STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1138

State of Minnesota,
Respondent,

vs.

Michael Eugene Stratenberger,
Appellant.

Filed September 12, 2011
Affirmed in part, reversed in part, and remanded
Hudson, Judge
Concurring in part, dissenting in part, Connolly, Judge

Crow Wing County District Court
File No. 18-K8-06-2371

Lori A. Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

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

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

HUDSON, Judge

Appellant Michael Stratenberger challenges his conviction of two counts of attempted second-degree murder, arguing that the district court abused its discretion in admitting into evidence photographs of appellant in handcuffs; he also challenges his sentence, arguing that the district court erred in imposing consecutive sentences for the two counts. Because the district court did not abuse its discretion in admitting the photographs, we affirm the conviction, but because the imposition of consecutive sentences was erroneous, we reverse and remand for resentencing.

FACTS[1]

On August 27, 2006, at about five a.m., C.V. was in bed with G.L. when she awoke to find appellant, with whom she had broken off her relationship, standing next to her. Appellant had a knife. Appellant began hitting C.V.; G.L. woke, wrestled with appellant, and pushed him away. Appellant left the house.

Meanwhile, C.V. called the police. When they arrived, they found C.V. and G.L. bleeding and having difficulty breathing. C.V. and G.L. were treated for multiple stab wounds and collapsed lungs.

When the police found appellant, he had discarded his shirt and was wearing only jeans. He was photographed in handcuffs from various angles; the photographs show blood on his hands and jeans.

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[1]For a more extensive fact statement, *see State v. Stratenberger*, No. A08-0226, 2009 WL 1311444, at *1-2 (Minn. App. May 12, 2009).

A jury found appellant guilty of two counts of attempted first-degree murder, two counts of first-degree assault, and one count of first-degree burglary. In November 2007, he was sentenced to two consecutive 216-month prison terms on each attempted first-degree murder count and one concurrent 48-month term on the burglary count.

Appellant challenged his conviction. This court reversed and remanded the attempted first-degree murder convictions for a new trial because the district court had given a transferred-intent jury instruction. *State v. Stratenberger*, No. A08-0226, 2009 WL 1311444 (Minn. App. May 12, 2009). On remand, the jury found appellant guilty of two counts of attempted second-degree intentional murder, a lesser-included offense. Appellant was sentenced to two consecutive 159-month prison terms on the attempted second-degree intentional murder convictions. In sentencing him, the district court did not indicate that it was departing from the sentencing guidelines.

Appellant now challenges his conviction, arguing that the district court abused its discretion by admitting the photographs of him in handcuffs, and his sentence, arguing that the district court erred by imposing consecutive sentences.

D E C I S I O N

1. Admission of Photographs

The admission of photographic evidence is reviewed for an abuse of discretion. *State v. Hurd*, 763 N.W.2d 17, 30 (Minn. 2009). Appellant argues that the photographs should not have been admitted both because they were irrelevant to any material issue and because their probative value was outweighed by the unfair prejudice they caused.

A. Relevance

> Photographs are admissible as competent evidence where they accurately portray anything which it is competent for a witness to describe in words, or where they are helpful as an aid to a verbal description of objects and conditions, provided they are relevant to some material issue; and they are not rendered inadmissible merely because they vividly bring to jurors the details of a shocking crime or incidentally tend to arouse passion or prejudice.

State v. DeZeler, 230 Minn. 39, 46–47, 41 N.W.2d 313, 319 (1950) (emphasis omitted). "In *DeZeler*, we noted that a 'horrible, revolting and ghastly' depiction was 'an inherent and inseparable part of the facts which were relevant to a full consideration of material issues by the jury.'" *Hurd*, 763 N.W.2d at 30 (quoting *DeZeler*, 230 Minn. at 46, 41 N.W.2d at 318–19). None of the photos of appellant could be described as horrible, revolting, or ghastly.

Appellant acknowledges that the blood on his hands and jeans showed he had been in an altercation; he argues that the photos added "no legitimate force to the prosecution's case" because they added nothing to what the police could have testified to and what the jeans would have shown. But the photos "accurately portray[ed]" appellant as he looked when the police found him and were "helpful as an aid to a verbal description of . . . [appellant's] condition[]." *See DeZeler*, 230 Minn. at 46–47, 41 N.W.2d at 319. Appellant's challenge to the relevance of the photographs is not persuasive.

B. Unfair Prejudice

Appellant argues that showing the jury photographs of him wearing handcuffs was "analogous to forcing him to appear before a jury in handcuffs or shackles." But appellant was not handcuffed when he was in the presence of the jury, and the jury knew the photographs had been taken immediately after appellant's arrest, when, given the conditions of the victims and of appellant, it could be assumed that he would be in handcuffs as part of "standard law enforcement practice." *See State v. Hull*, 788 N.W.2d 91, 105 (Minn. 2010) (stating that a defendant's appearance in restraints inside a courtroom is distinguishable from an appearance in restraints in transit to or from the courtroom, which a jury would take to be "standard law enforcement practice" (quotation omitted)).

Finally, appellant argues that "the photographs probably had a very substantial influence on the jury's verdicts." He relies for this argument on *State v. Harris*, 521 N.W.2d 348, 353 (Minn. 1994) (reversing a conviction partly because of evidence whose only purpose "was to further the prosecutor's goal of creating for the jurors an immensely disturbing image of a naked [defendant], in plain sight of other inmates and passing guards, sexually revelling over a picture of his purported victim"), and *State v. Carlson*, 268 N.W.2d 553, 558–59 (Minn. 1978) (reversing a conviction partly because of evidence that the defendant, who had assaulted police after they arrested a man wearing the insignia of a motorcycle gang, was wearing the same insignia because its "potential . . . to cause the jury to deal with the issue of guilt on an emotional level substantially outweighed the arguable probative value of the evidence"). But, in our view, the

photographs here cannot fairly be characterized as "immensely disturbing" or emotionally inflammatory. Thus, neither *Harris* nor *Carlson* provides support for appellant's view that the photographs would have had a substantial influence on the jury's verdict.

The admission of the photographs was not an abuse of discretion.

2. Consecutive sentences[2]

"This court reviews de novo the district court's interpretation of the sentencing guidelines." *State v. Johnson*, 756 N.W.2d 883, 894–95 (Minn. App. 2008), *review denied* (Minn. Dec. 23, 2008).

Prior to August 1, 2005, "[m]ultiple current felony convictions for crimes against persons [were permitted to] be sentenced consecutively to each other." Minn. Sent. Guidelines II.F.2 (2004). Effective August 1, 2005, Minn. Sent. Guidelines II.F.2 was amended to read: "Multiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences found in section VI may be sentenced consecutively to each other," and section VI, "Offenses Eligible for Permissive

[2] As a threshold matter, the state argues that, because appellant did not challenge the consecutive sentences before the district court, he has waived his right to challenge them on appeal. But "[s]entencing pursuant to the Sentencing Guidelines is not a right that accrues to a person convicted of a felony; it is a procedure based on state public policy to maintain uniformity, proportionality, rationality, and predictability in sentencing." Minn. Stat. § 244.09, subd. 5 (2010). Thus, appellant did not "waive his right" to a sentence that conforms to the guidelines. *See State v. Maurstad*, 733 N.W.2d 141, 142 (Minn. 2007) (holding that "[a] criminal defendant cannot waive or forfeit review of the . . . calculation on which his sentence is based because district courts must . . . set mandatory presumptive sentences that comply with the Minnesota Sentencing Guidelines"). The responsibility for seeing that the guidelines were properly applied was the district court's, not appellant's.

Consecutive Sentences," was added to the sentencing guidelines. Minn. Sent. Guidelines (Supp. 2005). Section VI included only one attempted offense, attempted first-degree murder. *Id*. Subsequent caselaw construed the new provisions. *See, e.g., Johnson*, 756 N.W.2d at 895.

