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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0609**

State of Minnesota,
Respondent,

vs.

Corey Joe Mickelson,
Appellant.

**Filed March 11, 2019
Affirmed
Klaphake, Judge***

Fillmore County District Court
File No. 23-CR-17-727

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Brett A. Corson, Fillmore County Attorney, Preston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Jesson, Judge; and Klaphake,
Judge.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Corey Joe Mickelson appeals from his conviction of disorderly conduct involving brawling or fighting. Mickelson argues that the district court plainly erred by not instructing the jury that the complaining witness was an accomplice as a matter of law. He further argues that the evidence is insufficient to sustain the jury's guilty verdict because it consists solely of uncorroborated testimony from the complaining witness, who was also an accomplice to the disorderly conduct. Because Mickelson has not demonstrated that he suffered prejudice and there is sufficient evidence to support Mickelson's conviction, we affirm.

DECISION

Jury Instruction

We first consider Mickelson's argument that the district court erred by not instructing the jury that the complaining witness, K.A., who testified at trial, was an accomplice as a matter of law. A jury instruction on accomplice testimony "must be given in any criminal case in which any witness against the defendant might reasonably be considered an accomplice to the crime." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004) (quotation omitted). "The duty to instruct on accomplice testimony remains regardless of whether counsel for the defendant requests the instruction," and omission of the jury instruction when required is error. *Id.*; see *State v. Strommen*, 648 N.W.2d 681, 689-90 (Minn. 2002) (noting that district court's failure to instruct on accomplice was error). If it is clear as a matter of law that a witness is an accomplice, i.e., the facts are undisputed and

only one inference can be drawn, a district court should make the determination and must then inform the jury. *Lee*, 683 N.W.2d at 314; *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989). But “if the evidence is disputed or susceptible to different interpretations, then the question whether the witness is an accomplice is one of fact for the jury.” *Lee*, 683 N.W.2d at 314 (quotation omitted); *Shoop*, 441 N.W.2d at 479. We review a district court’s decision whether to instruct the jury that a witness is to be considered an accomplice as a matter of law for an abuse of discretion. *State v. Pendleton*, 759 N.W.2d 900, 907 (Minn. 2009).

Here, the district court instructed the jury on accomplice testimony and left the question whether K.A. is an accomplice as one of fact for the jury. Because Mickelson did not object to the language of the jury instruction, the plain-error standard of review applies. *State v. Watkins*, 820 N.W.2d 264, 267 (Minn. App. 2012). Mickelson must therefore show that the district court’s failure to instruct the jury that K.A. was an accomplice as a matter of law was “(1) error, (2) that was plain, and (3) that affected [his] substantial rights.” *State v. Rossberg*, 851 N.W.2d 609, 618 (Minn. 2014) (quotation omitted). “If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Even assuming that the district court committed plain error by not instructing the jury that K.A. was an accomplice as a matter of law, the burden is on Mickelson to show that the error affected his substantial rights. *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016). Plain error in jury instructions affects “substantial rights” only if the error was

prejudicial. *Griller*, 583 N.W.2d at 741. An error is prejudicial if there is a “reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury.” *Id.* (quotation omitted). In determining whether an error is prejudicial, we look to the record and all relevant factors, including whether the accomplice testified under a promise of leniency and whether the evidence is overwhelming and independently corroborated. *See Shoop*, 441 N.W.2d at 481. Independent corroborating evidence may consist of “physical evidence associated with the crime; the testimony of eyewitnesses and experts at trial; inadequacies and admissions in a defendant’s testimony; 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).

Mickelson has not met his burden to show that this alleged error in the jury instructions was prejudicial. K.A., the complaining witness, testified at trial regarding the domestic disturbance between her and Mickelson that occurred in November 2017. K.A. testified that Mickelson became upset as they were driving back to Mickelson’s apartment from a Thanksgiving celebration. K.A. stated that Mickelson pulled over more than once, threatened to drive away without her and her two children, and was verbally abusive toward her in front of her children. K.A. also testified that once they returned to Mickelson’s apartment, Mickelson began throwing some of her belongings as she attempted to gather them. K.A. further testified that Mickelson charged at her, and that she picked up a glass ornament and threw it at him.

Significant evidence corroborating K.A.’s testimony was presented at trial. The state introduced K.A.’s 911 call, which contained prior consistent statements supporting her

testimony, as well as a photograph of a scratch on K.A.'s foot taken by the responding officer. Moreover, Mickelson's own testimony and his recorded statement to police, though inconsistent with K.A.'s testimony in some respects, corroborate K.A.'s testimony on several critical points. *See id.* at 733. Mickelson conceded in his testimony that he had an argument with K.A. on their return to his apartment from the Thanksgiving celebration. Mickelson also contrasted a "disagreement" between himself and K.A. before going to the Thanksgiving celebration as being distinct from the dispute that occurred when they returned, characterizing the later argument as "yelling and screaming . . . [and] so aggressive." Both K.A. and Mickelson testified that their argument escalated to a level such that K.A.'s children were crying. Mickelson's testimony was also consistent with K.A.'s testimony that he pulled over multiple times during their drive and that she threw glass ornaments at him. Because the record contains independent corroboration of K.A.'s testimony, there is no reasonable likelihood that the absence of the alleged error would have had a significant effect on the jury's verdict in this case. We therefore conclude that the district court's decision not to instruct the jury that K.A. was an accomplice as a matter of law did not prejudice Mickelson so as to affect his substantial rights.

Sufficiency of the Evidence

Next, we consider Mickelson's argument that the evidence is insufficient to sustain the jury's verdict against him for disorderly conduct involving brawling or fighting because it consists solely of uncorroborated accomplice testimony. "A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense." Minn. Stat. § 634.04

(2016). The corroboration “is not sufficient if it merely shows the commission of the offense or the circumstances thereof.” *Id.* But corroborating evidence does not, by itself, need to be sufficient to establish a prima facie case. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 519 (Minn. 2013). The corroborating evidence is adequate if “it restores confidence in the accomplice’s testimony, confirming its truth and pointing to the defendant’s guilt in some substantial degree.” *State v. Ford*, 539 N.W.2d 214, 225 (Minn. 1995) (quotation omitted). “When considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted).

Mickelson was convicted of disorderly conduct involving brawling or fighting, which requires proof that a person engaged in brawling or fighting in a public or private place and knew or had reasonable grounds to know that it would, or would tend to, “alarm, anger or disturb others or provoke an assault or breach of the peace.” Minn. Stat. § 609.72, subd. 1(1) (2016).

Assuming, without deciding that K.A.’s testimony required corroboration, there are still sufficient facts to sustain the jury’s verdict in this case. As discussed above, the 911 call containing K.A.’s prior consistent statements, the photograph of K.A.’s foot, and Mickelson’s own recorded statement and testimony that he engaged in an argument with K.A. all corroborate K.A.’s testimony. This evidence does not merely show that disorderly conduct occurred; rather, it points to Mickelson engaging in disorderly conduct in a

substantial degree. Accordingly, the evidence is sufficient to support Mickelson's conviction.

Affirmed.