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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0920**

State of Minnesota,
Respondent,

vs.

Albert George McIntosh,
Appellant.

**Filed June 18, 2018
Affirmed
Reyes, Judge**

Hennepin County District Court
File No. 27-CR-15-34803

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Jesson, Presiding Judge; Reyes, Judge; and Kalitowski, Judge.*

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

UNPUBLISHED OPINION

REYES, Judge

In this appeal from judgment of conviction entered on the jury's guilty verdicts on five counts of aiding and abetting robbery, burglary, and murder, appellant argues that the district court erred because (1) the state provided insufficient evidence to corroborate the accomplices' testimony; (2) the district court provided inadequate jury instructions; and (3) appellant did not knowingly, intelligently, and voluntarily waive his right to testify. Appellant also raises various arguments in his pro se supplemental brief. We affirm.

FACTS

The following facts were established at the jury trial held from January 23 to February 8, 2017. On October 18, 2015, appellant Albert George McIntosh and his girlfriend Michelle Koester met with Isiah Harper, Alvin Bell, and Shannon Haiden at a gas station before engaging in an extensive crime spree.¹ Koester drove a black Chevrolet Suburban with appellant and Haiden, and Bell drove his Toyota 4Runner with Harper.

At approximately 9:00 p.m. in the area of 15th Avenue South in Minneapolis, appellant, Harper, and Bell spotted A.R., who had just returned from grocery shopping, and approached him. Appellant pointed a gun at A.R. and took his wallet while Harper took his car keys. The three men then made A.R. leave his car and let him run away. After Harper parked A.R.'s car elsewhere, the group stopped by the gas station they first convened at and unsuccessfully attempted to withdraw money using A.R.'s credit card.

¹ Before they met, Koester, Harper, and Bell exchanged texts and agreed to "go hit a lick," which means to commit robbery.

Around 10:00 p.m. on Stevens Avenue in Minneapolis, appellant, Harper, and Bell saw J.M.-C. sitting in his van. Harper approached J.M.-C. and asked for a cigarette. When J.M.-C. handed him the cigarette, Bell pointed the gun at J.M.-C. and told him to give up everything. J.M.-C. resisted, and appellant took the gun from Bell and shot J.M.-C. five times, saying, “You think I’m playing?” J.M.-C. later died from the gunshot wounds.

Afterwards, appellant, Harper, and Bell drove to another area of Minneapolis, looked for a house to rob, and eventually found one. Through a window of the house, they saw a man lying on the couch watching television. Appellant kicked open the back door of the house, and all three entered. Appellant directed Bell, who had the gun, and Harper, to go upstairs while he stayed downstairs. Bell went into a room where C.W.-H. was getting ready for bed with her two children. Bell pointed the gun at C.W.-H., took both her and her daughter’s cell phones, and demanded C.W.-H.’s wallet. Harper initially went into a different room upstairs, but eventually joined Bell. The three men left the house with the victims’ phones, purses, a safe, and a PlayStation.

The group reconvened in North Minneapolis. Haiden left, and appellant gave the other three accomplices the stolen credit cards and told them to go to a Walmart to purchase goods. Harper, Bell, and Koester went into the Walmart and attempted to use the stolen credit cards. Only Bell was successful, and he purchased an Xbox One.

Thereafter, appellant became upset after arguing with Bell about the division of the proceeds of the crimes. Appellant shot the 4Runner multiple times and left with Koester. The police’s ShotSpotter system alerted officers to thirteen shots fired, and the officers

dispatched to the scene found a Toyota 4Runner with bullet holes in it and 9mm shell casings around the vehicle.

Police analyzed all of the accomplices' cell phones. Cell tower triangulation revealed that appellant's cell phone was in use at the corresponding times and locations of all three crimes. The police also analyzed text messages between Koester and appellant. Approximately an hour after the murder of J.M.-C., Koester texted appellant, "You okay?" On October 19, 2015, Koester sent appellant a photo of a hand holding five casings. Appellant replied, "Get rid of them shells." Koester texted back, saying "Done." The next day, appellant sent out multiple text messages to people attempting to sell a 9mm handgun.

Harper and Haiden testified at trial for the state in exchange for favorable plea deals. Victims, as well as eyewitnesses, police officers, and experts testified at the trial as well. Bell did not testify. Koester, who was tried jointly as appellant's co-defendant, did not testify. Appellant waived his right to testify.

On February 10, 2017, a jury returned guilty verdicts on each of the five charges: (1) aiding and abetting first-degree aggravated robbery in violation of Minn. Stat. § 609.245.1 (2014); (2) aiding and abetting second-degree intentional murder in violation of Minn. Stat. § 609.19.1(1) (Supp. 2015); (3) aiding and abetting second-degree murder while committing a felony in violation of Minn. Stat. § 609.19.2(1) (2014); (4) aiding and abetting first-degree burglary of an occupied dwelling in violation of Minn. Stat. § 609.582.1(a) (2014); and (5) aiding and abetting first-degree burglary while possessing a dangerous weapon in violation of Minn. Stat. § 609.582.1(b) (2014).

On March 16, 2017, the district court sentenced appellant to consecutive sentences of 108, 306, and 48 months. This appeal follows.

DECISION

I. Appellant’s sufficiency-of-the-evidence claim fails.

Appellant argues that the state produced insufficient evidence corroborating the testimony of the two accomplices, Harper and Haiden. We are not persuaded.

We review the sufficiency of the evidence corroborating an accomplice’s testimony by viewing the evidence in the light most favorable to the prosecution and resolving all conflicting evidence in favor of the verdict. *State v. Nelson*, 632 N.W.2d 193.

In Minnesota, a conviction may not rest solely on the testimony of an accomplice² unless it is corroborated, Minn. Stat. § 634.04 (2014), because such testimony is deemed inherently untrustworthy absent corroboration. *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004). Corroborating evidence need not establish a prima facie case of guilt, but instead must affirm the truth of the accomplice’s testimony and point to the guilt of the defendant in some substantial degree. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 519 (Minn. 2013) (quotation omitted). The state is not required to corroborate the accomplices’ testimony “on every point or element of the crime.” *State v. Kingbird*, 412 N.W.2d 350, 353 (Minn. App. 1987).

² An accomplice is “one who has been or who could be convicted of the same offense with which the defendant has been charged.” *State v. Houle*, 257 N.W.2d 320, 324 (Minn. 1977). Neither party disputes that Harper and Haiden were accomplices.

Corroborating evidence may be either circumstantial or direct, and may include physical evidence associated with the crime, the testimony of eyewitnesses, and suspicious and unexplained conduct of an accused before or after the crime. *State v. Pederson*, 614 N.W.2d 724, 732 (Minn. 2000) (citations omitted). Corroborating evidence may also be found “from [the defendant’s] proximity to the place where the crime was committed.” *State v. Her*, 668 N.W.2d 924, 927 (Minn. App. 2003) (quotation omitted), *review denied* (Minn. Sept. 30, 2003).

The state produced sufficient eyewitness testimony to corroborate the accomplices’ testimony. At trial, Harper, the first accomplice, testified that appellant wore a black hooded sweatshirt during the commission of the crimes and is significantly taller than he and Bell, both of whom are of medium height. Harper also testified that appellant held the gun when they robbed A.R., that appellant actively participated in J.M.-C.’s murder, and that during the house burglary, appellant stayed downstairs and made Harper and Bell, who had the gun, go upstairs.

A.R. testified that three men robbed him and that the tallest of the three held the gun. An eyewitness to J.M.-C.’s murder testified that he saw a man in a black sweatshirt who is taller than the other man he saw. Another eyewitness to J.M.-C.’s murder testified that he saw three men running away from the scene of the crime after he heard the gunshots. Finally, the house burglary victims testified that a man stayed downstairs while the two other medium-height men went upstairs with the gun.

The state also presented physical evidence corroborating accomplices’ testimony. Haiden, the second accomplice, and Harper both testified that they went to the gas station

between the first and second crimes. The gas-station security camera captured images of the Suburban, 4Runner, and A.R.'s stolen Chevrolet Impala entering the gas station around 9:22 p.m. The video showed appellant sitting in the front passenger seat of the Suburban, exiting out of the vehicle, and attempting to withdraw cash from an ATM.

Harper also testified about the location of J.M.-C's murder and the location where the 4Runner was shot. The state produced physical evidence corroborating this testimony. Specifically, the shell casings that the police found at the murder scene and the location where the 4Runner was shot matched the locations in Harper's testimony.

Appellant's suspicious texts to Koester and others after the crime corroborated Harper's testimony that appellant left with a gun after shooting the 4Runner and were consistent with the physical evidence of shell casings from the 9mm firearm discovered at the location where the 4Runner was shot.

Finally, cell-tower triangulation of appellant's phone showing appellant's proximity to the locations of all three crimes and the corresponding times matched Haiden's and Harper's testimony about the times and locations of crimes.

II. The district court's accomplice jury instruction did not affect appellant's substantial rights.

Appellant next argues that the district court erred by failing to instruct the jury that Koester and Bell were also accomplices because the state produced evidence of statements they made and text messages that they sent to others, which constituted testimony requiring corroboration. We disagree.

“The duty to instruct on accomplice testimony remains regardless of whether counsel for the defendant requests the instruction” and omission of the jury instruction is error. *Id.* (citing *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002)). “[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). “Before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). In evaluating whether the failure to give an accomplice-corroboration instruction affected the defendant’s substantial rights, appellate courts examine “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.” *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quoting *State v. Jackson*, 746 N.W.2d 894, 899 (Minn. 2008) (declining to decide whether witness was accomplice because failure to give an accomplice-corroboration instruction was harmless)).

Appellant fails to establish that the lack of an accomplice jury instruction for Koester and Bell violated appellant’s substantial rights. The state presented eyewitness testimony, physical evidence, evidence of suspicious conduct of appellant after the crime, and appellant’s proximity to the time and locations of the crime, all of which corroborated the accomplices’ testimony. All of this evidence was unrelated to Bell and Koester’s text messages and statements and was independently sufficient for the jury to reach the verdict

that it did. *See Horst*, 880 N.W.2d at 38 (“The first factor is whether, and to what extent, other evidence corroborated an accomplice’s testimony.”)

