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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1593**

State of Minnesota,
Respondent,

vs.

Lonnell Javey Powell,
Appellant.

**Filed August 26, 2013
Affirmed
Smith, Judge**

Hennepin County District Court
File No. 27-CR-11-27891

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David Merchant, Chief Appellate Public Defender, Lydia M. Villalva Lijò, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Schellhas, Judge; and Chutich, Judge.

UNPUBLISHED OPINION

SMITH, Judge

We affirm appellant's conviction of second-degree murder because there is sufficient evidence to support the conviction and because appellant's level of voluntary

intoxication did not vitiate his ability to form the requisite intent to commit murder. We also address appellant's pro se procedural-due-process and ineffective-assistance-of-counsel arguments.

FACTS

On September 2, 2011, a group of individuals, including the eventual victim S.H., gathered at a Minneapolis home intending to go downtown for the evening. At approximately 9:00 p.m., appellant Lonnell Powell arrived at the gathering with two of his friends. Individuals in the home were drinking alcohol and smoking marijuana. According to Powell, he consumed five beers, roughly 45% of a bottle of vodka, and smoked marijuana. Powell recognized a few of the individuals in the home and, after flirting with a woman, gave her his phone number.

Around 11:30 p.m., the group that had originally gathered at the home and Powell and his two friends began "not getting along out of nowhere." Powell began arguing with S.H. and T.M. and eventually punched both men in the head. The fight escalated to involve all of the adult males in the home, and pitted Powell and his friends against S.H. and T.M. The altercation caused significant damage inside the home and the men utilized broken furniture as weapons. Eventually, Powell and his friends exited the residence and walked to where their van was parked.

Before entering the residence, Powell, who normally carried a handgun, had placed it inside the engine compartment of the van. While Powell's friends laughed about the incident, Powell lifted the hood of the van and removed the handgun. Powell loaded a bullet into the chamber, readying it to be fired, and began approaching the

residence. Two individuals who had followed Powell and his friends to the van pleaded with Powell not to reenter the home. One of the individuals twice attempted to physically prevent Powell's reentrance into the home. According to the individual, Powell appeared "crazy," "very determined," and "too busy trying to do what he was doing."

Powell entered the home, confronted S.H., and shot him. The individual who attempted to block Powell's reentrance saw Powell shoot S.H. and, after the first shot, fled to remove the children from the home. The individual testified that, as she ran, she heard S.H. beg for his life between the first shot and those that followed. Witnesses recalled hearing five or six shots. S.H. died at the scene. Witnesses also observed Powell aiming his handgun at T.M., the other man with whom Powell had fought earlier in the evening and who fled to a nearby bedroom. A bullet was recovered from a wall in this bedroom.

Witnesses identified Powell as the shooter after reviewing a photographic line-up. Using the telephone number that Powell had provided to one of the women at the home, investigators discovered that the telephone number matched one of Powell's aliases. Following his arrest, Powell was charged with second-degree murder and attempted second-degree murder. A grand jury later indicted Powell for the first-degree murder of S.H. and attempted first-degree murder of T.M.¹

Powell elected to have a bench trial during the voir dire process. After the state rested, the district court informed Powell of his right to remain silent. Powell testified on his own behalf. Powell testified that at least four hours before the shooting he smoked

¹ The state later dismissed the attempted first-degree murder charge.

two PCP-laced cigarettes. The amount of PCP Powell ingested was similar to that which he had ingested on previous occasions. Powell testified that although PCP often made him feel paranoid and caused hallucinations, he experienced neither of those symptoms on the night of the shooting. Powell did not dispute that he shot S.H. or that he fired his handgun at T.M. Rather, Powell declared that he was “pretty messed up” and only remembered the initial altercation inside the house and had no recollection of retrieving the handgun. Powell testified that he remembered the following: (1) placing his gun inside the van; (2) flirting with a woman inside the home; (3) having a physical altercation with S.H. and T.M.; (4) being angry following the fight; (5) seeing S.H. on the floor; (6) fleeing the scene; and (7) disposing of his gun. Powell also called a witness to substantiate his alleged level of intoxication. Based on information provided by Powell regarding the substances he ingested, it was estimated that Powell’s blood alcohol level at the time of the shooting would have ranged from .17 to .19. The witness also related that ingesting PCP can cause memory loss and disordered thinking.

