STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1290

State of Minnesota,
Respondent,

vs.

Phillip Brent Carter, Jr.,
Appellant.

Filed June 22, 2020
Affirmed in part, reversed in part, and remanded
Hooten, Judge

Crow Wing County District Court
File No. 18-CR-18-3602

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Candace A. Prigge, Assistant Crow Wing County Attorney, Brainerd, Minnesota (for respondent)

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

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and Jesson, Judge.

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

HOOTEN, Judge

In this direct appeal from final judgment, appellant argues that his convictions for first-degree burglary, attempted fourth-degree criminal sexual conduct, and fifth-degree

criminal sexual conduct must be reversed because the evidence was insufficient to sustain these convictions. Alternatively, appellant argues that a remand is necessary because the district court erroneously entered judgments of conviction for four counts of first-degree burglary arising from the same incident, erroneously entered judgments of conviction for attempted fourth-degree and fifth-degree criminal sexual conduct arising from the same incident, and erroneously imposed consecutive sentences for counts that were not presumptive prison commitments. Finally, he argues that the district court erroneously imposed an upward dispositional departure for his conviction for attempted fourth-degree criminal sexual conduct. We affirm in part, reverse in part, and remand for resentencing.

FACTS

This case involves two separate break-ins occurring early in the morning in August 2018. Between 4:00 and 5:00 a.m., S.G. and her three children were sleeping in the living room of her home when S.G. was awakened by "the smell of alcohol and someone touching [her] leg and trying to pull the blanket off of [her]." A man, whom she did not know, was touching her thigh. She later identified the man as appellant Phillip Brent Carter, Jr. S.G. told Carter to leave, and he ran out the front door. After he left, S.G. realized that an Xbox system was missing from her home.

That same morning, at a different residence, between 5:30 and 6:00 a.m., N.O. and her three-year-old daughter were asleep in N.O.'s bedroom. N.O. woke up to someone in bed with her with his hand down her pants and rubbing her vagina area. As she woke up, N.O. then felt someone slide off the end of her bed. She looked under the bed, saw a strange man, and yelled, "Who are you and what the hell are you doing?" Carter said, "Oh,

wrong house," and ran out the door. N.O. later realized that money and her phone were missing from her purse. N.O. later identified the man as Carter.

Both women called 911. Later that morning, officers located Carter. Police found an Xbox controller, N.O.'s cell phone, and a pocketknife on Carter's person.

The state charged Carter with two counts of first-degree burglary with assault in violation of Minn. Stat. § 609.582, subd. 1(c) (2018); two counts of first-degree burglary with a dangerous weapon in violation of Minn. Stat. § 609.582, subd. 1(b) (2018); one count of fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(d) (2018); one count of attempted fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(d); and one count of fifth-degree criminal sexual conduct in violation of Minn. Stat. § 609.3451, subd. 1 (2018).

Carter requested to represent himself and waived his right to a jury trial. Following trial, the district court found Carter guilty of all seven counts. Following a sentencing hearing, the district court sentenced Carter to 57 months for Count I, first-degree burglary involving the assault of S.G. On Count VI, attempted fourth-degree criminal sexual conduct of S.G., the district court sentenced Carter to 12 months and one day, to be served consecutively with Count I. On Count II, first-degree burglary involving the assault of N.O., the district court sentenced Carter to 69 months to be served concurrently with Counts I and VI. On Count V, fourth-degree criminal sexual conduct of N.O., the district court sentenced Carter to 24 months stayed to be served consecutively with Counts I, II, and VI. The district court did not enter sentences on the remaining counts.

Carter appeals.

D E C I S I O N

I. Because the evidence was sufficient to support Carter's conviction of attempted fourth-degree criminal sexual conduct involving S.G., the evidence was sufficient for first-degree burglary involving the assault of S.G.

Carter argues that the evidence was insufficient to support his convictions of fifth-degree criminal sexual conduct and attempted fourth-degree criminal sexual conduct of S.G., and therefore, was insufficient to support his conviction of first-degree burglary with the assault of S.G.

