STATE OF MINNESOTA
IN COURT OF APPEALS
A10-981

State of Minnesota,
Respondent,

vs.

Philbert Nathaniel Barnes,
Appellant.

Filed June 27, 2011
Affirmed
Wright, Judge

St. Louis County District Court
File No. 69DU-CR-09-3511

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

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

David W. Merchant, Chief Appellate Public Defender, Theodora Gaïtas, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

WRIGHT, Judge

Appellant challenges his convictions arising from a shooting incident that resulted in the death of one person and the injury of another. Appellant argues that (1) the evidence was insufficient to support his convictions, (2) the district court deprived him of his right to present a complete defense by excluding evidence that an alternative perpetrator refused to submit to a gunshot-residue test after the shooting, and (3) the district court erred by failing to give the required accomplice-testimony instruction. We affirm.

FACTS

On July 12, 2009, an altercation occurred between A.T. and a group of passersby in the alley behind A.T.'s home in Duluth. As the argument escalated, one member of the group punched A.T. in the face, and A.T.'s daughter called the police. Duluth police officers cleared the scene by approximately 8:55 p.m., and the group continued through the alley to an apartment building on 419 North Second Avenue East (the apartment building).

Fearful that the group would return, A.T.'s wife telephoned A.T.'s brother, who contacted their sister. When she received the call at approximately 9:00 p.m., A.T.'s sister was socializing with her husband R.D. and appellant Philbert Nathaniel Barnes at a neighbor's home. Shortly thereafter, she and R.D. abruptly left. Barnes departed in a white minivan approximately five or ten minutes later and drove a female acquaintance to her home, which is in the same neighborhood as A.T.'s home.

Barnes and R.D. arrived separately at A.T.'s home. Barnes, R.D., and A.T. walked through the alley toward the apartment building because A.T. wanted to "fight one-on-one" with the man who had assaulted him earlier that evening. A.T. carried a two-inch-wide wooden dowel in case the fight was not "one-on-one." At approximately 10:00 p.m., a neighbor observed three men approach the apartment building. A.T. told the neighbor that they were looking for someone, but the neighbor did not tell the three men where that person was. Assuming that no one was home, Barnes, R.D., and A.T. began walking back through the alley toward A.T.'s home.

The neighbor advised the group in the apartment building that three men were looking for them. Immediately thereafter, a crowd of approximately eight to ten people, including the victims, E.B. and C.C., gathered outside the apartment building. As Barnes, R.D., and A.T. fled from the crowd through the alley, A.T. heard gunshots and observed Barnes shooting a gun behind him toward the crowd. E.B. first heard four rapid gunshots, followed by four slower gunshots. One of the bullets struck E.B. in the leg; and another bullet struck C.C. in the back of the head. C.C. subsequently died.

A.T. ran into his home and observed Barnes enter a white or gray van. But A.T. did not see where R.D. went. Neighbors M.B. and M.A. witnessed the shooting from an apartment across the alley from A.T.'s home. At approximately 10:00 p.m., M.B. observed three men walking down the alley. She heard four gunshots, at which point the three men quickly scattered; and she observed a white vehicle drive away from the alley. M.A. heard four or five gunshots and observed a white car drive away from the alley. At

10:39 p.m., Barnes advised a friend via text message to turn on the "scanner." She complied and updated Barnes about law-enforcement activities via text messages.

Police officers responded to a 911 call and arrived at the scene at approximately 10:00 p.m. The officers found eight shell casings located in a staggered line in the alley. The shell casings were between 170 and 199 feet from the location where C.C.'s body was recovered. The officers also found a bullet and a bullet fragment on the street directly in front of the apartment building, another bullet inside the apartment building, and several bullet-impact marks located on the window frame and foundation of the apartment building. Based on the locations of the shell casings, bullets, and bullet-impact marks, the police concluded that the shooter fired from the alley toward the apartment building.

