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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-532**

State of Minnesota,
Respondent,

vs.

Mario Martinez Michaca,
Appellant.

**Filed March 26, 2012
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-10-27939

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Bradford Colbert, Matthew A. York (certified student attorney), Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his five convictions of drive-by shooting for the benefit of a criminal gang, arguing that (1) there is not sufficient evidence to convict because his

accomplice's testimony was not corroborated, (2) there is not sufficient evidence to prove Vatos Locos is a criminal gang, and (3) the district court erred in sentencing appellant on all five convictions. We affirm.

FACTS

On the evening of March 31, 2010, A.P., J.P., O.P., and R.A. were gathered in and around cars parked in the driveway outside a residence at 8018 Portland Avenue in Bloomington. One person was sitting in a Chevrolet truck, two were standing next to a minivan, and the fourth person was in the driver's seat of a Dodge Stratus. A Chevrolet Blazer drove past the residence northbound on Portland Avenue. As the Blazer passed the residence, the group heard gunshots and both J.P. and O.P. noted that the shots came from the left side of the Blazer behind the driver's seat.

A Bloomington police officer was patrolling the area, heard the gun shots, and was flagged down by the people outside of the residence. The officer determined that no one had been struck by the bullets but observed that the minivan had two broken windows and a bullet hole, the tire of the pickup truck was damaged, and there were at least two bullet holes in the occupied house. Six shell casings were found on Portland Avenue in front of the residence. The Hennepin County crime lab later determined that the casings were from .22 caliber shells.

A.P., J.P., and R.A. told the officer that the shots came from a Chevrolet Blazer that was traveling northbound on Portland Avenue. Other officers spotted the Blazer within minutes of the shooting at the intersection of 78th Street and Portland Avenue and pulled the vehicle over. Five Hispanic males exited the vehicle. A.S. was seated in the

rear on the passenger side. Appellant Mario Martinez Michaca was seated in the rear on the driver's side. After removing the occupants, officers searched the vehicle. They found a loaded "long" .22 caliber rifle with the stock cut down into a pistol grip on the floor behind the front passenger seat. The officers also located .22 caliber shell casings and live ammunition behind the driver's seat, where Michaca had been sitting. The officers also observed that the Blazer's back window had the letters "V" and "L" written in dust; the officers understood the letters to stand for Vatos Locos, a Hispanic gang.

Ballistics analysis connected the rifle recovered from the Blazer to the shell casings located at the crime scene. And DNA testing established that Michaca could not be excluded as a contributor to the DNA found on the rifle but the four other occupants of the Blazer were excluded.

Michaca was charged with four counts of attempted first-degree murder committed in association with a criminal gang, four counts of attempted first-degree murder, five counts of drive-by shooting in association with a criminal gang, and five counts of drive-by shooting. During trial, A.S. testified that Michaca was responsible for the shooting. He testified that they drove to the residence because the people who lived there had broken a window on the Blazer earlier that day. Michaca testified that he was sitting behind the driver's seat, was very drunk, that someone else fired the shots, and that he did not know who the shooter was. A.S. testified in exchange for a three-year reduction of his own sentence related to the shooting.

The state introduced evidence of gang involvement in the shooting. J.P. and others who lived at the residence were associated with a criminal gang called Surenos 13.

J.P. and one of the investigating officers testified that Surenos 13 and Vatos Locos are rival gangs. Michaca testified that he joined Vatos Locos at age 13, has tattoos of the letters “V” and “L” on his arms, and has the street name “Peewee.” Michaca testified that he was no longer a member of Vatos Locos at the time of the shooting. He also confirmed A.S.’s testimony that Surenos 13 members broke a window out of the Blazer earlier on the day of the shooting.

The jury found Michaca guilty on all counts of drive-by shooting in association with a criminal gang and drive-by shooting. The district court sentenced Michaca on the five drive-by-shooting-in-association-with-a-criminal-gang convictions, imposing a total sentence of 216 months’ imprisonment. This appeal follows.

D E C I S I O N

I. The evidence is sufficient to corroborate that Michaca was the shooter.

Michaca argues that his convictions must be reversed because there is insufficient evidence to corroborate A.S.’s testimony identifying Michaca as the shooter. Minnesota law provides:

A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

Minn. Stat. § 634.04 (2008).

We review the sufficiency of corroborative evidence in the light most favorable to the verdict. *State v. Bowles*, 530 N.W.2d 521, 532 (Minn. 1995). “Corroborating

evidence is sufficient if it ‘restores confidence in the accomplice’s testimony, confirming its truth and pointing to the defendant’s guilt in some substantial degree.’” *State v. Ford*, 539 N.W.2d 214, 225 (Minn. 1995) (quoting *State v. Scruggs*, 421 N.W.2d 707, 713 (Minn. 1988)). Corroborative evidence may be direct or circumstantial and, “while it need not establish a prima facie case of the defendant’s guilt, it must point to [the] defendant’s guilt in some substantial way.” *State v. Johnson*, 616 N.W.2d 720, 727 (Minn. 2000).

Michaca contends that the state did not produce sufficient evidence to corroborate A.S.’s testimony that Michaca was the shooter. We disagree. J.P and O.P. testified that the gunshots came from the left side of the Blazer behind the driver’s seat. Michaca admitted he was seated in that location, with the window open, at the time of the shooting. The rifle and ammunition found in the backseat of the Blazer matched the casings recovered from the street in front of the residence and from the truck and minivan. Michaca is the only occupant of the Blazer that could not be excluded as a contributor to the DNA found on the rifle. Michaca admitted his past gang membership, that Surenos 13 is a rival gang, that some occupants of the residence were Surenos 13 members, and that Surenos 13 members had broken a window on the Blazer prior to the shooting. On this record, we conclude that the standard for corroboration is more than adequately met.

II. The evidence is sufficient to prove Vatos Locos is a criminal gang.

Michaca next argues that the evidence is not sufficient to establish that Vatos Locos meets the statutory definition of a “criminal gang” under Minn. Stat. § 609.229

(2008). When reviewing a challenge to the sufficiency of the evidence, we carefully analyze the record to determine whether the fact-finder could reasonably find the defendant guilty of the offenses charged based on the facts in the record and the legitimate inferences that can be drawn from them. *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 verdict and assume that the fact-finder believed the evidence supporting the verdict and disbelieved any contrary evidence. *Id.* We will not disturb a guilty verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

The statute defines a “criminal gang” as

any ongoing organization, association, or group of three or more persons, whether formal or informal, that:

(1) has, as one of its primary activities, the commission of one or more of the offenses listed in section 609.11, subdivision 9;

(2) has a common name or common identifying sign or symbol; and

(3) includes members who individually or collectively engage in or have engaged in a pattern of criminal activity.

Minn. Stat. § 609.229, subd. 1. Whether a group constitutes a “criminal gang” is a question of fact. *See State v. Carillo*, 623 N.W.2d 922, 928 (Minn. App. 2001), *review denied* (Minn. June 19, 2001).

Michaca challenges the sufficiency of the evidence with respect to (1) whether Vatos Locos commits enumerated crimes as one of its primary objectives and (2) whether

its members, individually or collectively, engage in a pattern of criminal activity.¹ Michaca argues that the evidence is insufficient because the state did not prove up any particular enumerated offense or a pattern of criminal activity. We are not persuaded.

Michaca cites no legal support for his assertion that Minn. Stat. § 609.229, subd. 1, requires proof of each individual crime that establishes a primary objective or pattern of criminal activity. The statute imposes no such requirement. And we previously rejected the argument that the state must present evidence of each gang member's criminal history rather than relying on expert testimony to establish the statutory elements. *Carillo*, 623 N.W.2d at 928.

Here, a member of the Richfield Police Department's gang unit recounted his experience investigating the criminal activities of Vatos Locos members. He testified that members engage in a pattern of criminal activity and that their primary activities include committing "[b]urglaries, thefts, assaults, ranging from simple assault of maybe a street fight, fist on fist to escalating to knives, to drive-by shootings or shootings." It is reasonable to infer from this testimony that one of Vatos Locos' primary objectives is committing burglaries, assaults, and shootings since the officer identified each activity in the plural form. All of these crimes are enumerated in Minn. Stat. § 609.11, subd. 9 (2008). On this record, we conclude that there was sufficient evidence that Vatos Locos is a criminal gang.

¹ Michaca concedes that the state proved the second statutory element—that Vatos Locos has a common name or identifying symbol.

III. The district court did not err in sentencing Michaca on all five drive-by-shooting-for-the-benefit-of-a-criminal-gang convictions.

Under Minn. Stat. § 609.035 (2008), the district court is generally prohibited from imposing “multiple sentences . . . for two or more offenses that were committed as part of a single behavioral incident.” *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn. 1986). The statute is designed “to protect against exaggerating the criminality of a person’s conduct and to make both punishment and prosecution commensurate with culpability.” *State ex rel. Stangvik v. Tahash*, 281 Minn. 353, 360, 161 N.W.2d 667, 672 (1968). But “multiple crimes against multiple victims permit the imposition of more than one sentence.” *Id.* Whether a defendant’s crimes involve multiple victims is a question of law, which we review de novo. *State v. Skipintheaday*, 717 N.W.2d 423, 426 (Minn. 2006).

Michaca contends that only one sentence may be imposed because his five convictions arise from a single drive-by-shooting incident. While we agree that the drive-by shooting constituted one behavioral incident, that does not end our analysis. We must determine whether the incident involved multiple victims. The drive-by-shooting statute provides that a person who discharges a firearm from a motor vehicle “at or toward a person, or an occupied building or motor vehicle” commits a felony. Minn. Stat. § 609.66, subd. 1e(b) (2008). Two of the convictions relate to R.A. and J.P., who were standing outside the residence at the time of the shooting. Two of the convictions concern the occupied Dodge Stratus and occupied Chevrolet truck that were struck. And the final conviction relates to the occupied residence. Because the two persons standing

outside the residence, the two occupied vehicles, and the occupied residence all fall within the scope of Minn. Stat. § 609.66, subd. 1e(b), they are all victims for sentencing purposes.

Michaca contends that the multiple-victim exception only applies to specific-intent crimes and therefore does not apply here. We disagree. The supreme court rejected this argument in *State v. Gartland*, holding that “[t]he fact that defendant may not have intended to hurt anyone should not make a difference. The significant fact is that defendant . . . kn[ew] that it was possible and even likely that he might injure or kill one or more innocent people.” 330 N.W.2d 881, 883 (Minn. 1983).

Michaca also argues that there were not multiple victims because no one was injured. However, to qualify as a victim of a drive-by shooting, the person does not have to be injured. *See State v. Ferguson*, ___ N.W.2d ___, ___, 2012 WL 75198, at *4 (Minn. Jan. 11, 2012) (stating that “[u]nlike the crime of assault, the drive-by shooting statute does not require that the occupants of the building be injured, put in fear, or even be aware of the shooting”).

Finally, Michaca relies on *State v. Thao*, 649 N.W.2d 414, 424 (Minn. 2002), for the proposition that the random firing of shots into a group of people constitutes one event. We disagree. *Thao* did not involve multiple convictions or the multiple-victim exception to section 609.035. Rather, *Thao* addressed the propriety of an upward durational sentencing departure.

In sum, we conclude that the evidence was sufficient to sustain Michaca's convictions and that the district court did not err in sentencing Michaca on all five drive-by-shooting convictions.

Affirmed.