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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1181**

State of Minnesota,
Respondent,

vs.

Jose Miguel Chavarria-Cruz,
Appellant.

**Filed July 13, 2012
Affirmed
Willis, Judge***

Hennepin County District Court
File No. 27-CR-06-074222

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

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant
County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and
Willis, Judge.

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

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges his conviction of first-degree felony murder, arguing that (1) protections against double jeopardy and due process barred the state from prosecuting him for first-degree felony murder, (2) testimony from an accomplice was not properly corroborated and, (3) the accomplice testimony, coupled with testimony from a fellow gang member, was insufficient to support his conviction. We affirm.

FACTS

Appellant Jose Miguel Chavarria-Cruz was charged by indictment on October 26, 2006, with first-degree premeditated murder, in violation of Minn. Stat. § 609.185 (a)(1) (Supp. 2005), and first-degree premeditated murder for the benefit of a gang, in violation of Minn. Stat. §§ 609.185 (a)(1) (Supp. 2005), 609.229, subd. 2 (2004). After a jury trial, Chavarria-Cruz was found not guilty of first-degree premeditated murder and first-degree premeditated murder for the benefit of a gang but was convicted of lesser-included offenses, including second-degree intentional murder for the benefit of a gang. The district court sentenced Chavarria-Cruz to an executed prison term of 350 months.

Chavarria-Cruz appealed the convictions, and we affirmed. *State v. Chavarria-Cruz*, 771 N.W.2d 883 (Minn. App. 2009). The Minnesota Supreme Court, however, reversed the convictions on the ground that the district court erred by not suppressing Chavarria-Cruz's confession. *State v. Chavarria-Cruz*, 784 N.W.2d 355 (Minn. 2010). On remand, the district court granted the state's motion to again present Chavarria-Cruz's case to a grand jury, which indicted Chavarria-Cruz for first-degree felony murder in the

course of an aggravated robbery, in violation of Minn. Stat. § 609.185(a)(3) (Supp. 2005); first-degree felony murder for the benefit of a gang, in violation of Minn. Stat. §§ 609.185(a)(1), 609.229, subd. 2; second-degree intentional murder, in violation of Minn. Stat. § 609.19 (2004); and second-degree intentional murder for the benefit of a gang, in violation of Minn. Stat. §§ 609.19, .229, subd. 2. Before trial on the new charges, Chavarria-Cruz moved to dismiss the first-degree murder charges on double-jeopardy grounds. The district court denied the motion, ruling that any sentence would be capped at the original sentence of 350 months, and, therefore, Chavarria-Cruz would not be placed in jeopardy. At the second trial, the jury found Chavarria-Cruz guilty of all four charges. The district court entered judgments of conviction on first-degree felony murder and second-degree intentional murder for the benefit of a gang. The district court sentenced Chavarria-Cruz to an executed prison term of 350 months for second-degree intentional murder.

At both trials, the state called co-defendant Felipe Saldivar Alvillar as a witness. At the first trial, Saldivar Alvillar testified as part of a plea agreement. At the second trial, Saldivar Alvillar testified that he did not recall his plea agreement or his testimony from the first trial. The district court, over Chavarria-Cruz's objection, allowed the state to read to the jury Saldivar Alvillar's testimony from the first trial.

In his testimony, Saldivar Alvillar stated that he was with Chavarria-Cruz and Noel Escarsega when they made phone calls to arrange to meet the victim outside his home with the intention of robbing him and that, when they arrived, Chavarria-Cruz and Escarsega got out of a car at the victim's home, each holding a handgun. Saldivar

Alvillar testified that he heard gunshots. He further testified that Chavarria-Cruz and Escarsega got back into the car carrying a pair of tennis shoes. Additional testimony indicated that the shoes belonged to the victim. Saldivar Alvillar also testified that Chavarria-Cruz said that his gun had gone off, and Escarsega said that his gun had misfired.

Manuel Guterrez testified that he was initiated into the same gang to which Chavarria-Cruz belonged. Guterrez testified that on the day of the shooting, he and Chavarria-Cruz discussed Chavarria-Cruz's participation in gang activities, and Chavarria-Cruz said that he had no choice but to participate. Guterrez further testified that a day or two after the shooting, Chavarria-Cruz said that he and others had tried to locate a rival gang member so that they could shoot him. Guterrez testified that Chavarria-Cruz said that he and Noel Escarsega went to the rival gang member's house—each armed with a handgun—and both tried to shoot the person. Guterrez testified that Chavarria-Cruz said that Escarsega's gun jammed but that Chavarria-Cruz was able to shoot the victim from a distance of only a few feet.