Johnson, like this case, involved sentencing on two convictions of attempted second-degree murder committed after August 1, 2005, when the modified guidelines became effective. *Id.* at 886, 888. "Modifications to the Minnesota Sentencing Guidelines and associated commentary will be applied to offenders whose date of offense is on or after the specific modification effective date." Minn. Sent. Guidelines III.F (2010). Noting "[t]he general rule that penal statutes are to be strictly construed," the *Johnson* court stated:

> Section VI lists Conspiracy/Attempted Murder in the First Degree as an offense for which permissive consecutive sentences may be imposed. But it does not list any other attempted homicide offense. Minn. Sent. Guidelines VI.
>
> The general principle frequently applied to the construction of statutes is that the expression of one thing implies the exclusion of all others. Although attempted second-degree murder is a crime of sufficient severity to justify permissive consecutive sentencing, this court must infer that the guidelines commission intended to exclude it. If the commission meant to include all attempted offenses, it would not have listed attempted first-degree murder as the only attempted homicide in section VI.

756 N.W.2d at 895 (quotation and citations omitted).[3] *Johnson* reversed the consecutive sentences imposed on the defendant's two convictions of attempted second-degree

[3]Moreover, even if the guidelines commission did not intend to exclude attempted second-degree murder and omitted it inadvertently, this court may not add "what the

murder and remanded for the imposition of concurrent sentences. *Id*. at 896. Thus, *Johnson* mandates the result here: appellant's consecutive sentences must be reversed because (1) the applicable guidelines did not include attempted second-degree murder among the convictions for which consecutive sentences are permissive and (2) the district court provided no basis for departing from the guidelines. *See* Minn. Stat. § 244.09, subd. 5 (2010) ("Although the Sentencing Guidelines are advisory to the district court, the court shall follow the procedures of the guidelines when it pronounces sentence in a proceeding to which the guidelines apply by operation of statute."); Minn. Stat. § 244.10, subd. 2 (2010) ("[T]he district court shall make written findings of fact as to the reasons for departure from the Sentencing Guidelines in each case in which the court imposes or stays a sentence that deviates from the Sentencing Guidelines applicable to the case."); Minn. Sent. Guidelines I.4. ("While the sentencing guidelines are advisory to the sentencing judge, departures from the presumptive sentences established in the guidelines should be made only when substantial and compelling circumstances exist."); Minn. Sent. Guidelines II.D. ("[I]n exercising the discretion to depart from a presumptive sentence, the judge must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence.").

The state argues that *Johnson* is distinguishable because, in *Johnson*, "[t]he district court . . . did not indicate that there were any grounds for departure," *Johnson*, 756

[commission] . . . inadvertently overlooks." *Martinco v. Hastings*, 265 Minn. 490, 497, 122 N.W.2d 631, 638 (1963).

N.W.2d at 896, and here, the district court stated that "in making [the sentences] consecutive" it considered that "injuries to both victims . . . were severe," and "the offense . . . occurred in the . . . residence of one [victim where] . . . the other was a guest . . . in the middle of the night, in the bedroom, being awakened from sleep." But the hearing transcript reflects that both parties' attorneys and the district court erroneously believed that appellant's offenses were eligible for permissive consecutive sentencing. The district court could not have intended its comments to disclose its reasons for departing from a presumptive sentence because it thought it was imposing a presumptive sentence. Thus, the state's attempt to distinguish *Johnson* fails.

After the *Johnson* decision, the guidelines commission amended section VI. Effective August 1, 2009, the language "Convictions for attempted offenses or conspiracies to commit offenses listed below are eligible for permissive consecutive sentences as well as convictions for completed offenses" was added at the beginning, and the phrase "Conspiracy/Attempted Murder in the First Degree" was deleted from section VI, the list of eligible offenses. Minn. Sent. Guidelines VI. The 2009 amendment was thus a change in the existing law. See *Frieler v. Carlson Mktg. Grp.*, 751 N.W.2d 558, 566 (Minn. 2008) ("An amendment . . . is normally presumed to change the law unless it appears that the legislature only intended to clarify the law."). The addition of all "attempted offenses or conspiracies" to the list of offenses eligible for permissive consecutive sentencing was a change, not a clarification, of a list that previously included only one attempted offense and conspiracy.

