STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0364

State of Minnesota,
Respondent,

vs.

Amani Fardan,
Appellant.

Filed June 30, 2009
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-06-005997

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Bradford S. Delapena, Special Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.[*]

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

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

HALBROOKS, Judge

Appellant appeals from his convictions of first-degree aggravated robbery, second-degree assault, kidnapping, first-degree burglary, first-degree criminal sexual conduct, and false imprisonment. He argues that the district court erroneously (1) admitted his confession because his *Miranda* waiver was not knowing, intelligent, and voluntary; (2) excluded evidence that an accomplice-witness, R.G., testified for the state as a result of prosecution threats and that appellant was particularly suggestible due to fetal-alcohol effect (FAE); (3) convicted him of multiple offenses against the same victims; (4) sentenced him on the second-degree assault convictions that were part of the same behavioral incident; and (5) imposed an aggregate sentence that unfairly exaggerates the criminality of his conduct. Because we conclude the district court improperly convicted appellant of three duplicative offenses against the same victims, we reverse and remand in part. But we otherwise affirm the district court.

FACTS

In the early morning hours of October 10, 2005, appellant Amani Fardan was with R.G., M.B., and Wandlee Jourdain. They were 15,[1] 16, 16, and 22, respectively. At about 2:00 a.m., the foursome was in the parking lot of a south Minneapolis grocery store and observed C.D. (a female) and A.K. (a male) emerge, carrying groceries.

[1] Appellant was 15 at the time of the offenses and the interrogation, but he was 17 at the time of trial and is now 18.

Appellant and his accomplices decided to rob the couple, so they followed them. When C.D. and A.K. parked near their apartment, the foursome proceeded to rob them. Appellant brandished a gun during the robbery. He and his accomplices took C.D.'s and A.K.'s wallets and keys and ordered the couple to get in the trunk of the car that the foursome was driving. They drove around, looking for an ATM, and took money out of C.D.'s bank account, using her debit card and the PIN they had obtained from her.

The foursome then decided to rob C.D. and A.K.'s apartment. Appellant and his accomplices learned from their two captives that there was a third roommate, S.D. (a female), who would be sleeping in the living room. S.D. awoke to find the foursome in the apartment. They bound S.D.'s hands, covered her head with a blanket, and told her that they had shot her roommates. Appellant's three companions left the apartment carrying stolen items. Appellant proceeded to fondle S.D., digitally penetrate her, penetrate her with a sex toy that he found in a bedroom, and have intercourse with her twice.

After stealing items from the apartment, appellant and his accomplices removed C.D. and A.K. from the trunk, ordered them to remove their clothing, and then forced them back into the trunk. Appellant fired three shots through the trunk lid; one bullet grazed C.D.'s arm and another struck her in the right thigh and lodged in her leg. The foursome subsequently left C.D. and A.K., who were still naked, on the shoulder of I-35W and went to R.G.'s house to unload the stolen items. C.D. and A.K. were able to flag down a passing motorist and subsequently called the police.

The police quickly focused their investigation on appellant and his cohorts. Appellant was arrested at a friend's home during the early morning hours of October 15. The officers who arrested appellant were in plain clothes. They handcuffed appellant and placed him in the back of an unmarked vehicle. Appellant testified that he asked the arresting officers, as they took him into Minneapolis City Hall, if "my dad could be present, like, he can be with me, and they said he will." Appellant also saw his father present inside City Hall as the officers walked him through the lobby.

Appellant was interrogated by two Minneapolis police officers who were not present at appellant's arrest or when he was brought into City Hall. The interrogation was video recorded, and a partially redacted version of the interrogation was played for the jury at appellant's trial.

