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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0945**

State of Minnesota,
Respondent,

vs.

Robert John Lund,
Appellant.

**Filed June 11, 2018
Affirmed
Smith, Tracy M., Judge**

St. Louis County District Court
File No. 69DU-CR-16-3808

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Cleary, Chief Judge;
and Rodenberg, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Robert John Lund challenges his convictions for aiding and abetting attempted second-degree murder, aiding and abetting drive-by shooting, and being a

prohibited person in possession of a firearm, arguing there was insufficient evidence to corroborate the accomplices' testimony that he committed the crimes. Lund also argues, and the state agrees, that the district court erred in sentencing him for one count of aiding and abetting attempted second-degree murder and one count of aiding and abetting drive-by shooting because both offenses occurred as part of the same behavioral incident. Because the record contains sufficient corroborating evidence to restore confidence in the accomplices' testimony and confirm Lund's active participation in the crimes, we affirm Lund's convictions. And because the district court did not err in imposing multiple sentences when one of the offenses was aiding and abetting drive-by shooting, we affirm Lund's sentences as well.

FACTS

This case revolves around a drive-by shooting that occurred at a home in Hermantown, Minnesota. On September 24, 2016, P.W. was with his girlfriend, J.B., and her friend, A.R., hanging out at "the wall" on Skyline Drive in Duluth. Denzel Perrin was also at Skyline Drive, with friends in his silver car. Perrin had been involved in a fight with P.W. the previous year. A little after 10:00 p.m., P.W., J.B., and A.R. got into their car to return to A.R.'s home in Hermantown. Perrin, who had spotted P.W., followed the group in his car.

The group noticed Perrin's car, and A.R. called home to inform her family that a silver car was following them. Her father, M.R., and brother, J.R., went out to the front lawn of the house to wait for A.R. According to M.R. and J.R., when Perrin arrived at

A.R.'s home, M.R. grabbed a baseball bat and walked toward the silver car to confront its occupants.

In response, Perrin drove away. He went to Lund's home. Lund was the boyfriend of Perrin's girlfriend's mother. Lund's son, Devin Lund (Devin), and his friends Kewon Dunn and Michael Roux, were also at Lund's house when Perrin arrived. Perrin recounted to the group what had happened in Hermantown. According to Perrin, Lund said that he was "pissed" and had been "looking for a fight all day." Perrin did not recall who initially suggested returning to Hermantown, but he claimed that Lund was "amping it all up" and told the four young men to load bats into his Suburban truck.

Once the bats were loaded, 47-year-old Lund drove the four young men to Hermantown in his Suburban. Perrin was in the front passenger seat; Dunn, Roux, and Devin were in the backseat. Dunn had brought a .22 caliber pistol. Perrin testified that Dunn showed him the gun and that everyone in Lund's car knew Dunn had a gun. Lund testified that he did not know Dunn had a gun and would have stopped the young men from going to Hermantown had he known.

When the group arrived at A.R.'s residence, Lund stopped his Suburban at the end of the driveway, with the passenger side facing the house and the front-passenger window rolled down. The victims, A.R., J.R., M.R., and A.R.'s boyfriend, T.S., were all initially outside the house. All of the victims recalled a truck pulling up to the end of the driveway, several shots being fired from the truck toward the house, and a pause before a second volley of shots was fired in the same direction. During this gunfire, T.S. was shot in the leg.

Descriptions of what happened inside the Suburban vary. Perrin testified that he saw Lund grab the gun from Dunn and fire four or five shots out the open passenger window in the direction of the house. Then Perrin grabbed the gun from Lund and fired at the house another four or five times. Dunn testified that when they pulled up to the house, Dunn handed the gun to Perrin upon Perrin's request, but Perrin "was hesitating." Perrin then "passed the gun off" to Lund, who fired out the passenger-side window three or four times while the car was stopped. Then Perrin took back the gun and fired out the same passenger window several times while the Suburban was slowly moving away from the house. Lund testified that, when he stopped the car, Perrin suddenly grabbed a gun and began firing at the house. According to Lund, Perrin fired all the shots. In response, Lund panicked and quickly drove away from the house.

M.R. and J.R. provided the police with a description of the truck that fired at them. Officers located Lund's Suburban and searched it. During the search, the police found several baseball bats inside the car, as well as a spent .22 caliber shell casing between the passenger seat and the door. Officers had previously recovered similar .22 caliber casings in the center of the roadway in Hermantown where the drive-by shooting had occurred.

At trial, Perrin and Dunn testified for the state in exchange for plea deals. The jury was instructed that Perrin and Dunn were accomplices whose testimony must be corroborated in order to find Lund guilty based on their testimony. The jury found Lund guilty of four counts of aiding and abetting attempted second-degree murder, four counts of aiding and abetting drive-by shooting, and one count of being a prohibited person in possession of a firearm. The district court imposed concurrent sentences of 240 months

for the four counts of aiding and abetting attempted second-degree murder, a concurrent 117-month prison sentence for one count of aiding and abetting drive-by shooting, and a concurrent 365-day sentence for being a prohibited person in possession of a firearm.

Lund appeals.

D E C I S I O N

I. The evidence was sufficient to corroborate the accomplice testimony.

Lund argues that the evidence is insufficient to support his convictions because the convictions depended on accomplice testimony that was not sufficiently corroborated.

Minnesota statute governs the use of accomplice testimony:

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 (2016). Under the statute, “[a] defendant may not be convicted based solely on the uncorroborated testimony of an accomplice.” *State v. Lee*, 683 N.W.2d 309, 314 (Minn. 2004). This rule recognizes that accomplice testimony is inherently suspect, *State v. Jackson*, 746 N.W.2d 894, 898 (Minn. 2008), because an accomplice “may testify against another in the hope of or upon a promise of immunity or clemency or to satisfy other self-serving or malicious motives,” *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989).

“This court reviews the sufficiency of evidence corroborating accomplice testimony in the light most favorable to the state, and all conflicts presented by the evidence are

resolved in favor of the verdict.” *State v. Her*, 668 N.W.2d 924, 927 (Minn. App. 2003), review denied (Minn. Dec. 16, 2003). The burden of corroboration is met when “the defendant is linked to the alleged crime by corroborating evidence that in some substantial degree tends to affirm the truth of the accomplice’s testimony and to point to the guilt of the defendant.” *State v. Clark*, 755 N.W.2d 241, 253 (Minn. 2008) (quotation omitted). “The precise quantum of corroborative evidence needed necessarily depends on the circumstances of each case, but corroborative evidence does not need to be sufficient to establish a prima facie case of the defendant’s guilt or sustain a conviction.” *Id.* at 253-54 (quotation omitted). “[C]orroborative evidence is sufficient when it is weighty enough to restore confidence in the truth of the accomplice’s testimony.” *State v. Sorg*, 275 Minn. 1, 5, 144 N.W.2d 783, 786 (1966).

Examples of corroborating evidence include “the defendant’s association with those involved in the crime in such a way as to suggest joint participation, as well as from the defendant’s opportunity and motive to commit the crime and his proximity to the place where the crime was committed.” *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990). “The defendant’s entire course of conduct may be looked to for corroborating circumstances. If his connection to the crime may be fairly inferred from those circumstances, the corroboration is sufficient.” *Id.*

Testimony of other witnesses can restore confidence in the truth of an accomplice’s testimony. See *State v. Lemire*, 315 N.W.2d 606, 610-12 (Minn. 1982). However, accomplice testimony cannot be corroborated only by another accomplice witness. *State v. Harris*, 405 N.W.2d 224, 227 (Minn. 1987). Likewise, “[e]vidence 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).

Accomplices Perrin and Dunn testified that Lund aided and abetted the drive-by shooting (and committed the related offenses of aiding and abetting attempted murder and firearm possession) by driving the group of young men to Hermantown and firing the first volley of gunfire at the residence. Lund argues that, because Perrin’s testimony and Dunn’s testimony “differed significantly” about the circumstances of Lund firing the gun, their testimony is “particularly suspect.” Specifically, while Perrin claimed that Dunn handed the gun directly to Lund, Dunn testified that he initially handed the gun to Perrin and that it was only after Perrin froze that Lund took the gun from Perrin. Lund argues that this is a “significant inconsistency,” which suggests that Dunn and Perrin implicated Lund to obtain favorable plea deals.

The state points to corroborating evidence from Lund’s and the victims’ testimony. Lund admits to being the driver of the vehicle from which the shots were fired and in which a spent .22 caliber shell casing—matching the casings found at the crime scene—was found. Moreover, Lund’s testimony that he observed the heated young men load baseball bats into his Suburban and subsequently drove them back to the scene of an earlier dispute corroborates the accomplices’ contention that Lund encouraged the young men to return to Hermantown for a fight.

In addition, the victims’ testimony matches Dunn’s and Perrin’s description of how, moments before shots were fired out the front-passenger window, a Suburban approached the residence, turned around, and stopped perpendicular to the driveway with the passenger

side of the car facing the house. The victims consistently testified that the gunshots came out of the front passenger window, directly next to where Lund admits he was sitting in the driver's seat and which he easily could have reached. The victims' testimony that there were two distinct volleys of bullets, separated by a pause, and that the second round of shots occurred while the Suburban was slowly moving away, also corroborates Dunn's and Perrin's consistent testimony that first Lund (the driver), and then Perrin (the front seat passenger), shot the gun out the front-passenger window. Although Perrin's and Dunn's versions of the shooting were not identical, the inconsistency of who initially handed Lund the gun (Dunn versus Perrin) before he fired the first round of shots is a minor detail, and our standard of review requires us to resolve inconsistencies in favor of the state. *Her*, 668 N.W.2d at 927.

Lund argues that the evidence offered to corroborate their testimony was sufficient to "prove only that an offense occurred, not that Lund was involved." We disagree. Lund's testimony establishes his proximity to the crime scene, the opportunity to commit the crimes, and his association with the persons involved in the crimes in a manner suggesting joint participation. *See Bergeron*, 452 N.W.2d at 924. And the victims' testimony regarding the driver's conduct and the circumstances of the gunshots likewise corroborates the accomplices' account of Lund's participation. *See id.* Viewing the corroborating evidence, as we must, in the light most favorable to the state, we conclude that the evidence restores confidence in the accomplices' testimony and confirms Lund's guilt in some substantial degree. *See Her*, 668 N.W.2d at 927. Sufficient evidence therefore supports Lund's convictions.

II. The district court did not err by imposing sentences for aiding and abetting drive-by shooting and aiding and abetting attempted second-degree murder.

Lund argues that the district court erred in imposing concurrent sentences for one count of aiding and abetting attempted second-degree murder as well as for aiding and abetting drive-by shooting because both offenses were committed during a single behavioral incident. The state agrees, reasoning that, since Lund received a sentence for aiding and abetting the attempted second-degree murder of J.R. (count one), he should not have been sentenced for aiding and abetting the drive-by shooting involving that same victim (count six). Although the parties agree that the district court erred, this court must still conduct an independent inquiry. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (noting that it is the responsibility of appellate courts to decide cases in accordance with the law, regardless of whether the parties choose to contest an issue).

Minn. Stat. § 609.035 (2016) generally “prohibits multiple sentences, even concurrent 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), and contemplates that a defendant will be punished for the “most serious” of the offenses arising out of a single behavioral incident, *State v. Johnson*, 273 Minn. 394, 399, 141 N.W.2d 517, 522 (1966). There is an exception to section 609.035 when multiple victims are involved. *See State v. Whittaker*, 568 N.W.2d 440, 453 (Minn. 1997). “[C]ourts are not prevented from giving a defendant multiple sentences for multiple crimes arising out of a single behavioral incident if: (1) the crimes affect multiple victims; and (2) multiple

sentences do not unfairly exaggerate the criminality of the defendant's conduct.” *State v. Skipin the day*, 717 N.W.2d 423, 426 (Minn. 2006).

In *State v. Ferguson*, the Minnesota Supreme Court affirmed sentences for eight counts of assault as well as one count of drive-by shooting at or toward an occupied building, based on the same incident. 808 N.W.2d 586, 591-92 (Minn. 2012). In that case, the appellant had engaged in drive-by shooting at a building occupied by eight people. *Id.* at 588. The appellant argued that, because the eight victims of assault were also the victims of the drive-by shooting, the district court could sentence only for the drive-by shooting offense. *Id.* at 589. The supreme court disagreed and affirmed sentences for all the offenses. *Id.* at 592. Drawing an analogy to burglary, where “entry into a single building occupied by three persons does not support three separate burglary convictions,” *id.* at 591, the supreme court concluded that a drive-by shooting likewise does not have particular victims, *id.* And because a drive-by shooting does not have particular victims, sentencing for both drive-by shooting at or toward an occupied building and assault did not violate the rule that “a district court may not sentence a defendant to more than one crime for each victim.” *Id.* at 590. Instead, the multiple-victim exception permitted multiple sentences for the eight assault convictions and a separate sentence for the drive-by shooting.

We conclude that *Ferguson* applies equally to a drive-by shooting at or toward a person. A person commits felony drive-by shooting when, “while in or having just exited from a motor vehicle, [that person] recklessly discharges a firearm at or toward another motor vehicle or a building.” Minn. Stat. § 609.66 subd. 1e(a) (2016). The offense of

drive-by shooting is “defined in its entirety in subdivision 1e(a), and subdivision 1e(b) provides for a sentence enhancement when a person, while committing a drive-by shooting, discharges a firearm at or toward an occupied building, an occupied motor vehicle, or a person.” *State v. Hayes*, 826 N.W.2d 799, 804 (Minn. 2013).

In this case, the shots were fired from Lund’s car “at or toward a person.” While Lund’s felony was therefore eligible for an enhanced sentence, it is still the same underlying drive-by offense under subdivision 1e(a) that was considered by the supreme court in *Ferguson*. Accordingly, applying *Ferguson*, we conclude that Lund was properly sentenced for one count of drive-by shooting in addition to his four sentences for aiding and abetting attempted second-degree murder.

Affirmed.