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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-2072**

State of Minnesota,  
Respondent,

vs.

Jeffrey Berger,  
Appellant

**Filed January 7, 2019  
Reversed  
Klaphake, Judge\***

Ramsey County District Court  
File No. 62-CR-16-5111

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

Lyndsey M. Olson, St. Paul City Attorney, Stephen J. Christie, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Pari I. McGarraugh, Kevin C. Riach, Jacob P. Harris, Fredrikson & Byron P.A., Minneapolis, Minnesota; and Teresa J. Nelson, ACLU of Minnesota, St. Paul, Minnesota (for appellant)

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

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

## UNPUBLISHED OPINION

**KLAPHAKE**, Judge

In this appeal from his conviction of public nuisance, appellant Jeffrey Berger argues that the public nuisance statute is unconstitutional, both facially and as applied to him, and that the evidence is insufficient to sustain his conviction. We reverse Berger's conviction on the basis that the state failed to prove beyond a reasonable doubt each element required under the public nuisance statute.<sup>1</sup>

### DECISION

Berger argues that his conviction is not supported by sufficient evidence. In cases where direct evidence supports an element of the offense, our 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, was sufficient to permit the jurors to reach the verdict that they did.” *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted). We assume that jurors believed the state's witnesses and did not believe contrary evidence. *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004). Further, this court will not disturb a jury's verdict if the jury, “while acting with proper regard for the presumption of innocence and regard for the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Id.* at 25-26.

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<sup>1</sup> Because we conclude that Berger's conviction was not supported by sufficient evidence, we do not reach his arguments regarding the constitutionality of the public nuisance statute.

Berger was convicted of public nuisance in violation of Minn. Stat. § 609.74(2) (2014). Under this statutory provision, the jury was required to find that (1) Berger acted intentionally, (2) that by his intentional act, Berger interfered with, obstructed, or rendered dangerous for passage any public highway or right-of-way, and (3) that Berger's actions occurred on July 9, 2016 in Ramsey County. Here, we focus our analysis on the only disputed element: whether the state proved that Berger's personal act interfered with, obstructed, or rendered dangerous for passage any public highway or right-of-way.

Upon review of the trial record, the evidence presented established the following: After the officer-involved shooting of Philando Castile, police learned that a large march was planned for Saturday, July 9, 2016. A "group" was planning to march from the intersection of University Avenue and Lexington Avenue towards the south and meet with a group marching north from the governor's mansion and "take over" I-94 near Lexington Parkway. Demonstrators began marching around 7:30 in the evening, and marchers from the south and north met at the Lexington bridge over I-94. Although police made efforts to block the ramps onto both sides of I-94, demonstrators were able to take down a portion of fence along I-94 and enter the highway at around 8:00 p.m. At the same time that a group of marchers began to enter the westbound side of the highway, eleven cars stopped on the eastbound side of the highway, and the drivers locked and abandoned their vehicles on I-94. At that time, the unfolding situation involved parked cars blocking the eastbound lanes of I-94, demonstrators in the westbound lanes of I-94, and drivers attempting to maneuver around the marchers in the westbound lanes. Because there were hundreds of

people on the interstate in both directions, primarily in the eastbound lanes, police made the decision to close I-94 between the I-35W and Highway 280 exchanges.

Officers told the demonstrators that they were violating the law and needed to leave the highway at least 30 times and communicated to the demonstrators that they would not be arrested if the group proceeded to a secondary street. Some demonstrators, but not many, left the highway. Shortly before 10:00 p.m., the nature of the demonstration in the eastbound lanes abruptly changed to riot-like conditions when a firework was thrown at police officers, followed by rocks, chunks of debris and concrete, and bottles.

Berger was demonstrating on the westbound side, where the protests were non-violent and demonstrators were standing with their arms linked together and chanting. When it became clear to police that these demonstrators did not plan to leave and intended to be arrested, they began making arrests on the westbound side of I-94. Photos showed Berger in the middle of traffic lanes sometime after dark. Further, Berger told police he was going to be arrested and that he was not going to leave. The arresting officer felt no threat from Berger and arrested him around 11:15 p.m. In total, around 40 people were arrested and I-94 was closed for about five hours. Based on this evidence, the jury found Berger guilty of public nuisance but rendered a verdict of not guilty for the unlawful assembly charge. *See* Minn. Stat. § 609.705(2) (2014).

Berger argues that the state did not present sufficient evidence to establish that he personally interfered with, obstructed, or rendered I-94 dangerous for passage. We agree. Although the state established that demonstrators entered I-94 resulting in the police decision to close the highway, the state failed to prove beyond a reasonable doubt that

Berger entered I-94 before it was already “interfer[ed] with, obstruct[ed], or render[ed] dangerous for passage” by several other circumstances that were unrelated to Berger. These circumstances proved that several vehicles were abandoned on the eastside of the highway and that police closed I-94 for around five hours. Although a photograph from the demonstration clearly places Berger in the traffic lanes of I-94, the photo was taken after dark and presumably well after I-94 had already been shut down by police. Accordingly, the state failed to sufficiently prove that Berger’s personal actions—as opposed to a myriad of circumstances unrelated to Berger—“interfer[ed] with, obstruct[ed], or render[ed] dangerous for passage” I-94.

The state contends that the jury was presented with evidence that Berger was on I-94 in the traffic lanes and that he remained there for a significant period of time even after being asked to leave by police officers. The state argues that because the normal flow of traffic on I-94 could not be restored until all pedestrians—including Berger—left the highway, the jury had a sufficient factual basis to conclude that Berger’s actions interfered with I-94 in violation of the public nuisance statute. The state also notes, correctly, that it was only required to prove that Berger’s conduct “interfere[d] with” a public highway, not necessarily that his conduct obstructed traffic. But the state was required to prove that Berger’s conduct violated the statute, and the evidence did not establish that *Berger’s* personal actions “interfer[ed] with” I-94. The state did not present evidence that Berger was one of the initial demonstrators who entered the highway resulting in its closure nor did the state present evidence that Berger’s presence prevented the highway from re-opening, as it remained closed for some time even after Berger had been arrested. Instead,

the evidence presented by the state established that I-94 would have been “interfer[ed] with” regardless of Berger’s presence on the highway, and even when viewing the evidence in the light most favorable to the conviction, no evidence proved a specific act performed by Berger which meets the requirements of the public nuisance statute.

Although the evidence presented by the state establishes that as a whole, the large group of demonstrators violated the public nuisance statute, we must examine the record with respect to the wrongful conduct of Berger as an individual. *See State v. Johnson*, 163 N.W.2d 750, 755 (Minn. 1968) (noting that when a record establishes the conduct of a group, it is necessary to examine it with respect to each individual defendant’s conduct). Here, we are not satisfied that the evidence presented by the state with respect to Berger’s individual actions sufficiently supports his conviction of public nuisance. *See State v. Hipp*, 213 N.W.2d 610, 617 (Minn. 1973) (reversing convictions for unlawful assembly where the evidence did not establish the required elements for two individuals); *Johnson* 163 N.W.2d at 755 (reversing convictions where the record did not satisfactorily contain evidence of wrongful conduct committed by each defendant individually).

Finally, we acknowledge the difficulties that law enforcement officers face in situations such as this one involving large crowds of individuals. But, the requirement that the state prove each element of each offense with respect to each individual does not leave the state with no recourse. Rather, the state could have charged Berger with a different offense, such as obstructing legal process or trespass. *See Minn. Stat. §§ 609.50, .605* (2014). But the state instead chose to charge Berger under the public nuisance statute, and

the evidence presented at trial did not establish that Berger violated that statute.

Accordingly, we reverse.

**Reversed.**