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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-1006**

State of Minnesota,  
Respondent,

vs.

Salahaldeen Avdil Hamad,  
Appellant.

**Filed July 15, 2019  
Affirmed in part, reversed in part, and remanded  
Slieter, Judge**

Clay County District Court  
File No. 14-CR-17-2063

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and  
Slieter, Judge.

**UNPUBLISHED OPINION**

**SLIETER**, Judge

In this direct appeal from final judgments of conviction for multiple counts of first-degree and attempted first-degree criminal sexual conduct, appellant argues that (1) the

district court abused its discretion by admitting the victim's out-of-court recorded statements at trial, (2) his multiple offenses represented a single behavioral incident and he should have received only one sentence, (3) his 360-month sentence is disproportionately long, and (4) the district court erred by convicting appellant on all counts. We affirm in part, reverse in part, and remand.

## **FACTS**

On June 10, 2017, 14-year-old M.A. told her brother that appellant Salahaldeen Avdil Hamad, M.A.'s father, sexually assaulted her the prior evening. M.A.'s brother contacted law enforcement. Detective Chris Martin with the Moorhead Police Department responded, and M.A. gave two recorded interviews. In these interviews, M.A. described several incidents of sexual abuse that occurred from January 2016 to June 2017. During this time, the family lived in two houses in Moorhead, Minnesota. M.A. refers to these houses as the "old" house, where the family lived from about January 2016 to August 2016, and the "new" house, where the family lived from about September 2016 to June 2017.

The state charged appellant with four counts of first-degree criminal sexual conduct (CSC), two counts of attempted first-degree CSC, and one count of malicious punishment of a child. Counts 1, 3, and 5 are based on abuse that occurred in the two homes that appellant and M.A. occupied during the relevant time; the counts are charged pursuant to Minn. Stat. § 609.342, subd. 1(b) (2016) (engaging in sexual penetration with person who is at least 13 but less than 16 and actor is more than 48 months older than complainant and in a position of authority over the complainant). Counts 2, 4, and 6 are based on the same conduct and timeframe but are charged pursuant to Minn. Stat. § 609.342, subd. 1(g) (2016)

(engaging in sexual penetration with person who is under 16 and with whom actor has a “significant relationship”). Finally, count 7 is based on an incident in the new house where appellant beat M.A. with a belt.

At trial, M.A. testified that shortly after midnight on June 10, 2017, appellant attempted to penetrate M.A.’s anus with his penis and attempted to penetrate M.A.’s vagina with his fingers. M.A. also testified that appellant had previously sexually assaulted her several times in the new house, including making M.A. perform oral sex on him, penetrating her anus with his penis, and groping M.A.’s breasts and vagina. When asked about abuse occurring in the old house, M.A. testified that “similar stuff” occurred but she did not remember specific acts of first-degree criminal sexual conduct.

During cross-examination, appellant challenged M.A.’s credibility. The state then offered M.A.’s recorded interviews with Detective Martin. Appellant did not object. Appellant knew of the state’s intent to introduce M.A.’s interviews. During a pretrial hearing, the parties discussed admitting M.A.’s interviews and appellant requested parts of the interviews be redacted.

In the recordings played for the jury, M.A. recounted sexual assaults that occurred in the old house. M.A. described appellant penetrating her anus with his penis, forcing her to perform oral sex on him, and touching her breasts and vagina.

The jury found appellant guilty on all counts. The district court sentenced appellant to a total of 360 months: 144 months on count 3; 144 months on count 5, consecutive to count 3; 72 months on count 1, consecutive to counts 3 and 5; and 365 days on count 7, concurrent to counts 3 and 5. The district court did not impose sentences on counts 2, 4,

and 6, finding that these counts were based on the same behavioral incident as other counts. On the order and warrant of commitment, the district court entered convictions on all counts. This appeal follows.

## D E C I S I O N

### **I. The district court did not abuse its discretion by admitting M.A.’s interviews with Detective Martin.**

Appellant argues that the district court abused its discretion by admitting into evidence M.A.’s interviews with Detective Martin. “The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.” *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted).

