STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0648

State of Minnesota,
Respondent,

vs.

Matthew Dennis Smith,
Appellant.

Filed April 11, 2022
Affirmed
Rodenberg, Judge[*]

Brown County District Court
File No. 08-CR-20-782

Keith Ellison, Attorney General, Edwin Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Charles Hanson, Brown County Attorney, New Ulm, Minnesota (for respondent)

Cathryn Middlebrook, Chief Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Cochran, Judge; and Rodenberg, Judge.

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

NONPRECEDENTIAL OPINION

RODENBERG, Judge

Appellant Matthew Dennis Smith appeals from his convictions for fifth-degree assault and two counts of theft, arguing that (1) the district court plainly erred by admitting inadmissible hearsay testimony at trial; (2) his right to a speedy trial was violated; and (3) the district court erred by imposing separate sentences for his two theft convictions because the offenses arose from a single behavioral incident. Appellant also submitted a pro se supplemental brief asserting various additional claims. We affirm.

FACTS[1]

On September 22, 2020, New Ulm police received a call that a shirtless man was acting strangely. Officers found the man, who was appellant, and briefly spoke with him. Appellant, wearing dark pants and shirtless while holding a sweatshirt, told the officers he was in New Ulm visiting friends K.B. and "Danielle," whose last name he did not know. The officers determined that no further action was needed and allowed appellant to leave.

Around 9:00 p.m. that evening, D.C. pulled into the drive-through line at the New Ulm McDonald's restaurant. An adult man was in her front passenger seat. D.C. testified that she brought the man to "get some food in his stomach" because he "wasn't acting himself." While they were waiting in line, the man got out of D.C.'s car, walked up to the car ahead of them in the line of cars, and punched the driver, S.H., through the open

[1] The facts recited in this ȍpinion are taken from the trial testimony.

window. S.H. rolled up his window and called 911. At trial, S.H. identified appellant as the man who punched him.

This man briefly returned to D.C.'s vehicle and then walked north. He was White and wore dark pants and a grey sweatshirt.

At 9:07 p.m., a witness at the Kwik Trip gas station a short distance north of the McDonald's saw a man wearing a grey sweatshirt jump over the fence, get into a white Ford Interceptor, and drive away with the headlights off. The owner of the Interceptor had parked the car and left it unlocked while he went into the store. The owner reported the theft to police. He told police that a loaded handgun was in the Interceptor's glove box.

Within the hour, police officers encountered a speeding vehicle that appeared to be the stolen Interceptor. One officer saw the Interceptor going east—away from New Ulm—at 113 miles per hour; the officer turned on his squad lights and tried to chase the speeding vehicle. The Interceptor turned off its headlights, and the officer lost track of the Interceptor after it went over a hill. While officers continued to look for the Interceptor, a clerk at a Casey's General Store reported that a vehicle with its headlights off had pulled in at a high speed and tried to get gas. Surveillance video confirmed that the vehicle was a white Interceptor. Its driver wore a white hooded sweatshirt, dark pants, and white shoes. The Interceptor drove away southbound on Highway 169 with its headlights still off.

Police found a white Interceptor a few miles south of this Casey's store, facing south on the shoulder of the northbound lane of Highway 169. Investigators later confirmed that this was the stolen Interceptor from the gas station. The glove box was open. The owner's

handgun was missing. Police searched unsuccessfully for the person who had taken the vehicle.

The next morning, a nearby resident saw a man he did not recognize walking along Highway 169. The man told the resident he needed gas and asked for a ride to town. The resident, who knew police were searching the area, told the man to walk and then reported the man to his neighbor, who was a deputy sheriff. The resident testified at trial and identified appellant as the man he encountered.

A short time later, police found appellant walking along Highway 169 and arrested him. Appellant's hair was disheveled, he had no shoes, and he was wearing a blue jacket and black pants with a blue stripe. Appellant's clothing was muddy and covered in cockleburs.

Police impounded the Interceptor and tested it for DNA. None of the DNA from the car matched appellant: some of the samples yielded insufficient DNA to test, and others contained a mixture of individuals with a major profile matching the Interceptor's owner. Police never found the Interceptor owner's missing handgun.

On September 23, after appellant's arrest, an investigator interviewed D.C. The investigator showed D.C. a photo of appellant taken from the bodycam footage of the officer who briefly spoke with appellant the prior afternoon. D.C. said she did not recognize the person in the photo. D.C. told the investigator that the man in her car the preceding evening was called "One." D.C.'s friend K.B. joined the interview and said she knew a person with appellant's name, but she did not recognize the person in the photo.

