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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0811**

State of Minnesota,
Respondent,

vs.

Leneil James Colbert,
Appellant.

**Filed July 8, 2024
Affirmed
Florey, Judge***

Ramsey County District Court
File No. 62-CR-21-6336

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Bjorkman, Judge;
and Florey, Judge.

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

NONPRECEDENTIAL OPINION

FLOREY, Judge

On appeal from the judgment of conviction for aiding and abetting second-degree unintentional murder, appellant argues that the district court committed prejudicial plain error by failing to instruct the jury that it could not convict appellant based on uncorroborated accomplice testimony, and by not instructing the jury that the state was required to prove beyond a reasonable doubt that appellant knowingly and intentionally aided another to commit the charged crime. In a pro se supplemental brief, appellant argues that his trial counsel was ineffective and that his conviction must be reversed for insufficient evidence. We affirm.

FACTS

Respondent State of Minnesota charged appellant Leneil James Colbert with aiding and abetting second-degree unintentional murder in connection with the armed robbery and death of A.C. The following facts derive from the evidence elicited at Colbert's jury trial.

On August 29, 2021, officers responded to Regions Hospital on a report that a shooting victim had been dropped off at the hospital. Upon arriving, officers learned that the victim, A.C., had died.

An officers spoke with A.M., who had driven A.C. to the hospital. A.M. said that he had been visiting A.C. at Spring Hill Suites and that he was on the second floor of the parking ramp when he heard shots coming from the third floor. A.M. told officers that he went to the third floor of the parking ramp and found A.C. lying face down next to the

passenger side of his car. A.M. also told officers that he saw a black or navy Mercedes speed out of the parking ramp around the same time as the shooting.

Testimony at trial established that Colbert had orchestrated a plan, which was executed by several others, to rob A.C. Two accomplices, Danell Christner and Davonte Tharpe, testified about the events leading up to A.C.'s death.

Christner's Testimony

Christner testified that she is a prostitute and Colbert is her pimp. Christner explained that Colbert provided her with housing in exchange for the money she made. Christner stated that, although she was bringing in at least \$1,000 per day, Colbert was never satisfied with the amount of money she made and told her to "work or find people to rob."

Christner testified that she met with A.C. in a hotel room on August 28. After leaving A.C.'s hotel, Christner called Colbert and told him that A.C. "had a lot of money and a lot of drugs."

Christner testified that she had been arrested in connection with the case, and that she received a deal in exchange for her truthful testimony against the others involved in A.C.'s death.

Tharpe's Testimony

Tharpe explained the relationship between the actors involved in the robbery and shooting death of A.C. Tharpe stated that he lived with Anthony Pryor. Tharpe also testified that his cousin, Travon Ferrara, introduced him to Colbert. Tharpe testified that he knew Christner through working at a local eatery, purportedly owned by Christner and

Colbert, and that he knew that Christner was “selling herself for [Colbert].” Tharpe stated that Pryor and Colbert were very close, claiming that “[i]f [Colbert] wanted somebody gone, Pryor had to do it, and if Pryor missed or he didn’t succeed, [Colbert] was going to kill him.”

Tharpe testified that Colbert called him around 8:41 p.m. on August 28, stating that he needed Tharpe to work. Around 9:26 p.m., Tharpe dropped Pryor off at the eatery and picked up Colbert and a bouncer from the same location. Tharpe stated that once Colbert and the bouncer were in his car, they stopped at a gas station and then went to Spring Hill Suites to scope out different ways to get in and out of the facility because Colbert planned on robbing someone who was staying there. After about 30 minutes, Tharpe dropped Colbert and the bouncer off a block away from the eatery.

Tharpe stated that Colbert told Tharpe and Pryor to go to Spring Hill Suites and rob A.C. Tharpe did not have a weapon, but he knew that Pryor had a gun. Tharpe testified that when he and Pryor left the eatery, Colbert was calling Christner to figure out A.C.’s location and then calling Pryor to relay the information. Tharpe stated that he was afraid of what would happen if the robbery went bad, so he told Pryor and Colbert that he had to return the vehicle he was driving to his girlfriend otherwise she would call the police. Tharpe dropped Pryor back off at the eatery shortly after midnight.

Tharpe testified that after he left the eatery, Colbert enlisted the help of Frank Spriggs and Tarrance Hardie to go to the hotel and rob A.C. Tharpe also testified that Ferrara’s distinctive Mercedes was used to transport the men to and from the hotel.

When Tharpe returned to the eatery a few hours later, Colbert was upset with him for leaving, told him that the robbery had gone bad, and that he better hope that A.C. survives. Several days later, Tharpe tossed the guns that were used to shoot A.C. off a bridge at Colbert's direction. Ferrara also asked Tharpe to get rid of his Mercedes, but Tharpe did not aid in that effort.

Tharpe testified that he had been arrested in connection with the case, and that the state asked him to truthfully testify against the others involved. Tharpe stated that, at the time of trial, he did not have any sort of deal with the state.

Trial Exhibits

The state presented numerous exhibits connecting Colbert to the incident, including surveillance videos from the eatery, hotel, and traffic cameras. Before the incident, surveillance from the eatery shows: (1) Colbert, Pryor, and Tharpe at the eatery; (2) Pryor and Tharpe leaving the eatery in Tharpe's vehicle; (3) Colbert using a cellphone; (4) Spriggs and Hardie meeting Colbert at the eatery; (5) Pryor getting out of Tharpe's car; (6) Colbert, Pryor, Hardie, and Spriggs walking toward the distinct Mercedes; and (7) Colbert returning to the eatery. Surveillance video from the hotel showed the distinctive Mercedes entering the parking ramp shortly before and leaving immediately after the shooting. Traffic cameras also captured Tharpe's vehicle arriving at the eatery and picking up two people, going to a gas station, and then driving to the hotel. Traffic cameras also captured the distinctive Mercedes driving in the direction of the hotel before the incident and away from the hotel after the incident.

The state introduced Colbert's cellphone data into evidence, which showed that he had been in communication with Christner, Tharpe, and Spriggs before and after the incident.

In his defense, Colbert presented testimony from several witnesses, including an officer who had taken Pryor's statement.¹ In that statement, Pryor told the officer that he, Spriggs, and Hardie were involved in the incident; that he and Spriggs fired three shots at A.C.; and that Colbert did not know about the robbery.

The jury found Colbert guilty as charged. The district court later sentenced Colbert to 180 months' imprisonment. Colbert appeals.

DECISION

I. Failing to include an accomplice corroboration jury instruction was plain error but did not impact Colbert's substantial rights.

Minnesota's uncorroborated-evidence-of-accomplice statute prohibits convictions based "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, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Minn. Stat. § 634.04 (2020). Although Colbert did not request an instruction to the jury regarding the accomplices' testimony, "trial 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." *State v. Strommen*, 648

¹ Pryor invoked his right against self-incrimination, but his statement was admitted through the officer's testimony.

N.W.2d 681, 689 (Minn. 2002). Here, there is no dispute that Christner and Tharpe were accomplices.

“[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). The plain-error analysis involves consideration of whether there is: “(1) an error, (2) that was plain, and (3) that affected the defendant’s substantial rights.” *Id.* at 583. If these factors are satisfied, this court then considers “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.* (quotation omitted).

Colbert claims that failing to instruct the jury that it could not convict Colbert based on uncorroborated accomplice testimony was plain error that affected his substantial rights. Because “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), we turn immediately to the question of whether the failure to provide such an instruction impacted Colbert’s substantial rights.

Failing to provide a jury instruction impacts a defendant’s substantial rights when “there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *Reed*, 737 N.W.2d at 583 (quotation omitted). The “reason for requiring the accomplice corroboration instruction is to ensure that the jury did not reject the corroborating evidence and base its verdict solely on the accomplice’s testimony.” *State v. Davenport*, 947 N.W.2d 251, 262 (Minn. 2020). Thus, to determine whether Colbert’s substantial rights were affected, the focus of the inquiry is on whether

there is a reasonable likelihood that the jury relied solely on the testimony of Christner and Tharpe in reaching its verdict. To do so, we consider “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 *State v. Jackson*, 746 N.W.2d 894, 899 (Minn. 2008)).

Corroboration

Christner’s testimony established that she was working for Colbert, and that Colbert told her to look for clients to rob. Christner testified that A.C. was a client, and that she told Colbert that A.C. had a significant amount of money and drugs. The state presented evidence of Christner’s vehicle entering the Spring Hill Suites parking ramp and of Christner and A.C. waiting for an elevator at the hotel on August 28. Cellphone data shows that Christner called Colbert at 8:37 p.m. when she was in the vicinity of Spring Hill Suites, and that she called Colbert again a few minutes later. The evidence is significant evidence corroborating Christner’s testimony.

Tharpe’s testimony demonstrated that Colbert orchestrated the robbery. Cellphone data shows that Colbert called Tharpe immediately after getting off the phone with Christner. Cellphone data further shows that (1) between 8:41 p.m. and 9:11 p.m., Tharpe and Colbert called each other eight times while Tharpe traveled near Colbert’s location; (2) thereafter, Colbert traveled towards Spring Hill Suites; (3) Colbert, Tharpe, and Pryor were at the eatery shortly after 10:00 p.m.; (4) Colbert remained at the eatery the remainder

of the night; (5) Pryor was in the vicinity of Spring Hill Suites around the time of the robbery; and (6) between 11:29 p.m. on August 28 and 12:34 a.m. on August 29, Colbert spoke to Tharpe 12 times, Ferrara seven times, Christner four times, and Spriggs twice. Here, the cellphone data corroborates the timing of Tharpe's testimony, including the location of Colbert at relevant points, and is significant evidence corroborating Tharpe's testimony.

Leniency

Christner testified that she was arrested in connection with this case and that she had reached a plea agreement with the state in which she was offered leniency in exchange for her truthful testimony. Tharpe testified that he had been arrested in connection with the case and that the state asked him to truthfully testify against the others involved but, at the time of trial, he had not reached a plea agreement with the state. Thus, the jury was aware that Christner had received a benefit for her truthful testimony and that Tharpe was asked to provide truthful testimony but had not reached a deal with the state at the time of trial. *Horst*, 880 N.W.2d at 38-39 (noting that informing the jury of an accomplice's agreement with the state provided the jury with the necessary information to weigh the accomplice's credibility).

Closing Arguments

The state's closing argument is approximately 50 pages. The state did not rely heavily on the accomplices' testimony during closing. The state, instead, focused on the corroborating evidence, including surveillance videos, images, and cellphone data. The state published images and videos for the jury throughout closing.

Credibility Instruction

The district court provided the following instruction related to witness credibility.

You are the sole judges of whether a witness is to be believed and of the weight to be given [to] a witness's testimony. There are no hard and fast rules to guide you in this respect. In determining believability and weight of testimony, you may take into consideration the witness's:

1. Interest or lack of interest in the outcome of the case,
2. Relationship to the parties,
3. Ability and opportunity to know, remember, and relate the facts,
4. Manner,
5. Age and experience,
6. Frankness and sincerity, or lack thereof,
7. Reasonableness or unreasonableness of their testimony in the light of all the other evidence in the case,
8. Any impeachment of the witness's testimony,
9. And any other factors that bear on believability and weight.

You should rely in the last analysis upon your own experience, good judgment, and common sense.

By instructing jurors to consider the accomplices' interests in the outcome of the case, the believability of their testimony, and impeachment of their testimony, the jury was “‘alerted . . . to the potential for conflicting motivations behind certain testimony.’” *Horst*, 880 N.W.2d at 39 (quoting *State v. Lee*, 683 N.W.2d 309, 317 (Minn. 2004)).

We recognize that one factor—leniency—favors Colbert's argument, but on balance, these factors show that the lack of an accomplice-corroboration instruction did not impact Colbert's substantial rights.

II. Failing to instruct the jury on the burden of proof needed to show that Colbert acted with the required mental state did not impact Colbert's substantial rights.

When there is no objection to jury instructions at trial, the appellate court has discretion to consider a claim of error on appeal “if there was plain error affecting substantial rights or an error of fundamental law in the jury instructions.” *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted). Our plain-error analysis contemplates whether there is: “(1) an error, (2) that was plain, and (3) that affected the defendant’s substantial rights.” *Reed*, 737 N.W.2d at 583. If these factors are satisfied, we consider “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.* (quotation omitted).

Colbert claims the district court committed prejudicial plain error by failing to instruct the jury on the burden of proof needed to show that he knowingly and intentionally aided the others.

The jury was instructed to “consider the instructions as a whole and regard each instruction in light of all the others.” The instructions set out the presumption of innocence, noting the state’s burden of proving Colbert’s guilt beyond a reasonable doubt. The instructions also defined “know,” “had reason to know,” “intentionally,” and “with intent.” The instruction regarding liability for the crimes of another laid out the elements of the offense, and included the requisite mental state, but did not include the state’s burden of proving that Colbert acted with the required mental state beyond a reasonable doubt. *See State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007) (noting that the element of intentionally aiding requires that the defendant knew that his alleged accomplices were

going to commit a crime, and that the defendant intended his presence or actions to further the commission of that crime).

We assume without deciding that the failure to instruct the jury on the burden of proof for showing that Colbert acted with the required mental state is plain error, and so we consider whether the failure to provide such an instruction impacted Colbert's substantial rights.

Failing to provide a jury instruction impacts a defendant's substantial rights when "there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *Reed*, 737 N.W.2d at 583 (quotation omitted). "The defendant has the burden of proving prejudice, and it is a heavy burden." *State v. Huber*, 877 N.W.2d 519, 525 (Minn. 2016).

There is no reasonable likelihood that the erroneous jury instruction had a significant effect on the jury verdict because there is considerable evidence that Colbert intentionally aided and abetted in robbing A.C. The jury heard evidence that Colbert told Christner to watch for clients to rob, and that Christner told Colbert where A.C. was staying and that he had a significant amount of money. The jury heard evidence that Colbert enlisted Tharpe's help in robbing A.C., and that Colbert contacted others when Tharpe backed out of the plan. The jury observed cellphone data showing Colbert in communication with his accomplices throughout the night of the robbery, and it saw surveillance footage corroborating Christner's and Tharpe's testimony. This evidence shows that Colbert knew his associates were going to rob A.C. and that he intended on aiding their efforts. Moreover, from these facts, the jury would have found Colbert guilty

even if the district court had instructed the jury on the burden of proof needed to prove that Colbert knowingly and intentionally aided in the robbery of A.C.

III. Colbert is not entitled to relief based on his claim of ineffective assistance of counsel.

Criminal defendants have a right to effective assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012).

Appellate courts apply the two-prong *Strickland* test to evaluate an appellant's ineffective-assistance-of-counsel claim. *State v. King*, 990 N.W.2d 406, 417 (Minn. 2023); see *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the *Strickland* test, the appellant has the burden of showing (1) that their "attorney's representation fell below an objective standard of reasonableness" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *King*, 990 N.W.2d at 417 (quotations omitted). If one prong is determinative, the reviewing court need not address the other. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). Because ineffective-assistance-of-counsel claims involve mixed questions of law and fact, the standard of review is de novo. *Id.*; see *Strickland*, 466 U.S. at 698.

Colbert alleges several mistakes by trial counsel, among them that counsel failed to raise objections, subpoena witnesses, and threatened to withdraw from the case. He states that these alleged errors impacted his substantial rights, but he presents no argument that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *King*, 990 N.W.2d at 417 (quotations omitted). Because Colbert has failed to prove that there is a reasonable probability that the outcome

would have been different but for the alleged errors, he has failed to demonstrate that he is entitled to relief for ineffective assistance of counsel. *Rhodes*, 657 N.W.2d at 842.

IV. Sufficient evidence supports the jury’s verdict.

When evaluating the sufficiency of the evidence, we review the record to determine “whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach their verdict.” *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004). We assume the jury believed evidence that supported the verdict and disbelieved any evidence that conflicted with the verdict. *Id.* “We will not disturb the verdict if the jury, while acting with proper regard for the presumption of innocence and regard for the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Id.* at 25-26.

A finding of guilt can be based on direct or circumstantial evidence. Circumstantial evidence is “evidence from which the [fact-finder] can infer whether the facts in dispute existed or did not exist.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). “In contrast, direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* (quotations omitted).

The parties agree that circumstantial evidence was used to prove Colbert’s guilt. When the state relies on circumstantial evidence to prove an element of an offense, we apply a heightened standard of review. *See id.* at 599-601 (discussing circumstantial-evidence standard); *State v. Al-Naseer*, 788 N.W.2d 469, 471 (Minn. 2010) (stating that “the heightened scrutiny applies to any disputed element of the conviction that is based on

circumstantial evidence”). Pursuant to the circumstantial-evidence standard of review, we first determine the circumstances proved, disregarding evidence that is inconsistent with the verdict. *Harris*, 895 N.W.2d at 600. Next, we “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt.” *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotation omitted). We do not defer to the fact-finder’s choice between reasonable inferences. *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). But we will not reverse a conviction based on circumstantial evidence unless there is a reasonable inference other than guilt. *Loving*, 891 N.W.2d at 643.

Much of Colbert’s sufficiency-of-the-evidence claim rests on the assertion that Christner and Tharpe are untrustworthy, and he claims that the forensic data does not corroborate their testimony. Colbert, however, does not present a circumstantial-evidence analysis. An assignment of error in a brief based on “mere assertion” and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971); see *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (applying this aspect of *Schoepke*).

Prejudicial error is not apparent upon mere inspection. The circumstances proved demonstrate that Christner informed Colbert that A.C. had a large amount of money and drugs, and that Colbert then orchestrated a plan for others to rob A.C. Colbert claims Christner and Tharpe are untrustworthy, rendering their testimony unreliable. But as evidenced by its verdict, the jury disagreed. See *Harris*, 895 N.W.2d at 600 (noting that under the first prong of the circumstantial-evidence standard, we defer to the jury’s

credibility determinations and “resolv[e] all questions of fact in favor of the jury’s verdict”). Moreover, Colbert presents no reasonable alternative inference from the circumstances proved other than his guilt. *See State v. Tschou*, 758 N.W.2d 849, 858 (Minn. 2008) (noting that to successfully challenge a jury’s verdict, an appellant must “point to evidence in the record that is consistent with a rational theory other than guilt”). Because the circumstances proved are consistent with guilt, and because Colbert failed to provide a reasonable hypothesis other than guilt, we conclude that sufficient evidence supports the jury’s verdict.

Affirmed.