STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0609

State of Minnesota,
Respondent,

vs.

Robert James Cerney, Jr.,
Appellant.

Filed April 14, 2025
Affirmed in part, reversed in part, and remanded
Johnson, Judge

Winona County District Court
File No. 85-CR-23-1781

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Karin Sonneman, Winona County Attorney, Winona, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Winona County jury found Robert James Cerney Jr. guilty of one count of first-degree burglary, two counts of threats of violence, and three counts of assault. We conclude that the evidence is sufficient to support the jury's verdict on the burglary charge,

that the district court did not commit reversible error when instructing the jury on the elements of the burglary charge, and that the district court did not plainly err by instructing jurors to continue deliberating. But we conclude that the district court erred by entering multiple convictions on one offense and a lesser-included offense and by imposing multiple sentences on two offenses arising out of a single behavioral incident. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

All charges in this case arise out of a series of events occurring on October 11, 2023. At approximately 2:00 p.m., Cerney went to the home of his former girlfriend, A.P., and entered an enclosed porch while A.P. was asleep in her bedroom. A.P. awoke to the sound of Cerney yelling at her to "let him in" and his statement that he "doesn't care what happens." Shortly thereafter, Cerney broke a window leading from the enclosed porch into A.P.'s bedroom and crawled through the broken window into her bedroom. As he did so, he yelled profanities and statements about A.P. giving him back his clothes. A.P. told Cerney to get out, but he remained in her house, yelling and pacing back and forth.

A.P.'s adult son received an alert from a motion-activated security camera in A.P.'s porch. He called 911. Within minutes, law-enforcement officers arrived at the house. Sergeant Anderson was the first to arrive. He told A.P. to climb out the broken window and leave the house. For the next 20 to 30 minutes, Sergeant Anderson tried to persuade Cerney to leave the house. Cerney responded by saying that he wanted to die, that he wanted law-enforcement officers to kill him, and that law-enforcement officers would need

to kill him to get him out of A.P.'s house. Similarly, Cerney told other law-enforcement officers to shoot him and also threatened to shoot other officers.

After a stand-off lasting approximately one hour, the officers decided to stand down and let Cerney leave of his own accord. This decision was informed by a prior stand-off with Cerney at A.P.'s house two and one-half years earlier, in May 2021. During the earlier incident, Cerney entered A.P.'s house, physically assaulted her, started fires, punched through walls, and refused to leave. There was a 12-hour standoff, during which Cerney threatened to shoot officers.

At approximately 7:30 p.m. on October 11, 2023, Officer Brommerich and Officer Sense found Cerney in the front yard of his last-known address and attempted to arrest him. Cerney responded by running toward Officer Brommerich with his arms swinging, yelling "shoot me." Both officers tried to control Cerney with their tasers. But Cerney was able to swing a fist at Officer Brommerich, hitting him in the hand, before he turned toward Officer Sense and attempted to punch him.

After that brief encounter, Cerney ran toward the back yard of the property. Officer Sense tackled Cerney, and both officers attempted to handcuff him. Unable to do so, the officers held Cerney on the ground for approximately three minutes while they waited for back-up. Cerney repeatedly told the officers that he was going to shoot them with their own guns.

The state initially charged Cerney with ten offenses. The state twice amended the complaint, adding six additional charges. The case was tried to a jury on four days in January 2024. On the first day of trial, the state dismissed nine of the sixteen charges, but

Cerney requested that two charges be submitted to the jury as lesser-included offenses, and the district court did so. The state called nine witnesses. Cerney did not testify and did not introduce any evidence.

The district court submitted the following nine charges to the jury: one count of first-degree burglary, in violation of Minn. Stat. § 609.582, subd. 1(a) (2022); two counts of fourth-degree assault, in violation of Minn. Stat. § 609.2231, subd. 1(c)(1) (2022); two counts of threats of violence, in violation of Minn. Stat § 609.713, subd. 1 (2022); and four counts of fifth-degree assault, in violation of Minn. Stat. § 609.224, subd. 4(b) (2022). The jury found Cerney guilty of six of the charges: count 1, first-degree burglary; count 2, fourth-degree assault of Officer Brommerich; count 4, threats of violence against multiple officers at A.P.'s house; count 12, threats of violence against Officer Brommerich and Officer Sense; count 13, fifth-degree assault against Officer Sense; and count 14, fifth-degree assault against Officer Brommerich.

