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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-1327**

State of Minnesota,
Respondent,

vs.

Michael James Ferguson,
Appellant.

**Filed October 6, 2009**
**Affirmed in part, reversed in part, and remanded**
**Minge, Judge**

Ramsey County District Court
File No. 62-K1-07-003464

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 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Marie L. Wolf, Interim Appellate Public Defender. Benjamin J. Butler, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104-6700 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Stauber, Judge.

## UNPUBLISHED OPINION

**MINGE**, Judge

Appellant challenges his convictions of eight counts of aiding and abetting second-degree assault and drive-by shooting and his sentence. Because we conclude that that there was sufficient evidence to convict appellant of all counts and to corroborate the testimony of appellant's accomplices, we affirm the convictions. We further conclude that appellant was not sentenced in violation of his right to a jury trial. But because the district court erred in failing to sentence appellant on the most serious offense, we remand for resentencing.

## FACTS

Appellant Michael James Ferguson and his brothers Matthew Dillard and Marcus Dillard rode together in appellant's car to the gas station across the street from the home of D.H. Because appellant was too drunk to drive, Matthew drove. Marcus had a dispute with D.H. over a dog Marcus had purchased. Marcus went to D.H.'s home, stood on D.H.'s porch, banged on the door and yelled for "the guys that sold that dog." D.H.'s girlfriend C.F. responded that D.H. was not home and that other people lived in the house. At the time there were eight people in the house, including D.H.

There was conflicting testimony as to whether appellant was standing on the porch with Matthew and Marcus when C.F. stated that there were other people living in the house. At trial, Matthew and Marcus testified that appellant did not join them on the porch of the home. However, Marcus had previously stated that appellant was with him on the porch. One of the persons in the house testified to seeing three men exit the car,

approach the house, and bang on the house door. D.H. testified that he saw three men walk from the house back to the car.

When the three brothers were back in the car, Matthew again drove. Initially, he drove away but then turned around. Marcus testified that he was in the back seat, that appellant, who was sitting in the front passenger seat, handed him a gun, and that he (Marcus) shot six bullets into the house.

D.H. called the police and told them that the men who had been at his door had shot at his house. The police stopped appellant's vehicle and arrested the three brothers. Appellant was seated in the front passenger seat and a handgun was found on the front passenger seat. An empty .45-caliber magazine was found in the glove box. Appellant repeatedly said "I'm sorry" as he was arrested. D.H. identified the three brothers who were in the car as the men who had been on his porch. At trial, Matthew testified that neither he nor Marcus owned a gun, and that appellant owned a .45-caliber handgun.

Appellant was charged with one count of aiding and abetting a drive-by shooting in violation of Minn. Stat. §§ 609.66, subd. 1e(b), .05, subd. 1, .11, subd. 5 (2006), and eight separate counts of aiding and abetting second-degree assault in violation of Minn. Stat. §§ 609.05, subd. 1, .11, subd. 5, .222, subd. 1 (2006), one for each of the eight persons in the house. Appellant was convicted on all counts. The district court sentenced appellant to two 36-month sentences for two of the eight aiding-and-abetting, second-degree assault convictions and ordered that the two 36-month sentences be served consecutively. The district court further sentenced appellant to 39 months for each of the six remaining second-degree assault charges to be served concurrently with each other

and with one of the 36-month sentences. Appellant's total sentence was 75 months. This appeal follows.

## D E C I S I O N

### I.

The first issue raised by appellant is whether there was sufficient evidence to convict him of eight separate counts of aiding and abetting second-degree assault. In considering a claim of insufficient evidence, this court reviews the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "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). The reviewing court 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

***A. Assaults***

Appellant was charged with aiding and abetting second-degree assault. Minn. Stat. §§ 609.05, subd. 1, .11, subd. 5, .222, subd. 1. To be convicted of second-degree assault, one must assault another with a dangerous weapon. Minnesota defines assault as:

> (1) an act done with intent to cause fear in another of immediate bodily harm or death; or
> (2) the intentional infliction of or attempt to inflict bodily harm upon another.

Minn. Stat. § 609.02, subd. 10 (2006). "Second-degree assault is a specific intent crime." *State v. Cole*, 542 N.W.2d 43, 51 (Minn. 1996). A specific intent crime requires that the defendant act with the intent to produce a specific result, and not merely intentionally engage in prohibited conduct. *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

Appellant first argues that the prosecution had to establish the guilt of Marcus as the person who committed the principle crime of second-degree assault and that the state failed to prove that Marcus specifically intended to cause fear in each of the eight victims. Appellant contends that, because Marcus only knew for certain that C.F. was in the house, the only charge supported by sufficient evidence was count four, which alleged appellant aided and abetted the assault of C.F. Appellant concludes that because the state failed to prove that Marcus committed the remaining seven underlying assaults, he could not be convicted of aiding and abetting those seven assaults.

Appellant's argument is contrary to our supreme court's holding in *State v. Hough*, 585 N.W.2d 393 (Minn. 1998). In *Hough*, the defendant was accused of firing numerous shots from a semiautomatic weapon into a family's home, and charged with six counts of second-degree assault. 585 N.W.2d at 397. On appeal, Hough argued that he only intended to scare one person in the home, and could not be guilty of the remaining counts of assault because he was unaware that other people were in the home. *Id*. at 396-97. The supreme court upheld the conviction on all six counts, stating that "[w]hen an assailant fires numerous shots from a semiautomatic weapon into a home, it may be inferred that the assailant intends to cause fear of immediate bodily harm or death to those within the home." *Id*. at 397. The supreme court affirmed the district court's

reasoning that "it was a natural and probable consequence that [the defendant's] actions would endanger people other than [the known target]." *Id*.

Here, Marcus fired a gun six times at a house. Because C.F. told Marcus that not only D.H., but also other people, lived in the building, Marcus knew the building was occupied. Following the reasoning in *Hough*, it may be inferred that Marcus intended to cause fear of immediate bodily harm or death to everyone the home despite the fact that Marcus did not know how many were inside. Because the accused in *Hough* did not know whether others were inside, in our case there is a stronger basis for conviction. Regardless, under *Hough*, the fact that Marcus did not know the specific number or identity of the people within the home is not material.

Appellant argues that this court should not rely on *Hough* because the supreme court erroneously used the general, and not specific-intent standard. While appellant has advanced arguments as to why this court should find *Hough* to be wrongly decided, we do not reverse established supreme court precedent. *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998). Accordingly, we conclude that there was sufficient evidence to allow a jury to find that Marcus intentionally assaulted each victim with a dangerous weapon, and to support appellant's conviction of aiding-and-abetting the assault of eight victims.

***B. Aiding/Abetting***

Appellant next argues that, even if Marcus committed eight second-degree assaults, there was insufficient evidence to prove that appellant intentionally aided Marcus in the assaults. A defendant is criminally liable for a crime committed by another, under an aiding-and-abetting theory, if he "intentionally aids, advises, hires,

counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2006). A person who is guilty of aiding and abetting another in the commission of a crime "is also liable for any other crime 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." Minn. Stat. § 609.05, subd. 2 (2006). Intent may be inferred from many factors including "defendant's presence at the scene of the crime, defendant's close association with the principal before and after the crime, defendant's lack of objection or surprise under the circumstances, and defendant's flight from the scene of the crime with the principal." *State v. Swanson*, 707 N.W.2d 645, 659 (Minn. 2006) (citing *State v. Pierson*, 530 N.W.2d 784, 788 (Minn. 1995)).

Here, there is evidence that (1) appellant was with Marcus before the shooting; (2) appellant was present when Marcus banged on D.H.'s door and spoke with C.F.; (3) appellant handed Marcus appellant's own gun; (4) appellant was present during the shooting; (5) appellant fled with Marcus after the shooting; (6) appellant's car was used in the commission of the crime; and (7) appellant did nothing to object to Marcus's conduct or call the police in response to the shooting. This evidence is sufficient to support a jury's conclusion that appellant intended to aid Marcus in the assaults.

As previously stated, the statute provides that appellant is criminally liable for any other crime committed in pursuance of the intended crime so long as it was "reasonably foreseeable . . . as a probable consequence of committing or attempting to commit the crime intended." Minn. Stat. § 609.05, subd. 2. There was testimony that appellant was present when C.F. informed the three men that there were others in the house. Further,

the jury could have found that it was reasonably foreseeable that shooting into a home could result in multiple people being put in fear of great bodily harm or death. *See Hough*, 585 N.W.2d at 397 (holding that the assault of other, unknown people in a home is the "natural and probable consequence" of firing shots into a home).

We conclude that there was sufficient evidence to support a jury verdict of guilty on all eight counts of aiding and abetting second-degree assault.

