STATE OF MINNESOTA

IN SUPREME COURT

A19-0436

Court of Appeals

Anderson, J.
Dissenting, Moore, III, J., Gildea, C.J.

State of Minnesota,

Respondent,

vs.

Filed: May 5, 2021
Office of Appellate Courts

Natasha Renae Berry,

Appellant.

Keith Ellison, Attorney General, Saint Paul Minnesota; and

Steven F. O'Keefe, Goodhue County Attorney, Christopher J. Schrader, Assistant County Attorney, Red Wing, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

Predatory registration under Minn. Stat. § 243.166, subd. 1b(a) (2020), is not required because appellant's conviction for aiding an offender to avoid arrest did not arise out of the same set of circumstances as the charged offenses of kidnapping and false imprisonment.

Reversed and remanded.

O P I N I O N

ANDERSON, Justice.

This appeal requires us to determine whether appellant Natasha Renae Berry is required to register as a predatory offender. Berry helped her husband flee from Red Wing to Ohio after he forced laundry employees into a breakroom at gunpoint in an attempt to regain his employment at the laundry. Berry was charged with kidnapping, false imprisonment, and threats of violence.[1] She was also charged with aiding an offender to avoid arrest. Berry pleaded guilty to aiding an offender to avoid arrest in violation of Minn. Stat. § 609.495, subd. 1(a) (2020), and as a result of a plea agreement, the remaining charges were dismissed. At the plea hearing, Berry was ordered to register as a predatory offender based on her conviction for aiding an offender to avoid arrest. Berry appealed the registration requirement, arguing that Minn. Stat. § 243.166, subd. 1b(a) (2020), does not require registration. The court of appeals affirmed. Because we conclude that Berry's conviction and charged offenses do not arise from the same set of circumstances, we reverse the decision of the court of appeals and remand to the district court to vacate the registration requirement.

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[1] All three charges alleged aiding and abetting criminal liability under Minn. Stat. § 609.05, subd. 1 (2020). As we reaffirmed in *State v. Ezeka*, 946 N.W.2d 393, 407 (Minn. 2020), aiding and abetting is not a separate substantive offense. We therefore refer to these offenses as kidnapping, false imprisonment, and threats of violence. Contrary to *Ezeka*, the dissent describes the kidnapping and false-imprisonment offenses as "aiding another in committing the crimes of kidnapping and false imprisonment" and "aiding and abetting kidnapping and false imprisonment."

FACTS

At around 7:02 a.m. on June 8, 2018, Berry entered Crothall Laundry Services in Red Wing. She went into an office and left the building at 7:06 a.m. At 7:07 a.m., Berry's husband entered the building carrying a gun. He ran into two Crothall Laundry managers and began yelling. He was angry because Crothall Laundry had refused to rehire him three days earlier. When one of the managers mentioned calling the police, Berry's husband responded, "[Y]ou aren't going anywhere and you aren't calling anyone." He then told the two managers to go to the breakroom. When he and the managers entered the breakroom, they encountered three other employees. Berry's husband continued yelling about getting his job back. The managers felt that they were hostages and were afraid. Berry's husband then allowed two of the employees to leave the breakroom, but said the managers could not leave.

By approximately 7:08 a.m., one minute after her husband had first entered the building, Berry reentered Crothall Laundry carrying a backpack. She stopped in the hallway in front of the breakroom and told her husband that it was time to leave. He left the breakroom, walked to the end of the hallway, and put the gun into Berry's backpack. Berry and her husband left the building and drove away in an SUV.

The police thought Berry might be a "possible hostage."[2] A subsequent search of the Red Wing hotel room where Berry and her husband were staying revealed "a large

[2] It is undisputed that the complaint alleges that the police thought Berry might be a "possible hostage." The dissent argues that mentioning this allegation is inappropriate because (1) duress is an affirmative defense that negates intent, *State v. Charlton*, 338

amount of clothing, food, a cell phone, and other personal items." The police traced Berry's cell phone to an area of Interstate 90 near Eyota, heading east. Berry and her husband were arrested in Ohio the next day.

Berry was subsequently charged with kidnapping in violation of Minn. Stat. § 609.25 (2020), false imprisonment in violation of Minn. Stat. § 609.255 (2020), and threats of violence in violation of Minn. Stat. § 609.713 (2020). All three counts alleged aiding and abetting liability under Minn. Stat. § 609.05 (2020). The State also charged Berry with aiding an offender to avoid arrest in violation of Minn. Stat. § 609.495 (2020).

On the morning of trial, Berry pleaded guilty to aiding an offender to avoid arrest in violation of Minn. Stat. § 609.495, subd. 1(a), and the remaining charges were dismissed. As part of the factual basis of her plea, Berry admitted that she was in Red Wing on June 8, 2018, with her husband. She admitted that she knew that "Mr. Berry threatened some people at Crothall Laundry with a firearm" and that she knew that by doing so he had committed a felony offense. She also admitted that she drove her husband to Ohio, and she had done so to help her husband avoid arrest.

