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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1654**

State of Minnesota,
Respondent,

vs.

Jerome Deshawn Misters,
Appellant.

**Filed October 24, 2022
Affirmed in part, reversed in part and remanded
Connolly, Judge**

Dakota County District Court
File No. 19HA-CR-20-2183

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

Kathryn M. Keena, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Ross, Judge; and Connolly, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On appeal from his convictions of second-degree murder and attempted second-degree murder, appellant Jerome Deshawn Misters contends that (1) the evidence presented at trial was not sufficient to support his convictions, and (2) the district court erred by

failing to sentence the offenses in the order in which they occurred. We affirm appellant's convictions but reverse and remand for resentencing because the district court did not sentence appellant in the order in which the offenses occurred.

FACTS

The State of Minnesota charged appellant with one count of second-degree intentional murder and one count of attempted second-degree intentional murder. The following evidence was presented at trial. On August 17, 2020, shortly before 4:00 a.m., police were called to the 600 block of 17th Avenue North in South St. Paul on a report of shots fired. When the police arrived on the scene, they found M.A. and M.P. with what appeared to be gunshot wounds. M.A. was alive and was lying in front of 621 17th Avenue North, the home of E.J. ("the house"), appellant's girlfriend. M.P. appeared to be deceased; even though officers could not find M.P.'s pulse and did not see signs of life, they attempted life-saving measures. When the paramedics arrived, they took over. M.A. and M.P. were transferred to the hospital. M.A. survived after receiving multiple surgeries. M.P. was pronounced dead at the hospital. M.P.'s cause of death was exsanguination due to gunshot wounds. The doctor who performed the autopsy identified five gunshot wounds but could not tell in what order they occurred.

Officers found shell casings and blood on the sidewalk in front of E.J.'s house and blood drops between the house and the location of M.P.'s body. Officers on the scene observed that appellant's car was parked on the street in front of E.J.'s house. An expert determined that a shot that hit appellant's car was fired from the direction of the front door of the house.

At trial, E.J. testified that, the night of the shooting, appellant spent the night at her house. Before going to bed, appellant argued with M.P. on the phone. While they were sleeping, appellant's phone beeped, and he said that M.P. was outside threatening his life. He left the bed and ran out of the room. E.J. followed him, and as she was going down the stairs, she heard at least two gunshots from outside. From the doorway, she saw appellant outside on the sidewalk in front of the house, and he yelled at her to "get the f-ck back in the house." Bloodstains and cartridge cases were later found on the sidewalk in front of the house in the spot where appellant had been standing. She testified that she thought appellant had been wearing a white T-shirt but later said that she did not know if appellant had taken off his shirt before going to bed. E.J. testified that she saw a man, later identified as M.A., lying in the street close to the sidewalk. She ran to the man and offered him help. As E.J. was calling 911, she heard a gunshot from behind her. She turned and saw somebody, who she believed was wearing a white shirt, point a gun down and shoot it twice. She testified that, even though she could not see the shooter's face, she believed it was appellant because he had told her to go back in the house, he ran in the direction that she heard the shots come from, and she did not see anyone else in the street. She also said that it was dark and that she had been drinking, so her memory of the day was blurry.

She ran inside the house, locked all the doors, and called appellant, but he did not answer the phone. At 4:15 a.m., she texted, "WTF." She also sent texts saying, "Call me now!"; "I'm so scared, please call me"; and "I'm so scared, why would you do something like this." Appellant did not respond. E.J. later identified appellant to the police and showed them his photo.

The detective who interviewed E.J. after the shooting testified. He testified that E.J. told him that (1) she was dating appellant; (2) appellant had been arguing with somebody that E.J. knew; (3) appellant woke up in the middle of the night and ran out of the house after saying that M.P. was outside and was threatening his life; (4) she followed appellant outside and saw a person with gunshot wounds, who was later identified as M.A., lying in the street; (5) appellant told her to get the f-ck back inside; (6) while she was with M.A., she heard more gunshots, turned around, and saw appellant “death killing somebody,” which she later clarified as “someone very obviously shooting someone”; (7) appellant was wearing a white shirt and black pants when he left the house; (8) she was certain it was appellant whom she saw; and (9) it “couldn't have been anybody else with how soon she was out of the house after the [appellant].” At a second interview, E.J. told the detective that she was only 90% sure that appellant was the shooter but confirmed her initial statement that it did not make sense that the shooter would have been anyone else.

M.A. testified that, on the night of the shooting, he had gone with M.P. to a bar. After they left the bar around closing time, M.A. observed that M.P. was texting and having heated arguments on the phone and appeared to be upset with someone named “Jerome,” whom M.A. had never met. M.A. testified that M.P. wanted to talk to “Jerome,” so they drove to a house in South St. Paul. When they got out of the car, a man, who M.A. believed was “Jerome,” came out of the house. M.P. and this man exchanged some words; the man pulled out a gun, held it to M.P.’s chest, and shot M.P. once. M.A. testified that M.P. then ran towards the street, and M.A. tried to run too, but the man shot him four or five times as he ran towards the street. M.A. testified that a girl came out of the house and said, “I can’t

believe he did this.” M.A. then heard more shots as he was lying on the ground. M.A. told an officer that the person who shot them had come from the first or second house on the right, and the officer determined that E.J.’s house was the first or second house.

At trial, the detective who interviewed M.A. the day after the shooting testified. He testified that M.A. was groggy when he interviewed him. M.A. told the detective that (1) before arriving to the house, M.P. was arguing with appellant on the phone and that M.P. intended to fight appellant; (2) the shooter came from the fourth house to the right of the parked car, which was not E.J.’s house; (3) “the defendant opened the door, held up a handgun, [and] [M.P.] said something to the effect of ‘you’re going to have to use that’”; and (4) the shooter was “shorter,” weird things had been going on, and he thought people were following him. Three days after the shooting, while M.A. was in the hospital recovering from surgery and under medication, he failed to identify appellant in a photo line-up.

Witnesses testified that they saw an individual wearing a light-colored shirt and dark pants run south on 17th Avenue North after the gunshots. E.J.’s next-door neighbor saw an individual with dark hair and dark skin wearing a white shirt and black pants running southbound. She saw the individual stop, hold his arm out close to a man on the ground, and shoot three times at the man. After hearing the gunshots, two witnesses saw a tan car that they did not recognize driving in the alleyway of 17th Avenue North, and a person run and get into the car.

On August 17, 2020, between 4:30 a.m. and 6 a.m., officers located and arrested appellant in the lobby of a hotel around 1 1/2 to 2 1/2 miles southeast from the scene of the

shooting. At the time of his arrest, he was not wearing a shirt and was wearing dark-colored pants. There was no blood or other DNA evidence found on appellant. Appellant arrived at the hotel on foot; his car was still parked at E.J.'s house.

Later in the day, officers located a Glock 9 mm pistol in a storm drain and a magazine in a nearby yard. Both locations were geographically between the scene of the shooting and the hotel where police arrested appellant. An expert determined that the bullets and cartridge cases involved in the shooting of M.A. and M.P. were fired from the Glock 9 mm. But there was no meaningful genetic or fingerprint evidence found on the gun or magazine.

In September 2020, appellant made three recorded telephone calls from prison with E.J. about the case. On September 20, he told her that he “do[esn’t] do anything unless [he’s] forced to be in that situation” and that “something happened that would push [him] to a level, or anybody to a level, where something like that would take place. It’s crazy. It was crazy man.” On September 28, appellant urged E.J. to get a hotel room and shut off her phone for the first two days of the trial. On September 30, he repeatedly urged her to tell the detective that she wanted to recant her statement.

The case was tried to a jury. The jury found appellant guilty of second-degree intentional murder and attempted second-degree intentional murder. The district court first sentenced appellant consecutively to 480 months in prison for second-degree murder and then sentenced appellant to 185 months in prison for attempted second-degree murder, for a total of 665 months in prison.

DECISION

A. Sufficiency of the Evidence

Appellant contends that the evidence was insufficient to support his convictions for attempted second-degree murder and second-degree murder because it did not prove the identity of the individual involved in the shooting. We disagree.

When evaluating the sufficiency of the evidence, this court “carefully examine[s] the record to determine whether the facts and the legitimate inferences drawn from them would permit the factfinder to reasonably conclude that the defendant was guilty beyond a reasonable doubt.” *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). This court views the evidence in the light most favorable to the conviction. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). But if the state relied on circumstantial evidence to prove an element of an offense, this court applies a heightened standard of review. *See State v. Harris*, 895 N.W.2d 592, 601-03 (Minn. 2017) (discussing the circumstantial evidence standard); *State v. Al-Naseer*, 788 N.W.2d 469, 471 (Minn. 2010) (stating that “the heightened scrutiny applies to any disputed element of the conviction that is based on circumstantial evidence”).

This court reviews the sufficiency of circumstantial evidence by conducting a two-step analysis. *State v. German*, 929 N.W.2d 466, 472 (Minn. App. 2019). First, we identify the circumstances proved by the state. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). We “assume that the [fact-finder] resolved any factual disputes in a manner that is consistent” with the verdict. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014).

Second, we “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt.” *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotation omitted). We will uphold the verdict if the circumstantial evidence forms “a complete chain” which leads “directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *State v. Petersen*, 910 N.W.2d 1, 7 (Minn. 2018) (quoting *Al-Naseer*, 788 N.W.2d at 473). Thus, we must determine whether the evidence was such that the jury could make no reasonable inference other than appellant’s guilt.

In identifying the circumstances proved, we “defer to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.” *Silvernail*, 831 N.W.2d at 598-99 (quotations omitted). We “consider only those circumstances that are consistent with the verdict.” *Id.* at 599. Twenty-nine circumstances are consistent with the verdict. They are:

1. Appellant and M.P. were arguing on the phone right before the shooting.
2. Appellant was sleeping at E.J.’s house on the night of the shooting.
3. M.P. and M.A. went to confront appellant at E.J.’s house.
4. When M.P. and M.A. arrived at the house, a man came outside, pointed a gun at M.P., and shot him.
5. The same man that shot M.P. shot M.A. several times.
6. After M.A. fell, he heard more gunshots.
7. M.A. testified that E.J. came out of the same house as the shooter.

8. Right before the shooting, appellant got out of bed and ran outside, telling E.J. that M.P. was outside the house threatening his life.
9. E.J. followed appellant and heard shots as she was going down the stairs that led to the front door.
10. When E.J. got to the front door, she saw appellant on the sidewalk in front of the house, and a person, later identified as M.A., lying on the ground in front of the house.
11. Appellant told E.J. to “get the f-ck back in the house” and turned and ran to the south.
12. E.J. testified that she thought appellant was wearing a white T-shirt when he yelled at her to get back inside.
13. Witnesses heard gunshots and then saw a man wearing a white T-shirt run to the south, stop, and fire several shots into a person.
14. As E.J. was helping M.A., she heard gunshots from behind her, to the south, and turned to see a person, who she believed was appellant, firing shots at the ground.
15. She testified that she believed the shooter was wearing a white T-shirt.
16. On the day of the shooting, E.J. identified appellant as the individual she saw shooting at the ground. She later told the detective she was only 90% sure that it was appellant but confirmed that it did not make sense that it would be anyone else.
17. E.J. saw no one else outside of her house at the time of the shooting other than M.A. and appellant.
18. M.A. saw no one outside of E.J.’s house at the time of the shooting other than the man who shot him and E.J.
19. Officers found shell casings and blood on the sidewalk in front of E.J.’s house and blood drops between the house and the location of M.P.’s body.
20. Appellant’s car was parked in front of E.J.’s house when officers arrived on the scene.
21. Appellant fled the scene of the shooting and never returned to the scene that night.

