STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1341

State of Minnesota,
Respondent,

vs.

Benjamin Woodrow West,
Appellant.

Filed September 25, 2023
Affirmed in part, reversed in part, and remanded
Bratvold, Judge

Chippewa County District Court
File No. 12-CR-21-695

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Matthew Haugen, Chippewa County Attorney, Montevideo, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leah C. Graf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Segal, Chief Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges his judgments of conviction for first- and second-degree burglary along with the sentence imposed. Appellant raises four issues: (1) whether the record evidence is sufficient to support his convictions; (2) whether his convictions should

be reversed and remanded for a new trial because the prosecutor committed plain, prejudicial misconduct during closing argument by referring to facts not in evidence; (3) whether the district court erred in calculating appellant's criminal-history score; and (4) whether the district court erred by convicting appellant of a lesser-included offense. We affirm in part, reverse in part, and remand for resentencing and to vacate the appellant's conviction for second-degree burglary.

FACTS

The following summarizes the evidence presented to the jury at trial. In the early morning hours of December 10, 2021, D.T. was visiting with two friends, N.H. and B.H., at her Granite Falls home. D.T.'s home security system's motion sensor beeped, and she went to her bedroom to watch the security-camera footage on a monitor. D.T. saw appellant Benjamin Woodrow West arriving on a bicycle and walking to her door. West and D.T. had been in a relationship for nine months, but the two had stopped dating two to three weeks before.

D.T. went to the door. D.T. kept the interior door closed and locked and could see West through the window in the door. She told West that she had company and that she was not going to open the door. West told D.T. to open the door, or he would kick it in. D.T. did not open the door. D.T. turned and asked N.H. and B.H. whether they felt safe if she opened the door. Before they could answer, West opened the storm door with one hand, counted to three using his fingers, and kicked in the interior door. D.T. testified, "The door flung in. The trim around the door came into the hallway." West entered the hallway and living room.

West "circled around the living room" and said to B.H., "I've told you about coming over here when I'm not here." West swung "a metal object at [B.H.]." D.T. "placed [her]self in between . . . West and [B.H.] . . . [t]o try to calm [West] down." N.H. and B.H. ran next door and called the police. West told D.T., "[Y]ou know not to have people over when I'm not here." West also said, "Please don't call the cops. I'll come and fix your door." West left, and police responded "a few minutes" later, at around 1:30 a.m. D.T. showed the officer the surveillance-camera recording of West holding open the storm door and kicking in the interior door.

Respondent State of Minnesota charged West with first-degree burglary of an occupied dwelling under Minn. Stat. § 609.582, subd. 1(a) (2020) (count one), first-degree burglary involving assault of B.H. under Minn. Stat. § 609.582, subd. 1(c) (2020) (count two), second-degree burglary of a dwelling under Minn. Stat § 609.582, subd. 2(a)(1) (2020) (count three), and fifth-degree assault of B.H. under Minn. Stat § 609.224, subd. 1(1) (2020) (count four).

At the May 12, 2022 trial, the jury heard testimony from D.T., N.H., and two responding police officers. B.H. did not testify. A video recording of West approaching and kicking in the door[1] and photographs of the damage to the door and doorframe were received into evidence. For counts one and three, the state argued that West unlawfully entered D.T.'s dwelling and committed criminal property damage while in her dwelling as

[1] To be clear, the responding officer wore a body camera and used it to record the surveillance-camera recording. The trial exhibit was the officer's body-camera recording. No audio recording was available.

shown by West kicking the door in and causing $1600 of damage. The jury found West guilty of counts one and three and acquitted West of counts two and four, which related to the assault of B.H. The district court entered convictions for count one and count three and imposed a 51-month sentence on count one.

West appeals.

DECISION

I. The record evidence is sufficient to sustain West's convictions for first- and second-degree burglary.

West argues that "the state failed to prove beyond a reasonable doubt that West committed the offense of criminal damage to property 'while in' D.T.'s residence." A person is guilty of first-degree burglary if the state proves three elements beyond a reasonable doubt: (1) the person "enter[ed] a building without consent," (2) the person "commit[ted] a crime while in the building," and (3) "the building is a dwelling and another person, not an accomplice, is present in it when the burglar enters." Minn. Stat. § 609.582, subd. 1(a). West's appeal challenges only the record evidence on the second element. West contends that the state did not offer evidence that West was "in" D.T.'s home when he damaged D.T.'s property, and therefore, the circumstantial evidence was insufficient to prove the element that he committed a crime while in the building.

