**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-1490**
**A18-1655**

State of Minnesota,
Appellant (A18-1655),
Respondent (A18-1490),

vs.

Brian Joseph Andvik,
Appellant (A18-1490),
Respondent (A18-1655).

**Filed November 18, 2019**
**Affirmed in part, reversed in part, and remanded**
**Smith, John, Judge**[*]

Traverse County District Court
File No. 78-CR-17-229

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

Matthew P. Franzese, Traverse County Attorney, Wheaton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Johnson, Judge; and Smith, John, Judge.

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

## U N P U B L I S H E D  O P I N I O N

**SMITH, JOHN**, Judge

This case comes before the court on separate appeals by appellant Brian Joseph Andvik from his final judgment of conviction and sentence and from the state's cross-appeal from the sentence. The appeals were consolidated by this court.

We affirm in part because appellant's conviction for felony domestic assault and threats of violence constitute separate behavioral incidents, and the district court did not abuse its discretion by not imposing permissive consecutive sentences on all eligible offenses. We reverse in part because the district court erred (1) by using an incorrect criminal history score, (2) by imposing the mandatory minimum sentence on Andvik's second-degree assault conviction, and (3) by convicting Andvik of both second-degree assault and the lesser-included offense of third-degree assault. We remand for resentencing in accordance with this opinion.

## FACTS

In 2017, the state charged appellant Brian Joseph Andvik in a ten-count complaint for conduct alleged to have occurred on various days from October 20 through October 29, 2017 against D.S., his former live-in girlfriend. The complaint alleged that Andvik committed the following offenses against D.S.: one count of second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2016); one count of third-degree assault in violation of Minn. Stat. § 609.223, subd. 1 (2016); three counts of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2016); two counts of domestic assault by strangulation in violation of Minn. Stat. § 609.2247, subd. 2 (2016); and one count of

threats of violence in violation of Minn. Stat. § 609.713, subd. 1 (2016). The complaint also charged Andvik with two counts of being an ineligible person in possession of a firearm and ammunition under Minn. Stat. § 624.713, subd. 1 (2016).

The district court severed the two ineligible-person-in-possession-of-a-firearm counts, and the state tried Andvik first on those offenses. After a jury found Andvik guilty on both counts, he was tried on the remaining eight counts. At the second trial, D.S. testified for the state to the following events. D.S. first explained that, in the evening of October 20, 2017, Andvik strangled her, grabbed her and threw her against a wall, pulled her hair, threw her to the ground, and body-slammed her.

D.S. next described an incident that occurred in the early morning hours of October 22, 2017, when she and Andvik were drinking alcohol in Andvik's garage with two friends. Around 1:30 a.m., D.S. threw a cup of beer in Andvik's face, and Andvik responded by grabbing her neck and throwing her across their garage. D.S. went inside and hid in an upstairs closet until around 4:30 a.m., when Andvik discovered her, dragged her out, and began physically beating her again. Eventually, their struggle led them to a downstairs bedroom, where Andvik pinned D.S. to the ground and asked if she had her partial dental fixture in her mouth. Andvik then told D.S. that she needed to take her partial out "cuz it's time you die."

Lastly, D.S. testified that on October 26, Andvik threw her off a couch, whipped her head backwards, and banged her head against the ground after he caught her in a lie about whether she had deleted text messages on her cellphone from a male acquaintance. D.S. stated that, just after Andvik ceased physically assaulting her, he propped her up on a chaise

lounge and gave her an ice pack. Moments later, Andvik retrieved a knife from the kitchen, returned to the living room where D.S. was sitting, swung the knife around while he was talking with his hands, and then pointed it at D.S. while accusing her of cheating. Andvik then pointed the knife at himself and asked D.S. to stab him because that was how her purported cheating felt to him.

