STATE OF MINNESOTA
IN COURT OF APPEALS
A10-470

State of Minnesota,
Respondent,

vs.

Alicia Venette Anderson,
Appellant.

Filed May 9, 2011
Affirmed
Wright, Judge

Anoka County District Court
File No. 02-CR-08-13369

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

Anthony C. Palumbo, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, Anoka, Minnesota (for respondent)

Lynne Torgerson, Minneapolis, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

WRIGHT, Judge

Appellant challenges her conviction of attempted second-degree murder, arguing that the district court erred by denying her request to present evidence of the victim's prior bad act and that the evidence was insufficient to support the guilty verdict.

Appellant also challenges the district court's imposition of a sentence of 90 months' imprisonment, contending that there are substantial and compelling reasons for a downward dispositional departure. We affirm.

FACTS

Appellant Alicia Venette Anderson and J.B. were friends. While still married to M.B., J.B. began a romantic relationship with L.E., who she met through Anderson. As a result, M.B. had a confrontational relationship with L.E. and J.B., which included a history of arguments and property damage.

J.B.'s sister planned to be married on October 18, 2008. On October 17, Anderson drove L.E., J.B., and J.B.'s grandchildren to a church in Columbia Heights for the wedding rehearsal. When they arrived, J.B. and the grandchildren exited Anderson's minivan. But when J.B. saw M.B. waiting outside the church, J.B. decided to leave with Anderson and L.E. in the minivan. As Anderson began to drive away from the church, M.B. and L.E. exchanged vulgar hand gestures. Immediately thereafter, L.E. left the minivan, smashed M.B.'s car window, and returned to the minivan. As Anderson drove away, M.B. retaliated by smashing the rear window of Anderson's minivan. L.E. got out of the minivan again and fought with M.B.

Believing that M.B. had shot through the rear window of her minivan with a gun, Anderson loaded her handgun, exited the minivan, walked over to L.E. and M.B., who were fighting each other, and fired her handgun three times. M.B. fled. A bystander called 911, and the 911 recording contains the sound of a gunshot. Columbia Heights Police Officer Paul Bonesteel arrived at the church within a few minutes of the 911 call.

He stopped Anderson's minivan as it exited the church parking lot, and he found Anderson and L.E. inside the minivan. Anderson advised the police that she had fired the gun, and the police recovered an empty shell casing from her minivan.

Anderson was charged with one count of attempted second-degree murder, a violation of Minn. Stat. §§ 609.19, subd. 1(1), 609.17 (2008), and one count of second-degree assault, a violation of Minn. Stat. § 609.222, subd. 1 (2008). Anderson filed a pretrial motion to admit prior-bad-acts evidence to establish that she had reason to fear M.B. and that she acted in reasonable defense of herself and of others. The district court granted the motion in part, admitting evidence of several incidents during which M.B. threatened or assaulted L.E., J.B., and Anderson's son. But the district court excluded testimonial evidence that M.B. allegedly sexually assaulted J.B. during their marriage on the grounds that the potential for unfair prejudice substantially outweighs the probative value of this evidence and that this evidence is cumulative.

The jury found Anderson guilty of attempted second-degree murder and not guilty of second-degree assault. At the sentencing hearing, Anderson moved for a downward durational or dispositional departure on the grounds that M.B. was the aggressor, Anderson's offense is not as serious as a typical attempted second-degree murder, and she is amenable to probation. The state opposed the motion and urged the district court to impose the presumptive guidelines sentence of 153 months' imprisonment. The district court granted Anderson's motion and imposed a sentence of 90 months' imprisonment, which is a downward durational departure from the presumptive sentence. This appeal followed.

D E C I S I O N

I.

Anderson argues that the district court erred by excluding evidence of an alleged sexual assault committed by M.B. She contends that M.B.'s past violent conduct is relevant and probative evidence supporting her self-defense theory and that the exclusion of this evidence violated her right to due process because it prevented her from explaining her conduct to the jury.

