STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0591

State of Minnesota,
Respondent,

vs.

Justin Dillard Thomas,
Appellant.

Filed April 21, 2009
Affirmed
Collins, Judge[*]

Washington County District Court
File No. K0-07-5867

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Douglas Johnson, Washington County Attorney, Washington County Government Center, 14949 62nd Street North, Stillwater, MN 55802 (for respondent)

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

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, 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

COLLINS, Judge

Appellant challenges his convictions of first-degree burglary, terroristic threats, interference with a 911 call, and two counts of fifth-degree assault, arguing that because the district court answered substantive jury questions outside his presence, his constitutional rights were violated and he is entitled to a new trial. Appellant also contends that because he was not afforded his right of allocution before sentencing, the sentence should be vacated with a remand for resentencing. Finally, appellant argues that because one assault was committed during the same behavioral incident as the interference with a 911 call, the district court erred by imposing separate concurrent sentences for each charge. We affirm.

FACTS

On July 29, 2007, Justin Thomas spent the night at his sister's apartment. His sister, a single mother of four who works two jobs and attends school, made it the rule that no one other than her children be in the apartment when she is not home—including Thomas. After Thomas awoke and found that his sister had already left for work, Thomas left the apartment and the children dutifully locked the door behind him. Thomas returned later that morning, and when the children would not let him in Thomas became angry, broke a window, and entered the apartment. After finding his sister's daughters, 13-year-old K.T. and nine-year-old A.S., hiding in a closet, Thomas struck K.T. in the face multiple times, pulled her from the closet, slammed her against the wall,

grabbed the phone K.T. was using to call 911, and struck her again. Thomas also stomped on A.S.'s stomach as she lay on the closet floor.

Following a jury trial, Thomas was convicted and sentenced to 69 months' imprisonment for the first-degree burglary, 15 months for the terroristic threats, 365 days for the interference with a 911 call, and 90 days for each of the two fifth-degree assaults, all concurrent. This appeal followed.

D E C I S I O N

I.

Thomas argues that he was wrongfully denied the right to be present for discussions regarding the deliberating jury's questions and for the district court's responses to the jury's questions. We agree. The confrontation clause of the Sixth Amendment to the United States Constitution guarantees a defendant the right to be present at all stages of trial. *State v. Sessions*, 621 N.W.2d 751, 755 (Minn. 2001); *see also* Minn. R. Crim. P. 26.03, subd. 1(1) ("The defendant shall be present . . . at every stage of the trial."). Responding to a deliberating jury's questions is a stage of trial. *Sessions*, 621 N.W.2d at 755. Generally, a district court judge should not communicate with the jury after deliberations begin unless it is done in open court and the defendant is present. *Id.* at 755-56.

Here, the district court received written questions from the jury asking for the time Thomas first left the apartment and the time of the 911 call, and for the definition of "a person in lawful possession." The district court informed the prosecutor and Thomas's attorney regarding the jury's questions and the court's proposed responses. With the

approval of both counsel, the district court responded to the jury's questions in writing as follows: (1) "The court cannot answer this question for you. You will have to rely on your memory from the trial"; and (2) "A person is in lawful possession when the person owns the building or has been given the right to control or occupy the building by the owner. Such a person is in lawful possession of the building, although the person is not physically present at the time of the entry." *See* 10 *Minnesota Practice*, CRIMJIG 17.15 (2006)(defining "person in lawful possession").

Thomas was not present for the discussions regarding the jury's questions and the proposed answers, or when the decision was made to deliver the response in writing to the jury room. And although it appears that the prosecutor and Thomas's counsel were consulted and satisfied as to the content of the response, the record does not reveal any agreement to vary from the standard of open-court communication with the deliberating jury or that Thomas was aware of or agreed to any of these discussions. Because Thomas did not waive his right to be present for all stages of the trial, the district court erred by responding to the jury's questions other than in open court and without Thomas being present.

However, even though Thomas's right to be present was violated, he "is not entitled to relief if it can be said that the error was harmless error beyond a reasonable doubt." *State v. Breaux*, 620 N.W.2d 326, 332 (Minn. App. 2001) (citing *State v. Ware*, 498 N.W.2d 454, 457-58 (Minn. 1993)). "If the verdict was surely unattributable to the error, the error is harmless beyond a reasonable doubt." *Sessions*, 621 N.W.2d at 756. When considering whether the erroneous exclusion of a defendant from communications

between the district court and the jury constitutes harmless error, we must consider the strength of the evidence and the substance of the judge's response. *Id.*

The evidence supporting Thomas's convictions, taken as a whole, is quite strong. Both children testified about the details of the break-in and assaults. It was conceded that Thomas assaulted both children, and evidence of his interference with the 911 call was detailed and undisputed. Although Thomas adamantly disputes the burglary charge, and maintains that the definition of "person in lawful possession" goes to the heart of the issue, the jury heard his sister and her children testify that Thomas was not permitted to be in the apartment unless his sister was home, and that because his sister was not home, the children locked the door when Thomas left that morning and refused to let him back in when he returned. Also, a police officer at the scene testified that Thomas had multiple lacerations on his arms and was covered in blood, and that Thomas admitted that he "punched a window because his nieces and nephews locked him out of the house." Finally, the jury saw photographs of the apartment, the broken window, and the blood-smeared blinds.

