STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1579

State of Minnesota,
Respondent,

vs.

Michael James Constantine,
Appellant.

Filed June 25, 2012
Affirmed
Toussaint, Judge[*]

Ramsey County District Court
File No. 62-CR-09-17338

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

John J. Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota; and

Jennifer Vainik Ives, Leonard Street and Deinard, Minneapolis, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and Toussaint, Judge.

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[*] 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

TOUSSAINT, Judge

Appellant Michael J. Constantine was charged by amended complaint with first- and second-degree burglary, based on evidence that he and another man broke into an apartment building and stole a flat-screen television and DVD player from the building's community or party room. Following a three-day trial, the jury found appellant guilty of both counts; after a sentencing trial, the jury also found that appellant committed both offenses as part of a "pattern of criminal conduct." The district court sentenced appellant for first-degree burglary to 240 months in prison as a repeat offender.[1] Because the evidence was sufficient to convict appellant of first-degree burglary, we affirm.

D E C I S I O N

Prior to trial, the district court allowed the state to amend the complaint, which initially charged appellant only with second-degree burglary, to include a count of first-degree burglary. Minn. Stat. § 609.582, subds. 1(a), 2 (2008). Appellant argues that the district court erred in allowing the state to do so and in denying his motion to dismiss the added charge based on lack of probable cause. On appeal from a conviction, however, a defendant's argument that a charge or complaint lacked probable cause largely becomes

[1] Minn. Stat. § 609.1095 (2008), provides for increased sentences for certain dangerous and repeat felony offenders. Appellant was sentenced under subdivision 4, which allows a judge to "impose an aggravated durational departure from the presumptive sentence up to the statutory maximum sentence if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed as part of a pattern of criminal conduct." *Id.*, subd. 4. The statutory maximum sentence for first-degree burglary is 20 years, while the statutory maximum for second-degree burglary is limited to 10 years. Minn. Stat. § 609.582, subds. 1, 2(a) (2008).

"irrelevant." *State v. Holmberg*, 527 N.W.2d 100, 103 (Minn. App. 1995), *review denied* (Minn. Mar. 21, 1995). Once convicted, the lack-of-probable-cause argument is more accurately construed or framed as a challenge to the sufficiency of the evidence. *Id*.[2]

The dispute in this case revolves around the language of the first-degree burglary statute. Whether particular conduct is encompassed by a criminal statute is an issue of statutory construction, which this court reviews de novo. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002); *State v. Tomlin*, 622 N.W.2d 546, 548 (Minn. 2001). A reviewing court must construe a statute according to its "plain language." *Id*. (citing Minn. Stat. § 645.16 (2010)). Penal statutes are to be strictly construed, with any reasonable doubt resolved in favor of the defendant. *State v. Olson*, 325 N.W.2d 13, 19 (Minn. 1982). But this court is not required to give a statute the narrowest possible construction. *State v. Zacher*, 504 N.W.2d 468, 473 (Minn. 1993); *State v. Wagner*, 555 N.W.2d 752, 754 (Minn. App. 1996).

The burglary statute provides that whoever enters a "building" without consent and either commits a crime or intends to commit a crime commits first-degree burglary if "the building is a dwelling and another person, not an accomplice, is present in it when the burglar enters or at any time while the burglar is in the building." Minn. Stat.

[2] A defendant does not have the right to appeal a pretrial ruling that allows the amendment of a complaint. This court may extend discretionary review if a "compelling reason" is shown to do so. *See State v. Jordan*, 426 N.W.2d 495, 496 (Minn. App. 1988) (special term op.). But this court has denied at least one request for discretionary review of an order denying a motion to dismiss for lack of probable cause, noting that the petition did not present a novel issue and that, in any event, the petitioner had the right to a jury determination at trial on every element of the offense. *State v. Masloski*, 430 N.W.2d 7, 9 (Minn. 1988). Thus, even if appellant had sought discretionary review in this case, the petition very likely would have been denied.

§ 609.582, subd. 1(a). A "building" is defined as "a structure suitable for affording shelter for human beings including any appurtenant or connected structure," while a "dwelling" means "a building used as a permanent or temporary residence." *Id*., subds. 2, 3.

Appellant's arguments focus on whether the party room was "occupied" or whether another person, not an accomplice, was "present" in the room.[3] Appellant claims that the district court's "expansive interpretation of the first-degree burglary statute is both unprecedented and unwarranted." And he insists that Minnesota courts have typically defined "occupied dwellings" as single-family homes and structures that allow immediate access thereto, such as basements and garages.

