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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0406**

State of Minnesota,  
Respondent,

vs.

Demarcus L. Barker,  
Appellant.

**Filed March 11, 2013  
Affirmed  
Hudson, Judge**

Goodhue County District Court  
File No. 25-CR-10-2413

Lori Swanson, Attorney General, Jennifer Coates, Assistant Attorney General, St. Paul, Minnesota; and

Stephen Betcher, Goodhue County Attorney, Red Wing, Minnesota (for respondent)

Steven J. Wright, Special Assistant State Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Hudson, Judge; and  
Klaphake, Judge.\*

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

## UNPUBLISHED OPINION

**HUDSON**, Judge

On appeal from his conviction of four offenses arising from an unsuccessful narcotics transaction, appellant argues that (1) his convictions of ineligible person in possession of a firearm, second-degree assault, and terroristic threats must be overturned because the evidence was insufficient to prove that he was not acting in self-defense; and (2) the evidence was insufficient to support his second-degree assault and terroristic-threats convictions. Because the evidence was sufficient to support the verdict and reject appellant's self-defense claim, we affirm.

### FACTS

On September 23, 2010, W.R. made arrangements to buy two ounces of cocaine from appellant for \$2,100. W.R. asked S.M., an acquaintance with whom he had been socializing that day, if her roommate S.J. could give him a ride to execute this transaction. That afternoon, W.R., S.M., and S.J. drove from Red Wing toward Zumbrota in a red minivan. With S.J. driving, W.R. called appellant, and the two agreed to meet at Casey's gas station in Zumbrota.

Appellant arrived first and parked on a street near the store. Appellant then entered Casey's and stood near the store entrance, waiting for W.R. to arrive. Minutes later, the red minivan pulled up to the front of the store, and S.M. immediately left the vehicle to go to the restroom. W.R. then exited the vehicle, met appellant outside the minivan, and the two got into the back seat, with W.R. entering first.

Once they were seated, appellant pulled out a bag of what appeared to be cocaine, while W.R. took out an envelope with money in it. The drugs and money were not successfully exchanged, and appellant and W.R. began arguing.

S.J. testified that appellant then pulled out a gun, cocked it, pointed it at her, and threatened to shoot her if W.R. did not give him the envelope. W.R. refused to hand over the money despite appellant's threats, and S.J. was eventually able to leave the vehicle while the two men continued to argue.

S.J. and S.M. met inside Casey's as S.M. was leaving the restroom. S.J. told her not to go back to the car, because appellant had a gun and was robbing W.R. Surveillance footage showed that shortly after S.J. exited the vehicle, the van began rocking back and forth. This movement continued for several seconds until appellant fell backward out of the car and fled, still holding the gun.

While it is undisputed that W.R. was shot twice by appellant while appellant and W.R. were alone inside the van, W.R. and appellant presented differing accounts of how appellant came to possess the gun and how the shooting occurred. W.R. testified that appellant refused to give him the drugs, then pulled out a gun to try and rob W.R. W.R. claimed that appellant shot him twice when he refused to hand over the envelope of money. Appellant testified that he found the gun sitting on his seat when he entered the van and surmised that it must have fallen out of W.R.'s pocket as he was entering the van. Appellant claimed that W.R. did not have the agreed-upon amount of money, which led to an argument between the two. Appellant alleged that W.R. tried to seize control of the gun while appellant was trying to open the door to exit the minivan. Appellant stated

that the gun accidentally went off twice as the two struggled over possession of the firearm.

Roughly fifteen seconds after appellant fled, S.M. and S.J. returned to the van. The two women sat in the van for approximately 20 seconds before pulling out of Casey's. When S.M. and S.J. realized that W.R. was severely injured, they drove to a nearby gas station and called 911 from S.J.'s cell phone. During the 911 call, the operator put S.J. on hold; while on hold, S.J. told S.M., "You've got to do it, [S.M.]." S.M. was later heard to respond, "I don't feel nothing. It's got to be in his pocket."

The minivan was later searched, and the police recovered 0.3 grams of cocaine and a marijuana pipe. S.J. admitted that the pipe was hers, but claimed she had a medical marijuana prescription that she had obtained in Illinois. No money was recovered from W.R. other than \$59 that S.M. gave to police, which she claimed belonged to W.R.

Appellant testified that after exiting the minivan, he ran to his car and left the scene. Appellant remained in possession of the gun, purportedly because he did not want W.R. to gain access to the gun in order to retaliate. Appellant claimed that he discarded the gun and the drugs on the side of the highway, though they were never recovered. Appellant was arrested in the same car later that day. The officers found no drugs or firearms on appellant's person or in the car, though appellant had \$850 in his possession, which he claimed to have won gambling the previous day.

