STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2299

State of Minnesota,
Respondent,

vs.

Mark Allen Holen,
Appellant.

Filed December 9, 2013
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Marshall County District Court
File No. 45-CR-11-94

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

Michael D. Williams, Marshall County Attorney, Warren, Minnesota (for respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

On appeal following his convictions of second-degree assault with a dangerous weapon, fourth-degree driving while impaired, failure to give information following a

traffic accident, failure to stop for an accident to property, fourth-degree criminal damage to property, driving in violation of a restricted license, obstructing the legal process, and falsely reporting a crime, appellant argues that (1) his assault conviction must be reversed because the prosecutor's comment during closing argument effectively amended the complaint; (2) the district court committed prejudicial plain error by failing to give a jury instruction about specific intent; (3) the court erred by allowing the prosecutor to elicit testimony that appellant had a temper; (4) the court violated appellant's right to testify by denying him the opportunity to explain his prior convictions; (5) the court committed prejudicial error by not instructing the jury regarding the proper use of his prior convictions; and (6) the court erred by imposing separate sentences for eight of appellant's convictions because they all arose out of the same behavioral incident. We affirm in part, reverse in part, and remand.

FACTS

On March 25, 2011, C.S., an 82-year-old man, was driving home in his pickup truck when he saw a Geo Prizm pull over into a ditch. The driver of the Prizm was later identified as appellant, Mark Allen Holen. C.S. pulled over to help appellant. When he stopped, appellant approached him and told him he was going too fast. Appellant hit C.S.'s window with his fist and yelled "come out here!" He then reached into the bed of C.S.'s pickup truck, grabbed a pitchfork, and began swinging it in the air. When C.S. decided to leave because he was afraid of appellant, appellant struck C.S.'s truck with the pitchfork, breaking the side mirror and the pitchfork handle in the process.

When C.S. attempted to leave the scene, his pickup truck got stuck in the ditch. By the time C.S. was able to get away, appellant was already in his vehicle pursuing him. Appellant rammed his car into C.S.'s back bumper several times, causing $1,383.11 worth of damage to C.S.'s vehicle. Appellant eventually lost control of his vehicle and drove into a ditch where he became stuck. C.S. called 911 and reported the incident as soon as he got home.

A witness who saw the Prizm in the ditch approached appellant and asked if he needed assistance. Appellant got into her car and directed her to drive him home. He asked her not to call the police.

Law enforcement officers responded to the scene and determined that the abandoned Prizm was registered to appellant's wife. The vehicle had damage to its grill, front bumper, and passenger side. The officers also discovered several beer cans on the ground near the car.

After making this discovery, officers went to appellant's residence to inquire about the incident with C.S. Appellant appeared to be intoxicated and had a fresh scratch on his arm. When the officers asked appellant about his car, appellant claimed that the Prizm had been stolen and accompanied them outside to show them a broken window on his garage. The officers did not believe appellant and placed him under arrest for assaulting C.S. Appellant responded by saying, "No, I'm not," and walking away from the officers. Appellant pulled away when officers tried to grab him. In response, several officers put appellant on the ground and handcuffed him. Appellant was taken to jail where officers obtained a sample of his urine, which showed a blood-alcohol concentration of .16.

Appellant was charged with second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2010), fourth-degree driving while impaired in violation of Minn. Stat. §§ 169A.20, subd. 1(1), 169A.27 (2010), fourth-degree driving with an alcohol level of .08 or more in violation of Minn. Stat. §§ 169A.20, subd. 1(5), 169A.27,[1] failure to give information following a traffic accident in violation of Minn. Stat. § 169.09, subd. 3 (2010), failure to stop for an accident to property in violation of Minn. Stat. § 169.09, subd. 2 (2010), fourth-degree criminal damage to property in violation of Minn. Stat. § 609.595, subd. 3 (2010), driving in violation of a restricted license in violation of Minn. Stat. § 171.09, subd. 1(f)(1) (2010), obstructing the legal process in violation of Minn. Stat. § 609.50, subd. 1(1) (2010), and falsely reporting a crime in violation of Minn. Stat. § 609.505, subd. 1 (2010).

