

*This opinion is nonprecedential except as provided by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
A25-1773**

State of Minnesota,
Respondent,

vs.

Derrick John Thompson,
Appellant.

**Filed September 8, 2026
Affirmed in part, reversed in part, and remanded;
motion denied
Worke, Judge**

Hennepin County District Court
File No. 27-CR-23-12910

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

Mary F. Moriarty, Hennepin County Attorney, Britta Nicholson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ede, Presiding Judge; Worke, Judge; and Reilly, Judge.*

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

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his third-degree murder and criminal-vehicular-homicide convictions, arguing that the district court (1) violated his right to due process by admitting an unreliable witness identification, (2) imposed a sentence that unfairly exaggerates the criminality of his conduct, and (3) erred by adjudicating convictions of included offenses. In a pro se supplemental brief, appellant asserts that he received ineffective assistance of counsel and that the state committed prosecutorial misconduct. We affirm appellant's convictions and sentence, but we reverse and remand for the district court to vacate the convictions for the included offenses.

FACTS

The following facts are derived from the pretrial and trial records.¹ In June 2023, a police officer observed a black sport utility vehicle (SUV) traveling on the interstate at a high rate of speed. While the officer attempted to catch up, the driver of the SUV exited the interstate, ran a red light, crashed into another vehicle, and fled on foot. The crash killed all five occupants of the other vehicle.

Minutes after the crash, a witness, D.P., told police that she saw a person exit the SUV and run through her neighbor's yard. She stated that the person was a Black male

¹ Respondent State of Minnesota moved to strike portions of appellant's pro se supplemental brief because it asserts facts and refers to matters outside the appellate record. Because our decision does not rely on the challenged material, we deny the motion as unnecessary.

who was six foot, two inches tall, and wearing a white t-shirt, gray skullcap, and gray or green pants. D.P. also stated that the person was limping.

Officers located appellant Derrick John Thompson, who matched the physical description provided by D.P., in a nearby parking lot. Thompson was sweating heavily, bleeding from fresh cuts, suffering from a leg injury, and asking others to borrow a cell phone to call for a ride.

Shortly after D.P.'s report to police, a second officer told her, "We have a guy stopped . . . that may or may not be involved. Would you be willing to come look at him?" D.P. agreed.

Officers again questioned D.P. about what she witnessed. D.P. repeated her observations and description of the person she saw.

An officer told D.P. that they "need[ed] to go, and id[entify] this person if we can." Police told D.P. that they "may or may not have" the person "that [she] may recognize" as the person she saw. The police told D.P. that she would need to give a "yes or no [as to] whether [she] recognize[s] him or not."

Police transported D.P. to Thompson's location. Police brought Thompson out, in handcuffs, and asked D.P. if he was the person she saw. D.P. stated she was "100 percent certain" that Thompson was the person she saw. D.P. reaffirmed her identification of Thompson when he limped and fell as he walked away.

The state charged Thompson with 15 offenses: five counts of third-degree murder, under Minn. Stat. § 609.195(a) (2022); five counts of criminal vehicular homicide, operating a motor vehicle in a grossly negligent manner, under Minn. Stat. § 609.2112,

subd. 1(a)(1) (2022); and five counts of criminal vehicular homicide, operator causes the collision and leaves the scene, under Minn. Stat. § 609.2112, subd. 1(a)(7) (2022).

Thompson moved the district court to suppress D.P.’s “show-up” identification, arguing that it was impermissibly suggestive. The district court denied the motion after determining that the show-up procedure was not unduly suggestive, and even if it was, the evidence was nonetheless reliable. The district court reasoned that the nature of the crash and the person’s flight from the vehicle provided D.P. with “a very acute degree of attention”; that D.P. had a clear view; that D.P. provided a detailed description; that D.P.’s description accurately described Thompson; that D.P.’s level of certainty was “high”; and that a very short time transpired between the crime occurring and the show-up procedure.

The jury found Thompson guilty as charged, and the district court entered judgment of conviction on all 15 counts. The district court imposed five consecutive sentences on the third-degree murder convictions, totaling 704 months in prison. The district court did not pronounce sentences on the remaining criminal-vehicular-homicide convictions.

This appeal followed.

DECISION

Show-up Identification

Thompson argues that the district court erred by admitting D.P.’s identification. Whether a show-up identification procedure violated a defendant’s right to due process is a legal question we review de novo. *State v. Adkins*, 706 N.W.2d 59, 62 (Minn. App. 2005).

Identification evidence is only admissible if it is reliable. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999). Appellate courts apply a two-part test to determine the reliability of an identification. *Id.* First, we look at “whether the procedure was unnecessarily suggestive.” *Id.* (quotation omitted). Included in this analysis is “whether the defendant was *unfairly* singled out for identification,” such as “the police singl[ing] out a suspect from the general population based on a victim’s description and present[ing] the suspect in handcuffs to the victim for identification.” *State v. Anderson*, 657 N.W.2d 846, 850-51 (Minn. App. 2002).

Second, if the procedure was unnecessarily suggestive, courts next look at the totality of the circumstances to determine if the identification was nonetheless reliable because the witness’s identification had an adequate independent origin. *Taylor*, 594 N.W.2d at 161. In evaluating the totality of the circumstances, we consider (1) the witness’s opportunity “to view the criminal at the time of the crime,” (2) “[t]he witness’[s] degree of attention,” (3) the accuracy of the witness’s description of the criminal before the identification, (4) the witness’s level of certainty, and (5) the time between the crime and the identification. *Anderson*, 657 N.W.2d at 851.

Here, Thompson was found in a parking lot near the crash. When police located Thompson, they noticed that he was sweating heavily, bleeding from fresh cuts, suffering from a leg injury, and asking others to use a phone to arrange a ride. Thompson was not unfairly singled out from the general population based solely on D.P.’s description; Thompson was found under extremely suspicious circumstances, and the procedure was essentially confirmatory.

Even if we were to conclude, as Thompson asserts, that statements police made to and around D.P., along with the procedure itself, made the show-up unnecessarily suggestive, the totality of the circumstances indicates that the identification was nonetheless reliable. D.P. stated that she clearly saw the person run through her neighbor's yard shortly after the crash. D.P. indicated that the "boom" from the crash caught her attention, which highlighted the person running from the crash. D.P.'s consistent description of the person she saw closely matched Thompson's. At the show-up, D.P. was "100 percent certain" that Thompson was the person she saw fleeing. Lastly, the time between the crash and D.P.'s identification was brief. The totality of the circumstances shows that the identification was reliable. The district court did not err by denying suppression of D.P.'s identification.

Sentence

Thompson next argues that his 704-month prison sentence unfairly exaggerates his culpability and the criminality of his conduct. "We review a district court's determination of whether sentences exaggerate the criminality of the defendant's behavior for abuse of discretion." *State v. Alger*, 941 N.W.2d 396, 403 (Minn. 2020). "The district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Sanders v. State*, 23 N.W.3d 86, 91 (Minn. 2025) (quotation omitted).

To protect against exaggerating the criminality of a person's conduct, Minn. Stat. § 609.035 (2022) restricts punishment to only one of multiple offenses occurring within a course of conduct. *State v. Kissner*, 541 N.W.2d 317, 322 (Minn. App. 1995), *rev. denied*

(Minn. Feb. 9, 1996). However, “section 609.035 does not bar multiple sentences when the defendant commits crimes against multiple victims.” *Alger*, 941 N.W.2d at 400. “When reviewing whether a consecutive sentence unfairly exaggerates a defendant’s criminality, we are guided by past sentences received by other offenders for similar offenses.” *Id.* at 403 (quotation omitted).

Appellate courts have upheld multiple sentences, one sentence for each victim, when the “defendant intentionally drove his car at an outrageously high rate of speed in a residential area knowing that it was possible and even likely that he might injure or kill one or more innocent people.” *State v. Gartland*, 330 N.W.2d 881, 883 (Minn. 1983); *see also State v. Chaklos*, 528 N.W.2d 225, 227 (Minn. 1995) (affirming consecutive sentences for each victim of vehicle crash). Similarly, appellate courts have upheld consecutive sentences for each victim who died in a single course of conduct in nondriving offenses. *See, e.g., State v. Olson*, 291 N.W.2d 203, 208 (Minn. 1980).

Here, Thompson’s conduct resulted in the deaths of five victims. Caselaw supports the imposition of consecutive sentences. Thompson’s citations and policy arguments to the contrary fail to show how the district court’s sentencing is an erroneous view of the law or is against logic and the facts. The district court did not abuse its discretion in its consecutive sentencing of Thompson to an aggregate of 704 months in prison.

