This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1748

Joshua Stuart Vossen,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 25, 2022
Affirmed
Smith, Tracy M., Judge

Sherburne County District Court
File No. 71-CR-17-1524

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this appeal from an order denying postconviction relief after remand for an evidentiary hearing, appellant Joshua Vossen challenges his sentence, arguing that the district court erred by assigning him four criminal-history points for four prior convictions

because the offenses were committed as part of a single behavioral incident. Respondent State of Minnesota concedes that two of the four offenses were part of the same behavioral incident but argues that Vossen still properly has three criminal-history points for the offenses. Because Vossen's sentence is the same with three criminal-history points for the four offenses, rather than with four points, the postconviction petition was properly denied. We affirm.

FACTS

In 2018, consistent with a plea agreement, the Sherburne County District Court sentenced Vossen to 111 months in prison following his guilty pleas to aggravated robbery and fleeing a peace officer in a motor vehicle. The sentence was a presumptive sentence under the Minnesota Sentencing Guidelines. Under the guidelines, a criminal-history score of six or higher for a severity-level eight offense, like aggravated robbery, called for a presumptive sentence of 108 months. Minn. Sent. Guidelines 4.A (Supp. 2017). An additional three months were added to the presumptive sentence when the defendant's total criminal-history score was seven or more and a custody-status point had been assigned. Minn. Sent. Guidelines, 2.B.2.c (Supp. 2017).[1]

The district court, in sentencing for the aggravated-robbery offense, determined that Vossen had a criminal-history score of eight, consisting of seven felony points and one custody-status point. The seven felony points included one point for each of four offenses

[1] Under current guidelines, the three-month enhancement applies when an offender has a total criminal-history score of seven or higher and has been assigned at least one-half custody-status point. *Id.* (Supp. 2021).

that Vossen committed on January 15 and 16, 2015: (1) January 15 motor-vehicle theft in Sherburne County, (2) January 16 theft in Wright County, (3) January 16 second-degree burglary in Anoka County, and (4) January 16 motor-vehicle theft in Anoka County.

In 2020, Vossen moved to correct his sentence under Minn. R. Crim. P. 27.03, subd. 9.[2] In an attached affidavit, Vossen stated that he committed all four of the January 2015 offenses in an attempt to get out of the cold until he could find a place to stay. Vossen contended that, because his objective was consistent for all the offenses, the offenses were all part of a single behavioral incident. He asserted that he therefore should have received felony points for only two of the four offenses. Under this argument, Vossen's criminal-history score would be six, meaning he would not receive a three-month enhancement, which would reduce his total sentence from 111 months to 108 months. *See* Minn. Sent. Guidelines 2.B.2.c.

The district court summarily denied Vossen's motion. On appeal of that decision, this court reversed and remanded, concluding that the district court should have conducted an evidentiary hearing. *Vossen v. State*, No. A20-1299 (Minn. App. June 7, 2021) (order op.).

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[2] Although the district court construed Vossen's motion as a motion to correct sentence and a postconviction petition, this court issued an order determining that the motion was properly considered a petition for postconviction relief because the sentence that Vossen was challenging was agreed to in exchange for the dismissal of other pending charges. *See State v. Vossen*, No. A21-1748 (Minn. App. Mar. 11, 2022) (order); *see also State v. Coles*, 862 N.W.2d 477, 481-82 (Minn. 2015) (holding that a petition for postconviction relief was appellant's exclusive remedy because his motion to correct his sentence implicated a plea agreement).

On remand, Vossen testified about the offenses he committed on January 15 and 16, 2015. According to his testimony, Vossen stole a total of eight vehicles over the course of those two days—an Audi, a van, a Saturn, a white Pontiac Grand Am, a white Astro van, a white Volvo, a snowmobile, and a Ford F-150. He also entered an outbuilding and a residential attached garage without permission. The following summary is taken from Vossen's testimony.

On January 15, Vossen was released from jail in Anoka County and had nowhere to go. About "an hour or two" after his release, he was no longer sober, having obtained and taken controlled substances. Between 6:30 and 7:30 p.m., he stole an Audi in Elk River "to get out of the cold" and, he testified, because he was concerned about the police finding him.[3]

About an hour later, the Audi broke down, and Vossen stole a van, which also broke down, and he then stole a Saturn. Vossen drove the Saturn from Elk River to Buffalo, where, at approximately 5:00 a.m. on January 16, he entered a gas station and unsuccessfully attempted to telephone a friend. After returning to the Saturn, Vossen found that it was not running, so he stole a white Pontiac Grand Am. When he stole the Grand Am, he did so because he was "still afraid that [he] was going to be arrested" and because he wanted to stay out of the weather and stay away from law enforcement.[4]

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[3] The theft of the Audi is the first of the four offenses at issue in Vossen's criminal-history score. Vossen pleaded guilty to that offense in Sherburne County District Court.

