

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota,)	Supreme Court No. 20210161
)	
Plaintiff and Appellee,)	District Court No. 18-2021-CR-00565
)	
vs.)	
)	
Joshua James Roberts,)	
)	
Defendant and Appellant.)	

BRIEF OF APPELLEE

APPEAL FROM CRIMINAL JUDGMENT
FROM THE DISTRICT COURT
FOR GRAND FORKS COUNTY, NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE JASON MCCARTHY, PRESIDING

ORAL ARGUMENT REQUESTED

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ORAL ARGUMENT REQUESTED

[¶1] This Court should conclude that oral argument would be helpful in deciding the issues on appeal given the procedural posture and facts of this case. Additionally, since the Appellant requested oral argument, the Appellee would request the opportunity to respond to any new claims raised and clarify its written argument on their merits.

STATEMENT OF ISSUES

- I. Josiah Roberts' testimony was corroborated by other evidence.**
- II. Whether the trial court erred in failing to instruct the jury on corroboration of accomplice testimony when Roberts did not request such an instruction.**

STATEMENT OF CASE

[¶2] The State concurs with Appellants recitation of the procedural posture of the case.

STATEMENT OF FACTS

[¶3] The State called nine (9) witnesses and submitted several pieces of evidence including body cam footage from two (2) law enforcement officers, video surveillance from the crime scene, twelve (12) photos, and a drug analytical report. Defendant testified on his own behalf and called two witnesses. Defendant submitted the interviews of Josiah Roberts in their entirety.

[¶4] During the evening of August 2, 2020, Cpl. Ryan Wadlow was dispatched to an apartment on 18th Avenue in Grand Forks in regard to a CPR in progress, likely caused by an overdose. Tr. Transcript Vol. 1, pp. 22-23. Upon arrival, a female was providing chest compressions on the minor male victim (John Doe). Id. p. 25. The minor appeared blue in the face and lips and did not appear to be breathing. Id. p. 26. Narcan was administered to the minor. Id. p. 30. Officer Henning located a Swisher Sweet packet with a smaller wrapper inside that said “Loon” on the front. Id. p. 44. Inside this Loon package was a partial pill. Id. p. 45. Officer Henning provided this evidence to Detective Fugazzi to be photographed and placed into evidence. Tr. Transcript Vol. 1, pp. 83-86. Det. Fugazzi was able to recognize the pill fragments as an M30 pill, which is a counterfeit pill containing fentanyl. Id. pp. 87-88. The lab confirmed the pill fragments contained fentanyl. Tr. Transcript Vol. II, pp. 160-163.

[¶5] Det. Fugazzi, with specialized training in narcotics investigations, testified that 10 to 12 interviews were conducted within the first 48 hours which revealed a particular apartment that was the source of this M30 pill. Tr. Transcript Vol. 1, pp. 79-82. The apartment building was identified as 1808 Continental Drive. Id. p. 92. The police department has direct access to the security cameras at this apartment. Id. pp. 92-93.

Numerous hours of surveillance footage were reviewed from this apartment. Id. p. 82. Officers started reviewing footage from the time frame directly preceding the overdose on August 2, 2021. Id. pp. 93-94. John Doe was seen arriving at the apartment building with his minor girlfriend, Jane Doe. Id. p. 94. Joshua Roberts lived in apartment #303 at this apartment building. Tr. Transcript Vol 1, p. 67 and Tr. Transcript Vol. II, pp. 126-127. Jane Doe and John Doe first arrive around 12:30 p.m. Id. pp. 105-106. Jane Doe drops John Doe off and she drives away. Id. John Doe walks into Roberts' apartment. Tr. Transcript, Vol. II, p. 124. Jane Doe goes back to the apartment at 3:02 p.m. Tr. Transcript Vol. I, p. 107. Around 3:11 p.m., Joshua Roberts and John Doe leave Roberts' apartment and walk down to Jane Does vehicle together. Id. pp. 107-109. Roberts chats with Jane Doe at the driver's side window. Tr. Transcript Vol. II, pp. 119-120. They all then walk into Joshua Roberts' apartment building together. Id. John Doe and Jane Doe leave Joshua's apartment building at 4:06 p.m. Id. p. 121. First responders where first dispatched to the overdose location at approximately 8:23 p.m. on this same day. Tr. Transcript Vol. I, p. 23. Det. Fugazzi testified that he observed Josiah Roberts coming and going from Joshua Robert's Apt. #303 on August 2, 2021. Tr. Transcript Vol. 1, p. 94.

[¶6] Detective Essig reviewed video surveillance from 1808 Continental Drive, Apt #3 prior to the afternoon of August 2nd. Tr. Transcript Vol II, p. 185. Det. Essig testified on cross examination that John Doe was at Joshua Roberts' apartment the previous day from approximately 6:40 p.m. until 11:00 p.m. Tr. Transcript Vol. II, p. 189 and the early morning hours of August 2nd around 2:27 A.M for about 45 minutes. Id. p. 190. Joshua Roberts was at his apartment during this time as he was observed on video

outside his apartment door between 1:00 and 2:00 A.M. Id. p. 186. Det. Essig was also able to identify Roberts on video surveillance outside his apartment door the afternoon of August 2, 2021 during the time John Doe and Jane Doe were at his apartment. Id. p. 187. Det. Essig was familiar with how Joshua Roberts appeared. Id. p. 185. Det. Essig testified he was confident that it was Joshua Roberts on the video clips. Id. p. 187.

[¶7] Despite the video evidence, Roberts testified that John Doe was not at his apartment around 3:00 P.M. on August 2, 2021. Tr. Transcript Vol. II, p. 214. Roberts testified that he was working that day from around 9:30 A.M. until 3:00 or 4:00 P.M. at Michelle Passmore’s residence. Id. pp. 216-217. Michelle Passmore could not confirm that Roberts was working at her house on August 2, 2021. Id. p. 199.

[¶8] Jane Doe testified that she gave John Doe a ride to an apartment on Continental Drive on August 2, 2020. Tr. Transcript Vol I, p. 51. John Doe testified that although he was high, he remembered going over to Continental Drive, apt #303 on August 2, 2020. Id. p. 63. Jane Doe explained that Joshua Roberts approached her car and they had a conversation. Id. p. 52. Joshua Roberts asked Jane Doe if she knew why she was there. Id. p. 52. When Jane Doe replied “no”, Joshua Roberts told her that she should know why she was there. Id. Jane Doe testified that she went into the Apt with John Doe and Joshua Roberts. Id. p. 53. Jane Doe described a female walking in who they referred to as Joshua’s sister. Tr. Transcript Vol I, pp. 53-54. Joshua’s sister is Josiah Roberts. John Doe went into the bedroom with the female and then Jane Doe and John Doe left. Id. p. 54. John Doe showed Jane Doe the pills he obtained. Id. pp. 54-55. Jane Doe described how John Doe crushed one of these pills with an “M” and snorted it the evening of August 2 and overdosed. Id. p. 55. Jane Doe explained that the pill was

wrapped in a Swisher Sweet wrapper. Id. During the trial, Jane Doe was able to positively identify Roberts as the individual who came to her car that day. Trial Transcript Vol. I, p. 56.

[¶9] Agent Derek Madsen conducted a search and photographed Joshua Roberts' Apt. #303 on August 6, 2020. Id. pp. 67-68. Joshua Roberts was at home at the time. Id. p. 68. Agent Madsen, trained in DEA narcotics investigations, testified to the drug paraphernalia located throughout the residence explaining how burnt tinfoil strips are used to smoke pills. Id. pp. 65, 70-75. A used piece of tinfoil in the trash was consistent with someone using it to smoke a pill as there was a distinct snake like pattern of burnt residue from the pill moving around on the tinfoil. Id. pp. 73-74. Agent Madsen explained the significance of the balled up tinfoil that was located in a drawer and how this item of paraphernalia can be used for storing, selling, and concealing narcotics. Id. p. 72.

[¶10] Josiah Roberts testified that Joshua Roberts was her brother and her best friend. Tr. Transcript Vol. II, p. 166. They would sing and rap together almost every day and were singing and dancing together on August 2. Id. p. 167 & 172. Jane Doe testified that Joshua Roberts and Josiah Roberts were singing to her. Tr. Transcript Vol. I, p. 54. When Josiah had heard that a child had overdosed, she immediately told the truth about what happened. Tr. Transcript Vol. II, p. 168. Josiah stated she went to her brothers apt around 5 a.m. on August 2 and smoked meth and pills on tinfoil with her brother and his friend, Jared. Id. p. 169. She went back later that afternoon and recalled this younger boy Jared was at her brothers apt. Id. pp. 170-171. A blonde haired girl came later. Id. Josiah testified that Jared and this girl were Joshua's friends and she had never seen them

before August 2nd. Id. p. 171. Josiah overheard a conversation when Jared asked Joshua Roberts for some pills. Id. p. 172. According to Josiah, Joshua talked to her and they agreed to give the pills to Jared or the girl after Joshua vouched for them. Id. pp. 172-174 & 176-177. Joshua asked Josiah for two pills. Id. p. 175. Josiah testified Joshua was hoping to get a finders fee for selling the pills. Id. pp. 174-175. Josiah explained how Joshua Roberts walked downstairs to the vehicle and asked both of them to come up because he wanted to know who they were delivering the pills to. Id. pp. 179-180. Josiah testified she gave the pills to her brother. Id. 180-181. The pills were in a “Loon pack.” Id. 178-179.

STANDARD OF REVIEW

[¶11] When reviewing sufficient of evidence related to corroboration of accomplice testimony, the Court employs a different standard of review than a traditional sufficiency of evidence analysis. See generally State v. Falconer, 2007 ND 89, 732 N.W.2d 703. The standard of review more specifically related to corroboration of accomplice testimony. “A defendant cannot be convicted of a crime solely upon an accomplice’s testimony.” Falconer, 2007 ND 89, ¶21.

ARGUMENT

[¶12] The State produced a sufficient amount of evidence to corroborate the testimony of Josiah Roberts, as required under North Dakota Century Code § 29-21-14 including physical evidence and corroborating testimony from other witnesses; and the trial court did not error by not including a standard jury instruction on “Corroboration of Accomplice Testimony”.

I. Josiah Roberts’ testimony was corroborated by other evidence.

[¶13] A challenge regarding the sufficiency of the evidence is reviewed in a light most favorable to the verdict. State v. Keller, 2005 ND 86, ¶50, 695 N.W.2d 703. The determination is “whether a rationale trier of fact could have found the essential elements of the crime were established beyond a reasonable doubt.” Id. (citing State v. Steiger, 2002 ND 70, ¶4, 644 N.W.2d 187). All inferences are drawn in favor of the verdict. Id.

[¶14] Roberts discusses the issue of sufficiency of the evidence in this case in the context of the requirement of N.D.C.C. § 29-21-14 which provides:

A conviction cannot be had upon the testimony of an accomplice unless the accomplice is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.

[¶15] “In cases where § 29-21-14 has been used we have said that any amount of corroboration will be sufficient to give the case to the jury to determine the sufficiency of the corroboration.” State v. Lind, 322 N.W.2d 826, 842 (N.D. 1982), *citing* State v. Thorson, 264 N.W.2d. 441, 445 (N.D. 1978).

¶16] In this case, there are several instances of corroboration. Video surveillance places Joshua Roberts at the scene with John Doe and Jane Doe when the drugs were delivered. The drugs were delivered inside Robert's apartment when he was inside the apartment. Jane Doe testified that while they were in Roberts' apt, a female who they referred to as Roberts' sister arrived. Josiah Roberts is the sister of Joshua Roberts and she is seen on video surveillance that day when the minors were at Roberts' apt. "Other jurisdictions have found that, under certain circumstances, evidence that the defendant was in the company of accomplices or present at or near the place of the crime shortly before or after the crime was committed, may be sufficient corroboration that tends to connect the defendant with the commission of the crime. State v. Thorson, 264 N.W.2d 441, 446, (N.D. 1978). This evidence, coupled with the fact that Roberts testified and denied being present at his apartment, provides suspicious circumstances wherein the jury could weigh the credibility of the accomplice testimony. "The purpose of corroborative evidence is to show that a testifying accomplice is a reliable witness and worthy of credit." State v. Gaede, 2007 ND 125, ¶ 11, 736 N.W.2d 418 (quoting State v. Zimmerman, 524 N.W.2d 111, 114 (N.D. 1994).