**II.**

The second issue raised by appellant is whether the accomplices' testimony implicating appellant was supported by sufficiently independent corroborating evidence. Under Minnesota law, accomplice testimony must be corroborated. Minn. Stat. § 634.04 (2006). "Evidence that merely shows the commission of the crime or the circumstances thereof is not sufficient to corroborate accomplice testimony." *State v. Johnson*, 616 N.W.2d 720, 727 (Minn. 2000). Corroborating evidence is viewed in a light most favorable to the verdict 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." *Id.*

Appellant argues that there was insufficient evidence to corroborate the testimony that appellant gave Marcus the gun before the shooting. It is not necessary that there be evidence sufficient to corroborate every aspect of the accomplice's testimony. *Cf. State v. Smith*, 669 N.W.2d 19 (Minn. 2003) (not necessary that corroboration cover every point or every element of the crime). Here, there was circumstantial evidence provided by a police officer that appellant sat in the front passenger seat, a handgun was found in the front passenger seat, and appellant repeatedly stated he was sorry after being arrested.

Also, appellant was identified by D.H. as one of the three men involved in the shooting. Further, the jury was specifically instructed that it could not find appellant guilty based on the testimony of Marcus and Matthew alone. Viewing the corroborating evidence in the light most favorable to the verdict, we conclude there was sufficient circumstantial evidence of appellant's guilt to meet the accomplice-corroboration requirement.

**III.**

The third issue raised by appellant is whether the district court sentenced appellant in violation of his right to a jury trial. Appellant argues that his Sixth Amendment rights under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) were violated when the district court imposed the 36-month mandatory-minimum sentence under Minn. Stat. § 609.11, subd. 5 (2006) without a jury finding that a firearm was used in the commission of the assaults. Whether a *Blakely* error occurred is a legal question, which this court reviews de novo. *State v. Dettman*, 719 N.W.2d 644, 648-49 (Minn. 2006). In *Blakely*, the Supreme Court held that a sentencing judge may not impose a sentence greater than "the maximum sentence [that may be imposed] solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303, 124 S. Ct. at 2537 (emphasis omitted). The rule in *Blakely* applies to the imposition of a mandatory-minimum sentence under Minn. Stat. § 609.11, based on a determination that a firearm was used or possessed during the commission of the offense. *State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005).

Here, the jury was asked to find whether or not Marcus "used a dangerous weapon" in the commission of the assaults. However, the jury was not asked to find

whether a "firearm" was used to commit either assault. Without a finding that Marcus used a firearm in the assaults, it would be a *Blakely* violation to sentence appellant to the higher mandatory-minimum sentence under Minn. Stat. § 609.11, subd. 5, rather than the lower presumptive sentence for non-firearm dangerous-weapon assaults under Minn. Stat. § 609.11, subd. 4. "[T]he decision to apply the mandatory minimum sentence, like a decision to depart from the guideline presumptive sentence, requires judicial fact-finding." *Barker*, 705 N.W.2d at 773.

*Blakely* errors are subject to a harmless error analysis. *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006). An error is harmless if there is no reasonable doubt that the result would have been the same if the error had not occurred. *State v. DeRosier*, 719 N.W.2d 900, 904 (Minn. 2006).

Appellant argues that the sentencing error was not harmless because it increased appellant's sentence. Respondent argues that any error was harmless because (1) the drive-by shooting conviction and the assault convictions resulted from the same conduct; and (2) that, based on the record, there is no logical possibility that the assaults were committed with a dangerous weapon other than a firearm. The undisputed evidence is that Marcus fired several shots into the home. There was no evidence that any weapon other than a firearm was used to commit the assaults. The only reasonable inference from the jury's verdicts that appellant aided and abetted the second-degree assaults with a dangerous weapon is that a firearm was used to commit the assaults. Any error in failing to instruct the jury to determine whether the assaults were committed with a firearm was harmless because it was undisputed that a firearm was used in the assaults.

## IV.

The final issue is whether appellant's 75-month sentence was erroneous. Appellant argues that the district court erred in failing to sentence him on the most serious offense, drive-by shooting. Respondent concedes that resentencing is appropriate because the drive-by shooting was the most serious offense and that appellant should have been sentenced on that offense in light of the supreme court's recent decision in *State v. Franks*, 765 N.W.2d 68 (Minn. 2009). We agree and therefore reverse and remand for resentencing in light of the supreme court's opinion in *Franks*. In reversing and remanding for re-sentencing, we observe that appellant and respondent agree that appellant cannot be resentenced for more time than his initial 75-month sentence. *Cf. State v. Jackson*, 749 N.W.2d 353, 358 (Minn. 2008) ("[A]s a matter of judicial policy in Minnesota, a court cannot impose on a defendant who has secured a new trial a sentence more onerous than the one he initially received." (quotations omitted)).

**Affirmed in part, reversed in part, and remanded.**

Dated: