STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1530

State of Minnesota,
Respondent,

vs.

Dellrae NMN Mashek,
Appellant.

Filed December 8, 2009
Affirmed
Stauber, Judge
Dissenting, Klaphake, Judge

Otter Tail County District Court
File No. 56CV082023

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

David Hauser, Otter Tail County Attorney, Otter Tail County Courthouse, Suite 310, 121 West Junius Avenue, Fergus Falls, MN 56537 (for respondent)

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

Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Worke, Judge.

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

STAUBER, Judge

On appeal from her convictions of two counts of first-degree arson, appellant argues that (1) the district court committed plain error in failing to provide the accomplice jury instruction; (2) the court erred when it denied appellant's motion to introduce a recording of appellant's statements to investigators; and (3) the state failed to prove beyond a reasonable doubt that she committed arson in the first degree. We affirm.

FACTS

In November 2004, appellant Dellrae Mashek opened a deli and variety store called the Pelican Dollar Store. On January 26, 2006, D.J., who lived in an apartment above the store, smelled and saw smoke shortly after coming home from work. D.J. left his apartment and called 911 to report a fire in the store. When firefighters arrived at the scene, the store was closed and the doors were locked. Although firefighters were able to extinguish the fire within a few hours, the building was essentially destroyed in a matter of minutes.

After the fire was extinguished, investigators attempted to determine the cause of the fire. According to the Pelican Rapids fire chief, the hot and fast-moving nature of the fire raised several "red flags." The chief subsequently requested the assistance of the state fire marshal. Upon investigating the scene, Deputy State Fire Marshal John Steinbach found the remains of at least six plastic charcoal lighter fluid containers on three pallets located in the store's rear storage room. Based on the heavy fire damage to that area, Steinbach concluded that the fire originated on the pallets containing the

combustible merchandise. Steinbach further concluded that the pallets were intentionally set on fire.

In April 2006, appellant was charged with first-degree arson pursuant to Minn. Stat. § 609.561, subd 1 (2004) (dwelling). The complaint was later amended to add a second charge of arson in the first-degree pursuant to Minn. Stat. § 609.561, subd. 2 (2004) (other buildings). At trial, the state offered testimony from S.L., S.A., and M.C. S.L. and S.A. were employees of the store. M.C. testified that she was friends with appellant, and that, although she was not an employee of the store, she spent many hours each weekday there because she enjoyed the company of the store's employees and customers.

S.A. and M.C. testified that the store sold lighter fluid, and that the product was maintained on a display rack in the store between two coolers. M.C. further testified that on the day of the fire, she helped appellant put various items, including the lighter fluid, into boxes that were placed on pallets in the back storage area. Although S.A. and S.L. recalled moving items into the storage room on January 26, both employees claimed that they did not move lighter fluid to the storage room on that date. S.A. and S.L. also testified that they did not recall seeing lighter fluid in the back room.

S.L. testified that she went home at 4:15 because business was slow, and S.A. claimed that she left at about 5:20. Both S.L. and S.A. also testified that they did not smell smoke or notice anything unusual when they left work for the day. After S.L. and S.A. left, appellant and M.C. were the only ones left in the store. At about 5:40, L.B., a frequent customer, stopped in on her way home. According to L.B., there was a younger

Somali man in the store who appeared ready to purchase something. M.C. also testified that she saw the Somali man in the store, but claimed that she lost sight of him and assumed that he must have left the store. L.B. claimed that when she left the store, she did not notice anything unusual in the store and did not see anybody outside of the store.

M.C testified that after the customers left, appellant locked the front door and closed out the cash register while M.C. used the restroom. The two then left the store through the front door at about 5:50, and appellant locked the door. There was no access into the store from the apartments above or the basement below. When the front door deadbolt was locked, it was impossible for anyone locked inside the store to leave.

M.C. testified that after the two women left the store, they got into their separate vehicles and appellant drove away first. According to M.C., she then left the store, but turned around after remembering she needed to go to the nearby liquor store. M.C. testified that as she drove by the store, she saw D.J. appearing frantic in front of the store and stopped to investigate. D.J. then told M.C. that the store was on fire.

Brian Poykko, a consulting engineer and fire investigator hired by American Family Insurance to investigate the cause of the fire, testified that the electrical system was not the cause of the fire. Steinbach also testified at trial and claimed that based on his investigation, the fire started in the back room where the lighter fluid was placed on the pallets. Steinbach opined that "[t]he merchandise on [the] three pallets, along with the ignitable liquids, were intentionally set on fire based on the remaining burn patterns."

In addition to the testimony concerning the cause of the fire, the state presented evidence that, at the time of the fire, the store owed $500 to the gas company and $2,000

to the electric company. Evidence was also presented showing that over the last few months, appellant's sales at the store had substantially declined. Moreover, appellant's personal financial situation was problematic. Appellant had approximately $123,000 in credit card debt, and at the time of the fire, two of the credit-card companies had obtained a judgment against appellant for part of the debt.

