STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0665

State of Minnesota,
Respondent,

vs.

Osman Abdi Bashir,
Appellant.

Filed May 8, 2017
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-15-5078

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

Michael O. Freeman, Hennepin County Attorney, Jean E. Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam S. Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Klaphake, 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

PETERSON, Judge

In this appeal from a conviction of simple robbery, appellant argues that (1) the evidence was insufficient to prove that he used force to overcome the resistance of another or compel another's acquiescence in a taking of property, (2) the district court committed reversible error and violated appellant's constitutional right to present a defense when it excluded psychiatric opinion testimony regarding his mental-illness history that was crucial to his voluntary-intoxication defense, and (3) the court erred in ordering appellant to register as a predatory offender because the offense of conviction did not arise out of the same set of circumstances as the predatory offense of which he was acquitted. We affirm.

FACTS

On a February afternoon, M.B.P.M. was in her car with her three-year-old daughter and her friend E.V.C.'s four-year-old daughter. The children were in car seats in the back seat; M.B.P.M.'s daughter was on the driver's side, and E.V.C.'s daughter was on the passenger side. M.B.P.M. drove to E.V.C.'s house on Harriet Avenue South, which is a one-way street, to drop off E.V.C.'s daughter. M.B.P.M. parked her car on the right side of the street, which was across the street from E.V.C.'s house, and waited in the car for E.V.C. to arrive. When E.V.C. arrived, she parked her car on the left side of the street in front of her house. A car facing the wrong way on the one-way street was parked in front of E.V.C.'s car.

M.B.P.M. left her car running while she got out and walked around the car to get E.V.C.'s daughter out of her car seat. As M.B.P.M. was unbuckling E.V.C.'s car seat,

appellant Osman Abdi Bashir opened the back door on the driver's side of the car and started removing M.B.P.M.'s daughter from her car seat. M.B.P.M. grabbed her daughter's foot, but Bashir succeeded in getting her daughter out of the car. E.V.C. ran across the street and confronted Bashir, yelling at him to let M.B.P.M.'s daughter go. Bashir put the child on the ground and grabbed E.V.C. by her hair. E.V.C. told Bashir to let her go or she would call the police, and he released her. M.B.P.M., E.V.C., and the children ran across the street to E.V.C.'s front yard.

M.B.P.M. and E.V.C. testified that, during the encounter, Bashir's "eyes had a blank stare" as "if he didn't know what he was doing," and his behavior and appearance indicated that he was drugged. Bashir did not say anything to E.V.C. but directed a lot of profanities toward people in the area.

A neighbor who witnessed the incident testified that after M.B.P.M., E.V.C., and the children got away, Bashir knelt down in the street and remained there on his knees for about 30 seconds to a minute. The neighbor testified that Bashir then put his hands on his head, one by each ear, and remained like that for about another 30 seconds to a minute. According to the neighbor, Bashir crawled to M.B.P.M.'s car, got into the driver's seat, and drove away with all of the doors open.

E.V.C.'s friend C.M.F., who arrived with E.V.C., testified:

> Q. Okay. Did you see this person take [M.B.P.M.'s] car?
> A. Yes, I saw [Bashir] take [M.B.P.M.'s] car.
> Q. Okay. Tell me what you saw?
> A. I just saw that [Bashir], um, let [E.V.C.] go and he took [M.B.P.M.'s] car.
> Q. Did he walk towards the car?
> A. They were just at the car.

Q. Okay. So he just got in the car?
A. He just stepped and went in.
Q. Okay. And then did you see the car drive away?
A. Yeah. The car took off and then [E.V.C.], just, you know, out of her mind, went after him.

E.V.C. testified:

Q. Okay. So he let go of your hair?
A. Yes.
Q. What did you do next?
A. I went with [M.B.P.M.], with [C.M.F.], and with the girls in front of my house.
Q. Okay.
Q. Did you see where the men went?
A. He grabbed [M.B.P.M.'s] car and he left.

E.V.C. got into her vehicle and followed Bashir. Bashir was driving fast but was not swerving and appeared to be in control of the car. A friend who had been in Bashir's car shortly before the incident testified that the appearance of Bashir's eyes and his behavior at that time were strange but that Bashir maintained control of his car and used turn signals appropriately. The friend thought that Bashir was high because they had smoked marijuana earlier.

While following Bashir, E.V.C. called 911. Several blocks from E.V.C.'s house, Bashir stopped in the middle of a street, got out of M.B.P.M.'s car, threw away M.B.P.M.'s cell phone, and approached E.V.C.'s car. E.V.C. got out of her car and got the attention of a police officer in a nearby squad car.

Bashir was arrested and charged with kidnapping and simple robbery. The case was tried to the court, and the district court found Bashir guilty of simple robbery but not guilty

of kidnapping. The district court sentenced Bashir to an executed term of 43 months in prison and ordered him to register as a predatory offender. This appeal followed.

D E C I S I O N

I.

Simple robbery is defined as follows:

> Whoever, having knowledge of not being entitled thereto, takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery . . . .

Minn. Stat. § 609.24 (2014).

The supreme court has stated:

> [T]he comments to Minn. Stat. § 609.24 . . . state that ordinary theft from the person without the use of force or fear, as where a defendant snatches a woman's purse or picks a man's pocket, is theft from the person. But the comments add that if a woman hangs on to her purse and the defendant uses force to overcome her resistance or if a defendant pushes a victim against a wall and takes his wallet, then the defendant has committed robbery, not theft from the person.

State v. Nash, 339 N.W.2d 554, 557 (Minn. 1983); *see also State v. Oksanen*, 311 Minn. 553, 554, 249 N.W.2d 464, 466 (1977) (concluding that grabbing victim and pushing him, causing him to fall, when taking wallet was sufficient to prove use of force or threat to use force) (citing Advisory Committee Comments to Minn. Stat. § 609.24)). Bashir argues that the evidence was insufficient to prove that he used force for the purpose of overcoming

the resistance of another to, or to compel another's acquiescence in, the taking of M.B.P.M.'s car.

In reviewing a challenge to the sufficiency of the evidence, an appellate court "review[s] the evidence to determine whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, [the fact-finder] could reasonably conclude that the defendant was guilty of the offense charged." *State v. Robertson*, 884 N.W.2d 864, 871 (Minn. 2016) (quotation omitted); *see State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (stating that same standard of review applies in bench trials and in jury trials when evaluating sufficiency of the evidence). This court will not overturn a guilty verdict "if the [fact-finder], acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty of the charged offense." *State v. Crockson*, 854 N.W.2d 244, 247 (Minn. App. 2014), *review denied* (Minn. Dec. 16, 2014). This court "defer[s] to the fact-finder's credibility determinations and assume[s] that the fact-finder disbelieved any evidence that conflicted with the verdict." *State v. Barshaw*, 879 N.W.2d 356, 366 (Minn. 2016) (quotation omitted).

We apply an elevated, two-step process in reviewing a conviction based on circumstantial evidence. *State v. Nelson*, 812 N.W.2d 184, 188 (Minn. App. 2012). "The first step is to identify the circumstances proved." *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). In doing so, we "defer to the [fact-finder's] acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id.* at 598-99 (quotation omitted). Second, we

"examine independently the reasonableness of all inferences that might be drawn from the circumstances proved" to "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt, not simply whether the inferences that point to guilt are reasonable." *Id.* at 599 (quotations omitted). "We give no deference to the factfinder's choice between reasonable inferences." *Id.* (quotation omitted).

Bashir argues that "appreciable time passed between his use of force and the eventual taking" and that "[i]t is rational to conclude that, if a person were using force for the purpose of taking property, that person would take the property as soon as resistance to the taking were overcome." This argument assumes the credibility of the neighbor's testimony about Bashir kneeling in the street for one to two minutes after using force and before taking the car. But C.M.F. testified that Bashir let E.V.C. go and took her car, and E.V.C. testified that, after Bashir let go of her hair, she went to her front yard and saw Bashir take M.B.P.M.'s car. The district court found: "When [E.V.C.] yelled for him to let her go, Mr. Bashir complied. He then opened the driver door, climbed in the car, and drove away." This finding shows that the district court did not credit the neighbor's testimony that Bashir knelt in the street for one to two minutes before taking the car.

