STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1980

State of Minnesota,
Respondent,

vs.

Duane John BlackBull,
Appellant.

Filed December 10, 2018
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Hennepin County District Court
File No. 27-CR-17-1663

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Hooten, Judge; and Stauber, 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

RODENBERG, Judge

Appellant Duane BlackBull appeals after he was convicted of multiple crimes, arguing that the district court erred by (1) admitting evidence that appellant previously assaulted the victim's elderly aunt, (2) allowing the state to repeatedly reference appellant's prior guilty plea to violating a no-contact order, (3) admitting the victim's out-of-court statements to law enforcement, (4) convicting appellant of two lesser-included offenses, and (5) staying appellant's sentence for five years when the maximum allowable term is four years. Because the district court's several trial errors were harmless, we affirm appellant's convictions for domestic assault–strangulation and gross misdemeanor domestic assault. But because fifth-degree assault is a lesser-included offense of domestic assault–strangulation, we reverse appellant's fifth-degree-assault conviction and remand to the district court to vacate that conviction and resentence appellant within legal parameters.

FACTS

Appellant arrived at C.G's apartment late on the evening of September 27, 2016. After a dispute, the details concerning which appellant and C.G. disagree, C.G. ran down the stairs of her apartment complex and knocked on a downstairs neighbor's door. C.G. said that she had been assaulted, and the neighbor called the police. The neighbor relayed to the 911 operator what C.G. had said and then handed the phone to C.G. C.G. told the dispatcher that appellant is an ex-boyfriend, who had previously assaulted both C.G. and her aunt, and that appellant showed up at her apartment the night before. C.G. stated that

appellant had choked her twice and pinned her down about one hour earlier. C.G. also stated that appellant was drunk, running around the building, and frightening her neighbors.

Minneapolis Police Officer Dante Dean arrived to find appellant in C.G.'s apartment. He handcuffed appellant and placed him in a squad car. Officer Dean then spoke to C.G., who told Officer Dean that she allowed appellant into her apartment building the night before, and that she asked appellant to leave, but he followed her upstairs to the apartment. She told Officer Dean that appellant wanted to have sex and became angry when she refused his sexual advances. C.G. said that appellant began grabbing her neck and strangling her on the bed, but that appellant let go when she promised to prepare some food. C.G. told Officer Dean that she made food and the two went to sleep. C.G. told Officer Dean that appellant strangled her for the second time at some point thereafter, and the officer observed and documented what appeared to be light scratch marks on C.G.'s neck. Officer Dean did not speak to anyone else at the apartment regarding the incident and did not see anyone else in the hallways. Officer Dean reported that he did not notice any obvious signs of struggle in the apartment.

Minneapolis Police Sergeant Rebecca Lane interviewed C.G. approximately two weeks after the alleged assault. C.G. told Sergeant Lane that she and appellant had been seeing each other intermittently for about two years. They broke up when appellant assaulted her in April 2016. C.G. then explained the September 27 incident and told Sergeant Lane that she mistakenly let appellant into her apartment building because she believed appellant to be another man she was dating at the time. C.G. said that appellant became agitated when she refused his sexual advances and started to choke her with one

hand until she could no longer breathe. C.G. told Sergeant Lane that appellant stopped choking her for about 30 seconds before choking her again, stopping only after spit began to leave C.G.'s mouth. C.G. recounted that appellant allowed her to sit up and she was able to run downstairs to her neighbor's apartment when she saw appellant put on headphones. C.G. told Sergeant Lane that she asked appellant to leave seven times during the course of the evening. Based on these facts, the state charged appellant with one count of domestic assault – strangulation, one count of gross misdemeanor domestic assault, and gross misdemeanor violation of a domestic abuse no-contact order (DANCO).[1]

Before trial, appellant pleaded guilty to the DANCO-violation charge, leaving the other charges for resolution by a jury. Appellant and the state acknowledged that appellant's guilty plea would not preclude the state from mentioning the DANCO violation during trial in the context of providing relationship evidence, and the state agreed that it would not dwell on the violation.

