STATE OF MINNESOTA
IN COURT OF APPEALS
A10-508

State of Minnesota,
Respondent,

vs.

Allen Chancey Olson,
Appellant.

Filed June 13, 2011
Affirmed
Randall, Judge[*]

Yellow Medicine County District Court
File No. 87-CR-08-588

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Keith Helgeson, Yellow Medicine County Attorney, Granite Falls, Minnesota (for respondent)

John E. Mack, Mack & Daby, New London, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Randall, 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

RANDALL, Judge

Appellant argues that: (1) the evidence was insufficient to sustain his second-degree-assault and terroristic-threats convictions; (2) the district court abused its discretion in sentencing; and (3) he was deprived of his right to the counsel of his choice. We affirm.

FACTS

Appellant Allen Chancey Olson was charged with terroristic threats and second-degree assault stemming from an altercation on appellant's property with C.M. in July 2008. C.M. testified at trial that he drove to appellant's residence to speak with him about a property survey conducted on a road running along the perimeter of appellant's farm. C.M., a township boardmember and the town clerk where appellant lives, had visited appellant's property in January 2008 to gauge appellant's willingness to trim tree branches on his property that were obstructing the road. C.M. testified that he explained the survey results to appellant and appellant became angry with C.M.'s assessment. C.M. testified that appellant drew a handgun out of his hip holster, pointed it at C.M., accused C.M. of trespassing, and demanded that he leave his property. C.M. retreated to his vehicle while appellant aimed the gun at him, entered his vehicle, and left appellant's property. C.M. testified that he was concerned for his safety because appellant was pointing the gun barrel directly at him. The investigating officer testified at trial, and corroborated C.M.'s testimony.

Appellant testified and provided a different account of events. Appellant testified that C.M. declared that the town was going to cut down some trees, and that C.M. stood on appellant's toes to intimidate him. Appellant testified that he asked C.M. to leave, and that C.M. did not immediately oblige. When C.M. finally walked away, appellant testified that C.M. appeared to have a pistol pointed at appellant as he approached his vehicle. Only then did appellant draw his gun at C.M., and appellant denied ever pointing the gun directly at C.M. A jury convicted appellant of terroristic threats and second-degree assault. Appellant was sentenced to 21 months incarceration, and this appeal follows.

D E C I S I O N

Sufficiency of Evidence

Appellant challenges the sufficiency of the evidence supporting his convictions. In considering a claim of insufficient evidence, we thoroughly review the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). An appellate court "cannot retry the facts, but must take the view of the evidence most favorable to the state." *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). The jury is in the best position to weigh the evidence and evaluate the credibility of witnesses; therefore, its verdict must be given due deference. *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980). An appellate court must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). And the reviewing court will not disturb the

verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Minn. Stat. § 609.02, subd. 10 (2006) defines an assault as "an act done with intent to cause fear in another of immediate bodily harm or death." A defendant is guilty of second-degree assault when (1) he assaulted another, (2) by using a dangerous weapon. 10 *Minnesota Practice*, CRIMJIG 13.10 (2006). Minn. Stat. § 609.713, subd. 1 (2006) defines terroristic threats as threatening, "directly or indirectly, to commit any crime of violence with [the] purpose to terrorize another." A defendant is guilty of terroristic threats when (1) he threatened to commit a crime of violence (2) with the intent to terrorize another. 10 *Minnesota Practice*, CRIMJIG 13.107 (2006).

Appellant argues that the evidence is insufficient to sustain his convictions because he testified that he never aimed his gun directly at C.M., and that he only drew the gun to force C.M. off of his property in self-defense after C.M. refused to leave. Appellant claims that this testimony was never refuted, and that any testimony regarding C.M.'s fear was irrelevant. Appellant ignores the testimony of C.M. that appellant was the aggressor and that appellant pointed his gun directly at him. C.M. denied being confrontational. On review, we assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *Moore*, 438 N.W.2d at 108. Accordingly, appellant's contention that he aimed his gun only to protect himself was within the jury's province to reject.

Appellant's assertion that he was trying to get C.M. to leave his property and that he did not intend to cause fear of bodily injury was his opinion. Intent is inferred by the jury from the totality of the circumstances. *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989). Here, the jury was presented with testimony that appellant pointed a gun at C.M., instructed him to get off of his property, and aimed the gun at him until he entered his vehicle. This evidence is sufficient for the jury to infer that appellant intended to cause C.M. to fear bodily injury.

Sentencing

Appellant challenges his 21-month sentence. Sentencing largely rests within the discretion of the district court, and a district court will not be reversed absent an abuse of that discretion. *State v. Olson*, 765 N.W.2d 662, 664 (Minn. App. 2009).

Appellant argues that the district court abused its discretion by sentencing him to the presumptive minimum under the sentencing guidelines instead of the minimum sentence provided by Minn. Stat. § 609.11 (2006). The statute provides a minimum sentence of "one year plus one day" for convictions of "an offense listed in subdivision 9." Minn. Stat. § 609.11, subd. 4. Second-degree assault is an offense listed under subdivision 9. *Id.*, subd. 9. Appellant argues that he was entitled to a minimum sentence of one year and one day, and that the 21-month minimum sentence under the guidelines is in conflict with the statutory minimum.

We conclude otherwise. All felony convictions that are not subject to a life sentence are determined by the sentencing guidelines. Minn. Sent. Guidelines II (2006). Specifically, the guidelines provide that:

> When an offender has been convicted of an offense with a mandatory minimum sentence of one year and one day or more, the presumptive disposition is commitment to the Commissioner of Corrections. The presumptive duration of the prison sentence should be the mandatory minimum sentence according to statute or the duration of the prison sentence provided in the appropriate cell of the Sentencing Guidelines Grids, *whichever is longer*.

Id. II.E (2006) (emphasis added). This excerpt resolves any alleged conflict between the two different minimum sentences by unequivocally announcing that the longer sentence applies. *See In re Welfare of D.W.*, 731 N.W.2d 828, 834 (Minn. App. 2007) (stating that the presumptive duration of a sentence is "the mandatory minimum sentence according to statute or the duration of the prison sentence provided in the appropriate cell of the Sentencing Guidelines Grid, whichever is longer"); *State v. Hysell*, 351 N.W.2d 691, 692 (Minn. App. 1984). Additionally, Minn. Stat. § 609.11 applies to *minimum* sentences, not maximum sentences; because the one-year-and-one-day sentence would be the minimum sentence that a district court could impose, not the sentence that appellant is necessarily entitled to, appellant's contention that the guidelines contravene this statutory penalty is unavailing.

Appellant argues that the second-degree assault here "was not as serious" as most second-degree assaults. This argument pertains to whether appellant should have received a downward departure in sentencing. *See State v. Yaritz*, 791 N.W.2d 138, 143 (Minn. App. 2010) (a defendant's conduct underlying a conviction being significantly less serious than ordinarily implicated in the crime is a substantial and compelling circumstance warranting departure), *review denied* (Minn. Feb. 23, 2011). Appellant did

not move for a departure at sentencing. This argument is not ripe for appeal. *See State v. Roby*, 463 N.W.2d 506, 508 (Minn. 1990) (stating that this court generally will not consider matters not argued to and considered by the district court). The district court correctly imposed the greater minimum sentence in accordance with the sentencing guidelines. The district court did not abuse its discretion in sentencing appellant.

Appellant's Representation

Appellant argues that he was deprived of his right to the counsel of his choice. A criminal defendant is guaranteed the assistance of counsel for his defense. U.S. Const. amend VI; Minn. Const. art. I, § 6. This right includes the right to choose one's counsel. *State v. Fagerstrom*, 286 Minn. 295, 298, 176 N.W.2d 261, 264 (1970). The denial of a right to counsel of one's choosing is never harmless error. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 152, 126 S. Ct. 2557, 2566 (2006). But the right to counsel of one's choice is not absolute. *Fagerstrom*, 286 Minn. at 299, 176 N.W.2d at 264.

Appellant first argues that the district court erred by imposing counsel against his will. Appellant claims that he had substantial conflicts with his trial counsel and did not want to retain his services, but was ultimately compelled to do so by the district court. The record indicates otherwise. Appellant's attorney was initially appointed as advisory counsel when appellant intended to proceed pro se. Appellant hired the attorney for full representation shortly thereafter, and the district court terminated the advisory appointment. Appellant indicated to the district court that he was dissatisfied with his attorney on three separate occasions, and the district court consistently confirmed that it was appellant's right to fire his attorney and hire different counsel. Appellant never fired

his attorney, never brought a formal motion notifying the court that he was changing counsel, and ultimately proceeded to trial with his initial attorney representing him. Appellant's contention that the district court somehow pressured him into retaining an attorney against his will is unconvincing.

Appellant argues that the district court erred by failing to intervene when the conflict between him and his attorney had grown so contentious that he could not receive effective counsel. Appellant first cites to the U.S. Supreme Court's decision in *Gonzalez-Lopez*, claiming that the decision analyzes a conflict between counsel and a defendant so severe that it deprived the defendant of his Sixth Amendment right to effective counsel. 548 U.S. 140, 126 S. Ct. 2557. *Gonzalez-Lopez* involved a defendant's decision to hire an out-of-state attorney as co-counsel to his originally retained counsel, and a district court's repeated refusal to allow the out-of-state attorney to appear pro hac vice. 548 U.S. at 142-43, 126 S. Ct. at 2560. Here, appellant never presented the district court with another attorney that he wished to represent him, and the district court never denied multiple motions made by appellant to frustrate his choice of counsel. Appellant was not prevented from choosing his counsel as was the defendant in *Gonzalez-Lopez*.

Appellant next cites to a Sixth Circuit Court of Appeals case, *U.S. v. Iles*, asking this court to adopt a three-part test to analyze whether a conflict between a client and his counsel is so serious that it renders further assistance of counsel ineffective. 906 F.2d 1122, 1131, n.8 (6th Cir. 1990). Appellant also cites to a Ninth Circuit case as an example of this analysis. *See U.S. v. Walker*, 915 F.2d 480 (9th Cir. 1990), *overruled on other grounds by U.S. v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). Both cases involved

indigent defendants seeking to substitute counsel. *See Iles*, 906 F.2d at 1130; *Walker*, 915 F.2d at 481-82. Appellant is not indigent and never made a formal motion to substitute or discharge his counsel. Appellant's right to the counsel of his choice was not violated.

Affirmed.