Appellant was charged with six offenses for his actions against W.R.: attempted first-degree murder (premeditated); attempted first-degree murder (felony); attempted second-degree murder; first-degree assault; attempted first-degree aggravated robbery;

and second-degree assault. For his actions against S.J., appellant was charged with second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2010), and terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2010). Finally, appellant was charged with being an ineligible person in possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2) (2010), and giving a false name to a peace officer.

Following a bench trial, the district court concluded that the evidence was insufficient to show that appellant intended to kill, assault, or rob W.R., or that he took any of W.R.'s property. Appellant was therefore found not guilty on all six charges arising out of his conduct against W.R. Appellant was found guilty of the remaining four offenses, and appellant now challenges his convictions of second-degree assault and terroristic threats against S.J., and his conviction of ineligible person in possession of a firearm.

## **D E C I S I O N**

On appeal, appellant argues that (1) the evidence was insufficient to prove beyond a reasonable doubt that appellant did not act in self-defense, and (2) the evidence was insufficient to support his convictions of second-degree assault and terroristic threats. We assess the sufficiency of the evidence supporting a conviction by determining whether the facts in the record and the legitimate inferences drawn from those facts would permit the fact-finder to conclude that the defendant was guilty beyond a reasonable doubt. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). In doing so,

we view the evidence in the light most favorable to the verdict and assume that the fact-finder believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). The fact-finder is to determine the credibility and weight given to the testimony of witnesses. *State v. Pendleton*, 706 N.W.2d 500, 512 (Minn. 2005). So long as the fact-finder was presented with sufficient evidence to assess the credibility of the witnesses, the fact-finder may believe witnesses whose credibility appears questionable. *Id.* 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 is guilty of the charged offense, the appellate court will not disturb the verdict. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). This court “review[s] criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions.” *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

## I

A person may use reasonable force to resist an offense against the person. Minn. Stat. § 609.06, subd. 1(3) (2010). The defendant carries the initial burden of production in order to raise a claim of self-defense. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006).

A valid claim of self-defense requires the existence of four elements: (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant’s actual and honest belief that he was in imminent danger of death or great bodily harm; (3) the existence of reasonable grounds for that belief;

and (4) the absence of a reasonable possibility of retreat to avoid the danger.

*State v. Radke*, 821 N.W.2d 316, 324 (Minn. 2012). Additionally, “[t]he degree of force used in self-defense must not exceed that which appears necessary to a reasonable person under similar circumstances.” *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). Once the defendant has met the burden of production, the state has the burden to disprove one or more of the elements beyond a reasonable doubt. *Radke*, 821 N.W.2d at 324. A defendant not lawfully permitted to possess a firearm may take up possession of a firearm in self-defense, but must rid himself of possession once possession of the firearm is no longer necessary for self-defense purposes. *State v. Spaulding*, 296 N.W.2d 870, 876–77 (Minn. 1980).

Appellant raised a claim of self-defense in his closing argument, claiming that W.R. introduced the gun, and in doing so initiated the conflict. Appellant further claimed that a “life-or-death” struggle for the gun was initiated by W.R. when he attempted to seize the firearm, and that appellant would have been harmed if no action had been taken. Finally, appellant claimed that he had no opportunity to retreat from the vehicle before W.R. was shot, and did in fact retreat from the minivan at his earliest opportunity.

Appellant argues that because the district court found appellant not guilty of all offenses involving his conduct toward W.R., the district court must have believed that appellant acted in self-defense. Appellant asserts that the district court then erred by not extending the defense to appellant’s actions towards S.J. as well as his possession of a firearm.

Appellant's argument lacks merit for a number of reasons. First, the district court's factual findings and legal conclusions contradict appellant's argument that the district court necessarily believed appellant's self-defense claim. The district court found that appellant was not a credible witness. The district court also found that W.R.'s testimony was reliable, but was generally incomplete given his inability to remember the incident. The district court made no finding that W.R. was the aggressor or that appellant was acting in self-defense. Thus, the district court's order simply reflects that reasonable doubt existed as to whether appellant committed the six offenses arising from his conduct toward W.R., not that the district court necessarily believed that appellant acted in self-defense.

Furthermore, appellant's self-defense claim does not extend to his actions toward S.J. as a matter of law. Appellant presented no evidence that S.J. acted as an aggressor, was an accomplice of W.R.'s in the narcotics transaction, or that appellant was threatened in any way by S.J. A self-defense claim is not available for actions that are aimed at innocent bystanders, even if those bystanders are associated with the alleged antagonist. *State v. Soine*, 348 N.W.2d 824, 826 (Minn. App. 1984), *review denied* (Minn. Sept. 12, 1984). For an action to qualify as self-defense under Minn. Stat. § 609.06, subd. 1(3), that action must have been taken to resist the commission of an offense upon that person. Yet the record clearly supports the district court's finding that appellant threatened S.J. to get the money from W.R., not to protect himself or escape from the minivan. As a matter of law, therefore, appellant's actions directed at S.J. do not constitute self-defense.

