STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1879

State of Minnesota,
Respondent,

vs.

Michael J. Washington,
Appellant.

Filed January 27, 2009
Reversed and remanded
Minge, Judge
Dissenting, Johnson, Judge

Hennepin County District Court
File No. 07009302

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

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

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Johnson, Judge.

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

MINGE, Judge

Appellant was convicted of aiding and abetting a first-degree robbery. Appellant argues that the district court's omission of an accomplice-jury instruction was reversible, plain error and the verdict was not supported by sufficient evidence. Although we conclude that there is sufficient evidence to support a conviction, because failure to give the accomplice instruction was prejudicial, we reverse and remand. Appellant's other objections are not meritorious.

FACTS

In February 2007, a man was robbed at approximately 6:00 p.m. as he left a Bloomington Unbank. The victim could not identify his assailants. A witness to the robbery told police that the assailants were two African American males of medium size. Although the witness could not further describe the assailants, he identified their vehicle as a white Pontiac Grand Am.

About 9:00 that same evening, Bloomington police officers were at an apartment complex investigating a series of car break-ins. They observed a man sitting in the back of a Lincoln Navigator outside the apartment complex with a substance that resembled crack cocaine. When the officers questioned the man, he identified himself as Michael Washington, the appellant in this proceeding. Eventually, the officers determined that his name was Johnny Jackson and that he was waiting for his friend, Jamarcus Bridges.

Ultimately, Jackson and Bridges were arrested. Both men and the vehicle were searched. As a result of the search, the officers found identification and credit cards

belonging to the robbery victim at the Unbank. The surveillance video from the Unbank showed Jackson entering the Unbank wearing a large fur-trimmed jacket. The jacket was later found on the side of a Bloomington freeway off-ramp. The blood on the jacket matched the victim's DNA. Jackson admitted involvement in the robbery, and his clothes and shoes were later determined to be stained by blood from the victim. Jackson also stated that he had spent the day with Washington driving around in Washington's white Grand Am and eventually identified Washington as the second robber.[1]

Bridges was not interviewed regarding the robbery until approximately one week later. Bridges denied involvement in the robbery and was not considered a suspect. His clothes were never sent for testing, and his alibi was never confirmed.

Washington was eventually questioned and denied any involvement in the robbery. The investigator told Washington that a witness had identified him and gave the police his license plate number, though none of this was true. Washington persisted in maintaining that he had nothing to do with the robbery. The second assailant does not appear on the Unbank surveillance video. In the interrogation, Washington initially stated that he sometimes lends his Grand Am out but later told the investigator that he was the only one who drives the car. Washington could not tell the investigators where his Grand Am was at the time of the robbery.

[1] At Washington's trial, the defense attempted to demonstrate that the investigators focused on Jackson's statement that he and Washington were driving around during the day together and that the officers suggested to Jackson that Washington was involved in the robbery. At points during the interrogation, the officer asked Jackson for ways to confirm that Washington was involved with the robbery and assured Jackson that the prosecutor would be advised of Jackson's cooperation.

The police seized and examined Washington's white Grand Am. The car had blood stains on the interior and exterior. Through DNA analysis, it was determined that the blood was that of the robbery victim. Blood on the driver's-side armrest contained a mixture of the victim's DNA and Washington's DNA. The police also searched Washington's apartment where they found a pair of shoes, one with a barely visible amount of the victim's blood on it.

Both Jackson and Washington were charged with aiding and abetting first-degree aggravated robbery. Jackson entered into a plea agreement with the prosecutor. In exchange for his testimony at Washington's trial, Jackson was to receive a reduction in his sentence.

At Washington's jury trial, Jackson was called to testify against Washington. Jackson testified that he lied when he implicated Washington and that he committed the robbery with a man whom he met at a "dope house." The district court later allowed the prosecutor to introduce the relevant portion of the transcript from Jackson's guilty plea hearing. In his testimony at that hearing, Jackson identified Washington as the second robber.

When the state rested, the defense moved for a judgment of acquittal based on insufficient evidence. The district court noted that the evidence was not overwhelming, but that there was enough to submit to the jury, and the court denied the motion.

Washington testified in his own defense. Washington denied participation in the robbery, testifying that he occasionally let Jackson use his car and that he kept items such as shoes and his fur-trimmed jacket in the car.

Neither the defense nor the prosecution requested, and the district court did not give, any instruction regarding the necessity of corroborating evidence for accomplice testimony. The jury found Washington guilty, and he was sentenced to 88 months. This appeal follows.

D E C I S I O N

Appellant raises several challenges to his conviction: (1) the failure of the district court to, sua sponte, give an accomplice-corroboration instruction; (2) sufficiency of the evidence; (3) matters related to the admission of Jackson's plea; and (4) instructions regarding the standard of proof and circumstantial evidence.

I.

The first issue is whether the district court committed reversible error by failing to, sua sponte, instruct the jury on accomplice testimony. Under Minnesota law, a conviction cannot be based upon the uncorroborated testimony of an accomplice and "the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Minn. Stat. § 634.04 (2006). In interpreting the Minnesota law requiring the corroboration of accomplice testimony, the supreme court has observed:

> On first reading, one might conclude that the statute would be satisfied if the appellate court, as part of its review of the sufficiency of the evidence to convict, were to scrutinize the record carefully to determine whether the testimony of the accomplice was sufficiently corroborated. However, for good reason, the statute contemplates more, namely, that the trial judge submit to the jury the question of whether the corroborative evidence is trustworthy by an assessment of the credibility of the corroborative testimony.

State v. Shoop, 441 N.W.2d 475, 479 (Minn. 1989). The basis for the accomplice-corroboration requirement is that "the credibility of an accomplice is inherently untrustworthy." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004).

"[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. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002). If the jury is not instructed on accomplice testimony, "this court should be concerned with the possibility that the jury rejected the corroborating evidence and convicted solely on the basis of the accomplice testimony." *State v. Jackson*, 726 N.W.2d 454, 461 (Minn. 2007).

When a defendant does not object to the omission of an accomplice-jury instruction at trial, this court reviews the omission for plain error. *State v. Clark*, 755 N.W.2d 241, 251 (Minn. 2008); *State v. Reed*, 737 N.W.2d 572, 584 n.4 (Minn. 2007). A plain-error analysis involves the examination of four factors to determine if there was (1) an error, (2) that was plain, (3) that affected the defendant's substantial rights, and, if the first three factors are satisfied, (4) whether the error should be addressed "to ensure fairness and the integrity of the judicial proceedings." *Reed*, 737 N.W.2d at 583. Because respondent agrees that Jackson was an accomplice and that the failure to give an accomplice instruction was plain error,[2] we proceed to the third part of the analysis:

[2] Respondent stated in its brief "[t]here is no dispute that Johnny Jackson was Appellant's accomplice and an instruction was required." On appeal, respondent only argues that the omission of the accomplice instruction did not have a significant impact on the jury's verdict. Because respondent has waived any challenge to the first two prongs of the

whether the error affected Washington's "substantial rights." *Clark*, 755 N.W.2d at 252. "[A]n error affects substantial rights where there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *Reed*, 737 N.W.2d at 583 (quotation omitted). The analysis of whether an error affects Washington's substantial rights "includes the equivalent of a harmless error inquiry"; however, under the plain-error analysis, the defendant generally bears the burden of persuasion. *Id.* at 584 n.4, 583-84. We consider whether the omission of an accomplice-jury instruction "might have prompted the jury . . . to reach a harsher verdict than it might have otherwise reached . . . ." *Shoop*, 441 N.W.2d at 481. Although *Shoop* contains other observations about the evaluation of a record for corroborating evidence, they are not applicable because in *Shoop* an accomplice instruction was requested and a harmless-error, not a plain-error test, was being considered. *Id.*

The Minnesota Supreme Court has recently reviewed the failure to give, sua sponte, an accomplice-corroboration instruction in two separate cases involving the 1970 shooting death of a St. Paul police officer. *Clark*, 755 N.W.2d at 244; *Reed*, 737 N.W.2d at 578. The court in *Reed* found that the failure to give an accomplice-corroboration instruction did not affect a defendant's substantial rights because of extensive corroborating evidence. *Reed*, 737 N.W.2d at 585; *see also State v. Henderson*, 620 N.W.2d 688, 701 (Minn. 2001) (noting the "overwhelming" corroborating evidence in *Shoop*, 441 N.W.2d at 481, and holding that statements by the defendant and others

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harmless-error analysis, we do not address them. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (holding issues not briefed on appeal waived), *review denied* (Minn. Aug. 5, 1997).

corroborated the accomplice testimony such that any error was harmless). In *Reed*, there was evidence that the defendant had a motive to kill the officer, that the defendant attempted to recruit others to commit the crime with him, that the defendant acted abnormally after the shooting, that the defendant plotted to free his alleged co-conspirators from jail, and that the defendant confessed to the killing. *Reed*, 737 N.W.2d at 578-79, 585.

In contrast, the supreme court reversed the conviction in *Clark*, where the corroborating evidence, although substantial, was not as strong as that in *Reed*. *Clark*, 755 N.W.2d at 252-53. In *Clark*, the corroborating evidence included evidence that the defendant had a motive for killing the officer, the defendant had been seen in possession of a weapon similar to the one used in the murder, the defendant's house was about 100 feet from the location of the murder victim and was in the direction from which the fatal shot was fired, the defendant was seen one-half hour before the shooting walking with Reed who was carrying a rifle, and the defendant committed a previous crime with Reed in which an officer was shot. *Id*. at 254. The court concluded that the defendant's substantial rights were affected, reasoning that the state's case, in comparison to that in *Reed*, "was necessarily more dependent on [the accomplice's] testimony; [and] at the same time, the evidence available to corroborate [the accomplice's] testimony was weaker." *Id.* at 252.

Here, Jackson's statement is the only direct evidence that places Washington at the scene of the robbery. In his statement, Jackson denies that he ever struck the victim and claims that Washington struck the victim, wore the blood-stained jacket, and threw the

bloody jacket out the window. There is no other eyewitness or participant who implicates Washington. However, because Jackson gave this statement as a part of his guilty plea in exchange for leniency in prosecution, the jury had reason to doubt it. Also, the status of Jackson's statement was placed in question by his contradictory trial testimony in which Jackson denied that Washington was a participant. Still, the statement was a significant part of the prosecution's case. It was read to the jury at trial, the transcript of the statement was given to the jury, they had it into the jury room, and it was prominently addressed in the prosecution's closing statement.

In addition to Jackson's statement, there was evidence that corroborates Jackson's statement identifying Washington as the second robber. The car, the jacket, and the shoes with blood containing the victim's DNA all belonged to Washington. However, Washington provided explanations of how each item could have had the victim's blood on them without his being involved in the robbery. Washington asserted that he often kept items such as the fur-trimmed jacket and shoes in his car, which had been used by the assailants. One shoe only had a barely visible amount of the victim's blood which could have been the result of contact with Jackson's bloody shoes. Further, the Unbank surveillance camera showed that, contrary to his plea testimony, Jackson was wearing the fur-trimmed jacket. Washington does not appear on the video surveillance record, and no one else testified that he saw Washington with Jackson during the part of the day when the robbery occurred. Bridges only testified that he saw Washington in the car that morning, he could not identify who else was in the car when Jackson was dropped off that evening.

The question we face is whether the corroborating evidence is sufficiently substantial so that we can conclude that the failure to give an instruction clearly did not have a significant impact on the verdict. Although strong, the corroborating evidence here was the subject of conflicts and alternative explanations. We do not know whether the jury found the circumstantial evidence was sufficiently corroborative in convicting Washington, as the jury would be obliged to do if properly instructed, or whether the jury relied on Jackson's statement in finding Washington guilty and did not find the other evidence persuasive, or whether some combination of considerations led to the guilty verdict. We also note the district court's observations about the quality and sufficiency of the state's evidence. When appellant moved for a judgment of acquittal after the prosecution had rested, the district court denied the motion but stated: "The evidence tying Mr. Washington to the robbery is not overwhelming." After reviewing the evidence presented at trial, the district court concluded: "I can't speak to whether [the sufficiency of the evidence] would hold up on appeal or not . . . ."

The prosecution's case attached substantial importance to Jackson's initial statement. The jury had to decide which version of Jackson's story to believe. To do that, it had to consider and weigh all the other evidence as well. But it needed to be properly instructed on *how* to weigh all of the evidence, including Jackson's two statements. The accomplice instruction would give them an important part of that framework. Absent that instruction, the jury does not have the proper legal tools to make the assessment required of it. All things considered, we cannot with reasonable assurance conclude that a proper accomplice instruction would not have led the jury to discount the

accomplice statement and acquit Washington. Accordingly, we conclude that Washington has pointed to issues that demonstrate a reasonable likelihood that the failure to instruct the jury on accomplice testimony affected his substantial rights.

