STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2219

State of Minnesota,
Respondent,

vs.

Darryl W. Lidel,
Appellant.

Filed May 27, 2008
Reversed and remanded
Poritsky, Judge[*]

Dakota County District Court
File No. K1-05-3134

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

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Melissa V. Sheridan, Assistant Public Defender, 1380 Corporate Center Curve, Suite 320, Eagan, MN 55121 (for appellant)

Considered and decided by Willis, Presiding Judge; Shumaker, Judge; and Poritsky, 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

PORITSKY, Judge

Appellant Darryl Wayne Lidel challenges his convictions of second-degree assault and three counts of aiding and abetting first-degree burglary. Because the district court erred by failing to define the term "assault" in its jury instructions, thereby failing to instruct the jury that intent is an element of assault, we reverse appellant's convictions and remand for a new trial.

FACTS

On an evening in October 2005, Y.H. called Burnsville police and told the dispatcher that his apartment was being robbed and that his roommate had been shot. The first officer on scene, Ben Archambault, found the victim, T.T., sitting outside of the apartment building covered in blood. T.T. told Archambault that three men came to the apartment looking for Y.H., that one of the men had a gun, that the men were looking for marijuana, and that one of the men shot him. T.T. was transported to the hospital and survived.

Approximately one-half hour after the shooting, Burnsville police responded to a pediatrics clinic on a report of a man with a gunshot wound. The man, later identified as appellant Darryl Lidel, was transported to Ridges Hospital, where he was met by Officer Jeffrey Pfaff. Lidel told Pfaff that his name was Derek Wayne and that he had been walking to a friend's house in Burnsville when a man approached him with a gun, demanded his money, and then shot him in the hand. Pfaff called Lidel's family, who identified him as appellant by name; Lidel told Pfaff that he had lied about his name

because he had a traffic warrant and did not want to go to jail for it. After questioning Lidel as to the details of his story, Pfaff told Lidel that the details of the events leading up to his shooting were confusing. Lidel then told Pfaff that he had been at a friend's house smoking marijuana, that they went to Y.H.'s apartment to buy more marijuana, and that when he was walking up to Y.H.'s apartment building four men confronted him, tried to rob him, and then shot him in the finger.

Near the end of Lidel's medical treatment at the hospital, Pfaff spoke by telephone with officers at the apartment complex and learned that Lidel's description of events conflicted with the physical evidence at the scene and witness statements and that Lidel was a suspect in the shooting at the apartment. When the hospital had finished treating Lidel for his injuries, Pfaff arrested Lidel. Lidel was charged with: first-degree burglary of an occupied dwelling; first-degree burglary while possessing a dangerous weapon; first-degree burglary during which an assault occurs; second-degree assault; attempted aggravated robbery; and attempted first-degree murder.

Before trial, Lidel moved to suppress his statements to Pfaff. The district court denied his motion, concluding that Lidel was not in custody when he made the statements.

At trial, T.T. testified that on the night of the incident, he left the apartment to run some errands and was accosted in the hall of the building by Lidel, who had a gun, and two other men. T.T. said that Lidel pointed the gun at him, that when he tried to run back in the apartment the three men followed him in, and that he fought with the men over the gun. T.T. thought the gun was fake. The gun went off during the fight, and then Lidel

gave the gun to one of the other men, who shot T.T. in the chest. All three men ran from the apartment.

Y.H. testified that he had sold marijuana to another man on Lidel's behalf, that the man had not paid Y.H. for the marijuana, that Y.H. had not paid Lidel for the marijuana he had sold, and that Lidel was upset with Y.H. because Y.H. owed him several thousand dollars for the marijuana. When Y.H. heard the men enter the apartment, he locked himself in his bedroom, heard a struggle, heard gunshots, and then heard T.T. say that he had been shot. He spoke with police immediately after the shooting and identified Lidel as a possible suspect.

Lidel testified that he had previously sold marijuana and that he had given Y.H. a pound of marijuana, worth approximately $3,000, on Y.H.'s promise to pay him back for the marijuana. Y.H. did not pay Lidel for the marijuana, and the people who had sold it to Lidel were harassing him because they wanted to be paid for it. Lidel paid his suppliers for the marijuana and then stopped selling drugs. Lidel and Y.H. worked out an agreement whereby Y.H. would repay him in increments or would sell him marijuana at a reduced price until Y.H. had repaid or discounted him the $3,000 he owed him for the marijuana. He said that Y.H. was "pretty much paid up" by the time of the shooting and that he was not that mad at Y.H. anymore.

