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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-755**

State of Minnesota,
Respondent,

vs.

Russell Lee Ferguson,
Appellant.

**Filed June 2, 2009
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-07-106546

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (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 Johnson, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

UNPUBLISHED OPINION

ROSS, Judge

M.E.'s intestines filled with blood from her ruptured spleen three days after her boyfriend, Russell Ferguson, punched her in the back. Doctors removed her spleen after she collapsed at work and coworkers rushed her to the hospital. Ferguson appeals his conviction of first-degree domestic assault, pointing to alternative theories of M.E.'s ruptured spleen and maintaining that the evidence is insufficient to support the conviction. He argues that facts cannot establish a connection between M.E.'s ruptured spleen and his assault and that M.E.'s testimony was not credible. Ferguson also argues that the district court shifted the burden of proof to him. Because sufficient evidence supports Ferguson's conviction and because the district court did not shift the burden of proof, we affirm.

FACTS

On August 9, 2007, M.E. and Russell Ferguson were repairing an air mattress in their apartment. According to M.E., Ferguson became angry and punched her in the arm and stomach. Ferguson then hit her in the back as she knelt.

M.E. did not report being assaulted for three days. She felt pain over several days, but still went to work on August 12. She fell unconscious and was rushed from work to the hospital. A computed tomography scan revealed that M.E. had a ruptured spleen, which required immediate surgery and removal. After surgery, M.E. told hospital staff about Ferguson's assault. Hospital staff called police. M.E. gave police several

statements and police arrested Ferguson. The state charged him with first- and third-degree assault.

Ferguson waived his right to a jury trial in exchange for the state's agreement to seek a prison sentence of no more than 43 months. Ferguson and the state stipulated to the admission of police reports and medical records. M.E. also testified at the trial. Ferguson questioned her about a robbery and assault that had occurred three days before his alleged assault, implying that M.E.'s spleen injury really occurred during the robbery. He also challenged a discrepancy in M.E.'s statement regarding Ferguson's assault. That oral statement was included in a police report and noted that Ferguson struck her on the right side of her lower back. But M.E.'s spleen was located on the left side of her lower back. She testified that she had actually pointed to her left side when talking to the officer, indicating that any mistake in the report was due to the officer's error in noting which side she was referring to.

Ferguson testified about the robbery where their shared scooter was stolen and stated that afterwards M.E. appeared to be injured. He denied assaulting M.E. The district court found Ferguson guilty of first-degree assault and sentenced him to 43 months in prison. Ferguson appeals.

DECISION

I

Ferguson argues that sufficient evidence was not introduced to prove first-degree assault because the stipulated records establish no connection between M.E.'s ruptured spleen and his alleged assault and because M.E.'s testimony was incredible. We review

claims of insufficiency of evidence by carefully analyzing the record and determining whether it sufficiently supports the verdict, when the evidence is viewed in the light most favorable to conviction. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We apply this standard to bench trials and jury trials alike. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). We assume that the factfinder believed the evidence supporting the verdict and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

The evidence supports Ferguson’s conviction. The conviction requires proof of an assault that inflicted great bodily harm on M.E. *See* Minn. Stat. § 609.221, subd. 1 (2006) (defining first-degree assault).

The evidence supports the finding that Ferguson assaulted M.E. M.E. testified that Ferguson hit her on August 9, 2007, in the arm, stomach, and back. Although Ferguson denied hitting M.E. and pointed to discrepancies in her police statements, credibility determinations rest with the factfinder. *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998). Because M.E.’s testimony indicated that Ferguson intentionally hit her forcefully in her lower left back, the district court had a basis to find that Ferguson committed assault. *See* Minn. Stat. § 609.02, subd. 10 (2006) (defining assault as “intentional infliction of . . . bodily harm on another”).

The evidence also supports the finding that Ferguson inflicted great bodily harm on M.E. Great bodily harm occurs if an injury “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 (2006). Medical records show that M.E. suffered from a

pneumothorax resulting in a partially collapsed lung, broken ribs, and a ruptured spleen that had to be removed. Ferguson contends that the lack of bruising and the three-day delay between his alleged assault and M.E.'s collapse indicate that she did not suffer great bodily harm from the assault. But lack of bruising does not prevent a finding that M.E. suffered trauma and that Ferguson caused her injuries.

Ferguson's alternative theory that the injury resulted from a scooter thief's alleged assault directly conflicts with his own argument. He claims that no evidence exists that "a person with a ruptured spleen could move about for nearly three full days before the [injury's effects] manifest themselves in a way that could not be ignored." How, then, could M.E.'s ruptured spleen be the result of the scooter incident, which occurred on August 6, or six days before her emergency surgery? The district court reasonably considered that *some* trauma caused M.E.'s spleen to rupture, and M.E.'s statement and testimony support the finding that the cause was Ferguson's violent blow to her back. Because M.E.'s spleen was removed, she suffered great bodily harm. The evidence sufficiently supports Ferguson's first-degree-assault conviction.

II

Ferguson also contends that the district court's findings of fact shifted the burden of proof to him. We will not reverse a district court's findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01. To comply with due process rights, the state must prove every element of the crime beyond a reasonable doubt. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). If the burden to disprove any element of the crime is shifted to the defendant, then the defendant's due process rights are violated. *Id.*

Remarks about a lack of evidence for a defendant's theory do not shift the burden of proof. *See State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993) (discussing a prosecutor's remarks).

Ferguson contends that the district court required him to prove that M.E. was not credible by including the following statement in its findings of fact:

In light of the Court's finding that [M.E.]'s testimony was credible, the Court finds that none of the Defendant's suggested scenarios constitute reasonable grounds to believe that some act other than the Defendant's August 9 assault caused [M.E.]'s spleen to rupture.

The contention has merit only if we consider the statement out of its context. The district court did not find Ferguson guilty because Ferguson offered implausible alternative reasons for M.E.'s injury. Rather, the district court explained that because it found M.E.'s causal explanation to be true, Ferguson's counter explanations could not be true.

Ferguson points to other findings and contends that the district court essentially required Ferguson to prove that another incident caused M.E.'s injury. But nothing in the district court's findings leads us to that conclusion. The district court did not, as Ferguson asserts, say that "Ferguson was guilty because there was nothing to the contrary in the record." M.E. testified that Ferguson struck her in the back, and the district court found M.E. to be credible. The state contended that Ferguson's blow ruptured M.E.'s spleen, and the record establishes that M.E. had a trauma-induced, ruptured spleen. In weighing Ferguson's contrary theories that the scooter thief injured M.E. or that M.E. injured herself by hitting a table when she lost consciousness at work, the district court

reasonably addressed why those theories did not measure successfully against the direct and circumstantial evidence establishing Ferguson's guilt. We reject the contention that the district court shifted the burden of proof to Ferguson.

Affirmed.