Andvik testified in his own defense and characterized his relationship with D.S. as normal, but recently marred by jealousy and drinking. As to the garage incident on October 22, Andvik recalled that he pushed D.S. away from himself after she threw a cup of beer in his face. Andvik stated that he went inside a few hours later, located D.S. in an upstairs bedroom closet, and, after observing that she was upset and advising her to take out her partial denture before she choked on it, went back downstairs and fell asleep. Andvik denied ever grabbing D.S.'s arms, pulling her hair, choking her, or slamming her head on the ground. In describing the knife incident, Andvik denied ever threatening D.S.; instead he explained that he had the knife pointed at his own heart while he sat on the opposite side of the living room couch from D.S. Andvik stated that he was talking with his hands while holding the knife.

The jury found Andvik guilty of second-degree assault, third-degree assault, threats of violence, and three counts of felony domestic assault, but did not reach a verdict on the two counts of domestic assault by strangulation. At Andvik's sentencing hearing, the district court first sentenced Andvik to 61 months in prison on one ineligible-person-in-possession-of-a-firearm conviction. The district court next sentenced Andvik on the felony-domestic-assault conviction for conduct on October 20. Then, the district court

sentenced Andvik on another felony-domestic-assault conviction for conduct on October 22. Finally, the district court sentenced Andvik to 36 months in prison on his second-degree assault conviction for conduct on October 26, based on the state's argument that Andvik was subject to the mandatory minimum provision from Minn. Stat. § 609.11, subd. 4 (2016). The district court ordered that the sentences for second-degree assault, felony domestic assault, and being an ineligible person in possession of a firearm run consecutively.

Both parties moved the district court for resentencing. Andvik argued that he could not be sentenced consecutively on the ineligible-person-in-possession-of-a-firearm count because it was not on the list of permissive consecutive sentences. The state argued that Andvik should be resentenced because four of his six convictions were eligible for separate, permissive consecutive sentences. In its resentencing order and memorandum, the district court imposed sentence in the following order: (1) a 36-month sentence on the felony-domestic-assault conviction from October 20; (2) a one-year-and-one-day consecutive sentence on the second felony-domestic-assault conviction from October 22; (3) a one-year-and-one-day concurrent sentence on the threats of violence conviction from October 22; (4) a 36-month consecutive sentence on the second-degree assault conviction from October 26; (5) a one-year-and-one-day concurrent sentence on the third-degree assault conviction from October 26; and (6) a 61-month concurrent sentence on the ineligible-person-in-possession of a firearm conviction. On appeal, Andvik and the state each challenge different aspects of the district court's resentencing order.

## D E C I S I O N

### I. Sentences for felony-domestic assault and threats-of-violence convictions from Andvik's October 22, 2017, conduct are permitted.

Andvik argues that the district court violated Minn. Stat. § 609.035 (2016) when it sentenced him for both the felony-domestic-assault and the threats-of-violence convictions from October 22, 2017. Whether multiple offenses arose from a single behavioral incident presents a mixed question of law and fact, requiring us to review the district court's factual findings for clear error and its application of the law to those facts de novo. *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014).

Absent limited exceptions, a person whose conduct constitutes multiple punishable offenses may be punished for only one offense. Minn. Stat. § 609.035, subd. 1. Minnesota courts have interpreted section 609.035 as contemplating "that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident." *State v. Kebasso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted). When the offenses at issue are intentional crimes, as they are here, we analyze "(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." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (quotation and citation omitted). It is the state's burden to establish by a preponderance of the evidence that the two offenses were not part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

