STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1689

State of Minnesota,
Respondent,

vs.

William Charles Nelson,
Appellant.

Filed August 10, 2010
Affirmed
Johnson, Judge

St. Louis County District Court
File No. 69DU-CR-08-4861

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

Melanie S. Ford, St. Louis County Attorney, James T. Nephew, Assistant County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Ngoc L. Nguyen, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Peterson, Judge; and Willis, 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

JOHNSON, Judge

A St. Louis County jury found William Charles Nelson guilty of first-degree aggravated robbery based on evidence that he stole money and prescription medicine from a person while mugging him on a sidewalk in downtown Duluth. Nelson challenges the sufficiency of the evidence and argues that his trial counsel provided constitutionally ineffective assistance. We affirm.

FACTS

On July 21, 2008, J.S. and an acquaintance known to him only as George were walking toward a casino in downtown Duluth when they were approached by Nelson. According to J.S., Nelson asked him whether he wanted to purchase crack cocaine. J.S. declined the offer and continued walking toward the casino with George. Nelson followed them.

When they reached the casino, J.S. handed George a $20 bill so that George could buy cigarettes. Nelson demanded that J.S. give him money also. J.S. responded by telling Nelson "to get out of my space and to quit following me." Nelson then punched J.S. in the head. While J.S. was bending down to pick up his hat, Nelson kicked him in the mouth at least twice. J.S. suffered a bloody nose and a swollen eye, and he lost two teeth. The casino's video-surveillance system captured most of the altercation between Nelson and J.S. Before being punched, J.S. had approximately $15 to $20 and two bottles of prescription medicine in the pocket of his jacket. When J.S. got to his feet, he

realized that the money and pills no longer were in his pocket, and he could not find them on the ground.

In August 2008, the state charged Nelson with one count of first-degree aggravated robbery, a violation of Minn. Stat. § 609.245, subd. 1 (2006). A two-day jury trial was held in June 2009. The state presented the testimony of J.S. and a police officer and played the video-surveillance recording for the jury. J.S. testified that, after he was punched and kicked, he "felt somebody's hands on me, like, going through my pockets." The jury found Nelson guilty. The district court sentenced Nelson to 80 months of imprisonment. Nelson appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Nelson first argues that the evidence is insufficient to support the jury's verdict of guilty. Nelson concedes that he had a physical altercation with J.S. But Nelson contends that the state failed to prove beyond a reasonable doubt that he stole money and prescription medicine from J.S. during the altercation.

When considering a claim of insufficient evidence, this court conducts a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008). If a conviction is based on circumstantial evidence, it "receives stricter scrutiny than a conviction based on direct evidence." *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010). To uphold a conviction based on circumstantial evidence, the evidence "must be consistent with the

hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt." *State v. Yang*, 774 N.W.2d 539, 560 (Minn. 2009) (quotation omitted). "'Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.'" *Stein*, 776 N.W.2d at 714 (quoting *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002)). Nonetheless, "we have recognized that 'the jury is in the best position to evaluate the evidence[,]' and we 'will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.'" *Id.* (alteration in original) (quoting *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998)).

A person is guilty of robbery if he or she "takes personal property from the person or in the presence of another" and, in addition, "uses or threatens the imminent use of force against [that] 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," if he or she has "knowledge of not being entitled" to the property. Minn. Stat. § 609.24 (2006). A person is guilty of first-degree aggravated robbery if, "while committing a robbery," he or she "inflicts bodily harm upon another." Minn. Stat. § 609.245, subd. 1.

In this case, the evidence is sufficient to prove that Nelson stole money and prescription medicine from J.S. and, thus, committed aggravated robbery. Nelson's theft of J.S.'s money and pills was not recorded by the surveillance camera, presumably because part of the scuffle occurred in an alcove that was not in the view of the camera. But Nelson's theft was proved by J.S.'s testimony that, while he was being mugged, he

"felt somebody's hands on me, like, going through my pockets." It is true, as Nelson argues, that when J.S. was skillfully cross-examined, he admitted that he did not know for certain that Nelson was the person who stole the money and pills from him. But J.S. was unequivocal in saying that Nelson had beaten him, and he also testified that he felt someone going through his pockets during the beating. No one else was involved in the altercation, and J.S. noticed that the money and pills were missing immediately after the altercation had concluded. This evidence is sufficient to allow the jury to infer that Nelson reached into J.S.'s pocket and removed the money and pills. The state's evidence, though circumstantial, creates a "complete chain" that leads directly to Nelson's guilt. *Stein*, 776 N.W.2d at 714 (quotation omitted). Nelson does not propose an alternative hypothesis to explain the evidence. "[W]e will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *Id.* (quotation omitted).

Nelson also contends that the evidence is insufficient on the ground that J.S.'s testimony was not credible. Nelson asserts that J.S.'s trial testimony was inconsistent with statements he made to medical personnel and to the police soon after the incident. Nelson's trial counsel took advantage of the opportunity to cross-examine J.S. on those inconsistencies. Some of J.S.'s inconsistent pretrial statements concerned matters that were not disputed at trial, such as whether he was mugged by one person or two, and whether it was Nelson who mugged him. Other inconsistencies did not relate directly to the incident but, rather, to J.S.'s conduct after the incident. It is significant that most of J.S.'s testimony was corroborated by the video-surveillance recording and that the

remainder of J.S.'s testimony is entirely consistent with the recording. In any event, the jury apparently concluded that J.S.'s testimony was sufficiently credible, and we must defer to the jury's assessment of a witness's credibility. *See State v. Green*, 719 N.W.2d 664, 673-74 (Minn. 2006) (stating that "it is within the jury's exclusive province to assess the credibility of a witness").

Thus, the evidence is sufficient to support the conviction.

II. Ineffective Assistance

In a *pro se* supplemental brief, Nelson argues that his trial counsel provided him with constitutionally ineffective assistance because he did not call George to be a witness at trial.

To prevail on a claim of ineffective assistance of counsel, Nelson "must affirmatively prove [1] that his counsel's representation 'fell below an objective standard of reasonableness' and [2] 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). A person alleging a claim of ineffective assistance of counsel "bears the burden of proof on that claim." *State v. Jackson*, 726 N.W.2d 454, 463 (Minn. 2007). To satisfy that burden, a petitioner "must do more than offer conclusory, argumentative assertions, without factual support." *State v. Turnage*, 729 N.W.2d 593, 599 (Minn. 2007). "We need not analyze both prongs of the *Strickland* test if either one is determinative." *Staunton v. State*, ___ N.W.2d ___, ___ 2010 WL 2606229, at *8 (Minn. June 30, 2010).

In this case, the assertions in Nelson's *pro se* brief do not state facts that would prove a claim of constitutionally ineffective assistance of counsel. Even if we assume that Nelson could satisfy the first prong of the *Strickland* test, he cannot satisfy the second prong. To prevail on the second prong, Nelson must state facts that, if proven, would show that, but for his attorney's alleged ineffective assistance, the result would have been different. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). To do so, Nelson must prove "what evidence would have been presented through witness testimony, or how the result of the proceedings would have been different because of the witness testimony." *State v. Loving*, 775 N.W.2d 872, 882 (Minn. 2009). But Nelson's *pro se* brief does not describe the testimony that George would have given or how George's testimony might have been favorable to Nelson. Thus, Nelson cannot prove that the result of his trial would have been different but for his attorney's alleged ineffective assistance. If Nelson's allegation of ineffective assistance were contained in a postconviction petition, he would not be entitled to an evidentiary hearing. *See* Minn. Stat. § 590.04, subd. 1 (2008); *McKenzie v. State*, 754 N.W.2d 366, 370 (Minn. 2008); *Gail v. State*, 732 N.W.2d 243, 248-49 (Minn. 2007).

Thus, Nelson has failed to allege facts sufficient to prove that his trial counsel provided him with constitutionally ineffective assistance.

Affirmed.