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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1970**

State of Minnesota,
Respondent,

vs.

Alexander Mayers,
Appellant

**Filed May 6, 2008
Affirmed
Ross, Judge**

Dakota County District Court
File No. K4-05-3256

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Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Crippen, Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

This appeal arises from a near-fatal shooting in a Burnsville apartment after three men looking for a resident who owed one of them money apprehended the resident's roommate, beat him at gunpoint, then shot him in the chest at point-blank range. Alexander Mayers was tried for first-degree attempted murder, first-degree assault, aiding and abetting first-degree burglary, aiding and abetting attempted aggravated robbery, and aiding and abetting second-degree assault. The jury found Mayers guilty of aiding and abetting second-degree attempted murder, first-degree assault, aiding and abetting first-degree burglary, and aiding and abetting second-degree assault. Mayers appeals his conviction, contending that the district court violated the Minnesota Rules of Criminal Procedure and his due process rights when it instructed the jury on aiding and abetting, and he argues that the evidence was insufficient to convict him. Because the additional aiding-and-abetting instruction did not violate the Minnesota Rules of Criminal Procedure or Mayers's due process rights and the evidence supports the jury's verdict, we affirm.

FACTS

The facts presented at Alexander Mayers's trial describe the melee that occurred on October 11, 2005, at about 6 p.m. in a Burnsville apartment building. Tollie Thomas told his roommate, Yonas Haile, that he was leaving on an errand. But as Thomas stepped out the door, three men approached him. Thomas recognized none of them. One brandished a handgun, and Thomas ran back into his apartment and tried unsuccessfully

to shut the door behind him. The three men pushed against the door and forced their way inside. Thomas later identified two of the men as Alexander Mayers and Darryl Lidel. Mayers held his hand to Thomas's head gesturing as though his hand were a gun, and he punched Thomas. Lidel held a real handgun to Thomas's head and the third man punched Thomas repeatedly in the face. Thomas fought the men and tried to seize the gun, without success.

As the three men assaulted Thomas, they repeatedly said his roommate's name, "Yonas." Thomas pounded on Yonas Haile's bedroom door and screamed for him, but Haile barricaded himself behind it and remained there throughout the fracas. Thomas began "seeing stars" from being struck in the head, but he continued struggling in self-defense. During the struggle, the handgun discharged, with a round striking Lidel in the hand. Mayers told Lidel to give him the gun. According to Thomas, Mayers then shot Thomas in the chest from what Thomas described as point-blank range.

The three men ran from the apartment, and Haile called the police. Thomas managed to leave the apartment also, run downstairs, and call his mother to tell her that he had been shot. Thomas asked Haile why he had not opened his door. He suspected that Haile knew why the men attacked because they repeatedly mentioned Haile's name.

The police arrived as Thomas walked out the front door of the apartment building. He leaned against the front door and slid to the ground. Emergency medical personnel rushed Thomas to Hennepin County Medical Center. Thomas had a collapsed lung and a rib fracture. The bullet, which physicians decided could not be removed, remains lodged centimeters from his heart and spine.

Police soon connected Lidel, and then Mayers, to the attack. Shortly after officers responded to the emergency call at Thomas's apartment, Burnsville Police Officer Jeffrey Pfaff received a call asking him to go to a Minneapolis clinic to meet with a victim of a gunshot wound to the hand. When Pfaff arrived there, he met with Lidel, who initially falsely identified himself with a different name. Lidel told Pfaff that he was shot outside of Burningham Apartments in Burnsville when three men ran by him. He claimed that he had been shot when he raised his right hand to protect himself. As Pfaff questioned Lidel, his story changed and he said that he had gone to the Burningham Apartments to buy marijuana from someone he knew only as "Dude." Eventually, Lidel gave the police his real name. He gave an alibi, claiming that he was with a friend at the time of the shooting. But police discovered that the friend had been working at that time. That friend told police that he had seen Lidel with Mayers on occasion. The investigation then turned to include Mayers, whom the state later charged with first-degree attempted murder, first-degree assault, aiding and abetting first-degree burglary, aiding and abetting attempted aggravated robbery, and aiding and abetting second-degree assault.