When Berry entered her guilty plea, her counsel argued to the district court that, because her conviction for aiding an offender to avoid arrest arose out of circumstances

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N.W.2d 26, 30 (Minn. 1983) (explaining that if a defendant adduces sufficient evidence to make duress one of the issues in the case, the burden reverts to the State to establish a lack of duress) and (2) during her plea colloquy, Berry answered "Yes" when asked if "[her] purpose was for [her husband] to avoid arrest." We respectfully disagree. It is difficult to reconcile this argument with the dissent's competing argument that our analysis "elevates facts from Berry's plea colloquy to a higher status than the facts from the complaint."

different from the circumstances underlying the dismissed charges, predatory registration was not required. The district court denied the motion, stating:

> *My understanding of the facts* was actually that Ms. Berry went in prior . . . . She then exited, and then Mr. Berry walked in with a gun and the whole melee took place, and then she went in and actually extricated him out of there and, in my mind, helped resolve the situation by getting her husband out of there and took him out. It sounds like the offense is based upon *her then decision* to flee the jurisdiction.
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> *My personal thoughts*, unfortunately, *about predatory registration in this type of a case simply carry no water whatsoever*. This would be a case where predatory offender registration, in my mind, wouldn't really apply to Ms. Berry. She was—I don't want to say [an] innocent bystander, but *wasn't directly involved*. Like I said, my take on it was that she actually helped resolve the situation and avoid further violence. But I have no jurisdiction over deciding who gets to register and who does not . . . .
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> So I am going to deny the motion, because I think it is inextricably involved with the underlying offense, regardless of how you look at it. *But for the offense at Crothall Laundry, they would not have been fleeing to another state*.

(Emphasis added.)

The district court later issued an amended sentencing order finding that Berry's conviction for aiding an offender to avoid arrest was "inextricably interwoven with the underlying offenses requiring registration" and therefore Berry's conviction "arose out of the same set of circumstances as the Kidnapping and False Imprisonment offenses."

Berry appealed the registration requirement. *State v. Berry*, No. A19-0436, 2020 WL 289060, at *1 (Minn. App. Jan. 21, 2020). The court of appeals affirmed, reasoning that, because Berry's charged predatory offenses arose out of the same set of circumstances as her conviction offense, she was required to register as a matter of law. *Id.* at *3. We granted Berry's petition for review.

ANALYSIS

Berry challenges the application of the predatory registration statute to her conviction. We review the district court's findings of fact for clear error and its application of the law to those facts de novo. *State v. Degroot*, 946 N.W.2d 354, 365 (Minn. 2020); *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014) ("We review the district court's findings of historical fact under the clearly erroneous standard, but we review the district court's application of the law to those facts de novo.").

"[T]he primary purpose of [Minn. Stat. § 243.166] is to create an offender registry to assist law enforcement with investigations." *Boutin v. LaFleur*, 591 N.W.2d 711, 717 (Minn. 1999). Before 1993, only persons *convicted of* enumerated predatory offenses were required to register. Minn. Stat. § 243.166, subd. 1 (1992). But in 1993, the Legislature amended Minnesota's predatory registration statute to also require registration for persons who are simply *charged with* predatory offenses, as long as they are convicted of "another offense arising out of the same set of circumstances." *See* Act of May 20, 1993, ch. 326, art. 10, § 1, 1993 Minn. Laws 1974, 2090; *State v. Lopez*, 778 N.W.2d 700, 704 (Minn. 2010) (suggesting that the purpose of the 1993 amendment was to prevent defendants from using plea agreements to avoid registration).[3] We have observed that, "[w]hile the threshold factual showing of probable cause necessary to support a charge is low," the 1993

[3] Minnesota appears to be "the only state in the nation with an offender registration law that requires registration as a predatory offender if an offender is 'merely "*charged* with" a predatory offense and then convicted of *any* other offense—no matter how minor—that arises from the same set of circumstances as the predatory offense charge.' " *Werlich v. Schnell*, __ N.W.2d __, 2021 WL 1556823, at *8, n.8 (Minn. 2021).

amendment "stopped short of requiring registration in every case where a predatory offense is charged." *Lopez*, 778 N.W.2d at 705. Under Minnesota law, a person is required to register as a predatory offender when the person was charged with one or more enumerated offenses and "convicted of . . . that offense or another offense arising out of the same set of circumstances." Minn. Stat. § 243.166, subd. 1b(a) (2020).

Two of the charged offenses here, kidnapping and false imprisonment, require predatory registration; the offense of aiding an offender to avoid arrest does not require predatory registration. *Id.*, subd. 1b(a)(1)(ii), (2)(ii). Berry is required to register as a predatory offender only if her conviction for aiding an offender to avoid arrest arose out of the same set of circumstances as the charged offenses of kidnapping or false imprisonment.

Berry makes two arguments. First, she argues that the district court erred by applying a "but for" test.[4] Second, Berry argues that the court of appeals, which applied the "same set of circumstances" test, erred by affirming the district court's determination that the conviction for aiding an offender to avoid arrest arose out of the same set of circumstances as the kidnapping and false imprisonment charges.