Finally, the state presented evidence that the fire was reported to appellant's insurance company, and Heidi Anderson, the claims adjuster, testified that she started processing the claim as if it were going to be paid. Anderson testified that after pictures were taken of the contents of the building, the next step was to ask the insured for an inventory of personal property, sworn proof of loss, and a document giving the insurance company access to appellant's financial records. According to Anderson, appellant filed a proof of loss claiming the following losses: (1) $365,326 for the building; (2) $70,000 for the building's contents; (3) $47,500 for loss of business income; and (4) $1,130 for "other." However, appellant refused to sign the document giving the insurance company access to her financial records. Anderson testified that, as a result, she sent appellant a letter denying her claim because (1) she failed to receive the requested information; and (2) the cause of the fire was determined to be non-accidental. Anderson claimed that she never heard back from appellant, and appellant never filed for arbitration or appraisal to challenge the denial of her claim.

Following the trial, the jury found appellant guilty of both charged arson counts. Appellant moved for a new trial, which was denied. The district court subsequently sentenced appellant to 48 months in prison. This appeal followed.

D E C I S I O N

I.

District courts have considerable latitude in formulating jury instructions. *State v. Mahkuk*, 736 N.W.2d 675, 681 (Minn. 2007). This court reviews jury instructions "in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). A jury instruction is erroneous "if it materially misstates the law." *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005).

Appellant argues that the district court committed reversible error by failing to provide the jury with the accomplice-testimony jury instruction. Because appellant did not object to the instructions at trial, this court reviews the unobjected-to instruction under the plain-error standard. *See State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007). Under this standard, appellant must establish that there was "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). An error is plain when it is "clear" or "obvious." *Id.* at 688. "[A]n error affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *Vance*, 734 N.W.2d at 656.

At trial, the state argued that appellant set the fire by herself, or was aided and abetted by M.C. The state also claimed that M.C. knew appellant was going to start the fire, but was trying to protect appellant. Based on these arguments, the prosecutor specifically asked the district court to include language in both charged offenses that the jury could find appellant guilty if the fire was caused by appellant "or another [for]

whose act [appellant] is liable." The prosecutor also asked that the jury be instructed regarding accomplice liability.

Appellant argues that because the state treated M.C. as an accomplice, Minnesota law requires that in order to find appellant guilty, M.C.'s testimony must be corroborated by other evidence. Thus, appellant argues that the district court erred by failing to instruct the jury that M.C. was an accomplice and failed to completely instruct the jury on the law of accomplices.

A defendant cannot be convicted based on the uncorroborated testimony of an accomplice. Minn. Stat. § 634.04 (2004). "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). 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).

Here, the state concedes that it argued that appellant set the fire herself, or was aided and abetted by M.C. But the state argues that the accomplice-testimony instruction

is "not required when a defendant argues that the purported accomplice is someone who committed the crime instead of the defendant." To support its claim, the state cites *Swanson*, in which the supreme court stated that "[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." 707 N.W.2d at 653 (emphasis omitted) (stating that in order for a witness to be an accomplice for purposes of Minn. Stat. § 634.04, there must be some evidence that the defendant and witnesses were accomplices); *see also State v. Evans*, 756 N.W.2d 854, 877 (Minn. 2008) (concluding that witness was not an accomplice because defense had argued witness was alternative perpetrator). Stated another way, if a defendant argues at trial that a witness, but not the defendant, committed the alleged crime, *and if the state does not seek to prove that the witness was an accomplice to the defendant's offense*, the defendant's version of the facts makes the witness an alternative perpetrator rather than an accomplice. *See Evans*, 756 N.W.2d at 877.

The state contends that because appellant argued at trial that M.C. or someone else set the fire, the supreme court's language in *Swanson* and *Evans* establishes that the district court was not required to give the accomplice-testimony instruction. We disagree. In *Swanson* and *Evans*, the state did not seek to prove that the witness was an accomplice to the defendant's offense. In contrast, the state here specifically argued that M.C. might have assisted in setting the store on fire, and the state requested that the jury be instructed on accomplice liability. "[A]s a rule, [district] 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. Clark*, 755 N.W.2d 241,

251 (Minn. 2008) (quoting *Strommen*, 648 N.W.2d at 289). Here, not only was it reasonable to consider M.C. as an accomplice, but the state specifically argued that M.C. might have been an accomplice. Therefore, the district court erred in failing to provide the accomplice-testimony jury instruction.

