

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0215**

State of Minnesota,
Respondent,

vs.

Albert Lomami Okitokoko,
Appellant.

**Filed October 17, 2022
Affirmed in part, reversed in part, and remanded
Wheelock, Judge**

Ramsey County District Court
File No. 62SU-CR-19-4501

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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Considered and decided by Bratvold, Presiding Judge; Segal, Chief Judge; and
Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges his convictions, following a bench trial, for two counts of
driving while impaired, arguing that a forklift does not fall within the definition of “motor
vehicle” for purposes of the driving-while-impaired statute. The district court did not err

in finding appellant guilty, but because the sentencing order and warrant of commitment included convictions for two offenses under different sections of the same criminal statute for acts committed during a single behavioral incident, we affirm in part, reverse in part, and remand with instructions for the district court to vacate one of the convictions.

FACTS

Appellant Albert Lomami Okitokoko appeals his convictions for driving while impaired (DWI), arguing that a forklift is not a motor vehicle as contemplated by the applicable statute. The following facts are taken from the evidence presented at Okitokoko's bench trial.

In November 2019, law-enforcement officers responded to a commercial property following the report of a medical concern, where they found Okitokoko recovering from a gash on his forehead. Okitokoko told the officers that he had driven a forklift through a door and off a loading dock, causing his head injury. Okitokoko's coworker told officers that he had noticed that Okitokoko was unsteady on his feet and suspected that Okitokoko was drunk, and an officer observed that Okitokoko smelled of alcohol.

Okitokoko refused a preliminary breath test, so officers obtained a warrant for a blood or urine test, and Okitokoko submitted to the test. After providing the sample, Okitokoko admitted to drinking several glasses of wine before about 10:00 in the morning before his evening shift began at 5:30 p.m. The test ultimately revealed that Okitokoko's alcohol concentration was over the legal limit to drive or operate a motor vehicle. Respondent State of Minnesota charged appellant with second-degree DWI.

Okitokoko moved the district court to dismiss the state's case against him, arguing that the forklift he had been driving was not a "motor vehicle" that could violate Minn. Stat. § 169A.20, subd. 1 (2018) (DWI statute), because the forklift was not being driven on a roadway, and it was not legally allowed on a roadway. The district court held that the statutory definition of "vehicle" does not restrict "motor vehicles" to devices legally permitted to be driven, or devices actually driven, on public roadways.

In an amended complaint, the state charged Okitokoko with second-degree driving while under the influence of alcohol under Minn. Stat. § 169A.20, subd. 1(1), and second-degree operation of a motor vehicle with an alcohol concentration of 0.08 or more within two hours under Minn. Stat. § 169A.20, subd. 1(5). Okitokoko agreed to a bench trial based on stipulated evidence and facts. The district court issued a finding of guilty on both counts. The district court's warrant of commitment indicates that Okitokoko was convicted of both counts, although he only received a sentence for the first count, second-degree operation of a motor vehicle with an alcohol concentration of 0.08 or more within two hours.

Okitokoko appeals.

DECISION

I. The district court did not err by determining that the forklift was a motor vehicle for purposes of the DWI statute.

Okitokoko argues that the district court erred by determining that driving a forklift while impaired is a crime under Minn. Stat. § 169A.20, subd. 1, because a forklift is not a

motor vehicle as contemplated by Minn. Stat. § 169A.03, subd. 15 (2018).¹ We review questions of statutory interpretation de novo. *State v. Defatte*, 928 N.W.2d 338, 340 (Minn. 2019).

We interpret statutes with the objective to “ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2020). We must construe every law “to give effect to all its provisions.” *Id.* “When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” *Id.* When a statute is subject to two or more reasonable interpretations, it is ambiguous. *State v. Miller*, 977 N.W.2d 592, 597 (Minn. 2022). “If the statute is ambiguous, . . . we apply canons of construction to resolve the ambiguity.” *Id.*

It is a crime in Minnesota “for any person to drive, operate, or be in physical control of any motor vehicle, as defined in section 169A.03, subdivision 15,” when “the person is under the influence of alcohol,” or when “the person’s alcohol concentration . . . is 0.08 or more.” Minn. Stat. § 169A.20, subd. 1(1), (5). A “motor vehicle” is defined as “every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires.” Minn. Stat. § 169A.03, subd. 15. Section 169A.03 defines “vehicle” as having the “meaning given in section 169.011, subdivision 92.” *Id.*, subd. 25 (2018). Section 169.011, subdivision 92, states that a vehicle is “every device in, upon, or by which any person or property *is or may be transported or drawn upon a highway*,

¹ Okitokoko does not dispute the facts underlying his conviction.

excepting devices used exclusively upon stationary rails or tracks.” Minn. Stat. § 169.011, subd. 92 (2018) (emphasis added). Section 169.011 also clarifies that the definition of a “motor vehicle” does not include “an electric personal assistive mobility device, or a vehicle moved solely by human power.” *Id.*, subd. 42 (2018); *see also* Minn. Stat. § 169A.03, subd. 15 (“The term [motor vehicle] . . . does not include a vehicle moved solely by human power.”).

