STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2194

State of Minnesota,
Respondent,

vs.

Paul Robert Tangen,
Appellant.

Filed February 3, 2009
Affirmed
Larkin, Judge

Dodge County District Court
File No. 20-CR-06-725

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

Paul Kiltinen, Dodge County Attorney, Dodge County Courthouse, 22 Sixth Street E., Mantorville, MN 55955 (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Hudson, 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

On appeal from his conviction and sentence, appellant argues that (1) the evidence was insufficient to sustain his conviction of attempted second-degree assault and (2) the district court erred by imposing sentences for both fleeing a peace officer in a motor vehicle and attempted second-degree assault. Because the evidence was sufficient to sustain appellant's conviction and multiple sentences were permissible under Minn. Stat. § 609.035, subd. 5 (2004), we affirm.

FACTS

On July 29, 2006, appellant Paul Tangen led Blooming Prairie Police Officer Jacob Peterson on a high-speed motor-vehicle chase. Appellant was subsequently arrested and charged with: (1) obstruction of legal process, in violation of Minn. Stat. § 609.50, subd. (1)(2) (2004); (2) driving after cancellation in a manner inimical to public safety, in violation of Minn. Stat. § 171.24, subd. 5 (2004); (3) fleeing a peace officer on foot, in violation of Minn. Stat. § 609.487, subd. 6 (2004); (4) fleeing a peace officer in a motor vehicle, in violation of Minn. Stat. § 609.487, subd. 3 (2004); and (5) attempted assault with a dangerous weapon in the second degree, in violation of Minn. Stat. §§ 609.222, subd. 1, 609.17, subd. 1 (2004). After a court trial, the district court found appellant guilty of all five offenses.

The evidence at trial included Officer Peterson's testimony and a squad-car video recording of the chase. Officer Peterson testified that appellant slammed on his brakes several times during the chase, causing Officer Peterson to brake in order to avoid a rear-

end collision. Officer Peterson further testified that appellant began to make a U-turn and then drove towards Officer Peterson's squad car. Officer Peterson had to accelerate in order to avoid appellant's collision course with the driver's side of Officer Peterson's squad car. Officer Peterson's testimony was consistent with the squad-car video recording of the chase. In addition to showing the U-turn incident, the video recording showed appellant stopping his vehicle and accelerating in reverse toward the squad car, causing Officer Peterson to back up in order to avoid a collision.

The district court sentenced appellant to concurrent sentences of 13 months for fleeing a peace officer in a motor vehicle and 19.5 months for attempted second-degree assault. This appeal follows.

D E C I S I O N

Sufficiency of the Evidence

Appellant contends that the evidence was insufficient to establish that he intended to assault Officer Peterson or that he took a substantial step toward assaulting Officer Peterson. When assessing the sufficiency of evidence, appellate courts review bench trials in the same manner as jury trials. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). Our review 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 permit the [court] to reach the verdict which [it] did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb the verdict if the court, "while acting with due regard for the presumption of innocence and requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged

offense, given the facts in evidence and the legitimate inferences that could be drawn therefrom." *State v. Crow*, 730 N.W.2d 272, 280 (Minn. 2007). We defer to the district court's determination of credibility because the district court is in the best position to judge the credibility of the witnesses. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). And we assume that the fact-finder believed the state's witnesses and disbelieved the defendant's witnesses. *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001).

In order to find appellant guilty of attempted second-degree assault, the district court had to find, beyond a reasonable doubt, that appellant intended to assault "another with a dangerous weapon" and completed an act that was a substantial step toward, and more than preparation for, the commission of the assault. Minn. Stat. § 609.222, subd. 1; 609.17, subd. 1. The determination of whether a defendant had the requisite intent to commit an assault is an issue for the finder of fact. *State v. Edge*, 422 N.W.2d 315, 318 (Minn. App. 1988), *review denied* (Minn. June 21, 1988). Intent is a state of mind "generally proved circumstantially—by drawing inferences from the defendant's words and actions in light of the totality of the circumstances." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

An assault is "an act done with intent to cause fear in another of immediate bodily harm or death" or "the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2004). "'Dangerous weapon' means [a] . . . 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. . . ." Minn. Stat. § 609.02, subd. 6 (2004). "'Great bodily harm' means 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 (2004).

