STATE OF MINNESOTA

IN SUPREME COURT

A18-0850

Court of Appeals — McKeig, J.
Concurring in part, dissenting in part, Gildea, C.J.
Concurring in part, dissenting in part, Thissen, Anderson, JJ.

State of Minnesota,

Respondent/Cross-Appellant,

vs.

Filed: July 15, 2020
Office of Appellate Courts

Darren Heath Degroot,

Appellant/Cross-Respondent.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Joseph M. Sanow, Nobles County Attorney, Worthington, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota, for respondent/cross-appellant.

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant State Public Defender, Saint Paul, Minnesota, for appellant/cross-respondent.

S Y L L A B U S

1. The State presented sufficient evidence to prove appellant committed an act that was "a substantial step toward, and more than preparation for" the commission of third-degree criminal sexual conduct, thereby meeting the requirement of the attempt statute, Minn. Stat. § 609.17 (2018).

2. The offense of electronic solicitation of a child under Minn. Stat. § 609.352, subd. 2a(1) (2018), necessarily includes the offense of electronic distribution under Minn. Stat. § 609.352, subd. 2a(3) (2018).

3. The State proved by a preponderance of the evidence that the electronic solicitation and the attempted third-degree sexual assault were not part of a single behavioral incident.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

MCKEIG, Justice.

Following a bench trial, appellant Darren Heath Degroot was convicted of attempted third-degree criminal sexual conduct,[1] electronically soliciting a child to engage in sexual conduct,[2] and electronically distributing any material, language, or communication that relates to or describes sexual conduct to a child.[3] On appeal, Degroot argued that the State failed to prove that he committed an act that was "a substantial step toward, and more than preparation for" the commission of third-degree criminal sexual conduct. He also argued that the district court violated Minn. Stat. § 609.04 (2018), when it convicted him of both the electronic solicitation offense and the electronic distribution offense. Finally, he argued that the district court violated Minn. Stat. § 609.035 (2018), when it sentenced him on both

[1] Minn. Stat. § 609.17, subd. 1 (2018) (defining attempt); *see* Minn. Stat. § 609.344, subd. 1(b) (2018) (defining third-degree criminal sexual conduct).

[2] Minn. Stat. § 609.352, subd. 2a(1) (2018).

[3] Minn. Stat. § 609.352, subd. 2a(3) (2018).

the electronic solicitation conviction and the attempted third-degree sexual assault conviction. The court of appeals agreed that section 609.04 and section 609.035 were violated, but otherwise rejected Degroot's arguments; thus, the court affirmed in part, reversed in part, and remanded for further proceedings. *State v. Degroot*, No. A18-0850, 2019 WL 1758464 (Minn. App. Apr. 22, 2019). We granted Degroot's petition for review and the State's petition for cross-review.

Because the State presented sufficient evidence to support the attempt conviction and because the offense of electronic solicitation necessarily includes the offense of electronic distribution, we affirm the court of appeals' decision in part. Because the State proved by a preponderance of the evidence that the electronic solicitation conviction and the attempted third-degree sexual assault conviction were not part of a single behavioral incident, we reverse the court of appeals' decision in part and remand to the district court for further proceedings consistent with this opinion.

FACTS

In February 2017, the Internet Crimes Against Children Task Force conducted an undercover operation in Worthington to investigate internet crimes against children. Special Agent John Nordberg operated a decoy profile of a 14-year-old boy named "Johnny" on an online dating application.[4]

[4] Because the online dating application's policies require its users to be 18 years old, Johnny's age was listed as 18.

Around 9:30 a.m. on February 7, 2017, appellant Darren Degroot sent an electronic message to Johnny from Degroot's home in Edgerton. Special Agent Nordberg, posing as Johnny, replied.[5] Degroot quickly began asking Johnny about his sexual experiences and preferences. Within 10 minutes, Johnny wrote, "I'm 14, is that ok?" Degroot replied "Oh wow u r young." As their electronic communication continued, the sexual nature of their conversation quickly escalated. In the first 30 minutes of their conversation, Degroot sent Johnny multiple unsolicited photographs of an erect penis. Degroot asked Johnny for photographs in return.

Degroot repeatedly expressed his arousal and sexual attraction to the child. Degroot and Johnny talked about when, and how often, they might meet for sex. Degroot suggested they could have multiple sexual encounters over the next 3 days. He also inquired about where Johnny normally lived and offered, more generally, that "any time u need to get away ur always welcome to come here n ill give u some fun." Degroot said he was interested in meeting later that day and Johnny told Degroot that he was alone at his aunt's house in Worthington.