The district court imposed separate sentences on Andvik's felony-domestic-assault and threats-of-violence convictions for conduct on October 22, 2017.[1] In analyzing whether a single criminal objective motivated Andvik's commission of these offenses, we consider their relationship to one another. *See State v. Bauer*, 792 N.W.2d 825, 829 (Minn. 2011). The district court found that Andvik's criminal objective was the same when he committed both offenses: "to subjugate, dominate, belittle, and break the victim down." Yet "[b]road statements of criminal purpose do not unify separate acts into a single course of conduct." *Jones*, 848 N.W.2d at 533; *cf. State v. Mullen*, 577 N.W.2d 505, 511 (Minn. 1998) (holding that acts "motivated by a continuous intent to harass" a particular person spanning a few hours constituted a single criminal purpose). Trial evidence demonstrates that Andvik committed the felony domestic assault in the garage and the threats of violence offense in the downstairs bedroom with differing criminal objectives. Andvik assaulted D.S. in the garage after she threw a cup of beer in his face. Three hours later, he threatened to kill her. Neither offense was committed in furtherance of the other. *See Bauer*, 792 N.W.2d at 830. Andvik's intent when he threatened to kill D.S. was not the same as his intent when he assaulted her three hours earlier.

These two offenses do not share a unity of time. Andvik assaulted D.S. around 1:30 a.m., then threatened to kill her shortly after 4:30 a.m. D.S. fled into the house while Andvik remained in the garage with a friend during the three-hour gap. Although Andvik

[1] Although the district court's resentencing memorandum contained language suggesting it may have considered these offenses to be part of the same behavioral incident, its order ultimately imposed separate sentences for these acts.

argues that he again assaulted D.S. in the closet just before he threatened to kill her, the record reveals that the garage assault was the felony domestic assault at issue. In its closing argument, the state argued that the garage conduct was felony domestic assault, and that the bedroom conduct constituted domestic assault by strangulation. Indeed, the state charged the bedroom assault under a domestic-assault-by-strangulation theory; the jury did not convict Andvik on this count. Accordingly, the three-hour difference between Andvik's commission of the garage assault and the closet threat were not unified in time. *See State v. Bookwalter*, 541 N.W.2d 290, 295 (Minn. 1995).

Similarly, the offenses lack a distinct unity of place. The offenses occurred in separate areas of Andvik's home, rather than in the same room. The record is silent on the distance between the garage and the bedroom in Andvik's home. Even assuming that this factor favors Andvik, the other factors outweigh it. On balance, Andvik's differing criminal objectives and the three-hour break between the assault and the threat of violence support a finding that these acts were not a single behavioral incident. Thus, we affirm the district court's imposition of separate sentences on Andvik's felony-domestic-assault and threats-of-violence convictions from October 22.

## II. The district court did not abuse its discretion by declining to impose permissive consecutive sentences on all eligible counts.

The state argues that the district court abused its discretion by not imposing consecutive sentences on all counts permitted under the sentencing guidelines and caselaw. This court reviews the imposition of consecutive sentences for an abuse of discretion. *State v. Fardan*, 773 N.W.2d 303, 322 (Minn. 2009). The Minnesota Sentencing Guidelines

state that "when an offender is convicted of multiple current offenses . . . concurrent sentencing is presumptive." Minn. Sent. Guidelines 2.F (2016). A court may impose consecutive sentences "[i]f the offender is being sentenced for multiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentence in section 6 . . . ." Minn. Sent. Guidelines 2.F.2.a.(i)(ii). Second-degree assault, third-degree assault, felony domestic assault, and threats of violence are included on the list of offenses eligible for permissive consecutive sentencing. Minn. Sent. Guidelines 6 (2016).

The district court did not abuse its discretion in not imposing permissive consecutive sentences on every eligible offense it sentenced. An abuse of discretion occurs when a court's decision reflects an incorrect view of the law or contravenes logic and the factual record. *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). Even though Andvik was convicted of multiple offenses, concurrent sentencing remained presumptive. *See* Minn. Sent. Guidelines 2.F. Clearly, the district court was aware of its ability to impose consecutive sentences because it did so on two of Andvik's convictions. However, it had no obligation to do so. The record fails to support the state's claim that the district court misunderstood the law in not imposing additional permissive consecutive sentences. Consecutive sentencing here was permissive, and the district court applied this principle in sentencing Andvik. We discern no abuse of discretion here.

