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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1373

State of Minnesota,
Respondent,

vs.

Rikesh Tuladhar,
Appellant.

Filed July 8, 2013
Affirmed
Peterson, Judge

Lyon County District Court
File No. 42-CR-11-1106

Lori Swanson, Attorney General, Michael Thomas Everson, St. Paul, Minnesota; and

Richard Robert Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

Melissa Victoria Sheridan, Assistant Appellate Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Smith, Judge.

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

PETERSON, Judge

In this appeal from convictions of first-degree burglary of an occupied dwelling, aiding first-degree assault, aiding third-degree assault, and aiding first-degree burglary-assault, appellant argues that the evidence, which consisted primarily of evidence of

appellant's presence at the scene of the assault and burglary, did not prove beyond a reasonable doubt his guilt as an aider and abettor. We affirm.

FACTS

V.D., A.S., and four of their friends, all university students, went to a bar to celebrate an anniversary. When the bar closed, the group went outside and waited for a ride. A.S. overheard G.T., who was not with the group, swearing loudly. A.S. asked him to stop swearing, and G.T., who was intoxicated, became very angry. Another student intervened, and A.S. and his girlfriend moved to a different area to wait for their ride.

G.T. then charged toward A.S., swearing at him, and V.D. and others intervened and separated G.T. from A.S. G.T.'s friend K.K. joined the fracas and began punching V.D. The altercation ended after several students pulled K.K. off of V.D. K.K. received a small cut on his eye, and his shirt was ripped.

K.K. and G.T.'s roommate T.T. were both upset with G.T. because they believed that he had started the whole incident. K.K. left, and G.T. and T.T. went to their apartment and told some friends about the fight, but no one was upset at that point. Appellant Rikesh Tuladhar came to the apartment about 20 minutes later, and G.T. told him that K.K. was beaten up by two or three guys and had suffered a bloody nose during the fight. Appellant got upset, and the mood in the apartment became "pretty intense." Appellant said that they should go to V.D.'s apartment and "solve this matter today" and that "they can't do this to us." Appellant contacted K.K., and appellant, K.K., G.T., and T.T. went to V.D.'s apartment.

When the doorbell rang at V.D.'s apartment, V.D. assumed that his roommate had arrived. As V.D. opened the door, four men pushed their way into the apartment, charged at V.D., and began hitting and kicking him. A.S. was in the apartment and managed to get V.D. away from the assailants and push the four men out of the apartment. A.S. described appellant as being aggressive and looking very mad. V.D.'s left eye globe was ruptured during the assault and will require multiple surgeries to repair, and he is likely to suffer a permanent loss of visual acuity in that eye.

Appellant, T.T., G.T., and K.K. returned to T.T.'s and G.T.'s apartment. A third roommate noted that the four men appeared very nervous and that K.K. washed his hands or face in the sink while appellant and G.T. stood nearby wiping their hands. K.K. and T.T. commented that "it's bad" and "he's bleeding from his eyes."

Marshall Police Officers Aaron Quesenberry and Benjamin Rieke responded to A.S.'s 911 call. A.S. knew G.T., K.K., and appellant from school and identified them to the officers as V.D.'s assailants. A.S. recognized the fourth assailant but could not recall his name. A.S. took officers to the apartment building where he believed K.K. lived. K.K. and appellant were outside smoking cigarettes, and T.T. and G.T. were found inside the building. A.S. identified appellant, K.K., T.T., and G.T. as the four men who had assaulted V.D.

Appellant was charged with first-degree burglary of an occupied dwelling, aiding first-degree assault, aiding third-degree assault, and aiding first-degree burglary-assault. The case was tried to a jury.

Appellant testified at trial that, after he heard that K.K. had been badly beaten, he suggested that he and his friends go and try to talk to V.D. to sort things out. He claimed that he was shocked when the fight started and that he tried to break it up.

The jury found appellant guilty as charged. Appellant moved for a judgment of acquittal or a new trial, arguing, in part, that his trial counsel was ineffective. The district court denied the motion in its entirety. This appeal followed sentencing.

D E C I S I O N

I.

When considering a claim of insufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," was sufficient to allow the jurors to reach the verdict that they reached. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). We must assume that "the jury believed the [s]tate's witnesses and disbelieved the defense witnesses." *State v. Tschen*, 758 N.W.2d 849, 858 (Minn. 2008). 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, could reasonably conclude that the defendant was guilty of the crime charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

The elements of first-degree assault are that the defendant (1) intentionally inflicted bodily harm and (2) caused great bodily harm. Minn. Stat. § 609.221, subd. 1 (2010); *see also* Minn. Stat. 609.223, subd. 1 (2010) (defining third-degree assault, which is a lesser-included offense of first-degree assault). The elements of first-degree

burglary-assault are that the defendant (1) entered a building without consent and (2) committed an assault while in the building. Minn. Stat. § 609.582, subd. 1(c) (2010). Appellant was convicted of aiding these crimes. A person is criminally liable for another's crime if he intentionally aids, advises, counsels or otherwise procures the other to commit the crime. Minn. Stat. § 609.05, subd. 1 (2010). Appellant does not dispute that, if the evidence was sufficient to support the conviction of aiding burglary-assault, it was also sufficient to support the conviction of first-degree burglary of an occupied dwelling. *See* Minn. Stat. § 609.582, subd. 1(a) (2010) (defining first-degree burglary of an occupied dwelling).

"To be guilty of aiding and abetting a crime, the defendant does not need to have participated actively in the actual commission of the crime." *State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011). "But the State must prove that the defendant had knowledge of the crime and intended his presence or actions to further the commission of that crime." *Id.* (quotation omitted). "Jurors can infer the necessary intent from factors including: defendant's presence at the scene of the crime, defendant's close association with the principal before and after the crime, defendant's lack of objection or surprise under the circumstances, and defendant's flight from the scene of the crime with the principal." *State v. Swanson*, 707 N.W.2d 645, 659 (Minn. 2006)). "In circumstantial evidence cases, the circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Hawes*, 801 N.W.2d at 668. To review whether the evidence in a circumstantial-evidence case was sufficient, we follow a two-step process:

> The first step in this analysis is to identify the circumstances proved. In identifying the circumstances proved, we defer, consistent with our standard of review, to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State. . . . Under this standard, we disregard testimony that is inconsistent with the verdict.
>
> The second step in this analysis is to determine whether the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt. Unlike the deference we give to the jury in reviewing circumstances proved, we give no deference to the fact finder's choice between reasonable inferences. When evaluating whether the circumstances proved are consistent with a rational hypothesis of guilt and inconsistent with a rational hypothesis of innocence, we do not review each circumstance proved in isolation. Instead, we consider whether the circumstances proved are consistent with guilt and inconsistent, on the whole, with any reasonable hypothesis of innocence.

Id. at 668-69 (quotations and emphasis omitted).

Appellant was present at the crime scene; he was with the other assailants before and after the offenses and was the person who became upset when told that K.K. was beaten up; he suggested going to V.D.'s apartment to "solve this matter today," saying that "they can't do this to us"; and he fled from the crime scene with the other assailants. Appellant argues that the evidence did not show that he knew that his friends were going to push their way into V.D.'s home and assault him or that he intended his presence to further the offenses. Appellant cites V.D.'s testimony on cross-examination that V.D. did not see appellant hitting him and that V.D. did not specifically recall appellant hitting him. But V.D.'s description of how the group charged into the apartment, combined with

A.S.'s testimony that all four men were present when the assault was going on, show that appellant participated in the assault, even if he did not actually hit V.D.

Although appellant claims that he tried to come to V.D.'s aid, A.S. testified that no one in the group stopped hitting V.D., that A.S. had to force each one of the four assailants out of the apartment, and that appellant was aggressive and looked very mad. By itself, appellant's statement about wanting to go to V.D.'s apartment to solve the matter could be consistent with a peaceful intent. But, considered together with appellant's statement that "they can't do this to us" and appellant's demeanor before and after the assault, the statement supports an inference of a criminal intent. Considering the circumstances proved, on the whole, we conclude that they are consistent with guilt and inconsistent with any reasonable hypothesis of innocence.

II.

In a pro se supplemental brief, appellant challenges the credibility of the evidence presented by the state and argues for the credibility of the evidence presented by the defense. But, as already discussed, this court defers to the jury's acceptance of the proof of the circumstances proved by the state and its rejection of evidence in the record that conflicted with the circumstances proved.

Appellant also argues that his trial counsel was ineffective. To establish a claim of ineffective assistance of counsel, a defendant "must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Caldwell*, 803 N.W.2d 373, 386 (Minn. 2011). There is a strong presumption that

counsel's performance was reasonable. *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003).

Appellant contends that his attorney was ineffective because he should have called additional witnesses to counter the aiding-and-abetting charge. But appellate courts "generally will not review attacks on counsel's trial strategy." *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Determining what evidence to present to the jury, including which witnesses to call, is a matter of trial strategy. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009).

Appellant also contends that his attorney was ineffective because he failed to tell appellant about a plea offer, under which appellant would have received a one-year sentence. Failure to communicate a plea offer to a defendant may provide a basis for an ineffective-assistance claim. *Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997). But appellant's trial attorney stated in affidavits that he discussed in detail with appellant all plea offers received from the prosecutor; that he discussed the potential consequences of a felony conviction, including the likelihood of deportation even if a gross-misdemeanor sentence was imposed; that appellant "consistently proclaimed his innocence and indicated that he would be unable to enter a guilty plea to any charge regardless of which one it was as he believed he was innocent and the legal system would find him innocent"; that he explained to appellant that there was no guarantee of prevailing at trial and discussed the possible sentences, including maximum penalties and the possibility that appellant would be convicted of multiple charges; and that appellant did not at any time indicate any interest in entering a plea.

The district court did not make a finding as to whether defense counsel communicated the plea offers to appellant. Instead, the court rejected appellant's ineffective-assistance claim based on appellant's failure to show prejudice. Appellant submitted an affidavit by his sister stating that the plea offer was not communicated to appellant, but there is no evidence in the record indicating that appellant would have accepted a plea offer or that the court would have accepted a recommendation for a one-year sentence. Rather, the record shows that appellant maintained his innocence throughout the court proceeding as shown by defense counsel's affidavits and appellant's trial testimony and statements during the presentence investigation. Because appellant failed to show that the outcome of the proceeding would have been different had he been properly advised, his ineffective-assistance claim based on failure to communicate a plea offer fails. *See State v Powell*, 578 N.W.2d 727, 732-33 (Minn. 1998) (rejecting ineffective-assistance claim when there was evidence that defendant was not amenable to pleading guilty and no evidence demonstrated that he would have pleaded guilty or that court would have accepted plea); *see also Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995) (requiring defendant to support ineffective-assistance claim with credible, nonconclusory evidence that defendant would have accepted offer and pleaded guilty had he been properly advised).

Appellant also asserts that defense counsel failed to explain to him the concept of liability for the crimes of another. The district court found that appellant failed to prove this assertion, which was raised in his sister's affidavit. We will not reverse a district court's factual findings underlying an ineffective-assistance claim unless they are clearly

erroneous. *Strickland v. Washington*, 466 U.S. 688, 698, 104 S. Ct. 2052, 2070 (1984); *see also Hawes v. State*, 826 N.W.2d 775, 783-85 (Minn. 2013) (reviewing factual findings underlying ineffective-assistance claim). Appellant does not offer any explanation why the court's findings are clearly erroneous.

Affirmed.