Lidel testified that on the night of the shooting, he was smoking marijuana with two friends, that they ran out of marijuana and called Y.H. to buy some from him, that they went to Y.H.'s apartment and were let in by T.T., and that Lidel and Y.H. got into an argument. During the argument, T.T. came into the room with a handgun and told them

to leave. Lidel thought the gun was fake and tried to take the gun from T.T. During the struggle, the gun discharged and then fell to the floor; one of Lidel's companions picked up the gun and pointed it at Lidel. Lidel grabbed for the gun to push it away, and the man holding the gun pulled the trigger, which caused the gun to go off, injuring Lidel's finger. Lidel and his companions then fled from the apartment; he did not know that anyone else had been shot. Lidel testified that he had lied to police because one of his companions had told him not to say anything about the shooting, which he perceived as a threat.

Following trial, the jury convicted Lidel of second-degree assault and three counts of aiding and abetting first-degree burglary. He was acquitted of attempted murder and attempted aggravated robbery. Lidel was sentenced to 48 months in prison for first-degree burglary while in possession of a dangerous weapon. This appeal follows.

D E C I S I O N

I.

Lidel first contends that the district court erred in denying his motion to suppress the statements he made to Officer Pfaff while he was at the hospital.

Statements made by a suspect in response to interrogation while in custody are inadmissible at trial "unless [the state] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). The state does not dispute Lidel's assertion that he was subjected to "interrogation" while at the hospital. We agree that Lidel was interrogated while at the hospital. *See Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689-90 (1980) (defining "interrogation" as "express questioning or its

functional equivalent"). Thus, the only issue is whether Lidel was in custody. On review of a motion to suppress, "whether a defendant was 'in custody' at the time of interrogation is a mixed question of law and fact, requiring the appellate court to apply the controlling legal standard to historical facts as determined by the [district] court." *State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998). We review the district court's findings of fact for clear error but review the district court's custody determination de novo. *Id.*

To determine whether a defendant was in custody during questioning, we examine whether the circumstances of the interrogation would make a reasonable person, in the suspect's position and from the suspect's perspective, believe that he was under formal arrest or physical restraint akin to formal arrest. *In re Welfare of D.S.M.*, 710 N.W.2d 795, 797-98 (Minn. App. 2006); *In re Welfare of G.S.P.*, 610 N.W.2d 651, 657 (Minn. App. 2000).

The district court found that Pfaff told Lidel that he considered Lidel a victim, that Pfaff was there to find out who shot Lidel, and that Lidel was not under arrest. The court further found that Pfaff allowed Lidel to make phone calls and have visitors while at the hospital. The only circumstance that the district court found that would indicate Lidel was in custody was that he made incriminating statements. The court concluded that Lidel was not a suspect and was not in custody during the interview.

Lidel argues that the circumstances surrounding Pfaff's questioning of Lidel at the hospital indicate that he was in custody during the questioning. We disagree. Pfaff never told Lidel that he was under arrest and told him that he would not be arrested for his traffic warrant or possession of a marijuana pipe. Pfaff also told Lidel that he considered

Lidel to be the victim of a shooting, and testified at the omnibus hearing that he personally believed Lidel was a victim and not a suspect in the apartment shooting until near the end of the interview. The district court specifically credited Pfaff's testimony that he believed Lidel was a victim. More important than these representations, however, are Pfaff's actions that indicate that Lidel was not in custody: Pfaff did not restrain Lidel, he allowed Lidel to make and receive telephone calls, he allowed Lidel's family and friends to visit him in the hospital, and Pfaff left Lidel's hospital room numerous times to make phone calls and when Lidel was receiving visitors. *See State v. Staats*, 658 N.W.2d 207, 212 (Minn. 2003) (concluding that suspect was not in custody during questioning when suspect was not told he was under arrest, was questioned at home in the presence of friends, and used the telephone during the interview).

Lidel also argues that he was in custody during the questioning because he was unable to leave the hospital bed. But any restrictions on Lidel's movements were imposed by the medical staff in order to treat his wound. Such a restriction does not change Lidel's situation into a custodial interrogation when, as here, the interrogating officer did not restrict Lidel's freedom of movement and other circumstances indicated that Lidel was not in police custody. *See State v. Mitchell*, 282 Minn. 113, 120-21, 163 N.W.2d 310, 315-16 (1968) (suspect was not in custody during questioning in hospital when, "[a]lthough [the defendant] was hospitalized, his freedom had not been restrained by the officers in any way").

