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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0263**

State of Minnesota,
Respondent,

vs.

Alexander Rapheal Marxen,
Appellant.

**Filed August 12, 2013
Reversed and remanded
Chutich, Judge**

Blue Earth County District Court
File No. 07-CR-12-820

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Ross E. Arneson, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Erik I. Withall, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Schellhas, Judge; and Chutich,
Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Appellant Alexander Raphael Marxen appeals his sentence, arguing that the
district court erred by sentencing him for his second-degree assault conviction before

sentencing him for his drive-by-shooting conviction. Because the record does not support the district court's findings, we reverse and remand for resentencing.

FACTS

On the evening of March 6, 2012, appellant Alexander Marxen, A.H., D.K., and E.B. were driving around Mankato in A.H.'s white minivan.¹ D.K. arranged a meeting with a second group of acquaintances with whom they had an ongoing dispute. When D.K. drove the van past the house where they believed the second group was located, the second group, driving a tan Chevrolet Blazer, began to chase the minivan. Eventually the minivan got away from the Blazer. D.K. then called a third group of friends, driving a yellow BMW, to help them find the Blazer. The groups eventually spotted the Blazer and cornered it, forcing it to stop. Marxen partially exited the minivan, pointed a .22-caliber rifle at the Blazer, and fired one round.

After Marxen fired the gun, the Blazer "peeled away." The minivan, with Marxen as a passenger, and the BMW chased the Blazer into a cul-de-sac and blocked the Blazer's exit. The Blazer's occupants exited the vehicle and ran towards the minivan. Marxen pointed the gun out of the front passenger window at the group approaching the van and fired one round at a man in a white sweatshirt. The man in the white sweatshirt, later identified as P.G., called the police to report the shooting.

Blue Earth County charged Marxen with two counts of first-degree attempted murder, two counts of drive-by shooting, second-degree assault, intentional discharge of

¹ These facts are taken from the complaint and the district court's findings in its probable-cause order.

a firearm that endangers safety, and reckless discharge of a firearm within a municipality. Marxen moved to dismiss five of the charges for lack of probable cause, but the district court denied his motion.

Marxen pleaded guilty to one drive-by-shooting charge in violation of Minnesota Statutes section 609.66, subdivision 1e(a), (b) (2010), and second-degree assault in violation of Minnesota Statutes section 609.22, subdivision 1 (2010). Under the plea agreement, the county dismissed the remaining five counts.

At the sentencing hearing, the parties agreed that the drive-by shooting should be sentenced before the assault because the drive-by occurred first. The district court disagreed and sentenced Marxen to 36 months for second-degree assault, and then, after applying a criminal history point for his assault conviction, sentenced Marxen to 66 months for the drive-by shooting. Marxen now appeals.

D E C I S I O N

“Multiple offenses are sentenced in the order in which they occurred.” Minn. Sent. Guidelines II.B.1 (2010). Interpretation of the sentencing guidelines is a question of law that we review de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). We review the district court’s factual findings for clear error. *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996).

At the sentencing hearing, the district court found that the assault occurred before the drive-by shooting. The record does not support the district court’s finding. Both the complaint and the district court’s previous probable-cause order describe Marxen firing

his first round at the Blazer. Then, after chasing the Blazer into a cul-de-sac, Marxen fired a second round at P.G. and a group of men who were approaching the minivan.

The district court's finding that the drive-by shooting occurred after the assault is clearly erroneous because only Marxen's first shot at the Blazer could form the basis for the drive-by-shooting charge. The statute provides that "[w]hoever, while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward *another motor vehicle or a building* is guilty of a felony." Minn. Stat. § 609.66, subd. 1e(a) (emphasis added). Marxen fired his first shot at the Blazer while he was partially inside the minivan. But Marxen fired his second shot at P.G. when P.G. was not in a motor vehicle or building. Therefore, the drive-by shooting occurred with Marxen's first shot and before Marxen's second-degree assault of P.G.

After the district court sentenced Marxen, the supreme court confirmed this interpretation of the drive-by-shooting statute in *State v. Hayes*, 826 N.W.2d 799 (2013). The supreme court concluded that firing at a person was not a separate violation of the statute, but rather a "sentence-enhancement provision." *Id.* at 805. Accordingly, "a person who recklessly shoots at or toward another person while in or having just exited a motor vehicle, without also shooting at or toward a building or another motor vehicle, has not committed the offense of drive-by shooting." *Id.* at 805 n.1.

In sum, the district court erred by not sentencing Marxen for the drive-by-shooting conviction before sentencing him for the second-degree assault conviction. We therefore reverse and remand for resentencing.

Reversed and remanded.