At the beginning of the interrogation, the officers told appellant that they had a search warrant for his DNA, and they took two cheek-swab samples from him. The officers also verified appellant's family and living situation, including that he lived with his father. Appellant did not, at the mention of his father, request his father's presence. The officers then informed appellant why he was being interrogated and obtained a purported *Miranda* waiver:

> Q. Do you know why you're down here, Amani?
> A. You tell me.
> Q. Huh?
> A. You tell me.
> Q. Well, I'm telling you that, because you're down here because you were involved in some incidences that occurred late Sunday night, early Monday morning. We've been talking to a lot of people today. We've been up since, almost twenty-four hours doing this,

talking to people and we've talked to just about everybody. They gave us their stories of what happened, what they recall and they all went ahead and spoke for themselves and here's your opportunity. I'm sure you have questions for us and want to ask us and we might want to ask you some questions and clear things up. Those guys want, you don't want those guys speaking for Amani. Only Amani speaks for Amani, right? You want them guys to determine what's going to happen to your future? Here's the deal. Because you were brought down here and you are not free to leave right now, I'm going to read you your rights. Have you been read your rights before, Amani? You have the right to remain silent. Anything you say can and will be used against you in court. You have the right to an attorney. You can have an attorney present now or any time during questioning. If you cannot afford an attorney, one will be provided for you without cost. Do you understand what that all means?

A. Yes.

Q. You have the right to remain silent. What does that mean to you? Amani?

A. I ain't got to talk to you without a lawyer.

Q. Okay. You don't have to talk to us without a lawyer. That's right.

And if you cannot afford a lawyer, one will be provided for you. Do you know what that means?

A. Yeah.

Q. Okay. Having all those rights in mind, we want to talk to you and ask you some questions about what happened, what these people are saying. What we hear from other people that are involved.

A. What people?

Q. Well, let me get by this before I can talk to you. I got to ask you, do you want to talk to us about this? Can we ask you some questions?

A. Yeah.

Q. The incident they say you were involved in, we've talked to everybody involved. You guys were involved in an incident down south Minneapolis that occurred, like I said, early on Monday morning. And we know all about it. We know who all the players

are. And we know what happened. We want your side of the story.

A. All right. All right, can I get a cigarette from anybody?

During the course of the interrogation, appellant confessed to the rape of S.D., kidnapping C.D. and A.K., taking money from an ATM using C.D.'s debit card, and shooting into the occupied trunk. At various points, he also tried to place blame on others for either committing the acts or forcing him to commit them. At the end of the interrogation, when the officers were preparing to transport him to the juvenile detention center, appellant asked about his father: "Can I see my dad real quick? . . . Can I go see my dad?"

A grand jury returned an indictment on 15 relevant counts:[2]

1. First-degree aggravated robbery (C.D.)
2. First-degree aggravated robbery (A.K.)
3. Second-degree assault (C.D.)
4. Second-degree assault (A.K.)
5. Kidnapping, to facilitate the commission of a felony (C.D.)
6. Kidnapping, to facilitate the commission of a felony (A.K.)
7. Kidnapping, to terrorize the victim or another (C.D.)
8. Kidnapping, to terrorize the victim or another (A.K.)
9. Kidnapping, to facilitate the commission of a felony (S.D.)
10. First-degree burglary, with a dangerous weapon
11. First-degree burglary, involving an assault
12. First-degree criminal sexual conduct, with a dangerous weapon (S.D.)
13. First-degree criminal sexual conduct, with fear of great bodily harm (S.D.)
14. First-degree criminal sexual conduct, with force or coercion (S.D.)
15. Kidnapping, to terrorize the victim or another (S.D.)

[2] The grand jury also indicted appellant on three counts related to crimes against a fourth victim, B.B.B. Those counts were tried separately, and appellant's separate appeal to the supreme court is pending. *State v. Fardan*, No. A08-1425 (Minn. argued Apr. 7, 2009).

The district court certified appellant to stand trial as an adult. The certification was appealed to this court, and we affirmed. *In re Welfare of A.J.F.*, No. A06-303, 2007 WL 92843 (Minn. App. Jan. 16, 2007). The district court denied appellant's motions to suppress his statement to the police and to allow him to present evidence of FAE for the purposes of showing that he committed his acts under duress and that his statement to the police was not voluntary.

A jury rendered guilty verdicts on all counts, except first-degree criminal sexual conduct with a dangerous weapon (count 12); first-degree criminal sexual conduct with fear of great bodily harm (count 13); and kidnapping S.D. to terrorize her or another (count 15). The jury also returned a guilty verdict on false imprisonment of S.D., which was a lesser-included charge of kidnapping S.D. to terrorize her.