We have addressed the "same set of circumstances" provision of Minn. Stat. § 243.166, subd. 1b(a)(1), most recently in *Lopez*. The defendants in *Lopez*, two brothers,

[4] We agree that *Lopez* did not create a "but for" test. In analyzing the "persons involved" factor of the *Lopez* test, the dissent applies a "but for" test by stating that "one may argue that the victims are involved too because without victims there would be no offense and no need for escape." This analysis is inconsistent with the test announced in *Lopez*, which requires "*overlap* with regard to time, location, persons involved, and basic facts." 778 N.W.2d at 706 (emphasis added).

had sold methamphetamine to a confidential informant and, 10 days later, in an attempt to collect the remaining balance on the drug deal, kidnapped the informant and the informant's friend. 778 N.W.2d at 702. The defendants were subsequently charged with kidnapping—an enumerated predatory offense requiring registration under section 243.166—and a first-degree controlled-substance crime.[5] *Id.* at 703. The defendants were eventually convicted of the drug charges, but the kidnapping charges against both were dismissed. *Id.* The defendants were ordered to register as predatory offenders as required by section 243.166; they appealed the registration requirement. *Id.*

In *Lopez*, we rejected arguments that predatory registration is required when the convicted offense and the charged offense arise out of "related circumstances" or where the two share a "single related circumstance." *Id.* at 706. We instead held that the "same set of circumstances" phrase contained in section 243.166, subdivision 1b, means that a person must register as a predatory offender when the "same general group of facts" gave rise to both the convicted offense and the charged offense. *Id.* The circumstances need not be identical in all respects, but there must be sufficient "overlap with regard to time, location, persons involved, *and* basic facts." *Id.* (emphasis added).

As a preliminary matter, we restate here that the test of time, location, persons involved, and basic facts is the correct framework, and a district court's consideration of whether predatory registration is required must include at least these factors. But as we suggested in *Lopez*, these factors should be read narrowly; they cannot be applied so

[5] Both charges alleged aiding and abetting liability under Minn. Stat. § 609.05.

broadly as to include merely "related" circumstances. *Id.* Reading the factors of time, location, persons involved, and basic facts narrowly to avoid "related circumstances," we conclude that Berry is not required to register as a predatory offender.

We first look to the "time" factor. The offense of aiding an offender to avoid arrest is unique because it necessarily occurs *after* the aided offender has committed the underlying crime. We recognized the unique nature of this offense in *State v. Skipintheday*, when we said, "a coconspirator helps someone *commit* a crime, but an accomplice after-the-fact helps a *person* who *has committed* a crime evade the law." 717 N.W.2d 423, 426 (Minn. 2006). An accessory after the fact interferes "with the processes of justice and is best dealt with in those terms."[6] *Id.* at 427 (quoting 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.6(a), at 404 (2d ed. 2003)). Consistent with the unique nature of the crime of aiding an offender to avoid arrest, the district court found that Berry helped her

[6] According to the dissent, the victims of kidnapping and false imprisonment were "arguably involved in [Berry's] escape" because the offense of aiding an offender to avoid arrest "required [Berry's] *awareness* of an underlying offense." (Emphasis added.) We respectfully disagree. First, the offense of aiding an offender to avoid arrest does not require the defendant to have an awareness of *the victims* or any other specific detail of the underlying offense. If Berry's husband had exclaimed, "Go, go, go, I just robbed a bank," Berry would have an "awareness of *the offense*" even though she had no idea who was in the bank. Next, the dissent's argument fails to interpret the persons-involved factor narrowly to avoid "related circumstances." See *Lopez*, 778 N.W.2d at 706. Instead, the dissent's argument stretches this factor to include a mere "awareness" of anyone involved in the underlying offense. Finally, the argument is inconsistent with *Skipintheday*, in which we explained that "accomplices after-the-fact come along *after the victims have been harmed* and do not further their victimization merely by helping the principal offenders evade the law." 717 N.W.2d at 427 (emphasis added).

husband flee the jurisdiction *after* her husband committed the kidnapping and false imprisonment. More specifically, the court said,

> [Berry] went in and actually extricated [her husband] out of there and, in my mind, helped resolve the situation by getting her husband out of there and took him out. It sounds like the offense [of aiding an offender to avoid arrest] is based upon *her then decision* to flee the jurisdiction.[7]

(Emphasis added.)

The factual basis of Berry's guilty plea is consistent with the district court's determination that she decided to help her husband flee the jurisdiction *after* her husband committed the kidnapping and false imprisonment.[8] In her factual basis, Berry admitted

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[7] The dissent asserts that the district court's use of the phrase "her then decision to flee the jurisdiction" does not reflect a determination of the moment Berry decided to flee the jurisdiction, and therefore a conclusion that Berry decided to help her husband escape only after he committed his offenses is "speculative at best." We respectfully disagree. In the phrase "her then decision," the word "then" is an adjective that means "existing or acting at or belonging to the time mentioned." *Webster's Third New International Dictionary* 2370 (1961). The "time mentioned" here is when Berry got "her husband out" of the laundry. Acknowledging this temporal fact, the dissent argues that the decision made by Berry at that moment might not have been "to flee the jurisdiction" but rather a decision "to follow-through on an earlier decision [to flee the jurisdiction]." In our view, the dissent's decision-within-a-decision interpretation of the district court's statement is unreasonable.