This appeal follows.

D E C I S I O N

I. Chavarria-Cruz's conviction did not violate protections against double jeopardy, and the state's decision to prosecute did not constitute prosecutorial vindictiveness.

Chavarria-Cruz argues that his conviction of first-degree felony murder violates protections against double jeopardy. The double-jeopardy clauses of the United States and Minnesota Constitutions protect a criminal defendant against “a second prosecution

for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.” *State v. Humes*, 581 N.W.2d 317, 320 (Minn. 1998). Additionally, Minn. Stat. § 609.035, subd. 1 (2004), bars serialized prosecution and multiple sentences for offenses resulting from the same behavioral incident. This court reviews double-jeopardy claims de novo. *State v. Watley*, 541 N.W.2d 345, 347 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996).

In Chavarria-Cruz’s first trial, he was charged with and acquitted of first-degree premeditated murder. In his second trial, Chavarria-Cruz was charged with and found guilty of first-degree felony murder. Chavarria-Cruz argues that the district court erred in denying his motion to dismiss the first-degree felony murder charge on double-jeopardy grounds because the protections against double jeopardy barred the state from prosecuting him for first-degree felony murder after he was acquitted of first-degree premeditated murder.

When the same act constitutes a violation of two distinct statutory provisions, a double-jeopardy claim is analyzed to determine whether “each [statutory] provision requires proof of a fact [that] the other does not.” *State v. Alexander*, 290 N.W.2d 745, 748 (Minn. 1980) (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932)). If any substantial difference exists between the essential facts that must be proved to sustain a conviction for each offense, the convictions are “free from the taint of double jeopardy.” *State v. Thompson*, 241 Minn. 59, 62–63, 62 N.W.2d 512, 516–17 (1954). A person commits first-degree premeditated murder by causing “the death of a human being with premeditation and with intent to effect the death of the

person or of another.” Minn. Stat. § 609.185 (a)(1). A person commits first-degree intentional felony murder in the course of an aggravated robbery by causing “the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit . . . aggravated robbery.” Minn. Stat. § 609.185(a)(3). Both require intent, but the offense of premeditated murder requires proof of premeditation, while the offense of first-degree felony murder in the course of an aggravated robbery requires proof of an attempt to commit aggravated robbery. *See State v. Smith*, 367 N.W.2d 497, 501 (Minn. 1985) (stating that premeditation is an element of first-degree premeditated murder); *Davis v. State*, 784 N.W.2d 387, 390 (Minn. 2010) (noting that attempted aggravated robbery is an element of Minn. Stat. § 609.185(a)(3) (2008)). Each charge required proof of a fact that the other did not, and Chavarria-Cruz, therefore, was not subjected to double jeopardy under the *Blockburger* test.

The Double Jeopardy Clause also precludes the state from “relitigating any issue that was necessarily decided by a jury’s acquittal in a prior trial.” *Yeager v. United States*, 557 U.S. 110, 119, 129 S. Ct. 2360, 2366 (2009). Under this collateral-estoppel aspect of double jeopardy, this court must examine the record of the first proceeding to determine whether a rational jury could have based its acquittal on a factual issue other than the one the defendant seeks to preclude. *Id.* at 119–20, 129 S. Ct. at 2367. That test is easily met in this case. The jury in Chavarria-Cruz’s first trial could have concluded that he did not premeditate the victim’s death. That is not an issue in the charge of first-degree murder in the course of an aggravated robbery that Chavarria-Cruz claims should not have been tried.

Chavarria-Cruz also cites a Nebraska case holding that double jeopardy applies “when there has been a single violation of a single statute” and that first-degree premeditated murder and first-degree felony murder are violations of the same statute. *State v. White*, 577 N.W.2d 741, 748 (Neb. 1998). But he cites no Minnesota cases applying that standard or holding that first-degree premeditated murder and first-degree felony murder are violations of the same statute. We note that because Chavarria-Cruz does not challenge the state’s ability to re-try him on the second-degree murder charges, the *White* court’s concern about allowing the state successive trials merely for additional bites at the first-degree-murder “apple” does not apply. *See id.*

Chavarria-Cruz also argues that Minn. Stat. § 609.035 (2004) barred the state from retrying him for a first-degree murder offense. We disagree. Although that statute is intended to broaden the constitutional double-jeopardy protection, it does not apply here. Because Chavarria-Cruz appealed his conviction and obtained a new trial, jeopardy did not terminate. *See Hankerson v. State*, 723 N.W.2d 232, 239–40 (Minn. 2006); *State v. Harris*, 533 N.W.2d 35, 36 (Minn. 1995). The prosecution of appellant continued by means of the original complaint to which the charge of first-degree felony murder was added by way of indictment.

Chavarria-Cruz argues that the indictment on the first-degree murder charge started a new prosecution. We disagree. The prosecution continued on the unresolved second-degree murder charges, with the first-degree charge being presented to the grand jury as it could have been under Minn. R. Crim. P. 8.02, subd. 2. Chavarria-Cruz was not charged “under a subdivision with greater penalties” or with “additional offenses.” *State*

v. Schmidt, 612 N.W.2d 871, 878 (Minn. 2000) (concluding double-jeopardy clauses did not bar re-trial following partial acquittal); *cf. State v. Guerra*, 562 N.W.2d 10, 13 (Minn. App. 1997) (concluding that amended complaint that charged same statutory violation based on different facts charged “a different or additional offense”).

Chavarria-Cruz alternately argues that he was denied due process because his re-prosecution for first-degree murder after a successful appeal constituted prosecutorial vindictiveness. The state’s imposition of additional penalties, such as charges of a more serious crime, in retaliation for a defendant's exercise of his legal rights is impermissible vindictive prosecution. *State v. Pettee*, 538 N.W.2d 126, 132 (Minn.1995). “To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” *United States v. Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 2488 (1982) (quotation omitted). But this due-process protection shields a defendant against retaliation when more serious charges are imposed after the exercise of one’s procedural rights. *See Blackledge v. Perry*, 417 U.S. 21, 27, 94 S. Ct. 2098, 2102 (1974) (stating “that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of ‘vindictiveness’”); *Pettee*, 538 N.W.2d at 133 (concluding appellant carries burden to show prosecutorial vindictiveness when charged with additional offense greater in degree than previously dismissed charge). Because the felony-murder conviction makes Chavarria-Cruz eligible for supervised release, while a conviction of first-degree premeditated murder would not, we conclude that Chavarria-Cruz was not subjected to any additional penalty and, therefore, was not deprived of due process. *See Minn. Stat.*

§ 609.106, subd. 2(1) (Supp. 2005) (providing that a conviction of first-degree premeditated murder is punished by life in prison without the possibility of release); Minn. Stat. §§ 609.185(a)(3), 244.05, subd. 4(b) (Supp. 2005) (providing that a person convicted of first-degree felony murder in the course of aggravated robbery is eligible for supervised release after 30 years' imprisonment).

II. The testimony of Chavarria-Cruz's accomplice was sufficiently corroborated.

Chavarria-Cruz asserts that the testimony of his accomplice, Salvidar Alvillar, was not sufficiently corroborated. Minn. Stat. § 634.04 (2010) requires that the testimony of an accomplice be corroborated. In reviewing the sufficiency of the evidence corroborating an accomplice's testimony, the evidence is viewed in the light most favorable to the state, and conflicts in the evidence are resolved in favor of the verdict. *State v. Adams*, 295 N.W.2d 527, 533 (Minn. 1980). Corroborative evidence must, to a substantial degree, confirm the truth of the accomplice's testimony and point to the defendant's guilt. *State v. Houle*, 257 N.W.2d 320, 324 (Minn. 1977). "Corroboration is required because the testimony of an accomplice is considered inherently untrustworthy," and "[t]he accused is exposed to the danger of imprisonment based on the testimony of a witness naturally inclined to shift or diffuse criminal responsibility." *State v. Sorg*, 275 Minn. 1, 5, 144 N.W.2d 783, 786 (1966); *State v. Mathiasen*, 267 Minn. 393, 399, 127 N.W.2d 534, 539 (1964).

It is undisputed that Saldivar Alvillar testified as an accomplice who received a favorable plea bargain. He testified that Chavarria-Cruz and Noel Escarsega made phone

calls to arrange to meet the victim outside the victim's home with the intention of robbing him and that Chavarria-Cruz and Escarsega got out of a car at the victim's home, each with a handgun. Saldivar Alvillar testified that he heard gunshots and that Chavarria-Cruz and Escarsega got back into the car carrying a pair of tennis shoes. Saldivar Alvillar also testified that Chavarria-Cruz said that his gun had gone off, and Escarsega said that his gun had misfired. Chavarria-Cruz asserts that, beyond a typical accomplice's motive to testify, Saldivar Alvillar was motivated to deflect suspicion from himself because the gun used in the shooting was kept in his car, his car was used in the shooting, and the cell phone used to call the victim belonged to Saldivar Alvillar's brother. But "[t]he credibility of a witness is to be determined by the jury." *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984).

