STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1778

State of Minnesota,
Respondent,

vs.

Michael Christopher Barta,
Appellant.

Filed August 29, 2011
Affirmed in part and vacated in part
Schellhas, Judge

Rice County District Court
File No. 66-CR-09-3882

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

G. Paul Beaumaster, Rice County Attorney, Benjamin Bejar, Assistant County Attorney, Faribault, 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 Klaphake, Presiding Judge; Wright, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges his convictions of third-degree assault and felony fifth-degree assault, arguing that (1) the state failed to disprove that he acted in self-defense

and (2) his conviction for felony fifth-degree assault should be vacated because it is a lesser-included offense of third-degree assault. We affirm in part and vacate in part.

FACTS

On November 24, 2009, respondent State of Minnesota charged appellant Michael Barta with third-degree assault in violation of Minn. Stat. § 609.223, subd. 1 (2008), fifth-degree assault within three years of the first of two or more previous qualified domestic-violence-related convictions in violation of Minn. Stat. § 609.224, subd. 4(b) (2008) (felony), and fifth-degree assault within three years of a previous qualified domestic-violence-related conviction in violation of 609.224, subd. 2(b) (2008) (gross misdemeanor), based on his conduct during an altercation in a Faribault bar on February 5, 2009. Before trial, Barta stipulated that he had two previous qualified domestic-violence-related convictions within three years of the current alleged offense. Based on Barta's stipulation, the state dismissed count three—the alternative gross-misdemeanor fifth-degree assault charge.

At trial, the state called five witnesses: the victim, the victim's girlfriend, the bartender, the investigating officer, and the emergency-room doctor who treated the victim. The victim testified that on February 5, 2009, he was in a Faribault bar with his girlfriend, Barta, and several other people. The group was eating, drinking, and having fun behind the pool table by the jukebox. No exit exists along the wall near the jukebox.

At some point, the victim grabbed a towel from the bar and began snapping people in the group with it. The victim testified that he snapped everyone in the group a couple

times and that they "were all laughing, having a good time." The towel snapping lasted approximately five minutes.

The victim testified that he snapped Barta a couple of times in the leg, the same as everybody else, but Barta became angry. While the victim's back was turned, Barta attacked him with a pool cue. Barta swung the pool cue like a baseball bat, hitting the victim in the ribs and breaking the pool cue. Barta then swung what was left of the handle down "like a hatchet or an ax" with both hands. The victim put his hand up to block the blow, and the pool-cue remnant cut his hand between two of his fingers, broke a bone in his fingertip, and separated one of his fingernails from the nail bed. After being hit twice, the victim attempted to punch Barta in the face before others in the group separated the two men. The victim went to the emergency room where he received 18 stitches to close the cut on his hand and reattach the nail.

The victim's girlfriend, who is Barta's cousin, testified that the group was in the bar having food and drinks. The bar was not crowded, and they had easy access to the door to go outside and smoke. Towards the end of the night, the victim jokingly snapped people in the group with a dry towel for 15–20 minutes and snapped Barta twice in the leg. The victim's girlfriend testified that no one in the group was upset; people were laughing. After the victim had stopped snapping people, Barta came from behind the victim "out of nowhere" and hit him with a pool cue on the shoulder. The pool cue broke and Barta hit the victim again. The victim put his hand up and the second blow hit him between the fingers, cutting his hand. After being hit, the victim swung at Barta. After they left the bar, she took the victim to the hospital.

The bartender testified that on February 5, 2009, at approximately 10:00 p.m., Barta, the victim, the victim's girlfriend, and a couple of other people entered the bar. The bar was not crowded and the group had easy access to the door. The victim was intoxicated and the bartender cut him off after the first drink because he was "obnoxious" and "unruly." At some point, the victim grabbed a wet towel from the bar, twirled it, and snapped Barta approximately 10 times. The bartender did not see the victim snap anyone else. The bartender testified that they were joking at first, but then Barta became "aggravated" and told the victim to "knock it off" multiple times. The bartender twice attempted to get the towel from the victim but was unsuccessful. When the victim continued to snap him, Barta picked up a pool cue and said, "Knock it off or I'm going to hit you." The victim hit Barta two more times including once in the face. Barta swung the pool cue at the victim, who was facing him. The victim reached up to catch the pool cue and it hit him. The bartender testified that the pool cue did not break. The bartender saw blood dripping from the victim's hand. The victim swung at Barta and, when the victim's girlfriend jumped in, the victim threw her down. After the victim and Barta were separated, Barta went outside, and the bartender assumed he walked home because he was a regular customer of the bar and often walked home.

Faribault Police Officer Eric Sammon testified that he responded to the victim's call the following morning. The victim reported an assault. Officer Sammon photographed the victim's injuries, which consisted of a large bruise on his rib cage, a laceration between two of his fingers with stitches, and stitches on the tip of one of his fingers. The photographs were admitted at trial. The victim told Officer Sammon that

the previous night Barta had hit him with a pool cue. Officer Sammon spoke with the victim's girlfriend and the bartender, whose stories were consistent with the victim's story. But, contrary to her testimony at trial, the bartender told Officer Sammon that the victim did not snap Barta in the head with the towel and that the pool cue broke in half when Barta hit the victim.

Officer Sammon also spoke to Barta, who told him the victim snapped him with a towel "quite a few times for around 20 minutes," including once in the head. Barta told Officer Sammon that he "got pissed, and walked outside" and smoked a cigarette. Barta then walked back into the bar and "was going to start playing . . . pool" when the victim "came up from behind him and hit him in the head with a pool cue." Barta told Officer Sammon that he grabbed another pool cue and said, "If you want to play rough, then here is a nice little whack on the head with a f---ing pool stick." Barta then hit the victim in the side of the head. The victim became upset and "started swinging around at the walls inside the bar, and then eventually went outside." Barta told Officer Sammon that when the victim came back inside he saw that the victim was injured. Barta thought that the victim hurt himself outside.

Doctor Guruprasad Kaginele, an emergency-room physician, treated the victim. Doctor Kaginele testified that the victim had a laceration on his hand, a fractured finger, and a fingernail detached from the nail bed. Doctor Kaginele testified that the victim's injuries were consistent with being struck by a broken pool cue.

The defense called one witness: the cook at the bar. The cook, who is Barta's friend, testified that he saw a person snapping people with a towel. The person was

"irritating people" and snapped a couple people, who became angry and left the bar. The person kept snapping Barta, who pushed the person away several times. The cook testified that the person "went crazy" and "started beating himself on tables and chairs." The person then "went outside [and] started beating his head and fist against the window." The cook testified that he never saw Barta hit the person with a pool cue and a pool cue was not broken.

Before the district court instructed the jury, and outside the jury's presence, the court addressed whether Barta had presented sufficient evidence to warrant a self-defense instruction, stating:

> [T]here is some testimony that it was [the victim] who was the aggressor. There is some testimony that Mr. Barta told him at least twice to stop and that he was snapped near the face area. So that constituted bodily harm.
>
> There [are] . . . reasonable grounds for the belief that the snapping would continue . . . and . . . there is also a dispute whether it even happened or not. But to that extent, it is up to the jury to decide whether or not the force used was reasonable.
>
> And in terms of the reasonably possibility to retreat, [there was] evidence [that] it was kind of back in the corner where there weren't any doors.

The district court found that Barta presented sufficient evidence to argue self-defense and therefore instructed the jury on self-defense.

The jury found Barta guilty of third-degree assault and fifth-degree assault. The district court entered judgment of conviction against Barta for third-degree assault. And based on Barta's stipulation that he had two previous qualified domestic-violence-related offenses, the court also entered judgment of conviction for felony fifth-degree assault.

On his conviction of third-degree assault, the court sentenced Barta to 21 months' imprisonment stayed for five years, subject to compliance with the terms of probation. The court did not sentence Barta on his conviction of felony fifth-degree assault.

This appeal follows.

D E C I S I O N

Self-Defense

A person may use reasonable force to resist an offense against him or her. Minn. Stat. § 609.06, subd. 1(3) (2008).

> The elements of self-defense are (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

State v. Johnson, 719 N.W.2d 619, 629 (Minn. 2006) (quotation omitted). Specifically, a person "who is being assaulted and who has reasonable grounds to believe that bodily injury is about to be inflicted" may lawfully defend against the attack. 10 *Minnesota Practice*, CRIMJIG 7.06 (Supp. 2010); *see also State v. Hare*, 575 N.W.2d 828, 833 (Minn. 1998) (holding that a reasonable belief of bodily injury is sufficient in an unintentional homicide case); *State v. Pendleton*, 567 N.W.2d 265, 268, 270–71 (Minn. 1997) (requiring only expectation of bodily harm for defense-of-dwelling argument where the defendant only expected felonies involving bodily harm, not great bodily harm). But a person may use only the degree of force that a reasonable person under

similar circumstances would deem necessary. *State v. Bland*, 337 N.W.2d 378, 381 (Minn. 1983).

"The defendant has the burden of going forward with evidence to support a claim of self-defense." *Johnson*, 719 N.W.2d at 629 (quotation omitted). "Once the defendant has met that burden, the state has the burden of disproving one or more of these elements beyond a reasonable doubt." *Id.* (quotation omitted).

Barta argues that the state failed to disprove one or more of the self-defense elements beyond a reasonable doubt. "In assessing the sufficiency of the evidence, we conduct a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the [fact-finder] to reach its verdict." *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010). We "assume that the fact finder rejected any evidence inconsistent with the verdict." *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). "We will not disturb a verdict if the jury could reasonably conclude, given the presumption of innocence and the requirement of proof beyond a reasonable doubt, that the defendant was guilty of the charged offense." *Id.* "Assessing witness credibility and the weight given to witness testimony is exclusively the province of the jury." *Id.*

The record reflects that the victim was the aggressor. The victim snapped Barta multiple times with a towel before Barta struck him. But viewing the evidence in a light most favorable to the verdict, the record reflects that the victim had stopped snapping Barta with the towel and had his back turned to Barta when Barta first struck him. Furthermore, the state presented substantial evidence that Barta had a reasonable

possibility to retreat. The bar was mostly empty; the entrance was easily accessible; when the victim repeatedly snapped him, Barta became angry and walked outside to smoke; and the victim did not prevent Barta from leaving the bar area while he was snapping Barta and other people with the towel. In response to being snapped with a towel, Barta swung a pool cue like a baseball bat with enough force to break when it contacted the victim's ribs. Then Barta swung the broken handle down toward the victim like an ax, using both hands.

Viewing the evidence in the light most favorable to the verdict, the evidence shows that a jury could have found that Barta did not reasonably believe that bodily harm was about to be inflicted on him, had a reasonable opportunity to retreat, and responded with excessive force. Under the circumstances, we conclude that the jury was justified in concluding that the state met its burden of proving beyond a reasonable doubt that Barta did not act in self-defense.

Lesser-Included Offense

Barta argues that his conviction for felony fifth-degree assault should be vacated under Minn. Stat. § 609.04 (2008) because it is a lesser-included offense of third-degree assault.[1] Section 609.04 provides that one "may be convicted of either the crime charged or an included offense, but not both." An included offense may be, among other things, a

[1] Barta did not raise this issue below. Barta argued that he should not receive multiple *sentences* under Minn. Stat. § 609.035 (2008), but did not argue that he should not receive multiple *convictions* under Minn. Stat. § 609.04. Although Barta did not raise this issue below, "an appellant does not waive claims of multiple convictions or sentences by failing to raise the issue at the time of sentencing." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007).

"lesser degree of the same crime" or a "crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1(1), (4).

The state correctly argues that felony fifth-degree assault is not necessarily proved if third-degree assault is proved because felony fifth-degree assault contains an additional prior-convictions element. But "the fact that the lesser offense is not necessarily proved by proof of the commission of the greater offense does not mean that the lesser offense is not an included offense under section 609.04." *State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995). "If the lesser offense is a lesser degree of the same crime or a lesser degree of a multi-tier statutory scheme dealing with a particular subject, then it is an 'included offense' under section 609.04." *Id.* In *Hackler*, the supreme court concluded that second-degree assault is a lesser-included offense of first-degree assault even though proof of first-degree assault does not necessarily prove second-degree assault. Similarly, felony fifth-degree assault is a lesser-included offense of third-degree assault because it is a lesser degree of the same crime even though proof of third-degree assault does not prove felony fifth-degree assault based on prior convictions.

"[I]f a person . . . is found guilty of a greater offense and an included offense, the protections of section 609.04 will not apply if the offenses constitute separate criminal acts." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). The state argues that Barta "committed two distinct and separate acts of assault" when he struck the defendant twice with a pool cue. "The inquiry into whether two offenses are separate criminal acts is analogous to an inquiry into whether multiple offenses constituted a single behavioral incident under Minn. Stat. § 609.035." *Id.* "Factors considered when analyzing whether

conduct is a single behavioral incident include time and place and whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *Id.* (quotation omitted).

In this case, the district court stated multiple times during the sentencing hearing that the two assaults "arose out of the same course of conduct" and "same set of circumstances." "The district court's decision of whether multiple offenses are part of a single behavioral incident is a fact determination and should not be reversed unless clearly erroneous." *State v. Carr*, 692 N.W.2d 98, 101 (Minn. App. 2005). Barta struck the victim twice within a matter of seconds in the same area of the bar and both strikes were motivated by an effort to retaliate against the victim for snapping him with a towel. The district court's decision is not clearly erroneous.

Because felony fifth-degree assault is a lesser-included offense of third-degree assault and the two offenses constituted a single behavioral incident, we vacate Barta's conviction for felony fifth-degree assault under section 609.04.[2]

Affirmed in part and vacated in part.

[2] The underlying guilty verdict remains intact. *See State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999) (holding that underlying guilty verdict of a lesser-included offense remains intact and district court may later convict and sentence on that crime if separate adjudicated conviction is later vacated).