The district court acquitted Powell of first-degree murder but convicted him of second-degree intentional murder. The district court determined that the state failed to establish that the killing was premeditated because “the killing is closer to a rash, impulsive act than one that was thought through.” However, after analyzing the sequence of events and because Powell targeted only the individuals with whom he fought, the district court concluded that “[t]here is no doubt that [Powell] intended to kill [S.H.] when he shot him five times.” The district court considered Powell’s asserted voluntary-

intoxication defense, concluding that Powell's insistence that he ingested PCP was "completely uncorroborated and particularly self-serving." The district court explained:

After carefully considering all the evidence, the Court concludes that [Powell] has shown by a preponderance of the evidence that he was intoxicated the night of the killing. In deciding that [Powell] had the intent to kill [S.H.] but did not premeditate the killing, the Court has considered the evidence of [Powell's] intoxication. That evidence, however, was only one relevant factor in reaching those decisions. [Powell's] intoxication did not create a reasonable doubt as to the element of intent to kill. The evidence of [Powell's] intent to kill was so overwhelming that the Court has no doubt [Powell] intended to kill [S.H.] even though he may have been intoxicated.

Powell was sentenced to 439 months' imprisonment.

D E C I S I O N

Powell argues on appeal that the evidence presented to the district court was insufficient to establish that he was capable of forming the requisite intent to commit intentional murder. Also, in a supplemental pro se brief, Powell argues that the district court violated his procedural-due-process rights and contends that he received ineffective assistance of counsel. We address these arguments individually.

I.

When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis of the record to determine whether the jury reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the guilty verdict,

assuming that the jury believed the evidence supporting the verdict and disbelieved evidence to the contrary. *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). We will not disturb a guilty verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). Determining the credibility and the weight of witness testimony is within the exclusive province of the factfinder. *State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998). The fact that a defendant opts for a bench trial rather than a jury trial does not alter these guidelines. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1990).

Circumstantial evidence is entitled to the same weight as any other evidence, provided that the “circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *State v. Pirsig*, 670 N.W.2d 610, 614 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004). For circumstantial evidence to support a conviction, the 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. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012) (quotation omitted).

Powell was convicted of second-degree murder, in violation of Minn. Stat. § 609.19, subd. 1(1) (2010). The statute provides that, “[w]hoever . . . causes the death of a human being with intent to effect the death of that person or another, but without premeditation,” is guilty of second-degree murder. *Id.* Under the statute, the phrase “with intent to” means “the actor either has a purpose to do the thing or cause the result

specified or believes that the act, if successful, will cause that result.” Minn. Stat. § 609.02, subd. 9(4) (2010).

It is undisputed that voluntary intoxication can serve as a defense to a second-degree murder charge because second-degree murder is a specific-intent crime. See Minn. Stat. § 609.075 (2010) (discussing intoxication as a defense); *State v. Torres*, 632 N.W.2d 609, 616 (Minn. 2001). In order for a factfinder to consider a voluntary-intoxication defense, it is required that (1) the defendant be charged with a specific-intent crime; (2) the preponderance of the evidence supports a finding of intoxication; and (3) intoxication is suggested as a reason for the defendant’s behavior. *Torres*, 632 N.W.2d at 616. However, intoxication does not render a defendant incapable of forming the requisite intent to commit a crime. *State v. Hale*, 453 N.W.2d 704, 707 (Minn. 1990). Rather, a defendant’s intoxication is only one fact that the factfinder is entitled to consider when determining whether the defendant formed the requisite intent. *State v. Cole*, 542 N.W.2d 43, 49 (Minn. 1996).

This court employs a two-part test when considering the intent element of a crime if it is established by circumstantial evidence. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). First, we identify the circumstances proved by the evidence; then, we independently examine the reasonableness of all inferences drawn from those circumstances and determine whether there is a reasonable inference other than guilt. *Id.* When engaging in such an analysis, we view the evidence as a whole. *Id.* at 623. An appellant must demonstrate more than mere conjecture to overturn a conviction based on circumstantial evidence. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998).

The circumstances proved establish that Powell (1) exited a Minneapolis home after having a physical altercation with S.H. and T.M.; (2) retrieved a gun that he earlier placed in the engine well of a vehicle; (3) ignored pleas to not return to the house; (4) targeted only S.H. and T.M. upon reentering the premises; (5) shot S.H. five times at close range; (6) fled the scene; and (7) disposed of the murder weapon. In considering these circumstances, the district court opined that, “The evidence of [Powell’s] intent to kill was so overwhelming that the Court has no doubt [that Powell] intended to kill [S.H.] even though [Powell] may have been intoxicated.”

Powell contends that his level of intoxication mitigated his ability to form the intent required to commit murder and, as a result, urges us to reverse his conviction. It is undisputed that Powell’s situation satisfies the requirements to assert a voluntary intoxication defense. *See Torres*, 632 N.W.2d at 616. However, his arguments on appeal ignore the fact that we must defer to the district court’s assessment of witness credibility. Specific to Powell’s assertions that he was intoxicated as a result of smoking PCP-laced cigarettes, consuming marijuana, and imbibing alcohol, the district court determined that Powell’s testimony was “incredible,” “self-serving,” “uncorroborated,” and displayed a “selective memory.” The district court determined that “[Powell] was sober enough to remember he had a gun hidden . . . and was able to shoot [S.H.] five times without missing.” This determination establishes that the district court properly weighed voluntary intoxication as only one consideration in a requisite-intent analysis. *See Hale*, 453 N.W.2d at 707 (“The trial court, as fact finder, was free to credit or not to credit the evidence of intoxication. If the trial court credited the evidence, the court was free to

give it whatever weight it felt the evidence deserved.”); *Cole*, 542 N.W.2d at 49-50 (concluding that despite the defendant’s consumption of “a variety of severely addictive illegal drugs” the defendant’s ability to act as a “genuine” retail consumer before committing violent acts supported the jury’s conclusion that the defendant was able to form intent). Ultimately, the district court determined the weight to be given to Powell’s alleged intoxication, explaining that, “In deciding that [Powell] had the intent to kill [S.H.] but did not premeditate the killing, the Court has considered the evidence of [Powell’s] intoxication.” Given this carefully detailed explanation, we defer to the district court’s assessment.

We are persuaded that the circumstances proved do not support any reasonable inference other than guilt. Powell, despite being intoxicated, was cognizant and angry over a physical altercation, remembered where he had hidden a weapon, retrieved it, targeted only those who were the source of his anger, killed one of those individuals and fired his weapon at the other, fled the scene, and disposed of the murder weapon. These actions demonstrate intent. See Minn. Stat. § 609.02, subd. 9(4). Powell’s only asserted mitigating argument was his voluntary intoxication, which the district court considered when assessing Powell’s credibility. Essentially, Powell asks that we reverse the district court’s credibility determination and find that his level of intoxication was too extreme to allow him to take intentional action. This request is beyond our purview. See *Folkers*, 581 N.W.2d at 327. The district court fully considered the burden of proof and Powell’s presumption of innocence before concluding that he committed intentional murder. Given such careful consideration, we will not disturb a guilty verdict. See *Alton*, 432

N.W.2d at 756. The evidence, when viewed in the light most favorable to the guilty verdict, forms a complete chain supporting Powell's conviction.

II.

In his supplemental pro se brief, Powell asserts that the district court proceedings violated his procedural-due-process rights and that he received ineffective assistance of counsel. The state argues that Powell waived these arguments by not supporting his assertions with citations to either the record or to caselaw. Traditionally, we extend some latitude to pro se litigants. *Liptak v. State ex rel. City of New Hope*, 340 N.W.2d 366, 367 (Minn. App. 1983). Although Powell's arguments are amorphous, if meritorious they raise questions of his constitutional rights to due process and effective assistance of counsel. As a result, we review his asserted errors.

A. Due Process

Powell argues that the district court and his attorney violated his procedural-due-process rights by "ambush[ing]" him with a bench trial and because his attorney coerced him into testifying. But Powell's arguments are without merit. The record contains a thorough conversation between Powell and the district court, wherein Powell explicitly consented to a bench trial. The district court ensured that Powell understood his right to a jury trial, the implications of waiving that right, the procedure of a bench trial, and that Powell was making a voluntary decision. Regarding Powell's decision to testify, Powell directly informed the district court, on the record, that he wished to waive his right to remain silent and desired to testify on his own behalf. Powell, therefore, is not entitled to relief on this ground.

B. *Ineffective Assistance of Counsel*

Powell asserts that he received ineffective assistance of counsel because his counsel failed to complete “genuine” discovery or conduct a thorough and complete investigation. A claim of ineffective assistance of counsel involves mixed questions of fact and law, which we review de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his or her counsel’s performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). The defendant must overcome the “strong presumption that counsel’s performance fell within a wide range of reasonable assistance.” *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). Matters of trial strategy presumptively fall within the discretion of trial counsel and will not be second guessed on appeal. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007).

Tactical decisions to not pursue a particular theory of defense do not constitute ineffective assistance of counsel. *See id.*; *see also Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008) (stating that trial strategy *includes thoroughness* of counsel’s investigation). Other than Powell’s assertions, he provides no evidence or transcript references establishing that his attorney’s conduct fell below that of reasonable assistance. As a result, Powell’s allegations of counsel’s unpreparedness and that his counsel failed to adequately adhere to what is required in an attorney-client relationship “do not reach the level of proof necessary to show ineffective assistance of counsel” and

rest on mere assertions. *See State v. Bock*, 490 N.W.2d 116, 123 (Minn. App. 1992), *review denied* (Minn. Aug. 27, 1992). Powell's claim of ineffective assistance of counsel fails.

Affirmed.