STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1508

State of Minnesota,
Respondent,

vs.

Jerry Lee Thompson,
Appellant

Filed September 26, 2011
Affirmed in part, reversed in part, and remanded
Peterson, Judge

Stearns County District Court
File No. 73-CR-08-10136

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

Janelle P. Kendall, Stearns County Attorney, Will R. Brost, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Benson Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

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

PETERSON, Judge

In this appeal from convictions of three counts of attempted first-degree murder, two counts of second-degree assault, and one count each of kidnapping, first-degree

burglary, and violation of an order for protection while possessing a dangerous weapon, appellant argues that (1) the evidence of intent is insufficient to support his convictions for attempted first-degree murder; (2) the district court erred in not using a zero criminal-history score for purposes of calculating the duration of his sentence for burglary; and (3) the imposition of four consecutive sentences unfairly exaggerated the criminality of appellant's conduct. We affirm in part, reverse in part, and remand.

FACTS

Appellant Jerry Lee Thompson and J.T. were married on October 1, 1988, and have two minor children. In 2008, J.T. filed for divorce, and the marriage was dissolved. On April 11, 2008, J.T. obtained an order for protection (OFP) against appellant. The OFP prohibited appellant from contacting J.T. or their children, from knowingly coming within 200 feet of J.T. or their children, and from coming within one mile of or entering J.T.'s residence. Appellant was present at the hearing when the OFP was imposed and, therefore, he knew that the OFP existed.

On May 27, 2008, J.T. received a phone call informing her that the alarm system for her residence had been tripped. That same day, J.T.'s neighbor saw appellant emerge from the woods between his property and J.T.'s property. Appellant repeatedly told the neighbor that he wanted to kill J.T. and that he had hidden a gun in the woods.

At approximately 5:40 a.m. on August 5, 2008, J.T. entered her garage to leave for work. As she opened the garage door, she saw a shadow shift behind her vehicle. Appellant emerged with a .44-caliber revolver. Appellant aimed the revolver at J.T. and ordered her to get into her vehicle.

J.T. began screaming, and the children alerted R.V., who identified appellant by listening through the door between the house and the garage. R.V. locked the garage door and instructed one of the children to call 911. Appellant forcibly gained entry into J.T.'s residence while holding the revolver to J.T.'s back.

Appellant entered the bedroom and found his 12-year-old daughter in the closet talking on the phone. Appellant pointed his revolver at R.V. and asked her who his daughter was talking to on the phone. Appellant then aimed his revolver at his daughter and demanded to know who she had called. R.V. told appellant that his daughter had called "grandma," and appellant told her to hang up the phone.

Appellant left the bedroom and forced J.T. to accompany him to the garage by pulling her hair. In the garage, appellant told J.T. to enter the passenger side of her vehicle, which faced the entrance to the house. When appellant went around the vehicle to enter the driver side, J.T. ran to the door that led to the house and dove headfirst through the doorway. As J.T. crossed the threshold, she heard a single gunshot. J.T. is five feet and two inches tall, and the bullet struck the doorframe at a height of approximately four feet and one inch.

Once inside the house, J.T. fled to the bedroom. R.V. handed J.T. a .22-caliber pistol and closed the door, but appellant forced his way inside, aiming his revolver at R.V. as he entered. As appellant approached the closet, J.T. attempted to fire at him, but the pistol did not fire. Appellant was able to wrestle the gun away from J.T. even though his 16-year-old daughter leaped onto him and began striking his back.

After gaining control of the pistol, appellant forced J.T. back into the garage. J.T. had intentionally left the keys to her vehicle in the bedroom to delay appellant, which caused the pair to enter the home for a third time. Appellant sent J.T. back into the bedroom to retrieve the keys. Because R.V. had removed the keys from the bedroom, J.T. could not find them. Appellant told J.T. to find the spare set. R.V. then grabbed the keys and gave them to appellant, who left the residence with J.T.

As appellant drove away, he steered with his right hand and aimed his revolver at J.T. with his left hand. J.T. was able to call 911 and let the phone sit in her lap, which allowed her conversation with appellant to be recorded by the system that monitors 911 calls.

After law-enforcement officers located the vehicle, a short chase ensued. Appellant repeatedly threatened that he would shoot J.T. if officers did not stop following the vehicle. The chase ended when appellant slammed on his brakes and caused a collision between J.T.'s vehicle and a squad car. The collision disabled J.T.'s vehicle and forced it to stop. J.T. escaped from the vehicle, and appellant was shot by an officer as he exited the vehicle.

Appellant was charged with attempted first-degree premeditated murder in violation of Minn. Stat. §§ 609.17, subd. 1; .185, subd. (a)(1) (2008); attempted first-degree murder while committing domestic abuse in violation of Minn. Stat. §§ 609.17, .185(a)(6) (2008); attempted first-degree murder while committing a burglary in violation of Minn. Stat. §§ 609.17, .185(a)(3) (2008); attempted first-degree murder while committing a kidnapping in violation of Minn. Stat. §§ 609.17, subd. 1; .185, subd. (a)(3)

(2008); kidnapping in violation of Minn. Stat. § 609.25, subd. 1(3) (2008); first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(c) (2008); two counts of second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2008); and felony violation of an OFP in violation of Minn. Stat. § 518B.01, subd. 14(d)(2) (2008). Before trial, the district court dismissed the charge for attempted first-degree murder while committing domestic abuse. The remaining charges were tried to the district court, which found appellant guilty as charged.

At sentencing, the court noted the existence of several aggravating factors, but declined to depart from the presumptive sentence. The district court announced sentences in the order that appellant's offenses occurred, as follows: (1) for violating the OFP (count 9), an executed term of one year and one day; (2) for first-degree burglary (count 6), an executed term of 69 months to be served concurrently with the sentence for violating the OFP; (3) for second-degree assault (count 7), a 36-month sentence to be served consecutively to the sentence on count 6; (4) for second-degree assault (count 8), a 36-month sentence to be served consecutively to the sentences on counts 6 and 7; (5) for attempted first-degree premeditated murder (count 1), a 216-month sentence to be served consecutively to the sentences on counts 6, 7, and 8; and (6) for kidnapping (count 5), a 57-month sentence to be served consecutively to counts 6, 7, 8, and 1. This appeal followed.

D E C I S I O N

I.

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 verdict that it reached. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). "In reviewing the sufficiency of evidence in a criminal case, we are limited to ascertaining whether, given the facts in the record and the legitimate inferences that can be drawn from those facts," the fact-finder could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004) (quotation omitted). This court will not disturb the verdict if the fact-finder, "acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged." *Id.* at 476-77 (quotations omitted). When determining the sufficiency of evidence, this court's review of bench trials is the same as the review of jury trials. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999).

To convict a defendant of attempted first-degree murder, the state must establish that the defendant acted "with intent to effect the death of [a] person." Minn. Stat. § 609.185(a)(1), (3) (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." Minn. Stat. § 609.02, subd. 9(4) (2008). Generally, intent is an inference drawn from the totality of the circumstances. *State v. Fardan*, 773 N.W.2d

303, 321 (Minn. 2009). Intent is generally proved circumstantially by drawing inferences from a defendant's words or acts in light of the surrounding circumstances. *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000).

Circumstantial evidence is entitled to as much weight as direct evidence. *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). But we apply a stricter standard of review when even a single element of the charged offense depends on circumstantial evidence. *State v. Al–Naseer*, 788 N.W.2d 469, 473-74 (Minn. 2010). To sustain a conviction based on circumstantial evidence, the evidence "must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

Appellant concedes that "[a] reasonable inference to be drawn from the circumstances proved was that appellant intended to kill [J.T.]." But appellant argues that the circumstantial evidence was insufficient to prove that he intended to kill J.T. because "[a]n equally consistent rational hypothesis from the circumstances proved was that appellant intended to kidnap [J.T.] to force her to talk."

To support this argument, appellant points to the numerous opportunities he had to fire his gun and kill J.T. He argues that had he intended to kill J.T., he would have killed her during those times. But appellant mischaracterizes the evidence of intent as entirely circumstantial. There was also direct evidence of appellant's intent, including testimony about appellant's own statements.

The evidence included a recording of the 911 call that J.T. made during the drive away from her residence. During the call J.T. stated "Don't point the gun at me anymore, you don't have to kill me, Jerry." Appellant responded, "I'm gonna." Also, J.T.'s neighbor testified that on May 27, 2008, appellant told him about 20 times that he wanted to kill J.T. and that he had hidden a gun in the woods.

Furthermore, appellant fired his gun at J.T. as she fled from the garage. Appellant acknowledges that firing his gun when J.T. fled "was arguably consistent with an intent to kill," but he contends that the evidence does not demonstrate an intent to kill because the revolver "was not aimed from point-blank range at [J.T.]'s head" and "after the shot missed [J.T.,] appellant never fired at her again." But this court has concluded that a single gunshot fired at a victim's vital organs from a moving car is sufficient to establish intent to kill. *State v. Chuon*, 596 N.W.2d 267, 271 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999); *see also State v. Whisonant*, 331 N.W.2d 766, 768 (Minn. 1983) (holding that evidence of intent to kill was sufficient when single bullet from a "pen gun" was fired at police officer 12 feet away). In addition, the supreme court has rejected the argument that firing only a single gunshot contradicts an inference of an intent to kill. *Fardan*, 773 N.W.2d at 321; *State v. Thompson*, 544 N.W.2d 8, 12 (Minn. 1996). The evidence demonstrates that appellant fired his revolver at J.T. and that it was simply good luck that the bullet missed J.T. and struck the door frame. Because the evidence as a whole makes the possibility that appellant shot at J.T. without believing that the shot would kill her seem unreasonable, the evidence is sufficient to support appellant's conviction of attempted first-degree murder.

II.

Appellant argues that the district court impermissibly used the *Hernandez* method to calculate his criminal-history score by assigning one criminal-history point for his conviction of violating the OFP when sentencing him for the first-degree-burglary conviction. This court will not reverse a district court's determination of a defendant's criminal-history score absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). But interpretation of the sentencing guidelines is a question of law reviewed de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

Under the *Hernandez* sentencing method, when a district court sentences a defendant on the same day for multiple convictions for separate and distinct offenses that were not part of a single behavioral incident or course of conduct, one point is added to the defendant's criminal-history score for each conviction sentenced before calculating the criminal-history score for the next sentence. *State v. Hernandez*, 311 N.W.2d 478, 480-81 (Minn. 1981). This principle is reflected in the sentencing guidelines, which state that "when multiple current convictions arise from a single course of conduct and multiple sentences are imposed on the same day pursuant to Minn. Stat. §§ 152.137, 609.585, or 609.251, the conviction and sentence for the 'earlier' offense should not increase the criminal history score for the 'later' offense." Minn. Sent. Guidelines II.B.1.c. (2008).

Under Minn. Stat. § 609.585 (2008), "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." Similarly, a prosecution for violating an OFP is "in addition to other civil or criminal remedies." Minn. Stat. § 518B.01, subd. 16 (2008). But if a burglary and another offense arose from a single behavioral incident within the meaning of Minn. Stat. § 609.035, subd. 1 (2008), the *Hernandez* method may not be used to increase the offender's criminal-history score for the second offense being sentenced. *State v. Hartfield*, 459 N.W.2d 668, 670 (Minn. 1990).

Whether multiple offenses arose from a single behavioral incident depends on the facts and circumstances of the case. *State v. Hawkins*, 511 N.W.2d 9, 13 (Minn. 1994). "A district court's sentencing decision ordinarily entails factual determinations that will not be reversed on appeal unless they are clearly erroneous. But on established facts, whether multiple offenses are part of a single behavioral incident presents a question of law, which we review de novo." *State v. Rivers*, 787 N.W.2d 206, 213 (Minn. App. 2010) (citation omitted), *review denied* (Minn. Oct. 19, 2010).

In determining whether a series of offenses constitutes a single behavioral incident, the relevant factors are (1) unity of time and place and (2) whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). The state has the burden of proving that the offenses were not part of a single course of conduct. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

The state argues that, even though it "did not dispute [in the district court] that [violating] the Order for Protection could be considered part of a single behavioral incident," "[i]t may legitimately be determined that in fact [violating] the Order for

Protection was not part of the same behavioral incident given the one mile prohibition." We disagree. Appellant's offenses were committed at J.T.'s residence, and appellant violated the OFP to reach the residence. Although the OFP was violated when appellant came within a mile of the residence, appellant violated the OFP to obtain his criminal objectives at the residence.

Because the OFP violation and the burglary arose from a single behavioral incident, the district court erred by using the *Hernandez* method to increase appellant's criminal-history score based on the OFP conviction when sentencing for the burglary conviction. Therefore, we reverse the burglary sentence and remand to permit the district court to determine the sentence without including a criminal-history point for the OFP conviction.

III.

The district court sentenced appellant to consecutive sentences that are permissive under Minn. Sent. Guidelines II.F.2.b (2008). When consecutive sentences are permissive, this court will not interfere with the district court's sentencing 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). Appellant has the burden of showing that consecutive sentencing exaggerates the criminality of his conduct. *See id.* at 398.

Citing *State v. Norris*, 428 N.W.2d 61 (Minn. 1988), appellant argues that imposing consecutive sentences unfairly exaggerates the criminality of his conduct. But *Norris* did not involve permissive consecutive sentences, and the fact that appellant's

sentence is 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).

Before imposing the consecutive sentences, the district court stated that the

> Minnesota sentencing guidelines provide that the severity of the punishment to an offender is to be proportional to the severity of his crimes. The Court must consider that as well as rationality as well as public safety in determining whether to impose consecutive sentences. The Court in this case also found that there were aggravating factors that could be used to support an upward durational departure. The Court has determined that utilizing permissive consecutive sentencing in this case but not imposing an upward durational departure results in the appropriate level of sentence. Imposing the presumptive concurrent sentence would result in an actual incarceration time that does not adequately take into account the seriousness of the defendant's actions. While I have decided to sentence the offenses consecutively and at the top end of the presumptive range, to impose an upward departure in this case would impose harsher consequences than the Court believes is warranted by the circumstances of the case when compared with other offenders.

Appellant was convicted of offenses against three victims. Although the offenses occurred during a single behavioral incident, each involved a distinct act directed toward each victim. The consecutive sentences for offenses against the three victims do not unfairly exaggerate the criminality of appellant's conduct, and the district court did not abuse its discretion by imposing consecutive sentences.

Affirmed in part, reversed in part, and remanded.