The district court imposed an aggregate sentence of 486 months with 777 days' credit, a ten-year conditional-release term, and restitution. This appeal follows.

D E C I S I O N

I.

Appellant's principal argument is that his *Miranda* waiver was not knowing, intelligent, and voluntary and that the district court erred by not suppressing the statement he gave after this purportedly defective waiver. Whether a juvenile's *Miranda* waiver is knowing, intelligent, and voluntary is a fact question that depends on the totality of the circumstances. *State v. Jones*, 566 N.W.2d 317, 324 (Minn. 1997). The district court's legal conclusion is reviewed de novo, but its findings of fact surrounding the purported waiver are reviewed for clear error. *State v. Burrell*, 697 N.W.2d 579, 591 (Minn. 2005).

Among the factors to be considered are the juvenile's age, maturity, intelligence, education, prior criminal experience, and ability to comprehend; the presence or absence of parents; and the circumstances of the interrogation and detention themselves, such as any physical deprivations, the length and legality of the detention, the lack of or adequacy of warnings, and the nature of the interrogation. *Burrell*, 697 N.W.2d at 595; *State v. Hogan*, 297 Minn. 430, 440, 212 N.W.2d 664, 671 (1973); *see also Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 2572 (1979) (stating that the inquiry is concerned with whether the juvenile "has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights").

1. Age and maturity

Appellant was 15 at the time of the interrogation. The supreme court has upheld *Miranda* waivers made by 15 year olds. *E.g.*, *State v. Ouk*, 516 N.W.2d 180, 185 (Minn. 1994); *Hogan*, 297 Minn. at 441, 212 N.W.2d at 671. Nothing in the record indicates that appellant was an immature 15-year-old. This factor weighs in favor of admitting the statement.

2. Physical deprivations; length and legality

Appellant does not assert that he suffered any significant physical deprivations, nor that his detention was illegal or improperly long. These factors weigh in favor of admitting the statement.

3. Education, intelligence, and ability to comprehend

Appellant asserts that he has a mental deficiency as a result of his diagnosed FAE. But the psychologists' report on which he relies concludes that "[o]verall, [appellant]

demonstrates cognitive abilities within the average range." And on specific tests that measure skills relevant to making a *Miranda* waiver—general cognitive functioning, executive functioning, and language reasoning and judgment—appellant scored within the normal range for his age group. Appellant relies on the fact that, on some of the tests, he measured near the low end of the average range. But "average" is a range on these tests, not a specific point. The report does not indicate that he was below average, just at the low end of average. Its main recommendations all relate to providing him with structure and guidance as to appropriate behaviors. As the district court concluded, "The report fairly indicates that [appellant] has the intelligence and capacity to understand the warnings that were given to him." This factor weighs in favor of admitting the statement.

4. Prior criminal experience

Appellant argues he has no prior criminal experience, only prior juvenile-justice experience. And because the juvenile-justice system is rehabilitative rather than punitive and adversarial, *State v. Loyd*, 297 Minn. 442, 445, 212 N.W.2d 671, 674 (1973), he argues that juvenile-justice experience with *Miranda* should not be weighed against him.

The parties stipulated to the district court that appellant had previously been provided a *Miranda* advisory by his school principal before being interviewed; the district court observed that there was no detail of the alleged offense, but that appellant "is not a complete stranger to the justice system."

Appellant seemed quite comfortable with the *Miranda* advisory, even restating the warning in his own terms. This demonstration of his knowledge and understanding of his rights supports the determination that he made a valid waiver. *See Burrell*, 697 N.W.2d

at 608 (Hanson, J., concurring and dissenting). This factor weighs in favor of admitting the statement.

5. Nature of the interrogation

The nature-of-the-interrogation factor is concerned with psychological tactics such as deception, trickery, threats, and cajolement used to persuade a suspect to waive his *Miranda* rights. *Burrell*, 697 N.W.2d at 596 (majority opinion). Appellant argues that the interrogating officers put psychological pressure on him, specifically challenging his "manliness" if he did not talk to them. But the record does not support this contention. The officers did tell appellant that they had just spoken to others, and they suggested that appellant might not want to let other suspects speak for him. This is not a challenge to his manliness. Nor does it appear that appellant was intimidated or coerced by the officers. Instead, he was argumentative from the outset. This factor weighs in favor of admitting the statement.

6. Lack or adequacy of warnings

Appellant argues he was inadequately warned because he was not explicitly warned of the possibility of adult criminal prosecution. Although the best practice may be to explicitly warn a juvenile of possible adult prosecution, the supreme court has rejected the creation of a per se rule that would require an explicit warning. *Ouk*, 516 N.W.2d at 185. Awareness of potential adult criminal consequences can be imputed to a juvenile. *Id.* Appellant contends that such awareness cannot be imputed to him, in part because his arrest lacked drama or a show of force. While he was arrested by plainclothes officers and placed in an unmarked vehicle, it is also significant that he was

arrested in the middle of the night, handcuffed, taken to City Hall rather than the juvenile detention center, and aggressively interrogated after providing a DNA sample pursuant to a search warrant. These are not the circumstances of a non-adversarial juvenile interview. *See In re Welfare of G.M.*, 542 N.W.2d 54, 61 (Minn. App. 1996) (noting that awareness of potential criminal responsibility could be imputed to a juvenile who was interrogated at a police department by a police officer), *aff'd*, 560 N.W.2d 687 (Minn. 1997). In addition, appellant volunteered his involvement in the rape after the officers told him only that they were interested in some incidents that had occurred early Monday by a south Minneapolis grocery store. This factor weighs in favor of admitting the statement.

7. Presence or absence of parents

Appellant argues that the police effectively denied his attempt to protect his rights when he asked the arresting officers to see his father. He contends that knowledge of his earlier request should be imputed to the interrogating officers and that their failure to bring his father into the interrogation room was an affirmative effort to prevent him from getting advice about making a *Miranda* waiver.

The supreme court has repeatedly rejected a per se rule requiring parental presence at interrogations of juveniles. *Burrell*, 697 N.W.2d at 597; *Hogan*, 297 Minn. at 440, 212 N.W.2d at 671. Although a request for a parent may, in the totality of the circumstances, operate to invoke the right to remain silent, it does not always do so. *Fare*, 442 U.S. at 725, 99 S. Ct. at 2572. As the Supreme Court has recognized, only the request for a lawyer automatically triggers an invocation of rights because lawyers play a unique role

in our system, and their training in the law positions them to assist the accused. *Id.* at 719, 99 S. Ct. at 2569.

Appellant contends that the police should be admonished for ignoring his request to speak with his parents, citing *State v. Lemieux*, 726 N.W.2d 783, 789 (Minn. 2007), for the proposition that the arresting officers' knowledge of his request must be imputed to the interrogating officers. We disagree.[3] First, *Lemieux* is an emergency-aid warrantless-search case, not a *Miranda* case. Unlike the law-enforcement function served by interrogation, emergency-aid searches serve a "community-caretaking function." *Lemieux*, 726 N.W.2d at 787. Second, the fact that a juvenile has requested parental presence is not dispositive in the way that a request for a lawyer would be. As *Fare* recognized, there is a difference between lawyers and laypersons.

Appellant's single request for his father, which the district court noted was established only by appellant's own testimony, was simply not enough to indicate that he was invoking his right to remain silent. This is not *Burrell*, where the accused asked for his mother 13 times. 697 N.W.2d at 595. At most, appellant asked for his father twice, several hours apart—once upon entering City Hall and once at the conclusion of the interrogation. Nor is this a situation where appellant did not believe that he could ask for

[3] We observe that a small number of jurisdictions, not including Minnesota, have adopted the imputation rule that appellant proposes. *See, e.g.*, *United States v. Scalf*, 708 F.2d 1540, 1544–45 (10th Cir. 1983); *People v. Medina*, 375 N.E.2d 78, 80 (Ill. 1978); *State v. Arceneaux*, 425 So. 2d 740, 744 (La. 1983); *State v. Middleton*, 399 N.W.2d 917, 924 n.7 (Wis. Ct. App. 1986), *overruled on other grounds by State v. Anson*, 698 N.W.2d 776, 793 (Wis. 2005). It is not our place to make a dramatic change in constitutional interpretation. *State v. Rodriguez*, 738 N.W.2d 422, 431–32 (Minn. App. 2007), *aff'd*, 754 N.W.2d 672, 675 (Minn. 2008).

his father. Appellant, a 15-year-old who could not legally smoke, had the self-assurance to ask two police officers for a cigarette at the outset of the interrogation. If appellant had wanted his father's presence, there is no reason to conclude that he would not have requested it. This factor weighs in favor of admitting the statement.

Our review of the record leads us to conclude, based on the totality of the circumstances, that appellant had the capacity to understand the warnings given him, the nature of his rights, and the consequences of waiving them. We therefore affirm the district court's determination that appellant's *Miranda* waiver was valid.

II.

Appellant argues the district court erroneously excluded (a) evidence that R.G. testified only because of the prosecutor's threats against him and (b) expert testimony regarding FAE. Evidentiary rulings will only be reversed if the district court clearly abused its discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). But the exclusion of defense evidence is subject to harmless-error analysis, and if "there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, then the erroneous exclusion of the evidence is prejudicial." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994); *see also State v. Ferguson*, 742 N.W.2d 651, 656–57 (Minn. 2007) (stating Confrontation Clause violations are subject to harmless-error analysis).

A. R.G.'s testimony

To support his argument that R.G. was threatened by the prosecutor, appellant selectively quotes from the trial transcript. But the full exchange between R.G. and the

district court provides a more complete picture: R.G. spontaneously stated that he did not want to testify, and the prosecutor had recently visited him in jail to say that she would withdraw his plea agreement if he did not testify. The district court reminded R.G. that he had agreed to testify as part of the plea agreement and confirmed that a public defender had visited R.G. the previous day to talk about his upcoming testimony. After the prosecutor and appellant's counsel argued to the court about what limits, if any, should be placed on appellant's ability to cross-examine R.G., the district court decided "to order [appellant] not to go into what [R.G.] contends was discussed in the jail with [the prosecutor] present until [appellant has] completed the rest of [his] examination." After appellant cross-examined R.G., the district court again denied appellant's "request to examine him about any conversation that might have occurred in the jail."

Cross-examination of the state's witnesses is one of the primary interests protected by the Confrontation Clause. *Ferguson*, 742 N.W.2d at 656. Cross-examination is the principal means of testing a witness's believability and the truthfulness of the witness's testimony. *Id.* Part of this testing is exposing the witness's biases or motivation for testifying. *Id.* But "the Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S. Ct. 2658, 2664 (1987) (quotation omitted).

Appellant had, and took advantage of, the opportunity to cross-examine R.G. about his biases and motivations for testifying. R.G. was specifically asked whether one of the conditions of his plea agreement was that he testify at his co-defendants' trials.

Appellant also confirmed that R.G. "could have gotten a lot more time" if he had rejected a plea agreement and gone to trial. Appellant asked R.G. whether, due to the state's motion for an upward departure, he could have spent the rest of his life in prison if he had gone to trial and lost; R.G. responded, "Guaranteed." And at the end of this line of questioning, appellant reinforced the terms of the guilty plea: "And part of this deal was to testify, isn't that correct?" Based on this record, the district court acted within its discretion by ruling that appellant could not inquire about the alleged jailhouse conversation.

B. FAE evidence

Appellant sought to introduce FAE evidence for two purposes: (1) to establish his defense of duress by helping the jury see "the whole man" and (2) to undermine the apparent voluntariness of his statement to the police.

Appellant's challenge is based solely on alleged error under Minn. R. Evid. 702 and the *Frye–Mack* standard for expert testimony. But the district court determined that appellant's proposed expert evidence was excludable under both rule 702 and rule 403.

Expert testimony is subject to both rule 403 and rule 702. *State v. Koskela*, 536 N.W.2d 625, 629 (Minn. 1995). Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Minn. R. Evid. 403. Rule 702 permits the admission of expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. But the expert opinion must have "foundational reliability"; and if it involves a novel theory, "the underlying

scientific evidence [must be] generally accepted in the relevant scientific community." *Id.*

The district court's 702 ruling was based on an absence of scientific foundational reliability for the proposed testimony that appellant, as a result of FAE, is "impulsive and easily talked into difficult behaviors by [his] peers." First, the report on which the testimony would be based did not support a factual conclusion, independent of FAE, that appellant behaves in that manner. The report does not indicate that the authoring psychologists observed him in the presence of his peers. Rather, the behavioral and emotional evaluations were based on reports from appellant's father, who indicated that appellant was getting in fights at school, and on the psychologists' own interactions with him, which would reflect how appellant responded to adult direction, not peer influence. Second, the report did not draw any connection between FAE and the alleged behavioral tendency for suggestibility. Although appellant criticizes the district court for becoming an amateur scientist by questioning the report, the district court properly determined that the proposed testimony lacked the required "foundational reliability."

The district court's rule 403 conclusion was based on its concerns that the proposed testimony would be "unfairly prejudicial to the State" and have a "tendency to confuse the jury." "[E]xpert testimony is generally not admissible during the guilt phase of a trial to inform the fact-finder about the general effects of a mental illness." *State v. Bird*, 734 N.W.2d 664, 673 (Minn. 2007). The supreme court has recognized an exception for a defendant with "a past history of mental illness" that "helps explain 'the whole man' as he was before the events of the crime." *Id.* (quotation omitted). But

appellant does not have "a past history of mental illness," at least not one that is evidenced by the report on which he relies. The report places the FAE diagnosis on Axis III and indicates an Axis I diagnosis of attention deficit hyperactivity disorder and no Axis II diagnosis. Axis III is used to describe general medical conditions that may affect the mental conditions reported on Axes I and II. Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* 27-29 (4th ed. Text Revision 2000). And it is on Axes I and II that one finds the disorders usually relied upon by criminal defendants to evade culpability. *Compare id.* at 28–29 (listing schizophrenia on Axis I and schizoid personality disorder on Axis II) *with Koskela*, 536 N.W.2d at 629–30 (discussing proposed evidence of schizoid personality disorder), *and State v. Provost*, 490 N.W.2d 93, 97 n.1 (Minn. 1992) (noting proffered diagnosis of schizophrenia).

Even if appellant has a history of mental illness, the district court's concerns about unfair prejudice and jury confusion are well-grounded. The supreme court has long been concerned about the possibility of jury confusion and the use of psychiatric opinion testimony as a backdoor way of adopting diminished-capacity and diminished-responsibility defenses. *Provost*, 490 N.W.2d at 100 (stating that "if psychiatric opinion testimony is admitted on the issue of whether the defendant *did or didn't* have the requisite guilty mind, the jury will inevitably take the testimony as an invitation to consider whether the defendant *could or couldn't* have a guilty mind"). The proposed FAE evidence simply comes too close to inviting the jury to exonerate him on the basis of diminished capacity or diminished responsibility. No jury instruction could undo that

harm. *See id.* ("The law cannot giveth psychiatric testimony on the one hand and taketh it away with the other.")

We therefore affirm the district court's exclusion of appellant's proposed FAE testimony.

III.

Appellant argues the district court improperly convicted him of multiple offenses against the same victim. He cites three convictions and argues that they must be vacated: kidnapping C.D. to terrorize her (count 7), which is duplicative of the conviction of kidnapping her to facilitate the commission of a felony (count 5); kidnapping A.K. to terrorize him (count 8), which is duplicative of the conviction of kidnapping him to facilitate the commission of a felony (count 6); and burglary involving an assault (count 11), which is duplicative of the conviction of burglary with a dangerous weapon (count 10).

Under Minn. Stat. § 609.04 (2004), "a defendant cannot be convicted twice of the same offense . . . based on the same act or course of conduct." *State v. Hodges*, 386 N.W.2d 709, 710 (Minn. 1986). The statute also "bars the conviction of a defendant twice for the same offense against the same victim on the basis of the same act." *State v. Ture*, 353 N.W.2d 502, 517 (Minn. 1984). Although a conviction that is improper under section 609.04 must be vacated, the underlying finding of guilt remains intact. *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999).

Because the convictions on counts 7, 8, and 11 are duplicative and violate section 609.04, we reverse in part and remand to the district court to correct this error.

IV.

Appellant argues the district court improperly sentenced him on the second-degree assault convictions concerning C.D. and A.K. (counts 3–4) because the assaults were part of the same behavioral incident as the aggravated robberies (counts 1–2). Whether offenses are part of the same behavioral incident is a fact determination we review for clear error. *State v. Butterfield*, 555 N.W.2d 526, 530 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996).

The legislature has provided 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 (2004). "Whether multiple offenses arose out of a single behavior incident depends on the facts and circumstances of the particular case." *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). In making this determination, a court "must consider whether the offenses (1) arose from a continuous and uninterrupted course of conduct, (2) occurred at substantially the same time and place, and (3) manifested an indivisible state of mind, or were motivated by a single criminal objective." *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008).

Appellant seizes on the opening line of a footnote in the district court's findings on aggravating factors: "In this case, [appellant] has been convicted of multiple counts evolving from a continuous course of conduct." But the footnote continues:

> These circumstances present issues of attribution of particular facets of conduct as aggravating factors of various counts. Thus, for example, whether particular acts of cruelty should

> be attributed to one count as opposed to two or more counts is not always capable of easy resolution.

The district court was not using the "continuous course of conduct" language with regard to the *Suhon* considerations or a section 609.035 analysis. Rather, the district court was trying to explain why it found particular cruelty as an aggravating factor for only the kidnapping offenses, even though appellant's cruel behavior might have aggravated (from the victims' perspectives) the assault, burglary, and robbery offenses.

Further, the second and third *Suhon* considerations weigh against a determination that the assault and aggravated robberies were part of the same behavioral incident. Appellant fired blindly into the trunk, risking hitting A.K. and C.D. and actually hitting C.D., well after the robberies were complete. Time had passed, and the vehicle was no longer near the victims' apartment. Nor did the assaults share a criminal objective with the robberies; there was no purpose in shooting wildly toward A.K. and C.D. except to inflict fear upon them.

The district court's treatment of the aggravated robberies and assaults as not part of a single behavioral incident is not clearly erroneous.

V.

Appellant argues that his 486-month aggregate sentence unfairly exaggerates the criminality of his conduct. When a district court imposes multiple sentences, it may not "unfairly exaggerate the criminality of the defendant's conduct." *State v. Williams*, 337 N.W.2d 387, 390 (Minn. 1983) (quotation omitted). In reviewing an aggregate sentence for unfair exaggeration, we compare the defendant's sentence with those of other

offenders. *Id.* Appellant fails to address how his aggregate sentence unfairly exaggerates the criminality of his conduct or what an appropriate sentence would be. He simply asks us to "modify and reduce" the sentence based on our experience reviewing sentences.

But as the state argues, "it is virtually impossible to exaggerate the criminality of [a]ppellant's brutal, terroristic conduct." Appellant chose his victims at random, followed them home, robbed them, forced them into the trunk of a vehicle, and threatened them with further violence while driving them around Minneapolis. He took them back to their home in order to rob it. When there, he bound S.D., told her that her roommates had been shot, and repeatedly raped her. He randomly and blindly shot into the trunk where A.K. and C.D. had been placed, and he left them naked on the side of a busy interstate highway.

The district court did not reach its sentence in haste. "I've had a lot of time to think about this and I've devoted a lot of time to thinking . . . . I've done a number of different calculations and used different rationales . . . . [Appellant] committed serious, violent offenses and . . . now he's going to have to pay the price for doing that." The district court was well aware that, under the sentence it was imposing, appellant could expect to spend at least 25 years behind bars. Appellant's aggregate sentence does not unfairly exaggerate the criminality of his conduct.

Affirmed in part, reversed in part, and remanded.