[4] The theft of the Grand Am is the second of the four offenses at issue. Vossen entered a *Norgaard* plea to stealing the Grand Am in Wright County District Court. *See State ex. rel. Norgaard v. Tahash*, 110 N.W.2d 867, 872 (Minn. 1961) (holding that a defendant may

Vossen drove the Grand Am back to Elk River, where he went to an acquaintance's apartment, but no one was there. Vossen then could not get the Grand Am to start, so he walked a couple of minutes to a gas station, where he stole a white Chevy Astro van.

Vossen drove the Chevy Astro into a neighborhood to steal license plates and was seen by an Elk River police officer. Vossen drove out onto a county road, where multiple police vehicles began pursuit. Vossen was able to evade police. He came across a residence, abandoned the Chevy Astro, and stole a white Volvo that was running in the residence's driveway. Vossen testified that, when he stole the Volvo, his motivation was to get away from the police.

Vossen crashed the Volvo into a ditch and then ran across farm fields and a county road to an outbuilding, where he stole a snowmobile. Law enforcement again spotted Vossen and began pursuit. Vossen fled through a field, over a county road, down a ditch, and into a stand of trees. He crashed the snowmobile into a tree, then ran on foot toward a house. Vossen entered the attached garage of the house, found a Ford F-150 inside, and attempted to flee in that vehicle.[5] He was quickly apprehended.

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enter a plea when they are unable to remember the specific facts of the offense because of intoxication or amnesia but is persuaded that they are likely to be convicted of the offense charged based on the evidence).

[5] Vossen pleaded guilty to second-degree burglary and motor-vehicle theft in Anoka County District Court. The burglary is the third offense at issue in this case. As to the motor-vehicle theft, as the state acknowledges in its brief, it is not clear from the record which motor-vehicle was at issue in the count to which Vossen pleaded guilty. The district court here assumed that the count was theft of the F-150. The state agrees with that approach in fairness to Vossen and concedes that, with that understanding, the fourth offense at issue in this appeal is the theft of the F-150 and that the third and fourth offenses arose out of the same behavioral incident.

Following the evidentiary hearing in the present matter, the district court denied Vossen's motion challenging his criminal-history score. The district court concluded that Vossen's offenses did not occur at substantially the same time and place and were not motivated by the same criminal objective.

Vossen appeals.

DECISION

Appellate courts review a denial of a petition for postconviction relief for abuse of discretion. *Davis v. State*, 784 N.W.2d 387, 390 (Minn. 2010). A postconviction court "abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted). When a defendant challenges a prior sentence under the postconviction statute after the time for direct appeal has passed, the defendant bears the burden of proving that his or her sentence was based on an incorrect criminal-history score. *Williams v. State*, 910 N.W.2d 736, 742-43 (Minn. 2018).

Under the sentencing guidelines, "[w]hen multiple offenses arising from a single course of conduct involving multiple victims were sentenced," only the two most serious offenses are included in the defendant's criminal-history score. Minn. Sent. Guidelines 2.B.1.d.2 (Supp. 2017); *see also State v. Marquardt*, 294 N.W.2d 849, 850-51 (Minn. 1980). Whether multiple offenses occurred during a single course of conduct depends on the facts and circumstances of the case. *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). "Offenses are part of a single course of conduct if the offenses occurred at substantially the same time and place and were motivated by a single criminal objective." *Id.* This

determination "is not a 'mechanical' exercise, but rather requires an examination of all the facts and circumstances." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (citation omitted). Whether a defendant's offenses occurred as part of a single course of conduct is a mixed question of law and fact. *Jones*, 848 N.W.2d at 533. We review the district court's factual findings for clear error but review the district court's application of law to those facts de novo. *See id.*

Vossen contends that the offenses that he committed on January 15 and 16, 2015, were part of the same behavioral incident and that he therefore should have been assigned two, rather than four, points for the offenses. The state concedes for purposes of this appeal that two of the offenses—the residential burglary and the motor-vehicle theft in Anoka County—constituted a single behavioral incident. The issue in this case is thus whether the Anoka County incident and the other two offenses—the motor-vehicle thefts in Sherburne and Wright counties—were all part of a single behavioral incident.

Vossen argues that the district court made legal and factual errors in concluding that they were not. He emphasizes that there was only a short period of time between his eight motor-vehicle thefts across those days and asserts that, from the start and throughout the crime spree, he was motivated by the same desires—to stay out of the cold and to avoid the police. The state counters that the record supports the district court's determination that Vossen's offenses occurred at substantially different times and places because they occurred over the course of hours and across counties and its determination that they were not unified by a single criminal objective because Vossen was not at all times pursued by police.

