STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0346

State of Minnesota,
Respondent,

vs.

Ronnie Jerome Jackson, III,
Appellant.

Filed March 10, 2014
Affirmed
Chutich, Judge

Crow Wing County District Court
File No. 18-CR-11-2655

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Candace Prigge, Assistant County Attorney, Brainerd, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

CHUTICH, Judge

Appellant Ronnie Jackson appeals his conviction of first-degree arson, arguing that (1) the evidence was insufficient to convict him; (2) the district court committed

plain error by failing to properly instruct the jury on accomplice liability; (3) the district court erred in permitting the state to reopen its case-in-chief; (4) the facts found by the jury were insufficient to prove that appellant's sleeping roommate was a "particularly vulnerable" victim; and (5) the district court committed plain error in failing to properly instruct the sentencing jury. Because the evidence was sufficient and no reversible error occurred, we affirm Jackson's conviction. Because the district court did not err in its instructions and sentenced Jackson within its discretion, we also affirm Jackson's sentence.

FACTS

On the evening of June 20, 2011, Jackson was with J.S., a woman he was dating, at the home where J.S. lived in Brainerd (Brainerd home). J.S.'s mother owned the home and allowed her daughters to live there. Around 6:30 p.m. that evening, Jackson and J.S. went to J.S.'s mother's other home, located in Barrows. A few hours later, Jackson and J.S. got into an argument, during which Jackson grabbed J.S.'s arms.

Around 11 p.m., Jackson returned to the Brainerd home, where he had stayed off and on since he and J.S. started dating earlier that year. Jackson spoke with another housemate, C.H., who helped Jackson pack up some of his belongings. Jackson also stopped at R.F.'s home, where he was planning to stay for the night.

Jackson then returned to J.S.'s mother's home in Barrows. J.S. was sleeping and woke up to Jackson punching her in the head. J.S.'s mother called 911, and Jackson said to them, "I can burn both your houses down." Jackson went back to R.F.'s house and

told R.F. that if he "really wanted to," he could "burn both them houses down." Jackson then left R.F.'s house.

Sergeant Vukelich of the Crow Wing County Sheriff's Department responded to the 911 call. After hearing about Jackson's threats to burn down a house, officers began looking for him. Sergeant Vukelich contacted Officer Davis, a patrol officer at the Brainerd Police Department, who then checked on the Brainerd home. Seeing nothing unusual, Officer Davis next went to the Lazy Acres trailer park, where he saw Jackson's white Mercury Cougar parked by one of the trailers. Officer Davis spoke with D.P., who was at the trailer. She told the officer that Jackson was not there, but that her car, a gray Hyundai Sonata, was missing from her driveway. While Officer Davis was speaking with D.P., he received a call of a "structure fire" at the Brainerd home.

At 4:00 a.m., a man who happened to be driving by the Brainerd home called 911 after he saw the house on fire. He banged on the door of the burning house, and eventually C.H. and J.S.'s sister emerged.

After responding to the fire, Officer Davis returned to the Lazy Acres trailer park because D.P. wanted to report that her car was stolen. D.P. told Officer Davis that shortly after he left the first time, her daughter, Nancy Portz, and Jackson arrived at her house; Portz was driving her mother's gray Hyundai. Jackson and Portz were at the trailer home for about five minutes and then left in Jackson's white Cougar.

During their investigation of the fire, officers spoke with an employee of a Holiday gas station. The employee described a customer who entered the store in the early morning hours of June 21 and bought a gasoline can, a Bic lighter, and $5 worth of

gasoline. The description of the customer matched Jackson's appearance, and the employee further described a silver-colored car that matched the description of Portz's mother's car. The receipt for these items was dated 6/21/11 at 3:29 a.m. and showed that a Visa card with the last four digits 6145 was used to buy the gas can, gas, and lighter.

Early that same morning, officers stopped Jackson on highway 169 near Onamia, driving his white Mercury Cougar. Nancy Portz was with him. Officers found a lighter and J.S.'s purse in Jackson's car. Officers also found three Visa gift cards in Jackson's pocket, one of which was the card used to buy the gasoline. A gas can was later discovered along the route between the Brainerd home and the Lazy Acres trailer park.

