STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0836

State of Minnesota,
Respondent,

vs.

Michael Dale Benson,
Appellant.

Filed August 5, 2008
Affirmed in part, reversed in part, and remanded
Muehlberg, Judge[*]

Nicollet County District Court
File No. 52-CR-148

Lori Swanson, Attorney General, Kimberly Ross Parker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael K. Riley, Sr., Nicollet County Attorney, 326 S. Minnesota Avenue, P.O. Box 360, St. Peter, MN 56082 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Muehlberg, Judge; and Huspeni, Judge.[**]

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

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

MUEHLBERG, Judge

On appeal from his convictions for escape from custody, criminal damage to property, burglary, and theft of a motor vehicle, appellant argues that he is entitled to a new trial because of repeated references to his status as a person subject to civil commitment as a sexual psychopathic personality. He also argues that he should be resentenced because the district court improperly applied the *Hernandez* method to enhance his criminal history score for each successive offense, but all of his convictions arose from a single behavioral incident or course of conduct. Appellant raises other pro se issues, including a mental illness defense. Because appellant stipulated to his status as a sexual psychopathic personality and references to this status would not have changed the trial outcome under the plain error test, the district court did not err by failing to exclude references to appellant's status, and we affirm on this issue. Because appellant has not raised pro se issues that merit action by this court, we also affirm as to those issues. However, because appellant's burglary conviction should not be used to enhance his criminal history score for the theft of a motor vehicle conviction when the burglary was committed for the sole purpose of accomplishing the theft, we reverse his theft sentence and remand for resentencing.

FACTS

On the evening of April 15, 2006, appellant Michael Dale Benson escaped from custody at the Minnesota Security Hospital in St. Peter, where he was civilly committed as a sexual psychopathic personality (SPP). Appellant and three other patients absconded

through appellant's room; evidence later found there included a note labeled "Bathroom Break" affixed to the door, a removed window bar, and a homemade rope tied to a C-clamp leading out of the window. Local police apprehended the three other patients soon after the escape, but appellant was not discovered until May 2, 2006. At the time of his arrest in Missouri, appellant was driving a vehicle that had been stolen from the garage of Armond Lundholm on April 16, 2006. Lundholm lives about five miles from the security hospital in St. Peter. Appellant's conduct ultimately resulted in the state charging him with escape from custody in violation of Minn. Stat. § 609.485, subd. 2(5) (2004), first-degree criminal damage to property under Minn. Stat. § 609.595, subd. 1(3) (2004), first-through third-degree burglary under Minn. Stat. § 609.582, subds. 1(a), 2(a), 3 (2004), and theft of a motor vehicle under Minn. Stat. § 609.52, subd. 2(17) (2004).

Before commencement of his two-day jury trial, appellant stipulated that he was committed to the Minnesota Security Hospital in St. Peter. During trial, two of the three patients who escaped with appellant testified for the state, and the jury found appellant guilty of all four charges. The court imposed presumptive concurrent sentences, applying the *Hernandez* method of sentencing that increased appellant's criminal history score for each successive conviction. The district court imposed executed sentences of 13 months for the criminal damage to property conviction, a year and a day for the escape conviction, 46 months for the first-degree burglary conviction, and 19 months for the theft conviction.

Appellant claims that he is entitled to a new trial because there were numerous trial references to his SPP status, despite his stipulation to this fact. He also claims that

the district court erred in employing the *Hernandez* method at sentencing because his convictions arose from a single behavioral incident or course of conduct. Appellant also filed a pro se brief that raises several arguments, including a mental illness defense. This appeal follows.

D E C I S I O N

1. Trial References to Appellant's SPP Status

At commencement of trial, appellant stipulated on the record that he was committed "to the regional treatment facility in St. Peter as a sexual psychopathic personality." Despite the stipulation, several references to appellant's status as a sexual psychopathic personality (SPP) were made at trial. In its opening and closing statements, the state referred to appellant as a "psychopathic personality," and the prosecutor and law enforcement personnel referred to appellant's escape from the "Minnesota Sex Offender Program" or referenced the program by its acronym, "MSOP." Further, trial testimony by law enforcement personnel and two of the escapees also referenced that the other three escapees had sexual psychopathic personalities, were committed for sex offenses, and were members of the sex offender program. Appellant argues that given the nature of these references, the district court plainly erred by allowing the jury to hear this highly prejudicial information and that this error mandates a new trial.

Defense counsel, who participated in crafting the stipulation that contained the initial reference, did not object to any of the references. For an error that occurs during a criminal trial to which there has been no objection, a reviewing court will reverse a criminal conviction only if the error is plain and affects the defendant's substantial rights,

which the supreme court has defined as being both "prejudicial and affect[ing] the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998); *see State v. Vance*, 734 N.W.2d 650, 655-56 (Minn. 2007); *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). The defendant has the "heavy" burden of persuasion to show a plain error affecting substantial rights. *Vance*, 734 N.W.2d at 659; *Griller*, 583 N.W.2d at 741. Where the three prongs of the plain error test are met, a reviewing court may correct the error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Reed*, 737 N.W.2d 572, 584 (Minn. 2007); *Strommen*, 648 N.W.2d at 686.

Appellant's brief primarily discusses the first two prongs of the test, that there was error and it was plain error, and, under the third prong, urges that the error was highly prejudicial. Although there are no cases directly on point, appellant analogizes this case to the charge of felon in possession of a firearm, where a defendant may stipulate to the underlying offense to reduce the prejudicial effect of having the jury hear the facts supporting the underlying offense. *See, e.g.*, *State v. Davidson*, 351 N.W.2d 8, 12 (Minn. 1984) (stating that effect of defendant's stipulation to underlying offense for charge of felon in possession of a firearm should be to "direct [the jury] to the issue of whether or not the state had established beyond a reasonable doubt that [the defendant] possessed the pistol"). Minnesota courts allow a defendant to stipulate to an underlying conviction if evidence of it would be prejudicial and the proposed stipulation provides sufficient evidence to satisfy a necessary element of the current charge. *Davidson*, 351 N.W.2d at 12; *see also State v. Berkelman*, 355 N.W.2d 394, 396-97 (Minn. 1984) (recognizing

defendant's right to stipulate to prior conviction in gross misdemeanor DWI prosecution); *State v. Clark*, 375 N.W.2d 59, 62 (Minn. App. 1985) (allowing defendant to stipulate to prior offenses in aggravated DWI prosecution). Other than in the context of a criminal charge that includes a prior conviction as an element of the offense, however, a district court generally has discretion to determine whether to allow a defendant to stipulate to evidence that comprises an element of an offense. *State v. Matelski*, 622 N.W.2d 826, 832 (Minn. App. 2001) (allowing the district court discretion to determine whether to permit defendant to stipulate to gang membership when defendant was charged with committing a crime for the benefit of a gang), *review denied* (Minn. May 15, 2001).

Even if we agreed that appellant's stipulation to his underlying civil commitment is analogous to a stipulation to an underlying criminal offense for a later criminal prosecution, we conclude that appellant's argument fails under the third prong of the plain error test. Under that prong, appellant must show that error in the admission of references to his SPP status affected his substantial rights, which must be both prejudicial and affect the outcome of his case. *See Griller*, 583 N.W.2d at 741. While appellant has argued that references to his SPP status were prejudicial, he has offered no evidence showing that this evidence had any impact on the outcome of his case. The record includes strong evidence of appellant's guilt on the escape from custody charge, including that the escape took place from a hospital that constituted a custodial setting, involved lengthy and detailed planning, occurred from appellant's room, and implicated appellant as the main actor in the multi-patient escape. In light of this strong evidence of appellant's guilt on the escape from custody charge, appellant has failed to show that the

outcome of his trial would have been different without the references to his SPP status. *Id.* Thus, we conclude that the district court did not plainly err by failing to exclude references to appellant's SPP status at trial.

2. Method of Sentencing

"[I]f 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 (2004). For this reason, a court may impose only one sentence when multiple offenses are part of a single behavioral incident. *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). To determine whether multiple offenses are part of a single behavioral incident, the court considers factors of time and place, and whether the offenses were motivated by a single criminal objective. *Id.* The court considers whether the offenses "(1) arose from a continuous and uninterrupted course of conduct; (2) occurred at substantially the same time and place; and (3) manifested an indivisible state of mind." *State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004), *cert. denied*, 546 U.S. 882 (2005). The district court's determination of whether multiple offenses constitute a single behavioral incident is a factual determination that an appellate court will not reverse on appeal unless clearly erroneous. *Id.* The state bears the burden of proof to show that the offenses were not part of a single course of conduct. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

Respondent concedes that the district court erred by separately sentencing the burglary and theft of a vehicle offenses, because the burglary was committed for the sole purpose of accomplishing the theft. Minn. Stat. § 609.585 (2004) allows separate

prosecution and punishment upon conviction for "any other crime committed on entering or while in the building entered." In *State v. Hartfield*, 459 N.W.2d 668 (Minn. 1990), the supreme court interpreted this statute in conjunction with Minn. Stat. § 609.035 and the Minnesota Sentencing Guidelines and ruled that a person convicted of both burglary and first-degree criminal sexual conduct may be sentenced separately for the offenses, but because the convictions arose from a single behavioral incident, the earlier offense could not be used to increase the criminal history score of the later offense. *Id.* at 670-71. The trier of fact in *Hartfield* specifically found that the defendant had intentionally entered the building to commit the sex offense. *Id.* at 670. Likewise here, appellant committed burglary for the purpose of stealing a vehicle, and under *Hartfield*, the burglary and theft were part of the same behavioral incident. Thus, appellant's burglary conviction may not be used to enhance his criminal history score for the theft of a vehicle conviction, and under these circumstances, we reverse appellant's sentence and remand for resentencing.

As to the other offenses, the evidence does not support appellant's claim that he was motivated by a single criminal objective in committing these offenses. According to trial testimony, the four escapees had arranged to meet at a bowling alley where the parent of one of the escapees was to provide them with a vehicle. This plan was necessarily aborted by appellant when the three other escapees were apprehended. Under these circumstances, appellant's impromptu decision to burglarize Lundholm's garage and steal his vehicle was "an afterthought" and not part of a "premeditated plan." *State v. Bookwalter*, 541 N.W.2d 290, 295 (Minn. 1995). Additionally, the two groups of crimes

were committed in different places, as the two first offenses occurred at the hospital and the last two offenses occurred at Lundholm's residence. As to the escape and criminal damage to property offenses in relation to each other, these crimes had unity of place because they both occurred at the hospital, but the escape occurred on April 15, 2006, while the criminal damage to property took place over the course of several months.

Finally, even if the three convictions other than the theft of a motor vehicle conviction could be considered part of the same behavioral incident, the district court was authorized to sentence appellant separately because the crimes had multiple victims and did not exaggerate the criminality of appellant's conduct. *See State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006) (noting well-established exception to prohibition against multiple sentences for same behavioral incident if offenses involve "multiple victims" and do not "unfairly exaggerate the criminality of the defendant's conduct"). For these reasons, we conclude that the district court erred in its application of the *Hernandez* method of sentencing only in allowing appellant to be sentenced with a criminal history score of four on the theft offense rather than a criminal history score of three.

3. Appellant's Pro Se Claims

Appellant submitted a pro se brief that appears to raise a mental illness defense—that appellant was unable to form the requisite intent to commit these crimes because the law recognizes him as a mentally ill person. While appellant stipulated that he was SPP within the meaning of Minn. Stat. § 253B.02, subd. 18b (2006), this status means that with regard to "sexual matters" he has demonstrated by clear and convincing evidence that he is emotionally unstable, impulsive, lacks "customary standards of good

judgment," or "fail[s] to appreciate the consequences of personal acts, or a combination of any of these conditions." *See* Minn. Stat. 253B.09, subd. 1 (2006) (enumerating standard of proof for civil commitments). Under the law, appellant's status as an SPP person does not excuse him from culpability for criminal acts. *See Bruestle v. State*, 719 N.W.2d 698, 701 n.2 (Minn. 2006) (stating that insanity defense is available to "defendants who can prove that, at the time of the offense, they were 'laboring under such a defect of reason, from [a mental illness or mental deficiency], as not to know the nature of the act, or that it was wrong.'"). Further, the proper time to assert a mental illness defense is at the time of trial. See Minn. R. Crim. P. 9.02, subd. 1 (3) (requiring defendant to provide pretrial notice of mental illness defense). Because appellant has failed to support his claims with any cogent legal authority, we are not persuaded by his pro se arguments. *See State v. Krosch*, 642 N.W.2d 713, 719-20 (Minn. 2002) (deeming as waived allegations in appellant's pro se brief that are unsupported by cogent argument or citation to legal authority).

Affirmed in part, reversed in part, and remanded.