STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0464

State of Minnesota,
Respondent,

vs.

Wynn D. Arvidson,
Appellant.

Filed April 29, 2008
Affirmed
Stoneburner, Judge

Dakota County District Court
File No. K1061894

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Scott A. Hersey, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

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

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

STONEBURNER, Judge

Appellant challenges his conviction of second-degree assault, arguing that the evidence was insufficient to prove beyond a reasonable doubt that he did not act in self-defense. We affirm.

FACTS

E.K. was socializing with friends at a bar in Eagan when a man, later identified as appellant Wynn D. Arvidson, approached and began talking to the people at E.K.'s table. From his experience working as a server and as a bouncer, E.K. is able to identify when an individual is intoxicated. E.K. thought that Arvidson appeared intoxicated and asked Arvidson to leave them alone. Arvidson left E.K.'s table.

After the bar closed, E.K.'s group gathered in the parking lot to discuss where they wanted to go to eat. E.K. was smoking. Arvidson approached and asked E.K. for a cigarette. E.K. told Arvidson he did not have any cigarettes and again told Arvidson to leave them alone. When Arvidson then asked other members of the group for a cigarette, E.K. told Arvidson to "get the f—k out of here." Arvidson walked away from the group and got on his motorcycle, which was about 15 to 20 feet from E.K. and his friends. Some of E.K.'s female friends expressed concern that Arvidson was driving because they believed he was intoxicated, and they offered to call him a cab.

Arvidson then approached the group on his motorcycle, and he and E.K. began to argue. E.K. and two of his friends later testified that Arvidson got off his motorcycle and approached E.K. "like he was going to fight." E.K. punched Arvidson in the face,

knocking him to the ground, then turned and walked away. E.K. testified that nothing prevented Arvidson from leaving the parking lot at that time. Arvidson got up, went back to his motorcycle, and began swearing at E.K. again. E.K. approached Arvidson and asked him if he wanted to get knocked out again. Arvidson then moved toward E.K. E.K. first thought that Arvidson was punching him in the stomach, but then realized that Arvidson had some type of knife, which was later identified as a box cutter, and had sliced E.K. across his stomach.

One of E.K.'s female friends attempted to intervene but E.K. pushed her back, stating that Arvidson had a knife. The bartender came out of the bar and stated that he was calling the police. Arvidson threw the box cutter into the bushes and got on his motorcycle. E.K. followed Arvidson and kicked the motorcycle over to prevent Arvidson from leaving. E.K. threw Arvidson to the ground and kicked him in the stomach. Police arrived shortly after. Arvidson told police that he did not have a knife. A police officer found a box cutter next to the building that housed the bar. E.K. was transported to the hospital, where medical personnel found that he had three cuts to his abdomen, some skin shaved off his finger, and a nick on his knee.

Arvidson was charged with first-degree assault, second-degree assault, second-degree refusal to test, and third-degree driving while impaired (DWI). Arvidson asserted the defense of self-defense to the assault charges. At trial, Arvidson testified that after leaving the bar, he went up to E.K.'s group of friends in the parking lot and asked for a cigarette a few times. E.K. said "no," then punched him in the mouth. Arvidson testified that he and E.K. did not exchange words prior to the punch. Arvidson testified that after

he was punched, he briefly exchanged words with E.K. as he walked away. Arvidson testified that he then got on his motorcycle and opened his saddle bag because he thought he might have cigarettes in it. He said he had the box cutter because he always carries one in his pocket.

Arvidson testified that the whole group of people moved closer to him as he started his motorcycle, and he started to drive away to get away from E.K., but E.K. kicked his motorcycle. He testified that he stopped and put down his kickstand, and E.K. kicked the motorcycle again. Arvidson testified that he pulled out the box cutter to warn E.K. because E.K. "looked like he was going to do some damage," but E.K. attacked him while he sat on his motorcycle. Arvidson testified that E.K. pushed him over his motorcycle, he hit his head, and the next thing he remembers is trying to pick up his motorcycle while everyone was at the end of the parking lot talking to the police.

Arvidson testified that he could not recall getting kicked or throwing the box cutter, and he could not recall what he said to the responding officer. He acknowledged that he did not tell the responding officer the truth about the box cutter, but believed that he was confused after hitting his head. Arvidson testified that the next day, while in jail, he was still suffering blurred vision and requested a physician. During cross-examination, Arvidson admitted that he made false statements to the arresting officer that he did not have a knife and that E.K. stabbed himself.

The jury acquitted Arvidson of first-degree assault but found him guilty of second-degree assault (assault with a dangerous weapon and infliction of substantial bodily harm), second-degree test refusal, and second-degree DWI. The district court sentenced

Arvidson to 49 months in prison for the second-degree-assault conviction. This appeal of the second-degree assault conviction followed.

D E C I S I O N

I. Self-defense

Arvidson argues that the evidence presented at trial was insufficient for the jury to find beyond a reasonable doubt that he did not act in self-defense. In a challenge to the sufficiency of the evidence, this court "ascertain[s] whether the jury could reasonably find the defendant guilty given the facts in evidence and the legitimate inferences which could be drawn from those facts." *State v. Miles*, 585 N.W.2d 368, 372 (Minn. 1998). This court carefully reviews the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach" their verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Recognizing that the jury is in the best position to evaluate the credibility of witnesses, this court will assume that the jury believed the witnesses' testimony that supports the verdict and disbelieved any contradictory evidence. *State v. Henderson*, 620 N.W.2d 688, 705 (Minn. 2001).

When a defendant asserts a claim of self-defense, the state has the burden of disproving one or more of the elements of self-defense beyond a reasonable doubt. *State v. Spaulding*, 296 N.W.2d 870, 875 (Minn. 1980). The elements of self-defense are:

> (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she 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. Basting, 572 N.W.2d 281, 285 (Minn. 1997). The degree of force used cannot exceed that which a reasonable person would find necessary in similar circumstances. *Id.* at 286.

Arvidson asserts that E.K. was the initial aggressor because he threw the first punch. But the testimony also established that Arvidson, after having been asked by E.K. to leave the group alone, drove up to the group on his motorcycle and kept asking E.K. if he wanted to fight. One of E.K.'s friends testified that Arvidson got off his motorcycle and started running at E.K.. E.K. testified that he felt threatened enough to strike Arvidson and that he punched him once and walked away. And after being punched, Arvidson resumed his verbal confrontation with E.K. and approached E.K. with the box cutter. Therefore, although E.K. threw the first punch, the evidence in the record is sufficient for the jury to reasonably conclude that either Arvidson was the initial aggressor by approaching E.K. with the intent to fight, or Arvidson initiated and was the aggressor in a second confrontation.

Arvidson next argues that he had an honest fear of serious bodily harm and a reasonable basis for that fear. Arvidson misstates this element, which requires not just a fear of serious bodily harm, but a fear of great bodily harm or death. *See Basting*, 572 N.W.2d at 285. Arvidson contends that his testimony that E.K. "looked like he was going to do some damage" supports his argument that he had an honest fear of bodily harm. But the testimony does not establish that Arvidson had an honest fear that he might suffer great bodily harm. That Arvidson continued to verbally confront E.K. after E.K. punched him indicates that he was not afraid to continue fighting with E.K., and the

jury could reasonably conclude that Arvidson did not have a reasonable basis for a fear of great bodily harm or death.

Arvidson argues that he could not retreat. A person claiming self-defense has "a duty to retreat and avoid danger if reasonably possible." *State v. Austin*, 332 N.W.2d 21, 24 (Minn. 1983); *see State v. Soukup*, 656 N.W.2d 424, 428 (Minn. App. 2003) (stating that "principles of self-defense in homicide cases apply to assault cases as well," including duty to retreat or avoid the physical conflict), *review denied* (Minn. Apr. 29, 2003). But the record establishes that E.K. distanced himself from Arvidson after punching him and only approached Arvidson again after Arvidson began to exchange words with him again. And witnesses testified that Arvidson could have left the parking lot on his motorcycle or on foot, but instead approached E.K. before each encounter. Although Arvidson suggests that he had a reasonable fear because he was outnumbered, the record suggests that E.K.'s friends were actively trying to avoid the altercation.

Arvidson contends that his intoxication prevented him from leaving the scene. Arvidson cites *Ture v. State*, 353 N.W.2d 518, 522 (Minn. 1984), in support of his argument that he did not have a means to retreat because of his particular vulnerability due to intoxication. But *Ture* addresses the particular vulnerability of a victim in the context of aggravating factors justifying a sentencing departure, and therefore *Ture* is not applicable here. *See Ture*, 353 N.W.2d at 522. And Arvidson's argument contradicts the evidence in the record that Arvidson intended to leave the parking lot on his motorcycle, and only stopped to engage E.K. in an altercation. Arvidson's argument that he had no reasonable means to avoid E.K.'s "imminent assault" was reasonably rejected by the jury.

The evidence sufficiently supports the jury's conclusion that, beyond a reasonable doubt, Arvidson was not acting in self-defense.

II. Appellant's pro se supplemental brief

In a pro se supplemental brief, Arvidson reiterates that the evidence was insufficient to disprove his self-defense claim and also alleges that he did not receive effective assistance of counsel. When considering an ineffective-assistance-of-counsel claim, this court applies the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007). Under *Strickland*, a defendant must prove that his counsel's performance "'fell below an objective standard of reasonableness'" and that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). This court will "not address both prongs if the defendant fails to demonstrate one of them." *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005).

Arvidson contends that his counsel erred by failing to admit photographs of his cut lip and a diagram and photographs of the scene. But these arguments are without merit because the state introduced the photographs that showed Arvidson's cut lip during testimony offered for the purpose of identifying Arvidson, and a diagram of the scene was already in evidence and used by Arvidson during his testimony to explain the location of the individuals involved in the altercations. Arvidson's complaint that his attorney was ineffective because she failed to introduce evidence that E.K. suffered a broken bone in his hand is also without merit because E.K. testified about this fracture.

Arvidson also argues that his trial counsel failed to call an expert on head injuries who, Arvidson claims, was in the courtroom prepared to testify about the existence of and extent of his closed-head injury. Matters of trial strategy lie within the discretion of trial counsel and will not be second guessed by appellate courts. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). And decisions about which witnesses to call at trial and what information to present to the jury are questions of trial strategy that lie within the discretion of trial counsel. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Arvidson has failed to show that his counsel's performance fell below an objective standard of reasonableness.

Affirmed.