STATE OF MINNESOTA
IN COURT OF APPEALS
A09-926
A09-934

State of Minnesota,
Appellant (A09-926),
Respondent (A09-934),

vs.

Steven Dale Leathers,
Respondent (A09-926),
Appellant (A09-934).

Filed June 8, 2010
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Itasca County District Court
File No. 31CR064218

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

John J. Muhar, Itasca County Attorney, Grand Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

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

STONEBURNER, Judge

Appellant challenges five convictions of first-degree assault for firing a single gunshot from inside his home as five peace officers attempted to enter it to execute a search warrant. Appellant argues that the evidence was insufficient to support a finding that he had specific intent to cause fear in more than two individuals. Appellant also argues that the jury instructions were unnecessary, confusing, or misstated the law such that he was denied a fair trial; and that the district court abused its discretion by sentencing him for all five convictions. The state asserts that the district court erred in holding that appellant is entitled to supervised release after serving two-thirds of his sentence. We affirm the convictions but reverse the district court's ruling that appellant is entitled to supervised release and remand for correction of appellant's sentence.

FACTS

Four Itasca County Sheriff's deputies and one state trooper went to the home of appellant Steven Dale Leathers to serve a search warrant. The five peace officers approached Leathers's side door on foot from an alley. Another deputy was parked in a marked squad car with a view of Leathers's front door.

Unknown to the officers, Leathers was, at that moment, anticipating a visit from two drug dealers who had threatened to kill Leathers if he did not pay them money that he owed for drugs. Leathers had loaded his gun and turned up his stereo loud enough that it could be heard outside. Leathers testified that he did not hear the officers announce that they were law-enforcement officers: he only heard banging on his door and saw that

the door was being kicked in as someone said "[k]ick it, kick it, kick it, kick it." Leathers fired one shot. He testified that he intended to fire at the floor to scare people at the door, but the bullet hit the doorknob and ricocheted into a wall.

Leathers thought he heard someone ask, "Was that a gunshot?" Leathers shouted, "[C]ome on in now, get me now, motherf–ers." Then Leathers heard the peace officers yelling "Sheriff."[1] Leathers testified that he then threw his gun down and tried to open the door, but it was jammed, so he instructed the officers to kick the door in.

The officers entered, handcuffed Leathers, and asked him if he had in his possession "anything he should not have." Leathers told the officers that there were drugs in his pockets. Leathers apologized for shooting at the officers. The officers found five baggies of methamphetamine in Leathers's pockets. In the search of his home, the officers found drug paraphernalia and a bag with a "crystal powder," later determined to be fake drugs often used to dilute methamphetamine. Leathers's .22 handgun loaded with nine rounds in the magazine and one round in the chamber was found on a shelf, and an ejected shell from the handgun was found inside a model ship on the fireplace mantel. One officer testified that the marked squad car was clearly visible from the location where the drug paraphernalia and shell casing were found.

The state charged Leathers with five counts of first-degree assault, use of deadly force against a peace officer—one count for each officer who was standing outside of

[1] Initially, only one officer was yelling "Sheriff," in order that the information be most clearly heard. After the shot was fired, all of the officers started yelling "Sheriff's department, search warrant." Leathers claimed at trial that he never heard the officers yelling that they had a search warrant.

Leathers's door when Leathers shot the doorknob. Leathers was also charged with one count of second-degree controlled-substance crime and one count of third-degree controlled-substance crime. Under a plea agreement, the drug charges were resolved with Leathers pleading guilty to a single amended charge of fourth-degree controlled-substance crime. Only the assault charges were tried to a jury.

At trial, over Leathers's objection, the jury was instructed that: (1) in order to be found guilty of assaulting a peace officer, Leathers need not have known that the people outside his home were peace officers when he fired the gun; (2) Leathers's intent to assault the individuals outside of his door could be inferred from the natural and probable consequences of his actions; and (3) self-defense and defense-of-dwelling defenses could not be considered by the jury if the state met its burden of proof that the peace officers announced their presence and were performing official duties at a location where a person was committing a crime.

