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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2276**

State of Minnesota,
Respondent,

vs.

Calvin D. Brackins,
Appellant.

**Filed January 13, 2009
Affirmed in part, reversed in part, and remanded
Connolly, Judge**

Clay County District Court
File No. K6-07-996

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

Brian Melton, Clay County Attorney, Clay County Courthouse, 807 North 11th Street, P.O. Box 280, Moorhead, MN 56561 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant argues that the evidence introduced at trial was insufficient to sustain his convictions of first-degree burglary, attempted first-degree robbery, and second-degree assault with a dangerous weapon. He further asserts that he was improperly sentenced to consecutive prison terms. Because the evidence was sufficient to sustain appellant's convictions, but he was improperly sentenced to consecutive prison terms, we affirm in part, reverse in part, and remand.

FACTS

Appellant Calvin D. Brackins worked at a Moorhead McDonald's for a short period during 2005 and 2006. Appellant's friend, Anthony Dobyne, also worked at that McDonald's. During the time when both appellant and Dobyne were working at McDonald's, appellant joked about robbing the restaurant. Although Dobyne and appellant joked about robbing McDonald's, Dobyne did not think that appellant would actually do it. Appellant quit his job at McDonald's in January of 2006.

On October 28, 2006, assistant-manager Nathan Brule, Barry Altepeter, and Shayla Franek were working the overnight shift at McDonald's. The McDonald's drive-through is open 24 hours on Fridays and Saturdays. The lobby door is locked at 11 p.m. on those nights. The back security door is always supposed to be locked, but sometimes it is unlocked when employees take the garbage out or take a smoke break. The employees do not always relock the door when they come back inside. As the manager on duty on October 28, Brule was the only person who had keys to the back door. At

some point that evening, Brule unlocked the back door so that other employees could go outside to smoke.

When Franek left the restaurant at the end of her shift around 3:30 or 3:45 a.m., she went out the unlocked back door. As she left, she yelled to Brule and Altepeter that she was leaving and to lock the door. As she was leaving Franek saw someone enter the restaurant through the back door, but it was too dark to see who it was, and she assumed that it was Brule or Altepeter.

After Franek left, Brule went into the office to count the money from the cash registers. The office has two safes where the money from each shift is deposited. Only managers know the combination to unlock the safes.

Brule was on the phone in the office when someone came up from behind him, put a hand over his mouth, and told him not to say a word. The assailant also put a knife against Brule's neck. The knife had a green handle and a serrated edge. McDonald's does not use knives of this description. Brule noticed that the assailant was wearing gloves and smelled of alcoholic beverages. Brule did not recognize the assailant's voice.

The assailant dragged Brule toward the safes and told him to open them. The safes were already unlocked because Brule had been working on the deposits for the night, so Brule just opened the safe door with his foot. The assailant forced Brule to lay face down on the floor next to one of the safes. Brule was able to witness the assailant, who had a bandana covering his face, taking money out of the drawers in the safes. At one point, Brule noticed that the assailant was no longer holding the knife because he had deposit bags in one hand and cash in the other. Brule stood up and kicked the assailant,

who was squatting down in front of the safe, on the side of the head. Brule was wearing steel-toed boots. The assailant stood up and Brule attempted to tackle him. Brule and the assailant then began throwing punches at each other.

During the altercation, Brule yelled for Altepeter, who had been cleaning the grills and getting food ready for breakfast. Altepeter came from the kitchen to see Brule scuffling with the assailant. Altepeter ducked behind a cooler and dialed 911. The assailant then ran out the back door without taking anything with him.

During his 911 call, Altepeter reported that an assailant, approximately 5'7" to 5'8" tall, was fighting with Brule for money. Brule described the assailant as a black male wearing a bandana, a facemask, a gold watch, and black, red, and white tennis shoes.

As a result of the attack, Brule had a bite mark on his arm, a bite mark in the middle of his back, and a bruise on his leg. Brule was not bleeding, but there was blood on the floor and on some of the money.

Moorhead Police Officer Jay Phillippi arrived at the McDonald's at 4:00 a.m. Officer Phillippi noticed that Brule had a torn shirt and blood on his arms. Brule was talking excitedly and was agitated. Officer Phillippi also noticed that Altepeter seemed nervous and scared. There was money lying on the ground and a knife by one of the safes. Officer Phillippi prevented anyone from entering the area of the attack and waited for Detective Brad Stuvland to arrive.

Detective Stuvland arrived and noticed that things were in disarray, including money scattered all over the floor. He also observed a glove lying on the floor.

Detective Stuvland unsuccessfully attempted to obtain fingerprints from the knife left at the scene.¹ There were no signs of a forced entry, and the back door was locked and the alarm activated. The assailant was not located that night.

Michael Eng, who is familiar with appellant, recalled seeing appellant with a mark under his eye around October 28. Eng overheard appellant say he got the black eye while playing basketball. Detective Stuvland interviewed Eng and was told that he might be able to get information about the incident at McDonald's from Dobyne.

Dobyne testified that he had seen appellant at a barbeque and that appellant had a black eye. Appellant told Dobyne that he got the black eye while playing basketball. A month or two later, appellant told Dobyne that he had robbed McDonald's. Dobyne informed Detective Stuvland that appellant had robbed McDonald's.

Detective Stuvland interviewed appellant on April 17, 2007. Appellant denied having any knowledge of the attempted robbery and denied that it was his blood inside the restaurant. Detective Stuvland collected a sample of appellant's DNA with a cheek swab.

The Bureau of Criminal Apprehension (BCA) analyzed two of the blood samples from the scene. The DNA in both blood samples matched appellant's DNA profile. This profile would not be expected to occur more than once in the world population.

Appellant was charged with first-degree burglary, attempted first-degree robbery, and second-degree assault with a deadly weapon. At trial, appellant's story differed

¹ The knife had been moved by Brule from the location by the safe to a rolling table in the back of the office.

substantially from the one told by Brule. According to appellant, Brule asked appellant's sister to become sexually involved with him. Appellant became enraged. Appellant testified that he called the McDonald's to find out when Brule would be working and went to the restaurant around 3:15 a.m. When he arrived, Brule let appellant in through the back door. This was not unusual, as appellant would occasionally come in late at night to help out in the kitchen in exchange for free food. Appellant denied covering his face or having a knife, but admitted that he was wearing gloves. Appellant stated that there was an altercation between him and Brule because of the sexual comments allegedly made to appellant's sister. Appellant claimed that during the altercation he was holding Brule from behind in a chokehold. Appellant stated that he lost his balance, slipped, and in doing so, caused the money that Brule was counting to go everywhere. At that point, appellant was lying on the ground and Brule began to hit him. Appellant bit and punched Brule, and when he was able to get up, ran out the back door. Appellant denied trying to take money from McDonald's. Appellant admitted that he lied to Detective Stuvland during the April interview. Appellant denied discussing the incident with Dobyne.

After a jury trial, appellant was convicted of all charges. He was sentenced to a 58-month prison term on the first-degree burglary conviction and a 24-month consecutive prison term on the attempted first-degree robbery. No sentence was imposed on the second-degree assault with a dangerous weapon conviction and that conviction was dismissed. This appeal follows.

DECISION

I. The evidence was sufficient to sustain appellant's convictions.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

The evidence, when viewed in the light most favorable to the conviction, is sufficient to sustain appellant's convictions. Appellant asserts that his testimony that he entered the restaurant with consent, that he did not take any money, and that he did not have a knife, creates sufficient reasonable doubt to mandate an acquittal. However, the jury obviously believed the state's witnesses, and not appellant. These witnesses testified that appellant entered the McDonald's without consent, attempted to steal money, and attacked Brule with a knife. Because the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably

concluded that appellant was guilty of the charged offenses, we will not reverse their decision.

II. The district court abused its discretion by sentencing appellant to consecutive terms.

Appellant argues that consecutive sentencing was improper because it represents an upward departure and no departure grounds were found on the record. Respondent asserts that consecutive sentencing was permissive. This court will not reverse a district court's decision to impose consecutive sentences unless there has been a clear abuse of discretion. *Neal v. State*, 658 N.W.2d 536, 548 (Minn. 2003). However, the district court's "interpretation of the sentencing guidelines is reviewed de novo." *State v. Jones*, 587 N.W.2d 854, 855 (Minn. App. 1999).

The sentencing guidelines state that consecutive sentencing is permissive for multiple current felony convictions when they are enumerated on the list of offenses eligible for permissive consecutive sentencing. Minn. Sent. Guidelines II.F. First-degree burglary and first-degree robbery are found on the list, but *attempted* first-degree robbery is not. Minn. Sent. Guidelines VI. The state argues that the commission implicitly included attempt crimes in the list, but provides no support for this assertion. In fact, this court has explicitly rejected the state's argument. *See State v. Johnson*, 756 N.W.2d 883, 886 (Minn. App. 2008) (concluding that "[a]tttempted offenses, other than attempted first-degree murder, are not listed in section VI of the Minnesota Sentencing Guidelines, and, therefore, are not offenses for which permissive consecutive sentences may be imposed"). Because attempted first-degree robbery is not listed as an offense eligible for

permissive consecutive sentencing, concurrent sentencing was the presumption in this case.

Because of this presumption, the imposition of consecutive sentences was a departure from the sentencing guidelines. The decision to depart from the sentencing guidelines rests within the district court's discretion and will not be reversed absent a clear abuse of that discretion. *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996). The sentencing guidelines state that "in exercising the discretion to depart from a presumptive sentence, the judge must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence." Minn. Sent. Guidelines II.D. "Furthermore, if an aggravated departure is to be considered, the judge must afford the accused an opportunity to have a jury trial on the additional facts that support the departure and to have the facts proved beyond a reasonable doubt." *Id.*

At sentencing, the state requested consecutive sentencing on the first-degree burglary and the second-degree assault convictions. Consecutive sentencing was permissive for those convictions because both first-degree burglary and second-degree assault with a dangerous weapon are found in Minn. Sent. Guidelines VI. Appellant conceded that consecutive sentencing on those two convictions was permissive, but he opposed consecutive sentencing because it would unfairly exaggerate the criminality of his conduct. Appellant therefore requested concurrent sentences.

The district court, however, sentenced appellant on the first-degree burglary conviction and the first-degree attempted robbery conviction, concluding that consecutive

sentencing was most appropriate for those crimes. The record indicates that the district court believed consecutive sentencing was permissive with regard to those convictions.² But, as discussed above, consecutive sentencing is not permissive for attempted first-degree robbery and first-degree burglary, because attempted robbery is not an enumerated offense in section VI of the sentencing guidelines.

Therefore, the district court abused its discretion in concluding that consecutive sentencing was permissive on the first-degree burglary and the attempted first-degree robbery convictions and not impaneling a sentencing jury for a determination of aggravating factors. We reverse and remand for an imposition of concurrent sentences or the impaneling of a sentencing jury to find aggravating factors that would support a sentencing departure.

Affirmed in part, reversed in part, and remanded.

² The district court stated that “[t]his is the sentence pronounced under the Minnesota sentencing guidelines and the Court finds no substantial or compelling reasons to depart from those guidelines.”