STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0172

State of Minnesota,
Respondent,

vs.

David Darnell Jones, Jr.,
Appellant.

Filed April 17, 2023
Affirmed in part, reversed in part, and remanded
Ross, Judge
Dissenting, Gaïtas, Judge

Crow Wing County District Court
File No. 18-CR-21-1920

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

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota; and

Scott A. Hersey, Special Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Greg Scanlan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Gaïtas, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

A jury found David Jones Jr. guilty of second-degree assault with a dangerous weapon and third-degree assault after learning that he struck a woman and then retrieved a

wooden board from another room, holding it over his shoulder but not striking her with it. Jones challenges the resulting conviction of second-degree assault, arguing that the evidence was not sufficient to prove that the board was a "dangerous weapon" under the statute because the circumstantial evidence could not exclude the rational hypothesis that he intended only to frighten the woman. He also contends that the prosecutor engaged in misconduct by misleading the jury to believe that it could find that the board was a dangerous weapon if he intended to use it only to cause fear. And he argues that the district court erroneously entered convictions for both second- and third-degree assault. Although the circumstantial evidence by itself does not support the conviction, the state introduced sufficient direct evidence of Jones's criminal intent, and the alleged prosecutorial misconduct did not impact Jones's substantial rights. We therefore affirm the second-degree assault conviction. But because the district court incorrectly entered convictions for both assault charges, we reverse and remand to the district court to vacate the third-degree conviction.

FACTS

A jury heard evidence of the following incident occurring in June 2021 after the state charged appellant David Jones Jr. with second- and third-degree assault. A woman, whom we will call Jane in the interest of her privacy, entered the home of another woman, who was in bed with Jones. Jane demanded that the woman give her keys to a car that Jane believed belonged to her and her boyfriend. Jones leapt from the bed, screamed at Jane, and struck Jane in the head or neck. Jane fell to the floor, dazed. Jones walked into another bedroom, and he returned with a three-foot-long 2x4 board. Jones walked toward Jane

holding the board over his shoulder in a manner appearing as if he was going to strike Jane with it. He got about six feet from Jane when the other woman, who stood between Jones and Jane, urged him not to hurt Jane. Jones stopped, did not attempt to force his way past the woman to Jane, and set the board down. Jane fled from the house and called the police.

The prosecutor's opening statement informed the jury that Jones faced two assault charges, second-degree assault with a dangerous weapon for his use of the wooden board and third-degree assault for his striking Jane. The prosecutor said that the dangerous-weapon element would be satisfied by "the two-by-four, and the manner in which it was used causing [Jane] to fear immediate bodily harm." Jones did not object to this characterization.

The other woman testified at trial and was asked four times about whether Jones said anything after Jones approached Jane with the board and before he put the board down. She offered conflicting testimony in response. The first time, the prosecutor asked the woman, "And what did Mr. Jones do while she laid there not moving?" The woman answered, "Listened to me and didn't strike her over the head with that wooden beam. Threatened that he was going to, but." The prosecutor immediately followed up asking, "What did he say?" And the woman testified, "I'm going to beat her bloody." The woman was asked a second time about the exchange: "Did Mr. Jones say anything while he was holding the board?" This time she replied, "Not that I recall." The third line of questions about any verbal exchange between Jones and the woman occurred after she was shown an exhibit that she identified as the board Jones held the day of the assault. The prosecutor asked, "And he threatened to use it to beat her up?" The woman replied, "He said he was

going to beat the bitch bloody." Jones's attorney made the fourth inquiry, asking the woman, "And you didn't hear him saying anything at that time [while Jones held the board up]?" The woman answered, "No, I was begging and pleading for him to stop and put it down and don't let – we're not going to do this."

In closing arguments, the prosecutor again discussed the dangerous-weapon requirement:

> Think about if someone were to grab a piece of wood and nail someone with it. They are holding it like a baseball bat. Could that cause great bodily harm? Think about if someone got struck in the head with it, in the eye, in the ear, in the leg, would that cause great bodily harm or death, especially if it was someone much bigger than another person, or if someone was laying on the floor and vulnerable, could that cause great bodily harm or death? The potential of that is severe injury, not just a little bit of injury, but we're talking severe great bodily harm.

The prosecutor told the jury "[The other woman] testified that Mr. Jones held that piece of wood like a baseball bat, like he was going to strike her . . . she believed that he was about to do some harm. There is no question that this board is a dangerous weapon." Jones did not object.

The jury found Jones guilty, and the district court convicted him of both second- and third-degree assault. Because the district court found that the guilty verdict on each count arose from the same behavioral incident, it sentenced Jones only on the more serious offense—second-degree assault with a dangerous weapon—and ordered him to serve 39 months in prison. Jones appeals.

DECISION

Jones raises three issues on appeal. He argues first that the evidence was insufficient to support his assault-with-a-dangerous-weapon conviction because it did not establish that the board was a dangerous weapon. He argues second that the prosecutor engaged in misconduct in her opening and closing remarks by misstating the legal requirements for the dangerous-weapon element. And he argues third that the district court erred by entering convictions on both second-degree and third-degree assault. We address each argument.

I

We first consider Jones's contention that the evidence was insufficient to prove that the board was a dangerous weapon. The answer turns on what the evidence proves, or does not prove, about Jones's intent to use the board to strike Jane.

Intent to Cause Only Fear Not Sufficient to Establish a Board as Dangerous Weapon

Jones maintains that the evidence presented at trial was insufficient to support his conviction for second-degree assault with a dangerous weapon, focusing only on the "dangerous weapon" element of the crime. *See* Minn. Stat. § 609.02, subd. 10 (2020) (defining assault as an act intending to cause fear of bodily harm or death and as any attempted or intentional infliction of bodily harm); Minn. Stat. § 609.222 (2020) (classifying assault with a dangerous weapon as assault in the second degree). Some objects are specifically categorized as dangerous weapons, including firearms, combustible liquids, and any device designed as a weapon capable of producing great bodily harm. Minn. Stat. § 609.02, subd. 6 (2020). Jones's board fits none of those categories and therefore is a dangerous weapon only if it falls into the generalized category: any

instrument "that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm." *Id.* The state's argument seems to imply that, because an "assault" includes both acts that intentionally cause fear of bodily harm and acts that cause bodily harm, citing Minnesota Statutes section 609.02, subdivision 10, one commits assault with a dangerous weapon if he acts with the intent to cause only fear of immediate bodily harm while wielding an object capable of producing great bodily harm. The implied argument contradicts the statute.

We have previously addressed the dangerous-weapon definition, expressly endorsing the definitional jury instruction that substituted the statutory phrase, "is calculated or likely to produce death or great bodily harm" with the clarifying phrase, "is known to be capable of producing death or great bodily harm." *State v. Weyaus*, 836 N.W.2d 579, 582–83 (Minn. App. 2013) (emphasis and quotation omitted), *rev. denied* (Minn. Nov. 12, 2013); *see also State v. Abdus-Salam*, ___ N.W.2d ___, ___, 2023 WL 2747202, at *4 (Minn. App. Apr. 3, 2023) (discussing *Weyaus* and expounding on dangerous-weapon definition). The *Weyaus* definition, like the statutory language, is prefaced by the phrase, "in the manner it is used or intended to be used." *Weyaus*, 836 N.W.2d at 582–83; Minn. Stat. § 609.02, subd. 6. Whether an object is a dangerous weapon under the statute's catch-all provision therefore depends on how the defendant used the object. And according to the statute, the object is a dangerous weapon only if it was used (or intended to be used) in a manner capable of producing great bodily harm, not in a manner that is merely capable of putting another in fear of great bodily harm. Because establishing an item as a dangerous weapon under this statute requires the state to prove

that the item was used or intended to be used in a manner calculated or likely to produce death or great bodily harm, an item is not a dangerous weapon if its manner of use or intended use was calculated or likely to produce only fear.

Insufficient Circumstantial Evidence of Jones's Intent

Jones contends that, applying the correct meaning of "dangerous weapon," we should conclude that the state offered insufficient circumstantial evidence to prove the intent element underlying the dangerous-weapon classification. We agree that the circumstantial evidence fails to satisfy the dangerous-weapon element based on Jones's use or intended use of the 2x4. The manner Jones used the board was to retrieve it from the room, walk toward Jane with it, and hold it over his shoulder in a manner suggesting that he might strike her with it. Because Jones did not strike Jane with the board or attempt to swing it at her, Jones did not actually use the board in a manner that was calculated or likely to produce death or great bodily harm. We therefore focus on whether he intended to use the board in that manner.

Assuming for the purpose of this discussion that Jones correctly maintains that the state offered no direct evidence that Jones intended to so use the board, Jones is correct that the circumstantial evidence does not prove that he intended to strike Jane with the board. When the state relies on circumstantial evidence to prove an element of a crime, we scrutinize the evidence by first identifying the circumstances proved by the state and accepted by the jury in its role as fact-finder, and we consider second whether those circumstances are consistent only with the defendant's guilt and not with any other rational hypothesis. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). Applying that standard

here, we conclude that the circumstances proved do not exclude the rational hypothesis that Jones intended to use the board to produce only fear.

The relevant circumstances proved at trial consist of the following. After striking Jane and knocking her to the floor, Jones went to a different room, retrieved the 2x4, and returned to the room where Jane lay on the floor. He stood six feet away from her holding the board over his shoulder, and the other woman stood between Jones and Jane and urged him not to strike her.

Although these circumstances support the conclusion that Jones intended to strike Jane with the board, they also leave open the hypothesis that he instead intended only to frighten her with it. The state insists that "[t]he only reason [Jones] did not strike the victim with the board . . . was because of the intervention of [the other woman], who blocked access to the victim and stood toe to toe with him while pleading with him not to hit her with it." But this is not itself a circumstance proved; it is instead merely one of at least two conclusions that might be inferred from the evidence. The evidence does not suggest that Jones attempted to force his way past the woman or that the woman could have prevented Jones from reaching Jane had he chosen to use the board in the attack. Nor does it show that Jones ever came within striking range of Jane. That Jones discarded the board after the woman asked him not to strike Jane with it is consistent with both possibilities—that he intended to use the board to strike Jane but changed his intent after the woman urged him not to, and that he never intended to use the board to strike Jane. The circumstances proved therefore do not exclude the rational hypothesis that Jones intended to use the board to

cause only fear and not injury. The second-degree assault conviction therefore cannot stand solely on the circumstantial evidence of Jones's intent.

Sufficient Direct Evidence of Jones's Intent

Our review of the circumstantial evidence does not end our analysis, however, because the record supports the conclusion that the jury also received direct evidence of Jones's intent. It is true that "direct evidence of intent is rare," *State v. Griese*, 565 N.W.2d 419, 425 (Minn. 1997), but this is one of those rare cases. Two of the four times the woman testified about whether Jones made any statements while he held the board over his shoulder in a threatening posture, the woman testified that Jones said, "I'm going to beat her bloody," or that "he was going to beat the bitch bloody." An assailant's expression revealing his planned attack is indeed the best, if not the only, truly direct evidence of his intent. Unlike circumstantial evidence, direct evidence is evidence that, "if believed, directly proves the existence of a fact without requiring any inferences by the fact-finder." *State v. Silvernail*, 831 N.W.2d 594, 604 (Minn. 2013) (Stras, J., concurring). Jones's statements responding to being confronted about the board constitute direct evidence of his intent because, if believed, his exclamation revealed exactly what he "was going to" do with the board with no inferences necessary.

We find support for this conclusion in *State v. Horst*, which repeated that evidence is direct when it "reflects a witness's personal observations and allows the jury to find the defendant guilty without having to draw any inferences." 880 N.W.2d 24, 40 (Minn. 2016). The *Horst* court reasoned that, under this standard, the defendant's statement, "I want him dead," was direct evidence of her intent. *Id.* We have also found a persuasively reasoned

unpublished opinion. Even our "unpublished opinions may be persuasive." *Donnelly Bros. Constr. Co. v. State Auto Prop. & Cas. Ins. Co*., 759 N.W.2d 651, 659 (Minn. App. 2009). In the unpublished opinion of *State v. Sawina*, we explained that "the state presented direct evidence of Sawina's determination and intent—all five victims testified that Sawina said, 'Get out, I'm going to kill you guys.'" No. A17-1423, 2018 WL 6442049, at *3 (Minn. App. Dec. 18, 2018), *rev denied* (Minn. Feb. 19, 2019). The *Sawina* court repeated the understanding that "[i]t is rare for the [s]tate to establish a defendant's state of mind through direct evidence" and that "direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Id.* at *2–3 (quotations omitted). Its conclusion that the defendant's declaration, "I'm going to kill you guys," is direct evidence of intent follows reasonably from that context. Not surprisingly, other jurisdictions have also recognized that statements expressing a defendant's violent plans are direct evidence of intent. *See, e.g.*, *State v. Stevenson*, 852 S.W.2d 858, 863–64 (Mo. Ct. App. 1993). ("Here, the state offered direct evidence of the defendant's stated intent to kill the victim. Such evidence [was a witness's testimony] . . . that the defendant had said, 'I'm going to kill that m____ f____ (the victim).'"); *People v. Otkins*, 252 N.E.2d 906, 910–11 (Ill. App. Ct. 1969) ("In the instant case there was an articulation by defendant of his intent [to commit rape]. Complaining witness testified that twice defendant said something like, '[a]t first I wanted your money, but now I want you.' . . . [T]he testimony was not limited to circumstantial evidence, as there was direct evidence of intent . . . ."); *State v. Griggs*, 951 A.2d 531, 546 (Conn. 2008) ("Moreover, the jury had before it direct evidence of the defendant's intent to kill as

expressed by his statements to the victim during the incident, including the bald assertion that 'I'm going to kill you, you son of a bitch' . . . ."); *State v. Chevalier*, 458 So. 2d 507, 512 (La. Ct. App. 1984) ("Appellant argues that the only direct evidence of specific intent was Marshall's testimony that just before the homicide, the defendant shouted, 'I'm going to kill El.'" (emphasis omitted)); *People v. Silva*, E064416, 2017 WL 2774343, at *6 (Cal. Ct. App. June 27, 2017) ("This case, however, presents one of those rare instances in which there was direct evidence of intent to kill. Defendant's neighbors . . . heard a man yelling, 'I'm going to kill you,' or 'I'm going to F'ing kill you,' on the morning of Corrales's death.").

The dissent reaches a different conclusion because it skips the first and most essential step of the direct-evidence test. The dissent considers Jones's unambiguous statement that he was planning to beat Jane bloody to represent only circumstantial rather than direct evidence of his intent because, although "[a] factfinder could infer from the statements that Jones had the intent to use the board to harm Jane," the fact-finder might instead "infer . . . that Jones intended [only] to frighten Jane." Contrary to this approach and as we have discussed above, the caselaw teaches that the critical first step in a direct-evidence analysis is *believing* the testimony, not *disbelieving* it by "inferring" that it means something else. The fact-finder cannot both believe that Jones's statement is true and "infer" that it is not.

We recognize that the woman confronting Jones about his board offered conflicting testimony, twice answering in the negative to questions about whether Jones said anything while he held the board in the threatening fashion. But we review a jury's finding of guilt

based on direct evidence with considerable deference. Our task is to carefully consider the record and determine whether the evidence, considered in the light most favorable to the guilty verdict in the context of the state's beyond-a-reasonable-doubt burden of proof, would permit a reasonable jury to find the defendant guilty. *State v. Gruber*, 864 N.W.2d 628, 636 (Minn. App. 2015). In doing so, we "assume the evidence supporting the conviction was believed and the contrary evidence disbelieved." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). In other words, it is the jury's role, not ours, to reconcile the conflicting testimony. That the jury heard a conflicting account about Jones's expressions of intent therefore does not prevent us from relying only on the direct evidence of his intent.

The only remaining question is whether Jones's expressed intent to use the board to "beat [Jane] bloody" is sufficient to prove that he intended to "produce death or great bodily harm." *See* Minn. Stat. § 609.02, subd. 6. Our answer is, yes. "Great bodily harm" includes a "bodily injury [that] creates a high probability of death," among other things. *Id.*, subd. 8 (2020). In *State v. Trott*, the supreme court addressed whether a board that was the same length as Jones's board but not nearly as thick, and that a man used to beat a child, was a dangerous weapon. 338 N.W.2d 248, 250, 252 (Minn. 1983). The *Trott* court had no difficulty with the question, concluding, "Clearly, a board of this nature qualifies as a dangerous weapon if so used." *Id.* at 252. This result aligns with *State v. Upton*, where the supreme court held that a pool cue used to strike a man in the head and cause a cut was a dangerous weapon. 306 N.W.2d 117, 117–18 (Minn. 1981). We are certain that Jones using the 2x4 to "beat" the downed, dazed Jane "bloody" would create a high probability of

death. We hold that the jury received sufficient evidence to find that Jones's board was a dangerous weapon as an element of second-degree assault based on the direct evidence of his intended use of it.

II

We next address Jones's argument that the prosecutor engaged in misconduct during her opening statement and closing argument by misstating the dangerous-weapon element of second-degree assault. Because Jones did not object at trial, we review his challenge under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). To prevail under this standard, Jones must first identify plainly erroneous conduct, and if he does, the burden then shifts to the state, which must demonstrate that the error did not affect Jones's substantial rights. *See State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). Even if the state fails to meet this burden, the misconduct will support reversal only if reversing is necessary to ensure fairness and the integrity of the judicial proceedings. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). Because our review satisfies us that the prosecutor's statements did not impact Jones's substantial rights, we need not consider whether the statements were plainly erroneous.

Jones contends specifically that the prosecutor improperly conflated the elements of assault based on fear and the dangerous-weapon definition, asserting that "she invited the jury to conclude . . . that all she had to prove was that the board caused fear of harm and was capable of great bodily harm" regardless of how Jones used or intended to use the board. But a prosecutor's alleged misconduct does not impact a defendant's substantial rights if "there is no reasonable likelihood that the absence of the misconduct in question

would have had a significant effect on the verdict of the jury." *State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006) (quotations omitted). The prosecutor's discussion did not precisely frame the legal issues. But the district court instructed the jury to rely on the court's instructions rather than the attorneys' representation of the law. And the prosecutor also correctly recited the dangerous-weapon definition during her closing argument. Proper instructions to the jury can cure any prejudicial effects of attorney misstatements. *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016). Any possible confusion resulting from the prosecutor's inexact language here was mitigated by her near-verbatim recitation of the dangerous-weapon statute and by the district court's properly instructing the jury on the definition.

We are not persuaded otherwise by Jones's reliance on *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002). The prosecutor in *Strommen* misstated the legal requirements for both the burden of proof and an affirmative defense, and, despite the district court's proper instructions, the *Strommen* court could not conclude with certainty that the misstatements did not impact the verdict. 648 N.W.2d at 689–90. But this case does not resemble *Strommen*. Here, unlike in *Strommen*, the prosecutor recited the correct definition of the disputed element in her closing argument immediately before her alleged misstatement. And in *Strommen*, the trial record revealed "strong evidence" supporting the affirmative defense. *Id.* at 689. By contrast, the "strong evidence" here—including Jones's own statements of intent and compelling physical evidence—points only to guilt. *Strommen* is inapposite.

III

We turn to Jones's contention that the district court erred by entering convictions on both second-degree and third-degree assault. A person may not be convicted of both a crime and its included offense. Minn. Stat. § 609.04, subd. 1 (2020). An offense is an included offense if it is a "lesser degree of the same crime." *Id.*, subd. 1(1). The state maintains, as the prosecutor had argued to the jury, that separate acts resulted in separate assaults, one predicated on Jones's striking Jane and the other on his using the board to cause her fear. Jones has the better argument.

Our circumstances are comparable to those in *State v. Tenhoff*, 322 N.W.2d 354 (Minn. 1982). The jury in *Tenhoff* found the defendant guilty of second- and third-degree assault after hearing evidence that the defendant fought a bartender, left the bar, went to the hospital, and returned to the bar and hit a patron with a pool cue. 322 N.W.2d at 355–56. The district court there found that the two offenses were part of the "same behavioral incident" but nevertheless entered convictions for both second- and third-degree assault. *Id.* at 357. The supreme court observed that the district court is best situated to decide the fact question of whether the two offenses were part of a single course of conduct and relied on the district court's finding that they were. *Id.* at 356–57 ("[T]he trial court specifically found that the two offenses were part of the same behavioral incident."). The *Tenhoff* court therefore vacated the conviction on the lesser offense. *Id.* at 357. The district court here likewise reasoned that the entire episode constituted a single behavioral incident. And the circumstances distinguishing the two potential offenses in *Tenhoff* were far more removed from each other than the circumstances distinguishing the two potential offenses here; here,

the purported second assault occurred within seconds of the first, and the only break in action involved the assailant's retrieving a weapon to continue his attack on the same victim. We therefore reverse Jones's third-degree assault conviction and remand the case to the district court to vacate that conviction.

Affirmed in part, reversed in part, and remanded.

GAÏTAS, Judge (dissenting)

I respectfully dissent. The majority's decision to affirm Jones's conviction hinges entirely on the determination that Jones's statements made while he wielded the board were direct evidence of his intent. I disagree that the statements were direct evidence of Jones's intent. In my view, they were circumstantial evidence of his intent. And because the circumstances proved support a reasonable hypothesis that Jones only intended to frighten "Jane," I would reverse Jones's conviction for second-degree assault.

I agree with the majority that an item is not a dangerous weapon if its manner of use or intended use was calculated or likely to produce only fear. Likewise, I agree with the majority that, to establish that an item is a dangerous weapon, the state must prove that it was used or intended to be used in a manner calculated or likely to produce death or great bodily harm. But I disagree that Jones's statements that he was going to beat Jane bloody—made while he stood approximately six feet away from her with the board raised over his shoulder—were direct evidence of his intent.

"[D]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *Id.* (quotation omitted). The key distinction between these two forms of evidence is that circumstantial evidence inherently "requires an inferential step to prove a fact that is not required with direct evidence." *Id.* (citing *State v. Silvernail*, 831 N.W.2d 594, 604 (Minn. 2013) (Stras, J., concurring)).

Because intent is a state of mind, it is "usually proved with circumstantial evidence." *State v. Balandin*, 944 N.W.2d 204, 217 (Minn. 2020); *cf. State v. Kirch*, 322 N.W.2d 770, 773 (Minn. 1982) ("[B]ecause premeditation is a product of the mind, it is incapable of direct proof . . . ."). A defendant's intent can be ascertained "by drawing inferences from the defendant's words and actions in light of the totality of the circumstances." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). And "a defendant's statements as to his intentions are not binding on the jury if his acts demonstrated a contrary intent." *Id.*

Here, there was direct evidence that Jones *made* the statements while wielding the board. The other woman present during the incident testified that he made the statements.

But to determine what the statements proved regarding Jones's state of mind, i.e., his intent, an inference is required. A factfinder could infer from the statements that Jones had the intent to use the board to harm Jane, which would make the board a dangerous weapon. However, a factfinder could also infer from the statements that Jones intended to frighten Jane. Because an inferential step is necessary to ascertain Jones's intent from his statements, I conclude that the statements were circumstantial evidence.

Citing two Minnesota cases, the majority seems to suggest that a defendant's statements *always* constitute direct evidence of intent. *See State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016); *State v. Sawina*, No. A17-1423, 2018 WL 6442049 (Minn. App. Dec. 10, 2018), *rev. denied* (Minn. Feb. 19, 2019). I am not convinced that we can extrapolate such a per se rule in Minnesota from these cases. In *Horst*—where the defendant initiated a plot with accomplices to kill her husband—the supreme court concluded that her statement "I want him dead" was direct evidence of her "knowledge that [her accomplice] would

commit a crime and an intent for her presence or actions to further the commission of the crime." 880 N.W.2d at 29-30, 40. Given the particular facts of *Horst* and the element of the offense at issue there—the defendant's knowledge that her accomplices were going to murder her husband—no inferential step was required to ascertain what her statement proved about her knowledge. *See id.* at 40. Thus, in *Horst*, the statement *was* direct evidence of the element at issue. In *Sawina*, a panel of this court determined that a defendant's statement, "Get out, I'm going to kill you guys," was direct evidence of the defendant's "determination and intent." 2018 WL 6442049, at *3. But *Sawina* is unpublished and does not bind our court. *See Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993) (stating that unpublished opinions are not binding on the court of appeals but may be considered for their persuasive value).

No Minnesota case holds that a defendant's statements are necessarily direct evidence of the defendant's intent. And considering the factual circumstances presented in *this* case, an inference is required to determine what Jones's statements proved about his intent. Thus, the statements were circumstantial evidence.

Where an element of a criminal offense is proven by circumstantial evidence alone, the reviewing court applies a heightened standard of review in considering the sufficiency of the evidence. The reviewing court must "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (quotation omitted). If one or more of the circumstances proved is inconsistent with guilt or consistent with innocence, there is reasonable doubt as to guilt. *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010). A

reviewing court should not "overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *Id.* at 473 (quotation omitted). Inferences of innocence must be reasonable. *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010).

Both of the inferences about Jones's intent that can be deduced from his statements are reasonable. It is reasonable to infer from the statements that he intended to harm Jane. And it is reasonable to infer that he intended to frighten her.[1] Because the purely circumstantial evidence of Jones's intent does not exclude a reasonable hypothesis of innocence, there is reasonable doubt as to Jones's guilt. I would reverse his conviction for second-degree assault.

[1] The majority recognizes that, if the state offered no direct evidence of Jones's intent, "the circumstantial evidence does not prove that [Jones] intended to strike Jane with the board."