At trial, C.G. testified that, when she let appellant into the building, she believed appellant was someone else. C.G. said that appellant was nice at first, but they began to argue about the fact that appellant did not defend C.G. on an earlier occasion when appellant's sister attacked C.G. C.G. also stated that appellant choked her and told her that now she "knew what it was like to die." C.G. testified that, after he briefly let go of her throat, appellant choked her a second time. When asked if she was in a significant or romantic relationship with appellant, C.G. agreed that the two had been dating "off and

[1] The district court also instructed the jury on the lesser-included offense of fifth-degree assault.

on." C.G. said that she was unsure if "romantic" was the word to describe their relationship but testified that "we were like a couple."

The jury returned guilty verdicts on the two domestic-assault charges and on the lesser-included charge of fifth-degree assault. The district court entered a conviction on all three charges but only sentenced appellant on the domestic assault–strangulation charge. The district court stayed imposition of the sentence for five years, on conditions.

This appeal followed.

D E C I S I O N

I. Evidence of appellant assaulting victim's aunt

Appellant argues that the district court erred by admitting evidence at trial that appellant assaulted C.G.'s aunt. The district court reasoned that it was relationship evidence under Minn. Stat. § 634.20 (2016).

The general rule in a criminal case is that evidence showing that the accused has committed another crime unrelated to the crime for which he is on trial is inadmissible. *See State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965); *State v. Thieman*, 439 N.W.2d 1, 6 (Minn. 1989) (noting that evidence of Thieman making threats to victim offered to prove a propensity or disposition to commit murder is inadmissible, but holding that such evidence is admissible to show relationship between Thieman and victim). Relationship evidence under section 634.20 serves as a legislatively created exception to this general rule and "is offered to demonstrate the history of the relationship between the accused and the victim of domestic abuse." *State v. Meyer*, 749 N.W.2d 844, 848 (Minn. App. 2008). Appellate courts review a district court's decision to admit similar-conduct or relationship

evidence under Minn. Stat. § 634.20 for abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). The appellant must show that the district court abused its discretion and that the appellant was thereby prejudiced. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

"Evidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury . . . ." Minn. Stat. § 634.20. Section 634.20 directs courts to apply the definitions in Minn. Stat. § 518B.01. Minn. Stat. § 634.20.

Under section 518B.01:

> "Family or household members" means:
> (1) spouses and former spouses;
> (2) parents and children;
> (3) persons related by blood;
> (4) persons who are presently residing together or who have resided together in the past;
> (5) persons who have a child in common regardless of whether they have been married or have lived together at any time;
> (6) a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time; and
> (7) persons involved in a significant romantic or sexual relationship.

Minn. Stat. § 518B.01, subd. 2(b) (2016).

Before trial, the state moved to admit a recording of C.G.'s 911 call under Minn. Stat. § 634.20. In the recording, C.G. tells the 911 operator that appellant "assaulted me and my aunt" and "he also beat up my aunt too and she's 72 years old." Appellant objected,

arguing that evidence of the assault on C.G.'s aunt cannot properly be admitted as evidence of a separate and earlier fifth-degree assault, and is inadmissible under section 634.20. The district court asked, "what if [C.G.] testifies during the course of the events, that [appellant] assaulted her aunt as well? . . . [i]f it's . . . testimony that comes in the courtroom, rather than through the 911 call?" Appellant argued that in neither instance would the evidence be admissible under section 634.20. The state responded that "it seems unfair and stilted to try to excise that part of the incident."

The district court admitted evidence of the assault on both C.G. and her aunt under Minn. Stat. § 634.20. It found the assault on C.G. to be admissible under section 634.20 and determined that it could not "parse out [the assault on the aunt] from the assault on [C.G.]." The district court determined that a cautionary instruction would be adequate to address appellant's concerns.[2] At trial, C.G. testified that, in April 2016, she awoke to find appellant pushing her aunt. When she went to help her aunt, appellant grabbed C.G.'s throat, pushed C.G., and knocked C.G. to the ground. The district court read a cautionary instruction to the jury before C.G.'s testimony and at the close of trial. The following day, the jury heard the recording of C.G.'s 911 call.

