

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-867**

State of Minnesota,
Respondent,

vs.

Dorian Jerome Pinder,
Appellant.

**Filed July 9, 2012
Affirmed in part and reversed in part.
Huspeni, Judge***

Marshall County District Court
File No. 45-CR-10-255

Lori Swanson, Attorney General, John B. Gallus, Assistant Attorney General, St. Paul, Minnesota; and

Michael D. Williams, Drenckhahn & Williams PA, Warren, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy George Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Rodenberg, Judge; and
Huspeni, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HUSPENI, Judge

Appellant was charged with second-degree assault, fourth-degree assault, terroristic threats, and disorderly conduct following an altercation with a neighbor, who was also a Marshall County deputy sheriff. *See* Minn. Stat. §§ 609.222, subd. 1, 609.11, subd 4, 609.2231, subd. 1, 609.713, subd. 1, 609.72, subd. 1 (2008). After a one-day trial, the jury acquitted appellant of the assault charges but convicted him of terroristic threats and disorderly conduct. The district court stayed imposition of sentence on the terroristic threats conviction and sentenced appellant to 90 days in jail on the disorderly conduct conviction. We affirm in part and reverse in part.

FACTS

In the summer of 2009, J.C. and his wife moved into a home that was located kitty-corner from appellant's property. J.C. was a Marshall County deputy sheriff.

At first, appellant Dorian Pinder and J.C. were friendly to one another. But appellant believed that J.C.'s attitude towards him changed after appellant quit a job at an elevator that was managed by one of J.C.'s friends. Appellant testified that J.C. became "very negative" after that occurrence.

On June 7, 2010, at approximately 4:20 p.m., J.C. pulled his squad car alongside appellant's vehicle, with the drivers' side windows facing each other. J.C. asked appellant to "keep the music down late at night," and appellant testified that he replied, "[S]ure, no problem," and then asked J.C. "[I]s there a problem between me and you?" According to appellant, J.C. responded, "I ain't got time" and left without saying more.

Appellant's testimony included the following: later that evening, J.C. pulled into his own driveway, got out of his squad car, and from his driveway swore at appellant, who was working on his house; appellant swore back at J.C. and told him, "[Y]ou don't even have to speak to me again"; J.C., who was dressed in plain clothes, walked to the back of his squad car, retrieved his gunbelt and strapped it on, grabbed his radio, began walking towards appellant's property, and yelled, "[Y]ou're going to jail," to which appellant responded, "I haven't broken no law . . . you have no reason to be over here . . . [Y]ou called me a name, I'll call you a name back."

Appellant's testimony continued: when J.C. got to the corner of appellant's property, appellant stepped back to avoid him; appellant had been working on his house and was holding a hammer, but denied hitting J.C. or threatening him or his family; appellant continued to tell J.C. to get off his property, that he was not going to jail, and that he was not going to be handcuffed. Appellant agreed that he was very upset when he was arrested, handcuffed, and transported to jail.

J.C.'s testimony included the following: that he heard loud music coming from appellant's house at approximately 6 p.m., when he was having dinner with his wife; he called for back-up at approximately 7:46 p.m. to assist him in confronting appellant, and left his residence for a short period of time; when he returned, he got out of his squad car and heard appellant talking to a small dog in a loud voice, swearing and stating "Talk to me like a man"; J.C. believed that appellant's statements were actually directed at him, and he went inside his residence to call the back-up deputy, who indicated that he would

be arriving shortly; J.C. went back outside and heard appellant swear at him and yell “I’ll kill you.”

J.C.’s testimony continued: appellant then began walking towards him with a hammer in one hand, and the dog on a leash in the other yelling that he would cut J.C.’s head off; the two met in the street or intersection, where appellant raised the hammer in a threatening manner; J.C. drew his weapon and told appellant to drop the hammer; appellant swung the hammer but missed J.C.; a car drove up and almost hit appellant, so he re-holstered his weapon and let the car pass; appellant began to walk back to his property and J.C. followed him; J.C. eventually wrestled appellant to the ground; appellant screamed, “[H]e’ll f-ing kill me and my family. He’ll come to my house[,] and I don’t know who I’m messing with.”

The back-up deputy arrived at the scene as J.C. handcuffed appellant. J.C. testified that appellant continued to threaten his life, as well as his family.

D E C I S I O N

I.

Appellant argues that he is entitled to a new trial because the district court refused to instruct the jury on defense of property. The district court has discretion to decide whether to give a requested instruction. *State v. Broulik*, 606 N.W.2d 64, 68 (Minn. 2000). We review the decision not to give a particular instruction for abuse of discretion. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). To be entitled to a new trial, the defendant must show that he was entitled to the requested instruction and that the district

court's failure to give the instruction was not harmless. *State v. Pendleton*, 567 N.W.2d 265, 270 (Minn. 1997).

A defendant is entitled to an instruction on his theory of the case only if there is evidence to support it. *State v. Coleman*, 373 N.W.2d 777, 781 (Minn. 1985); *see also State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977). When reviewing whether a specific instruction should have been given, this court views the evidence “in the light most favorable to the party requesting the instruction.” *State v. Turnage*, 708 N.W.2d 535, 545-46 (Minn. 2006).

Under Minnesota law, a person may use “reasonable force” toward another person “when used by the person in lawful possession of real . . . property . . . in resisting a trespass upon or other unlawful interference with such property.” Minn. Stat. § 609.06, subd. 1(4) (2008). The district court in this case denied appellant’s request for a defense of property instruction because appellant did not testify “that he used any force at all. His testimony is that it didn’t occur.” But appellant argues that when the evidence is viewed in the light most favorable to the verdict, there is evidence to support the requested instruction, even if the requested instruction is inconsistent with his testimony. We reject this argument.

Under Minn. Stat. § 629.34, subd. 1 (2008), an on- or off-duty police officer may arrest a person without a warrant if an offense is committed within the officer’s presence. The officer may enter private property to effect such an arrest. *See State v. Intihar*, 277 Minn. 222, 225 n.4, 152 N.W.2d 315, 317 n.4 (1967) (rejecting defendant’s claim that he had right to tell officer to get off of his property, which was based on his argument that

officer had no right to arrest him and was therefore trespasser). Even if the officer acts unlawfully and has no proper legal basis for making an arrest, a defendant generally has no right to resist. *See City of St. Louis Park v. Berg*, 433 N.W.2d 87, 91-92 (Minn. 1988).

In this case, there is no dispute that the deputy announced he was arresting appellant and that he entered appellant's property to make that arrest. Even if the arrest had later proved to be unlawful or made without proper purpose, appellant had no right to resist or to claim defense of property. Under any view of the facts, the deputy had a claim of right to enter appellant's property to effect the arrest and cannot be considered a trespasser. *See* Minn. Stat. § 609.605, subd. 1(b)(3) (2008) (providing that person is guilty of misdemeanor if he intentionally "trespasses on the premises of another and, without claim of right, refuses to depart from the premises on demand of the lawful possessor"). The district court thus did not err in refusing to instruct the jury on defense of property.

II.

Appellant next argues that the district court committed plain error when it instructed the jury on the offense of terroristic threats by failing to define the elements of the predicate "crime of violence." *See* Minn. Stat. §§ 609.713, subd. 1 (2008) (defining terroristic threats as requiring defendant to threaten to commit any "crime of violence"), 609.1095, subd. 1(b) (2008) (defining "crime of violence" to include all degrees of manslaughter and homicide). The terroristic threats charge against appellant was based on J.C.'s testimony that appellant threatened to kill him and his family. When defining

for the jury the elements of terroristic threats, the court merely told the jury that “murder is a crime of violence.” The court did not further instruct the jury on the specific elements of murder.

Appellant relies on *State v. Jorgenson*, in which the defendant was charged with terroristic threats and the predicate crime of violence was assault. 758 N.W.2d 316, 322 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009). The district court in *Jorgenson* instructed the jury that “assault is a crime of violence” and gave no further definition of assault. *Id.* at 320. But the defendant was also charged with misdemeanor domestic assault, which is not defined as a crime of violence, and the jury found him guilty of both offenses. *Id.* This court held that the district court committed plain error and that the defendant was prejudiced because the jury could have determined he was only guilty of misdemeanor domestic assault, which is not a crime of violence and could not support a terroristic threats conviction. *Id.*

The state asserts that *Jorgenson* is distinguishable because the confusion created by the jury instructions in that case was not present here, where the terroristic threats charge was based on evidence that appellant threatened to kill J.C. and his family. The state’s argument has merit.

Although appellant was also charged with second- and fourth-degree assault, the jury acquitted him of these charges, which indicates that the jury focused on appellant’s statement that he would kill J.C. and not on any claim by J.C. that appellant also assaulted him. Moreover, unlike assault, all levels of homicide and manslaughter are “violent crimes.” Thus, even if the court committed error that was plain because it

should have instructed the jury on the elements of “murder,” the instruction that was given did not prejudice appellant and did not affect his substantial rights. The district court’s failure to define the elements of the predicate crime of violence (murder) does not entitle appellant to a new trial on his terroristic threats charge.

III.

Appellant also argues that he is entitled to a new trial because during the testimony of a corrections officer, the court stated that J.C. had testified that appellant made threats at the jail and that the officer “has verified that.” When defense counsel objected to the court’s characterization of the officer’s testimony, the court stated: “The jury is to disregard what I said. You’ve heard this witness testify, they can characterize it any way they want.”

Appellant insists that his right to a fair trial was affected because the judge deviated from its neutral role by commenting on the evidence. Appellant also insists that even though the court attempted to instruct the jury to disregard his statement, the presumption that jurors follow curative instructions is not absolute. *See State v. Huffstutler*, 269 Minn. 153, 155-56, 130 N.W.2d 347, 348-49 (1964) (granting new trial, even though district court instructed jury to disregard prejudicial statement, which was volunteered by public official and prosecution was entirely responsible for its presence in record).

By asserting that the court’s remarks were prejudicial and entitle him to a new trial, appellant is necessarily claiming that the district court committed plain error in not acting sua sponte to declare a mistrial after defense counsel brought this issue to the

court's attention. The decision whether to declare a mistrial sua sponte is reviewed for an abuse of discretion. *State v. Gouleed*, 720 N.W.2d 794, 800 (Minn. 2006).

There was no abuse of discretion here. A review of the record establishes that the court's remark about J.C.'s testimony and the correction officer's verification was a fair characterization and does not compel a conclusion that the court itself believed appellant was guilty of making terroristic threats. Any error on the part of the district court in not declaring a mistrial was not "plain" and did not affect appellant's substantial rights. *See State v. Griller*, 583 N.W.2d 736, 740-41 (Minn. 1998).

IV.

Finally, appellant argues that the district court erred when it imposed sentences on both the terroristic threats and disorderly conduct convictions. Appellant did not object to imposition of sentences on both convictions in the district court, and raises the issue for the first time on appeal. But a "defendant does not waive relief from multiple sentences . . . arising from the same behavioral incident by failing to raise the issues at the time of sentencing." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992); *see also State v. White*, 300 Minn. 99, 106, 219 N.W.2d 89, 93 (1974) (stating that "the prohibition against double punishment cannot be waived"). Therefore, we address this argument on its merits.

Under Minn. Stat. § 609.035, subd. 1 (2008), "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." A person's conduct constitutes more than one offense within the

meaning of this statute if the offenses were committed as part of a “single behavioral incident.” *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn. 1986).

To determine whether a defendant’s conduct constitutes a single behavioral incident, the reviewing court will consider the time and place of the offenses, and whether a defendant is motivated by a single criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). Here, the prosecutor argued that appellant’s cursing at J.C. while being arrested constituted “fighting words” so as to support the disorderly conduct charge. The prosecutor also argued that the threats made by appellant against J.C. supported the terroristic threats charge. The prosecutor did not clearly delineate or explain how the curse words and threats uttered by appellant during and after his arrest fit under each offense, but there is a unity of time, place, and objective that supports the conclusion that the two convictions constitute a single behavioral incident.

In its brief, the state appears to concede that the terrorist threats and disorderly conduct convictions arose from a single behavioral incident. But the state claims that imposition of separate sentences was permissible under the multiple victim exception, because appellant’s conduct occurred in the presence of at least three persons: J.C., the back-up deputy, and another neighbor who witnessed part of the incident. *See State v. Whittaker*, 568 N.W.2d 440, 453 (Minn. 1997). The complaint, however, only charged appellant with terroristic threats and disorderly conduct based on the threats and obscenities he made to J.C. During trial, there was no discussion of amending the complaint to include additional victims. Moreover, the evidence presented at trial and arguments made by counsel cannot be construed as amending that complaint to include

threats and obscenities directed at other people. The multiple victim exception to section 609.035 does not apply here.

We therefore affirm the convictions of terroristic threats and disorderly conduct, but vacate the sentence imposed on the disorderly conduct conviction.

Affirmed in part and reversed in part.