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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0189**

State of Minnesota,  
Respondent,

vs.

Brennon Dale Merritt,  
Appellant.

**Filed January 14, 2013  
Affirmed  
Kirk, Judge**

Rice County District Court  
File No. 66-CR-10-3526

Lori Swanson, Attorney General, Robert A. Plesha, Assistant Attorney General, St. Paul, Minnesota; and

G. Paul Beaumaster, Rice County Attorney, Faribault, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Ross, Judge; and Schellhas, Judge.

**UNPUBLISHED OPINION**

**KIRK**, Judge

On appeal from his convictions of first- and second-degree assault, appellant argues that the evidence is insufficient to support either conviction. We affirm.

## FACTS

At approximately 1:05 a.m. on December 1, 2010, a police officer was patrolling downtown Faribault when a man flagged him down outside a bar and told him that a person inside the bar was hurt. Upon entering the bar, the police officer saw a man, who was later identified as N.T., sitting at the bar with his head down. When N.T. lifted his head, the officer observed that the left side of his face was swollen and blood was coming from the top of his head and down the side of his face. N.T. told the officer that three or four guys had jumped him outside the bar. An ambulance transported N.T. to the hospital.

Another police officer interviewed A.A., the man who had flagged down the officer outside the bar. A.A. stated that he was walking home from a bar when he saw a man kneeling on the ground in a public parking area and holding his head in his hands. A.A. saw that it was N.T., whom he knew, and that N.T.'s head was bleeding. A.A. helped N.T. walk to the bar. Shortly after the interview with the officer, A.A. left the bar. But A.A. returned a short time later and told the officer that he had retrieved N.T.'s wallet and checkbook from Melvin Garibay and his wife, Bethany Garibay.

A police officer interviewed N.T. at the hospital. N.T. was upset but alert and coherent during the interview. He stated that he was walking home to his apartment from a bar when "three black guys" jumped him and proceeded to kick and punch him. N.T. stated that two of the people who attacked him were in front of him and at least one person was behind him. N.T. did not know the men's names, but he reported that he had talked to the men at the bar earlier that night.

The doctor who treated N.T. when he arrived at the hospital observed that N.T. appeared intoxicated and in a lot of pain. His blood alcohol concentration was .264 shortly after his arrival. N.T.'s injuries included: two scalp lacerations on the back left side of his head; bruising around his left eye; hemorrhage on the surface of his left eye; a nasal fracture; a rib fracture; and pain in his back and hand. One of N.T.'s scalp lacerations was two to two and a half inches long and required eight staples to close, and the second laceration was one and a half inches long and required five staples to close. N.T. was admitted to the hospital, in part due to his pain and in part due to his intoxication; he was released later that day.

Later that morning, Bethany and Melvin went to the police station after they heard that the police were looking for them. Melvin was arrested. The police officers allowed Melvin to speak briefly with Bethany, and Melvin shouted to her that he was being arrested for what "Brennon" did. Bethany told a police officer that appellant Brennon Dale Merritt had committed the assault, was still at her apartment, and had placed a pair of bloody boots in a bag in her closet.

Several police officers went with Bethany to her apartment and Bethany gave the officers permission to enter. The officers arrested appellant in the apartment. Bethany identified several items in a closet as belonging to appellant, including a plastic bag that she said contained appellant's bloody boots, a pair of khaki pants that were underneath the bag, and a blue coat. The Minnesota Bureau of Criminal Apprehension (BCA) later tested the boots, pants, and coat and found them all to be positive for blood. The BCA scientists matched the DNA profile recovered from the outside of the left boot, the pants,

and the coat to N.T. The scientists identified the DNA profile from the inside of the left boot as a mixture of three or more people. They excluded Melvin and N.T. as possible contributors but were unable to exclude appellant.

In December 2010, the state charged appellant with one count of aiding and abetting first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2010), one count of aiding and abetting first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2010), and one count of aiding and abetting second-degree assault in violation of Minn. Stat. § 609.222, subd. 2 (2010). After a trial, a jury found appellant guilty of first- and second-degree assault and not guilty of aggravated robbery. This appeal follows.

## D E C I S I O N

Appellant challenges the sufficiency of the evidence underlying his convictions of first- and second-degree assault. In assessing whether the evidence was sufficient to support a jury's guilty verdict, this court "determine[s] whether the legitimate inferences drawn from the facts in the record would reasonably support the jury's conclusion that the defendant was guilty beyond a reasonable doubt." *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). We assume that the jury believed the state's witnesses and disbelieved contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the jury's 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).

**I. The evidence is sufficient to support appellant’s conviction of first-degree assault.**

A person commits first-degree assault if he “assaults another and inflicts great bodily harm.” Minn. Stat. § 609.221, subd. 1. “Great bodily harm” is defined as “bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.” Minn. Stat. § 609.02, subd. 8 (2010).

Appellant argues that the evidence was insufficient to support his conviction of first-degree assault because N.T.’s injuries do not satisfy any portion of the definition of great bodily harm. In response, the state argues that the evidence was sufficient to establish that N.T.’s injuries caused “serious permanent disfigurement” and “other serious bodily harm.”

**A. Serious permanent disfigurement.**

A victim’s scar may constitute a serious permanent disfigurement. *State v. McDaniel*, 534 N.W.2d 290, 293 (Minn. App. 1995), *review denied* (Minn. Sept. 20, 1995). To determine whether a scar is a serious permanent disfigurement, appellate courts consider the location, length, and visibility of the scar. *See id.* (determining that a six centimeter scar on the front of the victim’s neck and a two-thirds inch scar on the right center of the victim’s chest constituted serious permanent disfigurement); *see also State v. Gerald*, 486 N.W.2d 799, 802 (Minn. App. 1992) (concluding that two half-inch long cuts, one on the back of the victim’s neck and one in his right ear, did not constitute

a serious permanent disfigurement because they were “relatively small and in areas where they are not particularly noticeable”); *State v. Currie*, 400 N.W.2d 361, 366 (Minn. App. 1987) (concluding that the “numerous, permanent scars” on the backs of two child abuse victims supported the jury’s guilty verdict), *review denied* (Minn. Apr. 17, 1987); *State v. Anderson*, 370 N.W.2d 703, 706 (Minn. App. 1985) (determining that the jury could have concluded that the victim’s long scar stretching from her lower abdomen to her upper chest was a serious permanent disfigurement), *review denied* (Minn. Sept. 19, 1985).

Here, the doctor who treated N.T. at the hospital testified that N.T. received two lacerations on the left side of his head, one on the back and one on the top. One of N.T.’s scalp lacerations was two to two and a half inches long and required eight staples to close and the second laceration was one and a half inches long and required five staples to close. The doctor further testified that N.T.’s injuries should not leave “a tremendous scar.” N.T. testified that he has two scars on his head as a result of the incident and that he now wears his hair longer in order to cover the scars.

N.T.’s scars are not as large as the victims’ scars in *Currie* and *Anderson*. See *Currie*, 400 N.W.2d at 366; *Anderson*, 370 N.W.2d at 706. But they are much larger than the victim’s half-inch long scars in *Gerald* and approximately equivalent to the victim’s six-centimeter scar and two-thirds inch scar in *McDaniel*. See *McDaniel*, 534 N.W.2d at 292; *Gerald*, 486 N.W.2d at 801. In addition, N.T.’s scars are visible to others because of their location on the back and top of his head. Cf. *Gerald*, 486 N.W.2d at 802 (stating that one scar was behind the victim’s ear and one was inside his ear). While the location of scars on a victim’s head might not be noticeable on every person, N.T. testified that he

customarily wore his hair short and that he began to wear his hair longer after the assault to cover his scars. *Cf. Currie*, 400 N.W.2d at 363 (stating that victim did not feel he could take his shirt off in front of other people due to the scars on his back). Thus, based on the facts on the record, the jury could reasonably conclude that N.T. suffered a serious permanent disfigurement, satisfying the definition of great bodily harm.

**B. Other serious bodily harm.**

In the alternative, the state argues that the totality of N.T.'s physical injuries constituted "other serious bodily harm." This phrase is not defined by statute. To determine whether a victim's injuries are "other serious bodily harm," appellate courts have considered the totality of the victim's injuries. *See, e.g., State v. Barner*, 510 N.W.2d 202, 202 (Minn. 1993) (concluding that the victim's injuries, including a swollen head that made him unable to eat for several days, multiple stab wounds that left scars, and an injury to his hand, were encompassed by the phrase "other serious bodily harm"); *Anderson*, 370 N.W.2d at 706 (stating that, "taken as a whole," the victim's injuries constituted "other serious bodily harm").

Here, N.T.'s injuries included: two scalp lacerations on the back left side of his head; bruising around his left eye; hemorrhaging on the surface of his left eye; a nasal fracture; a rib fracture; and pain in his back and hand. N.T. was admitted to the hospital, in part due to his intoxication and in part due to his injuries, and released later the same day. Although the only injury that N.T. continues to suffer is some numbness on the side of his head, N.T.'s injuries from the assault were very serious and required hospitalization. Contrary to appellant's argument, N.T.'s injuries were much more

extensive than the injuries of the victim in *Gerald*, who suffered two small cuts, only one of which required stitches. *See* 486 N.W.2d at 801. Taken as a whole, N.T.’s injuries constitute “other serious bodily harm.” Thus, the jury could reasonably conclude that N.T. suffered other serious bodily harm, satisfying the definition of great bodily harm.

Accordingly, the evidence is sufficient to support appellant’s conviction of first-degree assault.

**II. The evidence is sufficient to support appellant’s conviction of second-degree assault.**

Appellant argues that the evidence was insufficient to support his second-degree-assault conviction because his boots did not constitute a dangerous weapon. A person commits second-degree assault if he “assaults another with a dangerous weapon and inflicts substantial bodily harm.” Minn. Stat. § 609.222, subd. 2. A “dangerous weapon” is defined as:

[A]ny firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid or other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm, or any fire that is used to produce death or great bodily harm.

Minn. Stat. § 609.02, subd. 6 (2010).

Hands and feet may be dangerous weapons if they are used in a manner that is likely to produce death or great bodily harm. *State v. Born*, 280 Minn. 306, 308, 159 N.W.2d 283, 284-85 (1968). Whether hands and feet are likely to produce death or great bodily harm depends on the circumstances of the case. *Id.* Appellate courts consider

“factors such as the strength and size of the aggressor and the victim, the vulnerability of the victim, the severity and duration of the attack, the presence or absence of victim provocation, and the nature and the extent of the injuries.” *State v. Basting*, 572 N.W.2d 281, 284 (Minn. 1997); *see also State v. Mings*, 289 N.W.2d 497, 498 (Minn. 1980) (stating that “while defendant may have initially acted justifiably, he continued to beat the victim after the victim was unconscious, kicking him with his cowboy boots a number of times about the head and chest”); *State v. Davis*, 540 N.W.2d 88, 91 (Minn. App. 1995) (concluding that the aggressor’s feet were a dangerous weapon when he kicked the victim, who was seven months pregnant, “several times with great force while she was on her hands and knees”), *review denied* (Minn. Jan. 31, 1996). While “something more than a mere injury by fist, such as is likely to occur in ordinary assault and battery is needed,” the determination of “whether an object is a dangerous weapon [does not] turn[] on the nature or severity of the victim’s injuries.” *Basting*, 572 N.W.2d at 285 (quotation omitted).

Here, appellant attacked N.T. without provocation when N.T. was vulnerable due to intoxication, which appellant was likely aware of due to being in the bar with N.T. shortly before the assault. Appellant repeatedly kicked and stomped on N.T. while he was wearing heavy work boots. Appellant was aided by another person in the assault and N.T. did not offer any resistance. Appellant left N.T. at the scene after the attack at approximately 1:00 a.m. in the winter while N.T. was severely injured and bleeding. N.T. suffered numerous injuries as a result of the assault. Considering the circumstances, the evidence was sufficient to establish that appellant’s boots constituted a dangerous

weapon. Therefore, the evidence supports appellant's conviction of second-degree assault.

**Affirmed.**