The district court found appellant guilty of attempted second-degree assault because appellant, during the high-speed pursuit of his vehicle, abruptly slammed on his brakes, "stopped his vehicle in the lane of traffic, and drove in reverse in an attempt to ram the front of [the officer's] squad car . . . [and] in the course of making a U-turn . . . , attempted to ram the driver's side front passenger door of [the officer's] squad car."

We conclude that the evidence was sufficient to sustain appellant's conviction. First, Officer Peterson testified that appellant attempted to ram his squad car. We defer to the district court's determination that the officer's testimony was credible. In addition, the video recording of the chase corroborates Officer Peterson's testimony. The video showed appellant twice driving his vehicle in reverse toward the squad car. Each time Officer Peterson backed up in order to avoid a collision. The video also showed appellant making a U-turn and driving toward the squad car, such that Officer Peterson had to accelerate in order to avoid a collision. When viewed in a light most favorable to the verdict, the evidence was sufficient to permit the district court to conclude that appellant intended to assault Officer Peterson, and that he took a substantial step toward assaulting Officer Peterson, when he abruptly slammed on his brakes, drove in reverse toward the squad car, and drove toward the driver's side front door of the squad car.

Appellant argues that his driving conduct did not transform his vehicle into a dangerous weapon. Appellant contends that because he drove slowly toward the squad

car, a collision could not have caused great bodily harm or death. A vehicle can be used as a dangerous weapon. *Cf. Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 708-09 (Minn. App. 2008*)* (holding that officers had probable cause to arrest defendant for second-degree assault with a dangerous weapon based in part on victim's statements that defendant rammed victim's vehicle repeatedly with defendant's truck); *State v. Craven*, 628 N.W.2d 632, 635 (Minn. App. 2001) (noting that "[i]f the act involved the use of a vehicle as a dangerous weapon, it would constitute felony-murder."), *review denied* (Minn. Aug. 15, 2001). Whether appellant's driving conduct could have caused great bodily harm or death was for the fact-finder to determine. When viewed in a light most favorable to the verdict, the evidence was sufficient to permit the district court to conclude that appellant's vehicle, in the manner in which it was driven, was capable of producing great bodily harm or death.

Multiple Sentences

The district court sentenced appellant to concurrent sentences for fleeing a peace officer in a motor vehicle and attempted second-degree assault. Appellant contends that the district court erred in sentencing appellant for both offenses.

With exceptions, "if 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." Minn. Stat. § 609.035, subd. 1. Section 609.035, subdivision 1, was intended "to broaden the protection afforded by our constitutional provisions against double jeopardy." *State v. Johnson*, 273 Minn. 394, 400, 141 N.W.2d 517, 522 (1966). "The purpose of section

609.035 is to protect a defendant convicted of multiple offenses against unfair exaggeration of the criminality of his conduct." *State v. Mullen*, 577 N.W.2d 505, 511 (Minn. 1998) (citation omitted). The protection against double punishment in section 609.035 cannot be waived; therefore, appellant may raise this issue on appeal without having contested the issue at sentencing. *State v. Mendoza*, 297 N.W.2d 286, 288 (Minn. 1980); *see also State v. White*, 300 Minn. 99, 105-06, 219 N.W.2d 89, 93 (1974). But section 609.035, subdivision 1, is subject to an exception: "[A] prosecution or conviction for [fleeing a peace officer in a motor vehicle] . . . is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct." Minn. Stat. § 609.035, subd. 5 (referencing Minn. Stat. § 609.487).

