STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1603

State of Minnesota,
Respondent,

vs.

Tyrone Demetrius Murphy,
Appellant.

Filed September 16, 2013
Affirmed and remanded
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-11-38483

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

SCHELLHAS, Judge

Appellant challenges his convictions of third-degree assault and aiding and abetting theft from person, arguing that (1) the district court deprived him of his right to a

speedy trial; (2) the district court's omission of an accomplice jury instruction affected his substantial rights and requires reversal to ensure fairness and integrity of the judicial proceedings; (3) the evidence was insufficient to sustain his conviction of third-degree assault; and (4) the district court erred by sentencing him on both convictions that arose out of the same behavioral incident. Because the district court did not violate appellant's right to a speedy trial, the omission of the accomplice jury instruction did not affect his substantial rights, and the evidence was sufficient to support his third-degree-assault conviction, we affirm. Because appellant's convictions arose out of a single behavioral incident, we remand to the district court for vacation of one of the sentences.

FACTS

Appellant Tyrone Murphy and D.H. were neighbors in a Brooklyn Park apartment building. On the evening of June 17, 2011, D.H. entertained Murphy and friends in his apartment. D.H. drank alcohol and stated that he felt its effects but was not intoxicated. The gathering ended after Murphy and a guest argued and D.H. asked everyone to leave. Later that evening, D.H. encountered Murphy and his girlfriend, F.W., in the hallway of the apartment building. D.H. testified at trial that he walked down the hallway and entered the elevator, Murphy prevented the elevator doors from closing, and Murphy hollered at D.H. with an aggressive demeanor. D.H. was fearful, left the elevator, backed up the hallway toward his apartment door, and Murphy pushed him against the wall. To keep Murphy away, D.H. grabbed Murphy's neck. Murphy then punched D.H. in the head, D.H. fell backwards onto the floor, and Murphy got on top of D.H. and hit him a few more times. D.H. thought that someone kicked him in the head a couple of times and

he "heard one of them say 'I got his wallet.'" After the altercation, he was missing his wallet. D.H. bit one of Murphy's fingers when it landed near his mouth. D.H. sustained a laceration on his forehead between his eyebrows.

F.W. testified that she observed the altercation between Murphy and D.H. Her testimony was consistent with D.H.'s testimony. F.W. denied hitting or kicking D.H. but admitted that she picked up a wallet from the floor next to D.H.'s feet and brought it to Murphy's apartment. She denied that she stated in the hallway that she had D.H.'s wallet. After returning to Murphy's apartment, when Murphy asked her to get his wallet from his bedroom, she realized that the wallet she brought to the apartment belonged to D.H. She told Murphy that she had mistakenly taken D.H.'s wallet and wanted to return it to him. Murphy said, "No, just give it to me," and F.W. gave him the wallet.

Murphy testified that he acted in self-defense. He testified that he and D.H. argued about money D.H. owed him and about who owned a bottle of alcohol. When Murphy walked down the hallway holding the bottle of alcohol, D.H. followed him, grabbed him by the throat, and squeezed. Murphy punched D.H. in the face to make D.H. let go. D.H. let go, came toward Murphy, and bit Murphy's thumb. Murphy hit D.H. again to get him to release his thumb and fell on top of D.H because his thumb was in D.H.'s mouth. Murphy did not see F.W. take the wallet in the hallway or hear her say anything about the wallet. F.W. showed him the wallet in Murphy's apartment and said that she wanted to return it. Murphy took the wallet from F.W. and told her that he would return it to D.H. the following day.

Brooklyn Park Police Officers Adam Rolshouse and Chris Donahue arrived at the scene. D.H. told them that Murphy had assaulted him, that a woman was with Murphy, and that someone took his wallet. The officers observed blood on the wall, the hallway carpet leading to D.H.'s apartment, and the apartment door. Murphy acknowledged the altercation but denied any knowledge of D.H.'s wallet. The officers located D.H.'s wallet in Murphy's apartment on his bed. F.W. lied to the officers, saying that she was not present during the altercation.

Respondent State of Minnesota charged Murphy with first-degree aggravated robbery. A jury found Murphy guilty of third-degree assault and aiding and abetting theft from person. The district court stayed imposition of sentence on both counts and placed Murphy on probation for three years.

This appeal follows.[1]

D E C I S I O N

I. Right to Speedy Trial

The United States and Minnesota Constitutions guarantee the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art I, § 6; *State v. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005). "A speedy-trial challenge presents a constitutional question subject to de novo review." *State v. Hahn*, 799 N.W.2d 25, 29 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

To determine whether an accused was deprived of the right to a speedy trial, we consider the four-factor balancing test announced in *Barker v. Wingo*, 407 U.S. 514,

[1] We granted Murphy's motion to accept his pro se reply brief.

530−33, 92 S. Ct. 2182, 2191−93 (1972): "(1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his or her right to a speedy trial, and (4) whether the delay prejudiced the defendant." *DeRosier*, 695 N.W.2d at 109. "None of the factors is either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (quotation omitted).

A. Length of Delay

A trial must commence within 60 days after a speedy-trial demand is made, unless good cause is shown for a longer delay. Minn. R. Crim. P. 11.09(b). Delay beyond 60 days from a demand for speedy trial is presumptively prejudicial and triggers consideration of the remaining *Barker* factors. *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989).

Murphy demanded a speedy trial on September 9, 2011. On October 31, before commencement of trial, the state moved to amend the complaint. Murphy objected, and the district court denied the state's motion. The state therefore dismissed the complaint and refiled it on November 29, charging Murphy with third-degree assault and attempted theft from person in violation of Minn. Stat. §§ 609.223, subd. 1, .52, subds. 2(1), 3(3)(d)(i) (2010). Later, the state amended the charge of attempted theft to aiding and abetting theft from person under Minn. Stat § 609.05, subd. 1 (2010).

Murphy did not make his first appearance on the refiled complaint until January 10, 2012, because the state acquiesced to his request that the refiled complaint be

issued as a summons as opposed to a warrant. Murphy appeared without his lawyer and did not reassert his speedy-trial right. On February 14, Murphy demanded a speedy trial. Due to scheduling conflicts of all parties, the district court found good cause to set the trial date outside of the speedy-trial time frame and set the trial for May 7. Murphy did not object. But, in March, Murphy moved to dismiss his case for violation of his speedy-trial right. The court denied his motion. The district court continued the May 7 trial setting to May 15 due to the prosecutor's scheduling conflict. The court continued the May 15 trial setting to June 4 due to defense counsel's scheduling conflict as well as Murphy's preference to wait two additional weeks in order to have his trial before the same judge.

Murphy's trial began on June 4, 2012, 269 days after his initial demand on September 9, 2011. When charges are dismissed and refiled, the time between dismissal and refiling "tolls the running of the 60-day speedy trial guarantee." *In re Welfare of G.D.*, 473 N.W.2d 878, 881 (Minn. App. 1991) (discussing *State v. Kasper*, 411 N.W.2d 182, 184–85 (Minn. 1987)). Even excluding the 29 days between October 31, 2011, and November 29, 2011, the delay of 240 days is sufficient to prompt consideration of the remaining *Barker* factors.

B. Reason for Delay

Although deliberate attempts to delay the trial are weighed heavily against the state, more "neutral" reasons for delay, "such as negligence or overcrowded courts," are accorded less weight. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. Nonetheless, "the ultimate responsibility for such circumstances must rest with the government rather than

with the defendant." *Id.* "There may be no violation if the delay is due to good cause." *State v. Griffin*, 760 N.W.2d 336, 340 (Minn. App. 2009).

The 53-day delay from September 9, 2011, to October 31, 2011, is attributable to the state. The 77-day delay from November 29, 2011, to February 14, 2012, is also attributable to the state. But these delays do not weigh heavily against the state. The length of the delay between the re-filing of the complaint on November 29, 2011, and the court's summons of Murphy for his first court appearance on January 10, 2012, was the result of the state acquiescing to Murphy's request that any re-filed charges be issued by summons as opposed to a warrant.[2] Because a district court gives hearing priority to in-custody defendants, the state's acquiescence to Murphy's request lengthened this period.

At a hearing on February 14, 2012, the first agreeable and available trial date was May 7, 2012. The district court found good cause for the delay, stating that "due to scheduling conflicts on all sides, May 7 is the first date available." The record contains no evidence to the contrary. "Where calendar congestion is the reason for delay, it weighs less heavily against the state than would deliberate attempts to delay trial." *Friberg*, 435 N.W.2d at 513. This 83-day delay therefore does not weigh heavily against the state.

On May 7, the district court continued the trial due to the prosecutor's scheduling conflict. The eight-day delay from May 7 to May 15 therefore weighs heavily against the state. But defense counsel had a scheduling conflict for the rest of the week after May 15

[2] In his reply brief, Murphy asserts that he did not ask to be served by summons, but this assertion is contrary to the record.

and agreed to a trial date of June 4. This 20-day delay from May 15 to June 4 therefore weighs against Murphy.

In sum, although the majority of the delay in bringing Murphy to trial weighs against the state, it does not weigh heavily against the state.

C. Assertion of Right

Assertion of a speedy-trial right "need not be formal or technical." *Windish,* 590 N.W.2d at 317. While "defendants are not required to continuously reassert their demand," "the frequency and force of a demand must be considered when weighing this factor." *Friberg*, 435 N.W.2d at 515. A district court must assess "the frequency and intensity of a defendant's assertion of a speedy trial demand—including the import of defense decisions to seek delays." *Windish*, 590 N.W.2d at 318.

The record is clear that Murphy demanded a speedy trial on September 9, 2011, reasserted his speedy-trial right on February 14 and May 7, 2012, and moved to dismiss the charges against him on the basis of a speedy-trial violation in March 2012. But, one day into trial, Murphy's counsel sought a one-day continuance that the district court granted and Murphy sought a 30-day continuance to seek private counsel that the court denied. Based on all the circumstances, we conclude that although this factor weighs against the state, it does not weigh heavily against the state.

D. Prejudice

This factor is measured "in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. Three interests must be assessed: (1) preventing oppressive pretrial incarceration,

(2) minimizing the accused's anxiety and concern, and (3) limiting the possibility that the defense will be impaired. *Id.* The third interest is the most important. *Id.*

Murphy argues that the trial delay prejudiced him because he suffered financial hardship by losing his job and housing, by strained personal relationships, and by delays in a pending child-custody matter. Murphy did lose his job and apartment as a result of the criminal charges, but he has not shown any significant prejudice from the delay in his trial itself. Murphy was not incarcerated before trial and conceded to the district court and to this court at oral argument that the trial delay did not impair his defense—our most important consideration. Additionally, the record shows that the trial delay did not adversely impact Murphy's child-custody matter; in the child-custody matter, while the criminal charges were pending, the family court removed a guardian ad litem on the basis of bias and increased Murphy's visitation with his child. This factor weighs against Murphy.

In consideration of all of the *Barker* factors, we conclude that Murphy has not demonstrated that the district court erred by refusing to dismiss the refiled complaint based on a speedy-trial violation.

II. Jury Instruction on Accomplice Testimony

Murphy seeks reversal of his convictions based on the district court's omission of an accomplice jury instruction, arguing that the omission affected his substantial rights. Although we agree that the district court plainly erred by not giving the jury an accomplice instruction, we conclude that Murphy has not shown that the plain error affected his substantial rights.

A. Plain Error

We review the district court's omission of an instruction to the jury on accomplice testimony using the plain-error standard because Murphy did not object to the lack of the instruction at trial. *State v. Scruggs*, 822 N.W.2d 631, 642 (Minn. 2012).

> Failure to object to jury instructions may result in waiver of the issue on appeal. But we have discretion to review instructions not objected to at trial if the instructions contain plain error affecting substantial rights or an error of fundamental law. To establish plain error, a defendant must show: (1) an error; (2) that is plain; and (3) the error must affect the defendant's substantial rights. This court will order a new trial only if all three prongs of the plain error standard are satisfied and the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.

Id. at 642 (quotations omitted) (citations omitted).

"A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense." Minn. Stat. § 634.04 (2010). "[District] courts have a duty to instruct juries on accomplice testimony in any criminal case in which it is reasonable to consider any witness against the defendant to be an accomplice." *State v. Barrientos-Quintana*, 787 N.W.2d 603, 610 (Minn. 2010) (quotation omitted). The district court's "duty arises from the very real possibility that a jury might discredit all testimony except the accomplice testimony, and thus find the defendant guilty on the accomplice testimony alone." *State v. Cox*, 820 N.W.2d 540, 548 (Minn. 2012) (quotations omitted).

"Generally, the test for whether a particular witness is an accomplice is whether the witness could have been indicted and convicted for the crime with which the

defendant is charged." *Scruggs*, 822 N.W.2d at 640 (quotations omitted). "[A] person is liable for a crime committed by another as an aider and advisor if the person 'intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the [defendant] to commit the crime.'" *Id.* (quoting Minn. Stat. § 609.05, subd. 1 (2010)). "[T]o the extent that the question of [the witness]'s accomplice status is close, the district court should . . . instruct[] the jury on the accomplice rule and [leave the] question of fact for the jury's determination." *Scruggs*, 822 N.W.2d at 641 (quoting *Barrientos-Quintana*, 787 N.W.2d at 612).

Here, the jury could reasonably have considered F.W. to have been Murphy's accomplice. F.W. testified that she took D.H.'s wallet and that the state charged her with the crime of theft from person. Additionally, D.H. testified that he thought he had been kicked in the head a couple of times and, when asked how Murphy could have kicked him if Murphy was on top of him, D.H. said that he believed that Murphy's girlfriend must have kicked him—that "she was hitting me kicking me or something. I had blood all over my eyes; I couldn't see." We therefore conclude that the district court plainly erred by not providing the jury with an instruction on accomplice testimony.

B. Substantial Rights

When a district court plainly errs by failing to provide the jury an accomplice-testimony instruction, an appellate court "must decide whether there is a reasonable likelihood that the jury's verdict would have been significantly affected if the jurors had known they could not convict [the defendant] of [the charged offense] unless they found that [the accomplice's] testimony was corroborated by other evidence in the record."

Barrientos-Quintana, 787 N.W.2d at 612. The defendant "bears the heavy burden of showing that there is a reasonable likelihood the error had a significant effect on the verdict." *State v. Davis*, 820 N.W.2d 525, 535 (Minn. 2012) (quotation omitted); *see State v. Reed*, 737 N.W.2d 572, 584 n.4 (Minn. 2007) (stating that inquiry into whether substantial rights are affected "includes the equivalent of a harmless error inquiry").

"In determining whether an accomplice's testimony is corroborated, the defendant's entire conduct may be looked to for corroborating circumstances." *State v. Clark*, 755 N.W.2d 241, 254 (Minn. 2008) (quotations omitted). The evidence "need only be sufficient to restore confidence in the truthfulness of the accomplice's testimony," "point[ing] to the guilt of the defendant in some substantial degree." *Barrientos-Quintana*, 787 N.W.2d at 612–13 (quotations omitted). Corroborating evidence may include evidence of "inadequacies and admissions in a defendant's testimony, and suspicious and unexplained conduct of an accused before or after the crime." *State v. Pederson*, 614 N.W.2d 724, 732 (Minn. 2000) (citations omitted). In this case, the testimony of D.H. and Murphy substantially corroborated F.W.'s testimony. The prosecutor emphasized how F.W.'s testimony was corroborated by other evidence showing that Murphy did not act in self-defense: D.H. was smaller than Murphy, D.H. had been drinking alcohol to the extent that his memory was affected, D.H. was the one injured, D.H. called 911, and the officers observed blood in the hallway and on D.H.'s apartment door. The prosecutor also focused on Murphy's testimony that F.W. was present and saw what happened—Murphy retained the wallet after F.W. gave it to him. Additionally, Murphy lied when the officers asked him about D.H.'s wallet.

