STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2307

State of Minnesota,
Respondent,

vs.

DeAndre Lenier Neal-Hill,
Appellant.

Filed January 18, 2011
Affirmed in part, reversed in part, and remanded
Wright, Judge

Ramsey County District Court
File No. 62-CR-09-8051

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

John J. Choi, Ramsey County Attorney, Mitchell L. Rothman, Assistant Ramsey County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Wright, Judge; and Collins, 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

WRIGHT, Judge

Appellant challenges his convictions arising from a drive-by shooting, arguing that the evidence was insufficient to support the guilty verdicts, the district court committed reversible error by admitting hearsay evidence, and the district court erroneously imposed separate sentences for second-degree assault and aiding and abetting a drive-by shooting because the two offenses involved the same victims. We affirm in part, reverse in part, and remand.

FACTS

At 1:22 p.m. on April 5, 2009, the St. Paul police received a report that shots had been fired near the intersection of Wheelock Parkway and Jackson Street. Witnesses reported that a red Monte Carlo was leaving the scene. Appellant DeAndre Lenier Neal-Hill subsequently was arrested and charged based on evidence of his involvement in the shooting. During the jury trial that followed, several witnesses testified regarding the events of that Sunday afternoon.

J.H. was driving a pickup truck on Wheelock Parkway when a red Monte Carlo traveled north through the intersection of Wheelock Parkway and Jackson Street. J.H. observed the passenger in the Monte Carlo fire a gun toward a white car, which caused the driver and passenger to flee that car. Although J.H. did not see the driver of the white car, he described the passenger as a light-skinned, heavy-set African-American man who was attempting to load a revolver. J.H. followed the Monte Carlo and called the police to report its location.

M.S. was walking on the north side of Wheelock Parkway, west of Jackson Street, when he heard a gunshot and saw an African-American man running along Jackson Street holding a chrome handgun. The man fired at a red Monte Carlo and hid behind a tree. M.S. described the man as between five feet, nine inches and six feet tall, with a weight between 185 and 210 pounds. After the Monte Carlo drove away, M.S. briefly saw a second man, who appeared to be Hispanic, join the first gunman. After the shooting, both men walked south on Jackson Street carrying semiautomatic handguns. When M.S. later viewed a six-person photographic lineup that included Neal-Hill, he identified Neal-Hill as one of the gunmen. M.S. told police that the person in the photograph had facial features resembling one of the gunmen.

C.M. was waiting for a bus at the corner of Wheelock Parkway and Jackson Street when the shooting occurred. He observed an African-American man exit a black sedan and fire a gun once at a red car. The gunman had his back to C.M., which obstructed C.M.'s ability to see the gunman's face. But C.M. described the shooter as approximately five feet, ten inches tall. The driver of the black sedan remained in the car.

J.M.-F. witnessed the shooting through his living-room window. He observed a gunman fire or attempt to fire a gun at a red car after exiting another car. Although J.M.-F. was unable to describe the gunman's car, he described the gunman as a thin man with dark skin.

The police pursued the red Monte Carlo and subsequently arrested the driver, M.J., and the passenger, D.B. Following the arrests, the police searched the car and recovered

a .40 caliber handgun near the Monte Carlo. During a search of Jackson Street in the area where the shooting occurred, officers recovered 13 spent .40 caliber casings, one unspent 9 mm round, and one spent 9 mm casing. A ballistics expert later determined that all of the .40 caliber casings were fired from the handgun recovered near the Monte Carlo and a different handgun was used to fire the 9 mm casing.

On April 6, 2009, officers observed Neal-Hill vacuuming the passenger compartment of a white Toyota Avalon at a gas station in Minneapolis. This car had been rented by a woman on April 4 and returned to the rental agency on April 6. When the police impounded the car and searched it, a brown glove was recovered from the trunk. Testimony at trial established that individuals often wear gloves, called "browns," to keep gunshot residue off their hands. The glove from the car was not tested for gunshot residue, and the car contained no bullet holes or shell casings.

