STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2236

State of Minnesota,
Respondent,

vs.

Hector Perez, Jr.,
Appellant.

Filed November 25, 2013
Affirmed
Bjorkman, Judge

Waseca County District Court
File No. 81-CR-12-712

Lori Swanson, Attorney General, Karen B. Andrews, Assistant Attorney General, St. Paul, Minnesota; and

Paul Dressler, Waseca County Attorney, Waseca, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his fourth-degree assault and misdemeanor domestic-assault convictions, arguing that (1) the district court abused its discretion in denying his motion

for a continuance, (2) the district court erred in failing to give a voluntary-intoxication instruction, and (3) the evidence is not sufficient to establish demonstrable bodily harm. We affirm.

FACTS

On August 2, 2012, Officer Samuel McGinnis and Sergeant Scott Girtler of the Waseca Police Department responded to S.H.'s report that her ex-boyfriend, appellant Hector Perez, Jr., was physically violent toward her. Perez ran out of the apartment, but the officers stopped him in a nearby parking lot. His parents were nearby, heard the commotion, and came over to see what was happening. Perez was uncooperative and struggled when the officers tried to put him in the back of the squad car. During the struggle, Perez kicked Officer McGinnis in the abdomen. Officer McGinnis testified that the kick threw him backwards against the squad car, hurt very much, made breathing difficult for five to seven seconds, and caused his abdomen to be sore for the rest of the night and the next day. The kick left a footprint on Officer McGinnis's vest. Officer McGinnis did not seek medical attention, but he photographed his vest. Sergeant Girtler did not see the kick, but saw Officer McGinnis fall back against the car door and gasp for air. Perez's mother attempted to record the incident on her cell phone.

Perez was charged with three assault offenses and obstruction of legal process. Trial was scheduled for September 12. Three business days before trial, Perez moved for a continuance. He cited several reasons, but primarily based the request on his desire to have his mother's cell phone analyzed to locate or recover video of the incident. The district court denied the request. The jury found Perez guilty of fourth-degree assault of a

peace officer and misdemeanor domestic assault—committing an act with intent to cause fear in another of immediate bodily harm or death.[1] This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in denying Perez's motion for a continuance.

A district court has discretion to grant or deny a continuance, and this court will not reverse unless denial of a continuance prejudiced the appellant by materially affecting the outcome of the trial. *State v. Larson*, 788 N.W.2d 25, 30-31 (Minn. 2010). Generally, a motion for a continuance must be made in writing and supported by affidavits or substantial reasons supporting the continuance. *See O'Neil v. Dux*, 257 Minn. 383, 387, 101 N.W.2d 588, 591-92 (1960). Lack of diligence in preparing for trial weighs against granting a continuance, *see State v. Courtney*, 696 N.W.2d 73, 82 (Minn. 2005), as does seeking a continuance on the eve of trial, *State v. Ahearn*, 292 Minn. 449, 450, 194 N.W.2d 256, 256 (1972). And if the evidence a party seeks to secure during the continuance period is unlikely to be obtainable, or unlikely to be helpful if obtained, denial of the motion is not an abuse of discretion. *See State v. Holmes*, 325 N.W.2d 33, 34-35 (Minn. 1982) (affirming denial of continuance because defendant had tried but failed to locate out-of-state witness and it was not clear that witness's testimony would have helped defendant).

Perez argues that the district court abused its discretion in denying a continuance because the trial was scheduled 41 days after the offense and his inability to recover and

[1] Perez does not challenge his additional conviction of gross misdemeanor obstruction of legal process.

have an expert analyze his mother's cell phone materially affected the outcome of the trial. We disagree. First, it is unclear whether cell phone video actually exists. Perez's mother testified that she attempted to record the incident but her efforts were unsuccessful. Second, even if the video exists, Perez's parents both testified at trial on his behalf; any video evidence likely would have been cumulative. Third, Perez knew about the video and had reasonable access to it, but was not diligent in obtaining it prior to trial. Finally, Perez did not raise the issue until three days before trial, and never made a written request for a continuance. While we note that the trial took place only 41 days after the charged offenses, Perez demanded a speedy trial. On this record, we discern no abuse of discretion in the denial of Perez's request for a trial continuance.