22. Officers located appellant around two hours later in the lobby of a hotel about 1.5 to 2.5 miles southeast of the scene of the shooting.
23. When officers located appellant, he was shirtless and was wearing dark pants.
24. Appellant arrived at the hotel on foot.
25. Appellant's car was still parked in front of E.J.'s house.
26. An expert determined that a shot that went into appellant's car was shot from the direction of E.J.'s front door.
27. In a recorded telephone call with E.J., appellant stated, "I don't do anything unless I'm forced to be in that situation" and "something happened that would push me to a level, or anybody to a level, where something like that would take place."
28. In a recorded telephone call with E.J., appellant tried to persuade her to disappear for the first two days of the trial by getting a hotel room and shutting off her phone.
29. In another recorded telephone call with E.J., appellant repeatedly urged her to recant her statements to police.

The second step of the analysis is to determine whether there are any rational inferences consistent with the proven circumstances yet inconsistent with guilt. *Id.* At this step, we do not defer to the fact-finder's choice between reasonable inferences. *Id.*

Appellant contends that there is a rational hypothesis that someone else shot M.P. and M.A. Appellant relies on several points of evidence: (1) M.A. made a statement that the shooter came from another house, not E.J.'s house; (2) M.A. failed to identify appellant in a photo lineup; (3) M.A. described the shooter as "shorter," but appellant is taller than 5'8"; (4) M.A. told a detective that weird things had been happening that night and that he thought people were following him and M.P.; (5) no one identified appellant as the shooter; (6) witnesses saw a tan car in the alley and a person run to the car; (7) it was dark outside

so there could have been a shooter whom witnesses did not see; (8) E.J. did not remember if appellant took off his shirt when he went to bed; and (9) there was no forensic evidence tying appellant to the shooting.

The evidence appellant relies on is not persuasive. This court does not consider M.A.'s statements because we "consider only those circumstances that are consistent with the verdict" because the "jury is in the best position to evaluate the credibility of the evidence." *Id.* The fact that no direct evidence identifies appellant as the shooter does not establish a rational hypothesis that someone else shot M.A. and M.P. because the circumstances proved by the state form a "a complete chain" which leads "directly to the guilt of the [appellant] as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Petersen*, 910 N.W.2d at 7. Appellant was present at the scene of the shooting. Just before the shooting, he had been arguing with one of the victims and left his bed in the middle of the night to confront him. M.A. said that the same woman who followed the shooter out of the house ran to assist him; E.J. said that she ran to assist M.A. after following appellant. E.J. and M.A. did not see anyone else except for M.P. and appellant at the scene of the shooting. The gun and magazine used in the shooting were found in a location between where appellant was apprehended and the scene of the shooting. Thus, when viewed as a whole, the only rational inferences to draw from the circumstances proved are consistent with finding appellant guilty.

B. Order of Sentences

Appellant contends that the district court erred by failing to sentence the offenses in the order in which they occurred. We agree.

The order in which appellant's offenses were sentenced affected the length of his sentences. The district court sentenced appellant at the top of the sentencing guideline's presumptive range, first imposing a sentence of 480 months in prison for the second-degree murder, using appellant's criminal history score of 10. The district court then imposed a consecutive sentence of 185 months in prison for the attempted second-degree murder, using a criminal history score of zero. *See Minn. Sent'g Guidelines 2.F.202 (2020)* ("If an offender is given permissive consecutive sentences, the presumptive duration for each offense sentenced consecutive to another offense(s) is determined by using the zero criminal history column, or the mandatory minimum, whichever is longer."). The presumptive sentences for his second-degree murder and attempted second-degree murder offenses were 429 and 154 ½ months respectively, a total of 583 ½ months in prison.¹ If the district court had sentenced appellant on the attempted second-degree murder before sentencing the second-degree murder, the presumptive sentences would be 214 ½ months' imprisonment (one-half 429 months' imprisonment) for attempted second-degree murder and a permissive consecutive sentence of 309 months' imprisonment for second-degree murder, for a total of 523 ½ months' imprisonment.²

