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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1865

State of Minnesota,
Respondent,

vs.

Derek Lee Enderle,
Appellant.

Filed August 17, 2020
Affirmed
Segal, Chief Judge

Sherburne County District Court
File No. 71-CR-18-1621

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

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for respondent)

Daniel P. Repka, Repka Law, LLC, St. Paul, Minnesota (for appellant)

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

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

SEGAL, Chief Judge

In this direct appeal from the judgment of conviction for third- and fourth-degree criminal sexual conduct, appellant argues that the district court erred in imposing separate

sentences for these offenses because his conduct constituted a single behavioral incident pursuant to Minn. Stat. § 609.035 (2016). We affirm.

FACTS

On May 15, 2018, C.K. went to the home of appellant Derek Lee Enderle for a cookout. Enderle's wife and three daughters were also present. C.K. is Enderle's niece through marriage and had a close relationship with the Enderle family. After the cookout, Enderle took C.K. and the children on a four-wheeler ride and had a bonfire. Enderle and C.K. consumed alcohol throughout the evening and both became heavily intoxicated. At some point while they were outside, C.K. flashed her breasts at Enderle. One of Enderle's daughters eventually suggested that he take C.K. inside due to her high level of intoxication. Enderle walked C.K. inside and took her to a couch in the basement, where his daughters' bedrooms were located. C.K. flashed her breasts at Enderle a second time and he then reached his hand under her clothing and touched her vagina. This occurred at approximately 11:00 p.m.

Enderle's wife saw him with C.K. in the basement and confronted him about his behavior. She did not see him touch C.K. but she knew that he was "doing something" to her. They went outside and argued for approximately forty minutes. After the argument, his wife went back inside and Enderle continued to consume alcohol by the fire. He later went inside to eat a burger and watch television, became sick, went to the bathroom and vomited. He eventually passed out on the couch in the living room. At some point, Enderle woke up, went back downstairs and had sexual intercourse with C.K. She was asleep when Enderle initiated intercourse and woke up to him penetrating her vagina. C.K. fell back

asleep. She woke up again at approximately 5:00 a.m. and went home. She told her mother what had happened, and her mother took her to the hospital for a sexual-assault examination. A vaginal swab revealed a DNA specimen that was a match for Enderle.

Respondent State of Minnesota charged Enderle with one count of third-degree criminal sexual conduct and one count of fourth-degree criminal sexual conduct. The third-degree charge was based on Enderle's conduct in sexually penetrating C.K., and the fourth-degree charge was based on his conduct earlier in the evening when he reached under C.K.'s clothing and touched her vagina.

Enderle pleaded guilty to both charges. Enderle provided a factual basis for the fourth-degree sexual contact charge, admitting that he touched C.K.'s vagina when he brought her inside to the couch in the basement. On the third-degree sexual penetration count, Enderle claimed he could not recall anything after falling asleep on the couch in the living room, but entered a *Norgaard* plea, in which he acknowledged that the prosecution has sufficient evidence to obtain a conviction but, because of a lack of recall, could not admit to the factual basis for the charge. *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 871 (Minn. 1961). The district court accepted Enderle's guilty pleas.

At the sentencing hearing, Enderle moved for a downward sentencing departure. The district court denied the motion and imposed sentences for both offenses after determining that the offenses did not arise from a single behavioral incident. The district court sentenced Enderle to 24 months in prison for fourth-degree criminal sexual conduct and 54 months in prison for third-degree criminal sexual conduct, to be served concurrently. Enderle appeals.

D E C I S I O N

Enderle's sole argument on appeal is that the district court erred in entering separate sentences for the third-degree and fourth-degree criminal sexual conduct offenses because they are part of a single behavioral incident. Pursuant to Minn. Stat. § 609.035, subd. 1, "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." The statute prohibits multiple sentences, including concurrent ones, for offenses that were committed as part of a single behavioral incident. *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012). "Whether the offenses were part of a single behavioral incident is a mixed question of law and fact, so we review the district court's findings of fact for clear error and its application of the law to those facts de novo." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

"In determining whether multiple offenses arise from a single behavioral incident, this court must consider the defendant's singleness of purpose, i.e., whether the defendant was motivated by a desire to obtain a single criminal objective . . . [and] whether the offenses (1) arose from a continuous and uninterrupted course of conduct, (2) occurred at substantially the same time and place, and (3) manifested an indivisible state of mind." *State v. Johnson*, 653 N.W.2d 646, 651-52 (Minn. App. 2002) (citations omitted). The analysis of whether offenses were committed as part of a single behavioral incident "depends heavily on the facts and circumstances of the particular case." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011).

Here, there is no dispute that both offenses occurred in the basement of Enderle's home and thus were committed in the same place. The district court determined, however,

that the offenses were committed at different times because they were separated by "at least hours." The district court also determined that the two offenses were not a "continuous and uninterrupted course of conduct" and that there was a "significant break, not just in time but also in actions by the defendant," and that there were "separate intents, separate states of mind."

As support for its determination that the two offenses were not part of a single behavioral incident, the district court cited the Minnesota Supreme Court decision in *State v. Stevenson*, 286 N.W.2d 719 (Minn. 1979). In *Stevenson*, the defendant was convicted of two separate counts of third-degree criminal sexual conduct involving a 15 year old girl who was kidnapped and driven by the defendant and his wife to an abandoned farmhouse. The girl was raped twice by the defendant while at the farmhouse, but the two offenses were separated by five hours. *Id.* at 719-20. The supreme court upheld sentencing the defendant for two separate crimes due to the break in time of five hours and that "neither act bore any essential relationship to the other." *Id.* at 720.

