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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1605**

State of Minnesota,
Respondent,

vs.

Dwayne Stephen Caldwell,
Appellant.

**Filed August 27, 2012
Affirmed
Bjorkman, Judge**

Olmsted County District Court
File No. 55-CR-09-2762

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Senior Assistant County
Attorney, Rochester, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and
Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

BJORKMAN, Judge

On appeal from his conviction of two counts of second-degree assault with a dangerous weapon, appellant argues that (1) the evidence is insufficient to support the verdict, (2) the district court abused its discretion by imposing consecutive sentences, and (3) the district court judge erred by failing to disqualify herself because she presided over the trial of another person charged in connection with the incident. We affirm.

FACTS

On August 15, 2008, Carlton Fogan and three friends went to a bar where they got into an argument with A.T. The argument quickly escalated, and Fogan and his companions went to the home of A.T.'s aunt, Cr.H. After a brief confrontation, they left. About 20 minutes later, Fogan returned with a passenger later identified as appellant Dwayne Caldwell. After arguing for several minutes with Cr.H. and her daughter, Ch.H., Caldwell got out of the car and threatened to shoot them. Several gun shots were fired, but no one was injured and everyone left the scene. Police officers later found Caldwell in the vicinity of the shootings. Caldwell was charged with three counts of second-degree assault with a dangerous weapon. Fogan also faced criminal charges related to the shootings.

At trial, none of the people present at the scene identified Caldwell as the shooter. But the state submitted testimony from Fogan's trial and statements made during photo lineups during which two eyewitnesses positively identified Caldwell as the shooter. The first eyewitness, J.B., denied any present recollection of the shooter's identity, but

admitted that he truthfully testified at Fogan's trial that Caldwell was the shooter. Likewise, Ch.H. testified that she did not remember the shooter but had testified at Fogan's trial that Caldwell pointed a gun at her and repeatedly asked Fogan, "[S]hould I shoot this b---h?" immediately before the shooting. Ch.H. also admitted that she unequivocally identified Caldwell during a photo lineup but claimed that she was actually uncertain at that time and identified Caldwell because she was angry and had heard rumors that he was the shooter. The transcript from the photo lineup confirms Ch.H.'s unequivocal identification of Caldwell as the shooter.

The jury found Caldwell guilty of two of the charged offenses. The district court imposed consecutive 36-month sentences. This appeal follows.

D E C I S I O N

I. Sufficient evidence supports the verdict.

When reviewing a sufficiency-of-the-evidence challenge, we carefully analyze the record "to determine whether the fact-finder could reasonably find the defendant guilty of the offenses charged based on the facts in the record and the legitimate inferences that can be drawn from them." *State v. Stone*, 767 N.W.2d 735, 745 (Minn. App. 2009), *aff'd*, 784 N.W.2d 367 (Minn. 2010). "In doing so, we view the evidence in the light most favorable to the verdict and assume that the fact-finder believed the evidence supporting the verdict and disbelieved any contrary evidence." *Id.* "A jury verdict may be based on the testimony of a single eyewitness." *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009). Where an eyewitness makes a statement regarding the crime prior to trial but later recants, the jury is entitled to credit the prior statement over any later statements to the

contrary. *State v. Washington*, 725 N.W.2d 125, 137-38 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007).

Caldwell argues that the evidence is insufficient to support the verdict because, at trial, none of the eyewitnesses identified him as the shooter. We disagree. The state presented evidence that two eyewitnesses had identified Caldwell as the shooter prior to trial during a photo lineup and in sworn testimony during Fogan's trial. These prior statements were admissible as substantive evidence and not merely for impeachment. *See* Minn. R. Evid. 801(d)(1)(A), (C). The jury was entitled to credit the eyewitnesses' prior identifications over their testimony at trial. These eyewitness accounts alone are sufficient to support the verdict.

Moreover, there was circumstantial evidence of Caldwell's guilt. First, a forensic examination revealed that shell casings found at the scene had been fired from a .40 caliber glock that belonged to Fogan's girlfriend. An examination of the DNA sample found on the glock revealed that 96.7% of the general population (including Fogan, Fogan's girlfriend, and two other suspects) could be excluded as contributors to the DNA sample, but Caldwell could not. Second, a witness testified that, shortly before the shooting, he heard Fogan yelling into his cell phone, "I'm not kidding. These n--gers got to pay. I need to get my forty. And I'll burn their f--king house down. . . . I'm walking down the middle of the street. I need to be picked up," and he saw a car stop to pick up Fogan. Phone records revealed that Fogan called Caldwell around the time that the witness heard this conversation. On this record, we conclude that ample evidence supports the jury's determination that Caldwell committed the assaults.

II. Caldwell's pro se arguments lack merit.

In a pro se supplemental brief, Caldwell argues that the district court abused its discretion by imposing consecutive sentences based, in part, on the fact that Fogan received consecutive sentences. We are not persuaded. “We will not reverse a district court’s decision to impose a consecutive sentence unless there has been a clear abuse of discretion.” *Neal v. State*, 658 N.W.2d 536, 548 (Minn. 2003). A district court does not abuse its discretion by considering the sentence of an accomplice or co-defendant during sentencing. *See State v. Vazquez*, 330 N.W.2d 110, 112 (Minn. 1983). More importantly, the sentencing guidelines permit consecutive sentences for separate counts of second-degree assault with a dangerous weapon. Minn. Sent. Guidelines II.F.2.b., VI (2008). We discern no abuse of discretion.

Caldwell also asserts that the district court judge should have disqualified herself because she presided over Fogan’s trial. We disagree. Whether a judge has violated the Code of Judicial Conduct is a question of law, which we review de novo. *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005). A judge should disqualify herself if her impartiality might reasonably be questioned, such as when she possesses “personal knowledge of disputed evidentiary facts.” Minn. Code Jud. Conduct 3D(1). But “personal knowledge” does not include knowledge that a judge acquires through her involvement in other court proceedings. *See Dorsey*, 701 N.W.2d at 247. No one could reasonably question the district court judge’s impartiality based on the fact that she presided over Fogan’s trial.

Affirmed.