STATE OF MINNESOTA
IN COURT OF APPEALS
A10-840

State of Minnesota,
Respondent,

vs.

Justin Allen DeGrote,
Appellant.

Filed March 29, 2011
Affirmed
Hudson, Judge

Renville County District Court
File No. 65-CR-09-495

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

Aaron D. Walton, Sacred Heart City Attorney, Olivia, Minnesota (for respondent)

Douglas D. Kluver, Nelson, Oyen, Torvik, Attorneys at Law, Montevideo, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Toussaint, Judge; and Hudson, Judge.

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

HUDSON, Judge

The appellant challenges his conviction of petty-misdemeanor disorderly conduct. After carefully reviewing the record, we conclude that sufficient evidence supports the conviction, and we affirm.

FACTS

This case arises out of an altercation that occurred at the Sacred Heart Municipal Liquor Store (bar) during the late evening and early morning of November 13 and 14, 2009. Appellant Justin DeGrote was charged with two counts of disorderly conduct, one for "brawling or fighting" in violation of Minn. Stat. § 609.72, subd. 1(1) (2008) (count 1), and another for "engag[ing] in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others" in violation of Minn. Stat. § 609.72, subd. 1(3) (2008) (count 2). The charges were amended to petty misdemeanors and tried to the district court, which determined that appellant was guilty of count 1 and not guilty of count 2 and ordered appellant to pay a fine.

At trial, appellant, several bar patrons, the bartender, and the responding officer testified. The district court found that all of the eyewitnesses from the bar, with the exception of the bartender, had consumed a significant amount of alcohol before the altercation.

There was divergent evidence about the events that led to the altercation. Appellant testified that, for most of the evening, he kept to himself, and he was not bothering anyone. But the district court credited several witnesses who testified that appellant was trying to pick a fight with an acquaintance who was also at the bar. The district court also relied on video surveillance footage, which showed appellant approaching the acquaintance before both of them exited the bar.

There was also divergent evidence about the altercation itself. Appellant testified that when he went outside, a bar patron told him to leave and several bar patrons proceeded to punch him. But the district court appears to have credited the testimony of several witnesses, including the bartender, who testified that once appellant came outside, he was yelling at those around him, swinging his arms, and throwing punches. The district court found that even though the details of the altercation were unclear, appellant encouraged the altercation and participated in it. It is not clear whether the district court relied on the video surveillance footage, which captured only part of the altercation, in making its findings.

Appellant was the only person injured during the altercation, and he claimed self-defense. The district court rejected this argument. The district court agreed that others were involved in the altercation but did not believe appellant's claim that he was trying to defend himself. The district court instead found that appellant could have left the premises and avoided the altercation entirely.

This appeal follows.

D E C I S I O N

"When reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the verdict and assume that the fact finder rejected any evidence inconsistent with the verdict." *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). This court will not disturb the verdict "if the [factfinder] 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.* In evaluating the

verdict, this court recognizes that "[a]ssessing witness credibility and the weight given to witness testimony is exclusively the province of the [factfinder]." *Id.* The court "may assume that the [factfinder] credited the state's witnesses and rejected any contrary evidence." *Id.*

An individual is guilty of disorderly conduct if he "engages in brawling or fighting" and "know[s], or ha[s] reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace." Minn. Stat. § 609.72, subd. 1(1). "[W]hether particular conduct or words or acts are or are not disorderly must at all times be dependent upon the facts of each particular case and the circumstances that surround the incident." *State v. Reynolds*, 243 Minn. 196, 201, 66 N.W.2d 886, 890 (1954). "The question of whether or not the offense has in fact been committed depends upon the circumstances of the situation." *Id.*

Initially, appellant contends that he cannot be guilty of disorderly conduct because he was the only individual who suffered physical injuries during the altercation. This fact is undisputed, but it does not follow that because appellant was the only person injured in the fight that he did not participate in it. There is sufficient evidence to support the district court's finding that appellant was encouraging the altercation and participating in it.

Appellant also argues that the video surveillance footage shows that he did not commit disorderly conduct. Under certain circumstances, a video recording must be treated as "[p]ositive testimony of [an] unimpeached witness." *State v. Elmourabit*, 356 N.W.2d 80, 84 (Minn. App. 1984). But here, the video surveillance footage shows only

part of the night's events and therefore does not provide irrefutable evidence regarding the altercation.

The footage of the inside of the bar shows appellant's activities for only a few minutes before he went outside. But several witnesses testified that, for much of the night, appellant was trying to pick a fight with other patrons. And contrary to appellant's descriptions, the video footage does not clearly show that appellant was keeping to himself. Instead, it shows appellant approaching his acquaintance and leaving the bar with him. The district court relied on this image to find that appellant was attempting to start a fight, and it was entitled to do so.

Similarly, the footage of the outside of the bar only shows part of the altercation. Most significantly, it does not show the first several minutes of the altercation during which several witnesses testified that appellant was yelling at other patrons, swinging his arms, and throwing punches. Based on this testimony, the district court found that appellant had indicated his desire to fight, had encouraged those around him to fight, and had engaged in fighting behavior. Again, the evidence is sufficient to support the district court's findings.

Appellant next contends that the testimony of the bartender, the only eyewitness who was sober during the incident, was inconsistent with regard to appellant's behavior outside the bar. During direct examination, the bartender testified that once appellant went outside, appellant was yelling, pushing people, and throwing punches, but on cross-examination, the bartender clarified that he did not see appellant punch the acquaintance, but he did see appellant hit several other people, including "girls," whose names he did

not know. This testimony is not inconsistent, but even if it were, "all inconsistencies in the evidence are . . . resolved in favor of the state" and would not undermine the district court's findings. *State v. Budreau*, 641 N.W.2d 919, 929 (Minn. 2002) (quotation omitted).

Appellant further argues that the district court was not entitled to reject his claim of self-defense. "[S]elf-defense is applicable to a charge of disorderly conduct where the behavior forming the basis of the offense presents the threat of bodily harm." *State v. Soukup*, 656 N.W.2d 424, 429 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003). The elements of self-defense are: "(1) an absence of aggression or provocation; (2) an actual and honest belief that imminent death or great bodily harm would result; (3) a reasonable basis existed for this belief; and (4) an absence of reasonable means to retreat or otherwise avoid the physical conflict." *Id.* at 428. Appellant contends that there was no evidence that he was the aggressor or that he had a reasonable means to retreat. But several witnesses testified that once appellant came outside, he began pushing people and throwing punches. And the bartender testified that before the altercation began, he told appellant to leave, but appellant declined to do so. The district court had sufficient evidence to find that appellant was not defending himself and that he could have left the premises and avoided the altercation altogether.

Finally, appellant contends that he was subject to selective prosecution because none of the other individuals involved in the altercation were prosecuted. But to establish a prima facie case of selective prosecution, the defendant bears the burden of demonstrating that the state's decision to prosecute was based on "impermissible

considerations [such] as race [or] religion, or the desire to prevent his exercise of constitutional right." *State v. Russell*, 343 N.W.2d 36, 37 (Minn. 1984) (quotation omitted). Appellant has produced no such evidence and therefore cannot prevail on a selective-prosecution defense.

Affirmed.