Appellant urges us to construe section 609.035, subdivision 5, as inapplicable in this case because the attempted second-degree assault (1) was committed for the purpose of facilitating the offense of fleeing a peace officer in a motor vehicle and (2) did not involve conduct in addition to fleeing a peace officer in a motor vehicle. Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

Appellant relies on *State v. Scott*, 298 N.W.2d 67 (Minn. 1980) and *State v. Jackson*, No. C5-01-428, 2002 WL 109345 (Minn. App. Jan. 18, 2002) in support of his position. *Jackson* is unpublished and has no precedential value. Minn. Stat. § 480A.08, subd. 3(c) (2008); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993) (addressing dangers of miscitation and unfairness associated with use of

unpublished opinions and stating that "[t]he legislature has unequivocally provided that unpublished opinions are not precedential").

In *Scott*, the Minnesota Supreme Court held that a defendant could not be sentenced for both burglary and possession of burglary tools when the tools were possessed "for the purpose of facilitating the burglary of which he was convicted." *Scott*, 298 N.W.2d at 68. But the *Scott* case involved a different statutory exception to section 609.035 than is at issue here. *Id*. ("A prosecution for or conviction of the crime of burglary is not a bar to conviction of any other crime committed on entering or while in the building entered." (quoting Minn. Stat. § 609.585 (1978))). And the *Scott* holding was fact-specific. *Id.* at 68-69. The supreme court did not articulate an analysis that justifies extending its holding beyond cases that involve burglary and possession of burglary tools. We therefore decline to extend the holding of *Scott* to the facts of this case. Instead, we apply section 609.035, subdivision 5, as written. Because appellant's attempted second-degree assault was a crime other than fleeing a peace officer in a motor vehicle, appellant's conviction of fleeing a peace officer in a motor vehicle does not bar appellant's conviction of or punishment for attempted second-degree assault.

Moreover, we reject appellant's contention that his attempted second-degree assault did not involve conduct in addition to fleeing a peace officer in a motor vehicle. Appellant's conviction for fleeing a police officer in a motor vehicle was based on the district court's finding that appellant led police on a high-speed pursuit of his motor vehicle, which began in Steele County and ended in Dodge County. Appellant's conviction for attempted second-degree assault was based on the following district court

findings: appellant abruptly slammed on his brakes during the course of the chase; appellant stopped his vehicle and drove in reverse in an attempt to ram the squad car; and appellant attempted to ram the driver's side of the squad car. Thus, appellant's attempted second-degree assault involved conduct in addition to fleeing a peace officer in a motor vehicle.

Finally, we address appellant's claim that the "avoidance-of-apprehension" doctrine bars appellant's sentences for both fleeing a peace officer and attempted second-degree assault. The Minnesota Supreme Court has held that "multiple sentences may not be used for two offenses if the defendant substantially contemporaneously committed the second offense in order to avoid apprehension for the first offense." *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991). The avoidance-of-apprehension doctrine is used to determine whether multiple offenses were committed during a single behavioral incident (i.e., whether section 609.035 is applicable). *See*, *e.g.*, *id.* at 497 (holding that criminal vehicular operation resulting in injury and felony leaving the scene of an accident were part of the same behavioral incident); *State v. Gilbertson*, 323 N.W.2d 810, 812 (Minn. 1982) (reversing where defendant drove recklessly in order to avoid being apprehended for driving after suspension; remanding for the district court to vacate either defendant's conviction of driving after suspension or reckless driving because both formed the same behavioral incident).

Appellant does not dispute that his offenses were committed as part of a single behavioral incident and that section 609.035 is applicable. The relevant issue is whether the fleeing-a-peace-officer exception to section 609.035 applies in this case. We have

concluded that it does. Appellant cites no legal authority supporting the proposition that the avoidance-of-apprehension doctrine prohibits multiple sentences in cases where the fleeing-a-peace-officer exception applies. One reasonably assumes that a person flees a peace officer in order to avoid apprehension. If we were to extend the avoidance-of-apprehension doctrine to cases where the fleeing-a-peace-officer exception applies, we would render the exception meaningless. We decline to do so.

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals