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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1880

State of Minnesota,
Respondent,

vs.

Noah James Anderson,
Appellant.

Filed September 26, 2011
Affirmed
Schellhas, Judge

Clay County District Court
File No. 14-CR-09-4940

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Michelle Lawson, Assistant County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Wright, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant seeks reversal of his convictions of conspiracy to commit aggravated robbery, first-degree burglary, and second-degree assault, and challenges his sentence,

arguing that (1) the district court abused its discretion by not instructing the jury that a witness was an accomplice as a matter of law, (2) the prosecutor committed prejudicial error, and (3) the district court abused its discretion by imposing consecutive sentences. We affirm.

FACTS

On November 8, 2009, roommates David Hertsgaard and Joshua Asp were watching Sunday Night Football in their Moorhead apartment when they heard the doorbell ring. The man at the door wore a pizza-delivery uniform, although neither Hertsgaard nor Asp had ordered a pizza. When Hertsgaard opened the door to tell the man that no pizza had been ordered, three men rushed into the apartment. Two of the men pushed the delivery man and Hertsgaard out of the way, while a third man entered holding a shotgun. The intruders wore dark clothing, gloves, and black masks. Police later identified the intruders as John Kukert, Jason Pendleton, and appellant Noah Anderson. At trial, Hertsgaard testified that he believed that Kukert wore black "motocross gloves" with orange marks and Anderson wore black gloves and a black sweatshirt.

Inside the apartment, Anderson, who had a knife, jumped on Hertsgaard's back and wrestled him to the ground; Pendleton pointed a pistol at Hertsgaard; and Kukert pointed a shotgun at Asp and ordered him to the ground. The intruders asked where the "money bag" and "weed" were located and searched the apartment. Aware of a recent drug bust in an upstairs apartment, the roommates told the intruders that they had the

wrong apartment, and the intruders left, taking Asp's wallet and cell phone. The man dressed in the pizza-delivery uniform also left.

The roommates called the police and left for their neighbor's house. On their way, they spoke with two people who said they saw a man run out of the apartment building heading south or southeast. Police investigators determined that Anderson, Kukert, Pendleton, Joshua Lowe, Nick Lindell, and Jean Roubideaux planned to rob the upstairs renters, who were known marijuana dealers, on November 8, when they believed the upstairs renters were receiving a shipment of marijuana.

The state charged Anderson with the following offenses: conspiracy to commit first-degree aggravated robbery in violation of Minn. Stat. §§ 609.245, subd. 1 (2008) and 609.175, subd. 1 (2008); first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1; second-degree assault in violation of Minn. Stat. § 609.222, subd 1 (2008); and first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(a) (2008).

Before the trial began, Anderson and the state agreed that the jury should receive an accomplice-as-a-matter-of-law instruction concerning witnesses Lowe, who drove a get-away car, and Roubideaux, who wore the pizza-delivery uniform. Anderson requested an accomplice-as-a-matter-of-law instruction with respect to Ethan Nelson, the owner of the pizza-delivery uniform, and the state opposed the request, asking that the district court instead give the jury a general accomplice instruction that would allow the jury to decide whether Nelson was an accomplice. The court reserved its ruling until after Nelson's testimony.

According to Nelson's testimony, on November 8, Pendleton asked him if he would knock on a door in his pizza-delivery uniform. Nelson declined but lent Pendleton his uniform, claiming at trial that he did not know that his uniform would be used in a robbery and only learned of the robbery when he attempted to retrieve his uniform. The district court declined to give the jury an accomplice-as-a-matter-of-law instruction but ruled that it would give the jury a general accomplice instruction.

According to the testimony of police officers, on the night of November 8, police located a Domino's Pizza shirt, a pizza warming bag, and a baseball cap about one block south of the apartment building. And, on November 16, in a wooded area about one block southeast of the apartment building, police found black clothing that included a dirty black thermal hood and gloves. "Pay up sucker" in green letters with a dollar sign appeared in the palm of one of the gloves. DNA testing revealed that the hood contained DNA evidence that matched Anderson's DNA profile. And Anderson's phone records showed that his telephone was used for calls with Lowe, Kukert, Lindell, Pendleton, and Roubideaux on November 8, and dates before and after November 8.

