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses.” Minn. Stat. § 609.035, subd. 1. A person cannot receive multiple sentences for “two or more offenses that were

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<sup>1</sup> Minnesota law authorizes criminal penalties for violating an OFP that was granted “pursuant to a similar law of . . . tribal lands.” Minn. Stat. § 518B.01, subd. 14(b) (2016).

committed as part of a single behavioral incident.” *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012) (quoting *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn. 1986)). However, a defendant may be given multiple sentences for crimes arising from a single behavioral incident if (1) there are multiple victims and (2) the sentences do not “unfairly exaggerate the criminality of the defendant’s conduct.” *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006). This is because “conduct,” as used in Minn. Stat. § 609.035, refers to conduct with respect to a single victim, so the prohibition on multiple punishments does not apply if there are multiple victims. *Munt v. State*, 920 N.W.2d 410, 418-19 (Minn. 2018).

The parties agree that the convictions and sentences here arise out of a single behavioral incident; the sole dispute is whether the multiple-victim rule applies. Alger argues that neither prong is met: there were not multiple victims, and the sentences exaggerate the criminality of his conduct. “Whether an offense is subject to multiple sentences under Minn. Stat. § 609.035 is a question of law” and is reviewed de novo. *Ferguson*, 808 N.W.2d at 590. Whether the sentences exaggerate the defendant’s criminality is a matter for the district court’s discretion; appellate courts review for abuse of that discretion. *See State v. Richardson*, 670 N.W.2d 267, 284 (Minn. 2003) (analyzing the second prong of the test under an abuse-of-discretion standard).

**I. There were multiple victims of Alger’s conduct.**

The state argues that Alger’s behavior victimized both K.R.B. and their child, each of whom was protected by the OFP. Alger, in contrast, contends that neither K.R.B. nor their child was a victim of his crimes—he argues that violating an OFP is a crime against

the court and not against the protected persons. Alger makes three supporting arguments, which we address in turn.

First, Alger argues that, because the elements of the crime of violating an OFP do not include harm to a victim, protected persons are not victims of the offense. *See State v. Hinton*, 702 N.W.2d 278, 283 (Minn. App. 2005) (providing the elements of violation of an order for protection, which include neither harm nor a victim). But a person may be subject to multiple sentences pursuant to the multiple-victim rule even if harm to a victim is not an element of the crime. *See State v. Rhoades*, 690 N.W.2d 135, 139 (Minn. App. 2004) (affirming the imposition of multiple sentences for possession of child pornography because each different minor who was depicted was a separate victim); *see also* Minn. Stat. § 617.247, subd. 4 (2018) (prohibiting possession of child pornography without reference to the harm to the depicted minor). We are not persuaded that the absence of an express mention of harm to a victim in the elements of the offense means that violation of an OFP does not victimize the protected persons.

Alger further attempts to support his argument that his violation did not victimize the protected persons by contending that he did not directly harm K.R.B. or their child during the incident. But “the applicability of the multiple-victim [rule] does not turn on the existence of direct harm to the victims in any of the cases cited.” *Rhoades*, 690 N.W.2d at 139. Rather, indirect harms, or even general societal harms that have some personal component, count as victimization for the purposes of the multiple-victim rule. *See id.*; *see also New York v. Ferber*, 458 U.S. 747, 759, 102 S. Ct. 3348, 3355-56 (1982) (identifying harms to victims of child pornography). Thus, in *Rhoades*, the defendant’s possession of

pornographic depictions of multiple children was subject to the multiple-victim rule, allowing one sentence for each child depicted. 690 N.W.2d at 138-39.

The same principle applies here. Minn. Stat. § 518B.01 (2016)—which is quite similar to the statute under which the OFP was issued in this case, 8 MLBS §§ 401-415—is a remedial statute intended to protect vulnerable members of a family or household. *Swenson v. Swenson*, 490 N.W.2d 668, 670 (Minn. App. 1992). An OFP is a means to prevent abuse from occurring and not simply a way to punish a person who commits domestic abuse. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (“An OFP is justified if a person manifests a present intention to inflict fear of imminent physical harm, bodily injury, or assault on the [protected person].”). Thus, Alger’s reliance on the fact that he did not actually engage in domestic abuse at the hotel misses the point of an OFP. By violating the OFP, Alger created a situation in which domestic abuse was more likely to occur. Even if K.R.B. and the child were not directly and identifiably injured by Alger’s conduct, they were nonetheless victims of his violation.

Second, Alger argues that, because violation of an OFP can be prosecuted as criminal contempt, it is actually a crime against the court, and not against the protected persons. *See* Minn. Stat. § 518B.01, subd. 14(b) (“A violation of an order for protection shall also constitute contempt of court . . .”). Alger cites no caselaw suggesting that violating an OFP does not victimize the protected person, instead relying on his interpretation of Minn. Stat. § 518B.01, subd. 14(b). But that provision says that violating an OFP is *also* criminal contempt, not that it is only criminal contempt. *Id.* Violating an OFP is both an offense against the protected persons and also contempt of court.

Finally, Alger analogizes violation of an OFP to burglary and contends that an OFP violation does not have individual victims. In *State v. Hodges*, the supreme court held that a defendant could not be sentenced on three counts of burglary based on breaking and entering a single dwelling that was occupied by three people. 386 N.W.2d 709, 711 (Minn. 1986). The court reasoned that “the burglarious entry of one dwelling” justified only one sentence because the crime was primarily a property crime. *Id.* Alger contends that his crime was similar in that it was primarily against the issuing court rather than the protected persons.

Caselaw shows that at least one other crime is treated similarly. In *Ferguson*, the supreme court ruled that a conviction for drive-by shooting at an occupied building can support only one punishment, regardless of how many people are in the building during the shooting, but assaults committed during the drive-by shooting may be sentenced separately from each other and from the drive-by shooting sentence. 808 N.W.2d at 590-91. *Ferguson* and *Hodges* indicate that, as Alger contends, certain “victimless” crimes are not subject to multiple punishment even when they affect multiple people.

But those cases also illustrate another property of such “victimless” crimes: a conviction for that sort of “victimless” crime, when combined with convictions for other crimes committed during the same behavioral incident, permits sentencing according to a one-sentence-per-victim-plus-one rule. *Id.* (holding that the district court could impose nine sentences based on a drive-by shooting that constituted assault against eight occupants of the building: one sentence for each assault, plus an additional sentence for the drive-by shooting); *Hodges*, 386 N.W.2d at 711 (endorsing one sentence for burglary and “one extra

conviction and sentence per victim of the other crimes”). If Alger’s analogy between violating an OFP and burglary or drive-by shooting at an occupied building were valid, then we would expect violating an OFP to share that same property of sentencing. That is, a defendant who, in a single behavioral incident, violated an OFP and committed another crime against the protected person could be sentenced for both crimes. *Cf. Ferguson*, 808 N.W.2d at 591; *Hodges*, 386 N.W.2d at 711.

But the Minnesota Supreme Court’s decision in *State v. Jones*, 848 N.W.2d 528, 535-36 (Minn. 2014) suggests otherwise. In *Jones*, a defendant was convicted of both violating an OFP and stalking based on a single behavioral incident. 848 N.W.2d at 535-36. The supreme court held that Minn. Stat. § 609.035 prohibits multiple sentences for the two crimes. *Id.* If violating an OFP were a “victimless” crime, two sentences would be permissible under *Ferguson* and *Hodges*. Alger’s analogy to burglary therefore fails, because violating an OFP does not share the number-of-victims-plus-one sentencing scheme that applies to the “victimless” crimes to which he compares it.

In sum, we reject Alger’s arguments. A crime may have a victim even if neither harm nor the existence of a victim is an element of the offense; violating an OFP is both a crime against a victim and contempt of court; and violating an OFP is not analogous to burglary for purposes of the multiple-victim rule. Because violating the no-contact provisions of an OFP is a crime against the persons protected by the OFP, Alger committed crimes against multiple victims.



## **II. The district court's imposition of multiple sentences did not exaggerate the criminality of Alger's conduct.**

Even when crimes are committed against multiple victims, multiple sentences—whether concurrent or consecutive—may not be imposed if doing so would “exaggerate the criminality of the defendant’s conduct.” *State v. Rieck*, 286 N.W.2d 724, 726-27 (Minn. 1979). Whether multiple sentences exaggerate the criminality of conduct is a matter for the district court’s discretion; appellate courts review for abuse of that discretion. *State v. Cruz-Ramirez*, 771 N.W.2d 497, 512 (Minn. 2009); *Richardson*, 670 N.W.2d at 284. Generally, appellate courts determine whether a sentence exaggerates the criminality of conduct by comparing it to sentences in comparable cases. *See, e.g., Cruz-Ramirez*, 771 N.W.2d at 512 (stating that “we have upheld similar sentences” and then concluding that the district court did not abuse its discretion by imposing multiple sentences); *State v. Lee*, 491 N.W.2d 895, 902 (Minn. 1992) (“Whether consecutive sentencing over exaggerates criminality is determined by this court, based on our observations of sentences in similar cases.”); *State v. Brom*, 463 N.W.2d 758, 765 (Minn. 1990) (affirming consecutive life sentences for multiple counts of premeditated murder, based on past cases doing the same). The defendant bears the burden of showing that the sentence unfairly exaggerates the criminality of his conduct. *State v. Hough*, 585 N.W.2d 393, 398 (Minn. 1998). Here, Alger does not cite any comparable case.

Instead he makes two arguments. First, Alger argues that the severity of his offense was reduced because he intended to help K.R.B. and their child when he went to the hotel and because he did not have a history of abusing or threatening to abuse the child. But the

record is silent as to the actual effects of his conduct. And even if Alger had a benevolent intent, that fact says nothing about whether he actually caused harm to K.R.B. and the child.

Second, Alger claims that the OFP should not have been issued with respect to the child because the petition did not allege that he had ever abused the child. Therefore, he argues, the additional sentence based on his violation with respect to the child exaggerates the criminality of his conduct. Alger denies that this argument is a collateral attack on the OFP.<sup>2</sup> But he does not identify any other reason that the factual basis for the issuance of an OFP would be relevant to the culpability of a defendant who violates it. His argument therefore provides no reason for this court to conclude that his sentences exaggerate that culpability.

In sum, Alger has failed to carry his burden to show that his consecutive sentences unfairly exaggerate the criminality of his conduct.

## D E C I S I O N

By contacting two protected parties in violation of the no-contact provisions of an OFP, Alger committed crimes against multiple victims. Therefore, even though the crimes were committed during a single behavioral incident, Minn. Stat. § 609.035 did not prohibit the district court from imposing multiple sentences. In addition, because Alger's

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<sup>2</sup> Because Alger disclaims any intent to do so, we need not, and do not, decide whether he could collaterally attack this ex parte OFP under the reasoning of *State v. Ness*, 819 N.W.2d 219, 222-24 (Minn. App. 2012) (allowing a collateral attack on a domestic abuse no contact order because there was no right of appeal from its issuance), *aff'd*, 834 N.W.2d 177 (Minn. 2013). *See also Chapman v. Dorsey*, 41 N.W.2d 438, 443 (Minn. 1950) (“[E]x parte orders are not appealable . . .”).

consecutive sentences do not exaggerate the criminality of his conduct, the district court did not abuse its discretion in sentencing.

**Affirmed.**