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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0857**

State of Minnesota,
Respondent,

vs.

Ronald Dean Smaller,
Appellant.

**Filed May 21, 2018
Affirmed
Reilly, Judge**

Ramsey County District Court
File No. 62-CR-15-8365

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Reilly, Judge; and Klaphake, Judge.*

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

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges his two convictions of aiding and abetting second-degree murder. Appellant argues that the state failed to prove that his felony assaults were a substantial causal factor for the victim's death, that two experts testified to legal conclusions that substantially affected the verdict, and that this court should adopt the merger rule. Appellant also raises a number of pro se arguments. We affirm.

FACTS

On November 11, 2014, victim E.F. celebrated his 40th birthday with his family. Afterward, he walked to the Tin Cup, a neighborhood bar. He then walked partway to another bar, the Tiki Hut, and called his daughter to have her drive him the rest of the way. Appellant Ronald Dean Smaller was also at the Tiki Hut that night. Within minutes of the victim arriving at the Tiki Hut, appellant began speaking loudly on his cell phone. The bar owner approached appellant to address his disruptive behavior. The victim accompanied the bar owner during the conversation, which occurred around 11:45 p.m. After the conversation, appellant began to leave the Tiki Hut with two of his companions. On his way out of the Tiki Hut, appellant's male companion stopped to speak with the victim. Then, appellant's female companion physically assaulted the victim's daughter by pulling her off of a bar stool. The victim reacted to the assault and tried to pull the two women apart. Appellant's male companion punched the victim. Appellant also began punching the victim. The victim fell to the ground and was motionless. Appellant began kicking the

victim in the neck and head at least four times. The victim appeared to be unconscious. In all, the assault lasted about 45 seconds.

The victim remained unconscious on the ground as appellant and his companions left. The victim woke and resumed sitting at the bar. Police arrived just before midnight and took witness statements. The victim refused medical help and decided to go home. On the ride home, the victim reported an increasing pain in his head and body; still, he refused medical help and returned home. Around 1:00 a.m., police were dispatched to the victim's home, where they found him unconscious on the floor of his bedroom. The victim was pronounced dead at approximately 1:40 a.m. on November 12, 2014.

The Ramsey County Medical Examiner, Dr. William McGee, conducted an autopsy. The autopsy concluded that the victim suffered sustained injuries to his face and an abrasion on his right shoulder. The victim also had internal injuries to his neck muscle tissue and scalp tissue. Dr. McGee determined the victim likely died of a cardiac arrhythmia caused by homicide.

The victim was diabetic and had received treatment for advanced coronary artery disease from his primary physician. In April 2014, the victim had a stent inserted in his main coronary artery by his cardiologist, Dr. McKinley. Following that procedure, the victim made excellent progress and experienced improved health. At medical appointments in July and early November of 2014, the victim's physicians observed "overall improvement" in his health condition and "excellent progress." The victim's physicians testified that, given the trajectory of his health, the victim should be alive today.

Appellant was charged with two counts of aiding and abetting second-degree felony murder, predicated on second- and third-degree assaults.¹ At the court trial, the cardiologist and medical examiner testified that the assault was a substantial cause of the victim's death. Dr. Wigren, the defense expert, is a forensic pathologist who reviewed the medical records in this case. He testified that the cause of death could not be determined. The district court found Dr. McKinley and Dr. McGee's testimony credible and found Dr. Wigren's conclusion not credible. The district court found that the state had proven beyond a reasonable doubt that appellant intentionally assaulted the victim with a dangerous weapon, his feet, and with the intent to inflict substantial bodily harm, and that the assault was a substantial causal factor in the victim's death. The district court determined appellant was guilty of both counts of aiding and abetting second-degree murder and sentenced appellant to 252 months in prison for the count of aiding and abetting second-degree murder, predicated on second-degree assault.

This appeal followed.

