STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0417

State of Minnesota,
Respondent,

vs.

Paul David Anderson,
Appellant.

Filed March 3, 2014
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-11-25787

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Johnson, Judge; and Kirk, Judge.

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

JOHNSON, Judge

Paul David Anderson led state troopers on a high-speed chase, which ended when he crashed his vehicle, was apprehended, and then punched a trooper in the head. A Hennepin County jury found Anderson guilty of five offenses, and the district court imposed sentences with respect to three offenses: first-degree driving while impaired, fleeing a peace officer in a motor vehicle, and fourth-degree assault of a peace officer. We affirm.

FACTS

In the early morning hours of July 4, 2011, two state troopers were watching for speeding cars in south Minneapolis on interstate highway 35W near 46th Street. At approximately 2:00 a.m., one of the troopers, Andrew Gibbs, observed a vehicle traveling at 73 m.p.h. in a 55-m.p.h. zone. The other trooper, Paul Henstein, followed the vehicle, activated his emergency lights and siren, and pulled the vehicle over to the right shoulder of the interstate highway between the 60th Street and Lyndale Avenue exits. Trooper Henstein approached the driver's side of the vehicle. When Anderson rolled down his window, Trooper Henstein detected an overwhelming odor of alcohol coming from inside the car. Trooper Henstein observed Anderson fumble with and then drop his wallet, and he also observed that Anderson would not make eye contact, that his eyes were bloodshot and watery, and that his speech was slurred. Anderson admitted to Trooper Henstein that he had been drinking. In light of his training and experience, Trooper Henstein believed that Anderson was under the influence of alcohol.

After several minutes of conversation and observation, Trooper Henstein asked Anderson to step out of the vehicle for field-sobriety tests. Anderson said "f-ck you," put his car in gear, and sped off. Trooper Henstein gave chase in his squad car and eventually caught up with Anderson's vehicle. A traffic-surveillance videorecording, which was admitted into evidence without objection, shows that Anderson sped past other vehicles, exited the interstate highway at 76th Street, and lost control, crashing into the center median of 76th Street. The videorecording shows that Anderson got out of his car and attempted to flee on foot, but Trooper Henstein drove his squad car over the center median and cut off his escape path. Anderson stopped for a moment, turned, and ran toward Trooper Henstein. Anderson threw an object at Trooper Henstein (which later was identified as his wallet) and punched Trooper Henstein in the side of his head. Trooper Henstein wrestled Anderson to the ground and, with the assistance of Trooper Gibbs and other officers, gained control of Anderson and handcuffed him.

Anderson was placed in the back of a squad car. Trooper Henstein asked him to take a preliminary breath test, but Anderson declined. Anderson repeatedly said "f-ck you" in response to practically every question and statement of Troopers Henstein and Gibbs. Trooper Henstein informed Anderson that he was under arrest for DWI and read him the implied-consent advisory. Anderson indicated that he understood the advisory and that he wished to consult with an attorney.

The troopers transported Anderson to the Hennepin County Medical Center (HCMC) for chemical testing and for an examination related to injuries he sustained during his confrontation with the troopers. Upon arrival at HCMC, Trooper Henstein

removed one of the handcuffs so that Anderson could call an attorney. As soon as the handcuff was removed, Anderson yelled and pointed his finger at Trooper Gibbs and then lunged at him. Anderson was once again placed into handcuffs, and the officers escorted him from HCMC to the county jail, where he remained uncooperative and physically combative. The troopers deemed Anderson's conduct to be a refusal to submit to chemical testing.

In August 2011, the state charged Anderson with six offenses: (1) first-degree driving while impaired, in violation of Minn. Stat. § 169A.24, subd. 1(1); (2) refusal to submit to a chemical test, in violation of Minn. Stat. § 169A.24, subd. 2; (3) fleeing a peace officer in a motor vehicle, in violation of Minn. Stat. § 609.487, subd. 3; (4) fourth-degree assault of a peace officer, Trooper Henstein, in violation of Minn. Stat. § 609.2231, subd. 1; (5) fourth-degree assault of a peace officer, Trooper Gibbs, in violation of Minn. Stat. § 609.2231, subd. 1; and (6) obstructing legal process or arrest, in violation of Minn. Stat. § 609.50, subd. 1(2) (2010).