Jackson first denied knowing anything about the fire. The following day, June 22, Jackson gave a statement to investigators, admitting his participation. Jackson admitted that he and Nancy Portz bought the gas and that he handed the gas can to her in the Holiday parking lot. He told Portz where J.S. lived, and he said that Portz put gloves on and, after they parked behind the house, she ran to the house while Jackson waited in the car. Jackson stated, "When I . . . next time I look up, dude, it was whoosh." When asked where Portz poured the gas, he said, "I don't know. I just know where I was parked at. . . . Somewhere along the porch it was set. I know that much because it . . . when I looked back up, all I seen was whoosh . . . ." Jackson also stated that, at some point after they drove away, Portz threw the gas can out of the window. Jackson insisted several times that he did not think that Portz would "do it," but he admitted to "egging her on." He also admitted that he knew C.H. was in the home when the blaze was set.

The state charged Jackson with first-degree arson. A jury trial was held in Crow Wing County. Jackson chose not to testify and did not call any witnesses.

The jury found Jackson guilty of first-degree arson, third-degree arson, and fifth-degree arson. After a *Blakely* hearing the next day, the jury responded "yes" to four special-verdict form questions. The district court sentenced Jackson to 115 months for the first-degree arson conviction. This appeal followed.

D E C I S I O N

I. Sufficiency of the Evidence

A person is guilty of first-degree arson if, "by means of fire," he "intentionally destroys or damages . . . a dwelling." Minn. Stat. § 609.561, subd. 1 (2010). "A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2010). Jackson argues that the evidence was insufficient to prove he was liable as an accomplice to first-degree arson because the state did not prove beyond a reasonable doubt that Nancy Portz intended to destroy or damage the home. He contends that the proven circumstances are equally consistent with Portz intending only to damage a couch that was sitting on the house's wooden deck. We disagree with his contention.

In considering an insufficient-evidence claim, we determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach a verdict of guilty. *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). We defer to the jury's acceptance of the circumstances proved by the state and rejection of

evidence that conflicted with those circumstances. *Id.* at 598–99. When reviewing a conviction based on circumstantial evidence, as here, the circumstances proved by the state must be "consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 599 (quotation omitted).

The circumstances proved by the state here show that, on the night of the fire, Jackson and J.S. got into an argument, and Jackson threatened to burn down J.S.'s home, a threat he made more than once that evening. Jackson bought a gas can, more than a gallon of gasoline, and a lighter, gave Portz the can of gasoline, told Portz where J.S. lived, drove her there, and admitted to "egging [Portz] on." After Jackson saw the "whoosh" of fire, Portz got back in the car and told Jackson, "[We're] going to drive. We're Bonnie and Clyde." Jackson and Portz discarded the gas can enroute to Portz's mother's trailer, changed cars, and were fleeing in Jackson's car when the police found them.

In addition, a deputy state fire marshal testified for the state as an expert in the area of fire origins and investigations. The marshal determined that the fire was intentionally set and that the fire's area of origin was the wooden deck where a couch had been sitting next to the house. The end of the couch "would have been no more than a foot away from the exterior of the house," and the deck itself was made of wood. The marshal testified that "as close as the sofa was to the wall, it would be very reasonable to expect that there very likely would be damage to the house" and it "would be unlikely that there wouldn't be damage to the house." The siding to the home had melted and

burned away, and many photographs showing the extensive damage to the home were admitted into evidence.

The record supports the inference that Portz intended to set fire to the home itself and that Jackson knew that she was going to damage the home by fire and intended his presence or actions to further the commission of that crime. *See State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007). That Portz only intended to damage the couch and not the home is not a reasonable, rational inference to draw from the circumstances proved, including where and how the fire was set and how it progressed. While Jackson told the police afterwards that he did not think Portz would "do it," we assume the jury disbelieved any testimony that conflicts with the guilty verdict. *See Silvernail*, 831 N.W.2d at 599; *State v. Johnson*, 568 N.W.2d 426, 436 (Minn. 1997) ("[A] jury, as the sole judge of credibility, is free to accept part and reject part of a witness' testimony." (quotation omitted)). In sum, the evidence presented at trial was more than sufficient for the jury to convict Jackson of aiding and abetting first-degree arson.

II. Jury Instructions on Accomplice Liability

Jackson alleges that the district court plainly erred when it instructed the jury on accomplice liability. Specifically, Jackson argues that the jury instructions allowed the jury to find him guilty as an accomplice without first finding that he knew Nancy Portz was going to commit a crime and that he intentionally assisted in that crime.

Because Jackson did not object to the jury instructions at trial, we review for plain error. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). "Under this standard, we may review an

unobjected-to error only if there is (1) error; (2) that is plain; and (3) that affects substantial rights." *Id.* at 655–56. If these three prongs are met, "we then decide whether we must address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quotation omitted).

District courts have "considerable latitude" in selecting jury instructions. *Mahkuk*, 736 N.W.2d at 681. In our analysis, "we review the jury instructions in their entirety to determine whether the instructions fairly and adequately explain the law of the case." *Milton*, 821 N.W.2d at 805 (quotation omitted). "To show that the error affected substantial rights, the defendant bears the heavy burden of showing that the error was prejudicial—that is, the defendant must show that there is a reasonable likelihood that the error substantially affected the verdict." *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002) (quotation omitted).

In *State v. Milton*, a case that was decided *after* the district court instructed the jury here, the supreme court held that a jury instruction on accomplice liability must specifically explain the element of "intentionally aiding." 821 N.W.2d at 807–08. The supreme court stated that, "to find a defendant guilty as an accomplice, the jury must find beyond a reasonable doubt that [1] the defendant knew his alleged accomplice was going to commit a crime and [2] the defendant intended his presence or actions to further the commission of that crime." *Id.* at 808. Here, the district court's instruction on accomplice liability does not comport with *Milton*.

But the jury instructions are not reversible error because Jackson cannot meet his heavy burden of showing that the error substantially affected the verdict. *See Burg*, 648

at 677. The district court's instructions, when read as a whole, actually imposed a heavier burden regarding the state of mind required to convict Jackson than is required for accomplice liability. *See State v. Bahtuoh*, 840 N.W.2d 804, 814 (Minn. 2013) (holding that giving of accomplice-liability instruction was not reversible error where, rather than requiring knowledge that the principal was going to commit a crime, the instruction required the jury to find that the defendant acted with the intent to kill).

In instructing the jury on first-degree arson, the district court's instruction required the jury to find that Jackson himself acted with the intent to destroy or to damage the dwelling, regardless of whether it found that Jackson acted as an accomplice or as a principal. *See id.* The district court's instruction also required the jury to find, if it found that Jackson did not cause the fire, that Jackson "intentionally aided . . . or has intentionally advised, counseled, conspired with, or otherwise procured" another person to commit the crime. When reading the jury instructions in their entirety, the jury was required to find, at a minimum, that Jackson knew that Portz "planned to commit a crime" and that Jackson "intended his actions to further it." *See id.* at 814–15.

Furthermore, as discussed above, the evidence at trial shows that the state proved beyond a reasonable doubt that Jackson knew that Portz planned to damage the home by fire. And Jackson's actions in initially threatening to burn down the house, buying and providing the accelerant to Portz, driving her to and from the scene, and "egging her on" conclusively show that he actively participated in committing the arson. Given the record here, the result would have been no different even if the district court had properly explained the "intentionally aiding" element. *See Milton*, 821 N.W.2d at 809 ("[E]ven if

the jury had been properly instructed, we conclude the jury would have found that Milton intentionally aided his alleged accomplices based on the evidence presented at trial.").

III. Reopen Case-in-Chief

Jackson argues next that it was an abuse of the district court's discretion to allow the prosecution to reopen its case-in-chief to present evidence of one of Jackson's telephone calls from jail. "In the interests of justice, the court may allow any party to reopen that party's case to offer additional evidence." Minn. R. Crim. P. 26.03, subd. 12(g). "We review the disposition of a party's request to reopen its case after the party has rested under an abuse-of-discretion standard." *State v. Caine*, 746 N.W.2d 339, 352–53 (Minn. 2008).

We need not decide if the district court abused its discretion because more than enough evidence existed to convict Jackson without the evidence of this brief phone call. And, in any event, Jackson's comments in the phone call were not clearly an admission of involvement or statement of intent; in fact, the meaning of Jackson's comments is difficult to decipher. The state's other evidence presented at trial is sufficient to establish Jackson's guilt beyond a reasonable doubt, and the admission of evidence of this telephone call, even if an abuse of discretion, did not affect the outcome of the trial. *See State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003).

IV. Sufficiency of "Particular Vulnerability" Finding

Jackson contends that the four factors found by the jury during the *Blakely* proceeding were insufficient to prove C.H. was "particularly vulnerable" for sentencing purposes because the particular vulnerability of the victim "had to also have been a

'substantial factor' in the defendant's accomplishment of the crime." As discussed below, we disagree.

The jury was asked to decide whether: (1) C.H. was asleep inside the Brainerd home when the fire was set; (2) Jackson knew or should have known that C.H. was asleep at that time; (3) C.H.'s status of being asleep impaired his ability to seek help or escape harm; and (4) Jackson knew or should have known that C.H.'s status of being asleep would impair his ability to seek help or escape harm. After deliberations, the jury responded "yes" to all four questions. The district court ultimately sentenced Jackson to 115 months in prison, an upward departure from the presumptive sentence of 68 months, after concluding that the jury's findings showed that C.H. was particularly vulnerable.

We review a district court's decision to depart from the sentencing guidelines for an abuse of discretion. *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005). "[T]he question of whether the district court's reason for the departure is 'proper' is treated as a legal issue." *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010). Departures from the presumptive sentence are justified when substantial and compelling circumstances exist that make "the facts of a particular case either more or less serious than a typical case involving the same crime." *State v. Simmons*, 646 N.W.2d 564, 567 (Minn. App. 2002).

Under the sentencing guidelines, a victim's particular vulnerability is a valid reason to impose a departure where "[t]he victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been

known to the offender." Minn. Sent. Guidelines II.D.2.b(1) (2010); *see also* Minn. Stat. § 244.10, subd. 5a(a)(1) (2010) (listing same as aggravating factor).

A particular vulnerability "impairs the victim's ability to seek help, fight back, or escape harm." *State v. Mohamed*, 779 N.W.2d 93, 98 (Minn. App. 2010). We have upheld "sleeping" as a form of particular vulnerability. *State v. Yaritz*, 791 N.W.2d 138, 145 (Minn. App. 2010) (concluding that defendant "exacerbated" victim's vulnerable state of sleeping "by applying chloroform to her face . . . to ensure that she would not wake up during the assault"), *review denied* (Minn. Feb. 23, 2011); *see, e.g.*, *State v. Skinner*, 450 N.W.2d 648, 654 (Minn. App. 1990) (determining that victim's "vulnerability was increased because appellant began touching her while she was asleep"), *review denied* (Minn. Feb. 28, 1990).

Applying these principles, the facts of this case make it a much more serious case than the typical first-degree arson. Setting a home on fire at 4:00 a.m. with the specific knowledge that a person is inside the home is far more serious than setting a fire during the day when the risk of a person being inside the home is unknown. By being asleep, C.H. was far less likely to detect the fire, defend himself, and escape. *See Mohamed*, 779 N.W.2d at 98. And the evidence shows here that C.H. escaped the home only after a passerby banged loudly on the door of the home to wake anyone inside. The status of C.H. sleeping in the home, which Jackson knew or should have known, made C.H. particularly vulnerable in this arson offense.

Jackson cites to *State v. Gardner* in support of his argument, but *Gardner* is distinguishable. *See* 328 N.W.2d 159, 162 (Minn. 1983). There, the district court

imposed an upward departure for three reasons, one of which was because "the victim was particularly vulnerable due to a reduced physical capacity and that she is an epileptic and defendant knew this." *Id.* The supreme court rejected this rationale, holding that the victim's fear of having an epileptic seizure did not make her vulnerable. *Id.* Here, by contrast, C.H.'s status of being asleep when the fire was set *did* make him vulnerable. For these reasons, we conclude that the district court acted within its discretion in sentencing Jackson to an upward durational departure.

V. Jury Instructions for Departure Factor

Lastly, Jackson asserts that "[w]hether or not a victim's particular vulnerability was a substantial factor in the commission of an offense is a fact question that must be resolved by the jury." District courts should "submit to the *Blakely* jury one or more special interrogatories that ask whether the State has proven, beyond a reasonable doubt, a factual circumstance which the State alleges would provide the district court a substantial and compelling reason (i.e., particular cruelty) to depart from the presumptive guideline sentence." *State v. Rourke*, 773 N.W.2d 913, 923 (Minn. 2009); *see Carse v. State*, 778 N.W.2d 361, 373 (Minn. App. 2010) (applying *Rourke* to particular-vulnerability departure factor).

Here, the district court submitted to the jury all the underlying factual issues necessary for the district court to ultimately conclude that C.H. was particularly vulnerable. Jackson's argument that more facts should have been submitted to the jury is meritless.

VI. Pro Se Argument

Jackson argues in his pro se supplemental brief that the evidence was insufficient to support the conviction. For the reasons discussed above, Jackson's argument is unpersuasive. Jackson also refers to the doctrine of respondeat superior in his argument on accomplice liability. But a criminal defendant's liability as an accomplice is not dependent on any principal-agent or employer-employee relationship. *See State v. Strimling*, 265 N.W.2d 423, 430 (Minn. 1978) ("[T]he operation of § 609.05 in the present case is not dependent upon any sort of principal and agent relationship. Instead, it imposes direct liability on anyone who with the requisite intent contributes meaningfully to the overtly criminal conduct of another person.").

Affirmed.