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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1287**

State of Minnesota,  
Respondent,

vs.

Eriberto Martinez Smith,  
Appellant.

**Filed May 29, 2012  
Affirmed  
Larkin, Judge**

Carlton County District Court  
File No. 09-CR-10-2246

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

Thomas Pertler, Carlton County Attorney, Carlton, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public  
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and  
Lansing, Judge.\*

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

## UNPUBLISHED OPINION

**LARKIN**, Judge

Appellant challenges his convictions of first-degree arson and second-degree burglary, arguing that the district court abused its discretion by refusing to instruct the jury on a lesser, nonincluded offense, that the district court erred in answering questions from the jury during its deliberations, and that the evidence is insufficient to sustain his arson conviction. Appellant also challenges his sentence, arguing that the district court abused its discretion in denying his motion for a downward dispositional or durational departure. We affirm.

### FACTS

Respondent State of Minnesota charged appellant Eriberto Martinez Smith with one count of first-degree arson and one count of second-degree burglary. The case was tried to a jury. At trial, the state presented evidence that in September 2010, Smith's girlfriend A.P. was renting-to-own a house located in Cloquet. A.P. testified that Smith was not on the lease, but that he stayed at her house "off and on," and that he kept some of his possessions at the house, including a bed, two televisions, a radio, and clothes. A.P. further testified that Smith did not have a key to her house and that he regularly stayed with "his sister and his friend."

Smith and A.P. have two children. On September 18, Smith was supposed to watch the children at A.P.'s house. Smith had not stayed at A.P.'s house for approximately two weeks prior to September 18. A.P. testified that Smith arrived at her

house on the 18th, but he refused to watch the children. A.P. told him to leave. A.P.'s sister came to the house to watch the children, and A.P. went to a bar.

When A.P. left the bar, she saw Smith "digging through" her car. Smith and A.P. argued. Smith grabbed A.P.'s cell phone and "took off running into the parking lot." A.P. and her cousin, D.D., went to A.P.'s house, picked up A.P.'s sister and children, and went to D.D.'s house. A.P. testified that she locked the door to her house when she left and that she did not leave candles ignited or the stove or space heater on.

D.D. testified that after arriving at her house, D.D. and Smith exchanged text messages. Smith had gone to A.P.'s house and had sent D.D. suicidal messages. D.D. returned to A.P.'s house to check on Smith. D.D. unlocked the door to A.P.'s house, entered, and saw Smith walking out of the bedroom. D.D. asked Smith where he was going. Smith did not respond. D.D. left the house. When D.D. looked back into the house through the door, she saw Smith standing near a window with a knife. D.D. saw Smith begin to cut his wrists, and she called 911. Shortly thereafter, D.D. saw smoke coming out of a dryer vent on the house.

At approximately 4:48 a.m. on September 19, Officers Andrew Murray and Chad Pattison were dispatched to A.P.'s house in response to a 911 call. Officer Murray testified that "[t]he call originally came out as a person who was inside as a burglary. Then as we were on our way there, another call came in saying that the individual had cut his wrists and they had started the house on fire." When he arrived at the house, Officer Murray saw smoke coming out of one of the dryer vents. He went to the back of the house and saw flames through a window and smoke coming out of another window.

D.D. was still at the house, and she unlocked the door for the officers. But the door was barricaded, and Officer Pattison had to force it open. Officer Pattison testified that after he opened the door, smoke began billowing out. Officer Pattison yelled into the house, encouraging Smith to come out. Smith responded, “No, I just want to fu----- die. Leave me alone.” Officer Pattison crawled into the house, but was overcome by smoke. Officer Pattison yelled for Smith to crawl towards the door, but Smith stated, “Just leave me alone. I want to fu----- die. That’s why I started this fire. Just leave me alone. I want to die.” Officer Pattison was unable to coax Smith out of the house. A firefighter had to drag Smith out of the house, and he was transported to a hospital by ambulance.

Mark Germain, a deputy state fire marshal assigned to the fire investigation team, concluded that the fire originated at two points. He opined that there were “two separate fires set in this house: One in the south bedroom, and one in the northeast bedroom, and those fires were not communicating to each other.” Deputy Germain classified the fire as non-accidental arson.

Smith’s defense theory was that he did not intentionally set the fire, but that he negligently allowed the fire to burn. Smith therefore asked the district court to instruct the jury on the lesser offense of negligent fire, but the district court refused to do so. Instead, the district court instructed the jury on the charged offenses of arson and burglary.

During deliberations, the jury sent two notes to the judge. The jury first asked the district court to “[d]efine lawful possession.” The district court’s written reply was: “I refer you to the bottom of p. 6 of your written instructions.” The jury also asked for

“[A.P.]’s first testimony.” The district court’s written response told the jurors that they “must rely on [their] recollection of the evidence as it was presented at trial.”

The jury found Smith guilty as charged. Smith moved for a downward sentencing departure, but the district court denied the motion and sentenced Smith to the presumptive sentence under the guidelines: an executed 68-month sentence on the arson conviction and a concurrent, executed 28-month sentence on the burglary conviction.<sup>1</sup> This appeal follows.

## DECISION

### I.

Smith argues that the district court deprived him of his due-process right to present a defense by refusing to instruct the jury on the lesser charge of negligent fire. The refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). The focus of the analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

Smith acknowledges that negligent fire is not a lesser-included offense of arson. *See State v. Ascherman*, 589 N.W.2d 486, 489 (Minn. App. 1999) (“A lesser-included offense is an offense necessarily committed if the greater offense has been committed.”). The general rule for jury instructions regarding lesser, but nonincluded, offenses is that “a court may not grant a request by either the [s]tate or a defendant for an instruction on a

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<sup>1</sup> The presumptive sentence on the burglary offense was actually a stayed prison term, but Smith requested execution of his sentence.

lesser but nonincluded offense on the grounds that the nonmoving party would be prejudiced by a lack of notice.” *State v. Flowers*, 788 N.W.2d 120, 131 (Minn. 2010) (citing *State v. Gisege*, 561 N.W.2d 152, 157 (Minn. 1997)). The supreme court explained the reason for this rule as follows:

The purpose of restricting the prosecution to the charges included in either the complaint or indictment is to provide the defendant with notice and an opportunity to prepare his or her defense. Were the prosecutor able to request an instruction on an offense whose elements were not charged in the indictment, this right to notice would be placed in jeopardy. . . . [T]he same restriction must apply to a defendant’s requests for instructions that include lesser but nonincluded offenses. . . . [F]airness requires that neither side receive an instruction on a lesser but nonincluded offense.

*Gisege*, 561 N.W.2d at 157 (quotations and citations omitted).

Smith concedes that under *Gisege*, “generally a [district] court does not have the discretion to instruct the jury on a lesser, but nonincluded, offense.” But Smith seeks a different result under the supreme court’s opinion in *Flowers*. In *Flowers*, the defendant argued that he was entitled to an instruction on a lesser but nonincluded offense, because “it was his theory of defense, and his right to present a defense trumps any prohibition against instructing juries on lesser but nonincluded offenses.” 788 N.W.2d at 131. The *Flowers* defendant cited *United States v. Brown*, 33 F.3d 1002 (8th Cir. 1994), to support his argument. *Id.* at 132. In *Brown*, the court held that the defendant was entitled to an instruction on a lesser nonincluded offense because, among other considerations, the instruction was necessary to his “theory of defense.” 33 F.3d at 1004. But the supreme court in *Flowers* found that the facts and circumstances of *Brown* were distinguishable

and therefore declined to consider “whether the prohibition on lesser-but-nonincluded offense instructions articulated in *Gisege* bars a defendant from instructing the jury on his theory of defense when his defense is a lesser but nonincluded crime.” 788 N.W.2d at 132-33.

Smith argues that because the circumstances of *Brown* and this case are similar, this court should adopt the reasoning of *Brown* and depart from the *Gisege* rule. Even if the circumstances presented in this case may be more consistent with those in *Brown*, *Gisege* remains the law. The supreme court had the opportunity to depart from the *Gisege* rule in *Flowers* and declined to do so. Moreover, the reason for the *Gisege* rule has not changed: both sides are entitled to notice and an opportunity to prepare. We therefore adhere to the *Gisege* rule and conclude that the district court did not abuse its discretion by denying Smith’s request for a jury instruction on the lesser, nonincluded offense of negligent fire.

