**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A21-0844**

State of Minnesota,
Respondent,

vs.
Gary Alvin Paananen,
Appellant.

**Filed August 22, 2022**
**Affirmed in part, reversed in part, and remanded**
**Bryan, Judge**

Washington County District Court
File No. 82-CR-19-2361

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

Kevin Magnuson, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Gaïtas, Judge; and Klaphake, Judge.*

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

## NONPRECEDENTIAL OPINION

**BRYAN**, Judge

In this direct appeal from two convictions of felony domestic assault, appellant raises the following three arguments: (1) the evidence presented against him was insufficient to support one of his convictions; (2) he is entitled to a new trial as a result of prosecutorial misconduct; and (3) the district court erred by imposing consecutive stayed sentences. Because we conclude that the evidence was sufficient to support appellant's conviction and any prosecutorial misconduct was harmless beyond a reasonable doubt, we affirm appellant's convictions. Because the district court erred in sentencing appellant to consecutive sentences, however, we remand the case to the district court to impose a concurrent sentence for the second conviction.

## FACTS

In June 2019, police arrested appellant Gary Alvin Paananen in relation to an altercation with R.M. and H.V. Respondent State of Minnesota charged Paananen with two counts of felony domestic assault, one corresponding to each victim, in violation of Minnesota Statutes section 609.2242, subdivision 4 (2018). The case proceeded to trial and the jury found Paananen guilty of both charges. Paananen appeals. Given the arguments raised, we summarize the pretrial rulings, the events surrounding witness interactions during the trial, and the evidence presented at trial.

Before Paananen's trial, Paananen's defense counsel requested "an order sequestering witnesses," under Rule 26.03, subdivision 7, of the Minnesota Rules of Criminal Procedure. Paananen's counsel also requested an order prohibiting the state from

entering evidence of prior bad acts and an order "prohibiting any testimony or other evidence regarding prior official or unofficial police contacts between [Paananen] and law enforcement." The district court granted Paananen's requests.

At trial, the state presented testimony from R.M., H.V., and two police officers who responded to the scene. According to this testimony, in June 2019, Paananen lived at a home in Cottage Grove owned by his mother, S.P. Many family members also lived in the home with Paananen and S.P., including Paananen's wife, son, and two daughters, as well as S.P.'s brother and R.M., Paananen's 20-year-old nephew. In addition, R.M.'s 16-year-old half-brother, H.V., often stayed at the house. H.V. is not a blood relative of Paananen. According to R.M.'s testimony, H.V. had been living at the house in R.M.'s room "every weekend" for the past several months. Specifically, when R.M. was asked "how long had [H.V.] been living there on the weekends?" he answered: "Um, several months. I'd say at least three." R.M. denied that S.P. prevented him from having friends or family, such as H.V., stay at the house, but R.M. did acknowledge that he would ask S.P. for permission before having people over "as a courtesy." When asked whether S.P. had told him that H.V. did not have permission to be at the residence, R.M. stated that S.P. had not told him that and instead, she gave her permission when he asked.

R.M. testified that he and Paananen would often argue, and on June 12, S.P. told R.M. to clean a spill caused by R.M.'s truck. R.M. and Paananen began arguing when R.M. flipped off Paananen. The altercation escalated. S.P. held Paananen back, but at one point, she stepped aside and said, "F-ck it, kick his a--," referring to R.M. Paananen then punched R.M. When H.V. pulled Paananen off of R.M., Paananen then punched H.V. in

the face. R.M. and Paananen continued to fight, and H.V. called 911. R.M. was recording the events leading up to the fight, including the statements he and Paananen made.

At the end of R.M.'s testimony, there was a break in the trial. When the proceedings resumed, the prosecutor made a record about an incident that happened in the hallway during the break. The prosecutor explained that he had observed Paananen sitting next to his son, who had been listed as a defense witness. The prosecutor also observed Paananen walk by S.P. and talk to her. S.P. was also designated as a trial witness. The prosecutor requested that the district court admonish Paananen. The district court reiterated its pretrial sequestration ruling and explained to Paananen that by talking to potential witnesses, he risked disqualifying those persons as witnesses and could also "be forfeiting his right to testify, if he wants to testify."

When testimony resumed, H.V. stated that he is not related to Paananen or S.P., but shares a mother with R.M. H.V. testified that he stayed in Cottage Grove on weekends in R.M.'s room every weekend for more than three months with S.P.'s permission. H.V.'s testimony was consistent with R.M.'s description of the fight, although H.V. also admitted that R.M. intimidated Paananen while they were arguing.

Officer Brandyn Graff also testified. He explained that he responded to the 911 call and was first on the scene. During his testimony, Graff referenced that Paananen had prior police contacts:

> Q: And what was going on when you arrived?
> A: So just to kind of backtrack, dispatch did advise that a male named "Gary" was involved.
> Q: Okay.

