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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-212**

State of Minnesota,
Respondent,

vs.

Dustin Lee Bodin,
Appellant.

**Filed January 26, 2010
Affirmed
Shumaker, Judge**

Pine County District Court
File No. 58-CR-08-170

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

John K. Carlson, Pine County Attorney, Pine City, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Shumaker, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

On appeal from his convictions of attempted third-degree burglary and fourth-degree criminal damage to property, appellant argues that the circumstantial evidence of

his intent to commit a crime while inside a building is equally consistent with his innocence as it is with his guilt and that his counsel impermissibly conceded his guilt to the criminal-damage-to property charge. We hold that appellant's theory of innocence is unreasonable and therefore affirm his burglary conviction. We do not reach appellant's claim of ineffective assistance of counsel, which is more properly raised in a postconviction proceeding in order to achieve an adequate record for review.

FACTS

In 2007, appellant Dustin Lee Bodin lived in an apartment above Froggy's bar, where he also worked as a janitor. His apartment, located at the front of the building, was directly accessible through a doorway five feet from the bar's main entrance. It was also potentially reachable through a back entrance to the building and through Froggy's main bar area, but access through these alternative entrances was generally impossible because it required going through a different apartment or at least one door that was always kept locked.

Around Thanksgiving of 2007, Bodin simply "disappeared." The owner of Froggy's bar eventually left a note at the bar telling Bodin that he could not return. The owner's daughter cleaned out Bodin's apartment, discarded some items, and put others in the hallway outside his former apartment. Apparently, Bodin knew that some of his belongings were still at Froggy's bar, but he did not know where they were stored and he did not make any attempt to retrieve them.

On February 1, 2008, Bodin's apartment was rented out to A.B. At approximately 5:00 a.m. on February 17, 2008, A.B. awoke and heard a "banging" noise from

downstairs. He went downstairs to let his dog out, and when he opened his door (the door five feet from the bar entrance), he saw Bodin “spook” and jump out of the doorway to Froggy’s bar. A.B. recognized Bodin from the bar and asked him what he was doing. Bodin replied, “Nothing,” and walked away. A.B. thought he saw something resembling a small crowbar tucked under Bodin’s arm, so he called the police and told them that “Dustin Bodin is trying to break into Froggy’s He ran behind the library”

The police followed boot prints in the freshly fallen snow from the library to a trailer home. There, among others, they encountered Bodin and C.L. C.L. told the police that Bodin had borrowed his crowbar and left the trailer early that morning. C.L. also informed the police that Bodin told him upon his return that someone had seen Bodin at Froggy’s bar.

Bodin was arrested and charged with two counts of attempted burglary and one count of criminal damage to property. Bodin went to jury trial on these charges. In final argument, the state contended that Bodin had attempted to break into Froggy’s bar with the intent to steal, or perhaps to vandalize the place. Defense counsel argued that Bodin did not commit an attempted burglary because he was merely trying to retrieve his personal belongings. Defense counsel also stated that Bodin did not have “the right to damage the door But the mere fact that he damaged the door doesn’t prove that he was attempting to commit . . . burglary.”

The jury found Bodin guilty as charged, and Bodin appealed from his convictions.

DECISION

In this direct appeal, Bodin argues that his convictions should be reversed because the state did not prove beyond a reasonable doubt that he tried to enter Froggy's with the intent to commit a crime inside, and his defense counsel improperly conceded his guilt to the property-damage charge in closing argument.

Sufficiency of the Evidence

Bodin contends that the state's circumstantial evidence of his intent to commit a crime inside Froggy's is insufficient to uphold his burglary conviction. In reviewing a claim of insufficient evidence, we determine "whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Tscheu*, 758 N.W.2d 849, 857 (Minn. 2008) (quoting *State v. Race*, 383 N.W.2d 656, 661 (Minn. 1986) (other quotation omitted). "And even though verdicts based on circumstantial evidence may warrant stricter scrutiny, we still construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the [s]tate's witnesses and disbelieved the defense witnesses." *Id.* at 858 (citing *State v. Asfeld*, 662 N.W.2d 534, 546 (Minn. 2003)) (other citation omitted).

A conviction of attempted third-degree burglary requires the state to prove that the defendant (1) attempted to enter a building, (2) without consent, (3) with the intent to commit a crime while in the building. *See* Minn. Stat. § 609.582, subd. 3 (2006) (defining third-degree burglary); Minn. Stat. § 609.17, subd. 1 (2006) (defining attempt as a "substantial step toward" the commission of an intentional crime). Where, as here,

“apprehension occurs before anything in the building is taken or disturbed, proof of intent to commit a crime must necessarily rest on a permissible inference reasonably to be drawn from all of the facts and circumstances proved.” *State v. Mills*, 289 Minn. 528, 529, 185 N.W.2d 276, 277 (1971). The circumstances from which intent may be inferred include “the manner and the time of entry, the nature of the building and its contents, any things which defendant may have had with him and all the other evidence in the case.” *State v. Johnson*, 417 N.W.2d 143, 146 (Minn. App. 1987) (quoting 10 *Minnesota Practice*, CRIMJIG 17.07 (1985)).

Bodin acknowledges that the circumstantial evidence of his intent is similar to that found to be sufficient in other cases, but he claims that his case is distinguishable because he “presented an alternate rationale [sic] explanation for his conduct that was consistent with his innocence.” The state counters that Bodin’s argument must fail because his theory that he was retrieving his property is not reasonable and is based on “mere conjecture.”

Convictions based on circumstantial evidence must be “consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt.” *State v. McArthur*, 730 N.W.2d 44, 49 (Minn. 2007). A defendant’s alternate explanation for the circumstantial evidence must be based upon the evidence produced at trial, rather than “mere conjecture.” *Tscheu*, 758 N.W.2d at 858. The state’s burden is not to “exclude *all* inferences other than that of guilt,” but to “exclude all *reasonable* inferences other than guilt.” *Id.* at 857. Put another way, “circumstantial evidence is sufficient to sustain a conviction when all the *circumstances proved* are

consistent with the hypothesis that the accused is guilty and inconsistent with any *rational* hypothesis except that of his guilt.” *Id.* (citation omitted). “[P]ossibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable.” *Id.* at 858. Thus, the question is whether Bodin presented a reasonable theory of his innocence based on the evidence produced at trial.

In *State v. Nelson*, we held that there was sufficient evidence to uphold the jury’s finding that the defendant had an intent to steal because of his late-night, forcible entry into a building that “presumably” contained money or items of value, and his flight after discovery. 363 N.W.2d 81, 83 (Minn. App. 1985). In *State v. Roehl*, we again cited a forcible entry after business hours in support of our holding that sufficient circumstantial evidence supported the jury’s finding of the defendant’s intent to commit a crime within a building. 409 N.W.2d 44, 47 (Minn. App. 1987). As in *Nelson* and *Roehl*, the evidence produced at trial showed that Bodin attempted to forcibly enter Froggy’s bar at 5:00 a.m., well before (or after) business hours, and that he took flight upon being discovered by A.B. Additionally, as a previous employee, Bodin knew that the bar contained money, food, and alcohol. These circumstances support the state’s theory that Bodin was attempting to enter Froggy’s bar to steal.

Bodin’s theory of the case was that he was merely attempting to break into Froggy’s bar to retrieve his personal property. The reasonableness of this theory depends, in large part, upon the layout of the building and the door that Bodin was attempting to enter. For example, if Bodin was attempting to pry open the front door to

the *apartment*, which apparently does not access the bar area, his theory might be more rational and consistent with innocence. On the other hand, if Bodin was trying to break into the *main* entry of Froggy's bar, his theory is not rational because the access to his former apartment through the bar was impossible because internal doors were kept locked. The evidence supported this latter proposition.

When reviewing a conviction based on circumstantial evidence, we still view the evidence in the light most favorable to the jury's verdict. *Id.* at 47. Although there was evidence that Bodin knew that some of his personal property was still on the premises, he made no previous attempts to retrieve his property from the bar owners, nor did he express any interest in doing so. Then, when A.B. encountered him at the bar doorway, instead of explaining his presence, he fled. The evidence as a whole points to the fact that Bodin attempted to enter the building to commit a crime while inside: he attempted to enter through the main entrance of the bar at 5:00 a.m. with a crowbar, knowing that this entrance did not lead to his former apartment, but rather led directly into the bar, and then he fled upon discovery. Bodin's hypothesis of innocence is unreasonable, and we affirm his burglary conviction.

Concession of Guilt

Bodin's claim that his counsel impermissibly conceded his guilt in closing argument is a claim of ineffective assistance of counsel. *See Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001) (explaining that when defense counsel admits a defendant's guilt without the defendant's consent, the counsel's performance is deficient and prejudice is presumed because the decision to concede guilt belongs solely to the defendant).

Generally, an ineffective-assistance-of-counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal, because the reviewing court does not “have the benefit of all the facts concerning why defense counsel did or did not do certain things.” *Roby v. State*, 531 N.W.2d 482, 484 n.1 (Minn. 1995) (quoting *State v. Zernehel*, 304 N.W.2d 365, 367 (Minn. 1981)). In *Dukes*, our supreme court stated that a defendant’s claim that he did not consent to his counsel’s admission of his guilt is “exactly the type of claim that needs additional factfinding before it can be resolved.” 621 N.W.2d at 255. As in *Dukes*, consideration of Bodin’s claim requires a developed record. We have no such record here, and therefore we decline to reach the merits of his argument on this issue.

Affirmed.