STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1373

State of Minnesota,
Respondent,

vs.

Joseph Timothy Soltis,
Appellant.

Filed August 25, 2009
Affirmed
Connolly, Judge

Washington County District Court
File No. 82-CR-07-1381

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Doug Johnson, Washington County Attorney, Andrew J. Jarmuz, Assistant County Attorney, Washington County Government Center, 14949 62nd Street North, P.O. Box 6, Stillwater, MN 55082 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

CONNOLLY, Judge

Appellant challenges his convictions of aiding and abetting the use of a minor in a sexual performance or pornographic work, in violation of Minn. Stat. § 617.246, subd. 2 (2008), arguing that (1) the district court's failure to provide the jury with an accomplice instruction is plain error that affected his substantial rights, and (2) there is insufficient evidence to support his convictions. We affirm.

FACTS

On November 28, 2007, appellant Joseph Timothy Soltis was charged with two counts of aiding and abetting the use of a minor in a sexual performance or pornographic work. A third count was later added "in chambers." Following a jury trial, appellant was found guilty on all three counts. He was sentenced to 36 months in prison on each count, consecutive to a sentence he was currently serving, and consecutive to each other. But the sentence for the count that was added "in chambers" was vacated because the state failed to either file an amended complaint, or amend the complaint on the record.

At the time of the offenses, appellant was incarcerated at the Minnesota Correctional Facility at Oak Park Heights pursuant to a conviction for first-degree murder. The complaint alleges that appellant arranged for D.J. to photograph C.B. and C.B.'s minor daughter, A.B.[1] The complaint states that A.B. was photographed naked, and engaged in sexual conduct with C.B. The complaint states that A.B. told

[1] C.B. testified that A.B. was born on February 3, 1992.

investigators that D.J. came to her residence on four occasions from January to May 2007 and, that, on three of these occasions, she was photographed by D.J.

At trial, Stillwater Police Sergeant Jeffery Magler testified that he interviewed appellant as part of his investigation into the complaint. Sergeant Magler testified that appellant "came right out" and admitted to arranging the photo sessions through D.J., who was his friend. According to Sergeant Magler, appellant: "felt that [A.B.] was 16 or 17" at the time of the photo sessions, stated that D.J.'s role was to "take photographs and provid[e] some clothing," and that he planned to use the "photos for different outlets in an attempt to make some money."

Stillwater Police Investigator Stephen Hansen was also involved in the investigation into the complaint. Investigator Hansen testified he made a request to prison officials for all recorded phone conversations from appellant to D.J.'s cell phone. Investigator Hansen testified that, while there were numerous phone conversations from January 2007 onwards, he was able to identify that the photo sessions occurred on April 4, 18, and 24 from the content of those calls. Minnesota Department of Corrections Investigator Vince Krenz explained how the department was able to link the information provided to Investigator Hansen to appellant. He testified that each offender is given an identification number that he uses when making calls. When making a call, an offender types in his identification number, dials an outside number, and the call is recorded. The date, time, length, and the outside number called is also recorded.[2] Thus, the department is able to link the recorded phone conversations, as well as the date and time they were

[2] The party receiving the call is notified that it originates from Oak Park Heights.

made, to the offender identification number used to make the calls. These calls were eventually transferred onto a compact disc, which was then given to Investigator Hansen.

D.J. testified that she had known appellant for approximately six years and was familiar with his voice. D.J. admitted that she took photographs of C.B. and A.B. on two or three occasions in March or April 2007. She testified that the photographs were taken in C.B.'s living room and that appellant was on the phone with her while she was taking the photos. D.J. stated that appellant directed what poses C.B. and A.B. should take. D.J. testified that, during the photo sessions, C.B. and A.B. both exposed their breasts. She also testified that A.B. was exposed from the waist down, and that C.B. and A.B. touched each other's breasts. She also testified that a sexual toy was involved in the photo sessions and that both women held it and kissed it. The state played portions of the recordings referred to in the previous paragraph at trial.

