STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0266

State of Minnesota,
Respondent,

vs.

Lester Ray Wiley,
Appellant.

Filed December 10, 2012
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-11-23635

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, Brian Wambach, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges his sentence for receiving stolen property, arguing that it is barred under Minn. Stat. § 609.035 (2010), which generally prohibits multiple sentences

for offenses that arose out of a single behavioral incident. Because multiple sentences are allowed under Minn. Stat. § 609.585 (2010), the burglary exception to section 609.035, we affirm.

FACTS

Respondent State of Minnesota charged appellant Lester Ray Wiley with one count of third-degree burglary. The probable cause portion of the complaint states:

> On or about July 11, 2011, Minneapolis Police Officers were dispatched to Powerlift, Inc., . . . in response to a reported burglary that had occurred sometime during the preceding two days. C.J.L., the owner of the business, reported that numerous items had been stolen, including a Kodak Easyshare camera, a Thermal Dynamics plasma cutter, a Toro lawn mower, an auto mechanic's creeper and a floor jack, among other items. Officers observed pry marks on the door to the business.
>
> After an arrest for an unrelated matter, LESTER RAY WILEY the defendant, made a post-*Miranda* statement in which he admitted to breaking into Powerlift, Inc., and stealing a floor jack, a plasma cutter torch tool, and a camera, among additional items. Some of the property stolen by the defendant from Powerlift, Inc., including the floor jack, the Toro lawn mower, and the auto creeper was recovered during the execution of a search warrant at [Wiley's] residence.

Later, the state added one count of felony receiving stolen property. The probable cause portion of the amended complaint states:

> Complainant . . . reports that Golden Valley Police Officers drew up a search Warrant for [Wiley's residence]. While that was occurring, Detective Laura Gould from the Golden Valley Police Department interviewed [Wiley]. [Wiley] was informed of his Constitutional rights per *Miranda* which he stated he understood and was willing to waive. [Wiley] admitted that he had committed a large number of business burglaries during the preceding few

> months. [Wiley] admitted that there were numerous pieces of stolen property at [his residence]. [Wiley] admitted that he had stolen this property and that he knew it was stolen when he was possessing it.
>
> Complainant . . . reports that a Search Warrant was executed at [Wiley's residence]. Law enforcement recovered numerous stolen items which included generators, floor jacks, lawn mowers, vending machines, computers, digital projectors and other tools and electronics. The total value of the items recovered was $14,960.00 dollars. Golden Valley Police confirmed that the items recovered had been taken in numerous burglaries occurring in a large number of cities.

Wiley pleaded guilty to both offenses. The district court accepted the guilty pleas, entered judgments of conviction, and sentenced Wiley to serve concurrent, 48-month prison terms. This appeal follows, in which Wiley challenges his sentence.

D E C I S I O N

Wiley argues that his convictions for burglary and receiving stolen property arose from a single behavioral incident and that the district court therefore erred in imposing a separate sentence for each offense.[1] Minnesota Statutes section 609.035 provides, in relevant part:

> Except as provided in subdivisions 2, 3, 4, and 5, and in sections 609.251, 609.585, 609.21, subdivision 1b, 609.2691, 609.486, 609.494, and 609.856, 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 and a conviction or acquittal of any one of them is a bar to prosecution for any other of them.

[1] It does not appear that this issue was raised and determined in the district court. However, the statutory protection against multiple sentencing under section 609.035 "is *not* forfeited by failing to raise the issue in the district court." *State v. Osborne*, 715 N.W.2d 436, 441 n.3 (Minn. 2006).

Minn. Stat. § 609.035, subd. 1.

Accordingly, "[a] defendant may not be punished twice for the same conduct. Multiple sentences, including concurrent sentences, are barred if the statute applies." *State v. Edwards*, 380 N.W.2d 503, 511 (Minn. App. 1986) (citation omitted). "[T]he prohibition against multiple punishment contained in Minn. Stat. § 609.035 applies only if the multiple offenses arose out of a single behavioral incident." *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995).

Wiley's argument regarding application of section 609.035 is three-fold. First, he argues that he pleaded guilty to possession of stolen property from the Powerlift burglary—and not to possession of stolen property taken from any other location or belonging to any other owner. Second, Wiley contends that because he "pleaded guilty to possessing the same stolen property that he took possession of during the burglary of the Powerlift building," the burglary and receiving-stolen-property "crimes constituted a single behavioral incident." Lastly, Wiley argues that because his crimes arose from a single behavioral incident, "section 609.035 prevents the district court from imposing sentences for both crimes."

We need not determine whether Wiley's offenses arose from a single behavioral incident because even if they did, multiple sentences nevertheless are authorized under Minn. Stat. § 609.585, the burglary exception to section 609.035. *See* Minn. Stat. § 609.035, subd. 1 (prohibiting multiple punishments "[e]xcept as provided in . . . section[] . . . 609.585"); *State v. Alexander*, 290 N.W.2d 745, 748-50 (Minn. 1980)

(concluding that "[a] burglary and the crime committed after entering the building are not the same offense" and that section 609.035 "clearly permits multiple prosecutions and punishments for these offenses"). Under the burglary exception, "a prosecution for or conviction of the crime of burglary is not a bar to conviction of or punishment for any other crime committed on entering or while in the building entered." Minn. Stat. § 609.585.

Wiley recognizes that section 609.585 provides an exception to the statutory bar on multiple punishments, but he argues that receiving stolen property is not "any other crime" under the statute. In *State v. Holmes*, the Minnesota Supreme Court interpreted section 609.585 and held that "[t]he phrase 'any other crime' means a crime that requires proof of different statutory elements than the crime of burglary." 778 N.W.2d 336, 341 (Minn. 2010). "Thus, the court must examine whether the crimes . . . require proof of different statutory elements." *Id.* Receiving stolen property and third-degree burglary require proof of different elements: unlike receiving stolen property, third-degree burglary does not require receipt, possession, transfer, or any other dominion over stolen property. *Compare* Minn. Stat. § 609.53, subd. 1 (2010) ("Except as otherwise provided in section 609.526, any person who receives, possesses, transfers, buys or conceals any stolen property or property obtained by robbery, knowing or having reason to know the property was stolen or obtained by robbery, may be sentenced in accordance with the provisions of section 609.52, subdivision 3.") *with* Minn. Stat. § 609.582, subd. 3 (2010) ("Whoever enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building, or enters a building without consent

and steals or commits a felony or gross misdemeanor while in the building, either directly or as an accomplice, commits burglary in the third degree . . . .").

Even though Wiley's crimes required proof of different elements, he contends that section 609.585 is inapplicable. He notes that one of the statutory elements of third-degree burglary is commission of "any felony while inside the [burglarized] building." He then argues that because he "committed the felony offense of possessing stolen property while within the Powerlift building[,] . . . possessing stolen property was an element of third-degree burglary and did not constitute 'any other offense' under section 609.585."

We disagree. The test under *Holmes* is not whether the other offense satisfies an element of burglary. *See Holmes*, 778 N.W.2d at 340-41 (rejecting argument that "third-degree assault is included in the crime of first-degree burglary with assault, and therefore is not 'any other crime' committed during the burglary under Minn. Stat. § 609.585"). The pertinent inquiry is whether the other offense requires proof of an element that is not included in the offense of burglary. *See id.* at 341 ("Because third-degree assault requires proof of different statutory elements than first-degree burglary with assault, it falls within the meaning of 'any other crime' under Minn. Stat. § 609.585."). And because receiving stolen property requires proof of different statutory elements than third-degree burglary, it constitutes "any other crime" under Minn. Stat. § 609.585. Thus, assuming, without deciding, that Wiley's burglary and receiving-stolen-property offenses arose from a

single behavioral incident, multiple sentences are permissible under section 609.585. We therefore affirm.

Affirmed.