STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0814

State of Minnesota,
Respondent,

vs.

Christopher Allen Hitchcock,
Appellant.

Filed August 1, 2022
Affirmed
Jesson, Judge

Stearns County District Court
File No. 73-CR-18-9646

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Jesson, Judge; and Klaphake, Judge.*

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

NONPRECEDENTIAL OPINION

JESSON, Judge

While in a daycare parking lot, appellant Christopher Hitchcock masturbated in his car in view of two children who were being picked up from the center. He was charged and later convicted of two counts of fifth-degree criminal sexual conduct. The district court sentenced Hitchcock to two concurrent sentences. Hitchcock appealed, arguing that the imposition of multiple sentences was against Minnesota Statutes section 609.035 (2018). Because the multiple-victim rule applies here and the concurrent sentences do not exaggerate the criminality of Hitchcock's conduct, we affirm.

FACTS

Late October 2018, mother went to the daycare at the St. Cloud State University campus to pick up her two children. At the time, her son was five years old and her daughter was four months old.

Mother parked her car in a designated drop-off area outside of the daycare. After retrieving her children from daycare, she placed her daughter in the car seat in the backseat, and her son sat in the passenger side backseat on a booster seat. As mother got into the driver's seat, she noticed movement to her left in a minivan. She saw a man masturbating with his penis exposed. Mother tried to make sure son did not see and drove away, but not before noting the license plate number. She called 911 and the daycare director to report the incident.

The responding officer determined that the minivan had been driven by Hitchcock. When questioned by an investigator, Hitchcock said that he was at his grandfather's house

and not at campus. The investigator claimed there was a video of the incident, which was not true, but led Hitchcock to admit he was on campus. Hitchcock explained that he did not know he was in a daycare parking lot but had parked there to watch college females cross a nearby footbridge. The state charged Hitchcock with two counts of fifth-degree criminal sexual conduct—one for each child—as well as two counts of attempted fifth-degree criminal sexual conduct.[1]

A jury trial was held. The owner of the minivan, mother, the responding officer, and the investigator all testified. The jury found Hitchcock guilty of both counts. The district court sentenced Hitchcock to an executed prison term of 77 months for the first count, and a concurrent executed prison term of 84 months for the second count.

Hitchcock appeals.

DECISION

Hitchcock argues that multiple sentences for the same criminal act violate Minnesota Statutes section 609.035 because the multiple-victim rule should not apply here.[2]

We review whether a conviction or sentence violates section 609.035 de novo. *State v. Branch*, 942 N.W.2d 711, 713 (Minn. 2020). Generally, "if a person's conduct constitutes more than one offense under the laws of [Minnesota], the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1. This prohibition

[1] In violation of Minnesota Statutes sections 609.17, .3451, subdivision 1(2) (2018).
[2] Hitchcock mentions that two convictions and two sentences are erroneous, but only makes arguments about the sentences under section 609.035. He makes no mention of Minnesota Statutes section 609.04 (2018).

against multiple punishment applies only if the offenses arose out of "a single behavioral incident." *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). If multiple offenses arose out of a single behavioral incident, the district court should impose only one sentence for the offense with the highest severity level. Minn. Sent. Guidelines cmt. 2.B.107 (2018).

But the Minnesota Supreme Court interpreted a rule when multiple victims are involved in a single behavior incident. *Munt v. State*, 920 N.W.2d 410, 419 (Minn. 2018). Under the multiple-victim rule, "courts are not prevented from giving a defendant multiple sentences for multiple crimes arising out of a single behavioral incident if: (1) the crimes affect multiple victims; and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant's conduct." *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006). Under the second factor, we will uphold "the imposition of one sentence per victim if this would not result in punishment grossly out of proportion to the defendant's culpability." *State v. Schmidt*, 612 N.W.2d 871, 878 (Minn. 2000) (quotation omitted). We look to the imposition of sentences in other cases when determining whether sentencing exaggerates the criminality of conduct. *State v. Cole*, 542 N.W.2d 43, 53 (Minn. 1996).

In order to review the criminality of Hitchcock's conduct, we turn to review the fifth-degree criminal sexual conduct statute, and then consider the sentences in any comparable cases. A person violates this statute if they "engage[] in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present." Minn. Stat. § 609.3451, subd. 1(2). The Minnesota Supreme Court interpreted the phrase "in the presence of a minor" to mean "reasonably

capable of being viewed by a minor." *State v. Stevenson*, 656 N.W.2d 235, 239 (Minn. 2003).

Here, it is undisputed that Hitchcock's criminal act was part of a single behavioral incident. It is also undisputed that there were multiple victims. And because it is only required that Hitchcock's actions were "reasonably capable of being viewed by a minor," we only need to consider whether the multiple sentences he received unfairly exaggerate the criminality of that conduct. *Skipintheday*, 717 N.W.2d at 426. Hitchcock received two concurrent sentences, both within the statutory range for fifth-degree criminal sexual conduct. But fifth-degree criminal sexual conduct is also listed in the guidelines as an offense eligible for permissive *consecutive* sentences. Minn. Sent. Guidelines 6.B. (2020). Because two consecutive sentences are permissive under the guidelines, the concurrent sentence Hitchcock received here is not a sentence that is "grossly out of proportion" to his culpability. *Schmidt*, 612 N.W.2d at 878 (quotation omitted).

To convince us otherwise, Hitchcock focuses on whether the multiple-victim rule applies at all. Hitchcock contends that we should consider the canon of interpretation that "the singular includes the plural; and the plural, the singular." Minn. Stat. § 645.08(2) (2020). This means, he argues, that the language "in the presence of a minor" in the fifth-degree criminal-sexual-conduct statute means *all* possible minors who are present, and that the legislature only intended one sentence for violating this statute. But the supreme court explained that when we determine whether the multiple-victim rule applies, we review "the facts and circumstances of the crime," *not* the statutory elements. *State v. Alger*, 941 N.W.2d 396, 402 (Minn. 2020); *see also State ex rel.*

Stangvik v. Tahash, 161 N.W.2d 667, 672 (Minn. 1968) (stating that "the legislature did not intend in every case to immunize offenders from the consequences of separate crimes intentionally committed in a single episode against more than one individual"). Reviewing the facts and circumstances here—as we did above—the language of section 609.3451 does not foreclose the possibility of sentencing for multiple victims.

Next, Hitchcock argues that this case is analogous to *State v. Ferguson*, which would preclude multiple sentences. 808 N.W.2d 586 (Minn. 2012). *Ferguson* involved a drive-by shooting at a building occupied by eight people. *Id.* at 588. The defendant was found guilty of and sentenced on one conviction for drive-by shooting at an occupied building and eight convictions for assault. *Id.* at 589-92. The Minnesota Supreme Court concluded that the crime of drive-by shooting at an occupied building, for the purposes of sentencing a defendant in accord with the multiple-victim rule, does not preclude sentences for a drive-by shooting and assault of the people inside. *Id.* at 590-91. But *Ferguson* is distinct in that it involved analyzing the interplay of a single conviction of violating the drive-by-shooting statute with that of eight convictions of second-degree assault. And Hitchcock ignores the *Ferguson* court's additional conclusion that the district court was not precluded from sentencing the defendant on eight assault counts, one assault for each victim. *Id.* at 592. Hitchcock's reliance on *Ferguson* is misplaced.

In sum, because the multiple victim rule applies, and the concurrent sentences did not exaggerate the criminality of Hitchcock's conduct, the multiple sentences do not violate Minnesota Statutes section 609.035.

Affirmed.