

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0051**

State of Minnesota,
Respondent,

vs.

Anthony Daniel Scott,
Appellant.

**Filed March 3, 2009
Affirmed
Stoneburner, Judge**

Ramsey County District Court
File No. 62K207000752

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, Ramsey County Government Center West, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102-1657 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges his conviction of possession of a firearm by an ineligible person, arguing that the district court committed reversible error in evidentiary rulings and in failing to instruct the jury on accomplice testimony. Because the district court did not err in admitting the challenged evidence as a witness's prior consistent statement and because the witness was not an accomplice, we affirm.

FACTS

At about 4:00 a.m. on a winter morning, Roseville police officers Erin Reski and Brady Martin spotted a car in the parking lot of a stripmall. After the car left the parking lot, the officers noticed that a brake light was out. They stopped the car. As the officers approached the car, Martin saw the backseat passenger reaching below the front seat. Martin thought that he might be reaching for a weapon or concealing contraband, so, as Reski approached the driver, Martin stood at the back of the passenger side and observed the back-seat passenger who was later identified as appellant Anthony Scott.

The driver identified himself to Reski as Jarrett Ready and admitted that he did not have a driver's license. Front-seat passenger Megan Cuddigan explained that Ready had just taken over driving for her because she had a migraine. Cuddigan said that they were looking for a hospital.

Meanwhile, Martin knocked about 10 times on Scott's window before Scott, whose attention appeared to be focused on the front seat, rolled the window down. Martin observed that Scott was sweating and shaking. When asked his name, Scott first

said “Scott Smith” but then gave his real name, Anthony Scott. As Martin questioned Scott, Martin saw an unzipped duffel bag on the floor of the backseat on the driver’s side. A pair of jeans was protruding from the duffel bag.

Cuddigan, Ready, and Scott were all removed from the car, handcuffed, and placed in squad cars while Martin searched the car. Martin unrolled the jeans that were in the open duffel bag and found a sawed-off shotgun with two rounds in the magazine. The jeans were later determined to be Scott’s size. Martin also removed an in-dash car stereo, a DVD player, and new, packaged duffel bags from the car. The Bureau of Criminal Apprehension (BCA) examined the gun, car stereo, and DVD player for fingerprints. There were no prints on the gun. Scott’s palm print was on the car stereo, and an unidentified fingerprint was on the DVD player. At the scene of the stop, Cuddigan was questioned by Officer Jesse Lowther, who had arrived to assist Martin and Reski.

Scott was subsequently charged with possession of a firearm by an ineligible person. At Scott’s trial, Cuddigan testified that, at about 4 a.m. on the morning in question, Ready received a call at Cuddigan’s house from Scott asking Ready to pick him up because he was selling a car stereo that Ready thought a friend might be interested in buying. Cuddigan testified that she reluctantly drove Ready to pick up Scott at Scott’s apartment because she had to drive Ready home anyway, and Ready assured her that his business with Scott would be brief. Cuddigan testified that Scott came out of the apartment building with a bag that she “want[ed] to say [was a] duffel bag,” and got in the backseat on the passenger side. Cuddigan drove away but then pulled into a stripmall

parking lot to let Ready drive because she had a migraine. Cuddigan wanted to go home. Ready offered to take her to a hospital. Cuddigan testified that the car was stopped by the police while they were discussing where to go.

Cuddigan testified that although the officers told her at the scene of the stop that there was a gun in the car, she did not see a gun or hear anyone in the car talk about a gun, and she would not have allowed a gun in her car. She testified that the packaged duffle bags were gifts from opening an account at a bank. She did not remember seeing Scott's bag after the stop.

At trial, Officer Lowther, over a hearsay objection from Scott, answered a question about what Cuddigan told Lowther about where she had been prior to the stop. Scott did not object to the prosecutor's follow-up questions eliciting Lowther's testimony about Cuddigan's additional at-the-scene statements, including testimony that Cuddigan identified the bag in which the gun was found as the bag that Scott brought into the car.

The district court denied the state's request for a jury instruction on joint possession. No accomplice instruction was requested or given. The jury found Scott guilty as charged. He was sentenced, and this appeal followed.

D E C I S I O N

I. Admission of Cuddigan's statements

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant [challenging an evidentiary ruling] has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn.

2003) (citations omitted). Scott argues that the district court committed reversible error in admitting Lowther's testimony regarding Cuddigan's statements made at the scene of the stop. But Scott's hearsay objection was only to the prosecutor's first question to Lowther, about where Cuddigan told him she had been prior to the traffic stop. The district court overruled the objection without placing any analysis on the record. Lowther responded: "She told me that she had been to some apartment on County Road D to pick up one of the people . . . in the car." Scott does not argue that he was prejudiced by this answer. Therefore, even if the district court abused its discretion with regard to this statement, the error was harmless.

The prosecutor continued, without objection, to question Lowther about what Cuddigan said at the scene. On appeal, Scott argues that all of these statements should have been excluded as hearsay. The state asserts that Cuddigan's at-the-scene statements were admissible as prior consistent statements offered to bolster her credibility.

