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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1836**

State of Minnesota,
Respondent,

vs.

Jeremy Darryl Jones,
Appellant.

**Filed September 23, 2019
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CR-15-32873

Keith Ellison, 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, St. Paul, Minnesota; and

Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Kalitowski,
Judge.*

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

UNPUBLISHED OPINION

SLIETER, Judge

In this direct appeal from a final judgment of conviction for aiding first-degree aggravated robbery, appellant argues that the district court plainly erred by failing to *sua sponte* give an accomplice-testimony instruction, and plainly erred by giving a no-adverse-inference instruction without appellant's consent. We affirm.

FACTS

The state charged appellant Jeremy Darryl Jones with aiding first-degree aggravated robbery and aiding simple robbery based on information that he participated in a robbery with his girlfriend Ashley Daher. Jones was present at trial initially but left the courthouse just after the jury was sworn in and did not return. The district court found that Jones had voluntarily absented himself and proceeded with the trial. The parties presented the following evidence.

Appellant and Daher were in a relationship for three years at the time of the robbery. They have one child together. Daher met victim J.M. at a Minneapolis strip club in 2014. Unlike J.M.'s romantic interest in her, Daher was not interested in J.M. romantically. Daher used J.M.'s romantic interest in her to her advantage; Daher would contact J.M. when she needed money. The two would occasionally go to the casino, and J.M. would give Daher money to play. Daher knew J.M. usually brought cash to the casino.

On October 11, 2015, Daher called J.M. because she needed money to pay her phone bill. The two met at a pizza restaurant in Minneapolis that evening. At dinner, Daher asked J.M. for money to pay her phone bill. J.M. responded that he wanted Daher to go to the

casino with him that evening and that the money he had was for use at the casino. J.M. told Daher that he would pay her phone bill in the morning.

This upset Daher, and she “felt like it was a waste of [her] time.” Daher then went to the bathroom to call appellant. Daher told appellant that J.M. would not give her the money and suggested that she “should just take the money.” Appellant told Daher to bring J.M. to an address on Upton Avenue and wait for appellant.

Daher returned to the table, told J.M. that she wanted to give the leftover pizza to her daughter and instructed J.M. to drive to the Upton Avenue address. Daher and J.M. drove separate vehicles to the address. After arriving, Daher got in J.M.’s vehicle and waited for appellant. J.M. was in the driver’s seat; Daher was in the front passenger seat.

Appellant arrived, walked up to the vehicle, got in the backseat, and pointed a gun at J.M.’s back. Appellant demanded money; J.M. complied—giving appellant his wallet, cash, and phone. Appellant then exited the vehicle. J.M. asked Daher to call the police, but Daher got in her vehicle and drove away.

J.M. went in search of the police and found a marked squad car. J.M. stopped to ask for help. J.M. described the man who robbed him as “a black man[]” and “muscular” but did not remember “exactly” what he looked like. The officers began investigating. The officers went to the pizza restaurant to view the security footage and saw J.M. and Daher at the restaurant and Daher’s 2002 silver Monte Carlo.

J.M. then met with the investigating officer. J.M. provided the investigator with Daher’s phone number. The investigator executed a search warrant on Daher’s phone number and discovered that Daher called a particular phone number approximately

22 times on the day of the robbery. The investigator learned that the phone number was linked to appellant's Facebook account.

The police asked J.M. to review a six-person photo lineup. J.M. identified two individuals as "very possible" suspects, one of which was a photo of appellant.

Daher testified against appellant at trial. The district court did not read an accomplice-testimony cautionary instruction before her testimony. Daher described the robbery as well as her and appellant's role in it. Daher also described the leniency she received in exchange for her testimony. The investigating officers also testified and explained their investigation.

The district court's final jury instructions did not include an accomplice-testimony instruction. The district court did give an instruction to the jury about appellant's right not to testify. Due to the appellant's voluntary absence, the district court was unable to obtain appellant's consent for that instruction. The jury convicted appellant of aiding first-degree aggravated robbery and aiding simple robbery. This appeal follows.

D E C I S I O N

Jury instructions "must fairly and adequately explain the law of the case[]" and cannot "materially misstate[] the applicable law." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). A district court has "considerable latitude in selecting language for jury instructions." *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). The jury instructions must be read as a whole, and if the instructions "correctly state[] the law in language that can be understood by the jury, there is no reversible error." *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998).

Because appellant did not object at trial to either of the jury instruction issues, we review their admission, or lack thereof, for plain error. Minn. R. Crim. P. 31.02. Plain error requires the defendant to show (1) error, (2) that was plain, and (3) that affected the defendant's substantial rights. *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). "If all three requirements are met, we then determine whether relief is required to ensure fairness and the integrity of the judicial proceedings." *State v. Fraga*, 898 N.W.2d 263, 277 (Minn. 2017) (quotation omitted). "An error is plain if it is clear and obvious; usually this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct." *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010).

I. The district court's failure to give an accomplice-testimony instruction did not affect appellant's substantial rights.

Appellant argues that it was plainly erroneous to fail to provide an accomplice-testimony instruction to the jury. We agree that the district court plainly erred in failing to provide the jury the accomplice-testimony instruction. However, this plain error did not affect appellant's substantial rights.

Minn. Stat. § 634.04 (2014) provides that a conviction cannot rest upon an accomplice's testimony "unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." The district court must give an accomplice-testimony instruction "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) (quoting *State v. Shoop*,

441 N.W.2d 475, 479 (Minn. 1989)). “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.* The accomplice instruction provides:

You 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. Such a person who could be charged for the same crime is called an accomplice.

....

