STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1028

State of Minnesota,
Respondent,

vs.

Wade Allen Sorensen,
Appellant.

Filed July 13, 2020
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

St. Louis County District Court
File No. 69DU-CR-18-753

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Mark Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

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

SMITH, TRACY M., Judge

In this direct appeal from a judgment of conviction for third-degree assault, aiding and abetting kidnapping, and aiding and abetting attempted first-degree felony murder,

appellant Wade Allen Sorensen challenges his convictions and sentences. He makes four arguments: (1) his conviction for aiding and abetting first-degree attempted murder was not supported by sufficient evidence that he acted with intent to kill the victim; (2) the district court erred by imposing a sentence for third-degree assault because the assault was committed as part of the same behavioral incident as the kidnapping and attempted-murder offenses; (3) he was deprived of the effective assistance of counsel when his attorney conceded his guilt to third-degree assault; and (4) in his pro se supplemental brief, his conviction of multiple counts violates Minn. Stat. § 609.04, subd. 1 (2016). We affirm in part, reverse in part, and remand.

FACTS

The state charged Sorensen with four counts arising from a series of events in which he and several co-defendants beat, kidnapped, and attempted to kill R.B. A jury found Sorensen guilty on all counts, and the district court imposed three concurrent executed sentences, with the longest sentence being 230 months. The evidence at Sorensen's trial established the following facts.

The offenses

On the morning of March 2, 2018, Natausha Smith asked R.B. to come to her home to help her move a piece of furniture. R.B. and Smith were friends, and R.B. had temporarily lived with Smith and her three children—at the time, ages eight, four, and two—at Smith's home in downtown Duluth. Sorensen is the father of Smith's two youngest children and lived nearby. At some point, Smith had come to believe that either R.B. or

R.B.'s boyfriend had sexually abused the four-year-old child of Smith and Sorensen. This belief led to the following events.

After R.B. arrived at Smith's house around noon on March 2, Smith told him to go downstairs. Smith then instructed her teenage niece, K.N., to retrieve some rope. After a few minutes, Smith and K.N. went downstairs and Smith placed some methamphetamine in front of R.B. for him to use. While R.B. began preparing to use the drug, Smith attacked him from behind and pulled him to the ground. As they struggled, K.N. used nunchucks to strike R.B. in the head. After five or six blows, Smith told K.N. to stop and proceeded to "hog-tie" R.B.'s wrists and ankles behind his back with yellow rope. She and K.N. then tied R.B. to a chair with rope around his waist. Smith placed a large padlock inside R.B.'s mouth and secured it by tying a bandanna around his head.

Smith then sat down in front of R.B. and said something like "[t]hat was my son." R.B. began to realize that Smith was accusing him of sexually abusing the child. Smith indicated that she had a video to prove it and repeatedly played footage from a nanny camera in the children's bedroom. The video, which was played at trial, showed two children sleeping and a cat jumping on the bed. R.B. is not in the video and did not know why Smith believed that it proved sexual abuse.

At around 4:00 p.m., Smith left R.B. tied up while she took her children to the police department for forensic interviews that had been arranged regarding the sexual-abuse allegations. During the interviews, she had four phone calls and one text message with Sorensen; the two subsequently deleted the records of these communications from their phones. The forensic interviews ended at 5:30 p.m., and Smith returned home sometime

thereafter. She and Sorensen exchanged more phone calls and messages, the records of which they also deleted, before Sorensen arrived at Smith's home around 6:45 p.m.

When Sorensen arrived at Smith's home, Smith instructed R.B.—who was still tied to the chair—to tell Sorensen what he had done. R.B. had started to believe that perhaps his boyfriend "molested" the child, which he told Sorensen. Sorensen then began punching R.B. in the head with closed fists, causing blood to "fly[] everywhere." When he eventually stopped punching R.B., Sorensen asked Smith what the plan was, and Smith suggested that she was going to "cut [him] loose" because she figured R.B. "learned [his] lesson." Sorensen replied, "Are you f-----g crazy? Look at him. We can't cut him loose. He'll go right to the police." After hearing this, R.B. believed they were going to "finish [him] off."

Shortly thereafter, Quinton Mock and Christy Tjaden arrived at Smith's home. Sorensen and Mock untied R.B. from the chair and put a reusable shopping bag over his head, threw him on the bed, and punched him and burned his back with a cigarette. They then threw R.B. to the floor and kicked and "stomped on" R.B. while Mock pointed a gun at him. The group eventually dragged R.B., with his hands and feet still bound and his head covered with the shopping bag, up the stairs. They forced him into the backseat of Tjaden's SUV. Sorensen and Smith got in the backseat, with Tjaden in the driver's seat and Mock in the front passenger's seat. They drove away from Smith's home.

While Sorensen and the others drove R.B. around in the SUV, Mock pointed a gun at R.B. and Sorensen hit R.B. if he moved. R.B. could hear them talking about how they needed to "finish [him] off" and "make [him] disappear." At some point, Smith asked to be dropped off because she did not want to be in the car, but she asked the others to call

her when they were done. After Smith was dropped off, the group eventually drove away from downtown Duluth, and Smith and Sorensen exchanged, and again deleted, several text messages and phone calls between 8:22 p.m. and 8:37 p.m.

