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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0777**

State of Minnesota,
Respondent,

vs.

Kaylen Demond Nelson,
Appellant.

**Filed June 17, 2019
Affirmed
Smith, Tracy M., Judge**

Anoka County District Court
File No. 02-CR-16-4007

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Larkin, Judge; and
Smith, John, Judge.*

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

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Kaylen Nelson was living with M.S.B. and her daughter, K.M.B., when injuries suggesting that K.M.B. was being abused were discovered. Nelson was charged with and convicted of third-degree assault and neglect of a child. A jury found him guilty under both direct- and accomplice-liability theories for each crime. In this direct appeal, Nelson argues that he was denied a speedy trial, that the evidence was insufficient to establish beyond a reasonable doubt that he committed third-degree assault under either theory of liability, and that the prosecutor committed reversible misconduct by misrepresenting the law to the jury. We affirm.

FACTS

This case concerns the abuse of a 22-month-old child, K.M.B., between February and late April 2016. In January 2016, Nelson met and began living with M.S.B., the mother of K.M.B. Not long afterward, Nelson began watching K.M.B. while M.S.B. was out of the house. This arrangement lasted until mid-April, when M.S.B.'s sister, K.S.B., and her sister's boyfriend, T.E., visited the apartment and discovered signs that K.M.B. was being abused. Specifically, K.S.B. noticed bruising on K.M.B.'s neck and face, an injury to the inside of her ear, scratches and bruising on her torso, as well as an unspecified injury to the child's vaginal area. T.E. saw scratches and bruising on the child's neck, bruising on her legs, and a fresh bruise on her arm. After K.S.B. and T.E. informed relatives about what they saw, K.M.B. was taken to the hospital, where the injuries were reported to police and child protection.

At the hospital, it was discovered that K.M.B. also had two fractures in her forearm that were healing but untreated; the breaks were estimated to be three to four weeks old. Blood analysis revealed an elevated level of creatine phosphokinase, an enzyme that is released from skeletal muscle when it is injured. Medical examination revealed numerous bruises and scars that, in the doctor's opinion, were consistent with physical abuse occurring on multiple occasions.

Just before K.M.B. was taken to the hospital, Nelson left the apartment and, apparently, the state. In June 2016, Nelson was charged with first- and third-degree assault. He was arrested in January 2017.

Though initially scheduled for February, Nelson's omnibus hearing was continued twice—once so that he could consider a plea offer, and once so that his new attorney could familiarize himself with the evidence provided in discovery up to that point. On May 4, Nelson waived the omnibus hearing and demanded a speedy trial. A pretrial hearing was set for May 16, and trial was set for June 12.

On May 22, the state amended the complaint. The amended complaint removed the previous paragraphs charging first- and third-degree assault and added paragraphs charging Nelson with aiding and abetting first- and third-degree assault as well as aiding and abetting neglect of a child. Nelson responded by waiving his speedy-trial demand in order to challenge probable cause for the amended complaint. A contested omnibus hearing was scheduled for June 27.

At the June 27 hearing, the state indicated that it intended to also charge those three crimes under direct-liability theories. Additionally, the court noted that the speedy-trial

demand had been withdrawn but said that a trial date and briefing schedule could be set if that was what Nelson wanted. Nelson's attorney responded by raising a discovery issue. The contested omnibus hearing was rescheduled to July 10 to accommodate the amendment to the complaint.

The second amended complaint charging six counts was filed on July 10. At the omnibus hearing on that same date, the parties agreed to argue Nelson's motion to dismiss based on lack of probable cause by simultaneously submitted briefs. In the event the motion was denied, a pretrial hearing was scheduled for September 26 and trial was scheduled for October 23. Nelson indicated at the July 10 hearing that, if his motion to dismiss was denied, he intended to reassert his demand for a speedy trial.

The parties submitted briefs, and, on September 25, the district court denied Nelson's motion to dismiss for lack of probable cause. A pretrial hearing was held as scheduled, at which Nelson reasserted his speedy-trial demand. However, trial was postponed until October 25 because the scheduled judge was unavailable. On October 25, trial was again rescheduled, this time to December 11, because there were not enough jurors available. Though Nelson objected to the second rescheduling on the basis of his speedy-trial demand, the court noted that the delay would be brief—only 16 days beyond the 60-day deadline, counting from September 25—and ruled that there was good cause to delay, because the trial could not start without jurors. The trial began on December 11.

