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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0231

State of Minnesota,
Respondent,

vs.

Brandyn Brett Phillips,
Appellant.

Filed April 28, 2009
Affirmed
Bjorkman, Judge

Cook County District Court
File No. 16-CR-06-197

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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Considered and decided by Bjorkman, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

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

BJORKMAN, Judge

On appeal from his conviction of third-degree criminal sexual conduct, appellant argues the district court erred in not sua sponte instructing the jury on accomplice testimony, and that the prosecutor committed misconduct by improperly questioning witnesses about appellant's use of different names and asking appellant "were they lying" questions during cross-examination. We affirm.

FACTS

During the summer of 2005, P.M. and her 14-year-old daughter, S.M., were campground hosts at the East Bearskin Campground in Cook County. Near the end of July, appellant Brandyn Phillips, then age 38, met P.M. and S.M. while he was a guest at the campground. Appellant represented to P.M. and S.M. that he was 25 years old. Appellant and S.M. thereafter engaged in an intimate relationship that lasted approximately six months.

After the relationship ended, appellant made repeated harassing phone calls to S.M. and P.M., and P.M. contacted the authorities. Appellant was subsequently charged with third-degree criminal sexual conduct.

At trial, S.M. testified that she met appellant when she was 14 years old, that she enjoyed spending time with him, and that he was aware she was going to be a sophomore in high school in the fall of 2005. S.M. stated that she first had sexual contact with appellant on August 17, 2005, four days before her 15th birthday. When asked whether her mom condoned the relationship, S.M. testified that

> she was okay at first but after she found out that we were having sex she didn't exactly go along with it. . . . [S]he supported me because I'm her daughter, and she . . . knew that if she would have put a stop to it, it just would have put a void between the two of us.

P.M. testified that she introduced S.M. to appellant as her "14-year-old daughter" and that appellant had expressed to her that "he thought [S.M.] looked older than 14." P.M. testified that she was furious when she learned that S.M. and appellant "had gone all the way." P.M. testified that she told them both that she "absolutely [did not] approve" of the relationship, but that if they were "going to be insistent" she wanted them to use the condoms she had provided to S.M.

Several defense witnesses testified that S.M. was introduced to them, or introduced herself to them, as being age 19 or older. And appellant presented a mistake-of-age defense. He testified that P.M. introduced S.M. to him as "her 19-year-old daughter," and that he "had no reason to disbelieve it." Appellant testified that he thought S.M. was preparing to go to college and was finishing up two remaining high school credits in order to do so. He admitted that he "lied to [P.M. and S.M.] directly about [his age]." Appellant further acknowledged that he legally changed his name to Brandyn Brett Phillips in 1998.

The jury found appellant guilty of the charged crime. This appeal follows.

D E C I S I O N

I. The district court did not err in failing to sua sponte give an accomplice-testimony jury instruction.

Appellant first argues that he was entitled to an accomplice instruction because P.M. aided and abetted him in commission of the charged crime by introducing him to S.M., encouraging appellant and S.M. to go hiking together, buying S.M. condoms, and taking her to the doctor. Appellant did not request an accomplice jury instruction at trial.

A defendant cannot be convicted based on the uncorroborated testimony of an accomplice. Minn. Stat. § 634.04 (2008). "An accomplice is one who could have been charged with and convicted of the crime with which the accused is charged." *State v. Swanson*, 707 N.W.2d 645, 652 (Minn. 2006). For a witness to be considered an accomplice, it should appear "that the witness co-operated with, aided, or assisted the person on trial in the commission of that crime either as principal or accessory." *Id.* at 653 (quotation omitted); *see also* Minn. Stat. § 609.05, subd. 1 (2008) ("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."). Mere presence at the scene, inaction, knowledge, and passive acquiescence are not enough. *State v. Palubicki*, 700 N.W.2d 476, 487 (Minn. 2005).

The accomplice-testimony-corroboration requirement is based on the fact that "the credibility of an accomplice is inherently untrustworthy." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004). "An accomplice instruction must be given in any criminal case in

which any witness against the defendant might reasonably be considered an accomplice to the crime." *Id.* (quotation omitted).

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 requires the court to determine whether 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 (quotation omitted).

Appellant contends that P.M.'s involvement was more than mere acquiescence because she facilitated the relationship. We disagree. P.M. testified at trial that she was "really upset" about the relationship, but that S.M. said she would continue the relationship and P.M. did not want to shame her daughter. P.M.'s actions—providing condoms and taking S.M. to the doctor—were aimed at protecting S.M. rather than assisting appellant in committing a crime. Moreover, appellant has not cited any rule or caselaw that requires an accomplice instruction under facts such as those present here. Under these circumstances, we conclude that the district court's failure to give an accomplice instruction was not plain error.

Even if the district court erred in not instructing the jury on accomplice testimony, appellant has not demonstrated that such error affected his substantial rights. *See State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002) (stating that an error in jury instruction is prejudicial if there is "reasonable likelihood" that the proper instruction "would have had

a significant effect on the verdict of the jury"). An "appellant bears the 'heavy burden' of showing that the error was prejudicial to the degree that 'giving of the instruction in question would have had a significant effect on the [jury's] verdict.'" *State v. Meldrum*, 724 N.W.2d 15, 20 (Minn. App. 2006) (quoting *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998)), *review denied* (Minn. Jan. 24, 2007).

Appellant asserts that an accomplice instruction would have affected the verdict because "[P.M.'s] weakened credibility as an accomplice would have caused the jury to view her self-serving testimony more skeptically and to test whether it was corroborated." But an accomplice instruction does not tell the jury to disregard the alleged accomplice's testimony or that the defendant's guilt may only be proved by the corroborating evidence. 10 *Minnesota Practice*, CRIMJIG 3.18 (2006). The accomplice-instruction rule does not require that the corroborative evidence, standing alone, be sufficient to support a conviction. Rather, such evidence must "affirm the truth of the accomplice's testimony and point to the guilt of the defendant in some substantial degree." *State v. Sorg*, 275 Minn. 1, 5, 144 N.W.2d 783, 786 (1966).

That standard is met here. P.M.'s testimony that appellant was aware of S.M.'s true age was corroborated by several other witnesses, including S.M. Additionally, P.M.'s son and his wife both testified that, as of at least late December 2005, appellant was aware that S.M. was 15 years old. Because P.M.'s testimony is corroborated by other evidence in the record, appellant is unable to establish that the district court's omission of the instruction affected his substantial rights. *See Reed*, 737 N.W.2d at 584-

85 (stating that "the concerns underlying the accomplice corroboration instruction were largely mitigated at trial" where corroborating evidence existed in the record).

II. Appellant is not entitled to a new trial based on alleged prosecutorial misconduct.

Appellant next claims that he is entitled to a new trial because the prosecutor elicited inappropriate testimony regarding his name change and asked him "were they lying" questions during cross-examination. We review appellant's unobjected-to prosecutorial-misconduct claims for plain error. *State v. Ramey*, 721 N.W.2d 294, 299, 302 (Minn. 2006). If appellant can establish that an error occurred and that the error was plain, the burden shifts to the state to establish that the misconduct did not prejudice the defendant's substantial rights. *Id*. at 302. The state meets this burden if it can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Id*.; *Griller*, 583 N.W.2d at 741.

A. Appellant's use of different names

Appellant argues that the prosecutor's questioning of various witnesses about the fact that appellant legally changed his name and has used different names in the past was misconduct because it inflamed the jury and unfairly prejudiced him. We disagree. Appellant's credibility was a primary issue in this case. He openly admitted that he lied to S.M. and P.M. about his age, and the state impeached him with evidence that he provided a false name to a police officer. Evidence that appellant has used different names, and the reasonable inferences to be drawn from this evidence, is highly relevant to appellant's veracity. Moreover, appellant's admission that he lied about his age and his

prior conviction for providing false information to the police were likely far more damaging than any reference to his use of multiple names. Therefore, even if the prosecutor erred in questioning appellant about his use of other names, there is no indication the questions impacted the outcome of the case.

B. "Were they lying?" questions

Appellant further argues that the prosecutor committed misconduct by asking him "were they lying" questions during cross-examination. Appellant challenges three portions of the cross-examination.

The first exchange relates to appellant's testimony that P.M. introduced S.M. to him as her 19-year-old daughter:

> PROSECUTOR: At that time [P.M.] testified that she introduced herself and her daughter to you as 14 years old. Do you recall her saying that?
> APPELLANT: There was no introductory at that point. We'd already been introduced.
> PROSECUTOR: Mr. Phillips, do you recall her saying that to you -- I mean saying that on the stand?
> APPELLANT: I believe I do recall her saying it - -
> PROSECUTOR: Thank you.
> APPELLANT: -- on the stand, yes.
> PROSECUTOR: Okay. Um, are -- is it your contention that she was lying about that?
> APPELLANT: Yes.

The prosecutor followed a similar line of questioning regarding when the first sexual encounter occurred:

> PROSECUTOR: Did you hear the testimony from [S.M.] when she was on the stand that you had sexual intercourse with her prior to the time she turned 15?
> APPELLANT: I did hear that.

PROSECUTOR: Do you believe she was lying at that time?
APPELLANT: I think it's a mistaken memory. I don't--
PROSECUTOR: Her memory is mistaken.
APPELLANT: I don't -- I'm not going to call anyone a liar. Um, I think that's --
PROSECUTOR: Again --
APPELLANT: -- just a mistaken memory.
PROSECUTOR: Okay. So you think she made a mistake in her memory.
APPELLANT: Yes.

The third exchange related to S.M.'s testimony that appellant gave her lubricant as a birthday gift:

PROSECUTOR: Is it your testimony that you in fact did not give her sexual lubricant?
APPELLANT: I would not term it lubricant. I would say --
PROSECUTOR: It's a yes or no question. Did you give her some kind of sexual lubricant or not?
APPELLANT: No.
PROSECUTOR: Okay. So she's either lying or mistaken in that regard.
APPELLANT: No. The words are being used improperly.
PROSECUTOR: Okay. It's just a semantical issue, in your opinion.
APPELLANT: It was a flavored lotion. It was not a lubricant.

Generally, questions intended to elicit testimony from one witness about the credibility of another witness are improper because they are argumentative and have no probative value. *See State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999) (stating that, in general, "were they lying" questions are improper). But the supreme court has held that such questions may be permissible when "the defense [holds] the issue of the credibility

of the state's witnesses in central focus." *Id.*; *see also State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005) (reaffirming the *Pilot* rule).

In *Morton*, the defendant's testimony contradicted that of other witnesses on the issues of whether the defendant committed the alleged crime and the occurrence of conversations about which the other witnesses testified. 701 N.W.2d at 235. But Morton did not "state or insinuate that [the witnesses] were deliberately falsifying any of [their testimony]." *Id.* The supreme court concluded that Morton's denial that he committed the crime or had certain conversations was "not enough to justify the state's use of 'were they lying' questions . . . because Morton did not put the witnesses' credibility at issue." *Id.*

We recently analyzed the issue of what it means to put a witness's credibility in "central focus" in *State v. Leutschaft*, 759 N.W.2d 414, 419-23 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). There, rather than offering merely contradictory testimony, Leutschaft stated that the victim's version of events was "absolutely untrue." 759 N.W.2d at 420. We concluded that this statement "appeared to hold in central focus [the victim's] credibility in the narrow sense of truthfulness versus lying, and [Leutschaft] arguably insinuated that she was fabricating aspects of the incident." *Id.* at 423. Because Leutschaft's testimony "arguably opened the door to the prosecutor's right to confirm what the defense in the case was," the propriety of the prosecutor's questions was "reasonably debatable" and thus not plain error. *Id.*

We conclude that this case is closer to *Morton* than *Leutschaft*. While appellant's testimony contradicted the testimony of P.M. and S.M., he did not expressly accuse them

of lying or insinuate that they were "deliberately falsifying" their testimony. *Morton*, 701 N.W.2d at 235. His responses to the second and third "were they lying" questions, in which he refers to "mistaken memory" and confusion in language, support our conclusion that appellant's testimony did not challenge the witnesses' credibility "in the narrow sense of truthfulness versus lying." *Leutschaft*, 759 N.W.2d at 423. As in *Morton*, the prosecutor's "were they lying" questions in this case did not assist the jury in evaluating appellant's credibility and constituted an improper request for appellant to comment on P.M.'s and S.M.'s credibility, amounting to plain error.

Even though the prosecutor's questions were improper, we conclude after reviewing the record that the questions did not affect appellant's substantial rights. *See Morton*, 701 N.W.2d at 235-36 (concluding that unobjected-to "were they lying" questions were not prejudicial because there was not a reasonable likelihood that the absence of the misconduct would have had a significant effect on the outcome). Appellant's credibility was significantly undermined by his admissions that he lied to P.M. and S.M. about his age and provided a false name to a police officer. And there is also substantial evidence in the record that indicates appellant was or should have been aware of S.M.'s actual age when he engaged in a sexual relationship with her, including: S.M.'s own testimony; P.M.'s testimony; the testimony of S.M.'s other family members; and the fact that appellant knew S.M. attended high school in Grand Marais, had picked her up there, and had flowers delivered to her there. Under these circumstances, there is no reasonable likelihood that the jury's verdict would have been different if the

prosecutor had not asked appellant "were they lying" questions, and therefore appellant's substantial rights were not affected.

Affirmed.