STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2271

State of Minnesota,
Respondent,

vs.

Jason Paul Hirman,
Appellant.

Filed December 1, 2009
Reversed
Shumaker, Judge

Washington County District Court
File No. 82-K1-07-004162

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and,

Douglas Johnson, Washington County Attorney, John W. Fristik, Maura J. Shuttleworth, Assistant County Attorneys, Washington County Government Center, 14949 62nd Street North, P.O. Box 6, Stillwater, MN 55082 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

Appellant argues that his prosecution for burglary in Washington County violated double jeopardy because he had previously pleaded guilty to possessing stolen property from that burglary. We agree and reverse.

FACTS

On October 2, 2006, police responded to a call regarding an abandoned vehicle in the woods in Dakota County. After identifying the abandoned vehicle, the officer noticed another vehicle and two white trailers farther back in a clearing. The officer observed numerous construction items strewn around the two trailers and a white tent. Appellant Jason Paul Hirman came out of one of the trailers and gave officers permission to search the premises. Among other things, officers discovered that one of the trailers was stolen, and suspected that numerous tools and brand new clothing from JCPenny found inside the white tent were also stolen.

Hirman was arrested and charged on October 4, 2006, with receiving stolen property in Dakota County. The complaint mentioned the discovery of the stolen trailer, and "numerous items including approximately 25 dress shirts from JCPenny with the tags attached, 11 new suit jackets with pants, all in a plastic carry bag, and 14 pairs of dress pants, all with JCPenny tags."

Sometime between September 29 and October 4, 2006, W.B.'s new home in Washington County was burglarized. Among the many items believed to be stolen were two vehicles, a number of tools, a boat, and clothing from JCPenny. A cigarette butt

taken from the scene was tested and contained Hirman's DNA profile. On June 21, 2007, Hirman was charged with third-degree burglary in Washington County.

On January 28, 2008, Hirman pleaded guilty to the receiving stolen property charge in Dakota County in accordance with a plea agreement.

On July 11, 2008, Hirman sought dismissal of the Washington County burglary charge at an omnibus hearing, arguing that he could not be prosecuted for the burglary because he had already pleaded guilty in Dakota County to the receipt of the property that he had stolen from that burglary. Hirman acknowledged that stolen property from other owners and thefts was discovered during the Dakota County search, but maintained that he "wasn't charged with those other items," and was only charged with the receipt of the stolen property from the burglary. The state stipulated that the clothing listed in the Dakota County complaint came from the Washington County burglary, but argued that the prosecution could move forward.

After taking the matter under advisement, the district court concluded that the two crimes occurred at different times, in different places, and involved separate and distinct property. It reasoned that, according to the Dakota County complaint, the property burglarized from Washington County was located "inside the tent" in Dakota County, and because Hirman only admitted to possessing the stolen property inside the "trailers" during his plea colloquy, Hirman did not plead guilty to the possession of the property from the Washington County burglary.

Hirman agreed to try his case before the court upon stipulated facts. The district court found him guilty as charged, and he appealed.

D E C I S I O N

We note at the outset that the parties dispute the appropriate standard of review. Hirman argues that this court engages in a *de novo* review of a district court's determination of whether offenses stem from a single behavioral incident, while respondent state cites the clearly-erroneous standard. Generally, whether offenses are part of the same behavioral incident is a fact determination reviewed for clear error. *State v. Butterfield*, 555 N.W.2d 526, 530 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996). But where the facts are undisputed, the determination is a question of law subject to de novo review. *See State v. Reimer*, 625 N.W.2d 175, 176 (Minn. App. 2001) (reviewing district court's separate-incident determination de novo where the facts were undisputed). In this case, the relevant facts are undisputed, and therefore our review is de novo.

Additionally, Hirman claims that the state is precluded from arguing that the stolen property discovered in Dakota County was from different owners or from thefts other than the property stolen during the Washington County burglary because the state did not raise the issue below. The record reflects otherwise. When Hirman challenged his prosecution for burglary, the state conceded that some of the property discovered in Dakota County was from the Washington County burglary, but maintained that

> a mother-lode of stolen property, some of which came from the burglary in Washington County, does not therefore mean that he cannot later be prosecuted for the burglary in Washington County . . . . Both offenses involved different elements of proof, different intents . . . [the] stolen property [found in Dakota County] . . . came from here, there and everywhere.

The state is not barred from arguing that the property discovered in Dakota County was received from different locations and different owners, and that therefore the convictions did not arise out of a single behavioral incident.