[8] The dissent contends the district court's statement that the offense of aiding an offender to avoid arrest "is based upon her then decision to flee the jurisdiction" is simply a personal thought, not a factual finding. We respectfully disagree. Although the district court explained that its personal thoughts "about *predatory registration* in this type of a case simply carry no water whatsoever," this statement does not suggest that the district court's earlier recitation "of the facts" was simply a "personal thought." (Emphasis added.) The "personal thoughts" statement plainly references a question of public policy that is reserved, in the first instance, for the Legislature. The dissent's analysis not only fails to defer to the district court's finding of fact, but it also erases the line between an accomplice who aids in the commission of the underlying offense and an accomplice who aids an offender after the fact.

the following facts: she was in Red Wing on June 8, 2018; she knew her husband had threatened laundry workers with a firearm; she knew that his conduct in threatening the laundry workers with a firearm was a felony; and she drove her husband to Ohio with the purpose of helping him avoid arrest. None of these admissions suggests that Berry decided to help her husband flee the jurisdiction *before* he committed the kidnapping and false imprisonment.[9] As a result, the district court's determination that Berry decided to help her husband flee the jurisdiction *after* her husband committed the kidnapping and false imprisonment is not clearly erroneous.[10]

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[9] The dissent argues, "none of Berry's admissions indicate that she made this decision only *after* her husband committed the predatory offenses." To the extent that Berry's admissions are neutral regarding the timing of her decision to flee the jurisdiction, those admissions plainly do not call into question the district court's finding that Berry decided to help her husband flee the jurisdiction *after* he committed the kidnapping and false imprisonment. Moreover, we have thoroughly reviewed the probable-cause section of the complaint. Nowhere in the complaint does it allege that Berry decided to help her husband flee *before* he committed the kidnapping and false imprisonment. Instead, the probable-cause section alleges the following. Berry entered the laundry and told her husband that "it was time to leave." Berry and her husband drove away in an SUV. The officers thought Berry might be a "possible hostage." A subsequent search of Berry's hotel room revealed "a large amount of clothing, food, a cell phone, and other personal items." In our view, the substantial amount of abandoned property supports a reasonable and logical inference that when Berry and her husband left their hotel room, they did not plan to flee to Ohio. Such an inference is consistent with the district court's finding that Berry decided to help her husband flee the jurisdiction *after* he committed the kidnapping and false imprisonment. According to the dissent, the fact that Berry took her cellphone and the means to buy goods and services suggests that she planned to flee to Ohio when she left the hotel room. We respectfully disagree. The actions highlighted by the dissent are wholly consistent with someone who plans to return to the hotel room and therefore do not support a reasonable and logical inference that Berry intended to flee to Ohio when she left the hotel room.

[10] In its amended order, the district court found that Berry's conviction of aiding an offender to avoid arrest was "inextricably interwoven with the underlying offenses

The remaining *Lopez* factors support a conclusion that there is insufficient overlap between the offense of aiding an offender to avoid arrest and the kidnapping and false imprisonment offenses. The kidnapping and false imprisonment offenses occurred entirely within the laundry building. By contrast, the offense of aiding an offender to avoid arrest occurred almost entirely outside the laundry building in a car traveling over hundreds of miles of interstate highway. Any overlap of location that occurred as Berry and her husband left the laundry was such a small sliver of the two events that it fails to satisfy the location factor of the *Lopez* test. There is also insufficient overlap of the persons involved. The laundry personnel were the victims of the kidnapping and false imprisonment offenses whereas the public at large was the victim of the offense of aiding an offender to avoid arrest.[11] *See Skipintheday*, 717 N.W.2d at 427 (explaining that accomplices after the fact do not further victimize the underlying victims by helping the principal offender evade the

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requiring registration." In light of the unique nature of the offense of conviction, the facts to which Berry admitted during her factual basis, and the district court's earlier finding that Berry helped her husband flee the jurisdiction *after* he committed the underlying offenses, the "inextricably interwoven" finding is clearly erroneous. According to the dissent, we are bound by the district court's clearly erroneous finding because the parties did not ask us to review it. We disagree. Appellate courts have a "responsibility to review the record even though the assignments of error are inadequate." *State v. Post*, 512 N.W.2d 99, 103 (Minn. 1994) (citation omitted). The dissent contends that its analysis "gives deference" to the "inextricably interwoven" finding. Although we defer to a district court's findings of fact, such deference does not extend to a clearly erroneous finding. *State v. McDonough*, 631 N.W.2d 373, 390 (Minn. 2001).

[11] The dissent argues that the persons-involved factor can be satisfied solely by the continued presence of the defendants (Berry and her husband). We respectfully disagree. If the continued presence of the defendant or defendants were sufficient, by itself, to satisfy the persons-involved factor of the *Lopez* test, the factor would be satisfied in almost every case, thereby undermining the purpose of the *Lopez* test—ensuring that the registration requirement is not extended to "related circumstances." 778 N.W.2d at 706.

law). Finally, the basic facts underlying the kidnapping and false imprisonment offenses do not sufficiently overlap with the basic facts of the offense of aiding an offender to avoid arrest. The State charged Berry with the kidnapping and false imprisonment offenses under an aiding and abetting theory of criminal liability, which required the State to prove that Berry knew that her husband was going to commit a crime and that she intended her presence to further the commission of that crime. *See State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007). The basic facts alleged in support of the kidnapping and false imprisonment offenses were Berry's scouting of the laundry, her reentry one minute after her husband entered the laundry with a gun, and her directive that it was time to leave. By contrast, the basic facts alleged in support of the offense of aiding an offender to avoid arrest were Berry entering the car and driving her husband to Ohio.

In sum, we hold that Berry is not subject to the predatory offender registration requirement because her culpable conduct occurred after the completion of her husband's crimes, in a car traveling over hundreds of miles of interstate highway, whose sole occupants were Berry and her husband, with the purpose of evading the law.

CONCLUSION

For the forgoing reasons, we reverse the decision of the court of appeals and remand to the district court to vacate the predatory-offender registration requirement.

Reversed and remanded.

D I S S E N T

MOORE, III, Justice (dissenting).

