STATE OF MINNESOTA

IN SUPREME COURT

A19-0538

St. Louis County

Thissen, J.
Took no part, Moore, J.

State of Minnesota,

Respondent,

vs.

Filed August 5, 2020
Office of Appellate Courts

Deandre Demetrius Davenport,

Appellant.

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, Saint Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Saint Paul, Minnesota; and

Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota, for appellant.

S Y L L A B U S

1. Because the jury reasonably could have concluded that a testifying witness was appellant's accomplice, and testimony given under oath in a court proceeding and admitted at trial as substantive evidence of appellant's guilt is "testimony" under Minn. Stat. § 634.04 (2018), the district court erred by failing to give an accomplice corroboration instruction to the jury; but viewing the record as a whole, the district court's

error did not affect appellant's substantial rights.

2. The circumstances proved, when viewed as a whole, are not consistent with any rational hypothesis other than that of guilt.

3. Appellant's substantial rights were not prejudiced by alleged defects in the indictment.

Affirmed.

O P I N I O N

THISSEN, Justice.

Appellant Deandre Demetrius Davenport stood trial for two counts of first-degree murder under an aiding and abetting theory of liability, Minn. Stat. § 609.185(a)(3) (2018), one count of second-degree murder under an aiding and abetting theory of liability, Minn. Stat. § 609.19, subd. 1(1) (2018), and one count of second-degree murder as a principle, *id.*, subd. 2(1) (2018), for the shooting death of William Grahek. A jury found him guilty of both counts of first-degree murder under an aiding and abetting theory and one count of second-degree murder under an aiding and abetting theory. Davenport appealed. He argues that his convictions should be reversed and the case should be remanded for a new trial. Because we conclude that Davenport is not entitled to a new trial, we affirm.

FACTS

On February 14, 2017, Grahek was shot and killed in his home during a home invasion. After an extensive police investigation, three young men were charged with Grahek's murder: Davenport, Noah Baker, and Noah King. Baker ultimately pleaded guilty to second-degree murder and implicated Davenport and King in his plea hearing testimony.

At Davenport's trial, the State's theory of the case was that Davenport shot Grahek while Davenport, Baker, and King were attempting to commit burglary and robbery. Baker's plea hearing testimony supported this theory. But when Baker testified at Davenport's trial, Baker stated that he alone had attempted to burgle Grahek's house and that he had shot Grahek. Davenport used that testimony to support his theory of the case, which was that Baker committed the charged crimes alone and that Baker had enlisted Davenport's assistance in selling the gun that was used to shoot Grahek.

During Davenport's trial, Baker's plea hearing testimony was admitted as substantive evidence and read aloud. The jury therefore heard and was required to weigh two conflicting versions of events offered by the same witness. Because Baker's testimony is central to this appeal, and because each version of events is supported by some corroborating evidence, we relate both versions here. Facts as related here are consistent with both versions unless expressly noted.

Grahek sold and distributed drugs. He kept drugs and money in a safe in the closet of his basement bedroom. He would often invite others into his bedroom when making sales, which made it possible for those individuals to see where he stored the drugs and money. According to Baker's plea hearing testimony, one of those individuals, X.H., was a friend of Davenport's and told Davenport about the drugs and money that Grahek had. Davenport shared that information with Baker and King approximately one month before the murder, and the three began planning to steal from Grahek. At trial, however, Baker testified that he alone found out about the safe from X.H. and that he did not share that information with King or Davenport.

Around 1:00 p.m. on February 14, Davenport and Baker left the house they shared with Baker's sister—and Davenport's girlfriend—T.B. They took T.B.'s white Jeep and drove it to King's house. Davenport and Baker parked down the street from King's house and walked the rest of the way. Surveillance cameras from shops and gas stations approximately one block from King's house captured video of a white Jeep driving near King's house around 1:30 p.m. Minutes later, cameras captured two men walking in the direction of King's house. According to King's girlfriend, who was present at the time, Davenport and Baker entered King's house through the back door and the three young men went immediately into King's bedroom. After about 15 minutes, the three men emerged from King's room, dressed in all-black clothing. They then left through the back door that led into the alley that King's house shared with Grahek's house.

State's theory of the case

According to Baker's plea hearing testimony, Davenport, Baker, and King then proceeded to Grahek's house. Baker was armed with a Glock 19, Davenport was armed with a Glock 17, and King was armed with a wrench. They had obtained the Glock 17 when Davenport and Baker robbed a house a couple of months earlier. When they arrived at Grahek's house, King kicked in one door, Baker kicked in the other, and the three men entered. Soon after entering, Baker heard Davenport shouting, "[G]et on the ground." Baker turned and saw Davenport pointing a gun at Grahek, so Baker pulled out his gun too. Grahek said, "[N]o," and continued walking toward the three men. Davenport then shot Grahek. After the first shot, Baker fled the scene. He heard a second shot as he was running out of the house.

At 1:59 p.m., video surveillance from a nearby business shows one person running away from the area where Grahek's house was located and, a few moments later, a white Jeep speeding off in the direction from which it had come less than one hour earlier.[1] Baker testified that, after leaving Grahek's house, he separated from Davenport and King but reconnected with them at the Jeep soon thereafter. The three then drove back to Baker and Davenport's house.

Baker further testified that on the way to Baker and Davenport's house, all three men removed everything they had been wearing and put it all into a garbage bag. When they arrived at the house around 2:00 p.m., T.B. was there. T.B. testified that Baker and Davenport came into the house while King stayed in the car. Davenport asked T.B. to drive King home and explained that she needed to do it because "[w]e just tried to rob somebody and it didn't go like it was supposed to." T.B. and Davenport then drove King home. They dropped him off at the gas station across the street from his house. Again, this action is confirmed by video surveillance. When King returned from Baker's house, he was wearing different clothing than he had been wearing when he left. His girlfriend testified that, upon arriving home, King told her that, if the police asked, she should tell them that he had been home all day watching television with her.

Defense's theory of the case

Davenport offered a different narrative to the jury based primarily on the testimony Baker offered at Davenport's trial. At trial, Baker stated that Davenport and King left

---

[1] The video of a single person running is consistent with either theory.

King's house to run errands in the Jeep. Baker alone entered Grahek's house. After being confronted by Grahek, Baker shot Grahek with the Glock 17 and then fled on foot. He then either walked or ran back to his house, arriving not long after Davenport and King returned in the Jeep.[2]

This version of events is supported by police officers' initial impression at the scene that there was only one set of tracks in the snow leading away from Grahek's house.[3] And Grahek's brother testified that, other than his brother's voice, he heard only one male voice before the gunshots. He also testified that he did not hear any other noises from the basement after the gunshots. The defense argued that this was consistent with one person fleeing the scene, as three would have made more noise. Finally, T.B. testified at Davenport's trial that Davenport never told her that he had tried to rob someone. She stated that her brother, Baker, had said he tried to rob someone. This testimony contradicted her

---

[2] When Baker testified at King's trial one month before Davenport's trial, he stated that he had reunited with King and Davenport at the Jeep and that Davenport drove the three of them home. At Davenport's trial, Baker stated that he testified incorrectly at King's trial because he was under the influence of drugs and that his testimony at Davenport's trial was the truth.

But in a letter to Davenport's counsel sent before Davenport's trial, Baker stated that, as he began running back to his house, he saw Davenport and King driving in the Jeep, stopped them, and rode the rest of the way back to his house. He did not explain this inconsistency when he testified at Davenport's trial.

[3] At trial, one of the officers testified that when he viewed the photos of the tracks "in preparation for the grand jury trial, it appeared . . . that those [tracks] could have been made by more than one person" because it "wouldn't be a natural kind of running stride to make those [tracks] equally right next to each other at that distance." In other words, rather than being staggered, it appeared to the officer that there were two sets of parallel tracks.

earlier testimony from another hearing that Davenport told her "[w]e just tried to rob somebody and it didn't go like it was supposed to."

Facts consistent with both theories

After being shot, Grahek stumbled upstairs where he collapsed in front of his brother. His brother ran outside and dialed 911 at 2:00 p.m. Another housemate of Grahek's also dialed 911 at that time. Grahek's brother and his housemate had both heard the gunshots. Grahek's brother had also heard a man yell "get on the ground." Neither they, nor anyone else, saw the intruders enter or leave the house. No DNA or fingerprint evidence connecting Davenport, Baker, or King to the crimes was found in or around Grahek's house.

Police began investigating the shooting immediately. They quickly identified King as a person of interest by finding distinctive shoe prints in the snow by Grahek's door, in the alley, and in King's backyard. A K9 unit tracking those prints also alerted at King's back gate and front door. Around 5:00 p.m. on February 14, officers executed a search warrant of King's house and found a pair of shoes with treads that matched the shoe prints. King was taken to the police station for an interrogation. Throughout the interrogation, King denied any involvement in the crimes. When investigators mentioned the shoe prints, however, King asked, "How do you know he doesn't have a pair of them shoes?" It was not clear to whom he was referring, but at that point, the investigators had not yet told him what crimes they were investigating or the gender of the victim.