The colloquy between the prosecutor and D.J. is as follows:

> [Tape playing.]
>
> PROSECUTOR: You've had a chance to listen to the recording a little bit more, can you identify at this point--
> D.J.: Yes.
> PROSECUTOR: --Who's talking?
> D.J.: Yes.
> PROSECUTOR: Who is talking?
> D.J.: It was myself and [appellant.]
> PROSECUTOR: The defendant[?]
> D.J.: Yes.
>
> [Tape playing.]
>
> PROSECUTOR: I want to pause for a moment again. Did you hear any other voices that we haven't identified yet?
> D.J.: Just [C.B.] and the girl, [A.B.]

[Tape playing.]

PROSECUTOR: [D.J.,] I want to ask you a couple more questions about that recording. You said that these photographing incidents happened maybe April or May of 2007, is that correct?
D.J.: Yes
PROSECUTOR: Do you have any reason to dispute that this incident that we just listened to happened on April 4, 2007?
D.J.: No.
PROSECUTOR: To your knowledge, is this a complete and accurate recording of that segment of the phone call?
D.J.: Yes.
PROSECUTOR: And you were taking photos during that time, is that right?
D.J.: Yes.
PROSECUTOR: Can you describe briefly what was going on during this segment here, if you recall?
D.J.: Pretty much just pictures of [A.B.] in either panties and a t-shirt type top or like I think it was panties and a top, just in different poses.
PROSECUTOR: Your honor, I do have two other recordings of approximately 15 minutes each that I want to play. I don't know if we want to--
COURT: I think we should take about a ten minute recess, so we'll take a short recess at this time.

[Recess.]

. . . .

PROSECUTOR: [D.J.,] I'm going to play another recording here and once we get into a little bit I'm going to ask you again to see if you recognize the voices involved. Okay?

[Tape playing.]

PROSECUTOR: Okay. We've had a chance to listen a little bit to this clip. Do you recognize voices?
D.J.: It sounded like mine, Joseph's and [C.B.'s.]
PROSECUTOR: Joseph who?
D.J.: [Appellant.]

PROSECUTOR: Okay.

[Tape playing]

PROSECUTOR: [D.J.,] you had an opportunity to hear that recording. Do you believe that's a true and accurate recording of that telephone call?
D.J.: Yes.
PROSECUTOR: And do you have any reason to dispute that that call is from April 18, 2007?
D.J.: No.
PROSECUTOR: And that was a call to your cell phone?
D.J.: Yes.
PROSECUTOR: And during that session what were you doing?
D.J.: Taking photographs.
PROSECUTOR: [D.J.], I'm going to play one more recording here, and as we start this again I'm going to ask you to identify the voices, if you can.

[Tape playing.]

PROSECUTOR: [D.J.], do you recognize any voices on this recording?
D.J.: Yes, myself and [appellant.]

[Tape playing.]

PROSECUTOR: [D.J.,] to your knowledge is that a true and accurate recording of that telephone call.
D.J.: Yes
PROSECUTOR: Do you have any reason to dispute that that call is from April 24, 2007?
D.J.: No.
PROSECUTOR: And that was a call to your cell phone?
D.J.: Yes.
PROSECUTOR: And we heard some description of what was going on during that phone call. Do you recall what if anything [A.B.] and [C.B.] were doing.
D.J.: They were posing.
PROSECUTOR: Was there any touching going on?
D.J.: I think they touched breasts, but other than that, not real touching, no.

> PROSECUTOR: You were taking photos during that time?
> D.J.: Yes.

When asked about what happened to the photos, D.J. explained that she had taken them with a digital camera and that she later deleted them.

Outside of the jury's presence, the district court explained that the recording was too difficult for the court reporter to transcribe and that, additionally, it would not be provided to the jury. Appellant's counsel then expressed concern about identifying exactly what portion of the tape was played before the jury. Counsel for the state responded that he played (1) file number 52, April 4, time 15:05:42, (2) file number 197, April 18, 15:23:26, and (3) file number 177, April 24, 15:33:57.[3] The district court then "received [the compact disc] for the file purposes only and only to be read on appeal or by the Court, and only as to the entries on the CD that were read on to the record by [counsel for the state.]" Appellant made no objection.