## II.

Smith next argues that the district court erred by “answering jury questions in writing where there was no record of any discussion regarding the questions or appropriate responses, nothing in the record suggests Smith was present for the discussions, and he did not waive his right to be present at this critical stage of trial.” A defendant has the right to be present at every critical stage of the trial, which includes a district court’s communications with a deliberating jury. *State v. Sessions*, 621 N.W.2d 751, 755-56 (Minn. 2001). “[A] court’s response to the jury . . . in [the defendant]’s absence and without obtaining a waiver from [the defendant] violate[s] his Sixth

Amendment right to be present and [Minn. R. Crim. P.] 26.03, subd. 1(1).” *Id.* at 756. But even if the defendant is denied his right to be present, “a new trial is warranted only if the error was not harmless.” *Id.* An error is harmless beyond a reasonable doubt if “the verdict was surely unattributable to the error.” *Id.*

There is no indication in the record that the state, Smith, or his counsel was notified of the jury’s questions to the district court. Because Smith did not waive his right to be present during the district court’s resulting communications with the jury, the district court’s response in Smith’s absence violated his right to be present at a critical stage of trial. We next determine whether this error was harmless. “When considering whether the erroneous exclusion of a defendant from judge-jury communications constitutes harmless error, we consider the strength of the evidence and substance of the judge’s response.” *Id.* (citation omitted).

As to the strength of the evidence, a person who enters a dwelling without consent and commits a crime while in the dwelling is guilty of second-degree burglary. Minn. Stat. § 609.582, subd. 2(a) (2010). And a person who intentionally destroys or damages a dwelling with fire is guilty of first-degree arson. Minn. Stat. § 609.561, subd. 1 (2010). The evidence at trial showed that although Smith stayed at A.P.’s house “off and on,” he did not live there, he did not have a key to the house, A.P. had told him to leave the house on the night of the fire, and there is no indication that he had permission to be at the house when the fire started. Officer Pattison testified that he heard Smith say: “Just leave me alone. I want to fu----- die. That’s why I started this fire. Just leave me alone. I want to die.” And Deputy Germain testified that there were “two separate fires set in this

house: One in the south bedroom, and one in the northeast bedroom, and those fires were not communicating to each other.” Deputy Germain therefore classified the fire as non-accidental arson. In sum, the evidence supporting Smith’s burglary and arson convictions was strong.

We next evaluate the substance of the district court’s responses. The jury first asked the district court to define “lawful possession,” which was an element of the district court’s instruction regarding the burglary charge.<sup>2</sup> In response, the judge directed the jury to the bottom of page six of the jury instructions, which states: “During these instructions I may have defined certain words and phrases. If so, you are to use those definitions in your deliberations. If I have not defined a word or phrase, you should apply the common, ordinary meaning of that word or phrase.” But the district court’s original instructions did not define lawful possession. Although Smith argues that “[i]f the judge had clarified the jury instruction, rather than merely referring the jurors back to the original instructions, the jury might have acquitted [him] of the burglary offense,” he does not suggest what response the district court should have given.

We observe that the criminal jury instruction guide<sup>3</sup> defines “lawful possession” as follows: “A person is in lawful possession when the person owns the building or has been given the right to control or occupy the building by the owner.” 10A *Minnesota Practice*,

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<sup>2</sup> The district court had instructed the jury that “the statutes of Minnesota provide that whoever enters a building without the consent of the person in lawful possession and commits a crime while in the building, and the building is a dwelling, is guilty of a crime.”

<sup>3</sup> “[J]ury instruction guides merely provide guidelines and are not mandatory rules; jury instruction guides are instructive, but not precedential or binding on this court.” *State v. Kelley*, 734 N.W.2d 689, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

CRIMJIG 17.15 (2006); *see also State v. Spence*, 768 N.W.2d 104, 108-09 (Minn. 2009) (defining a person in “lawful possession” in a burglary case as “a person who has a legal right to exercise control over the building in question” and stating that “[t]he legal right to exercise control over a building necessarily includes the right to consent to the entry of others into that building”). But an instruction consistent with this definition would not have impacted the jury’s guilty verdict on the second-degree burglary charge because even though Smith stayed at A.P.’s house “off and on,” he did not live there, he did not have a key to the house, A.P. had told him to leave the house on the night of the fire, and there is no indication that he had permission to be at the house when the fire started. In sum, the record would not support a finding that Smith owned the building or had been “given the right to control or occupy the building by the owner.”

The jury also sought access to A.P.’s trial testimony. The district court responded: “You must rely on your recollection of the evidence as it was presented during the trial.” Smith suggests that the district court’s refusal was in error, arguing that trial testimony “supported the argument that Smith lived with [A.P.] and the children.” The district court has broad discretion regarding whether trial testimony should be read back to the jury. *State v. Lane*, 582 N.W.2d 256, 259 (Minn. 1998).

[Appellate courts] have indicated that district courts cannot follow a “blanket rule” in denying such requests from the jury. But [appellate courts] have also held that, even if a district court makes its denial on the basis of a “blanket rule,” such a denial does not constitute error if the district court could have denied the request in a proper exercise of discretion.

