STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0561

State of Minnesota,
Respondent,

vs.

Benyamin Abner Israel,
Appellant.

Filed February 20, 2018
Affirmed in part and vacated in part
Schellhas, Judge

Kandiyohi County District Court
File No. 34-CR-15-229

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Shane Baker, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges his felony and misdemeanor convictions of fleeing a peace officer and his sentences. We affirm in part and vacate in part.

FACTS

After dark on a March evening in 2015, Officer Josh Helgeson investigated a car that he observed stopped in the middle of the road without its headlights or taillights illuminated. The driver of the car responded to the officer's approach by driving into and accelerating through a parking lot and onto a nearby street. Officer Helgeson pursued the car at a fast pace for approximately 30 seconds, at which point the car entered an open field and stopped. The driver exited the car and ran, and Officer Helgeson pursued the driver on foot. After Officer Helgeson gave the driver several verbal commands, the driver stopped, and Officer Helgeson arrested him.

Officer Helgeson identified the driver as appellant Benyamin Israel. Respondent State of Minnesota charged Israel with felony fleeing a peace officer by motor vehicle and misdemeanor fleeing a peace officer by means other than a motor vehicle under Minn. Stat. § 609.487, subds. 3, 6 (2014), and misdemeanor driving with a revoked license under Minn. Stat. § 171.24, subd. 2 (2014).

Israel moved the district court to dismiss all charges on the bases that law enforcement lacked reasonable articulable suspicion for a traffic stop and that the stop violated his constitutional right to interstate travel. The district court denied the motion. Israel then waived his right to a jury trial and submitted the case to the court under Minn. R. Crim. P. 26.01, subd. 4. The district court found Israel guilty and convicted him of all three counts.

This appeal follows.

D E C I S I O N

On appeal, Israel challenges his felony conviction of fleeing a peace officer by motor vehicle, his misdemeanor conviction of fleeing a peace officer by means other than a motor vehicle, and his sentences.

I.

Israel states in his brief that "[t]he [district] court denied [his] motion to *suppress*, ruling that the police stop of [him] did not violate [his] constitutionally guaranteed right to travel." (Emphasis added.) He also states that "this Court may independently review the facts and determine whether, as a matter of law, the district court erred in *suppressing* or not *suppressing* the evidence." (Emphasis added.) But the record does not reflect that Israel moved the district court to suppress evidence. And in its order, the district court noted that Israel argued that "all charges should be dismissed because law enforcement lacked reasonable articulable suspicion for a traffic stop and because his constitutionally guaranteed right to travel was violated." On appeal, Israel does not challenge the district court's determination that the officer who stopped his vehicle had a reasonable, articulable suspicion to stop him. We therefore address whether the statutes underlying Israel's convictions violated his constitutional right to travel.

"A person may be charged with a crime only where there is probable cause to believe that the person is guilty—that is, where facts have been submitted to the district court showing a reasonable probability that the person committed the crime." *State v. Lopez*, 778 N.W.2d 700, 703 (Minn. 2010) (citing Minn. R. Crim. P. 2.01). Appellate courts

review a district court's factual findings in a probable-cause determination for clear error and the district court's application of the legal standard of probable cause de novo. *Id.*

Minnesota law requires that motor-vehicle headlights be visible from sunset to sunrise and that a motor vehicle driven have a red tail lamp visible from at least 500 feet away. Minn. Stat. §§ 169.48, subd. 1(1), .50, subd. 1(a) (2014). Israel argues that the district court erred by concluding that the Minnesota statutes that required him to use lights while driving at night did not violate his right to interstate travel and denying his dismissal motion. We disagree.

"The constitutionality of a statute is a question of law, which [appellate courts] review de novo." *Schatz v. Interfaith Care Cntr.*, 811 N.W.2d 643, 653 (Minn. 2012). Appellate courts "presume that Minnesota statutes are constitutional and will only strike down statutes as unconstitutional when absolutely necessary." *Id.* at 653–54. "The party challenging the constitutionality of a statute, therefore, must demonstrate that the statute is unconstitutional beyond a reasonable doubt." *Id.* at 654.

"The right to interstate travel is a fundamental right recognized by the United States Constitution." *Id.* In analyzing right-to-interstate-travel issues, appellate courts "ask whether the right to travel has been so burdened by the challenged statute that the statute's classification requires strict scrutiny rather than minimal rational basis analysis because, in reality, right to travel analysis refers to little more than a particular application of equal protection analysis." *Id.* (quotations omitted). "The right to interstate travel is burdened when a statute *actually deters* such travel, when *impeding* travel is its primary objective,

or when it uses any *classification* which serves to *penalize* the exercise of that right." *Id.* (quotation omitted) (emphasis in original).

"But a statute does not burden the right to interstate travel unless it affects a component of the right." *Id.* The right to travel has at least three different components:

> (1) the right of a citizen of one state to enter and to leave another state, (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and, (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of *that State*.

Id. (quotation omitted) (emphasis in original).

"The first component, the right to move from state to state, is affected only when a statute directly impairs the exercise of the right to free interstate movement by imposing some obstacle on travelers." *Id.* Israel does not explain how the subject statutes in this case impose an obstacle on interstate travelers.

"The second component of the right to travel, the right to be temporarily present in a second state, is protected by the Privileges and Immunities Clause of the United States Constitution." *Id.* (citing U.S. Const. art. IV, § 2, cl. 1). "This right prevents a state from discriminating against temporary visitors where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.* (quotation omitted). The statutes at issue in this case do not discriminate against temporary visitors merely because they are citizens of other states and therefore do not impact the second component of the right to interstate travel.

"The third component of the right to interstate travel—the right to be treated like other citizens of the second state—is protected by the Equal Protection Clause of the United States Constitution." *Id.* at 654−55 (citing U.S. Const. amend. XIV, § 1).

> [T]he third component of the interstate travel right protects the right of a citizen of one state to become a citizen of a second state. This right is affected when the new state places some burden on citizens of other states who *move to* the new state to become permanent residents.

Id. (citing *Mitchell v. Steffen*, 504 N.W.2d 198, 199, 203 (Minn. 1993) (holding that a Minnesota statute that reduced general-assistance benefits to indigents who had not resided in Minnesota for at least six months was unconstitutional)). Like in *Schatz*, "[b]ecause [the statutes at issue in this case], do[] not place any burden on a citizen of another state who moves to Minnesota, it follows that the statute[s] do[] not affect the third component of the right to interstate travel." *Id.*

Here, Israel acknowledges, "Minnesota courts have repeatedly upheld the provisions of the motor-vehicle code as constitutional." And he fails to identify how requirements for headlights and taillights violate his right to travel. We conclude that Israel has failed to demonstrate that Minn. Stat. §§ 169.48, subd. 1(1), .50, subd. 1(a), are unconstitutional beyond a reasonable doubt because they burden his constitutional right to interstate travel. We therefore affirm the district court's denial of Israel's motion to dismiss for lack of probable cause.

II.

Israel argues that the district court erred by convicting and sentencing him for both the felony and misdemeanor fleeing offenses. Although Israel did not raise the issue in

district court, we do not deem the issue waived. *See Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) ("[A]n appellant does not waive claims of multiple convictions or sentences by failing to raise the issue at the time of sentencing.").

"A conviction is defined as either a plea of guilty or a verdict or finding of guilt that is accepted and recorded by the court." *Id.* (quotation omitted). "A guilty verdict alone is not a conviction." *Id.* "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2014). An "included offense" is "[a] crime necessarily proved if the crime charged were proved." *Id*. "To determine whether an offense is an included offense falling under [section 609.04], a court examines the elements of the offense." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006).

The elements of fleeing by motor vehicle are: (1) fleeing or attempting to flee, (2) by motor vehicle, (3) a peace officer acting in his or her lawful discharge of an official duty, (4) when the offender knows or should reasonably know the same is a peace officer. Minn. Stat. § 609.487, subd. 3. The elements of fleeing a peace officer by other means are: (1) fleeing or attempting to flee, (2) by any means except by motor vehicle, (3) a peace officer acting in his or her lawful discharge of an official duty, (4) for the purpose of avoiding arrest, detention, or investigation, or to conceal or destroy potential evidence related to the commission of a crime. *Id.*, subd. 6.

Because each offense requires proof of an element that the other does not, neither offense necessarily is proved when the other is proved. Fleeing by means other than a motor vehicle therefore is not a lesser-included offense of fleeing by motor vehicle. *See State v.*

Mitchell, 881 N.W.2d 558, 562 (Minn. App. 2016) (concluding that first-degree burglary (dangerous weapon) is not a lesser-included offense of first-degree burglary (assault) because each crime "requires proof of an element that the other does not"), *review denied* (Minn. Aug. 23, 2016).

"But section 609.04 does more than preclude conviction of both an offense and an included offense." *Id.* at 563. "[S]ection 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985) (footnote omitted).

Single behavioral incident under Minn. Stat. § 609.035 (2014)

Contending that he committed the offenses of felony fleeing by motor vehicle and misdemeanor fleeing by other means during a single behavioral incident, Israel argues that the district court erred by convicting him of, and sentencing him for, both offenses. "Subject to various exceptions, 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." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (quoting Minn. Stat. § 609.035, subd. 1 (2014)). "The State bears the burden of proving, by a preponderance of the evidence, that a defendant's offenses were not part of a single behavioral incident." *Id.*

When deciding whether two or more offenses occurred during a single behavioral incident, appellate courts "review the district court's findings of fact for clear error and its application of the law to those facts de novo." *Id.* Here, the prosecutor did not address at sentencing whether Israel committed the crimes during a single behavioral incident, and the district court made no finding on this issue.

When "the crimes . . . contain an intent element, [appellate courts] determine whether the crimes were part of a single behavioral incident by considering (1) whether the offenses occurred at substantially the same time and place, and (2) whether the conduct was motivated by an effort to obtain a single criminal objective." *Id.* (citation and quotation marks omitted). Fleeing by motor vehicle is a specific-intent offense. *State v. Johnson*, 374 N.W.2d 285, 288 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985). Fleeing by other means also is a specific-intent crime. *State v. Wilson*, 830 N.W.2d 849, 854 (Minn. 2013).

Here, without citation to supporting caselaw, the state simply argues that "[a]lthough the separation [of the fleeing crimes] in terms of time, place, and objective are not substantial, they are enough to reasonably support the district court's imposition of separate sentences for the two counts." The state also argues that Israel "completed the crime of fleeing in a motor vehicle when he initially failed to stop and accelerated away from Officer Helgeson," and that he "completed the crime of fleeing on foot when he separately elected to run from Officer Helgeson." We disagree.

The record reflects that Israel committed his fleeing crimes in substantially the same place—the streets and a field in Willmar, and that his conduct was motivated by an effort to obtain a single criminal objective—fleeing from law enforcement. *See State v. Barnes*, 618 N.W.2d 805, 813 (Minn. App. 2000) ("[C]riminal conduct committed to avoid apprehension for another offense is generally considered part of the same behavioral incident."), *review denied* (Minn. Jan. 16, 2001). We conclude that the state failed to meet

its burden of proving, by a preponderance of the evidence, that Israel did not commit his crimes as part of a single behavioral incident.

Exception under Minn. Stat. § 609.035, subd. 5

Because we have concluded that the state failed to prove that Israel did not commit his fleeing crimes as a single behavioral incident, we must consider whether an exception to section 609.035, subdivision 1, applies. *Mitchell*, 881 N.W.2d at 563. The fleeing exception in section 609.035 provides: "Notwithstanding subdivision 1, a prosecution or conviction for violating section 609.487 is not a bar to conviction of or punishment for *any other crime* committed by the defendant as part of the same conduct." Minn. Stat. § 609.035, subd. 5 (emphasis added).[1]

Israel argues that the fleeing exception in subdivision 5 does not justify multiple convictions or sentences because both fleeing crimes are violations of section 609.487 and therefore neither crime is "any other crime" for purposes of the exception. We agree.

In *Mitchell*, the defendant argued that section 609.035, subdivision 1, prohibited multiple convictions and sentences for his crimes of first-degree burglary (assault) and first-degree burglary (dangerous weapon) because he committed the crimes during a single behavioral incident and no exception applied. 881 N.W.2d at 563. The state argued that notwithstanding Minn. Stat. § 609.035, subd. 1., the following language in the burglary statute allowed multiple sentences: "a prosecution for or conviction of the crime of burglary is not a bar to conviction of or punishment for *any other crime*." *Id.* (quoting Minn. Stat.

[1] The state does not address the exception contained in Minn. Stat. § 609.035, subd. 5.

§ 609.585 (2002)) (emphasis added). This court rejected the state's argument and concluded that "the only reasonable interpretation of 'any other crime' is a crime different from burglary," and we remanded for the court to vacate one of Mitchell's convictions. *Id.* at 564.

Here, we similarly conclude that the only reasonable interpretation of "any other crime" in section 609.035, subdivision 5, is a crime different from fleeing under section 609.487. We conclude that the district court erred by convicting Israel of both fleeing crimes and imposing sentences for both crimes. Minnesota law "contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident." *State v. Kebaso*, 713 N.W.2d 317, 32 (Minn. 2006) (quotation omitted). Israel's felony fleeing-by-motor-vehicle crime is the most serious offense. We therefore affirm Israel's conviction of, and sentence for, felony fleeing in a motor vehicle, and we vacate his conviction of, and sentence for, misdemeanor fleeing by other means.

Affirmed in part and vacated in part.