**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-0235**

State of Minnesota,
Respondent,

vs.

Anthony Carmen Masso, III,
Appellant.

**Filed June 3, 2008**
**Affirmed**
**Wright, Judge**

Steele County District Court
File No. K2-05-604

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 5510; and

Douglas L. Ruth, Steele County Attorney, Daniel A. McIntosh, Assistant County Attorney, 303 South Cedar, Owatonna, MN 55060 (for respondent)

Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Stoneburner, Judge.

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

**WRIGHT,** Judge

Appellant challenges his conviction of aiding and abetting a sale of crack cocaine, arguing that (1) the admission of a lab report as testimonial hearsay violated his confrontation rights; (2) the admission of the unredacted audio recording of the controlled buy was plain error; (3) the evidence was insufficient to support the guilty verdict; and (4) the prosecutor committed prejudicial misconduct by referring to an uncharged offense. We affirm.

## FACTS

Appellant Anthony Masso was convicted of aiding and abetting a third-degree controlled-substance crime, a violation of Minn. Stat. §§ 152.023, subds. 1(1), 3, 609.05 (2004), based on a controlled buy involving crack cocaine at his apartment on February 23, 2005. That the drug transaction occurred is not in dispute. The central issue at trial was whether Masso aided and abetted the commission of the offense.

Sometime prior to February 23, 2005, Casey Sather contacted Agent Scott Hanson, a narcotics investigator with the South Central Drug Investigations Unit. Sather advised Agent Hanson about drug activity and participated in controlled buys of controlled substances. Sather, who has a criminal history, had no pending legal matters when he began to work for the police. Sather received cash in exchange for his assistance to law enforcement.

On February 23, 2005, Sather informed Agent Hanson that Sather would be able to purchase two or more 0.5 gram rocks of crack cocaine for $100 from Christie Ernest,

Masso's girlfriend. The transaction would take place at the apartment that Masso and Ernest shared. Agent Hanson directed Sather to set up the purchase and to meet him at a prearranged location. When they met, Agent Hanson gave Sather a $100 bill and a digital recording device. Agent Hanson transported Sather to a location near the apartment and waited in a nearby parking lot.

After knocking on the apartment door, Sather was admitted into the apartment. Ernest's role in the transaction was to obtain the crack cocaine from a third-party dealer and deliver it to the buyer. In exchange, she retained a portion of the drugs. Ernest testified that she and Masso would "get a finder's fee" of crack cocaine for the sale to Sather, which she and Masso would smoke.

When Sather arrived, Ernest told him that she had spoken to the dealer but she needed to call from a pay phone to make the final purchase arrangements. Ernest asked Masso for the keys to his car, which he provided. Sather asked Ernest to confirm with the dealer that she would receive two rocks of crack cocaine for $100. Ernest replied by asking if she should get more, to which Masso interjected, "More!" Agent Hanson observed Ernest drive away in Masso's car.

Masso and Sather waited at the apartment for Ernest. About 30 minutes later, Ernest returned and announced that she needed to call the dealer again because he was not answering her call. Masso gave Ernest money and directed her to call the dealer from a nearby pay phone.

Approximately 20 minutes later, when Ernest returned with two rocks of crack cocaine, she asked Sather to decide which rock of crack cocaine she and Masso would

keep as a finder's fee. Sather cut off a piece of the larger rock for Masso and Ernest to share. Dissatisfied with its size, Ernest and Masso complained to Sather:

> ERNEST: That's one hit.
> MASSO: (Inaudible.)
> ERNEST: I thought you were gonna give me one of those rocks?
> SATHER: Yeah, but—Christ.
> MASSO: Break it off. Break me off a chunk of that.
> SATHER: Alright.

After agreeing on the amount, Masso and Ernest began smoking the crack cocaine. Sather left the apartment, met Agent Hanson, turned over the crack cocaine, and returned the digital recorder.

After the crack cocaine was weighed and preliminarily tested, Agent Hanson sent it to the Bureau of Criminal Apprehension laboratory for additional testing to confirm the substance's identity. The BCA lab report that Agent Hanson received in July 2005 indicated that the substance tested positive for cocaine.

Both Masso and Ernest were charged as a result of the sale to Sather. Ernest pleaded guilty and testified against Masso. Following a four-day trial, a jury convicted Masso of aiding and abetting third-degree controlled-substance crime. This appeal followed.

## D E C I S I O N

### I.

Masso first argues that the admission of the BCA lab report violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. Whether evidence was admitted in violation of the Confrontation Clause presents a

question of law, which we review de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

The Confrontation Clause prohibits a district court from admitting the testimonial hearsay of a nontestifying declarant unless either the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination or the statement falls under an established exception to the common-law right of confrontation as it existed in 1791. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365-66 (2004). A BCA lab report is testimonial hearsay. *Caulfield*, 722 N.W.2d at 309-10. Generally, therefore, a lab report is inadmissible unless the lab report's preparer is called to testify. Rather than call Lisa Seurer, the BCA forensic scientist who prepared the lab report, the state introduced the lab report during the direct-examination of Agent Hanson. Accordingly, it is undisputed that Masso did not have a prior opportunity to cross-examine Seurer about the lab report she prepared. Masso objected when the state offered the BCA lab report, and because Seurer was not called as a witness, the BCA lab report that she prepared was inadmissible evidence.

A violation of the Confrontation Clause does not automatically entitle a defendant to a new trial. *State v. Courtney*, 696 N.W.2d 73, 79 (Minn. 2005). Even if testimonial hearsay is erroneously admitted over the defendant's objection, we will not reverse a conviction if the error was harmless. *Id.* at 79-80. And if an objection on this ground was not raised, we need not consider it on appeal unless the violation constitutes plain error. *See State v. Maurstad*, 733 N.W.2d 141, 153 (Minn. 2007) (approving of application of plain-error analysis to unobjected-to evidence raising Confrontation Clause

issue). Although Masso objected to the admission of the BCA lab report, his objection was on the ground that the BCA lab report did not comply with Minn. Stat. § 634.15, subd. 1(a) (2004). As such, Masso objected to the lack of foundation or the state's failure to authenticate the document.[1] Although Masso would have had a valid objection based on a violation of the Confrontation Clause had he raised it, an objection "must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). The ground on which Masso objected is categorically distinct from the error he now raises on appeal. *Cf. State v. Pearson*, 153 Minn. 32, 35, 189 N.W. 404, 405 (1922) (holding that objection on grounds that evidence was "incompetent, irrelevant and immaterial" did not preserve hearsay objection). We, therefore, review the admission of the BCA lab report only for plain error.[2]

To establish reversible plain error, the defendant must first demonstrate that (1) there was an error; (2) the error was plain; and (3) it affected the defendant's substantial rights. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). If these three requirements are satisfied, relief will be granted on appeal only if it is necessary "to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted). Regarding the first requirement, Masso argues that the district court erred by admitting

[1] Under Minn. Stat. § 634.15, subd. 1(a), a BCA lab report is admissible "if it is prepared and attested by the person performing the laboratory analysis or examination in any laboratory operated by the Bureau of Criminal Apprehension." Masso objected that the BCA lab report did not reflect that Seurer was the scientist who performed the analysis, presumably because Seurer certified only that the report "is true and accurate."

[2] Although Masso analogizes this case to *Caulfield*, he ignores a critical distinction. The defendant in *Caulfield* objected on Confrontation Clause grounds. 722 N.W.2d at 307. Therefore, the *Caulfield* court applied the more stringent harmless-beyond-a-reasonable-doubt standard. *Id.* at 314.

the BCA lab report without requiring Seurer to testify. As we observed above, it is undisputed that the BCA lab report was testimonial hearsay. Acknowledging this fact, the state argues that the district court did not err by admitting the BCA lab report because Masso waived his right to confront Seurer.

Masso counters that he did not have to request Seurer's presence because "[Minn. Stat. § 634.15 (2004)] itself violates the Confrontation Clause." But this misstates the holding in *Caulfield*. Section 634.15 permits the introduction of a BCA lab report without calling the preparer to authenticate it.[3] *Caulfield*, 722 N.W.2d at 312-13. Specifically, the *Caulfield* court held that, because a defendant's waiver of constitutional rights must be knowing, intelligent, and voluntary, the state cannot require the defendant to assert his Confrontation Clause rights before trial without adequate notice that failure to do so will waive the right to confront the analyst. *Id.* at 313. But a defendant's failure to assert his confrontation rights at trial by objecting to the admission of a lab report on Confrontation Clause grounds waives the right to later object to the failure to confront the preparer.[4] *Id.*

Moreover, the identity of the substance sold as crack cocaine was not a contested issue. Both Sather and Ernest testified that they understood the substance to be crack cocaine, and the audio recording of the controlled buy is replete with slang terminology

[3] A defendant can demand the testimony of the preparer by notifying the prosecutor at least 10 days before trial. Minn. Stat. § 634.15, subd. 2(a).

[4] The state apparently was prepared to call Seurer, requesting a continuance to bring Seurer in to testify "that she did, in fact, analyze the evidence" if the district court intended to exclude the report based on Masso's objection. The district court gave Masso an opportunity to respond, but he declined to do so.

consistent with a sale of crack cocaine. Thus, even if the district court erred by admitting the BCA lab report, Masso suffered no prejudice from it because there was ample evidence of the identity of the substance to which a Confrontation Clause objection does not apply. *See United States v. Harcrow*, 66 M.J. 154, 160 (C.A.A.F. 2008) (holding harmless error in admitting lab reports identifying controlled substances in violation of confrontation rights because defendant's admissions rather than lab reports were primary evidence on drug-related charges). Therefore, Masso is not entitled to relief under the plain-error legal standard.

**II.**

Masso next challenges the unobjected-to admission of the unredacted audio recording of the controlled buy. A district court has broad discretion to admit evidence, and, absent a clear abuse of discretion, relief will not be granted on appeal. *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002). When a defendant fails to object to a particular evidentiary error, we apply the plain-error legal standard to determine whether reversal of the conviction is warranted. *Id.*

Masso argues that admission of the evidence was plain error because, although "a few minutes of the recording arguably may have been relevant, the remaining fifty-odd minutes [were] irrelevant, prejudicial, and contained inadmissible evidence of [his] character and prior bad acts." The primary issue at trial was whether Masso's role in the events that were recorded was aiding and abetting the sale of crack cocaine. Immediately before trial, the parties addressed the admissibility of two audio recordings. One recording was a short conversation between Sather and Agent Hanson after the controlled

buy. Masso objected, arguing that it was the same as a police report; and the district court excluded this recording. In contrast, Masso's counsel stated that he did not object to the admission of the recording that Masso now maintains should have been redacted, which contains the entire controlled-buy transaction.

Indeed, as the state correctly observes, Masso made extensive use of the contents of the recording. Masso's counsel concluded his opening statement by imploring the jury to pay close attention to what the recording revealed, stating:

> Finally, there will be a lengthy audiotape that is played for you. It's fifty-five to fifty-six minutes long. It's long. Listen carefully to what you hear or to what is played on that audiotape. You will not hear anything regarding Mr. Masso driving anybody anywhere. He doesn't give directions to anybody on how to find drugs. Listen for that. Listen very carefully for what Mr. Masso does and what he says. When you listen carefully, we will be asking you at the end of this trial to acquit. Thank you.

During closing argument, Masso's counsel asked the jury to carefully weigh the credibility of the unaltered recording—"the one independent piece of evidence that we . . . have regarding what took place" in Masso's apartment—against the testimony of Sather and Ernest. In this argument, he analyzed the details of the recorded conversations, asked the jury to consider what individual words and phrases meant in context, and argued that the absence of evidence of Masso's participation on the recording created reasonable doubt warranting an acquittal. It is evident from the record that Masso considered the recording central to his strategy of convincing the jury that, although Masso may have smoked some of the crack cocaine Ernest received as a

finder's fee for the sale, Masso did not aid and abet her in selling it. Based on the foregoing, Masso's challenge to the admission of this evidence is unavailing.[5]

**III.**

Masso also challenges the sufficiency of the evidence that his participation in Ernest's sale of crack cocaine constitutes aiding and abetting. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis of the record to determine whether the jury reasonably could find the defendant guilty of the offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *Id.* We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Masso argues that his participation in the sale was merely "passive acquiescence" in permitting Ernest to drive his car. Under the aiding-and-abetting statute, "[a] person is

[5] Alternatively, Masso argues that the failure to object constitutes ineffective assistance of counsel. When a claim of ineffective assistance of trial counsel can be adjudicated solely on the record, it must be brought on direct appeal or it will be barred in any subsequent postconviction proceeding. *Leake v. State*, 737 N.W.2d 531, 535-36 (Minn. 2007). The record establishes that counsel's decision not to object to the admission of the recording was entirely strategic, precluding a determination that the performance of counsel was deficient. *See id.* at 536 ("Matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts.").

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 (2004). The defendant does not need to have actively participated in the offense itself. *State v. Gates*, 615 N.W.2d 331, 337 (Minn. 2000), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (prohibiting admission of testimonial hearsay despite indicia of reliability). Rather, it is sufficient for the defendant to have played a "knowing role" in a substantive offense committed by another. *Id.* Although a mere passive acquiescence is insufficient to establish that a defendant knowingly aided and abetted the crime, *id.*, the jury may infer the defendant's intent from the defendant's presence at the scene of the crime, close association with the principal before and after the crime, and lack of objection or surprise under the circumstances, *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007). Intent to aid and abet the commission of a crime also can be inferred from evidence that the defendant advised or encouraged the principal to commit the crime. *In re Welfare of M.E.P.*, 523 N.W.2d 913, 923 (Minn. App. 1994), *review denied* (Minn. Mar. 1, 1995).

Masso maintains that there is insufficient evidence of aiding and abetting the controlled-substance sale because he did not accompany Ernest to purchase the crack cocaine, transport her or the drugs, arrange the sale, or handle the purchase money. He acknowledges that he may have wanted to consume the crack cocaine and that he may have shared Ernest's "kickback" from the crack cocaine she sold to Sather, but he asserts that his consumption after the sale is insufficient to establish that he aided and abetted it.

Before Ernest left the first time to purchase the drugs, she confirmed that the purchase money would buy two rocks of crack cocaine. When Ernest asked if Sather wanted more than two, Masso interjected, "More!" The jury could reasonably infer from this evidence that Masso knowingly loaned his car to Ernest with the intent to facilitate her sale to Sather. Similarly, when Ernest returned to the residence because she needed to call the dealer again, Masso appears to have volunteered "[his] last dollar" and directed Ernest to call the dealer from a specific location. The jury could reasonably infer that Masso knowingly provided Ernest with money to facilitate her contact with the dealer and her completion of the sale. When viewed in the light most favorable to the guilty verdict, this evidence is more than sufficient to establish Masso's guilt.

Masso's argument that his conviction rests entirely on Ernest's uncorroborated accomplice testimony also is without merit. A conviction cannot rest solely on the uncorroborated testimony of an alleged accomplice. Minn. Stat. § 634.04 (2004). Corroborating evidence that "restores confidence in the accomplice's testimony, confirming its truth and pointing to the defendant's guilt in some substantial degree," however, is sufficient to counter Masso's challenge. *State v. Her*, 668 N.W.2d 924, 927 (Minn. App. 2003), *review denied* (Minn. Dec. 16, 2003). The precise quantum of evidence needed to render confidence in accomplice testimony depends on the circumstances of each case. *Id.*

Masso asserts that the evidence is insufficient to support his conviction because the only evidence that he would share the crack cocaine as a "finder's fee" from the sale to Sather is Ernest's uncorroborated testimony. Ernest testified that she and Masso had

an "understanding" that the two of them would get a finder's fee and they would consume their share of the crack cocaine obtained in exchange for the sale to Sather. The audio recording corroborates Ernest's testimony. For example, shortly after Ernest returned with two rocks of crack cocaine, she stated to Sather: "I thought you were gonna give me one of those rocks." This statement corroborates Ernest's testimony that she and Sather had a pre-existing understanding that she would be paid a finder's fee. Moreover, as Sather protests, Masso interrupts and directs Sather to "[b]reak it off. Break me off a chunk of that." Masso's apparent sense of entitlement corroborates Ernest's testimony that she and Masso had an understanding that he would receive a portion of the finder's fee. This evidence corroborates Ernest's description of the transaction and, when combined with the other evidence against Masso, is more than sufficient to support the guilty verdict.

**IV.**

Finally, Maaso argues that he was deprived of a fair trial because of prosecutorial misconduct committed during closing argument. Because Maaso did not object to the claimed misconduct, we review it for plain error. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006).

Masso claims that the prosecutor told the jury that it could convict him of conspiracy, a crime with which Masso was not charged. Because "a defendant cannot be held to answer a charge not contained in the indictment brought against him," *Schmuck v. United States*, 489 U.S. 705, 717, 109 S. Ct. 1443, 1451 (1989), it would be misconduct if the prosecutor urged the jury to convict Masso of a conspiracy offense, *see State v.*

*Strommen*, 648 N.W.2d 681, 689-90 (Minn. 2002) (stating that it is improper for prosecutor to misstate the law). But Masso's argument fails because aiding and abetting includes "intentionally . . . conspir[ing] with [another] to commit the crime." Minn. Stat. § 609.05, subd. 1. And although "[a]iding and abetting may be committed by an act of 'conspiring[,]' . . . conspiracy is more than merely aiding and abetting." *In re Welfare of D.W.O.*, 594 N.W.2d 207, 210 (Minn. App. 1999) (citation omitted). "Aiding and abetting" is not a separate substantive offense, *State v. Ostrem*, 535 N.W.2d 916, 922 (Minn. 1995), but conspiracy is, *D.W.O.*, 594 N.W.2d at 209.

To be convicted of conspiracy as a substantive offense, the defendant must (1) agree or conspire with another to commit a crime, and (2) perform some overt act in furtherance of the conspiracy. Minn. Stat. § 609.175, subd. 2 (2004); *State v. Aviles-Alvarez*, 561 N.W.2d 523, 526 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). The penalty for conspiracy is less severe than that for the completed criminal objective. Minn. Stat. § 609.175, subd. 2(1)-(3).

In contrast, the aiding-and-abetting statute extends the same degree of criminal liability for a completed substantive offense to those who knowingly participated in it. *State v. Swanson*, 707 N.W.2d 645, 658-59 (Minn. 2006) (stating that level of intentional participation is required). The aiding-and-abetting statute treats all knowing participants as principals to the completed offense. *See State v. Briggs*, 84 Minn. 357, 360, 87 N.W. 935, 936 (1901) (stating principle that aiding-and-abetting statute imposes liability as a principal). Consequently, a defendant convicted of aiding and abetting an offense is convicted of the offense itself and may be punished accordingly. *See State v. Redding*,

422 N.W.2d 260, 264 (Minn. 1988) (stating that although not the shooter, aiding-and-abetting defendant was guilty of first-degree murder and sentenced accordingly).

Here, the prosecutor argued two bases for establishing aiding-and-abetting liability. Under one, Masso "aided" Ernest in obtaining crack cocaine and selling it to Sather by providing her with transportation and by facilitating Ernest's communication with her dealer when he paid for the telephone call. Under the other, Masso "conspired" with Ernest to sell crack cocaine to Sather based on the mutual understanding between Masso and Ernest that they would share the finder's fee when she returned with the drugs. With regard to the second factual basis, nothing in the record suggests that the prosecutor argued that Masso committed the offense of conspiracy to sell a controlled substance. Rather, the prosecutor argued that, by conspiring with Ernest who committed the offense of selling a controlled substance, Masso is criminally liable for aiding and abetting the sale.[6] Specifically, the prosecutor argued:

> You've heard in your instructions here that *there are several different ways that a person can aid and abet*, and I'm going to keep talking about these definitions because there's a lot of words in there[,] . . . [b]ut we're focusing basically on two of these alternatives, aiding and conspiring with. . . . They're equal. If you find that the defendant either aided Miss Ernest in this sale or if you find that he conspired

[6] Masso's challenge to the unanimity of the jury's verdict also is without merit. The jury must unanimously agree as to whether the defendant committed an offense and, if so, which acts satisfied its respective elements. *State v. Stempf*, 627 N.W.2d 352, 354-55 (Minn. App. 2001). But where, as here, the jury is choosing between alternative means of committing a single element of an offense rather than between acts constituting discrete elements, unanimity is unnecessary. *Id.* Whether any individual juror convicted based on the "aiding" theory or the "conspiring" theory is irrelevant because they are simply alternative means by which Masso knowingly participated in the sale.

> with her, he's guilty. *Either one equally falls within the definition of aiding and abetting*.

(Emphasis added.) Only when viewed out of context can portions of the closing argument be interpreted to suggest that the prosecutor was urging the jury to convict Masso of the substantive offense of conspiracy. When read as a whole, the closing argument is consistent with aiding-and-abetting liability and inconsistent with the legal definition of conspiracy as a substantive offense. Masso's challenge on the ground of prosecutorial misconduct, therefore, fails.

**Affirmed.**