

*This opinion is nonprecedential except as provided by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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1114**

State of Minnesota,
Respondent,

vs.

Mark Anthony Blechinger,
Appellant.

**Filed July 17, 2023
Affirmed
Larkin, Judge**

Dakota County District Court
File No. 19HA-CR-21-1737

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

Kathryn M. Keena, Dakota County Attorney, Jessica A. Bierwerth, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Slieter, Judge; and Kirk, Judge.*

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

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his sentence for violating a domestic-abuse no-contact order, arguing that it is impermissible under Minn. Stat. § 609.035 (2022). We affirm.

FACTS

Respondent State of Minnesota charged appellant Mark Anthony Blechinger with felony violation of a domestic-abuse no-contact order (DANCO) and third-degree possession of methamphetamine.

According to the complaint, on July 30, 2021, law enforcement stopped a vehicle registered to Blechinger. Law enforcement discovered that Blechinger, the driver, was the subject of a DANCO issued in 2019 and that the DANCO's protected party, CN, was in the vehicle. After Blechinger and CN were ordered out of the vehicle, "law enforcement observed several apparently used hypodermic needles on the floor of the vehicle," and during a search of the vehicle, "law enforcement located a small pouch in a cupholder near where [Blechinger]'s right leg would have been while seated in the vehicle." The pouch was filled with baggies containing approximately 12 grams of methamphetamine.

Pursuant to a negotiation with the state, Blechinger agreed to plead guilty to the two offenses as charged, to receive a 29-month sentence for the DANCO violation, and to receive a concurrent 49-month sentence for the third-degree drug-possession offense. Additionally, Blechinger's 32- and 21-month sentences in two unrelated criminal files would be executed concurrently, and charges in two other criminal files would be dismissed.

In establishing a factual basis for his guilty pleas, Blechinger acknowledged that on July 30, 2021, he was driving in South St. Paul, CN was a passenger in the vehicle, and a DANCO prohibited Blechinger from having contact with CN. Blechinger acknowledged that he was “aware” that being in the vehicle with CN was a violation of the DANCO. Blechinger admitted that he had “two prior domestic-related convictions on [his] record within the last ten years,” which made the DANCO violation a felony. Blechinger admitted that law enforcement searched the vehicle and found baggies containing approximately 12 grams of methamphetamine. When asked if the baggies were in his possession, Blechinger responded, “Yes, they were mine.”

Prior to sentencing, CN gave a victim impact statement, stating:

First of all, I’d just like to say that I’ve been trying to get the DANCO dropped. [Blechinger] and I have been together off and on for six years. We have a son together. He’s a really good person. We’re both different, obviously, when we’re using. And I just—I really want to be able to work on our relationship and actually communicate.

The district court accepted the guilty pleas and entered judgments of conviction for both offenses. The district court sentenced Blechinger in accordance with the plea agreement, executed Blechinger’s two other sentences concurrently, and dismissed the additional charges.

Blechinger appeals.

DECISION

Blechinger contends that his sentence for the DANCO violation violates Minn. Stat. § 609.035, subd. 1, which provides, with certain exceptions not relevant here, 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.”

“[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 law to those facts is reviewed de novo. *Id.* If the facts are not in dispute, then the question of whether a sentence violates section 609.035 is a question of law, which we review de novo. *Branch*, 942 N.W.2d at 713.

A court determines whether separate intentional crimes were committed during 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.” *State v. Degroot*, 946 N.W.2d 354, 365 (Minn. 2020). The state bears the burden of establishing by a preponderance of the evidence that multiple offenses did not arise during a single behavioral incident.¹ *Id.*

¹ If any of the crimes lack an intent element, we consider whether they occurred “at substantially the same time and place and ar[ose] out of a continuous and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment.” *State v. Johnson*, 141 N.W.2d 517, 525 (Minn. 1966); see *State v. Bauer*, 792 N.W.2d 825, 828 n.3 (Minn. 2011) (stating same).