While King was at the police station, Davenport, Baker, and T.B. went to a hotel in Superior, Wisconsin and stayed there overnight. The next day, February 15, X.H. picked

up Baker from the hotel and took him to a wooded area so he could burn the clothes worn during the crimes. Video surveillance and cell-site data for X.H. corroborate this action. On that same day, Davenport sold the gun used to shoot Grahek. The gun was later recovered at the house of the man who bought it from Davenport. Ballistics analysis matched the gun to two cartridge cases recovered at Grahek's house.[4]

Other evidence presented at trial included cell phone data from February 14, which showed numerous calls and text messages between phones belonging to Davenport, Baker, and King's girlfriend. The majority of those exchanges had been deleted from their phones. The State argued that the cell phone activity connected all three to the crimes, while the defense argued that the evidence could just as easily support its version of events. A similar dispute surrounded phone conversations between Davenport and T.B. while Davenport was in jail. In one, she stated that none of them would be in trouble "[i]f nobody went out to do anything dumb," and Davenport replied, "Okay. Then a motha fucker ain't stop nobody from doing nothing dumb neither though." In another conversation, T.B. stated, "[I]t's not just [Baker's] fault," and Davenport replied, "I didn't say it was though." The State argued that those conversations implied Davenport's involvement in the crimes. Conversely, the defense argued that Davenport did not admit his involvement in the attempted burglary or murder at any time during those conversations.

[4] During his trial testimony, Baker stated that he asked Davenport to sell the gun because Baker did not know anyone who wanted a gun. He stated that Davenport did not know that the gun had been used to kill Grahek. At trial, the prosecutor questioned Baker about a Facebook conversation he had with another individual in which Baker offered to sell two Glocks. The State used this evidence to call into question Baker's trial testimony.

The jury found Davenport guilty of two counts of first-degree murder under an aiding-and-abetting theory of liability and one count of second-degree murder under an aiding-and-abetting theory of liability for the shooting death of Grahek and found him not guilty of second-degree murder as a principle. The district court imposed the mandatory sentence of life in prison with the possibility of release after 30 years. Davenport appealed.

ANALYSIS

Davenport argues that the district court's failure to give the jury an accomplice corroboration instruction was plain error that affected his substantial rights. In his pro se supplemental brief, he further argues that the evidence against him was insufficient to prove his guilt beyond a reasonable doubt. His pro se brief also alleges that two flaws in the indictment require reversal. We examine each argument in turn.

I.

Davenport argues that his conviction should be reversed because the district court was required to instruct the jury that accomplice testimony must be corroborated and failed to do so. Because Davenport did not request, or object to the absence of, an accomplice corroboration instruction at trial, our review is for plain error. *See State v. Clark*, 755 N.W.2d 241, 251 (Minn. 2008). When reviewing for plain error, we determine whether the district court erred, whether the error was plain, and whether the error affected Davenport's substantial rights. *Id.* at 251–52. If each of these requirements is satisfied, only then will we consider whether reversal of Davenport's conviction "is necessary to ensure fairness and the integrity of the judicial process." *Id.* at 252.

A.

We have held that a district court must instruct the jury that it cannot convict a defendant based on the uncorroborated testimony of an accomplice. *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002). That duty to instruct "remains regardless of whether counsel for the defendant requests the instruction." *Id.*[5]

The duty to instruct arises from Minn. Stat. § 634.04 (2018), which states:

> 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. "The statute contemplates that the issue of whether an accomplice's testimony has been sufficiently corroborated is a question of fact to be determined by the jury." *Clark*, 755 N.W.2d at 251. And unless the jury is told that it cannot rely solely on an accomplice's testimony, there is a "very real possibility that the jury could reject corroborating evidence and convict on the testimony of the accomplice standing alone." *Strommen*, 648 N.W.2d at 689.

The duty to instruct on the need for corroboration applies only when a witness may be an accomplice. *Id.* To determine whether a witness is an accomplice, courts ask whether the witness could have been "indicted and convicted for the crime with which the accused is

---

[5] The State argues that the accomplice corroboration instruction need not be given when, as here, the defense may have had strategic reasons for not requesting the instruction. But our case law makes clear that district courts are required to give the instruction sua sponte. Requiring district courts to speculate as to defense strategy unnecessarily complicates a clear rule of law. We might reach a different conclusion in a case where the defense had objected to the instruction, but we need not reach a decision on that issue here.

charged." *State v. Lee*, 683 N.W.2d 309, 314 (Minn. 2004) (citation omitted) (internal quotation marks omitted). When the facts are "undisputed or compel but a single inference" that a witness was an accomplice, that witness must be named in the jury instructions. *State v. Scruggs*, 822 N.W.2d 631, 640 (Minn. 2012) (citation omitted) (internal quotation marks omitted). "But if the question is disputed or subject to differing interpretations, the issue of whether a particular person is an accomplice is a fact question for the jury to resolve." *Id.* Accordingly, we must determine whether sufficient facts existed such that the jury could have found Baker to be Davenport's accomplice.[6]

"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." Minn. Stat. § 609.05, subd. 1 (2018). And a "person liable under subdivision 1 is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." *Id.*, subd. 2 (2018). "Whether one party to a conspiracy to burgle could have reasonably foreseen that the other might commit an assault in the event of such an encounter or interruption is a question of fact for the jury." *State v. Filippi*, 335 N.W.2d 739, 742 (Minn. 1983); *see also State v. Valtierra*, 718 N.W.2d 425,

---

[6] The Minnesota accomplice corroboration instruction—the instruction not given in this case—requires the jury to answer two questions. First, the model instruction informs the jury that it must determine whether a witness was an accomplice of the defendant. Second, it instructs that jury that, if it finds that the witness was an accomplice, it "cannot find the defendant guilty of a crime on the basis of the accomplice's testimony, unless that testimony is corroborated." 10 Minn. Dist. Judges Ass'n, Minnesota Practice—Jury Instruction Guides, Criminal, CRIMJIG 2.09 (6th ed. 2019). In other words, the jury must determine whether the witness's testimony was corroborated.

438–39 (Minn. 2006) ("[T]his court has rejected the contention that murder may not be a probable consequence of aggravated robbery.").

According to Baker's plea hearing testimony, Baker, Davenport, and King planned to rob Grahek. The three men gathered at King's house, dressed in all black, and armed themselves with two handguns and a wrench. They kicked in Grahek's doors and entered his home. After Grahek confronted the three men, both Davenport and Baker drew their guns and pointed them at Grahek. When Grahek refused to follow Davenport's instructions to get on the ground, Davenport shot him. The three then fled the scene and covered up their crimes. If the jury believed this version of events, it reasonably could have concluded that Baker intentionally aided, advised, and conspired with Davenport to commit burglary and robbery. The jury also reasonably could have concluded that murder was "reasonably foreseeable [by Baker] as a probable consequence" of the burglary and robbery. Consequently, we conclude that sufficient evidence was admitted at trial such that a jury could have found Baker to be Davenport's accomplice.

We further conclude that Baker's plea hearing testimony, which was read into the record at Davenport's trial, was "testimony" for the purpose of section 634.04. Baker gave his plea hearing testimony under oath during a court proceeding. And, importantly, his statements were admitted at Davenport's trial as substantive evidence of Davenport's guilt. Indeed, Baker's plea hearing testimony was read aloud to the jury in question-and-answer format; a testifying police officer read the prosecutor's questions and Baker's responses. The jury therefore heard the plea hearing testimony as though it was testimony given at

trial. Consequently, the court erred when it failed to instruct the jury on accomplice corroboration.[7]

B.

We do not reach the issue of whether the error was plain. Instead, we assume the error was plain and turn to whether it affected Davenport's substantial rights. Failure to give a required jury instruction affects a defendant's substantial rights when "there is a 'reasonable likelihood' that the absence of the error would have had a 'significant effect' on the jury's verdict." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). Because our reason for requiring the accomplice corroboration instruction is to ensure that the jury did not reject the corroborating evidence and base its verdict solely on the accomplice's testimony, our substantial rights inquiry focuses on whether there is a reasonable likelihood that the jury relied solely on Baker's plea hearing testimony.

To answer that question, we conduct an independent review of the record and consider all relevant factors that may bear on the question. *See Lee*, 683 N.W.2d at 317; *State v. Shoop*, 441 N.W.2d 475, 480–81 (Minn. 1989) (stating that "a simple mechanical analysis of the record" is insufficient). Our recent cases have highlighted four factors that we consider as part of that review. *See, e.g.*, *State v. Horst*, 880 N.W.2d 24, 38 (Minn.

