STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0232

State of Minnesota,
Respondent,

vs.

John C. Smith,
Appellant.

Filed April 7, 2009
Affirmed
Connolly, Judge

Ramsey County District Court
File No. KX-06-4487

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Blvd., Suite 315, St. Paul, MN 55102-1657 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

CONNOLLY, Judge

Appellant challenges his conviction of second-degree murder, arguing that the district court committed plain error when giving its defense-of-dwelling instruction to the jury. Because the district court did not commit plain error, we affirm.

FACTS

On November 23, 2006, appellant John Cornelius Smith stabbed his brother-in-law, R.T., to death, in appellant's girlfriend's apartment building. The incident followed a night during which the two men had been drinking heavily. At the conclusion of the night, appellant and R.T. went to appellant's girlfriend's apartment (the apartment). While at the apartment, an altercation broke out between the two men. Appellant and appellant's girlfriend eventually pushed R.T. into the apartment building's hallway and locked the door behind him. After exchanging further words, someone from the apartment threw R.T. his keys, which he had left behind when he was removed from the apartment.

After receiving his keys, R.T. began walking towards the apartment building's elevator. R.T. had proceeded about 50 feet from the apartment when appellant emerged and resumed the fight. The two men fought briefly before appellant began to return to the apartment. Sometime before appellant reached the apartment, R.T. cursed at him. Appellant then reversed directions and headed towards R.T. Upon reaching R.T., appellant pulled a knife from his pocket, which he had previously obtained from the apartment, and fatally stabbed his brother-in-law. When the police arrived, R.T.'s body

was approximately 100 feet from the apartment and 50 feet from the elevator. At trial, appellant asserted defense-of-dwelling.

The district court gave the following defense-of-dwelling instruction to the jury:

> In defense of dwelling. No crime is committed when a person takes the life of another, even intentionally, if the person's action was taken in preventing the commission of a felony in the defendant's place of abode. In order for a killing to be justified for this reason, three conditions must be met. First, the defendant's action was done to prevent the commission of a felony in the dwelling; second, the defendant's judgment as to the gravity of the situation was reasonable under the circumstances; third, the defendant's election to defend his dwelling was such as a reasonable person would have made in the light of the danger perceived. All three conditions must be met. The defendant has no duty to retreat. The state has the burden of proving beyond a reasonable doubt that the defendant did not act in defense–in self-defense of the dwelling.
>
> Now, the felony here is a burglary if you find these elements to be present. First, [R.T.] entered a building without the consent of the person in lawful possession or remained within the building without the consent of the person in lawful possession. The entry does not have to be made by force or by breaking in. Entry through an open or unlocked door or window is sufficient. . . . [R.T.] need not have entered the building without the consent of the person in lawful possession, nor does it matter whether the person knows of [R.T.]'s remaining so long as the person does not consent to [R.T.]'s remaining in the building. Second, [R.T.] assaulted a person within the building or on the building's appurtenant property. Third, [R.T.] entered or remained in the building with the intent to commit the crime of assault. It is not necessary that the intended crime actually was committed or attempted, but it is necessary that . . . [R.T.] had the intent to commit that crime at the time he entered or remained in the building.
>
> Whether [R.T.] intended to commit the crime must be determined by all the circumstances, including the time,

> manner of entry or remaining in the building, the nature of the building and its contents, and any things . . . [R.T.] may have had with him, and all other evidence in this case.
>
> Now a dwelling is a building used as a permanent or temporary residence.

Following a jury trial, appellant was convicted of second-degree murder on August 27, 2007. This appeal follows.

D E C I S I O N

District courts are allowed "considerable latitude" when selecting language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed 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). When reviewing jury instructions, this court assumes that the jurors were "intelligent and practical people." *State v. Edwards*, 269 Minn. 343, 350, 130 N.W.2d 623, 627 (1964). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). Generally, when it is not argued that an unobjected-to instruction violated the defendant's right to a jury trial, the instruction is reviewed under the plain-error standard. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007).

"The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740 (citing *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 1548-49 (1997))). "If those three prongs are met, we may correct the error only if it 'seriously affect[s] the fairness, integrity, or public

reputation of judicial proceedings.'" *Id.* (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

I. The district court did not commit plain error when giving its defense-of-dwelling instruction to the jury.

Appellant argues that the district court's defense-of-dwelling instruction, which closely mirrors the applicable CRIMJIGs, was "inadequate for the task of placing before the jury questions of fact, rather than a question of law." *See* 10 Minnesota Practice, CRIMJIG 7.05, 17.02, 17.04 (2006). More specifically, appellant finds four faults with the instruction itself. First, appellant argues the district court "did not include the definition of 'dwelling' in the defense-of-dwelling instruction." Second, appellant argues that the district court defined dwelling without including "appurtenant structure" language. Third, appellant argues the district court should have "expressly defined 'dwelling' to include the apartment's hallway to avoid any further confusion." Fourth, appellant takes issue with the district court's decision to include first-degree burglary's elements in its defense-of-dwelling instruction.