The parties agree that the crimes at issue here are intentional crimes, as do we. For purposes of chapter 609, the verb “know” indicates that criminal intent is an element of the crime. Minn. Stat. § 609.02, subd. 9(1) (2022). As to the DANCO conviction, Minn. Stat. § 629.75, subd. 2(b), (d)(1) (2020), provides that a crime occurs if a person violates a DANCO, “*knows* of the existence” of the DANCO, and has two or more prior qualifying convictions. (Emphasis added.) And Minn. Stat. § 152.023, subd. 2(a)(1) (2020), provides that a crime occurs if a person “possesses one or more mixtures of a total weight of ten grams or more containing a narcotic drug other than heroin.”² A conviction for possession of a controlled substance requires the state to prove a person consciously possessed a substance *knowing* the nature of the substance. *State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975). In sum, Blechinger was convicted and sentenced for two intentional crimes. *See State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014) (analyzing whether offenses for stalking and violation of an order for protection were motivated by a single criminal objective); *State v. Carr*, 692 N.W.2d 98, 101-02 (Minn. App. 2005) (analyzing whether offenses of possession and manufacture of methamphetamine were motivated by a single criminal objective).

Blechinger notes that the state did not offer evidence to prove that the two offenses did not occur in a single behavioral incident and that the court did not make any findings on that issue. He argues that “[g]iven the absence of evidence to the contrary, it must be concluded that the offenses were occurring at the same time and place.” He further argues

² Methamphetamine is a narcotic drug. Minn. Stat. § 152.01, subd. 10 (2020).

that “[i]t also follows that [he and CN] were together during that time for the purpose of using methamphetamine together” and that the state has therefore “failed to establish that the offenses were not a single course of conduct under the intentional-crime analysis.” Essentially, Blechinger argues that his DANCO and possession offenses were committed during a single behavioral incident because the record suggests that Blechinger violated the DANCO with the criminal objective of using methamphetamine with CN.

The state does not dispute that the offenses occurred at the same time and in the same place. But the state argues that the crimes were not committed during a single behavioral incident because Blechinger was not motivated by a single criminal objective. The state disputes that the record establishes that Blechinger and CN used methamphetamine together on the day in question.

Thus, we focus on whether Blechinger’s conduct was motivated by “an effort to obtain a single criminal objective.” *Bakken*, 883 N.W.2d at 270 (quotation omitted). Because Blechinger did not first challenge his sentence under section 609.035 in the district court, that court did not make findings regarding the issue. Generally, it is better to raise a section 609.035 claim in the district court so the court can make the necessary findings. *See, e.g., State v. Kemp*, 305 N.W.2d 322, 326 (Minn. 1981) (noting the “factual nature of a determination that two or more offenses were part of a single course of conduct” and “the desirability of counsel first presenting to the [district] court issues concerning the application of section 609.035”); *Dunn v. Nat’l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (“[A]ppellate courts may not sit as factfinders and are not empowered to make or modify findings of fact.” (quotations and citation omitted)).

However, this court can address a 609.035 sentencing issue for the first time on appeal if the relevant facts are *undisputed*. See *Branch*, 942 N.W.2d at 713 (determining issue as a matter of law); see also Minn. R. Crim. P. 27.03, subd. 9 (stating that an unauthorized sentence may be corrected at any time); *Ture v. State*, 353 N.W.2d 518, 523 (Minn. 1984) (stating that failure to raise section 609.035 issue at sentencing did not waive the issue). But in this case, the relevant facts are disputed. Blechinger argues that the record shows that he and CN were using methamphetamine together on the day in question and that his DANCO violation was motivated by his desire to use methamphetamine with CN. The state disagrees and argues that Blechinger impermissibly relies on the underlying criminal complaint and CN's victim-impact statement to support his position.