Accomplice witness Lowe testified that Kukert, Anderson, and he planned the robbery the week before November 8. Lowe testified that Anderson agreed to let them use his firearms and drove them to the area where the apartment was located. On the morning of November 8, Lowe and Kukert drove from Moorhead to Bismarck, North Dakota, to pick up Pendleton so that he could participate in the robbery. Later in the afternoon, Lowe, Kukert, Pendleton, and Lindell drove around the area of the apartment

building, picked up the pizza-delivery uniform from Nelson, and purchased black clothing at Kmart.

Roubideaux also testified about the planning and execution of the robbery and Anderson's involvement.

On his own behalf, Anderson testified and denied involvement in the robbery. He acknowledged that his DNA was located on the hood and black gloves with orange writing, but he testified that he kept the items in his motorcycle saddlebag and that, from the end of July until November 8, he did not see them. Anderson was unable to explain why the items were found in the wooded area one block southeast of the apartment building. Regarding the calls revealed by his cell-phone records, Anderson testified that Kukert came to his home on November 8 and used his cell phone, and that he did not know the purpose of the calls.

The jury found appellant guilty of conspiracy to commit aggravated robbery, second-degree assault, and first-degree burglary. The district court sentenced Anderson to the presumptive term of 28 months and 15 days in prison for conspiracy to commit aggravated robbery, 21 months for second-degree assault, to run consecutively to the conspiracy sentence, and 27 months stayed for first-degree burglary. The court granted Anderson's request for concurrent execution of his sentence for first-degree burglary.

This appeal follows.

D E C I S I O N

Accomplice Jury Instruction

Under Minnesota Statutes section 634.04, "[a] conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense." "A district court has a duty to instruct juries on accomplice testimony in any criminal case in which it is reasonable to consider any witness against the defendant to be an accomplice." *State v. Pendleton*, 759 N.W.2d 900, 907 (Minn. 2009) (quotation omitted). A witness is an accomplice if the witness could have been charged and convicted of the same crime as the defendant. *State v. Pederson*, 614 N.W.2d 724, 733 (Minn. 2000). "A person may be criminally liable for aiding and abetting the commission of a crime if the person 'intentionally aids' the commission of the crime." *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010). "[W]e distinguish between playing a knowing role in the crime and having a mere presence at the scene, inaction, knowledge and passive acquiescence." *State v. Jackson*, 746 N.W.2d 894, 898 (Minn. 2008) (quotations omitted).

When facts pertaining to whether a witness is an accomplice are undisputed and only one inference can be drawn as to whether the witness is an accomplice, then the district court makes the determination. *Id.* But when a witness's role as an accomplice is unclear, the determination is a question of fact for the jury. *State v. Barrientos-Quintana*, 787 N.W.2d 603, 610–11 (Minn. 2010). A district court's decision on jury instructions is reviewed for an abuse of discretion. *State v. Palubicki*, 700 N.W.2d 476, 487 (Minn. 2005).

Here, Anderson argues that the court abused its discretion and committed reversible error by declining to instruct the jury as a matter of law that Nelson was an accomplice. Noting that Nelson denied knowing that his delivery shirt and pizza bag were going to be used in the robbery and that "if [Nelson's] testimony is believed in that regard, the jury could find that he was not an accomplice," the court gave a general accomplice jury instruction as follows:

