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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1288**

State of Minnesota,
Respondent,

vs.

Felipe Fernandez Avalos,
Appellant.

**Filed October 14, 2008
Affirmed
Shumaker, Judge**

Stearns County District Court
File No. K2-06-2791

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appellant)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and
Huspeni, Judge.*

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

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant challenges his convictions of controlled substance crimes, arguing that the district court's failure to provide an accomplice-corroboration instruction to the jury was plain error requiring reversal. Because the district court's error did not affect appellant's substantial rights, as the accomplices' testimony was sufficiently corroborated, we affirm.

FACTS

Appellant Felipe Fernandez Avalos was charged with four counts of drug-related offenses involving possession of and possession with intent to sell methamphetamine, arising from a valid search of a St. Cloud residence where Avalos was staying. Officers found Avalos and one resident of the home, Jeromie Hacker, in the basement with drug paraphernalia and several bags of what was later determined to be 33.7 grams of methamphetamine¹ in plain view. Officers arrested four adults at the scene, including Avalos, Hacker, and another resident of the home, Fern Kelley.

In separate statements to officers, Hacker and Kelley admitted that all four individuals knew of and were involved in selling the methamphetamine found in the residence. They stated that Avalos had unexpectedly arrived at the house the day before with his own bag of methamphetamine and had been educating them on methamphetamine sales and distribution. Kelley and Hacker testified at Avalos's trial

¹ Avalos stipulated at trial to the findings of the Minnesota Bureau of Criminal Apprehension that five bags found at the scene each contained 6.9 grams, 1.8 grams, .1 gram, 19.7 grams, and 5.2 grams of methamphetamine.

under limited immunity with respect to the use of their testimony in their own pending prosecutions.

At trial, Officer Greenwald described entering the basement and finding Hacker and Avalos along with “evidence to the distribution of methamphetamine,” as indicated by the presence of scales, a smoking pipe, plastic packaging, and bags containing a substance that looked like methamphetamine. Greenwald also found one bag with “good” written on it and one bag with “no good” written on it. These items were found “in close proximity” to Hacker and Avalos, which suggested to Greenwald that they were “working together to repackage up crystal methamphetamine for sale.” Greenwald testified that “[b]oth [Hacker and Avalos] appeared to be very surprised” and that their reactions and statements indicated to him that “they realized . . . they were in trouble.” Greenwald explained that Hacker and Kelley were separated at all times and had no contact with each other before making separate statements to officers. Greenwald affirmed on cross-examination that he found no drug-related evidence on Avalos’s person.

Officer Rathbun, who was assigned to photograph and collect the evidence found at the residence, confirmed that Hacker and Avalos were found in the basement with various items of drug paraphernalia “just right out in the open.” Rathbun testified that he collected bags containing methamphetamine next to, on, and underneath a small child’s chair; loose methamphetamine from the coffee table in front of the couch; and a larger bag of methamphetamine next to the leg of a dresser. Rathbun explained that this larger bag contained 19.7 grams of methamphetamine that was “significantly more yellowish or

tinged” than the other bagged methamphetamine. Based on this evidence, Rathbun surmised that Hacker and Avalos “were separating larger quantities of controlled substance down to more salable quantities of controlled substance.”

Both Kelley and Hacker testified that Hacker already had methamphetamine in the house and planned to package it for sale before Avalos unexpectedly arrived with his own bag of methamphetamine, which according to Kelley had “a brownish tint” and according to Hacker “had a pink tint to it.” Kelley testified that she saw Avalos showing Hacker “what was good and what was bad” methamphetamine by comparing “his stuff to [Hacker’s] stuff,” and heard them discussing prices and Avalos’s role as supplier. Hacker in turn confirmed that he and Avalos were “bagging up the meth for sale” and that Avalos was demonstrating the difference between good and bad methamphetamine, assigning prices to different amounts of product, and offering to be Hacker’s supplier. Hacker testified that when the officers arrived in the basement, he and Avalos “were both sitting on the couch in front of the coffee table that had all the stuff on it,” and that Avalos “immediately stood up, reached in his pocket, and threw his bag” next to the dresser. Hacker admitted that, aside from this bag found next to the dresser, the rest of the methamphetamine found in the basement belonged to him.

Both Kelley and Hacker testified that they were each charged with crimes arising from this incident and were compelled to testify by court order; that they were not given any incentive to testify against Avalos; and that they each testified truthfully and consistent with their separate statements given to officers upon their arrests.

Neither Kelley nor Hacker was designated as an accomplice, and the district court did not give an accomplice-corroboration instruction to the jury. Avalos did not request such an instruction and did not object to its omission.

The jury found Avalos guilty of two counts of aiding and abetting a controlled substance crime in the first degree; one count of a controlled substance crime in the first degree; and one count of a controlled substance crime in the second degree. The district court sentenced Avalos, and this appeal follows.

D E C I S I O N

Avalos argues that Kelley and Hacker should have been designated accomplices and that the district court's failure to instruct the jury that the testimony of Kelley and of Hacker must be corroborated by sufficient evidence constitutes reversible error. "An accomplice instruction must be given 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) (quotation omitted); *see also* Minn. Stat. § 634.04 (2004) (providing that a conviction cannot rest solely on an accomplice's uncorroborated testimony). "[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). This analysis consists of a four-prong test. This court must first determine whether there is "(1) an error, (2) that was plain, and (3) that affected the defendant's substantial rights." *Id.* at 583. If this court determines that these three criteria are satisfied, then it should consider

“whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.* (quotation omitted).

Here, the first two prongs are satisfied: the state admits on appeal that Kelley and Hacker should have been designated accomplices and that the district court plainly erred by not giving the accomplice-corroboration instruction to the jury. *See Lee*, 683 N.W.2d at 316 (holding that the district court has a duty to instruct on accomplice testimony, regardless of whether counsel for the defendant requests it, and that omission of the jury instruction is error).

As to the third prong—that the plain error affected the defendant’s substantial rights—

[it] is satisfied if the error was prejudicial and affected the outcome of the case. The defendant bears the burden of persuasion on this third prong. We consider this to be a heavy burden. We have defined plain error as prejudicial 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) (quotation omitted). Avalos argues that the testimony of Kelley and of Hacker lacked corroboration. We disagree and conclude that Avalos has not carried his burden of showing a reasonable likelihood that the accomplice-corroboration instruction would have had a significant effect on the jury’s verdict.

Sufficient corroborating evidence “restores confidence in the accomplice’s testimony, confirm[s] its truth[,] and point[s] to the defendant’s guilt in some substantial degree.” *State v. Her*, 668 N.W.2d 924, 927 (Minn. App. 2003), *review denied* (Minn.

Dec. 16, 2003); *cf.* Minn. Stat. § 634.04 (2004) (providing that “corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof”). Officers Greenwald and Rathbun each testified that (1) they discovered Avalos and Hacker in close proximity to substantial drug-related evidence in plain view, including five bags of methamphetamine totaling 33.7 grams; (2) one of the bags contained 19.7 grams of tinted methamphetamine and was found next to a dresser; and (3) it appeared that Hacker and Avalos were repackaging methamphetamine for sale. This testimony and undisputed drug-related evidence corroborates Kelley’s and Hacker’s testimony that Avalos (1) had arrived at the house with his own large bag of tinted methamphetamine; (2) was instructing Hacker about how to sell and price Hacker’s existing supply of product; and (3) had thrown his bag of methamphetamine toward the dresser when the officers arrived. Corroboration can be shown through “the defendant’s association with those involved in the crime, or any opportunity, motive or proximity to the crime.” *State v. Flournoy*, 535 N.W.2d 354, 360 (Minn. 1995). Thus the officers provided sufficient evidence to corroborate Kelley’s and Hacker’s testimony.

Moreover, to prove that Avalos is guilty of the four charged offenses, the state had to show that Avalos (1) aided and abetted Hacker in possessing 25 or more grams of methamphetamine, Minn. Stat. §§ 152.021, subd. 2(1), 609.05, subd. 1 (2004); (2) aided and abetted Hacker in possessing with intent to sell 10 or more grams of methamphetamine, Minn. Stat. §§ 152.021, subd. 1(1), 609.05, subd. 1 (2004); (3) personally possessed with intent to sell 10 or more grams of methamphetamine, Minn. Stat. § 152.021, subd. 1(1) (2004); and (4) personally possessed six or more grams of

methamphetamine, Minn. Stat. § 152.022, subd. 2(1) (2004). The court properly instructed the jury on the legal standards for aiding and abetting, possession, and possession with intent to sell, and the largely uncontested evidence supports the jury's verdicts. *See State v. Swanson*, 707 N.W.2d 645, 659 (Minn. 2006) (holding that liability for aiding and abetting can be inferred from the “defendant’s presence at the scene of the crime, defendant’s close association with the principal before and after the crime, [and] defendant’s lack of objection or surprise under the circumstances . . .”) (citation omitted); *State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000) (holding that possession is shown if the controlled substance is found in an area over which “the defendant exercised dominion and control), *review denied* (Minn. June 13, 2000).

Furthermore, the purpose of requiring an instruction that uncorroborated accomplice testimony cannot support a conviction is to mitigate the inherent unreliability of an accomplice who “may testify against the defendant in the hopes of obtaining clemency for himself.” *Reed*, 737 N.W.2d at 582. Here, while Kelley and Hacker were granted limited use-immunity for their testimony, they were not granted any other favors in exchange for their appearance and, in fact, they faced their own prosecutions as a result of this incident. More significantly, both Kelley and Hacker implicated themselves by admitting that they already possessed and planned to sell methamphetamine before Avalos arrived at their house. The jury heard this testimony and was properly instructed to assess its weight and credibility.

Avalos makes much of the state’s reliance on the testimony of Kelley and Hacker in its closing argument. While the state did argue that Kelley and Hacker were credible

witnesses, the state also argued that their testimony was corroborated by the officers' testimony and the undisputed drug-related evidence. Notably, counsel for Avalos also referred to the testimony of Kelley and of Hacker, arguing that their credibility "[is] the lynch pin[] here" and urging the jury to "decide whether or not their stories are believable and whether or not the inconsistencies that I've pointed out to you make . . . their stories unbelievable" In his rebuttal, the prosecutor emphasized that the jury could rely solely on "the testimony of the officers and the pictures that were taken and the exhibits" and "find that the State has proven its case." On this record, we conclude that the prosecutor did not improperly rely on Kelley's and Hacker's testimony in his closing argument.

Because Avalos has not shown a reasonable likelihood that giving the accomplice-corroboration instruction would have had a significant effect on the jury's verdict, the third prong of the plain error test is not met. Therefore, we will not consider whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings, or Avalos's related sufficiency-of-the-evidence claim.

Affirmed.