STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2039

State of Minnesota,
Respondent,

vs.

Alexander Longfellow Bryan,
Appellant

Filed December 9, 2013
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-11-30501

Lori Swanson, Attorney General, St. Paul, Minnesota

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Charissa Perzel (certified student attorney), Minneapolis, Minnesota (for respondent)

Kirk M. Anderson, Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

WORKE, Judge

Appellant challenges his convictions of first-degree aggravated robbery and second-degree assault, arguing that (1) the evidence was insufficient to convict him of

first-degree aggravated robbery; (2) the district court abused its discretion by permitting the state to amend the complaint on the first day of trial; (3) the district court abused its discretion by denying his motion for a downward dispositional departure at sentencing; and (4) the district court erred in calculating his criminal-history score. We affirm.

FACTS

J.T. was struck with an egg through his open car window as he was driving in Minneapolis on September 28, 2011. He followed the vehicle from which the egg was thrown to a gas station. J.T. asked the two men in the vehicle why they threw something at him. Things escalated, and J.T. called the police and recorded part of the encounter on his cellphone.

While J.T. waited for the police, the driver of the other vehicle, appellant Alexander Longfellow Bryon, beckoned J.T. to come around the corner of the gas station, but J.T. declined, and Bryan walked away. J.T. followed and again confronted Bryan at a nearby grocery store. Bryan then feigned a punch at J.T., grabbed J.T.'s cell phone, threw it on the ground, and "stomped it once or twice." J.T. testified that it was clearly Bryan's intention to "make sure that I did not have the phone with the recording in it." As J.T. turned to walk away, Bryan pointed a four-to-five inch combat dagger at him and circled J.T. as if he were "angling around to get a shot." Bryan then sheathed the knife, took the "guts" of J.T.'s phone, and walked away.

Some of the altercation was recorded on store surveillance video, which was introduced at trial. An eyewitness, B.L., testified that Bryan took and smashed J.T.'s phone, and that Bryan "pulled a knife from . . . behind his back" and pointed it at J.T. As

B.L. observed this, B.L. said to J.T., "Look out[,] [h]e has a knife." Bryan did not testify at trial.

Bryan was initially charged with second-degree assault, but on the morning of trial the state moved to amend the complaint to include a first-degree aggravated-robbery charge. Bryan's attorney conceded that he had actual notice of the amended complaint the week before trial. The district court permitted the state to amend the complaint. Following a two-day trial, the jury convicted Bryan of both offenses.

Bryan moved for a downward dispositional departure from the presumptive sentence on the first-degree aggravated-robbery conviction, arguing that he was amenable to probation. The state strongly opposed imposition of a stayed sentence and placement on probation, stating that Bryan was not under the influence of narcotics or alcohol while committing the offenses, and that Bryan's demeanor and statements throughout trial showed that he was not remorseful.

The district court acknowledging that it was a "hard decision" because the facts supported either imposition of the presumptive sentence or a downward dispositional departure to facilitate treatment in a probationary setting. But the district court stated that Bryan acted in "a threatening manner" toward the jury after the jury returned the guilty verdicts, which the district court construed as a "sign of his impulsiveness, immaturity, and . . . dangerousness." The district court also noted that Bryan did not take advantage of prior chemical-dependency treatment opportunities, although he had participated in some of the best chemical-dependency programs available. The district court imposed a

54-month executed sentence on the first-degree aggravated-robbery conviction and did not impose sentence on the assault conviction. This appeal followed.

D E C I S I O N

Sufficiency-of-evidence claim

This court addresses a sufficiency-of-evidence claim by carefully examining the record evidence to determine whether the jury could reasonably find the defendant guilty of the charged offense. *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009). "We view the evidence in the light most favorable to the jury verdict, and assume that the jury believed all of the state's witnesses and disbelieved any evidence to the contrary." *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). The verdict should not be altered if the jury, acting with due regard for the presumption of innocence and requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty. *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004). The state must prove each element of an offense beyond a reasonable doubt. *State v. Montgomery*, 707 N.W.2d 392, 400 (Minn. App. 2005).

"Whoever, while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or inflicts bodily harm upon another is guilty of aggravated robbery in the first degree." Minn. Stat. § 609.245, subd. 1 (2010). "Whoever, having knowledge of not being entitled thereto, takes personal property from the person . . . and uses or threatens the imminent use of force against any person to overcome the person's

resistance . . . to . . . the taking or carrying away of the property is guilty of robbery." Minn. Stat. § 609.24 (2010).

Bryan argues that the facts do not show that he intended to commit a robbery because "he was not attempting to 'take' the cell phone." But J.T. testified that after smashing the phone and brandishing the knife at J.T., he observed Bryan take parts of the phone and leave the area. This evidence was sufficient for the jury to find that Bryan took J.T.'s cell phone. Further, the statute does not define for what purpose the offender must "take" the property of another; the purpose of the taking is not an element of the offense, and even if Bryan took the phone for the purpose of breaking it, his conduct satisfied that element of the offense. *See State v. Solomon*, 359 N.W.2d 19, 21 (Minn. 1984) ("One of the elements of robbery is the element of 'taking or carrying away' of property. . . . [T]he fact that the control or dominion [does] not last long does not make any difference.").

Bryan also argues that he merely dropped the knife and that his possession of the knife played no role in the interaction he had with J.T. J.T. and B.L. testified that while Bryan was taking the phone, he had a combat knife on his person and that he brandished the knife at J.T. after taking the phone. In *State v. Kvale*, 302 N.W.2d 650, 653 (Minn. 1981), the supreme court rejected an argument that aggravated robbery requires the offender's use of force to precede or be simultaneous to the taking and stated that the use of force merely requires facilitation of the carrying away of the property. Here, Bryan was armed with a dangerous weapon throughout the robbery and brandished the weapon after taking the phone, which elevated the crime to an aggravated offense.

Viewing the evidence in the light most favorable to the verdict, the evidence was sufficient to permit the jury to reasonably conclude that Bryan committed first-degree aggravated robbery.

Amended complaint

Bryan next argues that the district court abused its discretion by permitting the state to amend the complaint on the morning of trial to include the first-degree aggravated robbery charge. The district court's decision whether to permit amendment of a complaint is discretionary and will not be reversed on appeal unless the district court abused its discretion. *See Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982).

Minn. R. Crim. P. 3.04, subd. 2, provides that the state may amend the complaint at any time before commencement of trial. The district court may permit amendments to a complaint that charge a greater offense if jeopardy has not attached and the court permits a continuance, as necessary. *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990); *see State v. Alexander*, 290 N.W.2d 745, 748-49 (Minn. 1980) (permitting amendments before trial to charge different or additional offense as long as the new charges are not motivated by prosecutorial vindictiveness).

The aggravated-robbery charge arose from the same set of facts as the assault charge. But before trial began, defense counsel stated on the record that he received notice of the state's intent to amend the complaint a week before trial and received the amended complaint in time to permit Bryan to read it and consult with defense counsel about it. Defense counsel did not ask for a continuance to defend against the additional the charge. Nothing in the record suggests that the motion to amend the complaint was

motivated by prosecutorial vindictiveness. Under these circumstances, the district court did not abuse its discretion by permitting amendment of the complaint.

Downward dispositional sentencing departure

Bryan next argues that the district court abused its discretion by denying his motion for a downward-dispositional departure. *See State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985) (setting forth abuse-of-discretion standard of review for district court sentencing decisions, stating that an appellate court will not alter a sentence "as long as the record shows the [district] court carefully evaluated all the testimony and information presented before making a determination"). Only in a "rare case" with "compelling circumstances" will this court modify a presumptive guidelines' sentence. *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010) (quotations omitted), *review denied* (Minn. July 20, 2010).

Generally, a district court does not abuse its discretion by refusing to depart dispositionally "from a presumptively executed prison sentence, even if there is evidence in the record that the defendant would be amenable to probation." *State v. Olson*, 765 N.W.2d 662, 663 (Minn. App. 2009); *Van Ruler*, 378 N.W.2d at 81 (stating that when "the record shows the [district] court carefully evaluated all the testimony and information presented before making a determination[,]" we will affirm imposition of a presumptive sentence). In considering whether to depart dispositionally, the district court considers the defendant's "particular amenability to individualized treatment in a probationary setting." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Relevant factors

may include the defendant's age, prior record, remorse, attitude in court, and the support of friends or family. *Id*.

The district court considered the reasons supporting and not supporting departure proffered by both parties at sentencing. The district court noted that while Bryan has a supportive family, he did not benefit from "some of the best chemical dependency treatment programs around." The court also noted Bryan's trial behavior, referring to Bryan's acting in a "threatening manner . . . towards that jury" when the verdicts were received. The court said, "I would have been afraid of him if I had been on that jury." Because the district court did not need to give reasons for choosing to impose a presumptive prison sentence and because the district court properly applied the proffered *Trog* factors in rejecting Bryan's argument for a probationary sentence, the district court did not abuse its discretion in sentencing Bryan.

Criminal-history score

Bryan also claims that the district court erred in calculating his criminal-history score, because the PSI shows that he has a custody-status point, but "there is nothing in the record to support that." The Minnesota Sentencing Guidelines provides for assignment of a criminal-history point if the offender was on probation for another offense when the defendant committed the current offense. Minn. Sent. Guidelines 2(1)(i) (Supp. 2011). The sentencing worksheet indicates that Bryan was sentenced on two gross-misdemeanor offenses in Wisconsin in July 2009. The PSI also states that Bryan's sentences for these offenses included two years of probation. The PSI notes that

the information on Bryan's Wisconsin convictions was provided by Bryan and adult corrections records.

"The state . . . has the burden at a sentencing hearing of establishing the facts necessary to justify consideration of out-of-state convictions in determining a defendant's criminal history score." *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). The state must show, by a fair preponderance of evidence, the validity of a prior conviction. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). In addition to relying on a certified record of conviction, the district court may "rely on persuasive evidence that sufficiently substitutes for the official, certified record of conviction." *State v. Maley*, 714 N.W.2d 708, 712 (Minn. App. 2006). And when a defendant "does not dispute the fact of conviction, but only the failure to provide better documentation of the conviction," appellate courts have ruled that the state has met its burden. *State v. Dixon*, 415 N.W.2d 414, 419 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988); *see Griffin*, 336 N.W.2d at 525 (concluding that state met its burden to establish the existence of out-of-state conviction when the state did not offer a certified copy of the conviction, but defendant did not dispute its existence, and record included "considerable documentation" of out-of-state conviction).

Here, Bryan did not challenge the existence of the Wisconsin convictions or their dispositions at the sentencing hearing, and the probation officer who prepared the PSI testified at the sentencing hearing. As such, consistent with *Griffin* and *Dixon*, on this record the district court did not abuse its discretion in using the Wisconsin convictions to calculate Bryan's criminal-history score. *Maley*, 714 N.W.2d at 711 (applying abuse-of-

discretion standard of review to district court decision on calculation of a defendant's criminal-history score).[1]

Affirmed.

[1] We also note that if Bryan can later show that he was not on probation in Wisconsin at the time he committed the current aggravated-robbery offense, he can raise that issue again under Minn. R. Crim. P. 27.03, subd. 9 (permitting a defendant to correct an unlawful sentence at any time). *See State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007) (holding that a defendant cannot forfeit review of his criminal history score calculation).