STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1699

State of Minnesota,
Respondent,

vs.

Xieng Khan Lee,
Appellant.

Filed September 9, 2019
Affirmed in part, reversed in part, and remanded
Cochran, Judge

Hennepin County District Court
File No. 27-CR-17-14097

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

Michael O. Freeman, Hennepin County Attorney, Devona L. Wells, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Joseph P. Tamburino, Kayla K. Wengronowitz, Caplan & Tamburino Law Firm, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Schellhas, Judge; and Kirk, 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

COCHRAN, Judge

Appellant Xieng Khan Lee challenges his convictions of engaging in prostitution under Minn. Stat. § 609.324, subd. 1(b)(2) (2016), and electronic solicitation of a child under Minn. Stat. § 609.352, subd. 2a(1) (2016). Lee argues that the evidence was not sufficient to support either conviction and that the district court failed to make necessary findings of fact. Lee also maintains that the district court erred by imposing sentences for both convictions in violation of Minn. Stat. § 609.035 (2016). Because we conclude that the evidence was sufficient, we affirm the convictions. But because the district court erred by imposing multiple sentences, we reverse the imposition of multiple sentences and remand with instruction to vacate the sentence for the solicitation conviction.

FACTS

The Maple Grove Police Department placed an advertisement on Backpage.com (Backpage) as a part of the Guardian Angel Operation—an operation targeting individuals seeking and soliciting minors to engage in prostitution. Prostitutes frequently place advertisements on Backpage. The title of the advertisement that police placed in this case was "Like kissing on hump day – 18." The advertisement was written under the alias "[R]ayann," who, according to the advertisement, was 18 years old. A Maple Grove police officer familiar with Backpage testified at trial that Backpage "will pull" an advertisement from the site if the company determines that the advertisement was posted by a person under the age of 18.

The advertisement used sex-industry jargon such as "gfe" (meaning "girlfriend experience") and "in only" (meaning that the patron hiring the prostitute would travel to the prostitute's location), and contained sexually suggestive language (for example, the fictitious person indicated that she was "hottt and reddy to play" and "likes it wild"). Police testified at trial that the language used in this advertisement is similar to language used in real prostitution advertisements on Backpage and that individuals seeking prostitutes would typically understand the jargon. The advertisement contained a phone number for the fictitious person.

Appellant Xieng Khan Lee called the number in the advertisement. Police did not answer the call. Instead, an officer posing as the fictitious "Rayann" replied to Lee with a text message that read, "hi i missed ur call r u lookin for dat today?" Lee responded with two messages that read, "Where are you located for incal? What's your donation[]." According to law enforcement testimony, "in call" means that a sex-industry patron will go to where the prostitute is located. "Donation" is a word commonly used in the sex-trafficking industry to mean the cost of sexual services. The fictitious person responded that she was in an apartment in Maple Grove and provided prices for an hour or a half hour of her time. Lee asked whether the fictitious person was "open at 11," and the fictitious person responded, "yes condom is required tho I only do bb for bj's[1] but im open minded to anal and fetish if u hv one." Lee sent a text message that said, "Ok that's fine," asked for the fictitious person's address, and asked whether she had a condom for

[1] "bb" means engaging in a sexual act without using a condom. "bj" means oral sex.

him. The fictitious person asked for Lee's name and age. Lee falsely stated that his name was Steve and said that he was 32 years old.

The fictitious person said that she had condoms but preferred it when patrons brought their own. Lee responded, "I'll just use of your yours." Following that message, the fictitious person sent a text message that read, "nice to meet u steve im glad ur not old. im rayann im 15 and i want to make sure ur ok with that cause I don't want any truble." The fictitious person also said that Lee could use her condom. Lee's response to the fictitious person revealing her age was a message that said, "You're young," followed by a message asking the fictitious person where she lived.

The fictitious person said that she was in an apartment in Maple Grove and told Lee that she was alone and that they would have "complete privacy." Lee sent another series of messages asking for the fictitious person's address so that he could come to her apartment. Lee asked the fictitious person what would happen if he came and the fictitious person was not who she said she was and asked the fictitious person for a picture. Police did not send Lee a picture. The fictitious person gave Lee the address to an apartment building in Maple Grove and told Lee that she would provide the security code to enter the building when Lee arrived. Lee asked, "Sure it's you and is it safe?" The fictitious person said that she was who she claimed to be and indicated that it was safe.

After rescheduling to later that afternoon, Lee appeared at the fictitious person's apartment building. He texted the fictitious person, who provided Lee with the security code to the building. When Lee entered, police arrested him. Lee had about $400 with him. Another officer interviewed Lee on the scene. During the interview, Lee admitted

that the fictitious person identified herself as 15 and then said, "I know it's wrong." He also stated that he thought she was an escort. He later told police that he was not sure whether the fictitious person was lying when she said that she was 15 years old. He claimed that he was only seeking a massage when he contacted the fictitious person, but he agreed that he said he would use the fictitious person's condom. He also expressed remorse about going to the apartment and stated that it was a mistake. He agreed that the fictitious person asked for $100 and that he brought $100.

The state charged Lee with engaging in prostitution under Minn. Stat. § 609.324, subd. 1(b)(2), and electronic solicitation of a child under Minn. Stat. § 609.352, subd. 2a(1). At a bench trial, Lee testified that he was only seeking a massage when he responded to the Backpage advertisement. He admitted, however, that he had used Backpage on other occasions to solicit prostitutes and that he understood the language used in the advertisement. He stated that he did not believe that the fictitious person was under 18 years old because she may have been lying and that he was going to "see who she was" before agreeing to anything. Lee claimed that he would only have sex with a prostitute who is over the age of 21. The district court found Lee guilty as charged and entered convictions on both counts. The district court stayed imposition of sentence on both counts for two years, concurrent to each other.

Lee appeals.

D E C I S I O N

Lee first argues that the evidence introduced at trial is insufficient to support his convictions. Next, he contends that the district court failed to make a necessary finding of

fact regarding his conviction of electronic solicitation of a child under Minn. Stat. § 609.352, subd. 2a(1). Finally, he maintains that the district court erred in imposing multiple sentences in violation of Minn. Stat. § 609.035. We address each issue in turn.

I. The evidence is sufficient to support both convictions.

Lee maintains that the evidence introduced at trial is insufficient to prove beyond a reasonable doubt that he is guilty of either offense. The state contends that the evidence is sufficient to support each conviction. We first consider the appropriate standard to employ in reviewing the sufficiency of the evidence and then address each charge separately.

A. We review the sufficiency of the evidence under the traditional standard of review.

The parties disagree over whether the traditional direct-evidence standard or the heightened circumstantial-evidence standard applies to this court's review of the sufficiency of the evidence. Lee argues that the circumstantial-evidence standard applies because the state relied on circumstantial evidence. The state urges us to apply the traditional standard because direct evidence presented by the state supports the convictions. The circumstantial-evidence standard is appropriate when the conviction is based on circumstantial evidence, meaning that proof of the offense, or a single element of the offense, is based *solely* on circumstantial evidence. *State v. Fairbanks*, 842 N.W.2d 297, 307 (Minn. 2014). Circumstantial evidence is "evidence from which the [fact-finder] can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Direct evidence, on the other hand, is evidence

"based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Id.* (quotation omitted).

In this case, the state relied on both direct and circumstantial evidence. But, we conclude that Lee's convictions were sufficiently proven by direct evidence alone. The text messages that Lee sent to the fictitious person and Lee's statements to police in the post-arrest interview constitute direct evidence of Lee's intent and beliefs. This evidence reflects Lee's personal knowledge about the fictitious person and his mental state. Taken at face value, this evidence is sufficient to demonstrate Lee's intent and belief without inference or presumption. *See id.* at 599 (defining direct evidence). Consequently, we review the sufficiency of the evidence in this case under the traditional direct-evidence standard. *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016) (noting that the traditional standard applies "when a disputed element is sufficiently proven by direct evidence alone").

Under the traditional direct-evidence standard, the appellate court limits its review to a "painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the [fact-finder] to reach the verdict which [it] did." *Id.* at 40 (quotation omitted). We assume that "the [fact-finder] believed the state's witnesses and disbelieved any evidence to the contrary." *State v.Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). Appellate courts "will not disturb the verdict if the [fact-finder], acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably

conclude that the defendant was guilty of the charged offense." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012).

B. The evidence is sufficient to support Lee's conviction of engaging in prostitution under Minn. Stat. § 609.324, subd. 1(b).