¹ Second-degree assault is an assault with a deadly weapon or assault with a deadly weapon that inflicts substantial bodily harm. Minn. Stat. § 609.222 (2016). Third-degree assault is an assault resulting in the infliction of substantial bodily harm. Minn. Stat. § 609.223, subd. 1 (2016).

DECISION

I. There was sufficient evidence for the district court to find that appellant's assault was a substantial cause of the victim's death.

Appellant argues that there was insufficient evidence that appellant's assault was a substantial causal factor in the victim's death. Appellant claims that the state failed to prove that but for the assault the victim would still be alive.

When considering the sufficiency of the evidence, this court engages in a painstaking review of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the fact-finder to reach the decision she did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989); *State v. Cox*, 278 N.W.2d 62, 65 (Minn. 1979) (applying the same standard for the review of sufficiency of the evidence to jury trials and court trials). The reviewing court assumes the fact-finder believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). If the state failed to prove any of the elements of the crime beyond a reasonable doubt, the conviction must be reversed. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150-51 (1978).

Appellant was convicted of two counts of aiding and abetting second-degree murder. A person aids and abets a criminal act if they intentionally aid another in committing a crime. Minn. Stat. § 609.05, subd. 1. A person is guilty of second-degree murder if they "cause the death of a human being, without intent to [kill], while committing or attempting to commit a felony offense." Minn. Stat. § 609.19, subd. 2(1) (2016). A person causes the death of another in Minnesota if their acts were a substantial causal factor

leading to the person's death. *State v. Gatson*, 801 N.W.2d 134, 146 (Minn. 2011). It must be shown that appellant's assault led to the victim's death. *State v. Olson*, 435 N.W.2d 530, 534 (Minn. 1989) ("It must be shown that the defendant's acts injured the [victim's] brain which then led to the [victim's] death.").

The district court used circumstantial evidence to determine whether the assault was a substantial causal factor in the victim's death. Circumstantial evidence is evidence the fact-finder uses to infer other facts in dispute. *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017). "[C]ircumstantial evidence always requires an inferential step to prove a fact that is not required with direct evidence." *Id.* Circumstantial evidence routinely proves causation in second-degree murder cases, which includes a medical expert's testimony about causal factors they did not personally witness. See *State v. Mosley*, 414 N.W.2d 461, 466 (Minn. App. 1987), *review denied* (Minn. Dec. 22, 1987); see also *State v. Laine*, 715 N.W.2d 425, 431 (Minn. 2006) (treating medical examiner testimony as circumstantial evidence to show causation in a first-degree domestic-abuse murder case). Though a conviction based on circumstantial evidence merits higher scrutiny, "circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The circumstantial-evidence standard requires a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, this court must "identify the circumstances proved," "defer to the jury's acceptance of the proof of these circumstances" and reject evidence conflicting with the circumstances proved by the state. *Id.* at 598-99 (quotations omitted). Next, this court must "determine whether the circumstances proved

are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 599 (quotations omitted).

First, we identify the circumstances proved. The circumstances proved by the state that are consistent with the verdict include: (1) the victim died of an arrhythmia; (2) the victim had heart health issues; (3) the victim was prone to heart problems; (4) the victim’s heart health was improving; (5) catecholamine surges² cause arrhythmia; (6) physical assaults cause a catecholamine surges; (7) the victim experienced a violent physical assault; (8) a catecholamine surge remains in effect for at least an hour and can remain in effect for up to several hours; (9) appellant was not breathing and had no pulse just over an hour after he was assaulted.

The district court used the circumstances proved to make inferences, which allowed it to conclude that the assault was a substantial causal factor in the victim’s death. First, the court inferred that the victim experienced a catecholamine surge brought on by a physical assault. This inference is well supported by the circumstances proved, because the victim experienced a violent physical assault and physical assaults cause catecholamine surges. Second, the court inferred that the catecholamine surge caused a fatal arrhythmia. This inference is also well supported by the circumstances proved, because the victim had a weak heart and was more prone to experiencing arrhythmia during a catecholamine surge. The district court believed the state’s experts when they testified that the assault was a substantial factor in appellant’s death and disbelieved the defense expert’s testimony that

² A bodily chemical similar to adrenaline that causes an increase in heart rate followed by a sudden increase in blood pressure.

the cause of death could not be determined. The inferences adopted by the district court are consistent with the circumstances proved, and there is no other rational hypothesis for the cause of the victim's death, especially considering that his heart condition was improving.

Appellant argues that the victim's death could have an alternate cause—the emotional trauma of seeing the victim's daughter assaulted.³ According to appellant, if the emotional trauma of seeing his daughter assaulted triggered a catecholamine surge first, the physical assault could not be the true cause of his death. We are not persuaded.

The victim's daughter was assaulted mere seconds before the victim was physically assaulted himself, so the two incidents cannot be characterized as separate. The victim was sitting next to his daughter when she was assaulted, and, within seconds, he intervened in the assault, which then immediately led to appellant and his companions assaulting the victim. None of the experts could separate one part of the assault from another for the purpose of determining causation. Likewise, we will not parse out the seconds-long period of time when the victim was not involved in the assault as a separate assaultive act capable of providing an alternative causal factor in the victim's death. The actions of appellant and his companions were concurring causes of the victim's death, because they all occurred as

³ Appellant also argues that the conversation the victim witnessed between the bar owner and appellant could be a cause of the victim's death. The district court found that the conversation was “friendly and brief,” not a heated argument as appellant suggests. Appellant does not claim this finding of fact was clearly erroneous, and we defer to a court's findings of fact. *State v. Barshaw*, 879 N.W.2d 356, 366 (Minn. 2016). Therefore, we dismiss the possibility that a “friendly and brief” conversation could trigger a catecholamine surge as inconsistent with the circumstances proved.

part of a single assault. *State v. Hofer*, 614 N.W.2d 734, 737 (Minn. App. 2000), *review denied* (Aug. 15, 2000) (“When the acts or omissions of two or more persons combine to bring about a harmful result, those acts or omissions are concurring causes of the harm.”).

Furthermore, appellant was convicted of aiding and abetting second-degree murder, not for acting as the principal. Appellant approached the victim and his daughter with his two companions. When his female companion began assaulting the victim’s daughter, appellant remained. When the victim began to intervene in his daughter’s defense, appellant’s male companion struck the victim. Then, appellant began punching the victim too. Finally, the victim fell to the ground, seemingly unconscious, and appellant kicked him multiple times in the head and neck. The evidence shows that appellant was present for the entire 45-second assault and intended for his presence to aid in the assault of the victim’s daughter and then the victim himself. That victim’s daughter was assaulted seconds before the victim does not create an independent causal chain. Appellant aided and abetted in the entire assault, which was a substantial causal factor in the victim’s death.

There was sufficient evidence for the district court to find that appellant’s assault was a substantial causal factor in the victim’s death.

II. The state’s experts did not testify to a legal conclusion that substantially impacted the outcome of the trial.

Appellant argues that Dr. McKinley and Dr. McGee testified to legal conclusions and that their testimony prejudicially affected the verdict. We are not persuaded because witnesses’ statements were not legal conclusions, and the testimony likely had no prejudicial effect on the verdict.

We review unobjected-to admission of evidence for plain error. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). To demonstrate plain error, appellant must show: (1) error; (2) that is plain; and (3) that affects his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Plain error must be clear or obvious and must clearly contradict caselaw, a rule, or a standard of conduct. *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010). A plain error affects appellant’s substantial rights if the absence of the error would have had a significant effect on the verdict. *Id.* at 551. If the three prongs are met, the court may choose to address the error to ensure fairness and preserve the integrity of the proceeding. *Id.* at 549.

In Minnesota, an expert may give an opinion as to an ultimate fact issue if that testimony is helpful to the fact-finder. *State v. Vang*, 774 N.W.2d 566, 578 (Minn. 2009). Testimony is helpful if it is within the realm of the witness’s expertise and adds precision or depth to the fact-finder’s ability to reach a conclusion. *State v. Helterbride*, 301 N.W.2d 545, 547 (Minn. 1980). An expert may not make a legal conclusion, and such statements would be inadmissible. *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990).

Appellant argues that Dr. McKinley and Dr. McGee’s testimony that the assault was a “substantial factor” in the victim’s death are legal conclusions and the district court’s failure to sua sponte redact those statements was plain error. Appellant cites *State v. Moore*, 699 N.W.2d 733 (Minn. 2005), in which a doctor testified that the loss of a tooth met the definition of “great bodily harm.” *Id.* at 739. There, the court determined that the testimony was inadmissible because the doctor testified that a given injury satisfied a legal definition. *Id.* at 740. The court noted that an expert may “provide a medical explanation

in the context of the legal definition,” but that ultimate legal conclusions were not allowed. *Id.* Furthermore, the context in which the testimony is elicited can show how the factfinder will receive the information. *Id.* In *Moore*, the state asked the doctor whether “her injury meets the definition of great bodily harm.” *Id.* at 739. The question called for a specific legal conclusion, and instructed the jury to reach a certain result. *Id.* at 740.

Here, the witnesses were simply giving medical explanations in the context of the legal definition for substantial causal factor. The prosecutor asked both Dr. McKinley and Dr. McGee whether they thought, based on their medical training and experience, that the assault was a substantial factor in causing the victim’s death. The witnesses did not claim to know whether the assault satisfied the legal definition for a substantial causal factor. The prosecutor only asked the witnesses to testify about the victim’s health and whether various stimuli could explain his demise. The admission of the testimony was not plain error.

The experts’ testimony also did not affect appellant’s substantial rights. An error affects substantial rights only if there is a reasonable likelihood that the error had a substantial effect on the verdict. *Strommen*, 648 N.W.2d at 688. Concerning the somewhat parallel issue of prejudice, the risk of prejudicial evidence is reduced in a court trial, because a judge is more likely to use the evidence for a proper purpose and not be improperly swayed by emotions. *State v. Burrell*, 772 N.W.2d 459, 467 (Minn. 2009) (emphasizing the lessened prejudicial effect of past criminal history being presented to a judge as opposed to a jury).

Here, even if it was plain error, the admission of the expert testimony had no substantial effect on the verdict. If the district court determined that the defense's expert was credible, it would have credited his testimony over the state's witnesses. However, the district court chose to believe the state's witnesses. Furthermore, none of the state's witnesses' testimony was of the character that the district court would have no choice but to convict. Instead, the witnesses merely expressed their opinion that the assault was a substantial factor in the victim's death, and the district court chose to credit that testimony.

The experts' testimony was not plain error that substantially affected the verdict.

III. We will not adopt the merger rule.

Appellant argues that this court should adopt the felony-murder merger rule and announce that he is immune from prosecution for murder. The merger doctrine holds that a felony cannot support a conviction of felony murder if the felony is independent of the homicide. *See State v. Abbott*, 356 N.W.2d 677, 679 (Minn. 1984) (declining to adopt the merger rule in Minnesota). The Minnesota Court of Appeals is an error-correcting court, and we cannot and will not overturn established supreme court precedent. *State v. Grigsby*, 806 N.W.2d 101, 114 (Minn. App. 2011), *aff'd on other grounds*, 818 N.W.2d 511 (Minn. 2012). The Minnesota Supreme Court has declined to adopt the merger doctrine in Minnesota, and we will not deviate from that course. *Id.*

IV. Appellant's Pro Se Arguments

A. There was sufficient evidence to prove appellant committed the underlying offense of second-degree assault.

Appellant claims there was insufficient evidence to prove he committed the underlying offense of second-degree assault. A person commits second-degree assault if he assaults another with a dangerous weapon or if he assaults another with a dangerous weapon and inflicts substantial bodily harm. Minn. Stat. § 609.222, subds. 1, 2. Appellant argues that he did not use a dangerous weapon in his assault of the victim and that he did not inflict substantial bodily harm. We will reverse a conviction for insufficient evidence only if a painstaking review of the record shows the evidence, if viewed in a light most favorable to the conviction, cannot support the conviction. *Webb*, 440 N.W.2d at 430.

