STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1384

State of Minnesota,
Respondent,

vs.

Rhonda Kaye Brouwer,
Appellant.

Filed August 29, 2011
Affirmed in part, reversed in part, and remanded
Stauber, Judge

Stearns County District Court
File No. 73CR096939

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

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

STAUBER, Judge

On appeal from her conviction of first-degree arson of a dwelling, first-degree arson of a building with a flammable material, and insurance fraud over $35,000,

appellant challenges (1) the district court's acceptance of her stipulation to certain elements of the charged offenses without a jury trial waiver on the stipulated-to elements; (2) the sufficiency of the evidence; (3) the district court's imposition of multiple sentences; (4) the district court's denial of her request for a downward dispositional departure; and (5) the district court's order that she pay part of her public defender costs. Because we conclude that the district court's failure to secure a waiver of appellant's jury trial right on the stipulated-to elements was harmless error, the evidence was sufficient to support her convictions for arson and insurance fraud, and the district court did not abuse its discretion by denying her request for a downward dispositional departure and did not err by ordering her to pay a mandatory public defender copayment, we affirm in part. But because the district court improperly sentenced appellant on both arson offenses and the insurance fraud offense, we reverse in part and remand for resentencing.

FACTS

This case arises from a fire that occurred at appellant's home in St. Augusta on the morning of September 9, 2008. Appellant arose that morning around 6:30 a.m., helped her four children get ready for school and get on the school bus, and said goodbye to her husband when he left for work around 7:00 a.m. Other than the family's several dogs and cats, appellant was alone in the home.

Appellant testified that she went back to sleep but was awakened by the sound of her bedroom smoke detector. After checking the smoke detector and hearing the alarms from other smoke detectors in the house, she gathered her dogs and cats and left the home. She retreated to her backyard and sat on a picnic table where she noticed that her

attached garage was also on fire. Appellant sat on the picnic table and watched the fire for five to ten minutes before Kurt Helgeson, a passerby, found her in the backyard and assisted her in moving her animals to a vacant lot east of the home. Helgeson, a volunteer firefighter, had been driving near the area, saw the smoke, and called 911 at approximately 8:27 a.m. He found appellant in her backyard sitting on the picnic table, ascertained that no one was in the house, and advised appellant to move out of the backyard. A neighbor from across the street also noticed the fire and called 911 at approximately 8:28 a.m. Appellant did not call 911 or notify anyone.

Firefighters arrived on the scene at approximately 8:44 a.m. and began extinguishing the fire. The attached garage was "pretty much gone already" when they arrived. However, the firefighters discovered that there was also fire in an unattached garage on the property, as well as in the home's lower-level living room.

Stearns County Deputy Shirley Zwack arrived on the scene shortly after the firefighters and spoke with appellant. Deputy Zwack's suspicions were aroused when appellant made a comment to her, "something to the effect that, you know, someone must really not like her to do this to her." After discovering the additional fire in the unattached garage, Deputy Zwack contacted the fire marshal and a detective from the Sheriff's Department.

Deputy Fire Marshal John Steinbach investigated the scene and determined that there were four separate origins of fire: (1) the attached garage; (2) the lower-level living room of the home; (3) a woodpile adjacent to the unattached garage; and (4) the second level of the unattached garage. Fire Marshal Steinbach testified that he eliminated all

potential accidental causes from these areas of origin, and also concluded that there was no "communication," or spreading, between any of the fires. Steinbach therefore concluded that the fires were set intentionally.

James Novak, a St. Paul Fire Department arson investigator, was hired by State Farm Insurance to perform an origin and cause investigation. Novak also concluded that there were four separate origins of the fire, and testified that the fires were separate and unconnected and did not communicate with one another. Novak also eliminated all accidental causes at the four fire locations.

Given the extensive damage to the attached garage, Novak was unable to give an opinion as to the cause of that fire. However, he testified that the other fires were started intentionally. Novak testified that the fire in the lower-level living room was started with an open flame on the fabric of the couch and/or with ignitable liquids in that area. He opined that the fire in the woodpile was started by someone with an open flame, lighting either the plastic tarp or the wood itself and/or an ignitable liquid in the area. Likewise, he believed that the fire in the second level of the unattached garage was started by someone with an open flame igniting combustible materials and/or ignitable liquids.