¶17] In Haugen, the Supreme Court discussed the type of evidence necessary for corroboration:

"Under § 29-21-14, it is not necessary to corroborate every fact testified to by an accomplice. All that is required is that the evidence, circumstantial or otherwise, corroborate the testimony of an accomplice as to some material fact or facts, and tends to connect the defendant with the commission of the crime. It is not necessary that the corroborating evidence be sufficient, in itself, to warrant a conviction or establish a prima facie case. Furthermore, the State need not point to a single isolated fact which is sufficient corroboration, as it is the combined and cumulative weight of the evidence other than the testimony of the accomplice witness which satisfies the statute."

State v. Haugen, 448 N.W.2d 191, 194 (N.D. 1989).

[¶18] Furthermore, “the corroboration of an accomplice’s testimony need not directly link the accused to the crime.” “Rather, corroboration merely requires that there be evidence *tending to connect the defendant with the offense committed.*” Haugen, at 195. In this case, video surveillance tends to connect Roberts to the crime. Roberts is seen on video bringing John Doe and Jane Doe up to his apartment during the time of the crime.

[¶19] The video surveillance and the physical evidence corroborate the testimony of Josiah Roberts. Josiah’s testimony regarding the packaging of the delivered pills in a “Loon pack” is corroborated by the testimony of Corporal Wadlow and Officer Henning who found the pills on John Doe packaged in a “Loon pack.” Video corroborates that Josiah Roberts was at Joshua Roberts apartment during the time of the crime. Video corroborates Josiah’s testimony that Joshua Roberts went downstairs and brought John Doe and Jane Doe upstairs.

[¶20] Detective Essig testified to the video surveillance confirming the relative timeline of the day in question which corroborated the timeline Josiah testified to. Tr. Transcript Vol. II, p. 189.

[¶21] John Doe and Jane Doe both testified to being in Joshua Robert’s apartment during the time narcotics were delivered to John Doe. Tr. Transcript Vol. 1, p. 52 & 63.

[¶22] Because evidence corroborating the accomplice testimony was presented at trial, Robert’s argument fails.

II. The trial court did not error in its refusal to provide jury instructions on corroboration requirements of Josiah Roberts’ testimony.

[¶23] Under N.D.R.Crim.P. 30(a), a party must request a jury instruction in writing, and if a party fails to do so, the Supreme Court’s review is limited to whether the jury instructions constitute plain or obvious error. State v. Pulkrabek, 2017 ND 203, 900 N.W.2d 798. In addition, the Court has previously noted that “issues not raised at trial will not be addressed on appeal unless the alleged error rises to the level of obvious error under N.D.R.Crim.P. 52(b). State v. Lott, 2019 ND 18, ¶ 8, 921 N.W.2d 428. The Court’s obvious error standard is well established.

To establish obvious error, the defendant has the burden to demonstrate plain error which affected his substantial rights. To constitute obvious error, the error must be a clear deviation from an applicable legal rule under current law. There is no obvious error when an applicable rule of law is not clearly established.

State v. Pemberton, 2019 ND 157, ¶ 8, 930 N.W.2d 125, 128–29.

[¶24] The power to notice obvious error is exercised cautiously and only in exceptional circumstances where the defendant has suffered a serious injustice. State v. Janda, 397 N.W.2d 59, 70 (N.D. 1986). In assessing the possibility of error concerning substantial rights under Rule 52(b), it is necessary to examine the entire record and the probable effect of the actions alleged to be error in light of all the evidence. Id. The state asserts that Robert’s failure to request an instruction on corroboration bars his appeal on the issue. *See* State v. Berenson, 260 N.W.256, 261 (N.D. 1935). (internal citations omitted) (It is sufficient to say that there was no request for such an instruction [on corroboration of accomplice testimony], and, in the absence of a request, the defendant cannot complain because of the failure to instruct respecting the matter.”).

[¶25] In State v. Kelley, the defendant specifically requested a jury instruction under N.D.C.C. § 29–21–14 regarding corroboration of accomplice testimony. State v.

Kelley, 450 N.W.2d 729, 730–31 (N.D. 1990). There was disparate testimony from different individuals regarding a shooting, and the district court refused to give the defendant's requested corroboration instruction. Id. This Court held that an accomplice instruction was not required, and even if it was, any error in failing to give the instruction was harmless. Id. at 732–34. Kelley noted any error in failing to give an instruction under N.D.C.C. § 29-21-14 was “not of constitutional magnitude,” and, therefore, the issue was whether the error had a significant impact on the verdict. Id. In affirming the jury’s verdict in Kelley, this court concluded that because there was sufficient corroborating evidence tending to connect the defendant with the commission of the murder, a corroborating instruction would not have had a significant impact on the verdict. State v. Kelley, 450 N.W.2d 729, 730–31 (N.D. 1990). In support of any alleged error being harmless, Kelley further reasoned,

[t]here [could] be no doubt that all the participants in the trial, including the jury, were well aware that the outcome of the trial would depend upon whether the jury believed [the witness/accomplice] or [the defendant]. The jury was properly instructed as to its obligation to determine whom of the witnesses it would believe, and if the jury chose to believe [the witness/accomplice] because she was a more credible witness, there was, as the majority opinion observes, sufficient corroborative evidence that tends to connect [the defendant] with the commission of the crime.

Id. at 734 (VandeWalle, J., concurring).

[¶26] In Reddig, the State produced the testimony of three accomplice witnesses. State v. Reddig, 2016 ND 39, ¶ 15, 876 N.W.2d 34. “The court did not give a jury instruction requiring corroboration of the testimony of an accomplice. Reddig did not request that such an instruction be given, nor did he object when the court failed to do so.” Reddig at ¶5. Accomplice witnesses testified to the arrangement and timeline of the

drug transaction, the timeline of the day in question including the execution of the search warrant, as well as the relationship between the parties. Reddig at ¶¶ 3-5. The State corroborated this evidence through the testimony of law enforcement who searched the cell phone data from the accomplice witnesses and were able to confirm the timeline testified to as well as the relationship between the parties. Id. On appeal, the Court noted that because there was sufficient corroborating the accomplice witnesses' testimony, a corroborating instruction would not have had a significant impact on the jury. Therefore, the error of the district court, if any, in failing to give a corroboration instruction was harmless under the Kelley rationale. Id.

[¶27] Roberts has conceded the omission of the jury instruction regarding “accomplice testimony” was not raised during trial. Appellant Brief p. 12. Here, like in Reddig, any alleged failure of the trial court to instruct the jury on corroboration of accomplice testimony was harmless because corroborating evidence existed connecting Roberts with the crime. Because Roberts waived his right to challenge the jury instructions, Robert's argument regarding corroboration of accomplice testimony is best addressed under a sufficiency of the evidence analysis. This Court has held similarly. For example, in State v. Smith, the State argued the defendant waived his right to appeal the issue on corroboration of accomplice testimony because he did not request such a jury instruction. 238 N.W.2d 662, 669 (N.D. 1976), overruled on other grounds, State v. Himmerick, 499 N.W.2d 568 (N.D. 1993). This Court noted, however, the defendant was not appealing the jury instructions. Id. Rather, the defendant was arguing there was insufficient evidence to sustain conviction under N.D.C.C. § 29-21-14, which requires corroboration of accomplice testimony. Id.

[¶28] Therefore, although the jury was not instructed on corroboration of accomplice testimony, they were instructed on weight and credibility of witnesses. The jury had to weigh the testimony of Josiah Roberts and Joshua Roberts to determine which witness they found to be credible.

CONCLUSION

[¶29] Because Roberts failed to show the accomplice testimony was not corroborated as required under N.D.C.C §29-21-14, and because Defendant failed to demonstrate how the omission of a jury instruction would have significantly altered the jury’s decision; the State urges the Court affirm the criminal conviction of Defendant.

Respectfully submitted this 1st day of October, 2021.

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CERTIFICATE OF COMPLIANCE
SA#158724

[¶1] The State of North Dakota, by and through Assistant State's Attorney Carmell F. Mattison hereby certifies that the attached brief complies with the page limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The electronically filed brief contains twenty-one (21) number of pages.

Dated this 1st day of October, 2021.

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