Finally, when an appellate court determines that there was plain error affecting the substantial rights of the defendant, the appellate court then looks to see whether the error should be addressed "to ensure fairness and the integrity of the judicial proceedings." *Clark*, 755 N.W.2d at 583 (citing *Reed*, 737 N.W.2d at 584). We observe that there are significant policy considerations that are served by the statutory limit on the use of accomplice testimony. The requirement that an accomplice's testimony be corroborated reflects an inherent distrust of the testimony of an accomplice, a person who "'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.'" *Clark*, 755 N.W.2d at 251 (quoting *Shoop*, 441 N.W.2d at 479). The statute requires that the district court "submit to the *jury* the question of whether the corroborative evidence is trustworthy . . . ." *Shoop*, 441 N.W.2d at 479 (emphasis added).

Here, not only was Jackson's testimony given in the context of a guilty plea in exchange for leniency but the district court observed that "[t]he evidence tying Mr. Washington to the robbery is not overwhelming." Our supreme court has recently reversed a conviction where the trial judge did not take the initiative to give an accomplice instruction consistent with the statute. *Clark*, 755 N.W.2d at 251. Based on the requirement of an accomplice instruction and the record in this proceeding, we conclude that the district court's omission of an accomplice jury instruction in this case

was plain error, that it's absence affects the fairness and integrity of Washington's conviction, and reverse and remand for a new trial.[3]

II.

Washington claims that there was insufficient evidence to support his conviction at trial. Where the evidence at trial was "legally insufficient" to support the conviction, "the only 'just' remedy . . . is the direction of a judgment of acquittal." *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150-51 (1978). In considering a claim of insufficient evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient" to allow a properly instructed jury to reach the verdict as they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb a verdict "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-477 (Minn. 2004) (quotation omitted). The state bears the burden of proving guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970).

[3] Appellant complains that no accomplice instruction was given regarding how the jury should evaluate Bridge's testimony. However, appellant does not claim that Bridges committed the crime *with* appellant and Jackson. Instead appellant argues that Bridges could have committed the crime with Jackson *instead* of appellant. "A witness who is alleged to have committed the crime *instead* of the defendant is, as a matter of law, not an accomplice under section 634.04." *State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006). Therefore, the failure to give the accomplice instruction in the context of Bridges's testimony was not error.

As the foregoing discussion indicates, this court has carefully reviewed this record. Although, as the district court observed, the evidence in this case is not overwhelming, the DNA linked Washington's shoe, jacket, and car to the crime, and Jackson's disputed statement can all be viewed as placing Washington at the crime scene actively participating in the robbery. When viewing the evidence in the light most favorable to a guilty verdict, reached after a proper accomplice instruction, we conclude that the jury could find Jackson's guilty plea testimony credible, find Jackson's contrary trial testimony and Washington's denial unpersuasive, and find that Jackson's accomplice testimony was adequately corroborated by persuasive evidence. Because, under the sufficiency-of-the-evidence analysis, this court examines the evidence in the light most favorable to a possible verdict, we conclude there is sufficient evidence to submit the case to the jury and that the district court did not err in denying the motion for a directed verdict of acquittal.

III.

Pro se appellant Washington argues that, for several reasons, admission of Jackson's guilty plea at his trial was reversible error. First, Washington argues that the district court improperly admitted Jackson's plea statement under Minn. R. Evid. 804(b)(3). That rule of evidence recognizes a hearsay exception for statements against interest. This argument by Washington is unclear and without merit because the district court admitted the transcript of Jackson's guilty plea into evidence under Minn. R. Evid. 801(d)(1)(A) (prior inconsistent statements of a witness). Under Minn. R. Evid. 801(d)(1)(A), admission of the out-of-court statement was proper because Jackson was

available for cross-examination, the guilty plea was inconsistent with his courtroom testimony, and the guilty plea was given under oath at a hearing.

Second, Washington argues that he was constitutionally entitled to have the district court determine whether Jackson's statement was voluntary before the district court admitted it. We note that at trial Washington did not object to the admission of the statement on that basis or request a determination of voluntariness. Regardless, we note that Jackson's guilty plea was preceded by a plea petition and that the district court accepted Jackson's guilty plea after Jackson stated that he understood the rights he was relinquishing. Because Jackson's statement appears from the record to be voluntary and there is no basis alleged for finding that the statement was not voluntary, Washington's appellate challenge to the admission of the statement on this ground is not meritorious.

Third, Washington argues that the references by the prosecution and the defense to Jackson's guilty plea created an aura of guilt which denied Washington a fair trial and denied him his constitutional right to a presumption of innocence. The Minnesota Supreme Court has held that "generally evidence of a plea of guilty, conviction or acquittal of an accomplice of the accused is not admissible to prove the guilt or lack of guilt of the accused." *State v. Cermak*, 365 N.W.2d 243, 247 (Minn. 1985). However, the court has distinguished the admission of a bare plea that might be used to establish mere guilt by association from the admission of the statement accompanying the plea. *State v. Dukes*, 544 N.W.2d 13, 18 (Minn. 1996) (holding the admission of an accomplice's plea transcript under Minn. R. Evid. 804(b)(3) was not error), *abrogated in part on other grounds*, *State v. Dahlin*, 695 N.W.2d 588, 595-96 (Minn. 2005). Recently,

the Minnesota Supreme Court upheld the admission of the entire guilty-plea transcript that was offered as a "first-hand narrative," in lieu of accomplice testimony when the plea transcript was admitted as a non-hearsay statement under Minn. R. Evid. 801(d)(1)(A). *State v. Caine*, 746 N.W.2d 339, 351 (Minn. 2008). In sum, the narrative of events accompanying a plea can be used as substantive evidence if that statement does not violate the rules of evidence.

IV.

A. Proof-Beyond-A-Reasonable-Doubt Instruction

Pro se appellant Washington argues that his defense attorney was ineffective, and the district court committed reversible error because of the proof-beyond-a-reasonable-doubt instruction to the jury.[4] The United States Constitution requires that a criminal defendant's guilt be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364, 90 S. Ct. at 1073. However, "trial courts are not bound to use any particular form of words to define the government's burden of proof as long as, taken as a whole, the concept of reasonable doubt is correctly conveyed to the jury." *State v. Smith*, 674 N.W.2d 398, 400 (Minn. 2004). When a jury instruction is not objected to at trial, the instruction is reviewed for plain error. *Id*. A plain-error review involves four factors; the first two are whether there was an error and whether that error was plain. *Reed*, 737 N.W.2d at 583.

[4] Washington does not explain how his representation was ineffective. Apparently, Washington is arguing that, because his attorney proposed the jury instruction that Washington is now challenging, his attorney was ineffective. For this reason, we first consider Washington's challenges to the jury instruction.

Washington specifically challenges the jury instruction which read:

> Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act.
>
> Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it.

This instruction was proposed by the defense and is a hybrid instruction combining a CRIMJIG instruction and an instruction used in federal courts. 10 *Minnesota Practice*, CRIMJIG 3.03 (2006); *Eighth Circuit Manual of Model Jury Instructions, Criminal*, 3.11 cmts. (West 2007). Although Minnesota courts favor the use of CRIMJIG instructions, without modification, such use is not mandatory. *Smith*, 674 N.W.2d at 401.

Washington argues that, because the foregoing instruction has a hybrid character, it is confusing and shifts the burden to the defendant. In making this argument, Washington repeatedly refers to what he calls the "two-inferences" language of the instruction. An example of a "two-inferences" instruction is the following: "[i]f you as a jury view the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, you as a jury should, of course, adopt the conclusion of innocence." *See United States v. Inserra*, 34 F.3d 83, 87 (2nd Cir. 1994). The instruction in this case is not a "two-inferences" instruction. Because we conclude that, as combined, the instruction here is neither confusing nor compromises the proof-beyond-a-reasonable-doubt standard, the use of the instruction was not plain error. Accordingly, we do not reach the ineffective-assistance-of-counsel claim.

B. Circumstantial-Evidence Instruction

Finally, appellant Washington objects to the instruction referring to circumstantial evidence. Washington argues that the district court's "articulated twist" in CRIMJIG 3.05 violated his rights and constituted plain error. The instruction stated:

> A fact may be proven either by direct or circumstantial evidence or both. The law does not prefer one form of evidence over the other.
>
> A fact is proven by direct evidence when, for example, it is proven by witnesses who testify as to what they saw, heard or experienced, or by physical evidence of the fact itself.
>
> A fact is proven by circumstantial evidence when its existence can be reasonably inferred from other facts proven in the case.

This is the language of CRIMJIG 3.05. 10 *Minnesota Practice*, CRIMJIG 3.05 (2006). Washington complains that the instruction fails to inform the jury that a conviction cannot be based on circumstantial evidence unless "the sum of the reasonable inferences therefrom is consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt." We acknowledge that this standard appears in decisions of the Minnesota Supreme Court in reviewing the sufficiency of the evidence. *See, e.g., State v. Gassler*, 505 N.W.2d 62, 68 (Minn. 1993) (holding that the "rational hypothesis" standard applies to sufficiency-of-the-evidence analysis on appeal but does not apply to jury instructions). However, the Minnesota Supreme Court has specifically held that the additional language is not required to properly instruct the jury.

Id.; *see also State v. Turnipseed*, 297 N.W.2d 308, 312 (Minn. 1980). Accordingly, we conclude that the instruction used here was not plain error.

Reversed and remanded.

Dated:

JOHNSON, Judge (dissenting)

I respectfully dissent from the opinion of the court. I would conclude, contrary to the majority's conclusion in part I, that Washington has not satisfied the requirements of the plain-error test with respect to the absence of a jury instruction concerning accomplice testimony.

As an initial matter, there is uncertainty in the law as to whether the district court was required to give an accomplice-testimony instruction in light of the fact that the inculpatory accomplice evidence was a pre-trial statement, specifically, the transcript of Jackson's guilty plea. It is an open question whether an accomplice's out-of-court statement requires a jury instruction to effectuate the purposes of section 634.04. *See State v. Henderson*, 620 N.W.2d 688, 701 (Minn. 2001). Even if that question were answered in the affirmative, there would be no reason to extend the principle to this case, in which the accomplice also gave oral testimony professing the defendant's innocence. Notwithstanding this uncertainty in the law, the state's responsive brief says, "There is no dispute that Johnny Jackson was Appellant's accomplice and an instruction was required." It is unclear whether the state has conceded only the first requirement of the plain-error test or both the first and the second requirements. If it is in dispute, I would conclude that Washington cannot satisfy the second requirement of the plain-error test because any error that may exist is not "clear" or "obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotation omitted).

In any event, Washington cannot satisfy the third requirement of the plain-error test. The absence of an accomplice-liability instruction does not affect a defendant's

substantial rights if other evidence sufficiently corroborates the accomplice evidence. *State v. Clark*, 755 N.W.2d 241, 252 (Minn. 2008); *State v. Reed*, 737 N.W.2d 572, 585 (Minn. 2007). Evidence corroborating an accomplice's testimony "need not, standing alone, be sufficient to support a conviction, but it must affirm the truth of the accomplice's testimony and point to the guilt of the defendant in some substantial degree." *Reed*, 737 N.W.2d at 584 (quotation omitted). Accomplice testimony may be corroborated by "[c]ircumstantial evidence" or other facts that "link the defendant to the crime." *Clark*, 755 N.W.2d at 254 (quotation omitted). "The precise quantum of corroborative evidence needed necessarily depends on the circumstances of each case . . . ." *Id.* at 253 (quotation omitted).

The evidentiary record in this case contains ample evidence corroborating Jackson's out-of-court statement that Washington committed the robbery with Jackson. It is undisputed that Washington's car was used by two men to travel to and away from the scene of the robbery. Also, Bridges testified that Washington and Jackson were together at Bridges's home in north Minneapolis on the morning of the robbery and that they left Bridges's home in a white car matching the description of Washington's car. And Bridges also testified that someone driving a white car dropped off Jackson at Bridges's home the evening of the robbery, shortly after the robbery occurred. This evidence generally corroborates Jackson's identification of Washington as the other robber and specifically corroborates that part of Jackson's statement in which he said that Washington dropped him off at Bridges's home after the robbery.

In addition, investigators found Washington's DNA mixed with the victim's DNA in a blood spot on the driver's-side armrest of the car. Investigators also found the victim's blood on Washington's shoes, which were seized during a search of Washington's residence. Similarly, investigators found the victim's blood on Jackson's shoes. This physical evidence corroborates that part of Jackson's statement in which he said that Washington repeatedly kicked the victim as he lay on the ground bleeding because Washington had hit him on the head with a crowbar. The jurors focused on this corroborating evidence when they asked the district court whether they could remove Washington's shoes from a plastic bag. The majority's insistence on "direct evidence" corroborating Washington's participation in the robbery, *see supra* at 8, is inconsistent with caselaw stating that "[c]ircumstantial evidence may be sufficient to corroborate the testimony of an accomplice." *Clark*, 755 N.W.2d at 254 (quotation omitted). Furthermore, there is no requirement that the state, to defeat a defendant's assertion of plain error, must have "overwhelming" evidence of the defendant's guilt. *See supra* at 11.