The investigator showed K.B. appellant's jail roster photograph and K.B. identified appellant as the person she knew.

The investigator interviewed K.B. again on November 12, 2020. During the interview, the investigator asked K.B. "Okay, so [D.C.] told you that [appellant] was the one that was in the car?" K.B. answered "mmm-hmm" affirmatively. K.B. also told the investigator, "That was [appellant] in [D.C.]'s car with her at McDonald's," and that "he did go steal [a] car." The investigator asked if K.B. and D.C. were afraid of appellant and K.B. answered, "He's crazy, I mean like he was sitting in the McDonald's and she was ordering her food and he just kept going like hey that guy looked at me funny and he just got out of the car and punched, started punching him or something?" The investigator asked if "[D.C.] admitted that it was [appellant] that got out of her car." K.B. responded "Yea." K.B. also stated that "[D.C.] called me the night before you came, and she told me all about it. . . . You won't believe what happened with [appellant], blah blah blah, but we didn't know about the high-speed chase part."

The state charged appellant with third-degree assault, fifth-degree assault, theft of movable property (a handgun), and theft of movable property (a motor vehicle). Appellant moved to sever the assault and theft charges; the district court denied that motion after concluding that the offenses arose out of a single behavioral incident.

Appellant demanded a speedy trial on October 20, 2020. His trial was scheduled to begin on December 1, 2020. On November 20, 2020, the Chief Justice of the Minnesota Supreme Court ordered:

> [S]tarting on November 30, 2020, no new jury trials will commence before February 1, 2021, except criminal jury trials when the chief judge in the district where the trial is to be held, after consulting with the Chief Justice, grants an exception for the criminal jury trial to be held in person.

See Order Governing the Continuing Operations of the Minnesota Judicial Branch, No. ADM20-8001 (Minn. Nov. 20, 2020). The district court continued appellant's trial to February 1, 2021, citing the Chief Justice's order.

Appellant's trial began on February 2, 2021. At trial, the state called D.C. and K.B. to testify. D.C. testified that the man in her car at McDonald's was a friend of hers named "One." When asked to describe the man, D.C. stated, "He was around my height. I don't—he had a hood over his head, so he had, maybe, light skin, African descent. I don't know." After being asked what she meant by "African descent," D.C. testified that she meant "Albino. I don't know. Like, light complected, freckles, with bright red hair." D.C. was shown the surveillance footage from the McDonald's. She stated that she did not recognize the man in it and that she could not remember what "One" had been wearing that night because, she said, "I'm a recovering addict, you know, and I don't remember things."

The state impeached D.C. with testimony from an officer who pulled D.C. over shortly after the McDonald's assault. The officer testified that D.C. told him that the person with her was a White man in his 30s. The officer testified that D.C. said the person had brown hair or reddish hair, wore a hooded sweatshirt and blue and black pants, and had been in contact with law enforcement earlier in the day.

K.B. testified that she remembered speaking with the investigator in November, but when asked if she told the investigator that appellant was in D.C.'s car at McDonald's on

September 22, 2020, K.B. answered, "No. That doesn't make sense. She was with someone named One or something, some guy that she had a crush on . . . and she was with him, and he was African American . . . and that's who she was with at McDonald's."

The prosecutor began asking K.B. about her statements to police during the November interview. The district court interjected and instructed the jury that K.B. was testifying about things said by other people, which was not to be taken as evidence of guilt but was only being admitted as evidence relevant to K.B.'s credibility.

The investigator also testified, and the video and transcript of his November interview with K.B. were admitted as evidence. Before the jury watched the video, the district court again instructed the jury that it would "be hearing statements that were made. These are statements not offered as substantive evidence . . . they are offered as inconsistent statements made by witnesses who testified yesterday, again, [K.B.] and [D.C.]." The district court repeated the instruction after the video was played and reminded the jury that "if there are any statements made here by other people . . . it is only evidence regarding the credibility and believability of [D.C.] and [K.B.]."

The district court granted appellant's motion for judgment of acquittal on the third-degree assault charge. The jury found appellant guilty of the remaining charges: fifth-degree assault under Minn. Stat. § 609.224, subd. 2(b) (2020), and two counts of theft of movable property under Minn. Stat. § 609.52, subd. 2(a)(1) (2020) for theft of the handgun and the Interceptor. The district court imposed separate sentences for each conviction. It sentenced appellant to 365 days' imprisonment for the fifth-degree assault charge, 30

months' imprisonment for the handgun theft, and 23 months' imprisonment for the vehicle theft, to be served concurrently.

This appeal followed.

DECISION

I. The district court did not commit plain error by admitting K.B.'s police interview as evidence to be used solely to determine K.B.'s and D.C.'s credibility as witnesses.

Appellant first argues that the district court committed plain error by admitting a transcript and video of K.B.'s November interview because those statements were inadmissible hearsay evidence.

Appellant did not object to admission of the transcript or video at trial. We therefore review the admission of them for plain error. *See* Minn. R. Crim. P. 31.02; *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). To show plain error, appellant must show: (1) error, (2) that was plain, and (3) that affected his substantial rights. *Id.* If all three conditions are satisfied, we then determine "whether it is necessary to address the error to ensure the fairness and integrity of judicial proceedings." *Id.*

"An error is plain if it was clear or obvious," which is usually established if the error contravenes case law, a rule, or a standard of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c). Hearsay is inadmissible unless it fits under one of several exceptions. *See* Minn. R. Evid. 802.

Appellant argues that the following four out-of-court statements from K.B.'s November interview constitute inadmissible hearsay: (1) K.B.'s affirmative answer when

the investigator asked her if D.C. said that appellant was in D.C.'s car; (2) K.B.'s statement to the investigator that D.C. told her "[appellant's] crazy, I mean like he was sitting in the McDonald's and she was ordering her food and he just kept going hey that guy looked at me funny and he just got out of the car and punched, started punching him or something"; (3) K.B.'s affirmative answer when the investigator asked her if D.C. admitted to her that it was appellant who had gotten out of D.C.'s car; and (4) K.B.'s statement to the investigator that D.C. told her "you won't believe what happened with [appellant]" and then asked K.B. to help her by coming to D.C.'s first interview with the investigator.

Appellant fails to establish any of the three plain-error requirements concerning the admission of these statements.

First and foremost, K.B.'s out-of-court statements were admitted only as impeachment evidence. Prior inconsistent statements offered to impeach a testifying witness are not hearsay. *See* Minn. R. Evid. 801 1989 comm. cmt. ("If the out of court statement is being offered for some other purpose, such as . . . for impeachment purposes it is not hearsay."); *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004) ("If a statement is offered to show something other than the truth of the matter asserted, for example to impeach a witness . . . it is not hearsay."). When K.B. began testifying about the prior statements, the district court promptly interjected sua sponte and instructed the jury that those statements could not be used as substantive evidence of appellant's guilt and could only be used to judge the credibility of K.B.'s and D.C's trial testimony. The district court repeated that instruction both before and after the state played the video of K.B.'s

interview. We assume on appeal that the jury followed the district court's instructions. *See State v. Vang*, 774 N.W.2d 566, 578 (Minn. 2009).

Appellant argues that the statements were nevertheless inadmissible hearsay because to qualify as a prior inconsistent statement under the hearsay rules, the inconsistent statement must have been given under oath at a trial, hearing, or other proceeding, or in a deposition. *See* Minn. R. Evid. 801(d)(1)(A). But that rule applies when a prior inconsistent statement is being offered *as substantive evidence of guilt*, not when it is being offered only to impeach a witness's credibility. Here, the district court repeatedly and properly instructed the jury that the challenged statements were not substantive evidence.

Appellant also argues that the district court's limiting instruction required the jury to accept the truth of K.B.'s prior statements. In addition to being implausible on its face, D.C.'s and K.B.'s testimony was also inconsistent with their earlier statements. The jury could, without accepting the truth of the prior inconsistent statements offered at trial, properly use those statements to measure the reliability of their trial testimony.

The law limits the state's ability to impeach its own witnesses with prior inconsistent statements. Impeachment of a prosecution witness is not permitted if the prosecutor knows that the witness intends to testify inconsistently, and its sole reason for calling the witness is to make jurors aware of the prior statements. *State v. Dexter*, 269 N.W.2d 721-22 (Minn. 1978). But this rule does not apply if the witness has not revealed an intent to recant before testifying, *Moore v. State*, 945 N.W.2d 421, 430 (Minn. App. 2020), *rev. denied* (Minn. Aug. 11, 2020), and appellant has not argued, nor could he argue on this record, that the state had advance notice that K.B. and D.C. were going to testify at trial in a manner

inconsistent with their prior statements. Because the prior out-of-court statements were impeachment, not substantive, evidence, and because the record contains nothing to suggest that the state was aware of the intention of K.B. and D.C. to testify contrary to their earlier statements, it was not error for the district court to admit those earlier statements. As discussed above, the district court properly and commendably instructed the jury of the limited use to which the jury could put the inconsistent out-of-court statements.

