STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2301

State of Minnesota,
Respondent,

vs.

Robert Patrick Coronado Burke,
Appellant.

Filed October 1, 2012
Affirmed
Harten, Judge*

Hennepin County District Court
File No. 27-CR-10-44339

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

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

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Harten, 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

HARTEN, Judge

Appellant challenges his bench trial conviction for second-degree assaults of a cab driver and a police officer, claiming that the circumstantial evidence was insufficient and that the district court erred in excluding expert witness evidence on the effects of intoxication; he also challenges his sentence, arguing that the district court abused its discretion in denying his motion for a dispositional departure and in allowing the police chief's victim-impact statement to be read at the sentencing hearing.

FACTS

On 19 September 2010, appellant Robert Burke and three friends spent the late afternoon and early evening drinking and smoking marijuana at appellant's residence. Later that evening, they went to a nightclub to attend a concert. Appellant left the group before the concert began. Around 9:15, he was ejected from the nightclub. Nightclub security personnel flagged down a cab for him; appellant asked the cab driver to take him to his residence.

The driver asked appellant if he had money for the fare. Appellant said he did not and asked the driver to stop at a gas station so he could get money from an ATM, but later told the driver to take him home because he had money there. When they arrived at appellant's home, the driver pulled into the driveway, followed appellant to the rear door by which the lower level of the residence was accessed, and waited outside. Appellant entered, locked the door, and emerged five minutes later with a gun, which he pointed at the driver while telling him to "get out of here." The driver returned to his cab, walking

backwards, while appellant followed him with the gun. The driver backed out of the driveway, turned north, and called 911 to report the assault. Appellant, still near the driveway, fired eight shots, none of which hit the cab.

A number of police officers were dispatched to the scene, where they formed a perimeter around appellant's house. One officer drove his squad car to a point south of appellant's residence and near a neighboring house. From his squad car, he saw appellant walk out of his residence. Appellant held a pistol with both hands, pointed it at the squad car, and brought the sights on top of the pistol down to eye level. The officer backed up his squad car a short distance, then got out and ran to the south side of the neighboring house, away from appellant. Less than two seconds later, the officer heard three to six shots fired and a bullet hit the branches of a tree overhead; when he arrived at the neighboring house, he heard more shots.

Appellant eventually surrendered to other police officers who had arrived, laying his pistol on a chair. It was a .40 caliber pistol with a range of 3,000 feet. Appellant was given a preliminary breath test; his alcohol concentration was .292.

A police search of the area revealed eight cartridge casings near the front driveway of appellant's house, where the cab had been parked, and nine cartridge casings near a retaining wall at the back of the house. On the lawn to the south of the house, the police found eight marks that indicated bullets having a north-south trajectory. Some bullets appeared to have ricocheted from the marks; none had struck the officer's car or the trees between appellant's position and the car.

Appellant was charged with second-degree assault of the cab driver and first-degree assault of the officer. He waived a jury trial. After a bench trial, the district court found that appellant was guilty of second-degree assault of the cab driver; in regard to the police officer, he was not guilty of first-degree assault but guilty of second-degree assault, a lesser included offense. Appellant was sentenced to two consecutive 36-month prison terms.

Appellant challenges his conviction on grounds of insufficient evidence and improperly excluded expert evidence on intoxication and his sentence on grounds of improper denial of his request for a dispositional departure and improper admission of the police chief's victim-impact statement at the sentencing hearing.

D E C I S I O N

1. Sufficiency of the Evidence

This court "review[s] criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain [the] convictions." *State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008) (quotation and citation omitted). In considering a claim of insufficient evidence, our 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, was sufficient to permit [the factfinder] to reach the verdict." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

Appellant asserts that the evidence is insufficient to show that he met the intent element of second-degree assault because he was too intoxicated to satisfy that element.

> An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular

> intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

Minn. Stat. § 609.075 (2010). This language applies only to specific-intent crimes. *State v. Fleck*, 810 N.W.2d 303, 307 (Minn. 2012). "[A]n assault-fear offense under Minn. Stat. § 609.02, subd. 10(1) [(2010) (requiring "an act done with intent to cause fear in another of immediate bodily harm or death")] is a specific intent crime." *Id.* at 309.

