STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2012

State of Minnesota,
Respondent,

vs.

Darquel Markease Rockymore,
Appellant.

Filed September 26, 2011
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-09-36228

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

Michael O. Freeman, Hennepin County Attorney, Alan J. Harris, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Minge, Judge; and Bjorkman, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of second-degree assault on the grounds that irregularities in jury deliberations denied him a fair trial and that the evidence is insufficient to support his assault conviction. We affirm.

FACTS

On July 20, 2009, Minneapolis police responded to a 911 call from L.W., who told dispatch that she was being threatened by three men who had weapons, one of whom had a gun. When officers arrived, L.W. told them that the men had run down the street. The officers drove in that direction and saw a woman walking into a house. Officer Daniel McDonald knocked on the door and told the woman that people carrying weapons had run by her house and asked if they could look around inside. The woman agreed to let the officers inside. The officers looked around the main level; when they returned to the living room, two additional people had arrived. One of the men, later identified as appellant Darquel M. Rockymore, matched the description of the man carrying a gun that L.W. provided. When Officer McDonald went down to the basement, he found a sawed-off shotgun in the corner. Appellant was arrested, and both he and the shotgun were identified by L.W. in a subsequent show-up identification procedure. A subsequent forensic analysis of the gun revealed four fingerprints, but the quality of the prints was too poor to permit identification. The gun was swabbed for DNA, but no testing was ever completed. A jury trial was conducted.

The jury began deliberations on a Friday and recessed that afternoon for the weekend. Over the weekend, one of the jurors had a death in his family and traveled to Chicago. By Monday morning, he had not returned. Appellant stated that he would agree to 11 jurors, but the state would not. As a result, the district court dismissed the jury until Thursday morning. The district court gave no specific instructions to the jurors before they departed.

By Thursday, the missing juror had returned. He advised the district court that he was prepared to re-focus on the trial. Deliberations continued. At some point on Thursday afternoon, the jury sent a note to the district court asking, "Does the terroristic threat include a weapon and/or threat, or is it just a weapon, the terroristic threat?" The note also asked, "Do we, the jury, need to agree that the oral threat was made by the defendant?" The district court and the prosecutor met in chambers with appellant's counsel appearing by telephone. Appellant was not present. The district court and both counsel discussed the jury questions and potential responses. In the end, all agreed to send a note back to the jury telling the jurors to "[r]ely on the jury instructions."

The next morning, on Friday, after memorializing on the record the substance of the district court's and counsels' discussion, appellant's counsel remarked that she "should have asked the judge to answer [the second] question yes." The district court stated that the reason that it "decided at the end of our conversation that they need to rely on the jury instructions was that I believe, not knowing where they are as far as why they really want to know the answer to that question, could possibly give one side an advantage over the other."

Later on Friday, the jury sent another note saying, "We are deadlocked. We can't come to unanimous conclusion on any charge." The district court told the jury in open court:

> This is what I'm going [to] say about you being deadlocked. You have the instructions. You know what they say about what your duty is when you look at deliberating, okay? And part of that is that each of you have your own decision to make on this, and that's your decision, unless you believe that that view is erroneous, then you could change your mind.
>
> So what I'm going to ask you to do is it is 11:20. I'm going to ask you to go back to the jury room, take a good look at the instructions, take a good look at the evidence, make sure what your view is is your view, and deliberate. It's going to be close to 12. I don't care if you do it now and go to lunch and come back. But that's what I'm going to ask you to do. I'm going [to] ask you to go back in, deliberate, and at some point you're going to either send me another note back out telling me you have a verdict or you're going to tell me that you don't, but I want to be sure that when you tell me you're deadlocked, you really are. So go back, deliberate, and we'll see you today, next week, I don't know. But I'll see you, okay?

Both the prosecutor and appellant's counsel agreed with the district court's decision to instruct the jury to keep deliberating, especially in light of the long break.

Four hours later, the jury informed the district court that they had reached a verdict on the assault and possession charges but were deadlocked on the terroristic-threats charge. The jury found appellant guilty of second-degree assault and acquitted him of possession of the sawed-off shotgun.

Appellant moved for a new trial on the grounds that the trial proceedings were irregular, depriving him of a fair trial, and the evidence supporting the second-degree

assault charge was insufficient and did not support the conviction. The district court denied his motion. The district court sentenced appellant to 36 months, stayed for a period of five years—a dispositional departure from the presumptive sentence. This appeal follows.

D E C I S I O N

I.

Appellant contends that irregularities in the jury deliberations deprived him of his right to a fair trial. The Fourteenth Amendment to the United States Constitution and article I, section 7 of the Minnesota Constitution both guarantee a criminal defendant "due process," which includes the right to a fair trial and the right to present witnesses in one's defense. *State v. Reardon*, 245 Minn. 509, 513-14, 73 N.W.2d 192, 195 (1955); *State v. Carroll*, 639 N.W.2d 623, 627 (Minn. App. 2002), *review denied* (Minn. May 15, 2002). But the constitutional guarantee of a fair trial does not mandate a perfect trial. *State v. Billington*, 241 Minn. 418, 427, 63 N.W.2d 387, 392-93 (1954).

A.

Appellant asserts that the district court erred by suspending jury deliberations for three days. Appellant correctly notes that Minnesota case law has not specifically addressed the issue of temporarily suspending jury deliberations, but he suggests that Minn. R. Crim. P. 26.03, subd. 5(3), which relates to jury sequestration, provides a helpful framework. That rule provides that the defendant must consent before jurors are permitted to separate overnight. Allowing the jury to separate without the defendant's consent is reversible error only if prejudice results. *See State v. Sanders*, 376 N.W.2d

196, 206 (Minn. 1985). By analogy, appellant argues that his consent was required before the district court allowed jurors to suspend deliberations. Assuming, without deciding, that consent is a necessary prerequisite to a suspension in juror deliberations, we conclude that appellant has failed to show any prejudice resulting from his assertion of error.

Appellant's primary argument is that he was prejudiced by the district court's failure to provide the jury with additional instructions before and after the three-day break in deliberations. Other jurisdictions that have analyzed the prejudicial impact of a suspension in jury deliberations have considered a variety of factors in addition to the jury instructions, including whether there was a good reason for the suspension; whether the case was so complex that prolonged interruption would have a significant impact on the jury's ability to recall details; whether alternatives existed; and the length of the suspension. *See, e.g.*, *Hamilton v. Vasquez*, 17 F.3d 1149, 1159 (9th Cir. 1994), *abrogated on other grounds by Calderon v. Coleman*, 525 U.S. 141, 119 S. Ct. 500 (1998); *United States v. Acuff*, 410 F.2d 463, 467 (6th Cir. 1969). Because we find the analysis of these courts to be persuasive, we look to the entirety of the circumstances surrounding the district court's suspension of jury deliberations here to determine whether appellant was prejudiced.

The district court instructed the jurors before they departed for the weekend on the first Friday that they should "only discuss this case with each other when you get back together on Monday." The district court admonished the jury not to have contact with anyone in the case, not to research the case, not to view any locations associated with the

case, and to disregard Internet and TV that "involves a trial or anything similar to this case." When the jurors returned briefly on Monday morning before the three-day break, and again when they returned on Thursday, the district court did not provide any additional instructions or admonishments. The instructions provided on Friday before the weekend recess aptly informed the jury as to its limitations during the break, and there is nothing in the record to suggest that the jurors disregarded these instructions during the later three-day break. While it would have been advisable for a district court to provide an additional instruction to the jury before and after any suspension in deliberations, this is not the only factor we consider in assessing prejudice. *See State v. Kanae*, 970 P.2d 506, 511 (Haw. App. 1998).

Nothing about the issues in this case suggests that the three-day delay was prejudicial to appellant's case. Resolution of the issues boiled down to credibility determinations—it was L.W.'s word against appellant's—and the jury was charged with the task of assessing the credibility of these witnesses. There were no complex or scientific aspects to appellant's case such that a delay would have been detrimental to the jury's ability to recall specific, complicated evidence. Further, the reason for the three-day delay was legitimate, and the delay itself was not extensive. *See Hamilton*, 17 F.3d at 1159 (upholding an 18-day suspension in jury deliberations); *Kanae*, 970 P.2d at 511 (upholding a 17-day suspension in jury deliberations). Because appellant failed to demonstrate any prejudice resulting from the suspension in jury deliberations, he is not entitled to relief on this basis.

B.

Appellant asserts that his absence from a communication between the district court and the deliberating jury constituted harmful error. A defendant has the right to be present at every critical stage of the trial, which includes a district court's communications with a deliberating jury. *State v. Sessions*, 621 N.W.2d 751, 755-56 (Minn. 2001). "[A] court's response to the jury . . . in [the defendant]'s absence and without obtaining a waiver from [the defendant] violate[s] his Sixth Amendment right to be present and [Minn. R. Crim. P.] 26.03, subd. 1(1)." *Id.* at 756. But even if the defendant is denied his right to be present at every stage of the trial, "a new trial is warranted only if the error was not harmless," meaning that "the verdict was surely unattributable to the error." *Id.*

The state agrees that the district court's response to the jury in appellant's absence was error, but contends that the error was harmless. When considering whether appellant's absence amounted to harmless error, we consider the strength of the state's evidence and the substance of the district court's response. *Id.* The jury's note asked, "Does the terroristic threat include a weapon and/or threat, or is it just a weapon, the terroristic threat?" and "Do we, the jury, need to agree that the oral threat was made by the defendant?" The response of the district court was, "Rely on the jury instructions." At the time, appellant's counsel agreed with that resolution, but appellant now argues that, had he been present, his counsel would have requested that the district court respond, "Yes" to the second question.

The state's evidence against appellant consisted of the testimony of L.W. and the officers present when L.W. identifed appellant as the individual who threatened her and who had a gun. L.W.'s description in her 911 call was consistent with her identification of appellant and with the clothing that appellant admitted he was wearing that evening. Appellant admitted that he was there and that he yelled at L.W.; he disagreed with L.W. as to the content of his comments. While the state had no scientific evidence connecting appellant with the sawed-off shotgun, the state's case with regard to the assault charge was relatively strong.

As to the substance of the district court's response, appellant contends that "[w]ithout clarification, it is possible that the jury convicted [appellant] of second-degree assault based upon the threats of others." But the district court told the jury to rely on the instructions, which stated that an element of a terroristic-threats charge is "the defendant threatened, directly or indirectly, to commit a crime of violence," and an element of second-degree assault is "an act done with intent to cause . . . fear of immediate bodily harm or death in another." Moreover, the jury was instructed that it had to find each of those elements proven beyond a reasonable doubt and be unanimous in the verdict. We conclude that the district court's response to the jury to "rely on the instructions" was appropriate and, if the jury did so rely, it would have come to the correct conclusion on that factual issue. *See id.* at 756-57 (concluding that the absence of the defendant was harmless error in part because the district court did "not issue any new instructions in its responses" and "did not favor the prosecution or defense"); *State v. Schifsky*, 243 Minn. 533, 546, 69 N.W.2d 89, 97 (1955) (concluding that the defendant's absence was

harmless error because the "re-reading or repeating of a part of the original instructions by the court to the jury not in the presence of the defendant and in the open courtroom" did not demonstrate any prejudice).

C.

Appellant contends that the district court erred in its response to the jury when it informed the district court that it was deadlocked. In determining whether the district court errs in its charge to a deadlocked jury, "the real question is whether the jury was . . . threatened with the prospect of such unreasonably lengthy deliberations." *State v. Kelley*, 517 N.W.2d 905, 909 (Minn. 1994) (quotation omitted). In Minnesota, it is reversible error to coerce a jury toward a unanimous verdict. *See State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996).

In *State v. Martin*, the supreme court addressed the procedure for the district court in the event of a jury deadlock. 297 Minn. 359, 211 N.W.2d 765 (1973). The supreme court adopted the procedures and instructions regarding juror deadlock that were outlined by the American Bar Association. *Id.* at 371-72, 211 N.W.2d at 772. The approved instructions provide that, prior to deliberations, the district court should instruct the jurors that (1) the verdict must be unanimous, (2) they have a duty to consult with one another and to deliberate with a view to reaching an agreement, (3) each juror must decide the case for himself after an impartial consideration of the evidence with other jurors, (4) a juror should not hesitate to reexamine his views and change his mind, and (5) "no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a

verdict." *Id.* (quoting A.B.A. Standards Relating to Trial by Jury, § 5.4 (Approved Draft, 1968)). Our supreme court also held that if the jury is deadlocked, "the [district] court may require the jury to continue their deliberations and may give or repeat an instruction as provided [above]. The [district] court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *Id.* at 372, 211 N.W.2d at 772 (quotation omitted).

Appellant contends that the district court's statement to the jury to "go back, deliberate, and we'll see you today, next week, I don't know," had the effect of suggesting that the jury could be required to deliberate until it reached a guilty verdict. Appellant cites *Kelley* in support of this argument. In *Kelley*, the supreme court concluded that a district court's continued instruction to the jury to "keep deliberating," without a contemporaneous instruction similar to that in *Martin*, left jurors with "no sense of the limits of their duty." 517 N.W.2d at 909. The jurors in *Kelley* informed the district court twice in one day that they had deadlocked. *Id.* at 907. The judge was out sick and instructed his clerk to tell the jurors to continue deliberating. *Id.* at 907-08. At the end of the day, the jury returned a guilty verdict. *Id.* at 908. The supreme court reasoned that "[t]he repeated instructions to 'keep deliberating' may have led them to conclude that they were *required* to deliberate until a unanimous verdict was reached on each count." *Id.* at 909.

Here, after the jury advised the district court that it was deadlocked, the district court reminded the jurors that "each of you have your own decision to make on this, and that's your decision, unless you believe that that view is erroneous, then you could

change your mind." The district court instructed the jury to review the instructions, examine the evidence, reaffirm their individual views, and continue to deliberate. Then the district court said, "[s]o go back, deliberate, and we'll see you today, next week, I don't know." This statement by the district court does not constitute a threat or a suggestion to the jury that it would be required to deliberate for an unreasonable length of time to reach a verdict.

The district court did not tell the jury that it had to reach a unanimous verdict. To the contrary, the instruction left open the possibility for another deadlock. And the district court reaffirmed that the jurors had to make their own decisions and did not have to change their minds unless they believed "that that view is erroneous." In fact, the jury returned four hours later with a verdict on two counts and another statement that it had deadlocked on one of the charges, further demonstrating that the jury did not feel compelled to continue deliberating until a verdict was reached on all counts. We therefore conclude that the district court's instruction "did not so stress[] the duty to decide over the need for jurors to consult and deliberate with a view to reaching an agreement consistent with their individual judgments." *See Jones*, 556 N.W.2d at 911 (alteration in original) (quotations omitted).

D.

Appellant contends that even if he is not entitled to reversal on the basis of the trial errors considered individually, the cumulative effect of these irregularities demands a reversal. Under some circumstances, the cumulative effect of multiple harmless errors may deny a defendant a fair trial and, therefore, require reversal for a new trial. *State v.*

Litzau, 650 N.W.2d 177, 187 (Minn. 2002). When determining whether reversal is appropriate, a reviewing court balances the egregiousness of the errors against the weight of evidence against the defendant. *See State v. Cermak*, 350 N.W.2d 328, 334 (Minn. 1984). A new trial is not warranted when "errors did not affect the jurors' deliberations or their assumptions about appellant's innocence or guilt." *State v. Erickson*, 610 N.W.2d 335, 341 (Minn. 2000).

We conclude that appellant was not deprived of a fair trial by the harmless error that resulted from his absence from the district court's communication with the jury combined with the non-prejudicial error associated with failing to obtain his consent before suspending juror deliberations for three days. Appellant's absence and the three-day suspension in deliberations were procedural irregularities that had no effect on the assumptions of the jurors in considering appellant's guilt or innocence in the way that erroneously admitted evidence or improper argument may have. And the evidence against appellant was strong. He admitted to being outside of the home and to yelling at L.W. And L.W.'s testimony, as well as circumstantial evidence, provided strong evidence that appellant threatened L.W. while he was carrying a firearm. The aforementioned errors had no bearing on the jury's resolution of this evidence. *Cf. State v. Underwood*, 281 N.W.2d 337, 344 (Minn. 1979) (holding that the cumulative effect of evidentiary errors warranted reversal when the trial included "a great deal of conflicting testimony" and "the factual determinations must have been difficult"). We conclude that the combined effect of the two errors at trial did not deprive appellant of his right to a fair trial.

II.

Appellant contends that the evidence is insufficient to support the jury's conviction of second-degree assault and that the guilty verdict and acquittal are logically inconsistent. Even in cases where the verdicts may be said to be logically inconsistent, this court reviews the record for the sufficiency of the evidence. *Nelson v. State*, 407 N.W.2d 729, 731 (Minn. App. 1987), *review denied* (Minn. Aug. 12, 1987). In considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume "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). 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 reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A person is guilty of assault if that person commits an act with the intent to cause another person fear of immediate bodily harm or death. Minn. Stat. § 609.02, subd. 10(1) (2008). If the assault is carried out with a dangerous weapon, the person is guilty of second-degree assault. Minn. Stat. § 609.222, subd. 1 (2008).

L.W. testified at trial that she was inside her house when she saw four men standing across the street, one of whom was appellant. He was carrying a gun. L.W. heard appellant say, "I'm going to shoot the windows out on the house and stab up all of these tires on this car." L.W. testified that when she went outside, she observed appellant holding a sawed-off shotgun. She stated that she called the police because she was afraid appellant was going to "shoot up" her house.

This testimony provides support for each element of a charge of second-degree assault. The sole basis for appellant's challenge to the sufficiency of the evidence on appeal is his contention that L.W. was not a credible witness. Appellant points to the fact that L.W.'s statements to police regarding the number of people outside of her house were inconsistent and that her 911 call did not refer to a sawed-off shotgun, but instead referred to a chrome handgun. While L.W. provided inconsistent statements about the type of firearm that she saw appellant carrying, inconsistencies in testimony do not require reversal for insufficient evidence. Assuming, as we must, that the jury believed the state's witnesses and rejected appellant's contrary testimony, we conclude that there is sufficient evidence in the record to support appellant's conviction of second-degree assault.

Affirmed.