STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1927

State of Minnesota,
Respondent,

vs.

Johnny Aaron Miller,
Appellant.

Filed December 30, 2008
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-07-019699

Lori Swanson, Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Marie Wolf, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

LARKIN, Judge

Appellant contends that the evidence was insufficient to sustain his conviction of felony domestic assault. We affirm.

D E C I S I O N

When considering a claim of insufficient evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in [the] light most favorable to the conviction, [is] sufficient" to sustain the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court "must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude the defendant was guilty of the offense charged." *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). We must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We will not disturb the 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).

Appellant Johnny Aaron Miller was convicted of one count of felony domestic assault pursuant to Minn. Stat. § 609.2242, subds. 1, 4 (2006), which provides:

> Whoever does any of the following against a family or household member as defined in section 518B.01, subdivision 2, commits an assault and is guilty of a misdemeanor:
>
> (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or
>
> (2) intentionally inflicts or attempts to inflict bodily harm upon another.
>
> . . . .
>
> . . . Whoever violates the provisions of this section or section 609.224, subdivision 1, within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions or adjudications of delinquency is guilty of a felony and may be sentenced to imprisonment for not more than five years or payment of a fine of not more than $10,000, or both.

Minn. Stat. § 609.2242, subds. 1, 4 (2006).

The crux of appellant's argument on appeal is that the jury should have credited appellant's testimony that he merely reacted to an attack by the victim, B.M. and that he had no intent to cause fear or bodily harm. Appellant testified that B.M. physically attacked him and that he only pushed B.M. away in response to her attack. Appellant admitted that he did not tell the police this version of the events, but instead told police that he did not put his hands on B.M.

"Assessing the credibility of a witness and the weight to be given a witness's testimony is exclusively the province of the jury." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006); *Pieschke*, 295 N.W.2d at 584 (explaining that in sufficiency of the evidence cases, an appellate court construes the record most favorably to the state, especially where resolution depends on conflicting testimony because "weighing the

credibility of witnesses is the exclusive function of the jury"). "[T]he jury is free to question a defendant's credibility, and has no obligation to believe a defendant's story." *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995). A witness's credibility is not for this court to consider on appeal. *State v. Garrett*, 479 N.W.2d 745, 747 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992). The jury considered appellant's testimony but apparently did not find it credible, which was its prerogative.

The state presented the following evidence at trial: (1) a recording of B.M.'s 911 call; (2) Officer Mychal Johnson's testimony regarding what he observed when he responded to the 911 call; (3) B.M.'s recorded statement to Officer Johnson describing the assault; (4) Officer Johnson's photographs of B.M.'s injuries; (5) testimony of B.M.'s coworker regarding B.M.'s comments about the assault; and (6) recorded statements made by B.M. and appellant during telephone calls while appellant was in jail. This evidence was sufficient to sustain the jury's verdict.

During her 911 call, B.M. told the operator, "I need to report a Domestic Assault and he's trying to take off with my car." Officer Johnson responded to B.M.'s apartment in response to her 911 call. B.M. told Officer Johnson that she was concerned that appellant intended to take her van without her permission and that appellant had struck her in the face. Officer Johnson testified that he observed two bright red spots on B.M.'s upper cheekbones consistent with her report that appellant had struck her. B.M. also showed Officer Johnson a cut on her left arm consistent with B.M.'s report that she had been pushed down. The jury viewed color photographs of B.M.'s injuries taken by Officer Johnson at the scene. The photographs show a red mark on B.M.'s upper cheek

below her right eye, a red mark on the left side of B.M.'s face, and a scrape on B.M.'s elbow.

B.M. provided Officer Johnson with a taped statement describing the assault. B.M. explained that the incident began on March 25, 2007 when appellant's two-year-old son started screaming to go outside. Appellant was outside with the mother of two of his children at the time. B.M. asked appellant to come inside to take care of his children. An argument ensued and escalated to screaming. B.M. described the assault in detail:

> [W]e got into the kitchen he smacked me across my face, I fell down and broke my glasses and he hit me again and I was fighting back and then I got up and tried to call 911 and he took the phone away from me and he pushed me down again by the front door . . . . Then he started packing the kids up and I called 911 from my cell phone and left the apartment. Locked myself in the van until you got here.

When Officer Johnson asked B.M. to describe her injuries, she stated that her cheeks were sore, her elbow was scraped, and the top of her foot was aggravated.

B.M.'s coworker testified that on March 27, 2007, she noticed bluish-purple bruising underneath both of B.M.'s eyes. The coworker testified that B.M. had talked with her about the assault while at work and that B.M. said that she was upset because the incident occurred in front of appellant's children.

Appellant began calling B.M. on March 26, 2007, the day after his arrest and continued calling her until March 29, 2007. Appellant suggested that B.M. tell the prosecutor that things had not happened as she reported and that she was afraid appellant would leave her. Appellant said, "all you gotta do is go down there and tell them . . . that you're not pressing charges, you're not coming to trial," and "just keep telling them no

you ain't doing it, get me out of here." Appellant told B.M. that she could say that she made up the story because she was mad at appellant. Appellant asked B.M., "Why can't you just say it was all you?" Appellant advised B.M. to say, "I did everything in my power not to make him leave and then that was my last choice to say that he hit me and it just came out."

B.M. would not agree to tell the prosecutor that she fabricated the report. But she told appellant that she would not cooperate with the prosecution stating, "I'm not gonna cooperate neither. I need your help to take care of your boys." B.M. bailed appellant out of jail and told the prosecutor that she did not want to proceed with the case. The state subpoenaed B.M. to testify at appellant's trial and treated her as a hostile witness. When questioned, B.M. stated that she did not know or could not recall information about the incident. But B.M.'s statements to appellant during the phone conversations indicate that the assault occurred. B.M. expressed disapproval that appellant hit her in front of his children.

> [APPELLANT]: Why would you call the jail, why would you call and put me in jail?
>
> [B.M.]: Because it's not okay, you did this in front of your kids. I'm sitting there screaming call 911 and not one of [your children] picked up the phone. Do you understand how we are all scared of you?

B.M. also noted that appellant had hit her harder than he realized stating, "You just don't realize even though you think you're not hitting me hard."

On this record we determine that there was sufficient evidence for the jury to reasonably conclude, with due regard for the presumption of innocence and the

requirement of proof beyond a reasonable doubt, that appellant was guilty of the charged offense, and we will not disturb the verdict.

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals