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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1968**

State of Minnesota,
Respondent,

vs.

Daniel Louis Bono,
Appellant.

**Filed December 14, 2010
Affirmed
Collins, Judge***

Ramsey County District Court
File No. 62-CR-08-10687

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

Susan Gaertner, Ramsey County Attorney, Thomas Rolf Ragatz, Assistant County
Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Shumaker, Presiding Judge; Wright, Judge; and
Collins, Judge.

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

UNPUBLISHED OPINION

COLLINS, Judge

Appellant disputes his conviction of felony escape from custody, arguing that the evidence was legally insufficient for the jury to find that he committed the underlying felony for which he was arrested and on which the escape charge was based. We conclude that the state was required to prove only that appellant escaped from custody following a lawful felony arrest and, because the evidence was sufficient to prove that appellant was lawfully arrested for a felony, we affirm.

FACTS

On September 1, 2008, the first day of the Republican National Convention (RNC), Sergeant Jeffrey Rothecker of the St. Paul Police Department followed a group of protestors, one of whom was appellant Daniel Bono, from the cathedral of St. Paul to the state capitol building.¹ Sergeant Rothecker saw Bono making a jabbing motion toward a tire on a bus with something that appeared to be metal and which he suspected was “either a knife or large screwdriver.” Sergeant Rothecker grabbed Bono by the shirt collar, told him he was under arrest, and started backing away from the bus with him.

As Sergeant Rothecker was backing up with Bono in his grasp, some of the hundreds of protestors in the crowd started chanting “let him go.” Bono went limp and dropped to the ground, forcing Sergeant Rothecker to drag him. The crowd drew closer, and someone bumped Sergeant Rothecker hard enough to knock him to the ground; the

¹ Appellant was part of a single group of people that was associated with three flags—the Gadsden flag, a black and red anarchist flag, and a Students for Democratic Society flag. One of the protestors’ goals was to prevent delegates from reaching the RNC.

crowd rushed in, and Sergeant Rothecker sprayed them with mace. Two or three people then pulled Bono away from Sergeant Rothecker, and Bono merged with them into the crowd.

The state charged Bono with felony escape from custody in violation of Minn. Stat. § 609.485, subds. 2(1), 4(a)(1) (2008); aiding and abetting the obstruction of his arrest in violation of Minn. Stat. §§ 609.05, subd. 1, .50, subd. 1(1) (2008); and aiding and abetting assault in the fourth degree in violation of Minn. Stat. §§ 609.05, subd. 1, .2231, subd. 1 (2008).

At trial, Sergeant Rothecker testified that he arrested Bono for attempted criminal damage to the bus tire. The prosecutor tried to elicit testimony regarding whether Bono was arrested on a felony-level charge and as to the cost of replacing the tire. The district court sustained two foundation objections by defense counsel because there was no reliable basis for evidence of the value of the tire that Bono attempted to damage or of the cost of replacing it. The prosecutor then asked Sergeant Rothecker whether he knew the replacement cost of slashed tires on other buses damaged in St. Paul during the RNC. Defense counsel again objected for lack of foundation. The district court overruled the objection and allowed Sergeant Rothecker to testify that, based on the invoices he had seen, he was aware that the cost of replacing such tires on similar buses exceeded \$1,000. Responding to questioning by defense counsel, Sergeant Rothecker testified that Bono had not succeeded in damaging the tire and that he had no knowledge of the amount of wear on that tire or of its actual value. Sergeant Rothecker then testified that, based upon

his previous testimony that damage exceeding \$1,000 supports a felony-level damage-to-property charge, his arrest of Bono was for a felony.

Bono testified that when he was arrested, he had a washable magic marker in his hand, which was what Sergeant Rothecker saw glinting—not a knife, screwdriver, or other metal object—and that he used it to write on the bus. Bono acknowledged that he intentionally “went limp,” which enabled two individuals, whom he could not see, to grab his feet and pull him away from Sergeant Rothecker. He testified that he then changed his clothes, which were “completely soaked in Mace,” and then continued to walk with the crowd.

The jury found Bono guilty of both escape from custody and aiding and abetting the obstruction of his arrest, and it found him not guilty of aiding and abetting assault in the fourth degree. In response to interrogatories on the escape-from-custody verdict form, the jury found that (1) Bono was “in lawful custody on a criminal charge of attempted damage to property,” (2) “the value of the property attempted to be damaged [was] greater than \$1000 based on the cost of repair or replacement,”² and (3) Bono’s escape was “effected by violence or the threat of violence against a person.” This appeal from the conviction of felony escape from custody followed.

² Implicit in this finding is the finding of *probable cause* to believe that the value of the property to be damaged was greater than \$1,000 based on the cost of repair or replacement.

DECISION

Appellate review of a sufficiency-of-the-evidence claim entails “a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict.” *State v. Yang*, 774 N.W.2d 539, 560 (Minn. 2009) (quotation omitted). We “presume that the jury believed the State’s witnesses and disbelieved any contrary evidence.” *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009).

To prove escape from custody, the state was required to establish that Bono “escape[d] while held pursuant to a lawful arrest, in lawful custody on a charge or conviction of a crime, or while held in lawful custody on an allegation or adjudication of a delinquent act.” Minn. Stat. § 609.485, subd. 2(1). To enhance the crime of escape from custody to a felony, the state was required to prove that Bono was “in lawful custody for a felony.” *Id.*, subd. 4(a)(1). Bono’s challenge to the sufficiency of the evidence is limited to the felony-enhancement element.

Sergeant Rothecker testified that he arrested Bono for attempted criminal damage to property, specifically the bus tire. Criminal damage to property is a felony when “the damage reduces the value of the property by more than \$1,000 measured by the cost of repair and replacement.” Minn. Stat. § 609.595, subd. 1(3) (2008) (authorizing five years’ imprisonment); *see also* Minn. Stat. § 609.02, subd. 2 (2008) (defining felony as an offense punishable by more than one year of imprisonment). Attempting to commit a crime is an anticipatory crime. Minn. Stat. § 609.17, subd. 1 (2008). A person may be sentenced “to not more than one-half of the maximum imprisonment or fine or both

provided for the crime attempted.” *Id.*, subd. 4(2) (2008). Because felony damage to property is punishable by up to five years’ imprisonment, attempted felony damage to property, punishable by up to two and a half years’ imprisonment, is also a felony.

Bono argues that the state was required to prove beyond a reasonable doubt that the replacement cost of the bus tire in question was more than \$1,000, which the state failed to do because it presented no admissible evidence of the tire’s value or of the cost of replacing it. Without arguing whether the evidence was sufficient to prove beyond a reasonable doubt that the replacement cost of the tire was more than \$1,000, the state contends it was required to prove only that Bono’s arrest was supported by probable cause to arrest for a felony.

Statutory interpretation is a question of law and is reviewed de novo. *Roby v. State*, 787 N.W.2d 186, 190 (Minn. 2010). The plain language of an unambiguous statute must be given effect. *Id.* The meaning of statutory text is determined based on a “plain and ordinary reading” of the provision at issue. *State v. Wagner*, 555 N.W.2d 752, 757 (Minn. App. 1996). We may not supply statutory language that may have been intentionally or inadvertently omitted by the legislature. *State v. Hulst*, 510 N.W.2d 262, 264 (Minn. App. 1994).

Bono contends that, because the state was required to prove that he was in custody pursuant to lawful arrest for a felony, the state was ultimately required to prove beyond a reasonable doubt that he was guilty of the felony. But the legislature’s use of the terms “lawful custody” and “lawful arrest” make clear that the escape-from-custody statute focuses on the lawfulness of the arrest. The statute does not express a requirement that

the state prove guilt of a crime for which a defendant is not being tried, and we will not read such language into its text. By the plain language of the statute, a person commits the crime of escape from custody when he escapes while held pursuant to a lawful arrest. Minn. Stat. § 609.485, subd. 2(1). The felony-enhancement element is met when the lawful arrest was for a felony. *Id.*, subd. 4(a)(1).

We agree with Bono that due process requires the state to prove every element of the offense beyond a reasonable doubt. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). And any fact that increases the penalty for a crime beyond the prescribed statutory maximum authorized by the facts reflected in the jury verdict must be submitted to a jury and proved beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004). Here, the offense was escape from custody and the disputed element and fact at issue is whether Bono was under lawful arrest for a felony, not whether he is guilty of the alleged underlying felony. An arrest is lawful when it is supported by probable cause, that is, if the arresting officer could reasonably have believed that the person to be arrested had committed a crime. *State v. Riley*, 568 N.W.2d 518, 523 (Minn. 1997). Thus, the state was required to prove beyond a reasonable doubt that Sergeant Rothecker had probable cause to support a felony arrest of Bono.

Bono argues, and the state does not dispute, that the value of the bus tire in question was not proved beyond a reasonable doubt. But that is not the issue before this court, and we need not resolve it. Based on Sergeant Rothecker's trial testimony, we conclude that he could have reasonably believed that the cost of repairing or replacing

such a tire was more than \$1,000. Thus, we conclude that this testimony provided evidence sufficient to sustain the jury's verdict that Bono escaped from custody following a lawful felony arrest.

Affirmed.