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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1253**

State of Minnesota,
Respondent,

vs.

Corey NMN Smith,
Appellant.

**Filed June 9, 2009
Affirmed
Muehlberg, Judge***

Hennepin County District Court
File No. 27-CR-06-057751

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, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Muehlberg, 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UNPUBLISHED OPINION

MUEHLBERG, Judge

Appellant Corey Smith was convicted following a jury trial of attempted first- and second-degree aggravated robbery and of fifth-degree assault, which is a lesser included offense. He was sentenced to the presumptive term of 45 months in prison. On appeal, he argues that the evidence is insufficient to sustain his conviction because his assault of the victim occurred after the attempted robbery and not while the attempted robbery was taking place. We reject his argument and affirm his conviction.

FACTS

At about 1:00 a.m. on August 22, 2006, 28-year-old A.F. stopped by Lake Calhoun in Minneapolis on his way home from work. He walked a few blocks along the lake, smoked a cigarette, and turned around to return to his car. A man came up to A.F. from behind, put something against the back of A.F.'s head, and told A.F. not to turn around or look at him. The man, who was later identified as appellant, demanded money.

A.F. testified that appellant "hit me in the head" and "threw me down and hit me in the stomach." A.F. told appellant that he had no money, and he removed his wallet from his pocket to show appellant that he had no cash. Appellant then stated "Well you don't have any money, then I'm going to kill you." At some point, A.F. offered credit cards, but appellant only wanted cash.

A.F. was able to run away when appellant momentarily became distracted. He ran up to a squad car stopped at the intersection of Thomas Avenue and Lake Street, and

reported to the police officer that someone had just tried to rob him. A.F. directed the officer to the area where the robbery had occurred.

As the officer drove A.F. along the north side of the lake, they came across appellant who was walking toward the squad car. When the officer turned on his spotlight, A.F. yelled, “That’s him!” Appellant ran into a wooded area and was quickly apprehended by a police dog from a K-9 unit. A screwdriver was found in appellant’s pocket.

A.F. testified that the initial blow to his head caused a brief loss of consciousness. A.F. could not move his neck for more than a month after the assault. He also suffered stomach pain for almost a year afterwards.

DECISION

When a challenge is made to the sufficiency of the evidence to support a conviction, an appellate court reviews the record “to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989); *see State v. Bickham*, 485 N.W.2d 923, 925-26 (Minn. 1992). This court must assume that the jury “believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Appellant was charged and convicted of attempted first-degree aggravated robbery. A simple robbery involves the use or threatened use of force to “overcome the person’s resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property[.]” Minn. Stat. § 609.24 (2006). If a defendant inflicts

bodily harm or uses a dangerous weapon¹ “while committing [a] robbery,” a simple robbery is elevated to a first-degree aggravated robbery. Minn. Stat. § 609.245, subd. 1 (2006).

The standard jury instructions for first-degree aggravated robbery do not define the phrase “while committing a robbery.” See 10 *Minnesota Practice* CRIMJIG 14.04 (2006). But the district court in this case, with the parties’ approval, instructed the jury that “[w]hile committing the robbery means closely connected in terms of time, place, and causal relation.”

Appellant argues that the first-degree robbery statute requires more than a “time, place, causal relation” between the taking of property from another and the infliction of bodily injury. Appellant is correct: simple robbery becomes first-degree aggravated robbery when a defendant inflicts bodily harm to “overcome resistance or to compel acquiescence in the taking or carrying off of” the property. 10 *Minnesota Practice* CRIMJIG 14.04 (2006). Thus, it may be irrelevant whether the harm is inflicted before, during, or after the taking. The crucial question is whether the assault occurred to overcome the victim’s resistance or to compel the victim’s acquiescence in the taking of his or her property.

In *State v. Kvale*, 302 N.W.2d 650, 651 (Minn. 1981), the defendant threatened the victim, obtained back money that the defendant had previously paid the victim, and kept other money belonging to the victim. After getting money from the victim, the defendant

¹ The jury in this case was only instructed on the “bodily harm” provision of the statute, even though the screwdriver found in appellant’s pocket arguably could have been a dangerous weapon.

grabbed the victim's hair and used an object to cut the victim's throat. *Id.* On appeal, the defendant argued that the infliction of bodily harm after the taking was a separate assault and could not be used to elevate the simple robbery offense to aggravated robbery. *Id.* at 652. But the supreme court disagreed:

The robbery statute speaks of using force or threats to compel acquiescence in either the taking or the carrying away of the property. It does not require that the use of force or threats actually precede or accompany the taking. It requires only that the use of force or threats precede or accompany either the taking or the carrying away and that the force or threats be used to overcome the victim's resistance or compel his acquiescence in the taking or carrying away. Here the threats of force preceded the taking and the use of force—in the infliction of bodily harm—overcame the victim's power to resist and compelled his acquiescence both in the completed taking and in the contemporaneous carrying away of the money.

Id. at 653. The court in *Kvale* thus reviewed the entire incident to determine whether the infliction of bodily harm occurred while committing a robbery. *See also State v. Burrell*, 506 N.W.2d 34, 35-36 (Minn. App. 1993) (concluding that defendant's actions fit within the "carrying away" provision of the aggravated robbery statute when defendant, who had taken cigarettes from victim's store, bit the victim and pushed her to the ground after she had chased him down the street and jumped on him), *review denied* (Minn. Oct. 19, 1993).

Appellant argues that the evidence is insufficient to sustain his conviction of first-degree aggravated robbery because his assault of A.F. did not occur while he was attempting to rob A.F. Appellant claims that he struck A.F. only after A.F. told appellant

that he had no money. Appellant further claims that he gratuitously inflicted the bodily harm only after his attempt to rob A.F. had failed.

But appellant's argument ignores other facts, which show that appellant put an object to A.F.'s head and demanded money, and that when A.F. stated he had no money, appellant struck him in the head, knocked him to the ground, and struck him in the stomach. While on the ground, A.F. continued to try to convince appellant that he had no cash, opened his empty wallet and offered him credit cards instead. Based on these facts, the jury could easily conclude that the blows to A.F.'s head and stomach were intended to compel A.F. to produce any money he might have been hiding. Thus, the evidence supports a finding that appellant used force to overcome resistance or to compel acquiescence on A.F.'s part.

Affirmed.