STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0477
A21-0480

State of Minnesota,
Respondent,

vs.

Irfan Beganovic,
Appellant.

Filed April 11, 2022
Affirmed in part, reversed in part, and remanded
Jesson, Judge

Otter Tail County District Court
File No. 56-CR-19-2351

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

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

Considered and decided by Jesson, Presiding Judge; Bryan, Judge; and Kirk, Judge.[*]

SYLLABUS

1. The word "unlawfully," as used in the first-degree arson statute, Minnesota Statutes section 609.561, subdivision 1 (2016), is defined by reference to Minnesota Statutes section 609.564 (2016), which provides that a person who has a license, permit, or written permission from the fire department to set a fire is not guilty of arson.

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

2. A conviction of arson in the first degree under Minnesota Statutes section 609.561, subdivision 1, does not require the state to prove beyond a reasonable doubt that the defendant acted unlawfully.

3. When a defendant's criminal-history score includes a partial custody-status point, the partial point must be disregarded when determining the presumptive sentence.

OPINION

JESSON, Judge

In June 2018, a house burned down in Fergus Falls. Although the homeowner, appellant Irfan Beganovic, denied setting the fire, respondent State of Minnesota charged him with first-degree arson. At trial, Beganovic's daughter claimed that she accidentally started the fire. But the state's expert witness disputed this account and testified that the fire was intentionally set in three separate places. The jury found Beganovic guilty. The court sentenced him to a stayed prison term and ordered him to pay restitution to his insurance company.

Beganovic argues that he is entitled to a new trial because the state failed to prove that he acted "unlawfully" when he set fire to his home. Alternatively, he challenges his sentence, the restitution order, and the calculation of his criminal-history score. We affirm Beganovic's conviction and his sentence in most respects but reverse and remand for resentencing with a correct criminal-history score.

FACTS

In 2018, Beganovic's house caught fire. When first responders arrived, Beganovic and his family were already outside the home. Beganovic claimed that he had been asleep

and woke up to see the fire spreading. But the family's lack of injuries raised the suspicions of the fire chief, who personally came to the fire. When the fire chief walked through Beganovic's home with the fire marshal investigator, they concluded that the fire had three separate areas of origin.

After the fire, Beganovic filed an insurance claim. Upon further review of the home, the fire chief, the fire marshal investigator, and a fire investigator for Beganovic's insurance company all concluded that the fire had been intentionally set. The insurance company denied Beganovic's claim. Following the investigation, the state charged Beganovic with first-degree arson.

At trial, the state first called the fire investigator and an engineer who inspected the home to testify. The engineer testified that the appliances in the home could not have caused the fire, and the investigator testified that the fire had been intentionally set. But when the state called Beganovic's daughter to testify, she claimed to have accidentally started the fire while smoking a cigarette. The state then called the deputy fire marshal as an expert witness, who disputed the daughter's explanation because her version did not account for the other two points of origin of the fire. The jury found Beganovic guilty.

After the verdict, Beganovic moved for downward dispositional and durational departures. He argued that a dispositional departure was appropriate because he was particularly amenable to probation. But he contended that a durational departure was even more important because he faced deportation if sentenced to a felony. The district court granted Beganovic's dispositional-departure motion but denied his durational-departure motion and reserved the issue of restitution.

Beganovic's insurance company filed an affidavit with the district court requesting restitution for $25,867.52 that it incurred in the course of investigating his claim. Beganovic objected to restitution, contending that the company was requesting reimbursement for its business expenses rather than a loss that resulted from his conduct. After holding a hearing, the district court ordered Beganovic to pay restitution to the insurance company, minus the $16,542.75 requested for attorney fees, in the amount of $9,324.77.

Beganovic appeals.[1]

ISSUES

I. Does a first-degree arson conviction require the state to prove that the defendant acted unlawfully as a separate element of first-degree arson?

II. Did the district court abuse its discretion by denying Beganovic's motion for a durational departure?

III. Did the district court abuse its discretion by ordering Beganovic to pay restitution?

IV. Did the district court sentence Beganovic using the wrong criminal-history score?

ANALYSIS

Beganovic argues that he is entitled to a new trial because the state failed to prove that he acted unlawfully. In the alternative, he contends that the district court abused its discretion by denying his motion for a durational departure and ordering that he pay restitution. Finally, he contends that he was sentenced using an incorrect criminal-history score. We consider each claim in turn.

[1] Beganovic separately appealed his conviction (A21-0477) and the restitution order (A21-0480). We consolidated the appeals.