Moreover, the likelihood that the absence of an accomplice-testimony instruction affected the defendant's substantial rights in this case is significantly less than in the typical case in which an accomplice testifies only in support of the state's case and obtains a benefit for doing so. The caselaw seeks to ensure that juries do not rest their verdicts solely on evidence that may appear reliable but which the law deems to be inherently untrustworthy. *Clark*, 755 N.W.2d at 251. In this case, however, the jury had no illusions about the reliability of Jackson's inculpatory pre-trial statement because they

heard Jackson retract that statement while on the witness stand. The jurors were squarely confronted with Jackson's two versions of the robbery and had a full opportunity to decide which version to believe. Based on the trial transcript, it is not difficult to imagine that Jackson's trial testimony made a weak impression on the jurors. Jackson insisted that Washington did not take part in the robbery, but Jackson was completely unable to identify the other robber. He repeatedly claimed a bad memory and repeatedly asked to be excused before counsel had completed their questioning of him. The jury also may have considered the fact that Jackson and Washington had been friends since childhood. Moreover, Washington was effectively cross-examined concerning the presence of his car at the scene of the robbery and his prior inconsistent statements about the car. And the jurors could only speculate about how Washington's car was returned to him after Jackson was dropped off at Bridges's apartment. In my view, Washington has not carried his burden of persuasion on the plain-error test by establishing that there is a "reasonable likelihood" that the absence of an accomplice-liability instruction "had a significant effect on the jury's verdict." *Reed*, 737 N.W.2d at 583 (quotation omitted). To require a new trial in these circumstances undermines the jury's prerogative to decide whether Jackson's oral testimony was credible.

Finally, the majority's analysis conflates the plain-error test and the harmless-error test. Under the plain-error test, the defendant bears the burden of demonstrating that there is a "reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *Reed*, 737 N.W.2d at 583 (quotation omitted). By contrast, under the harmless-error test, the error requires reversal unless the error is

"harmless beyond a reasonable doubt," which is true "if the guilty verdict actually rendered was surely unattributable to the error." *State v. Rodriguez*, 754 N.W.2d 672, 682 (Minn. 2008) (quotation omitted). The majority improperly relies on *State v. Shoop*, 441 N.W.2d 475 (Minn. 1989), in framing the issue as "whether the omission of an accomplice-jury instruction 'might have prompted the jury . . . to reach a harsher verdict than it might have otherwise reached.'" *Supra* at 7 (quoting *Shoop*, 441 N.W.2d at 481). The *Shoop* court made that statement in the context of the harmless-error test, which was appropriate in that case because the district court refused the defendant's request for an accomplice-testimony instruction. *Id.* at 479-82. But the plain-error test applies if a defendant did not request an accomplice-testimony instruction, as is true in this case. *Clark*, 755 N.W.2d at 251-52; *Reed*, 737 N.W.2d at 584 & n.4. The two tests are "equivalent" only in that "[t]he 'affects substantial rights' language of the third plain error factor is the same language used to define harmless error." *Reed*, 737 N.W.2d at 583 (quoting Minn. R. Crim. P. 31.01). The two tests are significantly different in their respective allocations of burdens. *Id.* at 583-84.

Here, Washington bears the burden of establishing that the error affected his substantial rights, *see id.*, which requires him to affirmatively show that there is a "reasonable likelihood" that the error "had a significant effect on the jury's verdict," *see id.* at 583 (quotation omitted). But the majority frames the issue in the negative by asking "whether . . . we can conclude that the failure to give an instruction clearly did *not* have a significant impact on the verdict." *Supra* at 10 (emphasis added). And the majority concludes its analysis of the third requirement by stating, "we cannot with reasonable

assurance conclude that a proper accomplice instruction would *not* have led the jury to discount the accomplice statement and acquit Washington." *Supra* at 10-11 (emphasis added). The majority's approach essentially implements the harmless-error rule, which applies to "[a]ny error, defect, irregularity or variance which does *not* affect substantial rights," Minn. R. Crim. P. 31.01 (emphasis added), rather than the plain-error rule, which applies to "[p]lain errors or defects affecting substantial rights," Minn. R. Crim. P. 31.02.

For these reasons, I would conclude that Washington has not carried his burden of persuasion with respect to the plain-error test and, therefore, would affirm the conviction.