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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-124**

Kenneth William Parris, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 15, 2011
Affirmed
Hudson, Judge**

Goodhue County District Court
File No. 25-CR-08-3794

David W. Merchant, Chief Appellate Public Defender, Theodora Gaitas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Stephen Betcher, Goodhue County Attorney, Stephen F. O'Keefe, Assistant County Attorney, Red Wing, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant challenges the summary denial of his petition for postconviction relief, arguing that the evidence presented at trial was insufficient to sustain his convictions of first-degree aggravated robbery, fifth-degree assault, and theft. We affirm.

FACTS

During the early morning hours of September 5, 2008, A.F. was assaulted and his wallet stolen outside Andy's Bar in Red Wing. Shortly thereafter, appellant Kenneth William Parris was arrested and charged with first-degree aggravated robbery, fifth-degree assault, and theft. At appellant's bench trial, the main issue was whether appellant was, in fact, the assailant.

On the night of September 4, 2008, A.F. was at Andy's Bar, where he spent time with friends and drank several alcoholic drinks. A.F. testified that a patron who was sitting at the bar offered him potato chips. A.F. also testified that, later in the evening, when he went outside to smoke a cigarette, the patron who had offered him chips was also outside, initiated a friendly conversation, but then suddenly struck A.F. in the head, knocked him to the ground, took his wallet, and ran east on foot.

A.F. testified that, once he returned to the bar, he identified the assailant as the patron who had been sitting at the bar, and he asked if anyone knew the patron's name. According to A.F., the bar owner identified the patron as appellant. At trial, A.F. identified appellant as the assailant.

The bar owner and bartender testified that, toward the end of the night, appellant told the bartender that he was going outside but asked a bar employee to hold his pitcher of beer because he would be returning shortly. The bartender testified that she saw both appellant and A.F. go outside, but that she only saw A.F. return. The bartender testified that A.F. stated that “he got jumped by the guy sitting next to him.” The bar owner did not recall A.F. making this statement.

At trial, the responding officer recounted A.F.’s description of the assault, which was consistent with A.F.’s trial testimony. The responding officer testified that A.F. was not sure what the assailant looked like, but that he identified the assailant as the patron who had sat near him at the bar and had offered him chips earlier in the evening. The responding officer also testified that the bar owner identified the patron as appellant and described him as wearing a striped polo shirt and tattoos on his forearms. Based on these descriptions, the responding officer determined that appellant was likely the man he had seen running east on Sixth Street just before he was dispatched to Andy’s Bar.

Two investigating officers arrived at the bar but were quickly dispatched to search for appellant. The investigating officers found appellant in the vicinity of his siblings’ houses, which are located a few blocks east of Andy’s Bar. The officers informed appellant that he was a suspect in an assault. Appellant denied any involvement, stating that he did not need any money and that he would have had blood on his shirt and shoes if he had assaulted someone.

The responding officer brought A.F. to the location where appellant was detained. A.F. identified appellant as the person who assaulted him, and the responding officer

identified appellant as the person he had seen running away from Andy's Bar. Appellant was arrested and taken into custody.

Appellant testified that he arrived at the bar around midnight and that he ordered a pitcher of beer. Appellant testified that he only talked to the bar owner and the bartender and that he did not recall sharing his chips with anyone else. Appellant also testified that, when he decided to leave, he pushed his pitcher away from him and did not ask the bartender to save it for his return. Appellant testified that he left the bar and walked toward his brother's home; he did not recall running across the street or seeing a squad car. Appellant testified that after he talked to his brother for approximately fifteen to twenty minutes, he walked across the street to his sister's house. Appellant denied any involvement in the assault or robbery.

Appellant's trial testimony was largely consistent with his statements to police, which were recorded and played at trial. Appellant admitted, however, that in his first interview, he stated that he had gone inside his brother's house, whereas in his second interview, he stated that he stood outside his brother's house and spoke to his brother through a window.

The district court found that appellant was the assailant and that he was guilty of the charged offenses. The district court acknowledged that A.F. was the only witness to the assault, that he was intoxicated and disoriented, and that his show-up identification was unreliable. But the district court credited A.F.'s testimony that, before and during the assault, he recognized the assailant as the patron who sat near him and offered him chips, and that, based on these observations, A.F. was able to identify appellant as the

assailant at trial. The district court also found that A.F.'s testimony was corroborated by that of the bartender, who testified that, immediately after A.F. returned to the bar, he stated that he had been assaulted by the patron who sat next to him and gave him chips. The district court also discredited appellant's account of the events because of inconsistencies in his testimony.