*State v. Young*, 710 N.W.2d 272, 284 (Minn. 2006) (citation omitted). And it is within the district court's discretion to refuse to reread testimony if it might give undue prominence to a portion of the evidence. See *Lane*, 582 N.W.2d at 260 (upholding a district court's decision not to allow the jury to review testimony, based, in part, on its belief that the rereading of requested testimony would give it undue prominence). Thus, the district court appropriately advised the jury to rely on its recollection of the evidence presented at trial.

In sum, the district court's communication with the jury was not prejudicial to Smith. See *Sessions*, 621 N.W.2d at 756-57 (concluding that the district court's communications with the jury were not prejudicial to the rights of defendant where the district court did not issue any new instructions in its responses and the instruction did not favor the prosecution or defense). Because the evidence was strong and the district court's responses were not prejudicial, the verdict was surely unattributable to the erroneous exclusion of Smith from the judge-jury communications. The error therefore was harmless.

### **III.**

Smith's pro se supplemental brief appears to argue that the evidence is insufficient to sustain his arson conviction. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the state's witnesses and

disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

“Whoever unlawfully by means of fire or explosives, intentionally destroys or damages any building that is used as a dwelling at the time the act is committed . . . commits arson in the first degree.” Minn. Stat. § 609.561, subd. 1. As to the arson charge, Officer Pattison testified that he heard Smith say: “Just leave me alone. I want to fu----- die. That’s why I started this fire. Just leave me alone. I want to die.” And Deputy Germain testified, based on his investigation, that the fire was non-accidental arson.

Smith argues that the witnesses “could not agree during testimony on [the] exact origin of [the] fire and in fact contradicted each other.” But this court must view the evidence in the light most favorable to the verdict. *See Webb*, 440 N.W.2d at 430. The record evidence sufficiently establishes that the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that Smith intentionally destroyed or damaged A.P.’s house by unlawfully starting the fire at A.P.’s dwelling. The evidence therefore sustains Smith’s arson conviction.

#### IV.

Smith argues that the district court abused its discretion by denying his motion for a downward dispositional or durational sentencing departure, “because Smith was amenable to probation and this offense was less serious than the typical arson offense.” A district court may depart from the presumptive sentence provided by the sentencing guidelines only if “substantial and compelling” circumstances warrant such a departure. Minn. Sent. Guidelines II.D (2010). “Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case.” *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). Whether to depart from the guidelines rests within the district court’s discretion, and this court will not reverse the decision “absent a clear abuse of that discretion.” *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Only in a “rare” case will a reviewing court reverse a district court’s imposition of the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

The district court indicated that it had considered Smith’s argument for departure at the sentencing hearing and had read the letters submitted in support of his motion, but the court nonetheless concluded that the presumptive sentence was appropriate. *See State v. Weaver*, 796 N.W.2d 561, 575 (Minn. App. 2011) (stating that “in exercising its sentencing discretion, the district court must consider circumstances supporting a downward durational departure from the presumptive sentence” (quotation omitted)). The district court therefore acted within its discretion by imposing a presumptive guidelines sentence.

Smith argues that the district court should have granted a downward dispositional departure because he is young, amenable to probation, remorseful, has a limited criminal record, and was despondent and suicidal at the time of the fire. A “district court has discretion to impose a downward dispositional departure if a defendant is particularly amenable to probation.” *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009). But a district court does not abuse its discretion by refusing to depart “from a presumptively executed prison sentence, even if there is evidence in the record that the defendant would be amenable to probation.” *Id.* at 663.

Smith further contends that a downward durational departure is appropriate because his offense was less serious than the typical arson offense. *See State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985) (“[A] downward durational departure is justified if the defendant’s conduct is significantly less serious than that typically involved in the commission of the offense.”). Smith argues that his despondent and suicidal condition is a mitigating factor that justifies departure. *See* Minn. Sent. Guidelines II.D.2.a (listing factors that may be used as reasons for departure, including that the offender “because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed” and the existence of other substantial grounds “which tend to excuse or mitigate the offender’s culpability”).

Although Smith’s suicidal condition may be a mitigating factor, it is not clear that his conduct was significantly less serious than that typically involved in the commission of an arson offense. Moreover, an appellate court ordinarily will not disturb the district court’s imposition of a presumptive guidelines sentence, even where reasons for a

downward durational departure exist. *State v. Abeyta*, 336 N.W.2d 264, 265 (Minn. 1983). In sum, this is not a “rare” case in which we will reverse imposition of the presumptive sentence. *See Kindem*, 313 N.W.2d at 7.

**Affirmed.**