Degroot and Johnny agreed to meet that afternoon. Degroot asked Johnny about preparing for anal sex, specifically asking if Johnny knew how to use an enema and whether he had personal lubrication. Degroot said he could bring "supplies." They made plans to shower together when Degroot arrived. Degroot then described his sexual fantasies for

[5] We will refer to Special Agent Nordberg as Johnny when discussing the communications between Degroot and the undercover agent.

their encounter, including fetishized roleplay. Johnny ended their conversation around noon by stating that he needed to go to a nearby gas station to get something to eat.

Thirty minutes later, Johnny announced that he was back online and confirmed that he was 14 years old. Johnny asked again if that was okay. After 15 minutes, Degroot responded, "Yes that's ok bud." Degroot and Johnny resumed their dialogue. Returning to the topic of that afternoon, Degroot asked whether Johnny had been a good boy and referenced using a belt if Johnny had been naughty.

Degroot left Edgerton around 2 p.m. to drive to Worthington, which is approximately 40 miles away. Johnny told Degroot to text him when Degroot was nearby because he was staying with his aunt and did not know the exact address. During the drive, Degroot continued sending fetishized messages to Johnny with updates about his location. When Degroot arrived in Worthington, Johnny used landmarks to direct Degroot to his aunt's home. Johnny instructed, "The parking lot is right at the end of [the street]. My aunt's place is right across the street from the parking lot." Degroot texted Johnny "Ok I'm here" at 2:49 p.m. Johnny confirmed the relative location of his house a second time and said that the door was open. Degroot asked, "Ford Taurus in garage?" Johnny said yes.

Meanwhile, the Worthington Police Department dispatched an undercover arrest team to the decoy location. Officers observed Degroot park, get out of his car, and walk toward the house, carrying a plastic shopping bag. They arrested Degroot while he was still in the parking lot. Degroot's bag contained personal lubricant, an enema bottle, a long-handled spoon, and a belt.

The events of that day resulted in three charges that are relevant here: attempted third-degree criminal sexual conduct;[6] electronically soliciting a child to engage in sexual conduct;[7] and electronically distributing any material, language, or communication that relates to or describes sexual conduct to a child.[8] After a bench trial, the district court found Degroot guilty as charged. The district court entered judgments of conviction on all three charges, concluding they were not a part of a single behavioral incident because they were committed at different times and places with different criminal objectives. Using the *Hernandez* method, the district court sentenced Degroot in the order the crimes were committed: a 15-month stayed sentence for electronic distribution; a 20-month stayed sentence for electronic solicitation; and a 30-month executed sentence for attempted third-degree criminal sexual conduct.[9]

On appeal, Degroot argued that the State failed to prove that he committed an act that was "a substantial step toward, and more than preparation for" the commission of third-degree criminal sexual conduct. He also argued that the district court violated Minn. Stat. § 609.04 when it convicted him of both the electronic solicitation offense and the electronic distribution offense. Finally, he argued that the district court violated

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6 Minn. Stat. § 609.17, subd. 1; *see* Minn. Stat. § 609.344, subd. 1(b).

7 Minn. Stat. § 609.352, subd. 2a(1).

8 Minn. Stat. § 609.352, subd. 2a(3).

9 *See State v. Hernandez*, 311 N.W.2d 478, 481 (Minn. 1981) (allowing a district court to increase a defendant's criminal history score when sentencing multiple offenses on the same day, if certain conditions are met).

Minn. Stat. § 609.035 when it sentenced him on both the electronic solicitation conviction and the attempted third-degree sexual assault conviction.

Although the court of appeals rejected Degroot's sufficiency-of-the-evidence claim, it agreed that the district court violated sections 609.04 and 609.035. Degroot petitioned for review of the sufficiency issue and the State filed a cross-petition for review of the issues arising under sections 609.04 and 609.035. We granted both petitions.

ANALYSIS

I.

We begin with Degroot's argument that the court of appeals erred when it concluded that the State presented sufficient evidence to support his attempt conviction. Degroot concedes that he "prepared to have a sexual encounter with a decoy fourteen-year-old boy by driving to a parking lot across the street from the house where the planned sexual encounter was to take place and by exiting his vehicle with items in his possession to be used during the sexual encounter." Nevertheless, he argues that his preparatory acts did not rise to an attempt because he "did not commit a substantial step toward committing the intended sexual conduct while on the property where the sexual conduct was to take place."

In support of his argument, Degroot contends that the plain and unambiguous language of the attempt statute, Minn. Stat. § 609.17 (2018), requires the State to prove four elements. First, the defendant intended to commit a crime. Second, the defendant took a step considerable in degree, amount, or extent toward committing the intended crime. Third, the step was not part of the process of getting ready to commit the intended

crime. Fourth, the step took place at the location of the intended crime. The State argues that the plain and unambiguous language of the attempt statute does not require the defendant to take a substantial step at the location of the intended crime.

