IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

MAXIMO SN. MUNA,
Defendant-Appellant.

Supreme Court No. 2013-SCC-0044-CRM

Superior Court No. 12-0194

OPINION

Cite as: 2016 MP 10

Decided August 18, 2016

Stephen J. Nutting, Saipan, MP, for Defendant-Appellant.

Emily S. Cohen, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

INOS, J.:

¶ 1 Defendant-Appellant Maximo SN. Muna ("Muna") appeals his conviction for Armed Robbery, Theft, Criminal Contempt, and Disturbing the Peace. He argues the trial court erred by failing to give a cautionary accomplice jury instruction and claims his trial counsel's failure to request such an instruction constitutes ineffective assistance of counsel. For the following reasons, we AFFIRM Muna's conviction.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 On October 4, 2012, a masked person wearing camouflage military fatigues and carrying a machete entered the poker room in J's Restaurant in Gualo Rai and grabbed a basket of coins. Meanwhile, Anthony Aldan ("Aldan") was waiting outside in a black Jeep Cherokee getaway vehicle. But when Aldan saw people running out of the restaurant screaming, he became scared and drove away, leaving his accomplice behind. A police officer observed Aldan's vehicle leaving the scene, pulled him over, and searched the vehicle. Because the search yielded no evidence tying Aldan to the robbery, the officer let him go.

¶ 3 The masked man successfully fled the crime scene. Detective Peter A. Aldan ("Detective Aldan") arrived on the scene and learned that the suspect fled south. He followed suit and discovered a perforated yellow basket with several quarters on the ground. Detective Aldan continued on to a nearby building where he reached a retaining wall. On the other side of the wall, there was an area of grass. Based upon Detective Aldan's observation of the site, it appeared that someone had recently jumped down onto the grass and continued into the jungle.

¶ 4 Detective Dennis Masga Reyes ("Reyes") also responded to the robbery. At the scene, an officer informed Reyes that a vehicle had been pulled over at about the time of the incident. Reyes found the vehicle after three days of searching and consequently met Aldan. Reyes questioned Aldan, who implicated Muna in the robbery.

¶ 5 At trial, Aldan testified that Muna was the masked man who robbed the poker room. According to Aldan, Muna arrived at Aldan's house on the night of October 3, 2012, where the two smoked methamphetamine. Muna then left but the two met again at KB poker. There, Muna asked Aldan if he wanted to smoke more, and the two then proceeded in Aldan's car to another poker room. After stopping there, they drove to J's Restaurant. On the way, Muna asked Aldan if he wanted to make some money. Muna said that he had been staking out J's Restaurant, and knew he could get a lot of money there. Aldan agreed and parked the car outside the restaurant. Muna, wearing fatigues and holding a machete, put on a mask, told Aldan to keep the car running, and entered the

restaurant. When Aldan saw people running out of the restaurant and screaming, he got scared and drove off.

¶ 6 Two restaurant employees testified at trial. Vincent Deleon Guerrero ("Deleon Guerrero"), a waiter who knew Muna from junior high school, testified he had seen Muna at the restaurant several times. He identified Muna as wearing camouflage military fatigues on at least one occasion. Sometime before the robbery, Muna approached Deleon Guerrero and said "Ben, ta hit este," which Deleon Guerrero understood to mean, "let's rob the place." Tr. 156. Gloriana Rasa ("Rasa"), a waitress, saw Muna at the restaurant three different times prior to the robbery. She testified that she saw the robber wearing a military fatigue jacket. Additionally, the Commonwealth provided images taken from surveillance video showing the robber wearing a camouflage military jacket.

¶ 7 Following the close of evidence, the court gave a general witness credibility jury instruction:

> In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says or part of it or none of it. In considering the testimony of any witness, you may take into account, one, the witness' opportunity and ability to see, or hear, or know the things testified to. Two. The witness' memory. Three. The witness' manner while testifying. Four. The witness' interest in the outcome of the case, if any. Five. The witness' bias or prejudice, if any. Six. Whether other evidence contradicted the witness' testimony. Seven. The reasonableness of the witness' testimony in light of all the evidence. And eight, any other factors that bear on believability.

Tr. 302–03.

¶ 8 The jury found Muna guilty of Armed Robbery. Additionally, the court found him guilty of Theft, Criminal Contempt, and three counts of Disturbing the Peace.

II. JURISDICTION

¶ 9 We have jurisdiction over final judgments and orders issued by the Superior Court. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 10 Because Muna did not request a cautionary accomplice jury instruction, we review for plain error. NMI R. CRIM. P. 52(b); *See Commonwealth v. Ramangmau*, 4 NMI 227, 238 (reviewing vehicular homicide jury instruction for plain error when defendant failed to contemporaneously object). We review claims of ineffective assistance of counsel de novo. *Commonwealth v. Taivero*, 2009 MP 10 ¶ 7.

IV. DISCUSSION

¶ 11 Muna argues we must reverse his conviction for two reasons. First, he asserts the trial court erred by failing to give a cautionary accomplice jury instruction. Second, he contends his trial counsel's failure to request an accomplice instruction constitutes ineffective assistance of counsel. We address his arguments in turn.

A. Cautionary Accomplice Jury Instruction

¶ 12 We review for plain error the trial court's failure to instruct the jury to consider accomplice testimony with care and caution. When reviewing for plain error, we consider whether there was an error that was plain and whether the error affected the defendant's substantial rights. *Commonwealth v. Salasiban*, 2014 MP 17 ¶ 10. If the above elements are satisfied, we then have "the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

¶ 13 "A court errs if it deviates from a legal rule that has not been intentionally relinquished or abandoned by the appellant." *Id.* ¶ 11 (citing *United States v. Olano*, 507 U.S. 725, 732–33 (1993)). Whether a cautionary accomplice instruction is required is an issue of first impression. Because there is no written or local customary law regarding the necessity of a cautionary accomplice instruction and the restatements of law do not address the issue, we apply "the rules of the common law . . . as generally understood and applied in the United States." 7 CMC § 3401; *see also Commonwealth v. Quitano* 2014 MP 5 ¶ 13 n.11 (concluding 7 CMC § 3401 applies in both civil and criminal cases).

¶ 14 In the Commonwealth, we have held a conviction may be based solely upon an accomplice's uncorroborated testimony, provided "the testimony is not inherently implausible." *Commonwealth v. Camacho*, 2002 MP 6 ¶ 110. Likewise, federal courts and a majority of state courts allow convictions based upon uncorroborated accomplice testimony. *Caminetti v. United States*, 242 U.S. 470, 495 (1917); *Brown v. Maryland*, 378 A.2d 1104, 1105–06 (Md. 1977).

¶ 15 A number of federal courts have held that defendants may be entitled to instructions cautioning the jury to consider accomplice testimony with care and caution, depending on the circumstances of the case. *E.g.*, *Tillery v. United States*, 411 F.2d 644, 648 (5th Cir. 1969) (reversing for plain error where critical uncorroborated accomplice testimony was unreliable in light of contradictory statements); *United States v. Patterson*, 648 F.2d 625, 631 (9th Cir. 1981) (noting that a cautionary instruction is required when accomplice testimony provides the only strong evidence supporting a guilty verdict). When convictions can be based upon uncorroborated accomplice testimony, such testimony may often prove decisive. *Tillery*, 411 F.2d at 648. A cautionary instruction may therefore be necessary to ensure the jury considers potentially unreliable testimony from the proper perspective. *Id.*

¶ 16 Among the states allowing convictions upon uncorroborated accomplice testimony, there is substantial variation as to when cautionary accomplice instructions may be required. In some jurisdictions, trial courts are required to give cautionary accomplice instructions upon a defendant's request, *compare State v. Lawson*, 178 N.E. 62, 63 (Ill. 1931) (concluding trial court abused its discretion by refusing to instruct the jury that accomplice testimony should be viewed with great caution), *with People v. Parks*, 357 N.E.2d 487, 489–90 (Ill. 1976) (finding no reversible error when court failed to issue cautionary accomplice instruction sua sponte), while others require courts to give such instructions sua sponte. *See, e.g.*, *Brooks v. State*, 40 A.3d 346, 349–50 (Del. 2012) (concluding trial court must give sua sponte accomplice instruction cautioning the jury to view accomplice testimony with more care). In several other states, trial courts exercise discretion to deny cautionary accomplice instructions, *see, e.g.*, *State v. Palmer*, 474 A.2d 494, 495 (Me. 1984) (finding no abuse of discretion where the trial court refused to give an accomplice instruction but instead gave a general credibility instruction and the accomplice's testimony was substantially corroborated), or such instructions are altogether prohibited. *See, e.g.*, *State v. Bussdieker*, 621 P.2d 26, 29 (Ariz. 1980) (concluding refusal to give accomplice instruction is not reversible error by the trial court because such an instruction is an inappropriate comment on the evidence).

¶ 17 In eight of the thirty states in which a conviction can be based upon uncorroborated accomplice testimony,[1] courts may be required to issue a sua

[1] These thirty states include: Arizona, *State v. Edwards*, 665 P.2d 59, 67 (Ariz. 1983), Colorado, *Pieramico v. People*, 478 P.2d 304, 307 (Colo. 1970), Connecticut, *State v. La Fountain*, 103 A.2d 138, 142 (Conn. 1954), Delaware, *Jacobs v. State*, 358, A.2d 725, 729 (Del. 1976), Florida, *Land v. State*, 59 So.2d 370, 370 (Fla. 1952), Hawaii, *State v. Carvelo*, 361 P.2d 45, 58–59 (Haw. 1961), Illinois, *People v. Mentola*, 268 N.E.2d 8, 10 (Ill. 1971), Indiana, *Newman v. State*, 334 N.E.2d 684, 687 (Ind. 1975), Kansas, *State v. Shepherd*, 516 P.2d 945, 952 (Kan. 1973), Louisiana, *State v. May*, 339 So.2d 764, 775 (La. 1976), Maine, *State v. Jewell*, 285 A.2d 847, 851 (Me. 1972), Massachusetts, *Commonwealth v. Giacomazza*, 42 N.E.2d 506, 515 (Mass. 1942), Michigan, *People v. De Lano*, 28 N.W.2d 909, 913 (Mich. 1947), Mississippi, *Sanders v. State*, 313 So.2d 398, 400 (Miss. 19975), Missouri, *State v. Lang*, 515 S.W.2d 507, 509 (Mo. 1974), Nebraska, *State v. Huffman*, 385 N.W.2d 85, 90 (Neb. 1986), New Hampshire, *State v. Rumney*, 258 A.2d 349, 350 (N.H. 1969), New Jersey, *State v. Spruill*, 106 A.2d 278, 280 (N.J. 1954), New Mexico, *State v. Gutierrez*, 408 P.2d 503, 504 (N.M 1965), North Carolina, *State v. Saunders*, 95 S.E.2d 876, 879 (N.C. 1957), Ohio, *State v. Tapp*, 2007-Ohio-2959 at ¶ 44 (Ohio Ct. App. 2007), Pennsylvania, *Commonwealth v. Bruno*, 175 A. 518, 521 (Pa. 1934), Rhode Island, *State v. Riddel*, 96 A. 531, 534 (R.I. 1916), South Carolina, *State v. Steadman*, 186 S.E.2d 712, 715 (S.C. 1972), Vermont, *State v. Dana*, 10 A. 727, 729 (Vt. 1887), Virginia, *Dillard v. Commonwealth*, 224 S.E.2d 137, 138–39 (Va. 1976), Washington, *State v. Johnson*, 462 P.2d 933, 943 (Wash. 1969), West Virginia, *State v. Vance*, 262 S.E.2d 423, 426 (W. Va. 1980), Wisconsin, *Kutchera v. State*, 230 N.W.2d 750, 759 (Wis. 1975) and Wyoming, *Phillips v. State*, 553 P.2d 1037, 1040 (Wyo. 1976).

