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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0838**

State of Minnesota,
Respondent,

vs.

Antonio Odall Lewis,
Appellant.

**Filed May 7, 2018
Affirmed
Johnson, Judge**

Sherburne County District Court
File No. 71-CR-16-1021

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

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Kirk, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A Sherburne County jury found Antonio Odall Lewis guilty of three offenses, including second-degree assault and possession of a firearm by an ineligible person. The

jury's verdicts are based on evidence that Lewis fired a handgun at a woman (but missed her). Lewis challenges the sufficiency of the evidence on the assault conviction and the district court's decision not to give the jury an alibi instruction. We affirm.

FACTS

This appeal arises from a middle-of-the-night incident at a multi-unit apartment building in the city of St. Cloud in which a shot was fired at a resident of the building while she was standing in a hallway near her apartment.

After an investigation, the state charged Lewis with three offenses: (1) possession of a firearm by a prohibited person, in violation of Minn. Stat. § 624.713, subd. 1(2) (2016); (2) second-degree assault with a dangerous weapon, in violation of Minn. Stat. § 609.222, subd. 1 (2016); and (3) reckless discharge of a firearm within a municipality, in violation of Minn. Stat. § 609.66, subd. 1a(a)(3) (2016). The case was tried to a jury on three days in February 2017. The state called six witnesses, who testified as described below.

S.F. testified that, at approximately 2:30 a.m. on July 27, 2016, she awoke to the sound of an argument in her multi-unit apartment building. She walked out of her second-floor apartment and saw several people gathered near the door of her next-door neighbor, T.S.-L., with whom S.F. was very familiar. S.F. saw T.S.-L., T.S.-L.'s adult daughter, and a young girl. T.S.-L. and her daughter were standing in the hallway, arguing with Lewis, who was inside T.S.-L.'s apartment. S.F. previously had seen Lewis at the apartment building on several occasions when he came to visit T.S.-L., and S.F. had given him rides a few times. Based on those prior interactions, S.F. recognized Lewis's voice on this occasion. S.F. approached T.S.-L.'s apartment and asked the women if they were all right.

Lewis told S.F., “Please go back into your apartment. You don’t know what I’m capable of.” S.F. replied that she wanted to make sure that Lewis did not harm T.S.-L. or her daughter. S.F. and Lewis argued, and Lewis referred to her by a derogatory word.

As S.F. turned around toward her own apartment, Lewis quickly went down a flight of stairs and exited the building through a nearby exterior door, which was open. S.F. talked to T.S.-L., her daughter, and the young girl to “mak[e] sure they were okay.” S.F. then heard a loud bang, heard something whiz past her ear, smelled gunpowder, and fell to the floor. Lewis said to her, “Oh, my God, . . . did I shoot you? Are you okay?” Lewis then fled. S.F. crawled back to her apartment. She later called 911. Later that day, Lewis called T.S.-L.’s cell phone and spoke with S.F. Lewis apologized to her, saying that “it never meant to happen.” Lewis also offered S.F. “some money not to talk.”

M.A. testified that she lived in an apartment building across the street. On the night in question, she was outside smoking a cigarette when she heard arguing and yelling. She saw a man shoot a gun and heard a gunshot and a loud scream. She later saw the shooter place an object between two mattresses that were leaning against a nearby dumpster. She did not know who the shooter was but had seen him before at the multi-unit apartment building across the street. Shortly thereafter, she saw a different, younger man reach under the mattresses leaning against the dumpster and grab what she believed was a handgun. She called 911.

Three police officers who responded to the 911 calls testified about their response and subsequent investigation. Sergeant Koeniguer testified that officers searched the area near the dumpster but did not find a handgun. Investigator Peters testified about his

interview of S.F. and his conversations with three witnesses. S.F. initially told him that she did not know who shot at her. She later admitted that she had lied and that she did know who shot at her. Because she was afraid, S.F. asked Investigator Peters to meet her at a nearby parking lot, where she told him that she knew the shooter by his nicknames, Cubby and Caba. Investigator Peters compiled a photo array of six persons. S.F. identified the photo of Lewis as the shooter and said that she was “100 percent certain.”

Investigator Peters also testified about his interviews of Lewis, who said that he was at his home throughout the night and early morning hours of July 26 and 27, 2016, and that he had his cell phone with him. Investigator Peters further testified that he obtained data concerning the cell phone that is registered to Lewis, which indicated that no calls were made on the phone between 12:02 a.m. and 2:30 a.m. but that more than ten calls were made on the phone between 2:30 a.m. and 3:01 a.m. The data also showed that text messages were sent from Lewis’s cell phone at approximately 2:38 a.m. asking two friends for a ride.

Lewis called two witnesses. He first called his 18-year-old niece, with whom he shares a home. She testified that she was at home throughout the night and early morning hours of July 26 and 27, 2016; that she woke up at approximately 3:00 a.m. when she received a phone call; and that she talked on the phone “for at least an hour or two” before she saw a police officer drive by. She testified that she went downstairs to check on family members and saw Lewis sleeping on the living-room floor. Lewis also called his 27-year-old son, A.L., as a witness. He testified that he was living in the same multi-unit apartment building in which the shooting occurred and was home throughout that night but that he

did not hear anything. He also testified that he and Lewis had not seen each other in the 16 years before the incident.

