STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2160

State of Minnesota,
Respondent,

vs.

Joshua Leigh Miller,
Appellant.

Filed January 6, 2020
Affirmed
Johnson, Judge

St. Louis County District Court
File No. 69DU-CR-17-2580

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Florey, Judge; and John P. Smith, Judge.*

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

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

JOHNSON, Judge

A St. Louis County jury found Joshua Leigh Miller guilty of attempted second-degree murder based on evidence that he fired a gun at a woman's torso or head at close range. We conclude that the state's evidence is sufficient to prove beyond a reasonable doubt that Miller acted with intent to kill the victim. Therefore, we affirm.

FACTS

Late one night in July 2017, K.M., an acquaintance of Miller, arranged to purchase methamphetamine from a dealer, using T.B. as an intermediary. Miller, K.M., and another person met T.B. and gave her $80 in exchange for a "t-shirt," which is approximately 1.75 grams of methamphetamine. T.B. delivered the methamphetamine to Miller, who weighed it and said that it was "short." Miller and K.M. asked T.B. to return to the dealer to remedy the deficiency. T.B. refused but promised to give Miller and K.M. $20 of her own money as compensation. T.B. told K.M. that she would give her $20 by the following week, if not sooner.

The next day, K.M. sent electronic messages to T.B. throughout the day, inquiring about the money that T.B. had promised to give her. Later that evening, K.M. informed T.B. that she would visit T.B. at her home to discuss the matter. T.B. told K.M. not to come to her home. But, approximately 15 to 20 minutes later, K.M. arrived at T.B.'s back door and demanded the money that she was owed or property of equivalent value. T.B. refused, slammed the door on K.M., and locked it. K.M. pounded on the back-door window. T.B. pretended to call the police, which caused K.M. to run away.

A few minutes later, Miller, accompanied by K.M. and another person, kicked in T.B.'s back door and entered her home. T.B. saw that Miller was armed with a gun and was walking toward her. T.B. ran out the front door toward a neighbor's house. She slipped and fell on the grass of her front lawn. While sitting on the grass, T.B. turned her upper body around toward her house to see if anyone was following her. She saw Miller standing on her front porch, aiming his gun at her. T.B. instinctively raised her arms to protect her face. As she did so, she heard a gunshot and immediately saw that she was bleeding from her right arm. T.B. testified at trial that Miller was standing "just feet away" from her when he shot her and that there was nothing obstructing their views of one another.

After being shot, T.B. lay on the ground pretending to be dead. Miller turned around and ran through the front door of T.B.'s house, ran out the back door, and drove away in a car. After Miller and the others had left, T.B. got up and sought help by flagging down a cab and asking the cab driver to call 911. She was treated at a hospital and eventually recovered from her injuries.

The state charged Miller with attempted second-degree murder, in violation of Minn. Stat. § 609.19, subd. 1(1) (2016); first-degree assault, in violation of Minn. Stat. § 609.221, subd. 1 (2016); and first-degree burglary, in violation of Minn. Stat. § 609.582, subd. 1(b) (2016).

The case was tried to a jury over three days in August 2018. The state presented the testimony of ten witnesses, of whom T.B. was the only eyewitness. Miller did not testify or present any other evidence. In closing arguments, Miller's trial attorney did not dispute

that Miller shot T.B. but argued that he did not intend to kill her. Miller's trial attorney urged the jury to find him guilty only of second-degree or third-degree assault. The jury returned verdicts of guilty on all three counts as well as the lesser-included offenses of second-degree assault and third-degree assault. The district court imposed concurrent prison sentences of 200 months on count 1 and 78 months on count 3. Miller appeals.

D E C I S I O N

Miller argues that the state's evidence is insufficient to prove beyond a reasonable doubt that he intended to kill T.B.

A person is guilty of second-degree murder if he "causes the death of a human being with intent to effect the death of that person or another, but without premeditation." Minn. Stat. § 609.19, subd. 1(1). A person is guilty of an attempt to commit a crime if he, "with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1 (2016). The phrase "with intent to" is defined by statute to mean "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) (2016). In light of this definition, a person may be found guilty of attempted second-degree murder if he believes that his act will result in death. *See Arredondo v. State*, 754 N.W.2d 566, 572-73 (Minn. 2008); *State v. Bakdash*, 830 N.W.2d 906, 912 (Minn. App. 2013), *review denied* (Minn. Aug. 6, 2013); *State v. Noble*, 669 N.W.2d 915, 919 (Minn. App. 2003), *review denied* (Minn. Dec. 23, 2003).

When reviewing the sufficiency of the evidence, we ordinarily undertake "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient" to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We "assume that the factfinder disbelieved any testimony conflicting with that verdict." *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (quotation omitted). We do not disturb a verdict if the fact-finder, "acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

The above-stated standard of review applies so long as a conviction is based on direct evidence. *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). Direct evidence is evidence that is "based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence, on the other hand, is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *Id.* (quotation omitted). A conviction depends on circumstantial evidence if proof of the offense, or a single element of the offense, is based solely on circumstantial evidence. *See State v. Fairbanks*, 842 N.W.2d 297, 307 (Minn. 2014). In this case, the parties agree that the state's proof of Miller's intent depends on circumstantial evidence.

