This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0815

State of Minnesota,
Respondent,

vs.

Austin McKepton Lee,
Appellant.

Filed February 18, 2025
Reversed and remanded
Frisch, Chief Judge

Lyon County District Court
File No. 42-CR-23-316

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Abby Wikelius, Lyon County Attorney, Julianna F. Passe, Assistant County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered a nd decided by Bjorkman, Presiding Judge; Frisch, Chief Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Chief Judge

In this direct appeal of his convictions for attempted first- and second-degree murder, three counts of first-degree burglary, and first- and second-degree assault,

appellant argues that (1) the district court erred in convicting appellant of both first- and second-degree attempted murder, three counts of first-degree burglary, and both first- and second-degree assault; (2) the sentencing order must be amended to reflect entry of the judgment of conviction of attempted first- and second-degree murder; and (3) the district court erred in sentencing appellant for burglary before sentencing him for attempted first-degree murder. We conclude that the district court erred by improperly entering convictions for lesser-included offenses, multiple offenses stemming from the same behavioral incident, and offenses that were never charged. We also conclude that the record is insufficient to determine whether the district court imposed the sentences in the correct order. Accordingly, we reverse and remand for further proceedings.

FACTS

Based on allegations that appellant Austin McKepton Lee had assaulted his wife, N.P., and the occupants of a nearby trailer where N.P. had fled for safety, respondent State of Minnesota charged Lee with domestic assault by strangulation (count 1), two counts of second-degree assault (counts 2 and 3), three counts of first-degree burglary (counts 4, 5, and 9), terroristic threats (count 6), false imprisonment (count 7), attempted second-degree murder (count 8), attempted first-degree murder (count 10), and first-degree assault (count 11). The matter proceeded to a two-day bench trial, after which the district court issued a written order setting forth the following findings of fact.

At the time of the incident, Lee and N.P. lived together in a trailer located in a trailer park. On April 5, 2023, Lee and N.P. got into an argument at home. Lee hit N.P., told her, "You're going to die, b-tch," and choked her until she lost consciousness. N.P. managed

to escape and ran to a nearby trailer. The trailer was owned by T.M., who lived there with his son, H.M. N.P. knocked on the door, and T.M. let N.P. in to call 911. Lee followed N.P. to the trailer, kicked in the door, entered the trailer carrying a 14-pound cinderblock, and began hitting N.P. on her head repeatedly with the cinderblock. H.M. came out of his bedroom and tried to pull Lee away from N.P. Lee hit H.M. in the forehead with the cinderblock, and N.P. fled to H.M.'s bedroom. Eventually, H.M. retrieved his shotgun, approached Lee, and told him to leave the trailer. Lee departed.

An ambulance arrived and took N.P. to a local hospital, but due to the severity of her injuries, she was transferred to a larger hospital. N.P. had injuries to her neck, lips, eyes, and head. The head injuries required staples and sutures to repair. N.P. also exhibited respiratory acidosis from air deprivation and burst capillaries in both eyes. N.P. suffered bilateral fractures to her thyroid cartilage.

The district court acquitted Lee of the terroristic-threats charge and found him guilty of the remaining charges. The district court also found three aggravating factors: (1) that Lee "was a violent offender who is a danger to public safety and who has committed a third violent crime," (2) that Lee had "committed a sixth felony as part of a pattern of criminal conduct," and (3) that Lee "was convicted of an offense in which the victim was injured and [that he] had been convicted of a prior felony offense in which the victim was injured."

The district court sentenced Lee on three offenses in the following order as agreed upon by the parties. First, the district court sentenced Lee to a 125-month commitment on count 9 (one of the first-degree burglary counts). Next, the district court sentenced Lee to a 240-month commitment on count 10 (the attempted first-degree murder count). Finally,

the district court sentenced Lee to a 21-month commitment on count 3 (the second-degree assault count where H.M. was the victim). The district court ordered the sentences to run consecutively. The district court entered convictions on all counts of which it had found Lee guilty.

Lee appeals.

DECISION

I. The district court erred when it entered convictions for attempted second-degree murder, three counts of first-degree burglary, and second-degree assault.

Lee argues that the district court erred in entering convictions both for attempted first-degree murder and the included offense of attempted second-degree murder, three counts of first-degree burglary arising from the same behavioral incident, and both first-degree assault and the included offense of second-degree assault, in violation of Minn. Stat. § 609.04 (2022). The state agrees that the warrant of commitment should be amended to vacate these convictions. Whether the entry of multiple convictions violates section 609.04 is a question of law that we review de novo. *State v. Bonkowske*, 957 N.W.2d 437, 443 (Minn. App. 2021).

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1. As relevant here, an "included offense" is defined as "a lesser degree of the same crime," "an attempt to commit a lesser degree of the same crime," and "a crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(1), (3), (4). In other words, a person cannot be convicted of "both an offense and any lesser-included offenses." *Steward v. State*,

950 N.W.2d 750, 757 (Minn. 2020). And section 609.04 "bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985).

It is well-established that "the 'conviction' referred to in section 609.04 is not a guilty verdict but instead a formal adjudication of guilt." *Steward*, 950 N.W.2d at 757. "A conviction occurs only after the district court judge accepts, records, and adjudicates a finding of guilt." *Petersen v. State*, 937 N.W.2d 136, 141 (Minn. 2019) (quotation omitted).

Attempted Murder

The district court entered convictions for Lee for both first- and second-degree attempted murder of N.P. Attempted second-degree murder is a "lesser degree of the same crime" of attempted first-degree murder. *See* Minn. Stat. § 609.04, subd. 1(1). The district court therefore erred in entering a conviction for the included offense of attempted second-degree murder.

Burglary

The district court entered three convictions for first-degree burglary pursuant to Minn. Stat. § 609.582 (2022): one conviction for burglary of an occupied dwelling under subdivision 1(a); one conviction for burglary with a dangerous weapon under subdivision 1(b); and one conviction for burglary-assault under subdivision 1(c). All three convictions stem from the same act—Lee kicking in the door and entering T.M.'s trailer—and therefore the district court erred by entering convictions for all three counts of first-degree burglary. *See Jackson*, 363 N.W.2d at 760.

Assault

The district court entered convictions for both first- and second-degree assault. Second-degree assault is a "lesser degree of the same crime" of first-degree assault. *See* Minn. Stat. § 609.04, subd. 1(1). The district court therefore erred in entering a conviction for the included offense of second-degree assault.

Based on these errors, we reverse and remand to the district court with the following instructions: (1) vacate Lee's conviction of second-degree murder, (2) vacate Lee's conviction of second-degree assault, (3) vacate two of the three first-degree-burglary convictions, (4) issue an amended sentencing order and warrant of commitment, and (5) leave the guilty verdicts for the vacated convictions intact. *See State v. Walker*, 913 N.W.2d 463, 467-68 (Minn. App. 2018) (remanding to the district court with instructions to vacate the formal adjudication for one offense but to keep the underlying finding of guilt for that offense intact).

II. The district court must amend the sentencing order and warrant of commitment to reflect that Lee was convicted of attempted murder rather than murder.

The district court's sentencing order and warrant of commitment show a disposition of convictions for both first- and second-degree murder. But Lee was never convicted of—or even charged with—first- or second-degree murder. He was found guilty of *attempted* first- and second-degree murder. Lee argues that we must direct the district court to correct the sentencing order and warrant of commitment to accurately reflect convictions for attempted first- and second-degree murder. The state agrees that Lee "was found guilty of

attempted murder, rather than murder" but "takes no position" as to amendment of the warrant of commitment or sentencing order.

The sentencing order and warrant of commitment erroneously reflects convictions for first- and second-degree murder. On remand, the district court must amend the sentencing order and warrant of commitment to accurately reflect Lee's convictions. *See* Minn. R. Crim. P. 27.03, subd. 10 (providing that "[c]lerical mistakes in a judgment, order, or in the record arising from oversight or omission may be corrected by the court at any time").

III. The record is insufficient to determine whether the district court imposed the sentences for Lee's convictions in the correct order.

Lee argues that the district court erroneously imposed the sentence for first-degree burglary before imposing the sentence for attempted first-degree murder. Lee contends that "[t]he order [of sentencing] in this case matters" because, had the district court sentenced the burglary second and imposed a consecutive sentence, "the presumptive sentence for that offense would have been 86 (74-103) months rather than 98 (84-117) months." The Minnesota Sentencing Guidelines provide that "[m]ultiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred." Minn. Sent'g Guidelines 2.B.1.e (2022). Whether a sentence conforms to the requirements of the sentencing guidelines is a question of law reviewed de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). "Where the district court errs by incorrectly imposing a sentence, we remand for resentencing." *State v. Bell*, 971 N.W.2d

92, 107 (Minn. App. 2022), *rev. denied* (Minn. Apr. 27, 2022); *see also* Minn. Stat. § 244.11, subd. 2(b) (2024).

"Generally, the crime of burglary is defined in terms of entry, and is complete upon entry." *State v. Jerry*, 864 N.W.2d 365, 368 (Minn. App. 2015) (quotation omitted), *rev. denied* (Minn. Sept. 15, 2015). Therefore, the crime of first-degree burglary was complete when Lee entered T.M.'s residence.

An attempt is complete when a defendant, "with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1 (2022). To convict Lee of attempted first-degree murder, the state was required to prove that Lee acted intentionally and with premeditation. Minn. Stat. § 609.185(a)(1) (2022). "Premeditation" means "to consider, plan, or prepare for, or determine to commit, the act referred to prior to its commission." Minn. Stat. § 609.18 (2022). "Neither a specific period of deliberation nor evidence of extensive planning is required to prove premeditation, but the state must prove that some appreciable period of time passed after the defendant formed the intent to kill, during which the statutorily required consideration, planning, preparation, or determination took place." *State v. Holliday*, 745 N.W.2d 556, 563 (Minn. 2008).

We conclude that the record is insufficient for us to determine whether Lee completed the act of attempted first-degree murder before he completed the act of burglary. The district court's findings do not provide clear direction as to which act was completed first. In its sentencing order, the district court found that Lee committed attempted first-degree murder "when, after entry, [Lee] beat [N.P.] in the head with a cinderblock with the

intention of killing her." But the district court also found that, while Lee and N.P. were arguing in their trailer, Lee said, "You're going to die b-tch"; that Lee then choked N.P. until she lost consciousness; and that while pursuing N.P. to T.M.'s trailer, Lee retrieved the 14-pound cinderblock he later used to beat, and grievously injure, N.P. These acts occurred before Lee entered T.M.'s residence. And if these acts amounted to attempted first-degree premeditated murder, then the district court should have sentenced Lee for that crime first. But the district court's findings do not provide us with a sufficient factual basis to make this assessment on appeal. We therefore remand to the district court for additional factual findings as to which offense was completed first, and then re-sentence Lee accordingly. The district court may in its discretion allow the parties additional argument based on the factual record submitted at trial.

Reversed and remanded.