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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0989**

State of Minnesota,
Respondent,

vs.

Lynell Ellison,
Appellant.

**Filed May 29, 2018
Affirmed
Reilly, Judge**

Stearns County District Court
File No. 73-CR-16-2791

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi Lynn Proulx, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges his convictions of aiding and abetting first-degree aggravated robbery and aiding and abetting second-degree assault, arguing that the jury instructions

did not adequately explain the law and that the photo identification used to identify him was impermissibly suggestive. We affirm.

FACTS

On March 22, 2016, appellant Lynell Ellison contacted victim L.K. over the phone to buy “a half” of marijuana, which L.K. understood to mean a half ounce. After some initial confusion, it became clear that appellant had requested a half pound of marijuana, and, after some negotiation, L.K. agreed to supply it to him. L.K. and appellant arranged to meet at L.K.’s residence to conduct the transaction. Appellant arrived with a male companion, who also expressed an interest in buying a half pound of marijuana. L.K. consented to the modification but said he would need some time to collect that amount of marijuana.

Appellant and his companion returned to L.K.’s apartment about an hour later to conduct the transaction. L.K. greeted them and went into his bedroom to retrieve the marijuana. When he emerged from his bedroom, appellant’s companion pulled L.K. and held a gun to his head. Appellant’s companion demanded that L.K. give them the drugs and assured him that “this is real.” L.K. understood this to mean that the gun itself was real and that the man’s threats of violence were real. Appellant began looking through L.K.’s room to find more cash. Appellant searched through L.K.’s laundry basket, backpack, and bed. Appellant’s companion demanded to know where L.K.’s safe was, but L.K. did not have a safe. Appellant and his companion went through L.K.’s pockets. Appellant carried away L.K.’s backpack and the marijuana.

L.K. contacted police and described appellant and his companion to Officer Ryan Sayre. L.K. described that he'd spoken with a person named "Lionell" about purchasing marijuana who had later robbed him. Officer Sayre thought one of the robbers might be appellant, who was known to him, because his name, Lynell, sounded similar to "Lionell." Within two hours of the robbery, L.K. identified appellant in a photo lineup as the person who robbed him. The state charged appellant with one count of aiding and abetting first-degree aggravated robbery and one count of aiding and abetting second-degree assault.

The case proceeded to a jury trial, and the jury found appellant guilty of both counts. This appeal followed.

DECISION

I. The jury instructions were not erroneous.

Appellant did not object to the jury instructions at trial, so we review the jury instructions for plain error.¹ *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). To show plain error, appellant must show (1) there was error; (2) that was plain; and (3) that the error affected appellant's substantial rights. *Id.* An error affects appellant's substantial rights if the absence of the error would have had a significant effect on the verdict. *State v. Milton*, 821 N.W.2d 789, 809 (Minn. 2012). If these three prongs are met, this court may address the error to preserve the fairness and integrity of the judicial proceedings. *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014).

¹ Appellant challenges only the elements of "aiding and abetting," not the elements of robbery or assault. See *State v. Ostrem*, 535 N.W.2d 916, 922 (Minn. 1995) (stating that accomplice crimes contain elements distinct from the elements of the underlying offense).

The district court has broad discretion to choose the language for jury instructions. *Milton*, 821 N.W.2d at 805. We review jury instructions as a whole to determine whether they accurately state the law in a manner that the jury could understand. *Kelley*, 855 N.W.2d at 274. The jury instructions must describe the crime charged and explain the elements of the crime. *Milton*, 821 N.W.2d at 805. “To determine if a jury instruction correctly states the law, we analyze the criminal statute and the case law under it.” *State v. Taylor*, 869 N.W.2d 1, 15 (Minn. 2015).

In Minnesota, “[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). A defendant may acquire the requisite knowledge and intent during the course of a criminal act, as long as they continue to aid their accomplice. *State v. Smith*, 901 N.W.2d 657, 662 (Minn. App. 2017).

In a trial for a crime involving accomplice liability, the jury instructions must explain that the “intentionally aiding element requires that the jury find beyond a reasonable doubt that the defendant knew his alleged accomplice was going to commit a crime and the defendant intended his presence or actions to further the commission of that crime.” *Kelley*, 855 N.W.2d at 275 (citing *Milton*, 821 N.W.2d at 808). The instructions must also provide a definition of intent. *Huber*, 877 N.W.2d at 524.

The district court read to the jury the following instructions for the elements of aiding and abetting:

I'm now going to give you an instruction on what aiding and abetting means. The defendant is guilty of a crime committed by another person when the defendant has played an intentional role in aiding in the commission of the crime and made no reasonable effort to prevent the crime before it was committed.

