**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A16-0965**

State of Minnesota,
Respondent,

vs.

Stephen Gene Shawnoskey,
Appellant.

**Filed March 20, 2017**
**Affirmed**
**Hooten, Judge**

Traverse County District Court
File No. 78-CR-15-147

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

Matthew P. Franzese, Traverse County Attorney, Wheaton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Hooten, Judge; and Smith, Tracy M., Judge.

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

**HOOTEN**, Judge

Appellant challenges his conviction of first-degree burglary, arguing that (1) the evidence is insufficient to sustain his conviction; (2) the district court committed reversible error by admitting hearsay evidence; and (3) the district court committed reversible error

by failing to instruct the jury on factors to be considered in evaluating a witness' testimony identifying appellant as the perpetrator. We affirm.

## FACTS

Appellant Stephen Gene Shawnoskey was charged by complaint with two counts of first-degree burglary. The following evidence was presented at trial.

At approximately 1:00 p.m. on September 22, 2015, S.G. responded to a knock on the door of her house and saw a man, wearing a red bandana across his face and a black hooded sweatshirt, on the other side of the door pointing a gun at her. S.G. first locked the door, but opened the door after observing a second man wearing a skull mask. The men demanded that S.G. give them the family safe. The man with the skull mask grabbed the safe while the man with the red bandana held the gun on S.G. The men asked S.G. for the code to the safe, but S.G. told them she did not know the code. The men then left the residence with the safe. The incident lasted approximately four to five minutes.

After the burglary, S.G.'s husband, J.G., began talking to members of the community about the burglary. J.G. learned that a man had been trying to sell at a local casino a $100 bill printed in 1934 that was encased in plastic, which matched the description of a bill that had been in the stolen safe. Based on his discussions with members of the community, J.G. believed that two individuals, Shawnoskey and William Wozna, were involved in the burglary. Both Shawnoskey and Wozna were known to J.G. before the burglary, but were not known to S.G.

Shawnoskey had been staying with C.R., a friend of J.G., for approximately a month before the burglary. C.R. testified that on September 22, sometime between 10 a.m. and

noon, Shawnoskey was sleeping on C.R.'s couch when Wozna entered C.R.'s house, began kicking the couch, and spoke to Shawnoskey. C.R. heard Wozna ask Shawnoskey, "Are you ready?" C.R. asked Shawnoskey, "Ready for what?," and Shawnoskey replied that he was going to help Wozna do something and left the house with Wozna. C.R. stated that she did not see Shawnoskey again that day and that he did not return to her house for approximately a month, even though he had left his dog and some of his belongings there.

C.R. testified that she kept a skull mask in a cupboard and kept a red bandana around a lamp in her living room, where Shawnoskey had been sleeping. After the burglary, C.R. looked for the skull mask and red bandana but could not locate either item. C.R. testified that Shawnoskey was in possession of a black fake gun when he was staying at her house and that, after the burglary, she searched for the fake gun but was unable to find it.

An employee of a pawn shop located approximately a 15-minute drive from S.G.'s residence testified that shortly before 2 p.m. on September 22, 2015, Shawnoskey and Wozna brought in some collectible monies to sell. The employee purchased some items from Shawnoskey, which were identified by S.G. as being stored in the stolen safe. The employee testified that Shawnoskey also offered to sell a 1934 $100 bill, but that Shawnoskey did not like the price the employee offered and decided not to sell it. A list of the pawn shop's transactions for September 22 indicated that Shawnoskey's transaction with the pawn shop was completed at 2:04 p.m. The employee testified that Wozna "stopped in and out" while Shawnoskey and the employee discussed the transaction. The employee estimated that Shawnoskey was in the pawn shop for ten minutes.

A few days after the burglary, law enforcement located Wozna in a vehicle, and, pursuant to a search warrant, searched the vehicle and discovered a skull mask, jewelry, a 1934 $100 bill, and other items. C.R. identified the skull mask as the mask that was missing from her house. S.G. identified the jewelry and the 1934 $100 bill as having been located in the stolen safe.

S.G. testified at trial that the man wearing the red bandana looked 5 feet, 10 or 11 inches tall, while wearing a hooded sweatshirt that was "puffed up" on his head and may have been Native American. A Traverse County deputy sheriff testified that records listed Shawnoskey as being 5 feet, 7 inches tall and Native American.

The deputy testified that, when he spoke with S.G. about the burglary, she said something to the effect that she would always remember the eyes of the individual wearing the red bandana. At trial S.G. identified Shawnoskey for the first time as the person with the red bandana, stating that she recognized him by his eyes.

Shawnoskey testified that Wozna came to C.R.'s house sometime during the afternoon of September 22 and asked him to help pawn some items because Wozna did not have any form of identification. Shawnoskey testified that Wozna pulled the items that he wanted to pawn from under the driver's seat of his vehicle and stated that the items were not stolen. Shawnoskey identified himself as being part Native American.

After considering the above evidence, a jury found Shawnoskey guilty of both counts. The district court convicted Shawnoskey of one count of first-degree burglary and sentenced him to 48 months. This appeal followed.

## D E C I S I O N

### I.

Shawnoskey argues that the evidence was insufficient to support the jury's verdict because the state failed to prove beyond a reasonable doubt that he was involved in the burglary. When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the verdict and "assume the jury believed the state's witnesses and disbelieved contrary evidence." *State v. Robinson*, 539 N.W.2d 231, 238 (Minn. 1995). An appellate court "will uphold the jury's verdict if, giving due regard to the presumption of innocence and to the state's burden of proving the defendant's guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty." *State v. Quick*, 659 N.W.2d 701, 709–10 (Minn. 2003).

"[A] conviction can rest on the uncorroborated testimony of a single credible witness." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quotation omitted). However, corroboration is required to sustain a conviction when a single witness' identification "is made after only fleeting or limited observation." *State v. Walker*, 310 N.W.2d 89, 90 (Minn. 1981).

The state presented both identification testimony and circumstantial evidence that Shawnoskey was the individual wearing the red bandana who stole the safe from S.G.'s house. For the purposes of this appeal, we assume, without deciding, that S.G.'s in-court identification was insufficient by itself to support Shawnoskey's conviction. Shawnoskey argues that because S.G.'s identification was insufficient by itself to support his conviction we must apply the circumstantial evidence test. Despite Shawnoskey's lack of authority

supporting the application of the circumstantial evidence test under these circumstances, we apply the circumstantial evidence here because the state does not dispute its application and because we would come to the same result if we determined that only corroboration was required.

Compared to a conviction based on direct evidence, "[a] conviction based on circumstantial evidence . . . warrants heightened scrutiny." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). The heightened scrutiny comes in the form of a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). Under the first step of the circumstantial evidence test, we "identify the circumstances proved." *Id.* "[I]n determining the circumstances proved, [appellate courts] consider only those circumstances that are consistent with the verdict." *Id.* at 599. "As with direct evidence, [appellate courts] construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the [s]tate's witnesses and disbelieved the defense witnesses." *Id.* (quotation omitted).

The relevant circumstances proved in this case are as follows. Shawnoskey had been staying at C.R.'s home for approximately a month prior to the burglary. C.R. kept a skull mask and a red bandana in her house that were discovered to be missing after the burglary. Sometime between 10:00 a.m. and noon on September 22, 2015, Wozna went to C.R.'s house and asked Shawnoskey, "Are you ready?" Shawnoskey indicated to C.R. that he was going to help Wozna do something and left the house with Wozna. Shortly after 1:00 p.m., two men who were wearing the skull mask and the red bandana from C.R.'s home came to S.G.'s residence and stole a safe. Although the men asked for the code to

the safe, S.G. did not give the code to them. The man with the red bandana was holding a gun and wearing a black puffed up hooded sweatshirt. S.G. stated that she would always remember the eyes of the man wearing the red bandana and identified Shawnoskey as the man with the red bandana. Less than an hour after the burglary occurred, Shawnoskey and Wozna pawned some of the items from the stolen safe at a pawn shop approximately a 15-minute drive away from S.G.'s house. Law enforcement later recovered more items that were stolen in the burglary after searching a car driven by Wozna. Shawnoskey did not return to C.R.'s residence the day of the burglary and returned approximately a month later, though he had left his dog and personal belongings there.

Under the second step of the circumstantial evidence test, we "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotations omitted). Unlike the deference given to the verdict in determining the circumstances proved "[appellate courts] give no deference to the fact finder's choice between reasonable inferences." *Id.* (quotation omitted).

Shawnoskey argues that there is another reasonable hypothesis other than his guilt, namely that some other individual was the man wearing the red bandana who burglarized S.G.'s house with Wozna. We disagree.

The evidence shows that Shawnoskey left C.R.'s house with Wozna at some point between 10 a.m. and noon. The burglary occurred shortly after 1 p.m., and the burglars would have had to figure out a way to open the safe before attempting to sell its contents. Shawnoskey and Wozna, at approximately 1:55 p.m., entered a pawn shop located a 15-minute drive away to sell items stolen in the burglary. Shawnoskey is Native American,

though he is a few inches shorter than the description given by S.G. However, S.G. was able to observe the eyes of the man in the red bandana for four to five minutes, indicated that she would always be able to identify the eyes of the man in the red bandana because she had nightmares about them, and identified Shawnoskey at trial as the man wearing the red bandana. When viewed in its totality, the circumstantial evidence is inconsistent with any rational hypothesis except that of guilt. We conclude that the jury's verdict is supported by sufficient evidence.

**II.**

Shawnoskey contends that the district court abused its discretion in permitting the state to elicit testimony from C.R. that Wozna asked whether Shawnoskey was ready, arguing that the question constituted inadmissible hearsay.

Appellate courts "will not reverse evidentiary rulings absent a clear abuse of discretion." *Miles v. State*, 840 N.W.2d 195, 204 (Minn. 2013). On appeal, the defendant has the burden of proving that the district court abused its discretion in making its evidentiary ruling and that the defendant was prejudiced by the ruling. *Id.*

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is not admissible unless an exception applies. Minn. R. Evid. 802. "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Minn. R. Evid. 801(a). "Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay." *United States v. Thomas*, 451 F.3d 543, 548 (8th Cir. 2006); *see also State v.*

*Brown*, 455 N.W.2d 65, 68 (Minn. App. 1990) (concluding that declarant's statement "do what you came to do" was not assertive and therefore not excludable as hearsay), *review denied* (Minn. July 6, 1990).

Shawnoskey argues that, while some questions may not be assertive, Wozna's question was assertive because "it conveyed that Shawnoskey was going with Wozna and was prepared to do something." We disagree. While Shawnoskey is correct that Wozna's question provided some indication that Shawnoskey and Wozna anticipated taking some action, Wozna's question, "Are you ready?," was not an assertion and cannot be established to be true or false. *See Brown*, 455 N.W.2d at 68. Because the question is not an assertion, the district court did not abuse its discretion by admitting Wozna's question.

**III.**

Shawnoskey argues that the district court committed prejudicial plain error by not giving the standard jury instruction on eyewitness identification testimony contained in CRIMJIG 3.19. 10 *Minnesota Practice*, CRIMJIG 3.19 (2015). We disagree.

Determining whether to give a jury instruction is within the district court's discretion, and appellate courts review for an abuse of discretion. *State v. Kjeseth*, 828 N.W.2d 480, 482 (Minn. App. 2013). However, because Shawnoskey did not offer specific instructions regarding eyewitness testimony or object to the instructions given at trial, we review for plain error. *State v. Hughes*, 749 N.W.2d 307, 315 (Minn. 2008). In reviewing for plain error, we apply a three-part test, requiring that the challenging party show (1) an error, (2) that is plain, and (3) that affects the defendant's substantial rights. *Id.* 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). If the three prongs of the plain-error test are met, a reviewing court "may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Taylor*, 869 N.W.2d 1, 15 (Minn. 2015) (alteration omitted) (quotations omitted).

"The [district] court must instruct the jury on all matters of law necessary to render a verdict . . . ." Minn. R. Crim. P. 26.03, subd. 19(6). The supreme court has stated that "where requested by defendant's counsel, we think the court should instruct on the factors the jury should consider in evaluating an identification and caution against automatic acceptance of such evidence." *State v. Burch*, 284 Minn. 300, 315, 170 N.W.2d 543, 553 (1969). "The care with which a jury should be instructed with reference to this type of testimony must depend upon the particular circumstances in each case." *State v. Bishop*, 289 Minn. 188, 195, 183 N.W.2d 536, 540–41 (1971).

Even assuming the district court's omission of CRIMJIG 3.19 from its instructions was plain error, we conclude that any error did not affect Shawnoskey's substantial rights. While the district court did not include CRIMJIG 3.19, it did include CRIMJIG 3.12 in its final instructions. *See* 10 *Minnesota Practice*, CRIMJIG 3.12 (2015). CRIMJIG 3.12 instructs the jury on how to evaluate the testimony of witnesses. In accordance with the standard jury instruction, the district court instructed the jury that it was the sole judge of whether a witness was believable and that, in making such a determination, the jury could "take into consideration the witness's . . . ability and opportunity to know, remember and relate the facts; . . . reasonableness or unreasonableness of their testimony in light of all the other evidence in the case; . . . and any other factors that bear on believability and weight."

Therefore, while the district court did not give the jury instruction specific to identification testimony, it did instruct the jury how to consider the believability of the witness' testimony as a whole. Furthermore, the reliability of S.G.'s testimony was tested during cross-examination, and the identification issue was argued at length during closing arguments.

Under these circumstances, because the jury was made aware that it must evaluate the weight and credibility of S.G.'s identification of Shawnoskey, any error did not affect Shawnoskey's substantial rights. Because we conclude that Shawnoskey failed to meet the third prong of the plain error analysis, we need not consider the other prongs. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

**Affirmed.**