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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0361**

State of Minnesota,
Respondent,

vs.

Erik Walden Narveson,
Appellant.

**Filed September 3, 2019
Affirmed
Schellhas, Judge**

Olmsted County District Court
File No. 55-CR-15-2238

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Assistant County Attorney,
Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Schellhas, Judge; and
Peterson, Judge.*

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his sentence for false imprisonment, arguing that it was part of the same behavioral incident as his criminal-sexual-conduct offense for which the district court convicted and sentenced him. We affirm.

FACTS

Respondent State of Minnesota charged appellant Erik Narveson with one count of first-degree criminal sexual conduct (CSC), two counts of third-degree CSC, one count of false imprisonment, and one count of third-degree assault on April 7, 2015. Victim A.L. testified at Narveson's jury trial that Narveson came to her house in violation of a domestic-abuse no-contact order (DANCO) that prohibited him from contacting her, and that she awoke during the night to Narveson sexually assaulting her. When A.L. attempted to flee, Narveson punched her in the face, causing a blowout fracture near her left eye; grabbed her hair and dragged her back through the house to the bedroom; and tied her wrist and ankle to his wrist and ankle. A.L. testified that during that night she awoke several times to Narveson raping her at knifepoint. When she attempted to escape the next morning, Narveson tied her to a support pole in the basement, stuffed a sock into her mouth, and tied it to her head with a rope. Eventually, A.L. escaped, and law enforcement arrested Narveson.

The state dismissed one of the third-degree CSC counts. A jury then found Narveson guilty of third-degree CSC, third-degree assault, and false imprisonment and not guilty of first-degree CSC. A district court sentenced Narveson to 180 months in prison for his third-

degree CSC conviction and to separate concurrent sentences of 24 months in prison on his third-degree assault and false imprisonment convictions, consecutive to the 180-month sentence for third-degree CSC. Narveson appealed, and this court affirmed in part Narveson’s convictions and sentences, reversing and remanding the assault conviction and sentence because the district court failed to provide the jury with a self-defense instruction. *State v. Narveson*, No. A17-0938, 2018 WL 3340429, at *7 (Minn. App. July 9, 2018) (*Narveson I*), review denied (Minn. Sept. 18, 2018). On remand, the state dismissed the assault charge, and the district court sentenced Narveson to 140 months for his third-degree CSC conviction and 22 months concurrent for his false-imprisonment conviction.

This appeal follows.¹

DECISION

“[I]f 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 and a conviction or acquittal of any one of them is a bar to prosecution for any other of them.” Minn. Stat. § 609.035, subd. 1 (2014). “Thus, the law generally prohibits multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident.” *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (quotation omitted). When all the crimes at issue contain an intent element, “we determine whether the crimes were part of a single behavioral incident by considering (1) whether the offenses occurred at

¹ The state informed this court by letter that it would not be filing an informal brief and did not otherwise participate in this appeal.

substantially the same time and place, and (2) whether the conduct was motivated by an effort to obtain a single criminal objective.” *Id.* (quotations and citations omitted).

“The state has the burden to establish by a preponderance of the evidence that the conduct underlying the offenses did not occur as part of a single behavioral incident.” *State v. Williams*, 608 N.W.2d 837, 841–42 (Minn. 2000). “Whether a defendant’s offenses occurred as part of a single course of conduct is a mixed question of law and fact.” *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). We review a district court’s factual findings for clear error and whether offenses occurred as part of a single course of conduct *de novo*. *Id.*

Narveson testified that at the time of the alleged offenses, a DANCO had been “implemented against” him, which meant that he was supposed to stay away from A.L., her job, and house; not text, e-mail, or call A.L.; and not have third-party contact with her. Narveson also testified that at some point on April 4, 2015, he passed out at A.L.’s house and awoke to A.L. telling him that he had to leave and pointing a knife in his face. He claimed that he “grabbed [A.L.’s] right hand with the knife in it and I punched her in the face” and her “eye immediately, immediately just blew up.” He further claimed that after he punched A.L., he and A.L. went to her bedroom and the following occurred:

THE DEFENDANT: [W]e stayed in the bedroom. We had – eventually we were back out in the living room at one point.

....

DEFENSE COUNSEL: What happened next?

THE DEFENDANT: We – more me than her, but I proceeded to get drunk. Tired and wanted to go to bed. I didn’t want her to leave while I was asleep.

DEFENSE COUNSEL: So what did you do?

THE DEFENDANT: So we went into the bedroom together, laid down. I tied her left ankle to my right ankle and her wrist to my wrist.

DEFENSE COUNSEL: Why did you do that?

THE DEFENDANT: So if she woke up and tried to leave in the middle of the night, I would, you know, I would feel it and I would wake up.

DEFENSE COUNSEL: Did you want her to leave?

THE DEFENDANT: No.

DEFENSE COUNSEL: Why not?

THE DEFENDANT: I didn't want to face the music.