Appellant argues on appeal that evidence of the assault against C.G.'s aunt is inadmissible because the state provided neither evidence nor argument that C.G.'s aunt and appellant were family or household members.

[2] The district court stated that it would "give an instruction before it is played," suggesting the district court may not then have anticipated courtroom testimony about the assault on C.G.'s aunt.

There is no record evidence that appellant and C.G.'s aunt are family or household members. On appeal, the state adopts the district court's reasoning and argues that evidence of the assault on C.G.'s aunt was properly admitted because it could not be parsed out from the assault on C.G., and the assault on C.G. was admissible under section 634.20. The state provides several cases to support its argument that the assault on C.G.'s aunt is admissible because it occurred during the same course of conduct as an assault on C.G. *See, e.g.*, *State v. Wofford*, 114 N.W.2d 267, 271 (Minn. 1962) ("[W]here two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the *res gestae*, it is admissible."); *State v. Walsh*, 495 N.W.2d 602, 606 (Minn. 1993) ("Arguably, the waitress incident was admissible as part of the occurrence or episode out of which the offense charged against defendant arose." (quotation omitted)); *State v. Riddley*, 776 N.W.2d 419, 426-27 (Minn. 2009) (holding that the district court abused its discretion by allowing testimony regarding a prior robbery as immediate-episode evidence where there was no causal connection between the prior act and the charged offense, despite being closely connected in time and place).

All of the cases that the state asserts support its proposition that the assault on C.G.'s aunt was admissible as part of the assault on C.G. relate to immediate-episode evidence. The state argues that those cases can be properly analogized to Minn. Stat. § 634.20 evidence. The underlying theme of the immediate-episode cases is clear: The state may prove all relevant facts and circumstances which tend to establish any of the elements of the offense with which the accused is charged, even though such facts and circumstances

may prove or tend to prove that the defendant also committed other crimes. *See State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997) (citing *Wofford*, 114 N.W.2d at 272). The supreme court reasoned "that the general rule against admitting other crime evidence should not necessarily preclude the state from making out its whole case against the accused based on evidence that may be relevant to the accused's guilt of the crime charged." *Id.* (quotation omitted).

Neither this court nor the Minnesota Supreme Court has endorsed the admission of prior non-domestic-conduct bad acts or crimes solely because such evidence is part of an incident that also involved domestic conduct. We see no basis for doing so here. Evidence of the assault on the aunt is not relevant to whether appellant is guilty of the crimes charged, and it sheds no light on appellant's relationship with household or family members. The district court should not have admitted evidence that appellant assaulted C.G.'s aunt on the basis that it could not be separated from the assault on C.G.

When a district court's evidentiary error follows a timely objection, the harmless-error standard applies.[3] *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016). Under the harmless-error standard, "an appellant who alleges an error in the admission of evidence that does not implicate a constitutional right must prove that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id.* (quotation omitted). In determining whether a defendant has established a reasonable

[3] Appellant's initial objection was to the 911 recording that contained evidence of the assault on C.G.'s aunt, but appellant also argued that the same sort of evidence would also not be admissible through courtroom testimony. The state does not argue that the plain-error analysis should apply.

likelihood that erroneously admitted prior-bad-acts evidence substantially affected the verdict, we consider whether the district court provided the jury with a cautionary instruction, whether the state emphasized the evidence, and whether the other evidence of guilt was strong. *State v. Fraga*, 898 N.W.2d 263, 274 (Minn. 2017); *State v. Thao*, 875 N.W.2d 834, 839-40 (Minn. 2016); *State v. Hill*, 801 N.W.2d 646, 658-59 (Minn. 2011).

In *Fraga*, the Minnesota Supreme Court determined that improperly admitted sex-abuse evidence was harmless for three reasons. 898 N.W.2d at 274. First, the district court provided a cautionary instruction that informed the jury that it should not convict the defendant based on the evidence in question. *Id.* Second, the state did not dwell on the other-bad-acts evidence, mentioning it only once in summation. *Id.* Third, the state's case was strong, consisting of corroborating testimony and physical evidence. *Id.* Here, the district court provided a cautionary instruction to the jury before C.G.'s testimony was presented and again at the close of trial, instructing the jury that it was not to convict appellant on the basis of similar conduct from April 2016 because to do so might result in unjust double punishment. And, as in *Fraga*, the state did not dwell on the evidence in closing, only mentioning it once.

Appellant maintains that the state's case was weak because it hinged on C.G.'s in-court testimony and her prior statements regarding the September 27 incident. The state acknowledged as much in its summation at trial, arguing that "at its very core, [C.G.'s credibility is] what this case comes down to." Because there were no other witnesses to the assault, this case does depend largely on C.G.'s testimony. Officer Dean observed some "really light," "little scratch marks" on C.G.'s neck after the incident, which

observation was not itself particularly indicative of an assault. But the marks on C.G's neck corroborated her unequivocal testimony. Moreover, the jury was instructed multiple times not to convict appellant on the basis of any conduct that occurred in April 2016, and "[w]e presume that the jury followed the instructions given by the court." *Hill*, 801 N.W.2d at 658. Although the evidence that appellant assaulted C.G.'s aunt was not properly admitted, the error was harmless because we see no reasonable likelihood that the jury's verdict would have been different had the evidence not been admitted. *See Peltier*, 874 N.W.2d at 802-03.

II. Evidence of appellant violating domestic abuse no-contact order

Appellant argues that the district court plainly erred by admitting cumulative evidence of appellant's DANCO violation without providing a cautionary instruction to the jury. Appellant pleaded guilty to the charged DANCO violation, but the state referred to the DANCO and appellant's violation of it several times during trial. The parties had agreed to this treatment of the DANCO violation and appellant agrees that he was prohibited by the DANCO from having contact with C.G.

We generally do not decide issues which were not raised before the district court, but we have discretion to review such issues on appeal if plain error is shown. *State v. Barthman*, 917 N.W.2d 119, 125 (Minn. App. 2018). Minnesota appellate courts apply a three-prong test for plain error, requiring that before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error impacts substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a

rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). An error affects substantial rights if the defendant establishes that there is a reasonable likelihood that the error had a significant effect on the jury's verdict. *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016). If this test is met, "we may correct the error only if it seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (quotation omitted). This requirement "is satisfied only in those circumstances in which a miscarriage of justice would otherwise result." *State v. Huber*, 877 N.W.2d 519, 528 (Minn. 2016) (quotation omitted).

Evidence of a DANCO violation qualifies as domestic conduct that may be admissible under Minn. Stat. § 634.20 if its "probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. Stat. § 634.20. "Upon admittance of relationship evidence, even in the absence of a request from counsel, the district court should provide a cautionary instruction when the evidence is admitted, and again during its final charge to the jury." *State v. Meldrum*, 724 N.W.2d 15, 21 (Minn. App. 2006). The instruction should be given because relationship evidence and *Spreigl* evidence present a similar danger of misuse. *Id.* In *State v. Word*, we held that "[i]n light of our decision in *Meldrum*, the district court should have issued cautionary instructions related to the proper use of relationship evidence, and the failure to do so represented error that was plain." 755 N.W.2d 776, 785 (Minn. App. 2008). Then, in *State v. Barnslater*, we held that "[i]n light of our decisions

in *Word* and *Meldrum*, the district court's error in failing to instruct the jury regarding the proper use of relationship evidence was plain." 786 N.W.2d 646, 654 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). On this record, the references at trial to the DANCO and appellant's violation of it were not erroneous (and conformed to the parties' agreement), but the absence of a limiting instruction concerning the repeated references to the DANCO violation was error that is plain.

