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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2099**

State of Minnesota,
Respondent,

vs.

Timothy Joseph Gobely,
Appellant.

**Filed February 3, 2014
Affirmed
Connolly, Judge**

Dakota County District Court
File No. 19HA-CR-11-330

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Phillip Prokopowicz, Assistant County
Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Special
Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

On appeal following his conviction of aiding and abetting attempted theft over \$5,000, appellant argues that (1) there was insufficient evidence to support his conviction because it was based solely on accomplice testimony, (2) the district court erred in denying his request for a jury instruction on abandonment, and (3) the district court erred in sentencing him to the statutory maximum of 60 months in prison. Appellant also makes several pro se arguments. We affirm.

FACTS

At approximately 2:00 a.m. on January 27, 2011, T.N. was pulling into the parking lot of his apartment complex when he saw a vehicle pulling up to a trailer that belonged to his employer, Q.P. He saw two people in a car, which was parked in front of the lot, and two people in a pickup truck parked next to the trailer. These people were later identified as appellant, Timothy Gobely; his son, M.G.; and their girlfriends; J.H. and B.S. T.N. confronted the people, who claimed that they were in the parking lot to repossess a stolen trailer. T.N. was suspicious because he knew that the trailer belonged to Q.P. and went inside to get his landlord. When he returned, M.G. had a lit blowtorch near the trailer.

T.N. called Q.P., who instructed T.N. to call the police. Q.P. had recently purchased the trailer and used it in his construction business. He paid approximately \$3,500 for the trailer and kept approximately \$30,000 worth of equipment inside it. He

kept a lock on the trailer to prevent theft; the lock could be removed only by key or blowtorch.

After receiving a call about suspicious activity, officers responded to the scene without lights or sirens. When the first responding officer arrived, he found appellant, M.G., and T.N. standing by a black trailer. Appellant informed the officer that he was at the scene to help his son. Appellant and M.G. were adamant that the trailer actually belonged to M.G.'s employer and that they were there to repossess it. However, when the investigating officers spoke with M.G.'s employer, he stated that his trailer was white with a bad hitch, not new and black like the trailer in question.

Q.P. arrived soon thereafter with the title to the trailer. After he arrived, appellant and M.G. changed their story and said that they were there to check the trailer's vehicle identification number (VIN).

Based on these events, appellant was charged with aiding and abetting attempted theft over \$5,000, in violation of Minn. Stat. § 609.52, subd. 2(1) (2010), Minn. Stat. § 609.17 (2010), and Minn. Stat. § 609.101 (2010). Following a jury trial, appellant was found guilty. Prior to sentencing, appellant waived his right to a hearing pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) and stipulated that he met the criteria to be considered a career criminal under Minn. Stat. § 609.1095, subd. 4 (2010). The district court sentenced him to 60 months in prison, which is the statutory maximum for this offense.

DECISION

I.

Appellant first argues that there was insufficient evidence to support his conviction due to the fact that it was based solely on the testimony of appellant's accomplice, M.G. We disagree.

In considering a claim challenging the sufficiency of the evidence, our role "is limited to a painstaking analysis of 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). The reviewing 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). Therefore, we 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, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Olhausen*, 681 N.W.2d 21, 25-26 (Minn. 2004).

Appellant argues that there is insufficient corroborating evidence of M.G.'s testimony that appellant aided and abetted the attempted theft of the trailer. "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." Minn. Stat. § 609.05, subd. 1 (2010). To be guilty of aiding and abetting a crime, the defendant does not need to have participated actively in the commission of the crime. *Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004). However, the state must

prove that the defendant had “knowledge of the crime and intended his presence or actions to further the commission of that crime.” *State v. Clark*, 755 N.W.2d 241, 257 (Minn. 2008) (quotation omitted). Jurors can “infer the necessary intent from factors including: defendant’s presence at the scene of the crime, defendant’s close association with the principal before and after the crime, defendant’s lack of objection or surprise under the circumstances, and defendant’s flight from the scene of the crime with the principal.” *State v. Swanson*, 707 N.W.2d 645, 659 (Minn. 2006) (citation and quotation omitted).

M.G. testified that he attempted to steal the trailer even though he knew he did not have the right to take it. He explained that he went with his father and their girlfriends to the apartment building after a group discussion about stealing a trailer; he specifically discussed stealing the trailer with appellant and appellant’s girlfriend, J.H. He testified that the plan was to tow the trailer to appellant’s house and that appellant wanted to steal it because of the valuable items it contained.

M.G.’s testimony supports the conclusion that appellant aided and abetted the attempted theft. But “[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.” Minn. Stat. § 634.04 (2012). Corroborating evidence includes testimony of eyewitnesses and experts and may be circumstantial. *State v. Pederson*, 614 N.W.2d 724, 732 (Minn. 2000). “Corroborating evidence is sufficient if it restores confidence in the accomplice’s testimony, confirming its truth and pointing to the defendant’s guilt in some substantial degree.” *State v. Ford*, 539 N.W.2d 214, 225

(Minn. 1995) (quotation omitted). This court “review[s] the sufficiency of the corroborating evidence of an accomplice’s testimony . . . in the light most favorable to the prosecution and with all conflicts in the evidence resolved in favor of the verdict.” *State v. Usee*, 800 N.W.2d 192, 200 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

It is undisputed that M.G. was an accomplice and that his testimony needed corroboration. We conclude that his testimony was sufficiently corroborated. The responding officer and T.N. both testified that they encountered appellant standing in the parking lot between the pickup truck and Q.P.’s trailer. They both testified that appellant and M.G. claimed they were in the parking lot to retrieve the stolen trailer. The officer recalled appellant saying that he was there to help his son and testified that, when Q.P. arrived with the title to the trailer, appellant changed his story and claimed the group was actually there to check the trailer’s VIN. The officer found this suspicious because it was 2:00 a.m. and nobody had a physical VIN in their possession to check against the VIN listed on the vehicle.

Additionally, Q.P. testified that he owned the trailer in question. He explained that he put an expensive lock on the trailer and that the only way to remove it without a key was by using a blowtorch. When Q.P. arrived at the scene he saw a pickup truck backed up to his trailer and a lit blowtorch. Furthermore, there is no indication that appellant objected to or questioned M.G.’s behavior.

Viewed in the light most favorable to the conviction, we conclude that this testimony sufficiently corroborates M.G.'s statements that appellant was at the apartment complex to steal the trailer.

II.

Appellant next argues that the district court abused its discretion in denying his request for an abandonment instruction. The refusal to give a requested instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). The focus of the analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). If there is evidence to support a defendant's theory of the case, it is an abuse of discretion to refuse to give an instruction on that theory. *Id.* at 557.

In Minnesota, “[i]t is a defense to a charge of attempt that the crime was not committed because the accused desisted voluntarily and in good faith and abandoned the attempt to commit the crime.” Minn. Stat. § 609.17, subd. 3 (2012). To justify an abandonment instruction, the evidence must show that the defendant took affirmative, reasonable efforts to prevent the crime. *State v. Volk*, 421 N.W.2d 360, 365 (Minn. App. 1988), *review denied* (Minn. May 18, 1988).

Appellant requested the inclusion of an abandonment instruction in the final jury instructions.¹ The district court summarily denied this request. At trial, appellant's

¹ Appellant requested the following instruction:

If the defendant voluntarily and in good faith desisted and abandoned the intention to commit a crime, and because of

theory was that there was no theft. In his opening statement, appellant's counsel stated, "There's no attempted theft," and "There is no crime here." Similarly, in his closing argument, he argued that there was no attempt to commit a theft, and because there was no attempt, appellant could not be found guilty. Defense counsel never implied that appellant abandoned his purpose.

Moreover, the evidence presented does not support the conclusion that appellant abandoned his attempt to steal the trailer. After being confronted by T.N., appellant initially left the parking lot. However, an attempt is not voluntarily abandoned if the defendant refrains from completing the act because of intervening events. *State v. Cox*, 278 N.W.2d 62, 66 (Minn. 1979). After conferring with M.G., appellant returned to the parking lot and continued to claim that they were there to repossess the trailer and check its VIN. Three witnesses testified that appellant was near the trailer on the night in question. There is no evidence to suggest that appellant took affirmative, reasonable efforts to prevent the crime. *See Volk*, 421 N.W.2d at 365. Therefore, we conclude that the district court did not abuse its discretion in denying appellant's request for an abandonment instruction.

this, the crime was not committed, the defendant is not guilty of an attempt, even though the defendant had already taken a substantial step toward the commission of the crime. The burden of proof is on the State to prove beyond a reasonable doubt that the defendant did not voluntarily and in good faith abandon the intent to commit a crime.

10 Minnesota Practice, CRIMJIG 5.04 (2012).

III.

Finally, appellant argues that the district court improperly sentenced him to the statutory maximum of 60 months imprisonment for aiding and abetting attempted theft over \$5,000. Appellant's presumptive sentence for this crime was 13 months in prison.² Minn. Sent. Guidelines B.2.c(1), (2) (2012). Appellant concedes that he waived his right to a *Blakely* hearing and that he stipulated that he met the statutory criteria to be considered a career offender. However, he argues that his sentence is excessive in light of the crime. We disagree.

We review a sentencing enhancement based on the career-offender statute for an abuse of discretion. *State v. Munger*, 597 N.W.2d 570, 574 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999). A “judge may impose an aggravated durational departure from the presumptive sentence up to the statutory maximum sentence if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed as part of a pattern of criminal conduct.” Minn. Stat. § 609.1095, subd. 4 (2010). A defendant's valid waiver of a *Blakely* hearing, together with a factual admission to five or more prior felonies and an agreement that the offense forms a pattern with those offenses, is a valid basis for the court to sentence a defendant to the statutory maximum as a repeat-felony offender. *Vickla v. State*, 793 N.W.2d 265, 272 (Minn. 2011).

² The offense level for aiding and abetting an attempted theft is three. Appellant had a criminal-history score of seven or more with an added custody-status point.

Appellant has 19 prior felony convictions. The only gaps in appellant's criminal history occurred when he was incarcerated. The district court stated on the record that it was looking at every possible alternative to sentencing appellant to the statutory maximum. It even asked appellant to explain why the statutory maximum was not warranted in his case. Appellant responded by saying, "I don't care about the time, I'll do the five years. Five years, I've done it." Appellant's stipulation to the facts that support sentencing as a career offender provides a valid basis for the court to sentence him to the statutory maximum. Because this sentence is supported by the record, we conclude that the district court did not abuse its discretion in sentencing appellant to 60 months in prison. *See id.*

IV.

In his pro se supplemental brief, appellant argues that (1) he was denied effective assistance of counsel, (2) the district court erred in allowing the state to impeach a witness with her prior convictions, and (3) he is entitled to a new trial based on prosecutorial misconduct. After reviewing these arguments, we conclude that they are without merit.

Affirmed.