Appellant did not directly appeal his convictions, but instead brought a petition for postconviction relief. Appellant argued that the evidence presented at trial was insufficient to sustain the convictions. The district court summarily denied the petition. The district court concluded that the record contained ample direct and circumstantial evidence to uphold the convictions. This appeal follows.

D E C I S I O N

The district court must hold an evidentiary hearing on a petition for postconviction relief unless the petition, files, and records conclusively show that no relief is warranted. Minn. Stat. § 590.04, subd. 1 (2010). The allegations in a postconviction petition must amount to "more than argumentative assertions without factual support." *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995). A hearing is not necessary unless the allegations are sufficient to entitle the petitioner to the relief requested. *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990). In reviewing the denial of a postconviction petition, this court reviews questions of law de novo and findings of fact for an abuse of discretion. *Arredondo v. State*, 754 N.W.2d 566, 570 (Minn. 2008).

Appellant argues that he is entitled to postconviction relief because A.F.'s in-court identification was unreliable and therefore insufficient to sustain the convictions. When

reviewing a claim of insufficient evidence, this court views the evidence in the light most favorable to the verdict and assumes that the factfinder rejected any evidence inconsistent with the verdict. *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). The verdict will not be disturbed if the factfinder could have found, after giving due regard to the presumption of innocence and the requirement of proof beyond a reasonable doubt, that appellant was guilty of the offense. *State v. Crow*, 730 N.W.2d 272, 280 (Minn. 2007).

An appellate court must defer to the district court's credibility determinations and will reverse the district court's findings of fact only if they are clearly erroneous. *State v. Berkovitz*, 705 N.W.2d 399, 407 (Minn. 2005). In its findings, the district court acknowledged that A.F. was intoxicated during the assault and that A.F.'s show-up identification was tainted. But the district court found credible A.F.'s testimony and the bartender's corroborating testimony that, after the assault but before the show-up, A.F. told those around him that the assailant was the patron who had been sitting near him earlier that night. Based on this testimony, the district court was entitled to find that, even before the show-up occurred, A.F. could describe the assailant based on his earlier interactions with him, and that A.F.'s identification of appellant at trial was based not on the show-up, but on his interactions with appellant before and during the assault. *Cf. State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995) (even unnecessarily suggestive identification procedure can produce reliable evidence if identification has "adequate independent origin").

Appellant responds that, even though the district court stated that it was discrediting the show-up identification and was not taking it into account, its findings

suggest otherwise. In explaining why it was crediting A.F.'s in-court identification, the district court noted that "[A.F.] confirmed that he knew [that the assailant] was the same person that they had in the squad car by being able to note the clothing and tattoos about [appellant's] arms." Based on this statement, it appears that the district court may have used the show-up identification to support its finding that A.F.'s in-court identification was credible. But in reading the district court's order as a whole, it is clear that the district court decided to credit A.F.'s in-court identification based on A.F.'s testimony regarding his recollections of the assailant before and during the assault and because of the bartender's corroborating testimony that A.F. clearly described the assailant immediately after the assault. For these reasons, to the extent the district court relied on the show-up identification in making its findings, any error was harmless beyond a reasonable doubt. *See State v. Anderson*, 657 N.W.2d 846, 852 (Minn. App. 2002) (applying harmless-error rule to erroneously admitted police show-up evidence).

Viewing the evidence as a whole, we conclude that there was sufficient evidence to sustain the convictions. The record contains both direct and circumstantial evidence that appellant assaulted A.F. The video surveillance footage showed that appellant was the only patron who left the bar shortly before A.F. The bar owner testified that, based on A.F.'s description of the assailant, he believed that the assailant was likely appellant. The responding officer also testified that, immediately before he responded to the dispatch to Andy's Bar, he saw a man matching the assailant's description running away from the bar and that, during the show-up, he was able to confirm that the man he had

seen running away from the bar was appellant. And most significantly, A.F. credibly identified appellant as the assailant at trial.

Affirmed.