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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0726**

State of Minnesota,
Respondent,

vs.

Mark Robert Miles,
Appellant.

**Filed April 2, 2018
Affirmed in part, reversed in part, and remanded
Reilly, Judge**

Ramsey County District Court
File No. 62-CR-15-1660

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

John J. Choi, Ramsey County Attorney, Thomas B. Hatch, Assistant County Attorney, St. Paul, Minnesota (for respondent)

John L. Lucas, Steven J. Wright, Minneapolis, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and
Reilly, Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant Mark Miles challenges his convictions for making retail sales after revocation of a sales-tax permit and for willfully failing to pay sales taxes. Appellant argues that (1) the evidence is insufficient to support the verdict; (2) the statutory definition

of “person” is unconstitutionally vague; (3) the warrantless search of his bank records violates the constitution; (4) the district court erred in sentencing; and (5) his probationary conditions are unsupported by the record. We affirm appellant’s convictions but reverse the probationary condition that appellant abstain from alcohol use and remand with instructions to vacate.

FACTS

Appellant was the owner and chief executive officer of the Green Guardian Corporation (GGC), a landscaping company. The Minnesota Department of Revenue (the MDR) issued GGC a sales-tax permit in 2006. In 2007, GGC’s account went into collection for failure to submit tax reports and remit sales taxes on a monthly basis. In November 2013, when collection efforts proved unsuccessful, the MDR sent GGC a notice of default and a notice of intent to revoke the company’s sales-tax permit. A collections agent spoke with appellant and reiterated that appellant was obligated to pay GGC’s back taxes in full and remit an up-to-date filing of the reports. Appellant failed to pay sales taxes and, in January 2014, MDR revoked GGC’s sales-tax permit. Appellant later spoke to a collections agent and confirmed that the revocation was effective immediately. The agent cautioned appellant that he could be charged with a felony if he continued operating GGC without a sales-tax permit.

In April 2014, a former employee, G.H., informed the MDR that he purchased GGC from appellant for one dollar and wanted to operate the business as Green Guardian LandCare (GGL). The MDR agents were unable to verify that GGC and GGL were separate businesses and referred the case to MDR’s Criminal Investigation Division for

investigation. The investigation revealed that appellant had a defunct business known as Creative Automotive Products, Inc. (CAP), which was incorporated in 1992 and dissolved in 1996. Appellant reactivated CAP in March 2014, converted the company from a corporation to a limited-liability company, and changed the name from CAP to GGL. Records from the Minnesota Secretary of State did not reflect that G.H. was an owner or officer of GGL. G.H. was not authorized to sign checks on any of the bank accounts associated with GGL, and had no control over how the funds were deposited or used. G.H. continued to receive a paycheck from appellant with the same hourly wage that he earned as an employee of GGC, and continued to perform “the same role [he] had since the day [he] started” at GGC. GGC and GGL operated out of the same business location, used the same vehicles, products, tools, chemicals, and phone numbers, and relied on the same customer-invoicing system.

The state charged appellant with making retail sales after revocation of a sales-tax permit and with willfully failing to pay sales taxes. Appellant waived his right to a jury trial, and the case proceeded to a bench trial in January 2017. The district court adjudicated appellant guilty of making retail sales after revocation of a sales-tax permit and of willfully failing to pay sales taxes, and imposed sentence. This appeal follows.

ANALYSIS

I. Minnesota Statutes section 289A.63 is not unconstitutionally vague.

We first address appellant’s argument that Minnesota Statutes section 289A.63 is unconstitutionally vague. “The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand

what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) (citation and quotation omitted). The “touchstone” is “whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” *State v. Stockwell*, 770 N.W.2d 533, 540 (Minn. App. 2009) (citation omitted). We presume that Minnesota statutes are constitutional and we will exercise our power to declare a statute unconstitutional “only when absolutely necessary.” *Bussmann*, 741 N.W.2d at 82 (quotation omitted). “A party challenging a statute on constitutional grounds must demonstrate, beyond a reasonable doubt, that the statute violates a provision of the constitution.” *State v. Grossman*, 636 N.W.2d 545, 548 (Minn. 2001).

