STATE OF MINNESOTA
IN COURT OF APPEALS
A11-214

State of Minnesota,
Respondent,

vs.

David James Bower, Jr.,
Appellant.

Filed December 12, 2011
Affirmed
Stauber, Judge

Mahnomen County District Court
File No. 44CR10170

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

Darlene Rivera, Mahnomen County Attorney, Mahnomen, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bradford S. Delapena, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

STAUBER, Judge

Following a trial, a jury acquitted appellant of attempted first-degree murder, but found him guilty of attempted second-degree murder and felon in possession of a firearm.

On appeal, appellant argues that the evidence is insufficient to sustain his conviction of attempted second-degree murder. We affirm.

FACTS

In March 2010, appellant David James Bower, Jr. was charged with attempted first-degree murder, attempted second-degree murder, felon in possession of a firearm, and fifth-degree controlled-substance crime. The district court subsequently granted appellant's motion to sever for trial the charge of fifth-degree controlled-substance crime, and the matter proceeded to a jury trial on the other three counts of the complaint.

At trial, evidence and testimony were provided establishing that at about 11:00 a.m. on March 5, 2010, S.C., began partying with people at H.J.'s apartment on Main Street in Mahnomen. According to S.C., she drank a considerable amount of alcohol throughout the day and evening and experienced a "blackout" at some point in the afternoon. S.C. testified that as the evening wore on, people left the apartment and she fell asleep on a couch in the living room.

S.C. was awakened by an individual bursting into the apartment and then punching her in the head and body. S.C. identified the individual as appellant, whom she described as an acquaintance. According to S.C., she attempted to fight back, but appellant knocked her to the floor. When S.C. tried to get up, appellant produced a handgun and, from about a foot or two away, pointed it at her head. As S.C. started to go from a kneeling to a standing position, she anticipated that appellant was going to shoot. She rolled and ducked out of the way as appellant pulled the trigger. The bullet hit S.C. in her

left shoulder and arm. S.C. then "hopped" out of the window and eventually went to the residence of B.T. and M.K.

B.Y. testified that at approximately 4:30 a.m. on March 6, 2010, she was awakened by her dog barking. B.Y., who lives in an apartment on Main Street, testified that she heard somebody trying to quiet her dog and then heard a loud noise. According to B.Y., she thought someone was trying to break in, so she called 911. B.Y. testified that she then looked out her window and saw a man wearing an orange shirt, dark blue jeans, and possibly a black hat, run from the front door of her building and scale a six-foot fence across the street. B.Y. stated that a few seconds later, the man jumped back over the fence and ran down the street. Later, while talking with the officer who responded to her 911 call, B.Y. noticed a black handgun magazine near the back steps of her apartment, which police seized as evidence.

Also at about 4:30 a.m., three Mahnomen County deputy sheriffs, Michael Bunker, Scott Brehm, and Kyle Lusignan, were sitting in their parked squad cars in the vicinity of Main Street. As the deputies were conversing, they heard what sounded like a gunshot and left to investigate. Deputy Brehm drove down a nearby alley, where he saw an individual wearing a red shirt and blue jeans duck behind a snow bank. When Deputy Brehm ordered the man to stop, the man fled and jumped over a nearby fence.

Deputy Bunker testified that as he was traveling down Main Street, he heard the dispatcher's report of the possible burglary at B.Y.'s apartment and then observed a man descend from the fence and run down Main Street. Deputy Bunker pursued the man and cornered him in a lot that had buildings on three sides. After cornering the man, Deputy

Bunker observed the man throw something onto the roof of one of the buildings, drop to his knees, and reach into a snow bank. The man was arrested and identified as appellant. Police later recovered a black handgun from the roof of a building adjacent to where appellant was apprehended.

After apprehending appellant, Deputy Bunker received a call from dispatch informing him that two females in an apartment on Main Street wanted to talk to him. Upon his arrival at the apartment, Deputy Bunker was informed of S.C.'s presence and that she had been shot. S.C. had an active warrant for her arrest and was on probation for third-degree assault. Consequently, S.C. refused to answer Deputy Bunker's questions and was not willing to go to the hospital.

