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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-978**

State of Minnesota,
Respondent,

vs.

Joshua Dean Lee,
Appellant.

**Filed June 18, 2012
Affirmed
Collins, Judge***

Olmsted County District Court
File No. 55-CR-08-9413

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

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

Thomas R. Braun, Lisa Swenson, George F. Restovich and Associates, Rochester, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and
Collins, Judge.

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

UNPUBLISHED OPINION

COLLINS, Judge

Challenging convictions of first-degree manslaughter and fifth-degree assault, appellant disputes (1) the sufficiency of the evidence that he caused the victim's death, and (2) the district court's jury instructions on (a) substantial-factor causation and (b) aiding and abetting. Because the evidence supports the convictions and the jury instructions are apt and do not misstate the law, we affirm.

FACTS

Joshua Lee was initially charged with second-degree felony murder, predicated on the state's theory that he, together with Adam Brandrup, unintentionally killed the victim during the commission of an unspecified felony, in violation of Minn. Stat. 609.19, subd. 2 (1) (2008). The complaint was amended to add the count of first-degree manslaughter, unintentionally causing the death of another while committing a fifth-degree assault, in violation of Minn. Stat. § 609.20, subd. 2 (2008). Following the close of evidence at trial, at the state's request, jury instructions on third-degree assault, a felony, and fifth-degree assault, a misdemeanor, were added.

The charges stemmed from an incident on October 2, 2008, at approximately 1:30 a.m., in an alley behind a downtown Rochester bar. Earlier, Lee and a group of friends, including Brandrup, argued with members of another group of patrons in the bar. The eventual victim was among the other group of patrons but was not involved in the argument.

One member of the other group of patrons, M.O., threw a pool ball at one of Lee's friends, hitting him in the head. M.O. was pushed out the front door of the bar and chased down the street by two members of Lee's group of friends. Lee and Brandrup left the bar together shortly thereafter.

In the alley behind the bar, Lee and Brandrup encountered the victim. Apparently believing him to be a member of M.O.'s group, Brandrup punched the victim on the side of his head and threw him to the ground. Lee then kicked the victim in his chest two to four times. Lee and Brandrup left the alley together, while the victim remained motionless on the ground.

Police and emergency personnel arrived within ten minutes after the assault and found the victim to be nonresponsive and without a pulse; they were unable to resuscitate him. The county medical examiner was summoned and pronounced the victim deceased.

Following an autopsy, the medical examiner determined the cause of death to be homicide resulting from "an arrhythmia^[1] in the context of an assault." In determining cause of death, the medical examiner relied, in part, on a surveillance videotape of the scene of the incident that showed "a man who was upright and who, after an alleged assault, was pushed around, was lying down." The medical examiner determined the time of death to be within "an interval of time between an assault and when [the victim was pronounced] deceased, about a 10-minute interval of time."

The autopsy revealed multiple recent bruises and damage to the left side of the victim's face, specifically an abrasion on the upper lip and bruising over the cheek and

¹ An arrhythmia is "a condition of an abnormal or absent heart rhythm."

orbital area. There was not much blood on the victim at the time of the autopsy, but internal bleeding was noted. The medical examiner concluded that the multiple bruises or “blunt force injuries” were consistent with an assault.

The medical examiner’s report identified several contributing factors to the victim’s death, including “recent cocaine use, recent ethanol use and pulmonary emphysema.” The medical examiner concluded that these contributing factors did not cause the victim’s death.

At trial, Lee offered expert testimony from a medical doctor, who testified that the cause of the victim’s death was “undetermined.” The doctor indicated that the presence of cocaine in the victim’s system “could very well be the explanation for why [the victim] died.”

On the charge of first-degree manslaughter, the district court instructed the jury:

First, the death of [the victim] must be proven.
Second, [Lee] caused the death of [the victim]
Third, at the time of causing the death of [the victim], [Lee] was committing Fifth Degree Assault.

Regarding the causation element of the charge, the district court instructed:

To “cause” in the context of the homicide charges made here, means that an assault was a substantial factor in bringing about death. An assault may be a substantial factor in bringing about death and, thus, may be found to have caused death, even if it is not the sole cause, but rather is a substantial link in a causal chain that results in death.

Lee was acquitted of second-degree murder and third-degree assault and was convicted of first-degree manslaughter and fifth-degree assault. The district court granted

Lee's request for a mitigated durational departure and sentenced him to a 60-month prison term. This appeal followed.

DECISION

I.

Lee asserts there was insufficient evidence to support the jury's determination that he caused the death of the victim.

When considering a claim of insufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jurors to reach the verdict that they did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). "The verdict will be upheld if the fact finder, giving due regard to the presumption of innocence and to the state's burden of proof beyond a reasonable doubt, could reasonably have found the defendant guilty of the offense charged." *State v. Thomas*, 590 N.W.2d 755, 757-58 (Minn. 1999). Reviewing courts recognize that the fact-finder is in the best position to evaluate the credibility of witnesses and assume that the state's witnesses were believed. *State v. Profit*, 591 N.W.2d 451, 467 (Minn. 1999).

Here, the medical examiner classified the victim's death as a homicide. The medical examiner reviewed a videotape of the incident and noted that the victim was standing, was assaulted, and approximately ten minutes later was deceased. The medical examiner performed the autopsy and found physical evidence of an assault. Based on the testimony of the medical examiner, the jury could reasonably conclude that the assault caused the victim's death.

Lee argues that it was improper for the jury to consider the circumstantial evidence presented in the videotape and cited by the medical examiner, namely, that the victim was standing up, was assaulted, went to the ground, and was deceased within a ten-minute interval thereafter. However, “[c]ircumstantial evidence is entitled to the same weight as direct evidence.” *Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004); *see also* 10 Minnesota Practice CRIMJIG 3.05 (5th ed. 2006) (“A fact may be proven by either direct or circumstantial evidence, or by both. The law does not prefer one form of evidence over the other.”). Thus it was not improper for the medical examiner or the jury to consider the circumstantial, temporal connection between the assault and the victim’s death in evaluating causation.

Lee implies that we should reweigh the expert testimony given by the medical examiner and Lee’s expert to reach the conclusion that “it was not reasonable for a jury to conclude that there was no reasonable doubt as to the causation element.” But

[w]here the opinions of reputable doctors have a reasonable basis on the facts, it must be left to the trier of facts to say who is right when other doctors have conflicting opinions. [T]he credibility of the witnesses and the weight to be given their testimony, whether it be opinion evidence or otherwise, is for the trier of fact.

State v. Ostlund, 416 N.W.2d 755, 760 (Minn. App. 1987) (quotation omitted), *review denied* (Minn. Feb. 24, 1987).

Here, it appears the opinion of the medical examiner was reasonably based on the facts; he saw the recording of an assault, a death occurred within ten minutes thereafter, and physical evidence of an assault was revealed by the autopsy. In considering a

challenge to the sufficiency of evidence, we must assume that “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). Because the jury could reasonably believe the medical examiner’s testimony, sufficient evidence supported the jury’s determination that the victim’s death was caused, within the meaning of that term in the context of the charges, by the assault in which Lee participated.

II.

Appellate courts “review a district court’s decision to give a requested jury instruction for an abuse of discretion.” *State v. Koppi*, 798 N.W.2d 358, 361-62 (Minn. 2011). “[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case.” *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). “A jury instruction is erroneous if it materially misstates the applicable law.” *Koppi*, 796 N.W.2d at 362.

A. Substantial-Factor Causation

Lee argues that the district court erred in its instruction to the jury on causation because (1) the instruction defined cause where no definition was needed and (2) public policy dictates that courts should not instruct on substantial-factor causation when a homicide victim has ingested an illegal substance. We disagree.

The district court instructed the jury that causation was proved if “an assault was [a] substantial factor in bringing about death” and that “[a]n assault may be a substantial factor in bringing about death and, thus, may be found to have caused death, even if it is

not the sole cause, rather is a substantial link in a causal chain that results in death.” In deciding to give the instruction, the district court explained:

I think [causation] is just too important a part of this case and would leave the jury potentially confounded if we don't give them a definition of “causation,” particularly in a case like this one where it is certainly reasonably arguable there is more than one thing going on here, and so I think a definition is helpful to the jury. I think it is necessary in this case.

Substantial-factor causation is a well-rooted principle of criminal law. *See* Wayne R. Lafave, *Criminal Law* § 6.4(b), at 354 (5th ed. 2010) (“[T]he test for causation-in-fact is more accurately worded, not in terms of but-for cause, but rather: Was the defendant’s conduct a substantial factor in bringing about the forbidden result?”). In a homicide case, causation is established by proof that the defendant’s conduct was a substantial-causal factor in bringing about the victim’s death. *State v. Hofer*, 614 N.W.2d 734, 737 (Minn. App. 2000), *review denied* (Minn. Aug. 15, 2000).

Instructing on substantial-factor causation in the context of a homicide case is not an abuse of discretion. *See State v. Jaworsky*, 505 N.W.2d 638, 643 (Minn. App. 1993) (holding that district court within its discretion in giving instruction defining causation as something that played a substantial part in bringing about the death or injury), *review denied* (Minn. Sept. 30, 1993); *see also State v. Smith*, 224 Minn. 307, 321-23, 119 N.W.2d 838, 848-49 (1962) (holding that instruction that “if the said beating, striking, and kicking were . . . substantial factors in the death, then the chain of causation is not broken by reason of the fact that another contributory cause would have been fatal” properly stated law of proximate causation in context of homicide case); *State v. Olson*,

459 N.W.2d 711, 716 (Minn. App. 1990) (holding that instruction that “causal chain is not broken by the fact that a physical condition . . . may have made [the victim] more susceptible to injury” correctly stated law), *review denied* (Minn. Oct. 25, 1990).

Although Lee objected to the giving of the instruction, he did not argue that the substantial-factor-causation instruction misstated the law:

The court: So what you’re saying is the defense objects to a causation definition instruction at all.

[Defense counsel]: That’s right, but if the Court is going to give one . . . then the definition that is crafted is as close to the Minnesota law that the defense has found in this case.

The district court’s instruction on substantial-factor causation correctly stated the law. We conclude that the district court did not abuse its discretion in giving the instruction or in its formulation.

Lee argues that an instruction on substantial-factor causation violates public policy when the victim has ingested an illegal substance. Ordinarily, a victim’s causal contributory negligence is not a defense to a crime. *State v. Crace*, 289 N.W.2d 54, 56, 59 (Minn. 1979) (holding that even if victim was negligent in dressing in black and drinking while hunting, it would not relieve defendant from liability); *In re Welfare of J.G.B.*, 473 N.W.2d 342, 346 (Minn. App. 1991) (stating that even if victim had been driving negligently, it would not have relieved defendant from liability); *State v. Munnell*, 344 N.W.2d 883, 885, 887-88 (Minn. App. 1984) (holding that district court properly refuse to instruct jury on contributory negligence when victim’s intoxication and fact that he was lying in middle of road did not relieve driver of criminal liability).

Minnesota law does not differentiate between contributory negligent acts that are legal and those that are illegal. The question for the fact-finder is causation, and the classification of a victim's contributing negligent act as legal or illegal has no relevance to the fact-finder's consideration of this essential element. Lee's argument that we should introduce such a distinction into the analysis of causation in homicide cases is unpersuasive.

B. Aiding and Abetting

Lee argues that the district court abused its discretion on giving the standard jury instruction on aiding and abetting because no evidence was introduced at trial that Lee aided and abetted Brandrup in the commission of an assault. We disagree.

Liability under an aiding and abetting theory attaches when a defendant "plays some knowing role in the commission of the crime and takes no steps to thwart its completion." *State v. Swanson*, 707 N.W.2d 645, 658-59 (Minn. 2006) (quotation omitted). "Jurors can infer the [intent to aid and abet] from factors including: 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." *Id.* at 859 (quotation omitted).

Here, evidence was introduced that Lee and Brandrup left the bar together and encountered the victim in the alley. Evidence showed that Lee kicked the victim repeatedly, immediately after Brandrup punched the victim and threw him to the ground. Lee and Brandrup then left the alley together. Lee's contention that there was no

evidence introduced at trial supporting the theory that he aided and abetted Brandrup in an assault is simply wrong.

Lee does not argue that the district court's instruction on aiding and abetting misstated the law. Arguments not made on appeal are waived. *State v. Hurd*, 763 N.W.2d 17, 32 (Minn. 2009). Because evidence supported the state's theory that Lee aided and abetted Brandrup in the commission of the assault, the district court did not abuse its discretion in instructing the jury on aiding and abetting as it did.

Affirmed.