Around 9:00 p.m., Sorensen and the others in the SUV arrived at a remote location below the Becks Road overpass (hereinafter "Becks Road scene"). Once there, Sorensen pushed R.B. out of the moving vehicle into a snowy ditch. Mock and Sorensen then got out of the car and began stomping on R.B.'s head and neck. After a few minutes, Sorensen pulled R.B.'s head backwards and R.B. thought Sorensen was trying to break his neck. R.B. felt something scratching his neck but was not sure what the object was and thought that Sorensen had tried to slit his throat.[1] R.B. shoved his head in a snowbank to try to evade Sorensen. He then froze and "play[ed] dead," letting his body go limp while Sorensen and Mock kicked him. Mock then stomped on R.B.'s head a final time before R.B. heard Mock say, "Holy f--k, we did it. We gotta go. We gotta go." Sorensen and Mock then jumped in the SUV and fled the Becks Road scene, leaving less than five minutes after they had arrived.

They left R.B. alone in this dark, remote location, about twelve miles from downtown Duluth, in freezing March weather, and with no coat or shoes and his pants pulled down to his ankles. R.B.'s hands and ankles were still tied and he felt dizzy, but, to

[1] In his police interview, which was played for the jury, R.B. said he thought Sorensen was trying to slit his throat with a knife. At trial, R.B. testified that he thought Sorensen was trying to break his neck and that "it felt like there was like keys or a lighter or something in his hand while he was trying to do it . . . I felt something, like scratching me . . . it could have even been a ring."

avoid freezing to death, he started to "hop" and "wiggle" through the snow and up a hill towards Becks Road. Eventually, a truck driver—who happened to know him—saw R.B., picked him up, and took him to the hospital.

The investigation

At about 9:45 p.m., a hospital employee called 911 and reported that R.B. had arrived at the emergency room with "a rope tied around his feet," that he was "bleeding quite a bit from everywhere," and that he reported being "beaten several times with nunchucks." Duluth police officers responded to the emergency room and found R.B. with apparent head injuries, a yellow rope tied around his wrists and legs, and a bandanna with an attached padlock hanging around his neck.

The officers photographed R.B.'s injuries and obtained an initial statement. His injuries included bleeding, swelling, and contusions on his face and head. They also included scattered abrasions on his upper extremities, fluid and swelling in the upper neck musculature, and two small, linear lacerations on his head and neck that were closed with staples. R.B. also had a visible scratch under his jawline, which the officers did not note or photograph at the hospital but later captured with a still-shot image from body-worn camera footage. R.B. explained to the officers how he had been tied up at Smith's home, and that "sh-t started to get really bad" when Smith's "baby dad" arrived. He also told the officers multiple times that he believed his attackers only left the Becks Road scene because "[t]hey thought they killed [him]."

Meanwhile, several police officers arrived at Smith's home to investigate. Sorensen, Mock, and Tjaden had all returned to Smith's home, and Smith gave the officers permission

to come in. While inside, officers observed a carpet-cleaning machine and wet carpet, and also observed Sorensen sweating profusely. After obtaining a search warrant, they found evidence including yellow rope, a washcloth with blood on it, and blood spots on the carpet that later tested as R.B.'s blood. They also searched the SUV and found a blood-stained reusable shopping bag, R.B.'s shoes, and a set of nunchucks. At the Becks Road scene, they recovered R.B.'s broken belt, a towel, and yellow rope with R.B.'s blood on it.

When law enforcement conducted a follow-up interview with R.B., R.B. described Sorensen attempting to "slit [his] throat" at the Becks Road scene and said he thought he may have felt a blade. R.B. also identified Sorensen in a photo lineup.

Sorensen was taken into custody on March 10. When interviewed, he denied any involvement in the events of March 2. He denied being in the vicinity of the Becks Road scene that day or at Smith's home during the assault, but cell tower data placed him at the crime scenes at times corresponding with R.B.'s account.

Following his arrest, Sorensen made several statements in phone calls that the state presented as evidence at trial. In the first call, he told his mother that the charges against him related to a "babysitter" sexually abusing his child. The conversation included the following:

> SORENSEN: Okay. Well listen. Listen, mom. I went for—I went for the honor of your grandson, mom.
> [MOTHER]: Well, you should—you know, I would've preferred that you let them take care of it.
> SORENSEN: Mom, they were not gonna arrest these people, Mom. They said—
> [MOTHER]: They weren't?

> SORENSEN: —they had to do a complete investigation. They had to (unintelligible) to be re-arrested. So. If you have—if you have something—
> [MOTHER]: But why throw—but why throw your life away for—for this. Now—now you can't be in his life and protect him.
> . . .
> SORENSEN: Are you saying—are you saying that I should've done nothing about this and just let it ride out?