Deputy Bunker eventually convinced S.C. to let him take her to the hospital. According to Deputy Bunker, S.C. "appeared to be extremely intoxicated" and repeatedly told him that "they were out there and they were going to get her and she did not wish to make a taped statement." At the hospital, a physician's assistant stitched up S.C.'s wound. But when Deputy Bunker momentarily left the treatment room to use his radio, S.C. fled the hospital.

After leaving the hospital, S.C. returned to B.T.'s apartment. Deputy Brandon Larson arrived at the apartment to talk to B.T. During the course of his investigation, Deputy Larson discovered S.C. hiding in the closet. S.C. was then arrested for two outstanding warrants and transported to the law-enforcement center.

At the law-enforcement center, S.C. initially refused to speak with police. But according to Deputy Larson, S.C. eventually agreed to tell the officers "everything that

happened" if law enforcement would release her from the warrants. Deputy Larson testified that the proposition was entirely S.C.'s idea and that at the time her statement was taken, the deputies had never mentioned appellant's name or informed her of the status of the investigation.

S.C. told Deputy Larson that she had been drinking and partying at H.J.'s apartment on Main Street. S.C. also told Deputy Larson that later in the evening, appellant and another individual showed up at the apartment. S.C. further informed Deputy Larson that appellant started fighting with her, produced a gun, and shot her. Although S.C.'s statement to Deputy Larson was generally consistent with her trial testimony, S.C. admitted at trial that her testimony was inconsistent with her statement to Deputy Larson in the following respects: (1) she told Deputy Larson that the shooting took place in a bedroom, but testified that the shooting took place in the living room; (2) S.C. testified that she was kneeling when the gun went off, but initially told police that she was standing; and (3) S.C. told police that appellant put the gun against her head, but testified that appellant held the gun a foot away from her head.

Deputies transported appellant to the law-enforcement center after his arrest. There, appellant was told that he would undergo a gunshot-residue test. Before the technician arrived, appellant asked to use the bathroom. Mahnomen County Sheriff Douglas Krier testified that he told appellant that he would be allowed to do so, but specifically instructed appellant not to get his hands wet at all so as not to compromise the impending gunshot-residue test. Sheriff Krier testified that although he accompanied appellant to the urinal, appellant urinated on his hand and then "stuck his hand in the

toilet and swished his hand around." Sheriff Krier told appellant to "knock it off," but appellant repeated this conduct when Krier subsequently allowed appellant to use the bathroom again later that morning.

Investigator Paul Osowski testified that the black handgun recovered on the roof adjacent to where appellant was arrested was a semi-automatic Taurus 9mm pistol. According to Investigator Osowski, the gun contained no magazine, but had one spent shell casing still in the chamber indicating that a shell had been fired. Investigator Osowski also testified that the partially-loaded magazine found outside of B.Y.'s apartment had "Taurus nine-millimeter written on it." Investigator Osowski further testified that upon investigating H.J.'s apartment where the alleged shooting occurred, he discovered a bullet hole in a wall in the dining area and retrieved an expended bullet from inside the adjacent closet. Investigator Osowski opined that the trajectory to the bullet hole and the angle of the wound on S.C.'s arm were "consistent" with S.C.'s trial testimony, but he admitted that the location of the bullet hole was inconsistent with S.C.'s initial statement to law enforcement that the shooting occurred in the bedroom. Finally, BCA forensic tests determined that the Taurus 9mm handgun found on the roof had fired the bullet found in H.J.'s apartment, and that the firearm had malfunctioned due to operator error by failing to eject the spent shell casing from its chamber.

The jury acquitted appellant of attempted first-degree murder, but found him guilty of attempted second-degree murder and felon in possession of a firearm. Appellant was sentenced to an executed term of 203 months in prison for attempted second-degree

murder and to a concurrent term of 60 months in prison for felon in possession of a firearm. This appeal followed.

D E C I S I O N

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Minnesota law provides that a conviction of second-degree (intentional) attempted murder requires the state to prove that the defendant "does an act which is a substantial step toward" causing "the death of a human being with intent to effect the death of that person or another." Minn. Stat. §§ 609.17, subd. 1, 609.19, subd. 1(1) (2008).