When the meaning of a criminal statute is intertwined with the issue of whether the State proved a defendant's guilt beyond a reasonable doubt, we are presented with a question of statutory interpretation, which we review de novo. *State v. Townsend*, 941 N.W.2d 108, 110 (Minn. 2020).

The first step in statutory interpretation is to determine whether the statute's language, on its face, is unambiguous. *State v. Jama*, 923 N.W.2d 632, 636 (Minn. 2019). When the language of a statute is susceptible to only one reasonable interpretation, it is unambiguous and we must apply its plain meaning. *State v. Culver*, 941 N.W.2d 134, 139 (Minn. 2020). By contrast, language is ambiguous when it is subject to more than one reasonable interpretation. *Id.* In determining whether the language of a statute is subject to more than one reasonable interpretation, "we consider the canons of interpretation listed in Minn. Stat. § 645.08 [(2018)]." *State v. Riggs*, 865 N.W.2d 679, 682 (Minn. 2015). One such canon provides that "words and phrases are construed according to rules of grammar and according to their common and approved usage." Minn. Stat. § 645.08(1). "In the absence of statutory definitions, we may consider dictionary definitions to determine the meaning of a statutory term." *State v. Alarcon*, 932 N.W.2d 641, 646 (Minn. 2019).

The language of the attempt statute reads, "[w]hoever, with intent to commit a crime, does an act which is *a substantial step toward*, and *more than preparation for*, the

commission of the crime is guilty of an attempt to commit that crime." Minn. Stat. § 609.17, subd. 1 (emphasis added). The parties agree that the phrase "a substantial step toward" unambiguously requires the State to prove Degroot took a step "considerable in importance, value, degree, amount, or extent" toward committing the intended crime. *See The American Heritage Dictionary of the English Language* 1738 (5th ed. 2018). The parties, however, offer competing interpretations of the phrase "more than preparation for."

According to Degroot, the phrase "more than preparation for" should be interpreted as excluding substantial steps that are preparatory for but remote from the time and place of the intended crime. In support of his argument, Degroot defines "prepare" as "to make ready beforehand for a specific purpose, as for an event or occasion." *The American Heritage Dictionary of the English Language* 1391 (5th ed. 2018). He also relies on *State v. Dumas*, in which we stated, as a "general proposition," that:

> [T]o constitute an attempt to commit a crime[,] there must be an intent to commit it, followed by an overt act or acts tending, but failing, to accomplish it. The overt acts need not be such that, if not interrupted, they must result in the commission of the crime. They must, however, be *something more than mere preparation, remote from the time and place of the intended crime*; but if they are not thus remote, and are done with the specific intent to commit the crime, and directly tend in some substantial degree to accomplish it, they are sufficient to warrant a conviction.

136 N.W. 311, 314 (Minn. 1912) (emphasis added). Having argued that the phrase "more than preparation for" requires the State to prove something *more* than a substantial step that is remote from the time and place of the intended crime, Degroot asserts that it logically follows the State must prove that a substantial step occurred at the time and place of the intended crime.

The State argues that the statutory phrase "more than preparation for" does not require it to prove that a substantial step occurred at the time and place of the intended crime because there is "no mention of the concept of location in the plain text of the statute." The State also contends that Degroot's argument is predicated on a conflation of the concepts of sufficiency and necessity.

We agree that the common and approved usage of the word "prepare" is "[t]o make ready *beforehand* for a specific purpose, as for an event or occasion." *The American Heritage Dictionary of the English Language* 1391 (emphasis added). We do not consider *Dumas* at this stage of our analysis because we must limit our analysis to the language of the statute. Applying the common and approved usage to the word "preparation," we conclude that the only reasonable interpretation of the phrase, "more than preparation for," is that it excludes substantial steps that occur beforehand to make ready for the intended offense. But, for the reasons articulated by the State, we conclude that the phrase does not require the State to prove a substantial step occurred at the time and place of the intended crime.