Finally, there was sufficient evidence in the record to disprove one or more elements of appellant's self-defense claim as to his possession of a firearm. Both W.R. and S.J. testified that appellant was carrying the gun on his person when he entered the van, and initiated the confrontation by pulling out the gun. Appellant concedes that from the time he sat down in the minivan until he left the vehicle, he was in possession of the gun, casting doubt on his claim that he had an actual and honest belief that he was in imminent danger of death or great bodily harm, or that he had a reasonable basis for that belief. Viewed in the light most favorable to the verdict, the evidence was sufficient for the fact-finder to reject appellant's self-defense claim as to the charges of second-degree assault, terroristic threats, and ineligible person in possession of a firearm.

## II

Appellant argues that the evidence was insufficient to support his convictions of second-degree assault and making terroristic threats for his actions against S.J. Appellant was convicted of second-degree assault for causing fear in S.J. of immediate bodily harm or death with a dangerous weapon. Minn. Stat. § 609.222, subd. 1; Minn. Stat. § 609.02, subd. 10(1) (2010). S.J. testified that appellant pointed the gun at her, cocked it, then told W.R. that he would shoot S.J. if W.R. did not give him the money. A firearm is a dangerous weapon. Minn. Stat. § 609.02, subd. 6. Though the state must prove that the defendant intended to create fear of immediate bodily harm, the fact-finder may infer that the defendant intended the natural and probable consequences of his actions. *Hough*, 585 N.W.2d at 396. The natural and probable consequence of appellant pointing a gun at S.J.

and threatening to kill her would be to create fear in S.J. of immediate bodily harm or death. Therefore, so long as S.J.'s testimony was sufficiently credible to be believed by the district court, the district court did not err in convicting appellant of second-degree assault. *See State v. Williams*, 307 Minn. 191, 198, 239 N.W.2d 222, 226 (1976) (stating that the testimony of a single witness is sufficient to support a criminal conviction).

The same logic applies to appellant's conviction of terroristic threats for threatening to commit a crime of violence against S.J. for the purpose of terrorizing her. Minn. Stat. § 609.713, subd. 1. To be guilty of that offense, a defendant must "utter the threat with the purpose of terrorizing another." *State v. Schweppe*, 306 Minn. 395, 400, 237 N.W.2d 609, 614 (1975). For this offense, "purpose" means aim, intention, or objective. *Id.* "Terrorize means to cause extreme fear by use of violence or threats." *Id.* "The effect of a terroristic threat is not an essential element of the offense, but the victim's reaction to the threat is circumstantial evidence relevant to the element of intent." *Sykes v. State*, 578 N.W.2d 807, 811 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). Intent is a subjective state of mind that is typically established by making reasonable inferences from the surrounding circumstances. *Schweppe*, 306 Minn. at 401, 237 N.W.2d at 614.

S.J. testified that appellant threatened to shoot her, an act which would constitute a crime of violence. S.J. testified that this statement "[s]cared the hell out of" her, which is circumstantial evidence that appellant intended to cause extreme fear. The surrounding circumstances show that appellant made the threat to cause W.R. to hand over the money. Given that the success of this threat depended upon it causing extreme fear, it is

reasonable to infer that appellant did in fact intend to cause extreme fear by threatening to kill S.J. Therefore, as with the second-degree assault conviction, so long as S.J.'s testimony was sufficiently credible to be believed by the district court, the district court did not err in convicting appellant of making terroristic threats.

Appellant argues that S.J.'s testimony was not sufficiently credible to establish appellant's guilt. Appellant supports this argument by pointing to falsehoods within S.J.'s testimony, as well as questionable actions taken by S.J. during the course of the incident. This argument fails as a matter of law. The district court's verdict as well as its findings of fact demonstrate that it believed S.J.'s testimony. It is the province of the fact-finder to determine the credibility and weight given to the testimony of witnesses. *Pendleton*, 706 N.W.2d at 512. Appellant's "attempt to retry his case by asking us to reevaluate [the witness's] credibility is contrary to our role." *State v. Bliss*, 457 N.W.2d 385, 391 (Minn. 1990). "The resolution of conflicting testimony is the exclusive function of the [fact-finder]." *State v. Lloyd*, 345 N.W.2d 240, 245 (Minn. 1984). Appellant presented extensive evidence to the fact-finder—the district court—to cast doubt on S.J.'s credibility. The district court heard this evidence and nevertheless concluded that S.J.'s testimony was credible. So long as the fact-finder has sufficient evidence to assess a witness's credibility, the fact-finder may rely upon the testimony of a witness who appears to lack credibility. *See Pendleton*, 706 N.W.2d at 512.

As it was entitled to do, the district court found S.J.'s testimony credible. And because S.J.'s testimony alone was sufficient to prove appellant's guilt, we conclude that

there was sufficient evidence to support appellant's convictions of second-degree assault and terroristic threats.

**Affirmed.**