Leathers was found guilty of five counts of first-degree assault, use of deadly force against a peace officer, in violation of Minn. Stat. § 609.221, subd. 2(a) (2008). The district court denied Leathers's motion for a new trial. The district court imposed concurrent sentences for Leathers's six convictions, totaling 189 months, without the possibility of supervised release. Leathers moved for resentencing, challenging the length of his sentence and denial of supervised release. The district court declined to change the length of Leathers's sentence, but held that Leathers would be eligible for supervised release after serving 126 months (two-thirds of his sentence). In this

consolidated appeal, Leathers challenges his convictions and sentence, and the state appeals the district court's ruling on supervised release.

D E C I S I O N

I. Sufficiency of evidence

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 fact-finder to reach the resulting verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court will not disturb the verdict if the fact-finder, 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. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). Recognizing that the jury is in the best position to determine credibility, this court assumes that the jury believed testimony supporting the verdict and disbelieved evidence to the contrary. *State v. Henderson*, 620 N.W.2d 688, 705 (Minn. 2001); *see also State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (stating that determining witness credibility is usually the exclusive province of the jury).

Minn. Stat. § 609.221, subd. 2(a) (2008), prohibits assaulting "a peace officer . . . by using or attempting to use deadly force against the officer . . . while the officer . . . is engaged in the performance of a duty imposed by law, policy, or rule." Assault is defined as either "an act done with intent to cause fear in another of immediate bodily harm or death; or . . . the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2008). "'With intent to' . . . means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." *Id.*, subd. 9(4) (2008). Assault is a specific-

intent crime, which means that the state must prove "that the defendant acted with the intent to produce a specific result." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007). Intent is a state of mind that generally may be proved by inference from the defendant's words and actions in light of surrounding circumstances. *State v. Thompson*, 544 N.W.2d 8, 11 (Minn. 1996).

Leathers contends that it was impossible for the state to prove beyond a reasonable doubt that he intended to attempt to inflict bodily harm on, or cause fear of immediate bodily harm in, all five officers because "the evidence at best shows that [Leathers] had the specific intent to assault two of the officers." Although Leathers testified that he believed that there were two drug dealers at his door, he also testified that he thought there might be more than two people outside the door: "I thought they would have brought some more people with them." Leathers testified that he wanted to scare "them," referring to whomever was outside his door. Leathers's own testimony, therefore, is sufficient evidence to support a finding that he intended to inflict fear in everyone at his door.

In *State v. Hough*, the supreme court rejected Hough's argument that he only intended to cause fear of harm in one person in a home into which he fired numerous shots from a semiautomatic weapon. 585 N.W.2d 393, 397 (Minn. 1998). Hough was charged with one count of assault for each of the six people in the home at the time of the shooting even though Hough was not aware of the number of people in the home. *Id.* The supreme court affirmed all six convictions, stating that "[w]hen an assailant fires numerous shots from a semiautomatic weapon into a home, it may be inferred that the

assailant intends to cause fear of immediate bodily harm or death to those within the home." *Id.*

Leathers argues that this court should not rely on *Hough* because the supreme court erroneously used the general- and not specific-intent standard, and *Hough* was decided before *Vance*, which clearly instructs that assault is a specific-intent crime. *See Vance*, 734 N.W.2d at 656 (noting that specific intent means that a defendant acted with the intent to produce a specific result). Leathers also asserts that *Hough* is distinguishable from the facts of this case because here, Leathers fired only one shot from within his own home, while in *Hough* the defendant fired multiple shots at someone else's home. But Leathers admitted his intent to cause fear in whomever was outside of his door. He testified that he fired the gun believing that there were more than two people outside his door. And a fact-finder may "infer that a person intends the natural and probable consequences of [his] actions." *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000). We conclude that *Hough* is controlling on this issue, establishing that an act specifically intended to cause fear of immediate bodily harm to a group of people permits a finding of specific intent as to each person in the group. The evidence of intent in this case was sufficient to support convictions of assault of all five victims.

II. Jury instructions

"[J]ury instructions must be viewed 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). An instruction is erroneous if it materially misstates the law. *Vance*, 734 N.W.2d at 656. The district court is granted "considerable latitude" in the selection

of language for jury instructions. *State v. Traxler*, 583 N.W.2d 556, 560 (Minn. 1998). We review the district court's decision to give a particular jury instruction for an abuse of discretion. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). But any error is reviewed using a harmless error analysis. *State v. Jackson*, 746 N.W.2d 894, 898 (Minn. 2008).

