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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-325**

State of Minnesota,
Respondent,

vs.

Eric Thomas Heller,
Appellant.

**Filed December 21, 2010
Affirmed
Harten, Judge***

McLeod County District Court
File No. 43-CR-09-829

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael Junge, McLeod County Attorney, Glencoe, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Klaphake, Judge; and Harten,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HARTEN, Judge

Appellant challenges his conviction of first-degree burglary (assault) on the ground that the jury was improperly instructed on the elements of his offense. Because the unobjected-to jury instruction meets none of the elements of the plain error test, we affirm.

FACTS

On the night of 17 April 2009, A.L. drove her former boyfriend, D.L., and appellant Eric Heller to a bar, then to a party. After midnight, A.L. received a phone call from her current boyfriend, J.M., who wanted to meet A.L. at her home. A.L. decided to leave the party; D.L. and appellant decided to stay. A.L. said that she might return, but, when she got home, she and J.M. went upstairs to bed.

D.L. made several unanswered phone calls to A.L. Sometime later, D.L. and appellant walked to A.L.'s house. D.L. yelled and pounded on the door. A.L. went downstairs to lock the door. J.M. went downstairs a few minutes later.

It is undisputed that, inside the house, J.M. was assaulted by appellant. Appellant was eventually charged with first-degree burglary under Minn. Stat. § 609.582, subd. 1(c) (2008) (assault). At trial, A.L. testified that she did not give appellant or D.L. permission to enter; neither appellant nor D.L. testified that either of them was given permission to enter. J.M. and A.L. testified that appellant charged through the door, breaking the lock, and then assaulted J.M. D.L. testified that appellant entered the house and then “wrestled” with J.M. Appellant testified that, after assaulting J.M., he left the house

without his eyeglasses; he shouldered the door as A.L. was closing it and asked for the glasses, but A.L. closed it without giving them to him; and he did not go back into the house and knew nothing about the broken door, but did offer to pay to repair it.

The jury was instructed:

Burglary in the first degree, defined: The statutes of Minnesota provide that whoever enters a building without the consent of the person in lawful possession and assaults another within the building is guilty of a crime.

Elements: The elements of burglary in the first degree are:

First, the defendant entered a building without the consent of the person in lawful possession.

Second, the defendant assaulted a person within the building. An assault is the intentional infliction of bodily harm upon another or an act done with an intent to cause fear of immediate bodily harm . . . or death in another. Bodily harm means physical pain or injury, illness, or any impairment of physical condition.

Third, the defendant's act took place on or about April 18, 2009 in McLeod County. If you find that each of these elements has been proven beyond a reasonable doubt, then the defendant Eric Heller is guilty.¹

See 10A Minnesota Practice, CRIMJIG 17.04 (2006) (stating elements for first-degree burglary (assault)). The jury found appellant guilty.

Appellant asserts that the jury should have been instructed that the state had to prove appellant assaulted someone *after* entering the building without consent but was instead instructed that the state had to prove only that appellant both entered a building

¹ The instruction tracks Minn. Stat. § 609.582, subd. 1, which provides that: “[w]hoever . . . enters a building without consent and commits a crime while in the building . . . commits burglary in the first degree . . . if . . . (c) the burglar assaults a person within the building”

without consent *and* assaulted someone in the building. Appellant seeks a new trial on the basis of the erroneous jury instruction.

DECISION

A party's failure to object to jury instructions before they are given constitutes a forfeiture of the right to appeal based on those instructions, but failure to object does not preclude appellate review if the instructions constitute plain error affecting the defendant's substantial rights or an error of fundamental law. *State v. Vance*, 734 N.W.2d 650, 654-55 (Minn. 2007). Appellant neither objected to the instruction given nor requested an instruction that the assault had to follow the entry of the building. He argues that he did not waive the issue because the instruction was plain error: the jury was not properly instructed on the elements of first-degree burglary.² *See id.* at 658 (failure to instruct on element of offense is plain error). An instruction is reviewed under the plain error standard for (1) error, (2) that is plain, and (3) that affects substantial rights; if all three prongs are met, the reviewing court may reverse if it concludes "that reversal is required to ensure fairness and the integrity of the judicial proceedings." *Id.* at 655-56.

Here, there was no error: the jury was correctly instructed on the elements of the crime with which appellant was charged. Appellant offers no support for his view that it was error, much less plain error, for the district court not to add a sequential requirement

² Appellant relies on *State v. Pendleton*, 567 N.W.2d 265, 269-70 (Minn. 1997), to argue that use of a model jury instruction is not dispositive of the absence of error in the instruction, but cites no case in which the instruction given here was found erroneous.

to the elements of burglary by stating that a burglar must first enter a building without consent, then commit an assault.³

Even if the first two prongs of the plain error test were met, appellant does not show that his substantial rights were affected. He argues that the jury instruction deprived him of his right to a fair trial because “the jury may have credited [his] and [D.L.’s] testimony that [he] entered with consent.” But no testimony supports the claim that appellant or D.L. had A.L.’s consent to enter her residence.

Neither appellant nor D.L. testified that A.L. permitted them to enter. A.L. testified that, when D.L. and appellant were outside her door, she did not tell D.L. “it was okay to come in” and that she “got them [, D.L. and appellant,] outside of [her] house and . . . went to lock the door and . . . got all [the] locks locked.” J.M. testified that, when A.L. was downstairs, he “heard her ask them [, appellant and D.L.,] to leave.” He testified that, when he joined A.L. downstairs, he observed that “[appellant] and [D.L.] were both kind of standing at the door. [A.L.] kept asking them to leave and they wouldn’t leave.” None of the testimony supports the inference that A.L. gave her consent to appellant’s entry.

Moreover, “[e]nters a building without consent’ means [, among other things,] . . . to remain within a building without the consent of the person in lawful possession.” Minn. Stat. § 609.581, subd. 4(c) (2008); *see also Pendleton*, 567 N.W.2d at 268 (noting that the statutory definition of an element of a crime is relevant to a determination of

³ In any event, the jury did hear that the *first* element was nonconsensual entry and the *second* was assault; arguably, the sequence of the elements was at least implied.

whether an instruction on those elements enlightened or misled the jury). Appellant testified that he refused to leave when A.L. asked him to leave:

- Q. [D]id you ever hear [A.L.] ask you and [D.L.] to leave?
A. Yes, I did.
Q. How many times did she say that?
A. I don't know, a few times
Q. The first time she asked you to leave, did you?
A. No, because I was wrestling with somebody else. I can't just leave.

Even if A.L. had at some point consented to appellant's entry, by remaining in her residence and refusing to leave when asked, appellant entered it without her consent within the meaning of Minn. Stat. § 609.581, subd. 4(c), and Minn. Stat. § 609.582, subd. 1(c). Appellant's substantial right to a fair trial was not affected by the failure to instruct the jury that the entry without consent had to precede the assault because the jury had no basis to infer that appellant ever entered the residence with A.L.'s consent.

Finally, the trial transcript clearly shows that the evidentiary center of gravity throughout the trial was that the event being prosecuted was appellant's assaulting J.M. immediately following appellant's forced entry into the home by breaking down the door. Consideration of any other entry, if any, is irrelevant and illusory to the matter being litigated.

Because appellant made no consensual entry into A.L.s residence and entered the residence immediately before assaulting J.M., a separate jury instruction on the sequence of the elements of first-degree burglary (assault) would not have changed the result.

Affirmed.

Dated: _____

James C. Harten, Judge