DEFENSE COUNSEL: Face the music for what?

THE DEFENDANT: Her blackeye, my DANCO violation, being drunk, everything.

Narveson testified that the next morning, he "tied [A.L.] up in the basement" while he went out to get cigarettes because he was afraid that she would escape and call the police. He denied engaging in sexual activity with A.L. while she was tied to him or tied up in the basement.

At Narveson's first sentencing hearing on March 21, 2017, the prosecutor stated:

I'm going to concede something that it's fair to concede and I should concede here. One of the reasons the State isn't seeking a consecutive sentence on the false imprisonment is, as described by [A.L.], the false imprisonment was part of essentially the same behavioral incident as the criminal sexual conduct. Because as the Court will recall [A.L.]'s testimony, [Narveson] bound her to him with the green wire and then would take off the wire long enough to sexually assault her, and then rebind her up, and so on and so forth.

But the district court found that "there are breaks, there are gaps in time in the acts that occurred against this victim. I don't believe that it's the same course of conduct. The acts are separate, they're broken up in time and behavior."

On appeal, in relevant part, this court concluded that should the issue come up on remand, the assault offense and the false-imprisonment offense arose out of a separate behavioral incident from the CSC offense because the offenses were “separated by time and did not share a single criminal motivation.” *Narveson I*, 2018 WL 3340429, at *8. While Narveson petitioned the supreme court for further review, he did not seek review of the issue regarding whether his offenses arose out of the same or separate behavioral incidents. On remand to the district court, at the second sentencing hearing on December 4, 2018, the state dismissed the assault charge, and neither party made an argument favoring or opposing a sentence for the false-imprisonment conviction, nor did the court make any further findings; and the court sentenced Narveson on both offenses.

Now, on appeal after remand to the district court, Narveson argues that the prosecutor’s concession at his first sentencing hearing is binding on this court and requires it to determine that his offenses arose out of the same behavioral incident. But in *State v. Warren*, the supreme court declined to be bound by the state’s concession before a district court. 419 N.W.2d 795, 799 (Minn. 1988). We similarly conclude that we are not bound by the state’s concession at Narveson’s first sentencing hearing, which the district court disregarded. We therefore analyze the same-behavioral-incident issue to ensure that resolution of the issue is in accordance with the law. *See State v. Hannukesla*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (“[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities.” (quotation omitted)).

In *Munt v. State*, the supreme court analyzed whether the defendant committed multiple crimes during a single behavioral incident when he killed his ex-wife, kidnapped his children, stole a car, and absconded with his children. 920 N.W.2d 410, 416–18 (Minn. 2018). The defendant was convicted of murder, assault, robbery, criminal vehicular injury, and kidnapping. *Id.* at 417–18. The supreme court concluded that the defendant did not commit the offenses during a single behavioral incident because “a single criminal objective did not motivate his actions.” *Id.* at 418. When the defendant killed his ex-wife, his purpose was “to cause her death”; when he stole a car, his purpose was to “secure a getaway vehicle”; and when he drove away with his three children, his purpose was to “move [them] from one place to another.” *Id.*

Similar to *Munt*, Narveson’s trial testimony shows that a single criminal objective did not motivate his actions when he committed the CSC and false-imprisonment offenses against A.L. Narveson testified that he tied up A.L. because he did not want her to leave and he did not want to “face the music” for hitting her and violating the DANCO. Narveson denied any sexual contact with A.L., while she was tied or untied, and no record evidence suggests that he tied up A.L. with the objective of engaging in criminal sexual contact with her. Yet he argues now that we should consider only his conduct of tying A.L. to him, not his conduct of tying her up in the basement the next day. But even if we consider only the conduct of Narveson tying A.L. to him, his testimony still supports a conclusion that his criminal objective was to prevent A.L. from escaping; nothing in the record supports a conclusion that Naarveson tied A.L. to himself to perpetrate criminal sexual conduct against her. *Cf. State v. Koonsman*, 281 N.W.2d 487, 490 (Minn. 1979) (concluding

kidnapping and sexual misconduct part of same behavioral incident where defendant kidnapped child with purpose of committing an act of sexual misconduct); *State v. Morris*, 160 N.W.2d 715, 717–18 (Minn. 1968) (concluding indecent assault and kidnapping part of same behavioral incident where defendant removed victim 100 feet away from street so that he could assault her); *State v. Frank*, 416 N.W.2d 744, 750 (Minn. App. 1987) (concluding that repeated assaults were “a means to” perpetrate “contemplated sexual misconduct”), *review denied* (Minn. Feb. 8, 1988).

Narveson does not challenge the district court’s findings made at the first sentencing hearing on March 21, 2017, and those findings support our conclusion that he was not motivated by a single criminal objective when committing the two offenses. We conclude that a single criminal objective did not motivate Narveson when he committed CSC against A.L. and falsely imprisoned her, and that Narveson therefore did not commit the offenses during a single behavioral incident.

Affirmed.