STATE OF MINNESOTA
IN COURT OF APPEALS
A09-792

State of Minnesota,
Respondent,

vs.

Yahya Hassan Iman,
Appellant.

Filed May 18, 2010
Affirmed
Crippen, Judge*
Concurring in part, dissenting in part, Klaphake, Judge

Stearns County District Court
File No. 73-CR-07-7748

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Robert J. Kolstad, Minneapolis, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Toussaint, Chief Judge; and Crippen, Judge.

* Retired judge of the Minnesota Court of Appeals, serving 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

CRIPPEN, Judge

Appellant Yahya Iman challenges his conviction on four counts of second-degree assault, in violation of Minn. Stat. § 609.222, subd. 1 (2006), and four counts of aiding and abetting second-degree assault, in violation of Minn. Stat. §§ 609.222, subd. 1, 609.11 (2006), disputing the counts for aiding assault with a baseball bat and arguing that there was an improper search and an improper show-up. We affirm.

FACTS

During the afternoon hours of July 23, 2007, appellant and three acquaintances went swimming at Quarry Park in Waite Park. The four men were conversing among themselves in their native African language, but also were speaking in English at times. The four complaining witnesses, white males, were also swimming at the park.

When the men were returning from the swimming area to a parking lot, a verbal argument began between the two groups. As they left the lot in separate vehicles, appellant's vehicle followed the witnesses' vehicle. While driving on a four-lane section of the road, appellant's vehicle moved into the right lane and closely pulled alongside the witnesses' vehicle several times. While this was occurring, one of appellant's passengers extended himself out of the open rear window of appellant's vehicle and began swinging a baseball bat in an attempt to strike the witnesses' vehicle. This continued for "several blocks," "maybe a mile." The bat never made contact with the witnesses' vehicle. In addition, three of the witnesses saw appellant hold up a black pistol and point it at them.

One of the witnesses called 911 during the final moments of the chase. The Waite Park Police Department asked officers from other departments to look for appellant's vehicle. Officers from the St. Cloud Police Department and the Central Minnesota Drug and Gang Task Force located appellant's vehicle in a St. Cloud driveway approximately one and one-half hours after the incident was reported. As appellant's vehicle began to pull out of the driveway, three officers performed a felony stop. The officers placed wrist restraints on the four men in the vehicle and on two men that were standing outside of the vehicle. After the stop had been made, another officer was dispatched to the scene.

The officers were instructed by the Waite Park Police Department to have the vehicle towed. Prior to having it towed, one of the officers searched the vehicle and found a soccer shirt on the front seat of the vehicle matching the description of the shirt appellant reportedly had been wearing, a Little-League baseball bat, and an empty BB container. Authorities never located a gun.

The men were transported to the Waite Park Police Department by officers from the scene, where the complaining witnesses were waiting; the detained men were told that they were not under arrest. Appellant and his acquaintances were standing outside while the witnesses were inside looking at them through a window. The witnesses did not identify two of appellant's acquaintances, but appellant and the other three men who were identified by the witnesses were arrested. Appellant was charged with four counts of second-degree assault (involving use of the pistol) and four counts of aiding and abetting second-degree assault (involving the acquaintance's use of a bat).

Appellant filed a motion to dismiss four of the counts against him, to suppress all evidence taken from his vehicle, and to suppress the show-up identifications. The district court denied appellant's motions, concluding that the search was legal as incident to appellant's arrest. After a bench trial, appellant was convicted of all eight counts.

D E C I S I O N

1. Warrantless Search

"When reviewing a pretrial order on a motion to suppress evidence, we may independently review the facts and determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence." *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). This court reviews de novo whether a search or seizure is justified by probable cause. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005).

a. Scope of Exception

The Fourth Amendment to the United States Constitution and Article I, section 10 of the Minnesota Constitution guarantee an individual's right to be free from unreasonable searches and seizures. "Warrantless searches are generally unreasonable unless they fall within a recognized warrant exception." *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). One of the exceptions to the warrant requirement "is that a person's body and the area within his or her immediate control may be searched incident to a lawful arrest." *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000).

