STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1101

State of Minnesota,
Respondent,

vs.

Daryl Robert Lavan,
Appellant.

Filed August 14, 2017
Affirmed
Bjorkman, Judge

Mower County District Court
File No. 50-CR-15-858

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

Kristen Nelson, Mower County Attorney, Holli J. Mayer, Assistant County Attorney, Austin, Minnesota (for respondent)

Daniel P. Repka, Repka Law, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Toussaint, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

BJORKMAN, Judge

Appellant challenges his conviction of domestic assault and the denial of his petition for postconviction relief, arguing that he did not validly waive his right to a jury trial and that the evidence was insufficient. We affirm.

FACTS

On April 19, 2015, R.K. heard her sister, S.K., and appellant Daryl Robert Lavan screaming at one another. After observing S.K. crying, R.K. called 911. S.K. told the 911 operator that Lavan struck her nose and threatened her. S.K. told a responding Minnesota State Trooper that she and Lavan got into an argument because he would not give her the keys to their van. The argument led to a physical altercation during which Lavan hit her in the nose and threatened her. The trooper observed S.K. was visibly shaken and crying, and that her nose was red and slightly swollen.

Respondent State of Minnesota charged Lavan with domestic assault. At a July 8, 2015 pretrial hearing, Lavan waived his right to a jury trial. During the April 6, 2016 court trial, S.K. recanted her allegations against Lavan. She testified that on the morning of the incident she was agitated and grumpy because she had been out drinking the night before and was "between medications" for her borderline personality disorder. Later that day, she started a fight with Lavan because he would not give her the keys to the van. During the incident, he accidently "ended up bonking" her nose while attempting to calm her down. Testifying in his own defense, Lavan similarly denied hitting or threatening S.K., stating that any physical contact he made with S.K. was accidental or done in self-defense. When

asked if he bumped S.K.'s nose, he said it was possible but explained S.K. "has a red nose most of the time."

The district court found Lavan guilty, imposed a stayed 90-day sentence, and placed him on probation for two years. Lavan appealed. This court stayed the appeal to allow him to pursue postconviction relief. In his postconviction petition, Lavan argued that he is entitled to a new trial because he did not validly waive his right to a jury trial. The district court denied the petition without an evidentiary hearing. This court subsequently dissolved the stay.

D E C I S I O N

I. Lavan validly waived his right to a jury trial.

Under both the United States and Minnesota Constitutions, a defendant is entitled to a jury trial. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI; Minn. Const. art. 1, §§ 4, 6. A defendant may waive this right, "but the waiver must be knowing, intelligent, and voluntary." *State v. Little*, 851 N.W.2d 878, 882 (Minn. 2014). "Whether a waiver of a constitutional right was knowing, intelligent, and voluntary depends on the facts and circumstances of the case, including the background, experience, and conduct of the accused." *Id*. The defendant must make the waiver either in writing or in open court. Minn. R. Crim. P. 26.01, subd. 1(2)(a). We review the validity of a jury-trial waiver de novo. *State v. Kuhlmann*, 806 N.W.2d 844, 848-49 (Minn. 2011). The focus of our inquiry is whether the defendant understood the basic elements of a jury trial. *State v. Ross*, 472 N.W.2d 651, 654 (Minn. 1991).

Lavan argues that his waiver of his jury-trial right is not valid because his attorney did not adequately explain the constitutional protections of a jury trial. At the pretrial hearing, Lavan's counsel indicated that Lavan wished to waive his right to a jury trial. The following exchange then occurred:

> THE COURT: Mr. Lavan, have you had a sufficient amount of time to meet with [your attorney] and discuss your legal rights in this matter?
> THE DEFENDANT: Yes, I have.
> THE COURT: One of the legal rights that you have is the right to a trial. That trial can either be to the Court or to a jury. Your attorney has indicated that you wish to have the trial to the Court; is that correct?
> THE DEFENDANT: Yes, Your Honor.
> THE COURT: And therefore, you will be waiving your right to a jury trial.
> THE DEFENDANT: Yes, Your Honor.
> THE COURT: You understand that, sir?
> THE DEFENDANT: Yes.
> THE COURT: Any questions you have about that?
> THE DEFENDANT: No.

