STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1269

State of Minnesota,
Respondent,

vs.

Joshua Allan Haberman,
Appellant.

Filed July 15, 2013
Affirmed
Stoneburner, Judge

Rice County District Court
File No. 66-CR-11-1258

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

G. Paul Beaumaster, Rice County Attorney, Terence Swihart, Assistant County Attorney, Faribault, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Stoneburner, Judge; and Connolly, Judge.

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

STONEBURNER, Judge

Appellant challenges his convictions of stalking and second-degree burglary, arguing that the evidence is insufficient to support his stalking conviction and, even if

there is sufficient evidence to support the stalking conviction, that conviction cannot satisfy the independent-crime element of second-degree burglary. Appellant also argues that the district court abused its discretion by denying his motion for a downward-dispositional sentencing departure. We affirm.

FACTS

Beginning in March 2007, appellant Joshua Allan Haberman and J.F. dated for approximately ten months, with a brief break approximately eight months into the relationship. The relationship ended in January 2008, shortly before the birth of their child. In early October 2010, Haberman and J.F. began dating again, and Haberman began staying nearly every day at J.F.'s apartment in Faribault. Haberman did not have a key to the apartment and was not on the lease.

On October 30, 2010, Haberman and J.F. began an argument that continued into the following afternoon, at which time J.F. told Haberman that the relationship was "done" and asked him to leave. Haberman replied, "Make me." J.F. pushed Haberman out of the door with a bag of his belongings that he had previously packed. As soon as Haberman was gone, J.F. called her cell phone provider and changed her cell phone number. J.F. did not inform Haberman of her new cell phone number.

That evening—Halloween—J.F. took their child trick-or-treating in Owatonna. Before leaving her apartment, J.F. "double checked" that she had locked her door, "[b]ecause [she] didn't want [Haberman] to be able to come back." But at approximately 7:00 pm, Haberman tore a living-room window screen, pried open a double-paned window, and broke a single-pane storm window to enter J.F.'s apartment. An across-the-

hall neighbor, who heard the sound of smashing glass, opened her door just as Haberman opened J.F.'s door. Haberman was holding his bleeding hand and carrying a box. He told the neighbor that everything was okay, he had gotten "locked out and [he] had to break the window to get into the apartment to get [his] things."

J.F.'s neighbor immediately reported the incident to the apartment manager. The manager, who knew that there was no male on J.F.'s lease, went to investigate. Haberman answered J.F.'s door and informed the manager that he was "at home waiting to talk to [J.F.]" When the manager saw the broken window and Haberman's bleeding, bandaged hand, Haberman "said that the [child] . . . had broken [the window] a couple days previous[ly]. And he was trying to clean it up and that is how he had cut himself." The manager said that he needed to speak with J.F. Haberman replied that J.F. had just changed her phone number, and then showed the manager a number, in a notebook on the kitchen table, that Haberman believed to be J.F.'s new phone number. The manager "told [Haberman] to stay put" and then called the police from the hallway outside of J.F.'s apartment. While the manager was making the call, Haberman left the building.

The police arrived at the apartment and the manager made contact with J.F., using the number Haberman had shown to him. J.F. returned to her apartment.

After the police left but while the manager was still there, Haberman, who had sent text messages to J.F. using her new phone number before the manager reached her, returned to the apartment. Haberman admitted to the manager that he had broken the window because "he needed to talk to [J.F.] and he wanted to get into the apartment." Haberman stated that "he knew what he did was wrong." The manager called the police

again, and officers returned to the apartment but left without arresting or citing Haberman.

Haberman then left J.F.'s apartment. But he began texting J.F. from outside the apartment building. Around midnight, J.F. and their child accompanied Haberman while he visited a friend at a hotel. During the visit, both Haberman and J.F. mentioned to the friend that J.F. was going to leave Haberman.

In November 2010, J.F. applied for a no-contact restraining order. On December 1, 2010, J.F. moved to a second-floor apartment, because "[i]t felt safer."

Months later, the county attorney's office contacted J.F. regarding the October break-in. On May 3, 2011, the state charged Haberman with one count of second-degree burglary, in violation of Minn. Stat. § 609.582, subd. 2(a)(1) (2010), and one count of stalking, in violation of Minn. Stat. § 609.749, subds. 2(3), 4(b) (2010).

