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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0633**

In the Matter of the Welfare of:
C. W. A., Child.

**Filed November 13, 2017
Affirmed
Cleary, Chief Judge**

Wabasha County District Court
File No. 79-JV-16-845

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Karen S. Kelly, Wabasha County Attorney, Wabasha, Minnesota (for respondent)

Considered and decided by Cleary, Chief Judge; Bjorkman, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

In this extended jurisdiction juvenile (EJJ) delinquency appeal, appellant C.W.A. contends that the district court: (1) abused its discretion by admitting evidence that witnesses feared him, suggesting bad character; and (2) committed plain error by failing to give an accomplice-corroboration jury instruction. Because the district court did not abuse

its discretion in admitting the fear evidence and the absence of an accomplice-corroboration instruction did not affect C.W.A.'s substantial rights, we affirm.

FACTS

On September 2, 2016, three people burglarized the Millville Rod & Gun Shop in Wabasha County. The shop owner estimated that \$46,000 in guns and \$410 in ammunition were stolen. C.W.A. was arrested on September 16, 2016 and charged with two counts of burglary in the first degree and one count of theft. Witness T.W. was also charged with burglary and theft, and two additional witnesses, A.M. and R.C., were charged with crimes associated with the burglary for aiding an offender after the fact. Seven additional fact witnesses testified for the state. After a five-day trial in February 2017, the jury returned guilty verdicts on all counts.

At trial, the state presented evidence that a few witnesses feared C.W.A. One witness testified that he changed his statements because he was afraid. The prosecutor asked another witness if it was "hard to testify" with C.W.A. in the room. The state elicited from a county detective that another witness revised his prior statement because "he was scared." Over defense counsel's objection, the testimony was allowed in each circumstance.

DECISION

I. Fear Evidence

C.W.A. contends that the state improperly implied that he had intimidated some witnesses and that such prejudicial insinuations deprived him of a fair trial. "Evidentiary

rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). Where an error does not implicate a constitutional right, the defendant bears the burden of demonstrating that a new trial is warranted because the error substantially influenced the jury’s verdict. *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009).

All relevant evidence is generally admissible. Minn. R. Evid. 402. Evidence is relevant if “in some degree it advances the inquiry and thus has probative value.” *State v. Carlson*, 268 N.W.2d 553, 559 (Minn. 1978). However, “even relevant evidence may be inadmissible where its probative value is substantially outweighed by its potential to cause unfair prejudice, to confuse the issues, or to mislead the jury.” *State v. Harris*, 521 N.W.2d 348, 351-52 (Minn. 1994) (citing Minn. R. Evid. 403).

“Evidence of witnesses’ fears of testifying and of purported threats against witnesses both tend to be relevant to general witness credibility or to explain a witness’s reluctance to testify or inconsistencies in a witness’s story.” *State v. McArthur*, 730 N.W.2d 44, 52 (Minn. 2007). But such evidence may not be used to improperly attack a defendant’s character. *Id.* Even when such evidence is properly admitted, a district court should “provide safeguards, including cautionary instructions, in order to prevent the evidence from being misused.” *Id.* at 51.

Admission of fear evidence is not governed by a bright-line rule. *Id.* at 52. Instead, the Minnesota Supreme Court has left “the case-by-case determinations to the discretion of the district courts, trusting them to make sound decisions about the admissibility of evidence of witnesses’ fear and to fashion appropriate safeguards in the event such evidence is admitted.” *Id.*

In holding that the district court did not abuse its discretion by admitting evidence of witnesses’ fears of the defendant, the court in *McArthur* found that “the issues concerning witness fears arose in the broader context of several items of evidence that could prejudicially discredit [the defendant’s] character. In ruling on each item of proposed evidence, the district court displayed sensitivity to the potential for unfair prejudice.” *Id.* The court also highlighted that the fears were not the focus of the state’s case. *Id.*

In determining whether the district court erred in admitting the fear evidence, appellate courts have considered the following: the challenged evidence viewed in context; the focus of the state’s case; the district court’s reasoning in admitting the evidence; and the effect the evidence had on witness credibility. *See, e.g., State v. Hayes*, 826 N.W.2d 799, 808 (Minn. 2013) (noting the focus of the state’s case and the evidence when viewed in context); *State v. Scruggs*, 822 N.W.2d 631, 644-45 (Minn. 2012) (noting the probative value of evidence introduced to anticipate challenges to witness credibility); *State v. Vang*, 774 N.W.2d 566, 580 (Minn. 2009) (noting the probative value of the evidence); *State v. Martin*, 773 N.W.2d 89, 109 (Minn. 2009) (noting the context of the evidence and the overall weight of evidence against the defendant); *State v. Jackson*, 773 N.W.2d 111, 122

(Minn. 2009) (noting the scope of the state’s questions); *State v. Wren*, 738 N.W.2d 378, 390 (Minn. 2007) (noting witness credibility); *McArthur*, 730 N.W.2d at 52 (noting the broader context of evidence, the district court’s reasoning, and the acceptable responses to cross-examination).

Here, the challenged statements and questions occurred a total of three times throughout the five-day trial, and included no more than one answer to a single question. The state did not mention the witnesses’ fears in either its opening statement or closing argument. Finally, the state focused its case on the testimony from all witnesses against C.W.A. In ruling on the evidence, the district court precluded mention of specific threats and other bad acts but allowed the state to inquire if witnesses had changed their testimony. The district court instructed the jurors on witness believability and credibility. Even if the district court should have provided a cautionary instruction on the fear evidence, such error was not prejudicial. Based on the overall weight of the additional evidence offered against C.W.A., the fear evidence did not substantially affect the jury’s verdict. The district court did not abuse its discretion in admitting the fear evidence.

II. Jury Instruction

C.W.A. also contends that the district court’s failure to provide an accomplice-corroboration jury instruction affected his substantial rights. “[W]here a district court fails to give a required accomplice corroboration instruction and the defendant does not object, an appellate court must apply the plain error analysis.” *State v. Reed*, 737 N.W.2d 572, 584 n.4 (Minn. 2007). There must be: (1) an error; (2) that is plain; and (3) affects

substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). An error is plain if it is clear or obvious. *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). This prong is met if an error “contravenes case law, a rule, or standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects substantial rights if it had a significant effect on the jury’s verdict. *State v. Glidden*, 455 N.W.2d 744, 747 (Minn. 1990). If each prong is met, a reviewing court “must then consider whether reversal of [the defendant’s] conviction is necessary to ensure fairness and the integrity of the judicial process.” *State v. Clark*, 755 N.W.2d 241, 252 (Minn. 2008).

Minnesota law precludes a criminal conviction based on the uncorroborated testimony of an accomplice. Minn. Stat. § 634.04 (2016). This rule “reflects an inherent distrust of testimony from accomplices, who ‘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.’” *Clark*, 755 N.W.2d at 251 (quoting *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989)). “[T]rial courts have a duty to instruct juries on accomplice testimony in any criminal case in which it is reasonable to consider any witness against the defendant to be an accomplice.” *Strommen*, 648 N.W.2d at 689. “The relevant instruction tells the jury that it cannot find the defendant guilty of a crime on the testimony of a person who could be charged with that crime, unless that testimony is corroborated by other evidence that tends to convict the defendant of the crime.” *State v. Barrientos-Quintana*, 787 N.W.2d 603, 610 (Minn. 2010) (quotations omitted). Even when a defendant does not request it,

“it is plainly erroneous for a district court to fail to give an accomplice-corroboration instruction when the facts warrant it.” *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016).

“A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05, subd. 1 (2016). The first two prongs of the plain error analysis are satisfied as to T.W. T.W. was charged with the same crime as C.W.A. and the state conceded that he was an accomplice. The district court was required to provide the accomplice-corroboration instruction even when C.W.A. did not ask for it. This error was plain because it contravened Minnesota law.

However, the district court did not err as to the remaining witnesses. In imposing accomplice liability, Minnesota law distinguishes “between playing a knowing role in the crime and having [a] mere presence at the scene, inaction, knowledge and passive acquiescence.” *State v. Jackson*, 746 N.W.2d 894, 898 (Minn. 2008) (alteration in original) (quotation omitted). “In cases where it is unclear whether a witness is an accomplice or not, it generally becomes a question of fact for the jury to decide.” *Barrientos-Quintana*, 787 N.W.2d at 610-11 (quotations omitted). “But when ‘the facts of the case are undisputed and there is only one inference to be drawn as to whether or not the witness is an accomplice, then it is a question for the court to decide.’” *Jackson*, 746 N.W.2d at 898 (quoting *State v. Flourney*, 535 N.W.2d 354, 359 (Minn. 1995)). When two people have been charged with different crimes related to the same incident, the two are not

accomplices. *State v. Swyningan*, 304 Minn. 552, 555, 229 N.W.2d 29, 32 (1975). “Thus, . . . an accessory after the fact is not an accomplice of the principal.” *Id.*

Witness K.L. was not an accomplice. While she was present when C.W.A. and his co-conspirators planned the burglary, no evidence presented suggests that she actively participated in that conversation. Her passive acquiescence did not make her an accomplice. Similarly, the two witnesses charged with aiding an offender after the fact were not accomplices to the principal crime. No evidence presented suggests that they played a knowing role in the commission of the burglary and theft beyond receiving stolen guns after the fact. The remaining trial witnesses were also not accomplices. No evidence presented suggests any other witnesses played any knowing role in the burglary or theft beyond hearing of it afterwards. The district court did not err in failing to provide the accomplice-corroboration instruction as to the remaining witnesses.

The third prong of the plain error analysis is whether a district court’s error affected a defendant’s substantial rights. *Strommen*, 648 N.W.2d at 686. This prong has four factors: “whether the testimony of the accomplice was corroborated by significant evidence, whether the accomplice testified in exchange for leniency, whether the prosecution emphasized the accomplice’s testimony in closing argument, and whether the court gave the jury general witness credibility instructions.” *Horst*, 880 N.W.2d at 38 (quoting *Jackson*, 746 N.W.2d at 899).

“The first factor is whether, and to what extent, other evidence corroborated an accomplice’s testimony.” *Horst*, 880 N.W.2d at 38. “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." *Clark*, 755 N.W.2d at 253-54 (quotation omitted). Rather, the evidence need only "affirm the truth of the accomplice's testimony and point to the guilt of the defendant in some substantial degree." *Barrientos-Quintana*, 787 N.W.2d at 612-13 (quotation omitted). "Circumstantial evidence indicating the defendant's participation in the crime is sufficient to corroborate the accomplice's testimony." *State v. Bowles*, 530 N.W.2d 521, 532 (Minn. 1995) (citing *State v. Jones*, 347 N.W.2d 796, 800 (Minn. 1984)).

"In determining whether an accomplice's testimony is corroborated, '[t]he defendant's entire conduct may be looked to for corroborating circumstances.'" *Clark*, 755 N.W.2d at 254 (quoting *State v. Scruggs*, 421 N.W.2d 707, 713 (Minn. 1988)).

Relevant facts that may be used to corroborate an accomplice's testimony and link the defendant to the crime include: "participation in the preparation for the criminal act; opportunity and motive; proximity of the defendant to the place where the crime was committed under unusual circumstances; association with persons involved in the crime in such a way as to suggest joint participation; possession of an instrument or instruments probably used to commit the offense; and unexplained affluence or possession of the fruits of criminal conduct."

Clark, 755 N.W.2d at 254 (quoting *State v. Sorg*, 275 Minn. 1, 5, 144 N.W.2d 783, 786 (1966)). The weight of other witnesses' collective testimony can be sufficient to corroborate an accomplice's testimony. See *Reed*, 737 N.W.2d at 585.

At trial, T.W. testified that C.W.A. committed the crimes, that he was present and helped C.W.A. plan the burglary, and that C.W.A. discussed doing a “big dirty.” K.L. testified that she was present while C.W.A. and his co-conspirators planned the burglary, that C.W.A. confessed afterward, that she knew of C.W.A.’s plans to sell the guns, and that she saw the guns at C.W.A.’s residence after the fact.

The other witnesses and evidence presented corroborated T.W.’s and K.L.’s testimony in nine ways: (1) C.W.A. told three witnesses after the fact that he committed the burglary; (2) C.W.A. told one witness that the gun shop would be easy to rob and discussed doing a “big dirty” with three witnesses; (3) C.W.A. gave stolen guns to two witnesses; (4) four witnesses were present on the trips to bury and retrieve the guns; (5) four witnesses saw stolen guns in C.W.A.’s basement in bags later recovered by law enforcement; (6) two witnesses heard about or were told that C.W.A. intended to sell the stolen guns; (7) law enforcement witnesses testified to the collection of DNA evidence from one of the guns matching C.W.A.’s DNA; (8) the dusty ductwork in C.W.A.’s basement suggesting something had been moved; and (9) the bag of guns recovered that other witnesses saw in C.W.A.’s basement.

The weight of this collective evidence corroborates T.W.’s and K.L.’s testimony regarding C.W.A.’s role in the crime. K.L.’s testimony that she observed C.W.A. and his co-conspirators planning the crime was not independently corroborated by any non-accomplice, but the collective weight of the other evidence corroborated her testimony.

The second factor “is whether the witnesses testified in exchange for leniency.” *Horst*, 880 N.W.2d at 38. Courts have found that this factor is not satisfied when a witness is compelled to testify under a grant of use immunity, *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004), or when a witness testifies to his agreement with the state and thus fully informs the jury of his role at trial, *Horst*, 880 N.W.2d at 38-39.

Evidence on this factor was only presented as to T.W. Even as to T.W., however, this factor is not satisfied because he did not testify in exchange for leniency. Here, T.W. testified pursuant to his grant of use immunity and, when questioned, he appeared confused regarding the concept of use immunity. T.W. testified that he received no guarantees and no promises and believed that anything he said could be used against him.

The third factor “is whether the State emphasized the testimony of the accomplices in its closing argument.” *Horst*, 880 N.W.2d at 39. Here the state discussed each witness’s testimony and the evidence it proved, but did not emphasize T.W.’s testimony over the other witnesses, nor did the state encourage the jury to rely solely on T.W.’s testimony. Even if K.L.’s role was a jury question, the state did not emphasize her testimony either. Rather, the state emphasized another witness’s testimony in highlighting evidence that corroborated T.W.’s account of the crime. This factor is not satisfied because the state did not emphasize testimony of any alleged accomplice in its closing argument.

The final factor is whether the district court “gave the jury general witness credibility instructions.” *Jackson*, 746 N.W.2d at 899. The jury should be “‘alerted . . . to the potential for conflicting motivations behind certain testimony.’” *Horst*, 880 N.W.2d at

39 (quoting *Lee*, 683 N.W.2d at 317). Here, the district court instructed the jury on the weight and believability of witnesses. The jurors were instructed that they could consider “the witness[es’] interest or lack of interest in the outcome of the case; relationship to the parties; . . . reasonableness or unreasonableness of their testimony in the light of all the other evidence in the case; and any other factors that bear on believability and weight.”

C.W.A. has not established that the district court’s plain error affected his substantial rights. While the district court failed to provide the required accomplice-corroboration instruction as to T.W. and possibly as to K.L., that error did not affect C.W.A.’s substantial rights. C.W.A. is not entitled to relief because the substantial-rights prong is dispositive.

Because the district court did not abuse its discretion in admitting the fear evidence and because the lack of an accomplice-corroboration instruction did not affect C.W.A.’s substantial rights, we affirm his conviction.

Affirmed.