It is also undisputed that the only corroborating evidence submitted was the testimony of Manuel Guterrez, who testified in return for a reduction of his sentence. Guterrez testified that he was initiated into the same gang to which Chavarria-Cruz belonged. Guterrez further testified that on the day of the shooting, Chavarria-Cruz discussed with him whether Chavarria-Cruz should participate in gang missions, and Chavarria-Cruz stated that he had no choice. Guterrez also testified that a day or two after the shooting, Chavarria-Cruz said that he and others had tried to find a rival gang member to shoot. Guterrez testified that Chavarria-Cruz said that he and Noel Escarsega went to the rival gang member's house, each armed with a handgun. Guterrez testified that Chavarria-Cruz said that when they attempted to shoot the rival gang member,

Escarsega's gun jammed but that Chavarria-Cruz was able to shoot the victim from a distance of only a few feet.

Because Guterrez's testimony closely aligns with the testimony provided by Saldivar Alvillar regarding the events on the night of the shooting, the corroboration was sufficient to restore confidence in Saldivar Alvillar's testimony. *See State v. Guy*, 259 Minn. 67, 72, 105 N.W.2d 892, 896 (1960) (stating corroborative evidence sufficient when weighty enough to restore confidence in truth of accomplice's testimony); *see also State v. Hayes*, 351 N.W.2d 654, 656 (Minn. App. 1984), *review denied* (Minn. Sept. 5, 1984) (stating that corroboration need not establish a prima facie case). Each testified identically to key details, including the facts that both Chavarria-Cruz and Escarsega were in the car that drove to the victim's home, that both were armed with handguns, and that Escarsega's gun did not go off but Chavarria-Cruz's did. The evidence was sufficient to corroborate the testimony of the accomplice.

III. The evidence was sufficient for the jury to conclude that Chavarria-Cruz was guilty beyond a reasonable doubt.

Chavarria-Cruz also argues that the accomplice's testimony, as well as testimony from another gang member, was insufficient to support his convictions of first-degree and second-degree murder. When sufficiency of the evidence is challenged, this court makes a painstaking review of the record to determine if the evidence was sufficient to permit the jury to reach the conclusion that it did. *State v. Ellingson*, 283 Minn. 208, 211, 167 N.W.2d 55, 57 (1969). We assume that the jury believed the state's witnesses and disbelieved contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). A

verdict will not be disturbed if the jury could reasonably conclude that the defendant was proved guilty. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

Chavarria-Cruz’s conviction was based largely on the testimony of two state witnesses, Saldivar Alvillar and Guterrez. Saldivar Alvillar’s testimony placed Chavarria-Cruz at the victim’s home at the time of the murder, and he testified that Chavarria-Cruz had a gun and that Salvidar Alvillar heard a gun fire. Salvidar Alvillar further testified that Chavarria-Cruz told him his gun fired while Escarsega said that his did not. Guterrez’s testimony was similar to Saldivar Alvillar’s. *See State v. Williams*, 418 N.W.2d 163, 166–67 (Minn. 1988) (sustaining murder conviction when corroborated testimony, in part, showed that the defendant was with the accomplices at time of the murder and had access to a gun). Chavarria-Cruz makes multiple assertions regarding why the state’s evidence was insufficient, including a lack of physical evidence connecting Chavarria-Cruz to the murder and the absence of eyewitness testimony. But Chavarria-Cruz provides no caselaw to support the argument that a lack of physical evidence or eyewitness testimony compels a conclusion that Chavarria-Cruz’s conviction should be reversed. Based on the detailed testimony of Saldivar Alvillar and Guterrez, the jury could reasonably have concluded that the state proved beyond a reasonable doubt that Chavarria-Cruz was guilty. *See Bernhardt*, 684 N.W.2d at 476–77 (stating that verdict will not be disturbed if the jury “could reasonably conclude that [a] defendant was proven guilty of the offense charged”) (quotation omitted).

We conclude that, viewing the evidence in the light most favorable to the verdict and assuming that the jury believed the state's witnesses, the evidence was sufficient for the jury to conclude that Chavarria-Cruz was guilty beyond a reasonable doubt.

Affirmed.