Convictions of Included Crimes

Thompson also argues that the district court erred by adjudicating both third-degree murder and two forms of criminal vehicular homicide arising from each victim’s death. The state disagrees that criminal vehicular homicide is a lesser-included offense of

third-degree murder but concedes that Thompson may not be adjudicated guilty of two criminal-vehicular-homicide offenses for the death of the same victim. Whether one offense is a lesser-included offense of another presents a question of law, which appellate courts review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

A defendant cannot be convicted of both the primary and a lesser-included offense. Minn. Stat. § 609.04, subd. 1 (2022). A lesser-included offense may be “a lesser degree of the same crime.” *Id.*, subd. 1(1). Thus, a lesser-included offense is an offense whose elements are encompassed by the elements of the greater crime or is a lesser offense within a “multi-tier statutory scheme [addressing] a particular subject.” *See State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995). Similarly, “section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985).

Under Minnesota law:

Whoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree

Minn. Stat. § 609.195(a).

[A] person is guilty of criminal vehicular homicide . . . if the person causes the death of a human being *not constituting murder* or manslaughter as a result of operating a motor vehicle:

(1) in a grossly negligent manner;
. . .

(7) where the driver who causes the collision leaves the scene of the collision in violation of section 169.09, subdivision 1 or 6.

Minn. Stat. § 609.2112, subds. 1(a)(1), (7) (emphasis added).²

Here, third-degree murder does not encompass the elements of criminal vehicular homicide, as criminal vehicular homicide requires proving elements not required of third-degree murder. Specifically, unlike third-degree murder, criminal vehicular homicide requires the state to prove that the defendant was operating a motor vehicle in a grossly negligent manner, or the defendant knew or believed the collision occurred, caused the death of another, and failed to investigate or get assistance, or left the scene. *Id.* Nor is criminal vehicular homicide within a multi-tier statutory scheme, as it is not within the “ordinally numbered degrees” of homicide. *See State v. Bradley*, 4 N.W.3d 105, 113 (Minn. 2024) (concluding that “degree” refers to the “ordinally numbered degrees found throughout the criminal code”).

Nevertheless, the district court adjudicated Thompson guilty of two counts of criminal vehicular homicide under separate subdivisions of the same statute for each victim’s death arising from the same behavioral incident. Section 609.04 prohibits such

² Under Minn. Stat. § 169.09, subd. 1 (2022):

The driver of any motor vehicle involved in a collision shall immediately stop the vehicle at the scene of the collision, or as close to the scene as possible, and reasonably investigate what was struck. If the driver knows or has reason to know the collision resulted in injury to or death of another, the driver in every event shall remain at the scene of the collision until the driver has fulfilled the requirements of this section as to the giving of information. The stop must be made without unnecessarily obstructing traffic.

convictions. *See Jackson*, 363 N.W.2d at 760. Thus, the district court erred by adjudicating Thompson guilty of both criminal-vehicular-homicide offenses for each victim. We reverse and remand with instructions to vacate one of the two criminal-vehicular-homicide convictions entered for each victim.

Pro Se Claims

Ineffective Assistance of Counsel

Thompson, in his pro se supplemental brief, claims that he did not receive effective assistance of counsel. “Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal. A postconviction hearing provides the court with additional facts to explain the attorney’s decisions, so as to properly consider whether a defense counsel’s performance was deficient.” *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) (quotation and citations omitted). Thompson did not first petition for postconviction relief before appealing the matter, and the record is insufficient, which prevents adequate review. As such, we decline to reach the merits of the issue but note that the claim is preserved for a postconviction-relief petition, if filed. *See id.*

Prosecutorial Misconduct

Lastly, Thompson claims that the state committed prosecutorial misconduct. Specifically, Thompson contends that the evidence presented at trial conflicted with other evidence that, in his view, should have been presented and that the prosecutor relied on those alleged inconsistencies during closing argument. Thompson did not object to any alleged instances of prosecutorial misconduct at trial. Thus, “we apply the modified plain-

error test . . . under which the defendant has the burden to demonstrate that the misconduct constitutes (1) error, (2) that was plain” before the burden would shift to the state to demonstrate that the error did not affect substantial rights. *State v. Portillo*, 998 N.W.2d 242, 248 (Minn. 2023) (quotation omitted). Thompson fails to meet his burden.

Commenting on inconsistencies or conflicts in evidence does not, alone, constitute prosecutorial misconduct. *See State v. Johnson*, 568 N.W.2d 426, 436 (Minn. 1997) (“Inconsistencies or conflicts between one state witness and another do not necessarily constitute false testimony or a basis for reversal.”). Rather, the jury is responsible for resolving conflicting evidence and assessing witness credibility. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). Because Thompson’s argument identifies only alleged inconsistencies in the evidence, he has failed to demonstrate plain error.

Affirmed in part, reversed in part, and remanded; motion denied.