STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1597

State of Minnesota,
Respondent,

vs.

Michael Vaclav Sedlak,
Appellant.

Filed September 3, 2013
Affirmed
Hudson, Judge

Anoka County District Court
File No. 02-CR-12-1501

Lori Swanson, Anthony C. Palumbo, Anoka County Attorney, M. Katherine Doty, Assistant County Attorney, Anoka, Minnesota (for respondent)

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

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

HUDSON, Judge

Appellant challenges his conviction of domestic assault, arguing that the admissible evidence was insufficient to support his conviction and that he received ineffective assistance of counsel. Because the evidence was sufficient to support

appellant's conviction, and because the record is not sufficient to consider appellant's ineffective-assistance-of-counsel claim on direct appeal, we affirm.

FACTS

On February 28, 2012, Anoka County 911 dispatch received a call from D.K.A. about her husband, appellant Michael Sedlak. She stated that she had found pornography in the house and wanted him to stay away from their children. The dispatcher asked if there had been a physical or verbal altercation, and D.K.A. stated, "He's chasing me, yelling and screaming." She then stated that she was in her room and had to go because "I don't want him to [catch] me while I'm talking to you."

Officers Williams, Magana, and Pankonin responded to the 911 call. By the time they arrived at the house, appellant had left in his vehicle. Officer Magana testified that D.K.A. was distraught, crying, and "kept putting her hands to her face . . . and looking down and pacing." She told officers that she was upset because she had found some pornography of her husband's that was now strewn across the living room floor.

D.K.A. told officers that she had been assaulted by her husband. Officer Williams testified that D.K.A. "claimed that [appellant] pushed her, punched her and strangled her." Officer Magana testified that D.K.A. told him that she had been punched by appellant when she came out of her room and that as a result she had pain in her right cheek. Officer Magana also testified that D.K.A. stated that appellant had gotten on top of her, strangled her, and told her, "I am going to kill you and the children."

Officer Magana took three pictures of D.K.A. to show swelling in her right cheek allegedly caused by appellant's assault, but Officer Magana observed no other physical

indications that D.K.A. had been assaulted. She told officers that this was not the first time she had been assaulted by appellant. The officers could not determine if there were physical indications of strangulation because D.K.A. would not remove her headdress when requested.

Appellant was charged with three counts arising from the incident: (1) making felony terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2010); (2) felony domestic assault by strangulation in violation of Minn. Stat. § 609.2247, subd. 2 (2010); and (3) misdemeanor domestic assault for "commit[ting] an act with intent to cause fear in a family or household member of immediate bodily harm or death" in violation of Minn. Stat. § 609.2242, subd. 1(1) (2010).

In April 2012, D.K.A. executed an affidavit stating that when she accused her husband of striking her, she was "suffering from a mental infirmity" that caused her "to become extremely agitated, and have audio and visual hallucinations. The genesis of this condition goes back to March of 2010 when I began suffering post-partum depression." D.K.A. stated that she was admitted to the psychiatric unit of a hospital two days after the incident. She concluded that she did not recall her husband choking her, that their argument did not become violent, and that her husband had "never physically, mentally, or emotionally abused [her]."

During appellant's bench trial in July 2012, D.K.A. testified that she had little memory of the events of February 28, including the argument with her husband or what she told the officers. She stated that her memory issues related to medication that she had been taking and that she was hospitalized two days after the incident due to her mental

health and issues with her medications. She testified that she believed the argument with appellant had related to her ongoing refusal to take her medications and appellant's efforts to help her. Yet D.K.A. stated emphatically that appellant did not hit her that evening, and had never struck her.

On the terroristic-threats and domestic-assault-by-strangulation counts, the district court found appellant not guilty, stating that the only evidence supporting those charges was appellant's uncorroborated statements to police that she had since recanted and that this was insufficient to prove appellant's guilt beyond a reasonable doubt. As to the domestic-assault charge, the district court found that D.K.A.'s testimony that she could not remember the incident and that appellant had never struck her was not credible. The district court then found that appellant had struck D.K.A., a family member, in the face "with the intent to cause her fear of immediate bodily harm," satisfying the elements of the offense. Appellant was sentenced to two years of probation and 90 days in jail, 87 of which were stayed. This appeal follows.

D E C I S I O N

I

Appellant argues that the evidence was not sufficient to support his conviction of domestic assault because the alleged victim recanted her original allegations and the conviction rested on the hearsay testimony of officers repeating those recanted allegations. When assessing the sufficiency of the evidence, we conduct a rigorous analysis of the record to determine whether the legitimate inferences drawn from the facts in the record reasonably support the conclusion that the defendant was guilty beyond a

reasonable doubt. *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). We view the evidence in the light most favorable to the conviction and assume that the fact-finder believed the state's witnesses and disbelieved evidence in conflict with the decision. *State v. Hokanson*, 821 N.W.2d 340, 353 (Minn. 2012), *cert. denied*, 133 S. Ct. 1741 (2013). Assessing witness credibility and assigning the weight to be given to witness testimony is within the exclusive province of the finder of fact. *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). In determining whether the evidence is sufficient to support a conviction, we apply the same standard of review to bench trials as we do to jury trials. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

A conviction of domestic assault – fear requires proof beyond a reasonable doubt that the defendant intended to cause fear of bodily harm or death. Minn. Stat. § 609.2242, subd. 1(1). Heightened scrutiny is applied whenever an element of the offense, such as intent, has been proven entirely by circumstantial evidence. *See State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010). But if an element is supported by direct evidence, heightened scrutiny need not be applied. *See State v. Flowers*, 788 N.W.2d 120, 133 n.2 (Minn. 2010) (concluding that the state presented direct evidence on each element of charged offense and therefore declining to apply heightened scrutiny).

Viewed in the light most favorable to the verdict, several findings of fact by the district court support appellant's conviction: D.K.A. told officers that appellant had pushed her, strangled her, threatened to kill her, and struck her in the face; in her 911 call, D.K.A. stated that appellant had chased her through the house, yelling and screaming; two officers testified that they observed an injury to D.K.A.'s right cheek; three

photographs showed swelling in D.K.A.'s right cheek; D.K.A. was upset when officers arrived at her house, and she "was unable to speak for approximately four minutes" before she could describe what had happened; and D.K.A. stated that this was not the first time she had been physically assaulted by appellant.

Appellant argues that there is insufficient evidence to show that appellant committed an act upon D.K.A. But the element may be reasonably inferred from the direct evidence of D.K.A.'s statements to the officers that she was chased, yelled at, and struck in the face. And while the district court did not find D.K.A.'s statements sufficient to prove appellant guilty beyond a reasonable doubt of the other two counts, that was due to a lack of corroboration. But the district court's finding that appellant committed an act upon D.K.A. in which he intended to cause fear of bodily injury was corroborated by the 911 call, D.K.A.'s emotional state when officers arrived, and the testimony and photographs documenting the injury to D.K.A.'s right cheek.

There is no support for appellant's assertion that, because D.K.A. later recanted her statements to police, those statements could not support appellant's conviction. Prior statements in which a witness implicates a defendant that are later recanted at trial are admissible as substantive evidence so long as the statements fall under one of the hearsay exceptions under rule 803. *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985); Minn. R. Evid. 803; *see also State v. Soukup*, 376 N.W.2d 498, 501 (Minn. App. 1985) (admitting statements from defendant's son to school authorities that were later recanted when the statements were admissible as substantive evidence under rule 803), *review denied* (Minn. Dec. 30, 1985).

Here, the district court concluded that D.K.A.'s statements were excited utterances under Minn. R. Evid. 803(2), and appellant does not challenge that holding on appeal. D.K.A.'s statements to the police on the date of the incident were therefore admissible as substantive evidence. And the recantation of those statements does not eliminate their probative value; it simply requires the fact-finder to make a credibility determination comparing D.K.A.'s affidavit and trial testimony with her statements to officers on the date of the offense. *See State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002) (stating that it is the province of the fact-finder to resolve inconsistent testimony and in doing so the fact-finder "is free to accept part and reject part of a witness's testimony"). The district court concluded that appellant's statements on the date of the incident, as recalled by officers present at the scene, were more credible than D.K.A.'s affidavit and trial testimony. This determination was within the province of the fact-finder, and we will not disturb it on appeal. *See Pendleton*, 759 N.W.2d at 909.

Appellant next argues that even if the evidence shows that appellant acted upon D.K.A., there is no evidence that he intended to cause fear of immediate bodily injury in D.K.A. But according to the district court's findings, appellant chased D.K.A. throughout the home, yelling and screaming, and ultimately struck her. A fact-finder may "infer that a person intends the natural and probable consequences of [his] actions." *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000). And although the victim experiencing fear is not an element of assault, evidence of actual fear may be relevant to a determination of a defendant's intent. *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998). The natural and probable consequence of screaming, yelling, and striking a

person is to cause fear in that person of immediate bodily injury. Coupled with D.K.A.'s distraught state and her statements that she was afraid of her husband, the evidence is sufficient to support the district court's finding that appellant intended to cause fear of immediate bodily injury.

And while the evidence supporting the intent element must be subjected to heightened scrutiny, we conclude that there are no rational inferences regarding appellant's intent that can be drawn from the circumstances proved—appellant's chasing D.K.A. while yelling, D.K.A.'s swollen and puffy cheek, D.K.A.'s statement that she was assaulted, her stated fear of appellant—that are inconsistent with guilt. *See Andersen*, 784 N.W.2d at 330. The evidence was therefore sufficient to support appellant's conviction of domestic assault.

II

In a supplemental pro se brief, appellant argues that he received ineffective assistance of counsel due to his attorney's inadequate preparation, heavy case load, failure to present favorable evidence and witnesses, and failure to properly advise him about the judge's predispositions before he waived his right to a jury trial. A claim of ineffective assistance of counsel that requires consideration of facts not in the trial record is properly raised in a postconviction petition and not on direct appeal. *State v. Jackson*, 726 N.W.2d 454, 463 (Minn. 2007); *State v. Green*, 719 N.W.2d 664, 674 (Minn. 2006). Dismissal of a claim of ineffective assistance of counsel on direct appeal does not prejudice a defendant's right to raise the argument in a postconviction proceeding. *Jackson*, 726 N.W.2d at 463. The record here is inadequate to consider appellant's claim

that he received ineffective assistance of counsel. We therefore dismiss appellant's ineffective-assistance-of-counsel claim, permitting him to raise the claim in a postconviction petition.

Affirmed.