At sentencing, the district court entered convictions on all six guilty verdicts. The district court imposed concurrent sentences of 45 months on count 1 and 30 months on count 4. The district court also imposed three consecutive sentences of 12 months and a day on counts 12, 13, and 14, which were ordered to run consecutively to the sentences on counts 1 and 4. The district court did not impose a sentence on count 2. Cerney appeals.

DECISION

I. Sufficiency of the Evidence

Cerney first argues that the evidence is insufficient to prove beyond a reasonable doubt that he committed the offense of first-degree burglary.

In analyzing an argument that the evidence is insufficient to support a conviction, this court ordinarily undertakes "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). This court assumes 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). This court will not overturn a 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.

A person commits first-degree burglary if he or she "enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building," and, in addition, the building is an occupied dwelling, or the burglar possesses a dangerous weapon, or the burglar assaults a person within the building. Minn. Stat. § 609.582, subd. 1. In this case, the state sought to prove that Cerney entered a building without consent, that the building was an occupied dwelling, and that Cerney committed a crime while in the building, specifically, the crime of disorderly conduct.

Cerney's argument is focused on the predicate crime of disorderly conduct. He contends that the state's evidence is insufficient to prove beyond a reasonable doubt that he committed that crime while in A.P.'s house. A person commits the crime of disorderly conduct if he or she "engages in [1] offensive, obscene, abusive, boisterous, or noisy conduct or in [2] offensive, obscene, or abusive language tending reasonably to arouse

alarm, anger, or resentment in others." Minn. Stat. § 609.72, subd. 1(3) (2022) (alterations added).

Cerney contends that he did not commit the crime of disorderly conduct while in A.P.'s house based on the second prong of the disorderly-conduct statute, which may criminalize certain "language," because speech generally is protected by the First Amendment, unless it consists of "fighting words."

In *In re Welfare of S.L.J.*, 263 N.W.2d 412 (Minn. 1978), the supreme court held that section 609.72, subdivision 1(3), as enacted, "clearly contemplates punishment for speech that is protected under the First and Fourteenth Amendments." *Id.* at 419. To ensure that criminal defendants are not convicted of engaging in speech protected by the First Amendment, the supreme court narrowly construed the disorderly-conduct statute to criminalize speech only if it consists of unprotected "fighting words." *Id.* at 416-19. The supreme court explained that "fighting words" are "those 'personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction,'" *id.* at 418 (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)), or words that "'by their very utterance inflict injury or tend to incite an immediate breach of the peace,'" *id.* at 418 (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974)). Accordingly, the supreme court reversed a disorderly-conduct conviction of a "small, 14-year-old child" who said "f--k you pigs" while walking away from two police officers who were sitting in a squad car 15 to 30 feet away, in circumstances in which "there was no reasonable likelihood that [the juvenile] would tend to incite an immediate breach of the peace or to provoke violent reaction by an ordinary,

reasonable person." *Id.* at 415, 420; *see also In re Welfare of M.A.H.*, 572 N.W.2d 752, 758-60 (Minn. App. 1997) (reversing disorderly-conduct conviction based on evidence that juveniles made profane remarks to police officers while surrounded by other juveniles).

In response, the state contends that Cerney's conviction is justified by evidence that satisfies the first prong of the disorderly-conduct statute, which criminalizes certain "conduct," without regard to speech. In support of that argument, the state cites *In re Welfare of T.L.S.*, 713 N.W.2d 877 (Minn. App. 2006). In that case, a juvenile visited a school, became upset, yelled, and refused to leave when asked. *Id.* at 879. When police officers arrived, the juvenile again refused to leave and shouted profanities at the officers, thereby creating a "loud shrieking" noise that was found to be "disruptive to the running of the school and purposes of the school." *Id.* This court concluded that police officers had probable cause to arrest the juvenile for disorderly conduct, reasoning as follows:

> Although the disorderly conduct statute prohibits only "fighting words" as applied to speech *content*, the disorderly shouting of otherwise protected speech or engaging in other "boisterous or noisy *conduct*" may still trigger punishment under the statute without offending the First Amendment. In that circumstance, it is not the speech itself that triggers punishment; the statute may be applied to punish the manner of delivery of speech when the disorderly nature of the speech does not depend on its content.

