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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1889**

State of Minnesota,
Respondent,

vs.

Davone Laquin Jordan,
Appellant.

**Filed November 23, 2020
Affirmed
Johnson, Judge**

Olmsted County District Court
File Nos. 55-CR-19-2258, 55-CR-19-632

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Assistant County Attorney,
Rochester, Minnesota (for respondent)

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Considered and decided by Frisch, Presiding Judge; Johnson, Judge; and Schellhas,
Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant
to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JOHNSON, Judge

Davone Laquin Jordan pleaded guilty to two counts of felony domestic assault arising from two different incidents that occurred on two different dates and involved two different women. The district court imposed consecutive prison sentences of 32 months and 12 months and one day. Jordan's primary argument on appeal is that the consecutive sentences are disproportionate to the severity of his conduct. We conclude the district court did not abuse its discretion by imposing consecutive sentences and, therefore, affirm.

FACTS

In January 2019, the state charged Jordan with two counts of felony domestic assault, in violation of Minn. Stat. § 609.2242, subd. 4 (2018), and one count of threats of violence, in violation of Minn. Stat. § 609.713, subd. 1 (2018). The state alleged that, during the evening of January 23, 2019, Jordan and his then-girlfriend argued at the apartment they shared and that Jordan became angry, stood close to her with clenched fists, threatened to hurt her or members of her family, grabbed her by the shoulders and threw her onto a couch, and tried to choke her with a scarf.

Approximately two months later, the state charged Jordan with domestic assault by strangulation, in violation of Minn. Stat. § 609.2247, subd. 2 (2018); felony domestic assault, in violation of Minn. Stat. § 609.2242, subd. 4; threats of violence, in violation of Minn. Stat. § 609.713, subd. 1; and false imprisonment, in violation of Minn. Stat. § 609.255, subd. 2 (2018). The state alleged that, during the evening of March 31, 2019, Jordan and a woman with whom he was in a romantic relationship (a different woman from

the woman involved in the prior incident) argued in a motel room they shared and that Jordan became angry, slammed her into a wall, squeezed her throat with both hands to the point that she nearly lost consciousness, slapped her face twice, prevented her from leaving the room by barricading the door, and threatened to kill her if she tried to leave.

In May 2019, Jordan and the state entered into a plea agreement. Jordan agreed to plead guilty to two counts of felony domestic assault, one count in each case. The state agreed to dismiss the remaining five charges and agreed to a downward dispositional departure so long as the assigned correctional officer determined that Jordan is particularly amenable to probation. The parties also agreed that Jordan would be released to an in-patient treatment facility pending sentencing and that the sentencing hearing would not be held until at least 100 days later. The parties further agreed that if Jordan were discharged from treatment or were to leave the treatment facility for any other reason, he would be required to voluntarily return to jail within two days and would receive consecutive executed sentences if he failed to do so.

During the plea hearing, Jordan admitted that, on January 23, 2019, he grabbed his then-girlfriend by her shoulders and threw her onto a couch. He also admitted that, on March 31, 2019, he slapped the second woman. The district court accepted Jordan's pleas and adjudicated him guilty of both offenses. The district court implemented the parties' plea agreement by releasing Jordan to an in-patient treatment facility pending sentencing and scheduling the sentencing hearing for a date approximately 100 days in the future.

Jordan began in-patient treatment on May 16, 2019. The district court was advised on June 11, 2019, that, earlier that day, Jordan was "discharged unsuccessfully due to

several behavioral problems.” The following day, the district court gave notice to the parties that it would issue an arrest warrant if Jordan did not report to the Olmsted County jail by June 13, 2019, at 2:00 p.m. Jordan did not do so. The district court issued the warrant on June 14, 2019. Jordan was arrested and taken into custody on July 16, 2019.

Before the sentencing hearing, Jordan moved for a downward dispositional departure in each case. At the sentencing hearing, the district court stated that it had reviewed the pre-sentence investigation (PSI) report, a letter that Jordan wrote to the court, and a memorandum in support of the departure motion. The district court also listened to two victim-impact statements and Jordan’s allocution. The state opposed the motion and requested that the district court follow the recommendation in the PSI report to impose consecutive executed sentences. The district court denied the motion and imposed consecutive executed sentences of 32 months of imprisonment in the first case and 12 months and one day of imprisonment in the second case, resulting in an aggregate term of imprisonment of approximately 44 months. Jordan appeals.

D E C I S I O N

A.

Jordan first argues that the district court erred by basing its sentencing decision in the second case on a mistaken belief that he had pleaded guilty to domestic assault by strangulation, not domestic assault. Jordan contends that, as a result of the alleged mistake, the district court sentenced him for conduct for which he was not convicted, contrary to *State v. Womack*, 319 N.W.2d 17 (Minn. 1982), in which the supreme court held that a

district court may not impose an aggravated sentence based on the alleged conduct associated with a charge that has been dismissed. *Id.* at 19.

Jordan's argument is based on the fact that, at the outset of the sentencing hearing, the district court stated that Jordan would be sentenced for "domestic assault felony" in the first case and "domestic assault strangulation" in the second case. The district court's reference to "domestic assault strangulation" was inaccurate because Jordan pleaded guilty to felony domestic assault in both cases and because a charge of domestic assault by strangulation was dismissed in the second case.

Despite the misstatement, the record does not indicate that the district court actually misunderstood the offense of conviction. The district court stated that it had reviewed the PSI report, which correctly identified the offense of conviction in the second case as felony domestic assault. During the remainder of the sentencing hearing, the district court made no reference to the allegation that Jordan strangled the second woman on March 31, 2019. In addition, the warrant of commitment correctly identified the offense of conviction in the second case as felony domestic assault. We are not convinced that the district court's misstatement at the beginning of the sentencing hearing (to which Jordan's attorney did not object) demonstrates that the district court sentenced Jordan based on a mistaken belief that he was convicted of domestic assault by strangulation.

Thus, the district court did not err by basing its sentencing decision on alleged conduct underlying a charge that was dismissed.

B.

Jordan also argues that the district court erred by imposing consecutive sentences on the ground that the resulting punishment is disproportionate to the conduct for which he was convicted. Jordan contends that this court should focus on the nature of his conduct, not the fact that he was convicted of a felony, because his offenses are felonies only because of his prior convictions.

The Minnesota Sentencing Guidelines generally provide for presumptive sentences for felony offenses. Minn. Sent. Guidelines 2.C (2018). “Generally, when an offender is convicted of multiple current offenses, . . . concurrent sentencing is presumptive.” Minn. Sent. Guidelines 2.F (2018). But in certain situations, consecutive sentences “are presumptive (required by the Guidelines).” Minn. Sent. Guidelines 2.F.1 (2018). And in certain other situations, consecutive sentences “are permissive (may be given without a departure).” Minn. Sent. Guidelines 2.F.2 (2018). Among the situations in which consecutive sentences are permissive is the situation in which “the offender is being sentenced for multiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences in section 6” of the guidelines. Minn. Sent. Guidelines 2.F.2.a(1)(ii) (2018).

In this case, Jordan was sentenced on multiple convictions of felony domestic assault, in violation of section 609.2242, subdivision 4. That offense is among the offenses listed in section 6 of the guidelines. Minn. Sent. Guidelines 6 (2018). Thus, the district court was permitted to impose consecutive sentences on Jordan.

But that is not the end of the matter. Jordan contends that, even though consecutive sentences generally are permitted, the district court nonetheless erred by imposing consecutive sentences instead of concurrent sentences on the ground that his conduct was not severe enough to warrant consecutive sentences. He relies on a comment in the sentencing guidelines stating that, to ensure proportionality, “consecutive sentences should be limited to more severe offenses.” Minn. Sent. Guidelines cmt. 2.F.01 (2018). In response, the state argues that Jordan’s aggregate term of imprisonment is not disproportionate to his conduct because, but for the plea agreement, the two cases would have proceeded separately to trial and sentencing, and he would have been subject to a longer aggregate term of imprisonment.

The appellate courts apply an abuse-of-discretion standard of review to a district court’s imposition of permissive consecutive sentences. *State v. Ali*, 895 N.W.2d 237, 247 (Minn. 2017); *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007). A district court abuses its discretion by imposing permissive consecutive sentences if “the sentence is disproportionate to the offense or unfairly exaggerates the criminality of the defendant’s conduct.” *Ali*, 895 N.W.2d at 247 (quoting *McLaughlin*, 725 N.W.2d at 715).

Jordan’s argument—that his aggregate term of imprisonment arising from consecutive sentences is disproportionate to the conduct underlying his convictions—is in conflict with the negotiated plea agreement. At his plea hearing, Jordan specifically agreed that he would receive consecutive prison sentences if he failed to voluntarily return to jail within two days of being discharged from treatment. His agreement to that particular term allowed him to reap the benefits of other terms, such as the state’s agreement to dismiss

five other charges. In addition, Jordan's consecutive sentences are based on two convictions arising from two different incidents, on two different dates, involving two different victims. In that way, his case is distinguishable from *Ali* and *McLaughlin*, in which consecutive sentences were imposed on multiple convictions arising from the same incident. *See Ali*, 895 N.W.2d at 239-40; *McLaughlin*, 725 N.W.2d at 706. For these reasons, it does not appear that Jordan's consecutive sentences are disproportionate to his offenses or that they unfairly exaggerate the criminality of his conduct. *See Ali*, 895 N.W.2d at 247; *McLaughlin*, 725 N.W.2d at 715-16.

In determining whether a district court abused its discretion by imposing permissive consecutive sentences, the supreme court has compared the total duration of the consecutive sentences to "past sentences imposed on other offenders." *McLaughlin*, 725 N.W.2d at 715 (quotation omitted). Jordan compares his conduct and sentences to the conduct and sentences in two other cases in which defendants were convicted of multiple felony domestic-assault charges. *See State v. Pennig*, No. A12-1648, 2013 WL 4404267, at *1 (Minn. App. Aug. 19, 2013); *State v. Andvik*, No. A18-1655, A18-1490, 2019 WL 6112352, at *1-2 (Minn. App. Nov. 18, 2019). Jordan contends that, in those two cases, the offenders engaged in more serious conduct than he did but received aggregate prison terms of only 31 and 37 months, respectively, which are shorter than his aggregate term of 44 months. *See Pennig*, 2013 WL 4404267, at *1; *State v. Andvik*, 2019 WL 6112352, at *1-2. But in both of those cases, the defendants were convicted based on jury verdicts, not plea agreements, and the multiple convictions were based on either a single incident or multiple incidents involving a single victim. *See Pennig*, 2013 WL 4404267, at *1; *State*

v. Andvik, 2019 WL 6112352, at *1-2. Jordan's consecutive sentences compare favorably to the consecutive sentences in *State v. Maurstad*, No. A10-1517, 2011 WL 2982413 (Minn. App. July 25, 2011), *review denied* (Minn. Sept. 28, 2011), in which a jury found the defendant guilty of two counts of felony domestic assault based on a single incident involving two victims. *Id.* at *1. The district court in that case imposed consecutive prison sentences of 39 months and one year and one day, for a total of approximately 51 months. *Id.* Consequently, a comparison of Jordan's consecutive sentences to consecutive sentences imposed in other cases does not indicate that his sentences are disproportionate to his offenses or that they unfairly exaggerate the criminality of his conduct. *See Ali*, 895 N.W.2d at 247; *McLaughlin*, 725 N.W.2d at 715.

Thus, the district court did not err by imposing permissive consecutive sentences.

Affirmed.