STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1946

State of Minnesota,
Respondent,

vs.

Anthony Steven Hill,
Appellant.

Filed December 28, 2010
Affirmed
Johnson, Chief Judge

Hennepin County District Court
File No. 27-CR-08-47521

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Johnson, Chief Judge; and Crippen, Judge.[*]

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

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

JOHNSON, Chief Judge

A Hennepin County jury found Anthony Steven Hill guilty of first-degree assault of a peace officer based on evidence that he pointed a loaded handgun at three police officers. Hill challenges his conviction on multiple grounds. We conclude that the district court did not err by denying Hill's pretrial motion to suppress evidence, did not err by not instructing the jury on a lesser-included offense, and did not err in responding to a question from the jury. We also conclude that the evidence is sufficient to support the conviction. Therefore, we affirm.

FACTS

Hill's conviction arises from an incident at his home in the city of Edina on September 20, 2008. Police officers were dispatched to the home in response to a report that a woman, whom the caller identified as "mother," may have been shot in the head with a BB gun. Upon their arrival, the officers knocked and announced their presence at the front and back doors to the residence. Officer Joy Fragodt looked through the window to the left of the front door and observed a man, later identified as Hill, standing at the top of the stairs. He was holding a handgun at his side in his right hand. Through the closed door, Officer Fragodt ordered Hill to put down the handgun and come to the door, but Hill hid the handgun behind his back. A woman then walked down the stairs and opened the front door. Officer Fragodt asked her whether she was injured; she said she was not. Officer Fragodt then asked the woman about the man with the handgun.

The woman responded by saying that she had to get back to her children, and she ran up the stairs.

The police officers entered the home through the front door and followed the woman up the stairs. Officer Eric Carlson saw Hill, pointed his handgun at him, and yelled for him to show his hands. Hill retreated into a bedroom and closed the door. Officer Carlson, Sergeant Philip Larsen, and Officer James Rygg stated that they were police officers and instructed Hill to open the door. Hill did not do so. Sergeant Larsen kicked in the door, and the three officers entered the bedroom with their weapons drawn. Hill suddenly stepped out of a walk-in closet, assumed a firing stance, and aimed a handgun at the officers. Officer Carlson began to pull the trigger on his weapon when he heard another officer deploy a Taser. The Taser struck Hill, who fell to the floor and dropped his handgun. The officers tackled Hill, deployed the Taser on him again when he resisted, and placed him in handcuffs. When Officer Rygg secured the handgun, a .44 caliber revolver, he observed that the cylinder to the handgun was slightly ajar and contained one round in the one o'clock position, which would be the next round to rotate into the firing position.

After the officers subdued Hill, Officer Carlson told Hill "how close he came to dying." Hill responded by saying, "I wish you had killed me." Officer Carlson later brought Hill to the police station. While another officer processed Hill's booking, Officer Carlson made another comment to Hill about "how close you came to being dead." Hill responded by saying that he knew the people outside the bedroom were police officers and that he was sorry for putting them at risk.

A police detective later gave Hill a *Miranda* warning and conducted a formal interview after Hill waived his *Miranda* rights. During the interview, Hill told the detective that when he jumped out of the closet, he did not realize that he had a gun in his hand. He also stated that he thought that the handgun was unloaded. He told the detective that, earlier that day, he had accidentally discharged the handgun and subsequently removed all of its rounds. Further investigation revealed a holster and a box of ammunition in the closet and two rounds on the floor where Hill dropped the handgun. The police also discovered a bullet hole in the doorframe to the bedroom and wooden debris on the carpet outside the bedroom.

In September 2008, the state charged Hill with assault in the first degree, use of deadly force against a peace officer, a violation of Minn. Stat. § 609.221, subd. 2(a) (2008). In October 2008, Hill moved to suppress all evidence that police obtained inside his home and the two statements he made in response to Officer Carlson's comments. In March 2009, the district court denied his suppression motions.

The case was tried to a jury over four days in May 2009. Hill did not testify. The jury returned a verdict of guilty. The district court sentenced Hill to 120 months of imprisonment. Hill appeals.

D E C I S I O N

Hill challenges his conviction on five grounds. He asserts four reasons why this court should reverse his conviction and remand for a new trial. He also argues that he is entitled to a judgment of acquittal because the evidence is insufficient to support his

conviction. We first will address the sufficiency of the evidence and then discuss Hill's four arguments for a new trial.

I. Sufficiency of the Evidence

Hill argues that the evidence is insufficient to support his conviction. When considering a claim of insufficient evidence, this court conducts "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. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). We must assume that "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). "We 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 crime charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quoting *State v. McCullum*, 289 N.W.2d 89, 91 (Minn. 1979)).

A person commits first-degree assault if he or she uses or attempts to use deadly force against a peace officer while the officer is performing police duties. Minn. Stat. § 609.221, subd. 2(a) (2008). A person uses deadly force if he or she has the purpose of causing, or should reasonably know of a substantial risk of causing, death or great bodily injury. Minn. Stat. § 609.066, subd. 1 (2008). An attempt to use deadly force may support a conviction of first-degree assault. Minn. Stat. § 609.221, subd. 2(a). An attempt is any act that "is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1 (2008).

In this case, the evidence shows that Hill stepped out of the closet and aimed a handgun at three police officers. Hill assumed a "firing position" by holding the weapon in his right hand and supporting it with his left hand. The handgun was loaded with one round in the position directly next to the firing position. The state introduced evidence that Hill knew that he was aiming his handgun at police officers. This evidence is sufficient to prove that Hill attempted to use deadly force against a peace officer and, therefore, is guilty of first-degree assault of a peace officer.

Hill contends that the evidence is insufficient because the handgun was inoperable, which prevented him from causing death or great bodily injury. He asserts that the handgun was inoperable because the cylinder was not seated when the officer found the handgun on the bedroom floor and because the state's firearms expert was unable to make the handgun discharge accidentally. But the state introduced evidence that the handgun discharged successfully when the cylinder was properly seated, and the jury was permitted to infer that Hill could have seated the cylinder. The state also introduced evidence that Hill had fired the handgun at his home earlier that same day. This evidence is sufficient to allow the jury to conclude that Hill could have fired the handgun and that he made a substantial step toward doing so. *See State v. Trei*, 624 N.W.2d 595, 598-99 (Minn. App. 2001) (upholding probable cause determination for defendant who ran toward officer while holding knives but stopped eight feet short of officer).

Thus, the evidence is sufficient to support the conviction.

II. Warrantless Entry into Hill's Residence

Hill also argues that the district court erred by denying his pretrial motion to suppress evidence obtained as a result of the police officers' warrantless entry into his home. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. The United States Supreme Court has stated that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Court*, 407 U.S. 297, 313, 92 S. Ct. 2125, 2134 (1972). Thus, as a general rule, a warrant is required before a law-enforcement officer may conduct a search of a person's home. *State v. Lohnes*, 344 N.W.2d 605, 610 (Minn. 1984); *State v. Morin*, 736 N.W.2d 691, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

Accordingly, a warrantless search of a person's home is "presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980). In the absence of consent, the presumption of unreasonableness can be rebutted only if the

warrantless search is supported by, first, probable cause, and second, "exigent circumstances." *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75, 91 S. Ct. 2022, 2042 (1971). If a warrantless search is conducted without exigent circumstances, any evidence obtained in the warrantless search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 415-16 (1963); *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). The state bears the burden of demonstrating that a warrantless entry is justified by an exception to the warrant requirement. *See State v. Buschkopf*, 373 N.W.2d 756, 766 (Minn. 1985).

One exception to the warrant requirement permits law enforcement to enter a residence "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 1947 (2006). This exception is subject to two requirements. First, the circumstances surrounding the entry must meet the emergency exception. *Othoudt*, 482 N.W.2d at 223. Second, the officer's belief of an emergency must be objectively reasonable to a person of reasonable caution with the facts available to the officer at the time. *Id.*

In this case, police officers were dispatched to Hill's home based on a report in which the caller stated that his mother may have been shot in the head. Officer Fragodt observed a man inside the home with a handgun, and the man did not comply with her requests to open the door and appeared to hide the handgun behind his body. The woman who arrived at the front door rushed upstairs without answering all of Officer Fragodt's

questions. These facts are sufficient to cause a reasonably cautious police officer to conclude that an emergency existed inside the home that merited a warrantless entry.

Hill contends that it was unreasonable for the police officers to enter the home after they learned that the woman who answered the door was uninjured. But the police officers did not know whether she was the "mother" referred to by the caller and, in any event, reasonably believed that other persons in the home may have been in danger. In addition, the woman's demeanor did not indicate that the emergency had passed because she rushed upstairs without answering all of the officers' questions. *See State v. Anderson*, 388 N.W.2d 784, 787 (Minn. App. 1986) (upholding warrantless entry based on report of domestic disturbance), *review denied* (Minn. Aug. 20, 1986).

Hill also contends that the facts available to the officers lacked the immediacy or imminence required by the emergency-assistance exception. He compares the caller's report that a woman "may" have been shot to the report in *State v. Fitzgerald*, 562 N.W.2d 288 (Minn. 1997), that an occupant of a residence "may need help." But in *Fitzgerald*, the informant waited a full day before making the report. *Id.* at 288. In this case, there is no indication that the caller waited any significant period of time before making his report. In fact, police officers saw Hill with a handgun before entering, which tended to corroborate the caller's report of a possible shooting. For that reason, this case is different from *In Re Welfare of B.R.K.*, 658 N.W.2d 565 (Minn. 2003), another case cited by Hill. In *B.R.K.*, police officers conducted a warrantless entry of a home based on their knowledge that guns were present and their suspicion that teenagers were drinking alcoholic beverages inside the home. *Id.* at 568-69. Exigent circumstances were not

present in that case because there was no indication that the teenagers were handling the guns or that anyone inside the home was in danger. *Id.* at 579.

Thus, the district court did not err by denying Hill's motion to suppress evidence obtained by the warrantless entry into Hill's home.

III. Pre-*Miranda* Statement

Hill also argues that the district court erred by denying his pretrial motion to suppress the statement he made to Officer Carlson at the police station that he knew the people in the home were police officers and that he was sorry for putting them in danger.

A statement produced by a custodial interrogation is inadmissible unless the suspect is first advised of his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966); *State v. Tibiatowski*, 590 N.W.2d 305, 308 (Minn. 1999). A person is subjected to interrogation if there are "any words or actions on the part of the police . . . that the police should know are *reasonably* likely to elicit an *incriminating* response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90 (1980) (emphasis added); *State v. King*, 513 N.W.2d 245, 248 (Minn. 1994). To constitute interrogation, police conduct "'must reflect a measure of compulsion above and beyond that inherent in custody itself.'" *Tibiatowski*, 590 N.W.2d at 310 (quoting *Innis*, 446 U.S. at 300, 100 S. Ct. at 1689).

Hill contends that Officer Carlson's remark was the functional equivalent of an interrogation because Officer Carlson addressed Hill directly. Officer Carlson's comment was not in the form of a question. Officer Carlson made his remark long after the incident had occurred, during booking. *See State v. Hale*, 453 N.W.2d 704, 707

(Minn. 1990). It was not reasonably likely that Officer Carlson's spontaneous remark would elicit an incriminating response from Hill. Whatever "subtle compulsion" Hill may have felt upon hearing Officer Carlson's remark falls short of interrogation. *See Innis*, 446 U.S. at 303, 100 S. Ct. at 1691 (finding no interrogation in officers' discussion in murder suspect's presence regarding their concern that shotgun might be found by a child). Thus, the district court did not err by denying Hill's pretrial motion to suppress his pre-*Miranda* statements.

IV. Lesser-Included Instruction

Hill also argues that the district court erred by not instructing the jury on the lesser-included offense of second-degree assault. After Hill rested his case, the district court raised the issue of a jury instruction on lesser-included offenses. Hill's counsel informed the court that Hill did not want an instruction on lesser-included offenses. The district court addressed Hill personally, asking whether Hill had considered the matter and had had an opportunity to discuss the matter with counsel. Hill responded that he had done so and did not want a lesser-included-offense instruction. The district court did not instruct the jury on lesser-included offenses.

If a defendant asks the district court to not instruct the jury on a lesser-included offense, the defendant may not argue on appeal that the district court erred by not giving the instruction. *State v. Sessions*, 621 N.W.2d 751, 757 (Minn. 2001); *see also State v. Penkaty*, 708 N.W.2d 185, 208 (Minn. 2006). Hill urges us to consider his claim pursuant to the plain-error test; he cites *State v. Dahlin*, 695 N.W.2d 588 (Minn. 2005), in support of his argument that the plain-error test applies. But the defendant in *Dahlin*

requested a lesser-included-offense instruction. *Id.* at 592. Here, Hill did not request the instruction and, in fact, expressly waived any right to such an instruction. The governing law is found in *Sessions*, which precludes Hill from raising the issue on appeal. 621 N.W.2d at 757. Thus, we will not consider whether the district court erred by not instructing the jury on lesser-included offenses.

V. Response to Jury Question

Hill last argues that the district court erred in its response to a question from the jury. During the jury's deliberations, the jury sent the following question to the court: "If an empty gun is pointed at another person, is this considered the use of deadly force?" Hill's counsel urged the district court to answer the question in the negative. The district court responded by rereading a portion of the instruction defining deadly force, which was taken from Minn. Stat. § 609.066, subd. 1.

A district court is allowed "considerable latitude" in selecting language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). This latitude extends to responses to questions posed by the jury during deliberations. *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009). If a jury asks a question, the district court may, in its discretion, give additional instructions, reread portions of the original instruction, or give no response at all. Minn. R. Crim. P. 26.03, subd. 20(3). We apply an abuse-of-discretion standard of review to a district court's response to a jury question. *See State v. Laine*, 715 N.W.2d 425, 434 (Minn. 2006).

Hill contends that the district court should have answered the question in the negative because "pointing an empty gun at police is not, as a matter of law, the use of

deadly force." Hill does not cite any legal authority for that proposition. Answering the jury's question was complicated by the fact that the evidence did not necessarily show that the handgun was "empty." Whether the handgun was loaded or unloaded is a question of fact, and whether an unloaded handgun constitutes deadly force requires an application of the law to the facts; both tasks are properly within the province of the jury. *See State v. Keezer*, 274 Minn. 292, 296, 143 N.W.2d 627, 629-30 (1966) (admonishing district court for giving jury instruction on alibi that invaded province of jury). Furthermore, the district court was within its discretion in rereading the relevant portions of its jury instructions, and Hill has not argued on appeal that the instruction that was reread is erroneous.

Hill also contends that the district court erred by rereading only part of the instruction on deadly force. The two sentences of the instruction that the district court did not reread are as follows:

> The intentional discharge of a firearm in the direction of another person constitutes deadly force. Great bodily harm means bodily harm that creates a high probability of death, causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any part of the body, or other serious bodily harm.

The district court reasonably chose to not reread these two sentences because neither sentence is relevant to the jury's question about an empty handgun. Thus, the district court did not abuse its discretion by not answering the jury's question in the negative.

In sum, the evidence is sufficient to sustain the conviction, and the district court did not err by denying Hill's pretrial motion to suppress evidence, by not instructing the jury on lesser-included offenses, and by not answering the jury's question in the negative.

Affirmed.