STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0270

State of Minnesota,
Respondent,

vs.

Anthony L. Moore,
Appellant.

Filed July 21, 2009
Affirmed
Minge, Judge

St. Louis County District Court
File No. 69HI-CR-07-482

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-3421; and

Melanie Ford, St. Louis County Attorney, St. Louis County Courthouse, 100 North Fifth Avenue West, Suite 501, Duluth, MN 55802 (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 Worke, Presiding Judge; Minge, Judge; and Collins, 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

MINGE, Judge

Appellant challenges his second-degree assault convictions and sentence, arguing that there was insufficient evidence to prove that the assault was committed with a dangerous weapon and that there was an error in calculating his criminal-history score. We affirm.

FACTS

In April 2007, appellant Anthony L. Moore hit a man in the head, fracturing his skull and causing a brain hemorrhage. One witness claimed appellant used his fist. Another claimed he used a small black mallet. A third testified that he saw appellant standing above the victim holding a liquor bottle in his hand, which he then threw to the ground. On the night of the incident, the victim told an emergency room nurse that he had been struck in the head with a pipe; he later testified that appellant swung and hit him "with something," "a weapon of which I do not remember what it was." When police arrived, they found a broken vodka bottle and the victim, bleeding from his nose, mouth, and ear. A doctor testified that it takes considerable force to fracture someone's skull and that the injuries were consistent with being hit by a bottle, pipe, or other hard object.

Appellant was charged with two counts of second-degree assault and one count of third-degree assault. After a jury trial, appellant was convicted of all charges. Based on a criminal-history score of six and a conviction of a level VI offense, he was sentenced to 51 months for second-degree assault with a deadly weapon that inflicts substantial bodily harm. The remaining convictions were vacated. This appeal follows.

D E C I S I O N

I.

The first issue is whether there was sufficient evidence that a dangerous weapon was used in the assault. In claims of insufficient evidence to support a jury verdict, our review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, [is] sufficient to allow the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that the jury believed the state's witnesses and disbelieved any contrary evidence, *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989), especially if resolution of the matter depends mainly on conflicting testimony, *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). "We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted). We examine the "facts in the record and the legitimate inferences that can be drawn from those facts" to determine if a jury could have reasonably found the defendant guilty. *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). A jury "is in the best position to evaluate circumstantial evidence, and their verdict is entitled to due deference." *State v. Morris*, 606 N.W.2d 430, 437 (Minn. 2000).

Appellant's assault convictions require the use of a dangerous weapon. Minn. Stat. § 609.222, subds. 1, 2 (2006). A dangerous weapon is defined by statute as

> any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, any combustable or flammable liquid or *other device or instrumentality that, in the matter it is used or intended to be used, is calculated or likely to produce death or great bodily harm . . . .*

Minn. Stat. § 609.02, subd. 6 (2006) (emphasis added). Here, the jury was instructed using this definition and instructed that a fist could not be considered a dangerous weapon. Our case law is replete with decisions in which ordinary objects were "dangerous weapons" for the purposes of criminal assault. *See, e.g.*, *State v. Cepeda*, 588 N.W.2d 747, 748 (Minn. App. 1999) (beer bottle); *State v. Elkins*, 346 N.W.2d 116, 118-19 (Minn. 1984) (wooden chair rung); *State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983) (three-foot board); *State v. Moyer*, 298 N.W.2d 768, 770 (Minn. 1980) (gasoline); *State v. Mings*, 289 N.W.2d 497, 498 (Minn. 1980) (cowboy boots); *State v. Moss*, 269 N.W.2d 732, 735 (Minn. 1978) (scissors); *State v. Graham*, 366 N.W.2d 335, 337 (Minn. App. 1985) (four-foot lamp).

Here, there is testimony that appellant hit the victim with a mallet, bottle, or pipe, and testimony that the injuries were severe and consistent with being hit with such an object. Appellant does not contest that the victim suffered substantial bodily harm. Although there is also testimony that a fist was used, on appeal we assume the jury disbelieved this testimony. Consequently, we hold that there is sufficient evidence that appellant used a dangerous weapon in the assault.

II.

The second issue is whether the district court abused its discretion when calculating appellant's criminal-history score. The district court's determination of an individual's criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 564 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). The state has the burden of establishing an individual's criminal-history score and must prove by a preponderance of the evidence that the individual was the person who committed the prior crimes. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). "Fair preponderance of the evidence means that it must be established by a greater weight of the evidence. It must be of a greater or more convincing effect and . . . lead you to believe that it is more likely that the claim . . . is true than . . . not true." *Id.* (quotations omitted).

Appellant argues that his criminal-history score is five, not six. The district court determined that appellant had a score of six, based on four felony convictions; one custody-status point; and one misdemeanor point. The dispute is over the misdemeanor point. Under the sentencing guidelines, a defendant may receive a point for four qualifying misdemeanor or gross-misdemeanor convictions. Minn. Sent. Guidelines II.B.3. Appellant concedes he has two qualifying misdemeanor convictions for domestic assault but claims that the other two misdemeanor convictions, which were for theft in 2001 from Hennepin County, were not crimes he committed but involved a different person with a similar name.

Certified copies of the disputed convictions indicate that "Antwane Moore" was sentenced for the two disputed Hennepin County theft offenses. Respondent states that, based on fingerprints, appellant is the Antwane Moore convicted for the Hennepin County thefts. In support of this conclusion, respondent submitted records showing appellant and the person with the misdemeanor convictions had been assigned identical FBI and Minnesota identification numbers and pointed out that nothing in the record indicates that that Antwane Moore and appellant are different people. Further, the record shows that appellant used the name "Antwane Moore" as an alias when these offenses occurred, that Hennepin County later learned his true name was "Anthony Moore," and that the county's and state's records were updated to reflect his use of the "Antwane Moore" alias. The pre-sentence investigation indicates that appellant has an older brother from Illinois named Antwane Wesley Moore, but, other than appellant's claim, no evidence was presented to the district court showing that the Illinois brother committed the misdemeanor offenses. Based on the fingerprint and other records, we conclude that the district court did not abuse its discretion in finding that a preponderance of the evidence supported the determination that appellant committed the two misdemeanor theft offenses in Hennepin County, that appellant has four misdemeanor offenses, and that his criminal-history score is six.

Because there was sufficient evidence that the assault was committed with a dangerous weapon and because the district court did not abuse its discretion in calculating appellant's criminal-history score, we affirm.

Affirmed.