STATE OF MINNESOTA
IN COURT OF APPEALS
A09-360

State of Minnesota,
Respondent,

vs.

David Allan Skubinna,
Appellant.

Filed March 16, 2010
Affirmed
Crippen, Judge[*]

St. Louis County District Court
File No. 69VI-CR-07-2356

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Melanie Sue Ford, St. Louis County Attorney, Karl G. Sundquist, Assistant County Attorney, Duluth, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Jodie Lee Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Crippen, Judge.

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

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

CRIPPEN, Judge

Appellant challenges his convictions of first-degree burglary and domestic assault, principally arguing that the district court failed to instruct the jury, pertinent to the burglary, that it had to unanimously agree on who appellant assaulted, and that the evidence did not show lawful termination of his cohabitation rights. There being no merit in these or other arguments raised by appellant, we affirm.

FACTS

On September 12, 2007, N.N. ended her relationship with her boyfriend, appellant David Skubinna. She told him to move his belongings out of her apartment and that he was no longer allowed to be there.

On the morning of September 18, N.N. awoke to find appellant in her bedroom where she and her daughter had been sleeping. N.N. told appellant to leave, but he pleaded with her to talk to him. N.N. got out of bed and yelled at appellant to leave. She walked into the living room where her friend, P.M., was sleeping on the couch. Appellant grabbed N.N. by the front of her shirt and pinned her up against the wall. P.M. woke up and told appellant to leave. N.N. called 911, reporting that appellant had entered her residence and attacked her and P.M.

Officers interviewed appellant, who stated that he went to N.N.'s apartment to arrange to get his belongings. The door was unlocked, so he walked into the apartment and into N.N.'s bedroom to wake her. Appellant told officers that N.N. told him to leave, that he pushed P.M. after P.M. punched him, but that he then left in his vehicle.

A jury found appellant guilty of first-degree burglary and domestic assault of N.N. but not guilty of other counts. Prior to sentencing, appellant moved for a downward dispositional departure from the presumptive sentence, but the district court denied the motion and sentenced appellant to the presumptive sentence of 48 months in prison.

D E C I S I O N

Unanimous Verdict Jury Instruction

Appellant first argues that his first-degree burglary conviction must be reversed because the district court failed to instruct the jury that it had to unanimously agree on who appellant assaulted.[1] Appellant did not object to the district court's jury instructions. The failure to object generally constitutes a waiver to challenge the instructions on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). But we may review appellant's claim under a plain-error analysis. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001).

Under the plain-error analysis, we must find a plain error that affected appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). And appellant bears the "heavy burden" of showing that there is a "reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Id.* at 741 (quotation omitted). Similarly, if appellant establishes plain error, we

[1] In his pro se supplemental brief, appellant argues that his domestic-assault conviction must be reversed because the district court failed to instruct the jury that it had to unanimously agree on which act constituted the domestic assault. But in *State v. Rucker*, this court held that the district court was not required to instruct the jury that it must unanimously agree on which specific incidents formed the basis of appellant's convictions of criminal sexual conduct. 752 N.W.2d 538, 542, 548 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). The district court did not err.

then determine whether to "address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* at 740.

A jury's verdict must be unanimous. Minn. R. Crim. P. 26.01. The district court properly informed the jury of this unanimity requirement. But appellant argues that the court erred by failing to instruct that the jury must agree upon which individual was assaulted.

Supporting this argument, appellant claims that his case is identical to *State v. Stempf*, where police executed a search warrant at defendant's place of business and found methamphetamine. 627 N.W.2d 352, 354 (Minn. App. 2001). When Stempf arrived at his place of business, the police searched his vehicle and found more methamphetamine. *Id.* Stempf was charged with a single count of possession, but the state introduced evidence of both possession incidents. *Id.* Stempf presented evidence for different defenses with regard to each substance. *Id.* Also, "[t]he state told the jury in closing argument that it could convict if some jurors found [Stempf] possessed the methamphetamine found in the truck while others found he possessed the methamphetamine found on the premises." *Id.* The district court refused to give Stempf's requested instruction "requiring the jurors to evaluate the two acts separately and unanimously agree that the state had proven the same underlying criminal act beyond a reasonable doubt." *Id.*

The *Stempf* court held that the district court erred in failing to give the requested instruction, stating that "nothing in Minnesota law permits trial on one count of criminal conduct that alleges different acts without requiring the prosecution to elect the act upon

which it will rely for conviction or instructing the jury that it must agree on which act the defendant committed." *Id.* at 356. We concluded, just as the state had noted in final argument, that some jurors could have believed Stempf possessed the methamphetamine found on the premises while other jurors could have believed he possessed the methamphetamine found in the truck. *Id.* at 358.

Stempf does not apply because it involved two distinctive incidents. Appellant entered one dwelling and committed an assault during the moments after entry; he committed the first-degree burglary offense by assaulting someone regardless of who he assaulted. Moreover, it is evident from the jury's verdict that appellant assaulted N.N. The jury found appellant guilty of domestic assault of N.N., and the jury found appellant not guilty of the fifth-degree assault of P.M. Finally, appellant failed to show a reasonable likelihood that a further unanimity instruction would have had a significant effect on the verdict. The district court did not err.

