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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-867**

State of Minnesota,
Respondent,

vs.

Walter Allen Hart,
Appellant.

**Filed May 18, 2010
Affirmed
Johnson, Judge**

Benton County District Court
File No. 05-CR-08-511

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Robert J. Raupp, Benton County Attorney, Foley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A Benton County jury found Walter Allen Hart guilty of first-degree criminal damage to property and gross-misdemeanor mistreatment of an animal based on evidence

that he shot a neighbor's dog with a shotgun. On appeal, Hart argues that the district court erred in two ways: by failing to instruct the jury that the state bears the burden of proving that Hart's conduct was not justified, and by accepting a stipulation concerning the neighbor's financial damages without Hart's personal waiver of his right to a jury trial. We affirm.

FACTS

Hart is a resident of the city of Sauk Rapids. On the evening of January 27, 2008, he saw a dog rooting through his garbage, which was in a receptacle next to his garage. Hart shooed the dog away, retrieved a shotgun from his home, and proceeded to pick up the garbage that had been spilled onto the ground. When the dog returned and approached him, Hart shot the dog. Hart testified at trial that the dog growled at him and showed its teeth.

The dog, Mojo, a black Labrador, belonged to Hart's next-door neighbor. Mojo had more than 170 pellet wounds to her head and her left side and a serious injury to her left eye. A veterinarian performed emergency surgery on the eye but was unable to save it; the eye was replaced with a prosthetic and sewn shut. Hart's neighbor incurred more than \$2,500 in veterinary bills for Mojo's treatment.

The state charged Hart with first-degree criminal damage to property, in violation of Minn. Stat. § 609.595, subd. 1(3) (Supp. 2007), and gross-misdemeanor mistreatment of an animal, in violation of Minn. Stat. § 343.21, subds. 1, 9(b) (2006). A jury found him guilty of both charges. The district court stayed imposition of sentence on the conviction of criminal damage to property and placed Hart on probation for five years. The district court did not sentence Hart on the conviction of mistreatment of an animal. Hart appeals.

DECISION

I. Jury Instructions

Hart first argues that the district court erred by not expressly instructing the jury that the state bears the burden of proving beyond a reasonable doubt that Hart was not justified in shooting the dog. Hart concedes that he failed to make a proper objection to this aspect of the jury instructions. Thus, we review the issue for plain error. *See* Minn. R. Crim. P. 31.02. Under the plain-error test, we may not grant appellate relief on an issue to which there was no objection unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is "plain" if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotation omitted), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

The district court instructed the jury that the state had the burden to prove beyond a reasonable doubt all elements of each offense and that Hart had no duty to prove his innocence. The district court described the elements of the charged offenses. The district court twice instructed the jury that it could not find Hart guilty of mistreatment of an animal unless the state proved, beyond a reasonable doubt, each element of the offense, including

the element that Hart acted “unjustifiably” in shooting the dog. With respect to whether Hart acted justifiably or unjustifiably, the district court further instructed the jury as follows:

The Defendant has asserted that he was defending himself against the dog. According to the laws of Minnesota any person may legally kill a dog that may suddenly attack while the person is peacefully walking or riding so long as the dog is out of the enclosure of its owner or keeper. The Defendant is not guilty of killing or harming a dog if the Defendant has reasonable grounds to believe that it may attack. This defense is only available to the Defendant if he was acting in a peaceful manner.

The district court’s instruction concerning justification is derived from a statute that permits the killing of a dog “that may suddenly attack.” Minn. Stat. § 347.17 (2006).

Hart contends that the district court’s instruction concerning justification is erroneous because it does not expressly state that the state bears the burden of proving that Hart’s conduct was unjustified. Hart has not cited any published opinions concerning who bears the burden of proof on self-defense against a dog or what instructions must be given to the jury on that issue. We are not aware of any such caselaw. For that reason alone, Hart cannot establish that the district court plainly erred by not expressly stating that the state had the burden of proof on the question whether Hart was justified in shooting Mojo. *See State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008) (stating that plain error cannot be established without binding precedent).

Even if we assume that self-defense against a dog is treated in the same manner as self-defense against a person, Hart cannot establish that the district court plainly erred in its instruction. It is true that, if a defendant claims self-defense against a person, the defendant bears the burden of producing evidence to support the claim, and “the state has the burden of disproving one or more of [the] elements [of self-defense] beyond a reasonable doubt.”

State v. Basting, 572 N.W.2d 281, 286 (Minn. 1997). But Hart has not cited any caselaw holding that the absence of a jury instruction specifically stating that the state bears the burden of disproving a claim of self-defense is plain error, and we are not aware of any such caselaw. In fact, the caselaw suggests that, so long as the district court properly instructs the jury as to the presumption of innocence and the general burden of proof, a district court does *not* commit plain error by not specifically stating that the state bears the burden of proof on the issue of self-defense against a person. *State v. Love*, 285 Minn. 444, 449-52, 173 N.W.2d 423, 426-27 (1970) (holding that defendant was not deprived of fair trial by absence of instruction regarding burden of proof on self-defense against person). In any event, the district court's instructions on the offense of mistreatment of an animal instructed the jury that the state had the burden of proving beyond a reasonable doubt that Hart's act of shooting the dog was not justified. That instruction essentially provided the information that Hart contends is absent. Thus, Hart cannot establish the second requirement of the plain-error test.

And even if Hart could establish that the district court's instruction on self-defense was plain error, he could not establish the third requirement of the plain-error test, that the plain error affected his substantial rights. *See Griller*, 583 N.W.2d at 740. An error in instructing the jury affects a defendant's substantial rights if there is a reasonable likelihood that a proper instruction would have had a significant effect on the jury's verdict. *Id.* at 741. Hart has not identified any reason why an additional instruction on the state's burden of proof would have been helpful or determinative in this case. As stated above, the instructions given by the district court repeatedly indicated that the state bore the burden of

proof, and the instructions were quite similar to the instructions Hart contends should have been given, which makes it unlikely that the jury was misled. *See State v. Caine*, 746 N.W.2d 339, 355-56 (Minn. 2008) (holding that error in instruction on duress defense did not affect defendant's substantial rights because instructions made clear that state had burden of proof).

In addition, because Hart elected to testify, he and the state introduced evidence on both sides of the question of self-defense. The state's evidence included the testimony of a woman who lived across the street from Hart. She testified that she was taking her own garbage out when she saw Hart come out of his house. Shortly thereafter, she heard a gunshot. She did not hear any growling before the gunshot but heard a dog "[c]rying out" after the gunshot. She also heard Hart tell his wife, who came outside after the gunshot, that he was "sick of the dogs digging in his trash." The jury apparently found the state's evidence on the issue of self-defense more convincing than Hart's evidence. Thus, Hart has not established that any plain error in the instructions affected his substantial rights.

In sum, the district court did not commit plain error warranting reversal in its instructions to the jury concerning the burden of proof on Hart's claim of self-defense against the dog.

II. Right to Jury Trial

Hart also argues that the district court erred by accepting a stipulation concerning the amount of the financial loss sustained by Mojo's owner without obtaining from Hart a valid waiver of his right to a trial by jury on that element of the offense of first-degree criminal damage to property.

To establish a defendant's guilt of first-degree criminal damage to property, the state must prove that the defendant caused damage that "reduces the value of the property by more than \$1,000 measured by the cost of repair and replacement." Minn. Stat. § 609.525, subd. 1(3). Before trial, Hart moved to dismiss the charge of criminal damage to property based on the assertion that the replacement value of the dog was less than \$1,000. The district court denied the motion. The prosecutor and defense counsel then stipulated that Mojo's owner incurred a financial loss that satisfies the \$1,000 threshold. The district court accepted the stipulation but stated that evidence of the veterinary fees incurred in treating the dog nonetheless would be admitted as evidence at trial.

A defendant charged with an offense punishable by incarceration has a constitutional right to a jury trial. U.S. Const. amend. VI; Minn. Const. art. I, §§ 4, 6. This right includes the right to be tried before a jury on each element of the charged offense. *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). The defendant may, however, waive this right with respect to an element of a charged offense by stipulating that the element has been proved. *Id.* In the Minnesota state courts, the right to a jury trial must be waived "personally in writing or orally upon the record in open court." Minn. R. Crim. P. 26.01, subd. 1(2)(a) (2008); *State v. Hinton*, 702 N.W.2d 278, 281 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005).

Hart was present in the courtroom when counsel presented the stipulation to the district court. Hart also was present when the district court instructed the jury that no finding on the issue of financial loss was required because of a stipulation. But Hart never made a personal waiver of his right to a jury trial on that element. The state concedes that

the stipulation is invalid because it was not accompanied by a valid personal waiver of Hart's right to a jury trial on that element of the offense.

In *Wright*, this court determined that the district court erred by accepting a stipulation to one element of the charged offense without obtaining the defendant's personal waiver of the right to a jury trial. 679 N.W.2d at 191. We then applied the harmless-error test. *Id.*; see also *State v. Fluker*, ___ N.W.2d ___, ___, 2010 WL 1657117, at *3-4 (Minn. App. Apr. 27, 2010) (applying harmless-error test based, in part, on *Wright*). Under the harmless-error test, an error does not require reversal "if the jury's verdict was surely unattributable to the error." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). Hart contends that, contrary to *Wright*, an error of this type requires that we reverse his conviction without inquiring whether he was prejudiced by the error. He relies primarily on *State v. Antrim*, 764 N.W.2d 67 (Minn. App. 2009), in which we held that "[f]ailure to strictly comply with all of the waiver requirements of Minn. R. Crim. P. 26.01, subd. 3, requires reversal of a conviction entered pursuant to a defendant's stipulation to the prosecutor's case under Minn. R. Crim. P. 26.01, subd. 4." 764 N.W.2d at 68. *Antrim* does not apply to this case because it applies only in an appeal arising from a bench trial with stipulated facts. *Fluker*, ___ N.W.2d at ___, 2010 WL 1657117, at *3-4; *State v. Kuhlmann*, 780 N.W.2d 401, 405-06 (Minn. App. 2010), *pet. for review filed* (Minn. May 3, 2010).

In applying the harmless-error test to this case, it is significant that the state offered, and the district court admitted, evidence of the veterinarians' bills, which exceeded \$2,500. Hart does not challenge the admission of that evidence. The evidence of the veterinarians' fees clearly establishes that the neighbor's financial loss exceeded the statutory threshold.

Thus, we conclude that the district court's error in accepting the stipulation without Hart's personal waiver was harmless beyond a reasonable doubt.¹

In sum, the lack of a personal waiver of Hart's right to a jury trial on the element of the victim's financial loss is harmless error and, thus, does not warrant reversal of Hart's conviction of first-degree criminal damage to property.

Affirmed.

¹This court recently applied the plain-error test to a case in which the parties stipulated to elements of the offense by different means, namely, by omitting them from the jury instructions. *Kuhlmann*, 780 N.W.2d at 403-05. We apply the harmless-error test in this case because the mechanism used here to effect the parties' stipulation is more similar to the means of effecting the stipulations in *Wright*, 679 N.W.2d at 191, and *Fluker*, ___ N.W.2d at ___, 2010 WL 1657117, at *3-4. In any event, even if we were to apply the plain-error test, the result would be the same. Both the harmless-error test and the plain-error test consider whether an error affected the defendant's "substantial rights." *See* Minn. R. Crim. P. 31.01, 31.02 (2008). The two tests are different in, among other things, their respective allocations of burdens; the state bears the burden of persuasion on the harmless-error test, while the defendant bears the burden of persuasion on the plain-error test. *State v. Reed*, 737 N.W.2d 572, 583-84 & n.4 (Minn. 2007). Because the state has satisfied its burden under the harmless-error test, Hart cannot satisfy his burden of proving that the error affected his substantial rights under the plain-error test. And even if Hart could satisfy that requirement of the plain-error test, he could not establish the additional requirement that the district court's erroneous acceptance of the stipulation impaired the fairness or integrity of his trial. *See Kuhlmann*, 780 N.W.2d at 406. Thus, Hart's argument fails under either the harmless-error test or the plain-error test.