The constitutional right to due process requires a person accused of an offense to "be treated with fundamental fairness" and to be "afforded a meaningful opportunity to present a complete defense." *State v. Quick*, 659 N.W.2d 701, 712 (Minn. 2003) (quotation omitted) (citing U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7). Criminal defendants have a fundamental due-process right to explain their conduct to the jury, even if it is not a valid defense. *State v. Brechon*, 352 N.W.2d 745, 751 (Minn. 1984); *State v. Rein*, 477 N.W.2d 716, 719 (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992). "However, a defendant has *no* right to introduce evidence that either is irrelevant, or whose prejudicial effect outweighs its probative value." *State v. Crims*, 540 N.W.2d 860, 866 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). We review the district court's evidentiary ruling under an abuse-of-discretion standard even when it is claimed that excluding the evidence deprived the defendant of the constitutional right to present a complete defense. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006). But if we determine that the district court's evidentiary ruling denied the defendant the right

to present a complete defense, reversal is required unless the error is harmless beyond a reasonable doubt. *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003).

Anderson moved the district court to admit evidence that M.B. sexually assaulted J.B. at knifepoint during their marriage and that, because Anderson was aware of this incident, she reasonably feared M.B. When the defendant has knowledge of the victim's prior violent or bad acts, evidence of these acts can be relevant to establish the defendant's reasonable apprehension of fear. *State v. Robinson*, 539 N.W.2d 231, 240 (Minn. 1995). But relevant evidence is not admissible if its probative value is substantially outweighed by the risk of unfair prejudice. Minn. R. Evid. 403; *State v. Starkey*, 516 N.W.2d 918, 925 (Minn. 1994). Here, the district court excluded the evidence under rule 403,[1] concluding that the probative value of this evidence substantially outweighs its potential for unfair prejudice. Because this evidence is unsupported by police reports and there is no indication that Anderson feared being sexually assaulted at the time of the shooting, the district court concluded, and we agree,

[1] Although prior-bad-acts evidence generally is offered under rule 404(b), the district court excluded the evidence under the rule 403 standard, which has a lower threshold for admissibility. *Compare* Minn. R. Evid. 404(b) (providing that prior-bad-act evidence is admissible only if "the probative value of the evidence is not outweighed by its potential for unfair prejudice") *with* Minn. R. Evid. 403 (providing that relevant evidence "may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice" (emphasis added)). Because this evidence is inadmissible under the rule 403 standard, it also is inadmissible under rule 404(b). *See Richardson*, 670 N.W.2d at 280 ("When the defendant offers other-crimes evidence relating to a third party, the pragmatic relevance standard embodied in [rules 401 through 403] should apply, and the focus should be on whether the evidence is relevant to cast reasonable doubt on the state's case." (alteration in original) (quotation omitted)).

that the jury likely would place undue emphasis on this evidence, which would unfairly prejudice the state's case.

The district court also reasoned that this evidence is cumulative because M.B.'s other prior bad acts that were admitted in evidence would adequately establish M.B.'s propensity for violence. In S*tate v. Bland*, the Minnesota Supreme Court held that the defendant was not prejudiced by the exclusion of evidence of two of the victim's prior bad acts because the district court admitted a "wealth of reputation evidence and evidence concerning specific past acts of violence by the victim." 337 N.W.2d 378, 383-84 (Minn. 1983). Here, as in *Bland*, the record contains ample evidence establishing M.B.'s violent character: M.B. was arrested for domestic assault against J.B. and vandalized her property; L.E. had a restraining order against M.B., who broke windows on L.E.'s car and slashed L.E.'s tires on five separate occasions; M.B. once held a knife to J.B.'s throat and bruised her chest; M.B. threatened to kill J.B., L.E., and L.E.'s dog; while intoxicated, M.B. went to the home of Anderson's son and threatened him; and on the morning of the offense, M.B. kicked in the front door of J.B.'s home, threatened her nephew, poured oil around the house, and intended to ignite it. Because the district court admitted a wealth of evidence establishing M.B.'s prior violent conduct, the proffered, but excluded, evidence of the sexual assault is cumulative and of limited probative value. And its exclusion did not prejudice Anderson.

Accordingly, the district court did not violate Anderson's constitutional right to present a complete defense by excluding the proffered evidence.

II.

Anderson next argues that the evidence is insufficient to support her conviction because the evidence does not establish that she committed the offense and it fails to prove that she did not act in self-defense or in defense of others. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis to determine whether the jury reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the guilty verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *Id.* We will not disturb the guilty verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

A.

A conviction of second-degree murder requires proof beyond a reasonable doubt that the defendant "cause[d] the death of a human being with intent to effect the death of that person or another." Minn. Stat. § 609.19, subd. 1(1). Here, because Anderson was convicted of attempted second-degree murder, the evidence must prove beyond a reasonable doubt that, with the intent to commit second-degree murder, Anderson performed an act that is "a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1.