As part of Novak's investigation, samples were taken from the areas where the fires originated. These samples were tested by Crane Engineering and the findings were presented at trial by chemist Kerri Schnell. Schnell testified that a sample consisting of carpet, carpet pad, and fire debris taken from the lower-level living room indicated the presence of an oxygenated solvent. She testified that oxygenated solvents include household products such as fingernail polish remover, surface preparation solvents for

cleaning and painting, and fuel additives. Schnell also testified that a sample taken from the upstairs of the unattached garage tested positive for an ignitable liquid. This ignitable liquid was a petroleum distillate, which is found in items such as lighter fluid, charcoal starter, certain paint thinners, kerosene, diesel fuel, and some jet fuels. Finally, a soil and rock sample taken from around the unattached garage tested positive for gasoline.

Following the fire, appellant and her husband submitted a sworn proof of loss form to State Farm Insurance on December 20, 2008. The document was signed by appellant and her husband and claimed losses of $248,000 for the home and $149,558.67 for personal belongings. The document states that appellant believed the cause of the fire was accidental. State Farm denied the claims.

Appellant was charged with first-degree arson of a dwelling (Count I), first-degree arson of a building with flammable material (Count II), and insurance fraud over $35,000 (Count III). At trial, in addition to the evidence from the fire investigation, the state presented evidence of appellant's and her husband's financial problems. The family's mortgage had been in delinquency status since July 2007. As of February 2008, they were behind $14,367.33 on their mortgage payments and the outstanding principle of the mortgage was $149,209.75. Appellant had previously worked as a waitress and as a package handler in a warehouse, but had not worked outside the home for at least a year prior to the fire. Her husband worked full time as a driver for a delivery service. Prior to the fire, he earned a net income of $18,349.81 from January 2008 through the end of August 2008. He had $224.27 per month garnished from his paycheck for child support and $100 per month for an unpaid bill.

In June 2008, appellant and her husband were able to modify their mortgage and establish a new repayment schedule of $1,432.72 per month. However, they quickly got behind on their new payment schedule when they failed to make their July, August, and September payments. On September 4, 2008, appellant and her husband did make a payment of $1,108.37, and an additional payment of $600 was made on September 8, 2008. Appellant and her husband were also behind on numerous other bills. They owed $2,400 to Citibank, $4,600 to a family friend for a camper trailer, $116 to the City of St. Augusta, $623 to Stearns County Electric, $440 to Sprint, $225 to Verizon, and $1,160 to Qwest. Just prior to the fire, appellant also wrote a $300 check on a closed account for the purchase of a cat.

The state produced evidence that appellant's homeowner's insurance was being cancelled effective October 7, 2008. Appellant and her husband were notified that their homeowner's insurance policy would not be renewed because appellant was operating a dog-breeding business on the premises. Their policy was effective through October 7 and, as of the date of the fire, they had not secured a new policy. Finally, the state also produced evidence obtained from the family's home computer showing that someone had visited numerous "payday loan" and other short-term loan websites in the days leading up to the fire. Someone had also visited a website called "evidenceeraser.com" which offered software used to delete items on a computer's hard drive.

Prior to the close of evidence, the parties entered a stipulation that the liquids found in the samples analyzed by chemist Schnell met the definition of "flammable

material" for purposes of Count II. The district court instructed the jury on this element of Count II as follows:

> Fourth, a flammable or combustible liquid was used to start or accelerate the fire. A "flammable liquid" means any liquid having a flash point below 100 degrees Fahrenheit, and having a vapor pressure not exceeding 40 pounds per square inch (absolute) at 100 degrees Fahrenheit, but does not include intoxicating liquor. "Combustible liquid" means a liquid having a flash point at or above 100 degrees Fahrenheit. The parties agree that the substance located in the upstairs of the unattached garage meets this definition.

Further, the parties stipulated that the value element of Count III, insurance fraud over $35,000, was met. Pursuant to the stipulation, the district court omitted any instruction on value in its instruction to the jury on Count III. Appellant agreed to both stipulations on the record; however, the district court did not elicit from appellant a waiver of her right to trial on the stipulated issues.

The jury found appellant guilty of all three counts. At sentencing, the district court heard arguments from counsel and testimony from witnesses, including a St. Augusta city administrator, one of the responding firefighters, appellant, three of her children, and the corrections agent who authored the Presentence Investigation (PSI) report. The district court indicated that it read and considered the PSI report, which recommended a downward dispositional departure.

The district court denied appellant's request for a downward dispositional departure, finding that there were no substantial and compelling reasons for a departure. Appellant received an executed sentence of 48-months imprisonment on Count I and 58-months imprisonment on Count II, to be served concurrently. The district court also

sentenced appellant to 17-months imprisonment on Count III, but stayed execution of that sentence. Appellant was also ordered to pay restitution of $215,169.36 and a copayment of $75 for public-defender services. This appeal follows.

D E C I S I O N

I.

"A criminal defendant has the constitutional right to a jury trial for any offense punishable by incarceration." *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010); Minn. R. Crim. P. 26.01, subd. 1(1)(a). "A defendant's right to a jury trial includes the right to be tried on each and every element of the charged offense." *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). "But a defendant may waive the right to a jury trial on any particular element by stipulation." *Fluker*, 781 N.W.2d at 400. Because stipulating to an element of the charged offense effectively waives the defendant's right to a jury trial on that particular element, the defendant must personally waive this right "orally or in writing after being advised by the court and having an opportunity to consult with counsel" in accordance with Minn. R. Crim. P. 26.01, subd. 1. *State v. Kuhlmann*, 780 N.W.2d 401, 404 (Minn. App. 2010), *review granted* (Minn. June 15, 2010).

It is clear from the record that the district court failed to secure an express oral or written waiver of appellant's right to a jury trial on the stipulated elements. The parties agree this was error. The issue here is whether it is a reversible error or simply subject to harmless-error review.

Appellant relies on *State v. Antrim*, 764 N.W.2d 67, 70 (Minn. App. 2009), to argue that the district court's failure to strictly comply with the waiver requirements of Minn. R. Civ. P. 26.01 requires automatic reversal. However, this case and others cited by appellant dealt with bench trials, stipulated-facts trials, and *Lothenbach* proceedings in which the defendant waives his or her right to a jury trial in its entirety. *See Antrim*, 764 N.W.2d at 69 (trial on stipulated facts); *State v. Bunce*, 669 N.W.2d 394, 398 (Minn. App. 2003) (trial on stipulated facts), *review denied* (Minn. Dec. 16, 2003); *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002) (bench trial), *review denied* (Minn. June 18, 2002). In other cases where a defendant has only stipulated to certain elements of a charged offense and has otherwise received a full jury trial, this court has applied harmless-error analysis. *See Fluker*, 781 N.W.2d at 403 (stipulation to two elements of the charge of failure to register as predatory offender); *State v. Hinton*, 702 N.W.2d 278, 281–82 (Minn. App. 2005) (stipulation to two prior domestic violence convictions as elements of felony violation of order for protection charge), *review denied* (Minn. Oct. 26, 2005); *Wright*, 679 N.W.2d at 190–01 (stipulation to one element of the charge of first-degree criminal sexual conduct).

In *Fluker*, this court held that "[t]he absence of a defendant's personal waiver of his right to a jury trial when stipulating to elements of an offense is error that may be subject to harmless-error analysis." 781 N.W.2d at 399. The *Fluker* court concluded that a district court's failure to a elicit a defendant's jury-trial waiver with regard to stipulated elements was not a "structural error" requiring automatic reversal, but rather was a "trial error" subject to harmless-error review. *Id.* at 401–03. In *Kuhlmann*, released just after

Fluker, this court reached a similar conclusion, holding that "plain-error review" applies where a defendant stipulates to elements of a crime but does not waive the right to a jury trial on those elements. 780 N.W.2d at 402. The court stated that there are "deeply significant differences between the rights given up by foregoing a jury and agreeing to a bench trial or stipulated-facts trial and the rights given up when exercising the right to a jury trial and stipulating only to an offense element." *Id.* at 405–06. Because the defendant in *Kuhlmann*, like the appellant here, only stipulated to an element of the charged offense, the court recognized that he was still able to "compel witnesses to testify on [his] behalf, cross-examine the state's witnesses, challenge the state's other evidence, and argue the case to the jury." *Id.* at 406.

Accordingly, we follow the settled law of *Fluker* and conclude that the district court's error is subject to harmless-error analysis. Under this test, "[a] constitutional error will be found prejudicial if there is a reasonable possibility that the error complained of might have contributed to the conviction." *Wright*, 679 N.W.2d at 191 (quotation omitted). The state bears the burden of establishing that the error was harmless beyond a reasonable doubt. *Id.* "If, after reviewing the basis on which the jury rested its verdict, we conclude that the verdict was surely unattributable to the error, the error is harmless beyond a reasonable doubt." *Id.* (quotation omitted).

Appellant's first stipulation was that the liquids found in the upstairs of the unattached garage and the downstairs of the house would meet the definition of "flammable or combustible liquid" for purposes of Count II. Appellant did not stipulate that she used the flammable or combustible liquid to start the fire, only that it met the

definition of flammable or combustible liquid under Minn. Stat. § 609.561, subd. 3(b) (2008). Schnell testified during trial that the liquid found where the fire originated in the unattached garage was a petroleum distillate, commonly found in items such as lighter fluid, charcoal starter, certain paint thinners, kerosene, and diesel fuel. She testified that a petroleum distillate is a flammable liquid. Appellant did not offer evidence to rebut this opinion and did not otherwise challenge the testimony. Accordingly, the district court's error in failing to secure appellant's waiver of her jury trial right on this element did not contribute to appellant's conviction.

