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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0654**

Sonny Syhavong, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 6, 2020
Affirmed in part, reversed in part, and remanded
Worke, Judge**

Nobles County District Court
File No. 53-CR-14-676

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Joseph M. Sanow, Nobles County Attorney, Worthington, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and
Jesson, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that:
(1) his convictions are not supported by sufficient evidence; and (2) the district court erred

by entering a conviction for third-degree assault because it is a lesser-included offense of second-degree assault. Because sufficient evidence supports appellant's convictions but because the district court erred by entering a conviction for third-degree assault, we affirm in part, reverse in part, and remand for correction of the warrant of commitment.

FACTS

Appellant Sonny Syhavong was charged with aiding and abetting several criminal offenses for an incident that occurred in July 2014. The following facts were elicited in trial testimony.

At about 11:30 p.m., on July 3, 2014, A.R. was walking home from his friend's apartment when he noticed three people walking towards him. According to A.R.—who was 18 at the time—he recognized the three males as Syhavong, T.P., and J.K. Syhavong was 24 at the time, and T.P. and J.K. were both 13.

As the group approached A.R., Syhavong said something like “Hey, what’s up, n-gger?” or “What’s you up to n-gger?” The group surrounded A.R., and Syhavong “chest-bumped” him and said something like “[w]hat n-gger?” Then, A.R. turned around to find J.K. pointing a black “gun” at him. A.R. testified that he looked for an orange tip on the barrel to see if it was a BB gun, but he did not see one. J.K. was holding the gun with both hands and had it pointed towards A.R.’s face. Feeling panicked and nervous, A.R. grabbed the gun, pulled it down, and told J.K. to “[g]et that sh-t away from me.” After pulling the gun down, A.R. testified he pulled his cell phone out of his pocket and looked at it. After that, “[e]verything [went] black.”

A few hours later, A.R. woke up in his own bed nauseated and vomiting. He had a headache, and his face was swollen and covered in cuts and bruises. A.R. also realized that his cell phone was missing. Based on his injuries, A.R.'s mother took him to the hospital, where he was diagnosed with an intracerebral hemorrhage from a forceful, blunt injury to the head. At the hospital, A.R. spoke with police, but could not remember who attacked him, only that he was attacked from behind. He was released from the hospital that same day.

The day after the assault, A.R.'s brother used the Find My iPhone app to locate A.R.'s missing cell phone. The app led A.R.'s brother and sister to J.K.'s house. When they arrived, T.P. was at the house with A.R.'s cell phone. T.P. gave it to A.R.'s brother, and A.R.'s sister called the police. When they arrived, A.R.'s brother gave them the cell phone.

A few days later, A.R. returned to the hospital a second time and was transferred to another hospital where he was diagnosed with a concussion. A.R. later gave a second statement to police, in which he was able to recall more details about the attack, including that he believed Syhavong, T.P., and J.K. attacked him. Based on his role in the attack, the state charged Syhavong with aiding and abetting *each* of the following crimes: first-degree aggravated robbery, second-degree aggravated robbery, simple robbery, second-degree assault with a dangerous weapon, and third-degree assault-substantial bodily harm.¹

¹ The state initially charged Syhavong with two other crimes, but they were dismissed before trial.

At trial, the state presented testimony from A.R., who explained the alleged assault for the jury. During his testimony, A.R. further explained his beliefs regarding the gun. When asked if he believed the gun was real, A.R. responded, “At the time, no. I was still under the impression that it was just a BB gun.” And A.R. clarified that he did not feel threatened because he thought it was a “toy gun,” which is why he had the confidence to grab the gun and pull it down.²

The state also presented testimony from other individuals involved with the attack and its aftermath. First, a police officer described T.P.’s and J.K.’s physical appearance. According to the officer, T.P. is between 4 feet 10 inches and 5 feet tall, weighing about 100 pounds with a fairly thin, normal build. The officer described J.K. as a small male, weighing roughly 57 pounds and being about 4 feet 5 inches tall. Second, the emergency-room doctor testified that A.R.’s injury of an intracerebral hemorrhage required “a tremendous amount of force.” Finally, T.P. testified that he was present when A.R. was attacked, but that Syhavong was not. According to T.P., the only other person present during the attack was J.K., who struck A.R. with his fists. T.P. also testified that J.K. gave him A.R.’s cell phone and that after the attack, they both ran back to J.K.’s house.

At the end of the state’s case, Syhavong moved for a judgment of acquittal or a directed verdict on the charge of aiding and abetting second-degree assault with a dangerous weapon, arguing that the state failed to prove that J.K. used a dangerous weapon. After acknowledging that it was a “very close call,” the district court denied Syhavong’s

² The state did not present the actual object used during the alleged attack.

motion. Syhavong did not present any witnesses, and the case was submitted to the jury, who found Syhavong guilty of all five charges. Subsequently, the district court sentenced Syhavong to 98 months in prison for aiding and abetting first-degree aggravated robbery.

