STATE OF MINNESOTA

IN SUPREME COURT

A18-1055

Court of Appeals

Gildea, C.J.
Dissenting, Thissen, J.

State of Minnesota,

Respondent,

vs.

Filed: May 6, 2020
Office of Appellate Courts

Deveon Marquise Branch,

Appellant.

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica May Surges, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

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S Y L L A B U S

Because Minn. Stat. § 609.035 (2018) does not prohibit sentences for both drive-by shooting at an occupied vehicle and second-degree assault of a victim outside the vehicle, the district court did not err in sentencing appellant on both offenses.

Affirmed.

O P I N I O N

GILDEA, Chief Justice.

The question presented in this case is whether appellant Deveon Marquise Branch can receive sentences for both drive-by shooting at an occupied vehicle and second-degree assault, when the crimes arise from a single behavioral incident. The district court imposed two sentences to run concurrently: 48 months for drive-by shooting at an occupied vehicle and 36 months for second-degree assault. The court of appeals affirmed the sentences. *State v. Branch*, 930 N.W.2d 455 (Minn. App. 2019). Consistent with our decision in *State v. Ferguson*, 808 N.W.2d 586 (Minn. 2012), we conclude that Minn. Stat. § 609.035 (2018) does not prohibit the sentences. We therefore affirm.

**FACTS**

The facts are undisputed. On April 27, 2017, Branch met the mother of his child in a South Minneapolis neighborhood to drop off the child. After Branch gave the child to mother, she and the child, along with mother's adult male friend, got into mother's vehicle. Another adult male, C.L.G., was standing outside and next to the vehicle. Branch and C.L.G. began to argue. Branch pulled out a handgun and shot in C.L.G.'s direction, but the bullet struck the front passenger door of mother's vehicle.

The State charged Branch with one count of drive-by shooting at an occupied vehicle under Minn. Stat. § 609.66, subd. 1e(b) (2018), one count of second-degree assault under Minn. Stat. § 609.222, subd. 1 (2018), and one count of reckless discharge of a firearm within a municipality under Minn. Stat. § 609.66, subd. 1a(a)(3) (2018). The complaint identified the mother of Branch's child, who was sitting inside of the vehicle, as

the victim of the second-degree assault. The complaint did not identify any specific victims for the drive-by-shooting charge.

Branch entered a straight guilty plea to all three counts with no agreement on sentencing. During the plea hearing, Branch admitted that he pulled out a handgun and fired a single gunshot in the direction of C.L.G. with the intention to "scare," but not harm, C.L.G. He confirmed that C.L.G. was "[s]tanding next to the vehicle that was ultimately struck with the bullet." Branch conceded that discharging "the firearm toward [C.L.G.] and toward that motor vehicle . . . was reckless" and "by shooting in the direction of [C.L.G.], that was an assault on that person." He also agreed that "there were occupants inside that vehicle" when it "was struck by the bullet." The district court accepted Branch's plea and convicted him of all three charges.

The district court sentenced Branch to 48 months in prison for drive-by shooting and 36 months for second-degree assault, with the sentences to be served concurrently.[1] The court did not impose a sentence for the reckless-discharge-of-a-firearm conviction.

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[1] The sentences were presumptive sentences under the Minnesota Sentencing Guidelines. The presumptive sentencing range for the crime of drive-by shooting at an occupied vehicle for a defendant with Branch's criminal history score is 41–57 months. Minn. Sent. Guidelines 4.A. The presumptive stayed sentence for second-degree assault for a defendant with Branch's criminal history score is 27 months. *Id*. But because Branch committed the assault with a firearm, the presumptive minimum sentence is 3 years. Minn. Stat. § 609.11, subd. 5(a) (2018) ("[A]ny defendant convicted of an offense listed in subdivision 9 in which the defendant . . . had in possession or used . . . a firearm . . . shall be committed to the commissioner of corrections for not less than three years, nor more than the maximum sentence provided by law."); *see also* Minn. Sent. Guidelines 2.E.1 ("The presumptive duration of the prison sentence is the mandatory minimum sentence in statute or the duration provided in the appropriate cell on the applicable Grid, whichever is longer.").