The evidence that can corroborate the testimony of an accomplice must do more than merely show that a crime was committed or show the circumstances of the crime, but the corroborating evidence need not convince you by itself that the defendant committed the crime. It is enough that it tends to show that the defendant committed a crime, and that taken with the testimony of an accomplice you are convinced beyond a reasonable doubt that the defendant committed the crime.

10 *Minnesota Practice*, CRIMJIG 3.18 (2015 & Supp. 2018)

Because the district court did not provide the accomplice instruction, the error was plain; the issue here is whether or not the error affected appellant’s substantial rights. An appellant’s substantial rights are affected “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.” *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998) (footnote omitted) (quotation omitted). An appellant “bears the burden of persuasion” on this element, and it is a heavy burden. *Id.* To determine whether substantial rights have been affected by the omission of the accomplice instruction, we examine: (a) “whether the testimony of the accomplice was corroborated by significant evidence,” (b) “whether the accomplice testified in exchange

for leniency,” (c) “whether the prosecution emphasized the accomplice’s testimony in closing argument,” and (d) “whether the court gave the jury general witness credibility instructions.” *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted).

A. Corroboration

Corroborative evidence “is sufficient to corroborate an accomplice’s testimony when it is weighty enough to restore confidence in the truth of the accomplice’s testimony.” *State v. Clark*, 755 N.W.2d 241, 253 (Minn. 2008) (quotation omitted). “This burden is met when the defendant is linked to the alleged crime by corroborating evidence that in some substantial degree tends to affirm the truth of [the accomplice’s] testimony and to point to the guilt of the defendant.” *Id.* (alteration in original) (quotation omitted). “[A] single piece of corroborating evidence” does not have to “satisfy both corroboration requirements.” *Id.* at 255. Rather, “the evidence *as a whole* must both affirm the truth of the accomplice’s testimony and point to the defendant’s guilt.” *Id.* (footnote omitted). This court reviews the sufficiency of evidence corroborating an accomplice’s testimony in the light most favorable to the state, and all conflicts presented by the evidence are resolved in favor of the verdict. *See State v. Pippitt*, 645 N.W.2d 87, 93 (Minn. 2002).

There is sufficient corroborating evidence here. Surveillance video of the pizza restaurant showed J.M. and Daher eating together. The phone records show that Daher called appellant many times the day of the robbery. And J.M.’s own testimony corroborated Daher’s account of the robbery. This evidence sufficiently corroborates Daher’s testimony of events that night. The corroborating evidence also linked appellant to the crime. Out of a six-person photo lineup, J.M. picked appellant and one other suspect

as “very possible” perpetrators. This points to appellant’s guilt to a “substantial degree.” *Clark*, 755 N.W.2d at 253.

B. Testimony in Exchange for Leniency

Daher testified in exchange for leniency and admitted this to the jury. Daher stated, during cross-examination, that she entered a “deal” with the state in order to testify. Daher also testified that the deal called for 180 days at the workhouse, and that she would have received 48 months in prison had she not testified. The defense, during cross-examination of Daher, highlighted Daher’s desire to avoid jail because she has children to care for. “The jury was therefore fully informed when it weighed [Daher’s] credibility.” *Horst*, 880 N.W.2d at 39.

Although the plea deal was a significant benefit for Daher, the jury knew of her deal with the state while considering the credibility of her testimony. Further, appellant is Daher’s boyfriend and the father of one of her children—this weighs heavily in favor of her credibility before the jury.

C. Emphasis on the Accomplice’s Testimony in Closing Argument

The state did emphasize Daher’s testimony in closing. It referred to Daher’s testimony as the “most damaging evidence” implicating appellant. Hence, this factor favors the appellant’s position.

D. General Witness Credibility Instructions

In *Horst*, the supreme court placed emphasis on this element, stating “perhaps most importantly, the district court gave the general witness-credibility instruction to the jury.” *Id.* at 39. Like *Horst*, the jurors here were instructed that they “may take into consideration

the witness's interest or lack of interest in the outcome of the case.” Thus, the jury was “alerted . . . to the potential for conflicting motivations behind certain testimony.” *Id.* at 39 (alteration in original) (quotation omitted).

Weighing the factors, there is not a reasonable likelihood that the jury's verdict would have changed had the district court given an accomplice-corroboration instruction to the jury. *Griller*, 583 N.W.2d at 741. Therefore, appellant failed to show that his substantial rights were affected by the failure to give an accomplice-corroboration instruction, and he is not entitled to relief under the plain-error analysis.

II. The district court's no-adverse inference instruction, given without appellant's consent, did not affect appellant's substantial rights.

Appellant argues that the district court plainly erred by instructing the jury, absent his consent, that it cannot draw an adverse inference from appellant's decision not to testify. “[A] trial judge ordinarily should obtain a criminal defendant's permission before giving CRIMJIG 3.17, which instructs the jury not to draw any adverse inference from the defendant's decision not to testify.” *State v. Thompson*, 430 N.W.2d 151, 153 (Minn. 1988) (footnote omitted). The district court should ask the defendant, not the defendant's attorney, about the instruction, and a record should be made of the defendant's preference. *Id.*

Although there was error that was plain by providing the no-adverse-inference instruction, there is not “a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury.” *Griller*, 583 N.W.2d at 741. Appellant argues that “the instruction about Jones' failure to testify

only highlighted Jones' absence and his failure to testify, which could have cause[d] the jury to wonder whether Jones had something to hide." But appellant left during the first trial break and never returned—he "highlighted" his absence to the jury by leaving and failing to return even after a continuance.

Moreover, the issue at trial was the identity of the robber. Daher's testimony clearly tied appellant to the crime. Appellant "bears a heavy burden of showing that [his] substantial rights have been affected," and given the evidence at trial, the jury would have reached the same verdict with or without the no-adverse-inference instruction. *State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002).

Affirmed.