Almost two years later, Syhavong filed a postconviction petition for relief alleging that the state failed to prove that he intentionally aided and abetted the charged crimes. Alternatively, Syhavong argued that the state failed to prove that J.K. used a dangerous weapon, and asked the district court to vacate several convictions because they were lesser-included offenses of other crimes. The postconviction court concluded that sufficient evidence supported Syhavong's convictions, but vacated his convictions for aiding and abetting both second-degree aggravated robbery and simple robbery as lesser-included offenses. Syhavong appeals.

D E C I S I O N

We review the denial of a petition for postconviction relief for an abuse of discretion. *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018). And “unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings,” we will not reverse the denial of a postconviction petition. *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010). Syhavong argues that the postconviction court abused its discretion by denying his petition because (1) insufficient evidence supports his convictions, and (2) third-degree assault is a lesser-included offense of second-degree assault.

Sufficiency of the evidence

Syhavong raises two arguments related to the sufficiency of the evidence supporting his convictions. First, Syhavong contends that the state failed to prove that he intentionally aided and abetted any of the charged crimes. Second, Syhavong maintains that the state did not prove beyond a reasonable doubt that J.K. used a dangerous weapon, a required element of second-degree assault with a dangerous weapon.

In evaluating the sufficiency of the evidence, we “carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). In doing so, this court views the evidence “in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict.” *Id.*

Intent

Syhavong argues that the evidence does not demonstrate that he intentionally aided and abetted the charged crimes. Under the accomplice-liability statute, “[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05, subd. 1 (2012). The phrase “intentionally aids” requires two components: “(1) that the defendant knew that his alleged accomplices were going to commit a crime, and (2) that the defendant intended his presence or actions to further the

commission of that crime.” *State v. Bahtuoh*, 840 N.W.2d 804, 810 (Minn. 2013) (quotations omitted).

In general, the state proves a criminal defendant’s mental state through circumstantial evidence. *State v. Schneider*, 402 N.W.2d 779, 782 (Minn. 1987). When reviewing the sufficiency of circumstantial evidence, we use a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). In the first step, we identify the circumstances proved by the state. *Bahtuoh*, 840 N.W.2d at 810. At this stage, we defer to “the jury’s acceptance of the [s]tate’s evidence and its rejection of any evidence in the record that is inconsistent with the circumstances proved by the [s]tate.” *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). Then, the second step “is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Silvernail*, 831 N.W.2d at 599 (quotations omitted). In doing so, “[w]e examine independently the reasonableness of all inferences that might be drawn from the circumstances proved; including the inferences consistent with a hypothesis other than guilt.” *Id.* (quotation omitted). “If a reasonable inference other than guilt exists, then [appellate courts] will reverse the conviction.” *Loving*, 891 N.W.2d at 643.

Turning to the first step in our analysis—identifying the circumstances proved—the state and Syhavong agree that the state proved the following circumstances: A.R. encountered Syhavong, T.P., and J.K.—all of whom he knew—as he was walking down the street; Syhavong said something to A.R. like “Hey, what’s up, n-gger?” or “What’s you up to, n-gger?”; Syhavong chest-bumped A.R.; A.R. turned around and saw J.K. pointing

a black gun at him; A.R. told J.K. to “[g]et that sh-t away from me” and pulled down the gun; A.R. looked at his cell phone and then blacked out; A.R. woke up in his bed nauseated and beaten up; A.R.’s cell phone was missing; and the cell phone was recovered from T.P.³

Having established the circumstances proved by the state, our analysis next turns to “whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Silvernail*, 831 N.W.2d at 599 (quotation omitted). Here, the circumstances proved by the state support the jury’s conclusion that Syhavong intentionally aided and abetted the charged crimes. The state established that Syhavong approached A.R. while he was walking home, spoke to him using expletives, and physically engaged A.R. by chest-bumping him. This conduct, which occurred immediately before A.R. turned around to find a gun pointed at him, indicates that Syhavong acted intentionally in aiding and abetting the attack. *See State v. Cox*, 820 N.W.2d 540, 549 (Minn. 2012) (“When determining whether a person played a knowing role in the commission of the crime, we may infer criminal intent from the person’s presence, companionship, and conduct both before and after the crime.”).

Further, nothing in the circumstances proved indicates that Syhavong tried to stop the other two males from attacking A.R. or that Syhavong expressed any surprise or

³ Additionally, the state (correctly) notes a few additional circumstances proved at trial: A.R. suffered an intracerebral hemorrhage, as well as a concussion; it requires a tremendous amount of force to cause an intracerebral hemorrhage; both T.P. and J.K. were 13 at the time of the attack; T.P. was between 4 feet 10 inches and 5 feet tall at the time of the attack and weighed around 100 pounds; and J.K. was roughly 4 feet 5 inches and weighed 57 pounds.

objection to the attack. *See Bahtuoh*, 840 N.W.2d at 810 (identifying “a lack of objection or surprise under the circumstances” as a factor that may support a jury’s inference of the requisite state of mind); *see also State v. Parker*, 164 N.W.2d 633, 641 (Minn. 1969) (stating that if evidence “shows that a person is present at the commission of a crime without disapproving or opposing it,” a jury may consider this factor, with other circumstances, to conclude that a defendant aided and abetted a crime). Considering the circumstances proved by the state, Syhavong’s conduct is inconsistent with any *rational* hypothesis other than guilt.

Still, Syhavong argues that the circumstances proved by the state do not exclude the reasonable hypothesis that he was merely present when the attack occurred and had no knowledge that the other two males planned to commit a crime. Although mere presence alone does not prove intent to aid and abet a crime, “a person may aid or abet without actively participating in the overt act.” *Parker*, 164 N.W.2d at 641. And the circumstances proved show *more* than Syhavong’s mere presence: he and the other males surrounded A.R., Syhavong addressed him using expletives, and he chest-bumped the victim immediately before Syhavong’s companion pointed a gun at A.R. Despite Syhavong’s assertion that the circumstances proved support a rational hypothesis that the other two males—both aged 13 with small builds—made a sudden decision to assault and rob A.R., while Syhavong was merely present, the circumstances proved do not support such a conclusion. *See State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (noting that the state is not required to remove *all* doubt, but only all reasonable doubt). Accordingly, we

affirm the postconviction court's conclusion that the state proved that Syhavong intentionally aided and abetted the charged crimes.

Dangerous weapon⁴

Syhavong also argues that insufficient evidence supports his conviction for aiding and abetting second-degree assault with a dangerous weapon because the state failed to prove beyond a reasonable doubt that J.K. used a dangerous weapon. The only evidence regarding the use of a dangerous weapon presented at trial was A.R.'s testimony. "Testimony provided by a witness, concerning what the witness saw or heard, is considered direct evidence."⁵ *State v. Brazil*, 906 N.W.2d 274, 278 (Minn. App. 2017), *review denied* (Minn. Mar. 20, 2018). And when an element of an offense is supported by direct evidence, as is the case here, our review is limited "to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). In doing so, we assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

⁴ Although Syhavong clearly raised this issue in his postconviction petition, the postconviction court did not explicitly address this argument. See *Scruggs v. State*, 484 N.W.2d 21, 24-25 (Minn. 1992) (permitting this court to review a postconviction decision in the absence of legal conclusions if the record is clear).

⁵ As this court has stated, "even with eyewitness testimony, the factfinder must make some inferences in considering the testimony, such as whether the witness's memory is accurate, whether the witness accurately perceived the subject of the testimony, and even whether the witness is telling the truth. That some inference is required for the factfinder to interpret the evidence does not render otherwise direct evidence circumstantial." *Brazil*, 906 N.W.2d at 279.

We now turn our focus to A.R.'s testimony about the gun at trial. When describing the attack, A.R. testified J.K. had a black gun and that he looked for an orange tip on the gun to see if it was a BB gun, but he did not see one. Nevertheless, A.R. did not think the gun was real. During his testimony, when asked if he believed the gun was real, A.R. further explained, "At the time, no. I was still under the impression that it was just a BB gun." And A.R. clarified that he did not feel threatened because he just thought it was a "toy gun," which is why he had the confidence to grab the gun and pull it down.

Although Syhavong contends that this testimony only establishes that J.K. had a toy gun, A.R. did testify that, during at least one point of the attack, he believed the gun was a BB gun. Viewing the evidence in the light most favorable to the verdict, A.R.'s testimony provided the jury with a sufficient basis to conclude that J.K. had a BB gun. *Horst*, 880 N.W.2d at 40.

Having concluded that sufficient evidence supports a conclusion that J.K. had a BB gun, we must now determine whether a BB gun falls within the statutory definition of a dangerous weapon.⁶ Resolution of this issue requires us to engage in statutory interpretation, a question of law which we consider de novo. *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017).

⁶ Syhavong does not argue that a BB gun cannot be classified as a dangerous weapon under the statute. Instead, he contends that a toy gun does not meet the definition of a dangerous weapon. But because we conclude that the record contains sufficient evidence for the jury to have concluded that J.K. used a BB gun, we focus our analysis on that object.

