STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1861

State of Minnesota,
Respondent,

vs.

Antonio Maurice Delk,
Appellant.

Filed December 23, 2008
Affirmed in part, reversed in part, and remanded
Shumaker, Judge

Stearns County District Court
File No. K8-05-5488

Lori Swanson, Attorney General, Kristi Ann Nielsen, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101-2130; and

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Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

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

SHUMAKER, Judge

Appellant Antonio Maurice Delk challenges his convictions of second-degree intentional murder, second-degree unintentional murder, third-degree murder and second-degree assault with a dangerous weapon. On appeal he argues that (1) the district court erred in denying his motion to suppress primer gunshot residue evidence at trial because the test, as applied to him, was unreliable; (2) he was denied his right to a fair trial by the presence of two unauthorized persons in the jury room during deliberations; (3) the evidence was insufficient to prove that he acted with intent to kill; and (4) the prosecutor committed misconduct during closing argument by telling the jury to "do the right thing" and that some witnesses could not be accomplices. Appellant also raises several pro se issues. We affirm in part, reverse in part, and remand.

FACTS

On November 26, 2005, T.J. celebrated his 20th birthday and a friend held a party for him in a St. Cloud apartment. T.J. argued with one of the guests, who left the party and returned later with several other people. One of those people was appellant, Antonio Maurice Delk. That group was kicked out of the party and, shortly afterward, three shots were fired from outside the apartment building toward the unit in which the party was taking place. One of the shots struck and killed T.M. inside the apartment unit.

The state accused Delk of being the shooter and charged him with three counts of murder and one count of assault with a deadly weapon. A jury convicted Delk of those charges.

Various partygoers, some of whom had pleaded guilty to aiding Delk, testified at the trial. Although the testimony conflicted in several respects, there was firsthand evidence that Delk fired shots into the apartment unit where T.M. was killed.

Among the non-testimonial evidence received during the trial were gunshot residue samples taken from Delk's hands on November 27, 2005. From these samples, an expert witness concluded that Delk recently handled, or discharged, or had been in close proximity to the discharge of a firearm. Delk challenges the admissibility of this evidence.

While the jury was deliberating, it requested an opportunity to view a crime-scene DVD that had been received in evidence but had not been played during the trial. The court granted the request, and then later discovered that two bailiffs had remained in the jury room during the playing of the DVD. Delk moved for a mistrial because of the presence of the bailiffs in the jury room. The court denied the motion, and the jury was allowed to deliberate to verdict. This appeal follows.

D E C I S I O N

Gunshot Residue Evidence

Approximately 29 hours after the shooting, the police swabbed Delk's hands to test for gunshot residue (GSR). At no point from his arrest until his hands were swabbed were Delk's hands "bagged" or otherwise covered. A woman's coat found in the apartment where Delk was arrested was also swabbed.

The swabs were tested for GSR at the Bexar County Criminal Investigation Laboratory in Texas by Crystina Vachon, a forensic scientist. Vachon testified that

Delk's hands and the coat contained primer gunshot residue. Based on the GSR tests, Vachon concluded that Delk "may have discharged, handled, or been in close proximity to a discharged firearm."

Delk requested a *Frye-Mack* hearing on the issue of the admissibility of the GSR results and supporting expert testimony. The court held such a hearing and then ruled that the test results and Vachon's expert testimony were admissible. Vachon testified that optimal GSR testing should occur within four to six hours of a shooting and that ideally a suspect should be swabbed before being handcuffed and transported, but she maintained that the GSR testing was proper and supported her conclusion.

Delk argues that (1) there has never been a judicial determination that GSR testing is generally accepted by the scientific community; (2) the conclusions drawn from the GSR tests were not reliable; and (3) there was no adequate showing that the GSR methodology is reliable or in this instance produced a reliable result. Of particular concern to Delk was the 29-hour lapse of time between the shooting and the swabbing and many possible ways the GSR could have been transferred to him in that interval.

We first note that it is unlikely that the *Frye-Mack* standards apply to GSR testing. The first of *Frye-Mack*'s two prongs is that "a *novel* scientific technique that produces evidence to be admitted at trial must be shown to be generally accepted within the relevant scientific community." *State v. Traylor*, 656 N.W.2d 885, 891 (Minn. 2003) (emphasis added). There is no authoritative definition of "novel"; rather, that determination is left to the courts on a case-by-case basis. Minn. R. Evid. 702 2006 comm. cmt.; *e.g.*, *State v. Klawitter*, 518 N.W.2d 577, 585 (Minn. 1994) (addressing

whether 12-step drug recognition protocol involves novel scientific theory); *State v. Hodgson*, 512 N.W.2d 95, 98 (Minn. 1994) (finding dog-bite analysis does not involve novel scientific theory). "[T]he *Frye-Mack* test applies to evidence based on *emerging scientific techniques . . . .*" *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 528 (Minn. 2007) (quotation omitted) (emphasis added). The plain meaning of "novel" is "new." *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980) (words and phrases are construed to give them their ordinary meaning).

GSR-testing evidence has been admitted in Minnesota courts for decades. *E.g.*, *State v. Spencer*, 298 Minn. 456, 460, 216 N.W.2d 131, 134 (1974) (finding that neutron-activation analysis method of identifying GSR was reliable and holding GSR evidence and expert testimony was admissible). Delk has not shown that the relevant scientific community is in disagreement about what constitutes a particle of primer GSR, or that GSR can be identified from samples taken from skin or clothing, or that scanning electron microscope (SEM) is an appropriate device for identifying GSR particles. *See, e.g.*, *People v. Palmer*, 145 Cal. Rptr. 466 (Cal. App. 1978) (holding that no *Kelly-Frye* hearing need be held on general acceptance where "there appears to be a unanimity of scientific opinion regarding the value and reliability of the SEM for GSR particle analysis.")

Delk's quarrel is not with the science underlying GSR analysis but rather with the "meaning and helpfulness" of the data derived from the GSR analysis. He argues that "[t]he underlying problem with GSR is not the science, but the conclusions drawn from the science."

Thus, Delk does not raise a *Frye-Mack* issue but rather a rule 702 issue. *Jacobson*, 728 N.W.2d at 528-29 (holding that, because the evidence was not novel, no *Frye-Mack* hearing was required; courts are to evaluate the admissibility of such evidence on a case-by-case basis by applying rules 702 and 703 of the Minnesota Rules of Evidence); *State v. Jensen*, 482 N.W.2d 238, 239 (Minn. App. 1992), *review denied* (Minn. May 15, 1992) (finding *Frye-Mack* did not apply to retrograde extrapolation because principles underlying the science were not new or novel).

Under rule 702, to be admissible, an expert "opinion must have foundational reliability." Minn. R. Evid. 702. As the Advisory Committee to the rules of evidence noted:

> The . . . amendment does not purport to describe what that foundation must look like for all types of expert testimony. The required foundation will vary depending on the context of the opinion, but must lead to an opinion that will assist the trier of fact. If the opinion or evidence involves a scientific test, the case law requires that the judge assure that the proponent establish that "the test itself is reliable and that its admission in the particular instance conformed to the procedure necessary to ensure reliability." *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000) (quotation omitted).

Minn. R. Evid. 702 2006 comm. cmt.

At the *Frye-Mack* hearing, evidence was presented that gunshot residue from the discharge of a firearm can be reliably detected on human skin and clothing; that there are reliable procedures for lifting, testing, and analyzing GSR samples; and that Vachon followed those procedures in this case. The court also heard testimony that the GSR results supported the conclusion that Delk may have come into some type of contact with

a discharged firearm. This evidence provided the requisite "foundational reliability" for the admission of Vachon's opinion.

Beyond this foundation, there was sharp disagreement between the experts as to the significance of the time frame within which a swab for testing should be taken; the likelihood that, after the passage of 29 hours, any conclusions can be drawn about the source of the residue; the possibility of innocent explanations for the transfer of the GSR; the necessity of "bagging" a suspect's hands to preserve residue from a particular incident for testing; and the possibility of test distortion if the suspect engages in activities between the shooting and the lifting of the samples.

Although Delk disputes the proposition that these disagreements go to the weight of the evidence, we hold that, as here, once threshold reliability is determined, the district court may exercise its discretion to admit the expert evidence, and its ultimate reliability to prove or disprove consequential facts is for the trier of fact to assess. *See McPherson v. Buege*, 360 N.W.2d 344, 348 (Minn. App. 1984) (finding alleged deficiencies in the factual basis of expert testimony go more towards its weight than admissibility).

Delk also argues that Vachon's opinion was not helpful because it was equivocal, indicating only that Delk "may have" discharged a firearm, or recently handled one, or have been in the vicinity of one. We are aware of no requirement that the testimony of any witness, expert or otherwise, must be couched in terms of certainty. The key under rule 702 is whether the testimony would be helpful to the trier of fact. Although Vachon's testimony did not establish that Delk fired a gun, it moved him closer to that possibility than if the GSR evidence had been negative. Thus, it was helpful to the jury

to know the GSR test results, and the weight of those results was for the jury to decide. *See Haas v. Gaviser*, 348 N.W.2d 406, 408 (Minn. App. 1984) (noting that the value of expert evidence is to be tested by cross-examination and ultimately decided by the jury); *see also Spencer,* 298 Minn. at 461, 216 N.W.2d at 134 (holding that expert is not permitted to state conclusion from GSR test that defendant had definitely fired a gun but it would be appropriate to say that he "may have" done so).

The court did not abuse its discretion in admitting the GSR results and Vachon's expert testimony regarding the GSR tests.

Bailiffs' Unauthorized Presence in Jury Room

After the jury retired to deliberate, the state raised the issue of what to do about a DVD of the crime scene that had been admitted into evidence but had not yet been shown because of an equipment malfunction. Counsel and the court discussed various options if the jury asked to see the video. The jury did ask to see the video, and counsel agreed that the five-minute DVD that had no audio would be played in the jury room and then removed at its conclusion. The court instructed the jury about this procedure.

Later, the court learned that the bailiffs remained in the deliberation room while the jury watched the DVD. Both bailiffs gave statements under oath that they did not speak to the jurors or make any comments during the playing of the DVD. Delk moved for a mistrial, but the court denied the motion.

We review the court's denial of a motion for a mistrial because of an official's improper contact with the jury for an abuse of discretion. *State v. Hanke*, 712 N.W.2d 211, 214 (Minn. App. 2006) (citing *State v. Cox*, 322 N.W.2d 555, 558 (Minn. 1982)).

Unauthorized contact with a jury is presumptively prejudicial. *State v. Martin*, 723 N.W.2d 613, 623-24 (Minn. 2006). When the unauthorized contact is by a bailiff, who is an officer of the court, the prejudice carries great weight. *Cox*, 322 N.W.2d at 558. But the presumption of prejudice is "not conclusive." *Hanke*, 712 N.W.2d at 214 (quoting *State v. Richards*, 552 N.W.2d 197, 210 (Minn. 1996)). The state bears the burden of showing that the contact was harmless. *Id.* We must be able to conclude "beyond a reasonable doubt that the asserted error did not contribute to the verdict obtained." *Cox*, 322 N.W.2d at 558.

In assessing the nature and degree of the prejudice from an unauthorized contact with the jury, we consider "the nature and source of the prejudicial matter, the number of jurors exposed to the influence, the weight of the evidence properly before the jury, and the likelihood curative measures were effective in reducing the prejudice." *Id.* at 559. We also consider "the length and proportion of the time that the [third party] was present and also any active participation by the [third party] in the deliberation process." *State v. Crandall*, 452 N.W.2d 708, 711 n.1 (Minn. App. 1990).

