STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0290

State of Minnesota,
Respondent,

vs.

Chad William Kessler,
Appellant.

Filed January 21, 2014
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Dakota County District Court
File No. 19HA-CR-12-2432

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

James C. Backstrom, Dakota County Attorney, Elizabeth M. Swank, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

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

LARKIN, Judge

Appellant challenges his conviction of third-degree assault, arguing that the evidence is insufficient to sustain the district court's guilty verdict and that he did not validly waive his right to a trial by jury. He also challenges his sentences for third-degree assault, terroristic threats, and false imprisonment, arguing that multiple sentences are impermissible under Minn. Stat. § 609.035 (2010) because the offenses occurred during a single behavioral incident. Because the evidence is sufficient to sustain the verdict and appellant's waiver of his right to a trial by jury was valid, we affirm his conviction of third-degree assault. But because the factual record is inadequate, we reverse his sentence and remand for the district court to clarify its findings regarding whether the offenses occurred in a single behavioral incident and to resentence in accordance with its findings.

FACTS

On July 12, 2012, appellant Chad William Kessler was driving his girlfriend A.A. and her daughter in A.A.'s car. Kessler and A.A. had a disagreement about the radio, which quickly escalated. Kessler punched A.A. in the face approximately ten times, while driving. A.A. tried to block the punches with her forearm. After A.A.'s face began to noticeably swell and bruise, Kessler told A.A. "that he should just 'finish her' because he'd already messed her up pretty bad."

Kessler drove A.A. and her daughter to A.A.'s apartment, dropped them off, and drove away in A.A.'s car. A.A. did not call the police or otherwise report the incident. She put ice on her face and went to bed.

At approximately 3:30 a.m. on July 13, A.A. woke up and discovered Kessler in her bedroom. Kessler had barricaded the bedroom door with a heavy wooden chest, so A.A. was unable to leave the bedroom. Kessler told A.A. to be quiet and that he would kill her if she left the room. He stated that he should just "finish her off." Kessler kept A.A. in the bedroom until approximately 7:50 a.m., at which point he allowed her to leave the bedroom to obtain some ice for her eye. At that point, A.A. ran from her apartment to the caretaker's apartment and began pounding on the door, yelling "call 911." The caretaker's wife let A.A. into the apartment and the caretaker called 911. Meanwhile, Kessler drove away in A.A.'s car.

Respondent State of Minnesota charged appellant with fifth-degree assault, false imprisonment, terroristic threats, theft of a motor vehicle, and interference with an emergency call. On the day before trial, Kessler appeared in district court with his attorney and indicated that he wanted to have a court trial instead of a jury trial. Next, Kessler waived his right to a trial by jury. Then, a discussion occurred regarding the state's intent to amend the criminal complaint to include a charge of third-degree assault if the case proceeded to trial. The parties appeared for the scheduled court trial the next day, and the district court allowed the state to amend the complaint as discussed.

The district court found Kessler guilty of third-degree assault, fifth-degree assault, false imprisonment, terroristic threats, and theft of a motor vehicle.[1] The district court sentenced Kessler to serve 26 months in prison for third-degree assault, a consecutive sentence of 12 months and one day for terroristic threats, a concurrent sentence of 23 months for false imprisonment, and a concurrent sentence of 23 months for theft of a motor vehicle. The district court dismissed the fifth-degree assault conviction because it was a lesser included offense of third-degree assault. This appeal follows.

D E C I S I O N

I.

Kessler challenges the sufficiency of the evidence to sustain his conviction of third-degree assault, arguing that the "third-degree assault conviction must be reversed because A.A.'s injuries do not constitute substantial bodily harm." When reviewing the sufficiency of the evidence in a criminal case, we are "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 finder of fact to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb the verdict if the finder of fact, "acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the appellant] was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

[1] The state dismissed the charge of interference with an emergency call charge before the verdict was rendered.

When reviewing the sufficiency of the evidence in criminal cases, we "apply the same standard of review to cases heard before a court without a jury as is applied to those heard by a jury." *State v. Cox*, 278 N.W.2d 62, 65 (Minn. 1979). Accordingly, this court "will uphold the district court's findings if, based on the evidence contained in the record, the district court could reasonably have found [the] defendant guilty of the crime charged." *Id.* In making this determination, we view the evidence in a manner most favorable to the verdict and assume that the district court disbelieved contradictory testimony. *Id.*

"Whoever assaults another and inflicts substantial bodily harm" is guilty of third-degree assault. Minn. Stat. § 609.223, subd. 1 (2010). Substantial bodily harm is "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. § 609.02, subd. 7a (2010).

In Minnesota, "a black eye, in and of itself, does not equate to 'substantial bodily harm.'" *State v. Whaley*, 389 N.W.2d 919, 926 (Minn. App. 1986). But this court has concluded that "two black eyes, facial bruises, bruises on [the victim's] neck and head, and scratches on [the victim's] arm" were sufficient to constitute substantial bodily harm. *State v. Carlson*, 369 N.W.2d 326, 327-28 (Minn. App. 1985), *review denied* (Minn. July 26, 1985). In reaching its verdict, the district court considered *Whaley* and *Carlson* and concluded that "the injuries suffered by [A.A.] more closely approximate those suffered by the *Carlson* victim than that suffered by the *Whaley* victim." We agree.

The record shows that Kessler's beating left A.A. with two black eyes, creating a "raccoon" effect, as well as bruising around her mouth. A.A. often had to close her left eye in the days after the attack due to blurred vision. A.A. also had bruising on her arms and leg. The district court found that the photographs of A.A. after the assault showed "a very badly beaten woman." The court noted that A.A.'s injuries "lasted several days . . . likely . . . over a week and beyond" and that A.A. still had blood in her eye at the time of trial, nearly four months after the assault. The court also noted that A.A.'s injuries were not easily hidden by putting on a pair of sunglasses because the injuries extended down her face.

The bruising of A.A.'s eyes and face, the blood in her eye, and the bruises on her arms and leg significantly marred A.A.'s appearance for several days and amounted to temporary but substantial disfigurement. Because the district court, "acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude" that Kessler was guilty of third-degree assault, we do not disturb the verdict. *See Bernhardt*, 684 N.W.2d at 476-77.

II.

Kessler challenges the validity of his waiver of the right to a trial by jury. Under both the United States and Minnesota Constitutions, a defendant is entitled to trial by jury. U.S. Const. art. III, § 2, cl. 3, amend. VI; Minn. Const. art. 1, §§ 4, 6. "This right includes the right to be tried before a jury on every element of the charged offense." *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010). "In Minnesota, the right to a jury trial attaches whenever the defendant is charged with an offense that has an

authorized penalty of incarceration." *State v. Kuhlmann*, 806 N.W.2d 844, 848 (Minn. 2011). However, a defendant, "with the approval of the court, may waive a jury trial on the issue of guilt provided the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(a).

Caselaw requires the

> waiver of a jury trial to be knowing, intelligent and voluntary. The [district] court must be satisfied that the defendant was informed of his rights and that the waiver was voluntary. . . .
>
> . . . .
>
> The purpose of the [district] court's colloquy with the defendant is to learn whether the defendant's waiver is knowingly and voluntarily made. The focus of the inquiry is on whether the defendant understands the basic elements of a jury trial.

State v. Ross, 472 N.W.2d 651, 653-54 (Minn. 1991) (quotation and citation omitted).

On the day before the trial began, Kessler appeared in district court, and his attorney informed the court that Kessler wanted a court trial instead of a jury trial. The district court asked Kessler's attorney to "go over his rights." The following colloquy occurred between Kessler and his attorney:

> ATTORNEY: So Mr. Kessler, you understand that you have the right to have a 12-person jury when you are charged with a felony?
> KESSLER: Yes.
> ATTORNEY: And you understand that the 12 people have to have a unanimous verdict of innocence or guilt for each Count on the Complaint?
> KESSLER: Yes.
> ATTORNEY: They have to do that before they can enter a verdict; do you understand that?
> KESSLER: Yes.

> ATTORNEY: And we talked about the fact that if we don't all agree, it's called a hung jury, and that means we just have to try again from beginning with a new set of jurors; did you understand that?
> KESSLER: Yes.
> ATTORNEY: You understand that if you have a jury trial, the jury determines the guilt or innocence, and then the Judge, if you're found guilty on any charge, would have to decide the punishment phase of the trial; do you understand that?
> KESSLER: Yes.
> ATTORNEY: You understand that if you waive the right to have the jury, that the Judge is going to be the trier of fact and the one who would do the sentencing if you're convicted of any of the offenses; do you understand that?
> KESSLER: Yes.
> ATTORNEY: And knowing all that information, you want to waive your right to a jury and have this matter heard directly to [the judge].
> KESSLER: Yes.

Next, the district court questioned Kessler and established that no one had made any threats or promises to persuade him to give up his right to a jury trial, that he was making the decision freely and voluntarily, and that he had a clear mind and was not affected by alcohol, drugs, or any kind of mental disability.

Immediately after Kessler waived his right to a trial by jury, the district court asked the state if it wanted to make a record of the state's plea offer. In response, the prosecutor explained that she intended to amend the complaint to add a count of third-degree assault "arising out of the same course of conduct that's alleged in the complaint." The prosecutor further explained that one sentence would be added to the probable cause section, "that being that the alleged victim . . . was unable to open her left eye for a period of time after the assault." The prosecutor stated, "that's the basis of the probable cause for the amendment."

The prosecutor also stated that she had informed defense counsel that if Kessler were convicted on the current complaint, he faced a presumptive sentencing range of 26 to 36 months. But if he were convicted on the proposed amended complaint, he would face a presumptive sentence of "about 60 months."[2] The state indicated that if Kessler pleaded guilty to the complaint prior to amendment, "he would be looking at a sentence of 36 months," but if the complaint were amended, "he's looking at almost double." The state also indicated that it was investigating the possibility of additional charges against Kessler, including a violation of a domestic-abuse no-contact order and witness tampering.

In response, Kessler's attorney confirmed that she had "related that information" to Kessler. Next, Kessler's attorney questioned Kessler and established that she and Kessler had "talked a lot on Friday and a lot today and beforehand about possible resolution of this case"; "talked about the fact that if we went to trial, . . . there's a possibility this can go up to 60 months"; and "talked about [the possibility of additional charges] before" and "knew these things are a possibility." Then, Kessler's attorney asked him: "knowing all those things, you still want to go forward and have your trial, correct?" Kessler responded: "Yes, ma'am."

When the parties appeared for the court trial the next day, the district court granted the state's motion to amend the complaint to include the third-degree-assault charge. Kessler went forward with a court trial, as he had requested, and never indicated that he

[2] The state's brief notes that the prosecutor "significantly mistakenly overstated the presumptive sentence [Kessler] faced if he was convicted of the additional offense at trial."

wanted to withdraw his jury-trial waiver. *See* Minn. R. Crim. P. 26.01, subd. 1 (3) ("The defendant may withdraw the waiver of a jury trial any time before trial begins.").

Kessler's challenge to the validity of his waiver is limited to the third-degree-assault charge. He argues that because he "did not knowingly, intelligently, and voluntarily waive a jury trial on the third-degree assault charge, his conviction for that offense must be reversed." Kessler's argument focuses on the timing of his jury trial waiver: he provided his waiver the day before the complaint was formally amended. Kessler argues that

> [b]ecause the amended complaint added a much more severe charge with an additional element [(i.e., substantial bodily harm),] the district court erred by trying [him] on the third-degree assault charge without ensuring [that he] understood he could have a jury trial on the added assault charge and without obtaining an additional [waiver], or at least asking him whether he wished to reaffirm his earlier, jury trial waiver.

We reject Kessler's argument because it puts form over substance. Immediately after Kessler made his waiver, the state made a record of its intent to amend the complaint to include a charge of third-degree assault, the factual basis for the amendment, and the attendant penalty increase. The record shows that Kessler had discussed the proposed amendment and attendant consequences with his attorney *prior* to waiving his right to a trial by jury. The record therefore establishes that Kessler made his waiver with full knowledge of the possible amendment. Because Kessler waived his right to a trial by jury knowing that he might be tried on the additional charge of third-

degree assault, we reject Kessler's argument that a second waiver or affirmation was necessary after the third-degree-assault charge was formally added to the complaint.

Instead, we apply the standard articulated by the Minnesota Supreme Court in *Ross* to determine the validity of Kessler's waiver. In *Ross*, the supreme court offered "helpful guidelines" to ensure that a defendant understands the basic elements of a jury trial:

> [T]he defendant should be told that a jury trial is composed of 12 members of the community, that the defendant may participate in the selection of the jurors, that the verdict of the jury must be unanimous, and that, if the defendant waives a jury, the judge alone will decide guilt or innocence.

472 N.W.2d at 654.

These guidelines are not mandatory and the "nature and extent of the inquiry may vary with the circumstances of a particular case." *Id.* Neither the guidelines nor the procedural rules require a defendant to acknowledge the pending charges, the included elements, or the potential punishment when waiving the right to a trial by jury. *Compare* Minn. R. Crim. P. 26.01, subd. 1(2)(a) (allowing the district court to approve a defendant's waiver of a jury trial on the issue of guilt so long as the waiver is in writing or on the record, the court has advised the defendant of the right to trial by jury, and the defendant has had an opportunity to consult with counsel, without mandating any particular inquiry), *with* Minn. R. Crim. P. 15.01, subd. 1 (setting forth a specific, detailed inquiry that a district court must make before accepting a guilty plea and trial waiver from a defendant, which addresses, among other things, whether the defendant understands the crime charged and the maximum penalty that could be imposed). "The

focus of the inquiry is on whether the defendant understands the basic elements of a jury trial." *Ross*, 472 N.W.2d at 654.

In *Ross*, the supreme court held that the defendant's jury-trial waiver was valid, partly because "defendant had ample opportunity to consult with his attorneys who presumably also told him about the pros and cons of a jury trial." *Id.* Here, Kessler was represented by an attorney when he waived his right to a trial by jury. As to his waiver, Kessler acknowledged that he had a right to trial by jury, that 12 jurors would need to reach a unanimous verdict on each count, and that if he waived his right to a jury, the judge would determine his guilt or innocence. Kessler indicated that he understood his right to a trial by jury and that his jury waiver was made freely and voluntarily. Next, Kessler acknowledged that if he went forward with a trial, the charges might be amended to include third-degree assault.

In sum, the record shows that Kessler (1) voluntarily waived his right to trial by jury, (2) while represented by counsel, (3) with full knowledge of the state's intent to amend the complaint, (4) after discussing all of the circumstances with his attorney, and (5) nonetheless elected to go forward with a court trial after the amendment. There simply is no basis to conclude that when Kessler made his waiver, he did not understand that he was waiving his right to a trial by jury on the proposed third-degree-assault charge. On the particular facts and circumstances of this case, we conclude that Kessler's

waiver was valid as to all of the charges, including the third-degree assault.[3] We therefore affirm Kessler's conviction of third-degree assault.

III.

Kessler contends that his sentence violates Minn. Stat. § 609.035, which provides that a person whose conduct "constitutes more than one offense" may only be punished for one of them. Minn. Stat. § 609.035, subd. 1. The test is whether the offenses are part of "a single behavioral incident." *Effinger v. State*, 380 N.W.2d 483, 488 (Minn. 1986). "The state has the burden to establish by a preponderance of the evidence that the conduct underlying the offenses did not occur as part of a single behavioral incident." *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000). "In order to determine whether two intentional crimes are part of a single behavioral incident, [courts] consider factors of time and place and whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (quotation omitted).

"Whether multiple offenses arose out of a single behavior[al] incident depends on the facts and circumstances of the particular case." *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). But once "the facts are established, the determination [whether offenses arose from the same behavioral incident] is a question of law subject to de novo review." *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). Failure to raise

[3] Because we conclude that Kessler's waiver is valid, we do not address Kessler's argument that an invalid waiver of the right to trial by jury is a structural error. *See Kuhlmann*, 806 N.W.2d at 851 (explaining that "there are a very limited class of errors, referred to as structural errors, that require automatic reversal of a conviction" (quotation omitted)).

the issue of multiple sentences arising from a single behavioral incident at sentencing does not preclude relief on appeal. *Ture v. State*, 353 N.W.2d 518, 523 (Minn. 1984).

The district court's written findings and verdicts indicate that the third-degree assault occurred in A.A.'s car on July 12 and that the terroristic threats and false imprisonment occurred in A.A.'s apartment on July 13. However, at sentencing, the district court stated, "I should clarify something too, and that is that I concluded that the terroristic threats occurred during the incident where he falsely imprisoned her in the car, so I think they're really part of the same incident." The state responded, "Okay. Then we would ask the assault, though, would clearly be a separate incident." The court responded, "Right." Soon thereafter, the district court stated that the "assault happened first" such that it would sentence on the assault conviction first and then "if [it were] going to do a permissive consecutive [sentence it] would be the terroristic threats or the false imprisonment." Defense counsel later inquired if "the [c]ourt has found that the assault occurred first and then the false imprisonment [and] terroristic threats were the same incident . . . ?" The court responded, "Correct."

Kessler argues that his sentence for "either terroristic threats or false imprisonment must be vacated because the district court found at sentencing that both offenses were 'part of the same incident'" and that the "remaining sentence [for assault] must be vacated because the court's factual findings establish that both the terroristic threats and false imprisonment convictions arose from the same behavioral incident as [his] assault conviction." Kessler's arguments rely on the district court's statements at sentencing, but

he acknowledges that those statements conflict with the district court's written findings and verdicts.

The state contends that "the terroristic threats and false imprisonment occurred at the same time as one another, but not [at] the same time as the assault" and therefore concedes that "the [c]ourt must vacate the sentence on either the false imprisonment or the terroristic threats count." The state asserts that the district court intended to indicate that "the terroristic threats and false imprisonment occurred at the same time as one another, but not at the same time as the assault," but acknowledges that "[t]his is not . . . clear from the sentencing record." The state recommends that because the district court's comments at sentencing were unclear and may have contradicted its written findings and verdicts, we should remand the case to district court for resentencing. We agree.

Because the district court's written findings and verdict are inconsistent with its statements at sentencing, the factual record is inadequate for us to determine whether the third-degree assault, terroristic threats, and false imprisonment occurred as part of a single behavioral incident. *See Marchbanks*, 632 N.W.2d at 731 (stating that "where the facts are established, the determination [whether offenses arose from the same behavioral incident] is a question of law subject to de novo review"). We therefore reverse the sentence and remand for the district court to clarify its findings under section 609.035 and to resentence in accordance with those findings.

Affirmed in part, reversed in part, and remanded.