The court has determined Berry is not required to register as a predatory offender after finding that her conviction for aiding an offender to avoid arrest did not arise out of "the same set of circumstances" as the predatory offenses she was charged with—aiding another in committing the crimes of kidnapping and false imprisonment. In reaching this decision, however, the court misconstructs the factual record, hinges its conclusion on one factor of the *Lopez* test, applies the remainder of that test in an incomplete fashion, and adopts an apparent bright-line rule at odds with the case-by-case balancing approach we adopted in *Lopez*. Because there was sufficient overlap in the people, time, location, and basic facts of Berry's offenses to conclude they arose from the same set of circumstances, I agree with the district court and the court of appeals that the law mandates her registration. I therefore respectfully dissent.

I.

Minnesota Statutes § 243.166 (2020), requires an individual to register as a predatory offender if they are charged with a statutorily-enumerated predatory offense and are subsequently convicted of that offense "or another offense arising out of the same set of circumstances." In this case, Berry was charged with two predatory offenses for which registration would be required: aiding another in committing the crimes of kidnapping and false imprisonment. *Id.*, subd. 1b. The law, therefore, requires Berry to register if she was

found guilty of either predatory offense "or another offense arising out of the same set of circumstances." *Id.*[1]

After entering into a plea agreement, which resulted in the dismissal of the two charged predatory crimes, Berry was convicted of aiding an offender "avoid or escape from arrest, trial, conviction, or punishment"; a non-registration offense. *See* Minn. Stat. § 609.495 (2020). Thus, the question before us is whether Berry's conviction for aiding an offender to escape arrest arises out of "the same set of circumstances" as the charged, but dismissed, predatory offenses of aiding and abetting kidnapping and false imprisonment.

In *State v. Lopez*, we addressed the predatory registration requirement added by the Legislature in 1993 for dismissed charges contained within the same complaint as a non-predatory offense that results in a conviction. 778 N.W.2d 700, 705 (Minn. 2010). Lopez and his brother were each charged with aiding and abetting a first-degree controlled substance crime, a non-registration offense, and aiding and abetting kidnapping, a registration offense. *Id.* at 701–02. The charges arose out of a drug sale and a related kidnapping that occurred two weeks later after the prospective buyer refused to pay for the drugs. *Id.* at 702–03. The brothers were convicted of the drug charges after stipulated facts trials, but the kidnapping charges were dismissed. *Id.* We held that the kidnapping charge

[1] The Legislature added this language in an effort to limit the ability of offenders to plea-bargain out of registration requirements. *State v. Lopez*, 778 N.W.2d 700, 704–05 (Minn. 2010) ("[T]o ensure that true predatory offenders cannot plead out of the registration requirements, the legislature amended the statute to include defendants merely *charged* with predatory offenses.").

arose out of different factual circumstances from the drug sale and registration was not required. *Id.*

In coming to this conclusion, we determined registration is required "where the same general group of facts gives rise to both the conviction offense and the charged predatory offense." *Id.* "In other words, the circumstances underlying both [offenses] must overlap with regard to time, location, persons involved, and basic facts." *Id.* To evaluate the relationship between the two offenses, we decided the factual record for the charged kidnapping offense was comprised of stipulated facts underlying the drug convictions, "the charging documents," and the parties' briefs. *Id.* On this record, we concluded the kidnapping charges did not arise from the same set of circumstances as the drug sale because the alleged kidnapping "occurred 10 days later, in a different place, involving a slightly different group of people." *Id.* The only common circumstance between the two offenses (payment of a debt from a drug sale) was too "tenuous of a link" to justify a predatory offender registration requirement. *Id.* at 706.

The court reaffirms our *Lopez* test, but applies it to the charges in this case in an incomplete fashion, placing significant emphasis on a verbal comment made by the district court judge at Berry's sentencing hearing about when she formed her intent to aid her husband's escape. After considering the entire record of the case and applying all aspects of the *Lopez* test, I come to the opposite conclusion.

II.

To evaluate whether Berry's offenses arise from the same set of circumstances, it is important for us to first establish the factual record. Because there was no trial in this case,

the record we should consider—based on *Lopez*—includes facts surrounding the conviction offense from the charging documents and the parties' briefs. *Id.* at 705. The court's focus deviates from assessing the entirety of that undisputed record to parsing statements made by the district court judge about the case on the record and in writing. In doing so, the court focuses on one preliminary verbal statement made by the district court at Berry's sentencing hearing, sua sponte rejects a factual finding in the sentencing order, elevates facts from Berry's plea colloquy to a higher status than the facts from the complaint, and misapplies our clearly erroneous standard of review.

At Berry's plea and sentencing hearing, she moved the district court to find that the kidnapping offense arose out of different circumstances than the aiding and abetting offense so she could avoid registering as a predatory offender. Prior to denying the motion, the district court judge provided an explanation of his reasoning, including a summary of his understanding of the facts of Berry's conviction offense, and then his "personal thoughts . . . about predatory registration in this type of a case" which, in the judge's own words, "*simply carry no water whatsoever*." Yet, without explanation, the court focuses its analysis on one statement from the district court judge's impressions to the exclusion of the full factual record and troublingly suggests we are required to give specific deference to this statement.[2] None of these prefatory comments appear in the judge's written order

[2] The statement was the district court judge's comment that "[i]t sounds like the [conviction] offense is based upon her then decision to flee the jurisdiction." Emphasizing the district court's use of the word "then," the court cites this statement as a factual finding which precludes any possibility that Berry decided to help her husband escape before he kidnapped his former co-workers. As the court correctly points out, "then" is an adjective

appealed from and should be irrelevant to this court's reasoning.[3] *See Larson v. Hill's Heating & Refrigeration of Bemidji, Inc.*, 400 N.W.2d 777, 782 (Minn. App. 1987) (finding a trial court's oral impressions stated on the record which differed from later written conclusions to be "preliminary, non-binding observations"), *rev. denied* (Minn. Apr. 17, 1987).

