STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0431

Joseph Thomas Saari, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 13, 2021
Affirmed
Smith, Tracy M., Judge

St. Louis County District Court
File No. 69DU-CR-18-4166

Joseph Thomas Saari, Rush City, Minnesota (pro se appellant)

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

Kimberly Maki, St. Louis County Attorney, Victoria Wanta, Assistant County Attorney, Duluth, Minnesota (for respondent)

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

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this appeal from the district court's denial of his motion to correct his sentence, appellant Joseph Saari argues that the district court erred by (1) imposing separate sentences for domestic assault and witness tampering because the offenses were committed

as part of the same behavioral incident; (2) sentencing him for both domestic assault and witness tampering because the offenses are included offenses of engaging in a pattern of stalking; and (3) using the *Hernandez* method of sentencing. Because the district court did not err in its denial of Saari's motion, we affirm.

FACTS

The facts of this case are described in greater detail in our previous decisions addressing Saari's direct appeal. *See State v. Saari*, No. A19-1102, 2020 WL 3172657 (Minn. App. June 15, 2020), *rev'd* (Minn. Feb. 16, 2021); *State v. Saari*, A19-1102, 2021 WL 2645818 (Minn. App. June 28, 2021). For purposes of this appeal of the denial of his motion to correct his sentence, the following facts are relevant.

Saari was charged with, and a jury found him guilty of, eight counts of criminal offenses against his former girlfriend (the victim). One count was for felony domestic assault, which was based on his physical assault against the victim on September 2, 2018. A second count was for aggravated witness tampering, which was based on threats he made to the victim during the period November 16, 2018, through December 12, 2018, before his jury trial. A third count was for pattern of stalking, which was based on the September domestic assault and his actions against the victim that occurred during the same period as the witness-tampering count.

Before sentencing, respondent State of Minnesota dismissed several counts—including the pattern-of-stalking count—to avoid multiple convictions for offenses arising out of the same behavioral incident. The district court then convicted Saari of domestic

assault and aggravated witness tampering and sentenced him for both.[1] The district court imposed an executed sentence of 27 months for domestic assault and a concurrent executed sentence of 158 months for aggravated tampering with a witness. In calculating the sentence for the aggravated-witness-tampering offense, the district court used the conviction for domestic assault to add a criminal-history point, thus increasing the presumptive sentence.

Saari moved to correct his sentence under Minn. R. Crim. P. 27.03, subd. 9, and the district court denied the motion.

This appeal follows.

DECISION

I. The two sentences are not precluded by Minn. Stat. § 609.035 (2018).

Saari argues that the district court erred by sentencing him for one count of domestic assault and one count of witness tampering because it resulted in multiple sentences for a single behavioral incident.

Under Minn. Stat. § 609.035, subd. 1, "if a person's conduct constitutes more than one offense . . . 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." This means that, as a general rule, a court can only sentence a defendant once for offenses occurring in a "single behavioral incident." *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000).

[1] Saari was also convicted of and sentenced for two counts of nonconsensual dissemination of private sexual images. These convictions were the subject of Saari's direct appeal, and we have remanded them for sentencing. They are not at issue on this appeal.

Offenses occurred in a single behavioral incident if they "occurred at substantially the same time and place and were motivated by a single criminal objective." *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). We review the district court's factual findings for clear error and the application of law to facts de novo. *Id.*

The district court did not err when it found that Saari's domestic-assault and witness-tampering offenses were not a part of the same behavioral incident. These two offenses did not occur at substantially the same time because they occurred months apart. *Id.* Further, the domestic assault was a physical attack on the victim, and the witness tampering concerned threatening electronic messages. Additionally, the offenses did not share the same criminal objective: the domestic assault was related to a disagreement between Saari and the victim, whereas the witness tampering was linked to the victim's willingness to testify against Saari at trial for the domestic assault.

Saari contends, though, that the offenses arose from the same behavioral incident because they were both part of the pattern-of-stalking count against him. But the state dismissed the pattern-of-stalking charge prior to sentencing. Therefore, the relevant question under section 609.035 is whether the domestic-assault and witness-tampering offenses arose from the same behavioral incident. As explained above, they did not. The district court therefore did not err by sentencing Saari for both offenses.

II. The two sentences are not precluded by Minn. Stat. § 609.04 (2018).

Saari next argues that he was impermissibly convicted of—and therefore erroneously sentenced for—domestic assault and witness tampering because those offenses are lesser included offenses of engaging in a pattern of stalking.

A defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1. A lesser included offense is "a crime necessarily proved if the crime charged were proved." *Id.* Whether an offense is a lesser included offense is a legal question, which we review de novo. *State v. Woods*, 961 N.W.2d 238, 248 (Minn. 2021).

The principal flaw in Saari's argument is that he was not convicted of engaging in a pattern of stalking because the state dismissed that charge. He therefore could not have been convicted of both that offense and of lesser included offenses.

In any event, neither domestic assault nor witness tampering is a lesser included offense of engaging in a pattern of stalking. To be convicted of engaging in a pattern of stalking, a defendant must have committed two or more qualifying acts within a five-year period. Minn. Stat. § 609.749, subd. 5(b) (2018). Witness tampering is not a qualifying act for a pattern of stalking. *See* Minn. Stat. § 609.749, subd. 5(a) (2018) (listing 16 types of qualifying acts). Domestic assault may be a qualifying act for a pattern of stalking, but it is not a required qualifying act. *See id.* Therefore, neither witness tampering nor domestic assault is a necessary element of engaging in a pattern of stalking. In other words, if the state were to prove that a defendant engaged in a pattern of stalking, the state would not necessarily prove that the defendant also committed domestic assault or witness tampering. For this additional reason, Saari was not convicted of—and therefore not sentenced for—both a greater offense and a lesser included offense.

III. Application of the *Hernandez* method was not error.

Saari last argues that the district court should not have used the *Hernandez* method to calculate his sentence for witness tampering because the domestic-assault and witness-tampering offenses were part of the same behavioral incident.

The *Hernandez* method is a term used to describe a process under the Minnesota Sentencing Guidelines for sentencing multiple convictions on the same day. *See* Minn. Sent. Guidelines 2.B & cmt. 2.B.107 (2018); *State v. Hernandez*, 311 N.W.2d 478, 480-81 (Minn. 1981). Under this method, if a defendant is sentenced for multiple convictions on the same day, "a conviction for which the defendant is first sentenced is added to his or her criminal-history score for another offense for which he or she is also sentenced." *State v. Williams*, 771 N.W.2d 514, 521-22 (Minn. 2009) (citation omitted). Offenses are sentenced in the order they occurred. *State v. Patterson*, 796 N.W.2d 516, 531 (Minn. App. 2011), *aff'd*, 812 N.W.2d 106 (Minn. 2012). However, the *Hernandez* method cannot be used "when a defendant is sentenced for multiple convictions based on a single behavioral incident." *Williams*, 771 N.W.2d at 522. Because interpretation of the sentencing guidelines is a question of law, the court reviews this issue de novo. *See id.* at 520.

The district court did not err when it used the *Hernandez* method in sentencing Saari. As discussed above, Saari's domestic-assault and witness-tampering offenses were not part of a single behavioral incident, so using the *Hernandez* method was permissible. Saari analogizes his case to *State v. Longo*, where we held that racketeering and controlled-substance offenses were part of a single behavioral incident because the defendant's controlled-substance offenses were a means toward "facilitating and sustaining" his

racketeering "enterprise." 909 N.W.2d 599, 612 (Minn. App. 2018). Saari's case is distinguishable because he did not use the domestic assault to further his witness tampering, and he did not use witness tampering to further the domestic assault. These were distinct offenses, and thus the *Hernandez* method was permissible.

Affirmed.