> A: So as I arrived on the scene, we've had other police contacts with Gary. And as we arrived on the scene, I observed Gary and his brother . . . in the driveway next to some vehicles.

Graff described his investigation, including the interviews he conducted with R.M. and H.V., the photographs he took of their injuries, and the circumstances of Paananen's arrest. Graff then testified to the physicality of the fight, referring to Paananen as the "primary aggressor:"

> Q: You didn't hear anything other than the defendant made this verbal altercation physical; is that right?
> A: Yes.
> Q: He's the one that took it from words to physicality; correct?
> A: During my investigation that is what me and my partner determined, that he was our primary aggressor.
> DEFENSE COUNSEL: Objection, . . . He's making a conclusion.
> THE COURT: Well, that's his investigation, that's what he concluded. And you can cross-examine him on that if you choose to do that.

At the end of Graff's testimony, Paananen's counsel made a record about Graff's reference to previous police contacts and use of the term "primary aggressor." After discussion with counsel, the district court directed the jury to disregard this portion of Graff's testimony:

> Officer Graff, in his testimony yesterday, opined that the Defendant was, quote, "primary aggressor" closed quote. That testimony should be disregarded by this jury, and your jury should rely only upon all of the testimony and exhibits and evidence that was received in this case when making its determination in your jury deliberations.

Paananen's son, Paananen's daughter, and S.P. testified for the defense, and Paananen testified on his own behalf. Paananen's son testified that he lives with S.P., S.P.'s brother, his parents, and his sisters. Paananen's son overheard R.M. saying on the

phone that he wanted to kick in Paananen's knees before the fight but was not present in the house at the time of the argument. Paananen's daughter testified that she lives with S.P., her brother, her sister, S.P.'s brother, and her parents. Paananen's daughter testified that she was at the house on June 12 and was asleep but woke up when she heard fighting.

S.P. testified that the people who live with her at her house are Paananen, his wife, his son, his daughters, and S.P.'s brother. S.P. testified that R.M. lived with her for about two-and-a-half-years, but as a condition of R.M. continuing to live in the house, S.P. required R.M. to have a job and pay rent. S.P. testified that because R.M. quit his job and had not obtained another job yet, she asked him to leave the house. On June 12, S.P. heard R.M. and Paananen arguing, so she tried to break up the argument. She testified that she ultimately decided to let them fight, and R.M. "lunged" at Paananen. S.P. also testified that she did not know H.V. was in the house and that R.M. would not ask for permission for H.V. to stay at the house. During S.P.'s cross-examination, the prosecutor questioned S.P. about her conversation in the hallway during trial. S.P. testified that nobody told her speaking with Paananen would violate a court order and she could not remember Paananen saying anything to her or speaking to his son or daughter.

Finally, Paananen testified on his own behalf. He stated that R.M. was living at S.P.'s house and that he thought R.M. planned to attack him. Paananen admitted to being intoxicated at the time. Paananen conceded that their conversation escalated, but he believed that R.M. was the aggressor and he blamed R.M. for the fight "a hundred percent." Paananen denied hitting H.V. Paananen also testified that H.V. never lived in the house, and that R.M. would sneak H.V. into the house without S.P.'s permission.

Paananen moved for a mistrial because of S.P.'s testimony regarding the sequestration order, and because of Graff's statements that Paananen was the primary aggressor. The district court denied the motion. Among the other jury instructions, the district court instructed the jury regarding the elements of the offense, explaining that "[t]he statutes define a family or household member as including persons related by blood, or persons who are presently residing together, or who have resided together in the past."

During closing argument, the prosecutor highlighted the credibility and testimony of R.M. and H.V., emphasizing that Paananen was intoxicated and could not recall many details of the incident. The defense argued that Paananen acted in self-defense and that the defense witnesses were nervous because they are "not legally savvy." During jury deliberation, the jury asked the district court the following questions: "What is the law in being a resident of a household?" and "What is the Minnesota Statute definition of being a household resident?" In answering these questions, the district court instructed the jury that they had been given all the applicable law in the case. The jury found Paananen guilty of both counts. The district court sentenced Paananen to two, consecutive prison sentences, each for 12 months and one day. The district court stayed execution and placed Paananen on probation for three years. Paananen appeals.

## DECISION

### I. Sufficiency of Evidence

Paananen argues that the evidence presented is insufficient to support his conviction for assaulting H.V. because the evidence shows that H.V. was "only an occasional overnight guest [of R.M.]" and "only when [R.M.] asked [S.P.] permission for [H.V.] to

stay over." In response, the state contends that the evidence proves that H.V. stayed at the home every weekend for months. Because we conclude that the evidence presented was sufficient to establish this element of the offense, we affirm Paananen's conviction regarding the assault of H.V.

