STATE OF MINNESOTA

IN SUPREME COURT

A18-1000

Court of Appeals — Gildea, C.J.

State of Minnesota,

Respondent,

vs.

Filed: April 8, 2020
Office of Appellate Courts

James Martin Alger, Sr.,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. The multiple-victim rule applies to appellant's violation of an order for protection.

2. Permissive consecutive sentences do not unfairly exaggerate the criminality of appellant's behavior.

Affirmed.

O P I N I O N

GILDEA, Chief Justice.

The question presented in this case is whether multiple sentences are permitted for contacting two persons in violation of an order for protection (OFP), when the OFP violations arise from a single behavioral incident. A temporary OFP prohibited appellant James Martin Alger, Sr., from contacting either his infant son, J.A., or his son's mother, K.B. After Alger had contact with both J.A. and K.B. at a local hotel, the State charged Alger with two counts of violating an OFP under Minn. Stat. § 518B.01, subd. 14(d)(1) (2018). The district court accepted Alger's guilty plea to both counts and sentenced him to two permissive consecutive sentences. The court of appeals affirmed. Because the multiple-victim rule authorizes two sentences, and because the consecutive sentences do not unfairly exaggerate the criminality of Alger's behavior, we affirm.

FACTS

On February 9, 2018, K.B. petitioned for an emergency (ex parte) temporary OFP from the Mille Lacs Band of Ojibwe Court of Central Jurisdiction, restraining Alger from contacting K.B. or their infant child, J.A. K.B. alleged that Alger had "a history of aggressive and violent behavior," citing bodily injury she suffered on February 6, 2018. The Mille Lacs Band Tribal Court granted the petition. The temporary OFP provided that Alger "shall not have any contact with [K.B.], or minor children in the home, whether in person, with or through other persons, by telephone, mail, email, through electronic devices, social media or by any other means except as required for court hearings." The

OFP was effective for 14 days from the date of service. The OFP was served on Alger on February 10, 2018 and was therefore effective through February 24, 2018.

On February 21, a social services worker requested that law enforcement conduct a welfare check on K.B. and J.A. A Crow Wing County Sheriff's deputy found K.B. and J.A. at a local hotel. Also present, and in violation of the OFP, was Alger. Alger later claimed that he was trying to help K.B. and J.A. find a place to stay the night. The deputy arrested Alger for violating the OFP.

The State charged Alger with two felony counts of violating an OFP under Minn. Stat. § 518B.01, subd. 14(d)(1), one for coming into contact with K.B. and the other for coming into contact with J.A. The statute provides that a "person is guilty of a felony . . . if the person violates [an OFP] . . . within ten years of the first of two or more previous qualified domestic violence-related offense convictions . . . ." Minn. Stat. § 518B.01, subd. 14(d)(1).[1]

After his arrest, Alger repeatedly contacted K.B. On February 22, while at the jail, he called K.B. and told her to have the temporary OFP "dropped." Between February 27 and March 12, he sent K.B. 87 text messages, violating a Domestic Abuse No Contact Order issued on February 23, 2018. Based on Alger's post-arrest conduct, the State amended the complaint to include two counts for stalking under Minn. Stat. § 609.749, subd. 4(b) (2018).

[1] Alger's charges were felonies because he had two prior convictions for domestic assault, one on May 1, 2008, and another on April 8, 2012.

Prior to trial, the parties reached a plea agreement. Alger agreed to plead guilty to the two felony-OFP counts and the State agreed to dismiss the two felony-stalking counts. In the plea agreement, the parties also agreed to recommend that Alger receive two sentences: a sentence of 24 months for the first OFP violation (count 1), and a consecutive sentence of 12 months and 1 day for the second OFP violation (count 2). Consistent with the plea agreement, Alger pleaded guilty to the two OFP counts. The district court accepted Alger's guilty plea and sentenced Alger to 36 months and 1 day, as the parties recommended in the plea agreement.

Alger appealed his sentences, and the court of appeals affirmed. *See State v. Alger*, 928 N.W.2d 770 (Minn. App. 2019). The court of appeals determined that the multiple-victim rule applies because Alger contacted "two protected parties in violation of the no-contact provisions of an OFP." *Id.* at 777. Accordingly, the court held that Minn. Stat. § 609.035, subd. 1 (2018), did not prohibit the district court from imposing multiple sentences for crimes that were committed during a single behavioral incident. *Alger*, 928 N.W.2d at 770.