Branch appealed, arguing that the sentence for second-degree assault should be vacated because his convictions for the assault and the drive-by shooting arose out of a single behavioral incident, were motivated by a single criminal objective, and were committed against only one victim. *Branch*, 930 N.W.2d at 457. The court of appeals affirmed the sentences. *Id.* at 459. Relying on our decision in *Ferguson*, 808 N.W.2d 586, the court of appeals determined that the offense of drive-by shooting at an occupied vehicle does not constitute an offense against each occupant of the vehicle. *Branch*, 930 N.W.2d at 459. The court of appeals concluded that the district court therefore "did not err by imposing sentences for drive-by shooting and second-degree assault, even if both convictions arose out of a single behavioral incident involving the same victim." *Id.*

We granted Branch's petition for review.

## ANALYSIS

We must decide if Branch's second-degree assault sentence violates Minn. Stat. § 609.035. Whether Branch's sentence violates section 609.035 is a question of law that we review de novo. *See Ferguson*, 808 N.W.2d at 590.

Section 609.035 states:

> 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. All the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts.

Minn. Stat. § 609.035, subd. 1. In applying section 609.035, we have recognized that a person's "conduct," as used in the statute, is limited to acts committed during a single

behavioral incident and does not include acts that were committed as part of a separate behavioral incident. *State v. Johnson*, 141 N.W.2d 517, 524–25 (Minn. 1966); *see also Munt v. State*, 920 N.W.2d 410, 416–17 (Minn. 2018) ("[A]cts that lack a unity of time and place or are motivated by different criminal objectives do not constitute a single behavioral incident, and therefore, are not 'conduct,' for purposes of section 609.035."). We have also determined that "acts committed against separate victims are not 'conduct' for purposes of section 609.035." *Munt*, 920 N.W.2d at 417. Taken together, a person may be punished for only one of the offenses that results from acts committed during a single behavioral incident and that did not involve multiple victims.

Branch contends that under section 609.035, the district court should have imposed a single sentence for his most serious offense, the drive-by shooting at an occupied vehicle. *See* Minn. Stat. § 609.035. The parties do not dispute that Branch committed the offenses during a single behavioral incident: Branch firing a single gunshot.[2] Discharging the firearm resulted in three criminal offenses—the drive-by shooting, the second-degree assault, and the reckless discharge of a firearm within a municipality. According to Branch, the drive-by shooting is the most serious offense because it has a severity level of eight and second-degree assault has a severity level of six. Minn. Sent. Guidelines 5.A; *see also*

[2] The drive-by shooting and the second-degree assault occurred as a result of a continuous and uninterrupted course of conduct—Branch firing the gun. *See Johnson*, 141 N.W.2d at 525 ("[V]iolations of two or more . . . statutes result from a single behavioral incident where they occur at substantially the same time and place and arise out of a continuous and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment."). We therefore agree with the parties that Branch committed the offenses during a single behavioral incident.

*State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) ("[W]e have implicitly approved the use of the sentencing guidelines' severity-level rankings as a method for determining which of multiple felony offenses is the most serious."). He argues that the second-degree assault sentence therefore violates section 609.035 because the district court should have imposed punishment for only his most serious offense—the drive-by shooting at an occupied vehicle. We disagree.

In *Ferguson*, we concluded that section 609.035 does not prohibit multiple sentences for the crime of drive-by shooting when the same conduct—the shooting—also constitutes assault. 808 N.W.2d at 588, 592. In *Ferguson*, the defendant was involved in a drive-by shooting at an occupied building, which was a house with eight people inside. *Id.* at 588. Ferguson was convicted of one count of drive-by shooting at an occupied building and eight counts of second-degree assault, one count for each person inside the house. *Id.* The district court in *Ferguson* imposed nine sentences: one sentence for the conviction for drive-by shooting at an occupied vehicle and eight sentences for the second-degree assault convictions, one sentence for each victim inside the house. *Id.* at 589. The court of appeals vacated the second-degree assault sentences, holding that the district court could sentence Ferguson on only the drive-by-shooting conviction. *Id.* The court of appeals reasoned that "[t]he most serious offense against each victim was the drive-by shooting," and therefore "the district court erred by imposing sentence on all nine convictions." *State v. Ferguson*, 786 N.W.2d 640, 645 (Minn. App. 2010). We reversed the court of appeals' decision and upheld the sentences imposed by the district court. *Ferguson*, 808 N.W.2d at 592. We held that "for purposes of the rule that a district court