Minnesota law prohibits domestic assault and provides that a person commits a felony when, within ten years of committing two or more previous qualified domestic violence-related offenses, that person assaults a family or household member. Minn. Stat. § 609.2242, subds. 1, 4 (incorporating the definition of "family or household member" from Minnesota Statutes section 518B.01, subdivision 2 (2018)). The statutory definition of "family or household member" includes "persons who are presently residing together or who have resided together in the past." Minn. Stat. § 518B.01, subd. 2(4) (2018). To determine whether the evidence presented was sufficient to establish this element, we view the evidence in the "light most favorable to the conviction" and determine whether the evidence "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). We will not reverse a conviction for insufficient evidence "if the jury, acting with due regard for the presumption of innocence" and the need for 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).

Paananen challenges his conviction of felony domestic assault relating to H.V., arguing that the evidence presented showed that H.V. was an "overnight guest," who "only

stayed at [S.P.'s] house as [R.M.'s] guest on an occasional weekend," and that R.M. "would often sneak H.V. into the house without asking [S.P.'s] permission." Viewing the evidence in the light most favorable to the verdict, we do not agree with Paananen's characterization of H.V.'s residential arrangements.[1] Both R.M. and H.V. testified that H.V. "had been living" with R.M. at the residence "every weekend" for the past "several months." R.M. also testified that he asked permission for H.V. to stay at the residence "as a courtesy." Although this testimony conflicts with testimony presented in Paananen's defense,[2] on appellate review, we assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *Moore*, 438 N.W.2d at 108. Similarly, we assume that the jury believed R.M. and H.V.'s testimony regarding S.P.'s permission, and we disregard evidence to the contrary. In his brief, Paananen correctly points out that the state could have presented additional evidence to indicate that H.V. lived at the residence, including testimony regarding the location of H.V.'s belongings and H.V.'s sleeping arrangements.

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[1] Portions of Paananen's brief invite this court to interpret the meaning of "residing." Paananen, however, does not explain how the applicable statute has more than one reasonable meaning and instead, the argument presented centers on a dispute of fact based on conflicting evidence concerning whether S.P. gave permission to H.V. and the frequency, duration, and consistency of the time that H.V. spent at the house. Further, Paananen does not challenge on appeal the definitions in the jury instructions or otherwise assert legal error by the district court. Finally, "a trial court need not define every phrase or word used in the [jury] instructions, especially when they are used in their ordinary sense and are commonly understood." *State v. Davis*, 864 N.W.2d 171, 177 n.3 (Minn. 2015); *see also, e.g.*, *State v. Heinzer*, 347 N.W.2d 535, 537 (Minn. App. 1984) ("Words of common usage within the ordinary understanding of a juror need not be defined by the court."), *rev. denied* (Minn. July 26, 1984).

[2] For example, according to Paananen's son and daughter, neither R.M. nor H.V. lived at the residence. According to S.P., R.M. used to live there, but she informally evicted him. According to Paananen, R.M. lived at the residence, but H.V. did not.

The possibility that additional evidence could have been offered, however, does not alter our analysis given the standard of review applied to factual disputes stemming from conflicting evidence. In sum, the jury, acting with due regard for the presumption of innocence and the need for proof beyond a reasonable doubt, could reasonably conclude that H.V. was residing with Paananen because both R.M. and H.V. testified that H.V. had been living at the house every weekend for months.

## II. Alleged Prosecutorial Misconduct

Paananen next alleges three instances of prosecutorial misconduct: (1) the state's cross-examination of S.P. insinuated that Paananen violated the pretrial sequestration order; (2) Graff stated that Paananen was the "primary aggressor;" and (3) Graff referenced Paananen's prior police contacts.[3] Because the state established that any errors were harmless beyond a reasonable doubt, we affirm the district court.

The right to due process of law includes the right to a fair trial. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *rev. denied* (Minn. June 19, 2007). "Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial." *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008) (quotation omitted). Consequently, prosecutorial misconduct may deny the defendant his right to a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006).

Paananen's counsel objected to each of the three alleged instances of misconduct. For objected-to prosecutorial misconduct, appellate courts have applied one of two

[3] Paananen does not assert error in the district court's rulings on objections, pretrial decisions, or handling of the alleged improper conduct by the state.

standards of prejudice. *See State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974) (holding that for claims of serious prosecutorial misconduct, appellate courts determine whether the misconduct was harmless beyond a reasonable doubt, but for less serious prosecutorial misconduct, appellate courts determine whether the misconduct likely played a substantial part in influencing the jury to convict). Since *Caron*, however, the Minnesota Supreme Court decided *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006), and *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006), and the "continued viability of the two-tiered approach set forth in *State v. Caron* . . . remains to be decided," *State v. McCray*, 753 N.W.2d 746, 754, n.2 (Minn. 2008); *see also State v. Whitson*, 876 N.W.2d 297, 304 n.2 (Minn. 2016) (noting that many "cases have questioned whether the two-tiered *Caron* standard for reviewing objected-to misconduct remains viable," and listing cases); *State v. Graham*, 764 N.W.2d 340, 348 (Minn. 2009) (noting that the Minnesota Supreme Court has "yet to decide whether the two-tiered approach for objected-to prosecutorial misconduct as set forth in *State v. Caron* remains viable").

In deciding what effect challenged evidence or conduct had on the verdict, this court considers "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether the defense effectively countered it." *Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002); *see also State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (holding that a statement did not amount to misconduct because "[t]he improper statement was only two sentences in a closing argument that amounted to over 20 transcribed pages"); *State v. Glaze*, 452 N.W.2d 655, 662 (Minn. 1990) (holding that alleged prosecutorial misconduct in closing arguments did

not require a new trial because "the remarks were isolated and not representative of the closing argument when reviewed in its entirety"); *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (concluding that alleged prosecutorial misconduct was not prejudicial in part because the jury was properly instructed that remarks made by the attorneys in closing were not evidence). We address each of the three asserted instances of misconduct in turn. Assuming without deciding the presence of misconduct, we conclude that the state has established that the misconduct was harmless beyond a reasonable doubt.[4]

Paananen first argues that the prosecutor improperly insinuated that he violated the sequestration order. Even assuming that questioning S.P. about speaking with Paananen during the trial constitutes misconduct, the questioning was harmless. There was nothing out of the ordinary in the manner of the examination and S.P. answered that she could not recall whether she or other witnesses spoke with Paananen. The state spent the majority of its time cross-examining S.P. regarding her relationship with R.M., her conduct during the altercation (including stepping aside and saying "F-ck it, kick his a--"), and aspects of her testimony that conflicted with the audio recording of the altercation. In addition, the prosecutor did not reference these isolated questions or S.P.'s answers in closing argument.

Next, Paananen argues that it was improper for Graff to testify that he believed Paananen to be the "primary aggressor" because that statement led the jury to reject Paananen's theory that he acted in self-defense. We discern nothing about the manner in which the statement was made that would draw undue attention to it, and in closing

[4] Given this determination, we need not address the viability of the two-tiered approach.

argument, the state did not mention this statement, use the term "primary aggressor," or otherwise refer to this isolated portion of Graff's testimony. Moreover, the district court directed the jury to disregard this portion of Graff's testimony, and the defense countered this testimony by presenting evidence that supported Paananen's self-defense claim, such as H.V.'s admission that R.M. was intimidating Paananen, S.P.'s testimony that R.M. lunged at Paananen first, and R.M.'s plan to attack Paananen and target his knees.

Finally, Paananen argues that Graff improperly referred to Paananen's prior police contacts. Like the reference to Paananen being the aggressor, Graff's passing reference to knowledge about Paananen did not occur in a manner that drew any particular attention and was not brought up again at any point or otherwise mentioned in closing argument. Paananen also presented evidence that countered Graff's passing comment, such as testimony concerning Paananen's various health and mobility problems and relationships with his immediate family.

In sum, we conclude that based on the *Townsend* factors, and the other evidence in the case, the state established that any errors were harmless beyond a reasonable doubt.

## III. Permissive Consecutive Sentencing

Paananen argues that the district court erred by imposing a consecutive stayed sentence for the second count of domestic assault. The state agrees that the district court erred and recommends reversing and remanding for the imposition of concurrent sentences.

The Minnesota Sentencing Guidelines provide that consecutive sentences are permissive (may be given without departure) "if the presumptive disposition for the current offense(s) is commitment." Minn. Sent. Guidelines 2.D.2.a(1) (2018); *see also* Minn. Sent.

Guidelines 2.F.205 (2018) ("Consecutive sentences are permissive for multiple current felony convictions . . . only when the presumptive disposition is commitment."). This court reviews the interpretation of the sentencing guidelines under a de novo standard of review. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

In this case, the presumptive sentence for count one was a 12-month stayed prison sentence, and the presumptive sentence for count two was a 15-month stayed prison sentence. *See* Minn. Sent. Guidelines 4.A (2018), 5.A (2018). Thus, the district court erred by imposing a consecutive stayed sentence for count two. We reverse the sentence imposed for count two and remand to the district court to impose a concurrent stayed sentence for this offense.

**Affirmed in part, reversed in part, and remanded.**