

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1333**

State of Minnesota,
Respondent,

vs.

Thomas Eugene DuPaul,
Appellant.

**Filed August 12, 2024
Affirmed
Florey, Judge***

Ramsey County District Court
File No. 62-CR-22-5523

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Greg Scanlan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and Florey, Judge.

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

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this direct appeal, appellant argues that the evidence is insufficient to support his convictions of second-degree assault because the state failed to prove beyond a reasonable doubt that he used a dangerous weapon. Appellant also argues that the district court erred by giving the model jury instruction on second-degree assault, which states that a temporarily inoperable firearm is a dangerous weapon. Because there is sufficient evidence to establish that appellant used a dangerous weapon and because the district court did not err in its jury instructions, we affirm.

FACTS

On September 26, 2022, the state charged appellant Thomas Eugene DuPaul with one count of second-degree assault, in violation of Minn. Stat. § 609.222, subd. 1 (2022), for pointing an antique-style, black-powder revolver at his brother, J.D. The state later amended the complaint to include an additional charge of second-degree assault for DuPaul pointing the revolver at his stepbrother, C.C. The case was tried to a jury.

At trial, DuPaul's father testified that the family staged an intervention for DuPaul because DuPaul was having "mental problems" and had gotten into "bad drugs" including methamphetamine. DuPaul reacted negatively to the attempted intervention, started yelling, and would not listen. The family told DuPaul that if he would not talk about his behavior, he had to leave the premises and find another place to live. DuPaul left the home.

The same day, DuPaul's family changed the locks to the house to prevent DuPaul from entering without the permission of a resident-family member. DuPaul then returned to the house and attempted to break down the door.

DuPaul's family eventually let him enter the house. DuPaul immediately went to the basement bedroom where he had been living.

DuPaul's siblings approached him in the basement to tell him that he needed to leave. DuPaul confronted them and began yelling. DuPaul stepped into the basement bedroom and his siblings retreated upstairs because DuPaul's stepbrother "had a good feeling that [DuPaul] was going to get a gun."

DuPaul came upstairs less than 30 seconds later with what appeared to be a gun in his pocket. DuPaul's father asked him: "Have you got a gun?" DuPaul replied by removing the gun from his pocket and stating a combination of "Yeah, I have a gun" and "You're d-mn right."

DuPaul proceeded to wave the gun, sweeping the entire room. DuPaul pointed the gun at both his stepbrother, C.C., and his brother, J.D.

DuPaul's father called 911 and police arrived on the scene. Police took DuPaul into custody and recovered the gun. A forensic scientist identified the gun as a black-powder revolver manufactured by Pietta in 2020. DuPaul's stepbrother, C.C., had been with DuPaul when he purchased the Pietta revolver. Pietta revolvers are a modern-manufactured, antique-style firearm that are federally regulated as antique firearms. The forensic scientist testified that the components of this Pietta were designed to use an explosion to cause compressed gas to expel a projectile.

A Ramsey County jury found DuPaul guilty of two counts of second-degree assault. The district court granted DuPaul's motion for a downward dispositional departure, stayed execution of consecutive 21- and 27-month prison sentences, and placed DuPaul on supervised probation for five years with credit for 129 days served. DuPaul appeals.

DECISION

DuPaul raises two arguments on appeal. First, he argues that the evidence is insufficient to establish that the antique-style revolver is a firearm and therefore insufficient to establish that he used a dangerous weapon. Second, he argues that the district court committed plain error by giving the model jury instruction on firearms as dangerous weapons because it directed the jury to reach a guilty verdict based on a temporarily inoperable firearm.

I. There is sufficient direct evidence to establish that DuPaul used a dangerous weapon.

DuPaul argues that the evidence is insufficient to establish the dangerous weapon element of assault in the second degree.

When considering a claim of insufficient evidence under the direct evidence standard, this court's review is limited to a "painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We "assume that the jury believed the state's witnesses and disbelieved contrary evidence." *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). We will not disturb a guilty 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 that the state proved that the defendant was guilty of the offenses charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Assault is an “act done with intent to cause fear in another of immediate bodily harm or death.” Minn. Stat. § 609.02, subd. 10(1) (2022). “Whoever assaults another with a dangerous weapon” is guilty of assault in the second degree. Minn. Stat. § 609.222, subd. 1.

“‘Dangerous weapon’ means any firearm, whether loaded or unloaded. . . .” Minn. Stat. § 609.02, subd. 6. “[A] firearm manufactured as such is a ‘firearm’ even if there is some mechanical defect which renders it temporarily inoperable.” *LaMere v. State*, 278 N.W.2d 552, 556 (Minn. 1979). Even if temporarily inoperable, “a firearm is still a firearm and, therefore, a ‘dangerous weapon.’” *State v. Glover*, 952 N.W.2d 190, 194 n.5 (Minn. 2020) (quoting *LaMere*, 278 N.W.2d at 556). For purposes of firearm-possession offenses, the supreme court has defined a firearm to be “a weapon, that is, an instrument designed for attack or defense, that expels a projectile by the action or force of gunpowder, combustion, or some other explosive force.” *Id.* at 195.