Haile testified at trial that he owed Lidel \$3,000 and that Lidel had been calling and harassing Haile to pay. Lidel threatened Haile, saying that people wanted to kill him. Although Haile did not see any of the men who entered his apartment on October 11, 2005, he believed that one of the three was Lidel. After the shooting, Haile called Lidel and told him that he had messed up.

The jury heard all of the evidence but interrupted its deliberations to ask the court a question that led to the instruction that Mayers now challenges in this appeal. During the second day of deliberations, the jury posed this question to the court:

If [person A] is involved in an assault with a group of people and person A is only involved in the assault and another person in the group, person B, attempts to kill the person they are assaulting, would person A be guilty of the attempted murder in the eyes of the law?

The court discussed the question with counsel in chambers, and it decided to give the jury the following instruction on aiding and abetting:

The defendant is guilty of a crime committed by another person when the defendant has intentionally aided the other person in committing it, or has intentionally advised, hired, counseled, conspired with or otherwise procured the other person to commit it.

If the defendant intentionally aided another person in committing a crime, or intentionally advised, hired, counseled, conspired with or otherwise procured the other person to commit it, the defendant is also guilty of any other crime the other person commits while trying to commit the intended crime, if that other crime was reasonably foreseeable as a probable consequence of trying to commit the intended crime.

This instruction had already been given in the context of other offenses submitted to the jury, but not as to attempted murder. The court stated that it believed the aiding-and-abetting instruction adequately and correctly answered the jury's question. Mayers's counsel objected on the ground the instruction substantially changed the court's previous instructions. She also argued that the instruction effectively modified the original charges in the complaint and would cause confusion. She asked to be allowed to make additional argument to the jury if the court gave the instruction. The prosecutor contended that the instruction would assist the jury and pointed out that the Minnesota

Rules of Criminal Procedure allow the court to give additional instructions on points of law. The prosecutor also noted that aiding-and-abetting language does not have to exist in a charging document for a jury to convict a defendant of aiding and abetting a crime. The court agreed and held that it was not making any substantial change by responding with the instruction, recognizing that the jury could convict Mayers of aiding and abetting without the state even expressly alleging that Mayers aided and abetted the attempted murder.

The court gave the aiding-and-abetting instruction. At defense counsel's request, the court informed the jury that the instruction did not replace or nullify any of the previous instructions. That afternoon, the jury returned its verdict, finding Mayers guilty of second-degree attempted murder, first-degree assault, aiding and abetting first-degree burglary, and aiding and abetting second-degree assault. The jury found that Mayers was not guilty of first-degree attempted murder or attempted aggravated robbery. At his sentencing hearing, Mayers moved for post-verdict relief on the basis that he was not able to prepare a defense to the theory that he aided and abetted the murder and that the additional instruction was therefore given in error. The court denied Mayers's motion and sentenced him to 130 months' imprisonment on the attempted murder conviction. Mayers appeals from the judgment of conviction.

DECISION

I

Mayers contends that the district court violated the Minnesota Rules of Criminal Procedure and his due process rights when it gave the jury an aiding and abetting

instruction for attempted murder. He argues that he was not able to present any defense to this instruction, which he characterizes as a new charge. We analyze Mayers's procedural and constitutional arguments under Minnesota Rule of Criminal Procedure 17.05, which sets forth the test of whether a district court may amend a complaint, even though the complaint here was not amended. *See State v. Ostrem*, 535 N.W.2d 916, 922 (Minn. 1995) (applying the test set forth by rule 17.05 when a district court has sua sponte given the jury an aiding and abetting instruction, even though the complaint was not amended).

The analysis under rule 17.05 has two prongs. First, we consider whether an additional or different offense is charged and second, whether the substantial rights of the defendant were prejudiced. *Ostrem*, 535 N.W.2d at 922–23; Minn. R. Crim. P. 17.05; *see also State v. DeVerney*, 592 N.W.2d 837, 846 (Minn. 1999) (“We have long held that aiding and abetting is not a separate substantive offense and can be added at any point prior to a verdict or finding.”).