¹ Three months were added to the presumptive sentence on both counts because appellant had at least six criminal history points plus a custody status point. *See Minn. Sent'g Guidelines 2B.116(2)(c)*.

² The presumptive sentences would be 214.5 months in prison for the attempted second-degree murder, using a criminal history score of ten, and 309 months in prison for the second-degree murder, using a criminal history score of zero. *See Minn. Sent'g Guidelines 4.A (2020)*.

When the court imposes multiple sentences in the same proceeding, the court must sentence in the order in which the offenses occurred. *State v. Williams*, 771 N.W.2d 514, 522 (Minn. 2009); Minn. Sent’g Guidelines 2.B.1.e (2020). A trial court’s factual findings are subject to a clear error review. *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996). “Findings of fact are clearly erroneous if, on the entire evidence, we are left with the definite and firm conviction that a mistake occurred.” *State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010).

A murder occurs when the victim dies. *State v. Patterson*, 796 N.W.2d 516, 532 (Minn. App. 2011), *aff’d*, 812 N.W.2d 106 (Minn. 2012); see Minn. Stat. § 609.19, subd. 1(1) (2020) (stating that a person commits second-degree murder by “[causing] the death of a human being with intent to effect the death of that person or another. . .”). In *Patterson*, this court held that a drive-by shooting offense occurred before a second-degree murder offense arising out of the same shooting. *Patterson*, 796 N.W.2d at 532. This court determined that the shooting occurred when the defendant shot into the car, and the murder occurred after the shooting, when the victim died, sometime after he drove himself to the hospital. *Id.*

Appellant contends that the evidence demonstrates that M.P. died after M.A. was shot.

The determination of which offense occurred first in time is a question of fact, so this court reviews the district court’s finding for clear error. See *Critt*, 554 N.W.2d at 95. In sentencing appellant on the murder conviction first, the district court stated:

[M.P.] was shot first and then [M.A.] was shot second. [M.P.] was then on the ground after several seconds. There's a witness that testified, she was a witness that opened the door, saw a man standing over a body who was on the ground, and then saw several shots of that person laying on the ground.

As the state indicated, they didn't have an expert to say where the shots were fired or where the locations were fired. [Appellant could have been] — [M.P. could have been alive, he could have been dead. We just don't know which bullet killed him.] He was shot five times. We know that.

If the state knew that the second shots were the ones that killed him, I would believe the state would have charged him with first-degree premeditated murder, because you had time to contemplate your thoughts at that time. It's clear from the evidence you walked over, you stood over him. You pointed the gun at him, and then you paused, and then you fired shots into his body. If he wasn't dead then, he was then dead after those shots were fired.

(Emphasis added).

The district court clearly erred when it sentenced appellant on the second-degree murder before the attempted second-degree murder because the best evidence in the record demonstrates that the second-degree murder occurred when M.P. was declared deceased at the hospital. The initial shooting of M.P. occurred right before the attempted second-degree murder of M.A. M.P. was then shot again. First responders attempted life-saving measures before they brought M.P. to the hospital, where he was declared dead. The second-degree murder of M.P. occurred when M.P. was declared dead at the hospital, which was after the attempted second-degree murder of M.A. Thus, the district court clearly erred when it sentenced the second-degree murder before the attempted second-degree murder. Consequently, we remand to the district court for the purpose of

resentencing appellant in the correct order and to make any resulting changes to the terms of the sentences based on that correct order.

Affirmed in part and reversed and remanded in part.