The case was tried to a jury for two days in November 2012. Anderson testified. He admitted that he was driving while intoxicated, that he fled after Trooper Henstein stopped his vehicle, that he threw his wallet at Trooper Henstein, that he got into a physical confrontation with the troopers, that he resisted arrest, and that he refused to submit to chemical testing. The jury found Anderson guilty on counts 1, 2, 3, 4, and 6. The district court imposed a 60-month prison sentence on count 1, a concurrent prison sentence of one year and one day on count 3, and a concurrent prison sentence of 365

days on count 4. The district court did not impose sentences on counts 2 and 6. Anderson appeals.

D E C I S I O N

I. Sufficiency of Evidence

Anderson first argues that the state's evidence is insufficient to prove that he is guilty of DWI and of refusal to submit to a chemical test.

When considering a claim of insufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction," is sufficient to allow the jurors to reach a verdict of guilty. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted); *State v. Porte*, 832 N.W.2d 303, 307 (Minn. App. 2013). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). "[W]e will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

To establish Anderson's guilt on the charge of DWI, the state is required to prove that Anderson operated a motor vehicle while under the influence of alcohol. Minn. Stat. §§ 169A.20, subd. 1(1), .24; *State v. Ards*, 816 N.W.2d 679, 686 (Minn. App. 2012). To establish that Anderson was under the influence, the state is required to prove that Anderson "had drunk enough alcohol so that [his] ability or capacity to drive was

impaired in some way or to some degree." *See State v. Shepard*, 481 N.W.2d 560, 562 (Minn. 1992).

Trooper Henstein testified that he detected an overwhelming odor of alcohol coming from inside Anderson's car and that he observed Anderson fumble with and then drop his wallet. Trooper Henstein also testified that Anderson's eyes were bloodshot and watery and that his speech was slurred. Trooper Henstein testified that, in light of his training and experience, he believed that Anderson was under the influence of alcohol. Furthermore, Trooper Henstein testified that Anderson admitted during the initial stop that he had been drinking, and Anderson essentially admitted on cross-examination that he was intoxicated when Trooper Henstein pulled him over:

> Q: [T]he officer said you told him you had a couple of drinks; did you have a couple drinks?
>
> A: Yeah, I did have a couple drinks.
>
> Q: Do you believe you were intoxicated?
>
> A: Yeah. I don't know to what extent, you know what I mean.

This evidence is more than sufficient to prove that Anderson operated a motor vehicle while under the influence of alcohol, and, thus, is sufficient to support Anderson's conviction of DWI. *See Ortega*, 813 N.W.2d at 100; *State v. Teske*, 390 N.W.2d 388, 390-91 (Minn. App. 1986).

We need not address Anderson's argument concerning the sufficiency of the evidence of refusal because the district court did not record a judgment of conviction or impose a sentence with respect to that offense. *See State v. Hoelzel*, 639 N.W.2d 605,

609 (Minn. 2002) (holding that jury verdict of guilt, without recorded judgment of conviction and sentence, is not final, appealable adjudication); *State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (declining to address sufficiency-of-evidence argument for counts on which defendant was found guilty but not sentenced or formally adjudicated guilty). If Anderson is sentenced on the refusal offense at any time in the future, he will have an opportunity at that time to pursue a direct appeal from a final judgment on the refusal offense. *See* Minn. R. Crim. P. 27.03, subd. 8, 28.02, subd. 2(1); *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

II. Jury Instructions

Anderson next argues that the district court erred in its jury instructions on the charge of refusal to submit to chemical testing. Again, the district court did not record a judgment of conviction or impose a sentence with respect to the refusal offense. Therefore, we need not address Anderson's second argument at this time. *See Hoelzel*, 639 N.W.2d at 609; *LaTourelle*, 343 N.W.2d at 284; *Ashland*, 287 N.W.2d at 650.