The police searched A.T.'s home but did not find a gun or any other evidence. During the investigation, the police determined that each of the eight shell casings and the two bullets recovered from the scene of the shooting are of a unique type and were fired from the same gun as five shell casings recovered from the scene of a November 2008 shooting in which Barnes was involved. The two bullets recovered were consistent with the shell casings and appeared to have been fired from the same type of firearm. As a result of this discovery, officers interviewed K.D., an acquaintance of Barnes who was convicted of second-degree assault in connection with the November 2008 shooting and has been in custody since that time. Barnes furnished K.D. with the gun used in the November 2008 shooting, which the police never recovered.

Duluth Police Officer Mike Ceynowa interviewed Barnes two days after the shooting. Barnes advised Officer Ceynowa that he drove his white van to R.D.'s home on the afternoon of July 12 and socialized for several hours with R.D. and R.D.'s wife. Sometime between 9:00 p.m. and 10:00 p.m., he said, a friend drove him home, where he remained for the rest of the night. He also advised Officer Ceynowa that he parked his white van at R.D.'s home all night, he was not present during the shooting, and he did not learn about the shooting until the next day.

Barnes was charged with second-degree intentional murder, a violation of Minn. Stat. § 609.19, subd. 1(1) (2008); second-degree felony murder, a violation of Minn. Stat. § 609.19, subd. 2(1) (2008); attempted second-degree intentional murder, a violation of Minn. Stat. §§ 609.19, subd. 1(1), 609.17 (2008); and second-degree assault, a violation of Minn. Stat. § 609.222, subd. 1 (2008). In a pretrial motion, Barnes sought to admit evidence that the police asked R.D. to submit to a gunshot-residue test and he refused. The district court excluded this evidence, concluding that it was irrelevant and would confuse the jury.

Following a jury trial, Barnes was convicted of all charges. Barnes moved for judgment of acquittal on Count 1, intentional second-degree murder, and Count 3, attempted second-degree murder, arguing that the state failed to prove the element of intent beyond a reasonable doubt. After denying Barnes's motions for judgment of acquittal and for a downward durational departure, the district court imposed concurrent sentences of 173 months' imprisonment for attempted second-degree murder and 348 months' imprisonment for second-degree intentional murder. This appeal followed.

D E C I S I O N

I.

Barnes argues that the evidence is insufficient to support his convictions. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis to determine whether the jury reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *Id.* 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, reasonably could conclude that the defendant is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

To support a conviction of second-degree intentional murder, the state must prove beyond a reasonable doubt that the defendant caused the death of a person with the intent to effect the death of that person or another, but without premeditation. Minn. Stat. § 609.19, subd. 1(1). For attempted second-degree intentional murder, the state must prove beyond a reasonable doubt that the defendant performed an act that is "a substantial step toward, and more than preparation for," the commission of second-degree intentional murder. Minn. Stat. §§ 609.17, subd. 1, 609.19, subd. 1(1). For second-degree felony murder, the state must prove beyond a reasonable doubt that the defendant caused the death of a person while committing or attempting to commit a felony offense. Minn.

Stat. § 609.19, subd. 2(1). And for second-degree assault, the state must prove beyond a reasonable doubt that the defendant assaulted another person with a dangerous weapon. Minn. Stat. § 609.222, subd. 1.

In support of his challenge to the sufficiency of the evidence, Barnes contends that A.T.'s testimony was not credible, the evidence that Barnes had a gun that night is unpersuasive, and other witness testimony was inconsistent, equivocal, and failed to accurately identify him. But the determination of evidentiary weight and witness credibility rests exclusively with the jury, and it will not be disturbed on appeal. *State v. Carufel*, 783 N.W.2d 539, 546 (Minn. 2010). When judging witness credibility, the jury may accept a witness's testimony in part and reject it in part; moreover, "[i]nconsistencies or conflicts between one witness and another do not necessarily constitute false testimony or serve as a basis for reversal." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006); *see also State v. Mosby*, 450 N.W.2d 629, 634 (Minn. App. 1990) ("[I]nconsistencies are a sign of human fallibility and do not prove testimony is false, especially when the testimony is about a traumatic event."), *review denied* (Minn. Mar. 16, 1990). Moreover, a guilty verdict may be based on the testimony of a single eyewitness. *State v. Buckingham*, 772 N.W.2d 64, 71-72 (Minn. 2009).

