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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2147**

State of Minnesota,
Respondent,

vs.

Kabba Kangbateh,
Appellant.

**Filed December 3, 2012
Affirmed in part, reversed in part, and remanded
Collins, Judge***

Ramsey County District Court
File No. 62-CR-10-5352

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Worke, 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UNPUBLISHED OPINION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

Appellant challenges his convictions of attempted second-degree murder for the benefit of a gang, attempted second-degree murder, second-degree assault for the benefit of a gang, and second-degree assault. Appellant argues that (1) the evidence is insufficient to support the convictions, (2) his trial counsel was ineffective, and (3) the district court erred in adjudicating convictions on all four counts. Because the evidence is insufficient to conclude that appellant acted for the benefit of a gang, we reverse his convictions of attempted second-degree murder for the benefit of a gang and second-degree assault for the benefit of a gang. We affirm appellant's convictions of attempted second-degree murder and second-degree assault, and remand for sentencing on the conviction of attempted second-degree murder.

FACTS

Appellant Kabba Kangbateh was charged with attempted second-degree murder for the benefit of a gang, attempted second-degree murder, second-degree assault for the benefit of a gang, and second degree assault. The case was tried to a jury. The following summary of facts is drawn from the trial record.

Early on March 6, 2010, K.W. was shot after leaving a house party in the area of University, Prior, and Minnehaha avenues in St. Paul. K.W. could not identify who shot him. St. Paul police officers were already at the scene of the house party in response to a report of an unpaid cab fare. Sergeant David Stokes was outside, heard the shot, and believed it was from a gun larger than .22 caliber. About 30 seconds later, looking in the

direction of the sound of the shot, Sergeant Stokes saw Kangbateh in an alley near the garage behind 1927 Minnehaha Avenue. Officers identified themselves and Kangbateh ran down the alley. Officers eventually found Kangbateh on the porch of a nearby house.

K-9 officer Jason Brodt was called to the scene. Officer Brodt's dog tracked from the alley through the back and front yards of 1927 Minnehaha Avenue, and eventually nudged open the door to the garage. Officer Brodt entered the garage and saw a rifle and a mask on the floor. The rifle was later identified as a .303 caliber rifle. The rifle was inspected, found to be loaded, and had an expended cartridge in the chamber. Bullet fragments removed from K.W.'s shoulder did not have forensic value and could not be connected to the rifle.

DNA was recovered from the rifle and the mask. Kangbateh's DNA profile matched the profile of the predominant DNA profile on the mask and matched the only DNA profile found on the rifle. It is unknown, however, from which part of the rifle Kangbateh's DNA was obtained. A warranted search of Kangbateh's house produced a *Guns and Ammo* magazine and ammunition of a different caliber than the recovered rifle.

K.W. associates with a street gang called the Eastside Boys, but he is not a member. On the night he was shot, K.W. twice argued with A., who is a member of a gang called the Latin Kings. The house party took place in the territory of a gang called the Selby Siders. K.W. had only a minor conflict with a Selby Sider in the past, regarding a girl he had dated, but no Selby Siders had shown animosity toward K.W. that night. K.W. had never seen Kangbateh before and there was no history of a dispute between them.

The state presented evidence that a shooting occurred between members of the Eastside Boys and the Selby Siders at another location on the same day K.W. was shot. Another shooting related to the gangs occurred approximately eight months later. Sergeant Jennifer Corcoran testified that she saw Kangbateh at a sentencing hearing for a Selby Sider member who had shot and killed an Eastside Boy in November 2007. She also testified that she talked with Kangbateh a few days later at his school and took a blue bandana away from him because it symbolized a gang affiliated with the Selby Siders.

Kangbateh associates with the Selby Siders, but he is not a member. He testified that he knows many Selby Siders, has associated with them for years, and has worn blue bandanas. He testified that he took a cab to the party the night of the shooting but did not have enough money to pay the fare. Kangbateh went to the party to find his friend and get money. He did not find his friend but began talking to someone else he knew. When the police arrived, he and other young men fled the party and hid in a nearby garage. They were joking around with a mask and showing off a rifle. Kangbateh testified that he tried on the mask and held the rifle, but did not fire it. He then returned the rifle to one of the other young men.

Kangbateh further testified that the other young men eventually left the garage. He then heard a loud booming noise from outside, and the others ran back into the garage. Kangbateh testified that he then left the garage, heard something, panicked, and ran. He kept running after he realized that the police were chasing him.

The jury found Kangbateh guilty on all four counts. The district court entered convictions on all counts and sentenced Kangbateh to 165 months for attempted second-degree murder for the benefit of a gang. This appeal followed.

D E C I S I O N

Kangbateh argues that (1) the evidence was insufficient to prove he shot K.W., and if it was, the evidence was nevertheless insufficient to prove he shot K.W. for the benefit of a gang; (2) his trial counsel was ineffective for not seeking a hearing to inquire as to whether jurors had seen a booking photograph of Kangbateh found in a public restroom during the trial; and (3) the district court erred in adjudicating convictions on all four counts.

I.

Kangbateh argues that the circumstantial evidence against him is insufficient to prove that he was the person who shot K.W. He also argues that, even if the evidence is sufficient to prove that he shot K.W., it is nevertheless insufficient to prove that he shot K.W. for the benefit of a gang.

An appellate court assesses the sufficiency of the evidence supporting a conviction by determining whether the legitimate inferences drawn from the evidence in the record would permit a jury to conclude that the defendant was guilty beyond a reasonable doubt. *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). An appellate court is “limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach their verdict.” *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted).

An appellate court applies heightened scrutiny when reviewing a verdict based on circumstantial evidence. *Pratt*, 813 N.W.2d at 874. The circumstances proved must be consistent with guilt and inconsistent with any other rational hypothesis. *Id.* “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.” *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

Minnesota courts employ a two-step process when reviewing convictions based on circumstantial evidence. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). First, the reviewing court identifies the circumstances proved. *Id.* In doing so, the court views the evidence in the light most favorable to the verdict. *See Pratt*, 813 N.W.2d at 874. The court defers to the jury’s acceptance and rejection of proof and to the jury’s credibility determinations. *Andersen*, 784 N.W.2d at 329. This deference is because juries are generally “in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony.” *Id.*

Next, the reviewing court examines the reasonableness of the inferences that can be drawn from the circumstances proved, including inferences of innocence as well as guilt. *Id.* All of the circumstances proved must be consistent with guilt and inconsistent with any other rational hypothesis negating guilt. *Id.* at 330. The reviewing court does not defer to the jury’s choice between rational hypotheses. *Id.* at 329-30. But a rational hypothesis that negates guilt must be based on more than mere conjecture. *Id.* at 330.

Kangbateh concedes that “[t]he circumstantial evidence possibly supports the state’s theory” that he shot K.W. We agree. However, Kangbateh argues that the circumstances proved are consistent with two rational theories of innocence: (1) another gun was used to shoot K.W. and (2) another person used the rifle found in the garage to shoot K.W.

With regard to whether Kangbateh was the person who shot K.W., this court considers the evidence in the light most favorable to the verdict. *See Caine*, 746 N.W.2d at 356. The circumstances proved are as follows: The shot that hit K.W. originated from the general area where Sergeant Stokes saw Kangbateh just seconds after hearing the shot. The sound of the shot was consistent with a gun larger than .22 caliber. Upon seeing or hearing the police identify themselves, Kangbateh fled. Kangbateh handled the .303 caliber rifle and mask found in a garage in the area where the shot originated. The recovered rifle had been fired. However, there is no physical evidence showing that Kangbateh pulled the trigger of the rifle or physical evidence connecting the rifle to the bullet fragments removed from K.W.’s shoulder.

In support of his theory that another gun was used to shoot K.W., Kangbateh points to the facts that the bullet fragments taken from K.W.’s shoulder could not be connected to the rifle found in the garage, K.W. did not identify Kangbateh as the shooter, Kangbateh and K.W. did not know each other, and K.W. had argued with A., the Latin King member, that night. Kangbateh concludes that “[t]hese circumstances support a rational theory that [A.] and/or his Latin King cohorts shot [K.W.] with a different firearm that night.” Kangbateh relies on *State v. Al Naseer* to further argue that this

theory—that A. or another Latin King member used a different gun to shoot K.W.—is based on evidence in the record and is therefore not speculation or conjecture. 788 N.W.2d 469, 480 (Minn. 2010) (“It is true that we do not set aside verdicts based on speculation. However, . . . a defendant is not relying on conjecture or speculation when the defendant . . . point[s] to evidence in the record that is consistent with a rational theory other than guilt.” (quotation omitted)).

