STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1232

State of Minnesota,
Respondent,

vs.

Dion Jay Allen,
Appellant.

Filed July 11, 2011
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Benton County District Court
File No. 05-CR-09-795

Lori A. Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, St. Paul, Minnesota; and

Robert Raupp, Benton County Attorney, Foley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Larkin, Judge.

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

LARKIN, Judge

A jury found appellant guilty of one count of first-degree burglary, one count of fourth-degree criminal damage to property, two counts of domestic assault, and two counts of fifth-degree assault. Appellant challenges the sufficiency of the evidence to sustain his burglary conviction, the district court's denial of his request for a downward-dispositional departure, and the propriety of his sentences. Because the evidence is sufficient to sustain the burglary conviction, we affirm the conviction. We also affirm the sentence on this offense. But because convictions and sentences on all of the assault offenses are impermissible under statute, we reverse in part and remand for resentencing. Lastly, because the record is inadequate to permit review of the property-damage sentence, we do not determine whether the sentence constitutes an abuse of discretion.

FACTS

On April 5, 2009, appellant Dion Jay Allen arrived at the apartment of his ex-girlfriend, V.G. V.G. was in the apartment with her friend, A.B. Allen pounded on the door, but V.G. did not answer. Allen saw V.G. looking through the blinds and yelled, "I saw you through the blind. Let me in!" V.G. still did not open the door to Allen. Allen left. But he later returned and threw a rock through V.G.'s apartment window, shattering the glass. V.G. called 911 and ended the call when Allen again left the area. Allen later returned, and V.G. immediately called 911. While V.G. was on the phone, Allen once again pounded on her apartment door. When V.G. did not open the door, Allen kicked it down and entered the apartment. V.G. and A.B. ran to a back bedroom, attempting to

hide from Allen. Allen pursued them, and when he reached V.G., he hit her several times. When A.B. attempted to intervene on V.G.'s behalf, Allen struck her. Allen then left the apartment. Allen's assault left V.G. with a bloody nose, as well as swelling on her face. A.B. sustained facial swelling as a result of Allen's blow.

The state charged Allen with one count of first-degree burglary under Minn. Stat. § 609.582, subd. 1(c) (2008); one count of fourth-degree criminal damage to property under Minn. Stat. § 609.595, subd. 3 (2008); one count of domestic assault under Minn. Stat. § 609.2242, subd. 1(1) (2008); one count of domestic assault under Minn. Stat. § 609.2242, subd. 1(2) (2008); one count of fifth-degree assault under Minn. Stat. § 609.224, subd. 1(1) (2008); and one count of fifth-degree assault under Minn. Stat. § 609.224, subd. 1(2) (2008). The case was tried to a jury, and the jury found Allen guilty on all counts. Prior to sentencing, Allen moved for a downward-dispositional departure, seeking a probationary sentence instead of prison time. The district court determined that there were no "substantial and compelling reasons" to deviate from the sentencing guidelines and sentenced Allen to 48 months in prison on the burglary conviction. The district court also imposed concurrent 90-day sentences on all of the misdemeanor offenses. This appeal follows.

D E C I S I O N

I.

Allen argues that the evidence was insufficient to sustain his burglary conviction. 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 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 is construed in the light most favorable to the verdict, and we will not re-weigh the evidence. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009).

Assessing the credibility of the witnesses is exclusively the fact-finder's function. *State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000). We assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Even when a witness's credibility is seriously called into question, the fact-finder is entitled to believe the witness. *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002). All inconsistencies in the evidence are resolved in favor of the state. *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990).

In order to convict Allen of first-degree burglary, the state was required to prove that he entered the apartment without consent and committed or intended to commit a crime while in the apartment. *See* Minn. Stat. § 609.582, subd. 1 (2008). "'Enters a building without consent' means: (a) to enter a building without the consent of the person in lawful possession[.]" Minn. Stat. § 609.581, subd. 4 (2008). Allen argues that the evidence was insufficient to sustain his burglary conviction because he believed he was in lawful possession of the property. "[A] person in 'lawful possession' under Minn.

Stat. § 609.581, subd. 4(a), means a person who has a legal right to exercise control over the building in question." *State v. Spence*, 768 N.W.2d 104, 108-09 (Minn. 2009). Whether an individual has the right to enter the building is ordinarily a question of fact for the jury. *Id*. at 109.

The evidence refutes Allen's sufficiency challenge. At trial, V.G. testified that Allen's name was not on the lease for her apartment, that he did not live at her apartment, and that he did not have a key to her apartment. V.G. testified that Allen had stayed overnight at her apartment only three times and that the last time was a couple of weeks before the offense. V.G. testified that she did not consent to Allen's entry on April 5. In fact, Allen had to kick down the front door to gain entry to the apartment, thereby splintering the door and breaking out the deadbolt lock.

Despite the undisputed facts that Allen's name was not on the lease for V.G.'s apartment, that he did not have a key to the apartment, and that he kicked down a locked door to enter the apartment, knowing that V.G. had refused to open the door to him, Allen argues that he reasonably believed that he resided at the apartment and had ongoing consent to enter. Allen testified that he stayed overnight at the apartment for two of the three weeks that V.G. had lived there. He testified that he had as many, if not more, belongings at the apartment than V.G. Finally, Allen testified that he felt he had a right to be in the apartment because he helped V.G. take care of her daughter and was always there for V.G. The jury heard Allen's testimony and arguments regarding his consensual-entry defense and rejected them, as was its prerogative. *See State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995) ("[T]he jury is free to question a defendant's credibility, and has

no obligation to believe a defendant's story."). Viewing the evidence in the light most favorable to the verdict, the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that Allen was guilty of first-degree burglary. We therefore do not disturb the verdict. *See Bernhardt*, 684 N.W.2d at 476-77.

II.

Allen argues that the district court abused its discretion by denying his request for a downward-dispositional departure. The district court must impose the presumptive guidelines sentence unless there are "substantial and compelling circumstances" that warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The decision to depart from the sentencing guidelines rests within the district court's sound discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Ordinarily, this court will not disturb the district court's imposition of the presumptive guidelines sentence, even where reasons for a downward departure exist. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

When considering a downward-dispositional departure, the district court may focus "on the defendant as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). The court may also consider whether the defendant is amenable to probation. *Id.* Relevant factors include the defendant's age, criminal history, remorse, cooperation, attitude while in court, and support from family and friends. *Id.* If the district court "considers reasons for departure but elects to impose the presumptive sentence," an

explanation for its denial of the departure request is not necessary. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). And it is a "rare case" that warrants a reversal of a district court's refusal to depart from the presumptive sentence. *Kindem*, 313 N.W.2d at 7.

Allen contends that the district court abused its discretion by denying his request for a downward departure, arguing that there are substantial and compelling reasons to support the departure. Specifically, Allen cites evidence that he is amenable to probation; he has the support of his family and the community; he is remorseful and accepts responsibility for his actions; and he has no criminal history. Allen also argues that the district court "provided no proper rationale for not ordering a departure" and that the district court's reasoning was inadequate given that Allen's "dispositional expert had prepared a carefully crafted plan with conditions and programming that would ensure [Allen] could be successful on probation."

These arguments are not persuasive. Even where mitigating factors exist, the court is not required to order a downward departure. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). Moreover, the district court was not required to provide reasons to support its refusal to depart from the presumptive sentence. *See Van Ruler*, 378 N.W.2d at 80. Finally, this is not a "rare" case in which we would overturn the district court's imposition of the presumptive sentence. We therefore affirm Allen's burglary sentence.

III.

Allen argues that the district court erred by imposing sentences on all of the assault offenses, as well as the property-damage offense. V.G. was the victim of the two

domestic-assault offenses: assault-fear under Minn. Stat. § 609.2242, subd. 1(1) and assault-bodily harm under Minn. Stat. § 609.2242, subd. 1(2). A.B. was the victim of the two fifth-degree-assault offenses: assault-fear under Minn. Stat. § 609.224, subd. 1(1) and assault-bodily harm under Minn. Stat. § 609.224, subd. 1(2).

Minnesota law generally prohibits multiple sentences for two or more offenses committed as part of a single behavioral incident. "[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." Minn. Stat. § 609.035, subd. 1 (2008). In addition, Minn. Stat. § 609.04 (2008) "bars the conviction of a defendant twice for the same offense against the same victim on the basis of the same act." *State v. Ture*, 353 N.W.2d 502, 517 (Minn. 1984); *see* Minn. Stat. § 609.04, subd. 1 (stating that "[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both).

But there are exceptions. When crimes are committed against different victims during the same behavioral incident, the district court has discretion to impose one sentence per victim so long as the resulting sentence does not exaggerate the criminality of the defendant's conduct. *State v. Lee*, 491 N.W.2d 895, 901 (Minn. 1992). Moreover, "a prosecution for or conviction of the crime of burglary is not a bar to conviction of or punishment for any other crime committed on entering or while in the building entered." Minn. Stat. § 609.585 (2008).

Allen asks us to vacate his property-damage sentence, as well as one sentence on each of the assault counts against V.G. and A.B. The state concedes that we should vacate the conviction and sentence for one count of assault against both V.G. and A.B. We agree. *See State v. King*, 414 N.W.2d 214, 221 (Minn. App. 1987) (vacating appellant's conviction and sentence for third-degree assault because he was also convicted and sentenced for second-degree assault against the same victim for conduct that occurred during the same behavioral incident), *review denied* (Minn. Jan. 15, 1988). We therefore reverse the conviction and sentence on one of the assault counts against V.G. and one of the assault counts against A.B. We remand for the district court to determine which convictions and sentences to vacate and to correct the record in accord. But the jury's underlying findings of guilt shall remain intact. *See State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999) (explaining that although a conviction that is improper under section 609.04 must be vacated, the underlying finding of guilt remains intact).

The remaining issue for our consideration is whether the district court abused its discretion by imposing a sentence on the property-damage offense. The parties' arguments focus on whether the property-damage sentence was appropriate under Minn. Stat. § 609.585 and the multiple-victim exception to Minn. Stat. § 609.035. But there is another possible basis for the sentence: Allen's damage to the window, as opposed to the door, may not have been part of the same behavioral incident. Unfortunately, Allen did not object to his sentence on the property-damage offense in district court[1], and the

[1] Although Allen did not object to the sentence, the issue is not waived. *See State v. Pugh*, 753 N.W.2d 308, 311 (Minn. App. 2008) (stating that "[b]ecause courts have

district court did not explain the legal basis for the sentence. And it is not clear whether the sentence is based on the damage to the door or the damage to the window. If the sentence is based on the theory that the damage to the window occurred during a separate behavioral incident, a supportive finding is necessary. *See State v. Butterfield*, 555 N.W.2d 526, 530 (Minn. App. 1996) (explaining that whether offenses are part of the same behavioral incident is a factual determination), *review denied* (Minn. Dec. 17, 1996).

Because the record does not reveal the legal reasoning that supports the property-damage sentence, we are not able to determine whether the district court properly exercised its discretion in sentencing on this offense. We therefore do not decide the issue. We instead remand for the district court to articulate the legal basis for the property-damage sentence and to make supportive findings, if necessary. Of course, the district court has discretion to vacate the property-damage sentence if it concludes that the sentence is not authorized.

Affirmed in part, reversed in part, and remanded.

Dated:

Judge Michelle A. Larkin

authority to correct an illegal sentence at any time under Minn. R. Crim. P. 27.03, subd. 9, a defendant cannot forfeit, or waive by silence, review of an illegal sentence"), *review denied* (Minn. Sept. 23, 2008).