STATE OF MINNESOTA
IN COURT OF APPEALS
A09-135

State of Minnesota,
Respondent,

vs.

Jerry Lee Wiley,
Appellant.

Filed October 13, 2009
Affirmed
Bjorkman, Judge

Dakota County District Court
File No. 19HA-CR-08-1729

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

Marie L. Wolf, Interim Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

BJORKMAN, Judge

Appellant Jerry Lee Wiley challenges the district court's imposition of consecutive sentences for convictions of first-degree burglary and two counts of second-degree assault. Because consecutive sentencing is permissive and does not unfairly exaggerate the criminality of appellant's conduct, we affirm.

FACTS

Appellant's convictions stem from an incident that occurred on June 6, 2008. B.L.K. was staying overnight at her sister's home, along with her boyfriend, D.B.W. B.L.K. and D.B.W. were sleeping when appellant, who had been romantically pursuing B.L.K., entered through an unlocked door, carrying a loaded .22 caliber handgun.

D.B.W. woke up sometime after midnight when appellant turned on the light and pointed a gun at him. Appellant pulled the trigger, but the gun did not fire. B.L.K. awoke to see appellant pointing the gun at D.B.W.'s head. Appellant then pointed the gun at B.L.K.'s head and pulled the trigger. Again, the gun failed to fire. Appellant pulled the magazine from the handgun, reinserted it, and racked the slide, commenting that this had never happened before and this was their "lucky day." Appellant then pushed B.L.K. down onto the floor, kicked a cigarette away from her face, exclaimed that "everybody [sic] going to die tonight," and fired in B.L.K.'s direction. The bullet missed B.L.K.

Before the situation could escalate further, D.B.W. convinced appellant to leave the house before the police arrived. Appellant was later arrested at his apartment and taken into custody.

Appellant claimed at trial that he entered the home with B.L.K.'s permission, was carrying a gun out of fear of D.B.W., and was not aware that the gun was loaded. Appellant denied assaulting or threatening anyone, and he stated that the discharge of the firearm was accidental.

The jury found appellant guilty of first-degree burglary and two counts of second-degree assault. The district court imposed a 48-month sentence for the first-degree burglary conviction and 36-month sentences for each assault conviction, to be served consecutively, for a total of 120 months. This appeal follows.

D E C I S I O N

District courts have substantial discretion in imposing sentences that are authorized by law. *State v. Munger*, 597 N.W.2d 570, 573 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999). We will not disturb such a sentence unless the district court abused its discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *State v. Lundberg*, 575 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. May 20, 1998). When consecutive sentences are permissive, we will not interfere with the district court's decision "unless the resulting sentence unfairly exaggerates the criminality of the defendant's conduct." *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998).

I. The district court's imposition of consecutive sentences is authorized by law.

The legislature has established increased penalties for crimes committed in connection with a burglary. Minn. Stat. § 609.585 (2006). Although Minnesota law normally prohibits multiple sentences derived from the same behavioral incident, these

provisions specifically except crimes committed during a burglary. Minn. Stat. § 609.035, subd. 1; *State v. Mullen*, 577 N.W.2d 505, 511 (Minn. 1998).

The Minnesota Sentencing Guidelines likewise provide that "[m]ultiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences found in Section VI may be sentenced consecutively to each other." Minn. Sent. Guidelines II.F.2 (2006 & Supp. 2007). Appellant was sentenced to 48 months' imprisonment for one count of first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(b), (c) (2006), and 36 months' imprisonment for each of the two counts of second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2006). Both the burglary and assault offenses are listed in section VI of the guidelines and qualify for permissive consecutive sentencing. Minn. Sent. Guidelines VI (2006 & Supp. 2007). Under these circumstances, permissive consecutive sentencing is not considered a departure from the guidelines. *State v. Perleberg*, 736 N.W.2d 703, 705–06 (Minn. App. 2007), *review denied* (Minn. Oct. 16, 2007).

Moreover, a district court has discretion to impose consecutive sentences in cases involving multiple victims. *State v. Montalvo*, 324 N.W.2d 650 (Minn. 1982) (upholding consecutive sentences for two second-degree aggravated assault convictions on two victims). Consecutive sentences may be imposed even when, as here, the harm to each victim arose from a single behavioral incident. *See State v. Sanders*, 598 N.W.2d 650, 656–57 (Minn. 1999).

II. The imposition of consecutive sentences did not unfairly exaggerate the criminality of appellant's conduct.

Appellant admits that the sentence handed down by the district court is "technically legal" but argues, relying on *State v. Norris*, 428 N.W.2d 61 (Minn. 1988), that the imposition of consecutive sentences unfairly exaggerates the criminality of his conduct. We disagree. *Norris* did not involve permissive consecutive sentences under the guidelines. *Munger*, 597 N.W.2d at 574. Indeed, the *Norris* court observed that "[i]n numerous cases involving aggravated robbery, assault, and multiple victims, we have allowed consecutive sentences to stand." 428 N.W.2d at 70–71. And the fact that appellant's sentence was not a departure from the guidelines "presumptively suggests that it does not unfairly exaggerate the criminality of his conduct." *State v. Franks*, 742 N.W.2d 7, 16 (Minn. App. 2007), *aff'd in part and rev'd in part on other grounds,* 765 N.W.2d 68 (Minn. 2009).[1]

Our careful review of the record reveals ample support for the district court's sentencing decision. Appellant invaded a private home after midnight, carrying a loaded firearm. He pointed the weapon at two victims and pulled the trigger on both of them. When the gun jammed, appellant adjusted the magazine, said "everybody [sic] going to die tonight," and discharged the gun in B.L.K.'s direction. The fact that no one was seriously hurt or killed does not reduce the seriousness of appellant's conduct. On these

[1] In *Franks*, the supreme court overturned the sentence, but on the basis that the district court erred by failing to sentence based on the most serious of the convictions. The supreme court did not reach the issue of whether the imposition of consecutive sentences was error. *See State v. Franks*, 765 N.W.2d 68, 78 n.5 (Minn. 2009).

facts, we conclude that the district court did not abuse its discretion by imposing permissive consecutive sentences.

Affirmed.