STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1578

State of Minnesota,
Respondent,

vs.

Byron Dean Sayers,
Appellant.

Filed August 24, 2010
Affirmed
Halbrooks, Judge

Cass County District Court
File No. 11-CR-09-59

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

Christopher J. Strandlie, Cass County Attorney, Walker, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

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

HALBROOKS, Judge

On appeal from his felony convictions, appellant argues that (1) his convictions of first-degree property damage and third-degree burglary involving property damage should be reversed because there was insufficient evidence to prove that the property damage exceeded $1,000 or $500, respectively, and (2) the district court abused its discretion by refusing to instruct the jury on the defense of necessity. We affirm.

FACTS

W.B., a 79-year-old woman who lives in Cass Lake with her housemate, R.L., heard a knock on her door at approximately 7:30 p.m. on January 8, 2009. The temperature that evening was between 10 and 20 degrees below zero. W.B. opened the door slightly and saw appellant Byron Dean Sayers, who asked, "Can you help me?" W.B. observed that appellant had a bloody face and, in her words, "didn't look too good." Frightened, she slammed the door and locked it.

Approximately two hours later, W.B. looked out her window and saw a man walking on the sidewalk between her house and her unheated garage. R.L. also looked out the window and observed that the light outside the garage had been turned off and that another light, which could only be turned on from inside the garage, was on. R.L. went outside to investigate and saw appellant walking toward the alley. He told appellant to stop, but appellant kept walking. R.L. then saw a police officer exiting his squad car, and yelled, "Stop, stop, I think he's been in my garage." The police officer headed in

R.L.'s direction, saw appellant, and ordered him to stop. Instead, appellant ran approximately one block and collapsed face-down in a snowbank.

The police officer handcuffed appellant and took him to the squad car. The officer observed that appellant had blood on his face and had difficulty standing and walking; appellant also smelled of alcohol. Appellant was wearing socks but no shoes. The officer discovered that appellant had several items in his pockets, including a baseball cap, a screwdriver, brass knuckles, two cell phones with chargers, some pill bottles, and pieces of glass. R.L. went into his garage and observed that the circuit breaker that controlled the timer for the outside light was turned off, windows of his and W.B.'s cars were broken and it appeared that the glove compartments had been rifled through, and items kept in the garage were strewn about the garage floor and yard. Among the items in appellant's possession, R.L. identified the baseball cap, the screwdriver, and two bottles of pills as items that had been either in the glove compartment of his car or in his garage.

Appellant was arrested. Two days later, appellant was taken to a hospital emergency room. The physician who treated appellant stated that he complained of pain in his legs. The physician testified that appellant "probably [had] frostnip, which is a very, very, very, very mild form of, I don't even want to call it frostbite" and that there was "probably [an] eighty to ninety percent chance [appellant] had a minor rib fracture." The physician also testified that appellant "may have [had] a mild concussion, but [a] very, very mild concussion that may have resolved a day later."

Appellant was ultimately charged with third-degree burglary involving theft, third-degree burglary involving damage to property over $500, and first-degree property damage over $1,000, among other counts. Estimates from Glass Doctor, an auto-glass company, were admitted into evidence at trial that projected the cost to replace the cars' windows to be $1,065.13—$265.88 for W.B.'s window and $799.25 for R.L.'s windows. A Glass Doctor employee testified that he estimated the cost of replacing the windows based on a standardized industry reference. But R.L., who did not have glass coverage, testified that W.B.'s son arranged for his windows to be replaced for $150 with parts R.L. assumed were from an auto salvage yard. Appellant was convicted of all of the charged offenses except for obstruction of the legal process and received concurrent sentences of 27 months for third-degree burglary involving theft and 21 months for first-degree property damage.[1] This appeal follows.

D E C I S I O N

I.

Appellant argues that there is insufficient evidence of property damage to support his convictions of third-degree burglary involving property damage and first-degree property damage. A conviction of third-degree burglary involving property damage requires evidence that a defendant entered a property with the intent to commit a felony or gross misdemeanor. Minn. Stat. § 609.582, subd. 3 (2008). Criminal damage to

[1] Because his conviction of third-degree burglary involving property damage arose from the same set of facts as his conviction of third-degree burglary involving theft, appellant did not receive a sentence for his conviction of third-degree burglary involving property damage.

property in the third degree constitutes a gross misdemeanor, and requires proof that a person intentionally damaged property thereby reducing the value of property by at least $500 but not more than $1,000. *See* Minn. Stat. § 609.595, subd. 2(a) (stating the elements and possible sentence for criminal damage to property in the third degree) (2008); *see also* Minn. Stat. § 609.02, subd. 4 (defining gross misdemeanor) (2008). A conviction of first-degree property damage requires evidence that a defendant caused at least $1,000 in damage to property. Minn. Stat. § 609.595, subd. 1(3) (2008). The state was required to prove damage in at least these amounts to support appellant's convictions.

Due process requires the state to prove a criminal defendant guilty, beyond a reasonable doubt, of "every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970). When a criminal defendant argues that his conviction was not supported by sufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence is sufficient to allow the jurors to have reached their verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Evidence is viewed in the light most favorable to the conviction, *id.*, and 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). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Appellant argues that the true cost of the property damage should be measured by what the victims actually paid to repair or replace the property. Therefore, the total cost of the property damage was $415.88—$150 that R.L. paid plus the estimate of $265.88 to replace W.B.'s window. Appellant is correct that the criminal-damage-to-property statute measures the value of damage to property "by the *cost* of repair and replacement." Minn. Stat. § 609.595, subd. 1(3) (emphasis added). But the statute contains no language that would require the jury to consider only what the victim actually paid to replace or repair the property. In *State v. DeYoung*, we reasoned that it would be "contrary to the policy underlying the criminal-damage-to-property" statute if the culpability of a defendant convicted of criminal property damage were to depend on the victim's ability and inclination to repair damaged property. 672 N.W.2d 208, 213 (Minn. App. 2003). We concluded in *DeYoung* that the measure of the damage to property need not be restricted to the amount of money paid to repair the property but may also include the value of the victim's labor in repairing the property. *Id.*

In *DeYoung*, we relied on the principles underlying the criminal-theft and criminal-damage-to-property statutes to arrive at our conclusion. We first recited the policy underlying the criminal-damage-to-property statute, which states that "the gravity of the crime of criminal damage to property should turn upon the extent of the property damaged." *Id.* (quoting Minn. Stat. Ann. § 609.595, 1963 advisory comm. cmt. (West 2003)). We also relied on the definition of "value" from Minn. Stat. § 609.52, subd. 1(3) (2000), which states that value is measured at the "retail market value at the time of the theft, *or if the retail market value cannot be ascertained*, the cost of replacement of the

property within a reasonable time after the theft." (Emphasis added.) While the criminal-damage-to-property statute does not define the word "value," this definition from the theft statute informs our understanding of the meaning of Minn. Stat. § 609.595 (2008).

Because the theft statute relies on the market value of the property at the time of the theft, and because the policies underlying this statute and the criminal-damage-to-property statute are similar, we reject appellant's proposed interpretation that would limit the scope of the jury's consideration to the amount of money paid by victims for repairs. As in *DeYoung*, the policy of section 609.595 would be underserved if we were to adopt appellant's interpretation of the statute and hold that a defendant's punishment for this crime is dependent on whether the victim elects to minimize his or her costs for repair or replacement. Instead, consistent with *DeYoung* and the policy of section 609.595, we conclude that the jury may properly consider the actual market value of the repair or replacement of the damaged property.

As to the sufficiency of the evidence, the prosecution submitted an estimate, supported by the testimony of a glass-service company employee, indicating that the market value of repairing R.L.'s windows would be $799.25; therefore, the total value of the property damage exceeded $1,000. Appellant correctly argues that an estimate may not necessarily reflect the true cost of repair or replacement. But appellant had the opportunity to present evidence indicating that the market value of repair was lower than that stated in the prosecution's estimate. *See State v. McDonald*, 312 Minn. 320, 323, 251 N.W.2d 705, 707 (1977) (observing, in reviewing a theft conviction, that "[a]

defendant is free to introduce direct and circumstantial evidence bearing on the value of the item in the retail market"). And it is within the province of the jury to determine the credibility and weight of evidence. *State v. Clark*, 739 N.W.2d 412, 418 (Minn. 2007). Giving deference to the jury's credibility determinations and with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, we conclude that it was reasonable for the jury to find, based on the evidence presented, that the total value of the property damage exceeded $1,000. *Cf. State v. Stout*, 273 N.W.2d 621, 623 (Minn. 1978) (ruling, in a theft case, that the jury was precluded from finding that the value of a stolen ring exceeded $2,500 when the only proof of value was the testimony of the owner, who admitted that he would have willingly sold the ring for less than $2,500). Therefore, appellant's sufficiency-of-the-evidence argument fails.

II.

The decision to give a requested jury instruction lies within the discretion of the district court. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). "A party is entitled to an instruction if the evidence produced at trial supports the instruction." *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006). To be entitled to a jury instruction on the necessity defense, a defendant must make a prima facie showing of necessity. *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995).

The necessity defense "applies only in emergency situations where the peril is instant, overwhelming, and leaves no alternative but the conduct in question." *State v. Johnson*, 289 Minn. 196, 199, 183 N.W.2d 541, 543 (1971). The elements of a necessity defense are that (1) the defendant had no legal alternative to breaking the law, (2) the

harm to be prevented was imminent, and (3) there was a direct, causal connection between breaking the law and preventing the harm. *State v. Rein*, 477 N.W.2d 716, 717 (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992). The defense applies only if the harm resulting from compliance with the law would have significantly exceeded the harm that actually resulted from breaking the law. *Id.* Necessity is unavailable as a defense if the emergency situation is a result of the defendant's own recklessness or negligence. *Johnson*, 289 Minn. at 199, 183 N.W.2d at 543.

In refusing to instruct the jury on the defense of necessity, the district court determined that "there were alternatives that were readily available" to appellant that did not involve breaking the law. The record supports the district court's reasoning. Appellant did not testify at trial. And he does not dispute W.B.'s testimony that at 7:30 on the night of the incident, a supermarket located "just a block away" from W.B.'s residence was open. But despite the presence of an open and presumably heated business nearby, appellant spent two hours in subzero temperatures, either outside or inside W.B.'s unheated garage. We agree with the district court that appellant did not satisfy his burden of showing that he had no legal alternative to breaking into W.B.'s garage.

Appellant asserts that the evidence shows that he had been "beaten up," had sustained a broken rib, and was left outside in below-zero temperatures without shoes for more than two hours, and was therefore in danger of serious harm if he did not find shelter. Appellant also asserts that he took towels and a cap from W.B.'s garage, which have an "obvious causal connection to preventing frostbite or hypothermia," and that the jury could have concluded that he was looking through the glove compartments of the

cars for pain-relieving medication. In addition, appellant argues that while he was carrying two cell phones, it is not clear whether either of them was working. But even assuming the truth of these assertions and noting W.B.'s testimony that appellant asked for help at her door, they do not explain why appellant could not have walked to the supermarket at 7:30 p.m. instead of waiting outside or inside W.B.'s unheated garage for two hours. Further, the testimony of the physician who examined appellant was that appellant suffered only mild injuries as a result of his alleged assault and his exposure to the cold. While appellant claims that he had difficulty standing and walking when he was arrested, appellant was capable of fleeing the police shortly before his arrest.

The district court acted within its discretion by declining to instruct the jury on the defense of necessity.

Affirmed.