STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0455

State of Minnesota,
Respondent,

vs.

Jason Coe Day,
Appellant.

Filed June 10, 2008
Affirmed; motion to strike denied
Willis, Judge

Ramsey County District Court
File No. K9-06-2603

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Marie Wolf, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Willis, Presiding Judge; Shumaker, Judge; and Poritsky, 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.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

Appellant challenges his conviction for aiding and abetting attempted first-degree murder, arguing that (1) he was both acquitted and convicted of the same charge, which resulted in a double-jeopardy violation and legally inconsistent verdicts, (2) the evidence was insufficient to support his conviction, and (3) when the jury asked a question regarding the law, the district court committed plain error by referring the jury to the instructions already given rather than providing additional instructions. We affirm.

FACTS

This case arises out of an altercation at a St. Paul nightclub during the late evening of June 24 and early morning of June 25, 2006. Two groups of individuals were involved in the altercation: the first group consisted of appellant Jason Coe Day, his girlfriend, his girlfriend's sister, and one of the sister's friends; the second group consisted of the victim and her two companions, a male and a female. While the two groups were at the nightclub, the victim's female companion and Day's girlfriend bumped into each other. Members of the two groups began arguing, which escalated into pushing, shoving, and hitting. Bouncers at the nightclub intervened and ordered both groups to leave the club.

The victim and her companions left the nightclub and drove away; Day and his companions followed them in a car driven by Day. When the victim and her companions arrived at their destination, a house in Arden Hills, they parked in the driveway, and Day and his companions parked on the street.

Day's girlfriend and her sister got out of the car and began attacking the victim's female companion, who was able to escape and run into the house. Meanwhile, Day's girlfriend and her sister had begun attacking the victim. Day's girlfriend proceeded to drag the victim by her hair down the driveway, and as she was doing so, either Day or his girlfriend stabbed and cut the victim's neck with a knife. The girlfriend's sister testified that Day cut the victim, and the sister's friend testified that she saw Day make a slashing motion at the victim, although she did not see a knife. The victim testified that as Day's girlfriend was holding her by the hair and kicking her, she suddenly "saw a ton of blood and felt a ton of pain," and she realized that her neck had been cut but she did not know who had done it. The victim's male and female companions both testified that they did not see who had cut the victim.

On July 5, 2006, Day and his girlfriend returned to the St. Paul nightclub. A bouncer recognized them and called the police. A Ramsey County Sheriff's Department lieutenant responded and arrested both Day and his girlfriend.

Day was charged with first-degree assault, in violation of Minn. Stat. § 609.221, subd. 1 (2004). The complaint was later amended to add two additional charges—first-degree attempted murder, in violation of Minn. Stat. §§ 609.17, subd. 1, .185 (2004); and aiding and abetting first-degree attempted murder, in violation of Minn. Stat. §§ 609.05, subd. 1, .17, subd. 1, .185 (2004). A jury acquitted Day of first-degree assault and attempted first-degree murder but found him guilty of aiding and abetting attempted first-degree murder. The district court sentenced Day to 180 months' imprisonment, and he appeals.

D E C I S I O N

I. The jury's verdict convicting Day on the charge of aiding and abetting attempted first-degree murder and its verdict acquitting him on the charge of attempted first-degree murder do not violate protections against double jeopardy and are not legally inconsistent.

A. Day's conviction does not violate protections against double jeopardy.

Day argues that his conviction for aiding and abetting attempted first-degree murder violates protections against double jeopardy. This court reviews double-jeopardy claims de novo. *State v. Watley*, 541 N.W.2d 345, 347 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996).

Count one of the amended complaint charged Day with attempted first-degree murder and count two charged him with aiding and abetting attempted first-degree murder. Day argues that aiding and abetting attempted first-degree murder is not a separate, substantive offense from attempted first-degree murder, and, thus, he was charged with "two separate counts of the same substantive offense under precisely the same statute: attempted first-degree murder." He concludes, therefore, that because he was acquitted of count one, protections against double jeopardy preclude his conviction on count two. Day also makes the related argument that his conviction violates the doctrine of collateral estoppel incorporated in double-jeopardy protections.

Minnesota's statute imposing criminal liability for aiding and abetting another in the commission of a crime was enacted for the purpose of "eliminating the distinction existing at common law" between principals and aiders and abettors. *See* Minn. Stat. Ann. § 609.05 advisory comm. cmt. (West 2004). In other words, aiding and abetting is

an alternative theory of criminal liability that, if proved, makes an aider and abettor criminally liable just as if he were the principal. *See id.* Thus, Day is correct that aiding and abetting is not a separate, substantive offense. *See State v. DeVerney*, 592 N.W.2d 837, 846 (Minn. 1999) (explaining that because aiding and abetting is not a separate, substantive offense, it can be added to a complaint at any time before a verdict is reached). Day's double-jeopardy arguments, however, are nonetheless unavailing.

The double-jeopardy clauses of the United States and Minnesota constitutions protect a criminal defendant against "a *second* prosecution for the same offense after acquittal; a *second* prosecution for the same offense after conviction; and *multiple* punishments for the same offense." *State v. Humes*, 581 N.W.2d 317, 320 (Minn. 1998) (emphasis added). Similarly, Minnesota's double-jeopardy statute, Minn. Stat. § 609.035, subd. 1 (2004), prohibits serialized prosecutions and multiple sentences for offenses resulting from the same behavioral incident. *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). And the doctrine of collateral estoppel incorporated in double-jeopardy protections guarantees that if an ultimate issue of fact is actually and necessarily decided in a defendant's favor, a second prosecution cannot be undertaken based on proof of the issue already decided. *Ashe v. Swenson*, 397 U.S. 436, 443-44, 90 S. Ct. 1189, 1194 (1970); *see also State v. McAlpine*, 352 N.W.2d 101, 103 (Minn. App. 1984). Here, Day was not subjected to more than one prosecution nor was he subjected to more than one punishment. Therefore, double-jeopardy protections, including the doctrine of collateral estoppel and Minnesota's double-jeopardy statute, are not implicated.

Day maintains, however, that a second prosecution is not required for double-jeopardy protections to be implicated. He claims that when the jury acquitted him of attempted murder, double-jeopardy protections required that "the trial should have been over," and the district court should not have even proceeded to the jury's verdict on the count of aiding and abetting attempted murder. But Day cites no authority to support his argument.[1] Double-jeopardy protections do not prohibit the state from prosecuting a defendant for multiple offenses in a single prosecution. *Ohio v. Johnson*, 467 U.S. 493, 500-01, 104 S. Ct. 2536, 2541-42 (1984).

Day argues that the error here was caused by the manner in which the complaint was drafted. He claims that the state should have charged him with only one count of attempted first-degree murder and included a reference to the aiding-and-abetting statute. Then, Day maintains, the state could have accomplished its goal of trying him on alternate theories—that is, either that Day himself attempted a murder or that he aided and abetted an attempted murder—without implicating the double-jeopardy concerns that he raises in this appeal. But there is nothing improper about the state charging two separate counts when there are two different theories regarding how the defendant committed the same crime. *See State v. Marshall*, 358 N.W.2d 65, 66-67 (Minn. 1984) (upholding "the use of multiple counts . . . when it appears from the evidence that there

[1] Day does cite one case that he claims supports his argument, *Brooks v. State*, 472 A.2d 981 (Md. Ct. App. 1984). But *Brooks* is inapposite. In *Brooks*, the Court of Appeals of Maryland held that double jeopardy was violated when a district court granted a motion for judgment of acquittal on a charge at the close of the state's case and then later reversed that judgment and allowed that same charge to go to the jury. *Brooks*, 472 A.2d at 986. Here, the district court did not grant a motion for acquittal on a charge and then later reverse that decision and allow the already-acquitted charge to go to the jury.

are two different theories how defendant committed the same crime"); *see also* 8 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 11.11 (3d ed. 2001) ("[When] there are two different theories as to how the defendant committed the same crime, the use of multiple counts . . . is appropriate.").

We conclude that Day's conviction for aiding and abetting attempted first-degree murder does not violate protections against double jeopardy.

B. The jury's verdicts are not legally inconsistent.

In his reply brief, Day argues that the jury's verdict of acquittal on count one and its verdict of guilty on count two are legally inconsistent because the elements of the offenses in both counts are exactly the same. As an initial matter, the state has moved this court to strike that argument from Day's reply brief, arguing that the phrase "legally inconsistent" appears nowhere in Day's initial brief and that the state, in its brief, raises only the issue of whether the verdicts were "logically inconsistent." The ruling on the motion was deferred to this panel.