The state must prove every element of a crime beyond a reasonable doubt. *State v. Hage*, 595 N.W.2d 200, 204 (Minn. 1999). When reviewing the sufficiency of the evidence, we review "the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient" to support the conviction. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). "Because the meaning of a criminal statute is intertwined with the issue of whether the State proved beyond a reasonable doubt that the defendant violated the statute, it is often necessary to interpret a criminal statute when evaluating an insufficiency-of-the-evidence claim." *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017).

A. We need not address the sufficiency of the evidence of Carter's conviction for fifth-degree criminal sexual conduct.

Carter argues that the evidence was insufficient to support his conviction for Count VII, fifth-degree criminal sexual conduct. However, as Carter was not sentenced for this count, we need not assess the sufficiency of the evidence. *See State v. Ashland*, 287

N.W.2d 649, 650 (Minn. 1979) (noting that a reviewing court need not assess the sufficiency of the evidence for unadjudicated counts).

B. The evidence was sufficient to support Carter's conviction of attempted fourth-degree criminal sexual conduct.

Carter raises two arguments to challenge his conviction of attempted fourth-degree criminal sexual conduct: (1) that his conduct was not as egregious as the conduct found in *State v. Totimeh*, 433 N.W.2d 92 (Minn. App. 1988), *review denied* (Minn. Feb. 22, 1989); and (2) that the evidence was insufficient to show that he took a substantial step towards committing fourth-degree criminal sexual conduct.

Minn. Stat. § 609.345, subd. 1(d), provides that a person is guilty of fourth-degree criminal sexual conduct if that person "engages in sexual contact with another" when "the actor knows or has reason to know that the complainant is . . . physically helpless." Carter does not dispute that S.G. was physically helpless when she was asleep.

A person is guilty of attempting a crime when that person's action is "a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1 (2018). An attempt to commit a crime "requires that the actor have an intent to perform acts and attain a result which if accomplished would constitute the crime." *State v. Zupetz*, 322 N.W.2d 730, 735 (Minn. 1982). Those acts "must unequivocally demonstrate that the actor had such intent and would have committed the crime" but for an intervening or extraneous factor. *Id.*

First, Carter argues that there was insufficient evidence to convict him of attempted fourth-degree criminal sexual conduct because his conduct "in no way rose to the level of assaultive conduct" when he touched S.G.'s thigh.

The district court cited to *Totimeh* for the assertion that "intent to commit criminal sexual conduct [is] inferable from the evidence of [] assaultive conduct." 433 N.W.2d at 924 (quotation omitted). Carter argues that *Totimeh* is distinguishable from this case, and therefore, the district court could not reasonably conclude that Carter intended to commit fourth-degree criminal sexual conduct. While the facts in *Totimeh* are distinguishable—Totimeh climbed into the victim's bed, told her he wanted to have oral sex with her, pulled the covers off of her, and put his face near her vagina, *id.* at 923—Carter's argument that the facts in his case need to be as egregious as Totimeh's in order to sustain his conviction lacks merit. Instead, to prove attempted fourth-degree criminal sexual conduct, the state was required to prove that Carter took a substantial step towards committing criminal sexual conduct. While Carter's conduct may not have reached the same level of the "assaultive conduct" found in *Totimeh*, Carter's conduct—removing the blanket from S.G. while she was asleep and touching her thigh—is sufficient to support his conviction for attempted fourth-degree criminal sexual conduct.

Second, Carter argues that the evidence was insufficient to support that he took a substantial step toward the commission of fourth-degree criminal sexual conduct. He argues that touching S.G.'s thigh, without more, does not constitute a substantial step toward committing fourth-degree criminal sexual conduct based on *State v. Meemken*, 597 N.W.2d 582 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999).

In *Meemken*, the appellant was convicted of attempted second-degree criminal sexual conduct after he touched a child on the upper thigh, asked if he could touch her, told her not to tell anyone what happened, and had previously told the child's mother that he "want[ed] to hum-hum [the child]" and asked the child to "twirl around in her skirt without her panties on." *Id.* at 583–84. We held that "[a]lthough the act of touching a child on the upper thigh alone is not criminal, an act, to constitute an attempt, need not be a crime in itself." *Id.* at 586. We ruled that touching the child's thigh, paired with his multiple statements asking the child if he could touch her, was sufficient to support the appellant's conviction of attempted second-degree criminal sexual conduct. *Id.*

Based on *Meemken*, Carter argues that touching S.G.'s thigh, without more, was insufficient to convict him of attempted fourth-degree criminal sexual conduct. But, as discussed above, Carter's conduct constituted more than simply touching S.G.'s thigh. Carter broke into S.G.'s home and removed a blanket from her legs while she was asleep in order to touch her thigh. Additionally, her three children were sleeping in the same room, and when S.G. woke up and said, "What the f--- are you doing? Get the f--- out of my house," Carter ran out the front door. Based on the entirety of his conduct, Carter took a substantial step in committing fourth-degree criminal sexual conduct. When viewed in the light most favorable to the conviction, we conclude that the evidence was sufficient to support Carter's conviction of attempted fourth-degree criminal sexual conduct.

C. The evidence was sufficient to support Carter's conviction of first-degree burglary.

Carter argues that there was insufficient evidence to support his conviction of first-degree burglary. Minn. Stat. § 609.582, subd. 1, provides that a person is guilty of first-degree burglary if that person "enters a building without consent and commits a crime while in the building."

Carter does not dispute that he entered S.G.'s home without consent. Because we have determined already that the evidence is sufficient to convict Carter of attempted fourth-degree criminal sexual assault, and Carter was found in possession of a pocketknife, we conclude that there is sufficient evidence that Carter committed a crime while in S.G.'s home. Therefore, the evidence was sufficient to convict Carter of first-degree burglary of S.G.'s home.

II. The district court erred by entering convictions on three counts—one count of fifth-degree criminal sexual conduct of S.G. and two counts of first-degree burglary with a dangerous weapon—because they were part of the same behavioral incidents.

Carter argues that, because Count III, first-degree burglary (dangerous weapon) of S.G.'s home was part of the same behavioral incident as Count I, first-degree burglary involving the assault of S.G.; Count IV, first-degree burglary (dangerous weapon) of N.O.'s home was part of the same behavioral incident as Count II, first-degree burglary involving the assault of N.O.; and Count VII, fifth-degree criminal sexual conduct of S.G. was part of the same behavioral incident as Count VI, attempted fourth-degree criminal sexual conduct of S.G., the district court erroneously entered convictions on Counts III, IV, and VII. The state agrees.

Minn. Stat. § 609.04, subd. 1 (2018), provides that a defendant may not be convicted of both the crime charged and an included offense. Furthermore, "section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Chavarria-Cruz*, 839 N.W.2d 515, 523 (Minn. 2013) (quotation omitted). "Whether multiple offenses form part of a single behavioral act is a question of fact," but where the facts are undisputed, we review de novo whether the offenses are part of the same behavioral incident. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

A. Count III, first-degree burglary with a dangerous weapon against S.G., should be vacated.

Count III was part of the same behavioral incident as Count I, first-degree burglary with assault, as both crimes were charged following the burglary of S.G.'s home. Although the underlying finding of guilt should remain, the district court erred when it entered convictions on both Count III, first-degree burglary with a dangerous weapon, and Count I, first-degree burglary involving the assault of S.G. *See State v. Mitchell*, 881 N.W.2d 558, 563–64 (Minn. App. 2016), *review denied* (Minn. Aug. 23, 2016) (holding that when two different ways of committing burglary arose during the same incident, only one conviction can stand). Therefore, Carter's conviction of Count III should be vacated.

B. Count IV, first-degree burglary with a dangerous weapon against N.O., should be vacated.

The same is true for Count IV. Count IV was part of the same behavioral incident as Count II, first-degree burglary involving the assault of N.O, as both crimes were charged following the burglary of N.O.'s home. Although the underlying finding of guilt should

remain, the district court erred when it entered a conviction on Count IV, first-degree burglary with a dangerous weapon. *See Mitchell*, 881 N.W.2d at 563–64 (holding that when two different ways of committing burglary arose during the same incident, only one conviction can stand). Therefore, Carter's conviction of Count IV should be vacated.

C. Count VII, fifth-degree criminal sexual conduct against S.G., should be vacated.

Carter was convicted of both Count VI, attempted fourth-degree criminal sexual conduct, and Count VII, fifth-degree criminal sexual conduct, as a result of his actions against S.G. Because both convictions were based on Carter's conduct of removing the blanket from S.G. and touching her thigh while she was asleep, we conclude that the convictions were part of the same behavioral incident. And because we conclude that Count VI, a felony count, is the more serious offense than Count VII, a misdemeanor, *see State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (noting that a more serious offense is determined by looking at various factors including sentence duration and offense severity levels), we conclude that Carter's conviction of Count VII should be vacated.

For these reasons, we remand for the district court to vacate Carter's convictions on Counts III, IV, and VII.

III. The district court erred when it imposed a consecutive sentence on Count VI, attempted fourth-degree criminal sexual conduct of S.G. But the district court did not abuse its discretion when it sentenced Carter to a permissive consecutive sentence on Count V, fourth-degree criminal sexual conduct of N.O.

Carter challenges the district court's determination that the consecutive sentences on Count VI, attempted fourth-degree criminal sexual conduct of S.G., and Count V, fourth-degree criminal sexual conduct of N.O., were proper as permissive consecutive

sentences. The state agrees that the district court erred when it sentenced Carter to a consecutive sentence on Count VI, but argues that the district court did not err when sentencing Count V as consecutive to Count II, first-degree burglary involving the assault of N.O.

We review a district court's imposition of consecutive sentences for an abuse of discretion. *State v. Ali*, 895 N.W.2d 237, 247 (Minn. 2017). If there is a threshold question of whether the consecutive sentences imposed were permissive under the sentencing guidelines, we review the question de novo. *State v. Rannow*, 703 N.W.2d 575, 577 (Minn. App. 2005).

If a defendant is convicted of multiple offenses, it is presumed that sentences for these offenses will be served concurrently. *State v. Crocker*, 409 N.W.2d 840, 845 (Minn. 1987). However, the Minnesota Sentencing Guidelines allow for permissive consecutive sentencing in certain situations. Minn. Sent. Guidelines II.F.2 (2018). One such situation is when the defendant is "being sentenced for multiple current felony convictions" and the presumptive disposition for the conviction is commitment to the commissioner of corrections. Minn. Sent. Guidelines II.F.2.a.1.ii. If a permissive consecutive sentence is improper, then the sentence is considered a departure, and the district court must support the departure with written reasons to depart. Minn. Sent. Guidelines II.F; *Rannow*, 703 N.W.2d at 578.

On Count VI, attempted fourth-degree criminal sexual conduct of S.G., the district court sentenced Carter to 12 months and one day executed. In order to sentence multiple felony offenses consecutively, the district court must use a criminal history score of zero.

Minn. Sent. Guidelines II.F.2.b. The sentencing guidelines provide that Count VI would result in a presumptive stayed sentence, not a commitment to the commissioner of corrections. *See* Minn. Sent. Guidelines 4.B (2018) (sex offender grid). Therefore, this conviction was not subject to a permissive consecutive sentence, and the district court erred by sentencing Carter to a consecutive sentence.

On Count V, fourth-degree criminal sexual conduct of N.O., the district court sentenced Carter to 24 months stayed, consecutive to Counts I, II, and VI. The sentencing guidelines provide that Count V, with a criminal history score of four,[1] would result in a presumptive commitment. Minn. Sent. Guidelines 4.B. Because this conviction with a criminal history score of four carries a presumptive commitment, the guidelines provide that this was a permissive consecutive sentence and the district court was within its discretion to sentence Carter consecutively.

Therefore, the district court erred when it imposed a consecutive sentence on Count VI, attempted fourth-degree criminal sexual conduct of S.G. We reverse the district court's sentence on Count VI and remand for resentencing consistent with this opinion. Upon remand, the district court must sentence Carter using a criminal history score that takes Count I into account. Because we have determined that the district court must resentence

[1] Carter's criminal history score on this count equals four: 1.5 points for Count I, 1.5 points for Count VI, and 1.5 points for Count II, which added together equals 4.5 points. Because the sentencing guidelines provide to round down for partial points, Carter's criminal history score is four points for Count V.

Carter on Count VI, we need not address Carter's other argument regarding the district court's sentence on Count VI.

Affirmed in part, reversed in part, and remanded.