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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2037**

State of Minnesota,
Respondent,

vs.

Zacharia Dahir Mohamed,
Appellant.

**Filed October 22, 2018
Affirmed in part, reversed in part, and remanded
Bratvold, Judge**

Olmsted County District Court
File No. 55-CR-16-8913

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

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Considered and decided by Worke, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this direct appeal, appellant argues that the district court abused its discretion by denying his motion for plea withdrawal. Additionally, he contends that his two convictions

for second-degree assault with a dangerous weapon and first-degree witness tampering, arose in the same behavioral incident, and one sentence must be vacated. Because the district court did not abuse its discretion by denying appellant's motion for plea withdrawal, we affirm. But because appellant's offenses were part of the same behavioral incident, we reverse and remand to the district court with instructions to vacate appellant's sentence for witness tampering and leave the finding of guilt in place.

FACTS

On December 24, 2016, appellant Zacharia Dahir Mohamed was at a party in Rochester. Mohamed was "intoxicated and belligerent," became angry with the victim, and swung a knife at him. Mohamed told the victim he would kill him if he called the police. The victim called the police and Mohamed left the party while the victim was speaking to the 911 dispatcher. Officers located Mohamed nearby, arrested him, and eventually found "a pipe and a small amount of apparent marijuana in Mohamed's pockets."

The state charged Mohamed with second-degree assault with a dangerous weapon (count I) in violation of Minn. Stat. § 609.222, subd. 1 (2016), first-degree witness tampering (count II) in violation of Minn. Stat. § 609.498, subd. 1(d) (2016), threats of violence (count III) in violation of Minn. Stat. § 609.713, subd. 1 (2016), possession of drug paraphernalia (count IV) in violation of Minn. Stat. § 152.092(a) (2016), and possession of a small amount of marijuana (count V) in violation of Minn. Stat. § 152.027, subd. 4(a) (2016).

On March 16, 2017, the parties appeared before the district court for a plea hearing. The state alerted Mohamed and the district court that it would amend the complaint to

allege “aggravated” witness tampering involving a “threat[] to cause great bodily harm or death to another” under section 609.498, subdivision 1b(a) (2016), if the case went to trial. Aggravated witness tampering has a presumptively longer sentence under the Minnesota Sentencing Guidelines than what the state described as “regular” witness tampering. *See* Minn. Sent. Guidelines 5.A (2016) (providing that aggravated witness tampering is a severity level nine offense while first-degree witness tampering is a severity level five offense); *see also* Minn. Stat. § 609.498, subs. 1a, 1b(b) (authorizing a maximum sentence of up to 20 years for aggravated witness tampering and up to five years for first-degree witness tampering). After the state announced the amendment, the district court recessed to give Mohamed more time to consider his plea and consult with his attorney.

The district court reconvened the hearing approximately one hour later, and the parties stated they had reached a plea agreement. Mohamed agreed to plead guilty to counts I and II. The parties anticipated that Mohamed would be “released to [chemical dependency] treatment when a bed was available, and if he successfully completed treatment and aftercare, the [s]tate would agree to recommend a departure to probation at sentencing.” But if Mohamed “did not successfully complete treatment, he agreed to the [top-of-the-box] sentence of [68] months.” The state agreed to dismiss the remaining counts.

The district court questioned Mohamed and determined he understood the consequences of the guilty plea and the terms of the agreement. Mohamed also signed a plea petition that stated he understood the consequences of his plea. Mohamed then pleaded guilty to second-degree assault and first-degree witness tampering and testified to facts that

provided a factual basis for both offenses. The district court accepted Mohamed's plea and revised his conditions of release to be consistent with the plea agreement.

On May 22, 2017, the state filed an ex-parte motion with the district court to revoke Mohamed's conditions of release and issue an arrest warrant because Mohamed had been "unsuccessfully discharged from treatment." The motion alleged that Mohamed had engaged in a "pattern of criminal activity" since he left treatment, between May 11 and May 19, and the alleged offenses included providing a false name to law enforcement, trespass, and public intoxication. The district court granted the state's request.

Shortly after his arrest, Mohamed appeared in court without counsel and told the district court he did not want to plead guilty to the new or original charges. Later, with the assistance of counsel, Mohamed filed a motion to withdraw his guilty pleas. The district court held a hearing on Mohamed's motion, took the matter under advisement, and later denied Mohamed's motion in a written order. On September 25, 2017, the district court entered judgment of conviction for second-degree assault with a dangerous weapon and imposed an executed sentence of 68 months. It also entered judgment of conviction for first-degree witness tampering and imposed a concurrent sentence of 48 months. Mohamed appeals.