Further confounding the court's analysis is its application of the "clearly erroneous" standard of review. Despite not being mentioned in either Berry's or the State's brief, the court sua sponte rejects the district court judge's ultimate factual conclusion that Berry's conviction offense was "inextricably interwoven" with the underlying predatory offenses as "clearly erroneous." By doing so, the court is reviewing the factual findings of the district court for "clear error" despite *not being asked to do so*.[4] This is beyond our scope of review. *See Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008) ("[W]e rely on

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that means "existing or acting at or belonging to the time mentioned." This means that Berry's decision to flee the jurisdiction existed at the time mentioned; the moment of escape. This does not preclude the possibility that Berry decided to help her husband escape beforehand. It could simply mean that she decided at that time to follow through with an earlier decision. The judge's personal comment about this issue was, at best, an ambiguous and nonbinding musing that should not form the basis of this factual record.

[3] The Court of Appeals noted that "the district court's statements regarding its discretion or the appropriate legal standard do not change our analysis." *State v. Berry*, No. A19-0436, 2020 WL 289060, at *2 n.3 (Minn. App. 2020). The same should be the case for the district court's preliminary, nonbinding observations regarding the facts.

[4] The court asserts my analysis involves an "independent review of the record," but the court's analysis notably involves overturning a written factual finding by the district court judge without being asked to do so in this appeal. My analysis actually gives deference to the district court judge's ultimate finding of fact that the offense of aiding an offender was "inextricably interwoven" with the underlying registration offenses.

parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present . . . [and we] do not, or should not, sally forth each day looking for wrongs to right." (citation omitted)); *see also Johnson v. Johnson*, 84 N.W.2d 249, 254 (Minn. 1957) ("It is not within the province of this court to determine issues of fact . . . ."). At no point did either party ask us to determine whether that one oral statement made by the district court judge was a finding of fact essential to the case or whether any of the district court's factual findings were clearly erroneous. The interests of justice are not served when appellate courts decide cases based on issues that were neither raised nor argued because this violates the "important principle" of party presentation. *See Heilman v. Courtney*, 926 N.W.2d 387, 399 (Minn. 2019) (Hudson, J., concurring) (explaining that "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present").

To support its review of the factual record, the court cites to *State v. Degroot* and *State v. Jones*, both of which involved mixed questions of law and fact. 946 N.W.2d 354, 365 (Minn. 2020); 848 N.W.2d 528, 533 (Minn. 2014).[5] This case, however, involves no dispute over what the facts of the case are. As Berry herself admits, "[t]he facts that gave rise to [her] conviction are undisputed" and her only point of dispute "is whether the district

[5] The court's later citation to *State v. Post* is also inapposite. 512 N.W.2d 99, 103 (Minn. 1994). In that case, we determined sua sponte that a prosecutor's closing statement was inappropriate because it was prejudicial and could result in a new trial. *Id.* Nowhere in *Post* did we look through the underlying factual findings made by the district court and overturn one as clearly erroneous. *Id.* Nor is there an inadequate assignment of error in this case because there was *no* assignment of error related to the facts of this case. Any analogy to *Post* falls short and the court fails to cite a case where we have sua sponte reviewed underlying factual findings for clear error in circumstances similar to this case.

court properly imposed the predatory-offender-registration requirement." Following our *Lopez* decision, we should be applying de novo review to determine whether registration is required and not turning purely legal questions into mixed questions. 778 N.W.2d at 705 (applying de novo review to the predatory registration requirement despite minor "inconsistencies . . . in the various accounts of the" underlying offense).

Finally, the court claims that the facts to which Berry admitted during her plea hearing support its *Lopez* analysis after laying out the elements of the crime of aiding an offender escape. It is unclear why the court specifically highlights Berry's self-serving answers to leading questions posed to her during the plea colloquy when, under *Lopez*, we are to utilize the facts from the charging documents and briefs as well as the facts from the proceedings related to the conviction offense.

All the factors of the *Lopez* test should be evaluated with consideration of the entire factual record, which establishes the following. According to the complaint, this trip to Crothall Laundry Services was a return trip for Berry's husband, a former employee. He had gone there three days prior to harass his former co-workers. The complaint is silent as to whether Berry knew about this previous trip or not. On the morning of June 8th, Berry drove with her husband to the laundry while an AR-15 rifle rested somewhere in their vehicle.[6] Berry then entered the laundry before her husband and was observed on

[6] The court claims the complaint indisputably alleges that the police thought Berry might be a "possible hostage." This is, however, an incomplete representation of the complaint's actual language. The actual language from the complaint states that the police were "unsure . . . if [Berry] was a willing participant, accomplice, or possible hostage." This lack of awareness of Berry's role in the case led to the police conducting a follow-up

surveillance camera footage walking through an office area within the building. She left the building and shortly afterwards her husband entered wielding the AR-15 from the car. He kidnapped and imprisoned the management and staff while Berry remained outside. She then reentered the building, helped him conceal the weapon in a backpack, and drove off with him.

