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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1452

State of Minnesota,
Respondent,

vs.

Lindsey Damien Mitchell,
Appellant.

Filed August 10, 2020
Affirmed
Reilly, Judge

Mille Lacs County District Court
File No. 48-CR-18-2094

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

Joseph Walsh, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Laura Heinrich, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

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

REILLY, Judge

Appellant challenges his convictions for first-degree burglary and second-degree assault, arguing that (1) the district court abused its discretion in denying his request for a

self-defense instruction, (2) the district court erred in permitting the state to amend the complaint in the middle of trial, (3) the evidence was insufficient to prove the burglary offense beyond a reasonable doubt, and (4) he is entitled to a new trial based on his pro se arguments. We affirm.

FACTS

In September 2018, appellant Lindsey Damien Mitchell was staying with a relative, L.M.W. Appellant moved in with L.M.W. in July 2018. On September 5, appellant, L.M.W., and her friend were sitting in the living room. Appellant and L.M.W. got into a "heated argument," and L.M.W. told appellant to return the key and leave her home. Appellant threw a drink across the floor, threw a completed puzzle across the room, and threw his key at L.M.W. L.M.W. tried to stand up from the couch, but appellant pushed her back down. Appellant then went to the bedroom to gather his belongings. L.M.W. got up from the couch and walked in the direction of the bedroom.

After gathering his belongings, appellant met L.M.W. in the hallway outside the bedroom. Appellant held a knife in one hand and a bag of clothing in the other. L.M.W. testified that appellant made a stabbing motion toward her with the knife and appeared "angry" and "loud." L.M.W. testified that appellant said, "I ought to just stab you." Appellant then left through the front door, and L.M.W. called the police. Police officers arrested appellant the next day and found a folding knife near appellant.

Respondent State of Minnesota charged appellant with (1) first-degree burglary of an occupied dwelling under Minn. Stat. § 609.582, subd. 1(a) (2018); (2) first-degree burglary while possessing a dangerous weapon under Minn. Stat. § 609.582, subd. 1(b)

(2018); (3) first-degree burglary with a predicate offense of assault under Minn. Stat. § 609.582, subd. 1(c) (2018); (4) second-degree assault with a dangerous weapon under Minn. Stat. § 609.222, subd. 1 (2018); and (5) felony domestic assault under Minn. Stat. § 609.2242, subd. 4 (2018). During trial, the state amended the complaint to add a sixth charge for fifth-degree assault with two qualified convictions in the last three years under Minn. Stat. § 609.224, subd. 4(b) (2018). The state also sought an aggravated sentence based on appellant's status as a career offender.

The district court held a jury trial. The jury returned guilty verdicts on all six counts and completed a special verdict form finding that appellant used or brandished a dangerous weapon while committing a burglary. Appellant waived his right to a jury trial on the career-offender sentencing enhancement and tried the case to the court. The district court found appellant eligible for career-offender sentencing and granted the state's motion for sentencing enhancement. The district court entered convictions for first-degree burglary while possessing a dangerous weapon and second-degree assault with a dangerous weapon, and imposed sentence. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in denying appellant's requested jury instruction.

Appellant argues that the district court abused its discretion by denying his request for a self-defense jury instruction. A party is entitled to a jury instruction if the evidence introduced at trial supports the instruction. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). We review a district court's decision to give or deny a requested jury instruction

for an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). "While district courts have broad discretion to formulate appropriate jury instructions, a district court abuses its discretion if the jury instructions confuse, mislead, or materially misstate the law." *State v. Taylor*, 869 N.W.2d 1, 14-15 (Minn. 2015) (quotation omitted).

Appellant requested a self-defense jury instruction for the interactions between appellant and L.M.W. in the living room and in the hallway outside the bedroom. Appellant acknowledged that he "shoved" L.M.W. onto the couch in the living room but stated he only did so because he was acting in self defense. Appellant also argues that he had a reasonable belief that L.M.W. was going to throw bleach at him when she later appeared in the hallway carrying a cup. The district court granted appellant's request for a self-defense instruction for the interaction in the living room, stating that appellant's "testimony about his act of blocking [L.M.W.], and then that she fell back on the couch [is] within the very broad scope of self defense." However, the district court declined to give a self-defense jury instruction for the incident in the hallway because appellant failed to "come forward at all in his testimony with any sufficient threshold of evidence to make self defense in that instance one of the issues of the case."

Appellant argues that the district court abused its discretion by denying his request for a self-defense instruction for the interaction between him and L.M.W. in the hallway. Minnesota law permits the use of reasonable force against another person in certain circumstances, such as when force is used "in resisting . . . an offense against the person." Minn. Stat. § 609.06, subd. 1(3) (2018). The elements of self defense are:

> (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of . . . bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

State v. Pollard, 900 N.W.2d 175, 178 (Minn. App. 2017) (citation omitted). The defendant asserting self defense bears the burden of producing evidence to support that defense. *State v. Penkaty*, 708 N.W.2d 185, 207 (Minn. 2006).

Appellant did not satisfy his burden of production. "[A] person may act in self-defense if he or she reasonably believes that force is necessary and uses only the level of force reasonably necessary to prevent the bodily harm feared." *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014). But while a defendant "may assert a theory at trial, the [district] court has discretion not to instruct the jury on the theory" if no evidence supports it. *State v. Vazquez*, 644 N.W.2d 97, 99 (Minn. App. 2002) (holding that defendant is entitled to an instruction on their theory of the case if there is evidence and law to support it). Here, appellant did not establish evidence to support that his use of force was reasonable. The evidence shows that appellant met L.M.W. in the hallway holding a knife in one hand and a bag of clothes in the other. L.M.W. testified that appellant moved from two to three feet away from L.M.W. to about one foot away, made a stabbing motion toward her with the knife, and threatened to stab her. Based on this evidence, the district court did not abuse its discretion by refusing to instruct the jury on self defense where appellant failed to satisfy his burden of production on the reasonableness factor.

Nor has appellant demonstrated that he was prejudiced by the district court's decision not to give the self-defense instruction for the interaction in the hallway. To merit a new trial, the defendant must show that he was entitled to the jury instruction and that the district court's failure to give the requested instruction was not harmless. *State v. Pendleton*, 567 N.W.2d 265, 270 (Minn. 1997) ("An error in jury instructions is not harmless and a new trial should be granted if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict."). Here, the district court's jury instructions did not prejudice appellant. The record contains ample evidence of appellant's guilt. The jury also made certain credibility determinations in weighing L.M.W.'s testimony against the conflicting testimony presented by appellant. We defer to the jury, which is "generally in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony." *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011) (quotation omitted). In sum, we discern no abuse of discretion in the district court's decision to deny appellant's jury-instruction request.

II. The district court did not abuse its discretion in granting the state's motion to amend to add a charge for fifth-degree assault.

A criminal complaint may be amended at any time before the verdict "if no additional or different offense is charged and if the defendant's substantial rights are not prejudiced." Minn. R. Crim. P. 17.05. We review a district court's decision to allow an amendment for an abuse of discretion. *State v. Ostrem*, 535 N.W.2d 916, 922 (Minn.

1995). However, we review de novo whether an offense is a lesser-included offense of the charged offense. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

The state charged appellant with (1) first-degree burglary of an occupied dwelling under Minn. Stat. § 609.582, subd. 1(a); (2) first-degree burglary while possessing a dangerous weapon under Minn. Stat. § 609.582, subd. 1(b); (3) first-degree burglary with a predicate offense of assault under Minn. Stat. § 609.582, subd. 1(c); (4) second-degree assault with a dangerous weapon under Minn. Stat. § 609.222, subd. 1; and (5) felony domestic assault under Minn. Stat. § 609.2242, subd. 4. After the state's first witness finished testifying, the state moved to amend the complaint to add a charge for fifth-degree assault with two qualified convictions in the last three years under Minn. Stat. § 609.224, subd. 4(b). The district court granted the motion over appellant's objection.

Appellant is correct that the fifth-degree-assault charge is not a lesser-included offense of domestic assault. However, fifth-degree assault is a lesser-included offense of second-degree assault with a deadly weapon. And a criminal defendant "may be convicted of either the crime charged or an included offense." Minn. Stat. § 609.04, subd. 1 (2018). A lesser-included offense includes a lesser degree of the same crime. Minn. Stat. § 609.04, subd. 1(1) (noting that "[a]n included offense" may be "a lesser degree of the same crime"). Here, fifth-degree assault is a lesser degree of second-degree assault. *See State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995) ("If the lesser offense is a lesser degree of the same crime or a lesser degree of a multi-tier statutory scheme dealing with a particular subject, then it is an 'included offense' under section 609.04."). Because fifth-degree assault is a lesser degree of the same crime, it constitutes an "included offense" under a clear

application of section 609.04, subdivision 1. We discern no abuse of discretion in the district court's decision permitting the state to amend the complaint to add a fifth-degree-assault charge.

Nor did the amendment prejudice appellant's substantial rights. The purpose of rule 17.05 is to prevent jury confusion and to ensure that the defendant receives timely notice and an opportunity to prepare a defense. *State v. Guerra*, 562 N.W.2d 10, 13-14 (Minn. App. 1997). Appellant claims he was prejudiced because the state's theory of the case significantly changed. We do not agree. The complaint and the statement of probable cause put appellant on notice that he should prepare to defend against assault charges. The amendment did not have the effect of "confusing the jury, violating due process notions of timely notice, [or] adversely affecting the trial tactics of the defense." *State v. Weltzin*, 618 N.W.2d 600, 603 (Minn. App. 2000) (citation omitted), *aff'd*, 630 N.W.2d 406 (Minn. 2001). Appellant is not entitled to a new trial on the ground that the district court improperly permitted the state to amend the complaint during trial.

