STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2298

State of Minnesota,
Respondent,

vs.

Donald Leonard Staples,
Appellant.

Filed March 25, 2008
Affirmed
Collins, Judge[*]

Mille Lacs County District Court
File No. CR-05-840

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

Janice S. Kolb, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney, Courthouse Square, 525 Second Street Southeast, Milaca, MN 56353 (for respondent)

John M. Stuart, State Public Defender, Paul J. Maravigli, Assistant Public Defender, 317 Second Avenue South, Suite 200, Minneapolis, MN 55401 (for appellant)

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

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

On appeal from his convictions of second- and third-degree assault, appellant argues that (1) the evidence is insufficient to sustain his convictions; and (2) the district court committed fundamental error when it failed to define the terms "assault" and "intent" when instructing the jury on the elements of the offenses. We affirm.

FACTS

Following a confrontation with R.D., appellant Donald Staples was charged with second-degree assault in violation of Minn. Stat. § 609.222, subd. 2 (2004), and third-degree assault in violation of Minn. Stat. § 609.223, subd. 1 (2004).

At trial, James Pierzinski testified that on March 29, 2005, he was in the parking lot of the Mille Lacs Grand Casino hotel taking his lunch break with his work crew from their job of remodeling the interior of the hotel when he observed a vehicle stop at a point approximately 40 yards away. A man, recognized and identified by Pierzinski as appellant, got out of the vehicle and began arguing with Pierzinski's foreman's brother, R.D. Pierzinski testified that the two men began to throw punches at each other and then he heard R.D. shout out. Pierzinski recounted that "[t]here was a lotta action going on. . . . I seen [appellant] hit [R.D.] and all of a sudden [R.D.'s] bleedin'." Although Pierzinski stated that he did not actually see a weapon, and that there were a few cars in the parking lot, he testified that he had an unobstructed view of the fight.

Officer Anthony Erholz testified that he responded to the Nay Ah Shing Clinic after being informed of a man who had been cut. Erholz testified that he identified the

alleged victim, R.D., and photographed his injury, a six-inch long and two-inch wide cut on R.D.'s chest. Erholz then went to the scene of the altercation and took photographs of a red substance that was spattered on the parking lot. Although the substance was never tested, Erholz testified that based on his six years of law enforcement experience, he believed that it was blood. Erholz further testified that during his investigation, he learned that R.D. had been cut by a knife. But he also admitted that no knife was recovered.

Following trial, a jury returned guilty verdicts on both charged offenses. Appellant moved for judgment of acquittal or a new trial. The district court denied appellant's motion and imposed an executed guidelines sentence of 39 months in prison. This appeal followed.

D E C I S I O N

I.

Appellant argues that the evidence was insufficient to support the verdicts. In considering a claim of insufficient evidence, this court's review is limited to a "painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, [is] 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 that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). 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, could reasonably

conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Circumstantial evidence is entitled to as much weight as direct evidence. *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992). For a defendant to be convicted based on circumstantial evidence alone, however, the circumstances proved must be "consistent with the hypothesis that the [defendant] is guilty and inconsistent with any rational hypothesis [other than] guilt." *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). Even subject to this strict standard, the fact-finder is in the best position to weigh the credibility of evidence and thus determines which witnesses to believe and how much weight to give to their testimony. *State v. Daniels*, 361 N.W.2d 819, 826-27 (Minn. 1985). "Inconsistencies in the state's case or possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995).

Appellant was found guilty of both second- and third-degree assault. "Whoever assaults another with a dangerous weapon and inflicts substantial bodily harm" commits assault in the second degree. Minn. Stat. § 609.222, subd. 2 (2004). "Whoever assaults another and inflicts substantial bodily harm" commits assault in the third degree. Minn. Stat. § 609.223, subd. 1 (2004).

Appellant argues that the evidence was insufficient to support the verdicts because the exact time of the altercation was not established and there was no evidence as to the recency of the wound or how it was inflicted. Thus, appellant argues that the lack of

evidence presented leaves open the possibility that R.D.'s injury may have occurred earlier in the day and may have been inflicted in some way other than by appellant.