Appellant's second stipulation was to the value element of Count III, insurance fraud over $35,000. The state presented evidence that appellant submitted a claim to State Farm claiming losses of $248,000 for the home and $149,558.67 for personal belongings. The state also offered the sworn proof of loss form as an exhibit. The amount of the claim was uncontested; appellant's defense was that she did not commit insurance fraud because she did not set the fire. Thus, the jury's guilty verdict was unattributable to the district court's error in failing to instruct the jury on the value element of the offense.

Although the district court erred by accepting appellant's stipulation to the elements in Counts II and III without first securing appellant's waiver of her jury-trial right, we conclude that the jury verdict was surely unattributable to those errors. Thus, the errors were harmless and are not a basis for relief.

II.

In considering a claim of insufficient evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). A reviewing court must assume 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). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). This court 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. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

Appellant contends that the state presented only circumstantial evidence that she committed arson (and consequently, insurance fraud), and that this evidence is insufficient to support the jury's verdict. The standard for upholding a criminal conviction based on circumstantial evidence is as follows: [C]ircumstantial evidence in a criminal case is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt. *State v. Morgan*, 290 Minn. 558, 561, 188 N.W.2d 917, 919 (1971). The determination of the credibility of witnesses and the weight of their testimony is exclusively within the province of the jury.

State v. McDonald, 394 N.W.2d 572, 576 (Minn. App. 1986), *review denied* (Minn. Nov. 26, 1986).

The state presented evidence that appellant was the only person in the home at the time of the fire. After the fire was started, appellant did not attempt to alert anyone; rather, she sat in her backyard and watched her home burn. The state's expert witnesses testified that there were four separate origins of fire; none of these fires communicated with one another; and accidental causes had been ruled out at all four points of origin. The state also presented evidence of accelerants found at three of the origin points. This circumstantial evidence establishes that appellant had the means and opportunity to start the fires. The state also presented extensive evidence of appellant's financial troubles, thus establishing motive. Appellant's homeowner's insurance policy was set to expire within the month, she was delinquent on the mortgage payments, and she had many other debts.

Appellant contends that there is insufficient evidence to support her convictions because she presented evidence that "implicates the Ford Explorer as a cause of the fire." More than a year after the fire, appellant's husband received a recall notice for their family's Ford Explorer, stating:

> Ford cannot be confident that over many years in service, a speed control deactivation switch installed on your vehicle will not leak brake fluid, posing the risk of a fire. This condition may occur either when the vehicle is parked or when it is being operated.
>
> . . . .

> Until you have recall service performed, park your vehicle outdoors away from structures to prevent a potential fire from spreading.

The family's Ford Explorer was parked inside the attached garage, one of the fire origin points. But the state's witnesses testified that there were four separate origins of the fire and that all accidental causes were ruled out. Both Deputy Fire Marshal Steinbach and arson investigator Novak testified that the Ford Explorer was not a cause of the fire, primarily due to the fact that there were three other origin points in addition to the attached garage. Both witnesses testified that there was no communication between the four fires, so even if there was an accidental fire in the attached garage, it could not explain the fires in the house and unattached garage.

Viewing the evidence in a light most favorable to the jury's verdict, and assuming the jury believed no contrary evidence, the jury could reasonably conclude that appellant was guilty of the arson and insurance fraud charges. Thus, the evidence was sufficient to support appellant's convictions.

III.

When facts are not in dispute, the decision whether multiple offenses are part of a single behavioral incident presents a question of law that is reviewed de novo. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). Minn. Stat. § 609.035, subd. 1 (2008), provides that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." This prohibition against multiple sentencing applies to concurrent sentences. *State v. Hagen*, 275 N.W.2d 49, 51 (Minn. 1979).

Appellant argues, and the state concedes, that her 58-month sentence on Count II and 17-month sentence on Count III must be reversed and vacated because both offenses were part of the same behavioral incident as Count I. We agree that the district court improperly sentenced appellant on Counts II and III, and therefore reverse her sentences on Counts II and III and remand for resentencing on Count I.

IV.

Whether to depart from the sentencing guidelines rests within the district court's discretion and the district court will not be reversed absent an abuse of that discretion. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). The district court must order the presumptive sentence "unless substantial and compelling circumstances" exist to justify a departure. *State v. Pegal*, 795 N.W.2d 251, 253 (Minn. App. 2011); *see also* Minn. Sent. Guidelines II.D (2008) (stating that court has discretion to depart from presumptive sentence only when "substantial and compelling circumstances" are present). Only in a "rare case" will a reviewing court reverse the imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

The sentencing hearing in this case was contentious. The PSI report recommended a downward dispositional departure of 365 days in county jail and supervised probation. In support of this recommendation, the agent stated that appellant was amenable to probation, would be a good candidate for community supervision, and that such a sentence would allow appellant to seek employment sooner and begin paying back restitution. The agent also noted that appellant received a "low risk" score on the Level of Service Inventory-Revised test. The prosecutor strongly disagreed with the

agent's recommendation, stating in no uncertain terms that the recommendation was "a joke."

In denying appellant's request for a downward dispositional departure, the district court found that appellant does not accept responsibility for her actions and shows no remorse. The district court also found that the crime was very serious, that there was no evidence that appellant acted under coercion, force, or lack of capacity, and that appellant's actions endangered the lives of the firefighters. The district court found that the only factor weighing in favor of departure was allowing appellant to make restitution, but also noted that appellant's ability to do so is "questionable at best."

Appellant argues that the district court erred in its sentencing by failing to analyze all of the *Trog* factors. Appellant contends that "it is readily apparent that appellant should have been granted a downward dispositional departure, based on the *Trog* factors," and that the district court's failure to analyze these factors constitutes reversible error. In *State v. Trog*, the supreme court stated that "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family" are all factors that are relevant to a determination whether a dispositional departure is justified. 323 N.W.2d 28, 31 (Minn. 1982). But *Trog*, unlike this case, involved the district court's exercise of discretion in *granting* a downward dispositional departure. *Id.* This court recently rejected the same argument in another case, stating: "Appellant accurately asserts that the district court did not discuss all of the *Trog* factors before it imposed the presumptive sentence. But there is no requirement that the district court must do so." *Pegel*, 795 N.W.2d at 254 (quotations and citations omitted). The

Pegel court also noted that "the mere fact that a mitigating factor is present in a particular case does not obligate the court to place defendant on probation or impose a shorter term than the presumptive term." *Id.* at 253–54 (quotation omitted).

The district court therefore did not err by failing to discuss all of the *Trog* factors. Further, while there were mitigating factors here to justify a downward departure, the district court was not obligated to depart. This is not the "rare case" in which the imposition of a presumptive sentence must be reversed. The record reflects that the district court considered the reasons for departure set forth in the PSI as well as the prosecutor's strenuous opposition to the PSI, and exercised its discretion in denying appellant's motion for a dispositional departure.

V.

In Minnesota, persons who are unable to afford counsel are entitled to have a public defender appointed. Minn. Stat. § 611.14 (2008); Minn. R. Crim P. 5.04, subd. 1. A district court has a duty to conduct a financial inquiry to determine the financial eligibility of a defendant for the appointment of a public defender. Minn. R. Crim. P. 5.04, subd. 4. "Upon disposition of the case, an individual who has received public defender services *shall* pay to the court a $75 co-payment for representation provided by a public defender, unless the co-payment is, or has been, waived by the court." Minn. Stat. § 611.17(c) (Supp. 2009) (emphasis added). The Minnesota Statutes also provide that "[i]f the court determines that the defendant is able to make partial payment [for counsel], the court shall direct the partial payments to the state general fund." Minn. Stat. § 611.20, subd. 2 (2008).

Appellant argues that the district court erred by ordering her to pay a $75 public defender copayment without determining whether she had the financial ability to make the copayment. We disagree. Under Minn. Stat. § 611.17(c), a defendant is required to pay $75 for public-defender services unless waived by the district court. *See* Minn. Stat. § 611.17(c); *see also* Minn. Stat. § 645.44, subd. 16 (2010) ("'Shall' is mandatory."). The statute does not require specific findings regarding the defendant's financial circumstances. *See* Minn. Stat. § 611.17(c). Under Minn. Stat. § 611.20, which is entitled "Subsequent Ability to Pay Counsel," a partial payment *in addition* to the mandatory $75 public defender copayment may be imposed if the district court determines that the defendant is financially able to make a partial payment for public defender services. Minn. Stat. § 611.20, subd. 2. But the district court did not order partial payment under section 611.20, subdivision 2, and therefore was not required to make specific findings with respect to appellant's financial circumstances. Under Minn. Stat. § 611.17(c), the district court properly ordered appellant to pay a mandatory $75 copayment for public defender services.

Affirmed in part, reversed in part, and remanded.