The *Ostrem* analysis controls our decision. In *Ostrem*, after the close of evidence, the district court told trial counsel that it had concluded that the state had not presented sufficient evidence to submit substantive charges in the complaint, but that the court intended to submit the charges under an aiding-and-abetting theory. 535 N.W.2d at 920. The court then gave the jury the aiding-and-abetting instruction. *Id.* at 920–21. The jury returned guilty verdicts, and *Ostrem* argued on appeal that the district court committed reversible error when it sua sponte amended the complaint. *Id.* at 921–22. The supreme court disagreed, reaffirming that a jury may convict a defendant of aiding and abetting

despite the absence of aiding-and-abetting language in the complaint. *Id.* at 923. Because aiding and abetting is not a separate offense or an additional charge, the instruction did not violate rule 17.05. In *Ostrem* and here, the additional instruction explained the aiding-and-abetting theory as to one of the charges in the complaint, and it therefore did not constitute a different charge. We conclude the additional jury instruction here conforms with the first requirement of rule 17.05.

As in *Ostrem*, we consider Mayers's contention that his constitutional due process rights were violated under the second prong of rule 17.05, which is whether Mayers's substantial rights were prejudiced, because it is the same concern. *Compare State v. Chauvin*, 723 N.W.2d 20, 29–30 (Minn. 2006) (noting that that the due-process and notice requirements in the Sixth and Fourteenth Amendments require that the state inform a defendant of the nature of the charges so the defendant may prepare a defense), *with State v. Dickson*, 309 Minn. 463, 467, 244 N.W.2d 738, 741 (1976) (noting that the opportunity to prepare a defense is a substantial right); *see also State v. Alexander*, 290 N.W.2d 745, 748 (Minn. 1980) (concluding that rule 17.05 is intended to protect against confusing the jury, violating due process notions of timely notice, and adversely affecting the trial tactics of the defense).

The supreme court determined in *Ostrem* that the second element of rule 17.05 was met because “in order to prejudice the substantial rights of the defendant, it must be shown that the amendment either added or charged a different offense.” *Ostrem*, 535 N.W.2d at 923, quoting *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982). The court also noted there was no prejudice because *Ostrem*'s entire defense rested on an alibi

theory that he was at home with his wife, and that when the court informed defense counsel of the instruction, defense counsel was unable to articulate how Ostrem would be prejudiced. *Ostrem*, 535 N.W.2d at 923 n.8. Similarly, in *DeVerney*, the supreme court rejected DeVerney's assertion that his rights were substantially prejudiced by the district court's instructions to the jury on aiding and abetting because DeVerney had notice that the state's theory of the case included his active participation in the crime, and his defense was that he was not a participant. 592 N.W.2d at 847.

We find no prejudice here because Mayers was on notice from the complaint that he may be found liable as an accomplice because the state included alternative facts that could establish his guilt either as the shooter or as an accomplice. It is the language of the charging document, not the actual statutory citations contained within it, that provide the notice. *Id.*; *see also State v. DeFoe*, 280 N.W.2d 38, 40 (Minn. 1979) (noting that although aiding-and-abetting was not cited in the complaint, "the reports and statements attached to the complaint made it clear what the state basically contended had happened [and] [t]here is therefore no possibility that defendant was confused as to the nature of the charges."); *State v. Alexander*, 290 Minn. 5, 8-11, 185 N.W.2d 887, 890-91 (1971) (affirming the defendant's conviction for burglary and rejecting his argument that he was unable to prepare an adequate defense because the complaint did not give him notice that he could be liable under an aiding-and-abetting theory of liability).

Here, the complaint set forth two alternative, competing factual theories. One was that Mayers was the person who shot Thomas at point-blank range. This is the version that Thomas testified to at trial and that Mayers's attorney challenged during cross-

examination. The second factual theory apparent in the complaint was that Mayers was present at the apartment during the attack, but that someone else fired the gun. This is sufficient to give Mayers notice that the jury might consider his involvement either as principal shooter or aider and abettor.