“Intentional role” includes aiding, advising, hiring, counseling, conspiring with, or procuring another to commit the crime.

A defendant's presence constitutes aiding if, first, the defendant knew his alleged accomplices were . . . going to or were committing a crime, and the defendant intended that his presence and action aid the commission of the crime.

The district court then explained how the jury should apply the jury instructions for accomplice liability to the instructions for the actual crimes.

The defendant is guilty of a crime, however, only if the other person commits a crime. The defendant is not liable criminally for aiding, advising, hiring, counseling, or conspiring, or otherwise procuring the commission of a crime, unless some crime including an attempted crime, is actually committed.

If the defendant aided, advised, hired, counseled, or conspired with another or otherwise procured the commission of a crime by another person, and the crime was committed, the defendant is guilty of the crime. You are not to concern yourselves with what action, if any, was taken against the other person.

The instructions plainly and accurately describe the law of accomplice liability. The instructions clearly state that appellant aided his accomplice's crimes if he “knew his alleged accomplices were . . . going to or were committing a crime, and . . . intended that his presence and action aid the commission of the crime.” *See Milton*, 821 N.W.2d at 805-06 (holding that proper accomplice liability instructions must state the defendant

“knowingly and intentionally assisted in the commission of the crime”). The instructions also include a definition of intent, and district courts are “afforded considerable latitude in choosing the language to explain that element.” *Smith*, 901 N.W.2d at 661. The instructions were not confusing or misleading to the jury. *See id.* In fact, the instructions in this case were almost identical to the instructions given in *Smith*, which this court determined were not clearly erroneous. *See id.* at 664. For the foregoing reasons, the district court did not err by giving the instructions it did.

II. The district court did not abuse its discretion by failing to suppress the pretrial photo lineup.

Appellant argues the district court abused its discretion by admitting the pretrial photo lineup identification because it was impermissibly suggestive, not reliable, and that the error was not harmless. We determine that the identification was reliable in light of the totality of the circumstances and we affirm.

We evaluate the admission of identification evidence for an abuse of discretion. *State v. Booker*, 770 N.W.2d 161, 168 (Minn. App. 2009). Pretrial identification evidence is evaluated under a two-pronged test. *Ostrem*, 535 N.W.2d at 921. First, we determine whether the identification procedure was impermissibly suggestive. *Id.* An identification procedure is impermissibly suggestive if the suspect is unfairly singled out for identification. *Id.* Second, even if the identification procedure is found to be impermissibly suggestive, the identification is admissible if the totality of the circumstances show the witness’s identification is reliable. *Id.* We consider five factors when determining whether the identification is reliable in light of the totality of the circumstances: (1) the opportunity

of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the photo display; and (5) the time between the crime and the confrontation. *Id.* The identification is therefore admissible if the totality of the circumstances demonstrates that the "identification has an adequate independent origin" despite any suggestive procedure. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999).

In this case, appellant cites the following factors to argue that the photo lineup was impermissibly suggestive. Appellant argues that his photograph was larger than the others, that only two of the photographs were in color, that two of the photographs depicted men without afros, and that Officer Sayre's presentation of the lineup tainted the identification. Even if we were to agree with appellant, we reject his argument because in this case the totality of the circumstances show that the identification by L.K. was reliable.

Each of the factors weighs in favor of the identification's reliability. First, L.K. had ample opportunity to observe appellant and make an accurate identification. L.K. testified that he encountered appellant twice, and that their first meeting was nonviolent and lasted 10 to 15 minutes.

Second, L.K. was able to pay close attention to appellant. During the first meeting, he had enough time to view appellant and he could see appellant clearly in the light of his apartment. There was no violence during the first meeting that might have prevented him from clearly observing appellant. Though their second meeting involved violence and an

assault with a deadly weapon, L.K. was again able to pay close attention to appellant, because L.K. shook appellant's hand and said a friendly hello before the violence began.

Third, L.K. provided an accurate description of appellant to police. L.K. said that the robber was black, had an afro, wore all black clothing and a black hat, was in his mid-20s, and whose name was "Lionell." L.K.'s physical description was fairly generic, but his description of appellant Lynell Ellison's first name as "Lionell" allowed Officer Sayre to pinpoint appellant Lynell Ellison as a possible suspect. Knowing a person's first name is very specific knowledge that is not subject to the same unreliability of visual identification. That appellant correctly identified a person with a similar name to the one he stated to police and whose cell phone was later linked to his own shows that the identification was reliable.

Appellant concedes that factors four and five weigh in favor of the identification's reliability, because L.K. expressed a high degree of certainty that his identification of appellant was correct and the identification took place within two hours after the robbery occurred.

Considering the totality of the circumstances, the identification was reliable regardless of any impermissible suggestiveness.

Affirmed.