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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1080**

State of Minnesota,
Respondent,

vs.

Timothy Kenbert Engle,
Appellant.

**Filed May 12, 2009
Affirmed
Poritsky, Judge***

Ramsey County District Court
File No. 62-K8-04-000496

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

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Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and
Poritsky, 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.

UNPUBLISHED OPINION

PORITSKY, Judge

Appellant was convicted of reckless discharge of a firearm within a municipality. On appeal, he argues that there is insufficient evidence to support the conviction. We affirm.

FACTS

Appellant Timothy Engle was tried by the district court and convicted of reckless discharge of a firearm within a municipality, in violation of Minn. Stat. § 609.66, subd. 1a(a)(3) (2002). After this court upheld Engle's conviction and sentence, *State v. Engle*, 731 N.W.2d 852 (Minn. App. 2007), the Minnesota Supreme Court granted review solely on the issue of whether subdivision 1a(a)(3) requires an intentional discharge of a firearm, *State v. Engle*, 743 N.W.2d 592, 593 (Minn. 2008). The supreme court reversed and remanded the case to the district court for further consideration in light of its decision. *Id.* at 596. On remand, the district court again found Engle guilty of violating Minn. Stat. § 609.66, subd. 1a(a)(3), as construed by the supreme court. This appeal follows.

The incident for which Engle was convicted occurred in early November 2003 when Engle, working as a security guard, went to the aid of A.W., another security guard. A.W. was working at an apartment building in St. Paul and had witnessed on security monitors someone apparently breaking into a vehicle in the building's parking lot. A.W. confronted the individual, later identified as H.M., and brought him into the building's

security command post. A.W. called the security firm's dispatcher for assistance, and Engle was the guard who responded.

After Engle arrived, H.M. fled and got into the car in which he had arrived. Two other persons were in the car, one in the front passenger seat and one in the back. Engle and A.W. chased after H.M., and as they approached the car it began to back up, grazing Engle's knee. Engle, feeling that this was a threat to the guards' safety, drew his weapon, a handgun with a laser sight. A.W. aimed his weapon—a Taser with a laser sight—at the windshield of the car. Engle held his gun in both hands in what he calls the “up-and-ready” position, which he described as: “The weapon is out extended, but it's lowered a little bit and pointed down so I can still see whatever I need to see. It's as close to being ready to shoot as you can get, but with the weapon still pointed safely towards the ground.” Engle yelled at the occupants of the car to “[s]top the car, stop the car, put your hands up.” The car's reverse light and brake lights went off, though the engine was still running, and H.M., who was driving, and the passenger in the front seat both raised their hands. As Engle approached the driver's door, he noticed a third individual, whom he had not seen earlier, lying in the back seat. Engle could not see the individual's hands. The individual did not respond to Engle's command to put his hands up.

Engle continued his approach and opened the driver's door with his right hand while continuing to hold the weapon in his left hand, that is, his shooting hand. Engle reached for H.M., placing his right hand on H.M.'s shoulder. At that point the gun was

not locked and could be fired by merely pulling the trigger.¹ H.M. still had his hands up, and Engle testified at trial that H.M. was “turning and lifting himself off the seat as he’s standing, like he’s gonna get out of the car.” Engle further testified that the door opened faster than he anticipated, as if there was some force behind it, and that H.M. “turned and . . . lunged out.” Engle had previously stated in an affidavit that H.M. had jumped out of the car, pushed Engle, and grabbed Engle’s gun hand.

According to Engle’s trial testimony, the next thing he remembered was being “on [his] back in the grass. The gun had gone off and was lying to [his] left about three feet away and the suspect, [H.M.], is on top of approximately [his] knees, facedown.” H.M. testified that he was pulled out of the car and that he went to the ground. He remembered Engle pulling him out of the car, but he did not remember whether Engle remained standing. H.M. testified that he did not hear or feel the gunshot, though he recalled that he started bleeding from his mouth and felt burning in his stomach. A.W. did not see Engle fire his gun. H.M. was shot in the right side of his back, resulting in paralysis.

