STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1006

State of Minnesota,
Respondent,

vs.

Neil James Koskovich,
Appellant.

Filed June 26, 2017
Affirmed
Jesson, Judge

St. Louis County District Court
File No. 69VI-CR-15-697

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

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota; and

Sharon N. Chadwick, Assistant County Attorney, Virginia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Tara Reese Duginske, Special Assistant Public Defender, O. Joseph Balthazor, Jr., Certified Student Attorney, Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Jesson, Judge; and Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving pursuant to appointment pursuant to Minn. Const. art. VI, § 10.

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

JESSON, Judge

Appellant Neil James Koskovich challenges his conviction of aiding and abetting third-degree burglary, arguing that the evidence is insufficient to prove beyond a reasonable doubt that he entered a "building" as that term is defined for purposes of the burglary statute. Because the structure that he entered was suitable for affording shelter to human beings, we affirm.

FACTS

On an evening in May 2015, Neil James Koskovich, together with R.J.Y., entered an old plant (the Ainsworth Plant) in rural St. Louis County. Alerted to the entry by remote security cameras, the plant manager called the police, who were dispatched to the scene. When they arrived, one officer scaled the main gate, while another entered the south building of the plant, where he took cover near a door which had been propped open. Officers observed that at least one individual was inside. After some commotion, R.J.Y. and Koskovich fled from the plant. When apprehended, R.J.Y. was found carrying a headlamp, two pairs of gloves, a flashlight, a blade, a can of anti-seize, and three pad locks. He told police that his companion was named Neil. A sheriff's canine subsequently located Koskovich, who was charged with fleeing police and aiding and abetting third-degree burglary. *See* Minn. Stat. § 609.582, subd. 3 (2014); Minn. Stat. § 609.05, subd. 1 (2014).

Koskovich moved to dismiss the burglary charge, arguing that there was insufficient probable cause to conclude that the Ainsworth Plant met the definition of "building" under the burglary statute. Images of the plant structure from the surveillance camera were

entered into the record and reflect one individual in the plant walking along a concrete corridor, free of debris. Property is neatly stored against the walls, and all of the walls and doors in the images appear upright and sturdy.

Finding that the inside of the plant needed to be accessed through a door, the district court concluded that the structure fit the definition of a building and denied the motion to dismiss. Following a stipulated-evidence trial, the district court found Koskovich guilty of aiding and abetting third-degree burglary. The district court stayed imposition of his sentence, placed him on three years' probation, and ordered him to serve 30 days in jail. This appeal follows.

D E C I S I O N

Koskovich argues that the Ainsworth Plant was not a building suitable for affording shelter under the burglary statute because it was vacant and fire damaged at the time of the burglary. We initially note that Koskovich couches his appeal as a challenge to the denial of his motion to dismiss for lack of probable cause under Minnesota Rules of Criminal Procedure 26.01, subdivision 4. That procedure, which preserves the defendant's right to obtain review of a pretrial ruling dispositive of the case, does not apply here because probable cause is not a dispositive pretrial issue.[1] *See* Minn. R. Crim. P. 26 cmt. ("Rule 26.01, subd. 3, should be used if there is no pretrial ruling dispositive of the case.").

[1] Probable cause concerns whether a trial on the merits is justified. *See State v. Florence*, 306 Minn. 442, 456, 239 N.W.2d 892, 902 (1976); *see also* Minn. R. Crim. P. 11.04, subd. 1. Because the district court's probable cause decision is not properly before us, we do not reach Koskovich's argument that the district court applied the wrong legal standard on probable cause for the charged offense at the omnibus hearing.

We further note that Koskovich agreed to a court trial on stipulated *evidence* to preserve a pretrial issue, but that the district court conducted the proceeding under Minnesota Rules of Criminal Procedure 26.01, subdivision 3. Subdivision 3 governs trials on stipulated *facts* and requires the parties to agree on the facts, i.e., the events or circumstances of the case. *Dereje v. State*, 837 N.W.2d 714, 720 (Minn. 2013). While Koskovich did not stipulate to the facts, he did acknowledge and waive his jury-trial rights in the proceedings, and the district court made appropriate findings of fact on the record. As a result, we conclude that the trial here met the requirements for a bench trial under rule 26.01, subdivision 2. *Dereje*, 837 N.W.2d at 721 (construing a trial on stipulated evidence as a bench trial where defendant validly waived his jury-trial rights). Accordingly, we construe Koskovich's appeal as a challenge that the evidence at trial was insufficient to sustain his conviction. *See State v. Olhausen*, 669 N.W.2d 385, 390-91 (Minn. App. 2003), *rev'd on other grounds*, 681 N.W.2d 21 (Minn. 2004).

When reviewing a challenge to the sufficiency of the evidence, "we review the evidence to determine whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, [the factfinder] could reasonably conclude that the defendant was guilty of the offense charged." *State v. Robertson*, 884 N.W.2d 864, 871 (Minn. 2016) (quotations omitted). For Koskovich to be convicted of aiding and abetting third-degree burglary, the state must prove that he aided and abetted R.J.Y., who entered a

"building." *See* Minn. Stat. §§ 609.582, subd. 3; .05.[2] The burglary statute separately defines a building:

> Building. "Building" means a structure suitable for affording shelter for human beings including any appurtenant or connected structure.