Because the date an offense is committed determines the applicable version of the guidelines, neither a district court nor this court has authority to apply any other version. *See* Minn. Sent. Guidelines III.F (2010). In 2006, when appellant's offenses were committed, attempted second-degree murder, of which he was convicted, was not eligible for permissive consecutive sentencing. The 2009 amendment of section VI does not apply to appellant's 2006 offenses.

The dissent relies on *State v. Cruz-Ramirez*, 771 N.W.2d 497 (Minn. 2009) and *State v. Rivers*, 787 N.W.2d 206 (Minn. App. 2010). Both cases are distinguishable because neither involved a felony offense omitted from Section VI.

Cruz-Ramirez involved a 2007 incident in which a defendant shot four victims, one of whom died. *Id*. at 502. The defendant "was sentenced for the first-degree premeditated murder . . . to a life sentence with no possibility of release" and "to three consecutive 186-month sentences for the attempted first-degree murder of the other three victims." *Id.* at 504. The guidelines applicable to a 2007 offense list attempted first-degree murder as eligible for permissive consecutive sentencing. *See* Minn. Sent. Guidelines VI (2006). Thus, the three consecutive sentences in *Cruz-Ramirez* complied with the guidelines, and *Cruz-Ramirez* had no reason to address the guidelines. *Cruz-Ramirez* does not support either applying a version of the guidelines other than the version mandated by the date of the offense or imposing a sentence that does not comply with the applicable version without indicating reasons for a departure.[4]

[4] To conclude that the multiple sentences were not an abuse of discretion, *Cruz-Ramirez* relies on *State v. Richardson*, 670 N.W.2d 267, 284 (Minn. 2003) (2001 offense) and

Rivers involved consecutive sentences for two 2008 offenses: gross-misdemeanor child-endangerment domestic assault and first-degree burglary. 787 N.W.2d at 212. Because the sentencing guidelines pertain only to felonies, not to gross misdemeanors, they did not apply to the gross-misdemeanor sentence. *Id*. at 213. Thus, the guidelines did not prohibit the consecutive sentencing of a conviction of gross-misdemeanor child-endangerment domestic assault and felony first-degree burglary. *Id*. Like the sentence in *Cruz-Ramirez*, the sentence in *Rivers* complied with the applicable guidelines. Neither *Cruz-Ramirez* nor *Rivers* supports imposing consecutive sentences for two felony convictions of attempted second-degree murder resulting from an offense committed in 2006, when the list of crimes eligible for permissive consecutive sentencing in section VI of the guidelines did not include any attempted felonies other than attempted first-degree murder.

Because the district court did not abuse its discretion by admitting the photographs of appellant, we affirm his conviction. Because appellant's sentence did not conform to the applicable version of the sentencing guidelines, and no basis was provided for a

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State v. Whittaker, 568 N.W.2d 440, 453 (Minn. 1997) (1996 offense). *See State v. Cruz-Ramirez*, 771 N.W.2d 497, 511-12 (Minn. 2009). In both these cases, the applicable guidelines permitted consecutive sentences for multiple felonies with multiple victims. *See* Minnesota Sent. Guidelines II.F.2 (2002) (cited in *Richardson*, 670 N.W.2d at 284, for the proposition that "[c]onsecutive sentencing of multiple felonies with multiple victims is permissive and within the broad discretion of the [district] court"); *see also Whittaker*, 568 N.W.2d at 453 (noting that supreme court does not generally review sentencing "when the sentences imposed are all within the guidelines range" and affirming consecutive sentences). Thus, neither *Richardson* nor *Whittaker* supports the imposition of consecutive sentences not permitted by the guidelines without providing reasons for a departure.

departure from those guidelines, we reverse and remand for a sentence that either conforms to the guidelines or follows the appropriate procedures for a departure.

Affirmed in part, reversed in part, and remanded.

Date: _____ _____

Judge Natalie E. Hudson

CONNOLLY, Judge (concurring in part, dissenting in part)

I concur in part I of the decision, but respectfully dissent from part II. I would affirm the district court's imposition of consecutive sentences because caselaw has long authorized consecutive sentences when crimes are committed against multiple victims even if the crimes are committed in a single behavioral incident.

In this case, appellant was convicted of two counts of attempted second-degree murder against separate victims. He brutally stabbed two people. As recently as 2009, the Minnesota Supreme Court has held that "when multiple victims are involved, multiple and consecutive sentences are allowed." *State v. Cruz-Ramirez*, 771 N.W.2d 497, 512 (Minn. 2009) (citing *State v. Richardson*, 670 N.W.2d 267, 284 (Minn. 2003)). "As long as the multiple sentences do not unfairly exaggerate the criminality of the conduct, one sentence may be imposed for each victim." 771 N.W.2d at 512 (citing *State v. Whittaker*, 568 N.W.2d 440, 453 (Minn. 1997)). This caselaw represents the supreme court's most recent expression of its opinion on the issue of multiple and consecutive sentences when a crime is committed against multiple victims and "we are bound to follow Minnesota Supreme Court precedent." *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 439-40 (Minn. App. 2005), *review denied* (Minn. June 14, 2005).

Prior to appellant's offenses, the Minnesota Sentencing Guidelines provided for permissive consecutive sentencing for multiple current felony convictions for "crimes against different persons." Minn. Sent. Guidelines II.F.2 (2004). This included attempted second-degree murder. In 2005, Minn. Sent. Guidelines II.F.2 was modified to provide that consecutive sentences were only permissive for defendants convicted of

certain enumerated felonies. For reasons not explained, attempted second-degree murder was left off this list of enumerated felonies. *See* Minn. Sent. Guidelines VI (2005). This list formed the basis for our decision in *State v. Johnson*, 756 N.W.2d 883, 895 (Minn. App. 2008), *review denied* (Minn. Dec. 23, 2008). In *Johnson* this court said, "[we] must infer that the guidelines commission intended to exclude" attempted second-degree murder from the list of crimes eligible for permissive consecutive sentencing because "[i]f the commission meant to include all attempted offenses, it would not have listed attempted first-degree murder as the only attempted homicide." *Id*. This line of reasoning, however, is no longer persuasive because in direct response to *Johnson*, the sentencing guidelines were revised in 2009 to once again include attempted second-degree murder on the list of enumerated felonies eligible for permissive consecutive sentencing. Minn. Sent. Guidelines II.F.2(b) & VI (2009). This implies that the commission never intended to exclude attempted second-degree murder from the list of crimes eligible for permissive consecutive sentencing. Crimes also added, among others, to the list in 2009 which had also been left off the list of enumerated felonies in 2005 include attempted third-degree murder, attempted assault with a dangerous weapon, attempted murder of an unborn child, and attempted first-degree arson. *Compare* Minn. Sent. Guidelines VI (2005) *with* Minn. Sent. Guidelines VI (2009) (stating that convictions for attempted offenses and conspiracy offenses of crimes on list are eligible for permissive consecutive sentences).

Although I agree that between 2005 and 2009 attempted second-degree murder was not on the sentencing guideline's list of enumerated felonies, I do not believe that is

the end of the analysis. *Johnson* simply did not address the fact that, apart from the guidelines, our own caselaw has always supported permissive consecutive sentencing for crimes committed against multiple victims. Indeed, just this year in *State v. Rivers* we stated that: "[t]he authority for separate consecutive sentences for multiple victims is, therefore, *based on caselaw*, not the sentencing guidelines." 787 N.W.2d 206, 213 (Minn. App. 2010) (emphasis added), *review denied* (Minn. Oct. 19, 2010). To hold otherwise would be to suggest that before 2005 and after 2009, a criminal could stab two people nearly to death and receive consecutive sentences, while between 2005 and 2009 the same criminal could commit the same crimes and receive only concurrent sentences. Such a scenario defies common sense and minimizes the injury to each victim. *See State v. Branson*, 529 N.W.2d 1, 4 (Minn. App. 1995) (where multiple victims are involved, consecutive sentencing appropriate to recognize severity of each crime), *review denied* (Minn. Apr. 18, 1995). Consequently, I would affirm the district court's sentencing decision.