Id. at 881. We noted that the supreme court in *S.L.J.* narrowly construed the part of the disorderly-conduct statute that focuses on "language" but "did not address, and therefore did not except, boisterous and noisy conduct from legislative prohibition." *Id.* at 880 (citing Minn. Stat. § 609.72, subd. 1(3), and *S.L.J.*, 263 N.W.2d at 418-19).

The evidence introduced at trial shows that Cerney violated the disorderly-conduct statute by his conduct and by the offensive and abusive manner in which he spoke, without regard to the content of his speech. Cerney violently broke a window separating A.P.'s porch and bedroom, thereby creating a loud noise and causing glass to fly inside her bedroom. After entering A.P.'s house through the broken window, Cerney continually yelled loudly at her and refused her instructions to leave her house. A.P. testified that Cerney was "loud and crazy" as he yelled and paced around her house and that his conduct made her feel "scared" and "angry." The offensive nature of Cerney's conduct was reinforced by evidence that, approximately two and one-half years earlier, Cerney had entered A.P.'s house without consent and physically assaulted her, started fires inside her house, and broke several walls and windows. A.P. testified that the prior incident was on her mind during this incident. Cerney's conduct is similar to the conduct of other appellants whose disorderly-conduct convictions have been affirmed by this court. *See T.L.S.*, 713 N.W.2d at 879, 882; *see also State v. Janecek*, 903 N.W.2d 426, 431 (Minn. App. 2017) (affirming disorderly-conduct conviction based on evidence that defendant knocked over neighbor's trash bin, spilling debris onto neighbor's driveway and causing neighbor to feel "unsettled" and "fearful"); *State v. Ackerman*, 380 N.W.2d 922, 926 (Minn. App. 1986) (affirming disorderly-conduct conviction based on evidence that defendant continually and angrily shouted and swore at domestic partner, refused to leave their home, and yelled obscenities at and physically scuffled with police officers).

Thus, the evidence introduced at trial is sufficient to prove that Cerney committed the crime of disorderly conduct while in A.P.'s house due to his conduct and the offensive and abusive manner in which he spoke.

II. Jury Instructions

Cerney also argues that the district court erred in its jury instruction on the elements of disorderly conduct, the predicate crime underlying Cerney's burglary conviction. Specifically, Cerney argues that the district court erred by omitting the concept of fighting words.

A district court must instruct the jury in a way that "fairly and adequately explain[s] the law of the case" and does not "materially misstate[] the applicable law." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). A district court must define the crime charged and should explain the elements of the offense. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). A district court need not provide "detailed definitions of the elements to the crime . . . if the instructions do not mislead the jury or allow it to speculate over the meaning of the elements." *State v. Davis*, 864 N.W.2d 171, 177 (Minn. 2015) (quotation omitted). An appellate court reviews jury instructions "as a whole to determine whether the instructions accurately state the law in a manner that can be understood by the jury." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). A district court has "considerable latitude in selecting language for jury instructions." *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). Accordingly, we review a district court's jury instructions under an abuse-of-discretion standard. *Koppi*, 798 N.W.2d at 361.

In this case, the district court instructed the jury on the elements of disorderly conduct as follows:

> First, the defendant engaged in offensive, obscene, abusive, boisterous, or noisy conduct, or offensive, obscene, abusive language tending to reasonably arouse alarm, anger, or resentment in others. Second, the defendant knew or believed or had reasonable grounds to know that the conduct would or could tend to alarm, anger, disturb, provoke an assault, or provoke a breach of the peace by others. And third, . . . the act took place in a public or private place.

The district court did not instruct the jury that it could not find Cerney guilty based on constitutionally protected speech, nor did the district court define fighting words and clarify that fighting words are *not* constitutionally protected.

Cerney concedes that he did not preserve this argument by objecting to the disorderly-conduct instruction in the district court. The absence of an objection means that this court reviews only for plain error. *See* Minn. R. Crim. P. 31.02; *see also State v. Reek*, 942 N.W.2d 148, 158 (Minn. 2020). Under the plain-error test, an appellant is entitled to relief on an issue to which no objection was made at trial only if (1) there is an error, (2) the error is plain, and (3) the error affects the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three requirements are satisfied, the appellant also must satisfy a fourth requirement: that the error "seriously affects the fairness and integrity of the judicial proceedings." *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014). If an appellate court concludes that any requirement of the plain-error test is satisfied, the appellate court need not consider the other requirements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