We granted Alger's petition for review.

ANALYSIS

On appeal, Alger argues that the district court violated Minn. Stat. § 609.035 when the court sentenced Alger on both OFP counts. We review de novo "[w]hether an offense is subject to multiple sentences under Minn. Stat. § 609.035." *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012) (citing *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006)).

Minnesota Statutes § 609.035 provides:

> Except [for subdivisions that do not apply to this case], 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 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 purpose of section 609.035 is "to limit punishment to a single sentence where a single behavioral incident result[s] in the violation of more than one criminal statute." *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995) (citation omitted) (internal quotation marks omitted). The statute bars multiple sentences because it "contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident." *Ferguson*, 808 N.W.2d at 589 (citation omitted) (internal quotations marks omitted). And "imposing up to the maximum punishment for the most serious offense will include punishment for all offenses." *Id.*

We have clarified, however, that section 609.035 does not bar multiple sentences when the defendant commits crimes against multiple victims. As we recently explained, "behavior that harms one victim is not the same 'conduct' for purposes of [section 609.035] as behavior that harms multiple victims." *Munt v. State*, 920 N.W.2d 410, 419 (Minn. 2018). This is so because "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." *Stangvik v. Tahash*, 161 N.W.2d 667, 672 (Minn. 1968). Therefore, "behavior resulting in crimes against multiple victims . . . does not trigger application of the statute." *Munt*, 920 N.W.2d at 419.

This rule, which we first announced in *Stangvik*, is called the multiple-victim rule.[2] *Munt*, 920 N.W.2d at 419. Under that 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." *Skipintheday*, 717 N.W.2d at 426.

The court of appeals relied on the multiple-victim rule in affirming the district court. *Alger*, 928 N.W.2d at 774. Alger argues that this was error. Specifically, he argues that the multiple-victim rule should not be applied to OFP violations. And Alger argues that, even if the rule could apply in the context of OFP violations, it should not be applied here because the imposition of two consecutive sentences unfairly exaggerates the criminality of his behavior. We consider each argument in turn.

I.

Alger contends that the multiple-victim rule should not be applied to OFP violations for two reasons. First, he argues that the multiple-victim rule applies only when the elements of a crime require either (1) intent to harm the victim or (2) actual harm to the victim. Second, Alger argues that the multiple-victim rule does not apply to OFP crimes because OFP violations are crimes against judicial administration, not crimes against victims.

[2] In previous opinions, we have called this rule the "multiple-victim exception," *see Munt*, 920 N.W.2d at 418, 418 n.4, but the correct terminology is "multiple-victim rule." *See id.* at 419.

A.

Alger argues that the multiple-victim rule does not apply because the elements of an OFP violation do not require either (1) intent to harm the victim or (2) actual harm to the victim. Alger cites *Ferguson*, 808 N.W.2d 586, to support his argument that the absence of certain elements of a crime limits application of the multiple-victim rule.[3]

But *Ferguson* does not stand for that proposition. In *Ferguson*, we distinguished the crime of drive-by shooting at an occupied building from other crimes. *See* 808 N.W.2d at 590–92. *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, 590–92. The court of appeals vacated the assault sentences and remanded for resentencing only on the drive-by shooting conviction, concluding that section 609.035 prohibited multiple sentences arising from a single course of conduct.[4] *See id.* at 589–90.

We reversed. *Id.* at 589–92. We explained that "a single count of drive-by shooting at an occupied building does not constitute a crime against each building occupant." *Id.* at 590. To be sure, we discussed the elements of the crime, but we explicitly rejected the defendant's argument that the multiple-victim rule applies only when the elements include

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[3] Alger also cites *State v. Hodges*, 386 N.W.2d 709 (Minn. 1986), for this proposition. But *Hodges* analyzes Minn. Stat. § 609.04 (2018), which addresses convictions, not sentencing. 386 N.W.2d at 710–11. Nonetheless, *Hodges* is similar to *Ferguson*: it stands for the proposition that multiple-assault convictions are appropriate "if a burglar assaults three different people after entering a house." *Id.* at 711.

[4] *Ferguson* involved other procedural history that is not relevant here. *See* 808 N.W.2d at 589.

intent to harm the victim. *Id.* at 591 n.2. We explained that we had "rejected that contention [in *State v. Gartland*, 330 N.W.2d 881 (Minn. 1983)], holding that '[t]he fact that defendant may not have intended to hurt anyone should not make a difference' as to whether that defendant could be sentenced once per victim." *Id.* (quoting *Gartland*, 330 N.W.2d at 883). We 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 attach to a victim. *Id.* at 590–91. And we held that the district court was not precluded from sentencing the defendant on eight assault counts, one assault for each victim. *Id.* at 592.