We also consider "whether the accomplice testified in exchange for leniency, whether the accomplice's testimony was emphasized in the prosecution's closing argument, . . . and whether a general instruction on witness credibility was given." *Holt v. State*, 772 N.W.2d 470, 484 (Minn. 2009) (quotation omitted). F.W. testified that as a result of her agreement to testify truthfully, she would not face jail time and would be convicted of misdemeanor theft from person. The prosecutor discussed F.W.'s testimony during closing argument but did not over-emphasize it, and the prosecutor highlighted the jury's duty to make credibility determinations and focused on how D.H.'s testimony was inconsistent with Murphy's theory that he acted in self-defense. In addition, the district court gave the jury the standard instruction about assessing witness credibility.

We conclude that F.W.'s testimony was sufficiently corroborated by evidence in the record and that no reasonable likelihood exists that the jury's verdict would have been significantly affected had the jurors been instructed that they could not convict Murphy absent corroboration of F.W.'s testimony. Because Murphy has failed to show that the lack of a jury instruction on accomplice testimony affected his substantial rights, we need not consider whether the fairness, integrity, or public reputation of the judicial proceeding was seriously affected.

III. Sufficiency of Evidence

Murphy argues that the evidence was insufficient to sustain his conviction of third-degree assault. We disagree.

> When reviewing the sufficiency of the evidence leading to a conviction, we view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any

> testimony conflicting with that verdict. The verdict will not be overturned if, giving due regard to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty of the charged offense.

State v. Hayes, 831 N.W.2d 546, 552 (Minn. 2013) (quotations and citation omitted).

To convict a defendant of third-degree assault causing substantial bodily harm, the state must prove that the defendant assaulted another and inflicted "substantial bodily harm." Minn. Stat. § 609.223, subd. 1. "Substantial bodily harm" is an "injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. § 609.02, subd. 7a (2010). Whether an injury constitutes substantial disfigurement is a question of fact for the jury. *See State v. Harlin*, 771 N.W.2d 46, 51 (Minn. App. 2009) (holding that evidence was sufficient for jury to reasonably conclude that victim suffered substantial disfigurement), *review denied* (Minn. Nov. 17, 2009). In *Harlin,* this court held that injuries including "a cut on [the victim's] head that required four staples to close, leaving [the victim] with a permanent scar" and bruising on 15% of the victim's back were sufficient to support a finding of substantial disfigurement. 771 N.W.2d at 51.

Murphy argues that the evidence is insufficient to prove that D.H. suffered substantial bodily harm because the state offered no "medical evidence" concerning the injury or medical treatment. Murphy provides no citation to authority to support this assertion.

The record shows that D.H. suffered a substantial injury to his head. As a result of the altercation, D.H. sustained a laceration on his forehead between his eyebrows. Officer Rolshouse testified that when he arrived at the scene, he observed that D.H. had an "approximately inch-long laceration between his eyes on his forehead, which appeared to be relatively deep," and "blood on his face." Pictures taken four months after the assault show that D.H. had a visible scar on his forehead between his eyebrows. And at the time of trial, nearly a year after the altercation, the scar was still visible; D.H. stood a few feet from the jury box for the jury to see the scar. When the evidence is viewed in the light most favorable to the verdict, there is sufficient evidence for a jury to reasonably conclude that D.H. suffered substantial disfiguration and, therefore, substantial bodily harm as the result of Murphy's conduct.

IV. Sentences for Both Offenses

Murphy argues that the district court erred by sentencing him for both third-degree assault and theft from person because they arose out of the same behavioral incident. Murphy's argument is persuasive.