When considering a sufficiency-of-the-evidence issue, appellate courts "carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *State v. Boldman*, 813 N.W.2d 102, 106 (Minn. 2012). Appellate courts

"view the evidence in the light most favorable to the verdict" and assume the jury disbelieved any contradictory evidence. *Id.*

The sufficiency of the evidence for a conviction is reviewed differently based on whether direct or circumstantial evidence supports a challenged element. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist," and it "always requires an inferential step to prove a fact." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). In contrast, direct evidence is "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Id.* (quotation omitted).

We first consider whether the record includes direct evidence on the second element. West argues that the state did not present direct evidence that West was in the building when he committed the property damage. The state argues that it presented direct evidence through D.T.'s testimony, the video recording, and the exhibits showing the damage to the interior door. When we examine each piece of evidence offered by the state, we conclude that it requires an inference to find that West was "in" D.T.'s home at the time he damaged her door. First, D.T.'s testimony described West being "at" the door and that he kicked in the door, but she did not see West enter her home until after he had kicked in the door. Second, the video recording does not show West's foot "in" D.T.'s home or damaging the interior door because the view is obstructed by the open storm door. Third, the photographs showing the damaged interior door and doorframe do not prove that West was "in" D.T.'s

home when he caused the damage. Thus, we review the sufficiency of the evidence under the circumstantial-evidence test.

When an appellate court reviews the sufficiency of circumstantial evidence, the first step "is to identify the circumstances proved." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotations omitted). The second step is to "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved; this includes inferences consistent with a hypothesis other than guilt." *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (quotation omitted). Under this second step, the court must "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt, not simply whether the inferences that point to guilt are reasonable." *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013) (quotations omitted).

Beginning with the first step, these circumstances were proved: West stood outside D.T.'s home, asked her to open the door, and threatened to kick it in; West opened the screen door with one hand, counted to three, and kicked open the locked interior door; West's foot then returned to the ground outside the door. West's kick damaged the door and splintered the doorframe, sending pieces of wood into D.T.'s home. West caused $1600 in damage to the door. West walked into D.T.'s home after he kicked in the door.

Second, we conclude that the circumstances proved are consistent with West's guilt on the second element: based on D.T.'s testimony, the video recording of West's forceful kick, and the photographic evidence of the damaged door and doorframe, the jury could reasonably conclude that West was "in" D.T.'s home when he kicked in her locked door.

We next consider whether the circumstances proved were consistent with an inference other than guilt on the second element. West argues the circumstances proved are consistent with the inference that he remained outside D.T.'s home when he damaged her door. West contrasts his case with *State v. Rodriguez*, in which the appellant, Rodriguez, argued that his second-degree burglary conviction should be reversed because there was no evidence that he committed criminal property damage while in the building. 863 N.W.2d 424, 427-28 (Minn. App. 2015), *rev. denied* (Minn. July 21, 2015). This court rejected Rodriguez's argument, determining that "Rodriguez committed damage to property when he put his finger through the hole in the screen and made the hole larger in order to gain entry into [the victim's] home. Rodriguez was considered 'in the building' when his finger entered the premises." *Id.* at 428-29 (quoting Minn. Stat. § 609.582, subd. 2(a) (2012)).

West contends that the circumstances proved support the inference that after kicking in the door, West's foot "returned to the ground outside the residence before West walked into D.T.'s house." West also contends that the circumstances proved do not support the inference that "West, or any part of his body, came into the" building before the door was kicked in. We are not persuaded. The video recording shows that West was holding open the storm door while he forcefully kicked in the interior door. The photographs of the doorframe show that West's kick splintered the doorframe and opened the locked interior door. The photograph of the door shows that West dented the door when he kicked it.

West's argument essentially asks that we ignore reasonable inferences about the amount of force West applied when kicking in D.T.'s door. The photographic evidence of

the kicked-in door supports the inference that West used enough force to dent the door and splinter the doorframe. This is reinforced by D.T.'s testimony that "[t]he trim around the door came into the hallway." It is not a reasonable alternative hypothesis that West's foot somehow stopped at the door and did not enter D.T.'s home when he kicked in her door.

Similar to the appellant in *Rodriguez*, West committed the criminal property damage to D.T.'s door at the same time he entered her home. We determined in *Rodriguez* that putting a finger through a hole in the screen door was sufficient to prove that Rodriguez "entered the premises." *Id.* at 428. West's entry occurred when he kicked in D.T.'s door. We therefore conclude that the circumstances proved do not support a reasonable alternative hypothesis other than West's guilt of committing property damage while he was "in" D.T.'s home. Thus, the record evidence is sufficient to sustain West's convictions for first- and second-degree burglary.

II. The prosecuting attorney did not commit prejudicial misconduct during closing arguments.

West argues in the alternative that he is entitled to a new trial because "the prosecutor committed plain and prejudicial misconduct in closing argument." West argues that the prosecuting attorney referred to facts not in evidence "[b]y telling the jury that when West kicked down D.T.'s door West was 'being inside the building' and that West's foot 'went through' the door." West did not object during the prosecutor's closing argument.

Appellate courts review unobjected-to error for plain error affecting an appellant's substantial rights. Minn. R. Crim. P. 31.02. A modified plain-error standard applies to

unobjected-to prosecutorial misconduct. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). An appellant must show (1) there was an error and (2) the error was plain. *Id.* at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.*

If the appellant can establish that an error occurred and that the error was plain, the burden shifts to the state to "demonstrate [a] lack of prejudice; that is, the misconduct did not affect substantial rights." *Id.* To meet this burden, "the state would need to show that there [was] no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). If each of the three plain-error prongs are met, this court then determines "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* If the court determines that any one of the factors is not satisfied, it need not address the rest. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017).

Beginning with the first step—whether there was error—West is correct that it is error for a prosecuting attorney to refer to facts not in evidence. *State v. Peltier*, 874 N.W.2d 792, 804-05 (Minn. 2016) (concluding that statements by a prosecutor that had "no basis in the record" were improper). A prosecuting attorney is allowed "to analyze and explain the evidence and to present all proper inferences to be drawn" from the evidence. *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980); *see also State v. Swaney*, 787 N.W.2d 541, 560 (Minn. 2010) (concluding that a prosecutor's remarks about inferences to be drawn from the evidence were permissible). When reviewing allegations of prosecutorial misconduct, appellate courts examine the closing argument "as a whole,

rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

We conclude that West fails to establish that there was any error during the state's closing argument. During closing argument, the prosecutor described the evidence of burglary:

> The State also must show that Mr. West had committed a crime while in the building. The State submits to you that look—that *the door is part of the building and as Mr. West is kicking down the door, he's becoming part of—he's being inside the building, his foot going through that*, and [D.T.] had testified that she did not ask Mr. West to kick down the door. This damage was caused intentionally. It wasn't like he was bumped in or it was a reflex. Looking at the video, it appears that Mr. West had done this intentionally and this was [D.T.'s] property and she had not given consent for it and she had testified that she had to pay approximately $1600 to fix this.

(Emphasis added.) When we read the prosecuting attorney's closing argument as a whole, we conclude that the record supports the statement that West was "inside the building" when he committed the property damage to D.T.'s door. As discussed above, this is a reasonable inference that the jury may draw from the record evidence. Even though there was no direct record evidence definitively showing that the West's foot was "inside the building," the security-video footage and photographs of the door allowed the prosecuting attorney to argue that the jury should infer that West's foot entered the building. Because we conclude that there was no error, we need not discuss the other steps for evaluating prosecutorial misconduct and we reject West's request for a new trial.

III. The district court erred in calculating West's criminal-history score.

West argues the district court abused its discretion when it determined that West's criminal-history score was five. We review a district court's calculation of an appellant's criminal-history score for an abuse of discretion. *State v. Edwards*, 900 N.W.2d 722, 727 (Minn. App. 2017), *aff'd mem.*, 909 N.W.2d 594 (Minn. 2018). "The State bears the burden of proof at sentencing to show that a prior conviction qualifies for inclusion within the criminal-history score." *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). When a defendant does not object to the district court's calculation of their criminal-history score and the state's evidence does not support the score used at appellant's sentencing hearing, the proper remedy is to remand the matter and give the state the opportunity "to further develop the sentencing record so that the district court can appropriately make its determination." *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *rev. denied* (Minn. July 15, 2008); *see also State v. Strobel*, 921 N.W.2d 563, 577 (Minn. App. 2018), *aff'd*, 932 N.W.2d 303 (Minn. 2019).

The presentence-investigation (PSI) report stated that West had a criminal-history score of five, including, among other criminal history, one and one-half points for driving under the influence in South Dakota, one point for escaping from custody in South Dakota, and one-half point for fifth-degree drug possession in Minnesota. Although West did not offer any factual corrections to the PSI report at sentencing, he challenges the inclusion of these prior convictions in calculating his criminal-history score on appeal.[2]

[2] We note, as do the parties in their briefs, that West need not show that he presented this issue below or that he was prejudiced by the incorrect criminal-history score. "[A] sentence

As to the Minnesota drug conviction, West points out that it dates from 2016 and that the state failed to "prove[] that [the drug conviction] would have been a felony in 2021." "[A] defendant's prior offense may be classified as a felony only if the prior offense would constitute a felony under Minnesota law at the time the current offense was committed." *Strobel*, 921 N.W.2d at 574. Here, the state offered no evidence or argument about West's 2016 drug conviction. The state, therefore, failed to prove that the prior offense would be considered a felony in Minnesota at the time of West's 2021 offense.

As to the South Dakota convictions, West argues that "the state failed to satisfy its burden" to include the South Dakota convictions in his criminal-history score. The Minnesota Sentencing Guidelines direct that out-of-state felony convictions be considered in calculating a defendant's criminal-history score. Minn. Sent'g Guidelines 2.B.5 (Supp. 2021). Caselaw establishes that the state must lay a foundation for the court to do so. *Maley*, 714 N.W.2d at 711. The required foundation must prove the out-of-state convictions by a preponderance of the evidence, such as by presenting certified copies of prior convictions. *Id.* at 711-12. The record does not show that the state laid any foundation for the South Dakota convictions. The state concedes that it did not meet its burden and agrees that remand is the proper remedy.

Because the state did not offer any evidence about the 2016 drug conviction or the South Dakota convictions, the district court abused its discretion in determining that West's

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based on an incorrect criminal history score is an illegal sentence . . . ." *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). Therefore, "a defendant may not waive review of his criminal history score calculation" and may contest the score for the first time on appeal. *Id.* at 147-48; *accord State v. Maley*, 714 N.W.2d 708, 714 (Minn. App. 2006).

criminal-history score was five points. We reverse and remand for resentencing and to allow the state the opportunity to supplement the record on the 2016 drug conviction and the South Dakota convictions. *See Outlaw*, 748 N.W.2d at 360 (concluding that remand for resentencing was the appropriate remedy for a sentence based on an incorrect criminal-history score to which the appellant did not object at sentencing).

IV. The district court erred by convicting West of two counts of burglary.

West argues that his second-degree burglary conviction "must be reversed because it is an included offense of first-degree burglary." Under Minn. Stat. § 609.04 (2020), a person may not be convicted of both the crime charged and an included offense. An included offense is "a crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1(4). Whether to apply section 609.04 may be raised for the first time on appeal. *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007). We review the issue de novo as a question of law. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

The state agrees with West that West's conviction for second-degree burglary must be reversed and remanded so the district court can vacate the conviction. After examining the elements of these two offenses, we also agree. Under Minn. Stat. § 609.582, subd. 1(a), first-degree burglary requires proof that the defendant (1) entered a building without consent and (2) committed a crime while in the building and that (3) the building was an occupied dwelling. Under Minn. Stat. § 609.582, subd. 2(a)(1), second-degree burglary requires proof that the defendant (1) entered a building without consent and (2) committed a crime while in the building and that (3) the building was a dwelling.

Second-degree burglary is a crime necessarily proved if first-degree burglary is proved and is therefore a lesser-included offense of West's first-degree burglary conviction. Thus, on remand for resentencing, West's conviction for second-degree burglary should be vacated, leaving the jury's guilty verdict intact and unadjudicated. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

Affirmed in part, reversed in part, and remanded.