STATE OF MINNESOTA
IN COURT OF APPEALS
A10-42

Jestin Demitchell Davis, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 24, 2010
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-07-129890

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's denial of his petition for postconviction relief. We affirm.

FACTS

In August 2008, following a court trial, the district court found appellant Jestin Demitchell Davis guilty of first-degree aggravated robbery, based on evidence that he beat R.S. and stole R.S.'s scooter. The district court determined that a trial witness, S.D., was not an accomplice, and that even if he were, the record contained credible testimony from other individuals sufficient to corroborate S.D.'s testimony and prove appellant's guilt beyond a reasonable doubt. Appellant did not appeal his conviction.

In September 2009, appellant sought postconviction relief, arguing that S.D. was an accomplice and that his testimony was not adequately corroborated. The district court denied postconviction relief, and this appeal follows.

D E C I S I O N

Denials of postconviction relief are reviewed under the abuse-of-discretion standard. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). Findings are reviewed to determine if they are supported by sufficient evidence, and issues of law are reviewed de novo. *Id.* A postconviction court must hold an evidentiary hearing unless the petition, files, and records conclusively show that the petitioner is entitled to no relief. *Id.* (citing Minn. Stat. § 590.04, subd. 1 (2006)).

"A conviction cannot be had 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 (2008).

> In a practical sense, the legislation embodies the common law's long-standing mistrust of the testimony of the accomplice. The accomplice may testify against another in the hope of or upon a promise of immunity or clemency or to satisfy other self-serving or malicious motives. While the solution of the common law was to caution jurors about accomplice testimony, the legislature expanded the protection by enacting the statutory corroboration requirement.

State v. Shoop, 441 N.W.2d 475, 479 (Minn. 1989) (citations omitted). "Corroboration may not be provided merely by the testimony of another accomplice." *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010).

"The general test for determining whether a witness is an accomplice for purposes of section 634.04 is whether he could have been indicted and convicted for the crime with which the accused is charged." *State v. Lee*, 683 N.W.2d 309, 314 (Minn. 2004) (quotation omitted). For a witness to be an accomplice, "it should appear that a crime has been committed, that the person on trial committed the crime, either as principal or accessory and that the witness co-operated with, aided, or assisted the person on trial in the commission of that crime either as principal or accessory." *State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006) (quotation omitted). "[A]n accessory after the fact is not an accomplice." *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006) (quotation omitted).

> If the facts of the case are undisputed and there is only one inference to be drawn as to whether the witness is an accomplice, the court should make the determination; but if the evidence is disputed or susceptible to different interpretations, then the question whether the witness is an accomplice is one of fact for the jury.

Lee, 683 N.W.2d at 314 (quotation omitted).

"In assessing the sufficiency of the evidence, we conduct a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the [factfinder] to reach its verdict." *Staunton*, 784 N.W.2d at 297 (quotation omitted); *see also Turnage v. State*, 708 N.W.2d 535, 543 (Minn. 2006) ("When reviewing the sufficiency of evidence to corroborate accomplice testimony, we view the evidence in the light most favorable to the state and all conflicts in the evidence are resolved in favor of the verdict." (quotation omitted)). "We review criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions." *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999) (quotation omitted).

Here, the prosecution called seven witnesses.

- R.S., the victim, testified that on August 4, 2007, he rode a "little electric scooter" to the Old Colony gas station and that when he came out of the store, he was "blind-sided"—"hit with some object" that he did not see. He thinks he lost consciousness and had trouble remembering things when an ambulance arrived. R.S. received 17 stitches for his injuries.

- A Minneapolis police officer testified that he was dispatched to the scene and, on his way, he observed two black males unloading a scooter from the trunk of a gold sedan. After the males looked toward the police car, one of them ran. The other male, S.D., who was the driver of the vehicle, remained and spoke with the officers, was "extremely cooperative," told the officers that he was on conditional release, and identified appellant as the person who ran from the vehicle.

- Another police officer testified that he saw a person wearing a multi-colored striped shirt walk away from the vehicle. When the officer tried to catch up to the person on foot, the person ran. At trial, the officer identified Exhibit 4 as a photograph of a male wearing the same striped shirt as that worn by the person who fled. Exhibit 4 is a grainy surveillance photo that shows a black male

wearing a shirt with a white collar and five thick horizontal stripes: a red one, a white one, and three for which the colors are difficult to discern.

- E.T., a gas-station customer, testified that she noticed a car with several people inside, and a black male leaning into the car from outside. She also noticed a scooter because she liked the color of it. After paying for her gas, E.T. returned to the pump and then saw a male, whom she believed was the owner of the scooter, come out of the store. E.T. witnessed the black male who had been leaning into the car run up to the scooter owner "and just start[] beating the crap out of him." The black male who beat the scooter owner wore a polo shirt that had "very large stripes going across, white, green, and . . . either blue, . . . a dark blue or red." The black male continued beating the scooter's owner after he fell to the ground, and he asked the owner, "How do you start it? How do you start it?" The owner did not answer, and the black male ran away with the scooter without starting it. Although E.T. was unable to identify appellant during a pretrial photo lineup, she positively identified appellant at trial as the person who took the scooter.

- A.G. Jr. testified that while driving by the gas station, he saw a white male on the ground with a black male standing over him, kicking and hitting him. A.G. saw the black male take the victim's scooter, and A.G. followed him. A.G. saw him try to put the scooter in the trunk of a brown car that was parked at a corner.[1] A.G. could not remember what the black male was wearing. A.G. heard the driver of the car ask something like, "Why did you do something so stupid?" A.G. noted the license-plate number of the car, returned to the station, and gave the number to a clerk.

- S.D. testified that he was at the gas station on the morning in question. He spoke with two girls and a male in a green car. He also saw appellant, whom he had known since middle school, and appellant was also talking to the people in the green car. While S.D. was in the gas station, appellant passed him on the scooter. S.D. did not see how appellant got on the scooter. Appellant left the parking lot, and S.D. left approximately three minutes later. S.D. stopped by some bushes, and appellant was there. Appellant asked him for a ride. S.D. agreed and helped appellant get the scooter in the trunk. S.D. denied asking appellant, "Why did you do something so stupid?" S.D. was unclear about

[1] Appellant asserts that A.G. testified that S.D.'s car was "already waiting at the stop sign around the corner with the trunk open." But A.G. did not testify that S.D. was waiting or that the trunk was open before appellant reached the car. A.G. testified that: "there was a brown car parked at the corner right by the stop sign and he was trying to put the [scooter] inside the trunk of a car," and the trunk "was open, yeah, and he was trying to put the thing in the car trunk."

whether he opened his car trunk; he said he had a "key chain" and the trunk "could have popped open." Before trial, S.D. told police that he did not open the trunk. S.D. stopped when appellant said to pull over at a house. When S.D. was getting the scooter out of the car, appellant started walking away. S.D. said that he did not know that the scooter was stolen. S.D. acknowledged on cross-examination that, prior to trial, he had been told that he could be charged with aiding and abetting and that he had not been charged. S.D. testified that he was convicted of burglary a year earlier, and that the burglary conviction was the only offense on his record. But, on cross-examination, S.D. said that he had been charged with burglary about two weeks before the scooter incident, and that the burglary charge was for kicking in the door of a residence where appellant's cousin lived.

- A police sergeant testified that he searched appellant's mother's apartment and did not find the striped shirt. He also testified that police also did not find any evidence to confirm that appellant lived at his mother's residence. Recorded telephone calls between appellant and his mother while appellant was in jail were admitted at trial. In one call, appellant said that he had seen the surveillance video, and that all that could be seen was "the colors in my shirt." Immediately after saying that, appellant said something difficult to discern but that sounds like, "the colors of the shirt that dude had on."

The defense called four witnesses.

- A.M.D., appellant's mother, testified that appellant lived with her in August 2007, and she remembered that on the morning of August 4, she awakened appellant, whose father picked him up for work. Appellant and his father worked together. At work, appellant wore a work uniform that consisted of a blue shirt and dark blue pants, both of which had his name on them. A.M.D. testified that when police showed her a photograph of a striped shirt, she told them that she had never seen it before. Police looked through the clothing and photographs in A.M.D.'s residence.

- J.R., appellant's father, testified that on August 4, 2007, he picked up appellant and they went to work together. J.R. had heard discussions about threats being made by S.D. against J.R.'s family.

- Appellant's sister testified that she lived with appellant and their mother in August 2007, and that on the morning of August 4, her mother had her follow her father and brother to work. She knew that S.D. had "a beef" with her cousin, A.D.

- A.D. testified that in April 2007, there was an incident involving S.D., and that, as a result of A.D.'s fiancée's cooperation with authorities, S.D. was charged in July. A.D. testified that since then, S.D. had made threats to the whole Davis family, "any Davis."

Based on the evidence, the district court determined that S.D. was not an accomplice, and that even if he were an accomplice, the record contained sufficient credible evidence from the testimony of others to establish proof beyond a reasonable doubt of each element of the crime. While we acknowledge that the evidence in this case is susceptible to different interpretations on the issue of whether S.D. was an accomplice, the district court determined that, at most, S.D. was an accomplice after the fact. The factfinder is the exclusive judge of witness credibility, and this court assumes the factfinder believed the evidence supporting the state's case and disbelieved contrary evidence. *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995). Based on our painstaking review of the evidence, we conclude that the evidence and reasonable inferences drawn from it are sufficient to support the court's determination that S.D. was not an accomplice. S.D. testified that he did not know that the scooter did not belong to appellant and that he did not see appellant beating R.S. No direct evidence shows that S.D. played a role in planning or carrying out the offense. Appellant points out that A.G. testified that S.D. asked the perpetrator why he did something so stupid. But, even if true, this statement suggests that S.D. learned of the crime after it was committed, which would make him at most an accessory after the fact, not an accomplice.

And even if S.D. were an accomplice, the record contains adequate corroborating evidence.

> [C]orroborative evidence of the accomplice testimony does not need to be sufficient to establish a prima facie case of the defendant's guilt or sustain a conviction. Rather, the corroborating evidence need only link the defendant to the crime in some substantial degree that tends to affirm the truth of the accomplice's testimony and to point to the guilt of the defendant. Put differently, the other evidence is sufficient when it is weighty enough to restore confidence in the truth of the accomplice's testimony.

Staunton, 784 N.W.2d at 297 (citations, quotations and modifications omitted). The corroborative evidence in this case meets this standard—both the recorded phone conversation and E.T.'s testimony suggest that appellant was the man in the striped shirt who committed the crime. *See State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998) ("Identification testimony need not be absolutely certain; it is sufficient if the witness expresses a belief that she or he saw the defendant commit the crime."); *State v. Super*, 781 N.W.2d 390, 396 (Minn. App. 2010) ("The factfinder is the exclusive judge of witness credibility[.]"), *review denied* (Minn. June 29, 2010).

Affirmed.