Time and Place

The district court determined that the offenses were not part of a single behavioral incident because Vossen failed to establish that the offenses occurred at substantially the same time and place. Vossen argues that this was error, contending that "it is not possible to separate the time-and-space component of the analysis from the criminal objective analysis, particularly given the 'avoidance of apprehension doctrine.'"

Vossen cites *State v. Herberg*, 324 N.W.2d 346 (Minn. 1982), to support his argument. In *Herberg*, the defendant kidnapped and assaulted a victim in Stearns County and then transported her to Todd County, where he sexually assaulted her, moved her to a different location, and sexually assaulted her again. 324 N.W.2d at 347. The supreme court concluded that the assaults were part of a single behavioral incident because there "was an underlying unity to the various acts." *Id.* at 349. The supreme court stated that "[t]he fact that the two acts of sexual penetration of which defendant was convicted occurred in separate places does not necessarily mean that the acts were not part of a single course of conduct." *Id.* The court explained that the defendant moved to a different place to commit the second sexual assault "only because he feared that the first location was too open and that they might be noticed" and that "[h]is underlying motivation remained the same: to satisfy his perverse sexual needs by assaulting, penetrating, and degrading the victim in various ways." *Id.*

The state counters with *State v. Degroot*, in which the supreme court affirmed the district court's conclusion that the defendant's crimes of electronic solicitation and attempted criminal sexual conduct were not part of a single behavioral incident. 946

N.W.2d 354, 366-67 (Minn. 2020). In *Degroot*, the supreme court determined that the offenses at issue occurred at different times and places—the former when the defendant communicated with an officer posing as a child and the latter when the defendant arrived at a fictitious residence to meet with the supposed child. *Id.* at 365-66. The court cited a "nearly 45-minute break" in messages and a forty-mile drive as two factors that supported disunity of time and place. *Id.* at 365-66.

The present case is more like *Degroot* than like *Herberg*. Vossen's thefts and burglary occurred over January 15 and 16 and across multiple counties, with some time between each offense, as in *Degroot*. The case is unlike *Herberg*, where there was one victim, and the offenses—kidnapping and assaults—were more clearly driven by a continuing single criminal objective than the offenses in this case. Here, Vossen stole the first vehicle, the Audi, on the night of January 15, in Sherburne County. He stole the Pontiac in the early morning of January 16 (around 5:00 a.m.) in Wright County. He burglarized a dwelling and stole a Ford F-150 in the late morning of January 16 in Anoka County. Even considering the other offenses (that Vossen was ultimately not convicted of), Vossen's conduct took place over a wide area across a number of hours, and the district court did not err by determining that the offenses did not occur at substantially the same time and place.

Criminal Objective

Vossen also argues that the district court erred by determining that his offenses were not motivated by a single criminal objective. Vossen contends that the district court made clearly erroneous factual findings regarding his criminal objective and that it made a legal

error by not considering Vossen's offenses unified under the "avoidance of apprehension" doctrine.

We begin with the alleged factual errors. First, Vossen asserts that the district court clearly erred by finding that Vossen was not motivated by the goal of evading police when he stole the Audi in Sherburne County and that that fact separates that offense from the offenses that followed. The district court based its finding on the facts that the Audi was the first vehicle Vossen stole and that, at that point, Vossen had "not yet done anything criminal to warrant his arrest." Vossen argues the district court clearly erred because Vossen had cause to avoid the police because using narcotics is a crime and was a violation of his release conditions and because he testified that he was trying to stay ahead of the police—testimony that the district court did not specifically find not credible. The state counters that drug use and violation of release conditions are not crimes and that the district court therefore did not err by rejecting the claim that Vossen stole the Audi to avoid apprehension. On this record, we conclude that the district court did not clearly err by finding that Vossen's motivation for stealing the first vehicle—when he was not pursued by police and had not yet done anything criminal—was different from his motivation for the later offenses.

Second, Vossen asserts that the district court clearly erred by finding that Vossen obtained drugs from someone in Sherburne County *after* he stole the Audi, which suggested that Vossen had the opportunity to make some other plan to get out of the cold and thus constituted an "intervening event" and "a pause in the spree" that "sever[ed] the Sherburne County behavioral incident from the remainder of the sequence." Vossen asserts

that the record does not support a finding that he obtained drugs *after* he stole the Audi. The state counters that the district court did not make a factual error because it found that, "*[a]t some point* in Elk River, [Vossen] met with an acquaintance to obtain drugs, using them shortly after" and this finding is supported by the record. (Emphasis added.) The state, in fact, asserts that the record establishes that Vossen obtained the drugs *before* stealing the Audi.