At trial, the state introduced evidence that no one had noticed injuries on K.M.B. before Nelson moved in, that K.M.B.'s injuries occurred over a period of at least three to four weeks, and that Nelson was taking care of K.M.B. on a daily basis while living with

M.S.B., as well as testimony from M.S.B. that she witnessed Nelson “whooping [K.M.B.] with a belt.” The state also introduced evidence that M.S.B. had pleaded guilty to child neglect for her role in the abuse of K.M.B. In its closing argument, the state argued that Nelson should be found guilty if the jury believed that he had personally assaulted K.M.B. and also should be found guilty if the jury believed that M.S.B. had assaulted K.M.B. but Nelson had aided and abetted her by failing to intervene over the course of the abuse. The jury found Nelson guilty of third-degree assault, neglect of a child, aiding and abetting third-degree assault, and aiding and abetting neglect of a child. Nelson was acquitted of first-degree assault and of aiding and abetting first-degree assault.

Nelson appeals.

D E C I S I O N

I. Nelson’s right to a speedy trial was not violated.

Nelson first argues that the district court erred in ruling that the state had not violated his right to a speedy trial.

“Whether a defendant has been denied a speedy trial is a constitutional question subject to de novo review.” *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017). To determine whether the right to a speedy trial has been denied, Minnesota courts use a four-factor balancing test. *See id.* (citing *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S. Ct. 2182, 2192-93 (1972)). These factors are: “(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his or her right to a speedy trial; and (4) whether the delay prejudiced the defendant.” *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). No single factor is “a necessary or sufficient condition to the finding of a deprivation of the

right to a speedy trial.” *Id.* (quotation omitted). Rather, all of the factors must be considered. *Id.*

A. Length of delay

The first factor is the length of the delay. The length of delay functions as both a factor and a triggering mechanism—there must be some “presumptively prejudicial” delay before consideration of the remaining factors is necessary. *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192. The right to a speedy trial attaches either when a defendant is formally charged or when a defendant is arrested. *Osorio*, 891 N.W.2d at 627. Delay is usually calculated from the point of attachment; a six-month delay is presumptively prejudicial. *Id.* at 628. However, if a defendant demands a speedy trial pursuant to Minn. R. Crim. P. 11.09, a delay of more than 60 days from that demand is presumed prejudicial. *Windish*, 590 N.W.2d at 315-16.

Nelson made a speedy-trial demand on May 4, but he withdrew that demand in June. Nelson re-asserted his right to a speedy trial on September 26, 76 days before his trial began on December 11. There is no dispute that Nelson was not brought to trial within 60 days of his speedy-trial demand and that there was a “presumptively prejudicial” delay, requiring consideration of the remaining factors. *See id.* But the delay was also only 16 days longer than what is permitted by statute, so this factor barely weighs in Nelson’s favor.

B. Reasons for delay

The second factor is the reason for delay; its purpose is to determine who caused the delay and to weigh the responsible party’s culpability in bringing about the delay. *See Osorio*, 891 N.W.2d at 628-29. Thus, if a delay is due to a defendant’s actions, “there is no

speedy trial violation.” *Id.* (quoting *State v. Taylor*, 869 N.W.2d 1, 20 (Minn. 2015)). But when the delay is due to the government, the reason for the delay becomes more important. The Supreme Court in *Barker* described three tiers of culpability: deliberate delay intended to impede the defense is “weighted heavily against the government”; “negligence or overcrowded courts” weigh against the government, but not as strongly; and a good reason, “such as a missing witness,” will justify a commensurate delay. 407 U.S. at 531, 92 S. Ct. at 2192.

Nelson contends that the delay should be measured from one of three dates—January 23, the date of his arrest; May 4, the date of his first speedy-trial demand; or September 26, the date of his final speedy-trial demand.

If the delay is counted from either of the first two dates, blame for the majority of the delay falls on Nelson. Eleven months passed between Nelson’s arrest and his trial. Much of this delay was at Nelson’s request. His omnibus hearing was scheduled to take place on February 23, only a month after his arrest, but was continued at his request so that he could consider a plea offer; it was continued again so that his new attorney could review the evidence. Thus, the five-month delay between Nelson’s arrest and his speedy-trial demand on May 4 is of his own doing, and that delay does not support a speedy-trial violation. *See Osorio*, 891 N.W.2d at 628-29.