“A person who engages in the business of making retail sales in Minnesota after revocation of a [sales-tax] permit . . . when the commissioner has not issued a new permit, is guilty of a felony.” Minn. Stat. § 289A.63, subd. 3(b) (2016). Appellant contends that the term “person” is ambiguous because it is broader than the definition of “person” used elsewhere in the tax code. We are not persuaded. “The fact that taxpayers must rely on common sense and intelligence to determine whether their conduct complies with [Minnesota tax] law does not render the law unconstitutionally vague on its face.” *State v. Enyeart*, 676 N.W.2d 311, 321 (Minn. App. 2004) (citing *State v. Kuluvar*, 266 Minn. 408, 417, 123 N.W.2d 699, 706 (1963) (providing that use of broad, flexible standards requiring exercise of judgment does not render statute unconstitutional)). A statute is void for vagueness if a person must “guess at its meaning.” *State v. McElroy*, 828 N.W.2d 741, 744

(Minn. App. 2013) (citation omitted). However, “[a] law that is flexible and reasonably broad is nonetheless constitutional if it is clear what the law as a whole proscribes.” *Enyeart*, 676 N.W.2d at 321 (citation omitted); *see also State v. Hipp*, 298 Minn. 81, 88, 213 N.W.2d 610, 615 (1973) (construing statute in context and in light of its intent). Here, when viewed in context, an individual of ordinary intelligence would be able to determine whether or not their involvement with a business would qualify them as a “person” under Minnesota Statutes section 289A.63, subdivision 3(b). Given the strong presumption in favor of upholding the constitutionality of an ordinance, *Bussmann*, 741 N.W.2d at 82, we determine that appellant did not satisfy his heavy burden of establishing that section 289A.63 is unconstitutional.

II. The evidence supports appellant’s convictions.

In evaluating the sufficiency of the evidence, we employ the same standard of review for both bench and jury trials. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011). Our review of a sufficiency-of-the-evidence challenge is limited to a “painstaking analysis of the record” to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to support the conviction. *State v. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005) (quotation omitted). We will not disturb the verdict if the fact-finder, “acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012).

We apply a heightened standard of review, however, when an element of the offense rests on circumstantial evidence. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017); *State*

v. Al-Naseer, 788 N.W.2d 469, 474 (Minn. 2010) (holding that a conviction based on circumstantial evidence warrants heightened scrutiny).

In reviewing the sufficiency of circumstantial evidence, we first identify the circumstances proved and then “examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt.” *State v. Porte*, 832 N.W.2d 303, 310 (Minn. App. 2013) (quotations omitted). We defer to the fact-finder’s acceptance of the circumstances proved and rejection of evidence conflicting with those circumstances. *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). We assume the fact-finder “believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). “This is especially true whe[n] resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the [fact-finder].” *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We independently consider the inferences to determine if a hypothesis of innocence is unreasonable. *See Harris*, 895, N.W.2d at 601.

Appellant challenges the sufficiency of the evidence underlying his six convictions of failing to pay or collect and remit sales taxes. Specifically, he argues the evidence was insufficient to prove beyond a reasonable doubt that he was a “person” for purposes of the offenses of which he was convicted. Minnesota law provides that “[a] person required to pay or to collect and remit a tax, who willfully attempts to evade or defeat a tax law by failing to do so when required, is guilty of a felony.” Minn. Stat. § 289A.63, subd. 1(b) (2016). A “person” is “any officer or employee of a corporation or a member or employee

of a partnership who as an officer, member, or employee is under a duty to perform the act in respect to which the violation occurs.” Minn. Stat. § 289A.63, subd. 10 (2016).

