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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-1239**

State of Minnesota,  
Respondent,

vs.

Ronald Renaldo Ulmer-Kelly,  
Appellant.

**Filed May 21, 2018  
Affirmed  
Schellhas, Judge**

Hennepin County District Court  
File No. 27-CR-16-26805

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

Susan L. Segal, Minneapolis City Attorney, Sarah Becker, Assistant City Attorney,  
Minneapolis, Minnesota (for respondent)

Timothy Matuszak, Trice W. Okrzynski, Minneapolis, Minnesota (for appellant)

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

**UNPUBLISHED OPINION**

**SCHELLHAS, Judge**

Appellant challenges his conviction of second-degree driving while impaired,  
refusal to submit to a chemical test. We affirm.

## FACTS

Early in the morning on October 8, 2016, a police officer responded to a dispatch call reporting a “slumper.” The officer found appellant Ronald Ulmer-Kelly passed out in the driver seat of his car with the car in drive. After Ulmer-Kelly admitted to consuming alcohol earlier that night and “performed poorly” on a field sobriety test, the officer arrested him. The officer read Ulmer-Kelly the implied-consent advisory and attempted to administer a breath test. Following Ulmer-Kelly’s noncompliance in taking the breath test, the officer registered his failure to cooperate as a refusal to take the test.

Relevant to this appeal, respondent State of Minnesota charged Ulmer-Kelly with one count of second-degree driving while impaired (DWI), refusal to submit to a chemical test (DWI-test refusal) under Minn. Stat. § 169A.25, subd. 1(b) (2016), and one count of third-degree DWI under Minn. Stat. § 169A.20, subd. 1(1) (2016).<sup>1</sup> Ulmer-Kelly pleaded guilty to both counts.<sup>2</sup>

At his sentencing hearing, Ulmer-Kelly moved to dismiss the third-degree DWI charge. The court denied Ulmer-Kelly’s motion, adjudicated him guilty on all counts, and sentenced him for the third-degree DWI conviction.

This appeal follows.

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<sup>1</sup> Both of these statutes require the presence of an aggravating factor. An aggravating factor includes “a qualified prior impaired driving incident within . . . ten years,” which includes a prior DWI violation. Minn. Stat. § 169A.03, subs. 3(1), 20(1) (2016). The “aggravating factor” here is a prior DWI conviction from October 28, 2007.

<sup>2</sup> Ulmer-Kelly also pleaded guilty to possession of drug paraphernalia and possession of marijuana, but these charges are not the subject of this appeal.

## DECISION

Ulmer-Kelly argues that the district court erred by convicting him of both second-degree DWI-test refusal and third-degree DWI because multiple convictions and sentences under different subdivisions of the same criminal statute that arise from a single behavioral incident are barred under Minn. Stat. §§ 609.04, .035 (2016).

“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1. Minn. Stat. § 609.04 “bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Henderson*, 890 N.W.2d 739, 745 (Minn. App. 2017) (quotation omitted), *aff’d* 907 N.W.2d 623 (Minn. 2018).

This court decided a case involving identical DWI convictions in *State v. St. John*, 847 N.W.2d 704 (Minn. App. 2014). In *St. John*, the appellant pleaded guilty to second-degree DWI-test refusal and third-degree DWI. 847 N.W.2d at 706. The district court determined that the third-degree DWI offense was a lesser-included offense of the second-degree DWI-test-refusal offense and adjudicated the appellant guilty and sentenced her only for the second-degree DWI-test-refusal conviction and dismissed the third-degree DWI charge. *Id.*

On appeal, we concluded that the third-degree DWI offense was not a lesser-included offense of the second-degree DWI-test-refusal offense and that the district court therefore was not prohibited from convicting the appellant of the third-degree DWI offense after convicting her of the second-degree DWI-test-refusal offense. *Id.* at 708.

Here, the district court cited to *St. John* and concluded that neither the second-degree DWI-test-refusal offense nor the third-degree DWI offense is a lesser-included offense of the other. The court therefore adjudicated Ulmer-Kelly guilty of both second-degree DWI-test-refusal and third-degree DWI. We conclude that the court did not err in convicting Ulmer-Kelly of both offenses. We also conclude that the court properly sentenced Ulmer-Kelly only for his conviction of third-degree DWI. *See id.* at 709 (concluding “that third-degree driving under the influence is a more serious offense than second-degree test refusal”); *see also State v. Fichtner*, 867 N.W.2d 242, 252 (Minn. App. 2015) (citing *St. John* for proposition that third-degree driving under the influence is more serious offense than second-degree test refusal), *review denied* (Minn. Sept. 29, 2015) .

**Affirmed.**