STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1962

State of Minnesota,
Respondent,

vs.

Patrick D. Crohn,
Appellant.

Filed January 27, 2009
Affirmed in part, reversed in part, and remanded
Stauber, Judge

Anoka County District Court
File No. CR07420

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Robert M.A. Johnson, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Suite 720, Anoka County Government Center, 2100 Third Avenue, Anoka, MN 55303-5025 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from convictions of driving while impaired (DWI), driving after cancellation, and leaving the scene of a property-damage accident, appellant argues that (1) the district court erroneously concluded that mandatory consecutive sentencing applied to his DWI conviction; (2) the jury instructions for driving after cancellation constituted plain error; and (3) the district court was precluded from sentencing him for leaving the scene of a property-damage accident because the conviction arose out of the same behavioral incident as his DWI conviction. We affirm in part, reverse in part, and remand.

FACTS

Late on the evening of March 19, 2007, Brad Pearson, an off-duty St. Paul police officer, heard a "crashing sound" outside his Anoka home. While investigating the source of the noise, Pearson observed that a Jeep driven by appellant Patrick D. Crohn had struck his mailbox and entered the ditch across the street from his home before driving away. At the time, appellant was driving two friends, Daniel Norman and Terry Wellman home, after an evening of drinking and socializing at several locations.

Pearson called 911 and decided to follow the Jeep in his unmarked car. As Pearson followed behind, appellant made several erratic maneuvers and it appeared that the Jeep was experiencing mechanical failure apparently caused by the collision with Pearson's mailbox and entering the ditch. After dropping off Wellman, appellant noticed that they were being followed, and a short time later, appellant pulled into the driveway

of Norman's rural residence. Pearson confronted the men as they exited the Jeep, but after a brief confrontation, appellant and Norman entered the residence. Pearson alerted the police to the Jeep's location and two officers arrived on the scene. During a conversation with the officers, appellant exhibited multiple indicia of intoxication, admitted that he had been drinking, and took a preliminary breath test that indicated an alcohol concentration greater than .10. The officers also discovered numerous open and unopened alcohol containers in the Jeep. Appellant was subsequently arrested and charged with two counts of felony first-degree driving while impaired (DWI), one count of gross-misdemeanor driving after cancellation, and one count of misdemeanor leaving the scene of a property-damage accident.

After a jury trial, appellant was found guilty of all charges. At sentencing, defense counsel noted that appellant was currently on probation and subject to a stayed sentence for a prior gross-misdemeanor DWI conviction. Assuming that the stayed sentence would later be executed as a result of appellant's subsequent DWI conviction, defense counsel requested that the district court order that appellant's sentence for the current first-degree DWI conviction[1] be served concurrent with the stayed sentence. But the district court concluded that the "clear intent of the legislature is that these DWI offenses always be sentenced consecutive to one another." Utilizing a criminal history score of three, the district court imposed a 54-month presumptive sentence to be served consecutively to the prior stayed sentence. The district court also imposed concurrent

[1] Although appellant was found guilty of two counts of first-degree driving while impaired, the offenses merged because they arose from the same behavioral incident.

sentences for driving after cancellation and leaving the scene of a property damage accident. This appeal followed.

D E C I S I O N

I.

Appellant argues, and the state agrees, that the district court erred in concluding that state law required that appellant's sentence for felony first-degree DWI be served consecutive to a stayed sentence for a prior gross-misdemeanor DWI conviction. A district court has broad discretion in sentencing, and its decision will not be reversed absent a clear abuse of discretion. *See State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) ("[W]e generally will not interfere with the exercise of that [broad] discretion."). But the interpretation of a sentencing statute presents a question of law to be reviewed de novo. *State v. Borrego*, 661 N.W.2d 663, 666 (Minn. App. 2003). "The object of statutory interpretation is to determine and effectuate legislative intent," and "[t]he ambit of an ambiguous criminal law should be construed narrowly according to the rule of lenity." *State v. Zeimet*, 696 N.W.2d 791, 793-94 (Minn. 2005).

Generally, when an offender is convicted of multiple current offenses, or when a prior sentence has not expired or been discharged, concurrent sentencing is presumptive. Minn. Sent. Guidelines II.F. But in certain limited circumstances, consecutive sentences are called for or permitted. *Id.*; Minn. Stat. §§ 169A.28, subd. 1(a), 609.035, subd. 2 (2006). In the context of DWI sentencing, a district court must impose a consecutive sentence "when the person, at the time of sentencing, is on probation for" a prior DWI conviction. Minn. Stat. § 169A.28, subd. 1(a)(2). But "[t]he requirement for consecutive

sentencing . . . does not apply if the person is being sentenced to an executed prison term for" first-degree DWI. *Id.*, subd. 1(b) (2006). Thus, consecutive sentencing was not required in this instance because, although appellant was on probation for a previous DWI conviction, the district court imposed an executed sentence for the first-degree DWI.

This outcome is also consistent with the sentencing guidelines, which provide:

> When an offender is sentenced for a felony DWI, a consecutive sentence is presumptive if the offender has a prior unexpired . . . gross misdemeanor . . . DWI sentence. The presumptive disposition for the felony DWI is based on the offender's location on the grid. If the presumptive disposition is probation, the presumptive sentence for the felony DWI is a consecutive stayed sentence with a duration based on the appropriate grid time. . . . *If the disposition is commitment to prison, the requirement for consecutive sentencing does not apply.*

Minn. Sent. Guidelines II.F (2007) (emphasis added).

Based on this language, whether appellant is subject to presumptive consecutive sentencing depends upon his "location on the grid." *Id.* Appellant has a criminal history score of three, and felony DWI is a level-VII offense. Minn. Sent. Guidelines V. According to the sentencing guidelines grid, appellant would be subject to a presumptive, executed 54-month sentence for the felony DWI. *See* Minn. Sent. Guidelines IV. Thus, the disposition for the felony DWI is commitment to prison, and consecutive sentencing is not required in this case. *See* Minn. Sent. Guidelines II.F. Because the district court erred in its interpretation of these laws we reverse and remand for resentencing.

II.

Appellant challenges the district court's jury instruction for the offense of driving after cancellation. District courts are allowed considerable latitude in selecting the language in jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). This court reviews jury instructions for an abuse of that discretion. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). In particular, this court reviews the instructions as a whole to determine whether they fairly and adequately explain the law. *Id*.

Appellant failed to object to the instruction at trial. When a party does not object to a jury instruction at trial, this court may consider the issue only if the challenged instruction amounts to "plain error affecting substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Error is plain if it is clear or obvious. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). To affect substantial rights, the error must be prejudicial; that is, there must be a "reasonable likelihood" that giving the instruction would have had a significant effect on the verdict. *Griller*, 583 N.W.2d at 741. If the error was prejudicial, this court must assess whether it should remedy the error "to ensure fairness and the integrity of the judicial proceedings." *Id.* at 740.

In order to convict appellant of gross misdemeanor driving after cancellation, the state was required to prove, among other things, that appellant's driver's license had been canceled as inimical to public safety. Minn. Stat. § 171.24, subd. 5 (2006). Before trial, appellant stipulated to this element. Accordingly, the district court utilized jury instructions that included cancellation as inimical to public safety as one of the elements

of the offense, but also indicated that appellant had stipulated to the element. Appellant expressly agreed to this language.

Appellant argues that this element should have been removed from the jury instructions altogether. We agree that the better practice is to remove this language from the instruction. *See* 10A *Minnesota Practice*, CRIMJIG 29.36 cmt. (2006) (recommending that the cancellation as "inimical to public safety" element be omitted from the instructions when a defendant has stipulated to it). It was unnecessary for the jury to reach this element because appellant had stipulated to it, and the phrase "inimical to public safety" carries a negative connotation. However, its inclusion does not constitute plain error. Appellant's stipulation was designed to prevent the jury from learning about his lengthy record of driving offenses, and the instruction served that purpose. The court also reminded the jury that it was unnecessary to consider this element because appellant had stipulated to it. Thus, appellant is not entitled to relief on this basis.

III.

Appellant argues that the district court was precluded from sentencing him for his conviction of leaving the scene of a property-damage accident because it arose out of the same behavioral incident as his first-degree DWI conviction. "[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 (2006). For this reason, a court may impose only one sentence when multiple offenses are part of a single behavioral incident. *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000).

When conducting a single-behavioral-incident analysis for both intentional and non-intentional crimes, we consider whether the offenses "[arose] out of a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment." *State v. Sailor*, 257 N.W.2d 349, 352 (Minn. 1977) (quotation omitted). Whether conduct is singular depends on the indivisibility of the defendant's state of mind, not the separability of the defendant's actions. *State v. Krech*, 312 Minn. 461, 465, 252 N.W.2d 269, 272-73 (1977). The district court's determination of whether multiple offenses constitute a single behavioral incident is a factual determination that we will not reverse on appeal unless clearly erroneous. *State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004), *cert. denied*, 546 U.S. 882 (2005). The state bears the burden of proof to show that the offenses were not part of a single course of conduct. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

In support of his argument, appellant relies upon *State v. Corning*, 289 Minn. 382, 184 N.W.2d 603 (1971). The defendant in *Corning* was involved in an automobile accident while under the influence of alcohol. 289 Minn. at 383, 184 N.W.2d at 604-05. The defendant left the scene of the accident, but in doing so, he inadvertently drove around the block and was arrested by police as they arrived at the accident scene. *Id.*, 184 N.W.2d at 605. The defendant was charged with leaving the scene of an accident and driving under the influence. *Id.* at 384, 184 N.W.2d at 605. The supreme court concluded that the offenses arose out of the same behavioral incident because the conduct supporting the charges occurred at substantially the same time, and "the influence of alcohol was an important factor which could have caused [the defendant] to leave the

scene of the accident without providing the necessary information, to confusedly circle the block, and to exhibit signs of erratic driving behavior for which he was subsequently arrested." *Id.* at 387, 184 N.W.2d at 607.

In some respects, the circumstances here are similar to those in *Corning*. As in *Corning*, appellant was under the influence of alcohol when he left the scene of the accident, and there are some indications in the record that alcohol was an important factor in his decision to leave. But while the conduct underlying the convictions in *Corning* occurred over a short duration, evidence was presented in this case that appellant had been drinking since the afternoon, had consumed alcohol at more than one location, and had transported the men between several destinations. After hitting the mailbox, appellant dropped off Wellman and drove another five to six miles before stopping at Norman's and being arrested by police. Thus, we cannot conclude that these convictions arose from a continuous, uninterrupted course of conduct because it is impossible to determine whether appellant's conviction for DWI was based on conduct that occurred prior to, at the time of, or after, leaving the scene of the accident. *See State v. Reiland*, 274 Minn. 121, 124, 142 N.W.2d 635, 638 (1966) (concluding that offenses of driving after revocation and criminal negligence did not arise out of the same behavioral incident because it was unclear whether the driving-after-revocation conviction arose from driving that occurred before, during, or after the negligent act). In addition, the record does not support the conclusion that the offenses arose from an indivisible state of mind or coincident errors of judgment. Unlike in *Corning* where the defendant was severely intoxicated and arguably unaware of his actions, appellant made a conscious decision to

leave the scene and continue to drop off his friends. Therefore, these offenses are divisible because appellant's decision to operate a motor vehicle was separate and distinct from his decision to leave the scene of the accident.

Affirmed in part, reversed in part, and remanded.