In sum, *Ferguson* does not support Alger's contention that the multiple-victim rule applies only to crimes with the elements of either (1) intent to harm the victim or (2) actual harm to the victim. In fact, *Ferguson* explicitly rejects the "intent to harm" argument.

Rather than focusing on the elements of the crime, our precedent confirms that we examine the facts and circumstances of the crime to determine whether the multiple-victim rule applies. *See Gartland*, 330 N.W.2d at 883; *see also State v. Rieck*, 286 N.W.2d 724, 726 (Minn. 1979) (focusing on the facts of the case to determine that the multiple-victim rule applied). In *Gartland*, the defendant was charged with criminal negligence resulting in death—a crime that required harm to the victim (death) as an element. *See* Minn. Stat. § 609.21 (1982). We concluded that the multiple-victim rule applied because the defendant's criminal negligence led to the death of two people (meaning there were two victims). *Gartland*, 330 N.W.2d at 883. The defendant argued that the multiple-victim rule does not apply if the statute "does not require a showing of intent." *Id.* We rejected

that argument, explaining that "[t]he significant fact is that defendant intentionally drove his car at an outrageously high rate of speed in a residential area knowing that it was possible and even likely that he might injure or kill one or more innocent people." *Id.* Our analysis focused on the facts of the case, not simply on the elements of the crime.[5]

We followed a similar approach in *Skipintheday*, 717 N.W.2d 423. In *Skipintheday*, we said that "the crime of being an accomplice after-the-fact . . . is a crime against the administration of justice." 717 N.W.2d at 425. We explained that, because the act underlying the crime was giving "false statements to police," *id.*, it merely helped the offenders evade the law and did not further victimize the crime's victims. *See id.* at 427. Accordingly, we concluded that the crime of being an accomplice after-the-fact was not a multiple-victim crime. *Id.* But we limited our conclusion to the facts presented in that case, explaining that the crime could have had victims depending on the "manner in which the crime of accomplice after-the-fact was perpetrated." *Id.* at 427 n.5. Put differently, our analysis did not turn on whether the crime's elements included intent to harm or actual harm to the victim; instead, we focused on the facts.

Alger's argument cannot be squared with this precedent. In other words, his argument fails because application of the multiple-victim rule does not apply only when the crime's elements include either an intent to harm the victim or actual harm to the victim. We focus instead on the facts and circumstances of the crime. Looking to the facts and circumstances here, it is clear that there were two victims. The OFP precluded Alger from

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[5] Of course, if the crime at issue requires the State to prove intent or actual harm to a victim, the State must prove those elements in order to secure a conviction.

having contact with two different protected people, K.B. and J.A. And Alger violated the OFP twice, once for each protected person.

B.

In urging a different result, Alger argues that an OFP violation is a crime "against judicial administration" and therefore does not have victims. We are not persuaded.

The tribal court issued the order for protection in accordance with the Domestic Abuse Act, Minn. Stat. ch. 518B (2018).[6] We have recognized that the purpose of this statute is "to provide an efficient remedy for victims of abuse." *State v. Errington*, 310 N.W.2d 681, 682 (Minn. 1981); *see also Rew v. Bergstrom*, 845 N.W.2d 764, 791 (Minn. 2014) (explaining that "the Legislature enacted Minn. Stat. § 518B.01 . . . to protect victims of domestic abuse from their abusers"). And the very purpose of an OFP is "to protect the victim and members of the victim's family and household from domestic abuse." *Rew*, 845 N.W.2d at 792. Given this statutory context, the violation of an OFP obviously affects the protected person because the violation undermines the very protection sought and the protection that the statutory remedy is designed to provide. *See Baker v. Baker*, 494 N.W.2d 282, 285 (Minn. 1992) (noting that the Domestic Abuse Act "may be thought of as a 'band-aid,' designed to curtail the harm one household member may be doing to the other in the short term"). It simply makes no sense to conclude that the violation of an order for protection impacts only the court, as Alger argues. To the contrary,

[6] "A valid foreign protective order has the same effect and shall be enforced in the same manner as an order for protection issued in this state." Minn. Stat. § 518B.01, subd. 19a(e) (2018).

the purpose of the Domestic Abuse Act compels the conclusion that a person protected by an OFP is a victim when that order is violated.

Because Alger made in-person contact with two protected persons, there were two victims of the OFP-violation crime. Accordingly, we hold that the multiple-victim rule applies.

II.

Alger also argues that even if we were to conclude, as we have, that the multiple-victim rule applies to violations of an OFP, he should not receive multiple sentences because multiple sentences unfairly exaggerate the criminality of his behavior.[7] We review a district court's determination of whether sentences exaggerate the criminality of the defendant's behavior for abuse of discretion. *State v Richardson*, 670 N.W.2d 267, 284 (Minn. 2003); *see also State v. Cruz-Ramirez*, 771 N.W.2d 497, 512 (Minn. 2009).

When reviewing "whether a consecutive sentence unfairly exaggerates a defendant's criminality, we are guided by past sentences received by other offenders for similar offenses." *Carpenter v. State*, 674 N.W.2d 184, 189 (Minn. 2004). Alger does not cite any decisions, and we have found none, in which defendants violated an OFP against multiple people and received sentences less than the sentences that Alger received. Alger argues instead that his sentences exaggerate his criminality essentially because, if he had just received one sentence, that sentence would have been for 24 months, which is less than

[7] To the extent that Alger asserts that in-person contact with two protected persons in this case makes him no more culpable than in-person contact with one protected person, his argument ignores the well-established principle that a defendant is more culpable when there are two victims. *Ferguson*, 808 N.W.2d at 590.

the aggregate 36 months he received. But this is just another way of arguing that the multiple-victim rule should not apply; it is not an argument that shows that the two sentences Alger received unfairly exaggerate the criminality of his behavior.

In fact, Alger received permissive consecutive sentences, and the sentence on each count was the presumptive sentence for that count.[8] On rare occasions, we have concluded that presumptive sentences unfairly exaggerated the criminality of the defendant's behavior. *See State v. Norris*, 428 N.W.2d 61, 71 (Minn. 1988) (explaining that, although "technically permissible," five consecutive 60-month sentences, added to a life sentence, unfairly exaggerated the defendant's criminality); *see also State v. Goulette*, 442 N.W.2d 793, 795 (Minn. 1989) (concluding similarly regarding a defendant who received five sentences, aggregating to "the longest term possible without departing from the sentencing guidelines"). In *Norris*, we reduced consecutive sentences of life imprisonment plus a 300-month term to consecutive sentences of life imprisonment plus a 180-month term. *Norris*, 428 N.W.2d at 71. In reaching our decision, we were concerned that five consecutive terms were "added to a sentence of life imprisonment." *Id.* In *Goulette*, we reduced a total sentence of 251 months to 214 months. *Goulette*, 442 N.W.2d at 795. In

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[8] Because Alger's crime had a severity level of 4, Minn. Sent. Guidelines 5.A, and because Alger's criminal history score was 4, the presumptive range for his first felony-OFP conviction was 21 to 28 months. Minn. Stat. Guidelines 4.A. He received a 24-month sentence. For his second felony-OFP conviction, the district court imposed a permissive consecutive sentence under Minn. Sent. Guidelines 2.F.2.a(1)(i)(a), 6.A. Because the sentence was consecutive, the district court was required to sentence Alger based upon a criminal history score of 0, Minn. Sent. Guidelines 2.F.2.b, and a severity level of 4, Minn. Sent. Guidelines 5.A. With a criminal history score of 0, the presumptive sentence for his second felony-OFP conviction was 12 months and 1 day, *see* Minn. Sent. Guidelines 4.A, the sentence Alger received.

doing so, we highlighted that "the trial court imposed the longest term possible without departing from the sentencing guidelines." *Id.*

Alger's situation is strikingly different. Unlike the defendants in both *Norris* and *Goulette*, Alger received only two sentences. Moreover, Alger's total sentence of 36 months is much shorter than the sentences in *Norris* (300 months plus life) and *Goulette* (251 months). Finally, unlike *Goulette*, Alger did not receive the longest possible sentence without departing from the sentencing guidelines. Rather, the district court could have imposed a 28-month sentence—four months more than imposed—for the first felony-OFP conviction. *See* Minn. Sent. Guidelines 4.A.

In short, Alger's sentences do not exaggerate the criminality of his behavior. Accordingly, we hold that it was not an abuse of discretion for the district court to give Alger two sentences.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.