STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1455

State of Minnesota,
Respondent,

vs.

Marlon Kareem Mosby,
Appellant.

Filed August 22, 2011
Affirmed
Johnson, Chief Judge

Lyon County District Court
File No. 42-CR-09-950

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

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Johnson, Chief Judge; and Worke, Judge.

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

JOHNSON, Chief Judge

A Lyon County jury found Marlon Kareem Mosby guilty of second-degree assault and terroristic threats based on evidence that he fired a gun at another person during an

altercation in the parking lot of an apartment building. On appeal, Mosby challenges the sufficiency of the evidence supporting his conviction of second-degree assault. We affirm.

FACTS

In September 2009, the state filed a complaint alleging that Mosby and two other men, Berlon Curry and Kelvin Andrews, met John Stidman in the parking lot of Stidman's apartment building in the city of Marshall at approximately 2:00 a.m. on March 27, 2009, and that Mosby fired a .45-caliber handgun at Stidman. The state charged Mosby with four offenses: (1) attempted second-degree intentional murder, a violation of Minn. Stat. §§ 609.19, subd. 1(1) (2008) (second-degree murder), .17, subd. 1 (2008) (attempt); (2) second-degree assault with a dangerous weapon, a violation of Minn. Stat. § 609.222, subd. 1 (2008); (3) terroristic threats, a violation of Minn. Stat. § 609.713, subd. 1 (2008); and (4) intentional discharge of a firearm under circumstances that endanger the safety of another, a violation of Minn. Stat. § 609.66, subd. 1a(a)(2) (2008). The state later amended the complaint to allege, in the alternative, accomplice liability on each offense. *See* Minn. Stat. § 609.05 (2008).

At trial in April 2010, the state presented the testimony of eight witnesses, including Curry, Andrews, and Stidman. Their testimony was generally consistent with respect to the events leading up to the shooting. Stidman had invited Curry to the parking lot of Stidman's apartment building to address a rumor that Stidman planned to attack Curry and Andrews. Curry drove to the building with Mosby in the front passenger seat and Andrews in the back seat behind Mosby. Curry and Andrews testified that when

Curry parked his vehicle, Stidman ran up to the vehicle, pounded on the windows, beat on the hood, and yelled at Curry to get out. Curry started to drive away but then stopped in the driveway to the parking lot. When Curry attempted to exit the vehicle, Stidman closed the door on him, pinning his arm and leg against the vehicle, and punched Curry in the head.

The testimony of Curry, Andrews, and Stidman was somewhat inconsistent with respect to the events immediately before the shooting. Andrews testified that as Stidman and Curry scuffled, he and Mosby exited the vehicle and walked around the front to break up the fight. Curry testified, however, that Mosby never left the vehicle. Stidman testified that as he approached the vehicle, he noticed that Curry had a gun in his waistband. Curry denied that he had a gun in his waistband but testified that he reached into the back seat of the vehicle and pulled his Hi-Point brand .45-caliber handgun out of a plastic case. Stidman ran away when Curry brandished the handgun. Stidman testified that as he ran, he heard a "click-click" sound similar to "the sound of a gun loading one in the chamber." Andrews testified that he turned to leave once Stidman started running away and then heard a gunshot. Curry denied firing his handgun. Curry also testified that Mosby did not have a firearm with him during the encounter. None of the witnesses who were in the parking lot at the time of the shooting identified the shooter.

The state also presented the testimony of two residents of the apartment building. A.E. testified that she saw Stidman, whom she recognized, approach a vehicle in the parking lot, bang on its windows, and yell at its occupants. She testified that the vehicle started to drive out of the parking lot but then parked in the driveway, with its headlights

shining into the parking lot. She testified that she was unable to see much of the vehicle because it was dark and because the headlights were pointing toward her. She testified that Stidman walked over to the vehicle, that she heard yelling and scuffling, that Stidman ran away from the vehicle, and that a person whom she described as a "shorter" and "smaller" male exited the driver's side of the vehicle and took a few steps toward Stidman. She testified, "I saw the gun raise up and then I heard the shot." A.E. testified that she did not recognize the shooter but that she is familiar with Curry and Andrews and that both of them are taller than the man who fired the gun.