A.T. testified that Barnes shot multiple bullets toward a crowd on the night of July 12, 2009, and the evidence establishes that one bullet struck E.B. in the leg and another bullet struck C.C. in the back of his head, which caused his death. Other eyewitness testimony establishes that eight gunshots were fired, and the police recovered eight shell casings from the alley where the shooting took place. A.T.'s wife testified that

A.T., R.D., and a third man were in the alley that night, the third man was the shooter, and she advised a police investigator that she thought the third man was Barnes. Multiple witnesses observed a vehicle closely matching the description of Barnes's white minivan leave the alley after the shooting. The evidence also establishes that, eight months before the shooting at issue here, Barnes possessed the murder weapon and supplied it to K.D., who used it in an unrelated shooting. Moreover, Barnes's statements to the police regarding his whereabouts on the night of the shooting are inconsistent with the testimony of the trial witnesses. When viewed in its totality and in the light most favorable to the jury's guilty verdicts, there is ample evidentiary support to sustain Barnes's convictions of second-degree felony murder and second-degree assault.

Barnes also contends that the state failed to prove his intent to kill C.C., thereby invalidating his convictions of second-degree intentional murder and attempted second-degree intentional murder. Intent "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) (2008). Because intent involves a state of mind, it is ordinarily proved circumstantially. *State v. Davis*, 656 N.W.2d 900, 905 (Minn. App. 2003), *review denied* (Minn. May 20, 2003); *see also Davis v. State*, 595 N.W.2d 520, 525-26 (Minn. 1999) (stating that intent may be proved by circumstantial evidence, including defendant's conduct, and by events before and after the crime). And "the jury may infer that a person intends the natural and probable consequences of his actions." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). Here, the evidence, both direct and circumstantial, establishes that Barnes fired eight shots and that the last four shots were at

greater intervals than the first four. Evidence, including E.B.'s injury; C.C.'s death; A.T.'s testimony; and shell casings, bullets, and bullet-impact marks found in and around the apartment building, also establishes that at least several of the eight shots were fired toward the crowd. The jury could infer from this evidence that E.B.'s injury and C.C.'s death were the natural and probable consequences of Barnes's actions. *See State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998) (holding that intent to cause fear of immediate bodily harm or death may be inferred when assailant fired several shots into a home, unaware that multiple people were inside).

Accordingly, Barnes is not entitled to relief on the ground that the evidence is insufficient to prove beyond a reasonable doubt that he is guilty of the charged offenses.

II.

Barnes next argues that the district court deprived him of the right to present a complete defense by excluding evidence that R.D., who was a possible alternative perpetrator, refused to submit to a gunshot-residue test after the shooting. The district court excluded this evidence, concluding that it is irrelevant.

The constitutional right to due process requires a person accused of an offense to "be treated with fundamental fairness" and to be "afforded a meaningful opportunity to present a complete defense." *State v. Quick*, 659 N.W.2d 701, 712 (Minn. 2003) (quotation omitted) (citing U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7). The right to present a complete defense includes the right to present evidence that an alternative perpetrator committed the charged offense. *State v. Jones*, 678 N.W.2d 1, 15-16 (Minn. 2004). "However, a defendant has *no* right to introduce evidence that either is

irrelevant, or whose prejudicial effect outweighs its probative value." *State v. Crims*, 540 N.W.2d 860, 866 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996); *see also Jones*, 678 N.W.2d at 16 (observing that alternative-perpetrator evidence must comply with ordinary evidentiary rules). We review the district court's evidentiary ruling under an abuse-of-discretion standard even when it is claimed that excluding the evidence deprived the defendant of the constitutional right to present a complete defense. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006). But if we determine that the district court's evidentiary ruling denied the defendant the right to present a complete defense, reversal is required unless the error is harmless beyond a reasonable doubt. *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003).

Barnes contends that this evidence is relevant to establishing R.D.'s consciousness of guilt. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Evidence suggesting consciousness of guilt is relevant and admissible against a defendant. *State v. McDaniel*, 777 N.W.2d 739, 746 (Minn. 2010) (stating that evidence of flight can suggest consciousness of guilt). And a defendant's refusal to submit to a potentially incriminating test may demonstrate consciousness of guilt. *See State v. Mellett*, 642 N.W.2d 779, 786-87 & n.4 (Minn. App. 2002) (observing that refusal to perform field sobriety tests may indicate consciousness of guilt and holding that such evidence is admissible), *review denied* (Minn. July 16, 2002); *see also State v. Willis*, 332 N.W.2d 180, 186 n.1 (Minn. 1983) (Peterson, J., concurring) (observing that "'evidence of refusal

to take a potentially incriminating test is similar to other circumstantial evidence of consciousness of guilt'" (quoting *South Dakota v. Neville*, 459 U.S. 553, 561, 103 S. Ct. 916, 921 (1983))).

Barnes contends that, because consciousness-of-guilt evidence is relevant when it pertains to the defendant, it also is relevant when it pertains to an alternative perpetrator. We agree. Alternative-perpetrator evidence is admissible "if it has an inherent tendency to connect the alternative party with the commission of the crime." *Jones*, 678 N.W.2d at 16. A defendant may introduce evidence of an alternative perpetrator's motive, intent, "or other miscellaneous facts which would tend to prove the third person committed the act." *State v. Jenkins*, 782 N.W.2d 211, 224 (Minn. 2010); *see also State v. Atkinson*, 774 N.W.2d 584, 592-93 (Minn. 2009) (observing that defendant may introduce evidence of an alternative-perpetrator's prior bad acts). Here, the state's evidence establishes that R.D. was present during the shooting. Evidence of R.D.'s refusal to submit to a potentially inculpatory test is relevant and consistent with the rule expressed in *Jenkins* and *Atkinson*. Accordingly, the district court erred by determining that the evidence that R.D. refused to submit to a gunshot-residue test is irrelevant.

Because of its decision to exclude the evidence as irrelevant, the district court did not weigh the probative value of this evidence against the danger of unfair prejudice. *See* Minn. R. Evid. 402 (providing that evidence that is irrelevant is inadmissible); *cf.* Minn. R. Evid. 403 (providing that relevant evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice). Assuming, without deciding, that the probative value of this evidence was not substantially outweighed by the danger

of unfair prejudice, we next address whether such error, if any, in excluding this evidence is harmless beyond a reasonable doubt. "An error is harmless beyond a reasonable doubt if the guilty verdict actually rendered was surely unattributable to the error." *State v. Swaney*, 787 N.W.2d 541, 555 (Minn. 2010) (quotation omitted). It is not sufficient to find that, without the error, enough evidence exists to support the guilty verdict. *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997). Rather, we "must be satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, [a reasonable jury] would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994).