A jury found Haberman guilty of stalking, second-degree burglary, and the lesser-included offense of trespass. The district court denied Haberman's motion for a new trial and denied Haberman's subsequent motion for downward dispositional and durational sentencing departures. The district court sentenced Haberman to concurrent guidelines sentences of 51 months in prison for second-degree burglary and stalking. This appeal followed.

D E C I S I O N

I. Sufficient evidence to support conviction of stalking

Haberman argues that because the evidence fails to establish that he knew or had reason to know that his conduct would cause J.F. to feel frightened, it is insufficient to

support his conviction of stalking. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis of the record to determine whether the fact-finder reasonably could find the defendant guilty of the offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the fact-finder believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). We will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

When a conviction is supported in whole or in part by circumstantial evidence, a heightened scrutiny is warranted on review. *State v. Al-Naseer*, 788 N.W.2d 469, 473-74 (Minn. 2010). We first identify the circumstances proved, deferring to the fact-finder's "acceptance of the proof of these circumstances and rejection of evidence in the record that conflict[s] with the circumstances proved by the State." *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (quotation omitted). We then examine all reasonable inferences that may be drawn from the circumstances proved, without any deference to the fact-finder's choice between reasonable inferences. *Id.* at 329-30. To sustain a conviction based on circumstantial evidence, all reasonable inferences must be "consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 330. The "[c]ircumstantial evidence must form a complete chain that, in view of

the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

Under Minnesota law, a person stalks another if the person engages in conduct which the person "knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim." Minn. Stat. § 609.749, subd. 1 (2010). If the stalking conduct involves returning to the property of another "without claim of right to the property or consent of one with authority to consent," the person is guilty of a crime. *Id.*, subd. 2(3). Because proof of the intent element of the crime of stalking relies on circumstantial evidence, we apply the two-part standard of review of such evidence outlined above.

Viewing the record in the light most favorable to the verdict, the circumstances proved in this case are the following: (1) Haberman's relationship with J.F., including that they have a child in common and that Haberman stayed with J.F. and their child almost daily in October 2010; (2) Haberman was not listed on J.F.'s lease and did not have a key to her apartment; (3) on October 31, J.F. told Haberman that the relationship was "done," asked him to leave, and had to push him out of the door; (4) J.F. immediately changed her cell phone number and, before leaving with the child that evening, secured her apartment against entry by Haberman; (5) Haberman broke into J.F.'s apartment, found her new cell phone number in a notebook on her kitchen table, used this number to send J.F. text messages, and provided this number to her apartment

manager; (6) Haberman lied to the manager about his entry into the apartment; (7) when J.F. learned that Haberman had broken into her apartment, she was "[s]hocked, scared;" (8) approximately two weeks after the incident, J.F. applied for a no-contact restraining order; (9) one month after the incident, J.F. and the child moved to a second-floor apartment, because "[i]t felt safer;" and (10) J.F. asked the county attorney to pursue charges relating to the break-in.

Haberman agrees that the circumstances show "poor judgment" but argues that, because he and J.F. have broken up and gotten back together before, it is a reasonable inference from the circumstances that Haberman would not know that his breaking into J.F.'s apartment would cause her fear. We disagree. Given J.F.'s direct evidence that she did feel frightened and the evidence demonstrating her intent to sever telephone contact and keep Haberman out of her apartment, the only reasonable inferences that may be drawn from the circumstances proved establish that Haberman had reason to know that breaking into J.F.'s apartment and obtaining and using her new phone number would cause J.F. to feel unsafe and frightened. The evidence is sufficient to support Haberman's conviction of stalking.

II. Independent-crime element of second-degree burglary

Haberman argues in the alternative that, even if the evidence supports the stalking conviction, when a person commits the crime of stalking by "return[ing] to the property of another without . . . claim of right" to the property or consent of one with authority to consent, the crime is not sufficient to satisfy the independent-crime element of second-degree burglary.

The interpretation of a statute presents a question of law, which we review de novo. *Halvorson v. Cnty. of Anoka*, 780 N.W.2d 385, 389 (Minn. App. 2010). When interpreting a statute, we must "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2012). In doing so, we first determine whether the statute's language is ambiguous. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). A statute's language is ambiguous only when it is subject to more than one reasonable interpretation. *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). We construe words and phrases according to their plain and ordinary meaning. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980); *see also* Minn. Stat. § 645.08(1) (2012) (providing that words are construed according to their common usage). When the legislature's intent is clearly discernible from a statute's plain and unambiguous language, we interpret the language according to its plain meaning without resorting to other principles of statutory construction. *State v. Anderson*, 683 N.W.2d 818, 821 (Minn. 2004).

