STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1837

State of Minnesota,
Respondent,

vs.

Edward L. Hicks,
Appellant.

Filed January 27, 2009
Affirmed
Johnson, Judge

Ramsey County District Court
File No. K2-07-719

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Johnson, Judge.

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

JOHNSON, Judge

Edward L. Hicks briefly entered and exited the screened-in back porch of a single-family residence in the city of St. Paul. A Ramsey County jury convicted him of first-degree burglary. On appeal, Hicks's primary argument is that the district court erred by refusing his request to instruct the jury on the lesser-included offense of trespass. We conclude that the district court did not err by refusing to give the lesser-included instruction. We also conclude that Hicks's other arguments are without merit. Therefore, we affirm.

FACTS

On February 25, 2007, Hicks walked into the backyard of a home on South Sumner Street without permission. He opened the door to a screened-in porch on the back of the home and walked inside. He testified at trial that he was looking for something with which -- as the district court aptly put it -- to "wipe his butt" because he needed to defecate and intended to do so in the backyard. When Hicks saw someone inside the home, he left. He was arrested a few blocks away after a resident of the home made a report to the police.

The state charged Hicks with first-degree burglary. He testified in his own defense. He was cross-examined concerning prior convictions of burglary and receiving stolen property. At the conclusion of the trial, Hicks asked the district court to instruct the jury on the lesser-included offense of trespass. The district court denied the request.

The jury found Hicks guilty of first-degree burglary, and the district court sentenced him as a career offender. Hicks appeals.

D E C I S I O N

I. Instruction on Lesser-Included Offense

Hicks argues that the district court erred by refusing to give the jury an instruction concerning the lesser-included offense of trespass.

In determining whether to give a lesser-included-offense instruction, a district court "must determine whether 1) the lesser offense is included in the charged offense; 2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and 3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *State v. Dahlin*, 695 N.W.2d 588, 595 (Minn. 2005); *see also State v. Van Keuren*, ___ N.W.2d ___, ___, 2008 WL 5245487, at *3 (Minn. Dec. 18, 2008). Furthermore, "in evaluating whether a rational basis exists in the evidence for a jury to acquit a defendant of a greater charge and convict of a lesser, [district] courts must . . . view the evidence in the light most favorable to the party requesting the instruction." *Dahlin*, 695 N.W.2d at 597.

Although we review the denial of a requested lesser-included-offense instruction under an abuse-of-discretion standard of review, if "the evidence warrants a requested lesser-included offense instruction, the district court must give it." *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005); *see also State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008); *Dahlin*, 695 N.W.2d at 598. As the supreme court explained in *Dahlin*, "when evidence exists to support the giving of the instruction, it is an abuse of discretion for a

[district] court judge to weigh the evidence or discredit witnesses and thereby deny an instruction." *Dahlin*, 695 N.W.2d. at 598. And "if a district court errs by denying a requested lesser-included offense instruction, we will reverse unless the defendant was not prejudiced by the error." *Cooper v. State*, 745 N.W.2d 188, 194 (Minn. 2008).

In this case, the district court considered the *Dahlin* factors when declining to give the trespass instruction. The district court determined that the first and third requirements of the *Dahlin* test were satisfied because trespass is a lesser-included offense of burglary and because the evidence provided a rational basis for the jury to convict Hicks of trespass. *See State v. Roberts*, 350 N.W.2d 448, 451 (Minn. App. 1984) ("Absent an intent to commit a crime in the building, the same conduct constitutes an included misdemeanor offense of trespass."). The district court determined, however, that the second requirement was not satisfied because the evidence did not provide a rational basis for the jury to acquit Hicks of burglary. The district court reasoned that Hicks "admitted in his own testimony that he was on the porch intending to take paper to wipe his butt. That would constitute a theft. He had entered the dwelling. He admits that he was going to commit a theft."

Hicks contends that the district court erred because a rational basis existed for acquitting him of the burglary charge. A person is guilty of first-degree burglary if the person

> 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 . . . 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 (2006) (emphasis added).

Hicks argues that the jury had a rational basis for acquitting him on the ground that he did not have the requisite "intent to commit a crime," *id.*, because he did not intend to permanently deprive the residents of any property but, rather, merely "intended to use a scrap of abandoned paper, which would not constitute theft." On appeal, Hicks cites *State v. Gage*, 272 Minn. 106, 136 N.W.2d 662 (1965), in which a man was convicted of larceny for obtaining discarded business records that had been placed in a trash receptacle. The papers had been placed there so that they could be collected and sold for $7 per ton, but the defendant testified that he believed that they had been abandoned. *Id.* at 109-10, 136 N.W.2d at 664-65. The supreme court held that the essential element of intent was lacking because "the evidence establishes that [Gage] actually and reasonably believed that the sheets were abandoned." *Id.* at 111, 136 N.W.2d at 665.

Hicks's argument has support in the caselaw, but it does not have support in the district court record. On direct examination, Hicks testified that he entered the porch looking for "[s]omething that I could use . . . to wipe myself." In response to the prosecutor's cross-examination, Hicks testified that he was looking for "paper of any kind." Hicks never testified that he was looking only for paper that had been abandoned by the residents of the home or had no value. According to his own testimony, he was just as likely to take paper that had not been abandoned, including paper of value to the

residents of the home. Furthermore, Hicks did not actually ask the jury to acquit him on the ground that he intended to take paper that had been abandoned. Moreover, when Hicks requested the lesser-included-offense instruction from the district court, Hicks's trial counsel did not cite *Gage* and did not otherwise identify that theory as a basis of acquittal.

For purposes of our analysis, we must view the evidence in the light most favorable to Hicks. We acknowledge the prospect that the jury disbelieved Hicks's testimony and chose to see the case according to the state's theory, that Hicks entered the porch intending to steal something of value and later concocted the defecation story. But the caselaw requires us to take Hicks's testimony at face value and assume it to be true. Even when viewed in that light, however, the evidence does not support the conclusion that Hicks did not enter the porch with intent to commit a crime. He testified that he intended to take paper, and he did not testify to any exceptions or qualifications. His trial testimony does not support the legal theory he now asserts as a defense to the burglary charge. Thus, the district court did not abuse its discretion when it concluded that the evidence did not provide "a rational basis for acquitting [Hicks] of the offense charged," burglary. *See Dahlin*, 695 N.W.2d at 595. Accordingly, the district court did not err in refusing to give the lesser-included-offense instruction.

II. Pro Se Arguments

Hicks filed a pro se supplemental brief and a pro se reply brief in which he raised four additional issues.

A. Definition of "Building"

Hicks argues that a porch does not constitute a "building" for purposes of the burglary statute. Hicks raised this issue in the district court in a motion to dismiss for lack of probable cause. The district court rejected Hicks's argument. This court conducts a de novo review of a district court's interpretation of a statute. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999); *State v. Johnson*, 743 N.W.2d 622, 625 (Minn. App. 2008).

The term "building" is defined in chapter 609 of the Minnesota Statutes as "a structure suitable for affording shelter for human beings including any appurtenant or connected structure." Minn. Stat. § 609.581, subd. 2 (2006). For purposes of the burglary statute, a variety of types of structures have been held to be within the definition of "building." *See, e.g.*, *State v. Walker*, 319 N.W.2d 414, 417 (Minn. 1982) (structure attached to dairy barn capable of sheltering people from elements); *State v. Vredenberg*, 264 N.W.2d 406, 407 (Minn. 1978) (houseboat cabin); *State v. Bronson*, 259 N.W.2d 465, 465-66 (Minn. 1977) (basketball arena being converted to ice arena, with one wall removed); *State v. Gerou*, 283 Minn. 298, 302, 168 N.W.2d 15, 17 (1969) (steel warehouse used as shelter by workers); *State v. Hofmann*, 549 N.W.2d 372, 375 (Minn. App. 1996) (motor home), *review denied* (Minn. Aug. 6, 1996); *In re Welfare of R.O.H.*, 444 N.W.2d 294, 294-95 (Minn. App. 1989) (mini-storage unit). In light of the plain language of the statute and this body of caselaw, we have no difficulty concluding that the screened-in porch that was attached to the back of the house in this case is a "building," as that term is used in the burglary statute.

B. Use of Prior Convictions

Hicks argues that the district court erred by considering prior convictions that were more than 15 years old when imposing a sentence based on a "pattern of criminal conduct." The district court sentenced Hicks pursuant to Minn. Stat. § 609.1095, subd. 4 (2006), which allows for an enhanced sentence if an offender has five or more previous felony convictions. Although a district court may not consider felony convictions that are more than 15 years old when calculating an offender's criminal history score, *see* Minn. Sent. Guidelines II.B.1.f., the statute on which the district court relied contains no such limitation. This court previously has held that "sentencing calculations under the career-offender statute are not limited by the sentencing guidelines' 15-year 'look-back' provision." *State v. Mitchell*, 687 N.W.2d 393, 399 (Minn. App. 2004), *review granted* (Minn. Dec. 22, 2004) *and order granting review vacated* (Minn. Dec. 13, 2005). Thus, the district court did not err by using prior convictions that were more than 15 years old when sentencing Hicks under the career-offender statute.

C. Prosecutorial Misconduct

Hicks argues that the prosecutor engaged in misconduct that requires a new trial. Hicks did not object to any alleged prosecutorial misconduct at trial. Thus, we apply a modified plain-error test. *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007).

On appeal, Hicks does not point to anything the prosecutor said or did during trial. Rather, Hicks appears to be challenging a statement in the complaint that he has 12 prior felony convictions. The prosecutor plainly did not engage in misconduct when preparing the complaint.

D. Ineffective Assistance of Counsel

Hicks argues that his trial counsel provided him with constitutionally ineffective assistance. To prevail on this claim, Hicks "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

Hicks has identified 17 ways in which he believes his trial counsel failed to deliver effective assistance. None of Hicks's arguments has been considered by the district court. In light of the nature of his allegations, Hicks's ineffective-assistance claim "cannot be decided on the district court record because it requires additional evidence" and, thus, "may be brought in a postconviction petition." *Arredondo v. State*, 754 N.W.2d 566, 571 n.4 (Minn. 2008) (quotation omitted). Thus, we decline to consider Hicks's ineffective-assistance claim in its present procedural posture.

Affirmed.