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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2166

State of Minnesota,
Respondent,

vs.

Lawrence Behr,
Appellant.

Filed February 3, 2009
Reversed
Klaphake, Judge

Ramsey County District Court
File No. K8-07-1632

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Blvd., Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Theodora K. Gaitas, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

KLAPHAKE, Judge

Appellant Lawrence Behr was found guilty by a jury of felony domestic assault. Minn. Stat. § 609.2242, subd. 4 (2006). He argues that the felony-level conviction resulting from that verdict should be reversed because the evidence was insufficient to support the verdict. Because we agree that the evidence on the prior-convictions element of the offense is insufficient to support the verdict, we reverse.

D E C I S I O N

When this court reviews a claim of insufficient evidence, it must analyze the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach their verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

An element of the charge necessary to appellant's conviction is that the current assault must have occurred "within ten years of the first of any combination of two or more previous qualified domestic violation-related offense convictions . . . ." Minn. Stat. § 609.2242, subd. 4. Trial testimony referenced only one previous assault. Before the state rested, however, it introduced, and the district court received without objection, an exhibit which was also read to the jury: "The parties agree that May 9, 2007 falls within the time period between the first of any combination of two or more qualified convictions for [appellant and] the end of five years following [appellant's] discharge from the sentence or disposition for that conviction." The district court instructed the jury that to find appellant guilty of the charged offense the state had to prove beyond a reasonable

doubt that "[appellant's] act took place within 10 years of the first of any combination of two or more previous qualified domestic violence-related offense convictions." The jury returned a verdict of guilty. Appellant argues that evidence of the prior-convictions element of the verdict is insufficient. We agree.

The stipulation presented to the jury did not track the prior-convictions element of the statute under which appellant was charged. Instead, the stipulation apparently followed an earlier version of the statute and described a period between the first qualified conviction and five years following the discharge from sentence or disposition of that conviction. A look back of ten years (under the charging statute), within which two previous qualified convictions enhance a current conviction to a felony, is not the same as a period of time from conviction to five years following discharge from the sentence or disposition of that conviction. A conviction resulting in a sentence not discharged within five years, plus an additional five years, would be outside the ten-year window under the charging statute.

Further, the record evidence of prior convictions here is limited to one. Only the complaint, which is not evidence, references a second conviction within the ten-year period. The state argues that the parties' stipulation was intended to satisfy the prior-convictions element so that the jury was not required to decide whether the state had established that element beyond a reasonable doubt. We reject that argument for a number of reasons.

First, the record of what the parties intended is confusing, at best. While in conversation with the district court, defense counsel acknowledged that the state had

certified copies of two prior incidents, but nevertheless requested that the entire charge, including the prior-convictions element, be read to the jury. Second, the state acquiesced in the district court's instructions to the jury requiring proof of the prior-convictions element beyond a reasonable doubt. Third, in argument to the jury, the state referenced the prior-convictions element and suggested that the stipulation satisfied it. This sequence of events hardly shows that the parties intended that the jury not decide the prior-convictions element of this offense.

Normally, when a defendant stipulates to a prior conviction as an element of an offense, the stipulation removes the prior-convictions element and any evidence of it from the jury's consideration. *See State v. Davidson*, 351 N.W.2d. 8, 11-12 (Minn. 1984) (holding that generally in prosecution for being felon in possession of a weapon defendant can stipulate to prior conviction to remove issue from jury). Here, not only was the evidence of a prior conviction not kept from the jury, but the insufficient stipulation was also read to the jury.

Because the state introduced evidence of only one conviction that occurred within ten years from the date of the charged offense, and the stipulation stated only that the charged offense occurred within a period that could have exceeded ten years, there is insufficient evidence in the record on this element to support the verdict, and we must reverse.

In light of our decision, we need not address appellant's claim that the district court erred in accepting the parties' stipulation to the prior-conviction element of the charged offense without first obtaining appellant's waiver of his right to a jury

determination of that element, nor need we address appellant's other arguments on appeal.

Reversed.