sponte cautionary accomplice instruction.[2] In these jurisdictions, the court's failure to give a sua sponte cautionary instruction may be reviewed for plain error, but reversal may be unwarranted under the particular facts of the case.[3] Additionally, in Pennsylvania, an instruction cautioning the jury that an accomplice is a "corrupt and polluted source" is mandatory, and trial counsel's failure to request the instruction may constitute ineffective assistance. S*ee Commonwealth v. Chmiel*, 639 A.2d 9, 12–13 (Pa. 1994).[4]

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[2] These states are Colorado, Connecticut, Delaware, Florida, Kansas, Michigan, Ohio, and Wyoming. *See People v. Dillon*, 633 P.2d 504, 508 (Colo. App. 1981) (concluding the failure to issue a sua sponte cautionary accomplice instruction was not reversible plain error where jury was aware accomplice testimony was delivered because of plea negotiations and the accomplices' credibility was otherwise subject to challenge by defense); *State v. Jamison*, 134 A.3d 560, 566 (Conn. 2016) (concluding the court commits plain error by failing to give cautionary accomplice credibility instruction, but finding reversible error requires considering four additional factors); *Brooks*, 40 A.3d at 348 (holding it is plain error to fail to instruct that accomplice testimony should be viewed with more care and caution); *Dennis v. State*, 817 So.2d 741, 751 (Fl. 2002) (determining that reversal for fundamental error was unwarranted when court did not give sua sponte accomplice instruction, because general credibility instruction as sufficient in light of extensive cross-examination and defense's closing argument); *State v. Crume*, 22 P.3d 1057, 1063–64 (Kan. 2001) (finding no reversible clear error where accomplice testimony was corroborated and general credibility instruction was given); *People v. Young*, 693 N.W.2d 801, 808–09 (Mich. 2005) (concluding failure to issue sua sponte cautionary accomplice instruction was not reversible plain error when it was unclear that witnesses were actually accomplices, prosecution presented other evidence of guilt, alleged accomplices were subject to cross-examination, and court instructed on biases and prejudices of witnesses); *State v. Bentley*, 2005-Ohio-4648 at ¶ 58 (Ohio Ct. App 2005) (stating that plain error analysis regarding failure to issue sua sponte cautionary accomplice instruction involves consideration of whether accomplice testimony is corroborated, whether jury knows that accomplice benefitted by agreeing to testify, and whether general credibility instruction is given); *Vlahos v. State*, 75 P.3d 628, 639 (Wyo. 2003) (finding no plain error where court failed to give cautionary accomplice instruction because of lack of clear state precedent regarding the instruction). Additionally, in California, where a conviction cannot be based upon uncorroborated accomplice testimony, CAL. PENAL CODE § 1111, courts must issue sua sponte cautionary accomplice instructions. *See People v. Fowler*, 196 Cal.App.3d 79, 85 ("when an accomplice . . . is called as a witness by the People, the court is required to give a cautionary instruction concerning the accomplice's testimony even though no request is made").

[3] For instance, appellate courts may consider whether the trial court gave a general credibility instruction or whether the accomplice testimony was otherwise corroborated. *See, e.g.*, *Crume*, 22 P.3d at 1063–64.

[4] In states prohibiting convictions based upon uncorroborated accomplice testimony, the trial court may have a related duty to give a sua sponte instruction informing the jury of the need for evidence corroborating accomplice testimony. *See, e.g.*, *Zamora v. State*, 411 S.W.3d 504, 513 (Tex. Crim. App. 2013) (concluding court must sua

¶ 18 In contrast, at least eighteen of the states in which accomplice testimony need not be corroborated, courts either do not commit reversible error by failing to give cautionary accomplice credibility instructions sua sponte or such instructions are altogether inappropriate. Courts in at least twelve of those states—Illinois, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Vermont, West Virginia, and Wisconsin—have held that failure to give cautionary accomplice instructions sua sponte does not constitute reversible error.[5] In these jurisdictions, either trial courts have a limited duty to instruct the jury sua sponte on the elements of offenses, burden of proof, and presumption of innocence or the failure to object to jury instructions constitutes waiver. *See, e.g.*, *Parks*, 357 N.E.2d at 489; *State v. Schenk*, 193 N.W.2d 26, 29–30 (Wis. 1972). In the remaining six states—Arizona, Hawaii, Indiana, New Mexico, Rhode Island, and South Carolina—courts can or must refuse to give accomplice instructions upon a defendant's request.[6] A prohibition of cautionary accomplice instructions may be justified