> With respect to accomplice testimony, you cannot find the defendant guilty of a crime on the testimony of a person who could be charged with that crime unless that testimony is corroborated by other evidence that tends to convict the defendant of the crime. Such a person who could be charged for the same crime is called an accomplice.
>
> In this case, Joshua Lowe and Jean Roubideaux are persons who could be charged with the same crimes as the defendant. You cannot find the defendant guilty of a crime or crimes based on the testimony of these accomplices unless that testimony is corroborated.
>
> If you find that any person who has testified in this case is a person who could be charged with the same crime or crimes as the defendant, you cannot find the defendant guilty of that crime on that testimony unless that testimony is corroborated.
>
> The evidence that can corroborate the testimony of an accomplice must do more than merely show that a crime was committed or show the circumstances of the crime, but the corroborating evidence need not convince you by itself that the defendant committed the crime. It is enough that it tends to show that the defendant committed a crime, and that taken with the testimony of an accomplice you are convinced beyond a reasonable doubt that the defendant committed the crime.
>
> The testimony of one accomplice does not corroborate the testimony of another accomplice. Accomplice testimony

> must be corroborated by evidence other than the accomplice testimony before you may find the defendant guilty, but such other evidence may corroborate the testimony of each accomplice.

In this case, Nelson testified that Kukert was an acquaintance from whom he purchased marijuana and that he knew Lowe, Pendleton, and Anderson. About two or three weeks before November 8, when Kukert told him that they "should go rob someone," he "didn't really know what to make of it"; "I mean, [Kukert] would say, well, you can have a cut of it if you help out. I mean, I didn't—[Kukert] asked if I knew places to go and I said, no, I don't know anyone." When Nelson suggested that they go to a run-down apartment, he was joking and thought Kukert was joking. Nelson never discussed any specific plans for a robbery with Kukert, never heard anyone else talking about committing robbery, and never helped plan a robbery. On November 8, around 4:00 or 5:00 p.m., Pendleton called and asked if Nelson would knock on a door in his pizza-delivery uniform. Nelson did not know to what door Pendleton was referring or that the request related to committing a robbery. Nelson explained to Pendleton that he could not knock on a door because he had to go to work, and then he met Pendleton and gave Pendleton his pizza-delivery shirt and pizza bag. Nelson testified that he was in a hurry to get to work when he met Pendleton, and he shoved the items through the car window and asked what they would be used for. He was told not to worry about it, and Nelson left. Nelson testified that he did not know that a robbery was going to be committed on November 8 and that neither Kukert nor Lowe asked him to help with the robbery.

The jury could draw multiple inferences from Nelson's testimony. Because the facts did not compel a single inference concerning whether Nelson was an accomplice, the district court did not abuse its discretion by allowing the jury to decide the fact question, after giving the jury a general accomplice instruction. *See Pendleton*, 759 N.W.2d at 907–08 (determining that general accomplice instruction was not erroneous because multiple inferences could be drawn from facts, some that supported the conclusion that witness was an accomplice and some that did not).

Prosecutorial Error

Anderson argues that he is entitled to a new trial because of prosecutorial error committed during closing argument.[1] We consider "closing arguments in their entirety" in determining whether prosecutorial error occurred. *State v. Vue*, 797 N.W.2d 5, 15 (Minn. 2011).

Anderson did not object to the prosecutor's statements. We therefore consider the alleged error only if "it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297, 299 (Minn. 2006). An appellant bears the burden of showing that the prosecutor erred and that the error was plain. *State v. Wren*, 738

[1] Anderson characterizes several of the prosecutor's statements as prosecutorial "misconduct." "[T]here is an important distinction . . . between prosecutorial misconduct and prosecutorial error." *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Prosecutorial misconduct "implies a deliberate violation of a rule or practice, or perhaps a grossly negligent transgression," while prosecutorial error "suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time." *Id.* We apply the same standard to allegations of prosecutorial misconduct and prosecutorial error. *Id.* Because the statements Anderson challenges do not rise to the level of deliberate rule violations or gross negligence, we use the term "prosecutorial error."

N.W.2d 378, 389, 393 (Minn. 2007). "An error is plain if it was clear or obvious." *Ramey*, 721 N.W.2d at 302 (quotation omitted). "Typically, a plain error contravenes case law, a rule, or a standard of conduct." *Vue*, 797 N.W.2d at 13. "If the defendant establishes an error that is plain, the burden shifts to the State to demonstrate the error did not prejudice the defendant's substantial rights." *Id.* (quotation omitted).