An appellant cannot raise new issues in a reply brief; "[t]he reply brief must be confined to new matter[s] raised in the brief of the respondent." Minn. R. Civ. App. P. 128.02, subd. 3. When a new issue is raised in a reply brief, that portion of the brief should be stricken. *Huston v. Comm'r of Employment and Econ. Dev.*, 672 N.W.2d 606, 612 (Minn. App. 2003), *review granted* (Minn. Feb. 25, 2004), *appeal dismissed* (Minn. May 25, 2004).

After careful review of the parties' briefs, we conclude that Day's reply brief did not exceed the scope of rule 128.02, subd. 3. In its brief, the state argued that the verdicts

are not "legally contradictory" and cited caselaw addressing the issue of whether verdicts are legally inconsistent. Because the state raised the issue in its brief, Day was entitled to respond to it in his reply brief. We therefore deny the state's motion to strike.

Turning to the merits of this issue, we conclude that the verdicts are not legally inconsistent. Verdicts are legally inconsistent only when proof of the element of one offense negates a necessary element of the other offense. *See State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). Unlike a conviction for attempting a first-degree murder, a conviction for aiding and abetting another in that person's attempted first-degree murder does not require proving that the defendant was the individual who committed the act that constitutes the attempted murder but only that the defendant aided another in that person's attempted murder. *See* Minn. Stat. §§ 609.05, subd. 1, .17, .185 (2004). The two counts charging Day with attempted first-degree murder under different theories of liability require different proof. Nothing in the jury's verdict of acquittal on the charge of attempted first-degree murder necessarily negates any of the elements of the aiding-and-abetting charge. Rather, the verdicts are reconcilable because they reflect a rational decision by the jury from the evidence presented that either Day did not cut the victim or that the state had not proved that he did beyond a reasonable doubt but that, whoever cut the victim, Day aided and abetted that person.

II. The evidence was sufficient to support Day's conviction.

Day argues next that the evidence was insufficient to support his conviction. When considering a claim of insufficient evidence, this court painstakingly analyzes the record to determine whether the evidence, when viewed in the light most favorable to the

conviction, permitted the jury to find the defendant guilty. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We 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). This is especially true when resolution of the matter depends on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We will not disturb the 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 was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). Moreover, circumstantial evidence is entitled to as much weight as any other kind of evidence, and a conviction based on circumstantial evidence will be upheld if the reasonable inferences drawn from that evidence are consistent with a defendant's guilt and are inconsistent with any rational theory except that of guilt. *State v. Dominguez-Ramirez*, 563 N.W.2d 245, 257 (Minn. 1997).

Day argues that "[t]o convict an aider and abettor of attempted murder . . . a jury must find that the aider and abettor shared the perpetrator's specific intent to kill." In support of his argument, Day relies on a case from the District of Columbia, *Wilson-Bey v. United States*, 903 A.2d 818, 830 (D.C. 2006). The *Wilson-Bey* court concluded that, under the District of Columbia's aiding-and-abetting statute, a conviction for aiding and abetting first-degree murder requires the prosecution to prove that an aider and abettor acted with premeditation and deliberation and intent to kill. *Id.* at 830. But the court emphasized that its conclusion "rests substantially on the application of principles embodied in this jurisdiction's aiding and abetting statute," which does not extend

liability for aiding and abetting to "the natural and foreseeable consequences" of the aider and abettor's actions. *Id.* at 830 n.25.

Minnesota law is different. Unlike the statute at issue in *Wilson-Bey*, Minn. Stat. § 609.05, subd. 2 (2004), provides that liability for aiding and abetting extends to "other crime[s] committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." And Minnesota courts have applied this principle to first-degree murder.[2] *See State v. Pierson*, 530 N.W.2d 784, 789 (Minn. 1995) ("Under Minnesota law, a defendant charged as an accomplice to first-degree murder is not required to have predicted with certainty that a companion would intentionally murder the victim—only that the murder was reasonably foreseeable as a probable consequence of the intended crime."); *State v. Redding*, 422 N.W.2d 260, 264 n.2 (Minn. 1988).

Day acknowledges that Minnesota courts have upheld convictions for aiding and abetting first-degree murder on the ground that the murder was a reasonably foreseeable consequence of the commission of the crime that a defendant aided and abetted—that is, the intended crime—but he claims that courts have done so only when the intended crime was one of the predicate offenses for the application of the felony-murder rule. In Minnesota, the felony-murder rule imposes liability on a defendant for first-degree murder, regardless of whether the defendant acted with premeditation and specific intent to kill, when the defendant "causes the death of a human being while committing or

[2] Because the requisite intent for attempted first-degree murder is the same as that for first-degree murder, the application of the principle of reasonably foreseeable consequences to the two offenses is no different.

attempting to commit" certain felony offenses. Minn. Stat. § 609.185 (a)(2)-(7) (2004); *see also* 9A Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 49.3 (3d ed. Supp. 2007-08) ("The ostensible purpose of the felony murder rule is to 'deter negligent or accidental killings' that occur during the course of another felony, by increasing the penalties for 'nonpurposeful killings' by 'implying . . . premeditation and deliberation.'") (quoting *State v. Darris*, 648 N.W.2d 232, 238 (Minn. 2002)). Because the intended crime here was a first-degree assault, which is not one of the predicate offenses for the felony-murder rule, Day argues that the theory of accomplice liability for reasonably foreseeable consequences of the intended crime should not apply. We disagree.

Nothing in the language of section 609.05 or the caselaw suggests that accomplice liability for reasonably foreseeable consequences should be limited in the manner that Day urges. In fact, the supreme court has recognized that a defendant can be convicted for aiding and abetting first-degree murder on the ground that the murder was a reasonably foreseeable consequence of an intended crime that was not one of the predicate offenses for the application of the felony-murder rule. *See State v. Richardson*, 670 N.W.2d 267, 281 (Minn. 2003). In *Richardson*, the supreme court affirmed a district court's decision to not allow a defendant to introduce evidence of his wife's prior misconduct, which the defendant claimed was relevant to his defense that she was the individual who actually killed the victim. *Id.* at 279. The supreme court stated:

> Under Minnesota law, a defendant charged as an accomplice to first-degree murder is not required to have predicted that a companion would murder the victim. Rather, the question is whether the murder was reasonably foreseeable as a probable consequence of the intended crime which apparently by the

> offer of proof here was at least a felony-level assault. The proffered alternative-perpetrator theory arguably could have prompted an amendment to the indictment to include, or instructions on, aiding and abetting first-degree murder.

Id. at 281 (citations omitted). The supreme court explained that the risk that the evidence would confuse the issues and waste time outweighed the likely value that it would have to the defense's theory that the wife was the individual who killed the victim when that theory would "not have absolved [the defendant] of accomplice liability" for first-degree murder. *Id.* In light of this recognition in *Richardson* that a first-degree murder conviction can be sustained when the murder was a reasonably foreseeable consequence of a felony assault, which is not a predicate offense for the felony-murder rule, we conclude that the law in Minnesota does not limit accomplice liability for reasonably foreseeable consequences of the intended crime only to cases involving the felony-murder rule.

To find Day guilty, the jury was required to find that he intentionally aided, advised, hired, counseled, or conspired with or otherwise procured another to commit a crime. *See* Minn. Stat. § 609.05, subd. 1 (2004). Day concedes that the state proved that he intentionally aided and abetted a first-degree assault. The conviction for aiding and abetting attempted first-degree murder also required the jury to find that the perpetrator's acts satisfied the elements of attempted first-degree murder, including the fact that the perpetrator acted with premeditation and the specific intent to kill. *See* Minn. Dist. Judges Ass'n, *Minnesota Practice-Jury Instruction Guides, Criminal*, CRIMJIG 11.02 (4th ed. 1999). Day does not argue that the evidence was insufficient for the jury to find

that the perpetrator acted with premeditation and the intent to kill, and, thus, the only issue is whether the attempted murder was a reasonably foreseeable consequence of the assault. *See* Minn. Stat. § 609.05, subd. 2. This is a question of fact for the jury. *See Pierson*, 530 N.W.2d at 789 ("Whether the defendant could reasonably foresee that the victim would be murdered is a question of fact for the jury.").

Day's girlfriend's sister testified that Day's girlfriend told the group, including Day, that the girlfriend wanted to "get back" at the victim and her female companion. She testified that as they were following the victim and her companions, Day's girlfriend was "angry" and "getting ready to fight the two girls." Day himself testified that when the altercation first began at the nightclub he "knew that [his girlfriend] was going to get volatile and try to fight." And there was testimony that while Day and the others were on the way to the scene of the attack in Arden Hills, Day told his girlfriend to get a knife that was in the glove compartment. Viewed in the light most favorable to the jury's verdict, this testimony shows that Day knew that his girlfriend intended to attack the victim and that a knife might be used during the attack—indeed, it appears that Day was the one who suggested using a knife. The evidence was sufficient for the jury to find that the attempted murder was a reasonably foreseeable consequence of the assault. *See State v. Jackson*, 726 N.W.2d 454, 460-61 (Minn. 2007) (concluding that evidence showing that a defendant was aware of the basic plan to use force or the threat of force in an aggravated robbery was sufficient to prove that a murder was foreseeable).

III. The district court did not commit plain error by referring the jury to the instruction already given on accomplice liability.

Lastly, Day argues that he was denied a fair trial when, after the jury asked a question about aiding and abetting, the district court referred the jury to the instructions already given. We review for an abuse of discretion a district court's decision regarding whether to give additional instructions in response to a jury's question. *State v. Harwell*, 515 N.W.2d 105, 108-09 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). In response to a jury's question on a point of law, the district court has the discretion to give additional instructions, amplify previous instructions, reread previous instructions, or give no response at all. *See* Minn. R. Crim. P. 26.03, subd. 19(3); *State v. Laine*, 715 N.W.2d 425, 434 (Minn. 2006). If a defendant fails to challenge the district court's decision regarding how to respond to a jury's question, he waives the right to appeal that issue unless the district court committed plain error. *See State v. Crims*, 540 N.W.2d 860, 864 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). The record shows that Day and his attorney were present when the jury's question and the district court's answer were read, and there were no objections to the district court's response to the jury's question. Accordingly, we apply the plain-error standard of review.

After deliberating for more than four hours, the jury asked the following question: "Can aiding and abetting be considered an action taken after the assault with the knife, during the attack, only before the attack, or any time?" The district court instructed the jury to "re-read" the instructions that had been given on "liability for crimes of another." Day argues that the jury's question shows that it was confusing aiding and abetting

attempted first-degree murder with "some other crime," namely, being an accessory after the fact, and "suggest[s] a possibility" that the jury may have convicted him "based on an incorrect legal basis." Under these circumstances, Day claims, the district court "had an obligation to do more than reread the instructions that were causing the jury its initial confusion."

This court has stated that while the interests of justice occasionally require a clarification of instructions, a district court may properly refer the jury to the instructions already given when they provide the jury with the guidance necessary to resolve the confusion. *Crims*, 540 N.W.2d at 864-65; *see also Harwell*, 515 N.W.2d at 109 ("Because the original instructions provided sufficient guidance to enable the jury to resolve its concerns, the [district] court's response complied with Minn. R. Crim. P. 26.03, subd. 19(3) and was not an abuse of discretion.").

Here, the district court's instruction tracked the CRIMJIG jury instruction for aiding and abetting. Minn. Dist. Judges Ass'n, *Minnesota Practice-Jury Instruction Guides, Criminal*, CRIMJIG 4.01 (4th ed. 1999). The instruction correctly told the jury that Day could be criminally liable for aiding and abetting only if he intentionally aided another in "committing" a crime. Nothing in the instruction suggested that criminal liability could be based on anything Day did after the crime had been committed. And nothing in the record shows that the jury was unable to resolve any confusion it had by rereading the instruction that the district court had already given. Day does not claim that the instruction was unclear or erroneous, and he offers no explanation of why directing the jury to reread the instruction was insufficient to resolve the jury's apparent confusion.

Under these circumstances, if there was any error, it was not plain. *See Laine*, 715 N.W.2d at 434 (concluding that when a defendant failed to cite authority demonstrating that the district court's response erroneously stated the law, "the 'error,' if any, can hardly be said to be clear," and, thus, the defendant "cannot meet the requirements to establish that any error was plain").

Affirmed; motion to strike denied.