may not sentence a defendant for more than one crime for each victim, a single count of drive-by shooting at an occupied building does not constitute a crime against each building occupant." *Id.* at 590.

We reached the conclusion in *Ferguson* for two reasons. *Id.* at 591. First, the crime of drive-by shooting at an occupied building "require[s] only a reckless discharge of a firearm at or toward an occupied building." *Id.* (citation omitted) (internal quotation marks omitted); *see also* Minn. Stat. § 609.66, subd. 1e ("Whoever, while in or having just exited from a motor vehicle, *recklessly discharges a firearm* at or toward . . . a building is guilty of a felony . . . ." (emphasis added)). Therefore, the act of recklessly discharging a firearm at an occupied building does not, by itself, support eight separate drive-by-shooting convictions. *Ferguson*, 808 N.W.2d at 591 (explaining that the number of convictions for a drive-by shooting at an occupied building does not depend on the number of building occupants "[j]ust as entry into a single building occupied by three persons does not support three separate burglary convictions").

Second, "the drive-by shooting statute does not require that the occupants of the building be injured, put in fear, or even be aware of the shooting" by the defendant. *Id.* (citing Minn. Stat. § 609.66, subd. 1e). This feature distinguishes a drive-by shooting from an assault, which requires a defendant to have specific "intent to cause fear in another[,]" Minn. Stat. § 609.02, subd. 10 (2018); *see also Ferguson*, 808 N.W.2d at 591. Accordingly, we concluded in *Ferguson* that Minn. Stat. § 609.035 did not prohibit the

district court from imposing one sentence for the drive-by shooting plus eight additional sentences for second-degree assault, one for each building occupant.[3] 808 N.W.2d at 590.

With our holding in *Ferguson* in mind, we must first decide whether it extends to the offense of a drive-by shooting at an occupied vehicle. We expressly limited our decision in *Ferguson* "to the offense of drive-by shooting at an occupied building, and express[ed] no opinion about who could be victims of a drive-by shooting at a person or at an occupied vehicle[,]" because those questions were not before us. 808 N.W.2d at 590 n.1. The plain language of the drive-by-shooting statute compels the conclusion that our holding in *Ferguson* should apply to the offense of a drive-by shooting at an occupied vehicle.

The elements of the crimes of a drive-by shooting at an occupied building and a drive-by shooting at an occupied vehicle are essentially identical. *See* Minn. Stat. § 609.66,

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[3] Multiple assault sentences were consistent with the multiple-victim rule. *See State ex rel. Stangvik v. Tahash*, 161 N.W.2d 667, 672 (Minn. 1968) (recognizing that "multiple crimes against multiple victims permit the imposition of more than one sentence"). This rule allows "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). A defendant, however, "may not be sentenced for more than one crime for each victim" when the defendant has "a single criminal objective." *State v. Prudhomme*, 228 N.W.2d 243, 245 (Minn. 1975). Branch argues that the result in *Ferguson* (and in this case if we follow *Ferguson*) effectively creates a new exception to Minn. Stat. § 609.035. If the Legislature disagrees with our holding in *Ferguson*, the Legislature can, of course, pass new legislation to change the sentencing parameters for drive-by-shooting cases. *See Taylor v. State*, 670 N.W.2d 584, 589 (Minn. 2003) ("[I]t is the legislature that defines the conduct that constitutes a criminal offense and fixes the punishment."); *State v. Meyer*, 37 N.W.2d 3, 9 (Minn. 1949) ("The legislature can, and always has, fixed and determined the punishment that shall be imposed for a violation of law and the limits of discretion vested in the courts in the imposition of the sentence.").

