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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-322**

State of Minnesota,
Respondent,

vs.

Reginald Neal Birts,
Appellant.

**Filed May 29, 2012
Affirmed
Schellhas, Judge**

Scott County District Court
File No. 70-CR-08-28951

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney,
Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

On remand from the supreme court for further proceedings consistent with *State v. Zais*, 805 N.W.2d 32 (Minn. 2011), we affirm appellant's sentence for disorderly conduct.

FACTS

Appellant Reginald Birts engaged in malicious punishment of his daughter in a bank parking lot when a witness "heard [Birts's daughter's] screams for help, ran into the bank, and asked a teller to call 911." *State v. Birts*, A10-322, 2011 WL 1364238, at *1 (Minn. App. Apr. 12, 2011). A jury convicted Birts of malicious punishment of a child in violation of Minn. Stat. § 609.377, subd. 1 (2008), and disorderly conduct in violation of Minn. Stat. § 609.72, subd. 1 (2008), and the district court sentenced him for both convictions. On appeal to this court, Birts argued that "the district court erred by imposing separate sentences" for the two convictions because both sentences "arose from the same behavioral incident." *Id.* at *8. This court affirmed Birts's sentences for malicious punishment of a child and disorderly conduct, noting that

"if 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 (2008).

....

But, as to Birts's separate convictions for gross-misdemeanor malicious punishment of a child and disorderly conduct, the multiple-victim exception to section 609.035 allows a court to impose one sentence per victim if multiple

sentences do 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). The witness at the bank [to Birts’s malicious punishment of his daughter] was the separate victim of Birts’s disorderly conduct offense. The district court did not abuse its discretion by sentencing Birts separately on his convictions of malicious punishment of a child and disorderly conduct.

Id. The supreme court granted Birts review “on the sentencing issue,” denied review “on all remaining issues,” and stayed proceedings pending the supreme court’s disposition in *Zais*. *State v. Birts*, A10-322 (Minn. App. June 28, 2011) (order). After deciding *Zais*, the supreme court vacated this court’s decision “only as to appellant’s disorderly conduct sentence” and remanded the case to this court for further proceedings consistent with *Zais*. *State v. Birts*, A10-322 (Minn. Dec. 13, 2011) (order).

This reinstated appeal follows.

D E C I S I O N

The scope of this reinstated appeal is limited by the supreme court’s vacation of *Birts* “only as to appellant’s disorderly conduct sentence” and its remand for “further proceedings consistent with *State v. Zais*.” *Birts*, A10-322 (Minn. Dec. 13, 2011). We therefore limit our review to determining how *Zais* impacts Birts’s disorderly conduct sentence, if at all.

Respondent State of Minnesota argues that *Zais* is consistent with and does not impact our initial decision in *Birts* in which we affirmed Birts’s disorderly conduct sentence based on the multiple-victim exception to the general prohibition against multiple punishment for offenses arising out of the same behavioral incident. Birts

provides no argument regarding the impact of *Zais* on his disorderly conduct sentence. Rather, he argues that “[t]he fact that disorderly conduct can be a crime against a person does not change the argument that [Birts] cannot receive a separate sentence for disorderly conduct.” Birts also raises arguments in his brief that are irrelevant to the impact of *Zais* on *Birts* and therefore beyond the scope of this appeal on remand. *See State v. Birts*, A10-322 (Minn. App. Dec. 30, 2011) (order) (“The parties shall serve and file supplemental briefs, addressing the impact of *State v. Zais*.”).

We agree with the state that *Zais* does not impact our initial decision but conclude that *Zais* requires us to reach that decision based on a refined legal analysis that focuses on the elements of disorderly conduct and Birts’s underlying conduct.

The common issue between *Zais* and *Birts* is whether each defendant committed disorderly conduct against an individual rather than the public. In *Zais*, the supreme court considered what information a court should consider in determining whether a husband committed disorderly conduct *against* his wife, thereby rendering his marital privilege inapplicable. *See Zais*, 805 N.W.2d at 34, 38. The marital privilege prohibits a spouse from testifying against his or her spouse without the spouse’s consent and from being examined regarding marital communications with the spouse without the spouse’s consent, except in certain circumstances, such as in “a criminal action or proceeding for a crime committed by one [spouse] against the other.” Minn. Stat. § 595.02, subd. 1(a) (2010). *Zais* argued that disorderly conduct “cannot be considered a crime committed by one spouse against the other because it is a *public* offense committed against the *public at large* and not a specific individual.” *Zais*, 805 N.W.2d at 39 (emphases added). Rejecting

Zais's argument, the supreme court held that to determine whether a spouse commits disorderly conduct against his spouse, "a district court should examine the elements of the offense together with the defendant-spouse's underlying conduct to determine whether the record establishes that the defendant-spouse's acts were done against the other spouse." *Id.* at 40–41 (holding that "[t]he disorderly conduct statute does not exclude conduct that is directed against one person," relying on a string of cases standing for the proposition that "the crime [of disorderly conduct] may be committed when there is only one witness to the defendant's conduct").

In this reinstated appeal, the issue is whether the multiple-victim exception to the multiple-punishment prohibition is applicable based on the relevant disorderly conduct elements and Birts's underlying conduct. The multiple-punishment prohibition prohibits courts from punishing a person for more than one offense arising from the same behavioral incident, Minn. Stat. § 609.035, subd. 1, but the multiple-victim exception to section 609.035 permits a court to impose one sentence per victim if multiple sentences do not result in "punishment grossly out of proportion to the defendant's culpability," *Schmidt*, 612 N.W.2d at 878 (quotation omitted). For Birts to be convicted of disorderly conduct, the fact-finder must find that he was (1) "engag[ing] in offensive, obscene, abusive, boisterous, or noisy conduct"; (2) "in a public or private place"; while (3) "having reasonable grounds to know that it . . . will tend to[] alarm, anger or disturb others." Minn. Stat. § 609.72, subd. 1(3).

Here, Birts's underlying conduct was that "[i]n the middle of a bank driveway entrance, [he] engaged in a physical confrontation with [his daughter] resulting in her

crying out for help.” *Birts*, 2011 WL 1364238, at *9. The bank witness testified that she heard Birts’s daughter “scream[] for help” and then “ran into the bank, and asked a teller to call 911.” *Id.* at *1. “Such conduct supports a finding that Birts engaged in brawling or fighting, and that he had reasonable grounds to know that his brawling or fighting would tend to alarm, anger, or disturb others.” *Id.* at *9. Examining the disorderly conduct elements together with Birts’s underlying conduct, we conclude that the record clearly establishes that Birts had reasonable grounds to know that his conduct would tend to alarm, anger, and disturb the bank employee. We therefore affirm Birts’s disorderly conduct sentence under the multiple-victim exception to the multiple-punishment prohibition.

Affirmed.