Minn. Stat. § 609.581, subd. 2 (2014). "A burglary conviction can be sustained only if the building involved is within the statutory definition." *State v. Hofmann*, 549 N.W.2d 372, 374 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. Aug. 6, 1996). The Minnesota Supreme Court has explained that "the sole test of whether a structure is a 'building' [within the burglary statute] is whether the structure is 'suitable for affording shelter for human beings.'" *State v. Bronson*, 259 N.W.2d 465, 466 (Minn. 1977) (quotation omitted).

Here, the Ainsworth Plant consisted of multiple structures surrounded by fencing and at least one closed gate. The owner and the manager of the plant maintained a remote surveillance system on the property and, indeed, the plant manager arrived after Koskovich was apprehended to determine if anything was damaged or taken, which suggests that personal property was stored at the plant. This is supported by the photographs captured by the security cameras, which show an individual walking on a clean, concrete floor in a large enclosed area, with no visible debris, suggesting that the area had an intact roof. Equipment lined the far wall. There was a smaller room within the structure that was set apart with curtains. Based upon these facts in the record, and the inferences that can be

[2] On appeal Koskovich does not challenge the sufficiency of the evidence supporting the finding that he aided and abetted R.J.Y.

drawn from them, we conclude that the evidence is sufficient to prove that the structure is suitable for affording shelter for human beings. As a result, the structure is a building for purposes of the burglary statute.

Minnesota caselaw supports this analysis. The supreme court has determined that a variety of structures may constitute a building in the burglary context. *See, e.g.*, *State v. Walker*, 319 N.W.2d 414, 417 (Minn. 1982) (structure without heat or electricity that was attached to a barn); *State v. Vredenberg*, 264 N.W.2d 406, 407 (Minn. 1978) (cabins on houseboats); *Bronson*, 259 N.W.2d at 466 (basketball court that was being remodeled as ice arena); *State v. Gerou*, 283 Minn. 298, 300, 302, 168 N.W.2d 15, 17 (1969) (large steel structure used for owner's business). In fact, this court has determined that less substantial structures than the Ainsworth Plant may constitute a building under the burglary statute. *See, e.g.*, *Hofmann*, 549 N.W.2d at 374-75 (converted motorhome, even though it was not a fixed structure); *In re Welfare of R.O.H.*, 444 N.W.2d 294, 294-95 (Minn. App. 1989) (miniature storage unit used to store personal property even though there was no heating, electricity, or plumbing). In summary, Minnesota appellate caselaw demonstrates that the statutory definition of "building" may include structures ranging from an eight-by-ten-foot storage unit to an under-construction ice arena.

Koskovich argues that, under the supreme court's holding in *State ex rel. Webber v. Tahash*, the Ainsworth Plant is not a building. 277 Minn. 302, 306, 152 N.W.2d 497, 501 (1967). In *Tahash*, the supreme court held that a tool shed was not a building, based on the shed owner's testimony that the tool shed was not suitable for affording shelter for human beings. *Id.* The court held that this testimony "[took] the shed out of [the]

definition" of "building." *Id*. Unlike the situation in *Tahash*, none of the evidence in this case removes the plant from the definition of a building. Rather, the Ainsworth Plant appears to be more substantial than the miniature storage unit held to be a building. *See R.O.H.*, 444 N.W.2d 294, 294-95. Indeed, the plant appears to be like the steel building in *Gerou*, which was a steel structure used as a warehouse. 283 Minn. at 300, 302, 168 N.W.2d at 17.

Koskovich further contends that the plant is not a building because it is not currently being used for shelter. But we find no requirement in the statute or caselaw that a building must be currently used for shelter at the time of the burglary. It simply must be *suitable* for shelter. And there is sufficient evidence to demonstrate that suitability.

Finally, Koskovich contends, based upon a news release submitted at the omnibus hearing, that a reported fire within the plant demonstrated that the plant was fire-damaged and vacant, making it unsuitable for affording shelter. The news release describes a fire at a building within the Ainsworth Plant approximately two months before the burglary. It states that the plant was abandoned at the time, but it does not describe the extent of the damage. But the news release was not submitted to the district court at the stipulated evidence trial and, as a result, is not part of our sufficiency-of-the-evidence review. And even if it were, the fact that one part of a multiple-building plant suffered an unspecified amount of fire damage would not change our analysis.[3]

[3] While the news report referred to the plant as "abandoned," we note that the evidence at trial showed the plant as fenced and security-monitored.

Here, the record demonstrates that the Ainsworth Plant constituted a structure suitable for affording shelter to human beings. It therefore falls within the broad statutory definition of a building under the burglary statute. As a result, there was sufficient evidence to sustain Koskovich's conviction.

Affirmed.