As to the content of the responses to the jury's questions, the district court did not misstate the law or otherwise prejudice the jury against Thomas. The district court properly declined to answer the first question and instead instructed the jury to rely on their memory. And in responding to the second question, the district court elicited approval from both counsel to convey the definition verbatim from the criminal jury instructions guide. On this record, the verdict is "surely unattributable" to the error of the district court, and although the district court violated Thomas's constitutional right by

communicating with the deliberating jury outside of his presence, this error was harmless beyond a reasonable doubt.

II.

Thomas next argues that the district court erred by not affording him the opportunity to allocute prior to sentencing. We agree. A criminal defendant has a right to allocution before the district court imposes sentence. Minn. R. Crim. P. 27.03, subd. 3; *see also State v. Young*, 610 N.W.2d 361, 363 (Minn. App. 2000), *review denied* (Minn. July 25, 2000) (rejecting state's argument that presentence investigation satisfied defendant's right to allocution because "[a] defendant has a right to allocution before the court imposes sentence"). But a violation of the right of allocution is not always prejudicial. *See State ex. rel. Krahn v. Tahash*, 274 Minn. 567, 567-68, 144 N.W.2d 262, 262-63 (1966)*; see also State ex rel. Thunstrom v. Tahash*, 283 Minn. 239, 244-45, 167 N.W.2d 139, 144 (1969) (stating that prejudice was not demonstrated when a presentence investigation report was available, defense counsel spoke at sentencing, and defendant testified at hearing on motion to set aside verdict). In *Krahn*, the Minnesota Supreme Court held that because the district court had a presentence investigation report that provided "adequate assurance . . . that the court took into account the defendant's version of the events leading to his conviction and other background information which is normally considered in mitigation of the penalty" prior to sentencing, a failure to provide a right of allocution did not require that the sentence be vacated. 274 Minn. at 567-68, 144 N.W.2d at 262-63.

Before imposing the sentences, the district court heard from both counsel. Thomas's attorney gave no indication that Thomas had anything he wished to add. Although the district court did not invite Thomas to speak for himself, the district court had received and specifically acknowledged having reviewed the comprehensive presentence investigation report containing Thomas's detailed version of the events and his personal background information. On this record, because Thomas had the prior opportunity and had in fact informed the district court of his version of events and any mitigating circumstances through the presentence investigation report, we conclude that Thomas suffered no prejudice by virtue of the district court's error, and reversal for what would likely be a hollow resentencing hearing is not warranted.

III.

Thomas also argues that because the assault against K.T. was committed during the same behavioral incident as the interference with a 911 call, the district court erred by imposing separate concurrent sentences for each conviction. Although the state concedes that both crimes were part of the same behavioral incident, the state argues that separate sentences are justified under the judicially created multi-victim exception.

Ordinarily, a district court may not impose more than one sentence for multiple offenses committed during a single behavioral incident. Minn. Stat. § 609.035, subd. 1 (2008). But "a judicially created exception to this single-behavioral-incident rule permits the imposition of multiple sentences when (1) the offenses involve multiple victims; and (2) the multiple sentencing does not unfairly exaggerate the criminality of the defendant's conduct." *State v. Rhoades*, 690 N.W.2d 135, 138 (Minn. App. 2004); *see also State v.*

Skipintheday, 717 N.W.2d 423, 426 (Minn. 2006) (same). The supreme court has repeatedly stated that "the legislature did not intend in every case to immunize offenders from the consequences of separate crimes intentionally committed in a single episode against more than one individual." *State ex rel. Stangvik v. Tahash*, 281 Minn. 353, 360, 161 N.W.2d 667, 672 (1968); *State v. Rieck*, 286 N.W.2d 724, 727 (Minn. 1979). For example, in *Rieck*, the supreme court concluded that separate sentences for each of the aggravated assaults was proper because the defendant knew, or should have known, that there would be multiple victims when he firebombed a home, and the purpose of the firebombing was to silence a witness who was expected to be in the house. *Rieck*, 286 N.W.2d at 727.[1]

Whether the multi-victim exception applies is a question of law, which we review de novo. *Skipintheday*, 717 N.W.2d at 426. To avoid application of the multi-victim exception, Thomas would have us determine that the interference with a 911 call implicated only a single victim. But such is not the case. Thomas knew that the other children were in the apartment at the time. Just as in *Rieck*, Thomas knowingly undertook an illegal act that had the potential to harm more than one person. Moreover, similar to that in *Rieck*, the purpose of the crime was to silence more than one victim. Finally, because the district court imposed concurrent sentences, the aggregate sentence duration does not unfairly exaggerate the criminality of Thomas's conduct. Thus, we

[1] The supreme court did conclude, however, that additional concurrent sentences for arson and possession of a firebomb unfairly exaggerated the criminality of the defendant's conduct and vacated those sentences. *Id.*

conclude that the district court properly applied the multi-victim exception in sentencing Thomas for both fifth-degree assault against K.T. and interference with a 911 call.

Affirmed.