Second, even if we concluded that the statements were admitted in error—which we do not—any error was not plain. "The number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the [district] court's decision-making process in either admitting or excluding a given statement." *Manthey*, 711 N.W.2d at 504. A defendant's failure to object at trial deprives the state of the opportunity to establish a statement's admissibility under a hearsay-rule exception. *Id.* Because of the "complexity and subtlety" of the hearsay rule and its numerous exceptions, admission of a hearsay statement rarely constitutes plain error. *Id.* Here, the state argues that there may have been exceptions to the hearsay-exclusion rule that would apply to the challenged statements. We need not accept those arguments but simply note that no error was plain on this record.

Finally, even assuming error that was plain, and assuming further that the jury disregarded the district court's repeated instructions that it should not use the out-of-court statements as substantive evidence, the statements' admission did not affect appellant's substantial rights. The evidence of appellant's guilt here is overwhelming and includes

S.H.'s eyewitness identification of appellant as his assailant and appellant's arrest in the vicinity of the stolen Interceptor after it was abandoned.

We therefore easily conclude that it was not plain error for the district court to admit K.B.'s statements to the investigator as impeachment evidence.

II. Appellant was not improperly denied his right to a speedy trial.

Appellant next argues that his constitutional right to a speedy trial was violated because his trial did not begin until 105 days after his speedy-trial demand.

Under the United States and Minnesota constitutions, criminal defendants have the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Whether a defendant was denied a speedy trial is a constitutional question that we review de novo. *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017).

To determine whether a defendant has been unconstitutionally denied his right to a speedy trial, we apply the four-factor balancing test outlined in *Barker v. Wingo*, 407 U.S. 514 (1972). *See State v. Mikell*, 960 N.W.2d 230, 245 (Minn. 2021). The four factors are: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether the delay prejudiced the defendant. *Barker*, 407 U.S. at 530-33. No one factor is dispositive or necessary to establish a speedy-trial violation. *Id.* at 533. Ultimately, we balance the factors to answer the essential question of "whether the State brought the accused to trial quickly enough to avoid endangering the values that the right to a speedy trial protects." *Mikell*, 960 N.W.2d at 245.

A. Length of the Delay

We first consider the length of the delay. This factor serves two purposes. It serves as an initial "triggering mechanism." *Barker*, 407 U.S. at 530. There must be some "presumptively prejudicial" delay before further review is necessary. *Osorio*, 891 N.W.2d at 628. Delays beyond 60 days of a defendant's speedy-trial demand are considered presumptively prejudicial. *See* Minn. R. Crim. P. 11.09(b). We also consider the length of delay; the longer a delay stretches, the less likely it can be justified by other factors. *Mikell*, 960 N.W.2d at 250.

Appellant made his speedy-trial demand on October 20, 2020. His trial began February 2, 2021, 105 days after his demand. Because appellant's trial occurred more than 60 days after his speedy-trial demand, the delay was presumptively prejudicial, and we must consider the remaining *Barker* factors.

B. Reason for Delay

The essential question under the second *Barker* factor is whether the state or the defendant is to blame for the delay. *Osorio*, 891 N.W.2d at 628. After determining which party is responsible for the delay, we consider the specific reason for the delay. *Id.* A deliberate attempt to delay the trial in order to hamper the defense weighs heavily against the state, while neutral reasons such as negligence are weighted less heavily. *Mikell*, 960 N.W.2d at 251 (quoting *Barker*, 407 U.S. at 531). "And if there is good cause for the delay . . . the delay will not be held against the State." *Id.*

Appellant's trial was delayed after Minnesota's Chief Justice suspended jury trials in Minnesota in response to the COVID-19 pandemic. *See Order Governing the*

Continuing Operations of the Minnesota Judicial Branch, No. ADM20-8001 at 1 (Minn. Nov. 20, 2020). We held in *State v. Jackson*, 968 N.W.2d 55, 61 (Minn. App. 2021), *rev. granted* (Minn. Jan. 18, 2022), that a delay solely attributable to the COVID-19 pandemic is attributable to neither the state nor the defendant. Although appellant argues that the district court could have sought an exception from the Chief Justice under the November 20, 2020 order, appellant never requested that the district court do so. We therefore conclude that the delay is attributable to neither party and that this factor is neutral.

