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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1083

State of Minnesota,
Respondent,

vs.

Kirk Andre Harrison,
Appellant.

Filed August 25, 2009
Affirmed
Willis, Judge[*]

Hennepin County District Court
File No. 27-CR-07-101250

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

Michael O. Freeman, Hennepin County Attorney, Alan J. Harris, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Toussaint, Chief Judge; and Willis, Judge.

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

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges the sufficiency of the evidence to convict him of unintentional second-degree murder (drive-by), arguing that his conviction is based entirely on uncorroborated accomplice testimony. Appellant also challenges his sentence in a pro se supplemental brief. We affirm.

FACTS

On June 17, 2006, appellant Kirk Andre Harrison attended the Juneteenth celebration at Theodore Wirth Park in North Minneapolis. A friend of Harrison's, L.C., drove Harrison and several others to the celebration. Shortly after arriving, the men noticed members of a rival group including one with whom Harrison had had an argument. Harrison and his friends drove around the block, and approached a crowd of people near the intersection of Oliver Avenue North and Eighth Avenue North. Gunshots were fired from the driver's side of the vehicle into the area of the crowd where several of the rival group members were standing. Eighteen-year-old Brian Cole was in the crowd and was struck by one of the bullets. He was taken by ambulance to North Memorial Medical Center, where he was pronounced dead.

Following an investigation, Harrison was arrested for Cole's murder, and a grand jury returned an indictment charging Harrison with six felonies related to the shooting. Harrison waived his right to a jury, and the case was tried to the district court. The district court found Harrison guilty of unintentional second-degree murder and sentenced him to 400 months in prison. This appeal follows.

D E C I S I O N

I. The evidence is sufficient to sustain Harrison's conviction.

Harrison challenges the sufficiency of the evidence to sustain his conviction. When reviewing a challenge to the sufficiency of the evidence, we conduct a painstaking analysis of 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 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 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).

Harrison and the state dispute whether state witnesses W.B. and C.H., who were passengers in the vehicle from which the gunshots were fired, are accomplices for the purposes of Minn. Stat. § 634.04 (2006). A defendant may not be convicted of a crime based on uncorroborated accomplice testimony. Minn. Stat. § 634.04. Generally, if a person could have been indicted and convicted of the same crime as the accused, he is considered to be an accomplice, whose testimony must be corroborated. *State v. Jensen*, 289 Minn. 444, 445-46, 184 N.W.2d 813, 814-15 (1971). A person may be considered an accomplice for purposes of section 634.04 if the person "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn.

Stat. § 609.05, subd. 1 (2006); *In re Welfare of S.H.H.*, 741 N.W.2d 917, 920 (Minn. App. 2007). Under section 609.05, "liability attaches when one '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) (quoting *State v. Pierson*, 530 N.W.2d 784, 788 (Minn. 1995)). But mere presence at the scene of a crime does not, by itself, establish liability for the crime of another because "[i]naction, knowledge, or passive acquiescence [ ] do not rise to the level" of criminal culpability. *State v. Russell*, 503 N.W.2d 110, 114 (Minn. 1993).

Harrison directs us to testimony in which C.H. and W.B. admitted that they saw Harrison with a gun before the shooting and had reason to believe there was "bad blood" between Harrison and the rival group. Harrison argues that because C.H. and W.B. freely entered the vehicle despite their "knowledge of the gun and the plans for revenge," they are accomplices. But there is no evidence that C.H. or W.B. encouraged, aided, or conspired with Harrison to shoot into the crowd. To the contrary, the record shows that C.H. and W.B. were merely present at the time of the shooting. C.H. testified that as the vehicle approached the crowd of people, he "heard some shots." He saw that "[Harrison] was hanging out the back window. He had his arm out the back window, shooting out the back window." C.H. also testified that immediately following the shooting, Harrison had a gun in his hand. Similarly, W.B. testified that he saw L.C. pass a gun to Harrison. He said that as they drove past a crowd of people, Harrison took the gun off safety and "opened up fire."

Harrison is unable to identify any record evidence that would lead us to conclude that C.H. or W.B. knew Harrison planned to shoot at the rival group and assisted him in carrying out his "plan for revenge." Because the record shows that neither C.H. nor W.B. had any direct involvement in the perpetration of the crime at issue or that they encouraged perpetration of the crime, Harrison has failed to establish that they are accomplices for the purposes of section 634.04.

II. There was sufficient corroborating testimony to convict Harrison.

Even if we were to conclude that C.H. and W.B. were Harrison's accomplices, there is sufficient evidence to corroborate their testimony. The circumstances of a given case determine the quantum of corroboration necessary. *State v. Her*, 668 N.W.2d 924, 927 (Minn. App. 2003), *review denied* (Minn. Dec. 16, 2003). The corroborating evidence must do more than show that the offense was committed or the circumstances of its commission. Minn. Stat. § 634.04. But that evidence does not need to establish a prima facie case or even relate to every element of the offense charged. *State v. Lemire*, 315 N.W.2d 606, 610 (Minn. 1982). Rather, the corroborating evidence must only be sufficient to "restore[ ] confidence in the accomplice's testimony, confirming its truth and pointing to the defendant's guilt in some substantial degree." *Her*, 668 N.W.2d at 927.

C.B., another occupant of the vehicle, testified that he heard shots and believed that Harrison fired them. C.B. also testified that he saw a gun in Harrison's lap immediately following the shooting. T.Y. was also in the vehicle and acknowledged that he told the police that he heard gunshots, turned, and saw a gun in Harrison's hand. Further, Harrison's ex-girlfriend, V.S., testified that Harrison told her that he fired the

shots into the crowd. Two fellow inmates at the workhouse where Harrison was being held testified that Harrison admitted to them that he was the shooter. Finally, another state witness said that he saw Harrison at a bar before his arrest and asked him about the shooting. Harrison admitted he was the "one who did it" and that "he just started shooting into the crowd."

Harrison argues that the foregoing testimony is insufficient corroboration because all of the witnesses had incentives to testify against him. Harrison contends that the witnesses had reasons to implicate him because they were either granted use immunity by the state or had entered into plea or other agreements with the state. Harrison cites no law stating that corroboration must be provided by entirely disinterested witnesses. Furthermore, the prosecutor extensively questioned the witnesses regarding immunity or agreements they had with the state in return for their testimony, and Harrison had the opportunity to cross-examine them. *See State v. Miller*, 754 N.W.2d 686, 707 (Minn. 2008) ("The State is obligated to disclose plea bargains made with witnesses in exchange for their testimony.") (citing *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 766 (1972)).

Further, the district court considered defense testimony that suggested L.C. was the shooter and made credibility findings that

> [a]lthough some of these witnesses [who identified Harrison as the shooter] were of questionable credibility, taken as a whole [the district court is] satisfied beyond a reasonable doubt that [Harrison] fired a handgun from the rear seat of the vehicle at least twice, and one of those bullets killed Mr. Cole.

See State v. Bias, 419 N.W.2d 480, 484 (Minn. 1988) (assuming that the fact-finder believed the state's evidence over any contradicting evidence produced by the defendant); *see also State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (deferring to fact-finder's credibility determinations), *aff'd*, *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130 (1993).

Based on the evidence in the record, we conclude that neither W.B. nor C.H. was Harrison's accomplice. Further, even if they were accomplices, there is sufficient evidence corroborating their testimony to sustain Harrison's conviction.

III. None of the issues that Harrison raises in his pro se brief warrant relief.

Harrison first claims that he was improperly sentenced. Unintentional second-degree murder (drive-by) is a severity-level XI offense for which the sentencing guidelines provide a range of 346-480 months for a person who, like Harrison, has five criminal-history points. The district court's 400-month sentence was not an abuse of discretion.

Harrison also claims that he received ineffective assistance of counsel but fails to allege any specific acts. Thus, we decline to address the claim. *See State ex rel. Moriarty v. Tahash*, 261 Minn. 426, 429, 112 N.W.2d 816, 819 (1962) (stating a defendant's bare assertions of ineffective assistance of counsel will not suffice to meet applicable burden).

Next, Harrison claims that his defense counsel coerced him to waive his right to a jury trial. This argument is unsupported by facts in the record, and Harrison fails to cite

any relevant legal authority. Therefore, the argument is waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).

Finally, Harrison argues that he is entitled to a new trial because of newly discovered evidence, contending that C.H. wants to recant his trial testimony. But there is ample record evidence, apart from C.H.'s testimony, to sustain Harrison's conviction.

Affirmed.