**III. Calculation of criminal history score was erroneous.**

Andvik argues that the district court abused its discretion by calculating his criminal history score when it sentenced him first on the felony-domestic-assault conviction from October 20, 2017. The state concedes that the district court erred, but disagrees with

Andvik on the appropriate remedy on remand. We review a district court's calculation of a defendant's criminal history score for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Under the rule established in *State v. Hernandez*, a district court sentencing a defendant for multiple offenses on the same day may count each prior conviction in the defendant's criminal history score when sentencing subsequent offenses. 311 N.W.2d 478, 481 (Minn. 1981). The comments to the sentencing guidelines have adopted this principle and state that "for prior convictions to be used in computing the criminal history score, the felony sentence for the prior offense must have been stayed or imposed before sentencing the current offense." Minn. Sent. Guidelines cmt. 2.B.107 (2016). Here, the district court first sentenced Andvik to 36 months in prison on a felony-domestic-assault conviction. Felony domestic assault is a severity level four offense. Minn. Sent. Guidelines 5.A (2016). Before imposition of this sentence, Andvik's criminal history score was five, meaning that, absent a departure, he should have received a sentence between 23 and 32 months. Minn. Sent. Guidelines 4.A (2016). The district court improperly increased Andvik's criminal history score to six before imposing the first sentence. Therefore, we reverse Andvik's sentence on felony domestic assault from October 20, 2017, and remand to the district court for recalculation of his criminal history score and resentencing on this conviction.

The state argues that the district court resentenced Andvik's convictions in the wrong sequence, and that Andvik should be sentenced first on the ineligible-person-in-possession-of-a-firearm conviction on remand because he committed that offense first. However, the state failed to raise this issue in its principal brief or in the district court.

Thus, the state's argument that the district court should have sentenced Andvik first on the ineligible-person-in-possession-of-a-firearm conviction is not properly before us.[2]

## IV. Imposition of the 36-month mandatory minimum sentence for Andvik's second-degree assault conviction was erroneous.

Andvik's argument is that the district court erred by imposing the mandatory minimum sentencing provision from Minnesota Statutes section 609.11, subdivision 4, to his second-degree assault conviction. The interpretation of a sentencing statute is a question of law subject to de novo review. *State v. Amundson*, 828 N.W.2d 747, 752 (Minn. App. 2013). Individuals convicted of a "second or subsequent" qualifying offense that involves the use of "a dangerous weapon *other than a firearm*" are subject to a 36-month mandatory minimum sentence. Minn. Stat. § 609.11, subd. 4 (emphasis added). Second-degree assault is a qualifying conviction under the mandatory minimum provision. *Id.*, subd. 9 (2016).

Andvik persuasively argues that Minn. Stat. § 609.11, subd. 4 does not apply here because he does not have a prior conviction that involved the use of a dangerous weapon other than a firearm. The jury found that Andvik committed second-degree assault through his use of a knife against D.S. Andvik has a prior felony conviction for second-degree assault for an offense involving the use of a firearm. *State v, Andvik*, No. A11-0031, 2012 WL 1470148, at *1 (Minn. App. Apr. 30, 2012). The statute's plain language explicitly

[2] We note that the state charged the ineligible-person-in-possession-of-a-firearm counts with an offense date of October 29, 2017. The state's argument also impermissibly urges a longer prison sentence on remand. *See State v. Wallace*, 327 N.W.2d 85, 88 (Minn. 1982) (explaining that the district court cannot impose a longer sentence on remand after a defendant's successful appeal).

excludes offenders, such as Andvik, whose prior conviction involved the use of a firearm. *See* Minn. Stat. § 609.11, subd. 4.