"The court's analysis under the third prong of the plain error test is the equivalent of a harmless error analysis." *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011). Here, the state did not mention appellant's DANCO violation in its closing argument. Also, and as discussed, C.G.'s testimony was unequivocal and was corroborated by marks on her neck. It seems quite unlikely, on this record, that the jury convicted appellant of the charges because of the unquestioned DANCO violation. We conclude that the district's court's failure to provide a limiting instruction sua sponte did not affect appellant's substantial rights, and we therefore do not reach the question of whether reversal is required "to ensure [the] fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740.

III. Admission of C.G.'s out-of-court statements to police

Appellant argues that the district court committed reversible error by admitting C.G.'s prior and out-of-court statements to police. The admission of C.G.'s statements to Officer Dean are subject to a plain-error analysis because appellant did not object at trial. The recording of C.G.'s interview with Sergeant Lane is subject to an abuse-of-discretion and harmless-error review because appellant objected to admission of the recording as inadmissible hearsay.

Hearsay, an out-court-statement offered to prove the truth of the matter asserted, is generally inadmissible. Minn. R. Evid. 801(c), 802. But an out-of-court statement is not hearsay if the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement," and the statement is consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness. Minn. R. Evid. 801(d)(1)(B). Before a statement can be admitted under rule 801(d)(1)(B), "the witness'[s] credibility must have been challenged, and the statement must bolster the witness'[s] credibility." *Nunn*, 561 N.W.2d at 909.

Here, Officer Dean interviewed C.G. in the immediate aftermath of the domestic incident. Officer Dean testified without objection that C.G. told him that she inadvertently let appellant into her apartment building, thinking him to be someone else, and that appellant refused C.G.'s requests to leave. Officer Dean also testified that C.G. told him that appellant began strangling her because she had refused his sexual advances.

Over appellant's objection, the district court permitted the state to play a recording of C.G.'s interview with Sergeant Lane. In the recording, C.G. tells Sergeant Lane that she told appellant to leave her apartment several times before appellant assaulted her. C.G. also stated that appellant began to strangle her because she refused appellant's sexual advances. When asked if appellant was under the influence of drugs at the time of the alleged offense, C.G. stated that appellant showed her needle marks on his arm.

Because the statements to Officer Dean and the recorded conversation with Sergeant Lane are nearly identical, we analyze both statements under the harmless-error standard. If the district court abused its discretion in admitting prior statements, we will reverse only

if the error substantially influenced the jury to convict. *State v. Brown*, 455 N.W.2d 65, 69 (Minn. App. 1990), *review denied* (Minn. July 6, 1990).

Appellant argues that the out-of-court statements were inadmissible because C.G. did not testify at trial that (1) she asked appellant to leave several times, (2) appellant became angry because she refused his sexual advances, and (3) that appellant had needle marks on his arm. *See* Minn. R. Evid. 801(d)(1)(B) 1989 comm. cmt. ("Thus, when a witness' prior statement contains assertions about events that have not been described by the witness in trial testimony, those assertions are not helpful in supporting the credibility of the witness and are not admissible under this rule."). The trial testimony and the prior statement need not be verbatim to be considered consistent statements, and minor discrepancies do not necessarily prevent videotaped statements from being consistent with trial testimony. *See State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). However, in *Bakken*, this court held that the district court erred by not analyzing each statement in the interview individually, explaining that "[s]uch analysis is necessary under Rule 801(d)(1)(B), for without it a few consistent statements in a multi-statement interview may be used to bootstrap into evidence inconsistent statements that do not qualify under the rule." *Id.* "[W]here inconsistencies directly affect the elements of the criminal charge, the requirement of consistency is not satisfied and the . . . prior inconsistent statements may not be received as substantive evidence . . . ." *Id.* at 110.

We agree with appellant that the inconsistencies between C.G.'s trial testimony and the out-of-court statements are significant. Admitting the out-of-court statements to police as substantive evidence was improper under rule 801(d)(1)(B).

Nevertheless, we conclude that this error was harmless, for the same reasons discussed above. C.G. testified that appellant assaulted her and this was corroborated by marks on her neck. The prior inconsistent statements to police did not substantially influence the jury to convict appellant. Although the out-of-court statements to police added some detail that was not consistent with C.G.'s trial testimony, the fact of the assault and of the strangulation was proved by C.G.'s trial testimony.

Finally, appellant argues that the cumulative effect of the errors warrants reversal and remand even if the errors individually would not require a new trial. The cumulative effect of errors may warrant reversal. *State v. Valentine*, 787 N.W.2d 630, 642 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). As discussed, this case turned on C.G.'s testimony that appellant assaulted her. C.G. testified to that at trial, and her testimony was corroborated by physical evidence of marks on C.G.'s neck. The jury was able to consider for itself C.G.'s credibility, which the parties agree was central. It was on these facts that the jury arrived at its verdicts, and the erroneous admission of these tangential bits of evidence would not have changed that outcome. Accordingly, on this record, the errors do not warrant a reversal, either individually or cumulatively.

IV. Lesser-included offenses

Appellant argues that the district court erred by entering convictions for the gross-misdemeanor domestic assault and the fifth-degree assault, despite only sentencing appellant for the domestic assault–strangulation charge.

"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 (2016). An

included offense may be a lesser degree of the same crime or a crime necessarily proved if the crime charged is proved. Minn. Stat. § 609.04, subd. 1(1), (4). The supreme court has "consistently held that section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522-23 (Minn. 2013) (quotation omitted); *see State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (stating that when a defendant is found guilty on multiple charges for the same act, the district court should formally adjudicate and impose sentence on only one count). The application of Minn. Stat. § 609.04 is a question of law that is reviewed de novo. *See Chavarria-Cruz*, 839 N.W.2d at 522.

Appellant argues that both gross misdemeanor domestic assault and fifth-degree assault are a lesser degree of felony domestic assault–strangulation. The legislature separately addressed domestic assault when it enacted Minn. Stat. § 609.2242 (2016). Accordingly, neither gross misdemeanor domestic assault nor fifth-degree assault are a lesser degree of felony domestic assault–strangulation.

Appellant argues that fifth-degree assault is necessarily proven by proving domestic assault–strangulation. To determine whether an offense is necessarily proved by proof of another offense, courts must look at the statutory definitions. *State v. Gisege*, 561 N.W.2d 152, 156 (Minn. 1997). Felony domestic assault–strangulation requires proof that the defendant "assault[ed] a family or household member by strangulation." Minn. Stat. § 609.2247, subd. 2 (2016). Misdemeanor fifth-degree assault requires proof of "an act [committed] with intent to cause fear in another of immediate bodily harm or death . . . or intentionally inflicts or attempts to inflict bodily harm upon another." Minn. Stat.

§ 609.224, subd. 1 (2016). The state argues that it is possible to commit felony domestic assault–strangulation without also committing misdemeanor fifth-degree assault because the elements are different. However, the state cannot prove an actor to have assaulted a person by strangulation without necessarily proving that the actor attempted to inflict bodily harm on that person. Therefore, fifth-degree assault is a lesser-included offense of domestic assault–strangulation. Accordingly, we reverse appellant's conviction of fifth-degree assault and remand with instructions to the district court to vacate that conviction. Gross misdemeanor domestic assault, however, is not necessarily proved by proving felony domestic assault–strangulation, because gross misdemeanor domestic assault requires that the violation occur within ten years of a previous domestic violence related offense or conviction. Minn. Stat. 609.2242, subd. 2. Therefore, gross misdemeanor domestic assault is not a lesser offense of felony domestic assault–strangulation.

V. Stay of appellant's sentence

The state and appellant agree that we should remand for resentencing because the district court stayed appellant's 21-month sentence for five years when the maximum stay is four years under Minn. Stat. § 609.135, subd. 2(a) (2016). The parties are correct in that. We therefore direct the district court on remand to resentence appellant to a legally permitted sentence.

Affirmed in part, reversed in part, and remanded.