There is plenty of "reasonable evidence" within this record to support the district court's conclusion that the offenses were "inextricably interwoven." *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). The court's clearly erroneous rejection of that finding equates to "[a] definite and firm conviction that" the district's court's finding was "a mistake." *Id.* I respectfully disagree with this rejection. The totality of the circumstances casts serious doubt on the court's conclusion that Berry's offense did not arise from the "same set of circumstances" as her husband's actions in kidnapping, imprisoning, and threatening his former supervisors.

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investigation, including tracing Berry's cell phone. Berry's plea of guilty to the offense of aiding an offender escape, which required her to admit having "intent" that her husband would "avoid or escape from arrest, trial, conviction, or punishment," belies any notion that she was a hostage in this case. Minn. Stat. § 609.495. Under well-settled principles of criminal law, an actor does not have the required intent if they are acting under duress. *State v. Charlton*, 338 N.W.2d 26, 30 (Minn. 1983) ("[T]he element of intent requires a conscious desire and purpose to bring about a criminal result."). By pleading guilty, Berry admitted that she intended to help her husband escape and, therefore, by definition she cannot be a "hostage" who was acting under duress when she helped her husband escape. *Hostage,* Merriam-Webster, https://www.merriam-webster.com/dictionary/hostage (last accessed Apr. 30, 2021) (defining "hostage" to mean "one that is *involuntarily* controlled by an outside influence (emphasis added)).

III.

I turn next to the application of the *Lopez* test to this factual record. I begin by analyzing the *Lopez* factor emphasized by the court—time. The court concludes that the timing of Berry's kidnapping offense and her offense of aiding an offender escape did not overlap by looking at the elements of the underlying offenses and assuming that Berry's decision to help her husband escape was made after she aided his kidnapping and false imprisonment of his coworkers. This is error in two ways. First, the court's reliance on the underlying elements of these offenses creates a bright-line rule that is inconsistent with our *Lopez* decision. Second, the court's conclusion about the timing of Berry's decision to aid her husband is, even if correct,[7] not determinative of when the circumstances of her charged predatory offenses ended and when her aid to him began.

We have previously held that someone who aids an offender under Minnesota Statutes § 609.495, subd. 3 "helps a person who has committed a crime evade the law."

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[7] The court states that "[t]he factual basis of Berry's guilty plea is consistent with the district court's determination that she decided to help her husband flee the jurisdiction *after* her husband committed the kidnapping and false imprisonment." Putting aside whether it was appropriate to elevate the district court's on-the-record impressions to the level of a factual finding, it is not possible to determine what Berry's intentions were based on the truncated factual basis she provided for her guilty plea. The court states that none of Berry's admissions from her testimony suggest that she "decided to help her husband flee the jurisdiction *before* he committed the kidnapping and false imprisonment." But it could also be argued that none of Berry's admissions indicate that she made this decision only *after* her husband committed the predatory offenses, because she provided no details whatsoever regarding the incident or what her intent was that day. By answering "yes" to ten leading and general questions, Berry merely admitted that on the date in question she was with her husband in Red Wing, he committed a felony level offense, and that she aided him to avoid arrest for that offense by driving him to Ohio. Nothing about these admissions supports the conclusion the court reaches regarding the timing of the decision to flee.

State v. Skipintheday, 717 N.W.2d 423, 426 (Minn. 2006) (emphasis omitted). The court indicates that because the time factor in the aiding an offender statute necessarily occurs after the underlying offenses have been committed that the two cannot be "sufficiently linked" for the purpose of registration. *See Lopez*, 778 N.W.2d at 706. Neither our *Lopez* decision nor the registration statute, however, requires that the elements of the charged offense align perfectly with the elements of the predatory offense. Rather, the timing of the charged crime and the convicted offense "need not be based on identical facts," but simply must be sufficiently intertwined. *Id.*

The difference in time between an underlying offense and aiding an offender to escape from it is a fact-specific issue that does not provide a solid basis for a rule of law, and disregards the fact that aiding another by escaping from the scene of a crime extends the circumstances of the underlying crime beyond its actual commission. As the court of appeals aptly noted, "[a]iding another in the commission of a crime includes helping another escape after committing a crime." *Berry*, 2020 WL 289060, at *3. While the nature of the aiding-an-offender crime necessitates that it occur "after" the underlying crime, the inquiry for predatory registration is whether that aid is "sufficiently linked in time" to the kidnapping and false imprisonment. *Lopez*, 778 N.W.2d at 706. In *Lopez*, the time difference between the two offenses was 10 days and easily ascertained from the record. *Id.* In this case, the difference between the completion of the charged offenses and the beginning of the conviction offense was arguably seconds, which is assuredly enough of a temporal overlap for the crimes to be "sufficiently linked." *Id.*

After creating this bright-line rule, the court then concludes Berry did not decide to help her husband escape before leaving for the laundry without addressing that (1) the couple arrived together, (2) she entered the laundry first, (3) he was armed, and (4) she remained at the scene of her husband's crimes and took possession of his firearm before they left together.[8] Her precise intent is, admittedly, unclear from the record before us. But I am unwilling to reach the same degree of certainty regarding the timing of Berry's decision to aid her husband's efforts at avoiding or escaping arrest without further explanation of these facts. Indeed, as the district court and court of appeals did, I reach the opposite conclusion.