The delay between May 4 and September 26 is also Nelson’s responsibility. Nelson argues that, if the state had not amended the complaint, he would have gone to trial in June, as originally scheduled. According to Nelson’s argument, his decision to waive his speedy-trial demand was caused by the state’s amendment of the complaint, so the state is

responsible for any delay arising from his waiver. That argument fails. Nelson does not explain why the state's amendment of the complaint—a legal and fairly common decision, even if it changes the offenses charged, *see State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990) (“[T]he [district] court is relatively free to permit amendments to charge additional offenses before trial is commenced . . .”), and particularly when the amendment only adds an aiding-and-abetting theory, which is not a separate substantive offense, *State v. DeVerney*, 592 N.W.2d 837, 846 (Minn. 1999)—forced him to waive his speedy-trial demand. And he cites no caselaw supporting his position that the decision to amend shifts responsibility for his decision to delay onto the state. Finally, Nelson did, after the state's second amendment of the complaint, challenge probable cause for all of the counts against him, including the two that had been charged when he demanded a speedy trial. Thus, he appears to have gotten the benefit of waiving his speedy-trial demand in order to challenge probable cause. We see no reason to hold that a defendant, having demanded a speedy trial, is entitled to delay his trial in order to challenge probable cause and then have the charges dismissed because of a speedy-trial violation if that challenge fails. Because the delay between May 4 and September 26 was due to Nelson's own decision, it does not support a speedy-trial violation.

The final delay is from Nelson's last speedy-trial demand, on September 26, until his trial began on December 11. Nelson's trial was originally scheduled for late October. But on the morning of trial, not enough jurors were available to provide an adequate venire

from which to select the jury. Nelson’s trial was therefore continued until December 11.¹ Nelson notes that court congestion is not good cause for delay “unless exceptional circumstances exist.” *State v. Griffin*, 760 N.W.2d 336, 340 (Minn. App. 2009). Summoning too few jurors may be somewhat closer to “exceptional” than is ordinary court congestion. But even if it is merely a result of congestion, nothing suggests that the lack of jurors resulted from anything other than inadvertency or negligence. Thus, the delay was not intentional and weighs only lightly against the state. *State v. Friberg*, 435 N.W.2d 509, 514 (Minn. 1989) (“[T]he delay was caused by calendar congestion . . . [;] a scheduling delay over which the prosecutor had no control should not weigh heavily against the state . . .”).

C. Assertion of the right

The third factor is whether and when the defendant asserted his right to a speedy trial. While a defendant is not required to “bring himself to trial,” *Osorio*, 891 N.W.2d at 629 (quoting *Barker*, 407 U.S. at 527, 92 S. Ct. at 2190), he does have some responsibility to assert the right; the promptness and vigor with which a defendant demands a speedy trial carries “strong evidentiary weight” when courts evaluate this factor, *Barker*, 407 U.S. at 531-32, 92 S. Ct. at 2192-93. We consider “[t]he circumstances surrounding the frequency

¹ When explaining this decision, the district court also stated that the delay would ensure that defense counsel “has the opportunity to fully explore the medical records of the witness and see whether that is helpful in the defense of your case.” Nelson strongly objects to that reason, noting that his counsel had not asked for more time to look at medical records. But the fact that the district court provided a bad reason for delay along with a more neutral one does not make the better reason invalid.

and intensity of a defendant's assertion of a speedy trial demand—including the import of defense decisions to seek delays.” *Windish*, 590 N.W.2d at 318.

Nelson argues that he strongly asserted his right to a speedy trial, starting on May 4, and again on July 10, September 26, October 10, October 25, and December 11. But simply listing the dates of his demands does not adequately illustrate the circumstances surrounding those demands. Nelson did not demand a speedy trial until May 4, over four months after his January arrest. And, after asserting his right to a speedy trial in May, he then waived it. When Nelson expressed an intent to demand a speedy trial in July, the assertion was contingent on the outcome of his motion to dismiss, so he truly reasserted his demand only after his probable-cause challenge was denied in September. The fact that he then asserted his demand several times during the next 60 days does not change the fact that he did not consistently seek a speedy trial and caused delays much longer than the 16 days that he now asserts violated his right to a speedy trial. This factor weighs against Nelson.

D. Prejudice

The final factor in the *Barker* test is prejudice, which must be analyzed in light of three interests: first, preventing “oppressive pretrial incarceration,” second, minimizing “anxiety and concern of the accused,” and third, preventing the defense from being impaired. 407 U.S. at 532, 92 S. Ct. at 2193. The third interest is the most important of the three. *Id.*; *Osorio*, 891 N.W.2d at 631.

Nelson argues that all three interests were prejudiced by the delay in trying his case.

1. Oppressive pretrial incarceration

Nelson first asserts he suffered “oppressive pretrial incarceration” because he was jailed for ten months. The only fact Nelson relies on to assert that his pretrial incarceration was oppressive is its length. He cites no caselaw supporting the claim that ten months’ pretrial incarceration is oppressive. But, while no reported Minnesota case provides a definition of “oppressive” in this context, if delay is due to a defendant’s own decisions, that fact weighs against concluding that incarceration was oppressive. *State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993). Nelson is primarily responsible for the length of the pretrial proceedings, and he identifies no fact other than length to argue that his incarceration was oppressive. While we acknowledge that the length of the pretrial incarceration was unfortunate, it was not oppressive here.

2. Anxiety and concern

Nelson next argues that he suffered the sort of anxiety and concern that the right to a speedy trial is intended to protect against. When analyzing whether delay causes prejudice to a defendant’s interest in avoiding undue anxiety and concern, the question is whether a defendant suffers anxiety that “is greater than the anxiety of any other defendant.” *State v. Hahn*, 799 N.W.2d 25, 33 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). Nelson argues that he was prejudicially anxious, pointing to his statement to the district court on May 4, when he first made his speedy-trial demand: “I’m just really curious why I’m in custody. There’s no evidence against me. I’ve been sitting over 100 days with no evidence, nothing at all. I’m innocent. This is driving me crazy. That’s all. . . . I just need to get it off my back. . . . It is very frustrating.” But the anxiety caused by a

belief in one's innocence and a belief that the charges are not supported by evidence is likely no greater than that suffered by any other defendant who chooses to go to trial. And the fact that Nelson had been in jail for some time was, at that point, entirely due to his own requests for continuances. Nelson has not demonstrated that he suffered the sort of anxiety or concern that the right to a speedy trial is intended to protect against.

3. Prejudice to the defense

The final, and most significant, factor is whether the delay impaired the defense. “[C]onsideration of prejudice is not limited to the specifically demonstrable, and . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim.” *Doggett v. United States*, 505 U.S. 647, 655, 112 S. Ct. 2686, 2692 (1992). A presumption of prejudice, which does not require any specific showing of harm to a defense, may result from “excessive delay.” *State v. Strobel*, 921 N.W.2d 563, 571 (Minn. App. 2018) (quoting *Doggett*, 505 U.S. at 655, 112 S. Ct. at 2693), *review granted* (Minn. Jan. 29, 2019).

Nelson's sole argument that his defense has been prejudiced is his contention that the delay was excessive such that prejudice to his defense should be presumed. But while exceeding the 60-day period may be described as “presumptively prejudicial” for the purposes of triggering analysis of the remaining factors, a delay must be longer—“excessive”—before we presume that the delay impaired the defense. *Id.* (“Presumptive prejudice [to a defense] . . . results *only* from ‘excessive delay.’” (emphasis added)). A delay of just 16 days beyond the 60-day presumptive period is not “excessive.” *See State v. Jefferson*, No. A18-0122, 2019 WL 908269, at *4-5 (Minn. App. Feb. 25, 2019) (holding that a delay of 59 days beyond the 60-day period was not excessive), *review denied* (Minn.

May 14, 2019); *State v. Davis*, No. A13-0267, 2014 WL 502849, at *2 (Minn. App. Feb. 10, 2014) (holding that a delay of 22 days beyond the 60-day period was not excessive).²

Nelson has neither asserted that he suffered an identifiable prejudice to his defense nor has he shown that we should presume his defense was prejudiced merely because of the delay.

Thus, while the first and second factors weigh lightly in Nelson’s favor, the third and fourth weigh against him. Nelson’s right to a speedy trial was not violated.

II. The evidence was sufficient to prove third-degree assault.

Nelson next argues that there was insufficient evidence to prove that he committed third-degree assault or that he aided and abetted third-degree assault. When reviewing a challenge to the sufficiency of the evidence, appellate courts view the evidence “in the light most favorable to the conviction” and give deference to the jury’s opportunity to weigh the credibility of the evidence. *State v. Robinson*, 921 N.W.2d 755, 761 (Minn. 2019). If, “giving due regard to the presumption of innocence and the state’s burden of proof beyond a reasonable doubt, [the jury] could reasonably have found the defendant guilty,” a reviewing court will affirm. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (alteration in original) (quoting *State v. Pierson*, 530 N.W.2d 784, 787 (Minn. 1995)).

² We acknowledge that these cases are not precedential. Minn. Stat. § 480A.08, subd. 3(c). While we are not bound by them, we nonetheless find them persuasive in this case, as illustrative of the principle that delay beyond 60 days is not necessarily “excessive.” See *Donnelly Bros. Constr. Co. v. State Auto Prop. & Cas. Ins. Co.*, 759 N.W.2d 651, 659 (Minn. App. 2009) (“[U]npublished opinions may be persuasive.”), *review denied* (Minn. Apr. 21, 2009).

Direct and circumstantial evidence are different means of proving the elements of a crime and are subject to different standards of review. *State v. Harris*, 895 N.W.2d 592, 598, 600-01 (Minn. 2017) (reaffirming the circumstantial-evidence standard). Direct evidence is “[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* at 599 (alteration in original) (quoting *State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007)). When reviewing the sufficiency of direct evidence to support a conviction, we “assume that the factfinder believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Brazil*, 906 N.W.2d 274, 279 (Minn. App. 2017) (quotation omitted), *review denied* (Minn. Mar. 20, 2018). Then, viewing that evidence in the light most favorable to the verdict, appellate courts ask whether the evidence “was sufficient to permit the jurors to reach the verdict which they did.” *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted). Under this standard, if the state introduces direct evidence of an element of the offense, we assume that the jury credited that evidence and therefore treat the element as proved.

In contrast to direct evidence, circumstantial evidence always requires an inference to prove the relevant fact. *Harris*, 895 N.W.2d at 599. When reviewing the sufficiency of circumstantial evidence, appellate courts first “identify the circumstances proved.” *Id.* at 601 (quotation omitted). The circumstances proved are “those circumstances that are consistent with the verdict.” *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). Then, a reviewing court considers whether, viewed as a whole, the circumstances proved allow for a reasonable inference of guilt and are “inconsistent with any rational hypothesis except that of guilt.” *Harris*, 895 N.W.2d at 601.

Aiding and abetting a crime is not a separate substantive offense from the crime itself. See *DeVerney*, 592 N.W.2d at 846. Because the two charges are no more than separate theories for how Nelson committed a single crime, if the evidence is sufficient to support either theory, his conviction for third-degree assault will be affirmed. But because the evidence supports the jury’s verdict on the state’s theory of principal liability—the theory on which the district court actually convicted Nelson—we need not consider whether there was sufficient evidence to support the jury’s verdict on the aiding-and-abetting count. See *State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (holding that, when the evidence supports the theory on which a defendant was convicted, alternative theories of guilt need not be addressed).

Nelson argues that the state failed to prove that he committed third-degree assault because the only direct evidence that he personally injured K.M.B. was the uncorroborated testimony of an accomplice—namely, M.S.B.

Minnesota law prohibits convictions on the uncorroborated testimony of an accomplice. Minn. Stat. § 634.04 (2018) (“A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated . . .”). There are two main requirements for the corroboration under the statute. First, the corroborating evidence must “tend[] to convict the defendant of the commission of the offense.” *Id.* Second, the corroboration must do more than show that the offense was committed or the circumstances under which the offense was committed. *Id.* Corroborating evidence “must link or connect the defendant to the crime” and “must point to the defendant’s guilt in some substantial degree.” *State v. Scruggs*, 421 N.W.2d 707, 713 (Minn. 1988) (quotation omitted). But the corroborating

evidence need not “establish a prima facie case of the defendant’s guilt.” *Id.* (quotation omitted). All it is required to do is to “restore confidence in the accomplice’s testimony” in a way that suggests the defendant’s guilt. *State v. Hooper*, 620 N.W.2d 31, 39 (Minn. 2000). Thus, corroborating evidence may take the form of “evidence of the accused’s relationship with the accomplice,” evidence of “opportunity and motive,” and evidence of a defendant’s “proximity to the place where the crime was committed.” *State v. Nelson*, 632 N.W.2d 193, 202 (Minn. 2001) (quotation omitted).

Nelson argues that the state failed to prove beyond a reasonable doubt that he, personally, assaulted K.M.B., as it was required to do in order to prove guilt under its theory of direct liability. *See* Minn. Stat. § 609.223, subd. 3 (2014) (creating criminal penalties for a person who assaults a victim under the age of four, causing a certain degree of harm). M.S.B. testified that she saw Nelson hitting K.M.B. with a belt, providing direct evidence that Nelson personally assaulted K.M.B. But M.S.B. was an accomplice to Nelson’s crime. She had previously pleaded guilty to child neglect based on her complicity in the assaults on K.M.B. Thus, for M.S.B.’s testimony to be a basis on which the jury could convict Nelson of third-degree assault under a direct-liability theory, the state was required to corroborate M.S.B.’s testimony. *See* Minn. Stat. § 634.04.

Nelson argues that the state failed to corroborate M.S.B.’s testimony that she had seen him hit K.M.B. because the circumstantial evidence did not rule out the inference that M.S.B. was the one who actually committed the assault and that he was not involved. In doing so, Nelson wrongly combines two distinct concepts. Corroboration makes M.S.B.’s direct evidence of Nelson’s guilt competent. *See* Minn. Stat. § 634.04. Circumstantial

evidence would be a separate basis for finding guilt, even in the absence of direct evidence. If the circumstantial evidence that Nelson personally assaulted K.M.B. is sufficient to rule out any rational hypothesis other than guilt, that evidence would be sufficient to sustain a guilty verdict. *Al-Naseer*, 788 N.W.2d at 473. In that case, the direct evidence of Nelson’s guilt—M.S.B.’s testimony—would be unnecessary to support the verdict. But corroborative evidence need not make a prima facie case of the defendant’s guilt, much less provide an independent basis for conviction; rather, it need only “point[] to the defendant’s guilt in some substantial way.” *Hooper*, 620 N.W.2d at 39 (quotation omitted); *Scruggs*, 421 N.W.2d at 713. We reject Nelson’s attempt to raise the bar for accomplice corroboration by applying the circumstantial-evidence standard for reviewing the sufficiency of evidence to support a conviction.

Applying the proper standard, adequate evidence corroborates M.S.B.’s testimony. Nelson admits that he stayed at M.S.B.’s residence and watched K.M.B., often alone, during the time that K.M.B. was injured; and that, after the injuries were reported, he fled, suggesting consciousness of guilt. *See State v. McDaniel*, 777 N.W.2d 739, 747 (Minn. 2010) (holding that flight suggests consciousness of guilt and that evidence of other motivations for flight goes to the weight, not the admissibility, of the evidence of the flight). These facts implicitly link Nelson to the crime and point to his guilt. They provide evidence of Nelson’s relationship with M.S.B., show that he had “opportunity and motive,” and establish his “proximity to the place where the crime was committed.” *See Nelson*, 632 N.W.2d at 202 (quotation omitted). And M.S.B. testified to those same facts. Because those

facts are suggestive of guilt and align with M.S.B.'s trial testimony, they are sufficiently corroborative of M.S.B.'s testimony. *See Scruggs*, 421 N.W.2d at 713.

Because M.S.B.'s testimony that she saw Nelson assaulting K.M.B. was adequately corroborated, there was direct evidence of Nelson's guilt. Because that direct evidence was sufficient for the jury to find that Nelson committed third-degree assault, we need not consider whether any circumstantial evidence would also have been sufficient. *See State v. Salyers*, 858 N.W.2d 156, 161 (Minn. 2015) (holding that the circumstantial-evidence standard of review need not be applied when direct evidence establishes the challenged element).