In addition to the alleged faults with the instruction itself, appellant contends that the state misstated the law in its closing argument to the jury. We note at the outset that we are reviewing any problems with the instruction and the state's closing argument for plain error because appellant did not object to either the instruction or the state's closing argument at trial.

Regarding appellant's first point, the district court did include the definition of dwelling in its instructions to the jury. While appellant argues that it should have been

placed immediately after the district court listed the elements of defense-of-dwelling instead of immediately after it listed the elements of burglary, appellant cites no caselaw in support of his claim that this difference of two paragraphs constitutes plain error. When the definition is viewed in context, it is clear that the district court is defining "dwelling" as it was used in the defense-of-dwelling instruction.

Second, appellant is correct in pointing out that the district court did not include the term "appurtenant structure" in the defense-of-dwelling portion of its instructions to the jury; however, appellant does not explain why this constitutes error. Appellant implies that this constitutes plain error because the jury would have to decide whether an apartment's hallway is part of the dwelling in the absence of the term "appurtenant structure." The failure to include "appurtenant" in the defense-of-dwelling instruction does not constitute plain error because the district court's definition of dwelling encompasses hallways. Specifically, the district court defined dwelling as "a *building* used as a permanent or temporary residence." (Emphasis added.) It did not limit its definition to an apartment. Given that the definition included the term building, and that buildings contain hallways, it cannot be said that an "intelligent and practical" jury would conclude that the term "dwelling" as used in the instructions, was limited to appellant's girlfriend's apartment instead of her apartment building.

Third, while appellant is again correct in pointing out that the district court did not expressly include the term "hallway" in its definition of dwelling, this omission does not constitute plain error. As stated above, the district court's definition of the term "dwelling," which includes the term "building," encompasses hallways.

Fourth, appellant argues the district court committed plan error by including first-degree burglary's elements in its defense-of-dwelling instruction. Specifically, appellant finds fault with the district court instructing the jury on first-degree burglary's elements after it told the jury that the state had to prove beyond a reasonable doubt that defense-of-dwelling did not apply. Appellant contends this is plain error because its inclusion led the jury to think that appellant had to prove that the victim's conduct constituted first-degree burglary in order to effectively claim the defense-of-dwelling. We disagree.

Here, the district court: (1) listed defense-of-dwelling's elements; (2) instructed the jury that the state had to prove "beyond a reasonable doubt that the defendant did not act in self-defense;" and (3) listed first-degree burglary's elements. We believe that the district court's instruction to the jury that the state had to prove beyond a reasonable doubt that at least one of defense-of-dwelling's elements was not met could only be interpreted to mean that the state had to prove beyond a reasonable doubt that the victim did not commit a felony if it were to argue that the defense-of-dwelling did not apply because the victim did not commit a felony. Additionally, even if the district court's inclusion of first-degree burglary's elements constituted plain error that affected appellant's substantial rights, it did not "seriously affect the fairness, integrity, or public reputation of judicial proceeding[]." *Strommen*, 648 N.W.2d at 686. In its closing argument, the state did not argue that appellant had to prove that the victim's conduct satisfied the elements of first-degree burglary. The state never argued that the victim did not commit a felony. Instead, it argued that defense-of-dwelling did not apply because appellant was not acting to prevent a felony from occurring at the time he stabbed the

victim. The state's repeated references to the victim's distance from the apartment support this conclusion. Therefore, it is highly unlikely that the jury interpreted the district court's instructions as requiring appellant to prove that the victim's conduct satisfied first-degree burglary's elements.

Finally, appellant argues that the state made a clear misstatement of the law in its closing argument by arguing that defense-of-dwelling vanished when appellant moved from the doorway into the hallway of the apartment building. When looked at as a whole, the state's actual argument was, essentially, that appellant's actions were not reasonable.[1] *See State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) ("We look, however, at the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence."). Further, even if the state misstated the law in its closing argument, the district court remedied any resulting error by instructing the jurors that "[i]f an attorney's argument contains any statement of the law that's different from the law as I give it to you, disregard that statement. In that regard, each of you will get a copy of these instructions for your use in the jury room." *See State v. James*, 520 N.W.2d 399, 405 (Minn. 1994) (stating jurors are presumed to follow a district court's instructions).

However, while the state's references in its closing argument do not constitute plain error in this case, we caution the state that it should have taken greater pains to ensure that there was no room for confusion on the jury's part regarding the legal issues

[1] As the state points out, this line of reasoning matched its theory of the case: "given the location of the body, the other physical evidence . . .defense of dwelling did not apply."

implicated by the defense-of-dwelling instruction. The line that the state drew in its closing argument is a fine one that is best avoided in the future. We again note that we are applying a plain-error analysis to the issues presented in this appeal.

Affirmed.