Considering the location factor of the *Lopez* test, Berry's offense and the charged offenses clearly overlap. Berry was charged with kidnapping and false imprisonment. These crimes occurred at the Crothall Laundry Services. The aid to escape occurred at the same venue moments after the kidnapping ended. It was at the laundry where Berry took possession of the weapon brandished by her husband, told her husband that it was time to go, and began leading police on a multi-state pursuit that ended in Ohio. Even if one

[8] The court puts undue weight on Berry's abandonment of certain personal items in her hotel room as consistent with the district court judge's impression about the timing of her decision to flee the jurisdiction. The court's speculation about this is not supported by the record. Berry and her husband were able to drive over 1,000 miles in an SUV before being apprehended in Ohio. Assuredly, along the way, the couple had to purchase gas and thus had taken certain financial assets with them. The court also notes that the police were able to trace Berry's cell phone, another personal belonging the couple brought with them. These actions are wholly consistent with someone intending to have sufficient resources to help their husband escape over state lines. We simply do not know why the couple brought certain items with them and left others and we should not speculate about the timing of Berry's decision to aid her husband's escape in light of what she left behind in Red Wing.

adheres to the court's conclusion that the escape did not begin until the offense ended, Berry had helped her husband escape the second she helped him hide the AR-15 and told him to leave; acts that both took place at the laundromat.

The "persons involved" factor is also sufficiently established. Berry was charged with aiding her husband's offenses of kidnapping and false imprisonment. These offenses involved her, her husband, and their victims. Berry's charge of aiding an offender escape involved her and her husband. Indeed, one may argue that the victims are involved too, because without victims there would be no offense and no need for escape.[9] Even if we assume the victims are not involved in the escape offense, two out of the three parties to the charged crime and the convicted offense overlap. This is sufficient commonality to meet this prong of the *Lopez* test.

Finally, the essential facts of this case and the charged predatory crimes are significantly tied to the aiding-an-offender offense and meet the fourth *Lopez* factor. Berry

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[9] In *Skipintheday*, we noted that the public at large are victims of the crime of helping an offender escape and that the victims of the underlying offense are not further victimized because the offender escaped. 717 N.W.2d at 427. Here, however, the inquiry is not whether the kidnapped and imprisoned staff of Crothall Laundry Services were victims of Berry's aiding-an-offender crime. Rather, the question is whether these victims qualify as "*persons involved*" with Berry's charged predatory offenses. *Lopez*, 778 N.W.2d at 706 (emphasis added). Because Berry's offense of conviction required her awareness of an underlying offense that involved these victims, they were arguably involved in her aid to help her husband escape. Minn. Stat. § 609.495, subd. 1 ("Whoever harbors, conceals, aids, or assists by word or acts another whom the actor *knows or has reason to know* has committed a crime" is guilty of aiding an offender (emphasis added)). Indeed, there would be no need to escape if no one had been kidnapped or falsely imprisoned. The court's assertion that I am stretching "the 'persons involved' factor to include a mere 'awareness' of anyone involved in the underlying offense" is an argument that is absent from my analysis. My dissent rather abides by the language of the aiding an offender statute which requires awareness that an offense has been committed. *Id.*

could not have knowingly helped her husband escape if she had been unaware that he had just committed the underlying offenses he was fleeing from. The charges in this case—Berry's participation in her husband's confining his former co-workers against their will and aiding him to avoid or escape arrest—arose out of common underlying facts. She admitted knowing that her husband had committed a felony level offense and aided his efforts to avoid arrest for it by driving him to Ohio. The offenses were, as the district court found, "inextricably interwoven" with each other. The interrelationship of these events demonstrates that Berry's charged and convicted conduct was sufficiently united in time, place, persons involved, and basic facts under *Lopez*.

IV.

I acknowledge it may be tempting to agree with the result reached by the court in this case, particularly given the fact that the State agreed to a plea bargain which allowed Berry to admit guilt without having to articulate anything about her intent on the day of the incident. It is possible as the district court judge speculated that Berry's actions may have helped resolve the situation without additional violence, suggesting that the attendant collateral consequences arising from registration requirements might be an unjust result.[10] But notwithstanding those comments, the district court judge accepted Berry's guilty plea, convicted her of aiding her husband escape from his kidnapping offense, and decided that

[10] A district court always has the option to "exercise its own discretion in convicting" a defendant if it believes that conviction of a non-predatory offense that results in registration—and its resultant collateral consequences—is unjust. *See Johnson v. State*, 641 N.W.2d 912, 918 (Minn. 2002) (explaining that courts may reject plea agreements that result in injustice).

the facts in this case required her to register under the language of the statute. Similarly, "it is our job to interpret [statutes] as written and it is the Legislature's job to draft legislation" despite personal opinions about what the statute *should* say. *KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 349 n.4 (Minn. 2016). And we should not review facts for clear error when neither party asks us to do so.

Further, the court's apparent bright-line determination that registration is *never* required when an offender is convicted of aiding an offender escape or avoid arrest for a predatory offense is inconsistent with the statute's plain language as interpreted in *Lopez.* This inconsistency has troubling implications for future similar cases. Because the district court was correct in concluding that the aiding an offender offense of which Berry was convicted arose out of the same set of circumstances as the alleged predatory offenses committed on the same day, I would respectfully affirm the court of appeals' decision that the law requires Berry to register as a predatory offender.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Moore.