**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-2168**

State of Minnesota,
Respondent,

vs.

Chris David Cecka,
Appellant.

**Filed January 19, 2010**
**Affirmed**
**Hudson, Judge**

Ramsey County District Court
File No. 62-KX-07-004256

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Jennifer M. Macaulay, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Stauber, Judge.

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

**HUDSON**, Judge

Appellant challenges his conviction of third-degree assault, arguing that: (1) the jury's findings that he was guilty of third-degree assault and not guilty of the lesser-included offense of fifth-degree assault are legally inconsistent; (2) the circumstantial

evidence was insufficient to support his conviction; and (3) the district court's comments at sentencing evinced a bias against appellant. Because the jury's verdicts are not legally inconsistent, the evidence is sufficient to support appellant's conviction, and the district court's remarks did not impermissibly affect its sentencing decision, we affirm.

**FACTS**

A jury convicted appellant Chris David Cecka of third-degree assault in violation of Minn. Stat. § 609.223, subd. 1 (2006), arising from an incident that occurred outside the Polar Lounge in North St. Paul.

Two North St. Paul police officers testified that they responded to a reported assault outside the Polar Lounge. When they arrived, the complainant, D.J., was sitting on the curb with an injured left eye. He told the officers that appellant had briefly assaulted him by punching him, knocking him down, and kicking him. D.J. testified that he had spoken with appellant inside the Polar Lounge, but he decided to leave because he was uncomfortable and appellant did not seem friendly. He testified that as he was leaving, appellant pushed a stool in his path, and that as he exited the front door, he "was hit from behind and . . . fell on the ground." As he got up, he saw appellant approaching him, "saw a foot coming towards [him]," and "basically the lights went out." D.J. sustained injuries of three broken facial bones, including a left orbital blow-out fracture.

Appellant testified on his own behalf that he was in the Polar Lounge when D.J. arrived, appearing intoxicated. Appellant testified that he left the bar about five minutes after D.J. and D.J. approached him, "swinging wildly" and "striking [him] repeatedly." He testified that he first hit D.J. only in the body, but when D.J. kept hitting him, he "hit

him pretty good in the face." He testified that he saw D.J. fall down hard, directly on his face. Appellant testified that he went to another bar and ordered a beer, but he did not finish it and he went home.

Several bar patrons testified that they saw appellant and D.J. in the Polar Lounge that evening, but none of them saw the altercation outside. The jury also heard testimony regarding an earlier incident at another bar, where D.J. was the manager and appellant worked part time. In that incident, appellant grabbed a bar patron and shoved him against bar stools and onto the floor. After that incident was reported to D.J., appellant's employment at that bar was terminated.

During jury deliberations, the jury submitted a note to the district court asking for clarification as to whether they could find the defendant guilty of only third-degree assault, if they so decided. The judge responded that two of the four verdict forms given to the jury needed to be signed, and the judge responded "yes" when a juror asked whether the jury should consider each charge individually.

The jury found appellant guilty of third-degree assault, but not guilty of fifth-degree assault. The defense moved for a mistrial on the ground that the jury had returned inconsistent verdicts. The district court issued its written order concluding that the verdicts were only logically, but not legally, inconsistent, and denied the motion for a mistrial.

At sentencing, the district court commented that appellant was a "thug and a bully," based on his behavior. The court, considering a presumptive stayed sentence under the sentencing guidelines, declined to order a stay of imposition and instead

imposed a sentence of one year and one day, with execution stayed for five years and conditions of probation. This appeal follows.

## D E C I S I O N

### I

Appellant argues that the district court erred by denying his motion for a mistrial on the ground that the jury returned legally inconsistent verdicts. Whether a jury's verdicts are legally inconsistent presents a question of law, which this court reviews de novo. *State v. Laine*, 715 N.W.2d 425, 434–35 (Minn. 2006).