subd. 1e(b) ("Any person who violates this subdivision by firing at or toward a person, or *an occupied building or motor vehicle*, may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both." (emphasis added)). The statute does not distinguish between the two offenses. *Id.* Nor do the parties assert that a meaningful factual or legal distinction exists between shooting at an occupied building and shooting at an occupied vehicle. We therefore conclude that a single count of drive-by shooting at an occupied vehicle does not constitute a crime against each vehicle occupant.

The State argues that under our analysis in *Ferguson*, the district court properly imposed multiple sentences in this case. We agree. In *Ferguson*, we affirmed the district court's imposition of eight sentences for second-degree assault—one for each building occupant—plus one sentence for drive-by shooting. 808 N.W.2d at 592. Here, Branch similarly received one sentence for the second-degree assault against C.L.G and one sentence for the drive-by shooting at an occupied vehicle. The sentences comply with our holding in *Ferguson* that a single count of drive-by shooting is effectively a victimless crime: Branch received one sentence for his victimless conduct, plus one sentence for his offense against a victim, C.L.G. The district court's decision to impose two sentences in this case is consistent with *Ferguson*.[4]

[4] The dissent asserts that "our decision in *Munt v. State*, 920 N.W.2d 410 (Minn. 2018), fundamentally undermined the legal justification for our decision in *Ferguson*[.]" In *Munt*, we clarified that "behavior resulting in crimes against multiple victims does not constitute 'conduct' for purposes of section 609.035, and therefore that behavior does not trigger application of [section 609.035]." 920 N.W.2d at 419. Put differently, when a

In urging us to reach the opposite conclusion, Branch asserts that our holding in *Ferguson*—allowing a court to impose sentences for drive-by shooting and second-degree assault—applies only when the crimes are committed against multiple victims. In *Ferguson*, Branch notes, there were multiple assault victims. But in this case, the complaint charged that Branch committed second-degree assault against only one victim. To permit multiple sentences when, as here, there are not multiple victims, Branch argues, violates the rule that a sentence for the most serious offense includes punishment for all offenses. *See State v. Franks*, 765 N.W.2d 68, 78 (Minn. 2009) (holding that the district court must impose a sentence for the pattern of harassing conduct offense rather than the four violations of an order for protection because it was the most serious offense against the single victim); *Kebaso*, 713 N.W.2d at 322 (concluding that the court of appeals did not err in imposing a sentence for domestic assault, rather than for interference with a 911

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defendant is charged with crimes committed against multiple victims, a separate analysis under section 609.035 is conducted for each victim. When viewed in the clarifying light of *Munt*, the nine separate sentences imposed in *Ferguson* did not violate section 609.035. Applying a separate 609.035 analysis to each victim in *Ferguson*, the defendant committed only one offense against each victim (namely second-degree assault) because drive-by shooting at an occupied building is a victimless crime. The defendant's behavior in *Ferguson* involved separate and distinct conduct under section 609.035: the eight assaults each involved separate conduct and the victimless crime of drive-by shooting at the occupied building involved an additional separate conduct. The ninth sentence was therefore warranted based on the defendant's victimless conduct.

Applying this reasoning to the facts in this case, Branch's behavior involved separate and distinct conduct under section 609.035: (1) the assault committed against C.L.G., *and* (2) the separate victimless crime of drive-by shooting at an occupied vehicle. Section 609.035 therefore does not prohibit sentences for both the drive-by shooting and the second-degree assault.

call, because domestic assault was the most serious offense against a single victim). We disagree.

The drive-by-shooting sentence does not include punishment for the second-degree assault committed against C.L.G. This is so because C.L.G. was standing outside of the vehicle at the time Branch fired a single gunshot. Even if a drive-by shooting at an occupied vehicle could be considered to be a crime against each vehicle occupant, C.L.G. was not a victim of the drive-by shooting because he was not a vehicle occupant. The most serious (and only) offense against the single victim—C.L.G.—was the second-degree assault.

Based on our analysis, we hold that the district court properly sentenced Branch for both the drive-by-shooting conviction and the second-degree assault conviction.

## CONCLUSION

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

Affirmed.

D I S S E N T

THISSEN, Justice (dissenting).

The court's decision relies on *State v. Ferguson*, 808 N.W.2d 586 (Minn. 2012). Under that precedent, the court concludes that Minn. Stat. § 609.035 (2018) does not prohibit the multiple sentences that the district court imposed for drive-by shooting at an occupied vehicle under Minn. Stat. § 609.66, subd. 1e(b) (2018), and second-degree assault under Minn. Stat. § 609.222, subd. 1 (2018), despite the fact that appellant Deveon Marquis Branch fired only a single shot, because a drive-by-shooting crime is "victimless." Because our decision in *Munt v. State*, 920 N.W.2d 410 (Minn. 2018), fundamentally undermines the legal justification for our decision in *Ferguson*, I would reverse the court of appeals and remand for resentencing in accord with Minn. Stat. § 609.035.

Section 609.035, subdivision 1, provides: "Except [for certain express statutory exceptions], 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. The Legislature's directive is plain and simple: a person can be punished for only one offense arising from a single episode of conduct.

A few years after the Legislature passed section 609.035, we explained in *State v. Johnson* that the Legislature enacted the provision as a mechanism to protect a defendant against punishment incommensurate with the defendant's conduct in circumstances where one act violated multiple criminal prohibitions. 141 N.W.2d 517, 523 (Minn. 1966). That is to say, the Legislature identified a policy problem—the imposition of multiple sentences for different offenses arising from a single course of conduct that resulted in unfairly long

sentences—and implemented a policy solution intended to address the problem; namely, prohibiting more than one sentence for an episode of conduct. In other words, the Legislature's response to disproportionally long sentences in cases where a single act constituted more than one offense was to limit courts to imposing a single sentence for the conduct. Critically, the Legislature's solution was *not* to give the judiciary the discretion to impose a sentence a judge deemed proportionate.[1]

Five years after the enactment of section 609.035, and two years after *Johnson*, we held that multiple sentences could be imposed for a single episode of intentional conduct when multiple victims were involved. *State ex rel. Stangvik v. Tahash*, 161 N.W.2d 667, 671, 673 (Minn. 1968). We ruled that three concurrent sentences—one for each of three murder victims killed in a single, awful episode—"d[id] not offend our sense of justice." *Id*. at 673. We reasoned that because three separate victims were intentionally murdered, "[f]rom a legal point of view [each murder was] totally unrelated." *Id.*; *see also State v. Prudhomme*, 228 N.W.2d 243, 245 (Minn. 1975) (allowing three sentences for sexually

[1] The conduct of the courts themselves was one impetus for the Legislature's perception that disproportionately long sentences and double punishments were being imposed where one act constituted more than one crime. *See Johnson*, 141 N.W.2d at 522–23. The Legislature enacted section 609.035 in 1963 in reaction to decisions of this court that allowed multiple prosecutions and double punishments in more situations than the Legislature intended under former Minn. Stat. § 610.21 (1961), the predecessor-statute to section 609.035. *See Johnson*, 141 N.W.2d at 522–23 (discussing cases interpreting former section 610.21). As we noted in *Johnson*, the Advisory Committee that drafted section 609.035 declared that the new language "was intended to broaden the scope of the statute's application because, except for [] two early decisions, its language was no [sic] narrowly construed as 'to defeat [the statute's] purpose . . . .' " *Id.* at 523 (quoting Minn. Stat. Ann. § 609.035 (West 1966)). Section 609.035 was enacted to "effectuate the 'original' purpose" of former section 610.21. *Id*. at 524.

assaulting three victims during one incident but disallowing sentences for kidnapping involving the same victims). Stated another way, we considered each intentional murder as if it were a distinct episode of "conduct" under the statute even though each killing happened around the same time and in the same place.

We also observed in *Stangvik* that our decision did not undermine the Legislature's interest in avoiding disproportionately long sentences because the district court reduced two of the three charges from first-degree murder to second-degree murder and imposed the three sentences concurrently; accordingly, the multiple sentences were not "punishment grossly out of proportion to the gravity of the offense." *Id.* Notably, our concern was not about whether we could justify imposing a longer sentence because it would not be disproportionate, but rather about whether imposing multiple sentences would render the full sentence disproportionately long. That is a critical nuance.

In the years following *Stangvik*, what we called (until 2019) the multiple-victim exception to the statute evolved so as to swallow much of the plain and simple rule set forth in Minn. Stat. § 609.035, at least where multiple victims were affected by the defendant's conduct. *See generally* Benjamin J. Butler, *The Exception that Swallowed the Rule: Fixing the Multiple-Victim Exception to Minnesota Statutes Section 609.035*, 39 Wm. Mitchell L. Rev. 1552 (2013). In particular, our understanding of the statute shifted and was incrementally turned on its head. Rather than applying the statute as a limitation on the power of courts to impose multiple (and thus longer) sentences for multiple crimes arising from a single episode of conduct, we interpreted the statute as one (at least in the multiple-victim context) that *empowered courts* to impose multiple sentences for a single course of

conduct as long as *the court* thought that multiple sentences did not unfairly exaggerate the punishment imposed on the defendant. *See State v. Edwards*, 774 N.W.2d 596, 606 & n.6 (Minn. 2009). That shift is a vast expansion of judicial discretion never contemplated by the Legislature.

The expansion of judicial discretion in imposing multiple sentences in multiple-victim cases reached a through-the-looking-glass apex in *Ferguson* where we allowed nine sentences for the firing of approximately six shots at a building that had eight occupants: eight sentences for assault on the eight occupants of the building and a ninth sentence for the drive-by shooting, 808 N.W.2d at 592. We reasoned that because "the drive-by shooting statute does not require that the occupants of the building be injured, put in fear, or even be aware of the shooting" by the defendant, the occupants of the building were not victims of the drive-by shooting. *Id.* at 591. Accordingly, we held that the defendant could be sentenced for the "victimless" crime of drive-by shooting in addition to being sentenced for each of the assaults against actual victims. *Id.* at 592. And by logical extension, if a defendant fires a single shot at a single occupant of a building or a vehicle, that defendant can be sentenced for two crimes arising from that single episode of conduct. Stated another way, our multiple-victim rule no longer even needs multiple victims. We have transformed a statute from one that provides 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, into a statute that allows a person to be punished

for two offenses arising from a single episode of conduct even if there is only one victim,[2] *see Ferguson*, 808 N.W.2d at 597 (Anderson, Paul, J., dissenting, joined by Page, Stras, JJ.) ("Before today's case, we have described and applied our multiple-victim exception in over 30 cases; but, we have never held that the multiple-victim exception can support an additional sentence for a victimless crime. . . . The majority is left in the incongruous position of using the 'one sentence per victim' rule implicit in the multiple-victim exception to justify nine sentences for offenses committed against eight 'victims' of a 'victimless crime.' ").[3]

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[2] Even on this point, our case law is somewhat inconsistent. In *State v. Skipintheday*, we held that multiple sentences could not be imposed where the defendant was charged and convicted of three counts of being an accomplice after-the-fact. 717 N.W.2d 423, 427 (Minn. 2006). Each of the counts was based on the defendant's act of misleading the police during an investigation into a fight where two people were injured and a third was killed. *Id.* at 425. Reasoning that accomplice after-the-fact is a crime against the administration of justice and not against the three victims, we stated that "to define all those who suffer even the most indirect harm as 'victims' for the purpose of the multiple-victim exception to section 609.0[3]5 would be to sweep nearly all crimes within the multiple-victim exception, and in so doing swallow the rule." *Id*. at 427.