To obtain a conviction of second-degree assault, under Minnesota Statutes section 609.222, subdivision 1 (2012), the state must prove that a dangerous weapon was used during the assault. “Dangerous weapon” is defined as

any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid or *other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm*

Minn. Stat. § 609.02, subd. 6 (2012) (emphasis added). Under the third prong of this definition, an object may be a dangerous weapon if it is “calculated or likely to produce death or great bodily harm” in the manner in which it is used. *Id.* And “great bodily harm” is defined as “bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.” Minn. Stat. § 609.02, subd. 8 (2012). Accordingly, “[w]hen determining whether an object, even an inherently dangerous object, is a dangerous weapon, the court must examine not only the nature of the object itself, but also the manner in which it was used.” *State v. Basting*, 572 N.W.2d 281, 285 (Minn. 1997).

Here, J.K. pointed the BB gun at A.R. at close range while he was surrounded by a group of males. This demonstrates an intent to use the BB gun to frighten A.R. and to potentially harm him. *See State v. Patton*, 414 N.W.2d 572, 574 (Minn. App. 1987) (stating that the defendant “brandished [a] knife *in such a manner* that the jury could have found it was used as a dangerous weapon”) (emphasis added). And had J.K. fired the BB gun at

such a close range, it is evident that “great bodily harm” could have resulted, perhaps in the form of the loss of an eye or tooth.⁷ See *State v. Bridgeforth*, 357 N.W.2d 393, 394 (Minn. App. 1984) (loss of tooth), *review denied* (Minn. Feb. 6, 1985); see also *State v. Hysell*, 449 N.W.2d 741, 744 (Minn. App. 1990) (loss of eye), *review denied* (Minn. Mar. 15, 1990). Accordingly, we conclude that a BB gun falls within the statutory provision defining a dangerous weapon as a “device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.” Minn. Stat. § 609.02, subd. 6. And because the state proved that J.K. used a BB gun—a dangerous weapon—sufficient evidence supports Syhavong’s conviction of aiding and abetting second-degree assault with a dangerous weapon.

Lesser-included offense

Syhavong also argues that the postconviction court erroneously failed to vacate his conviction for third-degree assault because it is a lesser-included offense of second-degree assault. This presents a legal question which we review de novo. *Cox*, 820 N.W.2d at 552.

Under Minnesota law, a criminal defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2012). The statute provides that an included offense may be “a lesser degree of the same crime.” *Id.*, subd. 1(1). And “[i]f the lesser offense is a lesser degree of the same crime or a lesser degree of a multi-tier statutory scheme dealing with a particular subject, then it is an

⁷ Although not precedential, this court has previously determined that a BB gun is capable of causing great bodily harm. See *State v. Donson*, No. A16-0306, 2017 WL 393424, at *2 (Minn. App. Jan. 30, 2017), *review denied* (Minn. Apr. 26, 2017).

‘included offense’ under section 609.04.” *State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995).

Here, Syhavong was convicted of aiding and abetting second-degree assault with a dangerous weapon and aiding and abetting third-degree assault-substantial bodily harm. The postconviction court concluded that third-degree assault was not a lesser-included offense. In reaching this conclusion, the postconviction court stated that no weapon is required for third-degree assault, and that no harm must be inflicted for the second-degree assault charge. Accordingly, the postconviction court declined to vacate Syhavong’s conviction for aiding and abetting third-degree assault as a lesser-included offense.

We disagree. It is clear that “a lesser degree of the same crime” constitutes an included offense. Minn. Stat. § 609.04, subd. 1(1). And here, aiding and abetting third-degree assault is a lesser degree of aiding and abetting second-degree assault. Although the postconviction court concluded, and the state argues, that second-degree assault with a dangerous weapon does not necessarily require committing third-degree assault-substantial bodily harm, “the fact that the lesser offense is not necessarily proved by proof of the commission of the greater offense does not mean that the lesser offense is not an included offense under section 609.04.”⁸ *Hackler*, 532 N.W.2d at 559. Because it is a lesser-included offense of his conviction for aiding and abetting second-degree assault, we reverse

⁸ The state argues that *Hackler* is inconsistent with the plain text of Minnesota Statutes section 609.04 because the statute uses the word “may,” which is permissive. Minn. Stat. § 645.44, subd. 15 (2018). But this court is bound by supreme court precedent, and the state does not contend that *Hackler* is no longer good law. See *State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018).

Syhavong's conviction of aiding and abetting third-degree assault and remand for correction of the warrant of commitment.⁹ See *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

In sum, the postconviction court did not abuse its discretion by concluding that sufficient evidence supports Syhavong's convictions. But because aiding and abetting third-degree assault is a lesser-included offense of aiding and abetting second-degree assault, we reverse Syhavong's aiding and abetting third-degree assault conviction and remand for correction of the warrant of commitment.

Affirmed in part, reversed in part, and remanded.

⁹ We note that because Syhavong was sentenced only for his conviction of aiding and abetting first-degree aggravated robbery, this decision does not impact Syhavong's sentence.