In its findings of fact, the district court concluded that appellant was a “person” responsible for collecting and remitting sales taxes and with respect to the first prong of the heightened-scrutiny analysis, the circumstances proved are as follows. Appellant is the owner and operator of GGC. After his account went into collections, appellant revived CAP, identified himself as CAP’s chief executive officer, converted the company to a limited-liability company, changed the company name to GGL, and purported to sell ownership of the company to G.H. for one dollar. There is no evidence of a stock purchase agreement legitimizing this transfer. After the transfer, G.H. performed the same professional duties, received the same paycheck, and did not have access to company bank accounts. Appellant opened checking accounts in the name of GGL and was an authorized check signer on all of the bank accounts held by both companies. GGC and GGL operated out of the same building, used the same vehicles, tools and equipment, email and telephone numbers, and marketing materials, and invoiced customers in the same manner. When a customer paid an invoice, appellant determined which company received the funds, and directed which bills should be paid. These circumstances are consistent with guilt. See *Silvernail*, 831 N.W.2d at 599.

We next consider whether the circumstances proved are consistent with a reasonable inference other than guilt. *Al-Naseer*, 788 N.W.2d at 473-74. Here, the circumstances proved are that appellant owned and operated GGC and GGL, operated both companies out of the same location, used the same materials and vehicles, and was the check-signer

on all of the bank accounts. In light of these circumstances, it would be unreasonable for a fact-finder to infer that appellant was not responsible for paying taxes. We therefore conclude that sufficient evidence exists to permit the district court to conclude beyond a reasonable doubt that appellant was guilty of violating Minnesota Statutes section 289A.63, subdivisions 1(b) and 3(b).

Appellant also challenges the sufficiency of the evidence underlying his conviction of making retail sales after revocation of a sales-tax permit. “A person who engages in the business of making retail sales in Minnesota after revocation of a permit under section 270C.722, when the commissioner has not issued a new permit, is guilty of a felony.” Minn. Stat. § 289A.63, subd. 3(b).

The district court also determined that appellant was a person engaged in the business of making retail sales in Minnesota after revocation of his sales-tax permit, where the commissioner had not issued a new permit. *See* Minn. Stat. § 289A.63, subd. 3(b). We again apply the heightened-scrutiny standard of review. With respect to the first prong, the circumstances proved are as follows: GGC’s account went into collection in 2007 for failing to remit sales taxes, and the MDR revoked the company’s sales-tax permit in January 2014. A collections agent advised appellant that he could be charged with a felony if he continued to operate the business without a sales-tax permit. Shortly thereafter, appellant revived a dormant company and changed its name to GGL. GGL is indistinguishable in operation from GGC. Appellant failed to remit sales taxes collected from the company. The circumstances proved by the state are consistent with appellant’s guilt. *See Silvernail*, 831 N.W.2d at 599.

The second step requires us to consider whether the circumstances proved are consistent with guilt and inconsistent with any reasonable hypothesis other than guilt. *Al-Naseer*, 788 N.W.2d at 473-74. Appellant argues that he believed the sale of GGL to G.H. was a “valid sale,” and claims that the district court insufficiently credited the testimony of his witnesses. But these are not reasonable inferences, based on the circumstances proved. Appellant controlled the bank accounts of both companies, operated both companies in the same manner, and failed to remit sales taxes for those companies. The only reasonable inference, given the totality of the circumstances, is that appellant willfully evaded Minnesota’s tax laws.

In sum, we determine that sufficient evidence exists to permit the district court to conclude beyond a reasonable doubt that appellant is guilty of violating Minnesota Statutes section 289A.63, subdivisions 1(b) and 3(b).

III. Appellant lacks standing to object to the use of his bank records.

During the course of its investigation, the MDR’s Criminal Investigation Division issued subpoenas to banks used by appellant, GGC, and GGL. Appellant was not notified of these subpoenas because they were issued as part of a criminal investigation. Appellant argues that the warrantless search of his bank records violates his constitutional rights. We determine that appellant lacks standing to object to the use of banking records at trial.

In *United States v. Miller*, the United States Supreme Court held that the Fourth Amendment does not prohibit the government from obtaining information “revealed to a third party and conveyed by [the third party] to Government authorities, even if the information is revealed [by the defendant] on the assumption that it will be used only for a

limited purpose and the confidence placed in the third party will not be betrayed.” 425 U.S. 435, 443, 96 S. Ct. 1619, 1624 (1976) (concluding that bank depositor did not have a legitimate “expectation of privacy” in bank records). And in *State v. Milliman*, the Minnesota Supreme Court considered whether it was improper for the county attorney’s office to use its subpoena power to obtain a defendant’s banking and employment records. 346 N.W.2d 128, 130 (Minn. 1984). The Minnesota Supreme Court cited *Miller* for the principle that the “defendant had no reasonable expectation of privacy in the records in question,” and, therefore, “[did] not have a constitutional interest in the records that would entitle him to challenge the subpoenas.” *Id.* Given the uncontroverted holdings of *Miller* and *Milliman*, we determine that appellant lacks standing to object to the use of his banking records at trial.

IV. The district court’s sentencing decision is not erroneous.

Appellant argues that the district court erred in sentencing because his convictions arose from a single behavioral incident. Minnesota Statutes section 609.035 bars multiple punishments for offenses that arise from the same behavioral incident. See Minn. Stat. § 609.035, subd. 1 (2016) (“[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.”). When a person is charged with multiple offenses, a district court must examine the offenses charged to determine whether they “resulted from a single behavioral incident.” *State v. Johnson*, 273 Minn. 394, 404, 141 N.W.2d 517, 524 (1966). In such instances, multiple sentences are strictly prohibited to “protect a defendant convicted of multiple offenses

against unfair exaggeration of the criminality of his conduct.” *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn. 1986). The state bears the burden to establish that the offenses were not committed as part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000). We review de novo the district court’s determination of whether multiple offenses arose from a single behavioral incident. *State v. Bauer*, 776 N.W.2d 462, 477 (Minn. App. 2009), *aff’d*, 792 N.W.2d 825 (Minn. 2011).

The district court adjudicated appellant guilty of seven felonies and imposed a separate sentence on each count. Appellant argues that his convictions arose from a single criminal objective and constitute a single behavioral incident. “Whether two acts are part of a single course of conduct depends on the facts of the particular case.” *State v. Bakken*, 871 N.W.2d 418, 425 (Minn. App. 2015) (quoting *State v. Hawkins*, 511 N.W.2d 9, 13 (Minn. 1994)). When analyzing whether multiple, intentional crimes are part of a single behavioral incident, we consider “the factors of [a unity of] time and place and whether a defendant is motivated by a single criminal objective.” *Id.* (quoting *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995)). Here, the offenses were not part of the same behavioral incident because the tax violations occurred on different dates and involved different payments deadlines.¹ Appellant violated the tax code by failing to remit sales taxes on a monthly basis, as required. The state satisfied its burden of establishing that

¹We reached the same decision in an unpublished case, *State v. Beattie*, No. A13-1099, 2014 WL 1660688, at *1 (Minn. App. Apr. 28, 2014), affirming the district court’s order that 18 counts of tax evasion constituted separate behavioral incidents “because each involved a different type of tax with a different filing date and with a different payment deadline.” *Id.* at *7.

appellant's conduct did not arise from a single behavioral incident by establishing that the tax violations occurred on different dates. Under these circumstances, the district court properly sentenced appellant on each of the separate offenses.

V. The district court's probationary decisions are affirmed in part and reversed in part.

Appellant argues that the district court abused its discretion by prohibiting him from “engag[ing] in any sales, retail or otherwise,” while he is on probation. We disagree. A district court has broad discretion in setting the terms and conditions of probation. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). Probationary conditions “must be reasonably related to the purposes of sentencing and must not be unduly restrictive of the probationer’s liberty or autonomy.” *Id.* (quotation omitted). The evidence produced at trial demonstrates that appellant has a long history of failing to pay sales taxes. The district court’s prohibition against engaging in retail sales is reasonably related to preventing such future conduct and does not constitute an abuse of discretion.

The district court also ordered appellant to abstain from alcohol use as one of the conditions of probation. The state does not object to a modification of appellant’s sentence to remove “no alcohol” as a probationary condition. We therefore reverse that portion of the sentence and remand with instructions to the district court to vacate the no-alcohol-use condition of appellant’s probation.

Affirmed in part, reversed in part, and remanded.