We disagree. James Pierzinski testified that he was having lunch when he observed the altercation between the person he recognized as appellant and R.D. Pierzinski's testimony that the incident occurred at about noon is corroborated by Officer Erholz's testimony that he arrived at the Nay Ah Shing Clinic at about 12:22 p.m. and observed R.D.'s injury. If believed, this testimony is sufficient to establish the approximate time of the altercation. *See Moore*, 438 N.W.2d at 108 (stating this court assumes the jury believed the state's witnesses and disbelieved any contrary evidence). Although there was no expert testimony as to the age of the wound, the exhibited photographs taken by Erholz depict what could reasonably be viewed as a fresh cut. No less important, photographs of R.D.'s blood-stained shirts with holes coinciding with his chest wound were admitted. As argued by the state, appellant's insinuation that the victim's injury may have been inflicted some time prior to the altercation is illogical when viewed in light of the evidence because, under that theory, R.D. would have been at his job site, with a serious injury, wearing blood-stained and torn shirts. *See Ostrem*, 535 N.W.2d at 923 (stating that "[i]nconsistencies in the state's case or possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable.").

There is also sufficient evidence in the record to show that it was appellant who inflicted the wound. Pierzinski testified that after appellant and R.D. began fighting, he heard R.D. shout out. Pierzinski observed that "[t]here was a lotta action going on. . . . I

seen [appellant] hit [R.D.] and all of a sudden [R.D.'s] bleedin'." Officer Erholz testified that he observed R.D.'s injury and estimated that the cut was "six inches long and approximately two inches wide." Erholz further testified that he observed and photographed what he believed to be blood splatters in the parking lot where the alleged assault occurred and that, through his investigation, he learned that R.D. had been cut by a knife. Finally, the record reflects that after Erholz interviewed R.D. at the clinic, the only person he sought in the case was appellant. The only logical inference to be drawn from the evidence is that during the altercation, appellant cut R.D. with a knife or other sharp, dangerous weapon. *See Bias*, 419 N.W.2d at 484 (stating that for a defendant to be convicted based on circumstantial evidence alone, the circumstances proved must be "consistent with the hypothesis that the [defendant] is guilty and inconsistent with any rational hypothesis [other than] guilt."). Accordingly, we conclude that the record of circumstantial evidence, coupled with the direct evidence provided by Pierzinski, was sufficient to sustain appellant's convictions.

II.

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). This court reviews jury instructions in their entirety to determine whether they fairly and adequately explain the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

Appellant argues that the district court committed plain error in failing to define the terms "assault" and "intent" when instructing the jury on the elements of the offenses. But because he did not object to the jury instructions at trial, appellant has waived the issue. *See State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998) (stating that a party's failure to object to a jury instruction at trial generally waives consideration of the issue on appeal). Nevertheless, this court may review the issue for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). For an appellate court to grant relief for "an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *Id.* If all three prongs of this test are satisfied, the court may "remedy the error to ensure fairness and the integrity of the judicial proceedings." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002).

Here, the district court instructed the jury in accord with pattern jury instructions found in CRIMJIGs 13.11 and 13.12 (second-degree assault), and CRIMJIGs 13.15 and 13.16 (third-degree assault). *See* 10 *Minnesota Practice*, CRIMJIG 13.11-13.12, 13.14-13.15 (2006). These instructions set forth the statutory definitions and elements of the respective offenses. In the context thereof, as to each count of assault the district court instructed: "It is not necessary for the State to prove that the defendant intended to inflict substantial bodily harm, but only that the defendant intended to commit the assault."

The district court, however, did not define "assault" or "intent" for the jury. Minnesota law provides that "'Assault' is: (1) An act done with intent to cause fear in another of immediate bodily harm or death; or (2) The intentional infliction of or attempt

to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2004). Standard jury instructions define "intentionally" and "with intent" as follows:

> "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor's conduct criminal and that are set forth after the word "intentionally."
>
> "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act, if successful, will cause that result.

10 *Minnesota Practice*, CRIMJIG 7.10 (2006).

Appellant argues that because the statutory definition of assault includes the element of intent, making intent an essential element of each charged offense, the district court erred when it failed to instruct the jury on the statutory elements of assault and intent. We agree. The supreme court has stated that assault is a specific-intent crime. *State v. Edrozo*, 578 N.W.2d 719, 723 (Minn. 1998). Therefore, to prove that an individual committed an assault, the state "must prove beyond a reasonable doubt that the defendant . . . intentionally inflicted or attempted to inflict bodily harm on another." *Id.* (citing Minn. Stat. § 609.02, subd. 10 (1996)).

Recently, our supreme court stated:

> While the various degrees of assault require proof of different levels of actual harm, the assault statutes do not require a finding by the jury that a defendant intended to cause a specific level of harm. Thus, while the state did not have to prove that [the defendant] intentionally inflicted *substantial bodily harm*, the state did have to prove that he intentionally inflicted *bodily harm*.

State v. Vance, 734 N.W.2d 650, 656 (Minn. 2007) (citation omitted). In *Vance*, the district court failed to give the instruction on the definition of assault at the close of the defendant's trial on charges of third-degree assault and terroristic threats. *Id.* at 654. The supreme court concluded that the district court erred by omitting CRIMJIG 13.01 (statutory definition of "assault") because the instructions thus failed to inform the jury that the defendant had to "intentionally inflict bodily harm on [the victim]." *Id.* at 657 (concluding that the instructions the district court gave to the jury were erroneous because they created the possibility that the jury convicted the defendant without finding that he intended to cause bodily harm.). Notably, the supreme court stated that although it was not claimed as error on appeal, the "district court's failure to instruct the jury on the definition of intent compounded the erroneous omission of the element of intentional infliction of bodily harm from the jury instructions." *Id.* at 657 n.5.

Here, as in *Vance*, the district court failed to instruct the jury on an element of the offense. The supreme court has stated that "[d]ue process requires that every element of the offense charged must be proven beyond a reasonable doubt by the prosecution." *Cross*, 577 N.W.2d at 726. Accordingly, here, as well, the district court erred in not instructing the jury that for appellant to be found guilty of the assault charges, he had to intentionally inflict bodily harm on the victim. And the failure to instruct the jury on the definition of intent compounded the erroneous omission. *See Vance*, 734 N.W.2d at 657 n.5.

Having determined that the district court erred, we must decide whether the error is plain. An error is plain if it is "clear" or "obvious." *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002) (quoting *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993)). In *Vance*, the supreme court stated that "the law that informs our decision . . . is well settled – intentional infliction of bodily harm is an element of the crime of assault, and jury instructions must include all elements. . . ."[1] 734 N.W.2d at 658-59. We therefore conclude that here the district court committed plain error when it failed to instruct the jury on the intent element of the assault crimes.

The final prong of the plain-error test is whether the plain error affected substantial rights. *Griller*, 583 N.W.2d at 741. In *Vance*, the defendant was charged with assault after his girlfriend was injured when the defendant tackled her to prevent her from leaving the house. 734 N.W.2d at 653. Although the victim claimed that she was fleeing the house after the defendant punched her, the defendant claimed that he did not intend to assault his girlfriend, but was merely attempting to prevent her from driving because she was high on methamphetamine. *Id.* at 654. The supreme court held that because the defendant's intent was at issue, the district court's omission of the definition of assault affected the defendant's substantial rights. *Id.* at 661-62.

[1] Although *Vance* was decided later than the trial in the present case, the district court should have been guided nonetheless by this CRIMJIG 13.01 comment: "In cases in which a defendant is charged with a degree of an assault, the court may wish to incorporate this instruction directly into the first element of the appropriate elements instruction as a further definition of that element." 10 *Minnesota Practice*, CRIMJIG 13.01 cmt. (2006).

The present case is distinguishable from *Vance* and similar to *State v. Spencer*, 298 Minn. 456, 216 N.W.2d 131 (1974). In *Spencer*, the supreme court declined to reverse a conviction of aggravated assault when the jury was erroneously instructed that the element of intent was not required in order to find the defendant guilty. *Id.* at 463-64, 216 N.W.2d at 136. The court based its decision on the fact that the controversy at trial centered on the identity of the shooter, not on an issue of intent. *Id.* at 464, 216 N.W.2d at 136. The supreme court also noted that there was considerable evidence from which the jury could have inferred intent, namely that "the defendant held a loaded gun on the [victim], deliberately cocked the weapon, and then fired a bullet into [the victim's] back. . . ." *Id.*

Here, like *Spencer*, appellant's defense at trial was that he did not inflict the victim's injury and, although there may have been a confrontation between himself and R.D., that there was no evidence that appellant assaulted R.D. with a sharp object. Unlike *Vance*, appellant's asserted defense did not implicate the element of *intent*. Moreover, like *Spencer*, we note that there was considerable evidence from which the jury could readily have inferred intent. According to the evidence, appellant drove to the scene and confronted R.D., an altercation ensued, and R.D. sustained a gaping wound on his chest. Although the weapon was not recovered, the jury could reasonably have inferred from the evidence that appellant employed a knife or other sharp cutting implement and intended to inflict bodily harm on R.D. Therefore, on this record, we

conclude that the district court's failure to define "assault" and "intent" in the jury instructions, although plain error, did not affect appellant's substantial rights.

Affirmed.