STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2200
A11-2201

State of Minnesota,
Respondent,

vs.

Norris Deshon Andrews,
Appellant.

Filed November 19, 2012
Affirmed in part and reversed in part
Larkin, Judge
Concurring in part, dissenting in part, Stoneburner, Judge

Hennepin County District Court
File No. 27-CR-11-4028

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

LARKIN, Judge

In this consolidated appeal, appellant challenges his convictions of second-degree assault and prohibited person in possession of a firearm, stemming from an incident that occurred on December 29, 2010 (A11-2200), and second-degree assault and prohibited person in possession of a firearm, stemming from an incident that occurred on December 30, 2010 (A11-2201). Appellant argues that the district court lacked authority to preside over these cases and erred by denying his motion to suppress the firearm. In addition, he challenges the sufficiency of the evidence to support the December 30 second-degree-assault conviction. He also challenges his conviction and sentence for the December 30 firearm-possession offense on double-jeopardy grounds, arguing that the December 30 offense was a continuation of the December 29 firearm-possession offense. In a pro se supplemental brief, appellant asserts that his trial counsel was ineffective, the trial judge was biased against him, and he was denied a fair trial due to discovery violations. Because the December 30 firearm-possession conviction violates the constitutional protection against double-jeopardy, we reverse that conviction and vacate the associated sentence. We affirm appellant's other convictions.

FACTS

On December 29, 2010, C.R., a woman with whom appellant Norris Deshon Andrews had stayed for two nights, agreed to drive Andrews to a location to drop off some of Andrews's property, which C.R. had allowed Andrews to keep in her car overnight. C.R., C.R.'s two young children, and Andrews were in C.R.'s car driving to a

location Andrews had designated when Andrews told C.R. that, after dropping off his property, he wanted to go to another location. C.R. said she would take him to only one location. Andrews got mad, pulled out a gun, and said, "[Y]ou're going to take me where I need to go." Andrews pointed the gun at the dashboard, threatened to shoot up C.R.'s car, and said to her, "I'll make sure you take me."

C.R. called her sister, Ca.R., and told her that Andrews had threatened her. Ca.R. instructed C.R. to pull over and wait for her to arrive. C.R. pulled over and stopped the car, whereupon Andrews took the car keys, stepped out of the car, and shot the gun into the ground. Andrews concealed the gun before Ca.R. arrived. Ca.R., who was unaware that Andrews had a gun and had threatened C.R. with the gun, tried to calm the situation and told Andrews to leave. Andrews did not leave until he realized that Ca.R. was calling 911. Officer Gretchen Bloss responded to the scene and took a statement from C.R. Bloss found a casing for a nine millimeter handgun near the scene.

Andrews texted C.R. several times that night about retrieving his belongings. Some of the texts were threatening. On the morning of December 30, C.R. eventually agreed to take Andrews's belongings to a specified McDonald's restaurant. C.R. went to the McDonald's, but Andrews went to the wrong McDonald's. C.R. and Andrews continued to communicate by telephone and text messages, and, later that night, C.R. and Ca.R. went back to the specified McDonald's to return Andrews's belongings. As they waited for Andrews to arrive, he texted that he was not coming in person but was sending his ex-girlfriend and another woman to retrieve his belongings. Based on prior statements by Andrews, C.R. believed that these women wanted to hurt her, so C.R. and

Ca.R. left Andrews's belongings, which included bags of clothing, a computer monitor and printer, and a flat-screen TV, in the parking lot. They waited a few minutes to see if Andrews would arrive. Then, C.R. texted Andrews to tell him what they had done with his belongings, and they left.

C.R. had driven only a few blocks and was stopped at a stoplight when Andrews, driving a dark blue sedan, pulled into the right-turn lane next to C.R. Ca.R. opened the front passenger door[1] and told Andrews that they had left his belongings at McDonald's and that he should retrieve them before someone else did. At trial, C.R. testified that Andrews "pull[ed] his gun out again," "made sure that we could see it," and threatened that "'[i]f anything's missing or I find anything in my name, I'm coming for both of you guys. I'm going to come and f--k both of you all up." Andrews also said, "I'll come shoot up your house." Andrews then turned right and drove toward McDonald's. Ca.R. called 911 and said that Andrews had put a gun in her face. At trial, Ca.R. testified that she saw a gun in Andrews hand or in his lap and that he said, "If my F'ing stuff isn't at F'ing McDonalds, I'm coming back to the F'ing house and F'ing both you and your sister up." Both C.R. and Ca.R. testified that Andrews did not point the gun directly at them. And Ca.R. clarified that Andrews did not actually "put the gun in [her] face," as she had reported to the 911 operator, explaining that the statement "was an expression."

Meanwhile, the McDonald's manager, who had seen C.R. and Ca.R. place the items in the parking lot and leave, began to take the items into the restaurant. A blue

[1] C.R. testified that the windows in her SUV did not operate, so Ca.R. had to open the door to communicate with Andrews.

four-door sedan pulled up, and a man got out and asked the manager what he was doing with "my stuff." The manager explained that he was trying to help, and he helped load the items into the blue sedan.

Officer Troy Carlson responded to a call about a person displaying a gun at the McDonald's. Andrews, on foot, met the officers at McDonald's and was cooperative while the officer detained him. Officer Carlson searched Andrews, but he did not find a gun.

Officer Cory Fitch and his partner responded to the McDonald's parking lot in a separate car. Officer Fitch observed a vehicle that matched the description given in the dispatch. The motor of the car was running, and the driver's door was ajar. A McDonald's employee told Officer Fitch's partner that the vehicle was involved and that the driver, who had been putting property that had been left in the parking lot into the car, had just run from the vehicle. Officer Fitch searched the car for a gun. In the trunk he saw more bags of personal belongings, a computer screen, and some electronics. He pulled back the carpeting on the passenger-side rear quarter panel and saw a black semi-automatic handgun. He also found a bank-account agreement with Andrews's name on it on top of the bags in the trunk. A Minneapolis police firearms examiner later determined that the casing found on December 29 was fired from the handgun found on December 30.

In separate complaints, Andrews was charged with one count of second-degree assault and one count of being a prohibited person in possession of a firearm for each

incident. Andrews agreed to join the cases for trial. He asked to represent himself, but the request was denied. The district court appointed counsel to represent him.

Andrews moved to suppress evidence of the handgun, arguing that the warrantless search of the vehicle violated his Fourth Amendment rights. The district court denied the motion, concluding that exigent circumstances related to officer and public safety justified the search. The district court also concluded that the search was justified by probable cause and that the gun inevitably would have been discovered during an inventory search once the car was impounded.

Andrews's trial took place in July and August 2011. After the trial began, Andrews again asked to represent himself, asserting a "conflict of interest" with his appointed counsel. The district court granted the request and designated appointed counsel as standby counsel. The jury found Andrews guilty of all of the charged offenses.

At the sentencing hearing, Andrews moved for acquittal or a new trial. His motions were denied. The district court entered convictions on all counts and imposed the following sentences: concurrent sentences of 60 months for the firearm-possession convictions, a concurrent sentence of 55 months for the December 29 second-degree-assault conviction, and a consecutive sentence of 36 months for the December 30 second-degree-assault conviction. This appeal follows in which Andrews challenges (1) the authority of the district court judge to preside over his trial, (2) the sufficiency of the evidence to support the December 30 second-degree-assault conviction, (3) the denial of his motion to suppress the firearm, (4) the separate convictions and sentences for his

illegal possession of a single firearm, and, in a supplementary pro se brief, (5) the effectiveness of counsel, the impartiality of the judge, and the failure of the state to produce discovery.

D E C I S I O N

I. Authority of the presiding judge

In November 2011, the judge who presided over Andrews's trial was disciplined with a six-month unpaid suspension for residing outside of her judicial district from July 1, 2009, through September 30, 2009. *In re Conduct of Karasov*, 805 N.W.2d 255, 277 (Minn. 2011). Andrews argues that when the judge moved out of her judicial district in July 2009, she forfeited her position as a district court judge and had no legal authority to preside over his trial or sentence him to prison. But this court recently rejected an identical argument concerning the same judge in *State v. Irby*, 820 N.W.2d __, __, A11-1852 (Minn. App. Sept. 4, 2012). In *Irby*, this court held that, even if the judge was no longer a de jure judge at the time of Irby's trial, under either the Minnesota Constitution's residency requirement or the Minn. Stat. § 351.02(4) (2010) residency requirement, "she remained a de facto judge," operating under color of law with procedurally defective authority that did not warrant reversal of Irby's convictions. 820 N.W.2d at __, A11-1852, slip op. at 5. *Irby* is controlling authority. Thus, Andrews's argument that the procedural defects in the judge's authority entitle him to reversal of his convictions is unavailing.

II. Sufficiency of the evidence for the December 30 assault conviction

Andrews argues that because the state failed to prove that he "made an *immediate* threat of harm to [C.R.]" on December 30, 2010, the evidence is insufficient to support his conviction of second-degree assault. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not re-weigh the evidence. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009). And we must assume "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). This is especially true when a determination of guilt depends mainly on the resolution of conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

"Whoever assaults another with a dangerous weapon" is guilty of second-degree assault. Minn. Stat. § 609.222, subd. 1 (2010). Assault is defined as "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2010). Andrews's conviction is based on the first prong: "an act done with intent to cause fear in another of immediate bodily harm or death." *Id.* That prong

"does not require a finding of actual harm to the victim. A plain reading of the statute makes it clear that the law is violated when one engages in an 'act' with the intent 'to cause fear in another of immediate bodily harm or death.'" *State v. Hough*, 585 N.W.2d 393, 395 (Minn. 1998). "The intent of the actor, as contrasted with the effect upon the victim, becomes the focal point for inquiry." *Id.* at 396 (quotation omitted). "[T]he jury may infer that a person intends the natural and probable consequences of his actions. . . ." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). Moreover, "[t]he ordinary effect upon others of the acts alleged to constitute the crime may naturally be taken into account to determine intent," and "[w]hether such intent exists is for the factfinder to determine." *State v. Ott*, 291 Minn. 72, 75, 189 N.W.2d 377, 379 (1971).

Andrews argues that he did not point the gun at C.R. and "his only threat was of future harm if his belongings were missing." But the jury heard this exculpatory evidence and nonetheless found that Andrews acted with the requisite intent. When determining whether a defendant is guilty of second-degree assault, "[a] factfinder may reject . . . exculpatory statement[s] [regarding intent] if the evidence as a whole supports a finding that the actor intended the natural and probable consequences of his actions." *Hough*, 585 N.W.2d at 396. The natural and probable consequence of displaying a gun while making threats to "come and f--k both of you all up" is fear of immediate bodily harm. Moreover, the issue is not, as Andrews suggests, whether he "made an immediate threat to injure [C.R.]." The issue is whether he acted with intent to cause fear of immediate bodily harm. The evidence supports the jury's determination that Andrews

acted with the requisite intent. Even though his words explicitly referenced future events, his display of the gun conveyed a risk of immediate harm.

In sum, the testimony of C.R. and Ca.R. that Andrews displayed a gun while threatening to harm them is sufficient to establish Andrews's intent to cause fear of immediate bodily harm. Because the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that Andrews was guilty of second-degree assault based on his conduct on December 30, we will not disturb the verdict.

III. Denial of motion to suppress the firearm

Andrews argues that the district court erred by denying his motion to suppress evidence of the firearm found during the warrantless search of the vehicle in the McDonald's parking lot. When reviewing a pretrial order on a motion to suppress evidence, this court independently reviews the facts and determines as a matter of law whether the district court erred by suppressing or not suppressing the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The district court's factual findings are reviewed under the clearly erroneous standard, and its legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

Both the United States Constitution and the Minnesota Constitution guarantee the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A search of a vehicle is a search of a person's effects. *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S. Ct. 2523, 2527 (1973); *State v. Wiegand*, 645 N.W.2d 125, 131 (Minn.

2002). A warrantless search is per se unreasonable unless it falls within one of the recognized exceptions to the warrant requirement. *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). The state bears the burden of showing that at least one of the exceptions applies to avoid suppression of the evidence acquired from the warrantless search. *State v. Metz*, 422 N.W.2d 754, 756 (Minn. App. 1988). In this case, the district court justified the warrantless search of the vehicle under three exceptions to the warrant requirement: (1) the automobile exception, (2) exigent circumstances, and (3) inevitable discovery.

The automobile exception permits the warrantless search of a vehicle if the police have probable cause to believe that a search of the automobile will lead to the discovery of contraband or evidence of a crime. *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S. Ct. 2013, 2014 (1999); *State v. Search*, 472 N.W.2d 850, 852-53 (Minn. 1991). Probable cause means a reasonable belief based on the totality of the circumstances considered in light of the officer's experience and observations. *State v. Nace*, 404 N.W.2d 357, 360 (Minn. App. 1987), *review denied* (Minn. June 25, 1987).

Andrews argues that the automobile exception does not apply in this case because there was insufficient evidence linking him to the automobile that was searched. We disagree. The automobile matched the description C.R. gave of the vehicle except for the possible make, Officer Fitch found the automobile running with the driver's door open, and a McDonald's employee told Officer Fitch that someone had been putting the personal property into the vehicle before the person ran off.

"When more than one officer is involved in an investigation, Minnesota uses the 'collective knowledge' approach to determine whether probable cause existed." *State v. Riley*, 568 N.W.2d 518, 523 (Minn. 1997) (quoting *State v. Conaway*, 319 N.W.2d 35, 40 (Minn. 1982)) (involving probable cause to arrest and stating that under this approach, all of the knowledge of the police force is imputed to the arresting officer for the purpose of determining whether probable cause to arrest exists). Under the collective knowledge approach, Officer Carlson's knowledge that Andrews was alleged to have had a gun in his car and that no gun was found on his person is imputed to Officer Fitch, giving Officer Fitch probable cause to believe that the gun remained in the vehicle. Because we conclude that Officer Fitch had probable cause for the warrantless search of the vehicle, we do not address the district court's conclusions that the search was valid under the exigent-circumstances exception or that the evidence inevitably would have been discovered in an inventory search.

IV. Firearm-possession convictions and sentences

Andrews argues that the double-jeopardy prohibitions of the United States and Minnesota Constitutions bar his multiple convictions and sentences on the two counts of possession of a firearm by a prohibited person. Although Andrews failed to raise a double-jeopardy argument below, we consider this claim in the interests of justice. *See State v. Vang*, 700 N.W.2d 491, 494 (Minn. App. 2005) (addressing a claim of double jeopardy in the interests of justice).

The United States Constitution and the Minnesota Constitution prohibit a person from being twice put in jeopardy for the same offense. U.S. Const. Amend. V; Minn.

Const. art. I, § 7. The Double Jeopardy Clause "protects an individual against being twice convicted for the same crime." *State v. Jeffries*, 806 N.W.2d 56, 66 (Minn. 2011) (Stras, J., concurring) (quoting *Abney v. United States*, 431 U.S. 651, 660, 97 S. Ct. 2034, 2041 (1977)). Andrews contends that his two convictions for possession of a firearm by a prohibited person are the "same crime" because they involved continuous possession of the same firearm. We agree.

Possession crimes are continuing offenses. *See State v. Lawrence*, 312 N.W.2d 251, 253 (Minn. 1981) (holding that for purposes of the statute of limitations the word "possessing," as used in the "receiving stolen property" criminal statute, "was intended to denote a continuing offense"); *State v. Abu-Shanab*, 448 N.W.2d 557, 559 (Minn. App. 1989) ("A continuing offense is one which can be committed over an extended period of time."). Possession of a firearm, in particular, has been found to be a continuing offense. *See State v. Banks*, 331 N.W.2d 491, 494 (Minn. 1983) (noting that possession of a firearm is a "continuing offense"). But not all continuing offenses trigger double jeopardy concerns. *See, e.g.*, *State v. Sweet*, 179 Minn. 32, 33-34, 228 N.W. 337, 337 (1929) (child abandonment (failure to provide support)); *State v. Wood*, 168 Minn. 34, 37-38, 209 N.W. 529, 530 (1926) (nonsupport of wife or children); *State v. Ehmke*, 752 N.W.2d 117, 122 (Minn. App. 2008) (failure to register as a predatory offender). In these cases, the act triggering criminal liability was the failure to satisfy an ongoing obligation. Criminal liability attached each time a defendant was required to do something by law and failed to do it. Each distinct act of failing to satisfy an ongoing obligation, then, is a separate crime subject to multiple convictions and punishments.

For the crime of possession of a firearm, the act triggering criminal liability is the act of possessing the firearm. When a person is under a continuing obligation not to possess a firearm, each distinct act of possessing the firearm becomes a separate crime subject to multiple convictions and punishments. Without two distinct acts of possession, however, there can be only one conviction and punishment. *Cf. Ehmke*, 752 N.W.2d at 121-22 (noting that continuing offenses may be prosecuted separately if the defendant commits the same offense multiple times). The conduct in question here is the uninterrupted possession of the same firearm on two consecutive days, which is subject to only one conviction and punishment. *See United States v. Ellis*, 622 F.3d 784, 793-94 (7th Cir. 2010) ("[T]he Double Jeopardy Clause prohibits punishing [appellant] twice for a continuous possession of the same gun, even under a theory that he is being charged for different 'moments' of possession."); *United States v. Jones*, 533 F.2d 1387, 1390-92 (6th Cir. 1976) (holding that possession of the same weapon at different times is "only one offense" and, therefore, may support only one conviction).

For Andrews to be twice convicted of illegally possessing the same firearm on consecutive days, the state had to prove that Andrews committed a second distinct act of possession by first relinquishing both actual and constructive possession of the firearm after the December 29 incident and then reestablishing possession of the firearm before the December 30 incident. It is this reestablishment of possession that triggers new criminal liability. *See Ellis*, 622 F.3d at 794 (holding that if a defendant relinquishes both actual and constructive possession of a firearm and then reestablishes possession at a later point in time, he may be twice convicted of illegally possessing that same firearm). But

the state offered no evidence to prove that Andrews relinquished and then reestablished possession of the firearm between December 29 and December 30. On this record, we conclude that Andrews's possession of the firearm on December 29 and on December 30 constituted one continuous offense for which he may not be twice convicted. We therefore reverse the December 30 firearm-possession conviction, and we vacate the associated sentence. Accordingly, it is unnecessary to address Andrews's argument for reversal of that sentence under Minn. Stat. § 609.035 (2010).

V. Appellant's pro se arguments

Andrews argues that he received ineffective assistance of trial counsel because counsel failed to obtain the McDonald's surveillance video from the night of the December 30 incident. We find no merit in this argument because the record reflects that the surveillance video was provided prior to trial and that counsel reviewed the video with Andrews prior to trial.

Andrews also argues that the trial judge was biased against him as evidenced by her unfavorable rulings. Unfavorable rulings alone, however, do not constitute judicial bias. *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). Moreover, the record clearly shows that the trial judge carried out her judicial duties in a patient, fair, and impartial manner while Andrews represented himself over the course of a five-day trial. The judge overruled objections from the state, prompted proper questioning from Andrews, guided him as he laid foundation for the introduction of evidence, admitted evidence over the state's objection, and allowed him to fully cross-examine the state's witnesses. The district court overruled each of the state's objections during Andrews's closing argument

and denied the state's motion to sentence Andrews as a career offender, finding that his prior convictions did not establish a pattern of criminal conduct. Andrews has not shown that the trial judge was biased against him.

Andrews additionally argues that he was denied a fair trial when the state failed to provide him discovery, namely, footage of the video surveillance and reports from certain police officers. But Andrews's assertion is not supported by the record. The record reflects that the state provided Andrews all requested discovery in its possession and that the state did not possess any evidence that Andrews now claims was not produced. We find no merit to Andrews's claim that he was denied a fair trial based on discovery violations.

Affirmed in part and reversed in part.

STONEBURNER, Judge (concurring in part, dissenting in part)

I respectfully dissent from Part II of the majority opinion, and would hold that the evidence is insufficient to prove that on December 30, 2010, Andrews threatened C.R. or her sister with *immediate* bodily harm.

In order to convict Andrews of second-degree assault stemming from the December 30, 2010 incident, the state was required to prove that Andrews committed "an act done with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.02, subd. 10 (2010). Because the statute does not define "immediate," it is appropriate to refer to the common usage of the word. *See Gassler v. State*, 787 N.W.2d 575, 586 n.11 (Minn. 2010); Minn. Stat. § 645.08(1) (2010). "Immediate" is defined as "[o]ccurring at once; instant" and "[o]f or near the present time." The American Heritage Dictionary 902 (3d ed. 1992); *see also* Black's Law Dictionary 816 (9th ed. 2009) (defining "immediate" as "[o]ccurring without delay; instant").

Generally, the act of pointing a dangerous weapon at another is sufficient to prove intent to put the victim in fear of immediate harm. *See In re Welfare of T.N.Y.*, 632 N.W.2d 765, 770 (Minn. App. 2001) (collecting cases). But the act of showing a gun without pointing it at anyone and without making verbal threats or threatening gestures has been found insufficient to prove intent to put the victim in fear of immediate harm. *Id.* (emphasizing that facts must prove defendant's intent to cause fear of immediate harm, and fact that victim fears immediate harm is not sufficient to establish defendant's intent).

In this case, the record is undisputed that Andrews did not initiate contact with C.R. and Ca.R. and did not point the gun at anyone or brandish the gun toward the vehicle occupied by C.R. and Ca.R. on December 30, 2010. Ca.R. testified that she was able to see the gun because she was seated in a vehicle that was higher than Andrews's sedan, so she was looking down on him. Ca.R., who was closest to Andrews, could not recall whether Andrews had his hand on the gun, which was in his lap. It is undisputed that Andrews threatened to harm C.R. and Ca.R., but he did not threaten immediate harm. Andrews threatened to commit harm in the future only if he discovered that any of his belongings were missing. On this record, the evidence is insufficient as a matter of law to prove that Andrews's act of conditionally threatening future harm was intended to cause fear in C.R. or her sister of *immediate* bodily harm or death. I would reverse Andrews's conviction of second-degree assault in file A11-2201.