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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1476**

State of Minnesota,
Respondent,

vs.

Matthew Raymond Smoot,
Appellant.

**Filed August 13, 2018
Affirmed in part, reversed in part, and remanded
Cleary, Chief Judge**

Cass County District Court
File No. 11-CR-17-427

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

Benjamin T. Lindstrom, Cass County Attorney, Walker, Minnesota (for respondent)

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

Considered and decided by Jesson, Presiding Judge; Cleary, Chief Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

A Cass County jury found appellant Matthew Raymond Smoot guilty of second-degree burglary, third-degree burglary, receiving stolen property, and two counts of

motor vehicle theft. Appellant argues that: (1) he is entitled to a new trial based on the district court's erroneous accomplice-liability jury instruction; and (2) his convictions for third-degree burglary and receiving stolen property must be reversed as lesser-included offenses of second-degree burglary and motor vehicle theft, respectively. Because the jury likely found appellant guilty as a principal, we conclude that the jury instruction error did not affect appellant's substantial rights. And while the evidence was sufficient to support all five of appellant's convictions, the district court erred by formally adjudicating guilt on both burglary convictions, the motor-vehicle-theft conviction, as well as the receiving-stolen-property conviction. Therefore, we affirm in part, reverse in part, and remand.

FACTS

On March 10, 2017, the Cass County Sheriff's Department received a report of a break-in at a seasonal cabin and the theft of a Farmall tractor, a truck, and various other items. Soon after, a citizen informed a sheriff's deputy that appellant and a friend, W.A., were storing a tractor and a truck on the property of appellant's mother, where appellant was living. Later that day, two deputies went to the property and discovered a tractor matching the description of the tractor stolen from the cabin. Deputies attempted to make contact with appellant, but could not locate him. While waiting for a tow truck to remove the tractor, deputies observed appellant crawling on the ground in the back of the property in an attempt to flee. Appellant was apprehended and placed under arrest.

While still at the scene, appellant provided a statement to the police and showed the deputies other stolen items at the property. Appellant admitted his involvement in the break-in and described how he and W.A. drove the vehicles from the cabin to his mother's property. The deputies recovered multiple stolen items—including ladders, a chemical sprayer, and a screen door—from the garage. Deputies examined appellant's cell phone, which showed messages between appellant and W.A. about the presence of police at the property, a reference to the "fa," which police believed to be a reference to the Farmall tractor, and instructions from W.A. to appellant to hide. The appellant was later charged with five crimes: second-degree burglary, third-degree burglary, two counts of motor vehicle theft, and one count of receiving stolen property as both a principal and as an accomplice to W.A.

At trial, the state's evidence against appellant included photo evidence of the tractor at his residence, an audio recording of his confession, the messages exchanged between W.A. and appellant prior to his arrest, and testimony from the arresting deputy about appellant's statements and actions on the day he was arrested. In his post-arrest statement, appellant denied ransacking the cabin, but admitted that he and W.A. "broke into" the cabin. Appellant led deputies around the garage, pointing out items stolen from the cabin. Appellant explained how they entered the cabin and that they made two trips, one to drive the truck to his residence and a second to drive the tractor. Appellant admitted driving the truck back to his residence and explained that W.A. took possession of the truck earlier that week.

After the state rested, appellant testified on his own behalf. Prior to his testimony, the district court admitted impeachment evidence in the form of five of appellant's prior felony convictions. Appellant testified that he needed a tractor for his hobby farm and that W.A. offered to sell him a tractor for \$2,000. He stated that he agreed to pay W.A. either in cash or in exchange for a title loan on the property but that he was not going to let money exchange hands until W.A. "provided . . . a bill of sale for the tractor." Appellant testified that on March 6 or 7, he and W.A. went to pick up the tractor. Appellant testified that W.A. opened the gate on the maintenance road and entered the service door to the garage. He testified that W.A. placed a battery in the truck in the garage, started it with the key, and instructed appellant to drive it back to his residence. Appellant drove the truck back to his residence, and the two returned to the cabin to get the tractor. W.A. placed a battery in the tractor, started it with the key, and drove it back to appellant's residence. When W.A. did not produce a bill of sale for the tractor, appellant requested that the vehicles be removed from his residence. W.A. removed the truck on March 8, but left the tractor and other stolen items in appellant's garage. W.A. did not come back for the tractor, and the tractor remained parked in front of appellant's residence until the deputies arrived. Appellant explained that he would have told law enforcement about the purchase agreement during his post-arrest statement, but that he was confused, emotional, and overwhelmed at the time he gave his statement to the deputies. Appellant's mother also testified that she and appellant agreed to purchase the tractor from W.A. for \$2,000 and that when appellant informed her that W.A. did not

have authority to sell the tractor, she ordered them to remove it from her property. The prosecutor established the close familial relationship between appellant and his mother through cross-examination.

At the close of evidence, the district court gave the following instruction on accomplice liability:

The defendant is guilty of a crime committed by another person when the defendant has played an intentional role in aiding the commission of the crime and made no reasonable effort to prevent the crime before it was committed. “Intentional role” includes aiding, advising, hiring, counseling, conspiring with, or procuring another to commit the crime.

If the defendant intentionally aided another person in committing a crime, or intentionally advised, hired, counseled, conspired with, or otherwise procured the other person to commit it, the defendant is also guilty of any other crime the other person commits while trying to commit the intended crime, if that other crime was reasonably foreseeable to the defendant as a probable consequence of trying to commit an intended crime.

The defendant is guilty of a crime, however, only if the other person commits a crime. The defendant is not liable criminally for aiding, advising, . . . unless some crime including an attempt is actually committed.

Neither party objected to the substance of the instruction. The jury returned guilty verdicts on all five counts. The district court formally adjudicated appellant guilty and entered convictions on all five counts. The district court sentenced appellant to 54 months on the second-degree-burglary count and to 24 months for the receiving-stolen-property count to be served concurrently. This appeal follows.

DECISION

I. Appellant is not entitled to a new trial because the district court’s plainly erroneous accomplice-liability instruction did not affect his substantial rights.

Appellant argues that he is entitled to a new trial because the district court’s accomplice-liability jury instruction “omitted the requirement that the State prove appellant had the requisite intent to be liable for aiding and abetting.” Because the error did not affect appellant’s substantial rights, he is not entitled to a new trial.

We review a district court’s jury instructions for an abuse of discretion. *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). District courts have “considerable latitude in selecting jury instructions and the language of those instructions.” *Id.* But a district court may not select instructions that “materially misstate the law.” *Id.* Because appellant did not object to the accomplice-liability instruction at trial, we review the instructions for plain error. To establish plain error, appellant must show that there was (1) an error, (2) that is plain, and (3) that affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “If the appellant satisfies the first three prongs of the plain-error doctrine, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings.” *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014) (alteration in original) (quotation omitted).

A defendant can be held liable for the crimes of another only when the defendant “intentionally aids, advises, hires, counsels, or conspires with or otherwise procures another to commit the crime.” Minn. Stat. § 609.05, subd. 1 (2016). “Intentionally aids”

is not defined in the statute. But the supreme court has held that the element of “intentionally aiding” includes “two important and necessary principles: (1) that the defendant ‘knew that his alleged accomplices were going to commit a crime,’ and (2) that the defendant ‘intended his presence or actions to further the commission of that crime.’” *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quoting *State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007)). A district court’s failure to “explain that the intentionally aiding element requires that the jury find beyond a reasonable doubt that the defendant knew his alleged accomplice was going to commit a crime and the defendant intended his presence or actions to further the commission of that crime” constitutes plain error. *Kelley*, 855 N.W.2d at 275. The district court committed plain error by failing to instruct the jury on the “intentionally aided” element of accomplice liability.

A jury-instruction error affects a defendant’s substantial rights if the error was prejudicial and affected the outcome of the case. *State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015). “An error is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury’s verdict.” *State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013) (quotation omitted). An appellant bears a “heavy burden” of proving that an erroneous jury instruction had a significant effect on the jury’s verdict. *Kelley*, 855 N.W.2d at 283-84. “An erroneous jury instruction will not ordinarily have a significant effect on the jury’s verdict if there is considerable evidence of the defendant’s guilt.” *Id.* at 283. When examining whether the omission of an

element of a crime in a jury instruction was prejudicial, we must consider whether “(1) the defendant contested the omitted element and submitted evidence to support a contrary finding, (2) the State submitted overwhelming evidence to prove that element, and (3) the jury’s verdict nonetheless encompassed a finding on that element.” *Watkins*, 840 N.W.2d at 29.

While the first factor weighs in appellant’s favor, he has failed to establish that the error was prejudicial or affected the outcome of the case. Appellant contested the state’s evidence that he intentionally aided W.A. in the commission of the crime through his own testimony and that of his mother, but the state’s evidence that appellant acted as a principal to the burglary was strong. Appellant was charged with each of the five offenses two ways: as a principal and as an accomplice. The state’s evidence primarily focused on appellant as a principal to the burglary. Law enforcement discovered the tractor and other stolen goods after a concerned citizen informed a deputy that appellant and W.A. were storing the stolen vehicles at appellant’s residence. Appellant exchanged messages with W.A. about the location of the tractor while the deputies were investigating the break-in. Appellant fled from law enforcement when they arrived at the property. In a custodial statement, appellant admitted his involvement in the crime and detailed his role in the break-in. Appellant identified multiple stolen items in his garage for the deputies. At trial, appellant presented a different version of events related to his belief that he was making a legitimate purchase of the tractor and explained that he was confused, emotional, and overwhelmed when he made his initial statement.

Appellant's five prior felony convictions were admitted as impeachment evidence prior to his testimony. The jury weighed this evidence and returned a guilty verdict on all counts. The jury's verdicts are consistent with the evidence establishing appellant's active involvement in the crimes and inconsistent with his testimony that he unwittingly agreed to purchase stolen property.

The state's case focused primarily on appellant's liability as a principal. Whatever effect the erroneous accomplice-liability instruction may have had was limited only to appellant's liability as an accomplice and would not apply to his liability as a principal. Because the jury's verdicts were based on the state's primary theory that appellant was liable as a principal, appellant has not met the heavy burden of establishing that there is a reasonable likelihood that giving the erroneous instruction had a significant effect on the verdicts. Accordingly, appellant is not entitled to a new trial because he cannot satisfy the third factor of the plain-error test.

II. The district court erred in formally adjudicating appellant guilty of third-degree burglary and receiving stolen property.

The jury returned guilty verdicts on all five counts. The district court formally adjudicated appellant guilty and entered convictions on both burglary counts and on the motor-vehicle-theft count related to the theft of the tractor and the receiving-stolen-property count related to the theft of the tractor. The district court imposed a sentence on the second-degree-burglary and receiving-stolen-property convictions only. Appellant and the state agree that the district court erred by formally adjudicating

appellant guilty and entering convictions on both burglary counts, the motor-vehicle-theft count and receiving-stolen-property count.

We have consistently held that Minn. Stat. § 609.04 (2016) “bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). Third-degree burglary is a lesser-included offense of second-degree burglary. *See* Minn. Stat. § 609.582, subs. 2, 3 (2016). A defendant “may not be convicted of both theft and receiving stolen property with respect to property involved in the same transaction.” *State v. Lee*, 683 N.W.2d 309, 315 (Minn. 2004). The property at issue in both the theft count and the receiving-stolen-property count was the tractor. Appellant cannot be convicted of both stealing the tractor and receiving it as stolen property. The district court erred in formally adjudicating appellant guilty on both convictions of burglary and on the motor-vehicle-theft and receiving-stolen-property convictions.

“The proper procedure to be followed by the [district] court when the [appellant] is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only” and “[t]he remaining conviction(s) should not be formally adjudicated at this time.” *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). Where the district court errs in formally adjudicating multiple convictions for the same behavioral incident, the proper remedy is to “remand with instructions to the district court to vacate the formal adjudication of guilt” on the lesser-included conviction “and to leave the guilty verdict in place on that unadjudicated

conviction.” *State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014), *review denied* (Minn. Dec. 16, 2014).

Accordingly, we reverse and remand with instructions to the district court to: (1) leave the guilty verdicts in place on all five convictions; (2) issue a new warrant of commitment vacating the formal adjudications of guilt on the third-degree-burglary conviction and the receiving-stolen-property conviction; and (3) resentence appellant on the second-degree-burglary conviction as well as the motor-vehicle-theft conviction involving the tractor.

Affirmed in part, reversed in part, and remanded.