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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0533

State of Minnesota,
Respondent,

vs.

James William Graham,
Appellant.

Filed June 17, 2008
Affirmed
Ross, Judge

Benton County District Court
File No. CR-06-2109

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Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and Ross, Judge.

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

ROSS, Judge

Aristotle Piwowar and Christina Becker awoke and hurriedly forced the air conditioner from their bedroom window to crawl outside after a Molotov cocktail thrown into their living room ignited a fire that ultimately consumed their mobile home. James Graham appeals from his conviction of first-degree arson of a dwelling and an order for restitution. Graham argues that the district court erred by failing to instruct the jury that it could not convict him based on the uncorroborated testimony of an accomplice, that the district court committed plain error by providing the jury with an informational jury-deliberation pamphlet, and that the district court abused its discretion by ordering restitution when the supporting affidavit was not sufficiently detailed. Because the eyewitness was not an accomplice and the witness's testimony was corroborated by other testimony, and because the jury pamphlet could not have prejudiced Graham's substantial rights, we affirm the conviction. Because we conclude that the restitution affidavit was sufficiently detailed, we also affirm the restitution order.

FACTS

James Graham attended a party at a home in the Rockwood Estates mobile home park in Watab Township in August 2006. Several guests heard Graham discuss getting revenge on "Aris" and "Chrissy" for reporting to the police that his brother or an acquaintance was dealing drugs. Aristotle Piwowar and Christina Becker's nearby mobile home was destroyed by fire later that evening.

Graham had asked other party guests to help him burn down Piwowar's trailer specifically saying that they could use a Molotov cocktail, which is a crude, grenade-type incendiary device comprised of a bottle containing flammable liquid with a wick made of cloth. Three guests saw Graham making a Molotov cocktail with a Jose Cuervo tequila bottle and cloth from a shirt. Two of those guests also saw J.S., a juvenile who lived in the mobile home park, with Graham as he made the incendiary device. Moments later, several guests noticed that Graham and J.S. had left the party.

One guest became concerned and walked toward Piwowar's home. He found it ablaze. He rushed back to the party and told the host, "I can't believe he did it." Soon, Graham also returned and demanded to be let in. The host locked her doors and called the police.

Piwowar and Becker awoke to the smell of smoke. The living room and hallway of their mobile home were becoming engulfed in flames, cornering them in their bedroom. Piwowar quickly kicked the air conditioning unit from the window, and he and Becker crawled out to escape death. Piwowar briefly re-entered the burning home, rescuing his dogs, and Becker ran to her mother's house to call for emergency help. Firefighters soon arrived, but the fire had completely destroyed the home and garage. Piwowar and Becker had no insurance.

Graham admitted to police that he had a long friendship with a man whom Piwowar and Becker had reported to a law enforcement drug task force. A fire marshal investigated and determined that the fire started on a couch near a living room window. The marshal found shards of glass on and near the couch. The marshal reassembled these

pieces, forming part of a Jose Cuervo tequila bottle. He determined also that the bottle contained a piece of cloth at the time of the fire. The marshal concluded that the fire had been set intentionally with the incendiary device. The state charged Graham with first-degree arson of a dwelling.

Graham did not testify at trial. J.S. testified that he heard Graham talk about burning down Piwowar's trailer with a Molotov cocktail and that he saw Graham holding a tequila bottle that contained gasoline and in which a cloth had been inserted. J.S. testified that Graham asked him to help set fire to Piwowar's trailer. J.S. denied helping Graham make the incendiary device but admitted that he went to Piwowar's home with Graham. J.S. believed that Graham was bluffing until Graham began to walk across the street toward Piwowar's trailer.

Other witnesses also testified. Christopher Reynolds testified that while he was drinking with Graham at the party, Graham mentioned that Piwowar and Becker had reported Graham's brother for possessing methamphetamine. He testified that Graham stated that he did not like Piwowar and Becker and wanted to kill them. Reynolds testified that he told the police that Graham said he wanted a bottle full of gasoline. Jeffrey Steichen testified that he was at the party with Graham drinking tequila from a Jose Cuervo bottle. Steichen also testified that Graham stated that he wanted to exact revenge on "Chris and Aris" by burning their house down. He testified that he saw Graham and J.S. cutting a shirt and inserting a piece of it into a bottle. Three others testified, corroborating Reynolds's and Steichen's testimony.