III. Multiple Punishments

Anderson last argues that the district court erred by imposing sentences on both the DWI offense and the assault offense. Anderson contends that he cannot be punished for both offenses because they arose from the same behavioral incident. This court applies a *de novo* standard of review to a district court's determination as to whether multiple offenses arose from a single behavioral incident if the relevant facts are undisputed, as they are in this case. *See State v. Bauer*, 776 N.W.2d 462, 477 (Minn.

App. 2009) (*Bauer I*), *aff'd*, 792 N.W.2d 825 (Minn. 2011); *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

As a general rule, "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." Minn. Stat. § 609.035, subd. 1 (2010). Accordingly, if a person is charged with multiple offenses, a district court must determine whether the offenses "resulted from a single behavioral incident," in which event multiple punishments are prohibited. *State v. Johnson*, 273 Minn. 394, 404, 141 N.W.2d 517, 524 (1966). The statute prohibiting multiple punishments was first enacted in 1963. *See* 1963 Minn. Laws ch. 753, art. 1, § 609.035, at 1188. The purpose of the statute is "to protect a defendant convicted of multiple offenses against unfair exaggeration of the criminality of his conduct." *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn. 1986).

The supreme court has prescribed two different tests for determining whether multiple offenses arose from a single behavioral incident. *State v. Bauer*, 792 N.W.2d 825, 827-28 (Minn. 2011) (*Bauer II*). The first test applies if there are multiple intentional crimes; in that situation, "Minnesota courts consider whether the conduct (1) shares a unity of time and place and (2) was motivated by an effort to obtain a single criminal objective." *Bauer I*, 776 N.W.2d at 478 (citing *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000); *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997)). The second test applies if "the offenses include both intentional and nonintentional crimes"; in that situation, "the proper inquiry is whether the offenses (1) occurred at substantially the same time and place and (2) arose from 'a continuing and uninterrupted course of

conduct, manifesting an indivisible state of mind or coincident errors of judgment.'" *Id.* (quoting *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991)).

Anderson and the state agree that the second test applies to this case because DWI is deemed to be a nonintentional traffic offense. For purposes of this case, we accept the parties' agreement, assume that DWI is a nonintentional crime, and apply the second test. *See State v. Smoot*, 737 N.W.2d 849, 853 (Minn. App. 2007) (assuming without deciding that felony DWI is strict-liability offense for purposes of deciding whether DWI is predicate offense for felony murder), *review denied* (Minn. Nov. 21, 2007).[1]

The second test has two parts. With respect to the first part, Anderson is correct: the two offenses "occurred at substantially the same time and place." *Bauer I*, 776 N.W.2d at 478 . The DWI offense occurred when Anderson was stopped by troopers on

[1]The supreme court's caselaw historically has classified DWI as a "nonintentional" traffic offense, though the caselaw is somewhat dated. *See, e.g.*, *State v. Clement*, 277 N.W.2d 411, 413 (Minn. 1979); *State v. Sailor*, 257 N.W.2d 349, 352 (Minn. 1977); *Johnson*, 273 Minn. at 404-05, 141 N.W.2d at 525 (1966). The offense of DWI has changed significantly since the 1960s and 1970s. In 2000, the legislature removed DWI from the "traffic regulations" chapter and recodified it in a new chapter. *See* 2000 Minn. Laws. ch. 478, art. I, §§ 1-44, at 1484-1528 (codified at Minn. Stat. §§ 169A.01-.76). In addition, the penalties for DWI have increased dramatically over time. In 1965, DWI always was a misdemeanor, with a maximum sentence of 90 days in jail or a $100 fine, even if the offense was the proximate cause of grievous bodily injury or death to another person. Minn. Stat. § 169.121, subd. 3 (1965). In contrast, DWI today may be a felony, with a sentence of as much as seven years in prison and a $14,000 fine. Minn. Stat. § 169A.24 (2012). These changes may raise a question as to whether DWI still is a nonintentional crime. *See Bauer I*, 776 N.W.2d at 478 n.3 (noting that traffic offenses typically are strict-liability offenses); *State v. Ndikum*, 815 N.W.2d 816, 822 (Minn. 2012) (noting that offenses with "'small penalties' like fines and short jail sentences" typically are strict-liability offenses) (quoting *Staples v. United States*, 511 U.S. 600, 616, 114 S. Ct. 1793, 1803 (1994)). If DWI were an intentional crime, the first test, rather than the second test, would determine whether the two offenses at issue are part of a single behavioral incident.

interstate highway 35W near 60th Street. The assault took place several minutes later, after Anderson exited the interstate at 76th Street. Because "the offenses occurred within minutes of each other and in the same general area of each other," the first part of the single-behavioral-incident test is satisfied. *See State v. Boley*, 299 N.W.2d 924, 926 (Minn. 1980); *see also State v. Finn*, 295 Minn. 520, 522, 203 N.W.2d 114, 115 (1972) (noting that offenses occurring "within 5 minutes over a distance of 3 miles" shared unity of time and place).

With respect to the second part of the test, Anderson is incorrect: the two offenses did not arise from "a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment." *See Bauer I*, 776 N.W.2d at 478 (quotation omitted). There were distinct interruptions that broke the continuity of Anderson's course of conduct. Anderson was engaging in the first offense, DWI, when he was stopped by Trooper Henstein. Anderson pulled over to the side of the road, rolled down his window, and initially was cooperative with Trooper Henstein, thereby interrupting his criminal activity. But after speaking to Trooper Henstein for several minutes, Anderson decided to flee, thereby committing the second offense, fleeing a peace officer in a motor vehicle. And after crashing his car and ending the chase, Anderson decided to assault Trooper Henstein, thereby committing the third offense, assaulting a peace officer. Because Anderson's course of conduct was interrupted twice, the first offense and the third offense did not arise from "a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment." *See id.* (quotation omitted). Rather, Anderson's three offenses manifest a

divisible state of mind with three separate errors of judgment. For that reason, Anderson's DWI and assault offenses do not arise from the same behavioral incident.

Anderson cites *State v. Krech*, 312 Minn. 461, 252 N.W.2d 269 (1977), but the facts of that case are distinguishable from the facts of this case. The defendant in *Krech* led officers on a high-speed chase, which ended in his assault of an officer. *Id.* at 463, 252 N.W.2d at 271. He was adjudicated guilty of speeding, failure to stop at a stop sign, driving after revocation of his license, DWI, reckless driving, obstructing legal process, and aggravated assault. *Id.* at 463-64, 252 N.W.2d at 271-72. The issue on appeal was whether he could be sentenced on the traffic offenses as well as the obstruction and assault offenses. *Id.* at 462, 252 N.W.2d at 271. The facts of *Krech* are different from the facts of this case because Krech did not pull over when officers attempted to stop him for speeding, and there was no interruption between the high-speed chase and the assault. *Id.* at 463, 252 N.W.2d at 271. Rather, while still being chased, Krech accelerated his car toward an officer in an attempt to injure him. *Id.* He never left his car or even stopped the car until after he had completed all the offenses of which he was convicted. *Id.* For that reason, the supreme court reasoned that Krech's conduct was a single, continuous, uninterrupted act manifesting "an indivisible state of mind" and "coincident errors of judgment." *Id.* at 467, 252 N.W.2d at 273 (quotation omitted). In this case, however, Anderson's offenses were interrupted on two separate occasions, and the outward manifestations of his state of mind were noticeably different at various points in time.

Thus, the district court did not err by imposing multiple sentences on Anderson for his convictions of first-degree driving while impaired, fleeing a peace officer in a motor vehicle, and fourth-degree assault of a peace officer.

Affirmed.