A closer examination of the cited cases, however, supports the conclusion that courts have read the language of the burglary statute broadly and as covering any number of factual situations. *See, e.g.*, *State v. Maykoski*, 583 N.W.2d 587, 588-89 (Minn. 1998) (holding that basement was "part of dwelling house" and "clearly part of the occupied

[3] As the state notes in its brief, appellant does not challenge his second-degree burglary charge or conviction, thus apparently conceding that the building he broke into is a "dwelling." Under the plain language of the statute, appellant arguably completed the crime of burglary of a dwelling when he jimmied the security door and entered the lobby of the apartment building with intent to steal the television. *See State v. Nelson*, 363 N.W.2d 81, 83 (Minn. App. 1985) (holding that merely stepping through window onto desk and then exiting upon hearing alarm was sufficient to sustain burglary conviction, because crime was complete upon non-consensual entry of any part of defendant's body into premises with intent to commit crime). The state reasons that because the evidence established that at least two residents were present in their apartments, the crime of first-degree burglary of an occupied dwelling was complete once appellant entered the building. Thus, appellant's actions arguably meet the definition of first-degree burglary without regard to whether he proceeded into the party room and stole the television.

dwelling," even though inside stairs to basement were unusable and basement could only be accessed from outside house); *State v. Schotl*, 289 Minn. 175, 180-81, 182 N.W.2d 878, 880-81 (1971) (affirming burglary conviction, where defendant broke into store and entered owner's living quarters before leaving, emphasizing that "it is our view that the breaking and entering of any part of the structure was a breaking and entering of a dwelling which was habitually used and occupied by the owner's family"); *State v. Hendrickson*, 528 N.W.2d 263, 266 (Minn. App. 1995) (concluding that theft of wallet from religious official's rectory constituted burglary of occupied dwelling, where parishioners were present in adjacent church), *review denied* (Minn. Apr. 27, 1995). These cases illustrate that the question of whether a defendant has committed burglary of an occupied dwelling is not generally a question of law but is fact-specific.

Appellant argues that the facts of this case distinguish it from the cases referenced above. He emphasizes that he did not enter an individual's home, that the community or party room is not owned or maintained by any of the tenants who occupy the apartment complex, that no tenant lives in the community room, that a tenant's home cannot be accessed through the community room, that the community room was not "built as part of a dwelling house," that he could not have gained access to an occupied dwelling from the community room "merely by opening a hall door," that each apartment unit is locked, rendering it impossible to enter any tenant's home from the community room, and that he did not enter any tenant's unit while he was in the complex. Appellant's recitation of the facts, however, is not entirely consistent with the evidence presented at trial.

For instance, appellant ignores the fact that in order to gain access to the party room, which was always unlocked and accessible to the residents of the building, he had to break through a locked security door and cross the main foyer or lobby of the four-story, 73-unit apartment building, into which hallways open and lead to individual apartments. And while every apartment has a door that can be locked, the property manager testified that many tenants at that time actually left their doors unlocked. Appellant was in close proximity, approximately 20 to 25 feet, to an apartment in which at least one tenant was present when he broke in and crossed the lobby into the party room to steal the television. Moreover, one tenant testified that he considered the party room to be part of his residence, like a family room that encouraged interaction between residents. These facts support the conclusion that when appellant "jimmied" the front door of the apartment building, he entered a "dwelling" in which a person other than his accomplice was "present." *See Hendrickson*, 528 N.W.2d at 265-66 (construing statutory definition of "dwelling" to include any "appurtenant or connected structure").

Appellant warns that the district court's expansive interpretation of "occupied dwelling" to include the community room here is contrary to public policy. Appellant asserts that under the court's reasoning, "a person who enters a shared courtyard in an apartment complex and steals a planter [or] who steals from a hotel lobby" would be liable for first-degree burglary. In neither of these situations, however, would a person need to enter through a locked door without consent, as appellant did here.

We therefore conclude that the evidence was sufficient to prove beyond a reasonable doubt that appellant entered a dwelling in which another person, not his accomplice, was present, with intent to commit a crime.

Pro se Supplemental Brief

Appellant filed a pro se supplemental brief in which he discusses proceedings that occurred in another case against him involving a charge of felon in possession of a firearm. He argues that the prosecutor in this case was biased, as illustrated by the fact that had the prosecutor raised a conflict issue to the judge's attention, she would not have been able to rule that probable cause existed to charge appellant with the additional count of first-degree burglary. Appellant's argument is flawed, and makes assumptions that are inaccurate. Because appellant's pro se supplemental brief fails to include argument or citations to legal authority in support of his allegations of wrongdoing, we are unable to properly analyze his allegations and they are deemed waived. *See State v. Krosch*, 642 N.W.2d 713, 719-20 (Minn. 2002).

Appellant also complains that his co-defendant/accomplice was charged only with second-degree burglary. But these types of decisions are within the discretion of the prosecutor, and a discriminatory purpose will not be presumed. *State v. Andrews*, 282 Minn. 386, 394, 165 N.W.2d 528, 533 (1969). Appellant offers no other facts to establish any impropriety in the prosecutor's exercise of the charging function.

Appellant finally asserts that he did not want the assigned public defender to represent him at trial. Appellant notes that the district court denied his request for a continuance, made on the first day of trial, to find new counsel. An indigent defendant's

right to counsel does not include "the unbridled right to be represented by counsel of his own choosing." *State v. Fagerstrom*, 286 Minn. 295, 298, 176 N.W.2d 261, 264 (1970). A defendant's request for substitution of counsel will be granted only when exceptional circumstances exist, the demand is reasonable, and the request is timely. *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). Appellant has not shown that the district court abused its discretion in denying his request for a continuance. *See State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001).

Affirmed.