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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1225**

State of Minnesota,
Respondent,

vs.

Roland Eugene Smith,
Appellant.

**Filed July 9, 2018
Affirmed in part, reversed in part, and remanded
Schellhas, Judge**

Mille Lacs County District Court
File No. 48-CR-16-2621

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

Joseph Walsh, Mille Lacs County Attorney, Timothy S. Kilgriff, Assistant County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Hooten, Judge; and
Klaphake, Judge.*

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his convictions of two counts of first-degree burglary, arguing that he is entitled to a new trial because the district court abused its discretion and deprived him of his constitutional right to present a complete defense. We affirm in part, reverse in part, and remand to the district court with instructions to vacate one of appellant's burglary convictions.

FACTS

Respondent State of Minnesota charged appellant Roland Smith with first-degree burglary of an occupied dwelling under Minn. Stat. § 609.582, subd. 1(a) (2016); first-degree burglary accompanied by assault under Minn. Stat. § 609.582, subd. 1(c) (2016); third-degree assault under Minn. Stat. § 609.223, subd. 1 (2016); and fifth-degree assault under Minn. Stat. § 609.224, subd. 1(2) (2016). At trial, the state presented evidence that S.S. gave J.N. and N.A. permission to temporarily stay at her home because they had been “kicked out” of their own residence. Shortly after arriving at the home, J.N. and N.A. heard “pounding” at the door; N.A. opened the door, and Smith immediately hit N.A. in the face, causing him to fall down. Smith, his brother, and C.S., then entered the home and punched, kicked, and wrestled with N.A. During the altercation, a mirror fell on N.A. and cut his head. During the assault, J.N. hid in a bedroom and called 911. She then ran out of the bedroom and yelled at the men to stop. Police arrived at the scene shortly thereafter and arrested Smith, his brother, and C.S. N.A. was taken to the hospital and treated for a cut on his head, bleeding in his brain, and facial injuries.

S.S. is A.W.'s sister and the aunt of A.W. and Smith's children. S.S. testified for the defense and claimed that she "verbally told" A.W. and Smith that A.W. and Smith had permission to be at her home because she "needed somebody to watch [her] house" while she was away so that it did not appear abandoned. Although S.S. acknowledged that N.A. and J.N. contacted her about staying at her home, she claimed that she did not know when they would be staying there. S.S. also acknowledged that the night before she testified, she spoke with Smith, who told her, "Like when I get some more, you know what I'm sayin', I got you for real." S.S. claimed that she did not understand what Smith meant by that statement.

The defense sought to call A.W. as a witness. The state objected to A.W.'s testimony on the basis that A.W. had violated the district court's sequestration order by being present in the courtroom during approximately half of J.N.'s testimony. After defense counsel explained that the "crux" of A.W.'s proffered testimony was that "Smith had permission" from S.S. to be at her home, the state objected on hearsay grounds. The district court excluded A.W.'s testimony on the basis that it was "duplicative."

A jury found Smith guilty of the charged offenses. Following a *Blakely* trial, the district court found that Smith satisfied the requirements of the career-offender statute and sentenced him to an upward durational departure of 180 months.

This appeal follows.

DECISION

I.

Smith argues that the district court abused its discretion and denied him his constitutional right to present a complete defense by excluding A.W.’s testimony at trial. This court reviews “a district court’s evidentiary rulings for abuse of discretion, even when, as here, the defendant claims that the exclusion of evidence deprived him of his constitutional right to a meaningful opportunity to present a complete defense.” *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). If an objection was made and the district court actually abused its discretion in making the evidentiary ruling, this court will reverse only if the exclusion of the evidence was not harmless beyond a reasonable doubt. *Id.*

Smith was convicted of first-degree burglary accompanied by an assault under Minn. Stat. § 609.582, subd. 1(c). An element of this offense is that Smith “entered a building without consent.” *See id.* (defining elements of crime). “‘Enters a building without consent’ means: (a) to enter a building without the consent of the person in lawful possession.” Minn. Stat. § 609.581, subd. 4(a) (2016).