[3] The decision in *Ferguson* was driven in part by the unique sentencing circumstances in the case. *See* 808 N.W.2d at 592 n.4 ("Our analysis considers the separate and distinct situation in which a sentence on the most serious offense unfairly depreciates the criminality of the defendant's conduct."). When *Ferguson* was decided, our precedent required courts to impose the sentence for the "most serious" of the offenses arising from a single behavioral incident. *State v. Franks*, 765 N.W.2d 68, 77 (Minn. 2009); *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quoting *Johnson*, 141 N.W.2d at 522). That precedent created an uncomfortable result in *Ferguson* because the drive-by-shooting offense was the "most serious" offense arising from the conduct; more serious than the second-degree assault charges. *See* 808 N.W.2d at 592. However, because Ferguson was convicted on eight separate counts of second-degree assault (one for each victim), the district court had the discretion to (and did in fact) impose a longer sentence for the assault convictions (by imposing consecutive sentences) than the sentence it could have imposed for the single drive-by-shooting conviction. *Id*. at 588–90. We concluded that, in our

And that brings us to *Munt*. Munt argued that our creation and application of a judicially created multiple-victim exception to section 609.035 violated the separation of powers doctrine. *Munt*, 920 N.W.2d at 418. We rejected Munt's argument, reasoning that the multiple-victim rule is not an exception at all but simply an interpretation of the word "conduct" used in the statutory language. *Id.* We reaffirmed that "behavior that harms one victim is not the same 'conduct' for purposes of the statute as behavior that harms multiple victims." *Id.* at 419 (citing *Stangvik*, 161 N.W.2d at 672–73). For constitutional reasons, we've come full circle, returning to the original logic of the multiple-victim rule; namely, that an intentional act that harms one victim at the same time and place as an intentional act that harms a second victim are two different "conduct[s]" under section 609.035.

Where does that leave *Ferguson*? I conclude that at the very least the imposition of nine sentences where there are only eight potential victims is not sustainable. There simply cannot be nine intentional acts that each harm a victim where there are only eight potential victims. Further, *Munt*'s insistence in refuting a constitutional separation-of-powers argument that the multiple-victim rule is an exercise in statutory interpretation of the word "conduct" rather than a judicially created exception to the statute dooms the theory underlying *Ferguson*. *Ferguson* rests on the theory that section 609.035 is a grant of discretion to courts to impose multiple sentences where multiple victims are involved as long as the judge determines that the punishment imposed on the defendant is commensurate with the defendant's acts. *See* 808 N.W.2d at 590. In other words, the rule

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judgment, a single sentence for drive-by shooting was "not commensurate with Ferguson's criminal liability" and so upheld the higher sentence imposed. *Id*. at 592.

in *Ferguson* is a separate judicially created exception; something the majority acknowledges in this case. Such an assumption of discretion by courts simply cannot be squared with the plain language of section 609.035 and it raises once again the spectre that the *Ferguson* exception, now endorsed by the court in this case, violates the separation of powers.[4]

I turn now to the present case. The court upholds two sentences for the firing of a single shot at a car that was occupied by three individuals with a fourth individual—the target of the shot—standing outside the car: one sentence for assault on the person standing outside the car and one sentence for drive-by shooting at the occupied vehicle. Under *Munt*, separation-of-powers principles compel the conclusion that a single behavioral incident of firing one shot can result in two sentences only if the behavior constitutes two discrete intentionally harmful acts against separate victims. Certainly, the assault on the person standing outside the car is such a harmful act. On the other hand, the drive-by shooting is a victimless crime under the logic of our holding in *Ferguson*; the State can prove Branch guilty of drive-by shooting without any proof that any of the car's occupants were "injured, put in fear, or even [] aware of the shooting," 808 N.W.2d at 591. Accordingly, under the multiple-victim rule articulated in *Munt* and the understanding of drive-by-shooting crimes as crimes without a victim articulated in *Ferguson*, section 609.035 allows only a single sentence to be imposed on Branch. I would reverse.

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[4] Notably, Branch does not argue that we should overrule *Ferguson* and the interplay between *Munt* and *Ferguson* remains an open question.