C.B. testified that she had initially thought A.B. would be posing for appellant's "supposed Harley clothes catalog." But that "things changed" and that she was scared of appellant and did not know what to do besides follow his instructions. C.B. explained that she was instructed to touch A.B. externally, suck on her breasts, and put baby oil all over her. She also went on to explain that she was told that A.B. needed to "Nair her genital area and her body." When asked if appellant was involved in the photo session, C.B. responded that:

> [Appellant] was on the phone. . . . He was directing--well, [D.J.] would call me on my cell phone threeway so we both

[3] This information corresponds to the file names contained on the compact disc.

> heard what he was saying, and he would instruct me on how he wanted the pictures done, and at times conferring with [D.J.] making sure that it was being done the way he said.

After C.B. testified, the state rested.

This appeal followed, with appellant arguing that (1) the district court's failure to provide the jury with an accomplice instruction constituted plain error that affected his substantial rights, and (2) there is insufficient evidence to support his conviction.

D E C I S I O N

I. The district court's failure to provide the jury with an accomplice instruction did not affect appellant's substantial rights.

When, as is the case here, a defendant does not object to the omission of an accomplice 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).

Respondent concedes that it was plain error for the district court not to provide the jury with an accomplice instruction. As a result, it is necessary for us to determine if this plain error affected appellant's substantial rights. In this case, it did not. *See State v. Meldrum*, 724 N.W.2d 15, 20 (Minn. App. 2006) (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.'") (quoting *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998)), *review denied* (Minn. Jan. 24, 2007).

The absence of an accomplice instruction does not affect a defendant's substantial rights if other evidence sufficiently corroborates the accomplice evidence. *Clark*, 755 N.W.2d at 252; *Reed*, 737 N.W.2d at 585. 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). "Circumstantial evidence may be sufficient to corroborate the testimony of an accomplice." *Id.* at 254 (quotation omitted).

The corroborating evidence must do more than show that the offense was committed or the circumstances of its commission. Minn. Stat. § 634.04 (2008). But it does not need to establish a prima facie case or even relate to every element of the offenses charged. *State v. Lemire*, 315 N.W.2d 606, 610 (Minn. 1982). Rather, the corroborating evidence need only be sufficient to "restore[] confidence in the accomplice's testimony, confirming its truth and pointing to the defendant's guilt in some substantial degree." *State v. Her*, 668 N.W.2d 924, 927 (Minn. App. 2003), *review denied* (Minn. Dec. 16, 2003). Such corroboration may include evidence of the defendant's motive and opportunity to commit the crime, his proximity to the place

where it was committed, and his association with others involved when it suggests joint participation. *Id.*

Here, both appellant and respondent agree that the witnesses in need of the accomplice instruction were D.J. and C.B. Thus, it is necessary to determine if their testimony is sufficiently corroborated by other evidence. In this case, the three recorded phone conversations that were played for the jury support a finding of appellant's guilt to a substantial degree. Although they were not transcribed, the phone conversations are contained in the record. Appellant complains that it "cannot be determined from the record which portion of the phone calls were played for the jury." This is incorrect. The prosecutor indicated that he was playing three separate phone calls for the jury. He later made a record of the file number, date, and time of each segment that he played. Appellant did not object to this. Regarding the first call, D.J. testified that the segment played was "complete and accurate." Regarding the last two phone calls, the state explicitly stated on the record that it intended to play two phone calls that were approximately 15 minutes in length. The last two phone calls were then played for the jury. Given that these phone calls are approximately 15 minutes in length, and that the state said it was playing phone calls that were 15 minutes in length, it would be unreasonable to suspect that the phone calls were not played in their entirety.

Turning to the content of the phone calls, it is exceptionally disturbing. It highlights the depravity of appellant's crimes and the criminal nature of his acts. From the phone calls it is clear that appellant, whose participation in the calls was established by prison records and D.J.'s identification of his voice, is directing the continual

victimization of a minor child. He displays absolutely no concern for the well-being of A.B. He gives explicit directions as to how A.B. should pose, what acts she should engage in, and from what angles the photographs should be taken. He provides these directions to D.J., C.B., and, in some situations, A.B. herself. He continuously uses degrading language when giving these directions.

Appellant instructed D.J. to take numerous photographs, telling her that out of every 20 that are taken, there might only be 3 or 4 good ones. He is very specific when giving instruction regarding the poses A.B. should engage in. He asks questions of the participants to make sure that A.B. is in fact in the poses that he desires her to take. These poses are graphic in nature. As the testimony indicated, he can be heard instructing that A.B. display nudity above and below the waist and engage in sexual conduct with her mother. From the tape, appellant can be heard giving very explicit instructions as to what acts A.B. should undertake with a sexual toy used in the final photo session, a topic only briefly referred to in the testimony at trial.

Even if only a portion of the phone calls were played for the jury, one would be hard-pressed to find a single minute in those conversations which does not provide corroboration for the testimony of D.J. and C.B. While the photographs were not introduced at trial, there is no requirement that the actual photographs be admitted to provide independent corroboration for accomplice testimony in situations in a case of aiding and abetting the use of a minor in a sexual performance or work. The recorded phone conversations provided sufficient corroboration for the testimony of D.J. and C.B.

And the testimony of the police sergeant and investigators assigned to this case also corroborates the testimony of D.J. and C.B. Police Sergeant Magler testified that appellant: "came right out and wanted to take full responsibility, he said he orchestrated the photo sessions while he was in prison," believed that A.B. was 16 or 17 years old at the time of the photo sessions, said C.B. was an active participant, said D.J.'s role was to take photographs, and explained that he planned on using the photos to make money. This corroborates the testimony of C.B. and D.J., who explained that appellant directed the photo session by phone, that C.B. and her juvenile daughter were participants while D.J. took photographs, that appellant believed A.B. was a minor, and that there were discussions among the three adults about using the photos to make money. Investigators Hansen and Krenz's testimony linked appellant's identification number to the calls made to D.J.'s cell phone on April 4, 18, and 24. Investigator Hansen testified that he listened to these phone conversations and concluded that photo sessions took place on these dates. This testimony corroborates the testimony of D.J. and C.B. that appellant was directing the photo sessions by phone while at Oak Park Heights.

Based on the above, we find that the evidence is sufficient to "restore[] confidence in the accomplice's testimony, confirming its truth and pointing to the defendant's guilt in some substantial degree." *Her*, 668 N.W.2d at 927.

II. There is sufficient evidence to support appellant's convictions.

Appellant contends the evidence is insufficient to support his convictions. We disagree.

When considering a sufficiency of the evidence claim, this court 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, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). Further, this court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

For many of the same reasons already discussed, there is sufficient evidence to support appellant's convictions. Most notable is the phone conversations played before the jury. From these conversations, a jury could reasonably conclude that appellant was guilty of aiding and abetting the use of a minor in a sexual performance.

The elements of Minn. Stat. § 617.246, subd. 2 are: (1) the victim was a minor when the sexual performance or pornographic work was created, (2) the defendant promoted, employed, used, or permitted the minor to engage in or assist others to engage in posing or modeling, alone or with others, in a sexual performance or pornographic work, (3) the defendant knew or had reason to know that the conduct intended was a sexual performance or pornographic work, and (4) the defendant's acts took place on or about an identified time and place. *See* 10 *Minnesota Practice*, CRIMJIG 12.78 (outlining elements).

Here, appellant admitted and C.B. testified that A.B. was a minor at the time of appellant's criminal behavior. Next, the phone conversations indicate that appellant promoted the use of A.B. in a sexual performance or pornographic work. At a minimum,

a jury could reasonably conclude that he directed the manner in which A.B. was photographed. Third, given how explicit his instructions were, a jury could reasonably conclude that A.B.'s conduct was intended for a sexual performance or pornographic work. Finally, appellant's phone records from Oak Park Heights identify the time his acts took place, and they establish that appellant was on a phone in Oak Park Heights at the time his acts took place.

Appellant cites *U.S. v. Villard*, 885 F.2d 117 (3d Cir. 1989) for the proposition that the actual photographs are necessary to support a conviction. But that case is distinguishable because it, unlike the present case, did not contain recorded phone conversations of the defendant directing the sexual exploitation of a child.

Because the district court's failure to provide the jury with an accomplice instruction did not affect appellant's substantial rights, and because there is sufficient evidence to support appellant's convictions, we affirm.

Affirmed.