Consistent verdicts are not constitutionally required. *State v. Leake*, 699 N.W.2d 312, 325 (Minn. 2005) (citing *United States v. Powell*, 469 U.S. 57, 64–66, 105 S. Ct. 471, 477 (1984)). Generally, a defendant found guilty of one count of a two-count complaint or indictment is not entitled to a dismissal or new trial "simply because the jury found him not guilty of the other count, even if the guilty and not guilty verdicts may be said to be logically inconsistent." *Id.* (quoting *State v. Juelfs*, 270 N.W.2d 873, 873–74 (Minn. 1978)). This reflects a criminal jury's ability to exercise "the power of lenity—that is, the power to bring in a verdict of not guilty despite the law and the facts." *State v. Perkins*, 353 N.W.2d 557, 561 (Minn. 1984). Thus, the focus remains not on the jury's inconsistency in the verdicts, but on whether the record contains sufficient evidence to sustain the guilty verdict. *Nelson v. State*, 407 N.W.2d 729, 731 (Minn. App. 1987), *review denied* (Minn. Aug. 12, 1987).

But the Minnesota Supreme Court has recognized that if a jury has returned legally inconsistent verdicts, a defendant may be entitled to a new trial. *State v. Moore*,

458 N.W.2d 90, 94–95 (Minn. 1990). "Verdicts are legally inconsistent when proof of the elements of one offense negates a necessary element of another offense." *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

Appellant argues that the jury's verdicts finding appellant guilty of third-degree assault and not guilty of fifth-degree assault are not just logically, but also legally, inconsistent. But the supreme court has applied the legally-inconsistent verdict rule only when "the defendant alleged inconsistencies between multiple *guilty* verdicts." *Leake*, 699 at 326. Here, there were not multiple guilty verdicts. And proof of the elements of either offense—first-degree assault or fifth-degree assault—does not negate a necessary element of the other offense. *See Cole*, 542 N.W.2d at 50; *see also* Minn. Stat. §§ 609.223, subd. 1; 609.224 (2006).

Appellant also argues that because fifth-degree assault is a lesser-included offense of third-degree assault, it was not possible for the jury to find appellant guilty of third-degree assault, but not guilty of fifth-degree assault. But the supreme court has held that a guilty verdict on a lesser-included offense of second-degree murder was only logically, but not legally, inconsistent with a guilty verdict on a greater offense of first-degree murder because lack of premeditation is not a required element of second-degree murder. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). And this court has held that although a jury's verdicts finding a defendant guilty of first-degree criminal sexual conduct, but not guilty of third and fourth-degree criminal sexual conduct, were logically inconsistent, those verdicts did not entitle the defendant to a new trial because the jury was entitled to exercise lenity. *Nelson*, 407 N.W.2d at 731.

Appellant also argues that, even if the verdicts are not legally inconsistent, they violated the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 2356 (2000), that a criminal defendant has the right to be found guilty beyond a reasonable doubt of every element of the charged crime. But appellant presents no support for his argument that he was not found guilty of all elements of third-degree assault. Appellant further maintains that "the verdicts are evidence of confusion by the jury and prejudicial evidence." But the district court responded appropriately to the jury's question on whether it could find appellant guilty of only third-degree assault, confirming that each charge should be considered individually. *See State v. Murphy*, 380 N.W.2d 766, 772 (Minn. 1986) (stating that district court's response to jury's request for further instruction is reviewed for abuse of discretion).

Finally, appellant has failed to challenge the district court's evidentiary rulings or specify what "prejudicial evidence" the jury was allowed to consider. Therefore, we consider this argument waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that claims unsupported by argument or citation to legal authority are deemed waived).

**II**

Appellant argues that the evidence is insufficient to support his conviction. On a claim of insufficient evidence to support a conviction, this court carefully reviews the record, in a light most favorable to the conviction, to determine whether a jury could reasonably reach a guilty verdict based on the record and the inferences drawn from the record. *State v. Robinson*, 604 N.W.2d 355, 365–66 (Minn. 2000). Recognizing that the

jury is in the best position to determine credibility, this court assumes that the jury believed testimony supporting the verdict and disbelieved evidence to the contrary. *State v. Henderson*, 620 N.W.2d 688, 705 (Minn. 2001); *see also State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (stating that determining witness credibility is usually exclusive province of jury).

Appellant appears to argue that his conviction was based entirely on circumstantial evidence. To sustain a conviction based entirely on circumstantial evidence, the evidence as a whole must be consistent only with the defendant's guilt and inconsistent with any rational hypothesis other than guilt. *Robinson*, 604 N.W.2d at 366. A conviction of third-degree assault requires proof of specific intent, which is generally proved circumstantially "by inference from words and acts of the actor both before and after the incident." *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000); *State v. Edrozo*, 578 N.W.2d 719, 723 (Minn. 1998). But testimony of a victim about the events or facts at issue is direct evidence. *State v. Coley*, 468 N.W.2d 552, 555 (Minn. App. 1991) (considering victim's testimony about what she experienced as direct evidence of crimes at issue). Because the complainant testified as to his version the of events, appellant's conviction was not based entirely on circumstantial evidence.

Even considering the circumstantial evidence, "possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Hughes*, 749 N.W.2d 307, 313 (Minn. 2008) (quotations omitted). Appellant argues that the evidence supported an alternative rational hypothesis that he was acting in self-defense. The elements of self-defense include

(1) the absence of provocation or aggression on the defendant's part; (2) the defendant's honest and actual belief of imminent danger of great bodily harm or death; (3) reasonable grounds for that belief; and (4) the lack of "a reasonable possibility of retreat to avoid the danger." *State v. Basting*, 572 N.W.2d 281, 285 (Minn. 1997). A defendant has the initial burden to go forward with evidence supporting a claim of self-defense. *Id.* at 286. If the defendant has met that burden, "the state has the burden of disproving one or more of these elements beyond a reasonable doubt." *Id.*

Appellant testified that he is six feet tall, weighs about 230 pounds, and is larger than the victim, who testified that he is about five foot nine and weighs 50-75 pounds less than appellant. Based on this evidence, the jury could have found that appellant lacked an honest belief of imminent danger of great bodily harm. And although appellant testified that he did not run away because the victim "was all over [him]," the incident happened on an uncrowded sidewalk outside a bar, and the jury could have reasonably concluded that appellant had a reasonable possibility of retreat. Thus, the jury could have concluded beyond a reasonable doubt that the state had proved the absence of at least one element of self-defense. *See, e.g.*, *State v. McKissic*, 415 N.W.2d 341, 344 (Minn. App. 1987) (concluding in assault case that, even discounting state's evidence supporting verdict, "the jury could still conclude beyond a reasonable doubt that the amount of force used was unreasonable under the circumstances, or that there was a reasonable possibility of retreat"). Appellant's theory that he acted in self-defense is not reasonably supported by the evidence as a whole, and the evidence is sufficient to sustain his conviction.

## III

Appellant argues that he was deprived of due process because the district-court judge improperly sentenced him to a stay of execution rather than a stay of imposition, based on the judge's personal bias against appellant. When the presumptive sentence is a stayed sentence, the court has discretion to grant the stay by using either a stay of imposition or a stay of execution. Minn. Sent. Guidelines III.A.101, cmt. When the district court does not depart from the presumptive sentence, this court will not generally disturb the sentencing decision. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Because the presumptive sentence for appellant's offense for a person with his criminal–history score was a stayed sentence, the judge did not depart from the presumptive sentence by sentencing appellant to a stay of execution, rather than a stay of imposition.

Appellant argues that the judge's personal remarks established bias in the judge's sentencing decision. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of . . . current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008) (quoting *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994)). This court has affirmed the district court's imposition of an upward departure on the basis of the record before the district court, even when this court determined that a judge showed personal bias during the sentencing hearing. *State v. Simmons*, 646 N.W.2d 564, 570 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002).

The record shows that, at sentencing, the district court told appellant:

> I sat through that trial, and the whole perception that I came out with after listening to everybody, including yourself, is that you're a thug and a bully . . . . You're not an innocent victim of anything. You are a bully . . . . I cannot imagine why the probation office would even suggest a stay of imposition on a case of this sort, but let me tell you this: Probation does not control the judge either. The buck stops right here.

Some of these remarks may have been unnecessary during a sentencing hearing, but they did not reflect a bias sufficient to "make fair judgment impossible" in the judge's sentencing decision, which remained within the presumptive range for appellant's offense. *See Burrell*, 743 N.W.2d at 603 (quotation omitted). The district court did not abuse its discretion by sentencing appellant to a stay of execution.

**Affirmed.**