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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2122

State of Minnesota,
Respondent,

vs.

Eric Lee Hindermann,
Appellant.

Filed September 28, 2010
Affirmed in part, reversed in part, and remanded
Hudson, Judge

McLeod County District Court
File No. 43-CR-09-18

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

Michael Junge, McLeod County Attorney, Glencoe, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

HUDSON, Judge

On appeal after convictions of attempted first-degree manslaughter and two counts of assault, appellant argues that the evidence presented was insufficient to support his conviction of attempted manslaughter and that his consecutive sentence must be reduced or modified to a concurrent term because consecutive sentencing represents a departure unsupported by aggravating factors. Because the evidence presented was sufficient to support appellant's conviction, we affirm in part. But because appellant's consecutive sentence represents a departure, which was not supported by aggravating factors, we reverse that sentence and remand for resentencing.

FACTS

The state charged appellant Eric Lee Hindermann by complaint with two counts of attempted first-degree murder and two counts of second-degree assault, based on an allegation that he stabbed a male victim and assaulted a female victim with a knife on January 1, 2009.

Appellant and the female victim dated during 2008. In December 2008, the female victim ended their relationship, but she continued to socialize with appellant. On December 31, 2008, the female victim told appellant that she would be going with a friend to a local bar that night to celebrate New Year's Eve. The female victim arrived at the bar at approximately 10:30 p.m. and began drinking alcohol. Appellant arrived approximately 30 minutes later and briefly chatted with the female victim. At midnight, appellant became angry after he saw the female victim kiss the male victim. The female

victim testified that appellant then approached her and told her that she made a mistake and that now she was "done." Appellant claimed that he asked the female victim what "the deal was." The female victim then left the bar with the male victim. The female victim and the male victim went to the male victim's father's apartment and continued to consume alcohol until approximately 2:30 a.m. when they went to the male victim's apartment. Appellant remained at the bar with his brother until it closed and then went to his brother's apartment to continue drinking.

At approximately 3:00 a.m., appellant went uninvited to the male victim's apartment, entered through the unlocked front door without knocking or ringing the bell, and took off his shoes. The female victim and the male victim were in the bedroom when appellant entered the apartment. The jury heard three versions of the ensuing events.

Appellant testified that, after he entered the apartment, he heard the female victim giggle and tell the male victim to pull his pants down. Appellant testified that he became very upset upon hearing this, "lost it," and walked through the kitchen and into the bedroom. Appellant acknowledged that he picked up a knife from the kitchen counter and carried it into the bedroom, but he claimed that he did not remember doing so. Appellant testified that he entered the bedroom and began yelling at the female victim. He admitted that he held the knife to the female victim's throat and threatened to kill her but claimed that he did not intend to stab her. Appellant testified that, while he was confronting the female victim, the male victim came toward him, at which point appellant extended his arm and the knife cut the male victim. Appellant claimed that he then dropped the knife and ran from the apartment.

The female victim testified that she and the male victim were sleeping next to each other on the bed when appellant entered the bedroom, crawled on top of her, pressed his knees to her shoulders, held the knife to her neck, and told her that no one would know what happened because he was not using his own knife. The female victim testified that when the male victim woke up, appellant pushed him against a closet and began stabbing him. The female victim claimed that she then jumped on appellant's back and that she and the male victim fought with appellant for several minutes until the male victim managed to get the knife away from him. Appellant then began strangling the female victim until the male victim wrestled him off of her and continued fighting with appellant. The female victim testified that appellant threatened to kill both her and the male victim during the altercation. Appellant eventually ran out of the apartment as the female victim called 9-1-1.

The male victim testified that he was awakened by the female victim screaming at appellant in his kitchen. The male victim testified that he got out of bed and intervened between appellant and the female victim, resulting in a physical altercation in the doorway between the kitchen and the bedroom. The male victim stated that appellant threatened to kill him, pushed him toward the closet, and thrust the knife at him, striking him in the neck and arms. The female victim then pulled appellant off, and they fought. The male victim had trouble getting up and then saw appellant on top of the female victim in the kitchen thrusting the knife down at her. The male victim stated that he again intervened, and appellant eventually ran out of the apartment. The male victim sustained cuts to his neck, hand, arm, and leg.

After police arrived on the scene, the female victim received a series of three calls from appellant. In the calls, appellant called the female victim derogatory names and told her that the incident was her fault and that she got what she deserved. When police arrived to arrest appellant at his residence, appellant ran outside, yelled at officers to shoot him, and would not remove his hands from his pockets. His father tackled him to the ground, and the police swarmed in to arrest appellant. Appellant asked the officers why he was being arrested and stated, "Is it because I stabbed that guy in the neck . . . ?" Appellant also told the officers that he was crazy. Several days later, the female victim allowed a police officer to listen to a voicemail message left by appellant on her cellular phone at about 1:30 a.m., in which appellant stated, "I'm gonna crack, I'm gonna kill somebody."

A jury trial commenced on July 14, 2009, and the charges were submitted to the jury, along with two counts each of the lesser-included offenses of attempted second-degree intentional murder and first-degree manslaughter. The jury found appellant guilty of two charges involving the male victim—attempted first-degree manslaughter and second-degree assault—and one charge involving the female victim—second-degree assault.

Appellant was sentenced to 27 months for the second-degree assault against the female victim and to a consecutive sentence of 51 months for the attempted first-degree manslaughter against the male victim. This appeal follows.

D E C I S I O N

I

Appellant argues that the evidence was insufficient to support his attempted first-degree manslaughter conviction because he claims that the state did not prove that he was acting with the specific intent to cause the male victim's death.

When considering a claim of insufficient evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to permit the jurors to reach the verdict that they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court 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 reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

Appellant was convicted of attempted first-degree manslaughter of the male victim. A person is guilty of an attempt if he intentionally "does an act which is a substantial step toward, and more than preparation for, the commission of [a] crime." Minn. Stat. § 609.17, subd. 1 (2008). A person is guilty of first-degree manslaughter if he "intentionally causes the death of another person in the heat of passion provoked by

such words or acts of another as would provoke a person of ordinary self-control under like circumstances." Minn. Stat. § 609.20(1) (2008).

Intent is "an inference drawn by the jury from the totality of circumstances." *State v. Fardan*, 773 N.W.2d 303, 321 (Minn. 2009) (quotation omitted). Intent may be proved by circumstantial evidence. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). Words, actions, and surrounding circumstances may all provide evidence of intent. *State v. Boitnott*, 443 N.W.2d 527, 531 (Minn. 1989). "While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430.

Here, there is sufficient evidence of intent to support the conviction. Appellant argues that the evidence did not show that he intended to cause the male victim's death because appellant had not harbored any animosity toward the male victim prior to appellant entering his apartment and stabbing him, and that appellant's anger was instead directed at the female victim. But the intent to kill can be formed very quickly. *See State v. Marsyla*, 269 N.W.2d 2, 5 (Minn. 1978) (stating that intent to kill and premeditation may be formed in an instant before killing); *cf. State v. Moua*, 678 N.W.2d 29, 39 (Minn. 2004) (stating that premeditation requires that some "appreciable period of time" pass after intent to kill is found for premeditation to be proved). First-degree manslaughter does not require premeditation, but only the intent to kill triggered by the heat of passion. *Cooper v. State*, 745 N.W.2d 188, 194 (Minn. 2008). The evidence showed that

appellant was very upset after seeing the victims kiss. Appellant sneaked into the male victim's apartment, took off his shoes, and armed himself with a knife prior to encountering either victim. The evidence also showed that appellant stabbed the male victim at least five times, including at least two stab wounds to his neck and upper leg near the groin. The number of stab wounds alone may be sufficient to show intent to kill. *See State v. Thompson*, 544 N.W.2d 8, 12 (Minn. 1996) (noting that the Minnesota Supreme Court "has allowed intent to kill to be shown by a single gunshot fired at close range"); *State v. Whisonant*, 331 N.W.2d 766, 768 (Minn. 1983) (finding sufficient evidence of intent to shoot or kill when defendant fired a single shot at a police officer from 12 feet away); *State v. Bryant*, 281 N.W.2d 712, 714 (Minn. 1979) (finding sufficient evidence of intent to kill when "defendant fired three shots, the last two at close range and with the gun pointed at the victim").

Testimony regarding appellant's own statements also provided sufficient evidence of intent. The male victim testified that appellant said "This is your knife, don't you recognize it, I'm going to kill you," immediately before attacking him. Appellant also sent a text message to the female victim earlier in the night stating: "I'm gonna crack, I'm gonna kill somebody." A defendant's statements of intent are not necessarily binding if his actions show a contrary intent. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). But here, appellant's actions support his statements and show intent to cause the death of another.

Appellant argues that testimony from the female victim and the male victim was inconsistent and that the undisputed facts show only that appellant acted recklessly. But

even when a witness's credibility is seriously called into question, the jury is entitled to believe the witness. *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002). "All inconsistencies in the evidence are . . . resolved in favor of the state." *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990). The jury is entitled to accept a portion of a witness's testimony and reject the rest. *State v. Johnson*, 568 N.W.2d 426, 436 (Minn. 1997). Furthermore, this court will not re-weigh evidence. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009). Therefore, when viewed in the light most favorable to the conviction, the evidence is sufficient to support the jury verdict.

II

The parties agree that appellant's consecutive sentence is improper and request this court to vacate the consecutive sentence and remand for resentencing. The district court imposed a 27-month sentence for the second-degree assault conviction involving the female victim and a consecutive 51-month sentence for the attempted first-degree manslaughter conviction involving the male victim. At the time of appellant's offense, permissive consecutive sentencing for multiple current felony convictions was authorized only for certain felony offenses enumerated in section VI of the guidelines. *See* Minn. Sent. Guidelines II.F.2 (2008). Attempted first-degree manslaughter is not listed in that section. *See id.*; Minn. Sent. Guidelines VI (2008). Therefore, appellant was not subject to permissive consecutive sentencing. *See State v. Johnson*, 756 N.W.2d 883, 895–96 (Minn. App. 2008) (holding that consecutive sentencing for attempted second-degree murder was not permissive because that offense was not listed in section VI), *review denied* (Minn. Dec. 23, 2008). Thus, the consecutive sentence represents a departure, but

no departure factors were presented to the jury. If no reasons for departure are stated on the record at the time of sentencing, a departure will not be allowed. *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003). Therefore, the consecutive sentence is reversed and remanded to the district court for resentencing in accordance with the guidelines.

Affirmed in part, reversed in part, and remanded.