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sponte instruct that under Texas statute a conviction cannot rest upon accomplice testimony unless corroborated); *State v. Clark*, 755 N.W.2d 241, 252–53 (Minn. 2008) (determining court committed plain error by failing to instruct that conviction cannot be based upon uncorroborated accomplice testimony when corroborating evidence was relatively weak).

[5] *See, e.g.*, *Parks*, 357 N.E.2d at 489–90 (no reversible error where court did not issue sua sponte instruction cautioning the jury to view accomplice testimony with suspicion); *State v. Rabun*, 880 So.2d 184, 191 (La. App. 2004) (stating court has no duty to issue sua sponte cautionary accomplice jury instruction); *Commonwealth v. French*, 259 N.E.2d 195, 225 (Mass. 1970) (stating that a court is not obligated to instruct jury to scrutinize accomplice testimony with care); *Grimes v. State*, 909 So.2d 1184, 1189–90 (Miss. App. 2005) (noting that a court has no duty to give a sua sponte cautionary accomplice instruction); *Lang*, 515 S.W.2d at 509–10 (finding no reversible error where court refused an incorrect accomplice instruction and failed to give a sua sponte cautionary accomplice instruction); *Huffman*, 385 N.W.2d at 90 (concluding a court does not commit reversible error by failing to issue jury instruction on credibility of accomplice testimony); *State v. Artis*, 269 A.2d 1, 6 (N.J. 1970) (concluding a court does not err by failing to give sua sponte cautionary accomplice instruction); *State v. O'Brien*, 317 A.2d 783, 785 (N.H. 1974) (finding that failure to request cautionary accomplice instruction results in waiver); *State v. Whitaker*, 252 S.E.2d 242, 243 (N.C. App. 1979) (stating that a court not required to give sua sponte cautionary jury instruction to scrutinize accomplice testimony); *State ex rel. Franklin v. McBride*, 701 S.E.2d 97, 103 n.14 (W. Va. 2009) (commenting that the trial court need not issue cautionary accomplice instruction sua sponte); *State v. Crepeault*, 229 A.2d 245, 247 (Vt. 1967) (finding no reversible error where court failed to give sua sponte cautionary accomplice instruction); *State v. Schenk*, 193 N.W.2d 26, 29–30 (Wis. 1972) (determining that appellant waived argument that court erred by failing to issue sua sponte cautionary instruction).

[6] *See, e.g.*, *Bussdieker*, 621 P.2d at 29 (concluding denial of request for accomplice instruction was proper because such instructions constitute improper comments on the evidence); *State v. Okumura*, 894 P.2d 80, 105 (Haw. 1995) (concluding that courts have discretion to refuse or fail to give cautionary accomplice instruction in a case

as upholding the trial court's duty to avoid improperly commenting upon the evidence. *See, e.g.*, *Bussdieker*, 621 P.2d at 29; *State v. Bagwell*, 23 S.E.2d 244, 249 (S.C. 1942).

¶ 19 We have previously held the trial court has a duty "to instruct the jury of its own motion" in criminal trials, "charging them fully and fairly upon the law relating to the facts of the case." *Commonwealth v. Cepeda*, 2009 MP 15 ¶ 40 (quoting *People v. Davis*, 276 P.2d 801, 808 (Cal. 1954)). The trial court fails to meet this duty when it omits elements of criminal offenses. *Commonwealth v. Estevez*, 3 NMI 447, 453–54 (1993) (assault with a dangerous weapon jury instruction erroneously omitted the use of a dangerous weapon as an element); *Cepeda*, 2009 MP 15 ¶ 41 (failure to instruct that robbery required specific intent was error because it permitted a conviction without proof of all essential elements). We have also found reversible error when instructions failed to define terms of art relating to elements of offenses and when instructions inaccurately stated statutory requirements. *Quitano*, 2014 MP 5 ¶ 21 (failure to define premeditation, which is a term of art and an element of first-degree murder); *Commonwealth v. Sanchez*, 2014 MP 3 ¶ 24 (failure to give instruction that conduct amounting to sexual abuse of a minor in the first or second degrees must occur before victim's sixteenth birthday). Furthermore, we held the failure to give correct self-defense instruction denied defendant "the right to have the jury instructed on his theory of the case." *Commonwealth v. Demapan*, 2008 MP 16 ¶ 33. In sum, we have only found our courts fail to fulfill the duty to instruct the jury when they omit instructions closely related to elements of criminal offenses.

¶ 20 However, we are not convinced the court's duty to instruct the jury of its own motion extends to giving cautionary accomplice instructions. Among the jurisdictions in which convictions can be based upon uncorroborated accomplice testimony, only a small minority require cautionary accomplice instructions be given sua sponte, *supra* ¶ 17, whereas a substantial majority do not require sua sponte cautionary instructions. *Supra* ¶ 18. Indeed, the decision whether to request a cautionary accomplice instruction may be a matter of defense trial strategy. *See State v. Begyn*, 167 A.2d 161, 171 (N.J. 1961) ("after

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where accomplice testimony substantially supports prosecution); *Morgan v. State*, 419 N.E.2d 964, 968–69 (Ind. 1981) (noting that refusal to give cautionary accomplice instruction was proper because such an instruction "would have unduly disparaged the testimony of the defendants' accomplices"); *State v. Sarracino*, 964 P.2d 72, 76–79 (N.M. 1998) (concluding that existing practice of refusing to give cautionary accomplice instruction does not deny defendant due process of law); *State v. Mastrofine*, 551 A.2d 1174, 1176 (R.I. 1988) (holding that the court properly refused to give instruction cautioning jury to carefully scrutinize accomplice testimony because it has an obligation to avoid giving opinion on matters of weight and credibility of witnesses); *State v. Bagwell*, 23 S.E.2d 244, 249 (S.C. 1942) (concluding the court properly refused to give a cautionary accomplice instruction because the court is constitutionally prohibited from expressing opinion as to weight or sufficiency of testimony).

weighing the possible benefits against the potential harm, a defendant might wisely refrain from requesting" an accomplice instruction); *State v. Johnson*, 848 P.2d 496, 499 (Mont. 1993) (commenting that the decision to not request an accomplice instruction was a tactical choice because the instruction could be inconsistent with the assertion that defendant was not at the crime scene). Thus, issuing a sua sponte cautionary instruction could potentially be prejudicial to the defense, as defense counsel may prefer to pursue a trial strategy distancing the defendant from an alleged accomplice. *See Artis*, 269 A.2d at 6 ("While a defendant is entitled to such a charge if requested and a judge may give it on his own motion if he thinks it advisable under the circumstances, it is generally not wise to do so absent a request, because of the possible prejudice to the defendant."). In this case, counsel may have concluded the general credibility instruction was sufficient and decided the better strategy was to attack Aldan's credibility on cross-examination rather than by requesting a cautionary instruction. To minimize the risk of unfair prejudice to the parties, we leave the matter of trial strategy in the hands of counsel rather than the trial court. *See United States v. Goodwin*, 770 F.2d 631, 637 (7th Cir. 1985) ("A trial judge must take great care not to assume the functions of trial counsel."). Accordingly, we join the majority of jurisdictions and hold the trial court did not err by failing to give a cautionary accomplice instruction sua sponte.

¶ 21 Because the trial court's failure to give a cautionary accomplice instruction sua sponte was not an error, Muna is not entitled to reversal under the plain error doctrine. *See Commonwealth v. Taman*, 2014 MP 8 ¶ 31 (concluding appellant was not entitled to reversal when she did not satisfy first prong of plain error test).

B. Ineffective Assistance of Counsel

¶ 22 The Sixth Amendment of the United States Constitution guarantees the criminally accused the right to assistance of counsel. U.S. CONST. amend. VI. This "right to counsel is the right to the *effective* assistance of counsel." *Commonwealth v. Shimabukuro*, 2008 MP 10 ¶ 9 (quoting *McMann v. Richardson*, 397 U.S. 759, 774 (1970)). Here, Muna asserts he was denied effective assistance of counsel because of his counsel's failure to request a cautionary accomplice instruction.

¶ 23 Ineffective assistance of counsel claims often involve factual development outside of the appellate record; thus, such claims should typically be brought by collateral attack rather than direct appeal. *Id.* ¶ 8 (citing *Esteves*, 3 NMI at 460). However, ineffective assistance claims may be brought on direct appeal when "the record is sufficiently complete to decide the issue." *Id.* (quoting *Esteves*, 3 NMI at 460). Because Muna's argument does not rely upon facts outside of the record, we conclude his claim can be reviewed on appeal.

¶ 24 Establishing ineffective assistance of counsel requires a criminal defendant to "show that the counsel's *performance* was deficient," and "the deficient performance *prejudiced* the defense." *Taivero* 2009 MP 10 ¶ 10 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To demonstrate

prejudice, "the defendant 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Shimabukuro*, 2008 MP 10 ¶ 11 (quoting *Strickland*, 466 U.S. at 694). Thus, there must be a "reasonable probability that the attorney's error caused the defendant to lose the case." *Id.* (citing *Strickland*, 466 U.S. at 695).

¶ 25 Assuming, without deciding, defense counsel's performance was deficient, Muna fails to establish he received ineffective assistance because he does not demonstrate prejudice.[7] *See Commonwealth v. Laniyo*, 2012 MP 1 ¶ 25 (rejecting ineffective assistance of counsel for failure to demonstrate prejudice). In other words, Muna does not show a reasonable probability that the failure to request an accomplice instruction caused the jury to convict him. First, there was evidence corroborating Aldan's testimony identifying Muna as the robber. *See State v. Barnes*, 791 N.W.2d 817, 825 (Iowa 2010) (concluding failure to request instruction that conviction could not be based upon uncorroborated accomplice testimony did not prejudice defendant for purpose of ineffective assistance claim in light of substantial corroborating evidence). At trial, Aldan testified that Muna told him that he had been staking out J's Restaurant. Rasa testified she saw Muna at the restaurant three times before the robbery. Deleon Guerrero testified that he also saw Muna at the restaurant a couple of times before the robbery, and that Muna was wearing camouflage fatigues on at least one occasion. Surveillance video from J's Restaurant showed the robber wearing camouflage military fatigues. Deleon Guerrero further testified that during one of his shifts, Muna said he wanted to rob the place—"Ben ta hit este." Tr. 156. Thus, there was circumstantial evidence corroborating Aldan's testimony that Muna was the masked robber. Second, the trial court gave a general credibility instruction, which specifically instructed the jury to consider witnesses' interests in the outcome of the trial and any other factors bearing on credibility. Last, defense counsel attacked Aldan's credibility. During cross-examination, counsel elicited testimony that after the robbery, Aldan was afraid of losing his family; he admitted to participating in the robbery; he knew he could go to jail; and the detectives offered to try to help him. In light of the corroborating evidence, general credibility instruction, and extensive cross-examination, we conclude there is not a reasonable probability that counsel's failure to request a cautionary accomplice instruction affected the outcome.

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[7] Courts vary as to whether failure to request an accomplice instruction constitutes deficient performance. *Compare e.g.*, *Brooks*, 40 A.3d at 354 (finding deficient performance because failure to request instruction cautioning jury to view accomplice testimony with suspicion and caution yields no advantage) *with Johnson*, 848 P.2d at 499 (concluding failure to request accomplice instruction involved a tactical decision and was therefore not ineffective assistance of counsel). Because Muna fails to demonstrate prejudice, we need not reach the issue of deficient performance.

V. CONCLUSION

¶ 26 For the foregoing reasons, we AFFIRM Muna's conviction for Armed Robbery, Theft, Criminal Contempt, and Disturbing the Peace.

SO ORDERED this 18th day of August, 2016.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice