STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1443

State of Minnesota,
Respondent,

vs.

Rashid Abdi Ali,
Appellant.

Filed October 13, 2009
Affirmed
Peterson, Judge

Goodhue County District Court
File No. 25-CR-08-280

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

Stephen N. Betcher, Goodhue County Attorney, Goodhue County Justice Center, 454 West Sixth Street, Red Wing, MN 55066-2475 (for respondent)

Marie L. Wolf, Interim 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 Peterson, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

PETERSON, Judge

Appellant challenges the denial of his motion for a judgment of acquittal, arguing that the evidence did not show that he committed first-degree aggravated robbery. Appellant also challenges his sentence, arguing that his criminal-history score unduly exaggerated his criminality. We affirm.

FACTS

On the morning of January 12, 2008, appellant Rashid Ali asked his live-in girlfriend (the victim) to buy him beer. She refused. About an hour later, while the victim was getting ready to go to work, she discovered that her wallet and cell phone were missing. Those items had been in her purse, which was on the kitchen counter in the apartment that she shared with appellant. After seeing appellant pull her wallet out of his jacket or pocket, the victim confronted appellant and attempted to retrieve the items. Appellant, who was drunk, responded by hitting her in the head with a skateboard. After recovering from the blow, the victim went upstairs, where appellant offered to return the items. But instead of returning them, appellant knocked the victim to the floor and began punching or kicking her. As a result, the victim sustained a mild concussion and a broken finger.

Later in the afternoon, appellant was apprehended at a liquor store near the apartment. He was charged with one count of first-degree aggravated robbery in violation of Minn. Stat. §§ 609.24, .245, subd. 1 (2006); one count of simple robbery in violation of Minn. Stat. § 609.24; one count each of second-, third-, and fifth-degree

assault in violation of Minn. Stat. §§ 609.222, subd. 2, .223, subd. 1, .224, subd. 1(2) (2006); and one count of domestic assault in violation of Minn. Stat. § 609.2242, subd. 1(2) (2006). At his jury trial, following the state's case-in-chief, appellant moved for a judgment of acquittal under Minn. R. Crim. P. 26.03, subd. 17(1). The district court denied the motion. The jury found appellant guilty on all counts, and the district court sentenced him to a presumptive guidelines sentence of 108 months for the aggravated robbery. This appeal followed.

D E C I S I O N

I.

Appellant challenges the denial of his motion for a judgment of acquittal. Under Minn. R. Crim. P. 26.03, subd. 17(1), a defendant may move for a judgment of acquittal on the ground that the evidence introduced during the state's case-in-chief is insufficient to sustain a conviction. In deciding such a motion, the district court must determine whether the evidence and inferences drawn from it, viewed in the light most favorable to the state, are sufficient to present a fact question for the jury to resolve. *State v. Slaughter*, 691 N.W.2d 70, 74-75 (Minn. 2005). Appellant argues that the district court erred by denying his motion because the evidence failed to establish that his conduct amounted to robbery under Minn. Stat. § 609.24. Whether a statute applies to undisputed facts presents a question of law, which we review de novo. *State v. Maas*, 664 N.W.2d 397, 398 (Minn. App. 2003), *review denied* (Minn. Sept. 16, 2003).[1]

[1] The state argues that although appellant frames the issue as one of statutory construction, it is actually a challenge to the sufficiency of the evidence. But because

Minn. Stat. § 609.24 provides:

> Whoever, having knowledge of not being entitled thereto, takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery . . . .

Appellant argues that he did not take property "in the presence of" the victim because: (1) the property was taken from the victim's purse, which was sitting on the kitchen counter; and (2) the victim was not aware of the taking until sometime later.[2]

The phrase "in the presence of" contemplates cases "where the property is not on the person but near him and by the use of force the defendant prevents him from defending against the taking of it." Minn. Stat. § 609.24, advisory comm. cmt (West 2009). It is undisputed that the victim was in the apartment when appellant took the property from her purse. Even if we assume that she was not aware of the taking because she was in another room, the victim was sufficiently "near" the property. *See State v. Bonn*, 412 N.W.2d 28, 29-30 (Minn. App. 1987) (affirming aggravated robbery conviction when property taken from victim's room while victim was being assaulted in a

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appellant is challenging the denial of a motion made following the state's case-in-chief, the issue on appeal is not whether the evidence was sufficient to support the jury's verdict but whether it was sufficient to go to the jury in the first place. For purposes of this court's review, however, the distinction is irrelevant because appellant is not disputing the underlying facts; he is disputing whether those facts fall within the scope of the robbery statute.

[2] Appellant frames his argument by asserting that he did not take property "from the person or in the presence of" the victim. There does not appear to be any dispute that appellant did not take the property from the victim's person, only whether he took it in her presence.

common area or immediately after), *review denied* (Minn. Oct. 21, 1987). This is because "presence" in a robbery context "is not so much a matter of eyesight as it is one of proximity and control." 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.3(c), at 179 (2d ed. 2003).

Appellant's brief focuses less on the spatial relationship between the victim and her property than on the sequence of events. The thrust of his argument is that he did not use force to prevent the victim from defending against him taking the items from her purse and the taking was already complete before the victim became aware that the items were missing, and appellant used force only in escaping. Appellant correctly observes that, to commit robbery, "one must do more than merely use force to escape with stolen property." *State v. Kvale*, 302 N.W.2d 650, 652-53 (Minn. 1981). But this does not mean that there can be no robbery if force is used only after the taking. The robbery statute

> 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.

Id. at 653 (emphasis added). A jury could reasonably find that appellant used force in "carrying away" the victim's property rather than "to escape" with it.

The facts of this case are analogous to *State v. Burrell*, 506 N.W.2d 34 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). There, the defendant walked into the office at the back of a convenience store and stuffed seven cartons of cigarettes into his

coat. *Burrell*, 506 N.W.2d at 35. As the defendant was hurrying out of the store, the store owner noticed one of the cartons poking out of his coat and ran after him. *Id.* When the owner caught up with and confronted the defendant, the defendant assaulted her. *Id.* The defendant argued on appeal that the evidence was insufficient to sustain his robbery conviction because he did not use force in taking the cigarettes and "his use of force was clearly designed to effect his escape, not to enable him to 'carry away' the cigarettes." *Id.* at 36. This court concluded that the defendant's use of force "may be viewed as occurring more closely with the 'carrying away' of the cigarettes than with an escape" and affirmed the conviction. *Id.*

Just as the store owner in *Burrell* was unaware that the defendant had taken the cartons from the office until she observed one poking out of the defendant's coat as he hurried out, the victim here was unaware that appellant had taken her property until she saw appellant pull it from his coat or pocket. Just as the store owner in *Burrell* immediately gave chase when she realized that the defendant had taken the cartons, the victim here immediately confronted appellant when she realized that he had taken the items from her purse. And just as the defendant in *Burrell* used force only after being confronted by the store owner, appellant used force only after the victim confronted him. Although it is not clear from the record how much time passed between appellant's taking and the confrontation, whether appellant's use of force should be viewed as more closely associated with the "carrying away" or an escape was a proper question of fact for the jury. Therefore the district court did not err by denying appellant's motion for a judgment of acquittal.

II.

Appellant challenges his sentence, arguing that the criminal-history score used to calculate the presumptive sentence unduly exaggerated his criminality. We will not reverse a district court's determination of a defendant's criminal-history score absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Generally, a defendant's criminal-history score is calculated by assigning points "for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given before the current sentencing." Minn. Sent. Guideline II.B.1 (2006). The district court assigned one and one-half points for each of appellant's three prior convictions for third-degree controlled-substance offenses. Appellant argues that this unfairly exaggerates his criminality because the underlying drug sales, which occurred in a short period of time, were charged separately in order to ratchet up his criminal-history score.

To support his argument, appellant relies on the doctrine of sentencing manipulation discussed in *State v. Soto*, 562 N.W.2d 299 (Minn. 1997). That doctrine addresses "outrageous government conduct aimed only at increasing a person's sentence." *Id.* at 305. But in *Soto*, the supreme court specifically declined to adopt the doctrine "in the absence of egregious police conduct which goes beyond legitimate investigative purposes." *Id.* Appellant has not persuaded us that the bare fact that he was charged with three lesser drug offenses rather than a single first-degree offense is sufficient to invoke the doctrine of sentencing manipulation.

Appellant's argument that his three prior drug sales were a "unitary course of conduct" is without merit. The sales occurred at least two weeks apart. Thus, the district court could properly treat each as a separate and distinct offense. *See id.* at 304 (concluding that four drug sales were separate and distinct offenses when each took place on a different day and at three different locations).

While "the disparities which result between similarly situated defendants . . . because of differing charging practices" may be a cause for concern, they are insufficient to invalidate the imposition of a presumptive sentence absent "any evidence showing that the drug sales were obtained for the sole purpose of increasing [a defendant's] sentence, rather than to establish his guilt." *Id.* at 305. No such evidence was presented here.

Affirmed.