STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1638

State of Minnesota,
Respondent,

vs.

Rodney Duane Bitcon,
Appellant.

Filed June 30, 2009
Affirmed
Muehlberg, Judge[*]

Clay County District Court
File No. 14-CR-07-2585

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

Brian J. Melton, Clay County Attorney, Pamela L. Harris, Assistant County Attorney, 807 N. 11th Street, P.O. Box 280, Moorhead, MN 56561-0280 (for respondent)

Steven M. Light, Larivee & Light, Ltd., US Bank Building, 600 Demers Avenue, Suite 502, Grand Forks, ND 58201 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, 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.

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

MUEHLBERG, Judge

Following a jury trial, appellant was convicted of felony-level third-degree assault, Minn. Stat. § 609.223, subd. 1 (2006), and misdemeanor domestic assault, Minn. Stat. § 609.2242, subd. 1(1) (2006). Appellant argues that the district court abused its discretion by denying his motion for a judgment of acquittal[1] at the close of the state's case, claiming that the state failed to meet its evidentiary burden to negate his claim of self-defense. The district court properly denied the motion for judgment of acquittal because the state offered sufficient evidence to submit to the jury to determine as fact finder the issue of whether appellant acted in self-defense. We affirm.

FACTS

During the fall of 2007, appellant Rodney Bitcon allowed C.O., his intermittent girlfriend, to live with him temporarily in his Moorhead apartment. In the early morning hours of November 6, appellant, who is 6'2", and C.O., who is 5'2", became involved in a domestic altercation that resulted in injuries to C.O. C.O. and appellant telephoned 911 together, and appellant told the operator that C.O. had a "bad cut" because "I hit her." C.O. told the operator that appellant "beat me up" and "kicked me in the head." Appellant admitted to the police officers who responded to the call that he had struck C.O. and indicated that his hand was swollen because he had hit her.

[1] Appellant moved for a directed verdict, but consistent with Minn. R. Crim. P. 26.03, subd. 17(1), we will treat this motion as a motion for judgment of acquittal.

Appellant later gave a recorded statement to police in which he again admitted to hitting C.O. He stated that she began talking too loudly in his apartment, alarming him, and when he told her to be quiet, she threw a beer at him and "lunged forward a little bit." He became scared and backhanded her, and then he hit her "three or four" times "too hard." C.O. suffered a laceration above her eyebrow that required stitches.

Before trial on the ensuing felony assault and misdemeanor domestic assault charges, the district court ordered appellant to be evaluated for mental competence under Minn. R. Crim. P. 20.01, and he was found mentally competent to stand trial. At trial, the two police officers who responded to the call testified that, contrary to appellant's claim, they did not find any evidence in the apartment of a beer container that C.O. allegedly threw at appellant, although there were other signs of a scuffle, including an overturned chair and blood.

C.O. testified that appellant became upset with her for no reason, kicked her until he drew blood, and quit only when she begged him to stop. During cross-examination, C.O. admitted that she did not recall throwing a beer at appellant. She also conceded that she did not remember anything she did before the assault and that she could not remember if she initiated the assault, although she did not think so. The jury heard appellant's recorded confession to police, but appellant did not testify at trial.

At the close of the state's case, the district court granted appellant's motion to include a self-defense instruction, noting that C.O. "testified she didn't remember anything she said or did," and that this presented a fact question for the jury to decide whether appellant acted in self-defense. Appellant's counsel then moved for a judgment

of acquittal on the basis that the state failed to offer evidence to rebut appellant's self-defense claim. The court denied the motion, ruling that there was sufficient evidence to "let the jury make the factual determination about what happened here."

The jury returned a guilty verdict, and appellant filed this direct appeal.

D E C I S I O N

Before submission of a case to a jury and after the close of either side's case, the defendant may move the court for a judgment of acquittal on any charged offense, and the court shall grant the motion "if the evidence is insufficient to sustain a conviction[.]" Minn. R. Crim. P. 26.03, subd. 17(1). "The test for granting a motion for [judgment of acquittal] is whether the evidence is sufficient to present a fact question for the jury's determination, after viewing the evidence and all resulting inferences in favor of the state." *State v. Slaughter*, 691 N.W.2d 70, 74-75 (Minn. 2005). The reviewing 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 claims that the district court improperly denied his motion for judgment of acquittal because the state did not meet its burden of producing evidence that he did not act in self-defense.

> The elements of self-defense are (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

State v. Basting, 572 N.W.2d 281, 285 (Minn. 1997). Once the defense of self-defense is raised, the state has the burden of disproving one or more of these elements beyond a reasonable doubt. *Id.* at 286 (citing *State v. Spaulding*, 296 N.W.2d 870, 875 (Minn. 1980)). Further, a person who claims self-defense must use only the degree of force "necessary to a reasonable person under similar circumstances." *Id.* at 286.

Here, appellant claimed that C.O. initiated the assault, and C.O. testified that she did not remember any of her own actions before the assault, although she did not think she initiated the assault. On this evidence, the state did not meet its burden to produce evidence that C.O. did not initiate or provoke the assault. As to the remaining elements, as well as the requirement of a proportionate response, however, the state produced evidence to contradict appellant's self-defense claim. Appellant claimed that C.O. partly provoked him by throwing a beer at him, but her alleged conduct admittedly occurred after appellant hit her. Further, a search of appellant's apartment did not disclose any beer or beer container. In addition, appellant's own testimony establishes that any belief he had regarding imminent danger of great bodily harm was unreasonable. He claimed only that C.O. prepared to lunge at him, and this conduct alone did not provide him with a reasonable fear that he was physically endangered. Finally, appellant admittedly responded to any perceived provocation by backhanding C.O. and hitting her three or four times, and C.O. testified that appellant kicked her repeatedly in the head. This evidence shows that appellant's response was disproportionate to any provocation by the victim. Viewing this evidence and the inferences drawn from the evidence in the state's favor, we conclude that the state met its burden of producing evidence to show that

appellant did not act in self-defense. The jury, which received a self-defense instruction, properly resolved this issue as fact finder. Thus, the district court did not abuse its discretion by denying appellant's motion for a judgment of acquittal.

Affirmed.