DECISION

Engle argues that the evidence was insufficient to support his conviction. In considering a claim of insufficient evidence, this court’s review is limited to a painstaking review of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing

¹ The district court found that Engle’s gun “was not equipped with a traditional ‘safety.’” The record does not indicate whether the gun had any safety, traditional or not, but in any event, if it had a safety, the safety was not engaged.

court must assume that the fact-finder “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). The reviewing court will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

In its decision on Engle’s appeal, the supreme court ruled that “a conviction under Minn. Stat. § 609.66, subd. 1a(a)(3), does not require proof of an intentional discharge, but rather requires proof of a conscious or intentional act, in connection with the discharge of a firearm, that creates a substantial and unjustifiable risk that the actor is aware of and disregards.” *Engle*, 743 N.W.2d at 593.

Conscious or intentional act

The district court found that Engle was holding the unlocked gun with a round in the chamber and his finger on the trigger when he “forcefully extracted [H.M.] from the car.” Engle concedes that he was holding the unlocked gun with a round in the chamber, but contends that he did not “forcefully extract[H.M.] from the car.” Engle maintains that the gun discharged when H.M. lunged at Engle as he opened the door.

The district court noted that Engle’s trial testimony conflicted with an affidavit that Engle had sworn out earlier. The court went on to say:

To credit the Defendant's testimony that the victim either lunged at Defendant or attempted to exit the car on his own would require the Court to conclude that the victim lunged or moved backwards toward the armed security guard, whose laser sight had been persuasive enough to convince the victim to stop the car and put his hands in the air.

An expert witness called by Engle testified that Engle likely squeezed the trigger unintentionally as part of a reflexive response to a loss of balance. But if Engle's loss of balance had been the result of H.M. pushing or grabbing for him, it is much more likely that H.M. would have been shot in the front or on the side of his body rather than "in the right side of his upper back," as the district court found. H.M. was cooperating with Engle at the time of the shooting by stopping the car and putting his hands up. There is sufficient evidence in the record to support the district court's finding that H.M. had not lunged at Engle, but rather the gun discharged when Engle attempted to forcefully extract H.M. from the car.

Engle also argues that there was no evidence presented that his finger was on the trigger, contending that his finger was actually on the trigger guard. But none of the descriptions given by Engle's expert concerning reflexive squeezing responses explains how Engle's finger could have moved from outside the trigger guard to squeeze the trigger. The record supports the district court's finding that Engle had his finger on the trigger as he attempted to extract H.M. from the car. The record likewise supports the court's conclusion that Engle committed a conscious, intentional act when he held the unlocked gun in the manner found by the court, knowing that there was a round in the chamber.

Substantial risk

The district court found that as Engle extracted H.M. from the car, Engle was holding the unlocked gun in his shooting hand, extended away from his body, pointed in H.M.'s direction, with his finger on the trigger. These findings all support the conclusion that Engle's conduct created a substantial risk. As stated by the district court, "[a] reasonable person under the circumstances would appreciate the risks associated with holding a firearm with a round in the chamber and one's finger on the trigger." Particularly given Engle's training in the use of firearms, the district court's conclusion that Engle was aware of this substantial risk is a reasonable one.

Unjustifiable risk

The record also supports that Engle had a number of options available to him in his effort to ensure his safety and that of the other guard, A.W. At the time that Engle attempted to extract H.M. from the car by placing his hand on H.M.'s shoulder, H.M. had complied with Engle's orders, as evidenced by H.M.'s stopping the car and raising his hands. No evidence exists to suggest that H.M., having seen the laser sights shining into the car, would suddenly stop following Engle's orders. As described by Engle, the car's engine was running, but the brake and reverse lights had gone off, indicating that the car was in neutral or park and that H.M. would have had to lower his hands to put the car in gear before being able to move it. In any event, Engle could have ordered H.M. to turn off the car or to get out and lie on the ground. Or Engle could have requested A.W.'s help, covering H.M. while Engle extracted H.M. from the car, or Engle could have covered H.M. while A.W. extracted H.M. At the very least, Engle could have removed

his finger from the trigger before engaging in physical contact with H.M. Given the number of options available to Engle and Engle's training in dealing with such situations, the district court's finding that Engle had taken an unjustifiable risk, of which Engle was aware, is supported by the evidence.

Because the record supports the district court's findings that Engle engaged in conscious and intentional acts that created a substantial and unjustifiable risk, of which Engle was aware and chose to disregard, we affirm.

Affirmed.

/s/

Judge Bertrand Poritsky