The district court provided jurors with a pamphlet, *Behind Closed Doors: A Guide for Jury Deliberations*. The jury convicted Graham of first-degree arson of a dwelling. *See* Minn. Stat. § 609.561, subd. 1 (2006). Piwowar and Becker submitted affidavits of their losses under Minnesota Statutes section 611A.04, subdivision 1(a) (2006), and the district court ordered Graham to pay Piwowar and Becker restitution for their respective claimed amounts of $130,643 and $7,600. Graham appeals.

D E C I S I O N

I

Graham argues that the district court committed reversible error by failing to give an accomplice-corroboration instruction. Because Graham did not object to the omission at trial, we review for plain error. *See State v. Reed*, 737 N.W.2d 572, 584 n.4 (Minn. 2007) ("We clarify today that where 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."). To secure a reversal under the plain-error test, a defendant must prove that there was an error, that the error is plain, and that the error prejudiced the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

A defendant may not be convicted on the testimony of an accomplice unless that testimony is corroborated by other evidence that goes beyond merely showing the commission of the offense. Minn. Stat. § 634.04 (2006); *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989). But Graham does not establish that J.S. was an "accomplice." "A witness who is alleged to have committed the crime *instead* of the defendant is, as a

matter of law, not an accomplice under section 634.04." *State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006).

This case resembles *Swanson*. In *Swanson*, the supreme court held that a witness was not an accomplice because the defendant's version of the facts would have made the witness an "alternative perpetrator," not an accomplice. *Id.* Similarly here, Graham contended at trial that J.S., but not Graham, committed the arson. By Graham's account, J.S. was an alternative perpetrator rather than an accomplice. Because J.S. was not an accomplice, the district court had no duty to give an accomplice instruction. Failure to give the instruction therefore was not error. *See State v. Gail*, 713 N.W.2d 851, 864 n.11 (Minn. 2006) ("If [the defendant] had argued that he was innocent because [another] had committed the crime, there would have been no error in failing to give the [accomplice] instruction."). Graham's plain-error argument does not pass the first element.

We add that Graham also cannot show that the district court's failure to give the instruction affected his substantial rights. J.S.'s testimony was corroborated by other witnesses. These witnesses testified that Graham mentioned avenging an acquaintance whom he referred to as his brother because Piwowar and Becker reported him for drugs. They testified that Graham stated that he did not like Piwowar and Becker, that he said he wanted to set Piwowar's home on fire, and that he inserted a cloth into a bottle. The host of the party testified that Graham returned to the party shortly after the fire began, knocking on the door and walls and windows while shouting, "Let me in, let me in." These facts corroborate J.S.'s testimony and tend to show that even if the court had given an accomplice corroboration instruction, it would not have affected the jury's verdict.

II

Graham next argues that the district court erred by allowing jurors to review a pamphlet, *Behind Closed Doors: A Guide for Jury Deliberations*, during their deliberation. Because he did not object to the pamphlet at trial, he has waived that issue, *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001), and we review only for plain error. *Griller*, 583 N.W.2d at 740.

Graham cannot establish that providing the jury with the pamphlet was a prejudicial error. The pamphlet was published by the American Judicature Society, an independent, national, nonprofit organization of judges, lawyers, and members of the public seeking to improve the justice system. It offers basic conflict-resolution tips to help the jury facilitate healthy deliberation and reach a verdict. It has nine informative sections: Introduction, encouraging the jurors to act politely with each other and to follow the judge's instructions; Getting Started, suggesting that the jurors introduce themselves and discuss logistics; Selecting the Presiding Juror, explaining that a presiding juror should be fair and organized, and that the opinions of each juror count equally; Getting Organized, suggesting ways to conduct a group discussion; Discussing the Evidence and the Law, directing the jury to review the judge's instructions and to assess the evidence under the applicable elements; Voting, telling the jury not to rush to a verdict, but to listen to each other's opinions, and telling the jury to ask the judge for advice if it cannot reach a verdict after several attempts; Getting Assistance from the Court, suggesting that the jury ask the judge for assistance if they have questions; The Verdict, instructing the jury on how to return their verdict form to the court; Once Jury Duty is Over, explaining

that regardless of the case's outcome, if each juror tried his best, he did the right thing. The pamphlet does not as a whole or in its parts undermine the jury's independence or interfere with its decision-making process.

Graham argues that the pamphlet interferes with the jury's independence because it "tells" the jury how to deliberate. Not so. The pamphlet not only describes its recommendations as mere "suggestions," it expressly advises that jurors "are free to conduct . . . deliberations in whatever way is helpful," and it repeatedly directs jurors to follow the court's jury instructions.

Graham contends that the pamphlet dilutes the state's obligation to prove every element beyond a reasonable doubt because it advises jurors "to see if each element has been established by the evidence." Advising jurors to consider each criminal element against the evidence does not imply that they may do so under any standard other than proof beyond a reasonable doubt, the standard that was plainly stated in the court's instructions to the jury. And although Graham accurately contends that a juror should not compromise her individual viewpoint to achieve a verdict, nothing in the pamphlet's urging suggests otherwise. The pamphlet's suggestions are similar to the trial court's guidance addressed in *State v. Dahlstrom*, in which the supreme court found no prejudicial error in the jury instruction that "suggest[ed] a procedure for you to follow which you may or may not choose to follow." 276 Minn. 301, 311, 150 N.W.2d 53, 61 (1967). Graham has not shown that the district court's use of the pamphlet was plain error affecting his substantial rights.

III

Finally, Graham argues that Piwowar's restitution affidavit did not contain a sufficiently detailed description of the destroyed items. A victim seeking restitution must specifically describe the nature and amount of his losses. "Information submitted relating to restitution must describe the items or elements of loss, itemize the total dollar amounts of restitution claimed, and specify the reasons justifying these amounts." Minn. Stat. § 611A.04, subd. 1(a) (2006). A district court has broad discretion for awarding restitution. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). A district court abuses its discretion when it misapplies the law or its fact finding is clearly erroneous. *State v. Cassidy*, 567 N.W.2d 707, 709–10 (Minn. 1997) (stating that clearly erroneous factual findings constitute an abuse of discretion); *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002) (stating that a district court's contravention of law is an abuse of discretion), *review denied* (Minn. Aug. 20, 2002).

We are not persuaded by Graham's argument that Piwowar's restitution claim falls short of the statute's specificity requirement. The restitution statute does not require "receipts or proof of exact purchase price, but rather a list . . . with reasonable specificity describing the items or elements of loss and the dollar amount of those losses." *State v. Keehn*, 554 N.W.2d 405, 408 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996). Graham directs us to *Keehn* as support for his contention that Piwowar's affidavit is deficient. But unlike the affidavit in *Keehn*, the affidavit of losses here is not so general that it fails to comply with the statute. In *Keehn*, the victim's affidavit alleged relocation expenses but failed to list or itemize losses. The affidavit claimed a single amount for

miscellaneous cash receipts for purchases to set up a new household. *Keehn*, 554 N.W.2d at 408. We held that the statute required the victim to specify the replacement items purchased and how much each cost, concluding that the vague description in the affidavit "falls short of the statutory demand for an itemized description of the losses and their value." *Id.*

In contrast, Piwowar's affidavit contains an itemized list of his losses, totaling $130,643. It lists 89 items or classes of items and their specific value, including, for example, a statue of an Indian horse, an iguana, a handmade nightstand, and three Elvis jewelry boxes. For each listed item or class of items, the affidavit assigns a specific dollar amount, which the district court found to be reasonable. Graham maintains that we should remand the case and direct the district court to require Piwowar to provide a more detailed description of all items along with "additional justification for how he determined the amounts for those items." He specifically challenges Piwowar's right to any claim for "miscellaneous" items. The statute requires the affidavit to include "the reasons justifying these amounts," not "justification for *how*" a victim "determined the amounts." The reason here is that Graham's act of arson completely destroyed the items.

We recognize that the "miscellaneous" listing is obviously nonspecific and that in *Keehn* we held that the affidavit reference to "misc[ellaneous] [c]ash receipts from setting up new household" failed to meet the specificity requirement. But we distinguish this case. In *Keehn*, the "miscellaneous" category covered about 50 percent of the claimed losses, while here the amount claimed for miscellaneous losses is less than five percent of Piwowar's total loss. More significant, although "it is not unreasonable to request some

amount of detail in the description and general costs of items purchased” *after* the loss, *Keehn*, 544 N.W.2d at 408, it may be unrealistic and unreasonable to preclude a relatively small miscellaneous category after a fire has destroyed a home and all possessions. Because Graham’s fire destroyed nearly everything in Piwowar’s household, some miscellaneous losses are likely, if not inevitable, and the district court did not act inappropriately by deeming the relatively small amount sought here to be reasonable. We conclude, as the district court did, that Piwowar’s affidavit of losses was legally sufficient to support the restitution award. The district court did not abuse its discretion by awarding restitution.

Affirmed.