The district court pronounced sentences on both offenses but stayed imposition of each sentence and ordered Murphy to serve a term of probation. Generally, when "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 (2010). If a defendant commits multiple offenses against the same victim during a single behavioral incident, the defendant may be sentenced for only one of those offenses. *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012). Conversely, a defendant may be

sentenced for multiple offenses if his actions constitute more than a single behavioral incident. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). "The state has the burden to establish by a preponderance of the evidence that the conduct underlying the offenses did not occur as part of a single behavioral incident." *State v. Williams*, 608 N.W.2d 837, 841−42 (Minn. 2000).

The district court's determination of whether multiple offenses are part of a single behavioral incident is a fact question that we review for clear error. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). The district court's decision to impose multiple sentences is reviewed for an abuse of discretion. *Id.*

Murphy was found guilty of third-degree assault and aiding and abetting theft from person. "Assault" includes "the intentional infliction of . . . bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2010). Third-degree assault occurs when one "assaults another and inflicts substantial bodily harm." Minn. Stat. § 609.223. One commits theft when one "intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property." Minn. Stat. § 609.52, subd. 2(1). If "property is taken from the person of another[,]" the offense is treated as a felony under Minn. Stat. § 609.52, subd. 3(3)(d)(i). "Taking property that is in the immediate presence or control of the victim carries with it the same special potential for physical violence or alarm as that associated with a taking of property that is in the hand of the victim or otherwise somehow 'attached' to the victim." *In re Welfare of D.D.S.*, 396 N.W.2d 831, 833 (Minn. 1986). One aids and abets another

"if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05.

"[T]o determine whether two intentional crimes are part of a single behavioral incident, we consider factors of time and place and whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (quotation omitted). "The application of this test depends heavily on the facts and circumstances of the particular case." *Id.* "In assessing whether the crimes were committed with the same criminal objective, we have examined the relationship of the crimes to each other." *Id.* at 829.

Here, the two offenses occurred at the same time and place. Murphy assaulted D.H. in the apartment-building hallway; F.W. testified that, during the commission of the assault, she picked up D.H.'s wallet from the hallway floor. D.H. testified that he heard someone say, "I got his wallet," and that he noticed his wallet was missing. After the incident, Murphy admitted that he decided not to return D.H.'s wallet to him immediately. Instead, Murphy took control and possession of the wallet and lied to the police by denying any knowledge of the wallet.

When considering whether two offenses share a criminal objective, the Minnesota Supreme Court has framed the state's burden as "proving a change in [the defendant's] criminal objective during the course of th[e] incident to support a break in the continuum of [the defendant's] criminal conduct." *Williams*, 608 N.W.2d at 842. On this record, we conclude that the state has failed to meet its burden of proving that the assault and aiding and abetting theft were separate offenses.

"[S]ection 609.035 contemplates that a defendant will be punished for the 'most serious' of the offenses." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006). "[A]n appellate court vacating a sentence or sentences pursuant to section 609.035 should look to the length of the sentences actually imposed by the district court to ascertain which offense is the most serious, leaving the longest sentence in place." *Id.* An appellate court may also consider the sentencing guidelines' severity-level rankings or compare the maximum potential sentences of the offenses. *Id.*

Here, the district court sentenced Murphy on both offenses, and both offenses are crimes against a person that have a severity level ranking of four and carry the same maximum potential sentence. *See* Minn. Stat. § 609.223, subd. 1 (stating maximum penalty for third-degree assault is imprisonment of no more than five years or payment of a fine not more than $10,000 or both); .52, subd. 3(3)(a) (stating maximum penalty for theft from person where value of property taken is more than $1,000 is imprisonment of no more than five years or payment of a fine not more than $10,000 or both); Minn. Sent. Guidelines V.IV (2010) (reflecting that third-degree assault and theft from person carry a severity ranking of four). We therefore remand to the district court to vacate one of the sentences.

Affirmed and remanded.