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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2162**

State of Minnesota,
Respondent,

vs.

Damion J. Gullickson,
Appellant.

**Filed February 3, 2009
Reversed and remanded; motion denied
Toussaint, Chief Judge**

Mahnomen County District Court
File No. 44-CR-07-543

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Julie L. Bruggeman, Mahnomen County Attorney, Post Office Box 439, 311 North Main Street, Mahnomen, Minnesota 56557 (for respondent)

Lawrence J. Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Shumaker, 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UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

Appellant Damion J. Gullickson challenges his jury convictions of refusing to submit to chemical testing and driving after cancellation of his driver's license, arguing that he is entitled to a new trial because the district court omitted essential elements of these crimes from the jury instructions. Because we conclude that this omission was not harmless error, we reverse and remand. We deny appellant's motion to file a supplemental brief.¹

DECISION

Failure to instruct a jury on an essential element of a crime is fundamental error. *State v. Ouellette*, 740 N.W.2d 355, 358 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007). Here, the jury that found appellant guilty of refusal to test and of driving after cancellation had not been instructed by the district court on the prerequisites for

¹ Appellant filed his brief on April 4, 2008, respondent filed its brief on May 22, 2008, and the case was submitted without oral argument on November 19, 2008. On January 21, 2009, counsel for appellant filed a motion for permission to file a supplemental brief; respondent opposes the motion. The supplemental brief addresses issues considered by this court in *State v. Netland*, 742 N.W.2d 207 (Minn. App. 2007), *review denied* (Minn. Feb. 27, 2008). Appellant's counsel asserts that supplemental briefing is necessary "to preserve [the issue] for appellant if the Supreme Court rules in a manner favorable to the defense position in *Netland*." But the supplemental brief raises new issues and is not limited to the citation of additional authorities permitted by Minn. R. Civ. App. P. 128.05. In addition, counsel has not established good cause for additional briefing, particularly when he does not explain why the issue was not raised earlier in the course of this appeal. *See* Minn. R. Civ. App. P. 128.02, subd. 4 (additional briefs permitted only "with leave of the appellate court"). We see no reason to violate the general appellate court practice of declining to address issues not raised before the district court. *See State v. Busse*, 644 N.W.2d 79, 89 (Minn. 2002) (declining to address constitutional issue raised for first time in brief to supreme court because defendant "has not presented any reason why we should consider his constitutional claim for the first time on appeal").

administering a chemical test or on the need to find that appellant's license had been cancelled as inimical to public safety. Thus, the omission of these instructions was fundamental error. *See id.* at 360 (holding that failure to instruct jury deciding claim of refusal to test that defendant had been read implied-consent advisory and had either been arrested for DWI, been involved in accident, refused screening test, or taken screening test that indicated alcohol concentration of at least .08, is error of fundamental law); 10A *Minnesota Practice* CRIMJIG 29.36 (stating that, when defendant is charged with driving after cancellation, jury is to be instructed that, to find him or her guilty, it must determine whether his license was cancelled as inimical to public safety).

Although appellant did not request or object to the absence of the omitted instructions, if their omission affected appellant's substantial rights, this court may review the omission under the plain-error analysis. *See State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) ("The plain error analysis allows an appellate court to consider unobjected-to error that affects a criminal defendant's substantial rights." (Quotation omitted)). The plain-error analysis requires: "(1) an error, (2) that was plain, and (3) that affected the defendant's substantial rights." *Id.* If these three criteria are met, the reviewing court may proceed to the fourth and final criterion, "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted).

It is undisputed that the omission of jury instructions on elements of the crimes was plain error; thus, the first two requirements are met. "The 'affects substantial rights' language of the third plain error factor is the same language used to define harmless

error.” *Id.* “[W]e have consistently held that when an erroneous jury instruction eliminates a required element of the crime this type of error is not harmless beyond a reasonable doubt.” *State v. Mahkuk*, 736 N.W.2d 675, 683 (Minn. 2007) (quoting *State v. Hall*, 722 N.W.2d 472, 479 (Minn. 2006)).

Mahkuk reversed a conviction of aiding and abetting murder because the jury was not instructed that, in order to convict the defendant, it was required to find, beyond a reasonable doubt, that the defendant intended his presence at the crime to encourage the crime. 736 N.W.2d at 683. *Hall* reversed a conviction of first-degree premeditated murder because the jury was instructed that the premeditation element would be satisfied if it found that the defendant intended to kill some unidentified men, not that he intended to kill the victim specifically. 722 N.W.2d at 479; *see also State v. Kuhnau*, 622 N.W.2d 552, 558-59 (Minn. 2001) (concluding that omission from jury instructions of requirement that defendant in sale-of-controlled-substance case knew or believed substance to be controlled was not harmless error); *State v. Olson*, 482 N.W.2d 212, 216 (Minn. 1992) (concluding that erroneous instruction that jury could infer possession of controlled substance from certain evidence was not harmless error); *State v. Williams*, 324 N.W.2d 154, 160 (Minn. 1982) (concluding that erroneous instruction that constituted irrebuttable presumption denied due process).

Unless we cannot conclude beyond a reasonable doubt that appellant would have been convicted if the jury had been properly instructed, the error in omitting the required instructions was not harmless. *See Hall*, 722 N.W.2d at 479 (reversing because “we cannot conclude *beyond a reasonable doubt* that [defendant] would have been convicted

of first-degree premeditated murder without the erroneous transferred intent instruction” (emphasis in original)); *Olson*, 482 N.W.2d at 216 (reversing because “[a]lthough defendant *probably* would have been convicted in any event, we cannot conclude *beyond a reasonable doubt* that he would have been convicted in any event”). Thus, the third criterion of the plain-error test is met; the fact that the error was not harmless means that appellant’s substantial rights were affected. *See Reed*, 737 N.W.2d at 583.

The fourth criterion is “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.* In light of the clear requirement that a jury be instructed on all elements of the crimes charged, the integrity of the judicial proceedings mandates reversing appellant’s conviction and granting him a new trial.

Reversed and remanded; motion denied.