Mayers also had an opportunity to defend against both theories. In opening remarks, throughout trial, and in summation, the state argued that Mayers was the person who shot Thomas. The state presented evidence that Mayers came to the apartment with Lidel. The state alleged that Mayers, Lidel, and the third attacker entered Thomas's apartment with the intent to kill Haile, rob him, or threaten him. Thomas testified that Mayers was the person who shot him. During cross-examination, Mayers's attorney laid the ground for the alternative basis for guilt by contesting this testimony. The attorney asked Thomas, in four different ways, whether it was possible that someone other than Mayers had shot him. Although Thomas disputed this theory, the jury clearly considered it, based on its question to the court. The question reveals that the jury was contemplating Mayers's theory that he was present but did not shoot the gun.

We also decline to find prejudice because Mayers has failed to show how he would have presented his case differently had he been informed at the outset of the additional aiding-and-abetting charge. *See DeVerney*, 592 N.W.2d at 846. In response to the state's theory that he was the shooter, Mayers argued that he was present but not the shooter. Mayers argues on appeal that had he known the jury would consider an aiding-and-abetting charge with respect to the attempted-murder offense, he "undoubtedly" would have prepared a defense to that. He maintains that he could have at least

addressed in a second closing argument whether the state's evidence proved that Mayers aided or abetted the attempted murder. But given the caselaw establishing that a jury may convict for aiding and abetting a substantive offense, and the disputed facts concerning Mayers either being the shooter or his being present during the shooting, Mayers had the opportunity throughout the trial to anticipate and rebut this theory. *Cf.* Minn. R. Crim. P. 26.03, subd. 19(3) (allowing the district court to give appropriate additional instructions to the jury if the jury has post-closing argument questions on points of law).

Mayers was charged with first-degree attempted murder, first-degree assault, aiding and abetting first-degree burglary, aiding and abetting aggravated robbery, and aiding and abetting second-degree assault. Mayers knew that the state believed and argued that he was involved as an active participant in all crimes committed by the trio. He cannot successfully argue that he was prejudiced when the jury received the aiding-and-abetting instruction as to attempted murder, because the jury was already considering the extent of Mayers's involvement and participation in the entire attack. We therefore hold that Mayers's substantial rights were not prejudiced and his rule 17.05 and due process challenge fails.

II

Mayers also argues that there was insufficient evidence to convict him of any crime. We review a claim of insufficiency of the evidence to determine whether the jury could reasonably conclude that the defendant is guilty of the offenses charged beyond a reasonable doubt in light of the facts in the record and all the legitimate inferences that

can be drawn in favor of conviction from those facts. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). Inconsistencies in prosecution evidence do not require reversal. *State v. Robinson*, 604 N.W.2d 355, 366 (Minn. 2000). This court assumes that the jury believed the state's witnesses and disbelieved contrary evidence. *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001).

The facts in this record and the legitimate inferences discernible from those facts support the jury's findings of guilt. Although Mayers argues that Thomas's account was unbelievable, we construe the evidence in favor of the verdict and defer to the jury's credibility assessment. Thomas identified both Mayers and Lidel in a photographic lineup and at trial. Thomas was resolute when he testified that Mayers shot him. Cross-examined by defense counsel whether it was possible that in the chaos, someone else had shot him or whether all of the struggling men together had set the gun off, Thomas testified, "Absolutely not, it's absolutely not that everybody shot the gun . . . I got shot point blank range, I was looking at the man. I know who shot me."

Haile corroborated that there was a scuffle in his apartment on October 11, 2005, around 6 p.m. He testified that he heard people saying his name and that someone tried to open his bedroom door, but that he barricaded the door shut. Haile heard a gunshot, and when he left his room, he saw that Thomas had been shot. And Haile testified that he owed Lidel money, and that Lidel had threatened him. Haile testified that Thomas was shot because of him.

