STATE OF MINNESOTA
IN COURT OF APPEALS
A10-197
A10-198

In the Matter of the Welfare of: J. A. J., Child

Filed November 23, 2010
Affirmed
Connolly, Judge

Swift County District Court
File Nos. 76-JV-09-402, 76-JV-09-405

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Robin Finke, Swift County Attorney, Danielle H. Olson, Assistant County Attorney, Benson, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges his delinquency adjudications for third-degree assault under Minn. Stat. § 609.223, subd. 1 (2008), terroristic threats under Minn. Stat. § 609.713, subd. 1 (2008), and first-degree witness tampering under Minn. Stat. § 609.498, subd. 1(f) (2008). Appellant argues that the evidence was not sufficient to show that he choked

and threatened the victim. Because there was sufficient evidence for the district court to find the appellant guilty beyond a reasonable doubt on all charges, we affirm.

FACTS

Based on a police investigation in late April and early May of 2009, appellant J.A.J., then age 14, was charged with felony third-degree assault under Minn. Stat. § 609.223, subd. 1 (2008), felony terroristic threats under Minn. Stat. § 609.713, subd. 1 (2008), and felony first-degree witness tampering under Minn. Stat. § 609.498, subd. 1(f) (2008). All three offenses involved S.W., then age 12, who attended appellant's school. During the investigation, S.W. told the officer that appellant had choked her sometime between March 16 and 25, 2009; and that, after school on April 30, 2009, he had threatened to kill her.

The third-degree assault charge was tried first. The officer testified that S.W. told her about the choking incident; that she interviewed C.S., another juvenile, who was present at the choking incident; and that appellant admitted to her that he was present, but denied choking S.W. On cross-examination, appellant attempted to impeach the officer by showing that her notes indicated the incident took place in S.W.'s garage while other testimony from S.W. indicated that the incident took place in C.S.'s garage.

S.W. testified that she, appellant, and C.S. were all in C.S.'s garage when appellant put his hands around her neck, slammed her against the wall and began choking her. S.W. also testified that she asked appellant to stop but he did not, that the choking did not seem to be done in a joking manner, and that she was scared. She testified further

that she blacked out, fell to the ground, and awoke crying with marks around her neck. S.W. also testified that she and C.S. had dated previously.

C.S. testified that he saw appellant slam S.W. against the wall and choke her, which rendered her unconscious and left red marks on her neck. He also testified that he dated S.W. prior to this event and one of his assault adjudications stemmed from an incident with S.W.

S.W.'s mother testified that she saw the marks on S.W.'s neck and witnessed S.W. crying at some point around the end of March 2009.

Two other students testified during appellant's defense. One testified that, when he asked S.W. about the marks on her neck, she told him that C.S., not appellant, had choked her. The other testified that he overheard S.W. talking to a group of her friends and saying C.S. had choked her.

At the second trial, on the charges of terroristic threats and first-degree witness tampering, the officer testified that she first interviewed S.W. on April 30, 2009 about the choking incident, and that, when she interviewed S.W. again, she learned that appellant had threatened S.W. because of what S.W. had said the day before. The officer also testified that, when she interviewed appellant after hearing about the threat, he (1) denied threatening S.W.; (2) claimed that he did not go to S.W.'s house that night and was on the football field with C.S.; and (3) admitted to being angry and telling C.S. that he wanted to kill S.W.

S.W. testified that, after school on April 30, 2009 appellant came over to her house while she was alone and told her that, if he got in trouble for choking her, he was going to

kill her. C.S. testified that he was with appellant at S.W.'s house when appellant made the threat.

Appellant's mother and his aunt also testified. His mother testified that, (1) on April 30, 2009, she was with appellant from the time she picked him up after school until 4:00 p.m., when she left him; (2) while traveling to her next destination, she called appellant's aunt to ask her to check on appellant; (3) appellant was alone after she left; (4) S.W.'s house was less than a minute walk from appellant's house; and (5) appellant has had anger-management problems and was currently taking medication to control his anger. Appellant's aunt testified that, shortly after receiving the phone call, she went to appellant's house sometime between 4:03 p.m. and 4:30 p.m., and talked with appellant from her arrival until she left at 6:00 p.m.

The district court found that the state had proved beyond a reasonable doubt that appellant committed third-degree assault, terroristic threats, and first-degree witness tampering against S.W., and found him guilty of all three charges, and adjudicated him delinquent.

On appeal, appellant argues that, because no trier of fact could have reasonably concluded that he committed third-degree assault, terroristic threats and witness tampering, the convictions must be reversed.

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 the

light most favorable to the conviction, is sufficient to allow the court to reach the determination it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

> On appeal from a determination that each of the elements of a delinquency petition have been proved beyond a reasonable doubt, an appellate court is limited to ascertaining whether, given the facts and legitimate inferences, a fact-finder[1] could reasonably make that determination. This court must assume that the fact-finder believed the state's witnesses and disbelieved any contrary evidence.

In re Welfare of T.N.Y., 632 N.W.2d 765, 768 (Minn. App. 2001) (quotation and citation omitted). "On appeal, [the juvenile] has the burden of showing that the trier of fact could not reasonably find he committed the charged acts." *In re Welfare of T.M.V.*, 368 N.W.2d 421, 423 (Minn. App. 1985).

To prevail on appeal, appellant must show that it was not reasonable to find that appellant committed third-degree assault, terroristic threats, and first-degree witness tampering.

a. Third-degree Assault

An assault is the intentional infliction of bodily harm on another person or an act done with intent to cause fear of bodily harm. Minn. Stat. § 609.02, subd. 10 (2008). Third-degree assault, more specifically, is committed by "whoever assaults another and inflicts substantial bodily harm." Minn. Stat. § 609.223, subd. 1 (2008). Substantial bodily harm is "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any

[1] This case involved two bench trials. However, this court applies the same standard to bench trials as to jury trials. *In re Welfare of J.G.B.*, 473 N.W.2d 342, 345 (Minn. App. 1991).

bodily member or organ . . . ." Minn. Stat. § 609.02, subd. 7a (2008). To conclude that appellant committed third-degree assault, the district court had to find that he (1) choked S.W., (2) did so with the intent to harm or cause fear, and (3) inflicted substantial bodily harm.

Substantial evidence pointed to appellant as the one who choked S.W. The officer, S.W., and C.S. all testified that appellant choked S.W. Appellant presented conflicting testimony that C.S. was the assailant, but the district court determined that this testimony was not credible. Because the record supports the district court's finding that appellant choked S.W., we will not disturb it.

The next question is whether the record supports the district court's finding that appellant had the requisite intent. Appellant did not testify, and the only testimony discussing appellant's intent was that of S.W., who said that appellant seemed serious. However, "[i]ntent may be proved by circumstantial evidence, including drawing inferences from the defendant's conduct, the character of the assault, and the events occurring before or after the crime." *T.N.Y.*, 632 N.W.2d at 769. Appellant continued choking S.W. until she was unconscious. He slammed her up against the wall, and he left marks on her neck. Furthermore, appellant was known to have anger-management problems, and he later threatened to kill S.W. Considering all the evidence, the district court did not err in concluding that appellant acted with the requisite intent.

Finally, the district court had to find that S.W. suffered substantial bodily harm. "An individual who assaults another and causes temporary loss of consciousness has inflicted substantial bodily harm and is guilty of third-degree assault. . . ." *State v.*

Larkin, 620 N.W.2d 335, 338 (Minn. App. 2001). Here, S.W. lost consciousness from the assault, and that alone is sufficient to constitute substantial bodily harm.

b. Terroristic Threats

"Whoever threatens . . . to commit any crime of violence with purpose to terrorize another . . ." is guilty of terroristic threats. Minn. Stat. § 609.713, subd. 1 (2008). To be considered threatening, the communication is looked at, in its context, to see if it has a reasonable tendency to create apprehension that the threat will be acted upon. *State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996). To find appellant guilty of committing a terroristic threat, the district court had to find that he did utter the threat to S.W. and that it had the tendency to create apprehension in her that he would act on that threat.

S.W., C.S. and the officer testified that appellant threatened S.W. that if he got in trouble for the assault, he would kill her. Testimony elicited from appellant's mother and aunt to show that appellant could not have threatened S.W. because one of them was with him at the time he allegedly did so indicated that appellant had enough time to go to S.W.'s house and threaten her. Given this evidence, the district court did not err in finding that appellant threatened S.W.

The next question is whether the threat had the tendency to cause S.W. apprehension that it would be acted upon. The threat was made by a boy two years older than S.W. who had choked her to the point of unconsciousness just one month earlier. Furthermore, S.W. testified that she was in fact afraid that appellant would actually kill her. Based on this evidence, the district court reasonably found that appellant's threat put S.W. in reasonable apprehension that he would act on the threat.

c. First-degree Witness Tampering

Witness tampering in the first-degree is defined as intentionally causing injury or threatening to cause injury to any person or property in retaliation against a person who has provided information to law-enforcement authorities concerning a crime within a year of that person providing the information or within a year of the actor's release from incarceration, whichever is later. Minn. Stat. § 609.498, subd. 1 (f) (2008). To find that appellant committed first-degree witness tampering the district court had to determine that he made the threat in retaliation against S.W. for providing information to law-enforcement personnel.

The evidence established that S.W. did provide information to law-enforcement personnel about the choking incident and that April 30, 2009, was within one year of the date she did so. The district court's findings that appellant made the threat and that it was in retaliation for S.W. providing information are supported by the record.

S.W. and C.S. testified that appellant threatened to kill S.W. if he got in trouble. Given this testimony, it was reasonable for the district court to conclude that appellant made the threat. Additionally, since appellant made the threat on the same day that S.W. spoke to law-enforcement personnel and conditioned the threat on his getting into trouble, it was reasonable for the district court to conclude that the threat was made in retaliation for S.W. talking to law enforcement personnel.

The district court found S.W.'s and C.S.'s testimony credible and found appellant's witnesses not credible. Appellate courts defer to district court credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). The trier of fact

is free to question witnesses' credibility and is under no obligation to believe their version of events. *State v. Steinbuch*, 514 N.W.2d 793, 800 (Minn. 1994). When an alternative plausible explanation of what occurred is presented, the fact finder is free to accept or reject that explanation. *State v. Larson*, 393 N.W.2d 238, 241-42 (Minn. App. 1986). The record reflects that the evidence was sufficient to support all the district court's conclusions. Therefore, we affirm appellant's convictions.

Affirmed.