This court has remanded cases to the district court for findings where the factual record was not sufficiently developed to enable a determination regarding whether offenses were part of a single behavioral incident. See, e.g., *State v. Ratcliff*, No. A18-1502, 2019 WL 3000690, at *5 (Minn. App. July 1, 2019) ("Because we are unable, on this record, to determine whether the district court erred in imposing multiple sentences, we remand to the district court to make findings concerning whether the DANCO violations were part of one behavioral incident."), *rev. denied* (Minn. Sept. 25, 2019). But we need not do so in this case because even if we assume, without deciding, that the facts are as proposed by Blechinger, his argument that section 609.035 was violated fails as a matter of law.³ Nor

³ If the issue were not clear as a matter of law, we would not hesitate to remand for factual findings and a determination by the district court in the first instance. We do not fault the state for failing to present evidence in defense of Blechinger's challenge under 609.035, because Blechinger did not raise the challenge in district court. See *State v. Outlaw*, 748

is it necessary for us to resolve the parties' dispute regarding whether Blechinger's reliance on the complaint and victim-impact statement is appropriate.

Precedent is clear: broad statements regarding a defendant's criminal purpose do not unite separate acts into a single course of conduct. *See Degroot*, 946 N.W.2d at 366 (“[A] general desire to have penetrative sex with a minor is too broad a purpose to unify distinct criminal acts.”). Instead, courts ask “whether all of the acts performed were necessary to or incidental to the commission of *a single crime* and motivated by an intent to commit that crime.” *State v. Barthman*, 938 N.W.2d 257, 267 (Minn. 2020) (emphasis added) (quotation omitted).

For example, in *State v. Scott*, the supreme court held that the defendant could not be sentenced for both possession of burglary tools and burglary because the defendant committed the offenses at the same time and “possessed those tools for the purpose of facilitating the burglary.” 298 N.W.2d 67, 68 (Minn. 1980). But in *Bakken*, the supreme court allowed multiple sentences for multiple convictions of child-pornography possession, rejecting an argument that acts of possession were intended to achieve the single criminal objective of satisfying sexual urges. 883 N.W.2d at 271-72. The supreme court reasoned that “Bakken's offenses were not in furtherance of, or even incidental to, the successful completion of any of his other offenses.” *Id.* at 271. The same is true here. Blechinger

N.W.2d 349, 356 (Minn. App. 2008) (stating that if a defendant did not object at sentencing to the district court's inclusion of an out-of-state conviction in his criminal-history score, the proper remedy is to remand the case and permit the state “to further develop the sentencing record so that the district court can appropriately make its determination”), *rev. denied* (Minn. July 15, 2008).

did not need to violate the DANCO to possess the methamphetamine, and he did not need to possess the methamphetamine to violate the DANCO. Neither of his offenses was in furtherance of, or even incidental to, successful completion of the other offense.

Moreover, the difficulty with Blechinger's argument is that his purported singular criminal objective—*using* methamphetamine with CN—is not a defined crime. Blechinger is not charged with *using* methamphetamine with CN; he is charged with possessing methamphetamine and having prohibited contact with CN. And because the law penalizes “possession” of a controlled substance, and not necessarily the “use” of a controlled substance, we are not persuaded that Blechinger's desire to “use” methamphetamine with CN constitutes a “criminal objective.” *See State v. Lewis*, 394 N.W.2d 212, 216-17 (Minn. App. 1986) (stating that “[t]he general policy underlying [Minnesota's controlled-substance law] may encompass the use of controlled substances, however, the principles of statutory construction constrain this court from interpreting the term ‘possession’ to include mere presence of morphine within a person's body” and that “[t]he usual and ordinary meaning of the term ‘possession’ does not include substances injected into the body and assimilated into the system.”), *rev. denied* (Minn. Dec. 12, 1986).

We hold that Blechinger's desire to use methamphetamine with CN is not a single “criminal” objective as a matter of law. Thus, the record establishes that the offenses did not occur in a single behavioral incident, and Blechinger's multiple sentences do not violate section 609.035. We therefore affirm.

Affirmed.