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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1475**

State of Minnesota,
Respondent,

vs.

Daniel A. Maldonado Zepeda,
Appellant.

**Filed August 14, 2017
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-14-25792

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Daniel Maldonado Zepeda pleaded guilty to one count of fourth-degree criminal sexual conduct and one count of pattern of stalking conduct after he frequently groped a female coworker. He now appeals his conviction and sentence, arguing that his criminal

sexual conduct was necessarily proved by, and therefore constitutes a lesser-included offense of, his pattern of stalking conduct. He also argues that his actions comprised a single criminal act that supports only a single conviction. Because the act underlying Maldonado Zepeda's criminal sexual conduct crime was not included in his pattern of stalking conduct, his lesser-included argument fails. And because his actions involved multiple occasions of sexual gratification over the course of five weeks, their difference in time and intent prevent their characterization as a single criminal act. We therefore affirm.

FACTS

S.C. reported to police in June 2014 that her coworker, Daniel Maldonado Zepeda, had been sexually harassing and touching her at work for the past five weeks. She reported that he initially made sexually inappropriate remarks. He advanced to physical contact, rubbing against her, thrusting his pelvis into her from behind, and touching her legs, buttocks, and breasts over her clothing. He attempted to put his hand down her pants, and he grabbed her hand and pulled it toward his crotch. S.C. repeatedly told him to cease, but, according to Maldonado Zepeda's admission to police, he just "could not stop himself."

The state charged Maldonado Zepeda with one count of pattern of stalking conduct in violation of Minnesota Statutes section 609.749, subdivision 5 (2012), and one count of fourth-degree criminal sexual conduct (force or coercion) in violation of Minnesota Statutes section 609.345, subdivision 1(c) (2012). Maldonado Zepeda pleaded guilty to both charges. He admitted that he touched S.C. on multiple occasions and that he "grabbed her hand and tried to put it . . . between [his] legs and [his] crotch." To support his guilty plea, he had this exchange with his attorney:

Q: Now you would agree that when you were doing that, you were -- you put her in a situation, uh, that, under the circumstances, she felt terrorized of you and feared bodily harm and you were doing this over and over?

A: Yeah.

Q: And under the law, there's a charge that you fall under, it's a pattern of stalking conduct. Would you agree to that?

A: Yeah.

Q: And you did that by force?

A: Yeah.

Q: [A]nd when you did that, uh, each time -- many times that you did this, and not all, you were doing it with the purpose of having sexual contact with her?

A: Yeah.

The prosecutor stated at sentencing that "Maldonado Zepeda could have been charged with multiple individual counts of nonconsensual sexual contact," and that "he's charged with pattern over the course of five weeks, and then an instance where there's one act of criminal sexual conduct in the fourth degree . . . that occurred during that time period." The district court issued consecutive sentences on both charges.

Maldonado Zepeda appeals.

D E C I S I O N

Maldonado Zepeda challenges his criminal sexual conduct conviction on two bases. He asserts that the conviction is improper because the state proved fourth-degree criminal sexual conduct with facts that proved the pattern of stalking conduct, making his criminal sexual conduct a lesser-included offense. He also contends that his conduct constitutes a single criminal act warranting a single conviction and sentence. Neither argument prevails.

I

The state maintains that Maldonado Zepeda forfeited his lesser-included-offense argument because he did not present it to the district court. But the supreme court has held that an appellant does not forfeit his multiple-convictions claim or multiple-sentences claim by failing to raise them at sentencing. *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007). We therefore reject the state’s forfeiture argument and turn to the merits of Maldonado Zepeda’s lesser-included-offense argument, which we consider de novo. *See State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

A defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2012). “A crime necessarily proved if the crime charged were proved” is considered an included offense. *Id.*, subd. 1(4). This requires us to compare the elements of stalking to the elements of criminal sexual conduct.

A person is guilty of pattern of stalking conduct when he “engages in a pattern of stalking conduct with respect to a single victim . . . which the actor knows or has reason to know would cause the victim under the circumstances to feel terrorized or to fear bodily harm and which does cause this reaction” Minn. Stat. § 609.749, subd. 5(a). “A ‘pattern of stalking conduct’ means two or more acts within a five-year period that violate or attempt to violate” a number of enumerated provisions, including “sections 609.342 to 609.3451 (first- to fifth-degree criminal sexual conduct).” *Id.*, subd. 5(b)(15).