Kangbateh’s argument is not persuasive. In *Al Naseer*, the supreme court found that the circumstances proved did not support a conviction because the circumstantial evidence used to prove the mens rea element of a criminal-vehicular-homicide conviction were consistent with the hypothesis that the driver was asleep or otherwise unconscious when his vehicle hit a pedestrian. *Id.* The supreme court noted that the hypothesis was not based on speculation or conjecture because the inference that the driver was unconscious was based on circumstances proved, specifically that the “vehicle did not react to either the noise or jolt of the impact; it did not swerve, brake, or accelerate, but rather drifted past [the victim’s] vehicle along the shoulder of the road for another 150 feet, and then gradually returned to the highway.” *Id.* at 479. The supreme court held that the state had not proved beyond a reasonable doubt that the driver knew he was involved in an accident with a person or another vehicle. *Id.* at 480-81.

The *Al Naseer* hypothesis negating guilt relied only upon circumstances proved at trial, while Kangbateh’s theory that another gun was used to shoot K.W. is reasonable only by assuming evidence that was never presented at trial. While it is true that the bullet fragments removed from K.W.’s shoulder lacked forensic value and therefore

could not be connected to the rifle found in the garage, it is also true that no other gun was found from which the shot could have been fired. Kangbateh's theory that another gun was used to shoot K.W. is reasonable only if there is another gun. And because the presence of another gun is not a fact in the record, Kangbateh's theory relies on conjecture and cannot be accepted. *See Andersen*, 784 N.W.2d at 329.

The rest of Kangbateh's theory that A. and or his "Latin King cohorts" shot K.W. is more of an argument that another person, rather than another gun, shot K.W. But this is also conjectural. Although K.W. and A. twice argued on the night of the shooting, there is no evidence linking A. or anyone associated with A. to a gun, a shooting, or the scene at the time the shooting occurred.

Kangbateh also advances a second theory of innocence—that another person used the rifle found in the garage to shoot K.W. Specifically, Kangbateh argues that the circumstances proved "are consistent with the defense theory that the other men in the garage owned the rifle, took it from Kangbateh and exited the garage before he heard the shot fired." However, this theory also depends on circumstances that were not proved. At trial, Kangbateh testified that he was in the garage with other young men, the others left the garage with the rifle, and he then heard a shot fired while he was still in the garage. But had the jurors found this testimony credible, they would have acquitted Kangbateh of the charges. They did not. *Id.* (stating that in determining the circumstances proved, "we defer, consistent with our standard of review, 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" (quotation omitted)).

In sum, the only gun related to the scene was the .303 caliber rifle the police found in the garage. Sergeant Stokes saw Kangbateh in the vicinity of the garage within seconds after the shot was fired. After the police identified themselves, Kangbateh fled. The rifle was loaded and had an expended cartridge in the chamber. DNA found on the rifle matched Kangbateh's DNA profile. This evidence is sufficient for the jury to have made a legitimate inference and conclude beyond a reasonable doubt that Kangbateh shot K.W. with the rifle. The theories of innocence Kangbateh proposes are either based on conjecture or circumstances that were not proved at trial. We therefore conclude that the evidence is sufficient to sustain the convictions of attempted second-degree murder and second-degree assault.

However, we agree with Kangbateh that the evidence is insufficient to prove that he shot K.W. for the benefit of a gang. "A person who commits a crime for the benefit of, at the direction of, in association with, or motivated by involvement with a criminal gang, with the intent to promote, further, or assist in criminal conduct by gang members is guilty of a crime." Minn. Stat. § 609.229, subd. 2 (2008).

When we consider the evidence in the light most favorable to the verdict, the circumstances proved are as follows. K.W. associates with Eastside Boys but is not a member of that gang. Kangbateh associates with Selby Siders but is not a member of that gang. The Eastside Boys and the Selby Siders are rivals whose members have shot each other's members. K.W. had never seen Kangbateh before and had never had any disputes with him. In 2007, Kangbateh attended a sentencing hearing for a Selby Sider member

who had shot and killed an Eastside Boy, and a few days later Kangbateh wore a blue bandana said to symbolize affinity with the Selby Siders.

The circumstances proved are not sufficient for the jury to conclude beyond a reasonable doubt that in 2010 Kangbateh shot K.W. to benefit a gang, at the direction of a gang, or was motivated by involvement with a gang. *See* Minn. Stat. § 609.229, subd. 2. The state proved only that Kangbateh associates with Selby Siders. The fact that the Selby Siders and the Eastside Boys are rivals and that members of the two gangs have been violent toward each other says nothing about Kangbateh's motivation at the time of the shooting. We therefore conclude that the evidence was insufficient to permit the jury to find that Kangbateh shot K.W. for the benefit of a gang. Accordingly, we reverse Kangbateh's convictions of attempted second-degree murder for the benefit of a gang and second-degree assault for the benefit of a gang. We affirm Kangbateh's convictions of attempted second-degree murder and second-degree assault.

II.

Kangbateh next argues that his attorney was ineffective for not requesting a hearing to question jurors about whether they had seen a booking photo of Kangbateh with the word "gunner" written above his photo. The booking photo was found in a women's restroom at the courthouse during trial. Kangbateh did not raise this issue through a postconviction proceeding, arguing that the record is sufficient to allow review of the claim on direct appeal. Kangbateh asks, however, that this court now remand for the district court to hold a hearing to determine whether any of the jurors saw the photo and whether a deputy intentionally left the photo in the restroom.

To establish ineffective assistance of counsel, the “defendant must affirmatively prove that his counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

The supreme court “has repeatedly said that an appeal from a judgment of conviction is not the most appropriate way of raising an issue concerning the effectiveness of the trial counsel’s representation.” *State v. Hanson*, 366 N.W.2d 377, 379 (Minn. App. 1985). “This issue is more effectively presented in a postconviction proceeding.” *Id.* “[A] defendant intending to raise the issue of ineffective assistance of trial counsel among other issues should first file a direct appeal. If an evidentiary hearing is necessary to resolve factual issues, the defendant should move the appellate court for a stay of the appeal pending [a postconviction] hearing.” *Garasha v. State*, 393 N.W.2d 20, 22 (Minn. App. 1986) (citation omitted).

Kangbateh argues that the record is sufficient to review his ineffective-assistance-of-counsel claim yet recognizes that a hearing is necessary to resolve factual issues, specifically “whether and why any jurors saw this inflammatory document.” Our precedent makes clear that a postconviction proceeding is the proper venue to resolve factual issues regarding ineffective-assistance-of-counsel claims. We therefore deny Kangbateh’s requested relief on this appeal. *See State v. Wenberg*, 357 N.W.2d 355, 356 (Minn. App. 1984) (holding that it is “inappropriate for appellant to make [his

ineffective-assistance-of-counsel claim] on appeal” because the “issue should be addressed in a post-conviction proceeding”), *review denied* (Minn. Feb. 6, 1985).

III.

Finally, Kangbateh argues that the district court erred by entering judgments of conviction on all four counts and that, even if properly found guilty of more than one offense, he should receive a conviction and sentence only for the most serious offense of which he was found guilty. We agree.

We are reversing Kangbateh’s convictions of attempted second-degree murder for the benefit of a gang and second-degree assault for the benefit of a gang, leaving Kangbateh with convictions of attempted second-degree murder and second-degree assault. “Upon prosecution for a crime, the [defendant] may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2008). “Assault with a dangerous weapon is not a lesser included offense of attempted second-degree murder.” *State v. Gayles*, 327 N.W.2d 1, 3 (Minn. 1982).

Accordingly, we remand for sentencing on Kangbateh’s most serious remaining conviction, attempted second-degree murder, and we do not disturb Kangbateh’s conviction of second-degree assault.

Affirmed in part, reversed in part, and remanded.