A. Permissive-inference instruction

Leathers argues that the district court abused its discretion when it included permissive-inference language in its intent instruction. The district court instructed the jury on the intent element of each count of assault, consistent with the standard jury instruction found in 10 *Minnesota Practice*, CRIMJIG 7.10 (2006), stating that "'with intent to' means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act, if successful, will cause that result." But the district court also gave the state's requested permissive-inference instruction: "[t]he intent of the defendant may be inferred from the natural and probable consequences of his actions."

Leathers relies on *State v. Olson*, 482 N.W.2d 212 (Minn. 1992), and *Connecticut v. Johnson*, 460 U.S. 73, 103 S. Ct. 969 (1983), to support his argument that a permissive-inference instruction must be balanced with an instruction that the inference "could be overcome by sufficient contrary evidence." Leathers asserts that the district court's failure to instruct the jury to consider "all other pertinent evidence to decide whether the state proved that [Leathers] had the requisite intent to commit the charged crimes" deprived him of a fair trial and entitles him to a new trial.

Connecticut v. Johnson involved a conviction of numerous charges including attempted murder and robbery. 460 U.S. at 75, 103 S. Ct. at 971. General instructions to the jury included a description of intent stating that "a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act." *Id.* at 78, 103 S. Ct. at 973. The United States Supreme Court affirmed the judgment of the Connecticut Supreme Court that the instruction was an unconstitutional *conclusive*-presumption instruction on intent that permitted the jury to convict without examining the evidence concerning intent. *Id.* at 87–88, 103 S. Ct. at 978. (Emphasis added.) Because the instruction given in Leathers's case was not a conclusive-presumption instruction, *Johnson* is not controlling.

State v. Olson involved a conviction of a controlled-substance crime. 482 N.W.2d at 213. The district court instructed the jury that the presence of a controlled substance under certain circumstances "permits the factfinder to infer knowing possession of the controlled substance by each person in close proximity to the controlled substance when the controlled substance was found." *Id.* at 215. The supreme court concluded that the instruction "clearly was improper because it was not a balanced instruction on the various relevant factors bearing on the jury's determination of the disputed possession issue but rather was [an instruction] which singled out and unfairly emphasized one factor, one piece of the circumstantial evidence . . . . [T]he instruction did not even expressly inform the jury that . . . the jury was *not required* to infer that [Olson] knowingly possessed any [controlled substance] in open view." *Id.* at 216. Concluding that the erroneous instruction was not harmless error, the supreme court reversed Olson's conviction and

remanded for a new trial. *Id.* Leathers correctly cites subsequent cases in which the supreme court has disapproved of permissive-inference instructions, all of which apply the harmless-error test to determine if the disapproved-of instruction warrants the relief sought.[2] *State v. O'Neill*, 299 Minn. 60, 216 N.W.2d 822 (1974) appears to be the only reported Minnesota case in which there was a permissible-inference instruction on intent. But no error was found there because the district court gave the type of "balanced" instruction argued by Leathers, telling the jury that the "permissible inference . . . may be overcome by contrary evidence, and any such evidence is sufficient to overcome it which creates in the minds of the jurors a reasonable doubt that the defendant's intent was as so inferred." *Id.* at 71–72, 216 N.W.2d 830.

Because the district court did not give a balanced instruction in this case, we conclude that the district court abused its discretion by instructing the jury on the permissible inference. But the district court instructed the jury that, in addition to the permissive inference that it could make: (1) Leathers was presumed innocent; (2) the burden of proving guilt was on the state; (3) the jurors were the sole judges of credibility and weight to be given to evidence; and (4) if the jury found that any element was not proven beyond a reasonable doubt, Leathers was not guilty. And Leathers admitted that

[2] In *State v. Green*, 719 N.W.2d 664, 671 (Minn. 2006), *State v. Medal-Mendoza*, 718 N.W.2d 910, 918–19 (Minn. 2006), and *State v. Valtierra*, 718 N.W.2d 425, 433 (Minn. 2006), the Minnesota Supreme Court disapproved of instructions that permitted the juries to infer intent from the defendants' acts of flight following their crimes. But in each of the cases, the court concluded that the instructions, though erroneous, were harmless because of the amount of other evidence against each of the defendants. *Green*, 719 N.W.2d at 672; *Medal-Mendoza*, 718 N.W.2d at 919; *Valtierra*, 718 N.W.2d at 433.

he intended to cause fear in the persons outside his door. We therefore conclude that the abuse of discretion in this case constituted harmless error and that Leathers is not entitled to a new trial based on this instruction.

B. Knowledge that peace officers were outside the door

Leathers argues that it was an abuse of discretion for the district court, when instructing the jury on each count of assault, to state for each count that "[i]t is not necessary for the state to prove that [Leathers] knew or should have known [officer's name] was a peace officer." Leathers asserts that Minn. Stat. § 609.221, subdivision 2(a), defining the penalty for assaulting a peace officer, requires such knowledge.

Leathers's argument is based on a comparison of the wording of section 609.221, subd. 2(a), with the wording in Minn. Stat. § 609.185 (a)(4) (2008), providing that a person is guilty of first-degree murder if he "causes the death of a peace officer or a guard employed at a Minnesota state or local correctional facility, with intent to effect the death of that person *or another*, while the peace officer or guard is engaged in the performance of official duties." (Emphasis added.) Section 609.185 (a)(4) was examined in *State v. Evans*, in which the supreme court concluded that because of the "or another" language, the statute does not include an element of knowledge that the decedent was a peace officer. 756 N.W.2d 854, 875–76 (Minn. 2008). Leathers argues that the reasoning in *Evans* requires a conclusion that section 609.221, subdivision 2(a), which does not include the "or another" language, includes an element of knowledge. Therefore, Leathers argues, the district court abused its discretion by instructing the jury

that it was "not necessary for the state to prove that the defendant knew or should have known [officer's name] was a peace officer."

We decline to read into section 609.221, subdivision 2(a), an element of knowledge not included in the statute by the legislature. *See State v. Angulo*, 471 N.W.2d 570, 572 (Minn. App. 1991) (discussing knowledge in the context of an earlier version of section 609.185(a)(4), and declining to read a knowledge element into the statute where the legislature had chosen not to include knowledge as an element), *review denied* (Minn. Aug. 2, 1991). The district court did not abuse its discretion by instructing the jury that the state did not have to prove that Leathers knew that the people he assaulted were peace officers.

C. Availability of affirmative defenses

Leathers argues that the district court abused its discretion when it instructed the jury that it could not consider his affirmative defenses of self-defense and defense-of-dwelling if the state proved beyond a reasonable doubt that Leathers was not allowed to use deadly force. Leathers maintains that he was prejudiced because, on the day before closing arguments, the state agreed to a modified self-defense instruction, and Leathers relied on that agreement in preparing his final witnesses and closing argument, but, on the day the jury was instructed, the state requested different instructions.[3]

[3] But Leathers does not explain how his closing argument and preparation of final witnesses would have been different had he known of the changed jury instructions. Failure to adequately brief or argue an issue on appeal results in waiver of that issue on appeal. *See McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (indicating that although appellant "allude[d]" to issues, failure to "address them in the argument portion of his brief" constituted waiver).

Self-defense and other authorized uses of force are governed by Minn. Stat. § 609.06, subds. 1(4), 2 (2008). Section 609.06, subdivision 1(4), provides that

> [e]xcept as otherwise provided in subdivision 2, reasonable force may be used upon or toward the person of another without the other's consent when the following circumstances exist or the actor reasonably believes them to exist: . . . when used by any person in lawful possession of real or personal property, or by another assisting the person in lawful possession, in resisting a trespass upon or other unlawful interference with such property.

Section 609.06, subdivision 2, provides that "[d]eadly force may not be used against peace officers who have announced their presence and are performing official duties at a location where a person is committing a crime or an act that would be a crime if committed by an adult."

The state's requested instruction regarding self-defense and defense-of-dwelling incorporated the language of subdivision 2. Leathers objected to the inclusion of that language as well as the following requested instruction:

> The state has the burden of proving beyond a reasonable doubt that deadly force may not be used by the defendant. If you find that the State has met its burden of proof, you may not consider whether the defendant acted in self-defense. If you find that the state has failed to meet its burden of proof, you may consider whether the defendant acted in self-defense.

Leathers argues that because the instruction proscribed using deadly force against a peace officer, it automatically negated any claim he had of self-defense or defense-of-dwelling. Leathers argues that subdivision 1(4), which permits the use of reasonable force to protect real or personal property, or to resist a trespass or other unlawful interference with such property, is the applicable statute for a self-defense and defense-

of-dwelling instruction. But subdivision 1(4) references subdivision 2 such that failure to include subdivision 2 in the instruction results in an incomplete and inaccurate statement of the law. The district court did not abuse its discretion by instructing the jury on both provisions.

Leathers also argues that section 609.06, subdivision 2, does not apply to his defense-of-dwelling defense because a separate statute addresses defense of dwelling. Minn. Stat. § 609.065 (2008) provides that

> [t]he intentional taking of the life of another is not authorized by section 609.06, except when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death, or preventing the commission of a felony in the actor's place of abode.

But because Leathers did not take the life of another, section 609.065 is not relevant to this case. And section 609.065—the justifiable-homicide statute—does not define defense of dwelling. We find no merit in Leathers's arguments relating to this statute.

III. Sentencing

A district court has broad discretion in sentencing, and this court will not reverse a sentence absent an abuse of that discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Only in a "rare" case will a reviewing court reverse a district court's imposition of the presumptive sentence. *Id*. Generally, when an offender is convicted of multiple current offenses, concurrent sentencing is presumptive. Minn. Sent. Guidelines II.F (2008).

Nonetheless, Leathers argues that the district court's sentence unfairly exaggerated the criminality of his conduct because he was sentenced on all five convictions even though he only fired one gunshot. Leathers maintains that because he took responsibility for his actions, his case is distinguishable from *Hough* where the defendant "blamed the system" for his actions. 585 N.W.2d at 397. Leathers also relies on his argument that he lacked specific intent to assault five people to support the argument that his sentence is excessive, and cites *State v. Schantzen* for the proposition that this court may modify a sentence if it has a "strong feeling" that the offense is disproportionate to the sentence. 308 N.W.2d 484, 487 (Minn. 1981).

But *Schantzen* involved a departure from the presumptive sentence. *Id.* And the supreme court reversed Schantzen's sentence not only because it had a feeling that it was disproportionate to the offense, but also because the district court had used a speculative factor (i.e., threat of future crimes) in determining the sentence. *Id*. Here, Leathers was found guilty of assaulting five peace officers, and the district court did not depart from presumptive sentencing. The district court did not abuse its discretion in sentencing. *See State v. Whittaker*, 568 N.W.2d 440, 453 (Minn. 1997) (stating that the imposition of one sentence per victim in cases involving one behavioral incident generally is not an abuse of discretion when the sentences imposed are within the guidelines range).

IV. Supervised release

Leathers was initially sentenced to 189 months in prison with no possibility of supervised release. Leathers moved for an amended sentence, which the district court granted. The district court concluded that Leathers would be eligible for supervised

release after serving two-thirds of his sentence, or 126 months. The state argues that the district court erred in holding that Leathers is eligible for supervised release after two-thirds of his sentence has been served. We agree.

The interpretation and application of a sentencing statute is a question of law, which this court reviews de novo. *Miller v. State*, 714 N.W.2d 745, 747 (Minn. App. 2006). Minn. Stat. § 609.221, subd. 2(b) (2008), provides that a person who is convicted of assaulting a peace officer "is not eligible for probation, parole, discharge, work release, or supervised release, until that person has served *the full term of imprisonment* as provided by law." (Emphasis added.) In granting Leathers's motion, the district court noted that section 609.221, subdivision 2(b), does not define "term of imprisonment," but that Minn. Stat. § 244.01, subd. 8 (2008), defines "term of imprisonment" as a period of time equal to two-thirds of a defendant's executed sentence. But section 244.01, subdivision 1, explicitly provides that the definitions contained in the statute are "[f]or purposes of sections 244.01 to 244.11." And the district court ignored the use of "full term of imprisonment" in the language of section 609.221, subdivision 2(b). We conclude that section 609.221, subdivision 2(b), requires denial of a supervised-release term to a person convicted of assaulting a peace officer until the person has served the full amount of time imposed by the sentence. We therefore reverse the district court's ruling and hold that Leathers is not entitled to conditional-supervised release. We remand for correction of the sentence consistent with this opinion.

V. Pro se arguments

In his pro se supplemental brief, Leathers reargues defense-of-dwelling and self-defense claims argued by appellate counsel and asserts prosecutorial misconduct not raised in the district court and insufficiently briefed to permit review on appeal. We decline to address these issues. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that issues not raised in the district court are waived); see also *Balder v. Haley*, 399 N.W.2d 77, 80 (Minn.1987) (stating that issues unsupported by any arguments or authority are waived).

Affirmed in part, reversed in part, and remanded.