---

[7] In *State v. Henderson*, we declined to decide whether section 634.04 applies to out-of-court statements of an accomplice admitted through other witnesses at trial. 620 N.W.2d 688, 701 (Minn. 2001). But we did suggest that statements other than those made at trial may be "testimony" under section 634.04. *See id.* (stating that "arguably the same concerns regarding reliance on accomplice testimony exist regardless of the form in which the statements are presented to the jury"). In any event, we need not decide the issue left open in *Henderson* to decide this case. We simply hold that, whatever else may be "testimony," Baker's plea hearing testimony is testimony under section 634.04.

2016) (considering " 'whether the testimony of the accomplice was corroborated by significant evidence, whether the accomplice testified in exchange for leniency, whether the prosecution emphasized the accomplice's testimony in closing argument, and whether the court gave the jury general witness credibility instructions' " (quoting *State v. Jackson*, 746 N.W.2d 894, 899 (Minn. 2008))). We consider these factors as well as the unique fact here that the alleged accomplice essentially testified twice—once in person and once through his prior plea hearing testimony read into the record as substantive evidence—and his testimony was contradictory.

These unique circumstances of a single witness offering contradictory testimony is persuasive proof that the jury must have looked to something beyond Baker's plea hearing testimony—namely, corroborating evidence—to decide which version of Baker's testimony to believe. It also supports the conclusion that Davenport's substantial rights were not affected by the district court's failure to instruct the jury on the accomplice corroboration rule.[8]

---

[8] Arguably, the jury could have found that Baker was simply not a credible witness based solely on his demeanor at trial, without reference to other evidence introduced in the case. But we do not believe that is a reasonably likely explanation. Rather, after considering the totality of the trial record, we conclude that it is likely that Baker's trial testimony was not credible because it conflicted with other independent evidence. For example, Baker stated that he ran or walked back to his house, arriving just after Davenport and King, who had driven. But, as stated above, he offered a different version of events in his testimony at King's trial and in a letter to defense counsel. Baker also testified at trial that he asked Davenport to sell the gun because he didn't know anyone who wanted to buy one. However, he had previously testified that he did know someone looking to buy that precise type of gun. And Baker testified that he was the person who X.H. told about the safe, but others testified that Davenport was friends with X.H., while Baker and King were not. Although the weakness of Baker's trial testimony is not corroborating evidence per

Further, in this case, considerable evidence corroborates Baker's plea hearing testimony.[9] *See State v. Jackson*, 726 N.W.2d 454, 461 (Minn. 2007) (considering whether the accomplice's testimony was corroborated by significant evidence). For instance, Baker, Davenport, and King were close friends who had committed burglaries together before. And King's girlfriend testified that, immediately before the break-in and murder, the three men gathered at King's house and left the house together dressed in all black, heading in the direction of Grahek's house.

In addition, surveillance video corroborates the chronology and timing of the events to which Baker testified at his plea hearing. There is evidence that after the murder, Davenport told T.B. that "[w]e just tried to rob somebody and it didn't go like it was supposed to." He also repeatedly told T.B. not to ask him anything about what had happened. Moreover, police connected Davenport to the gun that killed Grahek. Finally, Davenport made several arguably incriminating statements on phone calls from jail.

---

se, it does "form[] part of the evidence as a whole[, which] must both affirm the truth of the accomplice's testimony and point to the defendant's guilt." *State v. Barrientos-Quintana*, 787 N.W.2d 603, 613 (Minn. 2010) (alteration in original) (citation omitted) (internal quotation marks omitted).

[9] Corroborative evidence need not "establish a prima facie case of the defendant's guilt or sustain a conviction." *Clark*, 755 N.W.2d at 253–54 (collecting cases). Rather, "evidence is sufficient to corroborate an accomplice's testimony 'when it is weighty enough to restore confidence in the truth of the accomplice's testimony.' " *Id.* at 253 (quoting *State v. Sorg*, 144 N.W.2d 783, 786 (Minn. 1966)); *see also State v. Rasmussen*, 63 N.W.2d 1, 3 (Minn. 1954) (stating that corroborating evidence is sufficient when it "in some substantial degree tends to affirm the truth of [the accomplice's] testimony and to point to the guilt of the defendant"). And "[c]ircumstantial evidence may be sufficient to corroborate the testimony of an accomplice." *Rasmussen*, 63 N.W.2d at 3.

As Davenport points out, some evidence, such as the surveillance video, supports Baker's plea hearing testimony and trial testimony equally. Further, some of the evidence that corroborates Baker's plea hearing testimony is contradicted by other evidence that supports Baker's trial testimony. For instance, at trial, T.B. testified that Davenport never told her that he tried to rob someone. The defense also pointed out that Davenport never plainly admitted to his participation in his calls from the jail.

