STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0968

State of Minnesota,
Respondent,

vs.

Steven Todd Parker,
Appellant.

Filed August 5, 2008
Affirmed in part, reversed in part, and remanded.
Minge, Judge

Dakota County District Court
File No. K1-05-2937

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

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Susan J. Andrews, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

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

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

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

MINGE, Judge

Appellant challenges his convictions of first-degree burglary, second-degree burglary, theft of motor vehicle, and fleeing a police officer in a motor vehicle and the sentences for those convictions. Appellant argues that (1) insufficient evidence supports his conviction of first-degree burglary; (2) the district court erroneously sentenced him to consecutive maximum prison terms on each conviction; and (3) the sentences were manifestly excessive. In his pro se supplemental brief appellant repeats the arguments of his counsel and raises additional issues including ineffective assistance of counsel. We affirm in part, reverse in part, and remand.

FACTS

On September 19, 2005 at approximately 10:00 p.m., appellant Steven Todd Parker kicked in the door of a Lakeville home. He intended to take items and sell them in order to obtain narcotics. While inside, Parker heard the automatic garage door opening and fled. He did not take any items from the home. The homeowner called the police, who set up a perimeter around the area and searched for the intruder.

After leaving the first home, Parker kicked in the door of a nearby residence on the same street. The homeowners were not present, and Parker rummaged through the house. Parker took a television, a DVD player, coins, jewelry, and some sweaters from the second home. Because of the police presence, Parker waited inside the second home.

At approximately 2:00 a.m. on September 20, 2005, after the other officers had gone home, a police officer who had remained in the area saw a Cadillac car back out of

the garage of the second residence. Parker was driving. The officer did not know a burglary had been committed at that location or the identity of the driver. The officer followed Parker in an unmarked squad car and attempted to pull him over. Parker refused to stop, leading the officer on a 16-mile, high-speed chase.

Parker was ultimately stopped, arrested, and taken to jail where he confessed. Parker was charged in Dakota County district court with first-degree burglary, two counts of second-degree burglary, theft of a motor vehicle, and fleeing police. Following the trial, the jury found Parker guilty on all five counts. Because the state had moved to sentence Parker as a career offender, the district court held a separate sentencing trial. The sentencing jury found that Parker had five or more prior felony convictions and committed the current offenses as part of a pattern of criminal conduct.

At sentencing, the state urged the court to "adopt the most stringent and extensive prison sentence available." Parker's sentencing worksheet indicated he was responsible for numerous burglaries over many years. Because one of the counts of second-degree burglary was a lesser-included offense of first-degree burglary, the district court did not sentence Parker on that count. On the other four counts, the district court sentenced Parker to the statutory maximum terms, and ordered the sentences to run consecutively. The sentences total 456 months of incarceration. This appeal follows.

D E C I S I O N

I.

The first issue is whether sufficient evidence existed to find Parker guilty of burglary in the first degree. "When reviewing a claim for sufficiency of the evidence, we

are limited to ascertaining whether, given the facts in the record and any legitimate inferences that can be drawn from those facts, a jury could reasonably find that the defendant was guilty of the charged offense." *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003) (quotation omitted). The determination must be made under the assumption that the jury believed the state's witnesses and disbelieved any contrary evidence, and we must view the evidence in the light most favorable to conviction. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988).

Parker asserts that the state failed to prove beyond a reasonable doubt that another person was present in the first home he entered. First-degree burglary is defined as follows:

> Whoever 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, either directly or as an accomplice, commits burglary in the first degree and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000, or both, if:
>
> (a) the building is a dwelling and another person, not an accomplice, is present in it when the burglar enters or at any time while the burglar is in the building[.]

Minn. Stat. § 609.582, subd. 1(a) (2004).

A "dwelling" is "a building used as a permanent or temporary residence." Minn. Stat. § 609.581, subd. 3 (2004). This includes "appurtenant structures." *State v. Hendrickson*, 528 N.W.2d 263, 265-66 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995); *see also State v. Schotl*, 289 Minn. 175, 179-80, 182 N.W.2d 878, 880-81 (1971) (holding that entry into a store attached to a residence constitutes entry of a

dwelling because "the breaking and entering of any part of the structure was a breaking and entering of a dwelling which was habitually used and occupied by the owner's family").

The owner of the first home, S.W., testified that she returned home a little after 10 p.m. and, while at the end of her driveway, pressed the remote control button to open the door to her attached garage. Once inside the garage she stepped out of her vehicle, approached the door leading into the living quarters, and found it was locked. S.W. further testified:

> I got a really creepy feeling in my stomach because I thought—I leave it unlocked and I was kind of scared and so I thought I heard something inside like a shuffle or something. But I thought—I didn't know if it was me just being a chicken or something, but I knew I hadn't left the door locked between the house and the garage.

She later specified that she was "working the knob" when she heard the noise, and that it "sounded like someone walking or moving." In his statement, Parker recounted that he heard the garage door open when he was in the house.

Considering this testimony in the light most favorable to the conviction, the jury could reasonably conclude that while in her garage S.W. heard Parker in her home. We conclude the attached garage was an appurtenant structure and that sufficient evidence supports Parker's conviction of burglary in the first degree.

II.

The next issue is whether the police officer had an adequate basis for stopping Parker as he began driving the stolen Cadillac from the second home. This issue is raised

by Parker in his pro se brief. Police may stop a vehicle if they have a particularized and objective basis for suspecting the occupants of criminal activity. *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981). The "particularized basis for the intrusion must be both articulable and reasonable." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)). The factual basis required to support a stop is minimal and may be supplied by information that the officer acquires from another person, including an informant. *Jobe v. Comm'r of Pub. Safety*, 609 N.W.2d 919, 921 (Minn. App. 2000). The officer need only suspect that the person stopped has engaged in or will engage in criminal activity. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). Whether a stop is reasonable is a legal determination for an appellate court. *Jobe*, 609 N.W.2d at 921.

Because no omnibus hearing was held, the record on this point consists only of the information in the complaint and the trial testimony of the officer who made the stop.[1] These sources show that police talked to three women in a van shortly after the first burglary. The women told police that 20 minutes earlier they had dropped off Parker, who was the boyfriend of one of the women. The driver of the van subsequently told police that Parker "was in the area to break into houses." The officer was told to look for somebody wearing a white shirt.

[1] In the district court proceedings, Parker did not challenge the initial effort to stop him. "This court generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). We will consider the issue in the interest of justice. Minn. R. Crim. P. 28.02, subd. 11.

The remaining police officer was still looking for the suspect from the first burglary when the officer saw Parker at 2:00 a.m. Parker backed the Cadillac he was stealing out of the garage, reentered the garage, returned to the car and left. The officer followed Parker and called and asked dispatch to identify the owner of the car. The officer learned it was registered to a driver with a birth date in 1936 or 1938, much older than Parker. The officer was aware of the description that the three women had given of Parker. The officer observed that the driver was wearing a white shirt. Being aware of this information, the officer attempted to stop Parker. Given the recent burglary, the unusual circumstance of someone driving off in a residential area at 2:00 a.m., the similarity in shirt color, and the age disparity with the registered owner, we conclude the officer had a particularized and objective basis for suspecting the Cadillac driver was involved in criminal activity.

III.

Another issue raised in appellant's pro se brief is whether he was denied his right to a speedy trial. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI; Minn. Const. art. I, § 6. In Minnesota, when a criminal defendant demands a speedy trial, the trial shall commence within 60 days of the demand unless good cause is shown. Minn. R. Crim. P. 11.10. Delay beyond the 60-day period raises a presumption that a defendant's speedy-trial rights have been violated, and requires a district court to inquire further into whether a violation has indeed occurred. *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989). Minnesota courts apply a four-part test to determine whether a defendant's speedy-trial right has been

violated: "(1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay." *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004) (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972)), *review denied* (Minn. Jul. 20, 2004).

A. Length of Delay

Parker was arrested on September 20, 2005, and his trial commenced on January 23, 2007. This 16-month delay supports a speedy-trial claim and triggers analysis of the rest of the factors. *See State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986) (holding a delay of seven months from the date of arrest until the trial was sufficient to trigger consideration of the other *Barker* factors); *see also State v. Corarito*, 268 N.W.2d 79, 80 (Minn. 1978) (holding delay of six months sufficient).

B. Reason for the Delay

Numerous delays occurred in this case with various causes. On October 17, 2005, Parker demanded a speedy trial. His trial was set for November 29, 2005, well within the 60-day requirement. On that date Parker's attorney was ill and could not begin the trial. The district court moved the trial to December 20, 2005, despite knowledge that its calendar already had over 30 trials set for that day. The case was further continued from that date because the district court gave priority to defendants with earlier speedy-trial demands. The district court offered to reset Parker's trial for a date in early January—about three weeks later. Rather than accept that date, Parker stated he was filing a writ of mandamus with this court to compel the district court to give him a speedy trial.

Anticipating a mandamus appeal, the district court continued Parker's case indefinitely. When Parker failed to file a petition for mandamus, his case was reset for jury trial on August 15, 2006.[2]

The trial was moved from August 15 to a later date both because the prosecutor was in a protracted trial and because Parker was incarcerated in Hennepin County on an unrelated matter and unable to appear. The district court indicated that had Parker been available, it would have held the trial despite the prosecutor's absence. Parker's trial was reset for August 22, 2006, and Parker failed to appear for unknown reasons. Parker was arrested, and his trial was re-scheduled for January 23, 2007. The trial finally commenced on that date.

The original delay resulted from the illness of Parker's attorney and cannot be attributed to the state. The second delay resulted from a full calendar, and is considered "neutral." *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. The rest of the delays were a result of Parker's own actions. Although his plan to file a petition for mandamus may have been misguided, *see McIntosh v. Davis*, 441 N.W.2d 115, 120 (Minn. 1989), the district court understandably decided to await the results of that petition. The other delays resulted from Parker's absences.

Parker nonetheless argues the district court violated his right to a speedy trial by continuing his case beyond December 20, 2005, because the calendar was full. He cites *McIntosh* for this proposition. Indeed, the *McIntosh* court did observe that "[m]ere court

[2] Parker did eventually file a writ with this court, over a year after he was first arrested. His writ was denied by order of this court on February 2, 2007.

congestion is insufficient" to continue a case beyond the 60-day limit. 441 N.W.2d at 120. But the *McIntosh* court further stated that delays caused by attempts to relieve court calendar congestion could, depending on circumstances, be justified. *Id.* Here, the district court had a congested calendar on December 20, 2005, and was forced to prioritize. The district court offered Parker a trial date in early January, but rather than accept that date, Parker said he was petitioning this court. This led to events that caused another year of delay.

C. Assertion of Right to a Speedy Trial

There is no question that Parker continually asserted his right to a speedy trial. But under *Barker*, "if delay is attributable to the defendant," he is deemed to have waived his right to a speedy trial. 407 U.S. at 529, 92 S. Ct. at 2191. The delays caused by Parker constituted a waiver of his speedy-trial right. Although such waiver can be overcome by reasserting a speedy-trial right and Parker *did* reassert the right, he does not claim that his right to a speedy trial was denied after this reassertion.

D. Prejudice Caused by Delay

Any prejudice Parker suffered would have been minimal if he had rescheduled his trial for early January in 2006, as the district court suggested. No specific prejudice has been shown. Although unexcused delay may be presumptively prejudicial, *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 2690-91 (1992), Parker largely waived his right to a speedy trial.

Ultimately, this case is akin to that of *State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993), wherein most of the delays of the trial were the fault of the defendant. The

Johnson court relied heavily on this fact to hold that the defendant's speedy-trial right was not violated. *Id.* We conclude that Parker's speedy-trial right was similarly not violated.

IV.

The next issue is whether Parker received ineffective assistance of counsel. Parker raises this claim pro se in this appeal. "Generally, a direct appeal from a judgment of conviction is not the most appropriate way to raise a claim of ineffective assistance of trial counsel because the reviewing court does not have the benefit of all the facts concerning why defense counsel did or did not do certain things." *Roby v. State*, 531 N.W.2d 482, 484 n.1 (Minn. 1995) (quotation omitted). When an ineffective-assistance-of-counsel claim is raised and considered as part of a direct appeal, the party raising it may be barred under *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976) from thereafter raising the claim in a postconviction hearing. *See Hale v. State*, 566 N.W.2d 923, 926-27 (Minn. 1997).

When this court lacks a sufficient record upon which to determine whether trial counsel was ineffective, we may decline to reach the merits of the issue and direct the affected party to seek postconviction relief. *State v. Green*, 719 N.W.2d 664, 674 (Minn. 2006). By declining to reach the merits, "[a]n appeal to this court from a post-conviction proceeding on the merits remains open." *State v. Schaefer*, 374 N.W.2d 199, 201 (Minn. App. 1985).

Parker alleges that his counsel made several errors, that collectively those errors cannot be considered harmless, and that this court must remand for a new trial with new

counsel. Two of these claims are based upon the admission of a recording of Parker making a full confession to all of the crimes with which he was charged. Parker gave this confession following his arrest. It was an important part of the evidence at trial. His counsel did not move to suppress it until after it was played for the jury. On appeal, Parker claims that shortly after his arrest he requested an attorney and that the officers violated his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966) by subsequently ignoring that request and questioning him without allowing him an attorney. Parker also makes the related claim that his confession was not voluntary.

We cannot effectively review these claims of ineffective assistance of counsel. Because his attorney did not object below, we have no testimony regarding whether the officers violated Parker's *Miranda* rights. Without an adequate record or any district court findings, we decline to reach any of his ineffective-assistance-of-counsel claims in accordance with *Green*, 719 N.W.2d at 674, and preserve the issue so it may be raised at a future postconviction proceeding.

V.

The next issue raised by Parker is that the district court should have excluded certain testimony by the arresting officer as hearsay and as a violation of his right to confrontation. The challenged testimony is the officer's statement that he was looking for a person in a white t-shirt, based on information obtained from "other individuals."

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). The police officer's testimony did not violate the hearsay rule. It was

used by the officer to establish a reasonable, articulable suspicion to justify the officer's attempt to stop the car, not submitted for the "truth of the matter asserted." *Id.* In any event, failure to object to hearsay is a waiver of one's hearsay protections. *State v. Blom*, 682 N.W.2d 578, 617 (Minn. 2004). Here, the statement was made in response to a question by Parker's counsel, and neither Parker nor his attorney objected to this statement. We conclude that Parker's hearsay claim is not meritorious.

Parker also claims that his right to confrontation was denied because he did not have an opportunity to cross-examine the person who said he was wearing a white t-shirt. Testimonial statements from witnesses who do not appear at trial will be excluded under the Confrontation Clause unless the declarant is unavailable for trial and the defense has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004). Non-testimonial statements do not implicate the Confrontation Clause, and states are free to develop hearsay law without its strictures. *Id.* The Supreme Court has not entirely spelled out what is and is not testimonial, but has held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 126 S. Ct. 2266, 2273-74 (2006).

Here, the officer's primary purpose was to identify and locate a suspect in a recent burglary, not to establish or prove any event relative to a later prosecution. Indeed, the state did not seek to call the declarant in its effort to prosecute Parker, and testimony regarding the declarant resulted from interrogation by Parker's attorney. Because the primary purpose of the interrogation was to identify and locate a suspect, not to establish or prove past events, the statement is non-testimonial and its admission does not violate the Confrontation Clause.

VI.

The sixth issue is whether the verdict should be reversed because of prosecutorial misconduct. In his pro se brief, Parker argues that the prosecutor committed misconduct by making "inflammatory statements" about him. But most of the alleged statements he challenges were made at pretrial hearings or during sentencing; only one of the alleged inflammatory statements was made in front of the jury, and it was not objected to.

Ordinarily, the defendant's failure to object to an error at trial forfeits appellate consideration of the issue. *See State v. Darris*, 648 N.W.2d 232, 241 (Minn. 2002). Nevertheless, "[p]lain errors or defects affecting substantial rights may be considered . . . on appeal although they were not brought to the attention of the trial court." Minn. R. Crim. P. 31.02.

Here, during the opening statement the prosecutor said "that the driver of the vehicle had dark hair, white shirt, male, but didn't match the registered owner of the vehicle." This is not "error." The prosecutor was simply stating what the officer would

later testify to. This is properly part of a prosecutor's opening statement. *See* Minn. R. Crim. P. 26.03, subd. 11(c). Therefore, the statement did not constitute misconduct.

VII.

The next issue is whether or not the district court erred in denying Parker's motion for mistrial after the jury viewed a transcription of his confession. Denial of a motion for mistrial is reviewed for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). The district court should deny a motion for a mistrial unless there is a reasonable probability that the outcome of the trial would have been different had the event that prompted the motion not occurred. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotation omitted).

The recording of Parker's confession was transcribed so that the jury could follow along while the tape was played during trial. Instead of the jury receiving the recording of the confession, as the district court ordered, the jury erroneously received the transcript. Parker's attorney moved for a mistrial, and the district court denied the motion. A claim that the jury would have reached a verdict of not guilty if during deliberations it had not had the written transcript of the confession is an unrealistic assertion. The evidence of Parker's guilt was overwhelming. In addition, the jury asked for the tape, suggesting that it did not rely upon the transcript alone. They listened to the tape, and were fully aware that Parker had confessed.

VIII.

The final issue is whether Parker's sentence is improper. Parker challenges his sentencing term on a number of grounds. He argues that (1) his actions constituted a

single course of conduct, and thus a sentence should not have been imposed on each conviction; (2) consecutive sentencing was improper under the Minnesota Sentencing Guidelines; (3) the district court violated *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) by considering aggravating factors not considered by the jury and should be modified accordingly; and (4) the cumulative sentence of 456 months (38 years) is "absurd."

A. Single Course of Conduct

Parker argues that the district court should not have imposed sentences on each of the four separate convictions because they arose from a single behavioral incident. "When a single behavioral incident results in the violation of multiple criminal statutes, the offender may be punished only for the most severe offense." *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007), *review denied* (Minn. Dec. 4, 2007); *see* Minn. Stat. § 609.035, subd. 1 (2004). To determine whether multiple offenses arise from a single behavioral incident, we consider 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, or were motivated by a single criminal objective." *Suhon*, 742 N.W.2d at 24.

Minnesota courts have created an exception to section 609.035, subdivision 1, which allows the imposition of multiple sentences despite the existence of a single behavioral incident if the offenses involve multiple victims. *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. App. 2005). Because Parker burglarized two separate

residences with different homeowners, the crimes resulted in two separate sets of victims, and the law allows separate sentences for each burglary.

Parker's conduct in fleeing police is statutorily excluded from the prohibition on punishment for crimes arising from the same behavioral incident. *See* Minn. Stat. § 609.035, subd. 5 (2004) ("Notwithstanding subdivision 1, a prosecution or conviction for violating section 609.487 [fleeing a peace officer in a motor vehicle] is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct.").

Finally, Parker's theft of a motor vehicle is subject to a statutory exception allowing for the imposition of a separate punishment. Minn. Stat. § 609.585 (2004) provides "a prosecution for or conviction of the crime of burglary is not a bar to conviction of or punishment for any other crime committed on entering or while in the building entered." This statute "expressly permits prosecution and conviction and sentencing for a second crime committed during a burglary." *State v. Hicks*, 432 N.W.2d 487, 492 (Minn. App. 1988), *review denied* (Minn. Jan. 26, 1989). Section 609.035, subdivision 1 recognizes that section 609.585 is an exception to its strictures. Because the Cadillac car was stolen from inside the attached garage of the second home, this theft occurred during that burglary.

In sum, the district court had discretion to impose separate sentences for each of Parker's four convictions.

B. Consecutive Sentencing

The next question is whether the district court erred by sentencing Parker to consecutive terms on each conviction. Our sentencing guidelines provide that, when an offender is convicted of multiple offenses, concurrent sentencing is presumptive.[3] Minn. Sent. Guidelines II.F. But consecutive sentences may be imposed permissively without a departure when the offense is listed in Minn. Sent. Guidelines VI. *Id.* Burglaries of a dwelling in the first and second degree are both crimes identified for permissive consecutive sentencing. *Id.* at VI.[4] In addition, fleeing police in a motor vehicle may be sentenced consecutively. *Id.* at II.F; *see also* Minn. Stat. § 609.035, subd. 5. However, theft of a motor vehicle is not listed as a crime for which consecutive sentencing is permissive. Based on these provisions of the guidelines, we conclude the district court erred in ordering the sentence on the theft-of-motor-vehicle conviction to run consecutive to the others but that the other consecutive sentences are permitted.

[3] Minn. Sent. Guidelines III.F. provides that "[m]odifications to the Minnesota Sentencing Guidelines and associated commentary will be applied to offenders whose date of offense is on or after the specified modification effective date." The 2006 version of the guidelines became effective August 1, 2005, and was the version in effect at the time of Parker's offenses.

[4] Parker also notes that although an offense qualifies for permissive consecutive sentencing when it is an offense "found in Section VI" of the guidelines, consecutive sentencing is not permitted "when the court has given an upward durational departure on any of the current offenses." Minn. Sent. Guidelines cmt. II.F.04. But this provision applies only where the multiple convictions in question involve a single victim. *Id.* Here, the two burglary convictions involved distinct victims. Therefore, the district court did not err in ordering consecutive sentencing regarding the separate burglary charges, despite the upward durational departures.

C. Blakely

Other than the fact of a prior conviction, the Sixth Amendment to the United States Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and must be proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000). To give effect to a defendant's Sixth Amendment right to a trial by jury, the Supreme Court applied the *Apprendi* rule to sentences that exceed sentencing guidelines. *Blakely*, 542 U.S. at 303-05, 124 S. Ct. at 2537-38. The *Blakely* court defined "statutory maximum" as the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303, 124 S. Ct. at 2537 (emphasis omitted). As a general rule, the maximum sentence that may be imposed by a district court absent additional jury findings is the presumptive guidelines sentence. *See State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008).

Because the jury found that Parker was a career offender, he was subject to upward sentencing departures on each of his four convictions. In its memorandum explaining its decision to depart upward, the district court relied on the jury's finding that Parker is a career offender. This complies with *Blakely*. But, the district court also relied on the fact that the separate crimes involved multiple victims, took place in the victims' homes, caused the victims fear, threatened public safety, and continued for 16 miles. At least two of these additional facts—the homeowners' fear and the additional threat to public safety—were not elements of any crime or admissions of Parker and were improperly considered as bases for upward departures without a finding by the jury

proving their existence beyond a reasonable doubt. Also, all residential burglaries presumably cause fear; nothing determined by the jury found that the fear Parker caused was different from the fear incident to burglaries generally.

That the crimes occurred in the victims' homes is an element of the burglary offenses, and is therefore an improper consideration for departure as well. *State v. Hearn*, 647 N.W.2d 27, 34 (Minn. App. 2002). And while Parker admitted that he fled police from Lakeville to Edina, and the extensive miles traveled during his flight undoubtedly did cause danger to the public, this is not an appropriate consideration for departure under Minn. Sent. Guidelines II.D.2.b, nor under any caselaw this court has examined or the state or district court has cited. We are thus left with a mixed situation: the district court relied in part upon a proper jury finding supporting departure and in part upon improper considerations inherent in the crime, not supported by a jury's determination, and that do not provide a basis for departure.

The reported decisions of the courts in this state have not ruled on the mixed reliance on proper, jury-based findings and improper findings when imposing an upward sentencing departure. The analysis of the U.S. Supreme Court in *Blakely* suggests any reliance by the district court upon the improper facts in making its upward departure violated Parker's right to a jury trial. 542 U.S. at 303, 124 S. Ct. at 2537. Other federal and state courts have determined that where a sentencing court uses both proper and improper reasons supporting a departure and the reviewing court cannot determine how the sentencing court weighed those factors, remand is required for resentencing. *See, e.g., United States v. Wallace*, 461 F.3d 15, 43-44 (1st Cir. 2006) (holding that where

three out of five reasons to depart were improper, remand was required); *Waldon v. State*, 829 N.E.2d 168, 183-84 (Ind. Ct. App. 2005) (holding that because it was unable to determine "how the trial court weighed" proper and improper factors at sentencing, remand was required); *see also Koon v. United States*, 518 U.S. 81, 113-14, 116 S. Ct. 2035, 2053-54 (1996) (holding, in a pre-*Blakely* downward departure case, that "[w]hen a reviewing court concludes that a district court based a departure on both valid and invalid factors, a remand is required unless it determines the district court would have imposed the same sentence absent reliance on the invalid factors" and ordering remand).

We agree with that assessment. We also note that following *Blakely*, we are not permitted to engage in an independent analysis of the record to determine whether sufficient reasons for a departure exist. *State v. Jackson*, 749 N.W.2d 353, 358 (Minn. 2008). Because we cannot determine from the district court's order what effect the improper findings had upon its decision to depart, we remand for resentencing. Upon resentencing the district court must limit its departure determinations to appropriate departure factors.

D. Manifestly Unjust Result

Finally, Parker argues that imposition of an incarceration term of 38 years is, on the facts of this case, absurd. He urges this court to use its authority under Minn. Stat. § 244.11, subd. 2(b) (2006), to modify the sentences. Under section 244.11, subdivision 2(b), this court

> may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive,

> unjustifiably disparate, or not warranted by the findings of fact issued by the district court. This review shall be in addition to all other powers of review presently existing. The court may dismiss or affirm the appeal, vacate or set aside the sentence imposed or stayed and direct entry of an appropriate sentence or order further proceedings to be had as the court may direct.

We review sentencing departures for an abuse of discretion. *State v. Thompson*, 720 N.W.2d 820, 828 (Minn. 2006).

Generally, an upward-durational departure is limited to a sentence double the length of the presumptive sentence, unless the facts are "unusually compelling." *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981). Typically, in order to impose a statutory-maximum sentence, severe aggravating factors must exist. *State v. Williams*, 608 N.W.2d 837, 840 (Minn. 2000). But legislatively-created sentencing enhancements such as the career-offender statute may be used to increase sentences beyond a double-durational departure in the absence of severe aggravating circumstances. *Neal v. State*, 658 N.W.2d 536, 545 (Minn. 2003) (citing *State v. Rachuy*, 502 N.W.2d 51, 52 (Minn. 1993)). Thus, a district court has discretion to impose statutory-maximum sentences under the career-offender statute.

In light of our decision to remand this case for resentencing, we do not exercise our discretion under section 244.11, subdivision 2(b), to vacate or otherwise alter this sentence. We note that the *Neal* court held that a quadruple-upward departure from the guidelines was excessive, and advised district courts to "use caution when imposing sentences that approach or reach the statutory maximum sentence" because such an

enhancement "may artificially exaggerate the defendant's criminality" by effectively considering the defendant's criminal history twice. 658 N.W.2d at 546.

We are aware that Parker has a lengthy history of felony convictions, especially burglaries, and has served a significant amount of time in prison for various past convictions. However, we note that excluding the sentence for theft of a motor vehicle, the consecutive sentences on Parker's other three convictions total 33 years in a case lacking any evidence of physical harm and limited evidence of psychological harm. The sentence for first-degree burglary comprises 20 of those 33 years even though Parker and the victim never saw each other, were in the same "dwelling" for only a very short period of time, and nothing was taken from the victim's home. We note the admonition of the Minnesota Supreme Court in *Neal*, and emphasize prudence in the resentencing of this case.

In sum, we affirm on all issues except sentencing and ineffective assistance of counsel. We remand for resentencing. On remand, the district court shall consider only the findings of the jury and matters properly admitted by Parker in making its departure determination. We further order that the district court not impose a consecutive sentence for the conviction of theft of a motor vehicle for which consecutive sentencing was not permissive under the guidelines.

We decline to reach the ineffective-assistance-of-counsel claims and determine they are appropriately considered in a postconviction proceeding.

Affirmed in part, reversed in part, and remanded.

Dated: