STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1073

State of Minnesota,
Respondent,

vs.

Willie James Hobbs,
Appellant.

Filed July 28, 2009
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-07-120723

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel Foster Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

BJORKMAN, Judge

In this appeal from his conviction of first-degree burglary, appellant argues that (1) the evidence is insufficient to support his conviction because the building he entered was not a "dwelling" within the meaning of the burglary statute, Minn. Stat. §§ 609.581, subd. 3, .582, subd. 1(a) (2006), and (2) the district court erred in instructing the jury regarding the definition of "dwelling." We affirm.

FACTS

In March 2005, A.S. and his father-in-law purchased a single-family home located at 2909 Bryant Avenue North in Minneapolis. A.S. renovated the house and put it on the market in September 2006. The sale of the property was scheduled to close on October 31, 2007.

On October 27, 2007, while conducting his weekly check of the vacant house, A.S. discovered that someone had broken in through a basement window and stolen copper piping. He replaced the piping and hired two individuals, J.W. and T.H., to stay in the house until the closing to prevent future break-ins. J.W. and T.H. arrived at the house at approximately 8:30 p.m. on October 29, 2007, bringing a gun for protection. They were checking window locks throughout the house when they heard a noise in the basement. T.H. ran down to the basement, where he saw a man halfway through a basement window. The man appeared to be entering the house, and T.H. yelled at him to get out. J.W. fired the gun at the man, who yelled, "Ow," and left. J.W. then called 911,

and Officer Christopher Tuma of the Minneapolis Police Department responded. J.W. and T.H. gave Tuma a description of the intruder.

Around the same time, Minneapolis Police Officer Ross Lapp responded to a 911 call from 3811 Bryant Avenue North regarding a shooting victim. As Lapp approached that house, he saw appellant Willie Hobbs, who was wearing clothing that matched the description of the intruder and had sustained a gunshot wound.

Hobbs was charged with first-degree burglary of an occupied dwelling. Hobbs moved to dismiss the charge, arguing that the house at 2909 Bryant was not a "dwelling" on October 29, 2007; the district court denied the motion. At Hobbs's request, the district court instructed the jury on both the charged offense and the lesser-included offense of third-degree burglary. The jury acquitted Hobbs of third-degree burglary but found him guilty of first-degree burglary.[1] This appeal follows.

D E C I S I O N

I. A single-family home that is vacant during renovation or pending sale is a "dwelling" for purposes of the burglary statute.

Hobbs argues that the house at 2909 Bryant was not a "dwelling" within the meaning of the burglary statute and that the district court erroneously instructed the jury on the definition of "dwelling." Because both of Hobbs's arguments implicate the statutory definition of "dwelling," we first examine the language of the burglary statute. *See State v. Edwards*, 589 N.W.2d 807, 810 (Minn. App. 1999) ("A burglary conviction

[1] Hobbs subsequently moved for a judgment of acquittal, arguing that the verdicts were inconsistent. The district court denied the motion, and Hobbs does not challenge the denial in this appeal.

will not be sustained where the building is not within the statutory definition."), *review denied* (Minn. May 18, 1999).

The primary objective of statutory interpretation "is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2008); *see also State v. Zeimet*, 696 N.W.2d 791, 793-94 (Minn. 2005). "Where the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and we apply the statute's plain meaning." *State v. Williams*, 762 N.W.2d 583, 585 (Minn. App. 2009) (quotation omitted), *review denied* (Minn. May 27, 2009).

The burglary statute defines "dwelling" as "a building used as a permanent or temporary residence." Minn. Stat. § 609.581, subd. 3. We have previously determined that the word "used" in that definition is a participial adjective, not a verb, and therefore "has no tense." *Edwards*, 589 N.W.2d at 811 (observing that the word "used" frequently is "resorted to for such descriptive purposes even though the article being described is not at the moment in actual use in any respect" (quotation omitted)). The word "residence" commonly means "[t]he act or fact of living in a given place for some time," or "[a] house or other fixed abode." *Black's Law Dictionary* 1335 (8th ed. 2004); *see also The American Heritage Dictionary* 1483 (4th ed. 2006) (defining "residence" as "[t]he place in which one lives").

We previously interpreted the term "dwelling" in a case similar to this one involving a house that was vacant at the time of a burglary. In *State v. Kowski*, we discussed the burglary of an unfinished vacation home. 423 N.W.2d 706, 707-08 (Minn. App. 1988). Cognizant of the legislature's concern "about the distress and lingering fear"

caused by residential burglary, regardless of whether anyone is living in the building at the time of the burglary, we held that a building "remains a dwelling" regardless of the amount of time the owner has been away, if the owner does not intend to abandon it. *Id.* at 709-10. "An owner's intent to return to a dwelling is the crucial factor in determining whether a structure retains its character as a dwelling in the owner's absence." *Id.* at 710. Because the owner in *Kowski* intended to return and use it as a residence, we concluded that the vacant and unfinished vacation home was a "dwelling." *Id.*

Hobbs contends that our subsequent decision in *Edwards* added a second requirement for a building to be considered a dwelling—use of the building as a residence in the immediate past. But Hobbs misconstrues *Edwards*, which explicitly distinguished *Kowski* based on unique facts. *Edwards*, 589 N.W.2d at 811. We held in *Edwards* that the apartment of a recently murdered woman was a "dwelling," despite the lack of evidence regarding the woman's future intention with respect to the apartment, because the "apartment had immediate past residential use." *Id.* We explained that the *Kowski* intent requirement "is used to distinguish between buildings that are residences, be they temporary or permanent, and buildings that are abandoned." *Id.* Although *Edwards* further analyzed the language of the burglary statute, explaining the adjectival nature of the word "used" in the statutory definition of "dwelling," *Edwards* did not replace or modify *Kowski*.

Based on the plain language of the statute and our previous interpretations of that language in *Kowski* and *Edwards*, we conclude that a building may be considered a "dwelling" within the meaning of the burglary statute if its owner intends it to be used as

a residence, regardless of whether anyone is residing in the building at the time of the burglary. Thus, the definition of "dwelling" in the burglary statute includes a single-family home that is vacant during renovation or pending sale.

II. Sufficient evidence supports the jury's determination that the house at 2909 Bryant was a dwelling.

Hobbs argues that the evidence is insufficient to prove that the house at 2909 Bryant was a "dwelling." On a claim of insufficient evidence, we conduct a thorough review of the record to determine "whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999) (quotation omitted). We review the record in the light most favorable to the conviction and 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 that the defendant was guilty as charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

There is no dispute that the house at 2909 Bryant was a single-family home intended for use as a residence. Although A.S. did not live in the house on October 29, 2007, there is no evidence that he intended to abandon the house. Rather, A.S. renovated, maintained, and sold the house as a single-family home. When he saw that the house had been damaged, he took precautions to secure the house pending its imminent sale. As a result, two people were lawfully present in the house, intending to sleep there for the

night, at the time of the burglary. The evidence supports the jury's finding that the house at 2909 Bryant was a "dwelling."

III. The district court did not err in instructing the jury on the definition of "dwelling."

Hobbs also argues that the district court erred in instructing the jury on the definition of "dwelling." District courts have considerable latitude in formulating jury instructions. *State v. Mahkuk*, 736 N.W.2d 675, 681-82 (Minn. 2007). We review jury instructions "in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). A jury instruction is erroneous "if it materially misstates the law." *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005).

Over Hobbs's objection, the district court instructed the jury as follows:

> The elements of burglary in the first degree are, first, the property involved in this case was a dwelling. A dwelling means a building used as a permanent or temporary residence. A building used as a permanent or temporary residence does not lose its residential character simply because it has been vacant for a certain period of time so long as the owner did not permanently abandon it.

The first two sentences of the instruction came from the jury-instruction guide, 10 *Minnesota Practice*, CRIMJIG 17.02 (2006), but the district court added the last sentence based on *Edwards* and *Kowski*. Hobbs argues that the instruction amounted to a directed verdict and misstated the law. We disagree.

First, the instruction did not effectively direct a verdict against Hobbs because the district court's further instruction on the elements of third-degree burglary demonstrated

that the jury could find the dwelling element was not met. The district court explained that the law permits a conviction of a lesser crime if the jury finds a person not guilty of the greater crime and instructed the jury that "[a] lesser crime in this case is burglary in the third degree." The district court also stated that the jury could find Hobbs guilty of third-degree burglary if it found all the elements of that offense met but some of the elements of first-degree burglary not met. The only elements of first-degree burglary that are not elements of third-degree burglary are the status of the building as a dwelling and the presence of another person in the building at the time of the offense. *Compare* Minn. Stat. § 609.582, subd. 1(a) *with* Minn. Stat. § 609.582, subd. 3 (2006). There is no dispute that others were present at 2909 Bryant when Hobbs entered the house. Because the third-degree-burglary instruction indicated to the jury that it could reasonably find the dwelling element not met, the first-degree-burglary instruction did not direct the jury's verdict.

Second, the "dwelling" instruction was not a misstatement of the law. As the district court indicated, the instruction was drawn directly from *Kowski*, in which we not only held that a building remains a dwelling "[r]egardless of the length of time an owner is absent from the structure," but also determined that "the legislature did not intend that a structure lose its residential character simply because it is vacant for a certain period of time before the burglary." 423 N.W.2d at 710. The district court did not err in instructing the jury on the meaning of "dwelling."

Affirmed.