In a second call, with his girlfriend, Sorensen spoke about the circumstances surrounding his arrest. He stated that, when the police came, he should have listened to her and "taken off on the run." He also stated:

> SORENSEN: . . . I mean (unintelligible) over my child, but it's like I don't feel bad about, you know, about, you know the attempting to protect. I feel bad about the end result, you know what I mean. But . . . could I do it over again? I just wish I could've been there more for my kids . . . I just hope everybody can respect my standards . . . .

And in the third call, with an unidentified person on March 27, Sorensen described how Smith had tied R.B. up and how, instead of becoming involved, he should have called 911. He asked the listener to understand that his child had been sexually assaulted, and conceded that he could use help with his "hostile temper."

The trial and sentencing

In its second amended complaint, the state charged Sorensen with four counts: (1) aiding and abetting attempted first-degree felony murder under Minn. Stat. § 609.185(a)(3) (2016); (2) aiding and abetting third-degree assault under Minn. Stat. § 609.223, subd. 1 (2016); (3) aiding and abetting kidnapping under Minn. Stat. § 609.25, subd. 1(3) (2016); and (4) aiding and abetting attempted second-degree murder under

Minn. Stat. § 609.19, subd. 1(1) (2016). Following a five-day trial, a jury returned guilty verdicts on all four counts.

At Sorensen's sentencing hearing, the state requested permissive consecutive sentencing on counts one, two, and three, while Sorensen requested downward durational and dispositional departures. The district court imposed presumptive concurrent executed sentences of 24 months on the third-degree-assault conviction, 146 months on the kidnapping conviction, and 230 months on the aiding and abetting attempted first-degree felony murder conviction.

This appeal follows.

D E C I S I O N

I. The evidence is sufficient to support Sorensen's conviction for aiding and abetting attempted first-degree felony murder.

Sorensen argues that the state failed to prove beyond a reasonable doubt that he intended to kill R.B.—a necessary element to sustain his conviction for aiding and abetting attempted first-degree felony murder.

To evaluate the sufficiency of the evidence, appellate courts "carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the factfinder to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). Appellate courts review the evidence "in the light most favorable to the conviction" and "assume the jury believed the State's witnesses and disbelieved any evidence to the contrary." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn.

2012) (quotation omitted). Appellate courts "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Id.*

If a conviction is based on circumstantial evidence, reviewing courts apply a heightened level of scrutiny. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). Under the heightened standard, appellate courts "consider whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt." *Id.* (quotation omitted). But "when a disputed element is sufficiently proven by direct evidence alone . . . , it is the traditional standard, rather than the circumstantial-evidence standard, that governs." *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016).

Sorensen urges the court to apply the circumstantial-evidence standard. The state argues that the traditional standard applies because it sufficiently proved the intent element of Sorensen's offense with direct evidence—specifically, Sorensen's statement to Smith in the basement—that they could not "cut [R.B.] loose" because he would go to the police—and the statements made in the SUV—that the group needed to "finish [R.B.] off" and "make [him] disappear." But we need not decide which standard applies because, even under the standard more favorable to Sorensen, the evidence is sufficient to prove the intent element of his offense. *See State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013) (determining the court "need not resolve the parties' dispute regarding the standard of review because, even under the more favorable standard proposed by [defendant], the record contains sufficient evidence to support the jury's verdict").

Sorensen was charged with aiding and abetting attempted first-degree felony murder under Minn. Stat. § 609.185(a)(3), with reference to Minn. Stat. § 609.05, subd. 1 (2016)—the accomplice-liability statute. A person is guilty of first-degree felony murder when the person "causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit . . . kidnapping." Minn. Stat. § 609.185(a)(3). Under the accomplice-liability statute, "[a] person is criminally liable for a crime committed by another if the person *intentionally aids*, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (emphasis added). The phrase "intentionally aids" encompasses two components: "(1) that the defendant knew that his alleged accomplices were going to commit a crime, and (2) that the defendant intended his presence or actions to further the commission of that crime." *State v. Bahtuoh*, 840 N.W.2d 804, 810 (Minn. 2013) (quotations omitted). Accordingly, as the district court instructed Sorensen's jury, the state needed to prove that "[t]he defendant, or a person he intentionally aided, acted with the intent to kill the victim."

To apply the circumstantial-evidence standard, we use a two-step process. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). First, we identify the circumstances that the state proved. *Id.* To do so, we "winnow down" the evidence by "resolving all questions of fact in favor of the jury's verdict" and disregarding any evidence inconsistent with the verdict. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). Second, we determine "whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt." *Bahtuoh*, 840 N.W.2d at 810. There are two questions within this second inquiry: first, "whether the inferences that point to guilt are reasonable,"

and, second, whether the circumstances exclude any reasonable inference other than guilt. *See Silvernail*, 831 N.W.2d at 599 (quotation omitted). We do not defer to the jury's choice between reasonable inferences; if the circumstances proved are consistent with a reasonable inference other than guilt, the conviction must be reversed. *See id.*

A. Circumstances proved

Assuming that the jury credited the testimony of the state's witnesses, and construing the evidence in the light most favorable to the verdict, *see State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011), we identify the following circumstances proved. Sorensen arrived at Smith's home to find R.B. tied up in the basement. Smith indicated to Sorensen that R.B. had sexually abused their four-year-old child, and Sorensen began to repeatedly punch R.B. in the head, causing blood to "fly[] everywhere." When the beating stopped and Smith suggested that they could release R.B., Sorensen replied, "Are you f-----g crazy? Look at him. We can't cut him loose. He'll go right to the police." Shortly thereafter, Mock and Tjaden arrived, and Sorensen and Mock continued to punch, kick, and stomp on R.B. The group then moved R.B. into the SUV, began driving, and discussed how they needed to "finish [him] off" and "make [him] disappear." Sorensen remained in the SUV after Smith was dropped off, and he agreed to call her when they were "done."

The remaining passengers then drove to a remote location where Sorensen pushed R.B. out of the moving vehicle. Sorensen and Mock proceeded to stomp on R.B.'s head while he lay in the ditch. Sorensen also pulled R.B.'s head back, and R.B. believed

Sorensen was trying to break his neck or slit his throat.[2] When R.B. eventually played dead, Mock delivered a final blow to his head and exclaimed, "Holy f--k, we did it. We gotta go. We gotta go." Sorensen fled the scene with Mock, without rendering aid to R.B. and leaving him in a dark, remote location in freezing weather without a coat or shoes. R.B.'s hands and feet were still tied. When police talked to Sorensen later that evening, he was sweating profusely. And when police later went to apprehend him, he thought about jumping out the window and "tak[ing] off on the run." When interviewed by police, Sorensen repeatedly lied about his whereabouts and involvement in the incidents on March 2. In communications with others after his arrest, Sorensen said that he believed that R.B. would not face any criminal consequences for the alleged sexual abuse of his child, that he took action "for the honor of [the child]," and that he felt bad "about the end result."

B. Inferences from the circumstances proved

We next determine whether the circumstances proved, when viewed as whole, permit a reasonable inference that Sorensen knowingly and intentionally aided Smith, Mock, and Tjaden in an attempt to kill R.B. *See Silvernail*, 831 N.W.2d at 599. "It is well established that a defendant charged as an accomplice under [Minnesota statute section 609.05,] subdivision 1[,] may be convicted for a murder even though he did not actively participate in the overt act that constitutes the primary offense." *State v. Pierson*, 530

[2] On appeal, Sorensen spends significant time arguing that it is unreasonable to believe that he tried to slit R.B.'s throat. But in determining the circumstances proved, we construe any conflicting evidence "in the light most favorable to the verdict." *See Hawes*, 801 N.W.2d at 668 (quotation omitted). R.B. stated in his police interview, played for the jury, that he believed Sorensen attempted to slit his throat. The jury was in the best position to evaluate his credibility.

N.W.2d 784, 788 (Minn. 1995). "[A] jury may infer the requisite mens rea for a conviction of aiding and abetting when the defendant plays some knowing role in the commission of the crime and takes no steps to thwart its completion." *Id.* Factors that can support the jury's inference of the requisite intent include the "defendant's presence at the scene of the crime, defendant's close association with the principal before and after the crime, defendant's lack of objection or surprise under the circumstances, and defendant's flight from the scene of the crime with the principal." *Id.*

Sorensen's words and actions undoubtedly give rise to a reasonable inference that, at the very least, he knew his accomplices intended to commit murder during the course of a kidnapping and that he intended his presence or actions to further the commission of the crime. *See Bahtuoh*, 840 N.W.2d at 810.

Sorensen argues, though, that the circumstances proved are also consistent with a reasonable hypothesis other than guilt—namely, that he merely intended to cause non-lethal harm to R.B. To support this hypothesis, Sorensen points to R.B.'s lack of serious or life-threatening injuries and to the lack of evidence that either Mock or Sorensen attempted to determine whether R.B. was dead.

While it is true that R.B. did not sustain any fractures and was hospitalized for a short period of time, we evaluate the circumstances as a whole to determine whether they permit a reasonable inference that neither Sorensen nor his associates intended R.B.'s death. Even if the group did not leave R.B. with broken bones, they drove him to and left him at a remote location, twelve miles away from downtown Duluth, in dark, freezing conditions. These actions, taken in conjunction with the statements that the group needed

to "finish [R.B.] off," do not give rise to a reasonable inference that Sorensen and his associates intended to only harm R.B. And that nobody specifically checked whether R.B. was still breathing does not create a reasonable alternative hypothesis when, after R.B. had let his body go limp in an attempt to play dead, Mock exclaimed, "Holy f--k, we did it. We gotta go. We gotta go." We accordingly hold that the evidence is sufficient to support Sorensen's conviction of aiding and abetting attempted first-degree felony murder.

II. The district court did not err by sentencing Sorensen on the third-degree assault conviction or by assigning him a criminal-history point for that conviction when sentencing on the kidnapping and attempted felony-murder convictions.

The district court imposed concurrent sentences on Sorensen's convictions for third-degree assault (24 months), kidnapping (146 months), and attempted felony murder (230 months). The sentences for kidnapping and felony murder each constituted presumptive dispositions when calculated based on a criminal-history score of five. The criminal-history score of five used to calculate these dispositions included one point for Sorensen's third-degree-assault conviction in this case, which was sentenced first. Sorensen argues that because his offenses were all part of the same behavioral incident, he should not have been sentenced on the third-degree-assault conviction and that his criminal-history score should have been four instead of five for calculating his sentences for kidnapping and attempted felony murder. We address each argument in turn.

A. The district court did not err by imposing multiple sentences.

Barring certain exceptions, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a

conviction or acquittal of any one of them is a bar to prosecution for any other of them." Minn. Stat. § 609.035, subd. 1 (2016). "Thus, the law generally prohibits multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (quotation omitted). When the offenses at issue "contain an intent element, [appellate courts] determine whether the crimes were part of a single behavioral incident by considering (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." *Id.* (citations and quotations omitted). "The application of this test depends heavily on the facts and circumstances of the particular case." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011).

"Whether the offenses were part of a single behavioral incident is a mixed question of law and fact, so [appellate courts] review the district court's findings of fact for clear error and its application of the law to those facts de novo." *Bakken*, 883 N.W.2d at 270. "But where the facts are established, the determination is a question of law subject to de novo review." *State v. Grampre*, 766 N.W.2d 347, 354 (Minn. App. 2009) (quotation omitted), *review denied* (Minn. Aug. 26, 2009).

Sorensen argues that the district court erred by imposing a sentence for third-degree assault because the assault was committed as part of the same behavioral incident as the kidnapping[3] and attempted-murder offenses. Specifically, he relies on the "avoidance-of-

[3] Sorensen does not argue that the district court erred by imposing a sentence on the kidnapping offense, in addition to the attempted-murder offense, since one of the

apprehension doctrine," arguing that the kidnapping and attempted-murder offenses were committed only to avoid arrest for the initial assault. He cites *State v. Hawkins*, in which the supreme court explained that "multiple sentences may not be used for two offenses if the defendant, substantially contemporaneously committed the second offense in order to avoid apprehension for the first offense." 511 N.W.2d 9, 13 (Minn. 1994) (quotation omitted).

The avoidance-of-apprehension doctrine requires analysis quite similar to the standard single-behavioral-incident analysis. *See State v. Bookwalter*, 541 N.W.2d 290, 296 (Minn. 1995). In either case, "[t]he determination of whether there is a 'single behavioral incident' or whether the offenses were committed 'substantially contemporaneously' turns on the particular facts and circumstances of each case and the resolution is not always simple." *Id.* Our analysis is appropriately guided by comparing the facts of the cases cited by the parties to the facts in Sorensen's case.

Sorensen relies heavily on *Hawkins*, in which the defendant was convicted and sentenced for attempted first-degree murder and aggravated robbery arising from an incident in which he robbed and assaulted an undercover narcotics agent. 511 N.W.2d at 10-11. While a surveillance team waited outside, the undercover agent went into a stairwell with the defendant and the defendant's companion to purchase cocaine, and, once in the stairwell, the two began beating the undercover agent. *Id.* at 11. When the agent shouted

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exceptions referenced in Minn. Stat. § 609.035, subd. 1, applies: "[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." Minn. Stat. § 609.251 (2016).

for backup and revealed that he was police, the defendant instructed his companion, "There is nothing we can do now, man. Get the gun. We've got to do him." *Id.* The two attempted unsuccessfully to get the gun before the surveillance team came into the stairwell and arrested them. *Id.* The supreme court held that the robbery and attempted murder were part of a single behavioral incident because they occurred at the same time and in the same place (the stairwell) and the second offense was committed to avoid apprehension for the first. *Id.* at 13-14.

The state, on the other hand, relies on three main cases in which the supreme court upheld multiple sentences for offenses committed throughout a series of incidents on a single day. In the first, *State v. Krampotich*, the defendant was convicted of and sentenced for unauthorized use of a motor vehicle, simple robbery, and aggravated assault. 163 N.W.2d 772, 774 (Minn. 1968). His offenses occurred in the span of about two and a half hours. *Id.* They began when the defendant and his accomplices approached the victim in his car and assaulted him, and "[a] succession of threats and assaults continued" wherein the assailants entered the victim's car, drove around, demanded his possessions, and ultimately fired a gun at him when he was able to escape. *Id.* at 774-75. The supreme court determined that all three of the offenses were distinct behavioral incidents, explaining:

> Although there was some unity of time in the sense that all the incidents occurred the same night, the incidents nevertheless occurred at clearly separate times during an extended period of some 2 1/2 hours. . . . The only behavioral relationship among the crimes was that defendants had embarked on a course of brutalizing and terrorizing their victim. There was no single criminal objective or prearranged program of events; each of the events . . . simply took place as an idea came into defendants' heads.

Id. at 776.

In the second case, *Bookwalter*, the defendant was convicted and sentenced for criminal sexual conduct, kidnapping, and attempted murder. 541 N.W.2d at 290. The defendant sexually assaulted a woman in her van before driving the van to another location a few miles away, where he pulled her into the woods and attempted to kill her. *Id.* at 292. The supreme court determined that the sexual assault and the attempted murder were separate behavioral incidents because they occurred at two distinct times and places and did not have a common criminal objective. *Id.* at 295. The supreme court rejected the defendant's argument that he should only be sentenced on one of the counts because he committed the attempted murder "in an effort to avoid being apprehended for the sexual assault." *Id.* at 296.

In the third case, *Munt v. State*, the defendant was convicted and sentenced for ten crimes arising out of a series of incidents where he killed his ex-wife, crashing his car into hers and then shooting her; injured and kidnapped his children, who had been in the car; threatened and robbed several passersby who attempted to intervene, and ultimately fled in a stolen vehicle. 920 N.W.2d 410, 413-14, 417-18 (Minn. 2018). All of the offenses occurred within 30 minutes, and most occurred within the same location. *Id.* at 418. The supreme court nonetheless determined that "looking to the criminal objectives of the murder, assault, robbery, criminal vehicular injury, and kidnapping offenses, it is clear that each was different." *Id.*

Sorensen urges that his case is most like *Hawkins* because he too was merely trying to avoid arrest, as evidenced by his statement to Smith in her basement, made immediately after the assault, that they could not "cut [R.B.] loose" because he would go to the police. He argues that the subsequent kidnapping and attempted murder occurred without delay, and "the location-change was necessary to the kidnapping and avoiding apprehension."

But, even applying the avoidance-of-apprehension doctrine to this case, Sorensen's offenses did not occur substantially contemporaneously, nor did they occur in the same location. *See Hawkins*, 511 N.W.2d at 13. Sorensen's assault of R.B. began shortly after Sorensen arrived at Smith's home, which was around 6:45 p.m. The kidnapping offense occurred when the group loaded R.B. into the SUV and proceeded to drive around with him from roughly 8:00 to 9:00 p.m. And the attempted felony murder took place shortly before 9:00 p.m., approximately twelve miles away from downtown Duluth, when Sorensen threw R.B. out of the vehicle and into the ditch and he and Mock stomped on him and left him for dead. This timeline is much closer to those in *Krampotich*, *Bookwalter*, and *Munt* than that in *Hawkins*, where the events unfolded quickly in a single stairwell.

The record also suggests that Sorensen had separate criminal objectives for the assault and the kidnapping and attempted felony murder offenses. When Sorensen first arrived at Smith's house and was told that R.B. had "molested" his child, he began punching R.B., presumably with the objective of badly injuring him as retribution. After the initial beating, he asked Smith what the plan was. The plan then continued to unfold throughout the evening, like in *Krampotich*, in which the supreme court noted that there was no "prearranged program of events." *See Krampotich*, 163 N.W.2d at 776. That the

plan was not prearranged is evidenced by R.B.'s testimony that the group continued to discuss what to do with him while driving around in the SUV. Later, when they drove to the Becks Road scene and threw R.B. out of the vehicle, Sorensen's objective was to aid and abet in causing his death.

Because the state showed that the assault occurred at a distinct time and place from the kidnapping and attempted-felony-murder offenses, and that Sorensen's criminal objective for the assault was distinct, the district court did not err by imposing sentences on all three counts.

B. The district court did not err when calculating Sorensen's criminal history score.

Sorensen also argues that the district court erred by using the *Hernandez* method to calculate his criminal-history score, assigning him a felony point for the third-degree-assault conviction when sentencing him on the kidnapping and attempted-felony-murder convictions. *See State v. Hernandez*, 311 N.W.2d 478, 480-81 (Minn. 1981). "*Hernandize*" is "the unofficial term for the process described in section 2.B.1.e [of the sentencing guidelines] of counting criminal history when multiple offenses are sentenced on the same day before the same court." Minn. Sent. Guidelines, 1.B.(10) (2016). Section 2.B.1.e of the guidelines provides, "Multiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred. As each offense is sentenced, include it in the criminal history on the next offense to be sentenced." Minn. Sent. Guidelines 2.B.1.e (2016). But, as an exception, "when multiple current convictions arise from a single course of conduct and multiple sentences are imposed on the same day under

Minn. Stat. §§ 152.137, 609.585, or 609.251, the conviction and sentence for the 'earlier' offense does not increase the criminal history score."[4] Minn. Sent. Guidelines 2.B.1.e(1).

Sorensen's criminal-history-score argument is again based on his contention that the third-degree-assault conviction should not have been sentenced *at all*; because of that, he argues, there should not have been "[m]ultiple offenses sentenced at the same time before the same court" to trigger section 2.B.1.e. As explained above, though, the district court properly sentenced Sorensen on the third-degree-assault conviction. Sorensen has not shown how the district court erred by using this sentence, which resulted from a separate behavioral incident, to increase his criminal-history score.

III. Remand is appropriate to determine whether Sorensen was deprived of the effective assistance of counsel when his attorney conceded his guilt of third-degree assault.

Sorensen argues that he was deprived of the effective assistance of trial counsel when his attorney conceded his guilt of third-degree assault during closing arguments. Ordinarily, claims of ineffective assistance of counsel are reviewed under the two-prong *Strickland* test, under which the defendant must establish that (1) his counsel's representation "fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

[4] Again, Minn. Stat. § 609.251 provides that "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." Thus, even though the district court sentenced Sorensen on the kidnapping offense, it did not use this conviction to increase his criminal history score when sentencing on the attempted felony murder offense, in accordance with the guidelines.

proceeding would have been different." *Nissalke v. State*, 861 N.W.2d 88, 93-94 (Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). But a different standard applies when a defendant claims that his counsel was ineffective for conceding guilt. "When defense counsel concedes the defendant's guilt without consent, counsel's performance is deficient and prejudice is presumed." *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017) (quotation omitted). This is because, even though conceding guilt on one offense may be good trial strategy, "whether or not to admit guilt at a trial is a decision that under our system can only be made by the defendant." *State v. Wiplinger*, 343 N.W.2d 858, 860-61 (Minn. 1984). Consequently, "if that decision is taken from the defendant, the defendant is entitled to a new trial, regardless of whether he would have been convicted without the admission." *Luby*, 904 N.W.2d at 457 (quotation omitted).

Appellate courts apply a two-step analysis to review claims of ineffective assistance based on unauthorized concessions of guilt. *Id.* We "first perform a de novo review of the record to see if counsel in fact conceded the defendant's guilt and, if so," we "must proceed to the second prong of the inquiry and determine whether the defendant acquiesced in that concession." *State v. Prtine*, 784 N.W.2d 303, 318 (Minn. 2010).

A. Sorensen's counsel conceded guilt.

The parties agree, and the record supports, that the first prong is satisfied because Sorensen's counsel in fact conceded his guilt for third-degree assault. During closing arguments, Sorensen's counsel stated:

> [T]he testimony is uncontroverted, [R.B.] had never seen [Sorensen], he hadn't had any dealings with him, and even after [Sorensen] arrives after six o'clock that night, all he knows is

> that this is [Smith's] baby daddy. And, yes, it's uncontroverted that [Sorensen], while [R.B.'s] tied up, hits [R.B.] repeatedly in his face. And I submit to you that the swelling that we see from the hospital around his eye very likely could have been caused by [Sorensen] striking him in the face. [Appellant's] actions temporarily disfigured [R.B.]
>
> I'm submitting to you, when you get down to the end, when you've talked about the evidence and you're getting ready to . . . make your decision on the verdict forms, you should find [Sorensen] guilty of aiding and abetting third degree assault. There's . . . no controversy to that evidence. We're not here asking . . . that you should determine that [Sorensen] did nothing wrong. But the . . . key things here are what level of seriousness are the things that [Sorensen] did wrong. The testimony is clear that [Sorensen] never hit him [with] nunchucks. Nobody . . . claims that. Nobody claims that [Sorensen] did anything other than hit him with his fists.

Defense counsel later stated, seemingly as a strategy to garner empathy for Sorensen:

> Well [Smith] makes [Sorensen] hysterical, and [he] reacts to that and . . . together they go down[stairs] and that's when he assaults [R.B.]. He does it. Shouldn't have done it. But I submit that many parents in that situation, learning and . . . thinking that this person that's there and tied up sexually abused my four-year-old son? Their anger—many people would be tempted to do what [appellant] did. Doesn't make it right. I'm not asking you to forgive what he did . . . .

While it is clear that Sorensen's counsel conceded his guilt during the closing argument, the parties dispute whether Sorensen acquiesced in this concession.

B. It is unclear whether Sorensen acquiesced in his counsel's concession of guilt.

When there is no evidence in the record of express consent, appellate courts "look at the entire record to determine if the defendant acquiesced in his counsel's strategy." *Luby*, 904 N.W.2d at 459 (quotation omitted). The court may determine that the defendant

impliedly acquiesced to the concession in certain circumstances, "such as (1) when defense counsel uses the concession strategy throughout trial without objection from the defendant, or (2) when the concession was an understandable strategy and the defendant was present, understood a concession was being made, but failed to object." *Id.* (quotation omitted). "When the record is unclear as to whether the defendant acquiesced in his counsel's concession . . . a remand to the district court for fact-finding is the appropriate resolution." *Prtine*, 784 N.W.2d at 318.

The parties agree that Sorensen did not give express consent to the concession of guilt. Sorensen argues that the record also shows that he did not impliedly acquiesce in the concession and that he is therefore entitled to a new trial. He cites *Luby* for support, arguing that, similarly here, counsel did not use concession as a strategy throughout trial and the concession did not arise until closing arguments. *See Luby*, 904 N.W.2d at 459. *Luby* is distinguishable, though, as Luby's counsel conceded guilt to the premeditation element of a murder offense and doing so "was not an understandable trial strategy because it admitted Luby's guilt to the only disputed elements of both of the charged offenses, the greater of which carried a mandatory life sentence." *Id.* Here, where conceding guilt to the less serious offense of third-degree assault may well have been a reasonable trial strategy, the record does not similarly preclude the possibility that Sorensen impliedly acquiesced.

The state, on the other hand, argues that remand is unnecessary because the record shows that Sorensen impliedly acquiesced in his counsel's concession because the concession was "part of a trial-long strategy that sought to minimize [Sorensen's] culpability and shield him from the more serious charges." As evidence of a trial-long

strategy, the state points to defense counsel's election not to make an opening statement and defense counsel's absence of questions to witnesses that would have highlighted evidence that "could not realistically be rebutted or challenged." The state also emphasizes that defense counsel noted, prior to Sorensen waiving his right to testify or present other evidence, that the defense team spent considerable time advising Sorensen as to his options.

The state cites for support *State v. Provost*, in which the supreme court concluded that the defendant acquiesced in conceding the causation element of the murder offense because, "from his opening statement through his closing argument, defense counsel consistently took the position that defendant had caused the victim's death," without objection from defendant. 490 N.W.2d 93, 97 (Minn. 1991). The defendant testified on his own behalf and admitted that he had set the victim on fire and left her to burn in a secluded area. *Id.* Based in part on this testimony, the supreme court determined that there was a consistent trial strategy of conceding causation and that Provost had not voiced any objection to or dissatisfaction with that strategy. *Id.*

Here, unlike in *Provost*, Sorensen did not testify or call any witnesses on his behalf. As in *Prtine*, his counsel did not make the express concession of guilt until closing arguments. *See Prtine*, 784 N.W.2d at 318. As Sorensen asserts, it is understandable that a defendant would not want to interrupt his attorney during closing arguments to object to his attorney's statements. While it is true that the defense team represented that they spent significant time with Sorensen discussing whether he would testify or otherwise present a case-in-chief, nothing in the record establishes that, at that meeting, the team elected, and Sorensen consented, to concede guilt on third-degree assault. And the state's other

purported evidence of implicit consent—an absence of an opening statement and an absence of certain questions to witnesses—does not, without more, establish that Sorensen consented to the concession of guilt. Because we cannot determine on this record whether Sorensen acquiesced in his counsel's concession of guilt, we remand for the district court to hold an evidentiary hearing and make a finding on whether appellant acquiesced in the concession and, depending that finding, to order the appropriate remedy (namely, sustaining the conviction for third-degree assault if appellant acquiesced or vacating the conviction if appellant did not acquiesce). The party adversely affected the by the district court's decision on remand may appeal the district court's final order on the issue.[5]

IV. Sorensen's third-degree-assault and kidnapping convictions do not violate Minn. Stat. § 609.04, subd. 1, but any conviction entered for attempted second-degree murder was an error.

Sorensen makes one additional claim in a pro se supplemental brief. He argues that his conviction on multiple counts violates his double-jeopardy rights, particularly pursuant to Minn. Stat. § 609.04, subd. 1, because kidnapping and assault are "lesser included offenses" of his aiding and abetting attempted first-degree felony murder conviction. Minn. Stat. § 609.04, subd. 1, states that, "[u]pon prosecution for a crime, the actor may be

[5] We note that "claims that require a court to explore conversations between attorney and client are best handled on a petition for postconviction relief." *Dukes v. State*, 621 N.W.2d 246, 255 (Minn. 2001); *see also* Minn. R. Crim. P. 28.02, subd. 4(4) (providing that "[i]f, after filing a notice of appeal, a defendant determines that a petition for postconviction relief is appropriate, the defendant may file a motion to stay the appeal for postconviction proceedings"). While we remand this case for an evidentiary hearing to develop the necessary factual record, consistent with Minnesota Supreme Court precedent, in the future we encourage defense counsel to develop the necessary factual record in a postconviction proceeding. In the meantime, in this case, we do not retain jurisdiction but rather permit the nonprevailing party to file an appeal.

convicted of either the crime charged or an included offense, but not both." The statute goes on to specify that an included offense encompasses both "a lesser degree of the same crime" or "a crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1(1), (4).

Sorensen specifically argues that assault is a "lesser degree" of attempted murder and that kidnapping is a crime "necessarily proved" if aiding and abetting attempted first-degree felony (here, kidnapping) murder is proved. As to his first contention, the assault was a separate behavioral incident from the attempted felony murder, as previously explained. As to his second contention, Minn. Stat. § 609.251 provides that, "[n]otwithstanding section 609.04, 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." Sorensen's claim that his convictions for third-degree assault and kidnapping violate section 609.04 are accordingly without merit.

However, from our examination of the record, it appears that the district court entered a conviction for attempted second-degree murder, which *is* a lesser-included offense in this case. Though the jury found Sorensen guilty on the second-degree attempted murder count, the district court did not adjudicate it on the record at sentencing. Yet second-degree attempted murder appears as a "conviction" on the warrant of commitment and in the court records system. Because it appears the district court may have

inadvertently[6] included a conviction, we reverse and remand to correct the warrant of commitment as to the attempted second-degree murder count.

Affirmed in part, reversed in part, and remanded.

[6] The state agreed at oral argument that entering a conviction for the second-degree murder count would be erroneous and likely inadvertent.