Accordingly, we apply the heightened standard of review applicable to the sufficiency of circumstantial evidence, which consists of a two-step analysis. First, we identify the circumstances proved. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). "In

identifying the circumstances proved, we assume that the jury resolved any factual disputes in a manner that is consistent" with the verdict. *Id*. Second, we "examine independently the reasonableness of [the] inferences that might be drawn from the circumstances proved" and "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotations omitted). At the second step of the analysis, we give no deference to the jury's verdict. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). In assessing the circumstances proved and the inferences that may be drawn from them, we consider the evidence as a whole rather than examining each piece of evidence in isolation. *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

We begin by identifying the circumstances that are relevant to the question whether Miller intended to kill T.B. *See Moore*, 846 N.W.2d at 88. The parties essentially agree on the relevant circumstances, which are stated above in the statement of facts.

We next "determine whether the circumstances proved are consistent with [Miller's] guilt." *See id*. Miller does not contend that the circumstances proved are inconsistent with guilt. The state contends that "[t]here can be no serious dispute that the circumstances proved are consistent with the jury's conclusion that Appellant acted with an intent to kill." We agree with the state that a reasonable inference from the circumstances proved is that Miller intended to kill T.B. *See State v. Fardan*, 773 N.W.2d 303, 321-22 (Minn. 2009) (concluding that defendant intended to kill when he fired single gunshot at victim's abdomen from distance of three to five feet); *State v. Robinson*, 536 N.W.2d 1, 2 (Minn. 1995) (concluding that defendant intended to kill when he fired single gunshot at victim's head at close range); *State v. Bickham*, 485 N.W.2d 923, 926 (Minn. 1992) (concluding

that defendant intended to kill when he fired single gunshot at back of victim's head at close range); *State v. Boitnott*, 443 N.W.2d 527, 530-32 (Minn. 1989) (concluding that defendant intended to kill when he fired single gunshot at victim's skull); *State v. Whisonant*, 331 N.W.2d 766, 768 (Minn. 1983) (concluding that defendant intended to kill when he fired single shot from pen gun toward victim from distance of 12 feet); *State v. Chuon*, 596 N.W.2d 267, 271 (Minn. App. 1999) (concluding that defendant intended to kill when he fired single gunshot at victim's shoulder from distance of six to eight feet), *review denied* (Minn. Aug. 25, 1999).

We continue by determining whether the circumstances proved are "inconsistent with any rational hypothesis except that of guilt." *See Moore*, 846 N.W.2d at 88 (quotations omitted). Miller contends that the circumstances proved are consistent with the inference that he was attempting merely to scare or injure T.B. but not kill her. He emphasizes that he had "a clear shot from close range at a sizable and stationary target" but fired only one shot at T.B. and hit her in her right arm rather than her head or torso. He asserts that if he had intended to kill T.B., "he easily could have done so by shooting her in the torso or head, rather than in the arm." He also points out that he did not continue to attack T.B. after firing one shot, even though she was vulnerable while lying on the ground only a few feet away from him. He further contends that, in light of the evidence that T.B. pretended to call the police, it is reasonable to infer that he shot her only to prevent her from reporting him and K.M. to law enforcement. In response, the state contends, "Taking the circumstances proved in the light most favorable to guilt permits only one inference:

when Appellant kicked down T.B.'s door while holding a gun, chased her outside, intentionally shot her, and then fled, he intended to kill her."

We agree with the state that Miller's alternative hypothesis is inconsistent with the circumstances proved. There was no evidence that Miller intended to shoot T.B. in her arm. It appears that the location of T.B.'s wound was by happenstance rather than by design. T.B. testified that she was raising her arms to protect her face when she was shot. Her testimony indicates that her arms were in front of her torso or head when Miller fired the gun, which indicates that Miller was aiming for her torso or her head, parts of the body where a gunshot wound likely would be fatal. Also, the fact that Miller shot T.B. only once does not indicate that Miller intended only to scare or injure her because a single gunshot into a person's torso or head can be fatal and, in this case, T.B. "played dead" after being shot. Even if Miller did not act with the purpose of causing T.B.'s death, he is guilty of attempted second-degree murder if he believed that his act would result in her death. *See Arredondo*, 754 N.W.2d at 572-73; *Noble*, 669 N.W.2d at 919. Miller's contention that he intended only to prevent T.B. from reporting him to law enforcement is illogical because killing her would have been more effective in accomplishing that objective. *See State v. Siverhus*, 355 N.W.2d 398, 401 (Minn. 1984) (reasoning that defendant's intent to kill victim was inferable from, among other things, "evidence that defendant believed that the victim had reported him to the police"). Also, T.B. testified that K.M. saw her with a telephone in her hand, but there is no evidence that K.M. told Miller that T.B. had a telephone or that Miller saw T.B. with a telephone. For all of these reasons, the only

rational inference from the circumstances proved is that Miller pointed a gun toward T.B.'s torso or head and fired it with the intent to kill her.

Thus, the evidence is sufficient to prove, beyond a reasonable doubt, Miller's guilt of the offense of attempted second-degree murder.

Affirmed.