Statement About Accomplice-Testimony Law

Anderson argues that the prosecutor misstated the law concerning the use of accomplice testimony in the following statement:

> And then, finally, you look at the testimony, as far as accomplice testimony, corroborating other accomplice testimony, it can do that and that can help you on your way to understanding everything that's going on in this case, but you could not just have two accomplices saying this is what happened and the defendant was involved.

Immediately before making the statement above, the prosecutor stated the following:

> There's also an instruction the Judge provided to you, just read to you that I want to go over some. Accomplice testimony. What the Judge told you and what the law is is that accomplice testimony itself cannot convict the defendant. You cannot convict Noah Anderson alone on the testimony of Josh Lowe or Jean Roubideaux, that you have to look at, beyond their testimony and look to see if there is information or evidence or other testimony that is out there that corroborates the information they provided. And in this case there is a great deal of corroboration as to their information, their testimony.

In this remark, the prosecutor referenced the jury instruction and correctly stated the law on accomplice testimony. *See State v. Her*, 668 N.W.2d 924, 927 (Minn. App. 2003)

(noting that accomplice testimony may not be corroborated solely by other accomplice testimony), *review denied* (Dec. 16, 2003). Additionally, after making the allegedly improper remark, the prosecutor referenced the district court's general accomplice jury instruction and again correctly stated the law. When the challenged remark is read in context, and the closing argument read in its entirety, the prosecutor's remark does not constitute error. *See State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005) (stating that we do not focus on "phrases or remarks . . . taken out of context or given undue prominence" (quotation omitted)).

Statement about Corroborating Testimony

Anderson acknowledges that the district court properly instructed the jury that Lowe and Roubideaux were accomplices as a matter of law and provided the general accomplice instruction. Anderson asserts that the prosecutor misled the jury by saying that Nelson's testimony corroborates Lowe's testimony. The prosecutor said this after referencing the jury instruction concerning a witness the jury finds to be an accomplice and while identifying other evidence that corroborates Lowe's testimony. Significantly, if the jury did not find that Nelson was an accomplice, the jury could have properly used Nelson's testimony to corroborate Lowe's testimony.

We presume that the jury followed the district court's instructions. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). Here, the prosecutor correctly stated the law on accomplice testimony in his closing argument, and we conclude that the prosecutor's remark is not erroneous.

Statement about Nelson

Anderson also argues that the prosecutor improperly vouched for Nelson's credibility by saying that Nelson was "not an accomplice." Vouching "occurs when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003) (quotations omitted). "But the state may argue that particular witnesses were or were not credible." *Id.*

After referencing the district court's jury instructions on accomplice testimony, the prosecutor stated the following:

> I expect you'll hear from defense counsel in closing, will talk to you about Ethan Nelson and argue to you that Ethan Nelson is also a co-defendant. Ethan Nelson is not a co-defendant in this case. He is not an accomplice. Ethan Nelson did not know that a robbery was going to occur on November 8, 2009.

Prosecutors are "free to make arguments that reasonably anticipate arguments defense counsel will make in closing argument." *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). The prosecutor's statement reasonably anticipates defense counsel's argument that the jury should find that Nelson is an accomplice and therefore the jury should not use his testimony alone to find Anderson guilty. Counsel may "argue reasonable inferences from the facts presented at trial." *Leake*, 699 N.W.2d at 328. Although the prosecutor's statement may not have been artful, it is not error. *See Lopez-Rios*, 669 N.W.2d at 614 (concluding that "remarks merely paraphrased the substance of

the witness's testimony and at worst, were unartful, not misconduct" (quotation omitted)).

Statement about Anderson

Anderson argues that the prosecutor improperly said that Anderson's statement to the police about Anderson's relationship with Kukert and Lowe, that he did not really talk to Kukert or Lowe, was "just simply not true." The prosecutor made this remark while arguing that Anderson's testimony was not credible and after mentioning the evidence of numerous phone calls between Anderson and Kukert and Lowe. The prosecutor did not err. He properly argued against finding Anderson's testimony credible and argued a reasonable inference based on the evidence of the phone records presented at trial. *See Leake*, 699 N.W.2d at 328; *Lopez-Rios*, 669 N.W.2d at 614.