The second resident of the apartment building, K.E., testified that she looked out her window at approximately 2:15 a.m. and saw "three, maybe four figures" in the parking lot. She testified that she saw a man push another man, saw a man run away, and then heard a gunshot. She did not see who fired the shot.

Three other witnesses testified about the investigation into the shooting. A police sergeant testified that law-enforcement officers found a spent .45-caliber casing in the driveway of the parking lot. A police detective testified that he sent the casing and Curry's Hi-Point brand handgun to a BCA lab for finger printing and ballistics testing. The ballistics testing revealed that the spent casing had contained a Federal brand bullet. The detective also testified that he seized a Taurus brand .45-caliber handgun and Federal brand cartridges at Mosby's residence, which were sent to the BCA lab for testing. A BCA forensic scientist testified that she test-fired Curry's Hi-Point brand handgun and Mosby's Taurus brand handgun, compared spent casings of bullets fired from each gun to

the spent casing found in the parking lot, and concluded that Mosby's handgun had fired a bullet from the spent casing found in the parking lot.

The jury found Mosby guilty of second-degree assault and terroristic threats but not guilty of attempted second-degree murder or intentional discharge of a firearm. The district court sentenced Mosby to 36 months of imprisonment. Mosby appeals.

D E C I S I O N

Mosby argues that the evidence is insufficient to support his conviction for second-degree assault with a dangerous weapon, either as a principal or an accomplice. Mosby does not challenge the conclusion that an assault occurred but, rather, the conclusion that he was the person who fired the handgun.

When considering a claim of insufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jurors to reach the verdict that they did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "We will not disturb the 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 the defendant was guilty of the crime charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quoting *State v. McCullum*, 289 N.W.2d 89, 91 (Minn. 1979)).

In this case, the conviction is supported by the testimony of three of the four participants in the altercation that led to the shooting, the testimony of eyewitnesses, and testimony about physical evidence indicating that the shot was fired from a handgun belonging to Mosby. The testimony of the participants leads to the conclusion that Mosby was the shooter. The testimony of Curry, Andrews, and Stidman shows that only four persons were present in the parking lot of the apartment complex at the time of the shooting—Curry, Andrews, Stidman, and Mosby. Several persons testified that they either saw or heard a shot being fired. There is no dispute that a shot was fired at Stidman. A.E. testified that she is familiar with Curry and Andrews and that neither of them has a body that is similar in size to that of the shooter. Moreover, the jury had the opportunity to observe Mosby, Curry, and Andrews in the courtroom and compare their relative physical sizes. This evidence is sufficient to allow a jury to conclude that it was Mosby who fired a shot at Stidman.

The testimony of the participants and eyewitnesses is corroborated by the physical and scientific evidence indicating that the shot was fired from a handgun belonging to Mosby. The spent casing of a Federal brand .45-caliber bullet that was found at the scene of the shooting matches cartridges that Mosby possessed in his home at the time of a search and seizure. Also, an expert analysis of the spent casing found at the scene led to the conclusion that it contained the bullet that was fired from the Taurus brand .45-caliber handgun that later was found in Mosby's apartment. This evidence provides further support for the jury's finding that Mosby was the person who fired a shot at Stidman.

Mosby contends that the evidence is insufficient because it does not satisfy the stricter standard of review that applies to circumstantial evidence. A conviction based on circumstantial evidence receives "heightened scrutiny" from a reviewing court. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). We apply a two-step test to evaluate the sufficiency of the circumstantial evidence supporting a defendant's conviction. *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010). First, we "identify the circumstances proved." *Id.* at 329. At this first step, "we defer . . . to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicts with the circumstances proved by the State." *Id.* Second, we "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved," including "inferences consistent with a hypothesis other than guilt." *Id.* At the second step, "we give no deference to the fact-finder's choice between reasonable inferences." *Id.* at 329-30 (quotation omitted). Circumstantial evidence supporting a conviction must be "consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 330. "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). "We will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *Andersen*, 784 N.W.2d at 330 (alteration and quotation omitted).

Mosby's argument requires us to determine whether the verdict in this case depends on circumstantial evidence. Circumstantial evidence is "evidence based on

inference and not on personal knowledge or observation and all evidence that is not given by eyewitness testimony." *State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007) (referring to witness's testimony of prior statement by victim of defendant's actions) (quotation omitted); *State v. McDonough*, 631 N.W.2d 373, 384 (Minn. 2001) (referring to defendant's statement about his own prior actions). By contrast, direct evidence "is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Clark*, 739 N.W.2d at 421 n.4 (referring to eyewitness's testimony about defendant's actions) (internal quotation omitted).

In light of these definitions, we agree with Mosby that his conviction rests on circumstantial evidence. In deciding whether a conviction is based on circumstantial evidence we look at the proof of the elements of the offense. *See Bernardt*, 684 N.W.2d at 477 n.11. The testimony of the participants and the eyewitnesses provided abundant direct evidence about the shooting, but the direct evidence does not extend so far as to identify the shooter because there was no direct evidence that Mosby is the person who fired a shot at Stidman. The jury could only make an inference to reach that conclusion. Nonetheless, the inference is rather obvious: by process of elimination, the shooter must have been Mosby. This is so because, if we assume the truth of the evidence that is consistent with the verdict, we know that four persons were present in the parking lot, that one of them (Stidman) was shot at, and that two of them (Curry and Andrews) were not the shooter. Similarly, the physical evidence that the shot was fired by the handgun that police later found in Mosby's home also is circumstantial evidence that supports the inference that Mosby was the person who fired a handgun at Stidman.

Mosby contends that the circumstantial evidence is not "inconsistent with any other rational hypothesis except that of guilt," *Andersen*, 784 N.W.2d at 330, because the circumstances proved would support a reasonable inference that he merely took possession of the handgun after it was used in the shooting. But this contention fails to account for A.E.'s testimony that the shooter is shorter than Andrews and Curry. Mosby contends that A.E.'s testimony is flawed because she testified that the shooter exited the vehicle from the driver's side of the vehicle, while other evidence shows that Mosby exited from the passenger's side of the vehicle. But this argument simply goes to credibility, and additional evidence places Mosby at the driver's side of the vehicle when the shot was fired. On appeal, we must assume that the jury believed the evidence that supports the verdict, namely, the evidence that Mosby was standing on the driver's side of the vehicle, and that the jury "disbelieved any evidence to the contrary." *Moore*, 438 N.W.2d at 108.

Thus, the direct evidence and the circumstantial evidence form a "complete chain" that leads directly to Mosby's guilt. *Al-Naseer*, 788 N.W.2d at 473. To the extent that the jury relied on the circumstantial evidence, the circumstances proved are consistent with the jury's finding that Mosby assaulted Stidman with a dangerous weapon by firing a loaded Taurus brand .45-caliber handgun at him. *See Andersen*, 784 N.W.2d at 330. The circumstances proved are "inconsistent with any rational hypothesis except that of guilt" because there is no rational explanation of the evidence that would allow the jury to find that someone else shot at Stidman. *See id.* The caselaw permits circumstantial evidence to establish the identity of the person who committed a crime. For example, in

State v. Scanlon, 719 N.W.2d 674 (Minn. 2006), the supreme court affirmed a conviction of first-degree premeditated murder based on circumstantial evidence that the defendant was experiencing "significant financial difficulties," that the victim often carried large quantities of cash, that the defendant was the last person seen with the victim, that the defendant gave his aunt more than $1,000 in cash on the night of the murder, and that the defendant possessed a shotgun of the same gauge as the gun that killed the victim. *Id.* at 678-79, 688. We believe that the circumstantial evidence in this case is as strong as, or stronger than, the circumstantial evidence in *Scanlon*.

In sum, the evidence is sufficient to prove that Mosby fired a handgun at Stidman and, thus, committed the offense of second-degree assault with a dangerous weapon. In light of this conclusion, we need not consider Mosby's argument that the evidence is insufficient to prove that he aided and abetted the commission of second-degree assault with a dangerous weapon.

Affirmed.