A person is guilty of engaging in prostitution if the person intentionally "hires or offers or agrees to hire an individual who the actor reasonably believes to be under the age of 16 years but at least 13 years to engage in sexual penetration or sexual contact." Minn. Stat. § 609.324, subd. 1(b)(3) (2016). Lee argues that the evidence is not sufficient to prove that he reasonably believed that the fictitious person was under the age of 16 years but at least 13 years, and that the evidence is also insufficient to prove that he offered or agreed to hire the fictitious person to engage in sexual penetration or sexual contact.

Lee first argues that the evidence is insufficient to prove that he reasonably believed the fictitious person was 15 years old. Viewing the evidence in a light most favorable to the conviction, we conclude that the evidence is sufficient. When the fictitious person told Lee that she was 15 years old, Lee's response was an affirmative statement: "You're young." At no point in his communications with the fictitious person did Lee inquire about her age or indicate that he was uninterested in receiving services from someone that was 15 years old. Instead, Lee went to the apartment to meet her that afternoon. And, when interviewed by police, Lee agreed that the fictitious person identified herself as 15. Viewing this evidence in the light most favorable to the conviction, we conclude that the evidence is sufficient to permit the fact-finder to conclude beyond a reasonable doubt that Lee reasonably believed that the fictitious person was 15 years old.

Lee's argument that the evidence is insufficient to prove this element is unpersuasive. He argues that his testimony and statements prove that he did not actually believe that the fictitious person was underage because people often lie on the internet. But we disregard Lee's own testimony that contradicts the verdict, because the district court did not find it credible. *See State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989) ("The weight and credibility of the testimony of individual witnesses is for the [fact-finder] to determine."); *see also Caldwell*, 803 N.W.2d at 384. Lee's statements requesting a picture from the fictitious person and asking the fictitious person whether she really was who she purported to be, viewed in a light most favorable to the conviction, were not sufficient to preclude the fact-finder from reasonably finding, beyond a reasonable doubt, that Lee believed that the fictitious person was 15 years old. We defer to the fact-finder's assessment of the weight of this evidence and conclude that the direct evidence of Lee's belief that the fictitious person was 15 years old is sufficient to prove this element beyond a reasonable doubt. *See Moore*, 438 N.W.2d at 108.

Lee also argues that the evidence is not sufficient to prove that he intentionally offered or agreed to hire the fictitious person for sexual penetration or sexual contact within the meaning of Minn. Stat. § 609.324, subd. 1. He maintains that he was only seeking a massage from the fictitious person, not sexual penetration or sexual contact. He also contends that the evidence is not sufficient to prove that he agreed to hire the fictitious person because his statements and conduct were ambiguous. We are not persuaded.

"'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause

that result." Minn. Stat. § 609.02, subd. 9(3) (2016). Sexual contact means "the intentional touching by an individual of a prostitute's intimate parts" or "the intentional touching by a prostitute of another individual's intimate parts." Minn. Stat. § 609.321, subd. 10 (2016). Sexual penetration means sexual intercourse, oral sex, or anal intercourse. *Id.*, subd. 11 (2016).

We conclude that there is sufficient evidence to prove beyond a reasonable doubt that Lee was seeking sexual penetration or sexual contact and not a massage. Again, we disregard Lee's statements and testimony that are contrary to the verdict because the fact-finder found them not credible. *See Moore*, 438 N.W.2d at 108; *Caldwell*, 803 N.W.2d at 384. The text message conversation between Lee and the fictitious person clearly establish that Lee was seeking sexual services. Lee, who had used Backpage in the past to solicit prostitutes and understood sex-industry jargon, responded to an advertisement that specifically used sex-industry jargon, contained suggestive language, and made no mention of a massage. Lee's first two text messages to the fictitious person also used sex-industry jargon, asking where the fictitious person was located for "in call" and what the fictitious person's "donation" was. Lee discussed condom use with the fictitious person, and ultimately stated that he would use the fictitious person's condom. Moreover, in the post-arrest interview, Lee admitted that he believed the fictitious person was an escort. The evidence is clearly sufficient to prove that Lee sought sexual penetration or sexual contact and not a massage.

We also conclude that there is sufficient evidence to prove beyond a reasonable doubt that Lee offered or agreed to hire the fictitious person to engage in sexual penetration

or sexual contact. Lee maintains that he never agreed to sexual contact and that he was free, at all times, to change his mind. The state argues that Lee's conduct and statements demonstrate his intent to engage in sexual contact.

In a prostitution case, an offer or agreement need not be explicit, and may be implied by the words and actions of a defendant taken in context. *State v. Bennett*, 258 N.W.2d 895, 897 (Minn. 1977). Further, we do not interpret whether the defendant made an offer or agreement to hire a prostitute using contract-law principles; rather, an offer to engage in sexual conduct for hire is an inchoate activity "requir[ing] neither completed sexual conduct nor a substantial act in furtherance of the endeavor." *Id.*

Here, there is evidence that Lee asked the fictitious person how much she would charge for sexual services—he asked the fictitious person what her "donation" was in response to an advertisement that used sex-industry jargon and suggestive language. Lee then asked whether the fictitious person was available at a specific time, discussed condom use with the fictitious person, and asked for the fictitious person's address. After the fictitious person revealed that she was 15 years old, Lee affirmatively stated, "You're young," and then sent messages that read, "We[]ll text me your address[,] [s]o I can come." He ultimately appeared at the address provided by the fictitious person with enough money to pay the fictitious person the price she identified. We conclude that this evidence, when viewed in a light most favorable to the conviction, is sufficient to prove beyond a reasonable doubt that Lee intentionally offered to hire the fictitious person, who he reasonably believed to be 15 years old, to engage in sexual contact.

Lee argues that he never discussed sexual conduct with the fictitious person once she revealed that she was 15 years old, and consequently, the evidence is insufficient to prove that he intentionally offered or agreed to hire someone that he reasonably believed to be 15 years old. We disagree. Immediately after learning that the fictitious person was 15 years old and stating, "You're young," Lee continued to request the fictitious person's address. And, when he told the fictitious person that he had to reschedule, he even "promised" that he would be "right back shortly." He then appeared at the location under the belief that the fictitious person was 15 years old. Considering the evidence as a whole, we reject Lee's contention that the evidence is not sufficient to prove this element beyond a reasonable doubt.

Viewing the evidence in the light most favorable to the verdict, we conclude there is sufficient evidence to support Lee's conviction because a fact-finder could reasonably conclude that he was guilty, beyond a reasonable doubt, of engaging in prostitution under Minn. Stat. § 609.324, subd. 1.

C. The evidence is sufficient to support Lee's conviction of electronic solicitation of a child under Minn. Stat. § 609.352, subd. 2a(1).

Minn. Stat. § 609.352, subd. 2a(1), provides that "[a] person 18 years of age or older who uses . . . an electronic communications system . . . [to solicit a child or someone the person reasonably believes is a child to engage in sexual conduct], with the intent to arouse the sexual desire of any person, is guilty of a felony." A "child" means a person 15 years of age or younger. *Id.*, subd. 1(a) (2016).

Lee does not dispute that the evidence is sufficient to prove that he was 18 years of age or older or that he used an electronic communications system to communicate with the fictitious person. Instead, Lee argues that the evidence is not sufficient to prove, beyond a reasonable doubt, that he solicited the fictitious person when he believed that she was 15 years old, that he intended to engage in sexual conduct with the fictitious person, or that he acted with the intent to arouse the sexual desire of any person.

For the reasons discussed above, we conclude that the evidence is sufficient to prove that Lee intended the fictitious person to engage in sexual conduct with him and that Lee reasonably believed that the fictitious person was 15 years old once she revealed her age. We focus our analysis on the other challenged elements.

Lee argues that the evidence is insufficient to prove that he "solicited" the fictitious person because the fictitious person, and not Lee, attempted to persuade Lee into engaging in sexual conduct. The state maintains that the evidence is sufficient because Lee sent the fictitious person numerous text messages using prostitution jargon, discussed the use of a condom, and responded to explicit messages relating to sex acts and fetishes.

To "solicit" means "commanding, entreating, or attempting to persuade a specific person in person, by telephone, by letter, or by computerized or other electronic means." Minn. Stat. § 609.352, subd. 1(c) (2016). In *State v. Koenig*, the supreme court clarified the definition of "solicit" used in the statute:

> "Solicit" is defined as "commanding, entreating, or attempting to persuade a specific person." Minn. Stat. § 609.352, subd. 1(c) (2002). The dictionary definition of "solicit" is "[t]o seek to obtain by persuasion, entreaty, or formal application." *The American Heritage Dictionary* 1163 (2d College ed.