Moreover, Koester and Bell did not testify in exchange for leniency, and the state did not “unduly emphasize” the text messages and statements of Koester and Bell over other evidence in its closing argument. *Id.* at 39.

Because appellant fails to establish prejudice, we need not consider the other prongs of the plain-error test. *State v. Goelz*, 743 N.W.2d, 249, 258 (Minn. App. 2007) (when an appellant fails to establish that claimed error affected substantial rights, appellate courts need not consider the other factors.)³

III. Appellant’s waiver of his right to testify was constitutional.

Appellant argues that his waiver of his constitutional right to testify was not knowing, intelligent, and voluntary because the district court failed to rule on the state’s motion to admit appellant’s prior convictions as impeachment evidence. We disagree.

“A defendant’s right to testify is protected by the Due Process clause of the United States Constitution and Minnesota law.” *Andersen v. State*, 830 N.W.2d 1, 11 (Minn. 2013). The right to testify is personal and may be waived only by the defendant. *State v. Rosillo*, 281 N.W.2d 877, 878 (Minn. 1979). The waiver must be made voluntarily and knowingly. *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997). The defendant has the

³ Because we conclude that the lack of this jury instruction on Koester’s and Bell’s accomplice status did not affect appellant’s substantial rights, we need not decide whether a witness who was not sworn under oath and was not subject to cross-examination can “testify” through out-of-court statements and in the form of text messages. *See State v. Schifsky*, 243 Minn. 533, 539, 69 N.W.2d 89, 93 (1955) (“testimony means the statement made by the witness under oath in the trial of a case or in a legal proceeding.”)

burden of proving that his waiver was not voluntary and knowing. *Andersen*, 830 N.W.2d at 11. “Absent a finding to the contrary, [appellate courts] presume that the defendant waived the right to testify for the reasons stated on the record.” *Id.* at 11.

Here, appellant clearly waived his right on the record. The following colloquy occurred between defense counsel and appellant:

Defense counsel: Mr. McIntosh, you understand that you would have had a right to testify in your defense at this trial?

Appellant: Yes.

Defense counsel: And have you had sufficient time during the course of our representation to consult with [defense counsel] whether you should take the stand in this trial?

Appellant: Yes, I have.

Defense counsel: And it is your decision that you decided not to take the stand?

Appellant: That’s correct.

Defense counsel: And that’s in consultation with [defense counsel?]

Appellant: That’s correct.

The district court then confirmed appellant’s waiver of his right to testify:

The district court: All right, Mr. McIntosh, just to be clear, although obviously you consult[ed] with your lawyers in making this decision, you know that ultimately it’s your decision, right?

Appellant: Absolutely.

The district court: And that regardless of what they say, you could decide on your own something different.

Appellant: Correct.

The district court: Okay. And you are satisfied with this decision?

Appellant: Yes I am.

Appellant does not point to any evidence, and we cannot find any in the record, that shows that the district court’s lack of ruling on the state’s motion affected appellant’s decision to waive his right to testify. Appellant only makes a bare assertion that it is *likely*

that his decision was impacted by the state's indication of its intent to impeach him. On this record, it is clear that appellant properly waived his right to testify, and fails to meet his burden to prove otherwise.⁴

IV. Appellant's pro se arguments lack merit.

Appellant raises various arguments in his pro se supplemental brief but fails to make legal arguments or cite to legal authority. This court generally does not consider pro se claims that are unsupported by either arguments or citations to legal authority. *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008).

Nonetheless, after full consideration, we concluded that appellant's arguments lack merit. Appellant challenges the admission of various videos and text messages because they were unrelated to the crimes committed in Minneapolis on October 18, 2015. Because defense counsel did not object to the admission of this evidence during trial, we apply the plain-error test. Under the plain-error test, "the burden of demonstrating prejudice generally falls on the party seeking relief." *State v. Little*, 851 N.W.2d 878, 889 (Minn. 2014). As appellant does not make any argument that the admitted evidence prejudiced him, he fails to meet his burden. Therefore, we need not consider the other prongs of the

⁴ Appellant also argues that the district court's lack of ruling on the state's motion was plain error that affected his decision to waive his right to testify. However, since appellant did not address any prong of the plain-error test in his brief, it is forfeited. See *State v. Beaulieu*, 859 N.W.2d 275, 278-79 (Minn. 2015) (forfeiture is failure to raise the issue.) Moreover, whether it was plain error for the district court to fail to rule on a motion has no bearing on his decision to waive his right to testify because he failed to show reliance on district court's failure to rule when he waived his right to counsel.

plain-error test. *See Goelz*, 743 N.W.2d at 258 (if an appellant fails to establish that claimed error affected his substantial rights, appellate courts need not consider the other factors.)

Appellant also argues that Harper and Haiden are unreliable and not credible. But we must defer to the jury's credibility determination. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010).

Finally, appellant has concerns that the jury engaged in misconduct. However, the district court adequately remedied this misconduct by excusing the juror who attempted to communicate with the prosecutor's office.

Affirmed.