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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1650
A10-1651**

State of Minnesota,
Respondent,

vs.

Joseph Thomas Hawkinson,
Appellant.

**Filed June 20, 2011
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge**

Hennepin County District Court
File No. 27CR0947898

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Larkin, Judge; and Willis, Judge.*

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

UNPUBLISHED OPINION

STONEBURNER, Judge

In this consolidated appeal, appellant argues that (1) the evidence is insufficient to support his conviction of first-degree burglary (A10-1651) and (2) the district court erred by sentencing him for two offenses that were part of a single behavioral incident (A10-1650). Because the evidence is sufficient to support appellant's conviction of first-degree burglary, we affirm that conviction. Because the district court erred by sentencing appellant for second-degree assault and domestic assault by strangulation for the same behavioral incident, we reverse and remand for resentencing in accord with this opinion.

FACTS

Appellant Joseph Thomas Hawkinson assaulted his girlfriend, C.S., in September 2009. During the assault, he dragged her by the ankles into his basement, choked her until she momentarily lost consciousness, pushed her head into a concrete pillar, put a gun against the side of her head, and told her he was going to kill her. He eventually stopped assaulting her and threatened to kill himself. Hawkinson was charged with kidnapping, second-degree assault, and domestic assault by strangulation for this incident.

The next night, Hawkinson, having been told by C.S. that she did not want to see him, entered C.S.'s home without her consent. He encountered C.S.'s friend, C.D., who was spending the night there so that C.S. would not be alone in the house.

C.D. saw Hawkinson in the hallway outside of the bedroom where she had been sleeping. He came into the bedroom and told C.D. to be quiet. She saw him put

something into his pocket. They went into the kitchen, and C.D. asked Hawkinson what he had put in his pocket. Hawkinson showed her a gun magazine. C.D. asked him if he had a gun, and he told her that he was carrying a gun. C.D. persuaded him to leave the house. She then awakened C.S. They left the house and contacted C.S.'s brother, J.F., who said he would meet them at C.S.'s home.

When J.F. arrived at C.S.'s home, he saw Hawkinson's car near the house and called 911. While he was on the telephone, Hawkinson pulled into C.S.'s driveway and approached J.F. Police arrived within minutes and arrested Hawkinson. Police found a handgun containing a magazine with seven rounds and one round in the chamber tucked into Hawkinson's waistband. Officers discovered an additional eight-round magazine in one of Hawkinson's front pockets.

Hawkinson was charged with first-degree burglary, in violation of Minn. Stat. § 609.582, subd. 1(b) (2008) (entering a building without consent and with intent to commit a crime while possessing a dangerous weapon). Hawkinson was also charged in a separate complaint with kidnapping, in violation of Minn. Stat. § 609.25, subd. 1(3) (2008); second-degree assault, in violation of Minn. Stat. § 609.222, subd. 1 (2008); and domestic assault by strangulation, in violation of § 609.2247, subd. 2 (2008). The kidnapping and assault charges were consolidated with the burglary charge for trial.

Hawkinson waived his right to a jury trial. The district court found Hawkinson not guilty of kidnapping but guilty of second-degree assault, domestic assault by strangulation, and first-degree burglary. The district court sentenced Hawkinson to 69 months in prison for first-degree burglary and concurrent sentences of 36 months for

second-degree assault and a year and a day for domestic assault by strangulation. In this consolidated appeal, Hawkinson argues that the evidence is insufficient to support the burglary conviction because the state failed to prove that he entered C.S.'s home with a dangerous weapon. Hawkinson also argues that the district court erred by imposing separate sentences for second-degree assault and domestic assault by strangulation.

D E C I S I O N

I. The evidence is sufficient to support Hawkinson's conviction of first-degree burglary.

In considering a claim of insufficient evidence, the standard of review is the same whether the trial is by jury or by the court. *State v. Thomas*, 590 N.W.2d 755, 757 n.1 (Minn. 1999). Review is limited to a “painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient” for the district court to reach the verdict that it did. *Cf. State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989) (involving a jury trial). The reviewing court will not disturb the verdict if the district court, 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. *Cf. Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004) (involving a jury trial).

Minn. Stat. § 609.582, subd. 1(b), provides, in relevant part:

Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building . . . commits burglary in the first degree . . . if . . . the burglar possesses, when entering or at any time while in the building . . . a dangerous weapon

Minn. Stat. § 609.02, subd. 6 (2008), defines “dangerous weapon” as including “any firearm, whether loaded or unloaded.” Hawkinson asserts that the state’s only evidence that he possessed a dangerous weapon in C.S.’s home is C.D.’s testimony that Hawkinson told her that he had a gun. Hawkinson characterizes his statement as a confession and argues that, because Minn. Stat. § 634.03 (2008) provides that a defendant’s confession “shall not be sufficient to warrant conviction without evidence that the offense charged has been committed,” his confession is insufficient to support the conviction.

But we need not determine whether Hawkinson’s statement to C.D. that he was carrying a gun was a confession, requiring corroboration. *See State v. Heiges*, 779 N.W.2d 904, 911 (Minn. App. 2010) (concluding that statements made to friends or acquaintances before commencement of a criminal investigation are not confessions requiring corroboration under Minn. Stat. § 634.03), *review granted* (Minn. June 15, 2010). Hawkinson’s admission was corroborated by evidence that he had previously threatened C.S. with a gun and possessed a gun when he was arrested shortly after having left C.S.’s home. Because the evidence is sufficient to support the conviction of first-degree burglary, we affirm the conviction.

II. The district court erred by imposing separate sentences for two assaults that were committed in one behavioral incident.

As the state concedes, the district court erred by imposing separate sentences for second-degree assault and domestic assault by strangulation committed in a single incident. “Minnesota law generally prohibits a person from being punished twice for

conduct that is part of the same behavioral incident” *State v. Holmes*, 778 N.W.2d 336, 339 (Minn. 2010). “[I]f 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” Minn. Stat. § 609.035, subd. 1 (2008). “[S]ection 609.035 contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses.” *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted).

Hawkinson was convicted of second-degree assault, in violation of Minn. Stat. § 609.222, subd. 1 (2008), and domestic assault by strangulation, in violation of Minn. Stat. § 609.2247, subd. 2 (2008). Both offenses are felonies, but second-degree assault carries a lengthier sentence. *See* Minn. Stat. §§ 609.222, subd. 1 (authorizing a sentence of imprisonment for not more than seven years for second-degree assault, .2247, subd. 2 (authorizing a sentence of imprisonment for not more than three years for domestic assault by strangulation). We therefore reverse and remand to the district court to vacate the sentence imposed for assault by strangulation.

Affirmed in part, reversed in part, and remanded.