The state acknowledges that Minn. Stat. § 609.11, subd. 4, is unambiguous, but contends that we should apply the absurdity canon to affirm Andvik's sentence. *See* Minn. Stat. § 645.17 (2016) (It is presumed that "the legislature does not intend a result that is absurd . . ."). When a statute is unambiguous, as the parties agree it is here, we must apply its plain meaning. *State v. Schmid*, 859 N.W.2d 816, 820 (Minn. 2015). The absurdity canon only applies in "exceedingly rare" cases. *State v. Smith*, 899 N.W.2d 120, 125 (Minn. 2017). The Minnesota Supreme Court has only once used this canon of interpretation to override a statute's plain language. *See Wegener v. Comm'r of Revenue*, 505 N.W.2d 612, 617 (Minn. 1993) (applying the absurdity canon when a statute's plain meaning rendered much of the statute unconstitutional). The supreme court has not answered whether the absurdity canon applies in criminal cases. *See Smith*, 899 N.W.2d at 125 (declining to answer whether the *Wegener* rule applies to unambiguous criminal statutes). Adopting the state's argument would read the words "other than a firearm" out of Minn. Stat. § 609.11, subd. 4, something we cannot do. *See Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 438 (Minn. 2009) ("We cannot rewrite a statute under the guise of statutory interpretation.").

Based on the statute's plain language, Andvik's second-degree assault conviction is not a "second or subsequent offense" involving the use of "a dangerous weapon other than a firearm." The district court erred in sentencing Andvik to 36 months in prison for second-degree assault under the mandatory minimum provision from Minn. Stat. § 609.11, subd.

4. Accordingly, we reverse and remand for resentencing on Andvik's second-degree assault conviction. *See State v. Crockson*, 854 N.W.2d 244, 249 (Minn. App. 2014) (reversing and remanding for resentencing when the district court improperly imposed a mandatory minimum sentence under Minn. Stat. § 609.11, subd. 5(a) (2014)), *review denied* (Minn. Dec. 16, 2014).

**V. Conviction and sentence for third-degree assault must be vacated.**

Lastly, Andvik argues that the district court abused its discretion by convicting and sentencing him for third-degree assault when it also convicted and sentenced him for second-degree assault. Whether a defendant may be convicted of multiple offenses without violating Minn. Stat. § 609.04 (2016) presents a legal question that we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1. "If the lesser offense is a lesser degree of the same crime or a lesser degree of a multi-tier statutory scheme dealing with a particular subject, then it is an 'included offense' under section 609.04." *State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995). Both second-degree and third-degree assault stem from the same multi-tier statutory scheme. *Compare* Minn. Stat. § 609.222 (2016) (defining second-degree assault), *with* Minn. Stat. § 609.223 (2016) (defining third-degree assault). Therefore, third-degree assault is an "included offense" of second-degree assault as defined in Minn. Stat. § 609.04. *See Hackler*, 532 N.W.2d at 559 (holding that second-degree assault is an "included offense" of first-degree assault under Minn. Stat. § 609.04).

The jury found Andvik guilty of both second-degree and third-degree assault based on his assault of D.S. on October 26, 2017. These offenses were not separate criminal acts; they occurred just minutes apart in Andvik's living room, and Andvik's criminal objective of assaulting D.S. remained unchanged throughout. *See State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006) ("The inquiry into whether two offenses are separate criminal acts [under Minn. Stat. § 609.04] is analogous to an inquiry into whether multiple offenses constitute a single behavioral incident under Minn. Stat. § 609.035."). The district court entered convictions on both offenses and sentenced Andvik on both convictions in its resentencing order. Because Andvik's third-degree assault offense is an "included offense" of his second-degree assault offense under Minn. Stat. § 609.04, the district court erred in convicting and sentencing him on both offenses. We reverse and remand to the district court with instructions to vacate the conviction and sentence on Andvik's third-degree assault offense. However, the jury's finding of guilt is not disturbed. *See State v. Wilson*, 539 N.W.2d 241, 247 (Minn. 1995) (holding that, while the formal adjudication of a lesser-included offense must be vacated when imposed in violation of Minn. Stat. § 609.04, the underlying guilty verdict endures).

**Affirmed in part, reversed in part, and remanded.**