Lidel admitted that he was at Burningham Apartments on October 11, 2005. The DNA from the blood collected from the apartment matched his DNA profile. An

acquaintance of Lidel's told police that he had seen Lidel and Mayers together. There was sufficient evidence to convict Mayers of second-degree attempted murder, first-degree assault, aiding and abetting first-degree burglary, and aiding and abetting second-degree assault.

III

In a pro se supplemental brief, Mayers contends that his conviction must be reversed because the district court abused its discretion by failing to give jury instruction 3.4 in its entirety and to give instruction 5.4, and because he was denied effective assistance of counsel. These contentions are not compelling.

We reject Mayers's contention that the court abused its discretion by failing to give the referenced instructions. As the state points out, there is no criminal jury instruction 3.4 in the Minnesota Jury Instruction Guide. And our review of the record indicates that the district court did provide jury instruction 3.04 in its entirety. Similarly, there is no criminal jury instruction 5.4. The court did not include instruction 5.04, but Mayers did not request it. We do not address Mayers's claim of error. *See State v. Goodloe*, 718 N.W.2d 413, 422 (Minn. 2006) ("Failure to request specific jury instructions or to object to instructions given generally results in forfeiture of the issue on appeal.").

We also are not persuaded that Mayers's conviction must be reversed because he was denied effective assistance of counsel. To establish ineffective assistance of counsel that violated his constitutional rights, Mayers must show that his attorney's representation fell below an objective standard of reasonableness and that but for the errors, the result

would have been different. *Hathaway v. State*, 741 N.W.2d 875, 879 (Minn. 2007). The petitioner has the burden of proof and must rebut “the strong presumption that counsel’s performance fell within a wide range of reasonable assistance.” *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). This court may “address the two prongs of the test in any order and may dispose of the claim on one prong without analyzing the other.” *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

Mayers argues that his trial attorneys’ representation fell below an objective standard of reasonableness because they refused to call any defense witnesses or to have Mayers testify on his own behalf, that they failed to challenge Thomas’s statement at trial that he shot himself, that his attorneys rested the defense without his consent, failed to file a motion for funds to hire an investigator, failed to call expert witnesses, and failed to have a juror removed because she was concerned with missing a planned trip.

A review of the record demonstrates that Mayers’s trial counsel did challenge Thomas’s statement at trial that he shot himself, which appears to have been made only with sarcasm, and that the juror was questioned about her trip, which she agreed she could postpone if necessary to reach a verdict. Mayers does not explain his assertion that his defense attorneys’ conduct fell below an objective standard of reasonableness because they failed to call witnesses on his behalf or file a motion for funds to hire an investigator. In the absence of any evidence supporting these allegations, this court cannot find that these acts were errors that impacted the outcome of the case. *See, e.g., Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003) (denying to address the appellant’s ineffective-assistance-of-counsel claims because the appellant presented no evidence that

his trial counsel's trial tactics were not reasonable). And appellate courts will not review trial tactics or strategy for competency. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999).

Similarly, Mayers provides no support for his assertion that he wanted to testify at trial but his trial attorneys refused to call him as a witness. The decision of whether to testify is the defendant's decision to make, after a full consultation with counsel. *Gustafson v. State*, 477 N.W.2d 709, 712 (Minn. 1991). Because a defendant's right to testify in his own defense is a personal, constitutional right, it cannot be waived by counsel. *State v. Rosillo*, 281 N.W.2d 877, 878 (Minn. 1979). If a defendant can prove that his attorney refused to let him testify, he is entitled to a new trial. *Id.* at 879. But where the record does not establish either a denial of right to testify or inadequate advice, and a criminal defendant is represented by counsel and does not testify, the court must presume the defendant voluntarily and intelligently waived the right to testify. *State v. Smith*, 299 N.W.2d 504, 506 (Minn. 1980). The record does not establish a violation of Mayers's right to testify or that he received inadequate advice. Mayers's claim that he received ineffective assistance of counsel fails.

Affirmed.