DuPaul contends that the state failed to present sufficient evidence that his Pietta revolver could “expel[] a projectile by the action of explosive force” at the time of the assaults and therefore did not prove that he used a firearm. DuPaul contends that no one test-fired the revolver, no witness testified to seeing the revolver previously fired, and no witness conclusively testified that the contents of the revolver could expel a projectile.

In this case, there is sufficient direct evidence to support that DuPaul used a dangerous weapon.¹ Sustaining a conviction for second-degree assault does not require proof of whether the firearm was loaded, unloaded, temporarily inoperable, or loaded improperly. *See LaMere*, 278 N.W.2d at 556 (stating that “so long as a firearm has the apparent ability to inflict injury, the victim of an assault or robbery will respond in the same way whether or not the gun is loaded”). Therefore, it is not a material fact whether the state presented sufficient evidence to prove that the actual contents of the revolver were capable of combustion on the date of the assaults.

DuPaul told his family that he had a gun. The forensic scientist testified that the components of DuPaul’s revolver are designed to use an explosion to cause compressed gas to expel a projectile. The forensic scientist testified that the Pietta revolver was manufactured as a firearm. Thus, the evidence allowed the jury to reasonably conclude that the black-powder revolver was a firearm and therefore a dangerous weapon.

Because the state presented sufficient direct evidence that DuPaul used a dangerous weapon, we affirm DuPaul’s convictions under Minn. Stat. § 609.222, subd. 1.

II. The district court did not err by instructing the jury that a firearm, even temporarily inoperable, is a dangerous weapon.

DuPaul’s second argument is that the district court erred by using the model jury instruction to instruct the jury that a temporarily inoperable firearm “is” a dangerous

¹ For purposes of this nonprecedential opinion, we assume without deciding that our review is limited, as DuPaul urges, to whether there is sufficient evidence to satisfy the instructions submitted to the jury, rather than a broader review. *But see Musacchio v. United States*, 577 U.S. 237, 244 (2016) (“A reviewing court’s limited determination on sufficiency review thus does not rest on how the jury was instructed.”).

weapon, rather than instructing the jury that a temporarily inoperable firearm “may” be a dangerous weapon.

A district court must instruct a jury in a manner that “fairly and adequately explain[s] the law of the case.” *State v. Peltier*, 874 N.W.2d 792, 797 (Minn. 2016). A district court errs if its jury instructions “confuse, mislead, or materially misstate the law.” *State v. Vang*, 774 N.W.2d 566, 581 (Minn. 2009). “[M]odel jury instructions ‘are not the law’ and are merely an ‘attempt to summarize the law for the convenience of the parties and the [district] court.’” *State v. Valdez*, 997 N.W.2d 557, 563 n.3 (Minn. App. 2023) (alteration in original) (quoting *State v. Pierce*, 792 N.W.2d 83, 86 (Minn. App. 2010)), *rev. granted* (Minn. Jan. 16, 2024).

The supreme court has held “that a firearm manufactured as such is a ‘firearm’ even if there is some mechanical defect which renders it temporarily inoperable.” *LaMere*, 278 N.W.2d at 556. A firearm is a dangerous weapon. Minn. Stat. § 609.02, subd. 6.

The model jury instruction for second-degree assault, used by the district court in this case, states that: “A firearm, whether loaded or unloaded, or even temporarily inoperable, is a dangerous weapon.” 10 *Minnesota Practice*, CRIMJIG 8.05 (2022) (citing Minn. Stat. § 609.02, subd. 6; *LaMere*, 278 N.W.2d at 556).

DuPaul concedes that the jury instructions were not objected to at trial. “A defendant who fails to object to a jury instruction at trial forfeits review of the instruction.” *State v. Coleman*, 957 N.W.2d 72, 77 (Minn. 2021). “An appellate court, however, has discretion to consider a forfeited issue if the defendant establishes: (1) an error; (2) that was plain; (3) that affects the defendant’s substantial rights.” *Id.*

In this case, the district court did not err in its jury instructions. The supreme court recently reiterated its holding from *LaMere* stating that “*LaMere* simply holds that a firearm is still a firearm and, therefore, a ‘dangerous weapon,’ even if there is ‘some mechanical defect which renders it temporarily inoperable.’” *Glover*, 952 N.W.2d at 194 n.5 (quoting *LaMere*, 278 N.W.2d at 556). Therefore, it was not error for the district court to instruct the jury that a temporarily inoperable firearm is a dangerous weapon because that is an accurate statement of the law.

Affirmed.