II. The district court did not plainly err in failing to give a voluntary intoxication instruction.

Perez argues that the district court erred by not giving a voluntary-intoxication jury instruction on the domestic-assault (fear) charge. He concedes that his counsel did not request this instruction or object to its absence. Failure to request a specific jury instruction waives the right to appeal, unless the instruction given contains plain error affecting substantial rights or an error of fundamental law. *State v. Laine*, 715 N.W.2d 425, 432 (Minn. 2006). Plain error exists if there is an error, that was plain, and it affected the defendant's substantial rights. *Id.* An error affects substantial rights if the error was prejudicial and affected the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

A district court has no obligation to instruct the jury sua sponte on the defense of voluntary intoxication. *State v. Hannon*, 703 N.W.2d 498, 512 (Minn. 2005). To receive this instruction: (1) the defendant must be charged with a specific-intent crime; (2) there must be evidence sufficient to support a jury finding by a preponderance of the evidence that the defendant was intoxicated; and (3) the defendant must offer intoxication as an explanation for his actions. *State v. Torres*, 632 N.W.2d 609, 616 (Minn. 2001).

Perez does not establish the third element, that his intoxication explained his actions.[2] Although several witnesses, including S.H., testified that Perez appeared to be intoxicated, none of them stated that Perez did not know what he was doing or that he acted in a certain way because he was intoxicated. In responding to the state's characterization of the case as one about an "intoxicated and jealous ex-boyfriend," Perez's counsel argued it was instead about "police officers who jump to conclusions and didn't do their job[s]." In short, the evidence suggested only that Perez was intoxicated; it was not so overwhelming that it explained his actions. *See State v. Wilson*, 830 N.W.2d 849, 856 (Minn. 2013) (holding that "the possibility of intoxication does not create the presumption that a person is incapable of forming a specific intent" (quotation omitted)); *Torres*, 632 N.W.2d at 617 (explaining that a defendant's use of intoxicants "does not create a presumption of intoxication and the possibility of intoxication does not create the presumption that a defendant is thereby rendered incapable of intending to do a

[2] Perez also argues that he implied intoxication as an explanation for his actions. *See Torres*, 632 N.W.2d at 617. But on this record, Perez did not present such overwhelming evidence of his intoxication that it explained his actions.

certain act"). Accordingly, the district court's failure to give an instruction on voluntary intoxication was not plain error.[3]

III. Sufficient evidence supports Perez's fourth-degree assault conviction.

In considering a claim of insufficient evidence, we carefully review the record to determine whether the evidence and reasonable inferences drawn from the evidence, viewed in the light most favorable to the verdict, were sufficient to allow the jury to reach its verdict. *State v. Pendleton*, 706 N.W.2d 500, 511 (Minn. 2005). A verdict will not be disturbed "if the jury . . . could reasonably conclude that [the] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted). Further, we assume that the jury believed those witnesses whose testimony supports the verdict and disbelieved contradictory testimony. *Pendleton*, 706 N.W.2d at 512.

A person commits felony fourth-degree assault when the person "assaults a peace officer when that officer is effecting a lawful arrest or executing any other duty imposed by law" and "inflicts demonstrable bodily harm." Minn. Stat. § 609.2231, subd. 1 (2012). "Demonstrable" is not defined in the statute, but has been defined by this court as "capable of being perceived by a person other than the victim." *State v. Backus*, 358 N.W.2d 93, 95 (Minn. App. 1984). The jury was instructed using that definition.

Perez argues that the evidence is not sufficient to convict him of fourth-degree assault because Officer McGinnis did not suffer "demonstrable bodily harm." Minn.

[3] Perez also argues that his counsel was ineffective for failing to request a voluntary-intoxication instruction. Because there was no evidence establishing that he was entitled to the instruction, his counsel was not ineffective in failing to request it.

Stat. § 609.2231, subd. 1.[4] Perez relies on unpublished decisions of this court for the proposition that the lack of external marks or other visible signs of injury negates a finding of demonstrable bodily harm. We disagree. Demonstrable bodily harm does not require a visible injury. Rather, it requires bodily harm that is capable of being perceived by someone else. While demonstrable bodily harm may often involve a visible injury, nothing in the statute or caselaw requires an external marking of the harm. Perez concedes that the injury Officer McGinnis sustained qualifies as bodily harm. Officer McGinnis suffered more than just pain: he had the wind knocked out of him, lost his ability to breathe for five to seven seconds, and his abdomen was sore the next day. Sergeant Girtler testified that he saw Officer McGinnis fall back against the door of the squad car, could tell he was in pain, and saw that he was unable to catch his breath for several seconds.

Perez asserts that interpreting demonstrable harm to require visible injury is consistent with the felony level of the offense. He points to the severity-level continuum of assault offenses under which the penalty assigned becomes more serious based on the extent of harm inflicted. *Compare* Minn. Stat. § 609.02, subd. 7 (2012) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition"), *with* Minn. Stat. § 609.02, subd. 7a (2012) (defining "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or

[4] Perez argues for the first time on appeal that Minn. Stat. § 609.2231, subd. 1, is unconstitutionally void for vagueness. Because he did not make this argument in the district court, it is waived. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

organ, or which causes a fracture"), *and* Minn. Stat. § 609.02, subd. 8 (2012) (defining "great bodily harm" as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement . . . permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm"). We are not persuaded. The assault continuum defines the offense based on the extent of the victim's injuries. But the fourth-degree assault statute does not do so. Whether bodily harm is demonstrable does not turn on the extent of the harm; the loss of a limb (substantial bodily harm) is capable of being perceived by another but so is a scratch or minor bruising (bodily harm). In short, the ability of another to perceive a victim's injury is an inquiry that is independent of the extent of the harm. The fact that fourth-degree assault is a felony offense does not require that the harm result in a visible injury.

Based on our review of the record, we conclude the evidence supports the jury's determination that Officer McGinnis suffered demonstrable bodily harm.

IV. Perez's pro se arguments lack merit.

Perez argues that his due-process rights were violated because the Spanish interpreter did not accurately translate the trial proceedings. When reviewing such a claim, we consider whether the translation of testimony was "on the whole adequate and accurate." *State v. Her*, 510 N.W.2d 218, 222 (Minn. App. 1994) (quotation omitted), *review denied* (Minn. Mar. 15, 1994). Perez bears the burden of proving that the interpretation was inaccurate. *Id.* He has not met this burden. He does not allege that any specific portion of the translation was incorrect, and did not point out any

inaccuracies during trial. On this record, we discern no violation of Perez's due-process rights.

Perez also argues that the state violated his due-process rights by withholding recorded audio or video taken from the squad car, the nearby intersection, or the jail sally port. Suppression of evidence that is favorable to a criminal defendant violates due process when the evidence is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). A *Brady* violation exists if (1) the evidence is favorable to the accused, because it is either exculpatory or impeaching; (2) the state suppressed the evidence, either intentionally or unintentionally; and (3) the defendant was prejudiced by the suppression. *State v. Brown*, 815 N.W.2d 609, 622 (Minn. 2012).

Perez has not established any of the *Brady* elements. The videotapes from both squad car cameras were turned over to the defense and Officer McGinnis testified that there were no other recording devices in use. And Perez did not establish that recordings were made from the intersection or the jail sally port, that the state has suppressed any such recordings, or that he was prejudiced by their absence.[5]

Affirmed.

[5] We have carefully reviewed Perez's other pro se arguments and conclude they likewise lack merit.