Given the district court's characterization of the drug use as an "intervening event" and a "pause in the spree," it appears that the district court found that Vossen obtained drugs *after* the crime spree started—that is, after he stole the Audi. Vossen did not testify that he met with anyone else at any point after his crime spree began, nor is there alternative support for that finding elsewhere in the record. We therefore agree with Vossen that the district court clearly erred by finding that he met with an acquaintance to use drugs after his crime spree started and that this meeting represented a "pause in the spree."

This factual error, however, is harmless if it does not change the determination that Vossen's criminal objective was not singular for the offenses. Minn. R. Crim. P. 31.01. Vossen argues that his offenses were all motivated by the same objectives—to stay warm and to avoid the police. He also contends that the district court committed legal error by not concluding, based on the facts, that his offenses were all motivated by the objective of avoiding apprehension.

A test for determining whether offenses are motivated by a single criminal objective "is whether all of the acts performed were necessary to or incidental to the commission of a single crime and motivated by an intent to commit that crime." *State v. Krampotich*, 163

N.W.2d 772, 776 (Minn. 1968). "Broad statements of criminal purpose do not unify separate acts into a single course of conduct." *Degroot*, 946 N.W.2d at 366 (quotation omitted). Rather, offenses are unified if the perpetrator had a single, specific, criminal purpose. *See id.* The purpose of avoiding apprehension can unify multiple offenses if a subsequent offense was "substantially contemporaneously committed" "in order to avoid apprehension for the first offense." *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991).

As we explained above, we discern no error in the district court's finding that Vossen's first theft—the theft of the Audi in Sherburne County—was not motivated by a desire to evade the police or avoid apprehension. The record supports the district court's finding that his motivation for that crime was to get out of the cold and its determination that that offense did not share a criminal purpose with the subsequent offenses. At the very least, then, the Sherburne County incident was part of a separate behavioral incident from the Wright County and Anoka County incidents.

But we also reject Vossen's argument that, on this record, all of the incidents necessarily shared the same criminal objective. Vossen argues that this case is like *Langdon v. State*, 375 N.W.2d 474, 476-77 (Minn. 1985). In *Langdon*, the supreme court held that a defendant's burglary of seven different laundry rooms over the course of an afternoon in an apartment complex constituted a single behavioral incident, determining that the offenses were all motivated by the defendant's goal "to steal as much money as he could that afternoon from the coin boxes on the washers and dryers in the several laundry rooms within the apartment complex." 375 N.W.2d at 475-76. But, importantly, the court observed that "burglariz[ing] a number of residences owned by a number of different

people in a single afternoon or . . . burglariz[ing] the apartments of a number of different people" would be unlikely to constitute a single behavioral incident. *Id.* at 476. And Vossen's conduct—stealing a series of vehicles from different persons in different locations—is more closely analogous to burglarizing several residences, owned by different people, in different locations than it is to the facts of *Langdon*.

We similarly reject the argument that the district court erred by not concluding that Vossen's offenses are unified under the avoidance-of-apprehension doctrine. Vossen argues that this case is like *State v. Hicks*, 864 N.W.2d 153 (Minn. 2015). In *Hicks*, the supreme court concluded that the defendant's concealment of the victim's body was part of the same behavioral incident as the underlying murder, noting that "we have long recognized that a defendant's conduct in concealing a crime is part of the same behavioral incident as the underlying offense." 864 N.W.2d at 160. Vossen argues that his case is like *Hicks* because, for him, "stay[ing] ahead of the police" "became particularly important as the thefts accumulated."

Vossen's argument is unavailing. His offenses were committed sequentially over January 15 and 16 and were not substantially contemporaneous. *See Gibson*, 478 N.W.2d at 497. The Sherburne County offense started the spree, and all of the offenses were committed hours apart. And the offenses were all committed under different circumstances. When Vossen stole the Audi in Sherburne County, he was not subject to any police pursuit; when he stole the Pontiac in Wright County, he had successfully evaded police and wished to avoid police; and, when he stole the F-150 from the garage in Anoka County, he was fleeing active police pursuit. These different circumstances support a determination that

the offenses were not motivated by the same objective of avoiding apprehension. Finally, as the state persuasively argues, the offenses were divisible and each could have been committed without the others, further supporting the district court's determination that this was not a single behavioral incident. *See State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001) (explaining that "where offenses are committed and proven independently of the others, they are not part of a single behavioral incident").

In sum, the district court did not abuse its discretion by denying Vossen's challenge to his 111-month sentence. When considering the two Anoka County offenses as part of the same behavioral incident, Vossen's criminal-history score is seven (six felony points plus one custody-status point). Because the three-month enhancement applies whether Vossen's criminal-history score was seven or eight, his 111-month sentence is not inaccurate. *See* Minn. Sent. Guidelines 2.B.2.c. Vossen's challenge to his sentence was therefore properly rejected.

Affirmed.