The state concedes that the district court erred by not including language in the instruction concerning the distinction between constitutionally protected speech and unprotected fighting words, and the state also concedes that the error is plain. *See Ihle*, 640 N.W.2d at 916-17 (holding that district court plainly erred by not giving jury fighting-words instruction in prosecution for obstruction of legal process). But the state argues that Cerney cannot establish that the absence of such language affected his substantial rights. *See Griller*, 583 N.W.2d at 741. An error affects a defendant's substantial rights "if the error was prejudicial and affected the outcome of the case." *Id.* "In the context of jury instructions, . . . an error affects substantial rights when there is a reasonable likelihood that a more accurate instruction would have changed the outcome in this case." *State v. Guiterrez*, 667 N.W.2d 426, 434-35 (Minn. 2003) (quotation omitted). An appellant bears a "heavy burden" in seeking to satisfy the third requirement of the plain-error test. *Griller*, 583 N.W.2d at 741.

At trial, the state's evidence and argument were focused primarily on Cerney's conduct, not his speech. As previously discussed, the state introduced abundant evidence that Cerney engaged in multiple forms of non-expressive conduct that satisfy the elements of the crime of disorderly conduct. *See supra* part I. The state also focused its closing argument on Cerney's non-expressive conduct. The prosecutor described how Cerney smashed A.P.'s window while she was asleep, screamed at A.P., and refused to leave after she told him to get out of her house. The state emphasized A.P.'s fear when Cerney entered her bedroom, the size difference between A.P. and Cerney, and how Cerney responded to A.P.'s fear by "yell[ing] at her more." Finally, the state contextualized this fear by

describing the prior incident in which Cerney entered A.P.'s house without consent, physically assaulted her, started fires, punched through walls, and refused to leave. Given Cerney's egregious conduct and the state's focus on Cerney's "conduct" (not his "language"), there is no reasonable likelihood that the inclusion of a fighting-words instruction would have changed the outcome of the jury's verdict on the burglary charge.

Thus, Cerney is not entitled to a new trial on the ground that the district court did not instruct the jury on the concept of fighting words.

III. Supplemental Jury Instruction

Cerney next argues that the district court erred by giving jurors a supplemental instruction in response to a note from the foreperson. Cerney contends that the supplemental instruction coerced the jury into reaching a verdict, even though a jury need not reach a unanimous verdict in every case. Cerney concedes that he did not object in the district court and that this court should review for plain error. *See Griller*, 583 N.W.2d at 740.

The case was submitted to the jury at the end of the third day of trial. The jury began its deliberations the following morning at 8:30 a.m. At 2:00 p.m. on that day, the district court received a note from the jury foreperson asking, "What if we cannot come to an agreement on some of the charges?" During a conference with counsel, the district court stated, "I'm just going to tell them to keep working." The district court judge then handwrote the following answer to the jury foreperson's question on the same piece of paper: "You must continue to deliberate to reach a verdict." Approximately one hour later, the jury returned its verdicts.

A rule of criminal procedure provides, "The jury may be discharged without a verdict if the court finds there is no reasonable probability of agreement." Minn. R. Crim. P. 26.03, subd. 20(4). In *State v. Martin*, 211 N.W.2d 765 (Minn. 1973), the supreme court held that the district court erred by suggesting to a deadlocked jury that it was required to reach "a unanimous result" and that the "case must at some time be decided." *Id.* at 767, 772-73. Similarly, in *State v. Kelley*, 517 N.W.2d 905 (Minn. 1994), the supreme court held that the district court erred by telling a deadlocked jury to "keep deliberating" because the supplemental instruction "may have led them to conclude that they were required to deliberate until a unanimous verdict was reached on each count." *Id.* at 909. The supreme court has summarized the district court's duty, if a jury appears to be unable to agree on a verdict, as follows:

> If a trial court believes a jury is unable to agree, it "may require the jury to continue their deliberations and may give or repeat an instruction . . . . The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *State v. Kelley*, 517 N.W.2d 905, 909 (Minn. 1994) (quoting A.B.A. Standards for Criminal Justice § 15-4.4(b) (1986)). "[I]t is reversible error in Minnesota to coerce a jury towards a unanimous verdict. A court, therefore, can neither inform a jury that a case must be decided, nor allow the jury to believe that 'deadlock' is not an available option." *State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996) (citations omitted).

State v. Buggs, 581 N.W.2d 329, 337-38 (Minn. 1998) (alterations in original).

In *State v. Cox*, 820 N.W.2d 540 (Minn. 2012), the jury foreperson sent a note to the district court that stated: "We have agreed on a verdict on two charges, but have not been able to agree on a third charge. What happens if we are unable to agree on the third

charge?" *Id.* at 550. The supreme court rejected the appellant's coercion argument with the following reasoning:

> The jury's note does not indicate that the jury was deadlocked. By asking "What happens *if* we are unable to agree on the third charge" (emphasis added), the jury appears to seek guidance not because the jury is currently deadlocked, but in the event that the jury may become deadlocked in the future. Thus, we conclude that the court did not abuse its discretion in instructing the jury to continue deliberating because the jury was never deadlocked.

Id. at 551. In the four paragraphs that follow, the supreme court reasoned in the alternative that, "[e]ven if we were to conclude that the jury was deadlocked," the district court's supplemental instruction did not coerce the jury into reaching a verdict. *Id.* at 551-52. We interpret *Cox* to say that, if a jury is not deadlocked, a district court does not err by instructing the jury to continue deliberating because such an instruction is not coercive if the jury receives the instruction when the jury is not deadlocked. *See id.* at 551. This interpretation is consistent with *Martin*, in which the supreme court recognized that "the potential for coercion is minimized" when the jury is instructed "before there is a minority or a majority," thereby avoiding the "undesirable effect on the minority of having the prestige of the court brought to bear on it by the court's focusing on the minority to achieve unanimity." 211 N.W.2d at 772.

In this case, the jury foreperson's note is practically identical to the jury foreperson's note in *Cox*. Accordingly, we assume that the jury in this case was not deadlocked when the foreperson wrote the note but, rather, was "seek[ing] guidance . . . in the event that the

jury may become deadlocked in the future." *See Cox*, 820 N.W.2d at 551. Thus, the district court did not abuse its discretion by instructing the jury to continue deliberating. *See id.*

Even if we assume that the jury was deadlocked, we would reach the same conclusion. In both *Cox* and this case, the essence of the supplemental instruction was that the jury should continue deliberating, although the district court's supplemental instruction in this case was more succinct than the supplemental instruction in *Cox*. In addition, the district court in this case earlier had given the jury, verbatim, a pattern instruction encouraging them to "reach[] an agreement if you can do so without violating your own individual judgment" and to "not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict." *See* 10 Minnesota Dist. Judges' Ass'n, *Minnesota Practice–Jury Instruction Guides* § 3.02, at 46 (7th ed. 2024). The same pattern instruction was given before deliberations in *Cox*, which was a factor in the supreme court's alternative reasoning. *See Cox*, 820 N.W.2d at 551; *see also Buggs*, 581 N.W.2d at 338 (reasoning that same pattern instruction reduced prejudicial effect of potentially coercive instruction). Furthermore, the jury in this case was not required to deliberate for an unreasonable period of time, as in *Cox*. *See id*. The district court gave only one supplemental instruction to continue deliberating, and the jury returned its verdicts an hour later.

We acknowledge Cerney's contention that, by instructing the jury to "continue to deliberate *to reach a verdict*," the district court in this case went further than the district court in *Cox*. (Emphasis added.) But we do not necessarily equate the district court's language with a statement that the jury *must* reach a verdict. The absence of such an

imperative makes the supplemental instruction in this case different from supplemental instructions in other cases that a jury "must reach a verdict," *see State v. Olsen*, 824 N.W.2d 334, 337-40 (Minn. App. 2012), *rev. denied* (Minn. Feb. 27, 2013), or that a case "must be decided," *see Martin*, 211 N.W.2d at 769. The district court's instruction to "continue to deliberate to reach a verdict" could just as well be understood to mean that the jury should continue to deliberate so that it might achieve the goal of reaching a verdict. The ambiguous nature of the phrase "to reach a verdict" leads to the conclusion that the district court's supplemental instruction is not plainly erroneous.

In light of the fact that the jury was not deadlocked, as well as other similarities to *Cox*, the district court's supplemental instruction is not plainly erroneous. Thus, Cerney is not entitled to a new trial on the ground that the district court erred in giving a supplemental jury instruction in response to the jury foreperson's note.

IV. Sentencing

Cerney argues in the alternative that the district court erred in two ways at sentencing.

A. Multiple Convictions

Cerney first argues that the district court erred by entering convictions on both count 2 and count 14, in which the state alleged that Cerney committed fourth-degree assault and fifth-degree assault against Officer Brommerich.