C. Assertion of the Right

A defendant's assertion of his speedy-trial right is entitled to strong evidentiary weight in determining whether he was deprived of the right. *Mikell*, 960 N.W.2d at 252.

Appellant repeatedly asserted his right to a speedy trial. He demanded a speedy trial on October 20, 2020 and reasserted that demand on November 16, 2020. This factor weighs in appellant's favor.

D. Prejudice Due to the Delay

"We consider three interests when determining whether a defendant suffered prejudice: (1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired." *Id.* at 253 (quotations omitted). Impairment of the defense is the most significant of these interests and is typically suggested by witness memory loss or witness unavailability. *Jackson*, 968 N.W.2d at 62.

Appellant argues that his pretrial incarceration was oppressive and caused anxiety and concern because he remained in jail during a deadly pandemic, putting him at increased

risk of contracting COVID-19. He also argues that, because of the unpredictable delays caused by the pandemic, he suffered more uncertainty than other defendants about whether his trial would really proceed in February or would again be postponed.

Although appellant remained in custody from the time of his arrest until his trial, the rules of criminal procedure do not require a defendant's release from custody until 120 days from the date of the speedy-trial demand. *See* Minn. R. Crim. P. 11.09(b). Appellant was tried 105 days after his speedy-trial demand, within the 120-day period. There is also no record evidence that appellant suffered from any condition that made him particularly susceptible to the COVID-19 virus. On this record, we cannot say that appellant suffered oppressive pretrial incarceration or anxiety and concern more serious than that experienced by other people held in custody pending trial during the COVID-19 pandemic. *See State v. Strobel*, 921 N.W.2d 563, 571 (Minn. App. 2018) (noting that the expected stress and anxiety experienced by anyone involved in a trial is insufficient to demonstrate prejudice).

Appellant argues that the delay hampered his ability to thoroughly examine witness D.C. D.C. testified in February 2021 that she could not remember the September 2020 events. But she testified that she could not remember those events because she was on drugs and her mental health was "wrong" and she was "really messed up." The record is devoid of evidence that the passage of time adversely affected D.C.'s memory—it is clear from the record that D.C. attributed her memory problems to her drug use and mental state. Appellant fails to show that his defense was impaired by the delay.

E. Balancing the Factors

Finally, we engage in the balancing required to determine whether appellant was brought to trial "quickly enough so as not to endanger the values that the speedy trial right protects." *Mikell*, 960 N.W.2d at 255.

Appellant's trial was delayed only because it could not be held within the 60-day time period without a special exception from the Chief Justice. The length of the delay (45 days past the 60-day demand period) was proportionate to the reason for the delay, and appellant has not established that he was prejudiced by that delay. We conclude that he was not unconstitutionally denied his right to a speedy trial.

III. Appellant's two theft offenses did not arise from a single behavioral incident.

Appellant argues that he should have not been separately sentenced for his two theft convictions because they arose out of a single behavioral incident.

Generally, "if a person's conduct constitutes more than one offense under the laws of [Minnesota], the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2020). This prohibition against multiple punishment applies only if the offenses arose out of "a single behavioral incident." *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). If multiple offenses arose out of a single behavioral incident, the district court should impose only one sentence for the offense at the highest severity level. Minn. Sent. Guidelines cmt. 2.B.107 (2020).

We determine whether crimes were committed as part of a single behavioral incident by considering whether there was (1) a single criminal objective, and (2) a unity of time and place. *Bookwalter*, 541 NW.2d at 294. "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). The state bears the burden of proving, by a preponderance of the evidence, that a defendant's offenses were not part of a single behavioral incident. *State v. Williams,* 608 N.W.2d 837, 841-42 (Minn. 2000).

Appellant was convicted of and sentenced for two counts of theft of movable property under Minn. Stat. § 609.52, subd.2(a)(1): one count for the vehicle theft and one for the gun theft. Although the district court did not expressly state its findings on this issue at sentencing, it implicitly found that the two offenses were not committed as part of a single behavioral incident when it imposed a separate, though concurrent, sentence for each conviction. The record supports that implicit finding.

First, the two theft offenses were not motivated by the same criminal objective. Appellant stole the Interceptor from the Kwik Trip lot to escape and evade apprehension for the McDonald's assault that immediately preceded the theft of the vehicle. He quickly entered and drove off in the unlocked and running vehicle shortly after the assault and then drove wildly and without headlights to avoid capture by pursuing police officers. The objective underlying the gun theft, on the other hand, was unrelated to appellant's flight from the McDonald's and was apparently motivated by appellant's desire to have and keep the gun. Although the gun was never found, appellant did not use the gun as part of his escape attempt, and the circumstances indicate that appellant found, and then took, the gun sometime after the vehicle theft.

Second, the two thefts were also not unified in time or place. Appellant stole the Interceptor when he entered it and drove away from the gas station. Although the gun was in the vehicle's glove compartment, appellant took the gun out of the glove compartment later and with the intent to keep it after he abandoned the car on the side of the highway.

Because the two thefts were not unified in time or place and were motivated by different criminal objectives, the two offenses did not arise from a single behavioral incident.

Appellant notes that the district court found that his offenses occurred as part of a single behavioral incident when it denied his pretrial motion to sever the assault offenses from the theft offenses. We first note that this determination followed appellant's motion to sever the assault charge from the theft charges. The district court's pretrial order on that issue only addressed whether the *assault and theft* offenses arose out of a single behavioral incident. The district court concluded that the assault and theft convictions arose out of a single behavioral incident because the theft of the car was motivated by an intent to escape after the assault. Appellant does not challenge that finding and acknowledges that the district court could properly impose separate sentences for the assault and theft convictions because the assault and theft crimes involved two different victims. *See State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012) ("Under the multiple-victim exception, courts are not prevented from giving a defendant multiple sentences for multiple crimes arising out of a single behavioral incident if: (1) the crimes affect multiple victims; and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant's conduct." (quotations omitted)).

The district court did not directly address in the pretrial order whether the *two theft offenses* arose out of the same behavioral incident. We also note that the district court correctly considered that the evidence underlying the offenses would have been admissible at each trial even if the charges had been severed and tried separately.

Finally, while pretrial joinder follows the same analysis as posttrial sentencing under Minn. Stat. § 609.035 (2020), pretrial joinder does not limit the district court's analysis during sentencing. Appellant's theft offenses did not arise out of a single behavioral incident. The district court properly imposed separate sentences for both convictions.

IV. Appellant's claims in his pro se supplemental brief do not merit relief.

Appellant submitted a pro se supplemental brief asserting various additional claims. We have carefully reviewed those claims and conclude that none merit relief.

Some of appellant's pro se claims repeat arguments concerning the hearsay and speedy-trial issues already raised in his principal brief and addressed above.

Appellant also claims that his trial counsel provided bad advice concerning his omnibus hearing and that the state and his counsel failed to investigate other suspects. Those claims involve facts not contained in the record on appeal and we therefore decline to address them. *See State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) (declining to reach merits of claim on the grounds that the appellate record was insufficient for review).

Appellant argues that the state's original felony assault charge was improper because appellant did not have the requisite prior qualified offenses. Appellant raised that issue before his trial, and the district court agreed with appellant. Appellant has failed to

show any prejudice resulting from the state's initial charging error, which was corrected before his trial.

Appellant appears to challenge the sufficiency of the evidence on the grounds that his DNA was not found in the car. In reviewing the sufficiency of circumstantial evidence, we identify the circumstances proved and determine whether they are consistent with guilt and inconsistent with any other rational hypothesis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). We review the evidence not as isolated facts, but as a whole. *Id.* at 599.

Here, the state produced evidence showing that appellant was in the area and acting strangely; S.H. identified appellant as the man who punched him; a man matching appellant's description stole a vehicle from the nearby Kwik Trip just minutes after that assault; the Interceptor was left unoccupied on the side of the road; and appellant was found near the abandoned vehicle with his clothes covered in mud and cockleburs. Even without DNA evidence linking appellant to the Interceptor, the circumstances proved are consistent with appellant's guilt and inconsistent with any other rational hypothesis. We therefore conclude that the state's evidence is sufficient to support appellant's convictions.

In sum, the district court did not commit plain error by admitting K.B.'s out-of-court statements to the investigator, appellant's speedy trial rights were not unconstitutionally violated by the COVID-19-related delay of his trial, and the district court did not err by imposing separate sentences for his two theft convictions that did not arise from a single behavioral incident.

Affirmed.