In the absence of an objection, we may review the admission of evidence for plain error. Minn. R. Crim. P. 31.02. To establish plain error, a defendant must show (1) error (2) that was plain; and (3) that affected the defendant's substantial rights. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). To satisfy the third element, "a defendant must show prejudice that forms the basis for a reasonable likelihood the error substantially affected the verdict." *Id.* And even if all three conditions are satisfied, a defendant is not entitled to relief unless we determine that the error must be addressed to ensure the fairness and integrity of the judicial proceedings. *Id.*

A statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness. Minn. R. Evid. 801(d)(1)(B). Before a prior consistent statement can be admitted, the witness's credibility must have been challenged, and the statement must bolster the witness's credibility with respect to the challenged aspect of the witness's credibility. *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997). The trial court must determine: (1) whether there has been a challenge to the witness's credibility; (2) whether the prior consistent statement would be helpful to the trier of fact in evaluating the witness's credibility; and (3) whether the prior statement and the trial testimony are consistent with each other. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). In this case, because Scott failed to object to the additional questions about what Cuddigan said at the scene, the district court had no opportunity to analyze whether the statements were admissible nonhearsay or inadmissible hearsay.

Plain error is error that is “so clear under applicable law at the time of conviction, and so prejudicial to the defendant's right to a fair trial, that the defendant's failure to object—and thereby present the trial court with an opportunity to avoid prejudice—should not forfeit his right to a remedy.” *Manthey*, 711 N.W.2d at 504 (quotation omitted). Because the state was not given the opportunity to establish and the district court was not given the opportunity to analyze whether some or all of the statements were

admissible as prior consistent statements, we cannot say that the statements were so clearly inadmissible as to make their admission plain error.

Scott argues on appeal that Cuddigan's credibility had not been attacked when the prior statements were admitted. But we conclude that Cuddigan's credibility was challenged in Scott's opening statement when he told the jury that Cuddigan told the officers that the gun must be Scott's, but that, at the close of the case, the jury would conclude that the only appropriate verdict was "not guilty."

Scott also argues that Cuddigan's statements at the scene were not consistent with her trial testimony and that information elicited from Lowther went beyond the scope of Cuddigan's trial testimony. But the prior statements and trial testimony do not have to be exact in every detail in order to qualify as prior consistent statements. *Bakken*, 604 N.W.2d at 109. The only significant alleged inconsistency between Cuddigan's testimony and Lowther's account of her statements at the scene is Cuddigan's trial testimony that she only remembered seeing the packaged bank-gift duffle bags at the scene, contrasted with Lowther's testimony that, at the scene, Cuddigan identified the bag in which the gun was found as the one Scott brought to the car. We first note that these statements are not necessarily inconsistent because one deals only with what Cuddigan remembered at the time of trial. And even if admission of this statement could be said to be error, Scott cannot show prejudice.

Cuddigan testified that Scott brought a bag into the car. The gun was found in a bag, wrapped in jeans that were Scott's size, near Scott in the backseat of the car. Scott made furtive movements at the time of the stop as if trying to retrieve or conceal

something under the front seat and was extremely nervous once the car was stopped. The circumstantial evidence connects the bag with the gun only to Scott.

Lowther's testimony about what Cuddigan said at the scene was reasonably consistent with Cuddigan's trial testimony. *See In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998) (holding that the district court did not commit reversible error by admitting a videotaped statement that was "reasonably consistent" with the declarant's trial testimony). And Scott used inconsistencies between Cuddigan's and Lowther's testimonies to argue to the jury that Cuddigan was not credible. Scott has failed to establish plain error or that he is entitled to any relief due to the admission of Cuddigan's at-the-scene statements.

II. Accomplice instruction

Scott argues that the district court's failure to instruct the jury that the state was required to present evidence corroborating Cuddigan's testimony constitutes reversible error. *See* Minn. Stat. § 634.04 (2008) (stating that a conviction may not be based solely on the uncorroborated testimony of an accomplice). "The decision to give a jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of that discretion." *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006). But "[a]n 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." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004) (quotations omitted). And "[t]he duty to instruct on accomplice testimony remains regardless of whether counsel for the defendant requests the instruction." *Id.* The supreme court recently applied plain-error analysis

where an accomplice instruction was not requested. *State v. Clark*, 755 N.W.2d 241, 251 (Minn. 2008). As described above, the plain-error analysis requires Scott to show (1) error; (2) that was plain; and (3) that affected his substantial rights. *Manthey*, 711 N.W.2d at 504.

Scott's argument depends on his assertion that Cuddigan was an accomplice. But we find no merit in this argument. In order for a witness to be an accomplice for the purposes of section 634.04, there must be some evidence that the defendant and witness were accomplices. "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). "[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." *Id.* at 653. Scott's defense was that Cuddigan (or Ready or both), not Scott, possessed the shotgun. Therefore, as a matter of law, Cuddigan was not Scott's accomplice, and the district court did not commit error, let alone plain error, in failing to, sua sponte, give an accomplice instruction.

Affirmed.