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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2161

State of Minnesota,
Respondent,

vs.

Samuel James Mosenden,
Appellant.

Filed December 16, 2019
Affirmed
Smith, John, Judge[*]

Cottonwood County District Court
File No. 17-CR-17-408

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Nicholas A. Anderson, Cottonwood County Attorney, Windom, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Florey, Judge; and Smith, John, Judge.

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

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm appellant Samuel James Mosenden's conviction of first-degree burglary because the evidence was sufficient to prove beyond a reasonable doubt that Mosenden lacked consent to enter the apartment before committing an assault.

FACTS

In the early morning hours of September 4, 2017, S.F. woke up when an acquaintance, M.G., knocked on his door and said she needed a place to stay. After S.F. said she could stay with him, M.G. went to her apartment to pick up some things. When M.G. arrived at her apartment, she found Mosenden sleeping there. They got into an argument and she kicked Mosenden out of the apartment. M.G. gathered her things and left.

When M.G. returned to S.F.'s, she knocked on his door and he let her in. S.F. told her that Mosenden had been there, but he told him to go away and did not let him in. At this point, M.G. realized she could not find her phone and became frantic. After looking in the apartment for her phone, M.G. decided to go outside to see if she dropped it on her way in.

When M.G. opened the door, Mosenden was standing there. Neither S.F. nor M.G. invited Mosenden into the apartment. Mosenden pushed his way into the apartment and immediately punched S.F. in the eye. The two of them got into a "wrestling match" and Mosenden bit S.F.'s finger, pushed him to the ground, and kicked him "three or four times

in the face." While this was happening, M.G. stood in the apartment "crying" and "freaking out." Mosenden then got up and left the apartment, and S.F. called the police.

Mosenden was charged with first-degree burglary, assault of a person, in violation of Minn. Stat. §609.582, subd. 1(c) (2016). At the jury trial, M.G. testified that she stepped back when she opened the door, but that she did not invite Mosenden into the apartment. S.F. testified that he did not invite Mosenden in and that Mosenden pushed his way into the apartment. Mosenden testified in his own defense. He did not deny that he assaulted S.F., but testified that he thought he had permission to enter the apartment. He testified that when M.G. stepped back as she opened the door, he thought she was inviting him into S.F.'s apartment.

The jury found Mosenden guilty of first-degree burglary, and the court sentenced him to 58 months in prison. This direct appeal follows.

D E C I S I O N

When addressing a sufficiency-of-the-evidence challenge, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court assumes that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This court will not reverse a conviction for insufficient evidence if the jury, acting with due regard for the presumption of innocence and the necessity of proof beyond a reasonable doubt, could

reasonably conclude that the defendant was guilty of the offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Burglary in the first degree occurs when one "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 burglar assaults a person within the building . . ." Minn. Stat. § 609.582, subd. 1(c). Mosenden admits that he assaulted S.F., but argues that he should be guilty only of misdemeanor assault because he thought he had permission to enter the apartment. He argues that because trespass is a lesser-included offense of burglary, the state must prove that he knew he did not have permission to enter S.F.'s apartment. And he contends that the evidence at trial was insufficient to prove that he knew he lacked consent to enter the apartment when he assaulted S.F.

To support this claim, Mosenden relies on this court's prior holding that trespass is a lesser-included offense of burglary because "[a]bsent an intent to commit a crime in the building, the same conduct constitutes an included misdemeanor offense of trespass." *State v. Roberts*, 350 N.W.2d 448, 451 (Minn. App. 1984). This court has frequently cited *Roberts* for the premise that, although the burglary statute does not contain express language requiring the defendant to know he lacked consent to enter the premises, because trespass is a lesser-included offense he still must know that he lacks consent. *See State v. Givens*, No. A15-0685, 2016 WL 1396686, *3 (Minn. App. Apr. 11, 2016).

However, recently, in *State v. Jones*, this court held that trespass is not a lesser-included offense to burglary. 921 N.W.2d 774, 781 (Minn. App. 2018), *review denied* (Minn. Feb. 27, 2019). In *Jones,* the court analyzed whether or not the first-degree burglary

statute requires proof that the defendant entered a building without a claim of right and whether trespass is a necessarily included offense. *Id*. at 780. This court determined that because burglary requires proof of either a crime committed while in the building, or the intent to commit a crime therein, there is no need to require that the defendant knew he entered without a claim of right. *Id*. at 781. Therefore, trespass is not a lesser included offense. The state is not required to prove that a defendant knew he did not have permission to enter a building so long as he either committed a crime while in the building, or entered it with the intent to commit a crime. *Id*.

Mosenden admitted to entering the home and assaulting S.F. Therefore, there is a sufficient factual basis to establish that Mosenden entered the building and committed a crime.

Even though the state is not required to prove knowledge, there is sufficient circumstantial evidence to support the jury's inference that Mosenden knew he did not have permission to enter the apartment. Knowledge is usually proven through circumstantial evidence. *State v. Mauer*, 741 N.W.2d 107, 115 (Minn. 2007). This court applies a two-step analysis when reviewing a conviction based on circumstantial evidence. *State v. Hanson*, 800 N.W.2d. 618, 622 (Minn. 2011). This court first "identif[ies] the circumstances proved" and defers to the fact-finder's acceptance of proof of those circumstances and rejection of evidence that conflicted with those circumstances. *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013). Then this court independently examines "the reasonableness of all inferences that might be drawn from the circumstances proved"

to determine whether they are "consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 599 (quotation omitted).

Here, there is abundant evidence that Mosenden knew he did not have permission to enter S.F.'s apartment. Shortly before the incident, when Mosenden knocked on S.F.'s door, S.F. told him to go away. When Mosenden returned, neither S.F. nor M.G. explicitly gave permission for Mosenden to enter. Both of them said so in their initial statements to police and testified in conformity at trial. While M.G. testified that she "stepped back" when she saw Mosenden at the door, she also stated that she did not give him permission to enter. Additionally, Mosenden acknowledged that he did not have explicit permission to enter S.F.'s apartment.

Mosenden argues that stepping back when opening a door can be inferred as consent to enter a dwelling. To support this assertion Mosenden cites *State v. Howard*, 373 N.W.2d 596, 599 (Minn. 1985). There, the Minnesota Supreme Court held that the defendant gave consent to officers to enter his home when he opened the inner door completely, stepped back to make room for the officers to enter, and had previously given officers a key to search his house if he were not home. *Id.* Here, however, M.G. opened the door to find her cell phone, did not say Mosenden could enter, and she was neither a resident of the apartment nor an overnight guest. Additionally, this court can assume that the jury rejected that M.G.'s stepping back gave Mosenden permission to enter when they found him guilty. *Moore*, 438 N.W.2d at 108.

Viewing the evidence in the light most favorable to the verdict, the evidence presented at the trial and the jury's verdict are sufficient to support appellant's conviction.

Affirmed.