Appellant argues he did not use a dangerous weapon. A dangerous weapon is “any . . . instrumentality that, in the manner it is used . . . is calculated or likely to produce death or great bodily harm.” Minn. Stat. § 609.02, subd. 6 (2016). When a person uses his feet to kick a victim on the ground while the victim is without effective means of defense, the person's feet are deadly weapons “calculated or likely to produce death or great bodily harm.” *State v. Davis*, 540 N.W.2d 88, 91 (Minn. App. 1995), *review denied* (Minn. Jan. 31, 1996). Here, appellant used his feet to kick the victim in the neck repeatedly when the victim was unconscious on the ground without an effective means of defense. There is sufficient evidence to prove that appellant used a dangerous weapon to assault the victim.

Appellant next argues that he did not inflict either great or substantial bodily harm, because “all blows [were] to the head but there were no reports of any internal damage to

the skull or the brain . . . no reports of any brain damage, no skull fractures, no concussion, or any great bodily harm.” Substantial bodily harm is “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.”⁴ Minn. Stat. § 609.02, subd. 7a (2016). A temporary loss of consciousness can amount to substantial bodily harm. *State v. Larkin*, 620 N.W.2d 335, 338 (Minn. App. 2001). Bruising and scratching on the face and neck can also qualify as substantial bodily harm. *State v. Carlson*, 369 N.W.2d 326, 327-28 (Minn. App. 1985), *review denied* (Minn. July 26, 1985). Here, appellant’s face and neck were bruised, and he fell unconscious during the assault. There is sufficient evidence to prove that appellant inflicted substantial bodily harm, using his feet.

We determine the evidence is sufficient to conclude that appellant committed the underlying offense of second-degree assault.

B. Dr. McGee’s credibility is not at issue on appeal.

Appellant claims Dr. McGee’s testimony should be viewed as less credible because the testimony was inconsistent and because Dr. McGee has testified incorrectly in past trials. This court does not weigh a witness’s credibility on appeal; that role belongs solely to the fact-finder at trial. *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997). Therefore, we will not evaluate the credibility of Dr. McGee’s testimony.

⁴ We do not address whether appellant inflicted great bodily harm, because the infliction of great bodily harm is not an element of second-degree assault.

C. The failure of the victim's wife to testify does not create reasonable doubt of appellant's guilt.

Appellant argues there is a reasonable doubt as to appellant's guilt because the victim's wife did not testify. Appellant argues that she could have identified a superseding cause for the victim's death between when the assault occurred and when he fell unconscious on his bedroom floor. Appellant does not describe how the wife's testimony would have exonerated him; he merely raises the possibility that her testimony could provide evidence of a superseding cause. Appellant does not claim that his lawyer's failure to call victim's wife as a witness was ineffective assistance of counsel. And even if appellant's lawyer had called the victim's wife to testify, the selection of evidence to be presented to the jury is a matter of trial strategy that is generally not subject to appellate review. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Because appellant's argument raises only a hypothetical doubt as to his innocence, and we determine that the victim's wife's absence did not affect the outcome of the trial, we will not disturb the verdict.

D. The verdict was supported by sufficient evidence.

Appellant argues the district court abused its discretion when it denied appellant's motion for acquittal. A motion for acquittal shall be granted "if the evidence is insufficient to sustain a conviction." Minn. R. Crim. P. 26.03, subd. 18(1)(a). Based on the foregoing analysis, there is sufficient evidence for the district court to find that appellant's assault of the victim was a substantial causal factor in the victim's death. The district court did not abuse its discretion when it denied appellant's motion for acquittal.

Affirmed.