

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1564**

State of Minnesota,
Respondent,

vs.

Kwadwo Adu Twum,
Appellant.

**Filed September 16, 2024
Affirmed
Cleary, Judge***

Washington County District Court
File No. 82-CR-21-3751

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

Kevin Magnuson, Washington County Attorney, Andrew T. Jackola, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Schmidt, Judge; and Cleary, Judge.

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

NONPRECEDENTIAL OPINION

CLEARY, Judge

In this direct appeal from the judgment of conviction for deprivation of parental rights, appellant argues that the district court erred in requiring him to register as a predatory offender because the kidnapping charges that require registration, and of which he was acquitted, were not supported by probable cause. We affirm.

FACTS

Appellant Kwadwo Adu Twum is the father of two children. Twum and the children's mother, Twum's ex-wife, share joint legal custody of the children but the children's mother has sole physical custody. Twum has supervised parenting time twice per week.

On October 25, 2021, the children's uncle dropped the children off at daycare. While the children and their uncle were entering the daycare, Twum approached them and told them that he had items inside his vehicle for the children. Twum led the children to his vehicle in the parking lot, put the children inside the vehicle, and drove away.

Three days later, the children's mother reported to the Woodbury Police Department that the children were missing, and that Twum had the children. The police tracked Twum's cellphone and located the phone in Naperville, Illinois. On October 31, the police located Twum's phone in St. Paul, Minnesota. Officers drove to a St. Paul address where they believed Twum was located, observed a vehicle registered to Twum in the area, and set up surveillance. Law enforcement located both Twum and the children at the address in St. Paul.

Respondent State of Minnesota charged Twum by amended complaint with two counts of kidnapping to facilitate a felony or flight thereafter, in violation of Minnesota Statutes section 609.25, subdivision 1(2) (2020), and two counts of deprivation of parental rights, in violation of Minnesota Statutes section 609.26, subdivision 1(3) (2020). The complaint identified the underlying felony for the kidnapping charges as deprivation of parental rights.

In February 2022, Twum moved the district court to dismiss the kidnapping charges. Twum argued that charging both deprivation of parental rights and kidnapping, where the predicate felony was deprivation of parental rights, was improper. At the motion hearing, Twum's counsel argued that kidnapping and deprivation of parental rights involved the same conduct, such that the state was "doubly charging the same exact conduct by using the predicate offense of deprivation of parental rights to then charge the more significant or severe kidnapping charge." The district court issued findings of fact, conclusions of law, and an order denying Twum's motion to dismiss the kidnapping charges.

The matter proceeded to a jury trial, which the district court held over four days in June 2022. The jury found Twum guilty of both counts of deprivation of parental rights and acquitted him of the kidnapping charges. The district court sentenced Twum to a stay of imposition on both counts and placed him on probation for two years. The district court explained that as part of his probation Twum was required to "cooperate with the Minnesota Predatory offender registry as required by Minnesota Statutes section 243.166, subdivision 1(b), by registering immediately and maintaining registration compliance for the duration of [his] probation."

This appeal follows.

DECISION

On appeal, Twum challenges the requirement that he register as a predatory offender. Minnesota Statutes section 243.166, subdivision 1b(a)(1)(ii) (2020), requires an individual to register if the person was charged with kidnapping under section 609.25, and the person was “convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances[.]”¹ As a result, a person who is charged with kidnapping may be required to register as a predatory offender even if the person is not convicted of kidnapping. But “a qualifying charge may trigger the registration requirement under Minn. Stat. § 243.166 only if it is supported by probable cause.” *State v. Haukos*, 847 N.W.2d 270, 274 (Minn. App. 2014).

Twum argues that the district court erred by requiring him to register as a predatory offender because the kidnapping charges were not supported by probable cause. We are not persuaded.

