STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1223

State of Minnesota,
Respondent,

vs.

Sean William Roulo,
Appellant.

Filed January 9, 2023
Affirmed
Johnson, Judge

St. Louis County District Court
File No. 69DU-CR-20-1977

Keith Ellison, Attorney General, Lydia Villalva Lijo, Assistant Attorney General, St. Paul, Minnesota; and

Kimberly J. Maki, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Sean William Roulo, Faribault, Minnesota (*pro se* appellant)

Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and Klaphake, Judge.*

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

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A St. Louis County jury found Sean William Roulo guilty of criminal sexual conduct based on evidence that he sexually abused his two stepdaughters when they were young. We conclude that the district court did not err by granting the state's motion to amend the complaint during trial. We also conclude that the district court did not err by imposing two sentences on two counts of criminal sexual conduct involving the same victim. Therefore, we affirm.

FACTS

In July 2020, the state filed a criminal complaint against Roulo based on reports by two adult stepdaughters, who then were 25 and 21 years old, that he had sexually abused them when they were much younger. The complaint alleged the following counts: (1) first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(g) (2004), based on the allegation that Roulo engaged in sexual penetration of S.H. between May 2006 and May 2008, when she was between 10 and 12 years of age; (2) first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(h)(iii), based on the allegation that Roulo engaged in multiple acts of sexual penetration of S.H. between May 2006 and May 2011, when she was between 10 and 15 years of age; (3) second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2004), based on the allegation that Roulo engaged in multiple acts of sexual contact with B.H. between May 2001 and May 2015, when she was between 2 and 15 years of age; and (4) fourth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.345, subd. 1(g)(iii)

(2004), based on the allegation that Roulo engaged in multiple acts of sexual contact with B.H. between May 2015 and May 2017, when she was between 15 and 17 years of age. Before Roulo's first appearance, the state amended the complaint so that the date range for count 3 started in May 2007 rather than May 2001.

The case was tried to a jury on six days in April 2021. At the outset of trial, the state moved to amend the complaint for a second time by changing the date ranges for counts 2 and 3 and by alleging second-degree criminal sexual conduct, instead of fourth-degree criminal sexual conduct, in count 4. The district court granted the motion with respect to counts 2 and 3 but denied the motion with respect to count 4 on the ground that the second-degree charge would have "a significantly different character" than the fourth-degree charge. The prosecutor then elected to withdraw the amendment with respect to count 3 and to dismiss count 4.

The state's first two witnesses were S.H. and B.H. S.H. testified that she remembered two specific incidents in which Roulo engaged in sexual contact with her. In the first incident, she awoke in her bed during the night because Roulo was fondling her vagina with his hand, over her underwear. In the second incident, she awoke in her bed during the night because Roulo was rubbing her vaginal area with his hand, under her underwear. S.H. could not remember the date or period of time of either incident but testified that both incidents occurred when she was in either eighth grade or high school.

B.H. testified about her first incident of sexual abuse, which occurred when she was approximately seven years old. She awoke in her bed during the night because Roulo was rubbing her butt, legs, and vaginal area with his hand, over her clothes. She also testified

that, after the first incident, Roulo frequently entered her bedroom at night when she was between the ages of 13 and 18 and rubbed her thighs and legs but never again touched her between her legs.

The state proceeded to call nine additional witnesses. On the fifth day of trial, the state moved to amend the complaint for a third time. The state sought leave to allege second-degree criminal sexual conduct, not first-degree criminal sexual conduct, in counts 1 and 2, on the ground that such an amendment would conform to S.H.'s testimony that Roulo engaged in sexual contact but not sexual penetration. The state also sought leave to allege two counts, instead of one count, of second-degree criminal sexual conduct with respect to B.H. Specifically, the state sought to renumber count 3, which alleged multiple acts of sexual contact over an extended period of time, to count 4 and to slightly change the applicable date range. The state also sought to insert a new count 3 to allege a single act of sexual contact, in violation of Minn. Stat. § 609.343, subd. 1(g), with the same date range as the new count 4. Roulo opposed the motion, primarily on the ground that the amendment would require his attorney to change his plans for examining the remaining witnesses and making closing argument. The district court granted the motion.

The state called one additional witness and rested. Roulo called one witness and testified in his own defense.

The jury found Roulo guilty of the charges in counts 1, 2, and 3 but not guilty of the charge in count 4. The district court imposed a stayed sentence of 21 months of imprisonment on count 1, a stayed sentence of 27 months of imprisonment on count 2, and an executed sentence of 46 months of imprisonment on count 3. Roulo appeals.

DECISION

As an initial matter, we will identify the arguments that have been properly presented on appeal. Roulo initially was represented by an assistant state public defender, who filed a notice of appeal on his behalf and a principal brief. Roulo later sought leave to file a supplemental *pro se* brief. Thereafter the assistant state public defender moved to withdraw as counsel, and we granted that motion. Between March and August of 2022, Roulo filed five motions for extension of time, four of which were granted and the last of which was denied. Roulo never filed a complete supplemental *pro se* brief. We ultimately filed an order stating that no further briefing would be allowed. Thus, the issues on appeal are the two issues that are presented in the brief that was filed by the assistant state public defender.

I. Amendment of Complaint

Roulo first argues that the district court erred by granting the state's mid-trial motion to amend the complaint by adding new count 3, which alleged second-degree criminal sexual conduct based on a single act of sexual contact within the same date range as new count 4, which alleged second-degree criminal sexual conduct based on multiple acts of sexual contact over an extended period of time.

After the commencement of trial, a district court generally may not allow the state to add "new and different charges." *State v. Gisege*, 561 N.W.2d 152, 157 (Minn. 1997). But a district court may allow the state to amend a complaint "at any time before verdict . . . [1] if no additional or different offense is charged and [2] if the defendant's substantial rights are not prejudiced." Minn. R. Crim. P. 17.05 (alterations added). This court applies

an abuse-of-discretion standard of review to a district court's grant of a motion to amend pursuant to rule 17.05. *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982); *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004).

Roulo argues that the district court erred for two reasons, which correspond to the two requirements in the text of the rule.

A. Additional or Different Offense

Roulo first contends that the district court allowed the state to add an additional or different offense. The first requirement of rule 17.05—that "no additional or different offense is charged"—is violated if an amendment "affects an 'essential element' of the charged offense," *State v. Guerra*, 562 N.W.2d 10, 13 (Minn. App. 1997), or "add[s] new charges with different elements," *State v. Caswell*, 551 N.W.2d 252, 255 (Minn. App. 1996). But the first requirement of rule 17.05 is *not* violated if an amended complaint merely adds a lesser-included offense. *Gisege*, 561 N.W.2d at 157 (citing Minn. Stat. § 631.14 (1996)). An offense is a lesser-included offense "if it is impossible to commit the greater offense without committing the lesser offense." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). To determine "whether one offense is necessarily proved by the proof of another, 'the trial court must look at the statutory definitions rather than the facts in a particular case.'" *Gisege*, 561 N.W.2d at 156 (quoting *State v. Gayles*, 327 N.W.2d 1, 3 (Minn. 1982)). Whether an offense is a lesser-included offense is a question of law. *State v. Degroot*, 946 N.W.2d 354, 364 (Minn. 2020).

Before the third amendment, the state alleged, as count 3, a charge of second-degree criminal sexual conduct, in violation of section 609.343, subdivision 1(h)(iii), based on the

allegation that Roulo engaged in multiple acts of sexual contact with B.H., between May 2007 and May 2015. After the amendment, the state alleged, in new count 3, a charge of second-degree criminal sexual conduct, in violation of a different subdivision of section 609.343, subdivision 1(g), based on the allegation that Roulo engaged in only a single act of sexual contact with B.H. during the same approximate date range. The only factual difference between the two charges is that new count 3 alleged only a single act instead of multiple acts. Consequently, new count 3 is a lesser-included offense when compared to former count 3 (which was renumbered count 4) because "it is impossible to commit the greater offense," which alleged multiple acts under subdivision 1(h)(iii), "without committing the lesser offense," which alleged a single act under subdivision 1(g). *See Bertsch*, 707 N.W.2d at 664.

Roulo also contends that the district court erred because it allowed the state to add an offense that is identical to the offense that the district court did not allow the state to add at the outset of trial. In response, the state asserts that, at the outset of trial, the prosecutor sought to amend then-existing count 4 by increasing the severity of the charged offense from fourth-degree criminal sexual conduct to second-degree criminal sexual conduct. The state also asserts that, at the outset of trial, the prosecutor sought to allege a violation of subdivision 1(a), which would have required proof that is not required by subdivision 1(g), namely, proof that the victim was under 13 years of age and that Roulo was more than 36 months older. *See* Minn. Stat. § 609.343, subd. 1(a) (2004). The state is correct that the offense in new count 3 is different from the offense that the state was not allowed to add at the outset of trial.

Thus, the offense alleged in new count 3 is not an additional or different offense.

B. Prejudice

Roulo also contends that the amendment prejudiced his defense. Specifically, he contends that he did not have proper notice and that, by the time of the amendment, it was impossible or impractical to cross-examine the state's multiple witnesses. In response, the state contends that Roulo was given advance notice of the amendment soon after S.H. testified and that the essential nature of the allegations—that he engaged in sexual contact against S.H. and B.H.—remained constant throughout the trial.