Our plain-language analysis is consistent with the Advisory Committee Comment to the proposed 1963 Criminal Code. The advisory committee provided a number of

hypotheticals to illustrate the test that was adopted in our attempt statute, Minn. Stat. § 609.17, subd. 1.[10] For example, the committee posited:

> "A" buys a gun to hold up a bank. He has taken a step toward the commission of the crime. This, however, is not enough to constitute an attempt. If, however, he goes to the bank and on arriving is frightened away by the presence of police this probably would constitute an attempt in most jurisdictions, including Minnesota. At some point between these two acts, the preparation for the crime ends and the attempt begins.[11]

Advisory Comm. on Revision of the Criminal Law, *Proposed Minnesota Criminal Code* 63 (West 1962) (citation omitted). By comparison, the committee explained that the phrase "substantial step toward the commission of that offense" that was used in "the new Illinois

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[10] Alternative tests focus on how close an individual came to completing the attempted substantive offense. Wayne R. LaFave, Substantive Criminal Law § 11.4(b) (3rd ed. 2018). For example, the physical-proximity test considers "how much more the defendant would have needed to do to complete the offense," *Physical-Proximity Test*, Black's Law Dictionary (11th ed. 2019), and focuses on the time and place that a crime was supposed to occur, LaFave, *supra*, § 11.4(b). Similarly, the dangerous-proximity test examines whether the defendant is "dangerously close" to completing the offense, taking into consideration "the gravity of the potential crime, the apprehension of the victim, and the uncertainty of the crime's occurrence." *Dangerous-Proximity Test*, Black's Law Dictionary (11th ed. 2019); LaFave, *supra*, § 11.4(b). The last-proximate-act test goes even further, requiring proof that the defendant did "the final act necessary to commit an offense." *Last-Proximate-Act Test*, Black's Law Dictionary (11th ed. 2019); LaFave, *supra*, § 11.4(b). In contrast to these alternative tests, the substantial-step test "shifts the emphasis from what remains to be done . . . to what the actor has already done," signifying a paradigm shift in how jurisdictions conceptualize attempt liability. *See* Model Penal Code § 5.01 cmt. 6 (Am. Law Inst. 1985).

[11] Focusing on the advisory committee's use of the word "probably," Degroot argues that the act of arriving at the proper location must be insufficient under some circumstances, in which case parking across the street from the proper location must always be insufficient. Degroot's argument is unavailing—by analogy, he was walking *toward* the doors of the hypothetical bank when he was arrested.

Act, § 8-4" was "broad enough to encompass the purchase of the gun in the illustration above." *Id.*

The committee's hypothetical illustrates that, in Minnesota, a person may be found guilty of attempted bank robbery if the State proves the following facts beyond a reasonable doubt. First, the defendant intended to rob the bank (intent). Second, he bought a gun (a substantial step that occurs beforehand to make ready for the intended offense). Third, he went to the bank where he is thwarted by the police (an act that constitutes "more than preparation for" the intended crime). The advisory committee's hypothetical is consistent with our analysis because, although it requires more than the purchase of a gun, it does not require the State to prove that the defendant committed a substantial step at the bank.

We also observe that Degroot's reliance on *State v. Stevenson*, 656 N.W.2d 235 (Minn. 2003), *Dale v. State*, 535 N.W.2d 619 (Minn. 1995), and *State v. Peterson*, 262 N.W.2d 706 (Minn. 1978), is misplaced. *Dale* and *Peterson* concern attempts to complete substantive offenses that include an element of force or assault; this case does not.[12] Moreover, Degroot's argument conflates the concepts of sufficiency and

[12] *See Dale*, 535 N.W.2d 619 (uncompleted substantive offense—first-degree criminal sexual conduct under Minn. Stat. § 609.342(e)(i) (2018)—required proof that "the actor cause[d] personal injury to the complainant, and . . . use[d] force or coercion to accomplish sexual penetration"); *Peterson*, 262 N.W.2d 706 (uncompleted substantive offense—third-degree criminal sexual conduct under Minn. Stat. § 609.344(c) (1984)—required proof that "[t]he actor use[d] force or coercion to accomplish the penetration"); *see also* 65 Am. Jur. 2d Rape §§ 19–20 (2001) (recognizing that assault with intent to rape, attempted rape, and attempted statutory rape are separate offenses with distinct elements and specifically noting that force is *not* a necessary element of attempted statutory rape).

necessity. In *Peterson*, *Dale*, and *Stevenson*, the evidence conclusively established that the defendant crossed the threshold separating preparation from attempt.[13] Although serving as examples of what might be sufficient, these cases do not establish what conduct is necessary—and *Peterson* and *Dale* certainly are not binding precedent as to the conduct required to commit an attempt of a *different* penetrative sex offense. *See State v. Noggle*, 881 N.W.2d 545, 549 (Minn. 2016) ("[A]ttempt is an inchoate crime that must be connected to an uncompleted substantive crime that was attempted.").

Finally, Degroot argues that—wherever the threshold for attempt might be—there must be more of an opportunity than what Degroot was afforded to abandon the attempted crime. The plain language of the attempt statute refutes Degroot's claim. Abandonment is an affirmative defense to a charge of attempt that does not depend on whether a substantial step occurred. *See* Minn. Stat. § 609.17, subd. 3. An actor who has taken a substantial step toward the commission of a crime—or who perhaps has taken the penultimate step—may be not liable if the actor can prove he voluntarily, and in good faith, abandoned the intention to commit the crime. *Id.* But the availability of an abandonment defense does not transform our substantial-step test into a dangerous-proximity test.

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[13] *See Stevenson*, 656 N.W.2d at 240 (stating that the evidence was sufficient to support a conviction of attempted fifth-degree criminal sexual conduct because the facts established that the defendant "placed himself in a position where he was reasonably capable of being viewed by a minor"); *Dale*, 535 N.W.2d at 623–24 (stating that the evidence was sufficient to support a conviction of attempted first-degree criminal sexual conduct because the facts established that the defendant "placed [the victim] in a headlock; threatened to kill her unless she had sex with him; told her he had a knife; poked her with some object; forcibly restrained [her]; and ripped the clothes from her upper body"); *Peterson*, 262 N.W.2d at 707 ("[T]he evidence was *more than sufficient* to justify the attempt verdict." (emphasis added)).

Degroot aptly notes that the moment that preparations for a crime become criminal conduct is often difficult to ascertain. "In a prosecution for an attempt, acts that could conceivably be consistent with innocent behavior may, in the eyes of those with knowledge of the actor's criminal design, be unequivocally and proximately connected to the commission of a crime . . . ." 22 C.J.S. *Criminal Law* § 157 n.9 (2006). What is sufficient in one case might not be sufficient in another. For this reason, we reaffirm that "no definite rule, applicable to all cases, can be laid down as to what constitutes an [attempt] within the meaning of our statute. Each case must depend largely upon its particular facts and the inferences which the jury may reasonably draw therefrom." *Dumas*, 136 N.W. at 314.

We return to the evidence presented in this case. From his home in Edgerton, Degroot used an electronic communications system to solicit multiple sexual encounters over the next 3 days with a decoy profile of a 14-year-old boy, named "Johnny." Johnny ended their conversation around noon by stating that he needed to go to a nearby gas station to get something to eat. When Johnny announced that he was back online, he confirmed that he was 14 years old. Approximately 45 minutes after Johnny announced that he was going to get lunch, their dialogue resumed. Returning to the topic of that afternoon, Degroot asked whether Johnny had been a good boy and referenced using a belt if Johnny had been naughty. At approximately 2 p.m., Degroot entered his car with a bag containing an enema, personal lubrication, a long-handled spoon, and a belt. As he drove to Worthington, Degroot continued sending fetishized messages to Johnny with updates about his location. When Degroot arrived in Worthington, Johnny used landmarks to direct Degroot to his aunt's home. Johnny instructed, "The parking lot is right at the end of [the

street]. My aunt's place is right across the street from the parking lot." Degroot texted Johnny "Ok I'm here" at 2:49 p.m. Johnny confirmed the relative location of his house a second time and said the door was open. Degroot asked, "Ford Taurus in garage?" Johnny said yes. The police arrested Degroot as he walked toward the house carrying the bag.

We note that the majority of jurisdictions that have considered the issue in question have concluded that an agreement to meet a fictitious minor at a designated time and place, coupled with traveling to that location, may satisfy the substantial-step element of attempt even if the sexual conduct would have occurred elsewhere. *See State v. Sorabella*, 891 A.2d 897, 915 (Conn. 2006) (collecting cases); *State v. Peterman*, 118 P.3d 1267, 1273 (Kan. 2005) ("[The defendant's] act of driving to meet [a third party] to pick up a child for the purpose of sexual intercourse constituted an overt act beyond mere preparations. Peterman went as far as he could toward completing his criminal intentions prior to discovering that the child victim was fictional."); *State v. Webster*, 955 A.2d 240, 244 (Me. 2008); *State v. Reid*, 713 S.E.2d 274, 277 & n.4 (S.C. 2011) (collecting cases and stating that "an agreement to meet a fictitious minor at a designated place and time, coupled with traveling to that location, may constitute evidence of an overt act, beyond mere preparation, in furtherance of the crime"). Although we decline to adopt a bright-line rule, we agree with our sister jurisdictions that under the facts of this case the substantial-step element is satisfied.

When viewed in a light most favorable to the verdict, the evidence proves beyond a reasonable doubt that Degroot intended to commit the crime of third-degree criminal sexual conduct and that he committed an act that was a substantial step toward, and more than

preparation for, the commission of the intended crime. Like the bank robber in the advisory committee's hypothetical, Degroot formed an intent to commit the offense, he took a substantial step toward the offense by arranging to meet the victim and gathering the necessary supplies, and he moved beyond preparation by driving to Worthington, arriving at the parking lot, and walking toward the house carrying the bag that contained the items he intended to use. For the foregoing reasons, the court of appeals did not err when it concluded that the State presented sufficient evidence to support Degroot's attempt conviction.

II.

The State argues that the court of appeals erred when it concluded that the district court violated Minn. Stat. § 609.04 by entering convictions on both the electronic solicitation charge and the electronic distribution charge. We disagree. Whether an offense is an included offense is a question of law, which we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Under section 609.04, a defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1. The term "included offense" includes "a crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1(4). In determining whether one offense is "necessarily included" in the other, we compare the statutory elements of the two offenses. *State v. Coleman*, 373 N.W.2d 777, 780–81 (Minn. 1985).

Degroot was convicted of electronic solicitation[14] and electronic distribution[15] under Minn. Stat. § 609.352, subd. 2a (2018). If one of these crimes is a lesser-included offense of the other, Degroot's conviction on the included offense must be vacated.[16]

Simply put, a person cannot ask another to do something without describing the thing to be done. Likewise, we conclude that a person cannot use electronic means to solicit a child to engage in sexual conduct without also electronically distributing material, language, or communication to the child that "relates to or describes" sexual conduct. *Compare* Minn. Stat. § 609.352, subd. 2a(1), *with* Minn. Stat. § 609.352, subd. 2a(3); *see also State v. Muccio*, 890 N.W.2d 914, 922 (Minn. 2017) (discussing the broad meaning of the phrase "relating to or describing sexual conduct" under Minn. Stat. § 609.352, subd. 2a(2)). Thus, the court of appeals did not err when it concluded that the offense of electronic solicitation necessarily includes the offense of electronic distribution.

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[14] Minn. Stat. § 609.352, subd. 2a(1) ("soliciting a child or someone the person reasonably believes is a child to engage in sexual conduct").

[15] Minn. Stat. § 609.352, subd. 2a(3) ("distributing any material, language, or communication, including a photographic or video image, that relates to or describes sexual conduct to a child or someone the person reasonably believes is a child").

[16] The district court found that the Grindr and text messages that proved Count III (solicitation) also proved Count V (distribution).

III.

Our last task is to decide if Degroot's electronic solicitation sentence violates Minn. Stat. § 609.035. Section 609.035 provides that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1. In applying section 609.035, we have held that "a person may be punished for only one of the offenses that results from acts committed during a single behavioral incident and that did not involve multiple victims." *State v. Branch*, 942 N.W.2d 711, 713 (Minn. 2020). Whether a defendant's multiple offenses were part of a single behavioral incident depends on the facts and circumstances of the case, presenting a mixed question of law and fact. *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). On appeal, the district court's findings of fact are reviewed for clear error and its application of the law to those facts is reviewed de novo.[17] *Id.*

We determine whether separate intentional crimes formed part of a single behavioral incident by considering (1) whether the offenses occurred at substantially the same time and place and (2) whether the conduct was motivated by an effort to obtain a single criminal objective. *Id.* The State bears the burden of establishing by a preponderance of the evidence that the conduct was not a single behavioral incident. *Id.*

Here, the district court found that electronic solicitation and attempted criminal sexual conduct occurred at different times and places. Specifically, the court determined

[17] Because Degroot's conviction under Minn. Stat. § 609.352, subd. 2a(3) is vacated pursuant to Minn. Stat. § 609.04, *supra* part II, we consider the sentences imposed on the two remaining convictions to determine if the sentences on both convictions may stand.

that the electronic solicitation offense occurred "over the course of hours" while Degroot was in his Edgerton home. In contrast, the court determined that Degroot committed attempted third-degree criminal sexual conduct when he arrived at the fictitious residence in Worthington later that afternoon. Because the district court's factual findings are well-supported by the record, we accept them.

Degroot relies on *Jones* to argue that the difference in time and place was not substantial. *See State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). In *Jones*, we concluded that sending 33 text messages in a 2-½ hour timeframe formed a single behavioral incident. *Id.* But *Jones* is inapposite. In *Jones*, the State did not admit into evidence the precise time that each message was sent, leaving us to assume an average rate of one message every 4 minutes, and conclude that the State had failed to meet its burden of establishing that the messages were sent at "clearly separate times." *Id.* at 533–34.

Unlike *Jones*, this record contains the timestamps of each message, revealing a nearly 45-minute break in their dialogue around noon. Before the lunchtime break, Degroot and Johnny had been engaged in a nearly uninterrupted stream of messages, sending and receiving messages almost every minute. When their dialogue resumed, Degroot shared new, specific details of his sexual fantasy for their afternoon and obtained the directions he needed to navigate to the child's home. He then left Edgerton—and drove approximately 40 miles to Worthington—before he committed attempted third-degree criminal sexual conduct. The time-stamped and place-specific evidence clearly separates the morning solicitation offense from the sexual assault that Degroot attempted later that afternoon. These offenses did not occur at substantially the same time and place.

Next, we consider whether the State established that a change occurred in Degroot's criminal objective that "support[s] a break in the continuum" of Degroot's criminal conduct. *See State v. Williams*, 608 N.W.2d 837, 842 (Minn. 2000). The court of appeals concluded that "all of [Degroot's] acts were motivated by an intent to commit the crime of third-degree criminal sexual conduct." *Degroot*, 2019 WL 1758464, at *6. We disagree.

Our precedent is clear: "[b]road statements of criminal purpose do not unify separate acts into a single course of conduct." *Jones*, 848 N.W.2d at 533. Here, a general desire to have penetrative sex with a minor is too broad a purpose to unify distinct criminal acts. *See State v. Barthman*, 938 N.W.2d 257, 267 (Minn. 2020) (rejecting the broad purpose of "sexual gratification"); *Bakken*, 883 N.W.2d at 271 (same).[18] Characterizing the solicitation offense as a "means to [an] end"—and concluding that the attempted sexual assault was "that end"—oversimplifies Degroot's conduct and ignores the facts of this case. *See Degroot*, 2019 WL 1758464, at *6.

The district court found that Degroot had "different motivations" for soliciting a child and for attempting sexual assault. The record supports this finding. On the morning of February 7, Degroot solicited a child with the objective of establishing an ongoing sexual relationship. He did not merely solicit Johnny "to engage in anal intercourse," as

[18] *See also State v. Stevenson*, 286 N.W.2d 719, 720 (Minn. 1979); *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007), *rev. denied* (Minn. Feb. 19, 2008); *State v. Secrest*, 437 N.W.2d 683, 685 (Minn. App. 1989), *rev. denied* (Minn. May 24, 1989); *but see State v. Herberg*, 324 N.W.2d 346, 349–50 (Minn. 1982) (recognizing, in what we described as "an extremely rare case," that the defendant's objective to satisfy his perverse sexual needs using "outrageously gross and vile physical abuse" unified otherwise separate criminal acts).

the court of appeals suggests. *See id.* He sought to have multiple sexual encounters with the child over the course of 3 days, as well as "any time [the child] need[ed] to get away." In contrast, Degroot's objective in attempting third-degree criminal sexual conduct was to have penetrative sex with the child that afternoon to satisfy the specific fantasy and series of events that he had described to the child in detail. We conclude that Degroot's objectives—although the same in their general nature—were not singular.[19] *See Bakken*, 883 N.W.2d at 271.

Because the State proved by a preponderance of the evidence that the electronic solicitation conviction and the attempted third-degree sexual assault conviction were not part of a single behavioral incident, the court of appeals erred when it concluded that the district court violated Minn. Stat. § 609.035.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is affirmed in part, reversed in part, and this matter is remanded to the district court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

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[19] "Although the focus of the statute is primarily on the defendant's conduct rather than the elements of the crimes committed, it is meaningful to recognize [when] two crimes involve separate intents . . . ." *State v. Bookwalter*, 541 N.W.2d 290, 295–96 (Minn. 1995) (footnote omitted). Here, attempted criminal sexual conduct in the third-degree requires the general intent to sexually penetrate the child victim. *See* Minn. Stat. § 609.344, subd. 1(b). In contrast, electronic solicitation of a child requires the intent to arouse the sexual desire of any person. *See* Minn. Stat. § 609.352, subd. 2a(1); *see also Muccio*, 890 N.W.2d at 921–22 (discussing the intent requirement of Minn. Stat. § 609.352, subd. 2a). This distinction further undermines Degroot's argument that the offenses shared a singular criminal objective.

C O N C U R R E N C E & D I S S E N T

GILDEA, Chief Justice (concurring in part and dissenting in part).

I agree with the majority's conclusions on issues I and II, but I respectfully dissent on issue III. I would hold that Degroot engaged in a single behavioral incident because his conduct was motivated by an effort to obtain a single criminal objective—to engage in penetrative sex with the child. *See Langdon v. State*, 375 N.W.2d 474, 475, 477 (Minn. 1985) (holding that, despite the four burglaries occurring in different buildings, the defendant had one "ultimate overall criminal objective, which was to steal as much money as he could that afternoon"); *see also State v. Herberg*, 324 N.W.2d 346, 349 (Minn. 1982) (holding that, although the defendant moved the victim from one location to another, his four violent offenses had one criminal objective, which was "to satisfy his perverse sexual needs by assaulting, penetrating, and degrading the victim in various ways").[1] Accordingly, I would affirm the court of appeals' conclusion that the district court violated

[1] The majority concludes that Degroot's "general desire to have penetrative sex with a minor is too broad a purpose to unify distinct criminal acts." But that proposition—that broad statements of criminal purpose do not unify separate acts—is not applicable here; it applies only when multiple crimes are committed over an extended period of time. We have never applied that proposition to a "shorter, discrete time period." *State v. Bakken*, 883 N.W.2d 264, 271 (Minn. 2016) (rejecting defendant's argument that the offenses constituted a single criminal objective by distinguishing those offenses, which were separated by at least 5 days, from cases involving offenses that occurred over the course of one afternoon); *see State v. Stevenson*, 286 N.W.2d 719, 720 (Minn. 1979) (rejecting the defendant's single-criminal-objective argument for offenses that "were separated by a period of approximately 5 hours and neither act bore any essential relationship to the other"). Here, the majority attempts to apply that proposition to "a nearly 45-minute break in their dialogue." If such even constitutes a *break*, it is a far cry from the 5 hours in *Stevenson*.

Minn. Stat. § 609.035 (2018) in sentencing Degroot on the electronic solicitation conviction.

C O N C U R R E N C E & D I S S E N T

THISSEN, Justice (concurring in part and dissenting in part).

I agree with the court that sufficient evidence exists to prove that appellant Darren Heath Degroot committed an act that was "a substantial step toward, and more than preparation for," the commission of third-degree criminal sexual conduct. I also agree with the court's holding that the offense of electronic solicitation of a child under Minn. Stat. § 609.352, subd. 2a(1) (2018), necessarily includes the offense of electronic distribution under Minn. Stat. § 609.352, subd. 2a(3) (2018). But I part ways with the court on its conclusion that Degroot's electronic solicitation of "Johnny" and Degroot's attempted third-degree sexual assault were not part of a single behavioral incident.

Minnesota Statutes § 609.035 (2018) clearly provides that "if a person's conduct constitutes more than one offense . . . , the person may be punished for only one of the offenses." In my view, the court of appeals' analysis of whether the imposition of separate sentences for electronic solicitation and attempted third-degree sexual assault violated section 609.035 was correct and well reasoned. *State v. Degroot*, No. A18-0850, 2019 WL 1758464 at * 5–7 (Minn. App. Apr. 22, 2019). As the court of appeals aptly stated:

> The electronic-solicitation [was] committed in order to accomplish the criminal sexual conduct. When [Degroot] solicited Johnny to engage in anal intercourse, his intent was not to stop at solicitation. [Degroot] desired to actually engage in that sexual activity—as evidenced by [Degroot's] concession on appeal that he intended to commit the sex offenses—and soliciting Johnny was a means to that end.

Id. at *6 (citation omitted).

I am not persuaded by the court's emphasis on the temporary break in communication over the lunch hour. Presumably, if that break had not occurred, the pre-lunchtime-break text messages by which Degroot solicited Johnny to engage in the sexual activity that Degroot attempted to commit in the afternoon after the break would be part of a single course of conduct. *See State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014) (concluding that 33 text messages in a 2-½ hour time frame, with no break in the middle, formed a single course of conduct). I find it difficult to conclude that is a truly meaningful distinction.

The word the Legislature used in section 609.035 is "conduct." Over the last several decades, we have created an intricate and complicated interpretive superstructure around that word that renders our application of the word "conduct" arbitrary. We now ask district courts, prosecutors, and defendants to understand what it means for a defendant's intent to be the "same" but not "singular."[1] You can only slice and dice the word "conduct" so much until it turns to mush.

The court's opinion needs to work too hard to justify the imposition of two separate sentences. In so doing, the court exceeds the limitations on judicial authority imposed by the Legislature in Minn. Stat. § 609.035. *See State v. Branch*, 942 N.W.2d 711, 717 (Minn. 2020) (Thissen, J., dissenting) (explaining that the passage of section 609.035 was intended

[1] In *State v. Bakken*, we held that possession of different pornographic images obtained at different times could not be joined by the defendant's similar intent in obtaining the images. 883 N.W.2d 264, 270 (Minn. 2016). Because the images were obtained at different times, there was not a "single" behavioral incident notwithstanding the same general intent.

to limit judges' discretion in imposing multiple punishments for a single course of conduct); *see generally State v. Pflepsen*, 590 N.W.2d 759, 764 (Minn. 1999) ("[T]he power to prescribe punishment for criminal acts is vested with the legislature and the judiciary may only impose sentences within the statutory limits prescribed by the legislature.").

I respectfully dissent from section III of the court's opinion.

ANDERSON, Justice (concurring in part and dissenting in part)

I join in the concurrence and dissent of Justice Thissen.