STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1324

State of Minnesota,
Respondent,

vs.

Warren Skinaway,
Appellant.

Filed April 20, 2020
Reversed and remanded
Larkin, Judge

Mille Lacs County District Court
File No. 48-CR-18-659

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

Joe Walsh, Mille Lacs County Attorney, Brian D. Wold, Assistant County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his convictions and sentences for first-degree driving under the influence and first-degree chemical-test refusal, arguing that they violate Minnesota Statutes sections 609.04 and 609.035 (2016). We reverse and remand for the district court to vacate one of the convictions and to resentence the remaining conviction.

DECISION

Following a court trial, the district court found appellant Warren Skinaway guilty of first-degree driving under the influence, first-degree test refusal, and driving in violation of a restricted driver's license. The district court entered judgments of conviction for each offense.[1] The district court sentenced Skinaway to a term of 79 months of imprisonment for the test-refusal conviction and a consecutive term of 36 months of imprisonment for the driving-under-the-influence conviction.

Skinaway appealed and filed three briefs as follows: (1) an appellant's brief contending that the district court erred by sentencing him for both driving under the influence and chemical-test refusal because those offenses arose from the same behavioral incident, (2) a supplemental appellant's brief contending that he cannot receive separate convictions for driving under the influence and chemical-test refusal because the offenses are set forth in different sections of the same criminal statute and arose from a single

[1] Skinaway does not challenge his conviction for driving in violation of a restricted driver's license.

behavioral incident, and (3) a pro se supplemental brief. Skinaway did not request oral argument before this court.

The state's participation in this appeal is limited to a letter to this court stating:

> Respondent State of Minnesota received copies of Appellant's briefs in this matter. After carefully reviewing the record and relevant case law, the State agrees that Appellant's sentences should be reversed and the matter should be remanded to the district court for sentencing on only one offense. The State does not intend to file a response brief unless directed to do so by the Court.

Against that procedural backdrop, we turn to the issues presented in this appeal.

I.

Skinaway contends that he cannot receive separate convictions for driving under the influence and chemical-test refusal because the offenses are set forth in different sections of the same criminal statute and arose from a single behavioral incident. Skinaway also contends, and the state agrees, that the district court erred by sentencing him for both driving under the influence and chemical-test refusal because his offenses arose from the same behavioral incident. Although Skinaway did not raise those issues in the district court, they are properly before this court because "an appellant does not waive claims of multiple convictions or sentences by failing to raise the issue at the time of sentencing." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007).

"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. An "included offense" includes "[a] lesser degree of the same crime" and "[a] crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(1), (4). Whether a conviction violates

Minn. Stat. § 609.04 is a legal question that this court reviews de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

The Minnesota Supreme Court has interpreted Minn. Stat. § 609.04 to "bar[] 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, 758, 760 (Minn. 1985). Skinaway argues that under *Jackson* and *State v. Clark*, 486 N.W.2d 166, 170-71 (Minn. App. 1992), "a defendant may not receive two convictions for two different types of [driving while impaired] that are part of a single behavioral incident" and that either his driving-under-the-influence or test-refusal conviction must be vacated because both convictions "were based on different subdivisions of a single statute, [section] 169A.20, and were part of a single behavioral incident."

In *Clark*, a jury found the defendant guilty of "driving while under the influence of alcohol and driving with a blood alcohol concentration of .10 or more" in violation of the driving-while-impaired statute in effect at the time. 486 N.W.2d at 169. The district court entered judgments of conviction for both offenses and sentenced the defendant for the driving-under-the-influence offense. *Id.* at 170-71. This court held that under *Jackson*, one of the convictions had to be vacated because they were based on different subsections of the same statute and stemmed from acts committed during a single behavioral incident. *Id.* *Clark* is distinguishable from this case because unlike Skinaway, the *Clark* defendant was not convicted of test refusal.

The facts of *State v. St. John* are more analogous to those here because in that case, the defendant was charged with and pleaded guilty to second-degree test refusal and third-

degree driving under the influence. 847 N.W.2d 704, 706 (Minn. App. 2014). The district court determined that the third-degree driving-under-the-influence offense was a lesser-included offense of second-degree test refusal, entered judgment of conviction on the test-refusal offense, and dismissed the driving-under-the-influence charge. *Id.* at 706-07. This court determined that Minn. Stat. § 609.04 did not prohibit convictions for both test refusal and driving under the influence. *Id*. at 707-08. It therefore reversed and remanded for the district court to reinstate the defendant's guilty plea to third-degree driving under the influence and to "accept, record, and adjudicate" that guilty plea. *Id.* at 709. This court did so based on its conclusion that driving under the influence is not "an included offense" of test refusal. *Id*. at 708.

But as Skinaway argues, in *St. John*, this court did not consider or decide whether the rule set forth in *Jackson* prevents a district court from entering judgments of conviction for both driving under the influence and test refusal if the convictions arose from a single behavioral incident. Instead, our conclusion that driving under the influence is not "an included offense" of test refusal within the meaning of section 609.04 was limited to a lesser-included-offense analysis based on a comparison of offense elements. *Id*. at 707-08; *see* Minn. Stat. § 609.04 (stating that "an included offense" may be "[a] crime necessarily proved if the crime charged were proved"). As the Minnesota Supreme Court explained in *Jackson*, considering whether each conviction required proof of an element not required by the other

> will correctly identify whether one of two crimes is an "included offense" under the test established in *Blockburger v. United States*, to determine whether two offenses are

> sufficiently distinguishable to constitutionally permit multiple punishments or prosecutions. Section 609.04, however, exceeds the requirements of *Blockburger*. By defining "a lesser degree of the same crime" as an included offense, section 609.04, subd. 1(1), expressly prohibits multiple convictions which might not be prohibited by the Double Jeopardy Clause. Moreover, we have consistently held that section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.

363 N.W.2d at 760 (footnote and citations omitted).

We are not aware of precedent establishing whether the *Jackson* rule applies to convictions of driving under the influence and test refusal. Skinaway argues for application of the *Jackson* rule in this case, and the state does not offer an argument in response. But an appellate court is obligated to "decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities." *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 875 (Minn. 2010) (quotation omitted). Because we are not aware of any authority that prevents application of the *Jackson* rule to convictions of driving under the influence and test refusal, we apply that rule here.

Under *Jackson*, section 609.04 "bars multiple convictions under different sections of a criminal statute" if the underlying acts were "committed during a single behavioral incident." 363 N.W.2d at 760. The *Jackson* defendant was convicted of aggravated forgery and uttering a forged instrument under subdivisions one and three of Minn. Stat. § 609.625 (1982). *Id.* at 760 & n.1. Because the underlying acts were committed as part of a single behavioral incident, the Minnesota Supreme Court held that "one of the two formal adjudications of conviction for violating section 609.625 must be vacated." *Id*. at 760. A

separate conviction of theft by check was not challenged because it was based on a different statute. *Id.* at 760 n.3. Like *Jackson*, Skinaway's convictions were under different subdivisions of a single criminal statute: subdivisions one (driving under the influence) and two (refusal to submit to chemical test) of Minn. Stat. § 169A.20 (2016 & Supp. 2017). Thus, the first part of the *Jackson* rule is satisfied in this case.

The test for determining whether the second part of the *Jackson* rule is satisfied—whether Skinaway's acts of driving under the influence and test refusal were committed during a single behavioral incident—is set forth in caselaw applying Minn. Stat. § 609.035, which is the statutory basis for Skinaway's challenge to his sentences. Section 609.035 provides 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 and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." Minn. Stat. § 609.035, subd. 1. "Section 609.035 prohibits multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident." *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn. 1986).

When determining whether two offenses arose from a single behavioral incident, a court considers "whether the offenses occurred at substantially the same time and place and arose out of a continuous and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment." *State v. Bauer*, 792 N.W.2d 825, 828 n.3 (Minn. 2011) (quotation omitted). That inquiry presents a mixed question of law and fact; we review the district court's findings of fact for clear error and its application of the law to those facts de novo. *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014).

In *State v. Simon*, this court concluded that the offense of test refusal, "committed after a detailed warning of the consequences and after the driver has been apprehended, is *not* part of the same behavioral incident as driving while under the influence." 485 N.W.2d 719, 721 (Minn. App.) (emphasis added), *rev'd mem.*, 493 N.W.2d 528 (Minn. 1992). In reaching that conclusion, we considered whether the two offenses had "occur[red] at substantially the same time and place and [arose] out of a continuous and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment." *Id*. at 723 (quotation omitted). In addition, we reasoned that the language of the refusal statute supported our decision, explaining:

> The refusal statute applies to all drivers, whether intoxicated or not. If an intoxicated driver could only be sentenced on the driving while under the influence charge, there would be no incentive for the driver to take a chemical test. The legislature clearly intended a person who drives while intoxicated would receive additional penalties if a chemical test was refused. The statute itself outlines two separate and distinct behavioral incidents. Each offense can be explained without reference to the other. Under these circumstances, each conviction should receive its own separate punishment.

Id.

The Minnesota Supreme Court reversed this court's decision in *Simon* in a single paragraph, stating:

> IT IS HEREBY ORDERED that the petition of Bruce George Simon for further review of the decision of the Court of Appeals, 485 N.W.2d 719, be, and the same is, granted for the limited purpose of holding that, contrary to the decision of the court of appeals, petitioner is entitled to have the [district] court vacate one of the two consecutive stayed terms of one year each; *in our view, the two offenses, gross misdemeanor [driving while impaired] and gross misdemeanor refusal to*

> *submit to testing, arose from a single behavioral incident and therefore under Minn. Stat. § 609.035 petitioner may be sentenced for only one of the two offenses.*

State v. Simon, 493 N.W.2d 528, 528 (Minn. 1992) (mem.) (emphasis added).

Subsequently, this court has consistently held that "[a driving-while-impaired offense] and test-refusal offense arise from a single behavioral incident and the driver may only be punished for one of the offenses, pursuant to section 609.035." *State v. Olson*, 887 N.W.2d 692, 701 (Minn. App. 2016); *see State v. Fichtner*, 867 N.W.2d 242, 246, 253-54 (Minn. App. 2015) (holding that the district court erred in sentencing defendant for driving while impaired, test refusal, and child endangerment because all three offenses arose from the same behavioral incident, the defendant's impaired driving with her children in the vehicle), *review denied* (Minn. Sept. 29, 2015); *St. John*, 847 N.W.2d at 708 (holding that the district court erred in sentencing defendant for both third-degree driving while impaired and second-degree test refusal because the offenses arose from a single behavioral incident).

In this case, the district court found that on March 22, 2018, Deputy Greg Brown of the Mille Lacs County Sheriff's Office learned that a red truck with a black topper was in a ditch near Port Mille Lacs. Deputy Brown responded to the area and observed a vehicle matching that description traveling southbound on Highway 169. The vehicle turned into a snow-covered driveway and became stuck. Deputy Brown approached the vehicle, opened the door, and encountered Skinaway in the driver's seat. Deputy Brown smelled an odor of alcohol emanating from inside the vehicle. At that time, Deputy Ryan Hanna

of the Mille Lacs County Sheriff's Office arrived on the scene. Deputy Hanna approached the vehicle and observed an open case of beer in the center of its passenger compartment.

Deputy Brown learned that Skinaway had a restricted license and that any use of alcohol invalidated his driving privileges. During his interactions with Skinaway, Deputy Brown observed that Skinaway appeared agitated, that Skinaway was very uncooperative, that Skinaway's speech was slurred, and that Skinaway smelled of alcohol. Deputy Hanna observed that Skinaway was upset, had bloodshot eyes, and exhibited poor balance. Deputy Hanna attempted field sobriety tests but discontinued them because Skinaway was uncooperative and was exhibiting dangerously poor balance. Deputy Hanna arrested Skinaway for driving while impaired and transported him to Mille Lacs County Jail. There, Deputy Hanna read Skinaway the breath test advisory and offered him a breath test. Skinaway refused the test.

The facts here are similar to those in *Simon*, in which

> [a] state trooper discovered Simon trying to drive his car out of a ditch along a highway in Aitkin County. The trooper observed car tracks in the snow on the opposite shoulder of the road and skid marks into the ditch. The trooper noted the road was dry. The trooper testified Simon had slurred speech, bloodshot eyes, a strong odor of an alcoholic beverage about him and had a difficult time walking back to the squad car.
>
> The officer placed Simon under arrest for driving while under the influence of alcohol and read him the Implied Consent Advisory. Simon was given a choice of a blood test or a urine test, but he refused to submit to either form of testing.

485 N.W.2d at 721.

Under *Simon* and the subsequent decisions of this court, Skinaway's act of driving under the influence and his ensuing refusal to submit to a chemical test were committed during a single behavioral incident. Thus, the second part of the *Jackson* rule is satisfied in this case.

In sum, caselaw supports a conclusion that sections 609.04 and 609.035 generally prohibit multiple convictions and sentences for driving under the influence and an ensuing test refusal. Because Skinaway's convictions of driving under the influence and chemical-test refusal were obtained under different subdivisions of a criminal statute for acts committed during a single behavioral incident, the district court erred by entering judgment of conviction and imposing sentence for each offense. We therefore reverse and remand for the district court to vacate one of those judgments of conviction and to resentence the remaining conviction.[2]

II.

Skinaway's supplemental pro se brief contains notations regarding his prior convictions of driving while impaired, including the convictions that were used to enhance his offenses to first-degree driving while impaired and first-degree test refusal. Skinaway's assertions of error are difficult to discern, but it appears that they regard his challenge at

[2] "[T]he proper procedure to be followed by the [district] court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence." *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

trial to the state's evidence of a felony driving-while-impaired conviction that took place in 2003, arising from an incident in Hennepin County in 2002.

"An assignment of error based on mere assertion and not supported by legal authority or argument is waived unless prejudicial error is obvious on mere inspection." *Brooks v. State*, 897 N.W.2d 811, 818 (Minn. App. 2017), *review denied* (Minn. Aug. 8, 2017). In addition, issues not adequately briefed are waived. *Id.* at 819. Because Skinaway's supplemental pro se brief does not contain supporting legal authority or discernable legal argument, any assertions of error within it are waived.

Reversed and remanded.