By contrast, a person commits fourth-degree criminal sexual conduct by engaging in “sexual contact with another person” and by using “force or coercion to accomplish the sexual contact.” Minn. Stat. § 609.345, subd. 1(c). “Sexual contact” includes “the

intentional touching by the actor of the complainant's intimate parts," "the touching by the complainant of the actor's . . . intimate parts . . . by coercion," or "the touching of the clothing covering the immediate area of the intimate parts" without consent and "committed with sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(a)(i), (ii), (iv) (2012). "Intimate parts" include a person's "primary genital area, groin, inner thigh, buttocks, or breast." *Id.*, subd. 5 (2012). "Force" is defined as

the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.

Id., subd. 3 (2012). And "coercion" is defined as

the use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant or another, or the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant's will.

Id., subd. 14 (2012).

Maldonado Zepeda's argument depends on the "force or coercion" component of his criminal sexual conduct conviction. He admitted that he contacted S.C.'s intimate parts at least three times, touching her legs, buttocks, and breasts over her clothing. He also admitted that he grabbed S.C.'s hand and pulled it to his crotch. He agreed with his attorney's statement that his conduct "fall[s] under" the charge of pattern of stalking conduct. And he acknowledged that he "did that by force." Maldonado Zepeda maintains

that he could have committed a pattern of stalking conduct only “if he also committed fourth-degree criminal sexual conduct” because “the state’s allegation is that Mr. Maldonado Zepeda was guilty of a pattern of stalking conduct because he engaged in a series of acts that qualified as fourth-degree criminal sexual conduct—namely, touching [S.C.]’s breasts and buttocks and putting [S.C.]’s hand on his crotch.” He implicitly contends that his general admission that he used “force” elevates each touching instance to fourth-degree criminal sexual conduct.

But Maldonado Zepeda did not admit facts that establish multiple instances of sexual touching by force. His admissions establish that he used physical force only once—when he pulled S.C.’s hand toward his crotch. As we view the record, the admitted facts establish just one instance of nonconsensual touching that supports of the fourth-degree criminal sexual conduct charge, and *multiple* instances of nonconsensual touching that support the pattern of stalking conduct charge. The state charged the crimes separately and did not seek to prove stalking by proving fourth-degree criminal sexual conduct. The stalking offense is therefore not included under the criminal sexual conduct offense.

II

Maldonado Zepeda argues additionally that, because his conduct constituted a single criminal act under Minnesota Statutes section 609.035 (2012), the district court inappropriately entered multiple convictions and sentences. Whether a defendant’s offenses occurred as a part of a single course of conduct is a mixed question of law and fact. *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). We review the district court’s findings of fact for clear error, but we review the district court’s application of the law to

those facts de novo. *Id.* The answer depends on the time and location of the offenses and whether they were motivated by a single criminal objective. *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006).

Maldonado Zepeda does not challenge the district court's general factual findings, only its conclusion that his conduct did not constitute a single behavioral incident (a conclusion that similarly applies to single criminal acts). He declares that his "offenses shared a unity of time and place" and that they shared "an indivisible state of mind," which was "to have sexual contact" with S.C.

We believe our reasoning in *State v. Suhon* directs the result here. 742 N.W.2d 16 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008). In *Suhon*, as here, the defendant engaged in multiple instances of nonconsensual sexual conduct with the same victim, he abused the same victim in the same building, and his intent in each encounter was to gratify himself sexually. 742 N.W.2d at 24. We analyzed Suhon's single-incident argument in part this way:

[D]ays passed between the incidents, and sometimes up to a week. Although the abuse always occurred in the Suhon home, it happened in many different rooms and at different times. And this court has held under similar facts that "motivation by perverse sexual desires" is too broad to constitute a single criminal objective. Suhon's abuse did not constitute a single behavioral incident

Id. (citations omitted).

As to Maldonado Zepeda's temporal-unity argument, as in *Suhon*, the conduct occurred on multiple occasions. It is true that Maldonado Zepeda's five-week conduct occurred over a shorter period than Suhon's. But the supreme court has held that no unity

of time existed between multiple incidents occurring in just a single weekend, *see, e.g., State v. McLemore*, 351 N.W.2d 927, 928 (Minn. 1984), and between incidents occurring within five hours of each other, *see, e.g., State v. Stevenson*, 286 N.W.2d 719, 720 (Minn. 1979). We see no temporal unity here.

A closer issue concerns unity of place. Maldonado Zepeda's conduct occurred in the same general location—the workplace. But in *Suhon*, the abuse occurred in various locations within Suhon's home. 742 N.W.2d at 24. The record does not say *where* within the workplace Maldonado Zepeda's offenses occurred. We can assume unity of location for the sake of our analysis.

Maldonado Zepeda argues that his singular intention in touching S.C. was “to have sexual contact” with her. As to whether the defendant had a singular intention, we consider the relationship of the incidents to each other. *Jones*, 848 N.W.2d at 533. “Broad statements of criminal purpose do not unify separate acts into a single course of conduct.” *Id.* And offenses are independent of each other when “nothing in the record reveals that either crime was in furtherance of the other or . . . a single criminal objective.” *Mercer v. State*, 290 N.W.2d 623, 626 (Minn. 1980). Just as the defendant's general assertion of “perverse sexual desires” was too broad a statement of intent in *Suhon*, 742 N.W.2d at 24, Maldonado Zepeda's desiring sexual contact is too broadly stated to unite his acts into a single criminal act. *See also State v. Secrest*, 437 N.W.2d 683, 685 (Minn. App. 1989), *review denied* (Minn. May 24, 1989). We observe that the caselaw is not entirely clear on this point. *Compare State v. Bakken*, 871 N.W.2d 418, 425–26 (Minn. App. 2015) (holding that collecting child pornography for “personal sexual gratification” was too broad a criminal

objective to be a single criminal act), *aff'd*, 883 N.W.2d 264 (Minn. 2016), with *State v. Herberg*, 324 N.W.2d 346, 349 (Minn. 1982) (relying on defendant's motivation "to satisfy his perverse sexual needs" to find single behavioral incident where multiple sexual acts occurred in a single afternoon), and *State v. Spears*, 560 N.W.2d 723, 727 (Minn. App. 1997) (following *Herberg*'s sexual-needs rationale when "[a]ll three offenses took place in Spears's parked car within a 45-minute period"), *review denied* (Minn. May 28, 1997). But we are certain that our approach in *Suhon* fits here. Although Maldonado Zepeda's actions have a *similar* intent, they do not have a *shared* intent, in that the instances do not build upon one another. See *Mercer*, 290 N.W.2d at 626. As the state argued at sentencing, Maldonado Zepeda's "sexual contacts were not done with a purpose to harass, but were mainly motivated by [his] sexual impulses." An impulse to pursue sexual contact with a person in one instance may be similar to an impulse to pursue sexual contact with the same person on a different day, but each of those impulses is an independent dynamic.

This case differs materially from those in which multiple acts supported a unifying, single objective. For example, Maldonado Zepeda did not admit that his purpose was to repeatedly harass, intimidate, or stalk S.C. See, e.g., *Jones*, 848 N.W.2d at 533 (finding single course of conduct because defendant sent 33 text messages to victim within two and a half hours, while the victim was at work, and with "a singular intent to intimidate and harass" the victim); *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000) (finding single behavioral incident because conduct occurring on the street in front of victims' home over the course of a year was directed toward a single criminal objective of harassing the victims and criminal complaint used identical facts for multiple counts); *State v. Mullen*, 577

N.W.2d 505, 511–12 (Minn. 1998) (finding unity of time, place, and intent where “telephone calls and breaking [a] window occurred within a few hours and were motivated by a continuous intent to harass” the victim); *but see State v. Richardson*, 633 N.W.2d 879, 888–89 (Minn. App. 2001) (finding that single purpose of harassing victims did not establish single behavioral incident when defendant’s conduct occurred against multiple victims between 1991 and 1999). Maldonado Zepeda’s separate acts of sexual contact in different forms on different days imply that he sought to satisfy his recurring but distinct sexual interests as they affected him on different occasions. We see no overall, unifying intent in his conduct.

Affirmed.