Sufficiency of the Evidence

Appellant next argues that the evidence is insufficient to show that he committed a burglary when he had cohabitated with N.N.[2] In considering a challenge to the sufficiency of the evidence, we must consider the presumption of innocence and the state's burden of proof and "must make a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in the light

[2] In his pro se brief, appellant challenges the credibility of the state's witnesses. But it is well settled in Minnesota that it is the province of the jury to determine the credibility and weight to be given to the testimony of any individual witness. *State v. Reichenberger*, 289 Minn. 75, 79-80, 182 N.W.2d 692, 695 (1970).

most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Pendleton*, 706 N.W.2d 500, 511 (Minn. 2005).

Appellant argues that this court should extend the holding in *State v. Evenson*, 554 N.W.2d 409 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996), to cases involving cohabitants, and require an order for protection to divest a cohabitant of his right of lawful possession. In *Evenson*, this court held that when there is an order for protection depriving a person of the right to lawfully possess a home in which he has an ownership interest, he can be convicted of burglary. *Id.* at 410. But this case is distinguishable because appellant did not have an ownership interest in the apartment. The evidence shows that appellant had N.N.'s permission to stay at the apartment, which she unequivocally revoked on September 12, 2007. N.N. was the sole renter listed on the lease, which was admitted into evidence. Appellant did not have a key to the apartment. When appellant was interviewed by police on the day of the incident, he gave a different address as his own. When appellant walked into the apartment on the morning of September 18, he did not have N.N.'s permission to do so. The evidence sufficiently supports appellant's burglary conviction.

Legal Possession Jury Instruction

Appellant argues that the district court erred in denying his request for a jury instruction on his theory that he had a legal right or N.N.'s consent to enter the apartment.[3] The district court has broad discretion in refusing to give a requested jury

[3] In his pro se brief, appellant also argues that the domestic-assault jury instruction misled the jury regarding the element of intent because the instruction focused the jury on N.N.'s

instruction. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). "The court need not give the instruction as requested by the party if it determines that the substance of that request is contained in the court's charge." *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977).

The district court rejected appellant's requested instructions premised on his erroneous theory that he had possession unless he was legally evicted. But the court gave an instruction identical to the language on lawful possession that is found in CRIMJIG 17.15. *See* 10 *Minnesota Practice*, CRIMJIG 17.15 (2006). The district court did not abuse its discretion by refusing to give appellant's requested instructions. Insofar as the requests properly stated the law, it was suggested in the standard instruction that was given. *See State v. Richardson*, 393 N.W.2d 657, 665 (Minn. 1986) (holding that the district court was not required to give a requested instruction when the standard instructions included the substance of the requested instructions); *State v. Patterson*, 493 N.W.2d 577, 580 (Minn. App. 1992) (stating that it is unnecessary to give requested instruction when the instruction seemed implicit in the district court's instructions).

Dispositional Departure

Appellant next argues that the district court abused its discretion by refusing to impose a downward dispositional departure from the presumptive sentence. "An appellate court will not generally review the [district] court's exercise of its discretion in

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reaction rather than on appellant's intent to commit a crime. But the district court gave the standard instruction and there was no error. *See State v. Peou*, 579 N.W.2d 471, 476 (Minn. 1998) (stating that there is no error in jury instruction when the district court correctly states the law).

cases where the sentence imposed is within the presumptive range." *State v. Witucki*, 420 N.W.2d 217, 223 (Minn. App. 1988) (quotation omitted), *review denied* (Minn. Apr. 15, 1988).

This is not a rare case requiring reversal. The presentence report recommended the presumptive sentence. Appellant claims that lack of remorse, noted by the district court as part of its rationale, is not a determinative factor and that the court ignored the fact that he does not have to admit the offense while his case is on appeal. But appellant does not need to admit guilt in order to express remorse. And if the district court relied solely on appellant's lack of remorse, that would be enough for the court to refuse to depart from the presumptive sentence. *See State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994) (stating that "absence of remorse can be a very significant factor in determining whether a defendant is particularly amenable to probation"), *review denied* (Minn. Apr. 21, 1994). In addition, there is adequate evidence in the record to sustain the court's findings that appellant invaded N.N.'s privacy by entering her bedroom, and that N.N. was frightened by appellant's actions. *See id.* (stating that the district court has the opportunity to actually observe the defendant throughout the proceedings and the "reviewing court must defer to the district court's assessment of the sincerity and depth of the remorse and what weight it should receive in the sentencing decision"). Finally, even if appellant is amenable to a probationary sentence, a court is not required to depart from the guidelines. *Evenson*, 554 N.W.2d at 412; *State v. Love*, 350 N.W.2d 359, 361 (Minn. 1984) (stating that a court may depart dispositionally from the presumptive sentence).

The district court did not abuse its discretion in denying appellant's request for a departure.

Void for Vagueness

In his pro se brief, appellant argues that the statute defining consent to enter is void for vagueness because lawful possession is not sufficiently defined. This is the first time appellant raised this constitutional challenge. "The law is clear in Minnesota that the constitutionality of a statute cannot be challenged for the first time on appeal." *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980). We have no occasion to address appellant's claim.

Affirmed.