“Probable cause is required for every element of the crime charged.” *State v. Suspitsyn*, 941 N.W.2d 423, 427 (Minn. App. 2020), *rev. denied* (Minn. May 27, 2020). “Probable cause exists if the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict of acquittal if proved at trial.” *Id.* (quotation omitted). Appellate court’s review “the application of the probable-cause standard to the facts de novo” and review “factual findings for clear error.” *Id.*

¹ The predatory-offender registration statute was amended in 2021 in a manner not relevant to this appeal. *See* 2021 Minn. Laws ch. 20, § 1.

First, Twum argues that he could only be charged with the specific crime of deprivation of parental rights, not the general crime of kidnapping. Generally, “the same set of facts may constitute more than one offense if the statutes so provide.” *State v. Craven*, 628 N.W.2d 632, 634 (Minn. App. 2001), *rev. denied* (Minn. Aug. 15, 2001). “A defendant may then be charged under whichever law or statute the prosecutor sees fit[.]” *Id.* at 634-35 (quotation omitted). “But when two criminal statutes, one general and one specific, conflict because they have the same elements but differing penalties, the more specific statute governs over the more general statute, unless the legislature manifestly intends for the general statute to control.” *Id.* at 635. For example, in *State v. Kalvig*, 209 N.W.2d 678, 680-81 (Minn. 1973), the supreme court concluded that the prosecutor did not have the discretion to charge the defendant under the general felony theft statute because a more specific statute, the welfare-fraud statute, controlled the defendant’s conduct. The supreme court reasoned that the legislature clearly intended to deal with welfare fraud as a misdemeanor and it was clear that the theft statute was “one of general application, while the statute referring to punishment for welfare fraud [was] a specific provision.” *Id.* at 680.

Here, the criminal statutes do not conflict because kidnapping and deprivation of parental rights do not share the same elements. Deprivation of parental rights requires proof that Twum took, obtained, retained, or failed “to return a minor child in violation of a court order, where the action manifests an intent substantially to deprive that parent of rights to parenting time or custody[.]” Minn. Stat. § 609.26, sub. 1(3). Kidnapping requires proof that Twum confined or removed a person under the age of 16, “without the consent of the person’s parents or other legal custodian,” to facilitate the commission of a felony—here,

depriving another of custodial or parental rights—or facilitate flight after the crime. Minn. Stat. § 609.25, subd. 1(2); *see also State v. Budreau*, 641 N.W.2d 919, 929 (Minn. 2002) (listing the elements of kidnapping).

Although deprivation of parental rights as the predicate felony to kidnapping and deprivation of parental rights as a standalone charge have the same elements, the state was required to prove the other elements of kidnapping. The state had to prove that Twum did not have the consent of a parent or legal custodian, an element that is not required to prove deprivation of parental rights. *See* Minn. Stat. § 609.25, subd. 1(2). The state was also required to prove that Twum removed a victim who had not reached their 16th birthday from one place to another.

But even if we were to assume, without deciding, that the kidnapping and deprivation-of-parental rights statutes conflict because the statutes share the same elements but require differing penalties, the legislature has expressed an intent, which has been reiterated in caselaw, to allow prosecution for kidnapping even though the state can also prosecute for deprivation of parental rights.

Minnesota Statutes section 609.251 (2020) provides: “a prosecution for or conviction of the crime of kidnapping is not a bar to conviction of or punishment for any other crime committed during the time of the kidnapping.” A similar legislative statement was at issue in *State v. Eaton*, 292 N.W.2d 260, 268 (Minn. 1980). The appellant in *Eaton* was charged and convicted of theft by swindle. 292 N.W.2d at 263. The appellant argued, by analogy to *Kalvig*, that he could be convicted only of securities fraud and not the more general crime of theft. *Id.* at 267. The securities fraud statute contained the following

language: “Nothing in sections 80A.01 to 80A.31 limits the power of the state to punish any person for any conduct which constitutes a crime under any other statute.” *Id.* at 268 (quoting Minn. Stat. § 80A.22, subd. 3 (1978)). The supreme court determined that the subdivision “clearly express[ed] the legislative intent to allow a prosecution for theft by swindle even though the state also prosecutes for securities fraud.” *Id.*

The language in Minnesota Statutes section 609.251 closely resembles the statutory language at issue in *Eaton*. *See id.* Additionally, in *State v. Alladin*, the appellant argued that he should have been charged with deprivation of parental rights rather than kidnapping. This court concluded that although deprivation of parental rights “may have been an optional charge . . . the facts justified the State’s use of the more severe kidnapping statute.” 408 N.W.2d 642, 647 (Minn. App. 1987). This court also stated that “[t]he plain meaning of [the kidnapping statute] gives the State the right to charge appellant under it if the State feels it can prove the essential elements of the crime.” *Id.* Based on Minnesota Statutes section 609.251 and this court’s precedent, we are not persuaded by Twum’s argument that, because deprivation of parental rights is the more specific offense, the state did not have probable cause to charge him with kidnapping.

Twum argues next that deprivation of parental rights cannot be the underlying felony for a kidnaping charge because deprivation of parental rights “did not include an independent crime in addition to a taking or lack of consent[,]” i.e., “[t]here was no independent act by . . . Twum that was separate from the taking of his children without their mother’s consent.” Twum further argues that the deprivation of parental rights charge was “completely ‘incidental’ to the kidnapping offense.”

Twum's argument is supported by caselaw. In *State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003), *overruled in part on other grounds by State v. Leake*, 669 N.W.2d 312, 322 (Minn. 2005), the supreme court concluded that "where the confinement or removal of the victim is completely incidental to the preparation of a separate felony, it does not constitute kidnapping." Here, depriving the children's mother of her parental rights was incidental to the preparation of kidnapping. In other words, Twum had to deprive the children's mother of her parental rights to commit the kidnapping. Moreover, in *State v. Welch*, 675 N.W.2d 615, 620 (Minn. 2004), the supreme court concluded that there was insufficient evidence to support a kidnapping conviction because "the confinement that form[ed] the basis of the kidnapping [was] the very force and coercion that support[ed] the attempted second-degree criminal sexual conduct conviction."

Similarly in this case, the confinement or removal that formed the basis for the deprivation of parental rights charge was the same confinement/removal that supported the kidnapping charge. But although Twum's argument is supported by caselaw, Twum fails to cite any authority demonstrating that these principles are applicable in the context of a pretrial probable-cause determination.

Lastly, Twum argues that because he "consented to the removal of his children from daycare, he could not be convicted of kidnapping based on the plain language of the statute." Twum explains that the provision in the kidnapping statute, "without the consent of the person's parents or other legal custodian," Minn. Stat. § 609.25, subd. 1, "removes culpability under [the kidnapping] statute when a parent consents to removal of their own child who is under the age of 16."

We rejected the same argument in *Alladin*. The appellant in *Alladin* argued that the “kidnapping statute was inapplicable to him, because as [the child’s] legal custodian, he gave himself consent to hold [the child] hostage.” 408 N.W.2d at 647. We determined that it was “unreasonable to construe the ‘consent of his parents or legal guardian’ language of Minn. Stat. § 609.25 to mean the consent of the person committing the crime.” *Id.* We further explained that public policy and developments in tort law repealing the parent-child immunity “support[] a finding that, depending on the facts, a parent could be convicted of kidnapping his own child.” *Id.* We conclude that we are bound by *Alladin*, and the fact that Twum consented to the removal of the children does not negate probable cause for kidnapping.

We note that although we are bound by the language of Minn. Stat. § 243.166, subd. 1(b) (2020), as applied, we are concerned that the statute’s language requires registration after a mere showing of probable cause on a charge (kidnapping) later dismissed after an acquittal. The deprivation conviction, standing alone, would not require registration. Here it is required because it arose “out of the same set of circumstances” as the dismissed charge. The statute’s language invites overcharging by prosecutors who are cognizant of how low the probable-cause burden is at arraignment and wish to impose registration by adding on a more serious charge that need never result in conviction but need only meet the low burden of probable cause, where the underlying charge would not require registration. That said, we are bound by the language of the statute as it applies here.

Affirmed.