I. In a prosecution for first-degree arson, the state is not required to prove that the defendant acted unlawfully as a separate element of the crime.

Beganovic argues that although the state proved that he intentionally set fire to his home, the evidence is insufficient to support his first-degree arson conviction because the state failed to prove that he "unlawfully" burned his house down. Due process requires the state to prove every element of an offense beyond a reasonable doubt. *State v. Pakhnyuk*, 926 N.W.2d 914, 919 (Minn. 2019). Beganovic alleges that the state failed to do so here by not proving that he acted unlawfully. When, as here, a sufficiency-of-the-evidence claim turns upon the meaning of a statute, we interpret the statute de novo. *State v. Bowen*, 921 N.W.2d 763, 765 (Minn. 2019). To resolve this question, we first consider what "unlawfully" means in the context of the first-degree arson statute. We then turn to whether the state bears the burden of proving that the defendant acted unlawfully.

The goal of statutory interpretation is to effectuate the legislature's intent. Minn. Stat. § 645.16 (2020). To discern this intent, we look to the plain meaning of the statutory language. *State v. Thompson*, 754 N.W.2d 352, 355 (Minn. 2008). And we may read multiple sections of a statute together to determine its plain meaning. *Cilek v. Off. of Minn. Sec'y of State*, 941 N.W.2d 411, 415 (Minn. 2020). We also look to the common meaning of the words used by the legislature. *State v. Haywood*, 886 N.W.2d 485, 488 (Minn. 2016). If the language of a statute is subject to more than one reasonable interpretation, we consider the canons of construction and other tools to discern legislative intent. *State v. Struzyk*, 869 N.W.2d 280, 285 (Minn. 2015).

To determine the meaning of the word "unlawfully" in the arson statute, we begin with the statutory language, which follows: "Whoever *unlawfully* by means of fire or explosives, intentionally destroys or damages any building that is used as a dwelling at the time the act is committed . . . commits arson in the first degree." Minn. Stat. § 609.561, subd. 1 (emphasis added) (the arson statute).

Beganovic argues that the word "unlawfully" creates a presumption that the state must do more than prove that he acted intentionally when he set fire to his home. The state contends that "unlawfully" means "without authorization" under Minnesota Statutes section 609.564 (the permit statute), which provides that a person who "sets a fire pursuant to a validly issued license or permit or with written permission from the fire department of the jurisdiction where the fire occurs" does not commit arson.

Based upon the plain language of the arson statute, we agree with the state. Reading the arson statute and the permit statute together, we conclude that "unlawfully" in the arson statute means "without authorization" (the license, permit, or written permission) described in the permit statute. *See Cilek*, 941 N.W.2d at 415 (reading two sections together to determine plain meaning). The structure of the arson statute supports this interpretation because the permit section appears directly after the sections defining arson in the first through fifth degrees. Minn. Stat. §§ 609.561-.564 (2016). And this conclusion is further supported by the common meaning of the word "unlawful." *Black's Law Dictionary* 1850 (11th ed. 2019) (defining "unlawful" as "[n]ot authorized by law"); *see also The American Heritage Dictionary of the English Language* 1876 (5th ed. 2011) (defining "unlawfully" as "[n]ot lawful; illegal").

Having defined the word "unlawfully" in the arson statute as "without authorization under the permit statute," we now consider whether the state is required to prove that the defendant acted without authorization as a separate element. A statutory clause requiring the absence of a fact may be "either an element or an affirmative defense." *State v. Hall*, 931 N.W.2d 737, 740 (Minn. 2019) (interpreting the phrase "without intent to effect the death of any person"). To determine which is the case here, we turn to precedent interpreting similar clauses. For ease of reference, we refer to such clauses requiring the absence of a fact as "negative clauses."

We begin with *State v. Timberlake*, in which the Minnesota Supreme Court considered a negative clause in the context of a statute prohibiting possession of a pistol in a motor vehicle. 744 N.W.2d 390, 394-95 (Minn. 2008). That statute provided that "[a] person . . . who . . . possesses a pistol in a motor vehicle . . . *without first having obtained a permit to carry* the pistol is guilty of a gross misdemeanor." Minn. Stat. § 624.714, subd. 1a (2006) (emphasis added). The question before the supreme court was whether the phrase "without first having obtained a permit to carry" was an element of the offense or an exception to criminal liability. *Timberlake*, 744 N.W.2d at 394-95. In other words, to prove a defendant guilty under this statute, did the state have to prove a negative—that the person charged did not have a permit?