Okitokoko argues that the language “is or may be transported or drawn upon a highway” in the statutory definition of “vehicle” is ambiguous. Minn. Stat. § 169.011, subd. 92. He argues that “may” can mean either a device that “possesses the ability to physically be used to transport persons . . . on a highway” or “is legally permitted, to transport persons or property on a highway.” Okitokoko argues that the word “may” creates an ambiguity in the definition of the word “vehicle” such that we must apply canons of construction and conclude that “may” means “legally permitted.” The state argues that “may” unambiguously means the device is one that “can” be driven on a highway or, in Okitokoko’s words, one that “possesses the ability” to drive on a highway.

We considered the definition of “vehicle” as used in the implied-consent statute in *Ruzic v. Commissioner of Public Safety*, 455 N.W.2d 89 (Minn. App. 1990) (interpreting Minn. Stat. § 169.123, subd. 2(a) (1988)), *rev. denied* (Minn. June 26, 1990). In *Ruzic*, we affirmed the revocation of Ruzic’s driver’s license after he was found intoxicated while operating a bulldozer in a private, vacant lot. 455 N.W.2d at 90. Ruzic argued that operating a bulldozer on private property was excluded from the implied-consent law because the bulldozer could not be driven legally on the highway, runs on tracks, and was

being operated on private property. *Id.* at 91. We concluded that “the implied consent law does *not* restrict its definition of vehicles to those that can only be legally driven upon a highway. Further, bulldozers may be legally driven upon a highway with special permits.” *Id.* (emphasis added). Although Okitokoko argues that this court in *Ruzic* relied on statutory authority for the operation of bulldozers on public highways found in Minn. Stat. § 169.72, subd. 1 (1988), the court’s mention of this provision does not undercut its initial conclusion that the definition of “vehicle” is not limited to “those that can only be legally driven upon a highway.” *Id.*

Okitokoko also argues that our prior decisions in *Boschee v. Duevel*, 530 N.W.2d 834 (Minn. App. 1995), *rev. denied* (Minn. June 14, 1995), and *State v. Sherbrooke*, 633 N.W.2d 856 (Minn. App. 2001), support his argument that devices not permitted on a roadway are vehicles only if they are in fact being driven on a roadway. In *Boschee*, we concluded that for purposes of the Minnesota traffic laws, “[i]n-line skates fall within the definition of ‘vehicle,’” reasoning that “as Boschee’s actions show, a person using in-line skates *is capable of being transported on a highway* via the skates, and does so solely by human power.”² 530 N.W.2d at 839 (emphasis added). *Boschee* therefore supports the interpretation of “is or may be” in the statutory definition of “vehicle” in Minn. Stat. § 169.011, subd. 92, to mean whether a device is driven or is capable of being driven on a highway.

² In *Boschee*, we clarified that although in-line skates were a “vehicle,” they were not a “motor vehicle” because they are moved solely by human power. 530 N.W.2d at 839.

Sherbrooke relied on *Boschee* and stated that the legislature intended to regulate *any* mode of transportation on state highways, and therefore, “[w]e have consistently interpreted the term ‘vehicle’ in the broadest sense possible with the understanding that if the legislature intended a narrower definition, it would adopt one.” *Sherbrooke*, 633 N.W.2d at 860. We therefore determined in *Sherbrooke* that when a state trooper saw an aircraft parked off a road after *Sherbrooke* had landed it on the road, the aircraft was included in the definition of a vehicle. *Id.* at 859-60. Even though an aircraft does not normally travel on state highways, regulating the use of aircraft on roadways promoted traffic safety. *Id.* at 860.

Ruzic, *Boschee*, and *Sherbrooke* properly interpreted the plain language of the definition of “vehicle,” and the district court did not err in its application of *Ruzic* to this case. The plain meaning of “is or may be transported” reflects the legislature’s intent to make it a crime to be impaired when operating or in physical control of a vehicle that either *is driven* on a highway or *has the ability to drive* on a highway. Our caselaw recognizes that this plain meaning reflects the legislature’s intent to criminalize operating or being in physical control of a vehicle that could go on a highway and endanger the driver and others when the driver is impaired. We note that common sense dictates that an impaired forklift driver has a greater potential to be dangerous than an in-line skater.

Furthermore, “[t]his court has repeatedly recognized that laws prohibiting a person from driving a motor vehicle while intoxicated are remedial statutes. Consequently, such laws are liberally interpreted in favor of the public interest and against the private interests of the drivers involved.” *State, Dep’t of Pub. Safety v. Junczewski*, 308 N.W.2d 316, 319

(Minn. 1981). Here, the language “is or may be transported” does not restrict the definition of “vehicle” to only vehicles that are being driven on the highway during the offense or that are legally allowed to be driven on the highway. Had the legislature intended the language to mean that the vehicle must be legally allowed to be driven on the highway, it could have defined “vehicle” as a device “permitted by law” or “legally allowed” on roadways. The legislature had excepted “an electric personal assistive mobility device” from its definition of “motor vehicle” at the time of Okitokoko’s offense. Minn. Stat. § 169.011, subd. 42 (2018).³ Statutory exceptions are construed to exclude all others. Minn. Stat. § 645.19 (2020). It is not the role of this court to carve out exceptions that are within the meaning of a statute’s plain language. *Ruzic*, 455 N.W.2d at 91.

When read in the context of the statute, the classification of a vehicle is not one that changes depending on where the device *is* driven; it is dependent on where the device *is able to be* driven. We concluded in *Boschee* that in-line skates qualified as a vehicle because they *could be used* on a roadway, and that capability was demonstrated by their actual use on a roadway. Although Okitokoko did not demonstrate the actual use of a forklift on a roadway in this case, he does not dispute that it would be possible to drive a forklift on a roadway. A forklift therefore falls within the definition of “vehicle” in Minn. Stat. § 169.011, subd. 92. And because it is undisputed that the forklift was motorized and self-propelled, it qualifies as a “motor vehicle” under Minn. Stat. § 169A.03, subd. 15, and the DWI statute.

³ Since Okitokoko’s offense, the legislature has further amended the statutory definition of “motor vehicle” to also except “an electric-assisted bicycle.” *Id.*, subd. 42(b) (Supp. 2021).

Based on the language of section 169.011, subdivision 92, and our prior interpretation of the statute in *Ruzic*, we conclude that the statute is unambiguous, and “may” means that a vehicle “has the ability to” drive on the highway. The district court did not err by determining that the forklift was a motor vehicle for purposes of the DWI statute.

II. The district court erred by entering two DWI convictions for offenses under different sections of a criminal statute for acts committed during a single behavioral incident.

Finally, this court notes that the district court pronounced a judgment of conviction on both counts for DWI. Although neither party discussed this issue, appellate courts have a responsibility “to decide cases in accordance with law, and that responsibility is not to be diluted by counsel’s . . . failure to specify issues.” *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (quotation omitted). Whether a defendant can be lawfully convicted of a crime is a legal question that appellate courts review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

“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 (2018). The supreme court has held that “section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985).

Where, as here, an appellant does not raise a section 609.04 issue under *Jackson*, this court applies a two-part test to determine whether any of the multiple convictions should be vacated. *State v. Bonkowske*, 957 N.W.2d 437, 443-44 (Minn. App. 2021). First,

the convictions at issue must be for offenses that arise under different sections of the same criminal statute. *Jackson*, 363 N.W.2d at 760. Second, the offenses must have been for acts committed during a single behavioral incident. *Id.*

Okitokoko's convictions for count 1 and count 2 were for offenses arising under different subsections of the same criminal statute—Minn. Stat. § 169A.20, subd. 1—and they are for the act of driving while impaired. Thus, we conclude that the district court erred by entering two convictions on the warrant of commitment.

The supreme court has established the “proper procedure to be followed by the trial court” and the rationale for doing so:

[W]hen the defendant is convicted on more than one charge for the same act [the district court is] to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence.

State v. LaTourelle, 343 N.W.2d 277, 284 (Minn. 1984). Because Okitokoko was convicted on counts 1 and 2 for offenses arising out of the same behavioral incident, “one of the two formal adjudications of conviction . . . must be vacated.” *Jackson*, 363 N.W.2d at 760. Even so, “a finding of guilt with respect to those lesser included offenses remains intact.” *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999).

Thus, the district court did not err in finding appellant guilty, but because the sentencing order and warrant of commitment included convictions for two offenses under different sections of the same criminal statute for acts committed during a single behavioral

incident, we affirm in part, reverse in part, and remand with instructions for the district court to vacate one of the convictions.

Affirmed in part, reversed in part, and remanded.