STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1837

State of Minnesota,
Respondent,

vs.

Eric Lee Fry,
Appellant.

Filed September 30, 2019
Affirmed in part, reversed in part, and remanded
Klaphake, Judge[*]

Koochiching County District Court
File No. 36-CR-18-308

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

Jeffrey Naglosky, Koochiching County Attorney, International Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Bjorkman, Judge; and Klaphake, 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

KLAPHAKE, Judge

Appellant Eric Lee Fry challenges his convictions for criminal vehicular operation (CVO) and fourth-degree driving while impaired (DWI), arguing that the district court erred by denying his motion for a directed verdict, abused its discretion by amending the criminal complaint at trial to charge a different CVO offense, and erred by entering convictions on both offenses, and that his trial counsel was ineffective by conceding his guilt during closing argument. We affirm the district court's denial of the motion for a directed verdict and amendment of the complaint; reverse the DWI conviction and remand for correction of the warrant of commitment, and decline to address the ineffective-assistance-of-counsel claim.

D E C I S I O N

Following an erratic driving incident in which Fry drove a group of teenagers around in his pickup truck and eventually crashed into a gravel pile, injuring two teenagers, Fry proceeded to trial on two counts of CVO and one count of fourth-degree DWI.[1] The CVO offenses are for violations of Minn. Stat. § 609.2113, subd. 3(2)(iii) (2016), which is premised on bodily harm caused by a person negligently operating a motor vehicle while under the influence of "any combination" of alcohol and a controlled substance. The same conduct also constitutes CVO if the person is under the influence of only alcohol or only a

[1] Fry was also charged with but not convicted of an open-bottle violation under Minn. Stat. § 169A.35, subd. 3 (2016).

controlled substance at the time of the offense. Minn. Stat. § 609.2113, subd. 3(2)(i), (ii) (2016).

At the close of the state's case, Fry moved for a directed verdict because the state had not offered evidence that Fry was under the influence of a controlled substance. A district court must acquit a defendant of a charged offense at the close of the state's case-in-chief "if the evidence is insufficient to sustain a conviction of such offense." *State v. Slaughter*, 691 N.W.2d 70, 74 (Minn. 2005) (quoting Minn. R. Crim. P. 26.03, subd. 17(1)). Whether a defendant should be granted a directed verdict is a question of law subject to de novo review. *State v. McCormick*, 835 N.W.2d 498, 506 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013).

To convict, the state must prove each element of a charged crime beyond a reasonable doubt. *Id.* But a complaint may be amended at any time during trial, and the district court did so here by instructing the jury that it could find Fry guilty if he was under the influence of alcohol at the time of the CVO offenses. *See State v. Mickelson*, 378 N.W.2d 17, 20 (Minn. App. 1985), *review denied* (Minn. Jan. 23, 1986). The criminal rules permit amendment of a complaint "at any time before verdict . . . if no additional or different offense is charged and if the defendant's substantial rights are not prejudiced." Minn. R. Crim. P. 17.05. The district court has the discretionary authority to amend a complaint. *State v. Ostrem*, 535 N.W.2d 916, 922-23 (Minn. 1995).

The amended complaint did not charge Fry with a new or different offense. The original CVO charge under Minn. Stat. § 609.2113, subd. 3(2)(iii), is accomplished if the offender drives while under the influence of both alcohol and a controlled substance. The

amended CVO charge under Minn. Stat. § 609.2113, subd. 3(2)(i), is identical to a subdivision 3(2)(iii) charge, except that it eliminates the requirement that the offender be under the influence of a controlled substance. The amended complaint does not charge an "additional or different offense."

As to the prejudice prong of rule 17.05, Fry also cannot demonstrate that he was deprived of the opportunity to raise a defense or that his substantial rights were otherwise affected by amendment of the complaint. He was required to defend against the same allegation for the alcohol-based charge as the combination-of-substances-based charge that he inflicted bodily harm while driving negligently under the influence of alcohol. Fry's substantial rights were not prejudiced by amendment of the complaint, and the district court did not abuse its discretion by amending the CVO charge to conform to the evidence presented at trial. *See Ostrem*, 535 N.W.2d at 922-23 (upholding conviction applying Minn. R. Crim. P. 17.05 on district court's amended charge of aiding and abetting burglary when original complaint charged offender with burglary and theft); *State v. Miller*, 352 N.W.2d 524, 525-26 (Minn. App. 1984) (upholding conviction applying Minn. R. Crim. P. 17.05 to permit the state's amendment of a complaint to a charge of DWI based on being in physical control of a vehicle, rather than driving a vehicle). For this reason, as well, the district court did not err by denying Fry's motion for a judgment of acquittal.[2]

[2] We note that the charging process, rather than amendment of pleadings to conform to the trial evidence, would be a better mechanism to account for the alternative factual scenarios presented here.