III. The prosecutor's purported misstatement of the law during closing arguments does not require reversal.

Finally, Nelson argues that this court must reverse his conviction for third-degree assault because the prosecutor committed misconduct by telling the jury that it could find him guilty of the aiding-and-abetting crimes based on his failure to stop M.S.B. from assaulting K.M.B.

A. Standard of review

As an initial matter, the parties disagree about what standard of review applies. Nelson, citing *State v. Nissalke*, 801 N.W.2d 82, 105-06 (Minn. 2011), argues that this court should apply the *Caron* standard of harmless-error review, because defense counsel objected to the prosecutor's arguments. *See State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974) (creating a harmless-error standard of review for objected-to prosecutorial misconduct in which one level of scrutiny is applied to less serious misconduct and another

level is applied to more serious misconduct). But the state argues that defense counsel did not object *during* the closing argument; the objection was raised only after the state had finished both its main closing argument and its rebuttal argument, as a basis for requesting surrebuttal. The state therefore argues that the plain-error standard applies.

The state relies most heavily on *State v. Ramey*, 721 N.W.2d 294, 298-99 (Minn. 2006), for the proposition that a timely objection is required to preserve an assertion of error. But *Ramey* does not expressly define “timely,” and its facts are dissimilar because “*Ramey* did not object at trial.” *Ramey*, 721 N.W.2d at 297. The state does not cite any other case showing that an objection made at the end of a closing argument is untimely or does not occur “at trial.” Further, *Ramey*’s explanation of why a timely objection is required indicates that this objection was sufficiently timely. According to *Ramey*, the threat of plain-error review being applied to assertions of error that were not timely objected to “encourages defendants to object at trial.” *Id.* at 298. Objections at trial are valuable because lack of “a contemporaneous objection” deprives the district court of “the opportunity to rule on the misconduct or make a determination as to whether a corrective instruction is required or appropriate.” *Id.* at 298-99. Here, Nelson’s objection was made at trial and gave the district court the opportunity to rule on whether the prosecutor’s comments were appropriate. Because the objection was made before final instructions, the district court could have given a corrective instruction if it decided that one was warranted. The district court could have “cure[d] the effect of alleged prosecutorial misconduct,” had it believed there was any. *See id.* at 299 (quoting *Rairdon v. State*, 557 N.W.2d 318, 323 n.5 (Minn. 1996)). Nelson’s objection was timely, and harmless-error review applies.

The exact form of that harmless-error review is an unsettled question. *Ramey* casts doubt on the continued applicability of *Caron*'s two-tiered standard to harmless-error review. *Id.* at 299 n.4 (“We leave for another day the question of whether the *Caron* two-tiered approach should continue to apply to cases involving objected-to prosecutorial misconduct.”). And recent cases have not needed to answer the question because any misconduct was harmless beyond a reasonable doubt, thus satisfying either standard of harmlessness. *State v. Whitson*, 876 N.W.2d 297, 304 & n.2 (Minn. 2016); *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). We also need not resolve the question here. Regardless of the seriousness of the alleged misconduct, the first question is whether the prosecutor engaged in misconduct at all. *See State v. Powers*, 654 N.W.2d 667, 678-79 (Minn. 2003) (ending analysis of one claim of misconduct upon determining that the statement did not amount to misconduct). Because he did not, we need not determine exactly what standard of review would apply to objected-to misconduct.

B. Propriety of the argument

Nelson argues that the prosecutor committed misconduct by misstating the law on accomplice liability by arguing that Nelson is guilty of aiding and abetting assault if he knew of the ongoing abuse and did nothing to stop it. Nelson argues that a person cannot be guilty of aiding and abetting by “mere presence” and that his living in the residence and looking after K.M.B. on a daily basis constitutes just such mere presence. But, under *Morrison*, a jury can reasonably infer the requisite mens rea to aid and abet from the fact that a person with a duty to care for a child ignored a pattern of abuse. *Morrison*, 437 N.W.2d at 426-27. The state’s closing argument accurately summarized that rule.

Continuing to look after a child who is being abused without taking any preventative action allows the inference that one knows of the abuse and is intending to further it. The prosecutor's closing argument asked the jury to infer the requisite mens rea from the ongoing nature of the abuse and the facts surrounding Nelson's status as a caretaker. Thus, the prosecutor's closing argument accurately described the law and was not misconduct.

Affirmed.