STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2307

State of Minnesota,
Respondent,

vs.

DeAndre Lenier Neal-Hill,
Appellant.

Filed July 30, 2012
Affirmed
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, Thomas R. Ragatz, 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 Wright, Presiding Judge; Ross, 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

On remand from the Minnesota Supreme Court, appellant challenges his sentences arising from a drive-by shooting. Appellant argues that the district court erroneously imposed separate sentences for second-degree assault and aiding and abetting a drive-by shooting at an occupied motor vehicle because the offenses involved the same victims. We affirm.

FACTS

The facts and procedural history of this case are set forth in detail in our previous opinion, *State v. Neal-Hill*, No. A09-2307, 2011 WL 134929, at *1-3 (Minn. App. Jan. 18, 2011). The following facts pertain to the issue presented on remand.

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 seeing a red Monte Carlo drive away from the scene. The police pursued the red Monte Carlo and subsequently arrested the driver, M.J., and the passenger, D.B. According to M.J., he and D.B. were leaving the home of D.B.'s brother when they heard shots. M.J. ducked his head and continued driving while D.B. fired a gun from the passenger window. A ballistics expert later determined that, of the 14 spent casings that the police recovered from the area where the shooting occurred, 13 were fired from a handgun recovered near the Monte Carlo and one was fired from a different handgun.

Several bystanders witnessed the shooting. C.M. observed a man exit a car and fire a gun once at a red car. J.M.-F. also observed a man exit a car and fire or attempt to

fire a gun at a red car. M.S. observed a man fire a chrome handgun at a red Monte Carlo and hide behind a tree, after which the shooter and another man, who also was carrying a handgun, walked south on Jackson Street. When M.S. later viewed a six-person photographic lineup that included appellant DeAndre Lenier Neal-Hill, M.S. identified Neal-Hill as one of the gunmen.

Neal-Hill was charged with (1) aiding and abetting a drive-by shooting at an occupied motor vehicle, a violation of Minn. Stat. §§ 609.66, subd. 1e(b), 609.05, subd. 1 (2008); (2) two counts of second-degree assault against victims D.B. and M.J., a violation of Minn. Stat. § 609.222, subd. 1 (2008); and (3) unlawful possession of a firearm, a violation of Minn. Stat. § 624.713, subd. 1(2) (2008). After a trial that included testimony from witnesses who observed the shooting and other evidence that linked Neal-Hill to the shooting, a jury convicted Neal-Hill of all charges. 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.

Neal-Hill appealed his convictions and sentences to this court, challenging the sufficiency of the evidence, the admission in evidence of alleged inadmissible hearsay testimony, and the district court's imposition of separate sentences for second-degree assault and drive-by shooting at an occupied motor vehicle. *Neal-Hill*, 2011 WL 134929, at *1. In a January 18, 2011 decision, we affirmed Neal-Hill's convictions but reversed the sentences imposed by the district court and remanded the case for resentencing. *Id.* at

*7. We observed that Neal-Hill's convictions arose from a single behavioral incident for which only one sentence for the most serious offense is permissible under Minn. Stat. § 609.035, subd. 1 (2008), and we held that the multiple-victim exception does not apply because the offenses involved the same victims—namely, the occupants of the red Monte Carlo, M.J. and D.B. *Neal-Hill*, 2011 WL 134929, at *5-7.

Neal-Hill and the state filed cross-petitions for further review. The Minnesota Supreme Court denied Neal-Hill's petition and granted the state's petition. But the supreme court stayed proceedings on the state's petition pending final disposition in *State v. Ferguson*, 808 N.W.2d 586 (Minn. 2012), which the Minnesota Supreme Court decided in January 2012. Subsequently, the Minnesota Supreme Court vacated the stay of proceedings in this case, reversed our January 18, 2011 decision, and remanded the case to us for reconsideration.[1]

D E C I S I O N

Neal-Hill challenges the district court's imposition of separate sentences for his convictions of second-degree assault and drive-by shooting at an occupied motor vehicle. Neal-Hill argues that only one sentence is permissible under Minn. Stat. § 609.035, subd. 1, 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 a single behavioral incident and that the most

[1] Because the Minnesota Supreme Court denied Neal-Hill's petition for further review as to the evidentiary issues, our January 18, 2011 decision became final as to those issues. On remand, the parties raise only the sentencing issue to which our analysis on remand is limited.

serious offense is drive-by shooting. Thus, our consideration is limited to the application of the multiple-victim exception to the facts of this case in light of the Minnesota Supreme Court's decision in *Ferguson*.

Ordinarily, when multiple offenses arise from a single behavioral incident, the district court may impose punishment for only one of the offenses. Minn. Stat. § 609.035, subd. 1. This rule protects against exaggerating the criminality of an offender's conduct by making punishment and prosecution commensurate with the offender's culpability. *Ferguson*, 808 N.W.2d at 589. If section 609.035 applies, multiple sentences, including concurrent sentences, are barred. *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995). 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. *Ferguson*, 808 N.W.2d at 589.

The multiple-victim exception to the single-behavioral-incident rule permits a district court to impose "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. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006). This exception exists because a defendant who acts "with the intent to harm more than one person or by means likely to cause harm to several persons is more culpable than a defendant who harms only one person." *Ferguson*, 808 N.W.2d at 590 (quotation omitted). Whether the multiple-victim

exception applies is a question of law, which we review de novo. *Skipintheday*, 717 N.W.2d at 426.

In *Ferguson*, the defendant was convicted of eight counts of aiding and abetting second-degree assault and one count of aiding and abetting drive-by shooting at an occupied building for the defendant's role in a drive-by shooting at a building with eight occupants. 808 N.W.2d at 588. The Minnesota Supreme Court held that, for the purpose of the multiple-victim exception to the single-behavioral-incident rule, "a single count of drive-by shooting at an occupied building does not constitute a crime against each building occupant." *Id.* at 590. The *Ferguson* court reasoned that the building occupants are not victims of a drive-by shooting because the elements of drive-by shooting at an occupied building do not require (1) the defendant to know that the building was occupied or (2) the occupants of the building to suffer injury, fear, or even become aware of the shooting. *Id.* at 591. The *Ferguson* court concluded that, notwithstanding the single-behavioral-incident rule, the defendant could be sentenced for his conviction of drive-by shooting at an occupied building *and* his convictions of eight counts of assault for each of the building's occupants. *Id.* at 592.

Neal-Hill asserts that his case is distinguishable from *Ferguson* because it involves drive-by shooting at an occupied motor vehicle rather than drive-by shooting at an occupied building. The *Ferguson* court expressly limited its holding to the offense of drive-by shooting at an occupied building "and express[ed] no opinion about who could be victims of a drive-by shooting at . . . an occupied vehicle." *Id.* at 590 n.1. But in reaching its decision, the *Ferguson* court relied on the statutory elements supporting a

drive-by-shooting conviction—namely, the lack of a knowledge-of-occupancy requirement. *Id.* at 591. These statutory elements are the same for both drive-by shooting at an occupied building and drive-by shooting at an occupied motor vehicle. Minn. Stat. § 609.66, subd. 1e(b). Like the conviction in *Ferguson*, a conviction of drive-by shooting at an occupied motor vehicle does not require the defendant to know that the motor vehicle was occupied or the occupants of the motor vehicle to know that the shooting occurred. *Id.* The drive-by-shooting statute describes drive-by shooting at an occupied building and drive-by shooting at an occupied motor vehicle in the very same clause, which convinces us that, with the exception of the object of the shooting, there is no distinction between the elements of these two offenses. *See id.* (providing that drive-by-shooting offense includes firing at or toward "an occupied building or motor vehicle").

Neal-Hill contends that the occupant of a motor vehicle, unlike the occupant of a building, is "easily visible." But the drive-by-shooting statute does not address the visibility of the occupants of either a building or a motor vehicle. Minn. Stat. § 609.66, subd. 1e (2008). The *Ferguson* court did not consider the visibility of the building's occupants when reaching its decision. Moreover, the occupant of a motor vehicle is not necessarily easily visible. For example, the occupant of a motor vehicle may be seated in the windowless backseat compartment of a van or trailer of a truck, in a car or limousine with tinted windows, in an airplane or a train car with the window shades drawn, in an enclosed boat, or may be lying down in a back seat. *See* Minn. Stat. § 609.52, subd. 1(10) (2008) (defining "motor vehicle" broadly to include "self-propelled device[s] for

moving persons or property . . . on land, rails, water, or in the air"). Conversely, the occupants of a building with a storefront window might be very visible.

Neal-Hill also argues that, in this case, neither the complaint nor the facts in evidence demonstrate that bystanders were the victims of the drive-by shooting. But the same is true of the *Ferguson* court's analysis, which did not rely on the identification of victims in the complaint or evidence of bystander victims. *See Ferguson*, 808 N.W.2d at 590-92. The *Ferguson* decision implies that a drive-by shooting has no particular victims. *Id.* Therefore, neither the description of the offense conduct alleged in the complaint nor the lack of evidence establishing that bystanders were the victims of Neal-Hill's conduct are relevant to our application of the *Ferguson* holding to the facts here.

Because there is no legally meaningful distinction between the offenses of drive-by shooting at an occupied building and drive-by shooting at an occupied motor vehicle, we apply the methodology employed by the Minnesota Supreme Court in *Ferguson* and conclude that a single count of drive-by shooting at an occupied motor vehicle does not constitute an offense against each occupant of the motor vehicle.[2] *See id.* at 592. Accordingly, notwithstanding the single-behavioral-incident rule, the district court did not err by imposing a sentence for Neal-Hill's conviction of drive-by shooting

[2] We are mindful that this conclusion is inconsistent with *State v. Edwards*, 774 N.W.2d 596 (Minn. 2009), in which the Minnesota Supreme Court affirmed the district court's imposition of one sentence for a conviction of first-degree assault and two sentences for two convictions of drive-by shooting at a motor vehicle arising from a single incident—one sentence for each of the three occupants of the motor vehicle. *See Ferguson*, 808 N.W.2d at 595 (Paul H. Anderson, J., dissenting) (observing inconsistency between *Ferguson* and *Edwards*).

at an occupied motor vehicle and imposing two additional sentences for his convictions of second-degree assault against the occupants of the motor vehicle.[3] *See id.*

Affirmed.

[3] Although the occupants of the motor vehicle are not victims of the drive-by shooting under the rule set forth in *Ferguson*, the single-behavioral-incident rule ordinarily would preclude imposing separate sentences for Neal-Hill's conviction of drive-by shooting at an occupied vehicle *and* his second-degree assault convictions for each of the vehicle occupants. *See Ferguson*, 808 N.W.2d at 597 (Paul H. Anderson, J., dissenting) ("Applying the principle of one sentence per victim, we have declined to count those affected by victimless crimes as 'victims' for purposes of the multiple-victim exception. . . . [C]onvictions for victimless crimes do not justify the imposition of additional sentences."). However, our decision is consistent with the sentencing methodology employed by the majority in *Ferguson*. *Id.* at 592.