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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0265**

State of Minnesota,
Respondent,

vs.

Dwayne Lee Wright,
Appellant.

**Filed January 22, 2013
Affirmed
Chutich, Judge**

Dakota County District Court
File No. 19HA-CR-09-2001

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

James C. Backstrom, Dakota County Attorney, M. Christine Misurek, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Chutich,
Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

In this appeal from his controlled-substance convictions, appellant Dwayne Lee Wright argues that the district court committed reversible error by failing to properly

instruct the jury on accomplice testimony. Wright also filed a pro se brief arguing that he received ineffective assistance of counsel and that the search of his home was not supported by probable cause. Because the district court's error in instructing the jury did not affect Wright's substantial rights, he did not receive ineffective assistance of counsel, and the district court did not err in finding probable cause for the search, we affirm.

FACTS

In March and April 2009, Bryce Mueller asked Matthew Adams to help him purchase heroin several times. For each of these purchases, Adams would contact a man he knew as "Low" to arrange a meeting place and time. Mueller would then drive Adams to a prearranged location, Adams would get into Low's car, exchange Mueller's money for drugs, and then return to Mueller's car with heroin.

Unknown to Adams, Mueller was working as a confidential informant for the Dakota County Drug Task Force under the supervision of Officer Donald Farrington during these buys. Officer Farrington had previously arrested Mueller on drug charges, and Mueller agreed to cooperate with Officer Farrington to "work off" some of his criminal charges by becoming a criminal informant for the task force. Officer Farrington gave Mueller recorded buy money, observed Mueller and Adams at the buy locations, and then after each transaction, obtained the heroin and a statement from Mueller. Officer Farrington observed controlled buys on four occasions: March 27, March 31, April 7, and April 16, 2009.

On March 27, Farrington gave Mueller \$600 to purchase heroin. As Farrington observed, Mueller picked up Adams at a gas station and together they drove to a nearby

store. Adams then left Mueller's car and got into a Ford Taurus that was occupied by two African-American men. After a few minutes, Adams returned to Mueller's car with heroin. Mueller then dropped Adams off at a different location, and met with Farrington to give him the .82 grams of heroin and remaining buy money.

On March 31, during the second buy, Mueller drove Adams to a parking lot in Inver Grove Heights. There, Farrington and other officers observed Adams get into a Buick Riviera that was occupied by an African-American male. After a few minutes, Adams returned to Mueller's car and both Mueller and the Riviera left the parking lot. Farrington arranged for the West St. Paul Police Department to conduct a traffic stop on the Riviera. Less than a mile from the parking lot and a few minutes after the controlled buy concluded, an officer stopped the car and identified two occupants as James Willingham and K.F. The officer did not charge either occupant with a crime during the stop.

After the stop, Sergeant Leko from the Dakota County Drug Task Force determined that James Willingham was an alias for Dwayne Wright. Through additional research, Sergeant Leko determined that Wright was connected to an Inver Grove Heights residential address. On April 4, Sergeant Leko with Sergeant Polinski, another task-force officer, conducted surveillance at the address and observed Wright leave the home in the Buick Riviera that was observed at the March 31 buy. The officers observed Wright make "two apparent drug transactions," unrelated to those at issue in this case.

On April 7, Mueller again picked up Adams at a hotel and drove him to a nearby parking lot to purchase \$600 worth of heroin. Farrington observed Adams get into a

yellow Chevy Caprice to purchase the heroin. Adams returned to Mueller's car with 2.04 grams of heroin.

On April 16, 2009, the last controlled buy, Mueller gave Adams \$1,200 to purchase heroin on his behalf. Mueller drove Adams to a nearby parking lot where Farrington observed Adams enter into a yellow Chevy Caprice, the same car that Farrington observed on April 7. While Adams was in the car, officers surrounded the vehicle and arrested Adams and Low. The officers later identified Low as appellant Dwayne Lee Wright, the owner of the car. The officers found the buy money and 5.94 grams of heroin on the floor of the vehicle, but did not find any drugs or money on Wright's person.

Shortly after Wright's arrest, officers executed a search warrant at his home. Officers found \$6,745 in cash including \$580 that matched bills used in the first two controlled buys. Officers also found a Georgia driver's license with the name James Willingham and a Minnesota driver's license with the name Dwayne Wright, both of which appeared to contain the same picture. In the kitchen, the officers found a box containing a digital scale, small baggies, razorblades, and a spoon with the word "cocaine" inscribed on it. In the bedroom, the officers found a handgun, a shotgun, and a permit to carry firearms issued to Wright's girlfriend K.F., a corrections officer for Ramsey County.

Dakota County charged Wright with aiding and abetting first-degree sale of a controlled substance, second-degree sale of a controlled substance, third-degree possession of a controlled substance, and felon in possession of a firearm.

The district court held a four day jury trial. At trial, Officer Farrington testified in detail about his observations of the four controlled buys. Officer Farrington also testified that the \$580 found in Wright's home specifically matched bills that were used in the March 27 and March 31 controlled buys. Adams also testified about his role in the controlled buys and stated that, during each controlled buy, he had purchased heroin from Wright. Adams further told the jury that he pleaded guilty to one count of first-degree sale of a controlled substance in connection with the controlled buys. The district court did not give a jury instruction on accomplice testimony concerning Adams's testimony.

K.F. also testified at trial. She testified that Wright was not aware she kept her guns in his home. K.F. said that she had never seen Wright use or sell heroin, but she conceded that some of the items found in Wright's home could be indicative of drug dealing.

The jury convicted Wright of the three controlled-substance charges, but acquitted him of the charge for felon in possession of a firearm. Wright now appeals.

D E C I S I O N

I. Accomplice Testimony

Wright argues that the district court committed reversible error by not properly instructing the jury about accomplice testimony. We review the district court's failure to instruct the jury using the plain-error standard because Wright did not object to the lack of an instruction at trial. *State v. Word*, 755 N.W.2d 776, 785 (Minn. App. 2008). "Under plain error analysis, we must determine whether there was error, that was plain, and that affected the defendant's substantial rights." *State v. Kuhlmann*, 806 N.W.2d

844, 852 (Minn. 2011). “An error affects substantial rights if the error was prejudicial and affected the outcome of the case.” *Id.* at 853. Plain error in jury instructions “is prejudicial if there is a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the [jury’s] verdict.” *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002) (quotation omitted).

Under Minnesota law, a criminal conviction cannot be based solely on the uncorroborated testimony of an accomplice. Minn. Stat. § 634.04 (2010). This rule “is based on the fear of self-serving dishonesty by accomplice witnesses.” *State v. Clark*, 755 N.W.2d 241, 253 (Minn. 2008). Accordingly, a district court is required to instruct the jury about the use of accomplice testimony whenever a witness against the defendant may be considered an accomplice. *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002).

The state concedes that Adams was Wright’s accomplice and that the district court committed plain error by failing to properly instruct the jury about his testimony. The state argues, however, that the error did not affect Wright’s substantial rights because sufficient evidence corroborated Adams’s testimony about each controlled buy.

“[E]vidence is sufficient to corroborate an accomplice’s testimony when it is weighty enough to restore confidence in the truth of the accomplice’s testimony.” *Clark*, 755 N.W.2d at 253 (quotation omitted). Sufficient corroborative evidence must “affirm the truth of the accomplice’s testimony and point to the guilt of the defendant in some substantial degree.” *State v. Sorg*, 275 Minn. 1, 5, 144 N.W.2d 783, 786 (1966); *see also State v. Rasmussen*, 241 Minn. 310, 313, 63 N.W.2d 1, 3 (1954).

Wright argues that no evidence in the record corroborates Adams's testimony that Wright sold him .82 grams of heroin on March 27, because Farrington was unable to identify Wright at the controlled buy. Although Farrington was unable to identify Wright, he testified that he observed Adams get into the Taurus with two African-American men, a description consistent with Wright's gender and race. Moreover, cash that had been used during the March 27 controlled buy was discovered at Wright's house during the search. This evidence is sufficient to "restore confidence in the truth of [Adams's] testimony." *Clark*, 755 N.W.2d at 253 (quotation omitted).

In fact, evidence in the record corroborates Adams's testimony about all four controlled buys even though Farrington and the other officers did not personally observe Wright and Adams exchange drugs or money. At the March 31 controlled buy, officers observed Adams get into a Buick Riviera occupied by an African-American male and owned by K.F., Wright's girlfriend. Officers stopped the car a few minutes after the controlled buy and identified the man as James Willingham, Wright's alias. Officers later found cash from the March 31 buy during the search of Wright's home. On April 7, Farrington observed Adams get into a Chevy Caprice that was registered to James Willingham. On April 16, officers observed Adams get into the same Chevy Caprice and then surrounded the car and arrested Wright and Adams. Thus, the corroborating evidence was sufficient to restore confidence in the truth of Adams's testimony about all four of the controlled buys.

Although the district court committed plain error by not properly instructing the jury about accomplice testimony, we conclude that the error did not affect Wright's substantial rights because other evidence sufficiently corroborated Adams's testimony.

II. Ineffective Assistance of Counsel

In his pro se brief, Wright argues that he received ineffective assistance of counsel at trial. To prevail on an ineffective-assistance-of-counsel claim, an appellant must demonstrate that the "representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Martin*, 695 N.W.2d 578, 587 (Minn. 2005) (quotation omitted).

Wright contends that his counsel failed to disclose evidence that would have proved his innocence. What evidence to present at trial is a decision that rests within the trial counsel's discretion. *Leake v. State*, 737 N.W.2d 531, 539 (Minn. 2007). Thus, we conclude that Wright's claim of ineffective assistance of counsel has no merit because we do not review attacks on trial strategy. *See Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001).

III. Probable Cause for Search

Wright also raises a pro se challenge to the search of his home, claiming that the search-warrant application was not supported by probable cause. "Determinations of probable cause by the issuing judge are afforded 'great deference' by [an appellate] court and are not reviewed de novo." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995). On

appeal, we must “ensure that the issuing judge had a substantial basis for concluding that probable cause existed” under the totality of the circumstances. *Id.* (quotation omitted).

Wright specifically challenges Farrington’s affidavit that was submitted with the search-warrant application, contending that it contained false statements. Search warrants are presumed to be valid, and this presumption may be overcome only if the affidavit supporting the application “is shown to be the product of deliberate falsehood or reckless disregard for the truth.” *State v. McGrath*, 706 N.W.2d 532, 540 (Minn. App. 2005) (citing *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684 (1978)), *review denied* (Minn. Feb. 22, 2006). “Misrepresentations invalidate a warrant when they are (1) deliberately or recklessly made, and (2) material to establishing probable cause, meaning probable cause could likely not be established without them.” *State v. Jenkins*, 782 N.W.2d 211, 223–24 (Minn. 2010) (quotation omitted), *cert. denied*, 131 S. Ct. 1533 (2011). “Innocent or negligent misrepresentations will not invalidate a search warrant.” *McGrath*, 706 N.W.2d at 540.

Wright specifically objects to Farrington’s statement that officers “observed Dwayne Lee Wright . . . at the controlled buys in the white Buick [Riviera],” and that officers observed Wright on April 4 “making two apparent drug transactions.” Wright argues that these statements are false and conclusory because the officers did not personally observe any drug transactions.

While probable cause may not be based solely on conclusory statements, “the issuing judge is entitled to draw common-sense and reasonable inferences from the facts and circumstances set forth in an affidavit.” *State v. Brennan*, 674 N.W.2d 200, 204

(Minn. App. 2004) (quotation omitted), *review denied* (Minn. Apr. 20, 2004). Additionally, the court may consider the police officer's training and experience when determining whether a warrant application is supported by probable cause. *Id.*

Wright has failed to demonstrate that these statements were false or that Farrington demonstrated a reckless disregard for the truth by including them in his affidavit. The officers' observations of Wright's movements, coupled with their training, reasonably led them to conclude that they did in fact observe Wright participating in "apparent drug transactions." On this record, we conclude that the issuing judge did not err in finding probable cause for the search warrant.

Affirmed.