STATE OF MINNESOTA
IN COURT OF APPEALS
A10-781

State of Minnesota,
Respondent,

vs.

Douglas Frederick Gratz,
Appellant.

Filed March 8, 2011
Affirmed
Connolly, Judge

Watonwan County District Court
File No. 83-CR-09-787

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

LaMar Piper, Watonwan County Attorney, St. James, Minnesota (for respondent)

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

Considered and decided by Lansing, Presiding Judge; Ross, 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 conviction of felony fourth-degree assault under Minn. Stat. § 609.2231, subd. 1 (2008), on grounds that the evidence was insufficient to show

that he inflicted demonstrable bodily harm. Because the jury could reasonably conclude from the evidence at trial that the injury was capable of being perceived by another, we affirm.

FACTS

On November 25, 2009, Sergeant Barry Gulden was looking for appellant Douglas Gratz. Sergeant Gulden went to appellant's house, but no one answered the door. Appellant's father, F.G., happened to drive by and see Sergeant Gulden coming down the porch steps. When F.G. stopped, Sergeant Gulden asked him if appellant was home. F.G. did not know, but offered to let Sergeant Gulden into the house, which F.G. owned. F.G. and Sergeant Gulden then went inside.

According to Sergeant Gulden, appellant came around a corner, naked except for a pair of socks, swore, and said that he was going to "get" Sergeant Gulden. Appellant then crossed the room and attempted to slam the door on Sergeant Gulden. Appellant began throwing punches at Sergeant Gulden: the first struck him in the jaw, he blocked the second with his right hand, and appellant missed him while attempting a third.

Sergeant Gulden did not sustain any marks on his jaw, just physical discomfort. But when blocking appellant's second punch, his "hand was open and [appellant's] fist hit [his pinkie] finger while it was open and kind of pushed everything back." Sergeant Gulden made between five and seven threats to tase appellant. Sergeant Gulden eventually got appellant under control and seated in a chair. Later, Sergeant Gulden accompanied appellant into his bedroom to get some clothes.

Sergeant Gulden went to the hospital and had his finger examined by a doctor. An x-ray revealed no cracks, but the finger "was jammed and there was bruising and swelling." Sergeant Gulden noticed visible swelling at the knuckle joint where his pinkie finger met his fist. Afterwards, Sergeant Gulden went right back to work and was not given a cast or similar treatment. Among other things, appellant was charged with one count of gross misdemeanor fourth-degree assault against a peace officer and one count of felony fourth-degree assault against a peace officer for inflicting "demonstrable bodily harm" in violation of Minn. Stat. § 609.2231, subd. 1.

A jury trial was held, and Sergeant Gulden, F.G., and appellant testified. In addition to his version of what happened, Sergeant Gulden testified that his hand has not yet returned to its "normal" flexibility or feeling and that he needs to return to the doctor to have his hand reexamined. Sergeant Gulden also testified that there were no pictures taken of his face or hand.

F.G. testified that, after he and Sergeant Gulden entered the home, appellant came out of his bedroom, around the corner, and right at Sergeant Gulden. F.G. heard appellant say something to the effect of, "Just get the F out of here, something like that." F.G. saw appellant throw two punches at Sergeant Gulden before Sergeant Gulden was able to seat appellant in a chair. F.G. saw the first punch land on Sergeant Gulden's face, but did not see where the second one landed.

At the close of the state's case, appellant moved for a judgment of acquittal on the felony assault count, arguing that the state had not provided sufficient evidence for the

fact-finder to determine that Sergeant Gulden suffered demonstrable bodily harm. The district court denied appellant's motion, stating:

> There were apparently three punches or attempt[s] to punch. As to Count 1, first punch hit him in the jaw. There was no visible sign of injury, although the deputy said it hurt. As to punch two, he blocked it with his hand, the act. The jury may infer that that was an attempt to cause bodily harm to another and in fact actually did cause bodily harm to another. . . .
>
> As far as the demonstrable injury, the law under *State v. Backus* defining demonstrable bodily injury is that it has to be capable of being perceived by another. The deputy testified that there was bruising and swelling, specifically his knuckles swelled and it has not returned to normal as of this day. He has to have follow up. There was injury to his right hand and he could see that it was swelling. The law does not require that anybody testify to corroborate it, only that it is capable of being viewed by another.

Appellant testified that Sergeant Gulden "threw open [his bedroom] door," "yelled 'freeze or I'll hook you up to 50,000 volts,'" and pointed his "stun gun" at appellant. Appellant was in bed under the covers; Sergeant Gulden instructed him to "get up real slow." Appellant stated that he was naked and asked if he could put on some underwear. Appellant testified that Sergeant Gulden told him to "just move real slow or I'll light you up like a Christmas tree." Appellant testified that he put on socks and underwear, was handcuffed, and was led out into the kitchen. Appellant testified that he did not punch Sergeant Gulden, and that his father is "kind of getting senile," does not "realize[] what's going on," and was "coached by the police."

When instructing the jury on the elements of felony fourth-degree assault, the district court told the jury that "'[d]emonstrable bodily harm' means harm capable of being perceived by a person other than [the] victim." The jury later asked the district

court to further define demonstrable bodily harm and was referred back to the jury instructions. The jury subsequently found appellant guilty of felony fourth-degree assault. Appellant was sentenced to one year and one day in prison, with the execution of his sentence stayed, and placed on probation for three years. This appeal follows.

D E C I S I O N

In considering a claim of insufficient evidence, appellate courts painstakingly review the record "to determine whether the evidence and reasonable inferences drawn therefrom, 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, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a 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.

To convict appellant of felony fourth-degree assault, the state had to prove that appellant "inflict[ed] demonstrable bodily harm" on Sergeant Gulden. *See* Minn. Stat. § 609.2231, subd. 1. "Demonstrable bodily harm" is not defined by statute. We have said, however, that "[a]ssault in the fourth degree requires a quantum of proof of harm between 'bodily harm' (assault in the fifth degree) and 'substantial bodily harm' (assault in the third degree)." *State v. Backus*, 358 N.W.2d 93, 95 (Minn. App. 1984). "Bodily harm" and "substantial bodily harm" are defined by statute. *See* Minn. Stat. § 609.02,

subds. 7, 7a (2008). "Bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." *Id.*, subd. 7. The more severe "substantial bodily harm" is defined 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 organ, or which causes a fracture of any bodily member." *Id.*, subd. 7a. Appellant concedes that Sergeant Gulden suffered "some bodily harm," but contends that the evidence was insufficient to show that he "suffered *demonstrable* bodily harm—a harm that was perceptible to anyone other than [Sergeant] Gulden."

In *Backus*, the defendant argued that the district court erred by defining "demonstrable bodily harm" as "bodily harm capable of being perceived by a person other than the victim." 358 N.W.2d at 95. We concluded that "[w]hile we believe 'demonstrable' is a word of common usage, there is no error in the court defining it as [capable of being perceived by a person other than the victim]." *Id.* Relying on *Backus*, appellant contends that the state failed to prove that Sergeant Gulden's bodily harm was "demonstrable" because the state did not offer evidence that Sergeant Gulden's injury was perceptible to anyone else. We disagree.

Appellant is correct that the district court instructed the jury on the definition of "demonstrable bodily harm" under *Backus*, but, as the state points out, the state was not required to prove that Sergeant Gulden's injury was in fact *observed* by someone else. To convict appellant of felony fourth-degree assault, the state was required to show that Sergeant Gulden suffered "demonstrable bodily harm," harm that was *capable* of being

perceived by someone else, not that the harm was *viewed* by someone else. Sergeant Gulden testified that he observed swelling at his knuckle joint when comparing his two hands. The reasonable inference drawn from this testimony is that anyone else comparing Sergeant Gulden's hands would have noticed the swelling too. Furthermore, when Sergeant Gulden was asked about the diagnosis he received at the hospital, he testified, "There was no cracks, but *he stated* it was jammed and there was bruising and swelling." (Emphasis added.) Presumably, the "he" referred to by Sergeant Gulden—the person who observed the jamming, bruising and swelling of Sergeant Gulden's finger—is the doctor who examined his hand. Appellant neither denied that such swelling occurred nor claimed that the swelling was not visible to anyone else; appellant maintained that he did not punch Sergeant Gulden. Reviewing the evidence in the light most favorable to the verdict, we conclude that (1) the evidence was sufficient to prove that Sergeant Gulden suffered demonstrable bodily harm as the jury could reasonably conclude from Sergeant Gulden's testimony that anyone else comparing his hands would have observed the swelling and that his doctor did in fact observe the swelling, and (2) the jury disbelieved appellant. *See Pendleton*, 706 N.W.2d at 512; *Bernhardt*, 684 N.W.2d at 476-77.

Finally, we noted in *Backus* that, despite the fact that the district court was not required to define words of common usage, using a dictionary definition to explain "demonstrable" to the jury was not error due to the desirability of explaining the elements of an offense, rather than just reading the statute to the jury. 358 N.W.2d at 95. If something is "demonstrable," it is "[o]bvious" or "apparent." *The American Heritage*

College Dictionary 370 (3d ed. 1997). An injury that is "obvious" is "[e]asily perceived or understood." *Id.* at 943. Similarly, an "apparent" injury is one that is "[r]eadily seen; visible." *Id.* at 65. Sergeant Gulden testified that the swelling on his finger was visible and that his doctor observed the swelling. Sergeant Gulden's injury was demonstrable because it was visible; because the injury was visible, it was capable of being perceived by another.

Affirmed.