At the instructions conference, Lewis requested an alibi instruction. The district court denied the request. In closing argument, Lewis's attorney summarized the evidence that Lewis was not in the multi-unit apartment building at the time of the incident and urged the jury to conclude that, for that reason, he could not have committed any of the charged offenses.

The jury found Lewis guilty of all three charges. The district court imposed concurrent prison sentences of 60 months on count 1 and 71 months on count 2. Lewis appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Lewis argues that the evidence is insufficient to support his conviction of second-degree assault. For purposes of this issue, he does not contend that there is insufficient evidence that he was present at the scene or that he fired a handgun. Rather, he contends that the evidence is insufficient to prove that he *intentionally* fired a handgun toward S.F. He contends that the circumstantial evidence is consistent with the inference of an accidental discharge of a handgun.

A person is guilty of second-degree assault if he “assaults another with a dangerous weapon.” Minn. Stat. § 609.222, subd. 1. The word “assault” is defined to mean “(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 (2016). In this case, the state sought to prove that Lewis engaged in the first type of assault because he intended to cause fear in S.F. of immediate bodily harm or death. Second-degree assault by causing fear is a specific-intent crime, which means that a defendant must intend to cause that particular result. *State v. Fleck*, 810 N.W.2d 303, 308-09 (Minn. 2012); *State v. Hough*, 585 N.W.2d 393, 395-96 (Minn. 1998). The requisite intent may be inferred from the “natural and probable consequences” of the defendant’s actions. *Hough*, 585 N.W.2d at 396-97.

In determining whether there is sufficient evidence to support a conviction, we ordinarily undertake “a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to” support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). “[W]e 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 charged offense.” *Ortega*, 813 N.W.2d at 100.

The parties agree that Lewis’s conviction rests on circumstantial evidence and that we should apply the standard of review that is appropriate for circumstantial evidence. In reviewing a conviction based on circumstantial evidence, we apply a two-step analysis. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we “identify the circumstances proved.” *Id.* (quoting *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). “In

identifying the circumstances proved, we assume that the jury resolved any factual disputes in a manner that is consistent with the jury's verdict." *Id.* (citing *Andersen*, 784 N.W.2d at 329). Second, "we examine independently the reasonableness of the inferences that might be drawn from the circumstances proved" and "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotations and alterations omitted). "To sustain a conviction based on circumstantial evidence, the reasonable inferences that can be drawn from the circumstances proved as a whole must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017) (quotation omitted).

At the first step of the circumstantial-evidence analysis, we identify the circumstances proved that are relevant to the question whether Lewis intended to fire a handgun at S.F. and cause her fear of immediate bodily harm or death. *See Moore*, 846 N.W.2d at 88. The relevant circumstances proved are as follows: (1) Lewis and S.F. engaged in an argument. (2) Lewis told S.F. to leave, saying, "Please go back into your apartment. You don't know what I'm capable of." (3) Lewis quickly went down a set of stairs and out an exterior door, where he was alone. (4) A neighbor saw a man who was standing near the exterior doorway shoot a gun into the apartment building and heard a gunshot. (5) S.F. heard a gunshot, smelled gunpowder, heard a bullet fly by her ear, and fell to the ground. (6) A bullet from a gun, which was traveling in an upward trajectory, was lodged in the wall approximately six inches above where S.F.'s head had been. (7) Immediately after the shot, Lewis said to S.F., "Oh, my God, . . . did I shoot you? Are

you okay?” (8) Lewis apologized to S.F. later that day and offered to give her money in exchange for her promise not to tell anyone about the shooting.

At the second step of the analysis, “we examine independently the reasonableness of the inferences that might be drawn from the circumstances proved” and “determine whether the circumstances proved are consistent with guilt.” *Id.* (quotations and alterations omitted). The state’s theory is that Lewis pointed a handgun at S.F. and fired it with intent to cause her fear of immediate bodily harm or death. We agree with the state that it is reasonable to infer from the circumstances proved that Lewis fired a handgun toward S.F. with intent to cause her fear of immediate bodily harm or death.

At the second step of the analysis, we also determine “whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotation omitted). Lewis contends that the circumstantial evidence is consistent only with the hypothesis that he inadvertently discharged a handgun, without intending to cause S.F. fear of immediate bodily harm or death. Lewis points out that no witness saw him possess a gun, let alone point a gun at S.F. He also points out that, immediately after the shooting, he came to S.F.’s aid and apologized to her and said that he never meant for it to happen.

In light of the circumstances proved, it is simply implausible that Lewis did not fire a handgun at S.F. with the intent to cause fear. Lewis and S.F. had exchanged angry words only a few moments before the shot was fired. During the exchange, Lewis referred to S.F. by a derogatory word. Lewis had threatened her by saying, “You don’t know what I’m capable of.” The shot was fired from the area where only Lewis was standing. The shot

was fired in an upward direction, and the bullet passed by S.F.'s head so closely that she could hear it. In short, the overwhelming circumstantial evidence shows that Lewis pointed and fired a handgun at S.F. The inference that Lewis inadvertently fired a handgun in S.F.'s direction is not a reasonable inference, which means that there are no rational hypotheses of innocence. *See Harris*, 895 N.W.2d at 598; *Moore*, 846 N.W.2d at 88.

Thus, the circumstantial evidence is sufficient to support Lewis's conviction of second-degree assault.

II. Alibi Instruction

Lewis also argues that the district court erred by denying his request to give the jury an instruction concerning his alibi theory.

A district court must instruct the jury in a way that “fairly and adequately explain[s] the law of the case” and does not “materially misstate[] the applicable law.” *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). An appellate court reviews jury instructions “as a whole to determine whether [they] accurately state the law in a manner that can be understood by the jury.” *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). A district court has “considerable latitude in selecting language for jury instructions.” *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). Accordingly, we apply an abuse-of-discretion standard of review to a district court's jury instructions. *Koppi*, 798 N.W.2d at 361.

An alibi instruction is not prohibited. *State v. Landa*, 642 N.W.2d 720, 727 (Minn. 2002). But if a defendant objects to an alibi instruction, such an instruction is not recommended. *Id.* If an alibi instruction is given, it “should be ‘carefully phrased to make

clear to the jury that defendant had only to create a reasonable doubt through the alibi defense.” *Id.* (quoting *State v. Kluck*, 299 Minn. 161, 170, 217 N.W.2d 202, 208 (1974)).

In general, “[a] party is entitled to an instruction on his theory of the case if there is evidence to support it.” *State v. Persitz*, 518 N.W.2d 843, 848 (Minn. 1994). If a defendant requests an alibi instruction, the district court may decline to give the instruction even if there is evidence to support the alibi. *Landa*, 642 N.W.2d at 728. The district court may decline to give an alibi instruction on the ground that such an instruction would require another instruction concerning the potential bias of the defendant’s friends or family members, which may be prejudicial to the defendant. *Id.* at 727. The district court also may decline to give an alibi instruction “if the substance of the particular instruction is already contained in the court’s instruction to the jury.” *Id.* at 728. In addition, the district court may decline to give an alibi instruction if the defendant’s attorney is able to present the alibi theory in closing arguments. *See id.*

In this case, Lewis requested that the district court instruct the jury concerning his evidence of an alibi as follows:

Defendant has presented a theory of defense of alibi. This defense does not shift the burden of proof to the defendant. The State must still prove beyond a reasonable doubt each element of the crime the defendant has been charged with. The defendant is not required to prove his alibi defense beyond a reasonable doubt. The defendant may still succeed by raising a reasonable doubt of his presence at the scene of the crime.

Lewis’s attorney explained that the requested instruction would help ensure that the jury would not shift the burden of proof to Lewis and find him “automatically guilty” if he

failed to prove his alibi. The district court denied the request for two reasons. First, the district court was persuaded by the Minnesota District Judges' Association pattern-jury-instruction guide, which recommends against giving an alibi instruction. A comment in the pattern-jury-instruction guide states:

An alibi is not a defense. It is proof that a necessary element of the State's case does not exist. The burden of proof is on the State. In keeping with the general position that the instructions should not comment on the effect of particular evidence, the Committee recommends no instruction on alibi.

10 Minnesota Dist. Judges' Ass'n, *Minnesota Practice – Jury Instruction Guides, Criminal*, § 7.08 cmt. (6th ed. 2015). Second, the district court stated that the requested instruction “would be more confusing to the jury than helpful.” The district court also stated its intention “to tell [the jury] repeatedly that the state has the burden of proving every element” and that “proving that he was there is the most basic element of all.”

With respect to the state's burden of proof, the district court instructed the jury as follows:

The defendant is presumed innocent. This presumption remains with the defendant unless and until he has been proven guilty beyond a reasonable doubt. . . . The burden of proving guilt is upon the state. The defendant does not have to prove innocence.

The state must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant has no obligation to prove innocence.

The district court also instructed the jury that it should find Lewis not guilty if it finds that any element of a crime had not been proved beyond a reasonable doubt.

Lewis contends that the district court erred by following the recommendation of the pattern-jury-instruction guide because the guide is not authoritative. Regardless whether the guide is authoritative, the comment to which the district court referred is not contrary to Minnesota law. See *Landa*, 642 N.W.2d at 727-28. In addition, the district court's reasons for denying Lewis's request are very similar to the district court's reasons in *Landa*. Because Lewis's alibi theory is based on the testimony of his niece and his son, a cautionary instruction might have been necessary and might have been more prejudicial to Lewis than helpful. See *id.* at 727. Furthermore, the district court clearly instructed the jury concerning the state's burden of proof. Moreover, Lewis's trial attorney was able to pursue the alibi theory in his closing argument.

Thus, the district court did not err by denying Lewis's request for an alibi instruction.

Affirmed.