STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1211

State of Minnesota,
Respondent,

vs.

Michael Lynn Howard,
Appellant.

Filed June 20, 2011
Affirmed
Worke, Judge

Anoka County District Court
File No. 02-CR-09-13014

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges his second- and fifth-degree assault and terroristic-threats convictions, arguing that (1) the district court abused its discretion by permitting a

witness to be present while the state gave an offer of proof regarding her anticipated testimony; (2) he was denied a fair trial because the immunity agreement required the witness to testify consistent with the state's offer of proof; and (3) the district court committed plain error by failing to instruct the jury on accomplice testimony, or alternatively, he was denied effective assistance of counsel. We affirm.

D E C I S I O N

Sequester Witness

A jury found appellant Michael Lynn Howard guilty of second- and fifth-degree assault and terroristic threats following a trial in which a witness who had been granted immunity testified against him. Appellant first challenges the district court's denial of his request to have the witness removed from the courtroom when the prosecutor provided an offer of proof regarding her anticipated testimony. The decision to sequester witnesses "rests in the sound discretion of the [district] court, and [when] there is no showing that failure to sequester witnesses was prejudicial to the accused, the court's refusal to require it does not in itself constitute reversible error." *State v. Garden*, 267 Minn. 97, 112, 125 N.W.2d 591, 601 (1963).

Appellant was charged with first-degree aggravated robbery after he and C.A. attempted to rob S.B., a man C.A. lured to her apartment by offering sex for money. C.A. was charged as an accomplice, but the state sought to compel her testimony against appellant by granting her immunity, pursuant to Minn. Stat. § 609.09, subd. 1 (2008), which provides:

> In any criminal proceeding, . . . if it appears a person may be entitled to refuse to answer a question or produce evidence of any other kind on the ground that the person may be incriminated thereby, and if the prosecuting attorney, in writing, requests the chief judge of the district or a judge of the court in which the proceeding is pending to order that person to answer the question or produce the evidence, the judge, after notice to the witness and hearing, shall so order if the judge finds that to do so would not be contrary to the public interest and would not be likely to expose the witness to prosecution in another state or in the federal courts.

The district court conducted a hearing and requested an offer of proof from the prosecutor regarding C.A.'s anticipated testimony to determine whether immunity would be contrary to the public interest and whether C.A. would be exposed to prosecution in another jurisdiction. Appellant's attorney asked that C.A. be removed from the courtroom while the prosecutor presented the offer of proof, but the district court appropriately denied this request.

The proceeding under Minn. Stat. § 609.09 relates to the witness, not appellant. This proceeding implicated C.A.'s constitutional rights, which required her presence. Because this proceeding was not a stage of appellant's criminal trial, he did not have standing to present a challenge. *See State v. Booker*, 770 N.W.2d 161, 167 (Minn. App. 2009) ("[A] defendant does not have standing to challenge a district court's determination that a witness has or does not have a Fifth Amendment privilege against self-incrimination."), *review denied* (Minn. Oct. 20, 2009).

Appellant asserts, however, that because C.A. heard the offer of proof she aligned her testimony to be consistent with it. He claims that her actual testimony regarding appellant's use of a knife shows that she attempted to "parrot the offer of proof." The

prosecutor anticipated C.A. would testify that (1) she and appellant devised a plan to lure S.B. to her apartment by offering him sex for money, (2) she told S.B. to remove his clothing, (3) she signaled to appellant, (4) appellant emerged with a knife and chased S.B. away, and (5) she and appellant agreed to tell the police that appellant rescued her from an attempted rape. C.A. testified that she did not know where the knife came from, and that she noticed it only after S.B. was gone. Appellant asserts that C.A.'s testimony was fabricated because S.B. fled with the knife. But C.A.'s testimony did not "parrot" the offer of proof. She did not testify that appellant emerged with a knife; she testified that she did not know where the knife came from. Thus, even if C.A.'s recollection was incorrect it was not aligned with the offer of proof. Finally, C.A. testified consistent with what she reported to police officers. Therefore, the district court did not abuse its discretion when it denied appellant's request to sequester C.A. during the witness-immunity proceeding.

Immunity Agreement

Appellant next argues that he was deprived of a fair trial because the immunity agreement arguably required C.A. to testify in accordance with the state's offer of proof. This court reviews de novo whether a defendant has been denied due process. *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008). The decision to offer immunity in exchange for truthful testimony "is a proper exercise of prosecutory authority." *State v. Jones*, 392 N.W.2d 224, 232 (Minn. 1986). "Such negotiations do not necessarily make an accomplice's testimony so unreliable that it must be excluded from evidence, for they

in no way bind the witness' testimony; . . . she is free to testify truthfully and fully without fear of reprisals on the part of the government." *Id.*

C.A. agreed to "provide testimony" in exchange for "immunity from criminal prosecution." The agreement indicated that "[C.A.] may be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing, or contempt." Appellant asserts that the agreement does not clearly require C.A. to testify truthfully and, arguably, C.A. believed that she agreed to testify in accordance with the state's offer of proof. But the agreement does not state that C.A. must testify according to the state's offer of proof; it does state, however, that C.A.'s testimony may subject her to penalty for perjury, which implies that it must be truthful. Appellant has failed to show that his due-process rights were violated by the immunity agreement.

Accomplice Jury Instruction

Appellant also argues that the district court committed plain error by failing to provide the accomplice-corroboration jury instruction. If the district court fails to give an accomplice-corroboration instruction, without objection, we apply the plain-error analysis. *State v. Reed*, 737 N.W.2d 572, 584 n.4 (Minn. 2007). In doing so, this court considers whether (1) there is error, (2) that is plain, and (3) it affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the three factors are established, this court next considers whether the error seriously affected the fairness and integrity of the judicial proceedings. *Id.* at 740, 742 (explaining that appellate courts may exercise discretion to correct plain error if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings"). When an

accomplice testifies against a defendant, omission of the instruction satisfies the first two plain-error factors. *See Reed*, 737 N.W.2d at 584 (noting that because the instruction is required by caselaw, failure to give it is plain error). Therefore, we must first determine whether C.A. was an accomplice.

The accomplice-corroboration instruction must be given if any witness "might reasonably be considered an accomplice to the crime." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004) (quotation omitted). An "accomplice" could have been charged and convicted of the same crime as the defendant. *State v. Pederson*, 614 N.W.2d 724, 733 (Minn. 2000). "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." *State v. Jackson*, 746 N.W.2d 894, 898 (Minn. 2008) (quotation omitted). For purposes of determining accomplice liability, a reviewing court distinguishes between playing "a knowing role in the crime" and having "[a] mere presence at the scene, inaction, knowledge and passive acquiescence." *Id.* (quotation omitted). When it is unclear whether a witness is an accomplice it becomes a question of fact for the jury to decide. *State v. Barrientos-Quintana*, 787 N.W.2d 603, 611 (Minn. 2010). "But when the facts of the case are undisputed and there is only one inference to be drawn as to whether or not the witness is an accomplice, then it is a question for the court to decide." *Jackson*, 746 N.W.2d at 898 (quotation omitted).

Appellant was originally charged with first-degree aggravated robbery. C.A. was an accomplice to that crime because she and appellant agreed to lure S.B. to the apartment in order to take his money. However, the state dismissed the robbery charge

and charged appellant with second-, third-, and fifth-degree assault and terroristic threats. The state could not have charged C.A. with these offenses because C.A. did not assist appellant in assaulting S.B. Additionally, the rationale for the accomplice-corroboration instruction is that an accomplice's credibility is inherently suspect. *Lee*, 683 N.W.2d at 316. The district court instructed the jury twice regarding C.A.'s testimony as an immune witness:

> The testimony of an immunized witness, someone who has been told either that her crimes will go unpunished in return for testimony or that her testimony will not be used against her in return for that cooperation, must be examined and weighed by you with greater care than the testimony of someone who is appearing in court without the need for such an agreement with the State.
>
> [C.A.] may be considered an immunized witness in this case. You must determine whether the testimony of the immunized witness has been affected by self-interest or by the agreement she has with the State or by her own interest in the outcome of the case or by prejudice against [appellant].

Thus, the jury was instructed to examine C.A.'s testimony more closely as an immunized witness, just as it would have been if it had been given the accomplice-corroboration instruction. Further, an accomplice-corroboration instruction does not instruct the jury to disregard the accomplice's testimony or that the defendant's guilt may only be proved by corroborating evidence. *See* 10 *Minnesota Practice*, CRIMJIG 3.18 (2006). The corroborating evidence "must affirm the truth of the accomplice's testimony and point to the guilt of the defendant in some substantial degree." *State v. Sorg*, 275 Minn. 1, 5, 144 N.W.2d 783, 786 (1966). Here, ample other evidence supported appellant's convictions. S.B. testified that appellant assaulted him. S.B. testified that he

went to the apartment to "hang out" with C.A. and gave her $20 for drinks. After S.B. removed his clothing at C.A.'s insistence, appellant came into the room with a knife. S.B. testified that appellant punched him and told him that he was going to kill him. S.B. grabbed the blade of the knife facing him and pushed his way out of the apartment. Appellant testified that he assaulted S.B. Despite denying culpability in devising a scheme to take S.B.'s money, appellant testified that he (1) saw S.B. naked in his home, (2) pushed S.B.'s forehead, (3) picked up a knife, and (4) forced S.B. out of his apartment. Thus, even if it was plain error to fail to give the accomplice-corroboration instruction, the other evidence amply supports appellant's convictions, and he fails to show prejudice from the asserted error.

Assistance of Counsel

Appellant claims that even if it was not plain error to omit the accomplice-corroboration instruction, he was denied effective assistance of counsel because his attorney failed to request the jury instruction. To prevail on an ineffective-assistance-of-counsel claim, "[t]he defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "We need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Appellant's counsel was not ineffective. C.A. was not an accomplice to the charged offenses. And the district court instructed the jury regarding C.A.'s testimony. Finally, appellant cannot show prejudice because the evidence supported his convictions. Thus, appellant's counsel was not ineffective for failing to request the accomplice-corroboration instruction.

Affirmed.