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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1108**

State of Minnesota,
Respondent,

vs.

Todd Charles Sharkey,
Appellant.

**Filed June 4, 2012
Reversed
Crippen, Judge***

Ramsey County District Court
File No. 62SU-CR-10-2242

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

Thomas R. Hughes, Hughes & Costello, St. Paul, Minnesota (for respondent)

Zorislav Romanovich Leyderman, Minneapolis, Minnesota (for appellant)

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

UNPUBLISHED OPINION

CRIPPEN, Judge

Challenging his convictions of two counts of disorderly conduct, appellant Todd
Charles Sharkey principally asserts, given his First Amendment protections, that the

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

record does not support the district court's findings. Because a substantial portion of appellant's conduct was protected by the First Amendment and his unprotected conduct was insufficient to sustain the convictions, we reverse.

FACTS

These convictions arise out of the state's assertion that appellant, in a disorderly fashion, interfered with a Shoreview City Council meeting. Trying the accusation without a jury, the district court found that appellant disturbed the meeting in a noisy and boisterous fashion, creating alarm. Appellant appeared at the city council meeting and repeatedly interfered with efforts of the presiding mayor to comment on the proceedings. Following the mayor's instruction, attending police removed appellant from the assembly over his loud and insistent objections. Upon conviction, the court stayed the sentence pending appellant's compliance with conditions of probation that included an order prohibiting him from attending city council meetings for one year.

Appellant asserts his right to freedom of speech in challenging the conviction. He further claims that the district court's stay-away order violated his First Amendment rights, the prosecutor lacked authority to prosecute the case, the district court improperly admitted *Spreigl* evidence, the evidence was insufficient, and the government's conduct violated his due-process rights.

DECISION

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 sustain the verdict. *State*

v. Webb, 440 N.W.2d 426, 430 (Minn. 1989). This court must assume that the fact-finder “believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the fact-finder, 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); *see also State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998) (bench trials are reviewed in the same manner as jury trials). “This court will review the evidence in the light most favorable to the state and then determine, as a matter of law, whether the defendant’s language under that set of circumstances falls outside the protection of the First Amendment.” *In re Welfare of M.A.H.*, 572 N.W.2d 752, 757 (Minn. App. 1997).

Appellant was charged with disorderly conduct in violation of Minn. Stat. § 609.72, subd. 1(2) & (3) (2010). Both subsections proscribe conduct with knowledge or cause to know that “it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace.” *Id.*, subd. 1. Subsection (2) addresses this conduct when it “disturbs an assembly or meeting, not unlawful in its character.” *Id.*, subd. 1(2). Subsection (3) speaks to engaging in “offensive, obscene, abusive, boisterous, or noisy conduct”; the subsection adds a proscription on offensive “language” that tends “reasonably to arouse alarm, anger, or resentment in others.” *Id.*, subd. 1(3). A conviction for disorderly conduct cannot be predicated solely on a person’s words unless those are “fighting words.” *In re Welfare of S.L.J.*, 263 N.W.2d 412, 419 (Minn. 1978).

Prior to trial, the district court found that appellant's words at the city council meeting did not rise to the level of fighting words and therefore could not form the basis for a conviction under the statute. But the court correctly observed that the state's accusations were stated in terms of loud and boisterous "conduct" under subsection (3), not in terms of "language" addressed in subsection (2). Minn. Stat. § 609.72, subd. 1(3). A second accusation, under subsection (2), states that appellant disturbed an assembly and could include conduct as well as words. *Id.*, subd. 1(2). As the court noted, the holding in *S.L.J.* regards offensive language. *S.L.J.*, 263 N.W.2d at 419.

But First Amendment protection is not limited to spoken words; it also extends to some conduct. *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). The "fighting words" narrowing construction applies to expressive conduct as well as verbal speech when the conduct and speech are "inextricably linked." *Baribeau v. City of Minneapolis*, 596 F.3d 465, 477 (8th Cir. 2010) (citing *Machholz*, 574 N.W.2d at 421).¹ When the speech and conduct are not inextricably linked, the statute may punish the disorderly manner in which the protected speech was delivered. *In re Welfare of T.L.S.*, 713 N.W.2d 877, 881 (Minn. App. 2006); *see also Machholz*, 574 N.W.2d at 421 ("[I]n some instances it is possible to separate protected speech from unprotected conduct . . ."). The district court observed that appellant's conduct "was also not so intertwined with what he was trying to say as to become constitutionally protected speech."

¹ The state does not claim that either appellant's words or conduct were in the nature of fighting words, inciting violent behavior.

It is critical to the case to determine whether appellant's conduct, which the district court found was "boisterous and noisy," as well as disturbing, can be separated from his protected speech or whether the conduct and speech are inextricably linked. "An actor's conduct is sufficiently expressive to merit First Amendment protection if the actor had '[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.'" *Baribeau*, 596 F.3d at 475 (quoting *Machholz*, 574 N.W.2d at 419-20).

Appellant attended the city council meeting on March 17, 2010, and got up to speak at the beginning of the citizen comment portion; the record supports the district court's finding that appellant "approached the podium very agitated." As the presiding officer, the mayor began comments directed toward appellant, and the record supports the district court's finding that appellant then became boisterous and noisy.² The mayor tried to address appellant again, and appellant began his comments, speaking over the mayor. The mayor then addressed appellant a third time, stating "I have something to say." Appellant responded, "I don't really want to listen to you." The mayor then stated that appellant was out of order; and, seemingly addressing the police officers who were present, the mayor instructed, "[w]ould you take Mr. Sharkey out please."

Appellant then stated in a raised voice, "This is set up, you set this up." Appellant tried to continue with his comments at which point a deputy sheriff approached him and

² The more specific district court findings indicate that appellant, while evidently agitated, spoke with a "raised" voice. But the record includes sufficient characterizations of appellant's speaking to support the court's more general finding that appellant was boisterous and noisy.

appellant yelled, “You’re going to have to arrest me.” As the district court found, appellant shouted this three times. Appellant clung to the podium and refused to leave until deputies pried his fingers off of the podium and escorted him from the meeting.

Appellant’s conduct at the city council meeting unfolded in two distinct parts—his conduct before and after the mayor called for his removal. Before the mayor called for his removal, appellant spoke in a raised voice and would not allow the mayor to instruct him or to run the meeting. The record establishes that in the past appellant had indicated his repeated aim to address grievances before the city council, but nothing in the record shows that appellant’s loud interruptions were linked to his wish to air grievances, which were not obstructed by the mayor’s choice to comment on the process. There is no merit in appellant’s assertions that the conduct before the mayor called for his removal was inextricably linked to his protected speech.

After his interfering remarks as he began his comments, appellant was denied the opportunity to address the substance of his concerns. After the mayor called for his removal, appellant’s loud and boisterous conduct was inextricably linked to his protected speech. He intended, once again, to address grievances to the council during the portion of the meeting set aside specifically for citizen comments. Appellant’s speech and expressive conduct conveyed his belief that he was being denied an opportunity to speak in a public forum, a right that the law boldly protects. *See Snyder v. Phelps*, ___ U.S. ___, 131 S. Ct. 1207, 1211 (2011) (announcing “special protection” for speech on matters of public concern). Appellant stated that the city council was violating his rights, and his conduct was directed at conveying the same message as his words. *See Machholz*, 574

N.W.2d at 419-20. There is no plausible way to separate appellant’s expressive conduct from his statements, and a reasonable person would understand that appellant intended to convey a message with his conduct. *Baribeau*, 596 F.3d at 477 (“[U]nder the surrounding circumstances, the likelihood was great that the plaintiffs’ . . . message would be understood by those who viewed the protest.”). Appellant’s speech was inextricably linked to the conduct of clinging to the podium and refusing to leave. Because the district court failed to distinguish between appellant’s conduct before and after he was ordered removed from the meeting, the court erred in its pretrial determination that appellant’s conduct was not linked to his free speech.

The disorderly conduct convictions are largely premised on the events that unfolded after the mayor called for appellant’s removal. Relating specifically to appellant’s protected conduct, the district court found that appellant refused to stop talking, refused to leave, clung to the podium, shouted at the deputies three times that they would have to arrest him to get him to leave, grabbed the podium and would not let go, and a deputy had to pry his fingers off of the podium to remove him from the meeting.³ This protected conduct could not form the basis for appellant’s criminal conviction. *See Baribeau*, 596 F.3d at 478 (finding that the defendants’ conduct could not form a basis for a disorderly conduct conviction because it was “expressive and

³ The district court found that the “total delay caused by [appellant’s] refusal to immediately leave the podium was less than five seconds.” We have labored in attempting to understand this observation. Nothing in the record supports the suggestion that the recited events beginning with the mayor’s announcement for removal occurred in less than five seconds. We can only speculate as to other points of reference that the district court may have had in mind. More importantly, for our observations, it does not signify a diminishment in the events after the mayor called for appellant’s removal.

inextricably linked to their protected message”); *see also State v. Peter*, 798 N.W.2d 552, 556 (Minn. App. 2011) (“Loud and even boisterous conduct is protected under Minnesota law, when that conduct is expressive and inextricably linked to [a] protected message.”) (quotation omitted).

The findings based on the unprotected conduct do not stand on their own to sustain the conviction. We begin this assessment with awareness that there is nothing in the record to permit the conclusion that the district court separately weighed the evidence to determine that the conviction was adequately supported by evidence of the events before the mayor asked for appellant’s removal. As a result, we proceed cautiously in determining whether the record would support such findings.

Assessing the evidence that is not tainted by appellant’s exercise of free speech rights, we observe that appellant’s initial interference occurred in a brief span of time, confirmed by a 15-second video record. A substantial part of the record regards events that began when the mayor asked for appellant’s removal. In a traditional assessment on the weight of the untainted evidence, the evidence was insufficient to sustain the conviction. Furthermore, the district court made only a generalized finding that appellant’s conduct made the witnesses alarmed and fearful. It is unclear which conduct, the protected or the unprotected, made the witnesses fearful. Because the unprotected conduct does not support a conviction, it cannot be said that the district court’s reliance on the protected conduct was harmless. We cannot, under these circumstances, uphold the district court’s conviction.

Because the district court improperly relied on protected conduct, and the unprotected conduct is insufficient to support the convictions for disorderly conduct, we reverse the convictions. Given our conclusion on the sufficiency of the evidence issue, we decline to address appellant's additional arguments.

Reversed.