Davenport's focus on the fact that corroborating evidence exists for both versions of Baker's testimony, however, misses the mark in this case. The inconsistencies in the evidence presented at trial may have affected the weight the jury gave some of the evidence that corroborated Baker's plea hearing testimony. But the existence of conflicting evidence does not mean that the record was devoid of evidence to corroborate Baker's plea hearing testimony. And because the jury ultimately believed the plea hearing testimony rather than Baker's trial testimony, there is a reasonable likelihood that it also believed, and relied upon, the corroborating evidence that supported the plea hearing testimony.

In assessing whether there is a reasonable likelihood that a jury did not rely solely on uncorroborated accomplice testimony given a district court's failure to give the mandated instruction, we have also considered whether the jury was alerted to facts that could raise questions about the motivations for an accomplice's testimony. *Cf. Jackson*, 726 N.W.2d at 461. When a jury does not understand that accomplice testimony was motivated by a desire to get a better deal or some other malicious motive, the harm from the failure to give the accomplice corroboration instruction may be exacerbated.

Here, the jury was told that Baker offered his plea hearing testimony because he was afraid that if he went to trial he would receive a life sentence and that Baker received a reduced sentence in exchange for his guilty plea. The jury knew it could consider that information when weighing Baker's plea hearing testimony. This record informs our conclusion that there is a reasonable likelihood that the jury did not solely rely upon Baker's plea hearing testimony to the exclusion of corroborating evidence.

Finally, we take into account two other factors that provide additional support for our conclusion that the jury likely considered corroborating evidence beyond Baker's plea testimony. Our review of the transcript confirms that the prosecutor in closing argument "did not unduly emphasize the testimony of the accomplice[] over other evidence." *Horst*, 880 N.W.2d at 39. And the district court gave the jury a general credibility instruction. *Lee*, 683 N.W.2d at 317 (considering whether the district court gave a general credibility instruction). The general credibility instruction told the jury that it should look at factors beyond the witness testimony itself, making us more comfortable that the jury likely looked to evidence corroborating Baker's plea hearing testimony in reaching its verdict.[10]

[10] The general credibility instruction, however, is not a substitute for the specific accomplice corroboration instruction. While the purpose of the general credibility instruction—to ensure convictions are based on reliable evidence—is the same as the purpose underlying Minn. Stat. § 634.04, we cannot ignore that the Legislature chose a very specific remedy to the problem of witness reliability in the context of accomplice testimony. A jury must not simply consider whether an accomplice's motives are suspect or selfish as at common law; it must specifically find that the testimony of the accomplice witness was corroborated. *Shoop*, 441 N.W.2d at 478–79.

In sum, our independent review of the record convinces us that the district court's failure to give the accomplice corroboration instruction did not affect Davenport's substantial rights because there is no reasonable likelihood that the jury relied solely on Baker's plea hearing testimony to find him guilty. Davenport therefore is not entitled to a reversal of his convictions because of the jury instruction error.

II.

Davenport argues in his pro se supplemental brief that the evidence against him was insufficient to prove his guilt beyond a reasonable doubt. Davenport was found guilty of first-degree murder (while committing or attempting to commit first-degree robbery) under an aiding and abetting theory; first-degree murder (while committing or attempting to commit first-degree burglary) under an aiding and abetting theory; and second-degree murder under an aiding and abetting theory.

As stated above, a "person is criminally liable [as an accomplice] 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." Minn. Stat. § 609.05, subd. 1. The phrase "intentionally aids" includes two elements: "(1) that the defendant knew that his alleged accomplices were going to commit a crime, and (2) that the defendant intended his presence or actions to further the commission of that crime." *State v. McAllister*, 862 N.W.2d 49, 52 (Minn. 2015) (citation omitted) (internal quotation marks omitted). In addition, an accomplice is "also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." Minn. Stat. § 609.05, subd. 2

(2018). Therefore, to convict Davenport of felony murder under an aiding and abetting theory, the State had to prove that (1) Davenport knew Baker and King were going to commit a robbery or burglary and intended his presence or actions to further the commission of the crime and (2) the killing of Grahek was in pursuance of the burglary or robbery and was reasonably foreseeable as a probable consequence of the crime.

Davenport focuses his sufficiency-of-the-evidence argument on the State's purported failure to prove that he knew about and intended to participate and aid in the robbery or burglary.[11] "The 'intentionally aids' element of accomplice liability is a state-of-mind requirement. It is rare for the State to establish a defendant's state of mind through direct evidence." *McAllister*, 862 N.W.2d at 53. Here, the evidence the State offered to prove Davenport's intent is circumstantial.

When a challenge is to the sufficiency of the circumstantial evidence, we apply the following two-step analysis:

> First, we must identify the circumstances proved, giving deference to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State. Second, we independently examine the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt.

Id. at 53–54 (quoting *State v. Anderson*, 789 N.W.2d 227, 241–42 (Minn. 2010)). In the second step, we give no deference to the jury's choice between reasonable inferences. *State*

---

[11] Davenport does not argue that the State presented insufficient evidence to prove that Grahek was killed in pursuance of the intended crime nor that such a killing was reasonably foreseeable as a probable consequence of committing or attempting to commit the crime intended. Minn. Stat. § 609.05, subd. 2. Nor does he argue that the person who killed Grahek acted without intent. *See McAllister*, 862 N.W.2d at 58 n.4.

v. Andersen, 784 N.W.2d 320, 329–30 (Minn. 2010). We therefore determine whether the circumstances proved, when viewed as a whole, are consistent with guilt and "inconsistent with any rational hypothesis" except that of guilt. *McAllister*, 862 N.W.2d at 54.

We begin by determining the circumstances proved, rejecting any evidence conflicting with the jury's verdict. Applying that standard, we conclude that the circumstances proved are as follows: Davenport found out about the safe at Grahek's house through his friend, X.H. Davenport, Baker, and King planned to steal from Grahek; the three had talked about doing so for several weeks before the crimes took place. The three were armed with weapons—Davenport and Baker each had a gun and King had a wrench. King's girlfriend saw the three men leaving King's house together dressed in all black just minutes before the murder occurred. Davenport was seen with Baker and King only minutes after the murder. Surveillance video also puts Davenport near the scene of the crime. And soon after the murder, Davenport told T.B. that "[w]e just tried to rob somebody and it didn't go like it was supposed to." He also repeatedly told T.B. not to ask him anything about what had happened. Davenport made several arguably incriminating statements during phone calls in which he participated while he was in jail. Finally, the gun used to kill Grahek was connected to Davenport in multiple ways. When viewed as a whole, the circumstances proved support a reasonable inference that Davenport knew of and intended to participate in the robbery.

Davenport points to other evidence that, if believed by the jury, could have called into question whether Davenport was involved in the robbery, including T.B.'s trial testimony that Baker had told her he alone tried to rob somebody; Grahek's brother's

statement that he heard only one voice coming from the basement during the robbery; the testimony of a law enforcement officer that he could not eliminate the possibility that Davenport returned to his car after he left King's house; testimony from another officer that there was one set of tracks leaving the crime scene; and Baker's trial testimony that Davenport was not involved in the crime. Because this evidence is inconsistent with the jury's verdict, we must assume that the jury did not believe it and, accordingly, we do not consider it as part of the circumstances proved by the State.

Next, we consider whether the circumstances proved, when viewed as a whole, are consistent with any rational hypothesis except that of guilt. We conclude that they are not. We can draw only one reasonable inference from the facts that Davenport found out about the safe, engaged in planning the robbery, armed himself, and entered Grahek's house with Baker and King. Davenport makes no argument that those circumstances support any other conclusion than that he intended to aid and abet the robbery and burglary of Grahek. Stated another way, Davenport's argument that he lacked intent is based on facts that are not part of the circumstances proved in this case. We therefore hold that the State presented sufficient evidence that Davenport knew Baker and King were going to commit a robbery or burglary and intended his presence or actions to further the commission of the crime.

III.

Finally, Davenport argues that his conviction should be reversed because the indictment against him was fatally flawed. Because we conclude that any flaws in the indictment did not prejudice Davenport's substantial rights, we reject Davenport's argument.

On December 4, 2017, Davenport moved to dismiss the indictment. He argued that the indictment failed to allege that Davenport intended to kill Grahek, which is an element of felony murder. He further argued that the indictment violated Minn. Stat. § 630.18(2) (2018) because it did not include the names of the witnesses who testified before the grand jury. At the end of December, the State and Davenport stipulated to the release of the complete record of the grand jury proceedings in part to cure "an alleged defect in form on the face of the Indictments." On January 4, 2018, the district court ordered the release of the grand jury record. Davenport subsequently moved a second time to dismiss the indictment, this time for lack of probable cause. On March 8, the district court denied both of Davenport's motions to dismiss the indictment.

"When challenging an indictment, the defendant bears a heavy burden and only in rare cases will an indictment be invalidated." *State v. Miller*, 754 N.W.2d 686, 698 (Minn. 2008) (citation omitted) (internal quotation marks omitted). On appeal, "[t]his heavy burden is heightened when the defendant has been found guilty beyond a reasonable doubt following a fair trial." *Id.* (citation omitted) (internal quotations marks omitted). Further, "[n]o charging document will be dismissed nor will the trial, judgment, or other proceedings be affected by reason of a defect or imperfection in matters of form that does not prejudice the defendant's substantial rights." Minn. R. Crim. P. 17.06, subd. 1; *see also* Minn. Stat. § 630.18 (2018) (stating that the statutory grounds for dismissal of an indictment are subject to the provisions of Minnesota Rule of Criminal Procedure 17.06, subdivision 1, and the harmless error rule set forth in Minnesota Rule of Criminal Procedure 31.01). A "conviction after a fair trial will stand unless there is actual proof that

[the] defendant has in fact been misled as to the charge brought against him, to his prejudice." *State v. Bias*, 419 N.W.2d 480, 486 (Minn. 1988).

There is no dispute that the State violated section 630.18(2), which requires that an indictment be dismissed "upon the defendant's motion . . . when the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or endorsed thereon." The State did not identify the names of the grand jury witnesses in the indictment.

The statutory violation, however, did not violate Davenport's substantial rights. We have identified multiple purposes served by section 630.18(2). We have said that

> the purpose of the statute in requiring the insertion on the indictment of the names of the witnesses appearing before the grand jury is to allow for a testing of the sufficiency of the evidence upon which the indictment is based. It is not a tool to assist the defendant in preparing for trial.

State v. Drews, 144 N.W.2d 251, 257 (Minn. 1966); *see also* Wayne R. LaFave, et al., *Criminal Procedure* § 20.1(a) n.6 (4th ed. 2015) (stating that "provisions requiring the listing of grand jury witnesses on the indictment . . . were designed primarily to ensure adequate grand jury screening . . . rather than to provide the defense with discovery of the prosecution's case). We have also stated that

> the main purpose of this requirement is to advise the defendant of the names of witnesses who may be called by the state upon the trial of the indictment, so as to afford him an opportunity to contact them, if he so desires, and to ascertain, if possible, what their testimony will be.

State v. Gorman, 17 N.W.2d 42, 47 (Minn. 1944).

The State's failure to list the grand jury witnesses in the indictment did not interfere with either of these purposes. The district court made the full transcript of the grand jury proceedings available to the defense. Davenport was therefore apprised of the names of

the witnesses who testified against him during the grand jury proceedings. Notably, Davenport also could have requested and obtained the names of the grand jury witnesses under Minn. R. Crim. P. 9.01, subd. 1(1)(c). He was fully able to test the sufficiency of the evidence upon which the indictment was based (in fact, he filed a motion doing just that) and to prepare for trial. His substantial rights were not prejudiced by the failure to list the grand jury witnesses in the indictment.

Davenport's vagueness argument is equally unavailing. An indictment shall contain "a statement of the acts constituting the offense, in ordinary and concise language, without repetition." Minn. Stat. § 628.10(2) (2018). "It shall be direct and certain as it regards: (1) the party charged; (2) the offense charged; (3) the particular circumstances of the offense charged, when they are necessary to constitute a complete offense." Minn. Stat. § 628.12 (2018). We will reverse only when "the charge was so vague as to make it impossible for the defendant to defend himself." *Bias*, 419 N.W.2d at 486.

The indictment here was not so vague as to make it impossible for Davenport to defend himself. The indictment contained the following information: the date and location of the offense; the crimes with which Davenport was charged; the statute under which each crime was charged; the anticipated penalty for each crime; and short descriptions charging Davenport with the murder of Grahek under an aiding and abetting theory while conspiring to commit or attempting to commit first-degree burglary and first-degree aggravated robbery. This information was sufficient to eliminate the risk of double jeopardy and apprise Davenport of the charges brought against him. *See State v. Hallmark*, 927 N.W.2d 281, 302 (Minn. 2019); *Bias*, 419 N.W.2d at 486–87.

CONCLUSION

For the foregoing reasons, we affirm the judgment of Davenport's conviction.

Affirmed.

MOORE, J., not having been a member of this court at the time of submission, took no part in the consideration or decision of this case.