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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0902**

State of Minnesota,
Respondent,

vs.

Dylan James Ganske,
Appellant.

**Filed February 25, 2013
Affirmed
Worke, Judge**

Carver County District Court
File No. 10-CR-11-1095

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

Mark Metz, Carver County Attorney, Sarah L. Wendorf, Assistant County Attorney, Chaska, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his domestic-assault and drug-paraphernalia-possession convictions, arguing that (1) the state failed to prove that he intended to cause the victim

to fear immediate bodily harm or death; and (2) the district court impermissibly sentenced him for two offenses arising out of a single behavioral incident. We affirm.

DECISION

Sufficiency of the evidence

A jury found appellant Dylan James Ganske guilty of gross-misdemeanor domestic assault—intent to cause fear. *See* Minn. Stat. § 609.2242, subs. 1(1), 2 (2010). He argues that the evidence fails to show that he intended to cause his girlfriend, J.N., to fear immediate bodily harm or death. In considering a claim of insufficient evidence, our review is limited to an analysis of the record to determine whether the evidence, viewed in a light most favorable to the conviction, is sufficient to allow the jury to reach the verdict that it did. *State v. Hurd*, 763 N.W.2d 17, 26 (Minn. 2009). 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 that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). We defer to the jury’s credibility determinations. *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002). And we assume that “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).

Appellant correctly asserts that there is no direct evidence to show that he intended to cause J.N. to fear immediate bodily harm. But the state used circumstantial evidence to prove intent—“subjective state of mind [which is] usually established only by reasonable inference from surrounding circumstances.” *State v. Schweppe*, 306 Minn.

395, 401, 237 N.W.2d 609, 614 (1975). While circumstantial evidence is “entitled to the same weight as direct evidence,” *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999), a conviction based on circumstantial evidence receives stricter scrutiny than a conviction based on direct evidence. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988).

This court applies a two-step process to evaluate the sufficiency of circumstantial evidence. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). We identify the circumstances proved; in doing so, we defer “to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate.” *Id.* We then examine “the reasonableness of all inferences that might be drawn from the circumstances proved[,]” including “inferences consistent with a hypothesis other than guilt.” *Id.* Because the jury “is in the best position to evaluate the evidence[,]” we “will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998).

Appellant and J.N. were in a relationship and lived together. On the night of November 1, 2011, they got into an argument after a night of consuming alcohol. While in bed, J.N. told appellant that she could not pay rent. Appellant wanted J.N. out of the bedroom, so he pushed her off of the bed and out the door. J.N. called the police. J.N. testified that she “panicked [because she] didn’t want it to escalate.” While J.N. testified that appellant did not harm her and that she was not “afraid or scared,” she stated that she called the police because she did not know what would happen after appellant pushed her, and she did not think that she could calm him.

A responding officer testified that J.N. appeared to be upset and crying. J.N. told the officer that appellant had pushed her out of bed. She told the officer that she was afraid of appellant and that she had been injured. J.N. also told the officer that this type of thing happened often, but that she rarely reported it. This statement supported J.N.'s testimony that appellant shoved her during an argument in September 2009 and pushed her out of a vehicle in June 2010.

This evidence, although circumstantial, proves that appellant intended to cause J.N. to fear immediate bodily harm. Appellant concedes in his brief to this court: "Those circumstances were probably consistent with the inference that [appellant] intended to cause J.N. to fear immediate bodily harm." But appellant argues that those circumstances do not eliminate the hypothesis that appellant intended only to remove J.N. from the bedroom. He asserts that he did not verbally threaten J.N. or threaten her with a weapon, and J.N. testified that she was not afraid of appellant. But we will not overturn a conviction "based on circumstantial evidence on the basis of mere conjecture." *See id.* Because the circumstances show that appellant, by pushing J.N., intended to remove her from the bedroom by causing her to fear immediate bodily harm if she did not leave, the evidence is sufficient to support appellant's conviction.

Sentence

The jury found appellant guilty of domestic assault and possession of drug paraphernalia. The district court sentenced appellant to probation for two years and imposed a \$50 fine for the drug-paraphernalia-possession conviction. Appellant argues that the district court impermissibly imposed two sentences for conduct arising out of a

single behavioral incident.¹ “[I]f a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses.” Minn. Stat. § 609.035, subd. 1 (2010). This statute has been interpreted to bar multiple sentences for crimes that arise out of a single behavioral incident. *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011). When the facts are not in dispute, whether multiple offenses are part of a single behavioral incident is a question of law that we review de novo. *State v. Bauer*, 776 N.W.2d 462, 477 (Minn. App. 2009), *aff’d*, 792 N.W.2d 825.

We determine if appellant’s conduct constitutes a single behavioral incident by considering whether (1) the offenses occurred at the same time and place; and (2) if the offenses arose out of a continuous and uninterrupted course of conduct, “manifesting an indivisible state of mind or coincident errors of judgment.” *State v. Johnson*, 273 Minn. 394, 405, 141 N.W.2d 517, 525 (1966). There must be a single criminal objective; there is no single criminal objective when the crimes “simply [take] place as an idea came into [appellant’s] head.” *Bauer*, 792 N.W.2d at 829 (quotation omitted).

Here, an officer responding to the call at appellant’s residence observed two glass pipes with burnt marijuana and testified that he noticed the odor of alcohol mixed with the smell of burnt marijuana. Appellant admitted that one of the pipes belonged to him. Appellant argues that the crimes were committed at the same time and in the same place, and that the use of the drug paraphernalia led to the assault. But the officer testified that appellant denied smoking marijuana that night, and even though the offenses occurred at

¹ Although the state agrees with appellant, we address this issue because it is our responsibility to decide cases in accordance with the law. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

the same time and place, there was not one course of conduct or a single criminal objective. Appellant's possession of drug paraphernalia was arguably an ongoing crime, whereas the assault occurred that night. Further, appellant committed two independent errors of judgment; one was assaulting J.N. and the other was possessing drug paraphernalia. The two sentences were permissible.

Affirmed.