Here, the jury was presented with evidence that conveyed some of the "damaging potential" suggested by the excluded evidence. The jury was aware that A.T. and R.D. accompanied Barnes through the alley and that R.D. did not testify, and R.D.'s neighbor testified that R.D. and R.D.'s wife appeared to be away from home in the days after the shooting and moved out of Duluth shortly thereafter. And the state presented ample direct and circumstantial evidence to support the guilty verdicts, including evidence that Barnes possessed the murder weapon and supplied it in another shooting approximately eight months before the shootings at issue here, and Barnes's statements to the police that were inconsistent with the testimony of several other witnesses and consistent with none. The excluded evidence, if admitted, would not have called this evidence of Barnes's guilt into question. Moreover, this evidence of Barnes's guilt was corroborated by evidence that A.T. and A.T.'s wife identified Barnes as the shooter. Thus, if evidence that R.D.

refused to submit to a gunshot-residue test had been admitted and the damaging potential of that evidence had been fully realized, the jury would have reached the same verdict.

Although the district court erred by determining that the evidence that R.D. refused to submit to a gunshot-residue test was irrelevant, on the record before us, this error is harmless beyond a reasonable doubt. Accordingly, Barnes is not entitled to relief on this ground.

III.

Barnes next argues that the district court erred by failing to instruct the jury that it could not convict Barnes solely based on A.T.'s uncorroborated accomplice testimony. This instruction must be given if any witness against the defendant "might reasonably be considered an accomplice to the crime." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004) (quotation omitted). This instruction cautions the jury that it cannot convict the defendant based on accomplice testimony unless the testimony is corroborated by other evidence that tends to establish that the defendant committed the charged offense. Minn. Stat. § 634.04 (2008); 10 *Minnesota Practice*, CRIMJIG 3.18 (2006).

If the district court "fails to give a required accomplice corroboration instruction and the defendant does not object, an appellate court must apply the plain error analysis." *State v. Reed*, 737 N.W.2d 572, 584 n.4 (Minn. 2007). In doing so, we consider whether there is an error, whether such error is plain, and whether it affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the three plain-error factors are established, we next consider whether the error seriously affected the fairness and integrity of the judicial proceedings. *Id.* at 740. When an

accomplice witness testifies against the defendant, omission of the accomplice-testimony instruction will necessarily satisfy the first two plain-error factors. *See Reed*, 737 N.W.2d at 584 (concluding that because instruction is required by caselaw, failure to give it is both error and "plain"). Therefore, we first consider whether A.T. was an accomplice to the charged offenses.

A witness is an accomplice if the witness could have been charged and convicted of the same crime as the defendant. *State v. Pederson*, 614 N.W.2d 724, 733 (Minn. 2000). When it is unclear whether a witness is an accomplice, the determination is a question of fact for the jury to decide. *State v. Barrientos-Quintana*, 787 N.W.2d 603, 611-12 (Minn. 2010). But when the facts pertaining to this determination are undisputed and there is only one inference to be drawn as to whether the witness is an accomplice, then the determination is to be made by the district court. *State v. Jackson*, 746 N.W.2d 894, 898 (Minn. 2008).

When determining accomplice liability, there is a legal distinction between playing "a knowing role in the crime" on the one hand and having a mere presence at the scene, inaction, knowledge, or passive acquiescence on the other. *Id.* "A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2008). Here, the record does not establish who, if anyone, contacted Barnes or advised him to come to A.T.'s home. A.T. testified that Barnes appeared suddenly and that Barnes and R.D. walked through the alley with A.T. so that A.T. could "fight one-on-one" with the guy who had assaulted him. A.T. also

testified that he did not know that either Barnes or R.D. had a gun. When A.T. observed Barnes shooting a gun toward the crowd, A.T. ran inside his home to avoid being shot while Barnes and R.D. fled. The record is undisputed as to A.T.'s actions; and it does not demonstrate that A.T. aided, advised, hired, counseled, conspired, or procured Barnes to commit any of the offenses of which Barnes was charged and convicted. Although A.T. was present at the scene of the offenses, the evidence does not establish that he played a knowing role in the offenses.

Our careful review of the record establishes that there is not an evidentiary basis to conclude that A.T. was an accomplice. The district court, therefore, did not err when it did not instruct the jury regarding the use of accomplice testimony. Barnes is not entitled to relief on this ground.

Affirmed.