> 1982). While we do not rely on this definition of solicit because the statute provides a definition, we note that the statute's definition appears to be in accord with the general understanding of the word "solicit." "Entreat" is defined as "[t]o make an earnest request of." *Id.* at 457. "Earnest" is defined as "[m]arked by or showing deep sincerity or seriousness." *Id.* at 434. Regarding an attempt to persuade, an "attempt" is defined as "[a]n effort or try." *Id.* at 139. "Persuade" means "[t]o cause (someone) to do something by means of argument, reasoning, or entreaty." *Id.* at 926. "Command" means "[t]o direct with authority; give orders to." *Id.* at 296. The statute requires that the acts of commanding, entreating, or attempting to persuade be directed at a specific person. Minn. Stat. § 609.352, subd. 1(c).

666 N.W.2d 366, 373 (Minn. 2003) (footnote omitted). "Solicitation, like the offer to engage in sexual conduct for hire, is an inchoate activity which permits application of Minn. Stat. § 609.352 to conduct that is in some degrees ambiguous." *State v. McGrath*, 574 N.W.2d 99, 102 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Apr. 14, 1998). Sending electronic messages to a person with the aim of engaging that person in sexual activity may constitute a solicitation. *State v. Coonrod*, 652 N.W.2d 715, 723 (Minn. App. 2002), *review denied* (Minn. Jan. 21, 2003).

Viewing the evidence in the light most favorable to the conviction, we conclude that the evidence is sufficient to prove beyond a reasonable doubt that Lee solicited the fictitious person. Although the fictitious person discussed sexual acts in her text messages to Lee, Lee's text messages inquiring about the price, location, and availability of the fictitious person for sexual conduct, in context, support the district court's finding that Lee solicited the fictitious person. These messages constituted an earnest request that the fictitious person engage in sexual conduct. As noted above, the term "solicit" is defined

broadly to include "entreating" or making an earnest request. *Koenig*, 666 N.W.2d at 373. The record shows that Lee repeatedly requested the fictitious person's address so that he could appear there. That Lee did appear and brought enough money to pay the stated price demonstrates that Lee's request was sincere.

We are not persuaded by Lee's argument that the evidence is insufficient to prove that he solicited a person he reasonably believed to be 15 years old simply because the fictitious person identified that she was 15 in the middle of their conversation. Though Lee did not specifically discuss sexual conduct with the fictitious person after she revealed her age, Lee continued to ask the fictitious person for her address. Lee's response to the fictitious person's age was merely a statement that she was young. There is no evidence to suggest that Lee no longer sought sexual conduct with the fictitious person once he learned that she was 15 years old. And Lee's continued communications with the fictitious person, repeated requests that the fictitious person provide her address, and appearance at the apartment all support the district court's finding that Lee solicited a person he reasonably believed to be 15 years old.

Finally, Lee argues that the evidence is not sufficient to prove that he acted "with the intent to arouse the sexual desire of any person" within the meaning of Minn. Stat. § 609.352, subd. 2a. He argues that there is no evidence that he acted with such an intent, that he made no sexual comments, and that his responses to the advertisement and the text messages were not done in a sexually suggestive way. The state maintains that this element was proved with evidence of Lee's response to the sexually suggestive advertisement and the text message discussion of sex acts, price, condom use, and location.

The state contends that this evidence demonstrates that Lee acted with intent to arouse the sexual desire of a person—namely himself.

As used in Minn. Stat. § 609.352, subd. 2a, the phrase "any person" includes the person doing the soliciting. *State v. Muccio*, 890 N.W.2d 914, 922 (Minn. 2017). And, the content of text messages sent by the solicitor are relevant in determining whether he acted "with the intent to arouse the sexual desire of any person" within the meaning of Minn. Stat. § 609.352, subd. 2a. *State v. Gundy*, 915 N.W.2d 757, 765 (Minn. App. 2018), *review denied* (Minn. Aug. 7, 2018).

We have already determined that the evidence is sufficient to prove beyond a reasonable doubt that Lee sought sexual penetration or sexual contact with the fictitious person. Considering the same evidence, we conclude that the evidence is sufficient to prove beyond a reasonable doubt that Lee's ultimate goal in communicating with the fictitious person and appearing at the apartment was to arouse his own sexual desire and have sexual conduct or penetration with the fictitious person. We note that Lee's statement that he would use the fictitious person's condom is particularly persuasive in concluding that the evidence is sufficient to prove this element, as it clearly demonstrated that Lee's goal was to engage in sexual conduct. Consequently, we conclude that the evidence is sufficient to prove that Lee acted with the intent to arouse the sexual desire of a person—himself.

In sum, when viewed in the light most favorable to the conviction, the evidence is sufficient to support Lee's conviction because a fact-finder could reasonably conclude that

the defendant was guilty, beyond a reasonable doubt, of electronic solicitation of a child under Minn. Stat. § 609.352, subd. 2a(1).

II. The district court's findings were sufficient.

Lee next argues that the district court erred by failing to make a finding that Lee acted with the intent to arouse the sexual desire of any person. He argues that this court must remand with instructions that the district court make necessary findings. The state maintains that the district court made sufficient findings to support its verdict.

Minn. R. Crim. P. 26.01, subd. 2(b), requires the district court, following a court trial, to make written findings of the essential facts. "An opinion or memorandum of decision filed by the court satisfies the requirement to find the essential facts if they appear in the opinion or memorandum." *Id.*, subd. 2(d). "If the court omits a finding on any issue of fact essential to sustain the general finding, it must be deemed to have made a finding consistent with the general finding." *Id.*, subd. 2(e). Moreover, "a fact found by the court, although expressed as a conclusion of law, will be treated upon appeal as a finding of fact." *State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008) (quotation omitted).

We conclude that the district court made sufficient findings of fact. The district court indicated in its written memorandum that the elements of electronic solicitation of a child included the element that the person charged have the intent to arouse sexual desire. The district court made a general finding that Lee was guilty of electronic solicitation of a child and found that the state proved all of the elements of the crime. The district court further found that Lee's communications were an attempt to solicit the fictitious person into engaging in sexual conduct by discussing the condom use, price, location, and sexual

acts that could take place when he arrived. While the district court did not make an express finding that Lee acted with the intent to arouse the sexual desire of any person, we conclude that the district court's findings were sufficient to support the general verdict and we deem the district court to have found that Lee acted with the intent to arouse the sexual desire of any person. *See* Minn. R. Crim. P. 26.01, subd. 2(e). Because the evidence is sufficient to support Lee's convictions, and because the district court made sufficient findings of fact to support its verdict, we affirm both of Lee's convictions.

III. The district court erred in imposing multiple sentences in violation of Minn. Stat. § 609.035.

Lee argues that the district court erred by imposing sentences for both convictions in violation of Minn. Stat. § 609.035. "[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 and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." Minn. Stat. § 609.035, subd. 1. The test in determining whether this statute applies is whether the multiple offenses arose out of a single behavioral incident. *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012).

The parties agree that the district court's decision to impose multiple sentences in this case violates Minn. Stat. § 609.035, subd. 1. Based on our independent review of the record, we agree. We remand to the district court to vacate one of Lee's sentences. *See Langdon v. State*, 375 N.W.2d 474, 476 (Minn. 1985) ("Multiple punishments refers not to convictions but sentences, and any multiple sentences, including concurrent sentences, are barred if [Minn. Stat. § 609.035 (1984)] applies." (footnote omitted)). On remand, the

district court should vacate the sentence for the less serious offense. *See State v. Olson*, 887 N.W.2d 692, 701 (Minn. App. 2016) ("Section 609.035 contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident." (quotations omitted)). To determine the more serious offense, the supreme court has indicated that courts may look to the length of sentence actually imposed by the district court, the severity level of the offenses in the sentencing guidelines, and the maximum potential sentence for each offense. *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006); *see also State v. Franks*, 765 N.W.2d 68, 77-78 (Minn. 2009) (noting approval of the comparison of severity levels and maximum sentences in determining the relative severity of multiple offenses). Here, the district court imposed identical sentences for both offenses. But the prostitution charge carries higher presumptive sentences for any given criminal history score under the guidelines. *Compare* Minn. Sent. Guidelines 4.A (2016), *with* Minn. Sent. Guidelines 4.B (2016). It also carries a higher maximum sentence. *Compare* Minn. Stat. § 609.324, subd. 1(b) (establishing a maximum sentence of ten years imprisonment), *with* Minn. Stat. § 609.352, subd. 2a (2016) (establishing a maximum sentence of three years imprisonment). Consequently, we affirm both of Lee's convictions but reverse the district court's imposition of multiple sentences and remand with instructions to the district court to vacate the sentence on the solicitation conviction.

Affirmed in part, reversed in part, and remanded.