At trial, appellant admitted that he consumed alcohol on the day in question and consumed one or two cans of beer while driving. He testified that he was out driving despite his intoxicated state in order to find his two small dogs that had run away. He explained that he saw one dog in the ditch and was trying to lure it into his car when C.S. arrived. He admitted that he took the pitchfork out of C.S.'s vehicle but claimed that he grabbed it because his dog ran under C.S.'s truck. Appellant testified that his dog followed C.S.'s pickup, which is why he followed C.S. and hit his bumper.

The jury found appellant guilty of all charges. The district court sentenced appellant to 33 months in prison for second-degree assault and seven concurrent 90-day jail terms for the remaining misdemeanor offenses.

[1] This charge was dismissed at sentencing.

D E C I S I O N

I.

Appellant argues that his second-degree assault conviction must be reversed because the state constructively amended the complaint during its closing argument to add an additional or different offense. The complaint charged appellant with second-degree assault with a dangerous weapon and defined the dangerous weapon as appellant's Prizm. Appellant argues that the state constructively amended the complaint in its closing argument when it stated that appellant committed second-degree assault and defined the dangerous weapon as the pitchfork.

The district court may permit the state to amend the complaint before the verdict if it does not charge a different offense or prejudice the defendant's substantial rights. Minn. R. Crim. P. 17.05. This rule applies to amendments to a complaint after trial commences. *State v. Guerra*, 562 N.W.2d 10, 12-13 (Minn. App. 1997). "A 'different offense' is charged if an amendment affects an 'essential element' of the charged offense." *Id.* at 13. "The principle underlying Rule 17.05 is a concern for prejudicial effect, not procedural regularity." *Id*. Allowing an amendment under Minn. R. Crim. P. 17.05 "is in the sound discretion of the trial judge." *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982). This court reviews the trial court's decision to allow amendments to a criminal complaint for abuse of discretion. *Id.*

The state charged appellant by complaint with second-degree assault with a dangerous weapon. In the offense section of the complaint, the state charged, "On or about March 25, 2011 . . . defendant assaulted another with a dangerous weapon to wit:

defendant intentionally drove a Geo Prizm into the rear end of a Chevrolet pickup being driven by [C.S.]" The state referred to the pitchfork in the probable cause section of the complaint by stating, "the defendant then reach[ed] into [C.S.'s] pickup and removed a pitchfork. The defendant then told [C.S.] to 'come on out here.' C.S. was frightened . . . ."

In its opening statement, the state explained the charge to the jury:

> And so his biggest charge, the last charge is called Assault in the Second Degree-Dangerous Weapon. . . . Well, what's the dangerous weapon here? There's no gun or anything like that, no bat, you know, but there is a car. . . . The car itself, the defendant's car, in this case is the dangerous weapon.

However, in its closing argument, the state explained,

> When you look at Count 1, Assault in the Second Degree-Dangerous Weapon, there are actually two dangerous weapons in this case, ladies and gentlemen, two dangerous weapons. One, the defendant's Prizm, the motor vehicle. . . . And secondly, we've got this pitchfork.

Appellant's defense counsel immediately objected to this statement. The district court overruled the objection because the state referred to the pitchfork in the probable cause portion of the complaint and during trial. It explained that C.S. and appellant both referred to appellant's handling of the pitchfork during their respective testimonies.

Appellant relies on *Guerra*, 562 N.W.2d at 11-13 to argue that his second-degree assault conviction should be reversed because the state constructively amended the complaint. In *Guerra*, the defendant was charged with one count of possession of a stolen firearm and two counts of possession of a short-barreled shotgun. *Id.* at 11. The complaint charged that "[o]n or about January 30, 1996 . . . [the defendant] received,

possessed, transferred, bought or concealed stolen property . . . knowing or having reason to know that the property stolen [was] a firearm." *Id.* The probable-cause portion of the complaint described a recent theft in the area where seven shotguns were taken from a house on December 5, 1995, and another where seven handguns were taken from a house on December 31, 1995. *Id.* Prior to trial, the district court and the parties agreed that the possession of stolen firearms charge arose from the defendant's possession of the shotguns and not the handguns. *Id.*

In *Guerra*, the district court allowed the prosecutor to reopen its case to present evidence about the handguns and shotguns and to change the date of the offense in the jury instructions. *Id.* at 12. The district court determined that the reference to "firearms" in count one of the complaint was broad enough to include the handguns and shotguns and that the language "on or about January 30, 1996" could include an offense that allegedly occurred in December 1995. *Id.*