At trial, Smith argued that he could not be convicted of the burglary charge because S.S. was in lawful possession of the home, and she had given him permission to enter. Smith asserts that A.W., S.S.’s sister, would have testified that S.S. had given him permission to enter the house. Smith contends that because this proffered testimony “would have been consistent with [S.S.’s] testimony” it would “have been helpful to the jury in assessing whether [S.S.’s] testimony was truthful.” Smith argues that because “consent to

enter the home was the central issue at trial relating to the burglary charge,” the exclusion of A.W.’s testimony deprived him of his right to present a complete defense.

Under Minn. R. Evid. 403, a district court may exclude relevant evidence “if its probative value is substantially outweighed by the danger of . . . needless presentation of cumulative evidence.” Although a district court also has “substantial discretion to sequester witnesses from the trial process,” *State v. Zornes*, 831 N.W.2d 609, 620 (Minn. 2013), the district court here made no finding that A.W. had violated the court’s sequestration order. The record reflects that the court’s sole basis for excluding A.W.’s testimony was that it would be cumulative.

We need not decide whether the district court abused its discretion in excluding A.W.’s testimony because, even if it did, we will reverse only if the exclusion of evidence, thereby depriving Smith of his right to present a complete defense, was not harmless beyond a reasonable doubt. *See Zumberge*, 888 N.W.2d at 694 (“Even if an objection was made and a district court abused its discretion, [a reviewing court will] reverse only if the exclusion of evidence was not harmless beyond a reasonable doubt.”). “An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the error complained of may have contributed to the conviction.” *Id.* (quotation omitted).

In this case, both J.N. and N.A. testified that they had permission from S.S. to stay at her home on the evening of the burglary, and that S.S. agreed that she had given the couple permission to stay at her home before the time of the alleged crime. The state also presented evidence that when police arrived at the scene, Smith attempted to flee the scene, which is inconsistent with his claim that he had a lawful right to be in S.S.’s home.

Moreover, the district court allowed Smith to present his defense through S.S.’s testimony that she had given Smith consent to be at her home. Although A.W.’s testimony might have corroborated S.S.’s testimony, the persuasive value of A.W.’s testimony was questionable because Smith is the father of A.W.’s child and A.W. continued to be in a relationship with Smith. Given the eyewitness testimony of J.N. and N.A. and the strength of the state’s case, we conclude that no reasonable possibility existed that the alleged error may have contributed to Smith’s conviction. *See id.* (“An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the error complained of may have contributed to the conviction.” (quotation omitted)). We therefore also conclude that Smith is not entitled to reversal and a new trial.

II.

Minnesota Statutes section 609.04, subdivision 1 (2016), provides that “[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” A conviction is the district court’s formal adjudication of the verdict through the filing of the official judgment of conviction. *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999) (directing courts issuing conviction orders to be “very clear” about the offense of which the defendant is formally adjudicated guilty). “When the defendant is convicted on more than one charge for the same act, the court is to adjudicate formally and impose sentence on one count only.” *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotation omitted). “[F]or the purpose of section 609.04, the burglarious entry of one dwelling should justify only one burglary conviction.” *State v. Hodges*, 386 N.W.2d 709, 711 (Minn. 1986).

A reviewing court typically looks “to the official judgment of conviction, which generally appears as a separate entry in the file, as conclusive evidence of whether an offense has been formally adjudicated.” *State v. Nodes*, 863 N.W.2d 77, 81 (Minn. 2015) (quotation omitted); *see also Pflepsen*, 590 N.W.2d at 767 (“Because the testimony and statements recorded in hearing and trial transcripts are often imprecise and unclear with respect to sentencing and conviction orders, [appellate courts] typically look to the official judgment of conviction, which generally appears as a separate entry in the file, as conclusive evidence of whether an offense has been formally adjudicated.”).

Here, although not mentioned by either party, the warrant of commitment reflects that the district court entered judgments of conviction on all counts but imposed a sentence only for the burglary conviction involving the assault. Because this case involves a single burglary, section 609.04 dictates that the court should have convicted Smith of only one burglary. *See Hodges*, 386 N.W.2d at 711 (vacating two of three burglary convictions arising from same burglary incident). We therefore affirm in part, reverse in part, and remand with instructions to vacate one of Smith’s burglary convictions.

Affirmed in part, reversed in part, and remanded.