IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 124,972

STATE OF KANSAS,
Appellee,

v.

RICHARD ALAN GOENS,
Appellant.

SYLLABUS BY THE COURT

1.

Failure to give an accomplice instruction sua sponte will not generally constitute clear error if the defendant's guilt is plain, or if the district court provided another instruction which adequately cautioned the jury about the weight to be accorded testimonial evidence.

2.

The lack of a lengthy explanation by a district court ordering a defendant to serve sentences consecutively does not imply an impermissible basis for that decision constituting an abuse of discretion.

Appeal from Riley district court; GRANT D. BANNISTER, judge. Oral argument held May 17, 2023. Opinion filed September 29, 2023. Affirmed.

Ryan J. Eddinger, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

David Lowden, deputy county attorney, argued the cause, and *Barry R. Wilkerson*, county attorney, and *Kris W. Kobach*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: In November 2019, Richard Alan Goens shot and killed Tanner Zamecnik during a drug deal gone wrong. Goens and his accomplices approached the victim intending to either buy or steal $600-700 worth of marijuana. The accomplices testified that the plan was to rob the victim; however, Goens testified at trial and maintains through his appeal that he only ever intended to purchase the marijuana. Given the two substantive issues on appeal, a more detailed recitation of the facts is unnecessary.

At trial, a jury convicted Goens of felony murder, attempted aggravated robbery, criminal discharge of a firearm, aggravated battery, aggravated assault, and possession of marijuana with intent to distribute. The court sentenced Goens to a hard 25 for the felony murder conviction and a grid-based sentence of 142 months for the rest of the charges, to be served consecutively.

Goens directly appealed to this court raising two issues. First, at trial Goens did not request, and the district court did not give, a credibility instruction specific to accomplice testimony. Goens argues that inconsistencies and changes in the details of the accomplices' stories over time—along with the fact that the accomplices were testifying as part of a plea agreement—renders the district court's failure to give a credibility instruction relating to their testimony as "clear error." As a result, Goens asks that his convictions be reversed. Second, Goens claims the district court abused its discretion in ordering Goens' to serve his sentences consecutively. We disagree and affirm both Goens' convictions and his sentences.

DISCUSSION

The trial court did not commit clear error by not providing the jury with a cautionary instruction regarding the credibility of accomplice testimony.

When a party fails to object to a jury instruction before the district court, an appellate court reviews the instruction to determine if it was clearly erroneous. K.S.A. 2022 Supp. 22-3414(3). The party claiming clear error has the burden to show both error and prejudice. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021). "The failure then to give an instruction on accomplice testimony when none is requested requires reversal only if 'clear error' occurred." *State v. DePriest*, 258 Kan. 596, 605, 907 P.2d 868 (1995). In this instance, we focus our analysis on the prejudice prong.

The "failure to give an instruction is clearly erroneous only if the appellate court reaches a firm conviction that, had the instruction been given, there was a real possibility the jury would have returned a different verdict." *State v. Buehler-May*, 279 Kan. 371, 384, 110 P.3d 425 (2005). To determine whether prejudicial error occurred in the failure to give an accomplice instruction, courts generally "look to the extent and importance of the accomplice testimony, as well as any corroborating testimony." 279 Kan. at 384. Given this, the failure to give an accomplice instruction sua sponte will not generally constitute clear error if the defendant's guilt is plain, or if the district court provided another instruction which adequately cautioned the jury about the weight to be accorded testimonial evidence. See 279 Kan. at 385 (quoting *State v. Crume*, 271 Kan. 87, 94-95, 22 P.3d 1057 [2001]).

We have previously held that it is not clear error for a district court to fail to give an unrequested accomplice credibility instruction when the court has given a general credibility instruction. See, e.g., *Buehler-May*, 279 Kan. at 385; *State v. Simmons*, 282 Kan. 728, 734-35, 148 P.3d 525 (2006); *State v. Todd*, 299 Kan. 263, 271, 323 P.3d 829

(2014). This is because judicial determinations concerning the necessity of an accomplice credibility instruction are steeped with an understanding that most jurors have common sense. See *State v. Miller*, 83 Kan. 410, 412, 111 P. 437 (1910) ("Without such an instruction a jury of ordinary intelligence would naturally receive with caution the testimony of a confessed accomplice."), *rev'd on reh'g on other grounds* 84 Kan. 667, 114 P. 855 (1911); *State v. Parrish*, 205 Kan. 178, 186, 468 P.2d 143 (1970) ("The necessity for many of these tautological instructions is losing force when a case is being considered by our present enlightened jurors.").

The language of the instruction at issue comes from PIK Crim. 4th 51.090 (2020 Supp.):

> "An accomplice witness is one who testifies that (he) (she) was involved in the commission of the crime with which the defendant is charged. You should consider with caution the testimony of an accomplice."

Rather than giving this instruction, the district court gave the following general credibility instruction as part of jury instruction No. 2:

> "It is for you to determine the weight and credit to be given [to] the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified."

Goens argues that because nearly all the evidence presented at trial was in the form of witness testimony, "the importance of the accomplice testimony" is too great in this case for a court to not have required an accomplice credibility instruction. This is not the correct framing of the question. Rather, we consider whether "no juror of average intelligence could have heard their testimony and accompanied cross-examination

without realizing that their credibility was at issue" and whether the accomplices were "properly subjected to thorough and detailed cross-examination." *State v. Simmons*, 282 Kan. 728, 741, 148 P.3d 525 (2006).

In this case, the jury was clearly aware of and properly instructed on the possible credibility issues concerning the accomplice testimony. Defense counsel went so far as to highlight these issues in closing argument—asking the jury to recognize that "[t]he source of this information . . . are the two . . . co-defendants," and that the codefendants "entered pleas to lesser charges to reduce their time," and that "in looking out for their own interests agree to this lesser charge and agree to testify against" Goens.

The record makes it clear that the jury was well informed about the possible mixed motives at play during the accomplice testimony. The instruction Goens now argues should have been given would not have added materially to the jury's understanding of these issues. As such, we find no clear error.

The trial court did not abuse its discretion by ordering Goens to serve his sentences consecutively.

In most cases, "'it is within the trial court's sound discretion to determine whether a sentence should run concurrent with or consecutive to another sentence.'" *State v. Baker*, 297 Kan. 482, 484, 301 P.3d 706 (2013). "In fact, this principle of a judge's discretion is so entrenched that the legislature determined a defendant cannot raise the issue of whether imposing consecutive sentences is an abuse of discretion if the sentence is imposed under the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 21-4701 et seq." *State v. Mosher*, 299 Kan. 1, 2-3, 319 P.3d 1253 (2014). However, appellate courts can review consecutive sentences if one of the sentences is for an off-grid crime because the resulting controlling sentence is not entirely a presumptive sentence. *State v. Young*, 313 Kan. 724, 731-32, 490 P.3d 1183 (2021). "'[A] life sentence for an off-grid crime is

not considered a "presumptive sentence" under the KSGA.'" *Baker*, 297 Kan. at 484. Because Goens' sentence for felony murder is classified as an off-grid crime, the KSGA does not preclude our review. See *State v. Brune*, 307 Kan. 370, 371, 409 P.3d 862 (2018).

The standard for determining whether a district court abused its discretion is whether

> "judicial action (1) is arbitrary, fanciful, or unreasonable, i.e., if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, i.e., if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, i.e., if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *Baker*, 297 Kan. at 484.

Goens has the burden to prove the trial court abused its discretion. To sustain his burden, he must show that no reasonable person would have taken the trial court's view.

Neither our statutes nor our caselaw set definitive criteria for when a district court should order sentences to be served concurrently or consecutively. See *State v. Darrah*, 309 Kan. 1222, 1227, 442 P.3d 1049 (2019). The State argued throughout trial and at sentencing that consecutive sentences were warranted because Goens was the mastermind and gunman, he lacked remorse, he failed to take responsibility for his actions, and he repeatedly lied on the stand at trial. Goens argues that he was punished for exercising his constitutional rights and demanding a fair trial. Goens claims that he took responsibility for his actions by pleading guilty to possession with intent to distribute.

While the district court's overall summary of its reasons for ordering Goens' sentences to run consecutive was sparse, the judge explicitly stated that Goens was not being punished for exercising his constitutional rights. Instead, the district court stated

that it was ordering Goens' sentences to run consecutive based on the "primary consideration" that these events constituted several different events rather than one occurrence. Because of that, there were several opportunities for Goens to abandon the plan, but Goens never did. This along with "other" considerations were the basis for the district court's decision.

The lack of a lengthy explanation does not constitute an abuse of discretion. See *State v. Frecks*, 294 Kan. 738, 742, 280 P.3d 217 (2012) ("While it is certainly the better practice for the district court to include an explanation of its reasons when it imposes consecutive life sentences, a sentencing judge's failure to engage in a lengthy colloquy does not amount to an abuse of discretion. Here, the sentencing judge did provide minimal justification for the decision to impose the life sentences consecutively. Reasonable people may disagree as to whether the sentences should have been imposed consecutively or concurrently; however, under the facts of this case, it was not an abuse of discretion to impose the life sentences consecutively.").

In arguing that the district court acted reasonably, the State cites two cases which help to provide context for when other district courts have ordered consecutive sentences. See *State v. Ross*, 295 Kan. 1126, 1138-39, 289 P.3d 76 (2012) (court considered the suffering of the victim, defendant's lack of compassion, and the extent of harm to the victim's family); *Mosher*, 299 Kan. at 3-4 (court considered the amount of planning and effort that went into the murder and how it could have been avoided).

Our own review of the caselaw turns up other such instances. See *Darrah*, 309 Kan. at 1227-28 (court made no specific findings of fact, but acted reasonably because defendant was central to the conspiracy and acted as a leader in the commission of the crimes); *Baker*, 297 Kan. at 484-85 (brutality of the murder on an innocent baby was not offset by a showing of remorse, acceptance of responsibility, or a decision to enter a plea); *State v. Wilson*, 301 Kan. 403, 406-07, 343 P.3d 102 (2015) (defendant's shooting

and/or attempted shooting of his five neighbors was unprovoked); *Brune*, 307 Kan. at 371 (considering evidence of planning, the egregiousness and brutality of the murder, the lack of legitimate provocation, lack of responsibility); *State v. Horn*, 302 Kan. 255, 257, 352 P.3d 549 (2015) (defendant's decision to murder a child who could be a witness against him was especially heinous and the defendant had a lack of regard for others' safety by setting an apartment building on fire).

We recognize that Goens' actions may be less egregious than many of the cases in which the court has upheld a district court's decision to order sentences be served consecutively. But simply not being the worst of the worst does not require the lower court to order his sentences to run concurrent. Because Goens has failed to meet his burden to show that no reasonable person would have ordered his sentences be served consecutively, we affirm the district court.

Affirmed.