But appellant's testimony that he was intoxicated at the time of the assaults is rebutted by evidence from the cab driver, the police officer, and a detective, all of whom spoke with appellant at or near the time of the assaults. This court must assume that "the evidence supporting the conviction was believed and the contrary evidence disbelieved." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

The cab driver testified that, after appellant was asked if he had money, he looked for money, could not find it, said he needed to stop at a particular gas station near his residence, gave the driver his address, and told the driver how to get to that address. The driver said appellant did not appear confused and did not lose consciousness during the ride. He also testified that, when he arrived at appellant's residence, appellant (1) emerged from his residence with a gun, yelling at the driver to "get out of here"; (2) followed appellant with the gun back to the cab; and (3) began firing the gun when appellant was backing out of the driveway. The driver believed appellant's gun was aimed at himself and the cab.

The police officer testified that, while he noticed indicia of intoxication, appellant's conversation while in the squad car provided understandable responses to the

officer's questions, indicated no difficulty understanding the officer, and included comments on his residence, his employment, his girlfriend, the concert he and his friends had attended, the transportation they had used to get to the concert, the amount he had paid for the concert, and the cab ride back to his residence.

The detective who spoke with appellant after he arrived at the jail testified that he did not notice signs of intoxication and that appellant did not complain of confusion or fatigue and knew what was going on. He also testified that appellant said: (1) he had been at a particular nightclub for a concert; (2) a shuttle from his employer had provided transportation; (3) he had paid for the tickets; (4) he had consumed between three and five shots of alcohol; and (5) he kept a gun at his residence. Appellant also described how he stored and loaded the gun. The detective also testified that appellant had "a fuzzy recollection of firing a weapon that night based on popping and noises in his ears."

Thus, although appellant testified that he remembered nothing of what happened between the time he left his group of friends before the concert began and the time he was in a squad car being transported to the jail, two individuals who saw him during this time and one who saw him shortly afterwards testified that he was able to answer questions, give directions, and load and shoot a gun. Particularly when resolution of an issue depends on conflicting testimony, we must assume the factfinder believed the state's witnesses and disbelieved any evidence to the contrary. *Pieschke*, 295 N.W.2d at 584. The district court determined that "[appellant's] intoxication does not give rise to reasonable doubt that [he] intended to assault [the police officer and the cab driver]."

The testimony of the cab driver, the police officer, and the detective supports this determination and was sufficient evidence to allow the district court to reach its findings.

2. Exclusion of Evidence

"The admission of expert testimony is within the broad discretion accorded a [district] court, and rulings regarding materiality, foundation, remoteness, relevance, or the cumulative nature of the evidence may be reversed only if the [district] court clearly abused its discretion." *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999) (quotation and citations omitted).

The district court denied appellant's motion to allow expert testimony on whether his voluntary intoxication diminished his capacity to commit an assault, relying on *State v. Provost*, 490 N.W.2d 93, 102 (Minn. 1992) ("Opinion testimony on a person's blood alcohol content and on the fact of intoxication is admissible, but expert testimony on how this intoxication may diminish capacity to form intent is not admissible."). The district court concluded that "[appellant's] offer of proof fails to present the exception to the general rule excluding expert testimony on a defendant's capacity to form the requisite criminal intent. There is nothing about [his] intoxication that is inconsistent with a behavioral characteristic associated with an assault."

No opinion testimony was needed as to appellant's blood alcohol content because the test results were in evidence, and three witnesses who saw, heard, and interacted with appellant at or near the time of the assaults testified as to whether they thought he was intoxicated. The opinion of an expert who did not see, hear, or interact with appellant at the relevant time would not have helped the district court determine whether or to what

extent appellant was intoxicated. *See State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984) (holding that admissible evidence is that which will help a factfinder resolve a factual question); *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980) (if evidence is about a subject within the knowledge and experience of a factfinder and will not add precision or depth to the factfinder's ability to make a determination on that subject, it is not admissible).

