STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1561

State of Minnesota,
Respondent,

vs.

Nou Chang,
Appellant.

Filed October 31, 2011
Affirmed
Halbrooks, Judge

Ramsey County District Court
File No. 62-CR-09-9042

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

John J. Choi, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Minge, Judge.

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

HALBROOKS, Judge

Appellant challenges his second-degree-murder and manslaughter convictions on the grounds that the evidence was insufficient to convict him and that the district court

erred by not instructing the jury on defense of others. We conclude that the state's evidence, which included forensic evidence of appellant's footprints on T.Y.'s clothing, was sufficient to support the guilty verdict. We further conclude that appellant was not entitled to a defense-of-others instruction because the facts did not support one. Appellant also argues in a separate pro se brief that he was entitled to a "mere presence" instruction. We conclude that such an instruction was unnecessary. We affirm.

FACTS

Seven individuals beat T.Y. to death during a fight outside the Moonlight Magic Bar in St. Paul in the early hours of May 10, 2009. One witness said that a "bunch of the guys in the bar . . . rushed out the door at the same time" shortly after 1:00 a.m. The witness recognized the group as members of a gang called G-Loc (an acronym for "Gangster Local Oriental Crew") because they wore the gang's light brown colors. The individuals were yelling "Slob, slob, slob" as they rushed the door, which the witness recognized as a derogatory term for a rival gang, the Bloods. The witness then heard a round of gunshots from the street and ran outside to investigate. He saw one G-Loc member lying wounded by the door and a group of four or five individuals stomping and kicking another man who was on the ground, later determined to be T.Y. The witness then heard a second round of gunshots and ran back into the bar.

Police soon arrived and quickly determined that T.Y. was dead and that three men were shot. The cause of T.Y.'s death was later determined to be either blunt-force injury to his head or a compressed neck. Police immediately secured the area and questioned individuals near the bar. The state ultimately charged seven individuals, including

appellant Nou Chang, with second-degree murder. It later amended its complaint against Chang to add charges of first-degree manslaughter for the benefit of a gang and first-degree manslaughter committed during an assault.

At the close of Chang's jury trial, he moved the district court to instruct the jury on defense of others based on his theory that he was defending others from T.Y.'s attack. The district court denied the motion, and the jury convicted Chang of all three counts. He was later sentenced to 141 months in prison. This appeal follows.

D E C I S I O N

I.

Chang argues that the state failed to prove that he was one of the seven individuals involved in the "kicking and stomping" murder of T.Y. Chang admits that he was at the Moonlight Magic Bar that evening, but argues that the circumstantial evidence connecting him to the crime is insufficient because a reasonable juror could draw rational inferences from that evidence leading to his innocence.

We review sufficiency-of-the-evidence cases by considering the record "in a light most favorable to the verdict to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *State v. Hanson*, 800 N.W.2d 618, 621 (Minn. 2011) (quotation omitted). In doing so, we distinguish between direct and circumstantial evidence, and review cases based on circumstantial evidence more closely. *See, e.g.*, *State v. Al-Naseer*, 788 N.W.2d 469, 473-74 (Minn. 2010); *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). Here, the state did not provide any direct evidence that

Chang kicked or stomped T.Y., so we must determine whether the state satisfied its burden with circumstantial evidence.

In circumstantial-evidence cases, we consider the circumstances proved and whether the reasonable inferences that can be drawn from those circumstances "support a rational hypothesis other than guilt." *Al-Naseer*, 788 N.W.2d at 473. The first step in reviewing circumstantial-evidence cases is to identify the circumstances proved. *Hanson*, 800 N.W.2d at 622. At this stage, we must defer to the jury's assessment of the evidence, assuming that it accepted the state's evidence proving circumstances consistent with the verdict and rejected contrary evidence. *Id.* After identifying the circumstances proved, we "examine independently the reasonableness of all inferences that might be drawn from [them], including inferences consistent with a hypothesis other than guilt." *Id.* (quotation omitted). In doing so, we give no deference to the jury's choice between reasonable inferences. *Id.*

The state presented circumstantial evidence at trial that included surveillance footage, photographs, forensic evidence supported by expert testimony, and several eyewitness accounts. The surveillance tape shows individuals mingling on the sidewalk but does not show the fight, which occurred west of the camera's view. The person depicted in the video (who the state claimed was Chang) was wearing a striped shirt and a grey hooded sweatshirt and was seen joining a group to the west of the camera's view. The state showed the jury a photograph of Chang wearing a striped shirt that was taken by police shortly after the murder.

The forensic evidence shows that Chang's white Nike shoes may have caused three of the footprint impressions found on T.Y.'s body and clothing. The three impressions matching Chang's shoes could also be attributed to another individual, "Y.," who wore identical model (but less worn) Nikes. But Y. testified that he was not involved in the fight, and an expert testified that T.Y.'s blood was found on Chang's Nikes, but not on Y.'s.

Eyewitnesses described the event as "a lot of people" and "at least five" people kicking T.Y. for "seconds or minutes." A witness also identified Chang as a G-Loc gang member and another witness testified that G-Loc members were yelling a derogatory name for a rival gang just before the fight.

Chang argues that the evidence against him can support a reasonable inference other than guilt. With regard to what appears to be the most significant evidence—the footprints on T.Y.'s clothing—Chang argues that they could have been caused by Y., who was wearing the same shoes, especially because Y.'s footprint was identified by a BCA expert as the only possible cause of another impression on T.Y., for which Chang's more-worn shoe was ruled out.

While Chang correctly notes that an innocent inference could be reasonably drawn from the shoeprint evidence if it were viewed in isolation, that innocent inference cannot be reasonably drawn when looking at the evidence as a whole, as this court is required to do. *See id.* at 623-24 (emphasizing that each piece of evidence should be viewed "coupled with the remaining evidence as a whole" to determine whether sufficient evidence supports the verdict). By asserting that Y. may have caused the three imprints,

Chang ignores the critical evidence that blood was discovered on Chang's shoe and not on Y.'s shoes. It would be unreasonable for the jury to believe that Y. caused all four imprints without contracting any blood on his shoes, while Chang, who did contract blood on the bottom, side, and back of his shoe, did not cause any of the imprints. We conclude that there is no reasonable innocent explanation for why foot imprints matching Chang's blood-smeared shoe were on T.Y.'s body.

II.

Chang contends that the district court erred by denying his request to instruct the jury on defense of others. *See* Minn. Stat. § 609.06, subd. 1(3) (2008) (allowing use of reasonable force "by any person in resisting or aiding another to resist an offense against the person").

We review the district court's decision not to give a requested jury instruction under an abuse-of-discretion standard. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). It is an abuse of discretion for the district court to refuse to give an instruction if the evidence supports it. *Id.* The defendant carries the initial burden of putting forth evidence to support an affirmative-defense instruction. *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). Chang needed to set forth reasonable evidence showing:

> (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

Id. at 285 (self-defense); *see also State v. Penkaty*, 708 N.W.2d 185, 201 & n.5 (Minn. 2006) (defense of others). We conclude that the district court properly found that Chang failed to put forth evidence supporting any of these elements.

The district court correctly found that Chang failed to provide any evidence that he did not start the fight with T.Y. There is no evidence about who started the fight with T.Y. that involved Chang and six others. While the surveillance video shows T.Y. kicking an individual near the doorway, there was a gap in time between that act and the off-camera fight resulting in T.Y.'s death. Chang could have started that fight.

The district court also properly found that Chang failed to show he had an honest belief that he was in imminent danger and had reasonable grounds for that belief. While it is possible to infer that Chang was afraid because of the repeated gunfire, there is no evidence that T.Y. was the cause of that gunfire or posed any threat. The evidence in the record strongly supports the opposite inference—that Chang was not in danger. T.Y. was helpless on the ground, surrounded and being beaten by several individuals.

Finally, the district court properly found that Chang failed to show that he could not have reasonably retreated. Chang brought forth no evidence explaining why he could not have retreated when others at the scene were able to re-enter the bar and T.Y. was helpless on the ground. The district court did not abuse its discretion by refusing to instruct the jury on a defense-of-others theory.

III.

Chang argues in his pro se brief that the jury "should have been given [a] mere presence instruction," presumably instructing the jury that the state needs to prove more

than the fact that Chang was present at the crime scene in order to convict him. Because Chang did not ask the district court to give this instruction at trial, we review the district court's failure to give a mere-presence instruction under a plain-error analysis. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To establish plain error, Chang must show that the district court (1) erred; (2) the error was plain; and (3) the error affected Chang's "substantial rights." *See id.* If Chang makes this showing, then we decide whether to "address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

We conclude that Chang's argument fails on the first prong of the analysis. The district court's decision was not error. "If the substance of an instruction is already contained in the jury instructions, a court need not give the . . . instruction." *State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006). Here, the district court instructed the jury that the state needed to prove each element of each crime beyond a reasonable doubt before it could convict Chang. After reciting the elements of each count, the district court repeated, "If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty." These instructions convey that the jury is not allowed to convict Chang if it concluded only that he was merely present at the crime scene.

Affirmed.