A criminal defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2022). In determining whether an offense is an "included offense" under section 609.04, courts examine "the elements of the

offense instead of the facts of the particular case." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). This court applies a *de novo* standard of review to the application of section 609.04. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

Cerney contends that count 14 is "an included offense" because it is a lesser degree of the crime charged in count 2. *See* Minn. Stat. § 609.04, subd. 1(1); *State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995). The state agrees and concedes that the district court erred by entering convictions on both count 2 and count 14.

Cerney requests that this court remand with instructions to vacate the conviction on count 14, but he does not explain why that particular conviction should be vacated. The state requests that the court remand with instructions to vacate the conviction on count 2 and leave the guilty verdict unadjudicated on the ground that the district court decided not to impose a sentence on count 2. The state's suggested remedy appears to align with the district court's stated intention during the sentencing hearing to not impose a sentence on count 2 because of the conviction entered on count 14.

Thus, we conclude that the district court erred by entering convictions on both count 14 and count 2. Therefore, we reverse the conviction on count 2 and remand the matter to the district court with instructions to vacate the conviction on count 2 and leave the guilty verdict on that charge unadjudicated. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984); *State v. Walker*, 913 N.W.2d 463, 467-68 (Minn. App. 2018).

B. Multiple Sentences

Cerney next argues that the district court erred by imposing three sentences on counts 12, 13, and 14 on the ground that the three offenses arose from a single behavioral incident.

In general, "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 (2022). Consequently, "multiple sentences for multiple offenses committed as part of the same behavioral incident are prohibited." *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020). If multiple offenses arise out of a single behavioral incident, the district court should impose only one sentence, and it should be for the offense with the highest severity level. Minn. Sent'g Guidelines cmt. 2.B.107 (2023). "To determine whether two or more offenses were committed under a single behavioral incident, we examine two factors: (1) whether the offenses occurred at substantially the same time and place, and (2) whether the conduct was motivated by an effort to obtain a single criminal objective." *Barthman*, 938 N.W.2d at 265 (quotations omitted). The state bears the burden of proving, by a preponderance of the evidence, that multiple offenses did not arise from a single behavioral incident. *Id.* at 266. This court applies a clear-error standard of review to a district court's findings of fact and a *de novo* standard of review to the district court's application of the law to given facts. *Id.* at 265.

In this case, the state made broad references to the "evidence" before asking the district court to impose three sentences on counts 12, 13, and 14. We consider the evidence presented at trial to determine whether it supports the district court's implied finding that

Cerney's threats of violence against Officer Sense and Officer Brommerich, which was the charge in count 12; his assault of Officer Sense, which was the charge in count 13; and his assault of Officer Brommerich, which was the charge in count 14, were committed during a single behavioral incident. *See id.* at 266-67.

The parties agree that the first factor identified in *Barthman* is present: that the offenses occurred "at substantially the same time and place." *See id.* at 265. But the parties disagree about the second factor: "whether the conduct was motivated by an effort to obtain a single criminal objective." *See id.* Cerney contends that all three offenses were motivated by the same objective: to die at the hands of police officers. The record supports this contention. While in the front yard at his last-known address, Cerney assaulted both officers by charging toward them and punching while yelling, "shoot me, come on." After moving to the back yard, Cerney threatened the officers with violence by saying that he was going to shoot them with their own guns. All three offenses appear to be motivated by a desire to escalate the officers' use of force so that he would be killed in a confrontation with law-enforcement officers.

Because both factors—same time and place and single criminal objective—indicate that Cerney's offenses on counts 12, 13, and 14 arose from a single behavioral incident, the district court erred by imposing three sentences on three convictions. Cerney requests that this court remand with instructions to vacate the two sentences on the two assault convictions in counts 13 and 14. But, as the state contends, the district court may impose two sentences on the two assault offenses because section 609.035 does "not bar multiple sentences when the defendant commits crimes against multiple victims." *State v. Alger*,

941 N.W.2d 396, 400 (Minn. 2020). Nonetheless, the district court erred by imposing a third sentence on count 12 because it arose from the same behavioral incident and involved the same victims as the convictions on counts 13 and 14. Thus, we reverse the sentence imposed on count 12 and remand the matter to the district court with instructions to vacate that sentence.

Affirmed in part, reversed in part, and remanded.