Statements about Anderson's Defense

Anderson argues that in two remarks during rebuttal, the prosecutor disparaged the defense. In closing argument, defense counsel argued that the victims were mistaken about certain things, such as Asp testifying that the man wearing the pizza-delivery uniform wore a Domino's Pizza hat, when in fact Roubideaux testified that he wore a NDSU hat.

On rebuttal, when addressing arguments defense counsel made in his closing, the prosecutor said the following:

> [T]he defendant must not be involved because he says there wasn't an NDSU hat involved, that's the kind of argument the defense has given to you at that point. That is not plausible. That is fanciful and capricious doubt that he's trying to raise there. You need to look at all the evidence in the case.

The prosecutor also said that defense counsel's argument that Anderson was not involved in the robbery because Anderson testified that someone must have stolen his mask and gloves is "not plausible. That, again, is the building and the building up of fanciful and capricious doubt, to try to make something up to raise doubt in your mind. You need to look at all the evidence in this case and how it fits together."

"The state has a right to vigorously argue its case, and it may argue in individual cases that the evidence does not support particular defenses. Further, the state's argument is not required to be colorless." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (citation omitted). But, a prosecutor may not belittle a defense in the abstract or suggest that the defendant raised the defense because "nothing else will work." *Salitros*, 499 N.W.2d at 818.

The prosecutor argued that the defense was trying to create fanciful and capricious doubt, not that defense counsel's argument was fanciful or capricious. The prosecutor's argument was proper based on the standard jury instruction, which the district court gave to the jury: "A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt." *See* 10 *Minnesota Practice*, CRIMJIG 3.03 (2006). The prosecutor did not belittle Anderson's defense that he was not involved in the robbery or suggest that he presented this defense only because he had no other options. Instead, when viewed in context, the remarks reflect the prosecutor's argument about the merits of the defense. The prosecutor did not err.

Even if the prosecutor committed some errors, they did not impair Anderson's substantial rights. Substantial rights are affected "if the error was prejudicial and affected the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). To determine this, we consider "the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *Davis*, 735 N.W.2d at 682.

First, the district court correctly instructed the jury on all relevant matters. Second, the challenged portions of the prosecutor's argument amount to a small portion of the prosecutor's closing argument, which covered 49 pages of transcript. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (refusing to grant new trial when objectionable statements consisted of two sentences in a closing argument covering 20 pages in transcript). Third, the evidence at trial undercuts Anderson's claim that the remarks were so severe as to deprive him of his right to a fair trial. The record includes testimony from two accomplices and one witness implicating Anderson, and evidence corroborating the testimony includes DNA evidence and phone records. *See State v. McNeil*, 658 N.W.2d 228, 236 (Minn. App. 2003) (declining to reverse despite numerous instances of misconduct because "given the extraordinary weight of the evidence, we cannot say appellant did not receive a fair trial"). Fourth, any prejudice was minimized by defense counsel's argument, in which he stated the requirement for corroboration of accomplice testimony, and argued that state witnesses were not credible.

In light of the closing and rebuttal arguments as a whole, the evidence adduced at trial, and existing caselaw, the prosecutor's statements do not rise to the level of error that would have denied Anderson his right to a fair trial.

Consecutive Sentencing

An appellate court will not interfere with a district court's decision concerning sentencing unless there has been a clear abuse of discretion. *State v. Lundberg*, 575 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. May 20, 1998).

Anderson argues that the district court abused its discretion by sentencing him to consecutive sentences for his convictions of conspiracy to commit aggravated robbery and second-degree assault because the offenses arose out of the same behavioral incident and therefore only a single sentence should have been imposed. Minnesota Statutes section 609.035 prohibits "multiple sentences for offenses resulting from the same behavioral incident." *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). The district court's determination of whether multiple offenses constitute a single behavioral incident is a factual determination that we will not reverse on appeal unless clearly erroneous. *State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

At the sentencing hearing, defense counsel objected to imposition of consecutive sentences for Anderson's convictions of conspiracy to commit aggravated robbery and second-degree assault, arguing that the offenses arose out of a single behavioral incident. The district court sentenced Anderson to 28 months and 15 days' imprisonment for conspiracy to commit aggravated robbery and 21 months for second-degree assault, to

run consecutively. By imposing consecutive sentences, the district court implicitly rejected Anderson's argument and found that the offenses did not arise out of the same behavioral incident.

Whether multiple offenses are part of a single behavioral incident involves examination of all of the facts and circumstances. *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). Because conspiracy and assault both require intent, "we consider factors of time and place and whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (quotation omitted); *see* Minn. Stat. § 609.02, subd. 10 (2010) (defining assault); 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(a), at 268 (2d ed. 2003) (explaining that all parties to a conspiracy must possess criminal intent in order to form a conspiracy).

Conspiracy requires that two or more people enter into a criminal agreement and that one person performs an overt act in furtherance of the agreement. Minn. Stat. § 609.175, subd. 2 (2010); *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). Conspiracy and the substantive crime that is the object of the conspiracy are "two distinct crimes." *Kuhnau*, 622 N.W.2d at 556. The record reveals that the agreement to commit robbery was made between Anderson and his co-conspirators in discussions that occurred at Kukert's apartment prior to November 8. One act in furtherance of the agreement was performed prior to November 8 when Anderson drove Lowe and Kukert around the area of the targeted apartment. Acts in furtherance of the agreement were also performed early in the day on November 8: Lowe and Kukert drove from Moorhead to Bismarck to pick up Pendleton so that he could participate in the robbery; Pendleton asked Nelson to

knock on a door in his pizza-delivery uniform, and when Nelson said he could not do it, Pendleton obtained the uniform from Nelson; and some of the conspirators bought black clothes at Kmart. The conspiracy was therefore committed when Anderson and his co-conspirators agreed to commit the robbery and took their first overt step in furtherance of the crime. *See State v. Tracy*, 667 N.W.2d 141, 146 (Minn. App. 2003) (stating that conspiracy does not require proof of underlying crime); *see also Heath*, 685 N.W.2d at 61 (determining that conspiracy and aiding and abetting constituted separate behavioral incidents). And Anderson committed the second-degree assault on the evening of November 8 in Hertsgaard's and Asp's apartment. Anderson therefore committed the conspiracy and assault crimes at different times and in different places.

"In assessing whether the crimes were committed with the same criminal objective, we have examined the relationship of the crimes to each other." *Bauer*, 792 N.W.2d at 829. Significantly, our caselaw establishes that a criminal plan of obtaining money is too broad to constitute a single criminal goal in the context of section 609.035. *Soto*, 562 N.W.2d at 304 (citing *State v. Eaton*, 292 N.W.2d 260, 266–69 (Minn. 1980)). Here, the criminal objective of the conspiracy appears to have been to obtain drugs or money. The criminal objective of the assault was to cause harm or fear of harm to an individual person. Therefore, the assault and robbery were not motivated by a singular criminal objective. Because the conspiracy to commit the robbery was complete before Anderson entered Hertsgaard's and Asp's apartment and committed the assault and because the two distinct crimes do not share a single criminal objective, the offenses are divisible. We conclude that the district court's finding that the offenses do not constitute

the same behavioral incident is not clearly erroneous, and the district court's imposition of two sentences for the two convictions was not an abuse of discretion. The guidelines in effect when Anderson committed the offenses permit the consecutive sentences. *See* Minn. Sent. Guidelines II.F.2.b, VI (2008 & Supp. 2009). The district court did not abuse its discretion by imposing consecutive sentences for Anderson's convictions of conspiracy to commit aggravated robbery and second-degree assault.

Affirmed.