Minnesota's double-jeopardy statute bars multiple punishments and prosecutions for offenses arising from a single behavioral incident:

> [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 and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts.

Minn. Stat. § 609.035, subd. 1 (2006); *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). "Whether multiple offenses arose out of a single behavioral incident depends on the facts and circumstances of the particular case." *Id.* The state bears the burden of proving by a preponderance of the evidence that the conduct underlying the offenses did not occur as part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

In a stolen property case, the single behavioral incident analysis centers upon the question of whether the defendant was convicted of possessing stolen property at a single time from the same or distinct thefts and owners. *See State v. Wybierala*, 305 Minn. 455, 457-58, 235 N.W.2d 197, 199 (Minn. 1975) (discussing single behavioral incident analysis in context of receiving stolen property crimes). "While it may happen that one should not be convicted for stealing and concealing the same item . . . it is acceptable to charge someone with either or both offenses and convict only one of them." *State v.*

Lawrence, 312 N.W.2d 251, 252 (Minn. 1981). On the other hand, a defendant's possession of stolen property from *different* owners at a single time does not preclude multiple prosecutions for the possession of that property. *Wybierala*, 305 Minn. at 458, 235 N.W.2d at 199. Thus, the threshold question for our review is whether Hirman pleaded guilty to receiving stolen property from the Washington County burglary, or to property from a different theft or owner.

The only property specifically delineated in the Dakota County complaint was the JCPenny clothing and the stolen trailer. In addition to the complaint, we have only the factual basis for Hirman's plea to rely upon in ascertaining the specific property which he admitted possessing. The factual basis for Hirman's plea to receiving stolen property, in its entirety, was as follows:

> Q. Mr. Hirman, on October 2nd, 2006, you were in an area by a bar called the—
> A. Bali (phonetic) Lounge.
> Q. —Bali Lounge in the County of Dakota?
> A. Yes.
> Q. And at that time law enforcement personnel happened to have seen these trailers that were parked back in that area, correct?
> A. Yes.
> Q. And eventually they came into that area and there were three people there, you and two other individuals, correct?
> A. Yes.
> Q. And at that time they ended up going through numerous of these trailers and found many items that they deemed to be stolen, correct?
> A. Right.
> Q. And they—you knew that a majority of these items could have been stolen, correct?
> A. Yes.
> Q. And you actually knew that some were indeed stolen.
> A. Yes.

Q. And this all occurred—and you knew that prior to the time of October 2nd, 2006, correct?
A. Yes.
Q. And you exercised dominion and control over those items, true?
A. Most of them.
Q. And you at the time knew that the value of those items exceeded $2,500.
A. Yes.

As noted, the district court based its legal conclusion on its belief that, during his plea colloquy in Dakota County, Hirman appeared to be pleading guilty only to the possession of stolen property found in the *trailers*, whereas the JCPenny clothing from the burglary listed in the complaint was discovered in the *tent*. Thus, it reasoned, Hirman must have been pleading guilty to the receipt of stolen property from different thefts or owners. However, the record reflects that W.B. identified stolen property from the burglary *inside of both trailers* as well as in the tent. An October 19, 2006 police report states that W.B. "positively identified most of the items that had been in the storage tent as well as many of the items that had been recovered from the trailer stolen from Princeton Hospital, as well as items that were located in the trailer stolen from Burnsville." Thus, the district court's rationale for distinguishing the two crimes is not supported by the record.

The state did not present any other evidence to support the conclusion that Hirman pleaded guilty to the possession of stolen property other than that received from his burglary in Washington County. Instead, it simply relied on the fact that *other* stolen property was found in the same location.

We cannot conclude from this record that Hirman pleaded guilty to the possession of stolen property distinct from that which he stole in the Washington County burglary. Such a conclusion would require us to speculate and make assumptions. The complaint delineates only the clothing taken from the burglary and a stolen trailer. The plea colloquy does not clarify things, for Hirman did not admit to possessing any specific stolen property. Rather, he only admitted generally that the property found in the trailers was stolen. W.B.'s property was found in the trailers. The evidence presented by the state is simply too vague for us to conclude that it is more likely than not that Hirman pleaded guilty to possessing stolen property other than from the Washington County burglary. *See State v. Barnes*, 618 N.W.2d 805, 814 (Minn. App. 2000) (vacating a multiple sentence because evidence of separate behavioral incidents was too vague), *review denied* (Minn. Jan. 16, 2001). Therefore, Hirman's conviction violated the prohibition against double jeopardy and must be set aside.

Reversed.