If a person enters a dwelling without consent and with intent to commit a crime, or enters a dwelling without consent and commits a crime while in the dwelling, the person is guilty of second-degree burglary. Minn. Stat. § 609.582, subd. 2(a)(1). "[T]he offense of second-degree burglary requires proof of an independent crime or intent to commit an independent crime upon entering a dwelling without consent." *Anderson v. State*, 806 N.W.2d 856, 859 (Minn. App. 2011), *review denied* (Minn. Jan. 17, 2012). "[C]ase law interpreting the second-degree burglary statute makes clear that the underlying independent crime cannot be one completely encompassed by the unconsented entry,

which is the essential feature of the crime of burglary." *Id.* at 860 (quotation omitted). Both "the crime of trespass, which is unconsented entry on property," and "violation of an order for protection (OFP) that is accomplished solely by making an unauthorized entry onto property" are wholly encompassed by the burglary statute and "may not be used as underlying independent crimes for a burglary charge." *Id.* (citing *State v. Colvin*, 645 N.W.2d 449, 454 (Minn. 2002); *State v. Larson*, 358 N.W.2d 668, 670 (Minn. 1984)). Haberman argues that the type of stalking he was convicted of is likewise wholly encompassed by the burglary statute. We disagree.

Minn. Stat. § 609.749, subd. 2(3), criminalizes "return[ing] to the property of another . . . without claim of right to the property or consent of one with authority to consent" when the actor knows or has reason to know that this conduct would "cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, *and* causes this reaction on the part of the victim regardless of the relationship between the actor and victim." Minn. Stat. § 609.749, subds. 1, 2(3) (emphasis added). Plainly, the stalking crime for which Haberman was convicted is not characterized solely by unauthorized entry and therefore constitutes an underlying, independent crime that supports a second-degree burglary conviction. *See Anderson*, 806 N.W.2d at 860 (concluding that, when appellant attempted to flee a police officer by concealing her van inside the victim's garage and by hiding inside the victim's house, "the crime of fleeing a police officer in a motor vehicle provided an underlying independent crime for purposes of proving a second-degree burglary offense").

Haberman's argument that stalking in violation of Minn. Stat. § 609.749, subd. 2(3), does not satisfy the independent-crime element of second-degree burglary is without merit.

III. Presumptive sentence

Haberman argues that the district court abused its discretion by denying his motion for downward dispositional departures and imposing the presumptive guideline sentences. We review a district court's sentencing decision for an abuse of discretion, and may not interfere "as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985); *see also State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). Only in a "rare case" with "compelling circumstances" will we modify a presumptive sentence. *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010) (quotations omitted), *review denied* (Minn. July 20, 2010).

The record demonstrates that the district court considered circumstances for and against departure before it sentenced Haberman. *See State v. Pegel*, 795 N.W.2d 251, 254-55 (Minn. App. 2011). At sentencing, the district court told Haberman:

> [I]t is hard for me to look past the [ten] prior felonies, including multiple serious assaults, violations of restraining order, multiple misdemeanor or gross misdemeanor harassments.
>
> It is hard for me to look past your statement during the PSI . . . [to] the agent . . . that ["]it is all bullshit. After my appeal, I'll be found not guilty. At sentencing I think I should get no time because I didn't do anything, and my appeal will prove that.["]
>
> So you haven't accepted responsibility despite some of the things I've heard today. . . .

> I'm not personally satisfied that sending you to Teen Challenge before you've accepted responsibility is going to be a productive thing. . . .
>
> . . . .
>
> The other thing that causes me not to want to depart is your claim that the victim has only been telling half-truths. And, again, that is further evidence that you just are not accepting responsibility for your own conduct. Even though what happened in this incident is, frankly, it is consistent with your past conduct.

Haberman has not persuaded us that the district court abused its discretion in sentencing. This is not a rare case with compelling circumstances that causes us to modify the presumptive sentences imposed by the district court.

IV. Supplemental pro se brief

Haberman's pro se supplemental brief discusses some facts but does not raise any issues for appeal.

Affirmed.