

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0720**

State of Minnesota,
Respondent,

vs.

Kadie Leeper,
Appellant.

**Filed March 18, 2013
Affirmed
Schellhas, Judge**

Pennington County District Court
File No. 57-CR-10-766

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

Alan G. Rogalla, Pennington County Attorney, Kristin J. Hanson, Assistant County Attorney, Thief River Falls, Minnesota (for respondent)

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges her convictions of conspiracy to commit fifth-degree controlled-substance crime and aiding and abetting fifth-degree controlled-substance

crime, arguing that the district court's failure to give the jury an accomplice instruction affected her substantial rights and requires reversal to ensure fairness and integrity of the judicial proceedings. We affirm.

FACTS

Respondent State of Minnesota charged appellant Kadie Leeper with conspiracy to commit fifth-degree controlled-substance crime in violation of Minn. Stat. §§ 152.025, subd. 2(b)(2)(i), 152.096, subd. 1 (2010), and amended the complaint to add a charge of aiding and abetting fifth-degree controlled-substance crime in violation of Minn. Stat. §§ 152.025, subd. 2(b)(2)(i), 609.05, subd. 1 (2010). And, in a separate case, the state charged Leeper's husband with both crimes. The district court conducted a joint jury trial of Leeper and her husband.

S.N. testified at trial on behalf of the state. S.N. testified that Leeper gave her a fraudulent hydrocodone prescription and that, on August 10, 2010, she handed the prescription to a pharmacy to obtain 250 hydrocodone pills for Leeper "[b]ecause [Leeper] couldn't get any." Based on her agreement with Leeper, after obtaining the hydrocodone pills, S.N. was "supposed to call" Leeper, but, while S.N. waited at the pharmacy for the prescription to be filled, Thief River Falls Police Deputy Chief Craig Mattson arrested S.N. After S.N. told Deputy Chief Mattson that she received the prescription from Leeper and about her agreement with Leeper, Deputy Chief Mattson asked S.N. to telephone Leeper, which S.N. did, and Deputy Chief Mattson recorded the call.

During the phone call, S.N. said to Leeper, “I got them if you still want them,” and Leeper asked, “Yeah how many?” S.N. responded, “It’s what you had on there, the 250,” and repeated, “It is the 250.” Leeper soon afterward said that “we are on our way home” and “we’ll turn around and come back to town.” Subsequently, Leeper met S.N. near a local park, where, according to S.N., she and Leeper had met in the past. Leeper and S.N. did not identify their meeting place during their phone call, but S.N. testified that they “knew where to meet.” Deputy Chief Mattson dropped off S.N. at the location and told her “to play it out.” When S.N. approached Leeper’s van, Leeper’s husband was seated in the front passenger seat and told S.N., “[Y]ou need to get in because we need to get going”; he showed S.N. “[a] folded up fifty in his . . . right hand”; and he told S.N., “[Y]ou need to get in so I can give you this.” Then, Deputy Chief Mattson and several other police officers approached, and Leeper’s husband called S.N. “a f-cking b-tch.” The police arrested S.N., Leeper, and her husband.

Other record evidence is consistent with S.N.’s testimony. Leeper testified that she met S.N. while both of them worked as hotel housekeepers in 2006 or 2007 and that they developed a “close friend[ship]” that involved, among other things, talking a lot about their medical issues, specifically Leeper’s fibromyalgia. Deputy Chief Mattson testified that, after he transported S.N. to the police station on August 10, S.N. “openly admitted that she did try to pass the forged prescription to obtain the . . . drugs, but she immediately made the comment that she did not write out the prescription; that . . . Leeper wrote out the prescription for her.”

Neither party asked the district court to instruct the jury on accomplice testimony, and the court did not give the accomplice instruction. The jury found Leeper guilty of both charges and found Leeper's husband not guilty of conspiracy to commit fifth-degree controlled-substance crime and failed to reach a unanimous verdict, "split[] six to six," on the charge of aiding and abetting fifth-degree controlled-substance crime.

This appeal follows.

D E C I S I O N

Leeper seeks reversal of her convictions based on the district court's failure to instruct the jury on accomplice testimony.