This case also involves a break in time between offenses of "at least hours." At the plea hearing, Enderle testified that the fourth-degree criminal sexual conduct offense occurred around 11:00 p.m. He and his wife then argued outside for approximately 40 minutes. After the argument, Enderle continued to drink outside by the fire for an unspecified amount of time. He then went inside, ate a burger, watched television, became sick, went to the bathroom and vomited before passing out on the living room couch. At some point he woke up, went downstairs and committed third-degree criminal sexual conduct. It is not clear at exactly what time the third-degree offense occurred, but C.K.

woke up and left the home at approximately 5:00 a.m. The record, thus, supports the district court's determination that the offenses were separated by a period of hours, not minutes.[1]

With regard to the district court's conclusion that the offenses were not part of a continuous and uninterrupted course of conduct, there were a number of intervening events between the first sexual contact offense and the second sexual penetration offense. These included the 40-minute argument between Enderle and his wife, additional drinking outside, eating a burger, watching television, vomiting and falling asleep on the living room couch. It was only after all of these non-criminal intervening events that Enderle went back down to the basement where C.K. was sleeping and committed the sexual penetration offense.

Enderle argues that he had a single criminal objective – to have sexual intercourse with C.K. – and that he formed this intent earlier when they were drinking outside and C.K. flashed her breasts at him for the first time. Whether conduct was motivated by a single criminal objective is a subjective test that depends on the facts of the particular case. *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). And "[b]road statements of criminal purpose do not unify separate acts into a single course of conduct." *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014); *see also State v. Barthman*, 938 N.W.2d 257, 267 (Minn. 2020) (determining that the broad criminal objective of "sexual gratification" did not unify

[1] This is in contrast to cases such as *State v. Spears*, 560 N.W.2d 723, 727 (Minn. App. 1997), in which this court found that three acts of sexual assault of the same victim that all took place in defendant's car within a 45-minute timeframe constituted a single behavioral incident.

separate acts of criminal sexual conduct). Rather, the court considers whether the offenses committed were "necessary to or incidental to the commission of a single crime and motivated by an intent to commit that crime." *Barthman*, 938 N.W.2d at 267 (quotation omitted).

Enderle cites to the case of *State v. Herberg*, 324 N.W.2d 346 (Minn. 1982), as support for his claim. The case involved a girl kidnapped by the defendant. The defendant drove her to one site where she was violently assaulted, sexually and physically, and then, because he apparently feared detection at that site, drove her to another site where he continued his sexual and physical assaults and acts of degradation. *Id.* at 347. The defendant eventually drove her back to the site where she was originally abducted and released her. In analyzing whether the offenses were part of a single behavioral incident, the court pointed out that the only event interrupting the course of conduct in the case was that defendant, likely fearing detection, drove the victim to a second location to complete his crimes; crimes that were apparently motivated by stories in the pornographic books seized by police at the time of his arrest. *Id.* at 347, 349. In the case, the Minnesota Supreme Court held that the defendant, who pleaded guilty to two assaults and two sex offenses, should have received only one sentence because the offenses were all part of a single behavioral incident.[2] *Id.* at 349. We are not persuaded that *Herberg* is controlling under the facts of this case.

[2] It bears noting, however, that the court found this to be the "extremely rare case" that justified a sentence greater than double the presumptive guidelines sentence and affirmed the upward departure. *Id.* at 349-50.

Here, the district court's determination that Enderle had "separate states of mind" when he committed the offenses is supported by Enderle's own testimony during the plea hearing. For example, Enderle stated that he brought C.K. inside at the request of his daughter, who was concerned about C.K.'s level of intoxication, not because he had formed an intent to have sexual intercourse with her. In addition, Enderle explained that he took C.K. to the couch in the basement because, in part, that is where his daughters' bedrooms were located, not because of its privacy. Finally, he explained that he touched her vagina as "a spur of the moment" reaction to her flashing him while she was on the couch. His own characterization of his conduct in committing the fourth-degree offense as "a spur of the moment" decision refutes his argument on appeal that the conduct was part of an already-formed criminal objective of having sexual intercourse with C.K.

Finally, Enderle's detailed description of what happened after he left the basement does not indicate an intent to return to the basement to engage in sexual intercourse with C.K. Even after the argument with his wife ended and she returned inside, Enderle stayed outside and continued to drink, he came inside and ate a burger, watched television, laid down on the living room couch and fell asleep. And he has no recollection of waking up and returning to the basement to have sexual intercourse with C.K. Thus, Enderle remembers committing the first offense as a "spur of the moment" decision, but has no recollection of his decision or conduct in committing the second offense. This supports the district court's determination that he had different states of mind when deciding to commit the offenses and does not establish a single criminal objective. At most, the record establishes that both offenses were committed for the broad purpose of sexual gratification,

which is insufficient to establish a single criminal objective sufficient to preclude multiple sentences. *Barthman*, 938 N.W.2d at 267.

On this record, the district court did not err in determining that the offenses did not arise from a single behavioral incident. The offenses share a unity of place, but were separated by hours and intervening events and did not share a single criminal objective. The district court therefore did not err by imposing sentences for both third- and fourth-degree criminal sexual conduct.

Affirmed.