A footnote in Bashir's reply brief states that C.M.F.'s testimony that she did not see Bashir kneel is consistent with the neighbor's testimony that Bashir knelt because C.M.F. was moving away from the scene and towards E.V.C.'s house while Bashir was kneeling. But C.M.F. specifically testified that she saw Bashir take M.B.P.M.'s car, and she also testified that Bashir let E.V.C. go and took the car. When asked whether Bashir walked

toward M.B.P.M.'s car, C.M.F. testified that Bashir and E.V.C. "were just at the car." When C.M.F.'s testimony is credited, the only reasonable inference is that Bashir removed M.B.P.M.'s child from the car and used force against E.V.C. to compel acquiescence in his taking of M.B.P.M.'s car.

Bashir argues that a rational hypothesis is that the use of force against E.V.C. "was purposeless and not calculated to overcome resistance to a taking." Bashir cites the facts that his own car was parked across the street and running,[1] that he voluntarily abandoned M.B.P.M.'s car about eight blocks away from E.V.C.'s house, that he did not make any statement or take any action indicating an intent to take the car, and that he was exhibiting "bizarre and concerning behavior." The district court found that Bashir "drove in an appropriate manner," "signal[ed] his turns, dr[ove] in his lane, and otherwise controll[ed] the vehicle." Record evidence supports these findings, and Bashir's ability to drive appropriately is relevant to his ability to intentionally use force to take the car.

Also, "[t]he mere fact of a person's [marijuana use] . . . does not create the presumption that a person is incapable of intending to commit a certain act." *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980). Whether a defendant was too intoxicated to form the requisite intent is an issue for the fact-finder to determine. *State v. Fratzke*, 354 N.W.2d 402, 408 (Minn. 1984). This court will not disturb the district court's determination that Bashir used force to overcome resistance to and compel acquiescence in the taking of M.B.P.M.'s car.

[1] The car facing the wrong way on Harriet Avenue was Bashir's car.

II.

To support his voluntary-intoxication defense, Bashir sought to present psychiatric opinion evidence that his mental illness made him susceptible to becoming extremely intoxicated by using an amount of marijuana that would not affect an average person. The district court granted the prosecution's motion to exclude the proffered opinion testimony.

"Criminal defendants have a right to prepare and present a complete defense." *State v. Hokanson*, 821 N.W.2d 340, 350 (Minn. 2012). The right to present a defense includes "at a minimum, . . . the right to examine the witnesses against the defendant, to offer testimony, and to be represented by counsel. However, the defendant must still comply with established rules of evidence designed to assure both fairness and reliability in assessing guilt or innocence." *State v. Reese*, 692 N.W.2d 736, 740 (Minn. 2005) (citation omitted). An evidentiary ruling is reviewed for an abuse of discretion. *State v. Ashby*, 567 N.W.2d 21, 25 (Minn. 1997).

The supreme court has held that expert psychiatric opinion testimony on the general effects of mental illness is inadmissible during the guilt phase of a trial and that the exclusion of psychiatric testimony on mens rea does not violate a defendant's due-process rights. *State v. Anderson*, 789 N.W.2d 227, 237-38 (Minn. 2010) (citing *State v. Provost*, 490 N.W.2d 93, 103-04 (Minn. 1995)). But "such testimony might be admissible (1) in the very rare circumstance in which 'there was a mental disorder characterized by the formation of a particular subjective state of mind inconsistent with the pertinent criminal mens rea,'" or (2) "'where the defendant has a past history of mental illness' and such

history 'is in the nature of a factual background to explain the "whole man" as he was before the events of the crime.'" *Id.* (quoting *Provost*, 490 N.W.2d at 103-04).

Bashir argues that the psychiatric evidence he offered about his history of mental illness falls within the second exception because it "was offered for the specific, limited purposes of establishing that it was more likely that Bashir was actually intoxicated during the alleged crimes due to his substance-abuse disorders, and for demonstrating that he was particularly susceptible to extreme reactions to intoxicating drugs." Citing *Fratzke*, 354 N.W.2d at 408, Bashir argues that expert psychiatric testimony on the defendant's "long history of alcohol abuse" and how that history affected the defendant's general ability to "exercise good judgment or self-control" is admissible. In *Fratzke*, however, although the court noted that such evidence was admitted, whether it was properly admitted was not at issue.

The supreme court has stated that, "[e]ven when mental illness impairs a defendant's capacity for forming criminal intent, such intent is still determined from what a defendant says and does." *Provost*, 490 N.W.2d at 98. "[P]sychiatric opinion testimony is not admissible on whether, in fact, the defendant had the capacity to form the requisite subjective state of mind." *Id.* at 101. "Nor is psychiatric opinion testimony admissible on the ultimate question of whether in fact the defendant had the requisite mens rea when he committed the crime." *Id.*

> "[E]vidence of intoxication" may be taken into consideration on whether specific intent has been formed. . . . The question, however, is whether expert psychiatric opinion testimony is admissible on whether defendant's intoxication has rendered the defendant incapable of forming the requisite mens rea. In

> Minnesota such opinion testimony is *not* admissible. Our case law on use of expert psychiatric testimony for intoxication and mental illness is quite consistent.
>
> Opinion testimony on a person's blood alcohol content and on the fact of intoxication is admissible, but expert opinion testimony on how this intoxication may diminish capacity to form specific intent is not admissible.

Id. at 102. "Expert testimony is not admissible on the 'ultimate' issues, *i.e.*, whether the defendant was capable of forming the requisite mens rea, or whether the defendant, in fact, actually did possess the mens rea." *Id.* at 103.

Bashir asserts that his marijuana use triggered something in his brain that heightened his level of intoxication, which made him incapable of forming the intent required to commit simple robbery. *See State v. Charlton*, 338 N.W.2d 26, 30 & n.8 (Minn. 1983) (stating that supreme court has "implied that specific intent, or a purposeful or conscious desire to bring about a criminal result, is an element of a robbery charge" and noting that simple-robbery knowledge finding in earlier case "was based on indications of defendant's reason and purpose while committing the crime, as based on his actions"). Under *Provost*, psychiatric opinion testimony is inadmissible for that purpose. The district court, therefore, did not abuse its discretion by excluding the testimony.

III.

Minn. Stat. § 243.166, subd. 1b(a)(1) (2014), requires a person to register as a predatory offender if charged with a felony specified in the statute and convicted of "that offense or another offense arising out of the same set of circumstances." Once the facts have been determined, whether the district court erred in requiring a defendant to register

as a predatory offender is a question of law, which is reviewed de novo. *State v. Lopez*, 778 N.W.2d 700, 705 (Minn. 2010).

In *Lopez*, two brothers sold methamphetamine to a police informant. *Id.* at 702. At the time of the sale, the informant could not pay the full price and agreed to pay the remaining amount at a later date. *Id.* Ten days later, when the informant still had not paid, the brothers held the informant and his friend hostage in a garage for 40 minutes while the informant arranged to pay the debt. *Id.* The brothers were each charged with aiding and abetting a first-degree controlled-substance crime and two counts of aiding and abetting kidnapping. *Id.* at 701. They were convicted of the controlled-substance crime, but the kidnapping charges were dismissed. *Id.* at 702. The district court required the brothers to register as predatory offenders because it concluded that the kidnapping charges "arose out of the same set of circumstances" as the controlled-substance crime. *Id.*

The supreme court concluded that the kidnapping charges did not arise out of the "same set of circumstances" as the controlled-substance crime. *Id.* at 706-07. The supreme court explained that while the conviction offense and the charged offense need not be based on identical facts, "the facts underlying the two must be sufficiently linked in time, location, people, and events to be considered the 'same set of circumstances.'" *Id.* at 706. It is not enough that the conviction offense and the charged offense "arise from 'related circumstances'" or "share a single 'related circumstance.'" *Id.* Instead, the two offenses must "arise from one 'same set of circumstances.'" *Id.* The kidnapping and controlled-substance offenses in *Lopez* shared "at most one single common circumstance—payment of a debt from the drug sale." *Id.* They did not arise "out of the same set of circumstances"

because the kidnapping took place ten days after the drug sale, in a different place, involved some different people, and involved a different set of events. *Id.*

Bashir argues that the robbery and kidnapping offenses did not arise out of the same set of circumstances because they had different victims; M.B.P.M.'s daughter was the victim of the alleged kidnapping, and M.B.P.M. was the robbery victim. But the daughter was removed from M.B.P.M.'s car during the alleged kidnapping, and M.B.P.M. tried to prevent her from being removed. The facts underlying the two offenses were linked in time, location, people, and events.

Bashir argues that the two offenses were separated in time. But as already addressed, the district court did not credit the neighbor's testimony about Bashir kneeling in the street for one to two minutes before taking the car. The district court properly determined that the kidnapping and robbery offenses arose out of the same set of circumstances and required Bashir to register as a predatory offender.

Affirmed.