

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37284

STATE OF IDAHO,)	2011 Unpublished Opinion No. 506
)	
Plaintiff-Respondent,)	Filed: June 6, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
MICHAEL DON HOPPER,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Bradly S. Ford, District Judge.

Judgment of conviction for aiding and abetting burglary and aiding and abetting grand theft, affirmed.

Molly J. Huskey, State Appellate Public Defender; Spencer J. Hahn, Deputy Appellate Public Defender, Boise, for appellant. Spencer J. Hahn argued.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent. Lori A. Fleming argued.

LANSING, Judge

Michael Don Hopper appeals from his judgment of conviction entered pursuant to a jury verdict finding Hopper guilty of aiding and abetting burglary and aiding and abetting grand theft.

I.

BACKGROUND

Hopper was charged with aiding and abetting a burglary, Idaho Code §§ 18-204, 18-1401; and aiding and abetting grand theft, I.C. §§ 18-204, 18-2403(1), 18-2407(1)(b); for his involvement in stealing a financial transaction card and checks from a car parked at a residence in Parma, Idaho, in the early morning hours of September 9, 2005.

The primary witness at Hopper’s trial was Sandra Williams. She testified that at the time of the offense she was living with her long-time boyfriend, Antonio Avila (hereinafter Avila Senior). Avila Senior’s son, also named Antonio Avila (hereinafter Avila Junior), came to Avila

Senior the day before the theft and asked if he and Hopper could borrow a car belonging to Avila Senior and Williams. Avila Senior initially told him no but later changed his mind after Avila Junior told Avila Senior that he would bring “stuff” back to Avila Senior. It was never clarified at trial what exactly Avila Junior promised to bring to Avila Senior. Avila Junior and Hopper did not return until the early morning hours of September 9, the next day, apparently without bringing Avila Senior anything. Avila Senior then told Williams that he was going out with Avila Junior and Hopper to put gasoline in the car. After they returned a few hours later, Avila Junior and Hopper left again for another couple of hours before returning around noon. At this time, Hopper told Williams that Hopper and Avila Junior had stolen a purse out of a car parked at a residence the night before and gave Williams some checks from that theft. Williams took the checks, forged them, and gave them to Avila Senior to cash, which he did. Williams testified to being a methamphetamine addict for fifteen years prior to trial and admitted that she accepted and forged the stolen checks to pay for her drug habit.

The State produced two more witnesses. One of the victims testified that his property was stolen on the date specified in the charging documents; that some of his property was recovered in Nevada; and that his financial transaction card was used twice the morning of the theft, once at 4:09 at a gas station in Caldwell and once at 7:48 at a gas station in Boise. The third witness for the State, Officer Doug Winfield, testified that he observed Hopper driving Avila Senior’s car at 5:10 the morning of the theft. Winfield had initiated a traffic stop of the vehicle. Winfield testified that Hopper gave his address as a location that was about two miles from the Boise gas station where the financial transaction card had been used.¹ The State also introduced a surveillance video that showed Avila Junior used the financial transaction card at the Caldwell gas station to put fuel in the car belonging to Avila Senior and Williams. The video

¹ The trial transcript indicates that the prosecutor asked the detective for the distance between Hopper’s stated address and “2689 South Pepper Way,” and the officer responded that it was a little over two miles. This questioning did not refer to the significance of the “2689 South Pepper Way” address. However, other testimony specified that the Boise gas station where the financial transaction card was used was located at “2689 South Federal Way.” Given that the street number is the same for both of these addresses and that there is not a “South Pepper Way” in Boise, it is apparent that the prosecutor was referring to the address of the Boise gas station and the “Pepper” street name is apparently a transcription error. The prosecutor commented in closing argument at trial that, “interestingly, after [Avila Junior and Hopper] left [Williams’ and Avila Senior’s residence] sometime around 8:00, the credit card is used within a couple of miles of Hopper’s residence over in Boise.”

showed Avila Junior to be the passenger, and it does not show the driver. However, about one hour later, Winfield observed Hopper driving the vehicle.

At the conclusion of Winfield's testimony, the State rested, and Hopper moved to dismiss. Hopper argued that Williams was an accomplice and a conviction could not be had, pursuant to I.C. § 19-2117, upon her testimony unless it was corroborated by other evidence that independently connected him with the commission of the offense. The State agreed that Williams' testimony was the only evidence that connected Hopper to the charged crimes but argued that Williams was not an accomplice and therefore her testimony did not need independent corroboration to be sufficient for a conviction. Hopper then argued that the jury should be allowed to determine whether Williams was an accomplice, and asked the court to so instruct the jury. The court determined that there was no evidence to support a finding that Williams was an accomplice and therefore denied Hopper's request to submit the issue to the jury. Hopper did not testify nor call any other witnesses in his defense. The jury found him guilty on both counts.

On appeal, Hopper argues that the district court erred in refusing to submit to the jury the question whether Williams was an accomplice and that the State committed prosecutorial misconduct amounting to fundamental error in closing arguments.

II.

ANALYSIS

A. Denial of Jury Instruction on Accomplice Testimony

Hopper argues that enough evidence was presented from which the jury could have inferred that Williams was an accomplice in that the car used in the offense was jointly owned by her and Avila Senior; Avila Senior agreed to allow the use of the car after Avila Junior and Hopper agreed to bring back "stuff" for Avila Senior; Williams has been addicted to methamphetamine for at least fifteen years and committed the offense of possessing the stolen checks in this case to pay for her drug habit; and Hopper gave the checks directly to Williams, not Avila Senior. Hopper asserts that from this the jury could have inferred that Williams agreed to loan the car to Hopper and Avila Junior so they could commit a burglary and give her some of the stolen property in payment for allowing them to use the car.

Whether a jury was properly instructed is a question of law over which we exercise free review. *State v. Severson*, 147 Idaho 694, 710, 215 P.3d 414, 430 (2009); *State v. Young*, 138

Idaho 370, 372, 64 P.3d 296, 298 (2002); *State v. Mack*, 132 Idaho 480, 483, 974 P.2d 1109, 1112 (Ct. App. 1999). As our Supreme Court stated in *Severson*:

A trial court presiding over a criminal case must instruct the jury on all matters of law necessary for the jury's information. I.C. § 19-2132. In other words, a trial court must deliver instructions on the rules of law that are "material to the determination of the defendant's guilt or innocence." *State v. Mack*, 132 Idaho 480, 483, 974 P.2d 1109, 1112 (Ct. App. 1999). This necessarily includes instructions on the "nature and elements of the crime charged and the essential legal principles applicable to the evidence that has been admitted." *State v. Gain*, 140 Idaho 170, 172, 90 P.3d 920, 922 (Ct. App. 2004). Each party is entitled to request the delivery of specific instructions. However, such instructions will only be given if they are "correct and pertinent." I.C. § 19-2132. A proposed instruction is not "correct and pertinent" if it is . . . "not supported by the facts of the case." *State v. Olsen*, 103 Idaho 278, 285, 647 P.2d 734, 741 (1982).

Id. at 710-11, 215 P.3d at 430-31.

A defendant cannot be convicted based on the testimony of an accomplice unless the testimony is corroborated by other evidence that independently tends to connect the defendant with the commission of the offense. I.C. § 19-2117; *Mack*, 132 Idaho at 483, 974 P.2d at 1112. Where the evidence raises a genuine issue as to whether a witness is an accomplice, the district court must submit the issue to the jury for resolution and instruct the jury accordingly. *Matthews v. State*, 136 Idaho 46, 50, 28 P.3d 387, 391 (Ct. App. 2001); *Mack*, 132 Idaho at 483, 974 P.2d at 1112. However, where it is clear from the evidence that a witness is an accomplice, the court should so conclude as a matter of law and instruct the jury accordingly. *Mack*, 132 Idaho at 483, 974 P.2d at 1112. An accomplice is:

a person who intends to promote or assist in the commission of a crime and who either directly commits the acts constituting the crime or who, before or during its commission, aids, assists, facilitates, promotes, encourages, counsels, solicits, invites, helps or hires another to commit the crime. Mere presence at, acquiescence in, or silent consent to, the planning or commission of a crime is not . . . sufficient to make one an accomplice.

Mack, 132 Idaho at 484, 974 P.2d at 1112 (quoting Idaho Criminal Jury Instruction 313). Some aiding, abetting, or encouragement of the criminal act is essential to make a person an accomplice. *State v. Ruiz*, 115 Idaho 12, 17, 764 P.2d 89, 94 (Ct. App. 1988). "A bystander's mere acquiescence in, or silent consent to, the commission of an offense, however reprehensible the crime may be, is not sufficient to make that person an accomplice." *Id.* Thus, an accessory after the fact is not an accomplice. *State v. McCabe*, 101 Idaho 727, 729, 620 P.2d 300, 302

(1980); *State v. Murphy*, 94 Idaho 849, 851, 499 P.2d 548, 550 (1972); *State v. Grimmett*, 33 Idaho 203, 212, 193 P. 380, 382 (1920).

Hopper contends that the question whether Williams was an accomplice should have been submitted to the jury because we have held that such a jury instruction must be given when there is “evidence from which the jury could have inferred” that a witness was an accomplice. *Mack*, 132 Idaho at 484, 974 P.2d at 1113. While that proposition of law is correct, it does not call for a jury instruction on accomplice testimony where there is no evidence from which the jury could infer that the witness was involved in a criminal enterprise until after the charged offense was completed. An illustrative case is *McCabe*, where the defendant stole 700 pounds of frozen meat and later gave it to his sister and her husband with whom he was living at the time. Our Supreme Court held that the sister and husband’s subsequent act of selling a portion of the meat at best made them accessories after the fact but not accomplices because the crimes for which the defendant was charged, grand larceny and burglary, had been completed prior to involvement or awareness of the sister and her husband. *McCabe*, 101 Idaho at 729, 620 P.2d at 302.

In this case, the only testimony concerning Williams’ connection with the crime was from Williams herself and a victim. The victim’s testimony was limited to a vague reference that there was “supposedly” a “four-some” that “committed this crime upon us,” which included Williams. Williams herself admitted that she was “involved” to the extent that she forged checks that Hopper gave her after the theft and directed Avila Senior to cash them, knowing that they were stolen. However, no evidence was admitted that Williams encouraged or facilitated the theft before or during its commission. Contrary to Hopper’s argument, there is no evidence from which the jury could have inferred that Williams knew about the theft and encouraged the theft by loaning her car to the perpetrators. The evidence at trial indicated that only Avila Senior was involved in the decision of whether to loan Hopper and Avila Junior the car, and Hopper and Avila Junior promised to bring something to only Avila Senior. That Williams owned the car and silently acquiesced to allowing the boys to use it does not indicate or suggest that Williams actively encouraged or facilitated the crime, nor that she even had knowledge that Hopper and Avila Junior were about to commit a crime. Williams’ subsequent acceptance and forging of checks was not a part of the charged offenses. Much like the situation in *McCabe*, Williams can at best be labeled as an accessory after the fact for receiving stolen property and subsequently

committing her own crimes ancillary to that, but she cannot be deemed an accomplice to the crimes with which Hopper was charged for actually breaking into the victims' car and physically stealing their property. We therefore find no error in the trial court declining to submit to the jury the issue of whether Williams was an accomplice.

B. Prosecutorial Misconduct in Closing Argument

During his initial closing argument, the prosecutor discussed a variety of reasons why the jury should believe Williams' testimony despite her methamphetamine addiction and stealing to support that addiction. The prosecutor cited Williams' demeanor while being cross-examined and the fact that her testimony that Hopper was driving the car was corroborated by an officer. The prosecutor then summarized his argument by stating:

Folks, those are some of the reasons why you can accept and should accept Sandra Hopper's--Sandra Williams'--Sandra Williams' testimony, who sat here and was cross-examined, she was raked over the coals, but it was unrebutted.

The burden of the State is to prove Mr. Hopper guilty, beyond a reasonable doubt.

If you disbelieve Sandra Williams, you can't do it. But you can and should believe Sandra Williams, and find the defendant guilty.

Thereafter, in rebuttal closing argument, the prosecutor responded to Hopper's argument that the State was prosecuting Hopper based solely on an accusation from an unreliable source by stating:

If I have to have a witness like Sandra Williams come in and testify, because that's the kind of person that the defendant hung out with, that's the kind of person that he trusted, and if I have some corroborating evidence, circumstantial evidence that supports that, another jury is going to hear it. Another jury should hear it.

Am I supposed to not charge somebody who is responsible--directly responsible for the burglary and theft just because I have somebody making an accusation only? Well, maybe if that's all I have, just a simple accusation. But if I have corroborating evidence, if I had any doubt about it, about the testimony, the cross-examination erased any doubt.

. . . I don't think he [defense counsel] may have fair accusations, but that's part of a defense attorney's job to kind of cloud the issue, blame the State, to blame the police. He couldn't blame the police here, he could only blame me.

. . . .

Another diversion: Sandra not charged in Idaho. Well, it would have been pretty hard since she's caught with the checks in Nevada. They are being charged in Nevada. We could have charged her based on her statement that they were given to her in Idaho, and could have charged her with a forgery, the one that she wrote out by hand assuming all the evidence added up.

But she is on felony probation--I think we talked about that earlier. She is not free to do anything she wants.

Hopper argues that the above comments were improper vouching for a witness, false statements, and “an attack on defense attorneys and their function.” Because Hopper made no objection at trial to these alleged acts of prosecutorial misconduct, he must establish that these claims of error are reviewable under Idaho’s fundamental error doctrine.

In *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010), the Idaho Supreme Court adopted a three-part definition of fundamental error:

(1) the defendant must demonstrate that one or more of the defendant’s unwaived constitutional rights were violated; (2) the error must be clear and obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant’s substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

Id. at 226, 245 P.3d at 978 (footnote omitted). Thus, on a claim of fundamental error a defendant must first show that the alleged error “violates one or more of the defendant’s unwaived constitutional rights” and that the error “plainly exists” in that the error was plain, clear, or obvious. *Id.* at 228, 245 P.3d at 980. If the appellate record is insufficient to show clear error, “the matter would be better handled in post-conviction proceedings.” *Id.* at 226, 245 P.3d at 978. If the alleged error satisfies the first two elements of the *Perry* test, the error is reviewable. *Id.* To obtain appellate relief, however, the defendant must further persuade the reviewing court that the error was not harmless, i.e., that there is a reasonable possibility that the error affected the outcome of the trial. *Id.* at 226, 228, 245 P.3d at 978, 980. In the context of prosecutorial misconduct, according to *Perry*, “[w]here a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from the evidence, this impacts a defendant’s Fourteenth Amendment right to a fair trial,” and hence is reviewable as fundamental error. *Id.* at 227, 245 P.3d at 979.

1. Vouching

Hopper argues that the prosecutor vouched for Williams’ testimony, thereby inviting the jury to substitute the prosecutor’s opinion as to Williams’ credibility for their own and abandon their core mission of fact finding, in violation of Hopper’s Sixth Amendment right to a jury trial. He so characterizes the comments that the jury “can and should believe Sandra Williams” and

that Williams' testimony was corroborated: "I have corroborating evidence, if I had any doubt about it, about the testimony, the cross-examination erased any doubt."

Though it is improper for prosecutors to express a personal opinion and belief about the credibility of a witness, they are entitled to ask jurors to draw reasonable inferences from the trial evidence about a witness's credibility. *State v. Felder*, 150 Idaho 269, 272-73, 245 P.3d 1021, 1024-25 (Ct. App. 2010); *State v. Priest*, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995).

Hopper's claim of vouching misconduct is not reviewable as fundamental error because it is not plain, clear, or obvious that the prosecutor was asking the jury to render a decision based on the prosecutor's personal opinion or belief rather than asking the jury to draw reasonable inferences from the trial evidence concerning Williams' credibility. The first objected-to comment came at the end of a long recitation concerning a variety of reasons, all arising during the course of trial, for why the jury should believe Williams' testimony despite her methamphetamine addiction and stealing to support that addiction. The prosecutor discussed Williams' demeanor while being cross-examined, the consistency with which she told her story while under cross-examination, the insignificance of her inability to recall certain details, and the corroboration of her testimony that Hopper was driving the car by an officer who saw Hopper driving it. Viewed in context, the first comment was a simple summation of the prosecutor drawing reasonable inferences for the jury from the evidence arising during the course of trial, a permissible comment on the evidence. The same can be said for the second comment, which again discusses how Williams' testimony was corroborated and emphasizes the outcome of cross-examination. Because we find no error, much less plain, clear, or obvious error in these remarks of the prosecutor, Hopper has not shown fundamental error.

2. False statements

Hopper next takes issue with the prosecutor's statement indicating that Williams was being charged in Nevada for her crimes related to the stolen property. Hopper argues this statement was either false or based on facts not in evidence. Hopper further argues that if this statement was true, then Williams lied in her testimony on this issue, and the prosecutor's failure to make the court aware of this lie would itself violate Hopper's constitutional right to due process and a fair trial because a prosecutor has a duty to correct false testimony.

Williams testified that she and Avila Senior had attempted to leave Idaho for Arizona because she was "wanted" by law enforcement. However, she was jailed while passing through

Elko, Nevada, for “transport to [Idaho].” She was also asked if she had been “charged with any crimes associated with the burglary and theft of their checks, and transaction cards,” to which she responded that she had not. On cross-examination, Williams stated she was not “charged with a crime as a result of what [Williams] did with all of these things.” Williams also clarified that the reason she was “wanted” by Idaho law enforcement, and therefore fleeing to Arizona, was for her part in a burglary where she and her sister stole beer from a store. She admitted that she was caught with the stolen checks in Elko, Nevada. Thereafter the following exchange took place between defense counsel and Williams:

Q. You were involved in stealing and getting rid those [sic] people’s personal property, weren’t you?

A. Yes, I was, but I didn’t accuse nobody else.

Q. How much time in prison did you spend for stealing those folks’ property?

....

Q. Did you get in trouble for stealing those folks’ property?

A. Yes, I did.

Q. What kind of trouble did you get in?

A. I was in jail for 127 days.

Q. For what?

A. What?

Q. For what?

A. For all of my charges.

Q. Well, wait a minute. You just told me that you weren’t charged with anything as a result of this.

A. I wasn’t charged with this.

Q. So, in other words, they put you in jail because you were on felony probation?

A. I wasn’t on felony probation yet.

Q. What did you do the jail time for, then?

A. I was in there waiting for sentencing on the burglary.

Q. Okay. So while you were waiting sentencing on a burglary, you committed another crime and they gave you 127 days in jail; is that what happened?

A. No.

Q. Tell me what happened.

A. I was out when I did all this--I was not in jail.

Q. So you were on pretrial release?

A. Yes.

Q. And being released on your own recognizance with the judge so you could report to somebody, you then committed another crime; is that right?

A. That’s right.

Q. That’s to pay for your drug habit; right?

A. Yeah.

....

Q. Okay. So what you are saying is your only responsibility was you and Big Tony forging some of those folks' checks; right?

A. Yes.

Q. You didn't take anything else or sell anything else of their personal property?

A. No, I did not.

....

Q. And you didn't have anything happen to you as a result of this; right?

A. Yes.

Q. Because you were--were you an informant?

A. No.

....

Q. Were you given some sort of deal to be an informant for the prosecutor?

A. No.

....

Q. You are not facing any current charges?

A. No, I am not.

Q. And the understanding was that if you testified against these folks, nothing was going to happen to you; right?

A. That's right.

As can be seen from this passage, neither defense counsel's questions nor Williams' responses were a model of clarity. Williams seemed to give contradictory answers as to whether she was charged or "got in trouble" for her actions related to the stolen checks. She said that she had served 127 days for "stealing those folks' property," even though she was not facing any current charges. She also testified that she was jailed in Nevada after being found with the stolen checks in her possession. As Hopper asserts, this testimony does not equate to evidence that Williams was "charged in Nevada" for possessing, forging, or passing the victim's checks. Nevertheless, in view of the ambiguity of the testimony, we conclude that Hopper has not met his burden to show on appeal that the prosecutor's misstatement was so "clear and obvious" as to meet the standard for fundamental error, such that we should address the issue despite the absence of any objection below.

Hopper also asserts that the prosecutor falsely stated in closing argument that Williams' testimony was "corroborated." Hopper points out that during his argument against Hopper's request for a jury instruction requiring corroboration of accomplice testimony, the prosecutor admitted that Williams' testimony linking Hopper to the charged offenses was not corroborated.

Therefore, Williams asserts, the prosecutor's claim of corroboration during closing argument was false and invited the jury to decide the case on factors outside the evidence admitted at trial. We disagree. The prosecutor conceded only that there was no independent evidence directly linking Hopper to the charged crime; he did not concede that *none* of Williams' testimony was corroborated by other evidence, nor would it have been correct to make such a concession. As the prosecutor stated in his initial closing argument, Williams' testimony that Hopper was driving the car was corroborated by the officer's testimony. While this corroboration may not have been sufficient to sustain the verdict if Williams had been an accomplice, it was evidence confirming a portion of Williams' testimony. Her story was also corroborated, to a degree, by the videotape showing Avila Junior using the stolen card at a gas station. The prosecutor's assertion in closing argument that Williams' testimony was corroborated was neither false nor inconsistent with the concession he made during argument on Hopper's claim that Williams' testimony should be treated as accomplice testimony.

III.

CONCLUSION

Hopper has shown no error in the district court's denial of his request for a jury instruction regarding the requirement of corroboration of accomplice testimony, nor has he shown any fundamental error in the prosecutor's remarks during closing argument. Therefore, the judgment of conviction is affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**