Fry next argues that the district court erred by convicting him of the CVO offenses as well as the fourth-degree DWI offense, because DWI is a lesser included offense of CVO. This is a question of law subject to de novo review. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Minn. Stat. § 609.04, subd. 1 (2016), states that an offender may not be convicted of both a charged crime and an "included offense." An "included offense" is defined as:

> (1) a lesser degree of the same crime; or
> (2) An attempt to commit the crime charged; or
> (3) An attempt to commit a lesser degree of the same crime; or
> (4) A crime necessarily proved if the crime charged were proved; or
> (5) A petty misdemeanor necessarily proved if the misdemeanor charge were proved.

Minn. Stat. § 609.04, subd. 1, *see, e.g., Spann v. State*, 740 N.W.2d 570, 573-74 (Minn. 2007) (defining second-degree intentional murder and first-degree aggravated robbery as lesser-included offenses of first-degree felony murder). "An offense is 'necessarily included' in a greater offense if it is impossible to commit the greater offense without committing the lesser offense." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). Fourth-degree DWI under Minn. Stat. § 169A.20, subd. 1(1) (2016), is necessarily proved if CVO is proved under Minn. Stat. § 609.2113, subd. 3(2)(i). The CVO offense requires negligent operation of a vehicle while under the influence of alcohol, and the DWI offense requires driving, operating, or being in physical control of a vehicle while under the influence of alcohol. Neither statute defines "under the influence of alcohol," but the definitional provisions of the CVO statute reference the DWI statute. *See* Minn. Stat. § 609.2111(e) (2016) (defining "qualified prior driving offense" with reference to Minn.

Stat. § 169A.20 (2016)). The offense of fourth-degree DWI is a lesser offense of the CVO offense in this case. *See State v. Chaklos*, 522 N.W.2d 361, 364 (Minn. App. 1994) (vacating lesser included DWI offenses in criminal vehicular homicide case on the ground that DWI convictions constituted lesser included offenses), *rev'd in part on other grounds*, 528 N.W.2d 225 (Minn. 1995).

"[W]hen the defendant is convicted on more than one charge for the same act the court [is] to adjudicate formally and impose sentence on one count only." *Spann*, 740 N.W.2d at 573 (alterations in original) (quotation omitted). We therefore reverse the entry of conviction on the DWI offense and remand to the district court to amend the warrant of commitment. *See State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999) (using "the official judgment of conviction . . . as conclusive evidence of whether an offense has been formally adjudicated"); *State v. Henderson*, 890 N.W.2d 739, 745-46 (Minn. App. 2017) (requiring reversal of conviction and remand for amendment of warrant of commitment when district court has erroneously convicted on a lesser-included offense).

Finally, Fry argues that he was denied effective assistance of counsel because his attorney arguably conceded his guilt to the CVO and DWI offenses during closing argument. When counsel admits a defendant's guilt without the defendant's permission, prejudice to the defendant is presumed, and the case must be retried unless the defendant has acquiesced to the concession of guilt. *Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001); *see McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) (violation of a defendant's constitutionally protected autonomy right is structural error "not subject to harmless-error review"); *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992) ("Admitting a client's guilt

without the client's consent or acquiescence is deemed ineffective assistance of counsel and is grounds for a new trial."), *cert. denied*, 507 U.S. 929, 113 S. Ct. 1306 (1993). But when it is unclear from the record whether the defendant acquiesced to counsel's concession of guilt, the proper method for considering the issue is in a postconviction proceeding where factual determinations can be made regarding whether the defendant granted his attorney the authority to concede his guilt. *State v. Christian*, 657 N.W.2d 186, 194 (Minn. 2003); *see Dukes*, 621 N.W.2d at 254-55 (remanding for postconviction proceeding when trial counsel did not impliedly concede the defendant's guilt until closing argument, whether the defendant acquiesced to counsel's statements was unclear, and the defendant's ineffective-assistance-of-counsel claim was ruled "exactly the type of claim that needs additional fact-finding before it can be resolved"). We therefore decline to reach the merits of Fry's ineffective-assistance-of-counsel claim.

Affirmed in part, reversed in part, and remanded.