Neal-Hill was charged with aiding and abetting a drive-by shooting, two counts of second-degree assault against D.B. and M.J., and unlawful possession of a firearm. At trial, M.J. testified that he and D.B. were leaving the home of D.B.'s brother near the intersection of Jackson Street and Wheelock Parkway when they heard shots. M.J. ducked his head and continued driving while D.B. fired a gun from the passenger window. M.J. did not know or see who was shooting at them. D.B. asserted his Fifth Amendment privilege and refused to testify.

Before the shooting, in an unrelated investigation, police obtained a wiretap warrant for two telephone numbers that Neal-Hill was known to use. Recordings of four calls were admitted in evidence. The first recorded call, which occurred five days before

the shooting, was between Neal-Hill and L.A. L.A. refers to an argument that he had with a person named "Triple O" during which L.A. challenged Triple O to meet and "cowboy out."[1] Later in the call, L.A. says that "Lil Staccs" has "Houdini" at the "crib" and that L.A. wishes he still had it. Neal-Hill had referred to "Houdini" in earlier conversations, and investigators determined that it is a firearm. Officer Eric Vang-Sticler testified that he knows D.B., the passenger in the Monte Carlo, and that D.B.'s street name is Triple O.

The second recorded telephone call, which was between Neal-Hill and D.S., occurred approximately four hours after the shooting. Neal-Hill states in the call, "[W]e had to shake it . . . it was hot." The event that he left, he states, occurred "by the old projects. Over there off of Wheelock."

The third recorded call was between Neal-Hill and L.A. on the following afternoon. L.A. asks why certain people are in jail, to which Neal-Hill replies, "I knew they was goin' get caught." Neal-Hill also states, "[I]t was too much goin' on right there. That's why niggas' had to get away from the scene." L.A. asks if the jailed individuals would "snitch," and Neal-Hill replies, "Sh-t if not they goin' upstate anyway. Cuz' you know, I think that pickup truck probably followed they ass."

In the fourth recorded call, which occurred later that day between Neal-Hill and L.A., L.A. states, "I'm saying they can't do sh-t . . . cuz' [he] had crownies on." In

[1] In its closing argument, the state characterized "cowboy out" as a reference to a western-style shootout.

closing argument, the state argued that "crownies" could refer to "browns," or shooting gloves.

Neal-Hill was convicted of (1) aiding and abetting a drive-by shooting, in violation of Minn. Stat. §§ 609.66, subd. 1e(b), 609.05, subd. 1, 609.11, subd. 5 (2008); (2) two counts of second-degree assault against victims D.B. and M.J., in violation of Minn. Stat. §§ 609.222, subd. 1, 609.11, subd. 5 (2008); and (3) unlawful possession of a firearm, in violation of Minn. Stat. §§ 624.713, subds. 1(2), 2(b), 609.11, subd. 5 (2008).[2] The district court imposed sentences of 60 months' imprisonment for unlawful possession of a firearm, 93 months' imprisonment for aiding and abetting the drive-by shooting, to be served concurrently with the 60-month sentence, and 36 months' imprisonment for each count of second-degree assault, to be served consecutively to each other and to all other sentences. This appeal followed.

D E C I S I O N

I.

Neal-Hill argues that the evidence is insufficient to support his convictions. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis 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 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 jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the

[2] Neal-Hill stipulated that he is ineligible to possess a firearm.

contrary. *Id.* 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, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

To support a conviction of aiding and abetting a drive-by shooting, the state must prove beyond a reasonable doubt that the defendant intentionally aided, advised, hired, counseled, conspired with, or otherwise procured another person to recklessly discharge a firearm at or toward an occupied motor vehicle while in or having just exited a motor vehicle. Minn. Stat. §§ 609.05, subd. 1 (aiding and abetting), 609.66, subd. 1e (drive-by shooting). For second-degree assault, the state must prove beyond a reasonable doubt that the defendant assaulted another person with a dangerous weapon. Minn. Stat. §§ 609.222, subd. 1, 609.02, subd. 10 (defining 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").

A witness's identification from a photographic lineup of the perpetrator of an offense is direct evidence. *Pierson v. State*, 637 N.W.2d 571, 580 (Minn. 2002). "Identification testimony need not be absolutely certain; it is sufficient if the witness expresses a belief that she or he saw the defendant commit the crime." *State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998). M.S. identified one of the gunmen from the April 5 shooting from a photographic lineup, and police testimony established that M.S. pointed to a photograph of Neal-Hill when doing so. This direct evidence supports Neal-Hill's conviction of aiding and abetting the drive-by shooting. Neal-Hill's stipulation that he

was ineligible to possess a firearm, together with the direct evidence that he was identified as having been in possession of a firearm, supports his conviction of unlawful possession of a firearm. *See* Minn. Stat. § 624.713. M.S. observed two gunmen but only observed one of them discharge a firearm. M.S. did not specify whether the gunmen he identified in the photographic lineup was the one that discharged the firearm. But J.M.-F. observed a thin man with dark skin shooting or attempting to shoot at a red car. Neal-Hill is an African-American man who is five feet, six inches tall and weighs approximately 145 pounds. Thus, J.M.-F.'s testimony corroborates M.S.'s identification of Neal-Hill and supports Neal-Hill's two convictions of second-degree assault. *See* Minn. Stat. §§ 609.02, subd. 10 (defining assault), 609.222, subd. 1 (defining second-degree assault).

The direct evidence of Neal-Hill's guilt is bolstered by circumstantial evidence, which warrants stricter scrutiny but is entitled to the same weight as direct evidence. *See State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). Viewed in the light most favorable to the verdict, the state established that Neal-Hill was at the scene of the shooting and had detailed knowledge of the shooting, based on the four recorded telephone conversations before and after the shooting. Neal-Hill was observed cleaning out a white car that was similar in appearance to a car observed at the shooting and that was rented for three days, including the day of the shooting. He was identified in a photographic lineup by an eyewitness who saw him carrying a gun while running down Jackson Street, and his presence at the scene of the shooting was corroborated by four eyewitnesses who observed a man of similar physical characteristics carrying a handgun and either shooting or attempting to shoot at a red car.

On this record, when viewed in its totality in the light most favorable to the jury's guilty verdict, the direct and circumstantial evidence amply support Neal-Hill's convictions. *See State v. Taylor*, 650 N.W.2d 190, 206-07 (Minn. 2002) (upholding conviction based on circumstantial evidence when, viewed as a whole, the evidence led directly to guilt). Accordingly, this challenge to Neal-Hill's conviction fails.

II.

Neal-Hill next argues that the district court erred by admitting Officer Vang-Sticler's testimony regarding Triple O's identity because it was hearsay. The district court's evidentiary rulings rest within its sound discretion and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). When challenging an evidentiary ruling, it is the appellant's burden to establish that the district court abused its discretion and that the appellant was prejudiced. *Id.*

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Out-of-court statements offered for purposes other than proving the truth of the matter asserted are not hearsay. *State v. Campion*, 353 N.W.2d 573, 580 (Minn. App. 1984). Hearsay is inadmissible absent one of several exceptions. Minn. R. Evid. 802 (barring admission of hearsay), 803 (listing 22 exceptions to hearsay exclusion), 807 (stating residual exception to hearsay exclusion); *see also State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (observing that hearsay exceptions "generally reflect the recognized reliability of statements made in certain situations").

Triple O's identity was important evidence in the state's case because it linked Neal-Hill to D.B. and the shooting that Neal-Hill discussed in the recorded telephone calls. Before eliciting testimony regarding D.B.'s street name, the state established the foundation for Officer Vang-Sticler's knowledge of D.B.'s street name. For example, Officer Vang-Sticler testified that he knows the street names of many individuals living in the western district of St. Paul where he routinely patrols. Officer Vang-Sticler had known D.B. for seven years, and he knows D.B.'s relatives. The state then elicited the following testimony:

> [THE PROSECUTOR]: And did you hear, in particular, from [D.B.] what his street name was?
> [VANG-STICLER]: Yes, his name was—
> [DEFENSE COUNSEL]: Objection, hearsay, Your Honor.
> [THE COURT]: Overruled.
> [THE PROSECUTOR]: *What was he known as?*
> [VANG-STICLER]: *He was known as Triple O.*
> [THE PROSECUTOR]: Did you hear this from him?
> [VANG-STICLER]: Yes, I did.
> [THE PROSECUTOR]: And from others?
> [VANG-STICLER]: Yes.

