STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1037

State of Minnesota,
Respondent,

vs.

Brian Daniel Freeman,
Appellant.

Filed March 17, 2014
Affirmed
Hooten, Judge

Faribault County District Court
File No. 22-CR-12-109

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

Troy Timmerman, Faribault County Attorney, Lamar Piper, Assistant County Attorney, Blue Earth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

HOOTEN, Judge

Appellant challenges the imposition of four consecutive sentences totaling 594 months' imprisonment, arguing that the sentence unfairly exaggerates the criminality of his offense. We affirm.

FACTS

Appellant Brian Freeman and Ca.F. were married and had one child together. Ca.F. had two additional minor children, B.D. and T.D., from a previous relationship. The marriage endured difficulties and Ca.F. began a relationship with Ch.F. On or around the late evening of February 19, 2013, appellant drove from Ceylon to Ch.F.'s residence in Blue Earth to determine whether Ca.F. was cheating on him. Appellant donned a facemask, grabbed a hammer, entered Ch.F.'s residence, and went upstairs. He walked into a bedroom and found Ch.F. and Ca.F. sleeping together. Appellant attacked Ch.F. with the hammer. Appellant also struck Ca.F. and later B.D. and T.D. Appellant then fled the scene.

Officers arrived to find T.D. with blood in her hair. They found Ch.F. deceased and lying in bed with significant head trauma. Ca.F. was injured and pleading for help. She stated that an unknown individual wearing a facemask attacked them. At the hospital, officers interviewed T.D. who stated that she woke up to the sound of B.D. screaming. She then went upstairs to find her mother fighting with a large male wearing dark clothing.

An autopsy revealed that Ch.F. died of "[c]erebral injuries due to multiple blunt force/chop injuries" and that the manner of death was homicide. Ca.F. suffered a skull fracture and the loss of one eye. B.D. and T.D. also sustained skull fractures.

A grand jury indicted appellant on 11 criminal counts, including first-degree premeditated murder, first-degree felony murder, and second-degree intentional murder of Ch.F. Appellant later entered into a plea agreement and signed a plea petition indicating that he would plead guilty to one count of second-degree murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2012), for the death of Ch.F. and three counts of first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2012), for the attacks on Ca.F, B.D., and T.D. Appellant also agreed to be sentenced to four consecutive sentences—336 months for second-degree murder and 86 months for each assault—totaling 594 months' imprisonment. In exchange for the plea, the state agreed to dismiss the remaining counts in the indictment.

At the sentencing hearing, the district court found appellant guilty of the offenses and sentenced him according to the terms of the plea agreement.

This appeal follows.

D E C I S I O N

Appellant argues that the 594-month sentence exaggerates the criminality of his conduct. Minnesota Statutes section 609.035, subdivision 1 (2012), 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." "The purpose of section 609.035 is to protect against exaggerating the criminality of a person's conduct and to make both

punishment and prosecution commensurate with culpability." *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012) (quotation omitted). "But the legislature did not intend section 609.035 to immunize offenders in every case from the consequences of separate crimes intentionally committed in a single episode against more than one individual." *Id.* (quotation omitted). When multiple victims are involved, "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." *Id.* at 590 (quotation omitted). "There is no abuse of discretion when the consecutive sentence does not exaggerate the defendant's criminality," *Carpenter v. State*, 674 N.W.2d 184, 189 (Minn. 2004), and we generally do not review the district court's exercise of discretion in sentencing when the sentences imposed are within the guidelines' range, *State v. Whittaker*, 568 N.W.2d 440, 453 (Minn. 1997).

Appellant asserts that the sentence unfairly exaggerates the criminality of the offense because the consecutive sentences circumvent the maximum sentences prescribed by the legislature. In general, concurrent sentencing is presumptive when an offender is convicted of multiple current offenses. Minn. Sent. Guidelines 2.F (2012). However, consecutive sentencing is permissive when there are "multiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences in section 6." *Id.* 2.F.2.a(1)(ii). For each offense sentenced consecutive to another offense, a zero criminal-history score or the mandatory minimum for the offense, whichever is greater, is used in determining the presumptive duration. *Id.* cmt. 2.F.202.

Appellant's sentence is technically correct. Second-degree murder and first-degree assault qualify for permissive consecutive sentencing because they are listed in section 6 of the sentencing guidelines. *Id.* 6 (2012). Appellant received one sentence within the presumptive range for each offense and the sentences were based on a criminal-history score of zero. The presumptive range for second-degree murder with zero criminal history points is 261 to 367 months. *Id.* 4.A (2012). For first-degree assault, the presumptive range is 74 to 103 months. *Id.* Because appellant's sentence is within the guidelines' range for each conviction, and the convictions may be consecutively sentenced, the district court did not abuse its discretion.

Appellant asserts that the sentences exaggerate the criminality of the offense because "[t]he extent of the injuries suffered by the people that [he] hit were consistent with what is expected for second-degree murder and first-degree assault" and because his "actions were driven by an extreme emotional response to seeing his wife in bed with another man." But these are not appropriate considerations when reviewing whether a sentence unfairly exaggerates the criminality of an offense. Instead, "we are guided by past sentences received by other offenders for similar offenses." *Carpenter*, 674 N.W.2d at 189.

Appellant claims that his case is analogous to *State v. Norris*, 428 N.W.2d 61 (Minn. 1988) and *State v. Goulette*, 442 N.W.2d 793 (Minn. 1989). In *Norris*, defendant and a co-defendant, in connection with an armed robbery, entered a bar and ordered all of the 20 to 30 patrons to get on the floor while they obtained money from the cash register. 428 N.W.2d at 64. During the course of the robbery, one of the patrons was shot and

killed. *Id.* The defendant was charged and convicted of first-degree murder and five counts of second-degree assault. *Id.* at 70. He was later sentenced to life imprisonment for the murder and five consecutive sentences for each assault. *Id.* The supreme court noted that while it had upheld consecutive sentencing involving aggravated robbery, assault, and multiple victims in prior cases, none of these cases involved more than three multiple sentences and that most only involved two to be served consecutively. *Id.* at 70–71. The supreme court concluded that defendant's consecutive sentences exaggerated the criminality of his conduct and modified it by making three of the five sentences to be served concurrently, rather than consecutively, to each other. *Id.*

In *Goulette*, defendant entered a restaurant, pointed a gun at the employees, tied up four of the employees, and ordered a fifth employee to put cash into a bag. 442 N.W.2d at 794. Defendant was convicted of and sentenced consecutively on five counts of aggravated robbery. *Id.* Noting its decision in *Norris*, the supreme court concluded that the sentence unfairly exaggerated defendant's conduct and modified the sentences. *Id.* at 794–95.

The state points to *State v. Whittaker*, in which defendant, along with a co-defendant, entered a home later in the evening, shot two occupants (killing one), and assaulted six others. 568 N.W.2d at 444. Defendant received eight consecutive sentences: one life sentence for first-degree murder, one 180-month sentence for first-degree attempted murder, and six 36-month sentences for second-degree assault. *Id.* at 447. The supreme court affirmed the imposition of eight consecutive sentences:

> Whittaker's conduct involved the "invasion of a residence" and "complete terrorization of all of its occupants." Guns were waved at the assault victims, and several of the victims, including a 12-year-old girl, were individually ordered at gunpoint to the floor. One of the assault victims crouched in the corner and covered her head as she witnessed her son's murder. We conclude that the district court's imposition of consecutive sentences for Whittaker's assaults on these multiple victims did not unfairly exaggerate the criminality of Whittaker's conduct.

Id. at 453.

This case is more similar to *Whittaker* than *Norris* or *Goulette*. Appellant committed some of the same offenses as defendant in *Whittaker*. Appellant committed these crimes by entering a home at night. He committed the offenses in the presence of and against children. Moreover, the seriousness of the assaults is greater than those committed in *Norris* and *Whittaker*—appellant's assault victims suffered skull fractures and the loss of an eye. We conclude that appellant's sentence does not unfairly exaggerate the criminality of his conduct. The district court, consistent with the plea agreement, did not abuse its discretion by sentencing appellant to four consecutive sentences totaling 594 months.

Affirmed.