Delk did not request a *Schwartz* hearing on this issue. *Cf. State v. Jurek*, 376 N.W.2d 233, 237 (Minn. App. 1985) (concluding that third-party communication requires a *Schwartz* hearing if counsel seeks one). The record shows that the DVD was only about five minutes in length and showed the scene of the crime. There was no audio. Neither bailiff spoke or communicated in any other way during the showing, nor did any juror comment while the DVD was being played. The jury as a whole did not conduct any deliberations while the bailiffs were present.

Delk argues that "[i]t is unlikely that jurors would have felt free to critically evaluate prosecution evidence while in the presence of two people who were not jurors and who should not have been in the jury room." The argument has merit, but, considering the brevity of the DVD, its nature as depicting only the physical crime scene, and the fact that no unauthorized communications occurred, we are persuaded beyond a reasonable doubt that this error regarding the bailiff's presence during the showing of a relatively minor evidentiary item was harmless.

Sufficiency of Evidence

The jury found Delk guilty of second-degree intentional murder, second-degree unintentional murder, and third-degree murder. He argues that the evidence was insufficient to support his conviction of second-degree intentional murder. We agree.

When reviewing the sufficiency of the evidence to support a conviction, this court is limited to a "painstaking analysis of the record to determine whether the evidence, when reviewed in the 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).

Evidence is sufficient to support a conviction if, given the facts in the record and the legitimate inferences drawn from those facts, a jury could reasonably conclude that defendant committed the crime charged. *State v. Laine*, 715 N.W.2d 425, 430 (Minn. 2006). We assume the jury disbelieved any evidence in conflict with the verdict. *State v. Bolstad*, 686 N.W.2d 531, 539 (Minn. 2004)

To support a conviction of intentional second-degree murder, the state had to prove that Delk (1) caused the death of another human being (2) with the intent to effect the death of that person, (3) without premeditation. Minn. Stat. § 609.19, subd. 1(1) (2004). The phrase "with intent to" means that the actor "either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(4) (2004).

Intent is "an inference drawn by the jury from the totality of circumstances." *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989). Being a state of mind, intent to kill is usually dependent upon proof by circumstantial evidence. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). The question is whether "a reasonable jury [could] conclude beyond a reasonable doubt that . . . the only reasonable inference to be drawn from all the evidence, now viewed most favorably to the state, is one of intentional killing?" *Id.*

There was evidence that three shots were fired from the road outside the building toward the building. One shot went through the apartment window and struck T.M. in the head. The state characterized Delk's act as shooting "blindly" towards the apartment building. Although we reject any argument that a so-called blind and random discharge of a firearm necessarily negates an intent to kill, we hold that the evidence here is not consistent with or reasonably supportive of an intention to kill.

Delk and his group had been kicked out of the party. Just before driving off, Delk fired three random shots, apparently aimed nowhere in particular except the building in general. There was no evidence that he aimed at or toward any particular person or group of persons, or that there was anyone outside the building when the shots were fired.

There was no evidence that any person was a visible "target" toward whom Delk fired the shots. The more rational hypothesis is that Delk was firing shots at the building from which he and his cohorts had been ejected.

Thus, Delk's conviction of second-degree intentional murder is reversed and must be vacated, and he must be resentenced accordingly.

Prosecutorial Misconduct

Delk points out several alleged instances of prosecutorial misconduct. Prosecution and defense counsel are given considerable latitude in making closing arguments so long as the defendant's fundamental rights are not infringed. *State v. Jensen*, 308 Minn. 377, 380, 242 N.W.2d 109, 111 (1976). To determine whether prosecutorial misconduct warrants a new trial, we first examine whether the appellant objected to the misconduct. *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007).

Objected-to Conduct

Delk argues that the prosecutor committed misconduct when he told the jury to "do the right thing." Specifically, he claims the remark was inflammatory and asked the jury to look beyond the parameters of the case. We disagree. In *State v. Powers*, the prosecutor asked the jury to "do the right thing," and the supreme court found no misconduct. 654 N.W.2d 667, 679 (Minn. 2003). *Powers* dictates that this statement neither inflames the jury's passions nor asks them to look beyond the parameters of the case.

Unobjected-to Conduct

For unobjected-to prosecutorial misconduct, the court applies a plain error test. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Before an appellate court will review an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. *Id.* at 298. The appellant has the burden of showing that the error was plain; if he does so, the burden shifts to the state to show that the error did not affect appellant's substantial rights, "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* at 302 (quotation omitted). Only if the three prongs of the plain error test are met do we determine whether the error seriously affected the integrity and fairness of the proceedings so as to require reversal. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Delk claims that the prosecutor misstated the law of accomplice testimony to the jury in his closing argument when he said the following:

> [T]he State can't charge them unless we have a good-faith belief that we can convict them . . . I can't charge them…You have been told that [J.G.] and [J.S.] can be accomplices. I am here to tell you that they cannot be accomplices just by their presence [at the scene]. There are no facts that support their aiding and abetting any murder . . . .

The prosecutor also stated that J.G. and J.S. could not be the shooters because "[t]hey deny that they know who pulled the trigger, other than individually they both tell you they didn't do it. The guys they were with, [C.M.] and their brother, didn't do it. The proof of the negative eliminating them as the shooter."

The determination of whether an individual is an accomplice is a question of fact for the jury when it is not clear the individual should be considered an accomplice as a matter of law. *State v. Gail*, 713 N.W.2d 851, 863 (Minn. 2006). The test to determine whether a witness is an accomplice is whether the witness could have been indicted and convicted for the same crime with which the defendant was charged. *Id.*

Here, the prosecutor created the impression that J.G. and J.S. could not be considered accomplices as a matter of law because he personally could not charge them, and that some "proof of the negative" negated them as potential accomplices. These statements are contrary to the law, and therefore constitute plain error. *Ramey*, 721 N.W.2d at 300 (plain error is obvious error that a "prosecutor should know is improper."). These statements could also lead the jury to improperly infer that, because the prosecutor did not charge J.G. and J.S., Delk must be guilty because he *was charged*. However, we conclude that these statements did not substantially affect Delk's rights because the court instructed the jury that anything the attorneys said was not the law; that anything the attorneys said that differed from the judge's instructions on the law was to be ignored; and most importantly, that the jury was to decide whether certain testimony should be considered accomplice testimony.

Finally, Delk argues that the prosecutor improperly commented on his failure to testify at trial. Particularly, he takes issue with the prosecutor's comments that his co-defendants had "at some level . . . accepted some responsibility," and that D.K. had "stepped up to the plate and admitted what he did." In reviewing a prosecutor's statements, we examine the arguments "as a whole, rather than just selective phrases or

remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). While prosecutors have a right to argue, analyze, and explain the evidence and its inferences, they may not directly or indirectly comment on a defendant's failure to testify. *State v. Whittaker*, 568 N.W.2d 440, 451 (Minn. 1997) (citing *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233 (1965)). A prosecutor may speak to the jury about accountability "in order to help persuade the jury not to return a verdict based on sympathy for the defendant, but the prosecutor should not emphasize accountability to such an extent as to divert the jury's attention from its true role of deciding whether the state has met its burden of proving defendant guilty beyond a reasonable doubt." *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985).

Here, the prosecutor's statements comprised, at most, a single paragraph of the 13-page opening statement and 35-page closing argument. These statements were not comments on Delk's failure to testify, nor did they emphasize accountability to the extent that the jury would be distracted from its duties. These comments do not rise to the level of prosecutorial misconduct or plain error.

Pro Se Issues

Finally, Delk raises several issues in his pro se supplemental brief.

Co-defendant Convictions

Delk argues the court erroneously admitted evidence of his co-defendants' convictions, which allowed the jury to impermissibly infer that he, too, was guilty of the crimes alleged. Delk did not object when evidence of his accomplices' crimes was introduced, and therefore his claim is reviewed for plain error affecting substantial rights.

State v. Meldrum, 724 N.W.2d 15, 19-20 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007).