Citing *In re Welfare of M.E.M.*, 674 N.W.2d 208 (Minn. App. 2004), Lavan argues that this exchange was insufficient to establish that he knowingly, intelligently, and voluntarily waived his right to a jury trial.[1] In *M.E.M.*, this court concluded the juvenile defendant's waiver of his right to a jury trial was valid, observing that defense counsel and the district court "inquired into whether appellant understood every aspect of his right to a jury trial." 674 N.W.2d at 214. Lavan argues that his waiver "falls significantly short of the standard established in [*M.E.M.*]." We are not persuaded. *M.E.M.* did not hold that

[1] Although Lavan cites all three requirements for a valid jury-trial waiver, he does not contend that his waiver was coerced.

such an inquiry is necessary to establish a valid waiver. To the contrary, there are no specific questions that a district court must ask to obtain a valid waiver. *See Ross*, 472 N.W.2d at 654 (stating the "nature and extent of the inquiry may vary with the circumstances of a particular case"). And Lavan cites no authority for his contention that a district court must specifically advise a defendant about the number of jurors who would decide the case and the requirement of a unanimous verdict. Indeed, our supreme court in *Ross* characterized such a colloquy as "helpful guidelines," but not mandatory. *Id.* We are convinced that the district court took adequate steps to ensure that Lavan's waiver (1) was valid by confirming that Lavan was satisfied that he had enough time to consult with counsel, (2) understood that he was waiving his right to a jury trial, and (3) did not have any questions about the waiver.

The record developed during the postconviction proceeding lends further support to our conclusion that Lavan validly waived his right to a jury trial. In an affidavit the state submitted in response to the petition, Lavan's trial counsel indicates he discussed with Lavan the features and advantages of a jury trial at length before Lavan decided to waive his right to a jury. During his initial contact with Lavan, counsel explained that Lavan had the right to a jury trial if the matter remained unresolved on the date of the pretrial hearing. On the morning of the pretrial hearing, Lavan's counsel explained the jury would consist of six jurors, they could question the potential jurors and eliminate those they felt were biased or could not be impartial, and unlike a court trial to a single judge, all six jurors would have to believe he was guilty beyond a reasonable doubt. On this record, we

conclude that Lavan's waiver of his right to a jury trial is valid. The district court did not abuse its discretion in denying Lavan's petition for postconviction relief.

II. Sufficient evidence supports Lavan's conviction.

In reviewing a sufficiency-of-the-evidence challenge, we review the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the [fact-finder] to reach the verdict which [it] did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume "that the [fact-finder] 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). And we use the same standard of review in court trials and jury trials when evaluating the sufficiency of the evidence. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

An individual is guilty of domestic assault when he "intentionally inflicts or attempts to inflict bodily harm" upon a family or household member. Minn. Stat. § 609.2242, subd. 1(2) (2014). Lavan argues that the evidence is insufficient because both he and S.K. testified that he did not intend to hit her, but rather accidentally made contact with her nose while attempting to calm her down. But the district court expressly found this testimony was not credible.[2] The district court rejected Lavan's testimony as a "self-serving fabrication" and "at odds with common sense." And after determining that S.K.'s trial testimony was not credible, the district court found that her initial statement to the

[2] Lavan initially appealed the district court's failure to make written findings as required by Minn. R. Crim. P. 26.01, subd. 2(c). The district court subsequently issued written findings, and Lavan withdrew the issue at oral argument.

trooper, in which she reported that Lavan threatened her, hit her, and tackled her to the ground, was credible. We defer to such credibility determinations. *State v. Kramer*, 668 N.W.2d 32, 38 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003).

Based on our review of this record, we conclude that sufficient evidence supports Lavan's conviction. S.K.'s statement to the trooper provides ample evidence that Lavan inflicted or attempted to inflict bodily harm upon her. And the testimony was corroborated by the trooper's and other law enforcement officers' observations and photographs of S.K.'s nose. R.K.'s trial testimony provides additional support. R.K. testified that she called 911 after she observed S.K. crying and S.K. told her Lavan "took a hammer . . . or a crowbar" and "raised it at her." Accordingly, we affirm Lavan's conviction.[3]

Affirmed.

[3] Lavan also contends that any use of force was authorized under Minn. Stat. § 609.06, subd. 1(9) (2014), which permits an individual to use reasonable force to restrain a person with a mental illness from harming herself or others. We do not consider this argument because Lavan did not raise it in the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating appellate courts generally do not decide issues not raised before the district court).