Appellant argues that his conviction of attempted second-degree murder should be reversed because the record lacks sufficient evidence that he intended to kill S.C. But intent may be inferred from the actions of the defendant in light of the surrounding circumstances. *State v. Andrews*, 388 N.W.2d 723, 728 (Minn. 1986). And "[t]his court has held that a single shot, even one fired from a moving car, may be sufficient to

establish an intent to kill." *State v. Oates*, 611 N.W.2d 580, 587 (Minn. App. 2000) (citing *State v. Chuon*, 596 N.W.2d 267, 271 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999)), *review denied* (Minn. Aug. 22, 2000).

Here, S.C. testified that appellant produced a gun, pointed it at her head, and pulled the trigger. The record reflects that S.C. was then shot in the arm. According to S.C., she avoided a shot to the head only because she quickly moved when she saw appellant start to pull the trigger. Although the state did not present any evidence of motive, the logical inference from the facts presented at trial is that appellant intended to kill S.C. when he pointed the gun at her head and pulled the trigger. *See Andrews*, 388 N.W.2d at 728 (stating that intent may be inferred from the defendant's actions). Therefore, the record contains sufficient evidence of intent.

Appellant also contends that the evidence is insufficient to support a finding of guilt because S.C.'s testimony was "fatally afflicted by impaired perception, inability to remember, bias, and lack of candor." Specifically, appellant argues that S.C.'s testimony at trial conflicted with her earlier statements to police regarding (1) whether the shooting took place in the bedroom or the living room; (2) whether she was kneeling or standing when she was shot; and (3) whether appellant held the gun to her head or pointed it at her from a foot or two away. Appellant also points out that S.C.'s perception was impaired at the time of the alleged shooting due to her intoxication, and that S.C. is a convicted felon who only agreed to talk with police after they promised to release her from the outstanding warrants. Thus, appellant argues that based on S.C.'s lack of credibility, "no jury, acting with due regard for the presumption of innocence and the requirement of

proof beyond a reasonable doubt, could rely on the testimony of [S.C.] to find appellant guilty of attempted intentional second-degree murder."

We disagree. Although there were inconsistencies in S.C.'s testimony, "[i]nconsistencies in the state's case are not grounds for reversing the jury verdict." *State v. Robinson*, 604 N.W.2d 355, 366 (Minn. 2000). And inconsistencies in witness testimony "are a sign of human fallibility and do not prove testimony is false, especially when the testimony is about a traumatic event." *State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. June 29, 2004).

Here, the inconsistencies in S.C.'s story of the events involve aspects that are not critical to the finding of guilt, and tend to show fallibility in light of the traumatic nature of the event. And, despite the inconsistencies, S.C.'s testimony about the critical facts was consistent; she testified that appellant burst into the apartment, assaulted her, produced a gun, aimed it at her head, and shot her. In addition to S.C.'s testimony, the jury heard testimony and evidence regarding appellant's attempt to flee the scene and his attempt to dispose of the firearm. The jury also heard evidence that the bullet found in H.J.'s apartment was fired by the handgun that appellant threw onto the roof. And although the jury heard testimony that S.C. was a convicted felon who initially did not want to cooperate with police, the jury also heard testimony of appellant's actions after being told that he would undergo a gunshot-residue test. Specifically, the jury heard testimony that after being apprised of the imminent test, appellant asked to use the bathroom, urinated on his hands, and then swished them in the toilet bowl despite being told not to get his hands wet. If believed, S.C.'s testimony, along with the additional

evidence and testimony presented at trial provided a valid basis for the jury to reasonably conclude that appellant was guilty of attempted second-degree murder. The jury found S.C.'s version of the events to be credible and disbelieved any evidence and testimony to the contrary. The jury is in the best position to assess witness credibility and this court defers to the jury's credibility determinations. *See State v. Profit*, 591 N.W.2d 451, 467 (Minn. 1999). Therefore, in light of our deference to the jury's assessment of witness credibility, sufficient evidence exists to support appellant's conviction of second-degree attempted murder.

Affirmed.