STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1851

State of Minnesota,
Respondent,

vs.

Cal Joseph Reckinger,
Appellant.

Filed December 24, 2018
Affirmed
Connolly, Judge

Mille Lacs County District Court
File No. 48-CR-16-149

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Joseph Walsh, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of assault with a dangerous weapon, arguing that the state failed to present the jury with sufficient evidence that appellant did not act in self-defense, and that his right to self-defense was not revived. Because the facts in the record and inferences drawn from them provide sufficient evidence to support the jury's verdict, we affirm.

FACTS

In January 2016, appellant Cal Joseph Reckinger was involved in a physical altercation in an apartment unit that resulted in his being arrested and charged with two counts of first-degree aggravated robbery, second-degree assault with a dangerous weapon, and aiding-and-abetting second-degree assault with a dangerous weapon. Appellant pleaded not guilty to the charges.

At trial, the state introduced evidence that appellant and three other individuals entered an apartment unit belonging to the victim, T.C. Once inside, appellant located T.C. and his friends A.S. and J.M. in a bedroom playing video games. Appellant was armed with a gun and a baseball bat, which he used to hit T.C.; he also demanded their cellphones and other items.

T.C. refused to hand over his possessions and asked appellant to leave the apartment. When appellant did not leave, T.C. hit him with a crowbar. T.C. then asked appellant to leave again. Appellant did not leave and T.C. struck him for a second time. A fight for the crowbar ensued; T.C. maintained possession of the crowbar and struck

appellant for a third time. Appellant then gained possession of the crowbar, and used it to strike T.C. Appellant and the other individuals then left the apartment.

Appellant offered a different version of events. He claimed that T.C. invited him into the apartment where he intended to purchase drugs. He testified that T.C. brought him to the bedroom and hit him in the head with a crowbar, when he was not paying attention. Appellant stated that he was hit two more times with the crowbar and was in-and-out of consciousness. Appellant admitted to pushing T.C. in order to escape, but he denied possessing a gun or hitting T.C. with the crowbar and stated that only one person was with him, not three.

In his defense, appellant raised self-defense. The jury found appellant guilty of second-degree assault but found him not guilty on the three other charges. Appellant filed a notice of appeal and argues that the state failed to present sufficient evidence that appellant did not have the right to act in self-defense.

D E C I S I O N

In a sufficiency-of-the-evidence claim, this court's role is limited to ascertaining whether the facts in the record and the inferences drawn from those facts would permit a jury to reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004). We 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). Inconsistencies in testimony go to witness credibility, which is an issue for the jury. *State v. Pendleton*, 706 N.W.2d 500, 511-12 (Minn. 2005).

Self-defense permits a person to use a reasonable amount of force against another "when used … in resisting or aiding another to resist an offense against the person." Minn. Stat. § 609.06, subd. 1(3) (2018). The defendant has the burden of producing evidence to support a self-defense claim, but the state retains the burden of proving beyond a reasonable doubt that a defendant did not act in self-defense. *State v. Penkaty*, 708 N.W.2d 185, 207 (Minn. 2006). A self-defense claim has four elements: (1) an absence of aggression or provocation by the party claiming self-defense; (2) an actual and honest belief that great bodily harm would result; (3) a reasonable basis for this belief; and (4) a lack of reasonable means to retreat or avoid the physical conflict. *State v. Soukup*, 656 N.W.2d 424, 428 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003).

The state first needed to prove that appellant was the initial aggressor. *See State v. Gray*, 456 N.W.2d 251, 257 (Minn. 1990) (if the state proves beyond a reasonable doubt the nonexistence of any of the elements, a defendant cannot prevail on a self-defense claim). Appellant contends that the state failed to prove that he was the initial aggressor, however, the state presented ample evidence on this point. The state elicited testimony that appellant was armed with a gun, demanded money and cellphones, and hit T.C. with a baseball bat after T.C. failed to comply with his demands. *See Moore*, 438 N.W.2d at 108.

Appellant nonetheless argues that, because the jury acquitted him of the aggravated robbery charge, which also has an element of aggression, the jury did not believe he was the aggressor. Appellant's argument is flawed. The crime of aggravated robbery contains different elements than that of second-degree assault with a dangerous weapon. *Compare* Minn. Stat. § 609.245. subd. 1 (2018) *with* Minn. Stat. § 609.222. subd. 1 (2018). The jury

could have found that the state failed to meet its burden on all the elements of aggravated robbery, but met its burden on all the elements of second-degree assault. For example, the jury could have concluded that appellant was the aggressor but did not take property. The jury's conclusion that the state failed to meet its burden on the aggravated robbery charge does not demonstrate that appellant was not the aggressor.

Because there is sufficient evidence demonstrating that the state disproved one of the self-defense elements beyond a reasonable doubt, appellant's self-defense claim fails. *See State v. Radke*, 821 N.W.2d 316, 325 (Minn. 2012) (concluding that where the state disproved one element of a self-defense claim, any evidence bearing on the other three elements "would not have changed the outcome" of trial).

Appellant argues, in that alternative, that even if sufficient evidence demonstrating that he was the initial aggressor had been presented to the jury, his ability to use self-defense was revived after T.C. hit him and he no longer engaged in threatening behavior.

The right to self-defense may be revived if the initial aggressor clearly manifests a good-faith intention to withdraw and removes the victim's apprehension or fear. *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986). But evidence that a victim may have had the upper hand during an altercation does not constitute a legally sufficient withdrawal. *Gray*, 456 N.W.2d at 258. In addition, "[i]f the circumstances are such that it is impossible for [appellant] to communicate the withdrawal, it is attributable to his own fault and he must abide by the consequences." *Bellcourt*, 390 N.W.2d at 272 (quotation omitted).

In this case, appellant did not communicate any intention to withdraw. Appellant, however, argues that his conduct after being struck with the crowbar was an implicit

withdrawal, and that although there was evidence presented to the jury indicating that he was armed with a gun during the altercation, he never threatened to use the gun after he was hit with the crowbar.

Appellant's argument is again flawed. First, an implicit withdrawal must be clear to remove the victim's fear or apprehension. *Id*. Here, appellant's behavior, or lack of aggression after getting hit, does not evidence a clear intention to withdraw that would have reasonably removed the victim's fear or apprehension. Moreover, the record contains evidence that appellant was asked multiple times to leave, but did not leave, before he was hit for the third time with the crowbar. The fact that he did not leave despite the request rebuts appellant's argument that his inaction should have been seen as an implicit withdrawal. Second, the fact that appellant may have been dazed from the third blow to his head and unable to clearly communicate his intention to withdraw is a circumstance that is attributable to his own fault and will not revive his ability to use self-defense. *See id.*

When viewed in the light most favorable to the jury's verdict, and assuming the jury believed the state's witnesses and disbelieved any evidence to the contrary, the evidence in the record was sufficient to support the jury's decision that the state disproved appellant's self-defense theory beyond a reasonable doubt.

Affirmed.