(Emphasis added.) Contrary to Neal-Hill's argument, Officer Vang-Sticler's testimony that D.B. "was known as Triple O" is not hearsay but testimony from his personal knowledge, derived from interacting with D.B. and D.B.'s family.

The evidentiary challenge here is akin to that in *United States v. Allen*, in which a police officer testified as to the alias used by the defendant. 960 F.2d 1055, 1059 (D.C. Cir. 1992). The defense challenged the officer's testimony as improperly admitted hearsay. *Id.* In rejecting the challenge, the *Allen* court opined that "[o]ne virtually always learns a name—even one's own—by being told what it is." *Id.* The *Allen* court

also observed that "evidence as to names is commonly regarded as either not hearsay because it is not introduced to prove the truth of the matter asserted, or so imbued with reliability because of the name's common usage as to make any objection frivolous." *Id.* (citation omitted). Indeed, although D.B. had told Officer Vang-Sticler that his street name is "Triple O," this was not the sole basis of Officer Vang-Sticler's knowledge. His knowledge was derived from his experience with the common usage of street names, as well as the context and meaning derived from his firsthand observation of others using "Triple O" to refer to D.B. and D.B.'s response to that name.

Because the district court properly overruled Neal-Hill's hearsay objection and admitted Officer Vang-Sticler's testimony, Neal-Hill's argument for reversal on this ground fails.

III.

Neal-Hill next challenges the district court's imposition of separate sentences for Neal-Hill's convictions of second-degree assault and drive-by shooting. Neal-Hill argues that only one sentence is permissible under Minn. Stat. § 609.035, subd. 1 (2008), because the offenses arise from a single behavioral incident and the multiple-victim exception does not apply when the offenses involved the same victims.

The state does not contest that these offenses arose from the same behavioral incident and that the most serious offense is drive-by shooting. But the state argues that the multiple-victim exception applies. The multiple-victim exception to the single-behavioral-incident rule permits the imposition of multiple sentences when the offenses involve multiple victims and the imposition of multiple sentences does not unfairly

exaggerate the criminality of the defendant's conduct. *State v. Marquardt*, 294 N.W.2d 849, 850-51 (Minn. 1980). Whether the multiple-victim exception applies is a question of law, which we review de novo. *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006).

Ordinarily, when a defendant's conduct constitutes more than one offense, the district court may impose punishment for only one of the offenses. Minn. Stat. § 609.035, subd. 1. Thus, as a general rule, when multiple offenses arise from a single behavioral incident, the district court may impose a sentence on only one offense. *Id.* This rule protects against exaggerating the criminality of an offender's conduct by making punishment and prosecution commensurate with the offender's culpability. *State v. Secrest*, 437 N.W.2d 683, 684 (Minn. App. 1989), *review denied* (Minn. May 24, 1989). If section 609.035 applies, all multiple sentences, including concurrent sentences, are barred. *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995). Whether the offenses arise from the same behavioral incident depends on the facts and circumstances of the particular case. *State v. Hawkins*, 511 N.W.2d 9, 13 (Minn. 1994).

A defendant will be punished for the most serious offense arising from a single behavioral incident because a sentence that is up to the maximum punishment for the most serious offense will include punishment for all offenses of conviction. *State v. Franks*, 765 N.W.2d 68, 77 (Minn. 2009). Although *Franks* involved a single victim, we recently applied *Franks* in a multiple-victim context and held that "a defendant convicted of offenses arising out of a single behavioral incident and committed against multiple victims may be sentenced only on the most serious offense against each victim." *State v.*

Ferguson, 786 N.W.2d 640, 645 (Minn. App. 2010), *review granted* (Minn. Oct. 19, 2010). In *Ferguson*, the defendant was convicted of eight counts of aiding and abetting second-degree assault and one count of drive-by shooting after committing a drive-by shooting involving a building with eight occupants. *Id.* at 642. The *Ferguson* court held that, because the drive-by shooting was the most serious offense committed against each of the victims, the defendant should have been sentenced only on that conviction. *Id.* at 645-46.

The state argues that, although M.J. and D.B. were the victims of the two separate counts of second-degree assault, they were not the victims of the drive-by shooting. The state maintains that the victims of the drive-by shooting were the innocent bystanders. Indeed, the record establishes that at least four bystanders were present at the scene of the shooting, and a drive-by-shooting conviction does not require an intended victim or direct harm. Minn. Stat. § 609.66, subd. 1e; *see State v. Rhoades*, 690 N.W.2d 135, 139 (Minn. App. 2004) (stating that multiple-victim exception does not require that victims be directly harmed). But we look to the complaint to determine who the alleged victims of the offenses are. *See Rhoades*, 690 N.W.2d at 138 (observing that complaint clearly specified that five of the charged offenses involved separate victims); *State v. Johnson*, 653 N.W.2d 646, 653 (Minn. App. 2002) (holding that multiple-victims exception does not apply when each offense in complaint identified same victim). Contrary to the state's argument, the complaint alleges that Neal-Hill "recklessly discharge[d] a firearm at or toward another occupied motor vehicle." The complaint does not allege that the bystanders were the targets or the victims of the drive-by shooting. If M.J. and D.B., the

occupants of the motor vehicle, are the only victims of the drive-by shooting contemplated in the complaint, the multiple-victim exception does not apply because Neal-Hill was sentenced for assaults against both M.J. and D.B.

Moreover, even if the evidence establishes that the victims of the drive-by shooting included the bystanders in addition to M.J. and D.B., the drive-by-shooting conviction is a more serious offense than second-degree assault and, therefore, preempts the two second-degree assault convictions.[3] *See Ferguson*, 786 N.W.2d at 642, 645-46 (holding that one count of drive-by shooting toward an occupied building included as victims each occupant of building for purpose of multiple-victims exception). Had the state charged Neal-Hill with multiple counts of drive-by shooting for each bystander, or a drive-by-shooting count for one specific bystander, sentencing for those additional counts might be proper. *See id.* at 645 n.6 (citing *State v. Edwards*, 774 N.W.2d 596, 605-06 (Minn. 2009)) (observing that multiple sentences may have been appropriate had the defendant been charged and convicted of multiple counts of drive-by shooting). But the state did not do so here.

Relying on *State v. DeFoe*, the state argues that the district court properly imposed separate sentences for the drive-by shooting and one assault. 280 N.W.2d 38 (Minn. 1979). In *DeFoe*, the defendant was convicted of aggravated robbery of a liquor store

[3] *Compare* Minn. Stat. § 609.222, subd. 1 (stating that second-degree assault is punishable by maximum of seven years in prison), *and* Minn. Sent. Guidelines V (2009) (stating that second-degree assault is a Level VI offense), *with* Minn. Stat. § 609.66, subd. 1e(b) (stating that drive-by shooting toward an occupied vehicle is punishable by maximum of ten years in prison), *and* Minn. Sent. Guidelines V (2009) (stating that drive-by shooting toward an occupied vehicle is a Level VIII offense).

and aggravated assault for shooting one of the liquor store's patrons. *Id.* at 39. The district court imposed a sentence for both offenses. *Id.* The Minnesota Supreme Court affirmed the district court's imposition of multiple sentences because the offenses involved multiple victims. *Id.* at 42. The *DeFoe* court observed that "the defendant robbed not just the victim of the assault but numerous other patrons present in the store." *Id.* We are not persuaded by the state's argument that a similar result should govern under these facts because we cannot discern from the *DeFoe* opinion that its facts are analogous to those here. The *DeFoe* court did not indicate how many victims were present at the liquor store or which victims were named in the complaint. If the defendant in *DeFoe* did not rob the patron whom he shot, or if the complaint named one specific robbery victim as distinct from the assault victim, then the *DeFoe* result is consistent with subsequent applications of the multiple-victims exception and its facts are distinguishable from the facts at issue here. Based on *DeFoe*'s limited factual presentation and analysis and in light of the Minnesota Supreme Court's more recent pronouncement in *Franks*, which the *Ferguson* court applied under circumstances akin to those here, we cannot conclude that *DeFoe* governs here.

The district court erred by sentencing Neal-Hill for both second-degree assault convictions and the drive-by shooting conviction rather than sentencing him only for the most serious offense. Accordingly, we reverse the sentence imposed and remand for resentencing in a manner not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.