Because appellant did not object at trial to the introduction of M.A.’s recorded statements, we review their admission for plain error. Minn. R. Crim. P. 31.02. Plain error requires the defendant to show (1) error, (2) that was plain, and (3) that affected the defendant’s substantial rights. *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). “If all three requirements are met, we then determine whether relief is required to ensure fairness and the integrity of the judicial proceedings.” *State v. Fraga*, 898 N.W.2d 263, 277 (Minn. 2017) (quotation omitted). This fourth prong is satisfied only “in those circumstances in which a miscarriage of justice would otherwise result.” *State v. Huber*, 877 N.W.2d 519, 528 (Minn. 2016) (quotation omitted). The plain error doctrine “authorizes appellate courts to correct only particularly egregious errors[]—in other words, those errors that seriously

affect the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (quotation and citations omitted).

Appellant contends that M.A.’s recorded statements were inadmissible hearsay. Hearsay is an out-of-court statement offered for its truth and is generally inadmissible evidence. Minn. R. Evid. 801(c), 802. The state responds that M.A.’s recorded statements were admissible pursuant to Minn. R. Evid. 801(d)(1)(B). This rule provides that a witness’s prior out-of-court statement that is consistent with his or her trial testimony is admissible as nonhearsay evidence if the statement is helpful to the trier of fact in evaluating the witness’s credibility. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). Before a statement may be admitted under rule 801(d)(1)(B), the district court must make a “threshold determination” that the witness’s credibility has been challenged. *Id.* The prior statement must also be consistent with the witness’s trial testimony. *Id.*

Appellant argues that because M.A. testified only that “similar stuff” occurred in the old house and the new house, but could not remember specific acts of first-degree CSC, her recorded statements describing first-degree CSC in the old house were not consistent with her trial testimony. Thus, appellant argues, her recorded statements are not admissible as prior consistent statements pursuant to Minn. R. Evid. 801(1)(d)(B).

Though M.A.’s recorded statements might not have been consistent with her trial testimony, the district court did not commit plain error. In *State v. Manthey*, our supreme court examined the application of plain-error review to hearsay evidence. 711 N.W.2d 498, 504 (Minn. 2006). The supreme court recognized that the “complexity and subtlety

of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted at trial.” *Id.* “In the absence of an objection, the state [is] not given the opportunity to establish that some or all of the statements were admissible under one of the numerous exceptions to the hearsay rule.” *Id.*

M.A.’s statements were not clearly or obviously inadmissible hearsay and by failing to object, even with notice of the statements’ proposed admission, appellant denied the state the opportunity to establish their admissibility. We conclude that it was not plain error for the district court to admit M.A.’s interviews.

**II. The district court properly determined that counts 1, 3, and 5 were not a single behavioral incident.**

Appellant challenges the district court’s imposition of sentences on counts 1, 3, and 5, arguing that because the convictions stem from a single behavioral incident, he should receive only one sentence. Appellant does not challenge the district court’s sentence on count 7. “Whether the offenses were part of a single behavioral incident is a mixed question of law and fact, so we review the district court’s findings of fact for clear error and its application of the law to those facts *de novo*.” *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

In Minnesota, “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 (2016). “[W]here multiple offenses arise from a single behavioral incident, a conviction or acquittal for one offense bars prosecution for any additional offense.” *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). “The single behavioral

incident statute protects criminal defendants from both multiple prosecutions and multiple sentences for offenses resulting from the same behavioral incident.” *Id.*

Appellant’s argument is unfounded. In addition to being separate instances of abuse, the acts occurred in different houses at different times. “Multiple acts against the same victim do not constitute a single behavioral incident when the individual acts are separated by time and place.” *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008). The district court did not err in finding that counts 1, 3, and 5 were separate behavioral incidents.

### **III. The district court did not impose a disproportionately long sentence.**

Appellant also argues that the district court imposed an excessive and disproportionate sentence. This court will not interfere with a district court’s sentencing decision unless the sentence is “disproportionate to the offense or unfairly exaggerates the criminality of the defendant’s conduct.” *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007) (quotation omitted). This court’s review is guided by sentences imposed on other similarly situated offenders, *id.*, acknowledging that a district court has “a unique perspective on all stages of a case, including sentencing, and . . . is in the best position to evaluate the offender’s conduct and weigh sentencing options.” *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998).

#### **A. State’s Charging Decision**

Appellant first appears to challenge the length of his sentence by attacking the state’s charging decision. Appellant argues that charging him with two counts of first-degree criminal sexual conduct and one count of attempted first-degree criminal sexual

conduct exaggerates the criminality of his conduct. Instead, appellant reasons, the state should have brought a single count pursuant to section 609.342, subdivision 1(h)(iii)—this subdivision applies to sexual abuse that “involved multiple acts committed over an extended period of time.” Minn. Stat. § 609.342, subd. 1(h)(iii) (2016).

But “a prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the prosecutor’s exercise of that discretion” absent special circumstances. *State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996). In the absence of limiting statutory language, a court gives deference “to the prosecutor’s discretion to evaluate the facts of a case, which may lead to various combinations of charges, and to select the particular charges best suited to achieve justice.” *State v. Richardson*, 633 N.W.2d 879, 884 (Minn. App. 2001).

There are no special circumstances here permitting us to interfere with the state’s charging decision. We note that even if the state had charged appellant pursuant to section 609.342, subdivision 1(h)(iii), it was not required to allege a single count. *Suhon* makes clear that this statute permits “the state to charge multiple counts for each extended period of abuse, [and] do[es] not preclude multiple charges merely because the multiple periods might alternatively constitute a single, longer period.” 742 N.W.2d at 22-23.

Appellant also argues that his sentence is disproportionate because the state charged the most recent acts of abuse as separate counts, instead of including them as part of the other counts. Appellant contends that these counts were essentially acts of abuse in a series of acts and were not removed in time nor of different conduct than the other counts.

In support of his argument, appellant relies on a 2008 unpublished opinion. Unpublished cases are not binding precedent. On review, the unpublished case is unpersuasive—that case involved charges under the multiple-acts-over-time subdivision of section 609.342 and an upward departure. Appellant was not charged under this subdivision, nor did the district court impose an upward departure.

#### **B. Comparison to other Sentences**

Appellant also argues that his 360-month sentence is disproportionate when compared to other sentences. In reviewing sentences, “the final analysis . . . must be based on our collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts.” *Rairdon v. State*, 557 N.W.2d 318, 327 (Minn. 2007) (quotation omitted). In our collective experience, appellant’s 360-month cumulative sentence is not excessive. A review of caselaw shows several defendants sentenced similarly. *See State v. Labatte*, No. A18-0926, 2019 WL 1591793, at \*7 (Minn. App. Apr. 15, 2019) (532-month sentence for two counts of first-degree criminal sexual conduct); *State v. Nordquist*, No. A17-1180, 2018 WL 3717078, at \*9 (Minn. App. Aug. 6, 2018) (360-month sentence for two counts of first-degree CSC); *State v. Kingbird*, No. A15-2001, 2018 WL 1997342, at \*2 (Minn. App. Apr. 30, 2018) (360-month sentence for three counts of first-degree CSC), *review denied* (Minn. July 17, 2018).

#### **IV. The district court erred by convicting appellant on all counts.**

Appellant argues, and the state agrees, that the district court erred by entering convictions on counts 2, 4, and 6. The district court did not impose sentence on counts 2, 4, and 6, but did enter convictions on them. *See Spann v. State*, 740 N.W.2d 570, 573

(Minn. 2007) (stating that the official judgment of conviction is “conclusive evidence of whether an offense has been formally adjudicated”).

“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2016). The supreme court has interpreted this statute to mean that “a defendant may not be convicted of two counts of criminal sexual conduct (different sections of the statute or different subsections) on the basis of the same act or unitary course of conduct.” *State v. Folley*, 438 N.W.2d 372, 373 (Minn. 1989).

The district court erred by entering convictions on counts 2, 4, and 6. Accordingly, we reverse and remand to the district court with directions to vacate appellant’s adjudicated convictions on counts 2, 4, and 6.

**Affirmed in part, reversed in part, and remanded.**