D E C I S I O N

I. The district court did not abuse its discretion by denying Mohamed's motion to withdraw his plea.

The decision to grant a motion to withdraw a plea "is left to the sound discretion of the trial court, and it will be reversed only in the rare case in which the appellate court can

fairly conclude that the trial court abused its discretion.” *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

“Guilty pleas facilitate the efficient administration of justice, and more than a change of heart is needed to withdraw a guilty plea.” *State v. Lopez*, 794 N.W.2d 379, 382 (Minn. App. 2011). A defendant may withdraw a guilty plea “only if one of two standards is met.” *Id.* First, as set out in Minn. R. Crim. P. 15.05, subd. 1, a defendant may withdraw a guilty plea “at any time, before or after sentence, if he can prove that withdrawal is necessary to correct a manifest injustice.” *Kim*, 434 N.W.2d at 266. “A defendant can establish manifest injustice by showing that the plea was ‘not accurate, voluntary, and intelligent.’” *Lopez*, 794 N.W.2d at 382 (quoting *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997)). Second, as set out in Minn. R. Crim. P. 15.05, subd. 2, a defendant may withdraw a plea before sentencing “if it is fair and just to do so.” *State v. Raleigh*, 778 N.W.2d 90, 97 (Minn. 2010). The manifest-injustice standard is more demanding than the fair-and-just standard. *Lopez*, 794 N.W.2d at 382.

Because Mohamed moved to withdraw his plea before he was sentenced, the fair and just standard applies. *Raleigh*, 778 N.W.2d at 97. Under this standard, the district court must give “due consideration to two factors: (1) the reasons a defendant advances to support withdrawal and (2) prejudice granting the motion would cause the [s]tate given reliance on the plea.” *Id.* (quotation omitted). The defendant has the burden to provide support for his withdrawal, but the state has the burden to show why withdrawal would cause prejudice. *Id.* When, however, “the defendant fails to advance valid reasons why withdrawal is fair and just,” a district court may deny a plea withdrawal even if the state

does not show prejudice. *State v. Cubas*, 838 N.W.2d 220, 224 (Minn. App. 2013) (citing *Raleigh*, 778 N.W.2d at 97-98), *review denied* (Minn. Dec. 31, 2013).

Mohamed argues that he satisfied the fair and just standard because his plea was involuntary. Mohamed adds that an involuntary plea satisfies the higher manifest-injustice standard. *See Lopez*, 794 N.W.2d at 382 (quoting *Perkins*, 559 N.W.2d at 688). Mohamed contends that he felt “coerced into giving up his trial rights” when the state announced it would pursue a more severe charge (aggravated first-degree witness tampering), with a possible greater sentence, if Mohamed decided to proceed to trial. He also alleged, to the district court, that the prosecutor “s[at] there and threaten[ed]” him with the higher charge and harsher sentence.

In a written decision, the district court rejected Mohamed’s claim, stating:

[Mohamed’s] arguments were mere argumentative assertions that lacked factual support. This is a case of a young man that did not successfully complete his end of the [plea agreement], and now he wants to withdraw his plea in order to avoid facing the consequences of his actions. While it is unfortunate that [Mohamed] did not complete treatment, *the [c]ourt does not find [Mohamed] credible. . . . [Mohamed], given his history with plea agreements in the past, understood the plea agreement he entered into . . . and pleaded guilty to [c]ounts [I and II] under oath and on the record.*

(Emphasis added.) The district court continued:

Further, the [c]ourt is familiar with the attorneys on this matter and they are professional and competent. [Mohamed] asserts that he was ‘threatened’ by [the prosecutor], but testified at the July 24, 2017 motion hearing that he never had direct contact with [the prosecutor]. [Mohamed’s attorney] spent [approximately an hour] counseling her client prior to his guilty plea, providing further assurance to this [c]ourt that [Mohamed] understood the agreement. None of [Mohamed’s]

arguments are factually supported. Accordingly, [Mohamed] did not meet his burden of showing that it is both fair and just to withdraw his guilty plea.

The district court did not abuse its discretion in denying Mohamed's motion for two reasons. First, the district court's determination that Mohamed was not coerced when he entered into the plea agreement is supported by caselaw and the record. The supreme court has explained that, "[a]lthough the government may not produce a plea through actual or threatened physical harm, or by mental coercion 'overbearing the will of the defendant,' a defendant's motivation to avoid a more serious penalty or set of charges will not invalidate a guilty plea." *State v. Ecker*, 524 N.W.2d 712, 719 (Minn. 1994) (applying manifest-injustice standard) (quoting *Brady v. United States*, 397 U.S. 742, 750, 90 S. Ct. 1463, 1470 (1970)).

Here, the prosecutor's decision to charge Mohamed with a more serious crime if he proceeded to trial did not amount to coercion. Existing caselaw establishes that "a threat to prosecute fully a defendant if he or she does not plead guilty is constitutional." *Ecker*, 524 N.W.2d at 719. And Mohamed does not allege that the prosecutor coerced him in any other way. The district court also found Mohamed had admitted that the prosecutor did not have any direct contact with him on the morning he pleaded guilty.

Second, the district court's determination that Mohamed voluntarily entered into the plea agreement is also supported by caselaw and the record. In *Raleigh*, the supreme court affirmed a district court's decision to reject a plea withdrawal under the fair-and-just standard, in part, because the defendant "affirmed that he understood" the terms of his agreement, which undermined the defendant's claim that his plea was involuntary. 778

N.W.2d at 97. Here, the district court determined that Mohamed's plea was informed and voluntary after completing extensive questioning. Mohamed told the district court that he was pleading guilty "[b]ecause [he] actually committed these felonies," that he was "thinking very clearly," that he was voluntarily giving up his trial rights, that he understood the maximum penalty for the charges against him, and that he was aware that his plea may have implications for his immigration status. Mohamed also stated that he understood the terms of the agreement and the consequences of failing to adhere to it.

In its order denying Mohamed's plea withdrawal, the district court also stated it did not find credible Mohamed's assertions that his guilty plea was involuntary. "Where, as here, credibility determinations are crucial, a reviewing court will give deference to the primary observations and trustworthiness assessments made by the district court." *State v. Alviles-Alvarez*, 561 N.W.2d 523, 527 (Minn. App. 1997) (affirming order denying plea withdrawal and deferring to district court's credibility determination), *review denied* (Minn. June 11, 1997).

In his brief to this court, Mohamed argues that his plea was involuntary because his attorney "could have asked for even more time for him to consider his options." But the district court specifically asked Mohamed at his plea hearing if he had been given enough time to make his decision, and Mohamed replied that he had. On this record, the district court did not abuse its discretion in rejecting Mohamed's motion to withdraw his plea.

We conclude that the district court did not abuse its discretion in concluding that Mohamed did not offer valid reasons to withdraw his plea. *See Cubas*, 838 N.W.2d at 224.

Thus, we affirm without considering whether the state would have been prejudiced had Mohamed been allowed to withdraw his plea.

II. The district court erred in imposing multiple sentences for offenses that arose from a single behavioral incident.

Generally, a court may not sentence a defendant to “multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident.” *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012); *see also* Minn. Stat. § 609.035, subd. 1 (2016) (prohibiting multiple sentences for “conduct constitut[ing] more than one offense under the laws of this state”). When the facts are not in dispute, this court reviews *de novo* whether criminal acts are part of a single behavioral incident. *Ferguson*, 808 N.W.2d at 590. A defendant does not waive a single-behavioral-incident challenge by failing to raise it at sentencing. *See Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (holding defendant “does not waive claims of multiple convictions or sentences by failing to raise the issue at the time of sentencing”).

Mohamed argues that the district court erred by imposing separate, concurrent sentences for count I, assault, and count II, witness tampering, because the two crimes arose from a “single behavioral incident.” The state concedes the issue, but we conduct an independent review of Mohamed’s sentences. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (stating that “it is the responsibility of appellate courts to decide cases in accordance with law”). “In order to determine whether two intentional crimes are part of a single behavioral incident, [appellate courts] consider factors of time and

place . . . [and w]hether the segment of conduct involved was motivated by an effort to obtain a single criminal objective.” *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011).¹

Here, Mohamed’s testimony at the plea hearing established that he committed assault and witness tampering at the same time and place: Mohamed was at a party when he threatened the victim and swung a knife at him in order to frighten the victim into not calling the police. Further, Mohamed committed both offenses to further a single criminal objective: to frighten the victim into not calling the police. Thus, we conclude that Mohamed’s two offenses were committed as part of a single behavioral incident.

Finally, we must consider which of Mohamed’s two sentences should be vacated. The supreme court has held that “section 609.035 contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident.” *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted). To determine the seriousness of an offense, courts may look to the sentencing guidelines severity-level rankings, “the length of the sentences actually imposed by the district court,” and the statutory “maximum potential sentence for each” offense. *Id.*

Assault is the more serious offense in Mohamed’s case, thus it is appropriate to vacate the sentence for count II, witness tampering. Second-degree assault is a severity-

¹ Mohamed’s two offenses were intentional crimes. *See* Minn. Stat. § 609.498, subd. 1(d) (stating that an offender must “intentionally prevent[] or dissuade[] [a person from giving information to law enforcement] . . . by means of force or threats of injury”); Minn. Stat. § 609.02, subd. 10 (2016) (defining assault as “an act done with intent to cause fear in another of immediate bodily harm or death” or “the intentional infliction of or attempt to inflict bodily harm upon another”). Had either of Mohamed’s offenses been an unintentional crime, a different test would have applied. *See Bauer*, 792 N.W.2d at 828 n.3.

level six offense and first-degree witness tampering is a severity-level five offense. Minn. Sent. Guidelines 5.A. Further, the district court imposed a 68-month sentence for count I, assault, and a 48-month sentence for count II, witness tampering. Lastly, the maximum penalty for second-degree assault is seven years of imprisonment while a person convicted of regular first-degree witness tampering may be imprisoned for only five years. *Compare* Minn. Stat. § 609.222, subd. 1, *with* Minn. Stat. § 609.498, subd. 1a. Accordingly, we reverse and remand with instructions to vacate the sentence for count II, witness tampering, and leave the finding of guilt in place.

Affirmed in part, reversed in part, and remanded.