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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A19-0997**

State of Minnesota,  
Respondent,

vs.

Andre Tiron Kelley,  
Appellant.

**Filed July 6, 2020  
Affirmed  
Smith, John, Judge\***

Anoka County District Court  
File No. 02-CR-18-6352

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and  
Smith, John, 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## UNPUBLISHED OPINION

**SMITH, JOHN**, Judge

We affirm appellant Andre Tiron Kelley's convictions because the evidence was sufficient to permit the jury to reasonably conclude that Kelley was guilty beyond a reasonable doubt of first-degree burglary and attempted second-degree murder.

### FACTS

While Kelley was asleep at his girlfriend A.T.'s apartment, A.T. went through Kelley's phone and found nude pictures of another woman. A.T. woke Kelley up and told him to leave. Kelley left, but returned shortly after. Kelley kicked in the apartment complex door and A.T.'s apartment door. Kelley then entered A.T.'s apartment, took her phone, struck her in the head with a bat, and left. A.T., bleeding profusely from a nine-centimeter laceration on her forehead, banged on her neighbor's door and told him to call 911. A.T. told the 911 operator that Kelley tried to murder her and hit her over the head with a bat.

At trial, the state introduced the 911 call, the responding officer's body camera footage, and A.T.'s recorded interview at the hospital. Throughout the recordings, A.T.'s story remained consistent; Kelley struck her over the head with a baseball bat. A.T. later changed her story to say that she tripped and fell into the wall and that Kelley never hit her. A.T. then changed her story back to the original version and told detectives that Kelley did indeed hit her in the head with a bat. After speaking with Kelley over a jailhouse telephone, A.T. again changed her story to tripping and falling into the wall. This is the story to which A.T. testified as Kelley's only witness. The jury did not believe A.T.'s trial testimony and

found Kelley guilty of (1) attempted murder in the second degree with intent, not premeditated, in violation of Minn. Stat. § 609.19, subd. 1(1) (2018), with reference to Minn. Stat. § 609.17, subd. 1 (2018); (2) assault in the first degree in violation of Minn. Stat. § 609.221, subd. 1 (2018); (3) assault in the second degree in violation of Minn. Stat. § 609.222, subd. 2 (2018); and (4) burglary in the first degree in violation of Minn. Stat. § 609.582, subd. 1(c) (2018).

### **D E C I S I O N**

Kelley argues that, because there was insufficient evidence that he struck A.T., the state did not prove that he assaulted A.T. or that he took a substantial step in furtherance of second-degree murder. Kelley does not dispute any of the other elements of his convictions. Kelley only argues that because A.T. denied that he struck her with a bat and because her injury was consistent with her explanation, the circumstances proved provide a reasonable, rational inference other than guilt. We are not persuaded.

To convict Kelley of first-degree burglary, the state had to prove, beyond a reasonable doubt, that Kelley entered the building without consent and assaulted A.T. within the building. Minn. Stat. § 609.582, subd. 1(c). “‘Assault’ is: (1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another.” Minn. Stat. § 609.02, subd. 10 (2018). To convict Kelley of attempted second-degree murder, the state had to prove, beyond a reasonable doubt, that Kelley committed a substantial step towards intentionally causing A.T.’s death without premeditation. Minn. Stat. § 609.17, subd. 1; Minn. Stat. § 609.19, subd. 1(1). Kelley concedes that, if there is sufficient evidence that he struck

A.T. over the head with a bat, then both the attempted-murder and burglary convictions were proven beyond a reasonable doubt.<sup>1</sup>

When reviewing a claim of insufficient evidence, we carefully review the record “to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict.” *Lapenotiere v. State*, 916 N.W.2d 351, 360-61 (Minn. 2018) (quotation omitted). Both parties argue in the briefing based on the premise that the “heightened” circumstantial evidence approach applies here because there is no direct evidence that Kelley struck A.T. We do not believe this is the right approach. If believed, A.T.’s statements during the 911 call, the body camera footage, and her recorded interview all directly prove that Kelley struck A.T. without inference.<sup>2</sup> This is the definition of direct evidence. *State v. Olson*, 887 N.W.2d 692, 700 (Minn. App. 2016) (“Direct evidence is evidence based on personal knowledge or observation that, if true, proves a fact without inference.”). “When direct evidence is sufficient to prove a disputed element of the offense, it is unnecessary to apply the circumstantial-evidence standard.” *Id.*

During the 911 call, the body camera footage, and the recorded interview, A.T. consistently states that Kelley struck her over the head with a bat. When reviewing this evidence, we assume “the jury believed the state’s witnesses and disbelieved any evidence

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<sup>1</sup> We decline to address Kelley’s sufficiency-of-the-evidence challenge to his assault convictions because those counts are lesser-included offenses and should not have been adjudicated. Minn. Stat. § 609.04 (2018); *State v. Hoelzel*, 639 N.W.2d 605, 610 (Minn. 2002); *State v. Ashland*, 287 N.W.2d 649 (Minn. 1979).

<sup>2</sup> Contrary to Kelley’s assertion, the district court allowed admission of these statements as substantive evidence under Minn. R. Evid. 807 and 803(2), not as impeachment evidence.

to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Thus, the fact that A.T. testified to the contrary is of no consequence. When viewing A.T.’s recorded statements in the light most favorable to the verdict, the only possible conclusion is that the state presented sufficient evidence to prove, beyond a reasonable doubt, that Kelley struck A.T. in the head with a bat.

**Affirmed.**