STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0328

State of Minnesota,
Respondent,

vs.

Jay M. Puig,
Appellant.

Filed June 9, 2009
Affirmed
Schellhas, Judge

Isanti County District Court
File No. K7-05-613

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

Jeffrey R. Edblad, Isanti County Attorney, 555 18th Avenue Southwest, Cambridge, MN 55008 (for respondent)

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

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges his conviction and the district court's denial of his motion for a new trial, arguing that the court erred in instructing the jury by misidentifying the date of the offense. We conclude that the court's instruction to the jury was not erroneous, and we affirm.

FACTS

Appellant Jay M. Puig was convicted of assaulting M.P., who owned a bike shop that operated in the same building as appellant's employer. Earlier in the week of March 25, 2005, M.P. had a verbal altercation with appellant. On March 25, between 4:30 and 5:30 p.m., M.P. was working on a trailer in his shop when he was struck in the jaw. M.P. saw appellant walk by and asked him, "What was that for?" Appellant responded by referring to the prior verbal altercation. M.P.'s jaw was broken as a result of the assault, and M.P. was required to have surgery to reset his jaw, extract a tooth, and wire his jaw shut.

Although the evidence presented at trial established March 25, 2005 as the date of the incident, the district court instructed the jury to find whether the assault occurred "on or about March 26, 2005." The jury returned a verdict of guilty. The district court granted appellant a continuance to file a motion for a new trial on the ground that the jury instruction was erroneous. The court denied the motion and sentenced appellant to an 18-month stayed sentence and five years' probation with 90 days in jail. The court also required appellant to pay restitution to M.P. in the amount of $24,053.04. Appellant

requested a hearing on the issue of restitution, and the court granted appellant's request but stayed both the hearing and the payment of restitution pending appeal. Appellant requests that this court reverse his conviction and remand for a new trial.

D E C I S I O N

The district court is obligated to "instruct the jurors on exactly what it is that they must decide." *State v. Peterson*, 673 N.W.2d 482, 485 (Minn. 2004). A criminal defendant has the right to be found guilty by a jury of "every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 2356 (2000). A defendant also has the right to have the jury instructed on all the elements of an offense, even if the evidence to a certain element is not contradicted. *State v. Ouellette*, 740 N.W.2d 355, 358 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007). "Jury instructions must be viewed in their entirety to determine whether they fairly and adequately explain the law of the case." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002).

Appellant argues that the date of the incident, March 25, 2005, was an essential element of the offense and that the district court committed reversible error when it instructed the jury to find whether appellant assaulted M.P. "on or about March 26, 2005." Ordinarily, the date is not a material element of the offense, and an exact date is an essential element of the crime only when the act is unlawful at certain times. *State v. Becker*, 351 N.W.2d 923, 927 (Minn. 1984). The elements of third-degree assault are assaulting another and inflicting substantial bodily harm. Minn. Stat. § 609.223, subd. 1 (2004). The statutory definition of third-degree assault does not include a particular time

period. Because the exact date is not an essential element of the crime, and because March 25, 2005 was "on or about March 26, 2005," we conclude that the district court did not err in instructing the jury.

Had the district court erred, appellant would, at most, be entitled to harmless-error review. *See State v. Vance*, 734 N.W.2d 650, 655 n.3 (Minn. 2007) (stating that an error raised for the first time in a motion for a new trial is reviewed for harmless error if it is one of fundamental law or controlling principle, or for plain error otherwise). Harmless error is error which, beyond a reasonable doubt, did not affect the jury's verdict. *Id.* at 659. We observe that, aside from the jury instructions, the complaint contains an error in that it states that the reporting officer spoke with M.P. on March 26, 2005 and that M.P. reported being assaulted on "*Friday*, March 26." But this complaint also states that the assault occurred "on or about March 25," and appellant's examination of M.P. at trial establishes March 25 as a Friday. Furthermore, the reporting officer testified at trial that he first spoke with M.P. on March 26, but that M.P. told him the assault occurred on March 25. Apart from these two erroneous and incidental references, testimony and closing arguments from both sides consistently established the date of the incident as March 25, 2005. Therefore, if the district court's jury instruction was erroneous, we conclude that the error did not substantially affect the jury verdict beyond a reasonable doubt and was therefore harmless.

Appellant also argues that because he requested a restitution hearing at sentencing, he has not waived his right to challenge restitution by bringing this appeal, and the state agrees. A defendant has the statutory right to challenge an order for restitution by

requesting a hearing within 30 days of sentencing. Minn. Stat. § 611A.045, subd. 3(b) (2008). Appellant has exercised this right, and in light of appellant's desire to preserve the issue of restitution, we do not reach the merits of this issue.

Affirmed.