The state also contends that even if it was error not to provide the accomplice-testimony jury instruction, the error is not plain because there is no binding precedent on the issue. Again, we disagree. As stated above, the supreme court has unambiguously stated that "[a]s a rule, [district] 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." *Id.* (quoting *Strommen*, 648 N.W.2d at 289). We find it difficult to imagine how the court could more clearly state the rule. Based on the state's arguments at trial that M.C. was an accomplice, the supreme court's language in *Clark* is directly applicable to the circumstances here. Accordingly, the district court committed plain error in failing to give the accomplice-testimony instruction.

Appellant argues that the failure to give the accomplice-testimony instruction affected her substantial rights. We disagree. The pertinent part of the accomplice jury instruction requires that it is the testimony that tends to convict the defendant of the crime that must be corroborated. 10 *Minnesota Practice*, CRIMJIG 3.18 (2006).

Here, the testimony elicited from M.C. that tended to convict appellant was M.C.'s testimony that she helped appellant move lighter fluid into the storage room. A review of the record reveals that the testimony regarding the lighter fluid was corroborated by other evidence. Store employees testified that the store sold lighter fluid, and that it was

typically displayed on a rack in the store between two coolers. Store employees also testified that they assisted appellant in moving some products into the back room. Although the employees could not recall specifically moving lighter fluid into the back room, Steinbach testified that lighter fluid was discovered on pallets in the back room. Steinbach also testified that the lighter fluid was intentionally set on fire and caused the building to burn, and photos of the burned pallets and lighter fluid were admitted into evidence. Accordingly, with this evidence, appellant cannot show that the error affected her substantial rights.

II.

Evidentiary rulings rest within the discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). On appeal, the appellant bears the burden of establishing that the district court abused its discretion and that appellant was thereby prejudiced. *Id.*

A witness with first-hand knowledge of what was said in a conversation may permissibly testify as to what he heard. Minn. R. Evid. 602. In so testifying, a witness may legitimately rely on a writing to refresh his or her memory. Minn. R. Evid. 612. The district court has wide discretion in permitting use of memoranda to refresh a witness's memory and in the references made thereto. *Ostrowski v. Mockridge*, 242 Minn. 265, 274, 65 N.W.2d 185, 191 (1954).

On February 3, 2006, appellant was interviewed by Steinbach and Officer Jeff Stadum. The interview was taped and a transcript was prepared. During trial, the prosecutor asked Steinbach and Officer Stadum about the statements appellant made

during the February 3 interview. When counsel for appellant cross-examined Officer Stadum about the statements, the transcript of the February 3 interview was marked as an exhibit. The transcript was then used by Officer Stadum to refresh his memory during re-direct by the state.

After the close of the state's case, appellant moved to introduce the recording of appellant's February 3 interview. Appellant claimed that it was not being offered for proof of the matter asserted, but "to show the context in which the statement was given." The prosecutor objected on the basis that her statements could not be admitted without appellant being subject to cross-examination. The district court agreed and denied appellant's motion to admit the recording.

Appellant argues that the state opened the door for the defense to request the admission of appellant's recorded statement. Thus, appellant argues that the district court erred in denying her request to introduce the recording.

"Opening the door" occurs when "one party by introducing certain material . . . creates in the opponent a right to respond with material that would otherwise have been inadmissible." *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006) (quoting 8 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 32.54 (3d ed. 2001)). "The doctrine is essentially one of fairness and common sense, based on the proposition that one party should not have an unfair advantage and that the factfinder should not be presented with misleading or distorted representation of reality." *State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007) (quotation omitted). "The doctrine must be applied cautiously, however,

especially when it is being used to impeach a criminal defendant." *Valtierra*, 718 N.W.2d at 436.

Appellant argues that because the prosecutor opened the door by examining Officer Stadum and Steinbach about her transcribed statements made during the February 3, 2006, interview, the fairness requirement of Minn. R. Evid. 106 required the district court to admit the recordings into evidence. This rule provides that "[w]hen a . . . recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at *that time* of any other part . . . which ought in fairness to be considered." Minn. R. Evid. 106 (emphasis added). But, "Minn. R. Evid. 106 is not applicable unless portions of the actual recording have been introduced into evidence." *State v. Bauer*, 598 N.W.2d 352, 368 (Minn. 1999). Here, the state did not introduce any part of the actual recordings into evidence. Therefore, Minn. R. Evid. 106 does not require that the recording be admitting into evidence, and the district court did not abuse its discretion in denying appellant's motion to admit the recording. *See State v. Mills*, 562 N.W.2d 276, 286-87 (Minn. 1997) (recognizing that the "rule of completeness" applies only when it is necessary to give the jury the full understanding of the facts and it may not be used to introduce otherwise irrelevant statements).

III.

An appellate court will not disturb the jury's verdict if the jury, considering the presumption of innocence and the requirement of proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). The court reviews the record to "determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

"A conviction may be based on circumstantial evidence and will be upheld if the reasonable inferences from such evidence are consistent only with [the] defendant's guilt and inconsistent with any rational hypothesis except that of his guilt." *State v. Anderson*, 379 N.W.2d 70, 75 (Minn. 1985) (quotation omitted). Circumstantial evidence must "form a complete chain which, in the light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt." *State v. Wahlberg*, 296 N.W.2d 408, 411 (Minn. 1980). "To successfully challenge a verdict based on circumstantial evidence, [an appellant] must show his claim is consistent with a rational hypothesis other than guilt." *State v. Bias*, 419 N.W.2d 480, 486 (Minn. 1988). A jury normally is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *State v. Berndt*, 392 N.W.2d 876, 880 (Minn. 1986).

A conviction for arson in the first degree is warranted when one "unlawfully by means of fire or explosives, intentionally destroys or damages any building that is used as

a dwelling at the time the act is committed." Minn. Stat. § 609.561, subd. 1 (2004). Arson convictions often rely on circumstantial evidence because typically no one is at the scene when the fire is discovered. *State v. Jacobson*, 326 N.W.2d 663, 665 (Minn. 1982). Whether the accused had the motive, means, and opportunity to commit arson is important in determining guilt when the sufficiency of the evidence is challenged. *See State v. McDonald*, 394 N.W.2d 572, 574–75 (Minn. App. 1986) (affirming first-degree arson conviction where appellant and victim fought during the day, appellant made threatening comment to victim, and witnesses saw appellant's car near the scene of the fire around the time the fire was discovered), *review denied* (Minn. Nov. 26, 1986).

Appellant does not argue that the fire was unintentional, but instead argues that the state did not establish that she was the one who set the fire. We disagree. The state presented testimony that appellant and M.C. were the last two people in the store, that appellant locked the store when they left for the day on the 26th, and that there was no access to the store from the apartments above or the basement below. The state also presented testimony that the store carried lighter fluid, and M.C. testified that she helped appellant move boxes of lighter fluid into the storage room on the day of the fire. Steinbach testified that after the fire, lighter fluid containers were discovered on pallets in the back room, and that based on his investigation, the fire began when the pallets were intentionally set on fire. Evidence further established that appellant's personal financial situation was in shambles, and that the store had substantially decreased profits over the past few months. Finally, the state presented evidence that appellant attempted to collect the insurance from the fire, but when she refused to turn over her financial records to the

insurance company, her claim was denied. Accordingly, the evidence, when viewed in the light most favorable to the verdict, is sufficient to support the jury's guilty verdicts.

Affirmed.

KLAPHAKE, Judge (dissenting)

I respectfully dissent. The state argued that appellant either set the fire or was aided and abetted by Clark. "The general test for determining whether a witness is an accomplice . . . is whether he could have been indicted and convicted for the crime with which the accused is charged." *State v. Lee*, 683 N.W.2d 309, 314 (Minn. 2004) (quotation omitted). When the state argues that Clark aided and abetted appellant, it is arguing that Clark is criminally liable to the same extent that appellant is. 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."). In short, the state not only argued that Clark could have been indicted for the same crime and that therefore she was appellant's accomplice, but it requested that the district court instruct the jury that appellant could be found guilty if the fire was caused by her "or another for whose act appellant is liable," a clear reference to Clark.

Having established Clark as a possible accomplice, the state now argues that the court's failure to instruct the jury that accomplice testimony must be independently corroborated was not plain error. Minn. Stat. § 634.04 (2008) states that "[a] conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Whether there is sufficient corroboration is a question of fact we entrust to the jury; because of this and because of the inherent unreliability of accomplice

testimony, we require the trial court to give an accomplice-testimony instruction. *State v. Clark*, 755 N.W.2d 241, 251 (Minn. 2008).

The majority contends that although the district court plainly erred by failing to give an accomplice instruction, appellant's substantial rights were not affected because there was sufficient corroboration of Clark's testimony. I disagree. The corroborating evidence cited by the majority merely shows "the commission of the offense or the circumstances thereof," both examples of testimony insufficient to corroborate accomplice testimony. *See* Minn. Stat. § 634.04. None of the corroborating evidence cited by the majority establishes that appellant committed the offense, except for the testimony of Clark. Clark's testimony was critical because she alone testified that appellant moved the lighter fluid on the day of the fire and that the lighter fluid was in the storage room where the fire started; the store employees claimed that they had not moved it, did not know if appellant did, and did not see the lighter fluid in the back room, and Steinbach's testimony merely describes the probable source of the fire. Clark's testimony is essential to tying appellant to the source of the fire, but is inherently unreliable because she is the supposed accomplice. The other testimony does nothing to corroborate Clark's testimony.

Because the jury was not instructed about the inherent unreliability of Clark's testimony, we cannot state with assurance that the error did not have a significant effect on the jury's verdict. I would reverse and remand this matter for a new trial.