A defendant may be prejudiced by an amendment pursuant to rule 17.05 if the amendment adversely affects "the opportunity to prepare a defense." *State v. DeVerney*, 592 N.W.2d 837, 846 (Minn. 1999); *see also State v. Alexander*, 290 N.W.2d 745, 748 (Minn. 1980) (stating that rule 17.05 protects against "violating due process notions of timely notice" and "adversely affecting the trial tactics of the defense").

In this case, the prosecutor stated his intention to amend the complaint, shortly after S.H. testified on the first day of trial. The amendment that the prosecutor later sought did not expand on the allegations that previously had been made; the amendment merely alleged a single act of sexual contact instead of multiple acts over an extended period of time. Roulo does not contend that, before the amendment, his defense was focused on the state's lack of evidence of multiple acts. Rather, Roulo's theory at trial was that he never engaged in any sexual contact with either S.H. or B.H. The district court did not abuse its discretion by rejecting Roulo's argument that he would be prejudiced if the state were allowed to narrow its allegations with respect to B.H. by adding new count 3.

In sum, the district court did not err by granting the state's mid-trial motion to amend the complaint by adding new count 3.

II. Multiple Sentences

Roulo also argues that the district court erred by imposing two sentences on counts 1 and 2, both of which alleged second-degree criminal sexual conduct with respect to S.H. Roulo contends that two sentences are prohibited on the ground that the two offenses arose from a single behavioral incident.

In a criminal case, "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 (2004). Consequently, "multiple sentences for multiple offenses committed as part of the same behavioral incident are prohibited." *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020). "To determine whether two or more offenses were committed during a single behavioral incident, we examine two factors: (1) whether the offenses occurred at substantially the same time and place, and (2) whether the conduct was motivated by an effort to obtain a single criminal objective." *Id.* (quotations omitted). The state bears the burden of proving, by a preponderance of the evidence, that multiple offenses did *not* arise from a single behavioral incident. *Id.* at 266. This court applies a clear-error standard of review to a district court's findings of fact and a *de novo* standard of review to the district court's application of the law to given facts. *Id.* at 265.

At the sentencing hearing, the state argued that Roulo's first and second offenses were not committed during a single behavioral incident. But the district court did not make any express findings of fact on the issue. Accordingly, we will review the evidence

presented at trial to determine whether it supports the implied finding that Roulo's first and second offenses were not committed during a single behavioral incident. *See id.* at 266-67.

In *Barthman*, the supreme court considered this issue in the context of an evidentiary record that is remarkably similar to the evidentiary record in this case. The appellant in *Barthman* was found guilty of two counts of first-degree criminal sexual conduct toward a daughter who was between 10 and 12 years old during the charged period. *Id.* at 262. With respect to the first factor, the parties did not dispute that both offenses occurred in the family's home, but they disputed whether the two incidents occurred at substantially the same time. *Id.* at 266. The victim's testimony was not crystal clear about the date or time period of either incident. *Id.* Nonetheless, the supreme court determined that it was sufficiently clear, based on the victim's descriptions of the distinguishing features of two different incidents, that the incidents were separate. *Id.* at 266-67.

Similarly, in this case, S.H. testified that she did "not know the exact time frame" of each incident, but she stated that the incidents occurred "somewhere between at least eighth grade . . . and high school." She described the two incidents differently: in the first incident, Roulo touched her vagina with his hand over her underwear, and in the second incident, he touched her vagina beneath her underwear. Furthermore, S.H. referred to the first incident as "the first time" and later stated, in reference to both the first and second incidents, that "those are the only two." As in *Barthman*, S.H.'s testimony indicates that the two incidents did not occur at substantially the same time. *See id.* at 267.

With respect to the second factor, Roulo contends that the two incidents were motivated by a single criminal objective: to exploit his position as a caretaker of S.H. by sexually abusing her. The appellant in *Barthman* made a similar argument. *Id.* The supreme court rejected the argument by stating that "broad statements of criminal purpose do not unify separate acts into a single course of conduct." *Id.* (quotation omitted). Rather, the supreme court inquired "'whether all of the acts performed were necessary to or incidental to the commission of a single crime and motivated by an intent to commit that crime.'" *Id.* (quoting *State v. Krampotich*, 163 N.W.2d 772, 776 (Minn. 1968)). The supreme court answered that question by stating that the appellant's conduct in the first incident was "not in furtherance of, or incidental to, his successful completion" of the second incident, and vice versa. *Id.* The same is true here. Roulo's conduct in each incident described by S.H. was not in furtherance of or incidental to his conduct in the other incident.

Thus, the district court did not err by imposing two sentences on counts 1 and 2 because those two offenses did not arise from a single behavioral incident.

Affirmed.