STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0427

State of Minnesota,
Respondent,

vs.

Michael Matthew Harms,
Appellant.

Filed December 17, 2018
Affirmed
Smith, Tracy M., Judge

Wabasha County District Court
File No. 79-CR-17-417

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Karrie Kelly, Wabasha County Attorney, Wabasha, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

In this direct appeal, appellant Michael Harms argues that the district court erred by entering convictions for both first-degree burglary and theft. Because theft is not an

included offense of first-degree burglary, and because a person can be convicted of both burglary and any other crime committed during the burglary, we affirm.

FACTS

In May 2017, M.P., a 12-year-old girl, was staying at her grandmother's house while her mother was in Florida. On May 12, the grandmother drove M.P. back to her home in Wabasha so that M.P. could feed her pet bunnies. Once inside her house, M.P. noticed a bedsheet in the middle of the dining room floor that was "bundled up" with belongings from the house. M.P. and her grandmother then noticed that the door in the kitchen leading to the garage was cracked open and, upon looking inside, saw a person standing in the garage.

M.P. recognized the person to be Harms, the son of her mother's friend. M.P. had met Harms on multiple occasions when her mother invited him over to their house. When he saw them, Harms asked M.P. how she was doing and asked if her mom was home. When M.P. said no, Harms said he was just using the Wi-Fi, although, as far as M.P. knew, he did not have the password. M.P. said goodbye, and Harms left the house through the service door. After he left, M.P. and her grandmother went upstairs to check if the safe was still there and found that it was gone. M.P. also noticed that both of the bedrooms looked as though somebody had gone through their possessions.

The grandmother called the police. The state charged Harms with first-degree burglary of an occupied dwelling under Minn. Stat. § 609.582, subd. 1(a) (2016) and theft under Minn. Stat. § 609.52, subd. 2(a)(1) (2016). A jury found Harms guilty of both charges and found that the value of the items taken did not exceed $500. The district court entered

convictions on both counts and imposed a 57-month prison sentence for the burglary offense and a concurrent, 90-day jail sentence for the theft offense.

D E C I S I O N

Harms argues that his theft conviction must be reversed because it is an included offense of burglary. Statutory construction is a question of law, which appellate courts 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 (2016) ("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 under this statute includes "[a] crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(4).

In determining whether a crime is necessarily proved by proof of another crime, "a court examines the elements of the offense instead of the facts of the particular case." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006); *see also State v. Matilla*, 339 N.W.2d 54, 55 (Minn. 1983) ("In determining whether a lesser offense is a necessarily included offense, we look at the statutory definitions rather than the facts in a particular case to determine if a lesser offense is necessarily included."). "An offense is 'necessarily included' in a greater offense if it is impossible to commit the greater offense without committing the lesser offense." *Bertsch*, 707 N.W.2d at 664. We apply that test to the offenses here.

First-degree burglary occurs when a person "enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime

while in the building," if the building is a dwelling and another person, who is not an accomplice, is present. Minn. Stat. § 609.582, subd. 1(a). Theft occurs when a person "intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property." Minn. Stat. § 609.52, subd. 2(a)(1). First-degree burglary does not require the commission of a *theft*; it requires the commission of or the intent to commit a *crime*. It is possible to commit first-degree burglary, by entering a dwelling without consent and committing a crime, without committing a theft. Theft is thus not an included offense of first-degree burglary. *See State v. Minton*, 149 N.W.2d 384, 386 (Minn. 1967) ("Theft is neither a lesser degree of burglary nor a crime necessarily proved upon proof of burglary.").

Appellant argues that, because the district court instructed the jury on first-degree burglary specifically with respect to theft, the theft crime was necessarily proved by proof of first-degree burglary. The district court instructed the jury on the fourth element of first-degree burglary as follows: "Fourth, the defendant committed the crime of theft while in the building." But the district court referred to theft only because this case happened to involve theft. Again, the statutory elements—not the facts of a particular case—are what matters in determining whether an offense is an included offense, *see Bertsch*, 770 N.W.2d at 664, and the elements of first-degree burglary do not require the commission of a theft, Minn. Stat. § 609.582, subd. 1(a).

Appellant also argues that his theft conviction must be vacated because the theft and the burglary were based on the same criminal act. But Minn. Stat. § 609.585 (2016)

provides 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." In *State v. Holmes*, the Minnesota Supreme Court held that section 609.585 "allow[s] 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." 778 N.W.2d 336, 341 (Minn. 2010). Because theft requires proof of different statutory elements than burglary, the theft underlying the first-degree burglary offense is an "other crime" that may be the basis for a separate conviction and separate punishment under section 609.585.

The district court did not err by entering convictions on both the burglary and theft crimes.

Affirmed.