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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-856**

State of Minnesota,  
Respondent,

vs.

Sherrod Lamont McClain,  
Appellant.

**Filed May 29, 2012  
Affirmed in part, reversed in part, and remanded  
Rodenberg, Judge**

Olmsted County District Court  
File No. 55CR099384

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and Rodenberg, Judge.

**UNPUBLISHED OPINION**

**RODENBERG, Judge**

On appeal from his conviction of first-degree assault and two counts of aiding and abetting second-degree assault following a bench trial, appellant argues that (1) his first-

degree assault conviction must be reversed because the district court's sua sponte decision to convict him of this uncharged, non-included offense prejudiced his substantial rights and (2) his second-degree assault convictions must be reversed because the circumstantial evidence was insufficient to prove beyond a reasonable doubt that he intentionally aided and abetted his accomplice in shooting at a vehicle occupied by two other people. We affirm in part, reverse in part, and remand.

### **FACTS**

This case arises from a shooting that took place in the early morning hours of December 4, 2009, in Rochester, Minnesota.

In late November 2009, R.R. became involved in a dispute with appellant Sherrod McClain's brother. R.R. received a phone call from appellant, who made statements to R.R. to the effect that R.R. "had been warned." A few days later, appellant's brother shot at R.R.'s car four or five times while R.R. and a passenger were in it.

On the evening preceding and into the early morning hours of December 4, 2009, R.R. went out drinking with two of his brothers and some friends, eventually returning to one brother's home. Sometime after midnight, R.R. left to buy cigarettes at a gas station and purchase some fast food. When he arrived at the gas station, he saw a vehicle drive by and recognized it as belonging to someone who had been at the home where the original dispute had occurred. R.R. followed the vehicle and, when it came to a stop on a bridge, pulled up alongside it. At this point, he saw two people sitting in the other vehicle, and signaled them to roll down their window. Appellant, who was the passenger, rolled down his window, and he and R.R. began to speak. Appellant suggested that they

pull over, and they agreed to continue their discussion in the parking lot of a nearby apartment complex. R.R. pulled his car into the parking lot and parked on the far side of the building. R.R. telephoned his two brothers after parking and asked them to come to the apartment complex. He waited a moment to allow his brothers some time to depart, got out of his car, and walked out to the front of the building to speak with appellant.

Both appellant and Yolanda Collins, who had been driving the other vehicle, were present during the conversation. Ms. Collins stood off to the side, just out of R.R.'s field of vision.

R.R. and appellant spoke for approximately 10 to 15 minutes. Following the conversation, R.R. turned to leave. When he was 15 to 20 feet away from appellant, he turned and saw appellant make a movement with his hand as if drawing a gun from under his sweatshirt. R.R. broke into a run, felt a bullet hit him, and fell to the ground. R.R. did not see the gun, but he saw the muzzle flash. R.R. lay where he fell, overwhelmed by pain.

Just as this happened, R.R.'s two brothers arrived at the apartment complex in their vehicle. They saw a tall, long-haired man running from the scene and saw a woman step out of the shadows and begin shooting at their vehicle. Several shots hit the vehicle, but neither of the brothers was hurt. After firing the shots, the woman left, heading in the same direction that the man had run earlier. The brothers drove into the parking lot, put R.R. into their vehicle, and drove him to a nearby hospital for treatment. A .40 caliber bullet was removed from R.R. at the hospital.

Police found footprints in the recently fallen snow that led away from the scene of the shooting in the same direction that the man and woman had fled. The footprints led to the parking lot of a nearby business. At the parking lot, police found spent .40 caliber shell casings and a live .40 caliber round. The footprints were consistent with a set belonging to a male and a set belonging to a female. The footprints led to a set of vehicle tracks. There were two sets of footprints for each individual: one leading from the location of the vehicle tracks in the direction of the apartment complex and one returning to the vehicle tracks from the direction of the apartment complex.

Police did not recover any .40 caliber weapons as a part of their investigation.

Appellant was charged by complaint on December 17, 2009, with one count of aiding and abetting attempted murder in the first degree<sup>1</sup> for the shooting of R.R. and two counts of aiding and abetting assault in the second degree for his role in Yolanda Collins's shooting of the vehicle occupied by R.R.'s brothers. Appellant waived his right to a jury trial. Following a bench trial held from December 13, 2010, to December 16, 2010, appellant was convicted of one count of assault in the first degree and of the two counts of aiding and abetting assault in the second degree. The district court determined first-degree assault to be a lesser-included offense of attempted murder in the first degree. The district court concluded that the state had not proven the charged offense of attempted murder.

This appeal follows.

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<sup>1</sup> The complaint alleged that Ms. Collins had shot R.R. and that appellant had aided and abetted this act. The complaint was not amended prior to trial.

## DECISION

Appellant raises two issues on appeal. Appellant first asserts that the district court erred when it convicted him of first-degree assault as a lesser-included offense of attempted first-degree murder. Appellant also contends that the evidence was insufficient to support the district court's conclusion that he aided and abetted Ms. Collins in her commission of the second-degree assaults.

### I.

Assault in the first degree is not a lesser-included offense of attempted murder. *State v. Gisege*, 561 N.W.2d 152, 157 (Minn. 1997). Therefore, it was error for the district court to convict a defendant charged with attempted murder in the first degree of the “lesser included offense” of assault in the first degree. *See id.* at 157–58 (holding that instructing the jury on assault in the first degree as a lesser included offense was erroneous, even though the defendant had requested the instruction). However, such error is only reversible if it deprives the appellant of a substantial right, such as the opportunity to prepare a defense to the new charge. *Id.* at 159.

Appellant argues that the district court's sua sponte inclusion of the first-degree assault charge deprived him of notice and an opportunity to argue whether or not the victim's injuries constituted “great bodily harm.” *See generally* Minn. Stat. §§ 609.02, subd. 8 (defining great bodily harm), 609.221, subd. 1 (first-degree assault) (2008). The state concedes this point and agrees that the conviction for assault in the first degree must be reversed. The holding of *Gisege* is controlling. Reversal is warranted.

Appellant's conviction for assault in the first degree is reversed.

## II.

Appellant argues that the circumstantial evidence in this case is insufficient to prove beyond a reasonable doubt that he intended to aid and abet Ms. Collins's assault on R.R.'s two brothers.

In considering the sufficiency of evidence, this court applies the same standard of review to a district court's findings following a bench trial that it would apply to a jury's verdict. *State v. Cox*, 278 N.W.2d 62, 65 (Minn. 1979). This court's 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 allow the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that 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). The reviewing court will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that appellant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

Convictions based on circumstantial evidence merit stricter scrutiny. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). In such cases, the circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *Id.* This standard applies even in cases where the only

element established by circumstantial evidence is intent. *State v. Al-Naseer*, 788 N.W.2d 469, 474–75 (Minn. 2010).

Appellant was charged with, and convicted of, aiding and abetting Ms. Collins’s second-degree assault under Minn. Stat. § 609.05, subd. 1 (2008). He does not dispute that Ms. Collins committed those assaults. However, appellant contends that the evidence is insufficient to show that he had the requisite intent to be convicted of aiding and abetting Ms. Collins.

As the supreme court recently explained, “[w]hen a statute simply prohibits a person from *intentionally* engaging in the prohibited conduct, the crime is considered a general-intent crime.” *State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012) (emphasis added). A general-intent crime only requires proof that “the defendant intended to do the physical act forbidden, without proof that he meant to or knew that he would violate the law or cause a particular result.” 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 44.3 (3d ed. 2001), *cited in Fleck*, 810 N.W.2d at 308. This distinguishes general-intent crimes from specific-intent crimes, which “require[] an ‘intent to cause a particular result.’” *Fleck*, 810 N.W.2d at 308 (quoting McCarr & Nordby, *supra*, § 44.3).

Section 609.05, subd. 1, imposes criminal liability when a person “*intentionally* aids, advises, hires, counsels, or conspires with or otherwise procures the [principal] to commit the crime.” § 609.05, subd. 1 (emphasis added). Therefore, criminal liability for aiding and abetting under this provision is a general-intent form of criminal liability. *See Fleck*, 810 N.W.2d at 308.

Section 609.05, subd. 1, is violated where the accomplice commits acts that “affect the principal, encouraging him to take a course of action which he might not otherwise have taken.” *State v. Ulvinen*, 313 N.W.2d 425, 428 (Minn. 1981). Because section 609.05, subd. 1, is a general-intent statute, the state need only prove acts done intentionally that so affect and encourage the principal. It is not necessary to prove intent that the principal will be so affected and encouraged by the acts. Facts that would support an inference of the requisite intent include the “defendant’s presence at the scene of the crime, defendant’s close association with the principal before and after the crime, defendant’s lack of objection or surprise under the circumstances, and defendant’s flight from the scene of the crime with the principal.” *State v. Pierson*, 530 N.W.2d 784, 788 (Minn. 1995).

The only rational inference to be taken from the facts in the present case is that appellant intentionally committed acts that encouraged Ms. Collins to take a course of action that she might not otherwise have taken. Appellant intentionally suggested to R.R. that they pull over to continue the discussion outside their vehicles. Appellant intentionally rode with Ms. Collins to the meeting place with a firearm.<sup>2</sup> Given his subsequent actions, appellant knew this encounter was likely to erupt into a gun fight. Appellant intentionally initiated the gun fight. He shot R.R. in the back. As a

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<sup>2</sup> The record is unclear as to how many .40 caliber pistols appellant and Ms. Collins brought to the meeting. The district court found that Ms. Collins used the same pistol to shoot at R.R.’s brothers that appellant had used to shoot R.R. The record could also support an inference that there were two pistols. Neither inference is inconsistent with appellant’s guilt. In either scenario, appellant was in the vehicle with Ms. Collins and at least one pistol, and he possessed a pistol and shot a man with it in Ms. Collins’s immediate presence.

consequence, Ms. Collins participated in the gun fight and fired upon the vehicle of R.R.'s brothers, a course of action that she would not otherwise have taken. Appellant and Ms. Collins fled together and apparently departed the area in the vehicle in which they had arrived.

Therefore, sufficient evidence existed in the record to prove beyond a reasonable doubt that appellant had the requisite intent to be convicted of aiding and abetting Ms. Collins's second-degree assaults.

This court holds that, on the facts of this case, the district court did not err in finding appellant guilty of two counts of aiding and abetting second-degree assault.

Appellant's conviction for first-degree assault is reversed. Appellant's convictions for two counts of aiding and abetting second-degree assault are affirmed. This matter is remanded to the district court for resentencing.

**Affirmed in part, reversed in part, and remanded.**