Minnesota Rule of Evidence 609(a) provides that a witness may have his or her credibility impeached by the introduction of a prior felony-level conviction that is less than ten years old. Generally, an accomplice's guilty plea cannot be used to prove the guilt or innocence of the accused. *State v. Cermak*, 365 N.W.2d 243, 247 (Minn. 1985). However, testimony regarding the circumstances surrounding the plea is permissible if it is offered for the value of the firsthand narrative it provides. *State v. Caine*, 746 N.W.2d 339, 351 (Minn. 2008). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. Delk has not shown that any of these rules was violated.

Delk also contends that the court erroneously admitted self-exculpatory statements of his co-defendants. This argument has no merit. Prior inconsistent statements are admissible to impeach a witness. The alleged self-exculpatory statements were actually prior inconsistent statements elicited from the witnesses when they denied that they had seen Delk with a gun or shooting towards the apartment building. The court properly instructed the jury that such testimony was "admitted only for the light it may cast on the truth of [the witness's] testimony." The introduction of these statements was not plain error.

Jury Selection

Delk asserts that his right to a fair trial was violated because there were no minorities in his prospective jury pool. At the outset of voir dire, Delk's counsel moved

to strike the entire all-white jury panel on a *Batson* challenge. The court denied the motion, noting that this was a recurring issue in Stearns County because of the small minority population. A defendant has the right to an unbiased jury, and the existence of racial discrimination in the selection of that jury is a violation of his right to equal protection. *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 (1986). However, there is no right to a jury with a particular racial make-up. *Hennepin County v. Perry*, 561 N.W.2d 889, 895 (Minn. 1997). Rather, "[t]he Sixth Amendment requires that the pool from which a jury is drawn reflect a representative cross-section of the community." *Id.*

To make a prima facie showing that the jury selected was not a fair cross-section of the community, a defendant must show (1) that the group allegedly excluded is distinctive in the community; (2) that the group was not fairly represented in the venire; and (3) that the underrepresentation was a result of systematic exclusion of the group in the selection process. *Id.* at 896 (citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668-69 (1979)). Delk has made no such showing. The district court did not clearly err in denying his motion to strike the entire jury.

Jury Instructions

Delk argues that he was denied his due process right to a "hung jury," when the district court instructed the jury that it must reach a unanimous verdict. To support this contention, he cites *State v. Martin*, which held that a "hung-jury" (a jury that is deadlocked and unable to reach a verdict) is a legitimate end to a criminal trial. 297 Minn. 359, 372-73, 211 N.W.2d 765, 772-73 (1973). *Martin* also held that a jury should

not be instructed with the so-called "Allen" charge, which tells the jury that a criminal case may not end until a unanimous verdict is reached. *Id.* at 369, 211 N.W.2d at 770.

Here, the court instructed the jury in accordance with Minnesota criminal jury instruction 3.04, which states, "[i]n order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous." 10 *Minnesota Practice*, CRIMJIG 3.04 (2006). That instruction also tells the jury that "[y]ou should not hesitate to reexamine your views and change your opinion . . . you should not surrender your honest opinion . . . merely to reach a verdict." *Id.* Judges are not required to instruct that deadlock is a permissible result; they must simply refrain from telling juries that they *must* reach a verdict. *State v. Peterson*, 530 N.W.2d 843, 846 (Minn. App. 1995). The court did not tell the jury that it was required to reach a verdict, and thus Delk's argument fails.

Amended Indictment

Finally, Delk argues that the court impermissibly amended his indictment when it gave the jury an instruction on aiding and abetting. The inclusion of a jury instruction on aiding and abetting does not constitute an amendment to the complaint. *State v. Ostrem*, 535 N.W.2d 916, 922 n.6 (Minn. 1995) (sua sponte instruction on aiding and abetting, when appellant was not charged with aiding and abetting, did not violate defendant's due process rights). Aiding and abetting is not a separate substantive offense, and so this argument also has no merit. *Id.* at 922.

In conclusion, we find that there was insufficient evidence to support the conviction of second-degree intentional murder, and Delk's conviction on that count is

reversed and must be vacated, and he must be resentenced accordingly. We affirm the district court as to all other issues.

Affirmed in part, reversed in part, and remanded.