STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1592

State of Minnesota,
Respondent,

vs.

Jesus Gonzalez Sotelo,
Appellant.

Filed August 6, 2018
Affirmed in part, reversed in part, and remanded
Bratvold, Judge

Dakota County District Court
File No. 19HA-CR-15-2359

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

James C. Backstrom, Dakota County Attorney, Elizabeth Swank, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Bratvold, Judge; and Kalitowski, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by 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

BRATVOLD, Judge

Appellant Jesus Gonzalez Sotelo was convicted of first-degree burglary, violation of a domestic-abuse no-contact order (DANCO), and two counts of domestic assault. In this direct appeal, he raises two issues. First, Sotelo argues that the district court erred by imposing convictions of and sentences for burglary, violation of a DANCO, and domestic assault–harm. Second, Sotelo contends that the district court erroneously formally adjudicated a conviction of domestic assault–fear.

Because the district court did not err by convicting and sentencing Sotelo for first-degree burglary, violation of a DANCO, and domestic assault–harm, we affirm in part. But because the district court erred in formally adjudicating Sotelo as convicted of both domestic assault–harm and domestic assault–fear, we reverse and remand to the district court with instructions to vacate the formal adjudicated conviction of domestic assault–fear, but to leave the finding of guilt in place.

FACTS

Sotelo and D.F. were previously in a romantic relationship and have one child together, L.G. In 2014, Sotelo, D.F., and three children, M.N., V.N., and L.G., lived together in an apartment in Burnsville, Minnesota. In December 2014, a district court issued a criminal DANCO against Sotelo, prohibiting him from having contact with child L.G., "wherever [she] resides," except by police escort.

In February 2015, D.F. and the three children moved into a new apartment, also in Burnsville. Although Sotelo is listed as a "resident" on the lease of the new apartment, D.F.

testified that Sotelo did not live with them and did not have a key to the apartment, and that she and Sotelo were no longer in a romantic relationship.

On July 14, 2015, D.F., the three children, and one of her children's friends were at the new apartment. D.F. and M.N., D.F.'s 11-year-old son, were in the living room. L.G., V.N., and V.N.'s friend were in their bedrooms. At approximately 10:00 p.m., Sotelo came to D.F.'s new apartment and demanded that D.F. let him in. D.F. refused and told Sotelo to leave. Sotelo banged and kicked the door for five minutes until he broke it open. D.F. told Sotelo that she was going to contact the police; when she tried to make the 911 call, Sotelo pushed her and took her phone. D.F. told M.N. to call the police, which he did. Sotelo pushed M.N. down against a wall. M.N. suffered lower back pain and had a red mark on his back. Sotelo left before the police arrived.

Officer Ainslie responded to the 911 call and searched the apartment complex, but did not find Sotelo. Ainslie spoke to D.F. and M.N. Ainslie testified that M.N. looked "kind of dazed" and said that Sotelo had shoved him against the wall. M.N. showed Ainslie his "upper, middle part of his back" and described his pain. D.F. and M.N. told Ainslie that Sotelo "was intoxicated" and had shoved them both. Ainslie testified that the door was broken, "the dead bolt [popped] completely out," wood framing of the door was completely splintered," and there were "wood chips along the floor" of the apartment.

The state charged Sotelo with nine counts stemming from the July 14 incident; the initial complaint was filed in July 2015 and amended before trial. The four counts relevant to the issues on appeal are: (1) first-degree burglary with assault under Minn. Stat. § 609.582, subd. 1(c) (2014); (2) violation of a DANCO under Minn. Stat. § 629.75,

subd. 2(b) (2014); (3) domestic assault (intentionally inflicting or attempting to inflict bodily harm upon a family or household member) (domestic assault–harm) (victim was M.N.) under Minn. Stat. § 609.2242, subd. 1(2) (2014); (4) domestic assault (causing fear of immediate bodily harm or death in a family or household member) (domestic assault–fear) (victim was M.N.) under Minn. Stat. § 609.2242, subd. 1(1) (2014).[1]

Sotelo waived his right to a jury trial, and the district court conducted a bench trial on March 28, 2017. The state's three witnesses, D.F., M.N., and Ainslie, testified to the facts summarized above. Sotelo testified that he did not live at D.F.'s new apartment and that he had never been there. He acknowledged that the DANCO prevented him from having contact with L.G. Sotelo asserted an alibi defense, and testified that he was "nowhere near" D.F.'s new apartment because he was working at a commercial building in Willmar, Minnesota at the time of the incident.

On April 4, 2017, the district court issued findings of fact, found Sotelo guilty of first-degree burglary with assault, violation of a DANCO, domestic assault–harm (victim was M.N.), and domestic assault–fear (victim was M.N.), and acquitted Sotelo of the five other counts. Because Sotelo could not provide a name of the company he worked for or an address for the commercial building, the district court did not find his alibi testimony credible.

[1] Sotelo was also charged with five other counts: interference with an emergency call; domestic assault–harm (victim was D.F.); domestic assault–fear (victim was D.F.); first-degree burglary (occupied dwelling); and second-degree burglary.

At a hearing on July 13, 2017, the district court sentenced Sotelo to 41 months in prison for first-degree burglary, 90 days for violation of a DANCO, and 90 days for domestic assault–harm. During the hearing, the district court stated that it would not formally adjudicate Sotelo as convicted of domestic assault–fear because the offense was "in the same behavioral course of conduct." On that same day, however, the district court issued a warrant of commitment that included a conviction of domestic assault–fear along with the other three convictions. This appeal followed.

D E C I S I O N

I. The district court did not err by convicting and sentencing Sotelo for first-degree burglary, violation of a DANCO, and domestic assault–harm.

The district court adjudicated separate convictions of and imposed separate sentences for first-degree burglary, violation of a DANCO, and domestic assault–harm. On appeal, Sotelo argues that all three offenses occurred as part of a single behavioral incident and, under Minn. Stat. § 609.585 (2014), a district court may impose a conviction and sentence for burglary and only one other offense. Sotelo asks this court to vacate the conviction and sentence for domestic assault–harm. This issue requires us to interpret and apply Minn. Stat. § 609.585, which raises a question of law that we review de novo. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003).

Generally, Minnesota law prohibits a conviction of both the crime charged and an included offense. Minn. Stat. § 609.04, subd. 1 (2014) ("Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both."). An included offense includes "[a] crime necessarily proved if the crime charged were

proved." *Id.*, subd. 1(4). Minnesota law also provides that "if 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." Minn. Stat. § 609.035, subd. 1 (2014). This second prohibition is usually called the single-behavioral-incident rule. *See generally State v. Holmes*, 778 N.W.2d 336, 339-40 (Minn. 2010).

Minnesota law, however, provides a relevant exception for burglary, stating that "[n]otwithstanding section 609.04, 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. This statute "allows for separate convictions and sentences for burglary and crimes committed during the burglary" and explicitly provides that section 609.04's prohibition against multiple convictions for included offenses does not apply to a conviction for burglary and any crime committed during the burglary. *Holmes*, 778 N.W.2d at 340 (citing Minn. Stat. § 609.585).

In Sotelo's case, the parties agree with the district court's conclusion that the burglary, violation of a DANCO, and domestic assault–harm occurred as part of a single behavioral incident. Although the parties agree on this legal question, we conduct an independent inquiry. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (noting that it is the responsibility of appellate courts to decide cases in accordance with the law, regardless of whether counsel chooses to contest an issue). In determining whether a course of conduct consists of a single behavioral incident, this court considers time, place, and "whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000) (quotation

omitted). According to the testimony at trial, these three offenses all occurred in the same place, D.F.'s apartment, lasted no longer than ten minutes, and were motivated by the same criminal objective. We agree with the parties that these offenses were part of the same behavioral incident.

Sotelo argues that, under the "basic principles of statutory construction," the phrase "any other crime" in section 609.585 refers to "'crime' in the singular." Thus, Sotelo argues that the court may impose only one conviction and sentence in addition to the conviction and sentence for burglary. The state argues that the plain language of section 609.585 permits "more than one additional crime to be adjudicated in connection to a burglary conviction." The state argues that, "the ordinary use of the term crime—written in singular form as opposed to plural ('crimes')" can refer to "illegal acts in general."

Minnesota precedent governs our analysis of the issue. In *Holmes*, the supreme court interpreted section 609.585 and held:

> We read the statute to allow a conviction of another crime committed in the same course of conduct as the burglary, provided that the statutory elements of that crime are different than the crime of burglary. The phrase "any other crime" means a crime that requires proof of different statutory elements than the crime of burglary.

778 N.W.2d at 341. Accordingly, "to determine whether a crime committed during a burglary is 'any other crime' within the meaning of the statute" we must "compare[] the statutory elements" of the crimes and determine "whether the elements of the crimes are different." *Id.* at 340. In *Holmes*, the supreme court determined that first-degree burglary and third-degree assault required proof of different statutory elements and, therefore,

affirmed the district court's decision to separately convict and sentence appellant for both offenses, even though both offenses were based on a single behavioral incident. *Id.* at 338, 341-42.

Here, we consider whether first-degree burglary, violation of a DANCO, and domestic assault–harm require proof of different statutory elements. First-degree burglary with assault prohibits a person from (1) "enter[ing] a building without consent and with intent to commit a crime, or enter[ing] a building without consent and commit[ing] a crime while in the building," and (2) "assault[ing] a person within the building or on the building's appurtenant property." Minn. Stat. § 609.582, subd. 1(c). A DANCO violation consists of entirely different statutory elements, requiring (1) a DANCO, (2) the defendant "knows of the existence" of the DANCO, and (3) the defendant violated a term of the DANCO. Minn. Stat. § 629.75, subd. 2(b). Finally, domestic assault–harm requires that (1) the defendant intentionally inflicted bodily harm and (2) the victim was a member of the defendant's "family or household." Minn. Stat. § 609.2242, subd. 1(2).

Sotelo appears to concede that violation of a DANCO is comprised of entirely separate statutory elements and instead challenges only his separate conviction of domestic assault–harm.[2] Sotelo instead argues that "first-degree burglary with an assault already

[2] Although not cited by Sotelo, we recognize that in *State v. Colvin*, the supreme court held that a defendant's violation of a no-entry provision of an order for protection (OFP) was insufficient to establish the independent crime element of burglary. 645 N.W.2d 449, 453-54 (Minn. 2002). In other words, in *Colvin*, the supreme court reversed the defendant's burglary conviction because the "same entry [was] insufficient to satisfy both the illegal entry element of the burglary statute" and the no-entry provision of the OFP. *Id.* at 454. But *Colvin* does not apply here because the district court did not rely on the DANCO to establish the burglary's illegal-entry element, nor did it need to. Several other facts in the

encompasses the offense of domestic assault–harm." We disagree. Domestic assault–harm requires as an element of the offense that the victim be a member of the defendant's family or household, but first-degree burglary with assault as the predicate offense does not.

Despite the supreme court's decision in *Holmes*, Sotelo argues that other relevant caselaw supports his reading of section 609.585. For example, in *State v. Hartfield*, the supreme court considered a challenge to the defendant's criminal history score when two criminal offenses occurred in the same behavioral incident. 459 N.W.2d 668, 669-70 (Minn. 1990). The supreme court briefly discussed section 609.585 and described the statute as "allowing sentencing for both a burglary and *one of the offenses* committed during a burglary even if it could otherwise be said that they were both committed as part of a single behavioral incident." *Id.* at 670 (emphasis added); *see also State v. Jackson*, 749 N.W.2d 353, 358 (Minn. 2008) ("Burglary is a serious crime, and punishment is allowed for *both* the burglary and *the* crime committed in the dwelling.") (Emphasis added). Sotelo argues that these decisions authorize district courts to impose a conviction of and sentence for burglary and only one other offense.

The state responds that, while *Hartfield*'s language "comport[s] with [Sotelo's] 'singular' interpretation" of the statute, *Hartfield* is not dispositive. We agree. The appellant in *Hartfield* did not rely on the "any other crime" language in section 609.585;

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record establish an illegal entry. For example, Sotelo forcibly entered D.F.'s apartment without her consent by kicking in the door after she told him to leave; Sotelo admitted he did not live in the apartment and that he had never been there before. Thus, the district court correctly convicted Sotelo of and sentenced him for violation of a DANCO as well as first-degree burglary.

instead he challenged whether two offenses that arose from a single behavioral incident may be used to increase his criminal history score for sentencing of the second offense. *Hartfield*, 459 N.W.2d at 669-71. The supreme court held no they could not. *Id.* at 670-71. Thus, the supreme court did not analyze whether section 609.585 permits the conviction of and sentence for burglary and more than one additional crime. *Id.* at 670. We conclude that *Hartfield* does not affect our analysis.

Finally, this court has previously discussed section 609.585 and determined that it permits the conviction of more than one crime committed during a burglary. For example, in *State v. Beane*, this court described section 609.585 as allowing the "convict[ion] of burglary and *each of the several offenses* committed during the course of the burglary." 840 N.W.2d 848, 852-53 (Minn. App. 2013) (emphasis added), *review denied* (Minn. Mar. 18, 2014).

Because domestic assault–harm and violation of a DANCO require proof of different statutory elements than first-degree burglary with assault, they fall within the meaning of "any other crime" under Minn. Stat. § 609.585. *See Holmes*, 778 N.W.2d at 340-41. We conclude that the district court did not err by convicting and sentencing Sotelo for violation of a DANCO and domestic assault–harm in addition to first-degree burglary-assault.

II. The district court erred when it entered a judgment of conviction for domestic assault–fear on the warrant of commitment.

At sentencing, after adjudicating convictions of and imposing sentences for the first three offenses, the district court stated that it would not adjudicate Sotelo's conviction of

domestic assault–fear, because the offense occurred in "the same behavioral course of conduct." Even so, the warrant of commitment includes a conviction of domestic assault–fear. Appellate courts "look to the official judgment of conviction in the district court file as conclusive evidence of whether an offense has been formally adjudicated." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotations omitted). On appeal, Sotelo argues that the judgment of conviction for domestic assault–fear must be vacated. The state concedes that Sotelo was incorrectly adjudicated on domestic assault–fear. This court must still conduct an independent inquiry. *See Hannuksela*, 452 N.W.2d at 673 n.7.

Sotelo and the district court analyzed this issue under the single-behavioral-incident rule. *See* Minn. Stat. § 609.035. But that statute prohibits multiple sentences. *Id.* Section 609.04 is the appropriate analysis for determining if multiple convictions are permitted. *See* Minn. Stat. § 609.04, subd. 1 (prohibiting conviction of crime charged and included offense). Minnesota courts have also held that Minn. Stat. § 609.04 "bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985); *see also State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995) ("If the lesser offense is a lesser degree . . . of a multi-tier statutory scheme dealing with a particular subject, then it is an included offense under section 609.04.") (Quotation omitted). Application of Minn. Stat. § 609.04 is a question of law, which we review de novo. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

Sotelo was convicted of domestic assault–harm in violation of Minn. Stat. § 609.2242, subd. 1(2) and domestic assault–fear in violation of Minn. Stat. § 609.2242,

subd. 1(1). Although domestic assault–fear is not a lesser-included offense of domestic assault–harm, these convictions are part of the same statutory scheme because they appear in the same criminal statute. *See* Minn. Stat. § 609.2242, subd. 1. Additionally, these convictions are "alternative means" of committing the same crime. *State v. Dalbec*, 789 N.W.2d 508, 512-13 (Minn. App. 2010), *review denied* (Minn. Dec. 22, 2010). Because the domestic-assault counts alleged that Sotelo violated the same criminal statute for an assault against a single victim, the district court erred by formally adjudicating convictions of both counts. *Jackson*, 363 N.W.2d at 760.

Accordingly, we reverse and remand to the district court with instructions to vacate the formal adjudicated conviction of domestic assault–fear, but to leave the finding of guilt in place. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (stating that the proper procedure "when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only," and to leave the remaining count unadjudicated); *State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014), *review denied* (Minn. Dec. 16, 2014).

Affirmed in part, reversed in part, and remanded.