Anderson testified that she shot the gun upward. On appeal, she argues that any witness's testimony to the contrary is not credible. But the determination of evidentiary weight and witness credibility rests exclusively with the jury, and it will not be disturbed on appeal. *State v. Carufel*, 783 N.W.2d 539, 546 (Minn. 2010). When judging witness credibility, the jury may accept a witness's testimony in part and reject it in part; moreover, "[i]nconsistencies or conflicts between one witness and another do not necessarily constitute false testimony or serve as a basis for reversal." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006). Anderson testified that she loaded her gun and shot it three times. In direct contradiction of Anderson's testimony, the testimony of those present established that Anderson shot the gun toward M.B.; M.B. started to back away; Anderson followed M.B. through the parking lot as he fled between parked cars; and Anderson deliberately aimed and fired the gun at him "[a]s soon as she felt she had a clear shot." J.B.'s sister testified that, when she asked Anderson to stop shooting, Anderson told her to mind her own business. She also testified that, when M.B. tripped and fell on the ground between two cars, Anderson aimed the gun at M.B. and "would have [shot] him" if the gun had not run out of bullets. In sum, the victim and four eyewitnesses testified that Anderson aimed the gun directly at M.B. and fired multiple times, thereby completing a substantial step toward the commission of the offense. Testimonial evidence also establishes that Anderson acted slowly and deliberately, with the goal of shooting M.B., thereby proving that she acted with the requisite intent.

When viewed in its totality in the light most favorable to the jury's guilty verdict, the record demonstrates that there is more than ample evidentiary support to sustain

Anderson's conviction of attempted second-degree murder. Accordingly, Anderson is not entitled to relief on this ground.

B.

Anderson also contends that the state failed to prove that she did not act in self-defense or in defense of others. The legal justification of self-defense is available when (1) the defendant does not act with aggression, (2) the defendant believes that she was in imminent danger of death or great bodily harm, (3) there are reasonable grounds for that belief, and (4) there is not a reasonable possibility for the defendant to retreat to avoid the danger. *State v. Johnson*, 277 Minn. 368, 373, 152 N.W.2d 529, 532 (1967). The amount of force a defendant may use in self-defense is "limited to that which a reasonable person in the same circumstances would believe to be necessary." *Bland*, 337 N.W.2d at 381; *accord State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). Self-defense is limited to situations during which there is "an absence of reasonable means to retreat or otherwise avoid the physical conflict." *State v. Soukup*, 656 N.W.2d 424, 428 (Minn. App. 2003) (citing *Basting*, 572 N.W.2d at 285), *review denied* (Minn. Apr. 29, 2003). The legal justification of defense of another parallels that of self-defense. *Richardson*, 670 N.W.2d at 278.

Anderson was not the first aggressor. Rather, it was M.B. who broke the back window of Anderson's minivan while Anderson sat inside. Anderson testified that, when the window shattered, she believed that M.B. had shot out the back window with a gun. This evidence establishes Anderson's belief that M.B. placed her in imminent danger of death or great bodily harm. The evidence also establishes reasonable grounds for her

belief. Anderson, who is African American, testified regarding her personal knowledge of M.B.'s violent character and his racial animus toward African Americans. Anderson's subsequent actions, however, cause the essential elements of self-defense to dissipate. Because Anderson was in the driver's seat of her minivan when the fight between M.B. and L.E. began, she could have driven to safety. *See State v. Edwards*, 717 N.W.2d 405, 413 (Minn. 2006) (holding that guilty verdict reflected that elements of self-defense were not satisfied when defendant-shooter was driving van and victim was on foot outside). Moreover, when Anderson exited the minivan, she observed that M.B. was unarmed and was fighting L.E. He was not confronting her. At that point, there no longer were reasonable grounds for Anderson to believe that she was in imminent danger of death or great bodily harm. *See State v. Columbus*, 258 N.W.2d 122, 125 (Minn. 1977) (noting that imminent-danger element was not met when defendant had gun and victim was unarmed). But Anderson followed M.B. and fired her gun at him as he fled.

Because Anderson's use of force under these circumstances was not legally justifiable as self-defense, her actions also were not legally justifiable as defense of L.E. *Richardson*, 670 N.W.2d at 277-78 (observing that defendant may not use more force than reasonably necessary under the circumstances and legal justification "for homicide in defense of another parallels defense of self"). Moreover, the record reflects that L.E. was the first aggressor when he exited Anderson's minivan and smashed M.B.'s car

window. L.E., therefore, could not assert self-defense.[2] Thus, Anderson's argument that she acted justifiably in the defense of L.E. fails.

When viewed in the light most favorable to the verdict, the evidence, taken as a whole, is more than sufficient to support the jury's rejection of Anderson's theories of self-defense and defense of another. Anderson, therefore, is not entitled to relief on this ground.

III.

The district court sentenced Anderson to 90 months' imprisonment—a downward durational departure from the presumptive guidelines sentence of 153 months' imprisonment. In doing so, the district court reasoned that the offense in the instant case is not as serious as a typical attempted second-degree murder. Anderson argues, however, that the district court abused its discretion by declining to impose a downward dispositional departure. She identifies three bases for a dispositional departure: M.B. was

[2] While some jurisdictions follow an "alter ego" rule, which permits a defendant to claim defense of another using deadly force only when the person being defended would have been legally entitled to use deadly force in self-defense, other jurisdictions have adopted the "reasonable belief standard," which permits a defendant to claim defense of another if the defendant's actions were reasonable under the circumstances. *Compare People v. Nunn*, 541 N.E.2d 182, 194 (Ill. App. Ct. 1989) (applying alter ego rule) *and Louisiana v. Ducote*, 452 So.2d 1305, 1308 (La. Ct. App. 1984) (same) *with Washington v. Bernardy*, 605 P.2d 791, 792 (Wash. Ct. App. 1980) (holding that defendant is justified in using force necessary to protect a third party if defendant reasonably believes the third party is innocent, even if the third party was the aggressor); *see also West Virginia v. Cook*, 515 S.E.2d 127, 135 (W. Va. 1999) (comparing these two doctrines); Model Penal Code § 3.05 cmt. 1 (1985) (discussing these doctrines); Wayne R. LaFave, *Criminal Law* § 10.5 (5th ed. 2010) (same). Although Minnesota has not formally adopted either rule, Anderson's defense-of-another argument fails under either rule. L.E. could not assert self-defense because he was the first aggressor; and Anderson's actions were not otherwise reasonable because she knew that L.E. was the first aggressor and her use of force was excessive.

the aggressor, Anderson's offense was not as serious as a typical attempted second-degree murder, and she is amenable to probation.

The district court must impose the presumptive guidelines sentence unless there are "substantial and compelling circumstances" that warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The decision to depart from the sentencing guidelines rests within the district court's sound discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001); *see also State v. Anderson*, 463 N.W.2d 551, 555 (Minn. App. 1990) (applying abuse-of-discretion standard when evaluating downward departure), *review denied* (Minn. Jan. 14, 1991). Even if reasons for departing downward from the presumptive guidelines sentence exist, we ordinarily will not disturb the district court's sentencing decision. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

A district court may consider only offense-related mitigating factors to support a downward durational departure. *See State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998) (holding that conduct unrelated to offense is not relevant to durational-departure decision), *review denied* (Minn. Mar. 19, 1998); *see also State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995) (holding that offense-related factors may be used to support durational departure). By contrast, when considering a downward dispositional departure, the district court may focus "on the defendant as an individual and on whether the presumptive sentence would be best for [the defendant] and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). A relevant factor for the district court to consider when determining whether to impose a downward dispositional departure is the

defendant's amenability to probation. *Id.* Other relevant factors include the defendant's age, prior criminal history, remorse, cooperation, attitude while in court, and support from family and friends. *Id.* (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)). If the district court considers reasons for a dispositional departure but declines to depart, an explanation for denying the downward departure motion is not necessary. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

Anderson contends that several substantial and compelling reasons, including her age, prior criminal history, and family support, demonstrate that she is amenable to probation. But the existence of mitigating factors does not compel the district court to impose a downward departure. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). The district court observed that this serious offense could have been avoided if Anderson had called the police or driven away. Moreover, the district court acknowledged certain mitigating factors when it exercised its discretion and imposed a downward durational departure. In doing so, the district court observed that the instant case is not as serious as a typical attempted second-degree murder case because Anderson caused no injuries.

On the record before us, there is no legal basis to conclude that the district court's decision to forgo a downward dispositional departure was an abuse of discretion.

Affirmed.