Minnesota Statutes section 634.04 (2010) prohibits convictions based on uncorroborated accomplice testimony. "[T]rial courts have a duty to instruct juries on accomplice testimony in any criminal case in which it is reasonable to consider any witness against the defendant to be an accomplice." *State v. Barrientos-Quintana*, 787 N.W.2d 603, 610 (Minn. 2010) (quoting *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002) (quotation marks omitted)). "This duty arises from the very real possibility that a jury might discredit all testimony except the accomplice testimony, and thus find the defendant guilty on the accomplice testimony alone." *State v. Cox*, 820 N.W.2d 540, 548 (Minn. 2012) (quotations omitted). "[C]ourts distrust accomplice testimony because the accomplice might have chosen to testify against the defendant in the hope of or upon a promise of immunity or clemency or to satisfy other self-serving or malicious motives." *Id.* (quotations omitted).

Leeper did not request the accomplice instruction, and we therefore “review the trial court’s failure to give the instruction for plain error.” *Barrientos-Quintana*, 787 N.W.2d at 611. “We have discretion to correct an error not objected to at trial where the error is plain and affects substantial rights.” *Id.* “Under plain-error analysis, [the defendant] must show that: (1) there was error; (2) that was plain; and (3) [the defendant’s] substantial rights were affected. . . . If these three prongs are met, the reviewing court then assesses whether it should address the error to ensure the fairness and integrity of the judicial proceedings.” *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012) (quotation and citation omitted).

Plain Error

“District courts must instruct juries on accomplice testimony in any criminal case in which it is reasonable to consider that a witness testifying against the defendant is an accomplice.” *Cox*, 820 N.W.2d at 548. “The test for whether a particular witness is an accomplice is whether the witness could have been indicted and convicted for the crime with which the defendant is charged.” *Barrientos-Quintana*, 787 N.W.2d at 610 (quotations omitted). A district court commits “plain error” by failing to give an accomplice-testimony instruction “wherever a witness can reasonably be considered an accomplice.” *Id.* at 612; *see State v. Clark*, 755 N.W.2d 241, 252 (Minn. 2008) (concluding that district court plainly erred by “failing to instruct the jury on accomplice testimony” when “it was reasonable for a jury to consider [a witness] to be an accomplice”).

Leeper argues, and the state concedes, that the district court plainly erred by not instructing the jury on accomplice testimony. We conclude that the jury could reasonably have considered S.N. to have been Leeper’s accomplice; S.N. testified that she pleaded guilty to her “whole part of this scheme.” The district court therefore plainly erred by not instructing the jury on accomplice testimony.

Substantial Rights

Leeper argues that the district court’s plain error affected her substantial rights. We disagree.

“To satisfy the third [plain-error] prong, [the defendant] bears the heavy burden of showing that there is a reasonable likelihood the error had a significant effect on the verdict.” *State v. Davis*, 820 N.W.2d 525, 535 (Minn. 2012) (quotation omitted). In cases in which a district court plainly errs by failing to provide the jury an accomplice-testimony instruction, an appellate court “must decide whether there is a reasonable likelihood that the jury’s verdict would have been significantly affected if the jurors had known they could not convict [the defendant] of [the charged offense] unless they found that [the accomplice’s] testimony was corroborated by other evidence in the record.” *Barrientos-Quintana*, 787 N.W.2d at 612.

In this case, the previously noted testimony of S.N., as an accomplice, required corroboration. *See* Minn. Stat. § 634.04. “In determining whether an accomplice’s testimony is corroborated, the defendant’s entire conduct may be looked to for corroborating circumstances,” and “[c]ircumstantial evidence may be sufficient to corroborate the [accomplice’s] testimony.” *Clark*, 755 N.W.2d at 254 (quotations

omitted). “[T]he corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.” Minn. Stat. § 634.04. But “[t]he evidence need not, standing alone, be sufficient to support a conviction”; rather, the evidence “need only be sufficient to restore confidence in the truthfulness of the accomplice’s testimony,” “affirm[ing] the truth of the accomplice’s testimony and point[ing] to the guilt of the defendant in some substantial degree.” *Barrientos-Quintana*, 787 N.W.2d at 612–13 (quotations omitted).

Corroborating evidence may include evidence of the defendant’s “motive,” “association with persons involved in the crime in such a way as to suggest joint participation,” *Clark*, 755 N.W.2d at 254 (quotation omitted), “inadequacies and admissions in a defendant’s testimony, and suspicious and unexplained conduct of an accused before or after the crime,” *State v. Pederson*, 614 N.W.2d 724, 732 (Minn. 2000) (citation omitted). Also, an inquiry into whether substantial rights are affected “includes the equivalent of a harmless error inquiry.” *State v. Reed*, 737 N.W.2d 572, 584 n.4 (Minn. 2007). Under harmless-error review, appellate courts consider “whether the accomplice testified in exchange for leniency, whether the accomplice’s testimony was emphasized in the prosecution’s closing argument, whether the accomplice’s testimony was corroborated by significant evidence, and whether a general instruction on witness credibility was given.” *Holt v. State*, 772 N.W.2d 470, 484 (Minn. 2009) (quotation omitted).

Here, the recording of S.N.’s and Leeper’s August 10 phone call corroborates S.N.’s testimony. Leeper had a motive to obtain hydrocodone; she testified that she has

“severe chronic muscle pain,” “severe fibromyalgia,” “two herniated disks in [her] neck,” and “arthritis in [her] lower back.” *See* Minn. Stat. § 152.02, subd. 3(1)(a) (2010) (providing that “hydrocodone” is a Schedule II controlled substance as a type of “[o]pium and opiate, and any salt, compound, derivative, or preparation of opium or opiate”); *Wall v. Astrue*, 561 F.3d 1048, 1060 n.19 (10th Cir. 2009) (observing that “[h]ydrocodone is used to treat moderate to moderately severe pain” and “is the most frequently prescribed opiate in the United States”). Moreover, the record reveals no promise of leniency to S.N. in exchange for her testimony; to the contrary, Chief Deputy Mattson testified that he “never promised [S.N.] anything for her cooperation,” he told S.N. “several times” after arresting her at the pharmacy that he “cannot promise her anything,” and S.N. testified that “nobody promised any deals to turn over on any other defendants or anything” and that she pleaded guilty to her “whole part of this scheme.”

Moreover, Leeper’s testimony inadequately explained why she met S.N. in the park on August 10, if not to retrieve the fraudulently obtained hydrocodone pills from S.N. Leeper claimed that, during the August 10 phone call, she heard S.N. say, “I need that fifty,” and, “Well, can I meet up with you?” Leeper also claimed that she “couldn’t understand what [S.N.] meant about her needing that fifty” and that she agreed to meet S.N. because she “wanted to go and hear what [S.N.] needed fifty dollars for.” But Leeper’s testimony is inconsistent with the recording of the phone call, which reveals that S.N. never asked to meet with Leeper. And Leeper’s testimony was inconsistent with her husband’s trial testimony. Leeper claimed that when she asked, “How many?” during the phone call with S.N., she was actually asking her husband how many hours they would

be at her husband's dentist. And Leeper also claimed that she and her husband discussed loaning S.N. fifty dollars and that was why her husband had fifty dollars in his hand. But, after his arrest, Leeper's husband told Deputy Chief Mattson that he had "no idea why [he] [was] going back to the park" and that he "had the fifty dollars in [his] hand, but that it was" for him to "us[e] . . . for the dentist."

The district court gave the jury the standard instruction about assessing witness credibility. The jury's verdicts reflect that the jury believed Leeper's husband's testimony but did not believe Leeper's testimony. And, although, during the state's closing argument, the prosecutor mentioned S.N.'s testimony numerous times, the prosecutor did not rely exclusively on the testimony but rather repeatedly emphasized consistencies between S.N.'s testimony and the other record evidence. *See State v. Shoop*, 441 N.W.2d 475, 481 (Minn. 1989) (concluding that district court's failure to instruct jury with accomplice-testimony instruction did not significantly impact verdict because, among other reasons, the prosecutor "focused the jury's attention on the evidence corroborating [the accomplice]'s testimony"). The prosecutor argued that S.N.'s "story fits the facts of this case as Deputy Chief Mattson stated; that everything that she said was corroborated by what actually took place."

We conclude that S.N.'s testimony is amply corroborated by other record evidence and that no reasonable likelihood exists that the jury's verdict would have been significantly affected had the jurors been instructed that they could not convict Leeper absent corroboration of S.N.'s testimony.

Fairness and Integrity in Judicial Proceedings

Leeper argues that reversal is “necessary to ensure fairness and integrity of the judicial proceedings.” But appellate courts address the fairness-and-integrity prong of plain-error review only when the three other plain-error prongs are satisfied. *State v. Kuhlmann*, 806 N.W.2d 844, 852–53 (Minn. 2011). Because we conclude that the district court’s plainly erroneous failure to instruct the jury on accomplice testimony did not affect Leeper’s substantial rights, we do not reach the fairness-and-integrity prong of plain-error review.

Affirmed.