The supreme court, reaffirming its decision in *State v. Paige*,[2] held that the state did not bear the burden of proving that the defendant lacked a permit. *Id.* at 396-97. Instead,

[2] The *Timberlake* court noted that it had first considered this provision in *State v. Paige*, 256 N.W.2d 298, 396-97 (Minn. 1977). *Id.* Although the legislature had amended the

the phrase without first having obtained a permit to carry was an exception to—not an element of—the crime of carrying a pistol in public. *Id.* at 397. Addressing how to distinguish between an element of a crime and an exception, the court explained that "[i]n order to place the burden of proving the exception on the defendant, a court must decide that the act in itself, without the exception, is ordinarily dangerous to society or involves moral turpitude."[3] *Id.* at 396-97 (quoting *State v. Brechon*, 352 N.W.2d 745, 749 (Minn. 1984) (quotation omitted)).

Applying this analysis, the supreme court concluded that possession of a firearm is an act that is ordinarily dangerous to society. *Id.* The *Timberlake* court distinguished the conduct of possessing a firearm from conduct in two cases where negative clauses were construed as elements of an offense. *Id.* In *State v. Burg*, the supreme court concluded that the phrase "without lawful excuse" was an element of the offense of felony nonsupport of a child. 648 N.W.2d 673, 678-79 (Minn. 2002). And in *Brechon*, the supreme court concluded that the phrase "without a claim of right" was an element of criminal trespass. 352 N.W.2d at 750. But because possession of a firearm in public was dissimilar from

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statute in the years between *Paige* and *Timberlake*, the *Timberlake* court concluded that the amendments, which did not alter the "without a permit" language, did not overrule *Paige*. *Id.* at 395-96.

[3] The *Brechon* court described this inquiry as whether the negative clause was incorporated into the definition of the offense. 352 N.W.2d at 749. A clause is incorporated when the offense cannot be clearly described if the exception is omitted. *United States v. Cook*, 84 U.S. 168, 173 (1872). If the offense can be described without reference to the exception, the defendant must prove its existence. *Id.* at 173-74. We note that the offense of first-degree arson can be accurately described as "intentionally damaging or destroying a dwelling with fire or explosives," without reference to the existence or absence of a permit.

"nonpayment of child support or criminal trespass in terms of its potential danger to society," the court concluded that the negative clause in *Timberlake* was an exception to, not an element of, the crime of possessing a pistol in public. 744 N.W.2d at 396-97.

Following the guidance in *Timberlake*, we turn to the first-degree arson statute before us. Like the possession of a firearm in public, the act of destroying homes by fire or explosives is "ordinarily dangerous to society." *Id.* at 397 (quotation omitted). On the spectrum of acts that jeopardize society, arson falls closer to (and perhaps beyond) the act of carrying a firearm than do the acts of either nonpayment of child support or criminal trespass. *Compare id. with Burg*, 648 N.W.2d at 678-79; *Brechon*, 744 N.W.2d at 750. Accordingly, we conclude that the phrase "unlawfully" in the arson statute presents an exception to liability, not an element of arson. The burden of proving that exception (that the defendant's act is lawful because it is authorized by the permit statute) falls on the defendant, not on the state to prove the opposite. *Timberlake*, 744 N.W.2d at 396-97.

Still, Beganovic argues that *State v. Clarin* compels his reading of the arson statute. 913 N.W.2d 717 (Minn. App. 2018), *rev. denied* (Minn. Aug. 7, 2018). *Clarin* involved a conviction for second-degree possession of methamphetamine. *Id.* at 719. A person who "unlawfully possesses" the requisite amount of a drug is guilty of second-degree controlled-substance crime. *Id.* (citing Minn. Stat. § 152.022, subd. 2(a)(1) (2014)). And in this context, "unlawfully" is defined as "selling or possessing a controlled substance in a manner not authorized by law." *Id.* (citing Minn. Stat. § 152.01, subd. 20 (2014)). Beganovic argues that because the arson statute uses "identical" language (the word

"unlawfully") to the statute at issue in *Clarin*, that case dictates his interpretation of the arson statute.

But the language is not identical. Unlike the arson statute, the chapter containing the controlled-substance statute applied in *Clarin* specifically defines the word "unlawfully." *Id.* And the *Clarin* court recognized that "possession of physician-prescribed methamphetamine is lawful." *Id.* at 720. Thus, the word "unlawfully" in the controlled-substance statute carves out a manner of possession that is unlawful from the lawful possession of prescribed medication. By contrast, setting fire to dwellings is not generally lawful. Beganovic has not demonstrated that *Clarin* compels his interpretation.

Finally, Beganovic contends that *State v. Mikulak* supports his reading of the arson statute. 903 N.W.2d 600 (Minn. 2017). But this case is inapposite. In *Mikulak*, the supreme court held that a guilty plea to violating the predatory-offender registration statute[4] must establish that the defendant "knowingly" violated the statute, meaning that the defendant was aware of the obligation to register at the time of the violation. 903 N.W.2d at 604-05. Beganovic does not explain why this general rule—that a prohibited action must coincide with the specified mental-state element—would require us to adopt his view that the state must prove that he "unlawfully" burned down his home.[5]

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[4] Minn. Stat. § 243.166, subd. 5(a) (2016).

[5] We further note that the arson statute already contains a mental-state element, that the defendant "intentionally" destroy the dwelling. Minn. Stat. §§ 609.561, subd. 1, .02, subd. 9(3) (2016) (defining "intentionally").

In sum, "unlawfully" in the arson statute means "without authorization" as provided for by the permit statute. And to prove a defendant guilty of first-degree arson, the state does not bear the burden of proving that the defendant acted unlawfully as a separate element. Instead, if the defendant can show a permit, license, or written permission complying with the permit statute, the defendant has an affirmative defense to criminal liability for arson. Accordingly, sufficient evidence supports Beganovic's conviction because the state proved that he intentionally burned down his home, and he did not show that he was permitted to do so.[6]

II. The district court did not abuse its discretion by denying Beganovic's durational-departure motion.

Beganovic contends that the district court abused its discretion by denying his motion for a downward durational departure. We review this claim for an abuse of the wide discretion given to district courts in the imposition of criminal sentences. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017). Only rarely would we reverse a sentence that falls within the presumptive range. *State v. Kangbateh*, 868 N.W.2d 10, 14 (Minn. 2015).

A durational departure is a sentence that is shorter or longer than the presumptive range prescribed by the Minnesota Sentencing Guidelines. *State v. Solberg*,

[6] Beganovic also contends that the district court plainly erred by not instructing the jury that the state was required to prove that he acted unlawfully. Because he did not object to the district court's jury instructions at trial, we review the argument for plain error. *State v. Ezeka*, 946 N.W.2d 393, 407 (Minn. 2020). And because we conclude that the state was not required to prove that Beganovic acted unlawfully as a separate element, the district court's instruction here was not plainly erroneous.

882 N.W.2d 618, 623 (Minn. 2016). Only offense-related reasons may justify a durational departure. *Rund*, 896 N.W.2d at 553. A durational departure is not justified unless the defendant's conduct was significantly less serious than the conduct typically associated with the offense. *Solberg*, 882 N.W.2d at 624. When the defendant's actions fit squarely within the conduct prohibited by the statute, the offense is not significantly less serious than typical. *Rund*, 896 N.W.2d at 533; *Solberg*, 882 N.W.2d at 627.

At sentencing, Beganovic argued that the court should depart from the presumptive felony sentence and instead sentence him to a gross-misdemeanor sentence so he would not be deported. He further contended that his offense was less serious than a typical first-degree arson because he damaged only his own property and did not injure anyone.

The district court denied Beganovic's durational-departure motion. Beganovic's risk of deportation is not a proper basis for a durational departure. *See State v. Peter*, 825 N.W.2d 126, 129-30 (Minn. App. 2012), *rev. denied* (Minn. Feb. 27, 2013). And the court's conclusion that Beganovic's offense is not less serious than a typical first-degree arson is supported by the caselaw given that many first-degree arson cases involve a homeowner burning down their own house without causing harm to others. *See, e.g.*, *State v. Giles*, 322 N.W.2d 755, 756-57 (Minn. 1982); *State v. Matthews*, 425 N.W.2d 593, 594-95 (Minn. App. 1988); *State v. Conklin*, 406 N.W.2d 84, 85-86 (Minn. App. 1987).

Because Beganovic's case is similar to these cases, he has not shown that the district court abused its discretion by denying his durational-departure motion.[7]

III. The district court did not abuse its discretion by requiring Beganovic to pay restitution.

Beganovic contends that he should not have to pay restitution to the insurance company because the company's loss was not a direct result of his arson conviction. We will not reverse a restitution award unless the district court abused its discretion. *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015). An abuse of discretion occurs if the district court's decision is against logic and the facts in the record or based on an erroneous view of the law. *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011).

A district court may require a defendant to pay restitution as part of a felony sentence. Minn. Stat. § 609.10, subd. 1(5) (2020). In determining the amount of restitution, the court must consider the loss sustained by the victim because of the offense. Minn. Stat. § 611A.045, subd. 1(a) (2020). But the court may only order restitution for losses that are directly caused by, or follow naturally from, the defendant's conduct. *State v. Boettcher*, 931 N.W.2d 376, 381 (Minn. 2019).

Here, the district court concluded that most of the insurance company's losses were a direct result of Beganovic's offense. After Beganovic set fire to his home and then filed an insurance claim, the company expended resources to investigate the claim. These

[7] Beganovic also asserts that the district court failed to consider "offense-related facts" supporting his departure motion. But the record reflects that the district court considered the offense-related facts and rejected his argument.

expenditures were directly caused by Beganovic's conduct. Accordingly, the court ordered Beganovic to pay $9,324.77 in restitution to the insurance company.

The district court did not abuse its discretion in doing so. Payments made by insurance companies related to criminal offenses are economic losses for which the companies may be entitled to restitution. *State v. Jola*, 409 N.W.2d 17, 19 (Minn. App. 1987). Beganovic attempts to distinguish his case from one in which an insurance company paid out a claim, as opposed to incurring costs before denying the claim. But this distinction has no basis in logic or caselaw because whether or not the insurance company paid its investigators or Beganovic, the losses were still a direct result of the arson.

IV. Beganovic was sentenced with an incorrect criminal-history score.

Finally, Beganovic contends that he must be resentenced with a criminal-history score of zero because he was erroneously assigned a custody-status point. The state agrees.[8] We interpret the Minnesota Sentencing Guidelines de novo. *State v. Strobel*, 932 N.W.2d 303, 306 (Minn. 2019).

In 2017, a defendant who was on probation for a non-traffic gross misdemeanor at the time of an offense could be assigned a custody-status point. Minn. Sent. Guidelines 2.B.2.a (2017). But in 2019, the guidelines were amended so that such a defendant received only a partial, not a full, custody-status point. Minn. Sent. Guidelines 2.B.2.a (Supp. 2019). Under the amelioration doctrine, a defendant whose offense was committed before the amendment and for whom final judgment has not been reached is entitled to be sentenced

[8] Although the parties agree on this issue, we are obligated to decide cases in accordance with the law. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

under the amended version of the Guidelines. *State v. Robinette*, 964 N.W.2d 143, 151 (Minn. 2021).

The guidelines provide that partial felony points are rounded down but do not indicate whether partial custody-status points are rounded down as well. Minn. Sent. Guidelines 2.B.1.i (2017). To resolve this uncertainty, the Minnesota Sentencing Guidelines Commission issued interim guidance instructing courts to follow our nonprecedential opinion in *State v. Eubanks* and disregard a partial custody-status point when determining the presumptive sentence.[9] No. A19-2042, 2021 WL 318260, at *6 (Minn. App. Feb. 1, 2021). We now adopt the reasoning of the commission's interim guidance and hold that a partial custody-status point should be disregarded when calculating the presumptive sentence.

Beganovic was given a full custody-status point because he was on probation for a gross misdemeanor at the time of the offense. But because Beganovic was not tried until 2020, he should have only received a partial point and that partial point should not have been considered in calculating Beganovic's presumptive sentence, according to the commission's interim guidance. *Robinette*, 964 N.W.2d at 151. Because Beganovic's criminal-history score was incorrectly calculated, and because "a sentence based on an incorrect criminal history score is an illegal sentence," we reverse and remand for

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[9] Minn. Sent. Guidelines Comm'n, *Half Custody Status Point Problem – Interim Guidance* (Jan. 15, 2022), https://mn.gov/sentencing-guidelines/assets/20220115-MSGC-PartialPointsinCriminalHistory_tcm30-515455.pdf.

resentencing with the correct criminal-history score. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007).

DECISION

"Unlawfully" in Minnesota Statutes section 609.561, subdivision 1, means without authorization as described in Minnesota Statutes section 609.564. As "unlawfully" is not an element of arson, the state does not bear the burden of proving that the defendant acted unlawfully. And because the state proved that Beganovic intentionally set fire to his home, sufficient evidence supports Beganovic's first-degree arson conviction. Further, the district court was within its discretion to deny Beganovic's durational-departure motion and order him to pay restitution to the insurance company. But because Beganovic was sentenced with an incorrect criminal-history score, we reverse and remand for resentencing.

Affirmed in part, reversed in part, and remanded.