In February 2008, the district court found that the St. Cloud police officers had probable cause to arrest appellant and his acquaintances and reasonably conduct the vehicle search incidental to their arrests. The court acted on the authority of *Chimel v.*

California, 395 U.S. 752, 89 S. Ct. 2034 (1969), which justified searches incidental to arrest in order to protect officer safety and preserve evidence, and *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860 (1981), which permitted police to conduct a *Chimel* search of a vehicle whenever they had probable cause to arrest the occupants, without a showing of need related to police protection or locating evidence. The court also cited Minnesota precedent establishing that *Belton* permitted a search even after the defendant is placed in a police squad car. *See State v. White*, 489 N.W.2d 792, 795-96 (Minn. 1992) (holding that an officer may still search a vehicle incident to a lawful arrest if he first places the defendant in the squad car). In 2004, the Supreme Court (over a dissent authored by Justice Stevens) confirmed the validity of a *Belton* search even though the occupant had left the vehicle before he was approached by police. *Thornton v. United States*, 541 U.S. 615, 124 S. Ct. 2127 (2004).

In April 2009, over a year after the district court's decision, but before briefing in this appeal, the Supreme Court decided *Arizona v. Gant*, 129 S. Ct. 1710 (2009), which directly affects the law of this case. In *Gant*, the majority (with Justice Stevens now speaking for the court) recognized that applying *Belton* is questionable in cases in which occupants have been taken from the vehicle (Gant had been removed and handcuffed), and then expressly held that police could not employ *Belton* as authority for a vehicle search incident to an arrest unless "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," thus expressly tying the rule to the original *Chimel* rationale on police and evidence protection. *Gant*, 129 S. Ct. at 1719.

Appellant and his acquaintances, like defendant Gant, were removed from their vehicle, handcuffed, and under the control of officers when their vehicle was searched.

But *Gant* also established an exception to its new limitation on police powers, thus gaining majority support (a concurrence of Justice Scalia) for the holding limiting application of *Chimel*/*Belton*. Separate from the newly restricted *Chimel* rationale, the Court "also conclud[ed] that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* (quoting and following the concurring opinion of Justice Scalia in *Thornton*, in which Justice Scalia proposed a similar rule, freed from the *Chimel* aims of police and evidence protection). The newly announced limits on *Chimel* barred admissibility of the fruits of the police search of defendant Gant's vehicle, because he had been handcuffed before the search occurred. And the evidence against Gant was also inadmissible under the *Thornton*-concurrence exception stated in *Gant*, because he was arrested for driving with a suspended license, an offense for which evidence could not be expected to be found in the vehicle, not for the drug offense proven by evidence seized from his vehicle. *Id.* at 1719.

Under the *Thornton*-concurrence exception, adopted by the Court in *Gant*, appellant's vehicle was properly searched for evidence on the reported assault offenses so long as the St. Cloud officers had probable cause to believe appellant had committed the assaults and appellant was arrested contemporaneously with the search. This is not a case in which the officers arrested for one offense but seized evidence of another crime while searching a vehicle; rather, this is a circumstance in which the seized evidence is

admissible under the incident-to-arrest exception only as permitted under *Chimel*, delimited by *Gant*.

b. Probable Cause Element

For there to be a valid search incident to arrest, there must be probable cause to arrest prior to performing the search. *State v. Bauman*, 586 N.W.2d 416, 419 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999). "Under the 'collective knowledge' approach, the *entire* knowledge of the police force is pooled and imputed to the arresting officer for the purpose of determining if sufficient probable cause exists for an arrest." *State v. Conaway*, 319 N.W.2d 35, 40 (Minn. 1982).

One of the witnesses called 911 and contacted the Waite Park Police Department as appellant and his acquaintances were following them. During the witness's conversation with the 911 operator, he stated, "[W]e have some people chasing us," and "They had a bat hanging out the window trying to hit our car and then the driver had a, had a gun and was pointing it at the car." Reporting the vehicle altercation by radio, the Waite Park police asked other officers to look for the 1998 silver Isuzu Rodeo, license plate number included, occupied by four black males; and if located, the department instructed officers to stop the vehicle and hold the occupants for further investigation. Officers of the Central Minnesota Drug and Gang Task Force located a vehicle with a matching license plate number and occupants that matched the descriptions given. The officers stopped the vehicle, handcuffed the occupants, and performed a search. Although the arrest was not done until the occupants were identified at the Waite Park

Police Department, there was probable cause to arrest the occupants at the time of the detention and search.

c. Contemporaneous Requirement

A search incident to an arrest must be done contemporaneously with the arrest. *Gant*, 129 S. Ct. at 1717. The search can be considered contemporaneous with an arrest so long as it involves a detention resulting in an arrest. *See Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S. Ct. 2556, 2564 (1980) (stating that when an arrest immediately follows a challenged search, it is not important that the search preceded the arrest, as long as the evidence discovered was not necessary to support probable cause to arrest). Appellant has not identified and we have found no authority associating contemporaneousness with the mere passing of time, when a period of time begins with detention, followed by a search, and continues in a routine policing action through the moment of a formal arrest. Because appellant was detained at the time the search was being conducted and remained under this detention as he was transported to the Waite Park station and formally arrested, the search and arrest were conducted contemporaneously.

2. Show-up Identification

Appellant argues that the show-up was unduly suggestive, and the actions of the officers cast "serious, irreparable doubt on the independence, accuracy and reliability of the identifications." Identification evidence is admissible when it is reliable. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). To determine whether appellant's right to due process has been violated, we apply a two-part test articulated in *Manson v.*

Brathwaite, 432 U.S. 98, 97 S. Ct. 2243 (1977). *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999). This court first determines whether the procedure was unduly suggestive, and if so, determines whether the identification was nonetheless reliable in light of the totality of the circumstances. *Id.*; *State v. Adkins*, 706 N.W.2d 59, 62 (Minn. App. 2005). If the procedure was unduly suggestive, the identification evidence may be admitted if the identification "has adequate independent origin," and is therefore reliable. *Ostrem*, 535 N.W.2d at 921.

The district court found that the show-up was "unnecessarily suggestive," and the parties do not dispute this analysis. A number of factors are to be considered to resolve the reliability question, and these were articulated in *Ostrem*:

> 1. The opportunity of the witness to view the criminal at the time of the crime;
> 2. The witness' degree of attention;
> 3. The accuracy of the witness' prior description of the criminal;
> 4. The level of certainty demonstrated by the witness at the photo display;
> 5. The time between the crime and the confrontation.

Id. Appellant contends that these five factors are not useful because "the violation was so egregious that they provide virtually no guidance as to whether the lineup was unduly suggestive." But it is these types of show-ups that the factors articulated in *Ostrem* are intended to address.

Supporting the district court's determination of reliability, the record shows that (1) each complaining witness's attention was drawn specifically to appellant when a dispute arose at Quarry Park, (2) each witness had a heightened degree of attention

during the altercation at the park and while driving next to appellant's vehicle, (3) two of the witnesses gave an accurate description of appellant without regard to his clothing prior to the show-up, (4) all four witnesses demonstrated certainty in their identification, and (5) less than two hours had elapsed between the alleged assault and the disputed show-up.

Based on the totality of the circumstances, the identification of appellant was reliable, despite the fact that it was unduly suggestive, and the district court did not err in failing to suppress evidence of the show-up.

3. Baseball Bat

Appellant contends that a baseball bat is not a dangerous weapon when it is swung at a car. The supreme court has determined as a matter of law that the application of the "dangerous weapon" element may depend on its manner of use. *See State v. Basting*, 572 N.W.2d 281, 282 (Minn. 1997) (correcting a determination of "dangerous" based solely on evidence of the nature of the alleged weapon without evidence showing a dangerous manner of use).

A "dangerous weapon" includes "any . . . device or instrumentality that, in the manner 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. "Great bodily harm" means "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." *Id.*, subd. 8 (2006).

Appellant concedes that there was an assault. Therefore, the remaining question is whether the assault was done with a dangerous weapon. *See* Minn. Stat. § 609.222, subd. 1 (2006) (indicating that second-degree assault includes an assault done with a dangerous weapon). Appellant contends that the bat cannot be considered a "dangerous weapon" because it was too short to make contact with the witnesses' vehicle, and even if it had hit the car, the witnesses would not have been hurt because it would have only hit the car. This court has consistently held that ordinary objects can be transformed into dangerous weapons based on the manner in which they are used during an assault. *State v. Coauette*, 601 N.W.2d 443, 447 (Minn. App. 1999), *review denied* (Minn. Dec. 14, 1999).

The record shows the alleged weapon was an aluminum bat that was 30 inches long, not distinctly "short" as characterized by appellant. And in contrast with *Basting*, the record here also includes several items of evidence regarding the manner in which the bat was used. As the *Basting* opinion shapes the analysis, we examine evidence on the manner of use independent of the question whether the use actually did damage that could be seen as likely to occur. *Basting*, 572 N.W.2d at 285.[1] The evidence shows that the vehicles were speeding, that appellant's vehicle came "very close" to the other, within two feet, on several occasions over a course of several blocks, and that the bat was swung at the nearby vehicle by a man leaning out of the window of appellant's car. Under these

[1] The dissent rests on the importance of damaging use and suggests that the assessment of prospective damage is insufficient. Existing precedents do not show error in examining the manner of use of an instrument to gauge its risk that the target of an assault may be seriously hurt.

circumstances, there was no error in the district court's assessment that "a shattered car window, or a sudden swerve to avoid a blow to the car, could well have caused the driver to lose control of the vehicle resulting in serious injury to its occupants."

Affirmed.

KLAPHAKE, Judge (concurring in part, dissenting in part)

Although I concur with my colleagues on the issues of the validity of the search and identification evidence, I respectfully dissent from their determination that the bat used here was a dangerous weapon.

Appellant was convicted of four counts of aiding and abetting second-degree assault. Minn. Stat. § 609.222, subd. 2 (2008). This offense requires proof of assault of another with a dangerous weapon and infliction of substantial bodily harm. *Id.* Minn. Stat. § 609.02, subd. 6 (2008), defines "[d]angerous weapon" as a "device or instrumentality that, *in the manner it is used* . . . is calculated or likely to produce death or great bodily harm[.]" (Emphasis added.) "Great bodily harm" includes bodily injury that "creates a high probability of death, or which causes permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2008). Considering these definitions as a comprehensive whole, the offense of second-degree assault requires circumstances in which an object is used in such a way that serious injury is a likely result.

The record evidence here is that appellant's car followed the complainants' vehicle, drawing parallel to it two or three times on the right. Appellant's co-defendant, Abdihakim Muse Muhumed, extended his body out of the left rear window and swung a Little League bat at the complainants' vehicle. According to the complainants, appellant's vehicle stayed mostly behind their vehicle, except on two or three occasions when the vehicles were parallel, at a distance of between one and ten feet. Muhumed never struck the complainants' vehicle and the complainants were inside their vehicle at

all times when Muhumed was wielding the bat. The owner of complainants' vehicle was "scared for the safety of us" and "scared for my vehicle." While Muhumed's bat-wielding activities certainly created a risk of damage to complainants' vehicle, the evidence here does not support a finding beyond a reasonable doubt that the bat was used in a manner "calculated or likely to produce death or great bodily harm."

In *In re Welfare of D.W.*, 731 N.W.2d 828, 831 (Minn. App. 2007), this court reviewed a conviction of second-degree assault involving the use of a bat as a dangerous weapon. Although we declined to review the question of whether a bat is a dangerous weapon, because that issue had not been raised below, it is notable that D.W. and his companions physically beat a pedestrian with a baseball bat. *Id.* Under those circumstances, the bat was used in a manner "calculated or likely" to cause injury to a person. Here, the circumstances are not so compelling.

In a second-degree assault, the circumstances are critical to the question of whether a dangerous weapon was used. The difference between *D.W.* and the matter before us is not unlike the different circumstances in *State v. Basting*, 572 N.W.2d 281 (Minn. 1997), and *State v. Davis*, 540 N.W.2d 88 (Minn. App. 1995), *review denied* (Minn. Jan. 31, 1996). The dangerous weapon in both of those cases was a fist. In *Basting*, the defendant had been a professional boxer and the district court found that because of his training, his fists were a dangerous weapon. 572 N.W.2d at 283. But the supreme court stated that the manner in which he used his fists did not support a finding of a dangerous weapon, because the defendant had struck his victim only twice, had left immediately, and was of the same approximate height and weight as the victim. *Id.* at

284. In contrast, the defendant in *Davis* maliciously, brutally, and repeatedly assaulted a pregnant woman. 540 N.W.2d at 89-90. The *Basting* court concluded that the differences in circumstances between *Basting* and *Davis* merited different results. 572 N.W.2d at 284.

The district court cited a litany of possible outcomes that support the likelihood of death or great bodily harm: "a shattered car window," "a sudden swerve," or a loss of control of the vehicle. But a criminal conviction must be based on facts found beyond a reasonable doubt, not on possibilities. In *Basting*, it is certainly possible that even just two blows from the fist of a professional boxer could have resulted in death or great bodily harm; yet the supreme court concluded that the circumstances did not support a finding beyond a reasonable doubt that Basting used his "dangerous weapon" in a manner calculated or likely to cause death or serious injury.

In the circumstances before us, Muhumed used the bat in a manner calculated or likely to cause damage to complainants' car, but the evidence does not support a finding beyond a reasonable doubt that he used the bat in a manner calculated or likely to cause death or great bodily harm to the occupants of a closed moving vehicle. Appellant's conviction for aiding and abetting these four assaults cannot be sustained on this record.

For these reasons, I would reverse appellant's four convictions for aiding and abetting second-degree assault.