Appellant relies on *State v. Ptacek*, 766 N.W.2d 355 (Minn. App. 2009), *review denied* (Minn. 26 Aug. 2009), to argue that expert testimony on blackouts would have been helpful to explain why appellant had no memory of what happened between when he left his friends at the nightclub and when he was transported to jail. But, appellant offers no support for his implication that culpability requires the ability to remember one's acts: two witnesses and the victims testified as to appellant's ability to plan and to converse about a variety of topics during the time he claimed to have been blacked out. We note that, while the *Ptacek* court admitted expert testimony on "the general types of alcoholic blackouts and the factors that cause them," it upheld the exclusion of testimony that "would have directly related to the effects of intoxication on [the] appellant's ability to form specific intent and, therefore, . . . is prohibited under [*State v.*] *Greise*, [565 N.W.2d 419, 425 (Minn. 1997)]." *Ptacek*, 766 N.W.2d at 358. Appellant's reliance on *Ptacek* is misplaced.

The district court did not abuse its discretion by excluding expert testimony on intoxication.

3. Sentencing

The district court must impose the presumptive sentence provided in the sentencing guidelines unless the case involves "substantial and compelling circumstances" to warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *State v. Anderson*, 463 N.W.2d 551, 555 (Minn. App. 1990) (applying abuse of discretion standard to district court's refusal to depart downward), *review denied* (Minn. 14 Jan. 1991). Appellant was sentenced to two consecutive 36-month terms, the presumptive minimum sentence on each count.

It is a "rare case" that warrants reversal of a sentencing court's refusal to depart from the guidelines. *Id*. Appellant urges that this is a "rare case" because, although his counsel told the district court that "[t]he recommendation from the evaluator, psychologist, and from probation was that probation would serve [appellant] better than incarceration[,]" the district court sentenced him to prison.

The district court first noted that appellant had been told of his chemical addiction in 2004 and had not treated it and that, although appellant might not be a danger to others if he abstains from chemicals, he is definitely a danger if he does not abstain. The district court then continued:

> But really, this is . . . not about your amenability to probation in my mind. Ultimately, it is about deterrence and the seriousness of what you did. Probation, I think, unduly depreciates the seriousness of what you did . . . .
>
> The legislature wants me to take this very seriously regardless of whether you knew you were shooting at a police officer. Perhaps if this had been one or two shots, your sobriety for the last year would tell me to keep you on probation, but this was 17 shots at two different victims in a residential neighborhood.

Appellant relies on *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (affirming stayed execution of sentence because of "defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of [his] friends and/or family" and concluding that defendant was "particularly suitable to individualized treatment in a probationary setting"). The transcript of appellant's sentencing hearing indicates that many of these facts were also true for appellant. But the defendant in *Trog* had pleaded guilty to one count of burglary with assault. The case does not reveal the particular facts of that crime, but there is no indication that it involved two incidents in which 17 shots were fired in a residential area. It was not an abuse of discretion for the district court to consider the severity of appellant's crime and to conclude that probation was not appropriate in light of its severity. *See generally State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995) (offense-related factors are relevant to a decision whether to depart dispositionally).

4. Police Officer's Letter

One of appellant's victims was a police officer assaulted in the line of duty. The chief of that officer's department wrote a letter to the district court, and the district court allowed his letter to be read into the record at the sentencing hearing.[1] The letter noted that: (1) the officer had "watched [appellant] take aim at him and shoot while [the officer was] seated in his squad car with no concealment or cover"; (2) "no one has ever deliberately taken . . . nine shots from a semiautomatic handgun at one of our officers before"; (3) "[w]ith flashing emergency lights lining the street, [appellant] knowingly

[1] The district court did not allow the police chief to testify at the sentencing hearing.

stepped from his home and took aim at [the officer]"; and (4) "the police did not initiate this activity . . . and did not even return [appellant's] fire."

Crime victims and representatives of the community affected by a crime have the right to submit impact statements at a sentencing hearing. Minn. Stat. § 611A.038(a), (b) (2010). Appellant argues that the police chief's letter should not have been read because the police chief was neither a victim nor a representative of the affected community; according to appellant, the only possible representatives of the community would be neighbors of the residence from which the shots were fired. But this view presupposes a very narrow definition of "community affected by the crime." While the statute does not define the word "community," other members of the police department of an officer at whom shots were fired, regardless of whether they lived in that neighborhood, were a "community affected by the crime" of firing shots at an officer.[2] Moreover, the judge had heard the details of appellant's crime; the police chief's letter did not provide new information. Thus, any error from the admission of the letter was harmless. Appellant's argument is not persuasive.

Affirmed.

[2] Analogously, family members of assault victims are a community affected by the crime of the assault, whether or not they live in the vicinity where it occurred.