The defendant in *Guerra* appealed his conviction and argued that the district court constructively amended the complaint. *Id.* at 13. This court held that "[a]lthough the state did not move to amend the complaint, the district court's decision to allow the prosecutor to reopen its case to present additional evidence and to change the date in the jury instruction constituted a constructive amendment." *Id.* Because of the constructive amendment, the defendant was required to defend against the additional charge of possession of the stolen handguns, which violated Minn. R. Crim. P. 17.05. *Id.*

This case is very different from *Guerra*. In *Guerra*, the amendment charged the defendant with a different offense because the underlying facts, date, and object of the

amended offense were all different from the original charge. In this case, appellant was not charged with a different offense based on the prosecutor's statement. The underlying facts and date of offense are the same. Although the complaint specifically alleged that appellant used his Prizm as a dangerous weapon, the pitchfork was referenced in the probable-cause portion of the complaint as a weapon that appellant used to frighten or harm C.S. Both parties referred to the pitchfork at trial and had the opportunity to examine and cross-examine witnesses about it. In fact, appellant's counsel specifically asked him about the pitchfork.[2]

Moreover, unlike the situation in *Guerra*, the district court in this case did not amend the jury instructions to define dangerous weapon. In fact, while defining second-degree assault with a dangerous weapon to the jury, the court instructed:

> First, the defendant assaulted [C.S.] An assault is an intentional attempt to inflict bodily harm upon another, or an act done with intent to cause fear of immediate bodily harm or death in another. Second, the defendant, in assaulting [C.S.], used a dangerous weapon. A "dangerous weapon" is anything that, in the manner it is used or intended to be used,

[2] The following exchange occurred between appellant and his counsel on direct examination:

> Q: Did you try to get [the dog] out . . . from underneath the truck?
> A: Yeah. When I was walking behind that pickup that was there, there was like a pitchfork in the back. That was the only thing there, so I grabbed that and I tried to shoo the dog from underneath and push it out.
> . . .
> Q: Were you using the pointy end or were you using the blunt end?
> A: I was using the pointy end.

> is known to be capable of producing death or great bodily harm.

Because the district court did not define dangerous weapon in its instruction to the jury, the jury was free to find that the pitchfork or the Prizm was a dangerous weapon. The state did not charge appellant with a different offense when it referred to the pitchfork in its closing argument, but rather, presented the jury with an alternate means for finding him guilty. Jury unanimity is not required with respect to the alternate means in which the crime can be committed. *State v. Begbie*, 415 N.W.2d 103, 106 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988). The essential element of second-degree assault with a dangerous weapon is the fact that a dangerous weapon was used. The actual weapon used is the means by which the offense is committed.

Furthermore, appellant was not prejudiced by the state's reference to the pitchfork because he was not required to defend himself against an additional offense. Because the pitchfork was referred to in the probable-cause portion of the complaint and referred to through trial, appellant had notice that it could be found to be a dangerous weapon and was able to present his defense that he was using the pitchfork to retrieve his dog. Therefore, appellant was able to assert a defense to the charge that he used the pitchfork to assault C.S. and was not prejudiced by the state's reference to the pitchfork in its closing argument.

Appellant had the opportunity to review the jury instructions prior to the end of trial and made no objection to the fact that the district court did not define "dangerous weapon" as appellant's Prizm. The district court did not abuse its discretion by allowing

the state to refer to the pitchfork as a dangerous weapon in its closing argument and there was no amendment of the complaint.

II.

Appellant next argues that the district court committed prejudicial plain error by failing to give the jury a specific-intent instruction. The district court has significant discretion in crafting jury instructions. *State v. Broulik*, 606 N.W.2d 64, 68 (Minn. 2000). "A jury instruction is erroneous if it materially misstates the law." *State v. Dalbec*, 789 N.W.2d 508, 511 (Minn. App. 2010) (citation omitted), *review denied* (Minn. Dec. 22, 2010). "We examine the jury instructions in their entirety to determine if they fairly and adequately explain the law and define the crime charged and explain the elements of the offense to the jury." *Id.* (citation and quotation omitted).

Generally, the failure to object to a jury instruction forfeits the issue for appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). "Under the invited error doctrine, a party cannot assert on appeal an error that he invited or that could have been prevented at the district court." *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). The invited error doctrine does not apply if the error meets the plain error test. *Id.* Under the plain error test, the defendant must show (1) error; (2) that is plain; and (3) the error must affect substantial rights. *Id.* "When addressing the third prong of the plain error test, whether the error affected substantial rights, we ask whether the error was prejudicial and affected the outcome of the case." *Id.* (citation omitted).

Appellant was charged with one count of second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1. Under this section, whoever

assaults another with a dangerous weapon may be guilty of a crime. *Id*. In order to find appellant guilty, the jury had to find that he assaulted C.S. There are two theories of assault under Minn. Stat. § 609.02, subd. 10(1), (2) (2010). Under the first definition, "assault is an act done with intent to cause fear in another of immediate bodily harm or death." *Id.*, subd. 10(1). This is also known as assault-fear. Under the second definition, "assault is the intentional infliction of or attempt to inflict bodily harm upon another." *Id.*, subd. 10(2). This is also known as assault-harm.

The Minnesota Supreme Court recently clarified that assault-harm under Minn. Stat. § 609.02, subd. 10(2), is a general-intent crime, and that assault-fear under Minn. Stat. § 609.02, subd. 10(1) is a specific-intent crime. *State v. Fleck*, 810 N.W.2d 303, 312 (Minn. 2012). In *Fleck*, the court did not address whether an attempt to inflict bodily harm is a specific-intent crime because the facts of Fleck's case involved the actual infliction of bodily harm. *Id.*

In this case, the district court instructed the jury that an assault is "an intentional attempt to inflict bodily harm upon another, or an act done with intent to cause fear of immediate bodily harm or death in another." The jury later sent a question to the district court asking, "What does it mean the 'intent to cause bodily harm'?" The court responded, "You are to rely on your recollection of the evidence presented and the instructions you have been given." Both parties agreed that this instruction was acceptable. Because appellant did not object to the original instruction or the district court's response to the jury, he forfeits the issue for appeal unless there was prejudicial plain error. *Carridine*, 812 N.W.2d at 142.

In this case, the district court gave the standard jury instruction in accordance with 10 *Minnesota Practice*, CRIMJIG 13.10 (2012). Appellant did not request any additional instructions to clarify specific intent. The district court instructed the jury that appellant had to intentionally attempt to inflict bodily harm or act with the intent to cause fear of immediate bodily harm, which comports with the statutory definition of assault. Therefore, the instructions did state that appellant had to act with the intent to cause a specific result. Furthermore, this court has previously held that the instruction currently contained in CRIMJIG 13.10 adequately explains the elements of assault in the second degree, including the element of specific intent. *State v. Blawat*, 399 N.W.2d 671, 673 (Minn. App. 1987). Because the district court adequately explained the element of specific intent, it did not err in failing to give an additional specific-intent jury instruction.

III.

Appellant contends that the state's inquiry into appellant's temperament was improper because appellant did not put his character into issue. The unobjected-to admission of evidence is reviewed for plain error. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *Id.* "If those three prongs are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citations and quotations omitted).

Appellant waived his marital privilege at trial. His wife testified that on the date of the offense, appellant was slurring his speech and that he had recently been diagnosed

with a concussion. Appellant's trial counsel asked her if she was aware that appellant had had legal trouble in the past, to which she responded "yes." Specifically, appellant's trial counsel asked her if she knew that appellant had been convicted of terroristic threats and assault in 2004 and 2005, to which she responded "yes." He asked her if those convictions affected her testimony, to which she responded "no." On cross-examination, the following exchange occurred between appellant's wife and the state:

> Q: Does your husband have a temper?
> A: To a certain point, not very much.
> Q: Not very much?
> A: No.
> Q: Did he have a temper when he got convicted at that time?
> A: For what time?
> Q: When he was convicted of terroristic threats?
> A: In the situation that we were in, yes.

"Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . [e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." Minn. R. Evid. 404(a). "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." Minn. R. Evid. 405(a).

Appellant's attorney opened the door to the state's inquiry about appellant's temperament during his direct examination of appellant's wife. After appellant's wife confirmed that appellant had previously been convicted of terroristic threats and assault in 2004 and 2005, he asked her whether these convictions impacted her testimony. By

asking appellant's wife whether she was biased or testifying falsely based on appellant's prior convictions, appellant's counsel implied that appellant's wife was not afraid of him despite his convictions for terroristic threats and assault. When appellant's wife testified that she was not biased or testifying falsely out of fear, she presented evidence of appellant's nonviolent character. Because appellant's attorney put his character at issue, the prosecutor properly inquired about his temper to rebut appellant's evidence concerning his nonviolent nature. Minn. R. Evid. 404(a). The district court did not err in allowing this inquiry.

IV.

Appellant argues that the district court violated his right to testify and committed reversible error by denying him the opportunity to explain the circumstance of his prior convictions. A "defendant should be allowed to give his or her version of the facts underlying the conviction and to explain the circumstances relating to the conviction, but any error in refusing to allow the defendant to do so is subject to harmless error impact analysis." *State v. Frisinger*, 484 N.W.2d 27, 33 (Minn. 1992). When applying the harmless error test, we must "look to the basis on which the jury rested its verdict and determine what effect the error had on the actual verdict." *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996) (citation omitted). "If the verdict actually rendered was surely unattributable to the error, the error is harmless beyond a reasonable doubt." *Id.*

Appellant should have been allowed to give his version of the facts underlying his prior convictions of third-degree assault and terroristic threats. Although erroneous, we conclude that the district court's decision to deny appellant that opportunity did not have

an effect on the verdict. Appellant argues that "had [he] been allowed to explain the circumstances surrounding his prior convictions, jurors may well have attached less weight to or entirely discounted this evidence when deciding his guilt of the contested charges." Appellant has not indicated what the substance of his testimony would have been had he testified.

Nevertheless, the impeachment evidence was not a key part of the state's case. The state had ample evidence to convict appellant even without any reference to his prior convictions. C.S. testified about the encounter he had with appellant and explained that appellant damaged his pickup truck with a pitchfork and with the Prizm. The jury also heard testimony from appellant's wife about his general demeanor on the day in question. She testified that he had been drinking and explained the circumstances surrounding his arrest. The responding officers testified that appellant resisted arrest, falsely reported that his Prizm had been stolen, and had a blood-alcohol concentration of .16. Lastly, the jury heard testimony from a witness who explained that she picked up appellant after the accident, that he asked her to drive him home, and that he told her not to call the police. Due to the overwhelming evidence admitted against appellant, the verdict in this case is unattributable to any error.

V.

Appellant argues that the district court committed reversible plain error by admitting evidence of his prior convictions to impeach him, but failing to provide the jury with a limiting instruction. At trial, appellant admitted that he had previously been convicted of third-degree assault and terroristic threats.

Where, as here, the parties fail to request a limiting instruction and do not object to its absence, the issue is forfeited unless appellant can demonstrate plain error. *State v. Barnslater*, 786 N.W.2d 646, 653 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010).

Impeachment evidence "is admitted only for a limited purpose and the giving of a contemporaneous limiting instruction helps ensure that the evidence will not be used inappropriately." *State v. Bissell*, 368 N.W.2d 281, 283 (Minn. 1985). "The fact that defense counsel elicited the impeachment evidence on direct did not disqualify defendant from receiving a cautionary instruction during the course of the trial." *Id.* "The district court should issue a limiting instruction even when the defense counsel introduces the evidence." *State v. Word*, 755 N.W.2d 776, 787 (Minn. App. 2008). Because the failure to give the instruction was plain error, the inquiry becomes whether the failure to instruct was prejudicial.

Here, the failure to instruct did not affect appellant's substantial rights. His prior convictions were only referenced by appellant and his wife and only appear on two pages out of an approximately 400-page transcript. Their testimony is confined to the fact that appellant was convicted of third-degree assault and terroristic threats; neither party presented testimony regarding the facts underlying the convictions.

VI.

Appellant claims that the district court incorrectly sentenced him because several of his offenses arose from a single behavioral incident. "[I]f 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 (2012). "The purpose of [this section] is to protect a defendant convicted of multiple offenses against unfair exaggeration of the criminality of his conduct." *State v. Mullen*, 577 N.W.2d 505, 511 (Minn. 1998).

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.* at 732.

"[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). "To determine whether two unintentional crimes or an intentional and an unintentional crime arise from a single behavioral incident, we analyze the facts to determine whether the offenses occur[red] at substantially the same time and place and ar[ose] out of a continuous and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment." *Id.* at 828 n.3 (quotation omitted).

A. Driving while impaired and driving in violation of a restricted license

Appellant first argues that the district court erred by sentencing him for both driving while impaired in violation of Minn. Stat. § 169A.20, subd. 1(1) and driving in violation of a restricted license in violation of Minn. Stat. § 171.09, subd. 1(f)(1). In *State v. Reimer*, this court held that "driving with an expired driver's license is a

continuing offense that recurs every time appellant drives." 625 N.W.2d 175, 177 (Minn. App. 2001). This court explained, "[T]he offenses of DWI and driving with an expired license do not manifest an indivisible state of mind or coincident errors of judgment. Appellant's decision to drive with an expired license may be attributed to errors in judgment wholly independent of his decision to drink and drive."[3] *Id.*

Although this case deals with driving in violation of a restricted license and not driving with an expired license, *Reimer* is instructive. Similar to the decision to drive with an expired license, appellant's decision to drive with a restricted license is a continuing offense that occurs each time he decides to drive. These offenses do not manifest an indivisible state of mind or coincident errors of judgment. Therefore, the offenses are not part of a single behavioral incident and were properly sentenced.

B. Second-degree assault and fourth-degree criminal damage to property

Appellant next argues that the district court erred by sentencing him for both second-degree assault in violation of Minn. Stat. § 609.222, subd. 1, and fourth-degree criminal damage to property in violation of Minn. Stat. § 609.595, subd. 3. Second-degree assault is a felony and fourth-degree criminal damage to property is a misdemeanor. Appellant was sentenced to 33 months in prison for second-degree assault

[3] Several cases indicate that driving offenses are often separate and distinct crimes. *See e.g., State v. Meland*, 616 N.W.2d 757, 759 (Minn. App. 2000) (holding that DWI and driving with expired tabs do not manifest an indivisible state of mind or coincident errors of judgment because driving with expired tabs is a continuing offense that occurs whenever the defendant drives); *State v. Bishop*, 545 N.W.2d 689, 692 (Minn. App. 1996) (holding that although driving after cancellation and aggravated DWI occurred at the same time and place, they involved distinct and dissimilar errors in judgment).

and 90 days in jail for fourth-degree criminal damage to property, to be served concurrently.

In its closing argument, the state commented that appellant's use of the pitchfork or the Prizm could serve as an alternate means for finding appellant guilty of second-degree assault with a dangerous weapon. The record does not indicate whether appellant was convicted of second-degree assault based on the pitchfork incident or the Prizm incident.

In *State v. Rivers*, 787 N.W.2d 206, 213-14 (Minn. App. 2010), *review denied* (Minn. Oct. 19, 2010), the state unsuccessfully argued that because it was not clear from the record which violation of an order for protection the jury convicted Rivers on, Rivers was properly sentenced for multiple offenses because the crimes did not arise from a single behavioral incident. This court decided that separate sentences were not permitted for third-degree assault and violation of order for protection that arose out of the same behavioral incident. *Id.*

The victim had a temporary order for protection against Rivers. *Id.* at 208. On October 2, 2008, Rivers entered the victim's apartment and assaulted her while she was holding her one-year-old daughter. *Id.* He was charged with two counts of burglary in the first degree, felony domestic assault, violation of an order for protection, assault in the third degree, and gross-misdemeanor child-endangerment domestic assault. *Id.* at 208-09. The complaint alleged that all crimes occurred on or about October 2, 2008. *Id.* at 209.

Rivers was found guilty of all charges and sentenced to 333 days for the gross-misdemeanor child-endangerment domestic assault, a consecutive 69-month sentence for first-degree burglary, a concurrent 21-month sentence for violation of the order for protection, and a concurrent 28-month sentence for third-degree assault. *Id.*

Rivers argued on appeal that it was an error for him to be sentenced for the third-degree assault and violation of the order for protection because these offenses arose from a single behavioral incident. *Id.* at 213. The state argued that because the jury heard about many instances of contact between Rivers and the victim during the time the protective order was in effect, "[i]t is not clear from the record which contact the jury decided was the violation." *Id.* at 213-14. This court found this argument to be "entirely without merit," and noted that the state's theory invites argument that the jury's verdict on this charge might not have been unanimous. *Id.* at 214. Furthermore, the complaint alleged that the violation of the order for protection occurred on or about October 2, 2008. *Id.* The jury was instructed that in order to find Rivers guilty of violating the order for protection, it had to find that the acts took place on or about October 2, 2008. *Id.* Therefore, the record indicated that the jury convicted him based on the October 2 violation.

"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). In this case, if the convictions are based solely on appellant hitting C.S.'s pickup with his Prizm, appellant's second-degree assault with a dangerous weapon and fourth-degree damage to property

convictions arose from a single behavioral incident; in fact, the charges arose from one discrete action. However, if the convictions are based on the pitchfork incident and the Prizm incident, then the offenses occurred at different times and places, and were most likely motivated by different criminal objectives.

Unlike the situation in *Rivers*, we cannot determine based on the record whether appellant was convicted for second-degree assault with a dangerous weapon based on the pitchfork or the Prizm. Therefore, the state did not meet its burden because it has not established that the conduct underlying the offenses did not occur as part of a single behavioral incident.

Because the jury may have believed that these offenses occurred as part of a single behavioral incident, appellant should be sentenced for only one of these offenses. Minn. Stat. § 609.035, subd. 1 ("[I]f 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."). "[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." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006). Because appellant was sentenced to 90 days in jail for his misdemeanor criminal damage to property conviction and 33 months in prison for his felony second-degree assault conviction, appellant's sentence for criminal damage to property should be vacated.

C. Leaving the scene of an accident and failure to give information after an accident

Next, appellant argues that the district court erred by sentencing him for both leaving the scene of an accident in violation of Minn. Stat. § 169.09, subd. 2, and failure to give information after an accident in violation of Minn. Stat. § 169.09, subd. 3. After appellant's encounter with C.S., he drove his Prizm into a ditch. A witness approached the scene to assist him. Appellant got into the witness's car and she drove him home. At this point, he had completed the offense of leaving the scene of an accident. Appellant asked the witness not to call the police and never reported the crime himself. When police officers arrived at appellant's door later that day and inquired about the Prizm, appellant told the officers that his car had been stolen and showed them the broken window on his garage. He did not report the accident to police at that time.

Therefore, appellant's action of failing to give information after an accident occurred at a different time and place than his action of leaving the scene of the crime. He failed to give information to police when they arrived at his house after the accident and he informed them that his car had been stolen. In contrast, he left the scene of the accident when he left his car in the ditch. Appellant was properly sentenced for each of these offenses.

D. Obstructing the legal process and falsely reporting a crime

Lastly, appellant argues that the district court erred by sentencing him for obstructing legal process in violation of Minn. Stat. § 609.50, subd. 1(1), and falsely reporting a crime in violation of Minn. Stat. § 609.505, subd. 1. When police officers

arrived at appellant's door and inquired about the Prizm, appellant told the officers that his car had been stolen and showed them the broken window on his garage. The officers subsequently noticed that appellant had a cut on his nose, a fresh scratch on his arm, and that he resembled the description of the Prizm driver given by witnesses. As a result, the officers informed him that he was under arrest. Appellant physically resisted the arrest by walking away, stating that he was not under arrest, and pulling away when officers tried to restrain him.

These acts occurred at appellant's residence but are two distinct acts separated by time. Appellant first gave false information to police about his car being stolen to avoid incriminating himself for his previous actions. There was a break in the course of conduct between the time that appellant reported that his car was stolen and when the officers told appellant he was under arrest. *See State Bookwalter*, 541 N.W.2d 290, 295 (Minn. 1995) ("[I]f the factors of time and place are not coincidental and a defendant is not motivated by a single criminal objective in committing two intentional crimes, then generally the defendant may be sentenced for both crimes."). Appellant did not physically resist the officers until he was told that he was under arrest. Because these are two discrete actions separated by time and consist of separate courses of conduct, appellant was properly sentenced on these two counts.

We therefore affirm the convictions of driving while impaired, driving in violation of a restricted license, second-degree assault with a dangerous weapon, leaving the scene of an accident, failure to give information after an accident, obstructing legal process, and

falsely reporting a crime. We reverse and remand to the district court to vacate appellant's sentence for fourth-degree criminal damage to property.

Affirmed in part, reversed in part, and remanded.