Lidel further argues that Pfaff determined that Lidel was a suspect and began interrogating him as such. But Lidel's vague argument that "[a]t some point during the

interview . . . [Pfaff] began treating the questioning as an interrogation rather than an interview" is contrary to Pfaff's testimony and does not affect our determination that Lidel was not in custody. *See Staats*, 658 N.W.2d at 210-12 (concluding that appellant was not in custody until he was formally arrested, even when appellant made incriminating and inconsistent statements during the interview).

II.

Lidel next contends that the district court's failure to give the jury the statutory definition of "assault" deprived him of a fair trial. At trial, however, Lidel failed to object to the instructions on this ground. A defendant's failure to object to jury instructions generally constitutes a waiver of the right to appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). But "a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law." *Id*.; *see also* Minn. R. Crim. P. 31.02. To show plain error, appellant must demonstrate (1) error; (2) that is plain; (3) that affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If each of the prongs is satisfied, we must then determine whether reversal is necessary to ensure fairness and the integrity of the judicial proceedings. *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

At trial, the district court did not define the term "assault" in its jury instructions. The statute defines "assault" as "(1) [a]n act done with intent to cause fear in another of immediate bodily harm or death; or (2) [t]he intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2004). The Jury Instruction Guide closely tracks the statutory definition. *Cf.* 10 *Minnesota Practice*, CRIMJIG 13.01

(2006). Assault is a specific-intent crime. *Vance*, 734 N.W.2d at 656. Specific intent means that the defendant acted with the intent to produce a specific result. *Id.*

Lidel's argument raises the issue of which, if any, of his four convictions must be reversed as a result of the court's omission. The state concedes that Lidel's convictions of second-degree assault and first-degree burglary during which an assault occurs must be reversed. We agree. When the district court omitted the definition of assault, it failed to instruct the jury of the requirement that the state prove Lidel or an accomplice assaulted the victim with intent to cause bodily harm or fear of bodily harm. But the state argues that Lidel's convictions of aiding and abetting first-degree burglary of an occupied dwelling (burglary of an occupied dwelling) and aiding and abetting first-degree burglary while in possession of a dangerous weapon (burglary with a dangerous weapon) should be affirmed. Therefore, as to each of the remaining two burglary convictions, we must determine whether Lidel has shown plain error affecting substantial rights, and, if so, then we must determine whether reversal is required.

1. Error

"It is well settled that jury instructions must define the crime charged and explain the elements of the offense to the jury." *Vance*, 734 N.W.2d at 656. An element of burglary of an occupied dwelling and burglary with a dangerous weapon is proof that the burglar either (1) entered or remained in a building "with intent to commit a crime" or (2) entered or remained in a building and "commit[ed] a crime while in the building." Minn. Stat. § 609.582, subd. 1 (2004). In other words, "[f]or a burglary conviction to stand, the state must prove that a defendant intended to commit some independent crime

other than trespass [i.e., the mere entry into the building]." *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002).[1]

Here, with respect to each of the two remaining burglary charges, the district court instructed the jury that there were four crimes that the jury might find in order to satisfy the element of an independent crime: attempted first-degree murder, attempted second-degree murder, attempted aggravated robbery, and second-degree assault. Thus, a finding by the jury that Lidel or an accomplice intended to commit or actually committed any of these four crimes would have satisfied the independent-crime element.

Because the verdicts were general verdicts, the jury was not required to indicate which of the four independent crimes it found in order to arrive at its finding of guilty. It is entirely possible that the jury found that second-degree assault was the independent crime. This possibility is supported by fact that the jury convicted Lidel of second-degree assault and acquitted him of the three remaining independent crimes included in the court's instructions. Because the jury—following the court's instruction—could have found that the independent crime was second-degree assault, we conclude that the failure to instruct the jury on the definition of assault is error with respect to Lidel's convictions of burglary of an occupied dwelling and burglary with a dangerous weapon.

[1] As part of the instruction for burglary in the first degree, the Jury Instruction Guide states: "[1] Fourth, the defendant (entered) (or) (remained in) the dwelling with intent to commit [the independent crime] . . . . [or] [2] Fourth, the defendant committed the [independent crime] while in the building." CRIMJIG 17.02. The Jury Instruction Guide further instructs the court to: "State the [independent crime] alleged and read CRIMJIG or statutory definition." *Id.*

2. Plain Error

Having concluded that the failure to include the statutory definition of assault is error, we must determine whether the error is plain. An error is plain if it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Recently, the Minnesota Supreme Court stated that it is well settled that "intentional infliction of bodily harm is an element of the crime of assault, and jury instructions must include all elements of the offense." *Vance*, 734 N.W.2d at 658-59.[2] Because second-degree assault was given to the jury as a possible independent crime in connection with the burglary charges, we conclude that the district court's failure to define assault and instruct the jury as to the degree of intent required is plain error with respect to those convictions.

3. Plain Error Affecting Substantial Rights

Next we must determine whether the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741. "An erroneous jury instruction is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict." *Vance*, 734 N.W.2d at 659 (quotation omitted). Lidel bears the "heavy burden" of showing that the error was prejudicial. *See id*.

The state argues that the district court's failure to define assault was not prejudicial to Lidel's convictions of the two remaining burglary charges. But when proof

[2] Although *Vance* was decided after Lidel's trial was completed, the law at the time was nonetheless well settled that jury instructions must define the crime charged and explain the elements of the offense to the jury. *See State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002).

of an essential element was either contested at trial or not shown by overwhelming evidence, it cannot be said that the failure to instruct on that element had an insignificant impact on the jury's verdict. *Id.* at 659-62. Where there is such a failure, reversal is appropriate: "[W]hen an element is removed from the jury's consideration, a reviewing court cannot evaluate the strength of the evidence on that element because the jury was precluded from considering whether the element existed at all." *Id.* at 660 (citing *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), *aff'd*, 515 U.S. 506, 115 S. Ct. 2310 (1995)).

As we have noted above, "[f]or a burglary conviction to stand, the state must prove that a defendant intended to commit some independent crime other than trespass." *Colvin*, 665 N.W.2d at 452; *see Connecticut v. Johnson*, 460 U.S. 73, 85-86, 103 S. Ct. 969, 977 (1983) (concluding that if a jury may have failed to consider the evidence of intent because of erroneous jury instructions, a reviewing court cannot hold that the error did not contribute to the verdict).[3] And here, the jury acquitted Lidel of all independent crimes except second-degree assault and did not indicate that it relied upon any other independent crime to satisfy that element. Evidence of Lidel's intent to assault T.T. was not overwhelming, and the evidence offered at trial created fact issues as to whether Lidel had assaulted T.T. outside of the apartment and whether his accomplice intended to point the gun at and shoot T.T. Because it is entirely possible that the jury found the

[3] In some cases, a court is able to infer from a special verdict form or conviction of an offense containing a like element that the omitted element did not prejudice the defendant. *See Ihle*, 640 N.W.2d at 917 (concluding third prong of plain-error test not met because the defendant was found guilty of another offense which arguably required the finding of the omitted element). Such is not the case here.

independent crime to be second-degree assault, and for the reasons discussed above, we conclude that the district court's failure to define *assault* likely had a significant impact on the jury's verdict of guilty of the remaining counts of burglary.

4. Reversal necessary to ensure fairness and integrity of proceedings

Having concluded that the three prongs of the plain-error test have been met, we must now determine whether reversal is necessary to ensure the fairness and integrity of the judicial proceedings. *See Griller*, 583 N.W.2d at 740. As we noted above, the evidence of intent presented at trial was controverted. Lidel was not afforded the opportunity to have his account of the facts considered under the proper jury instructions, and the jury may have convicted him of all charges without considering whether Lidel or an accomplice acted with intent to cause bodily harm or fear of bodily harm.[4] We therefore conclude that the fairness and integrity of the judicial proceedings are called into question by the erroneous instructions and reverse all of his convictions, remanding for a new trial.

[4] We note that the United States Supreme Court has stated that "[t]o allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made." *Johnson*, 460 U.S. at 86, 103 S. Ct. at 977.

III.

Lidel contends that the prosecuting attorney committed misconduct during his closing argument and that the misconduct deprived him of a fair trial. In light of our conclusion that Lidel's convictions must be reversed, we decline to reach this issue.

Reversed and remanded.