III. Sufficient evidence supports the jury's verdicts for burglary.

To evaluate the sufficiency of the evidence, appellate courts "carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the factfinder to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). Appellate courts review the evidence "in the light most favorable to the conviction" and "assume the jury believed the State's witnesses and disbelieved any evidence to the contrary." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn.

2012) (quotation omitted). Appellate courts "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Id.* We review de novo whether the defendant's conduct satisfies the statutory definition of an offense. *State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013).

The first-degree burglary statute provides that:

> Whoever 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, either directly or as an accomplice, commits burglary in the first degree and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000, or both, if:
>
> (a) the building is a dwelling and another person, not an accomplice, is present in it when the burglar enters or at any time while the burglar is in the building;
>
> (b) the burglar possesses, when entering or at any time while in the building, any of the following: a dangerous weapon, any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or an explosive; or
>
> (c) the burglar assaults a person within the building or on the building's appurtenant property.

Minn. Stat. § 609.582, subd. 1. The state charged appellant with burglary of an occupied dwelling under subdivision 1(a), burglary while possessing a dangerous weapon under subdivision 1(b), and burglary with assault under subdivision 1(c).

Appellant challenges the sufficiency of the evidence underlying his first-degree-burglary conviction.[1] Appellant argues that the state failed to prove he was not in lawful

[1] Appellant does not challenge the sufficiency of the evidence supporting the other crimes.

possession of the dwelling at the time of the burglary. The statute defines "enter[ing] a building without consent" to include "remain[ing] within a building without the consent of the person in lawful possession." Minn. Stat. § 609.581, subd. 4(c) (2018). Appellant argues he had been living with L.M.W. for months with no fixed end date, creating a tenancy at will and entitling him to occupy or possess the house. A person is in lawful possession if he or she has the "legal right to exercise control over the building in question." *State v. Spence*, 768 N.W.2d 104, 109 (Minn. 2009). Lawful possession "does not require an ownership interest in the building but does require more than mere presence in the building." *State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014), *review denied* (Minn. Dec. 16, 2014). A lawful possessor may include the co-tenant of a residence. *State v. Lilienthal*, 889 N.W.2d 780, 787-88 (Minn. 2017).

Appellant argues that, applying *Lilienthal*, he was permitted to be on the property because he was an at-will tenant and L.M.W. did not provide adequate written notice of eviction. *Id.* at 788 (holding that tenant had lawful possessory interest in property where tenant had a lease agreement and paid weekly rent). We disagree. No evidence suggests that appellant and L.M.W. entered into a lease agreement entitling appellant to a possessory interest in the property. Appellant lived in L.M.W.'s house for a few months, had a key to the house, and kept his belongings there. But he did not pay rent or pay for household expenses and, according to his own testimony, he only stayed with L.M.W. "off and on" depending on who else was at the house. There are no facts in the record showing that appellant was a tenant entitled to notice of eviction.

Appellant also argues that he did not remain in the house after L.M.W. told him to leave. Appellant claims he immediately went to the bedroom to gather his belongings and left the house. Appellant contends that the burglary statute does not criminalize this behavior because he immediately got his clothing and left. Whether an individual has the right to be on the property is a question of fact for the jury. *Spence*, 768 N.W.2d at 109. Here, the jury heard testimony from L.M.W. and appellant about appellant's presence in the house. The jury also heard testimony about appellant's argument that he did not improperly remain in the house after L.M.W. told him to leave. The verdict reveals that the jury rejected appellant's position, and it is the jury's exclusive province to assess witness credibility. *Francis v. State*, 729 N.W.2d 584, 589 (Minn. 2007). "[T]he jury is free to question a defendant's credibility, and has no obligation to believe a defendant's story." *Ostrem*, 535 N.W.2d at 923. We do not revisit the jury's determination that appellant did not have a right to remain on the property after L.M.W. told him to leave. *See Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (declining to disturb verdict "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [a] defendant was proven guilty of the offense charged"). We therefore affirm appellant's conviction for burglary.

IV. Appellant is not entitled to relief on the merits of his pro se claims.

Appellant raises two additional issues in his pro se supplemental brief, asserting claims for ineffective assistance of counsel and judicial bias.

To prove ineffective assistance of counsel, "an appellant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quotation and citation omitted). Appellant fails to cite to relevant facts or legal authority to support his ineffective-assistance claim, and we therefore consider it forfeited. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (deeming allegations of wrongdoing by trial counsel forfeited when unsupported by "argument or citation to legal authority").

In evaluating a claim of judicial bias, there is a "presumption that a [district court] judge has discharged his or her judicial duties properly," and a party alleging bias has the burden to establish allegations sufficient to overcome this presumption. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). Further, "adverse rulings by themselves do not demonstrate judicial bias." *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008). Because appellant has not identified facts or legal authority supporting this claim, we deem it forfeited. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (declining to address arguments raised in supplemental pro se brief that were "unsupported by facts in the record" and contained "no citation to any relevant legal authority").

Affirmed.