STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0163

State of Minnesota,
Respondent,

vs.

Dustin Ried Purinton,
Appellant

Filed December 26, 2017
Affirmed
Worke, Judge

Sherburne County District Court
File No. 71-CR-16-424

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

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

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

WORKE, Judge

Appellant challenges his conviction of first-degree burglary while possessing a dangerous weapon, arguing that the district court plainly erred by not giving a specific unanimity jury instruction. We affirm.

FACTS

Around December 21, 2015, appellant Dustin Ried Purinton attempted to reconnect with an old friend, B.Z. Purinton asked B.Z. if they could "hang out" on Christmas Eve. B.Z. told Purinton that he was not available on Christmas Eve because he was going to his family's cabin.

B.Z. went to his family's cabin on Christmas Eve. Around 6:00 p.m. on Christmas Day, B.Z. returned to his home that he shared with his mother, L.Z., and step-father, R.Z., and found the basement "pretty much in ruins." Law enforcement was called, and B.Z. reported that several items, including a "good sized hunting knife" had been taken from the home. R.Z. had a gun safe in the home that secured firearms, valuable coins, deer-hunting poker change, and jewelry. The safe was "dumped" over and had holes cut in the bottom. L.Z.'s father's "antique loaded handgun" was taken from the gun safe. Law enforcement took items that the intruders might have touched for DNA testing. B.Z. reported that Purinton might be involved.

On December 26, 2015, around 12:34 a.m., a deputy made contact with Purinton. Purinton told the deputy that he had not been in B.Z.'s house in over two years. The deputy

noticed fresh cuts on Purinton's hands. On January 8, 2016, Sergeant Jeanetta spoke with Purinton, and Purinton denied having any knowledge of the burglary.

On January 20, 2016, items taken from B.Z.'s home were recovered during the execution of a search warrant at A.H.'s home. Around the same time, items taken from B.Z.'s home were recovered during the execution of a search warrant at J.R.'s residence on a separate matter. At J.R.'s residence, officers found B.Z.'s backpack that contained a "large Rambo style knife." J.R. told Sergeant Jeanetta that Purinton brought the backpack to his house. With this information, Sergeant Jeanetta talked to Purinton again. Purinton admitted that he brought the backpack to J.R.'s house, but claimed that he took it from A.H.'s house for a fishing trip. While still denying his involvement in the burglary, Purinton stated his belief that A.H. committed the burglary. When Sergeant Jeanetta confronted Purinton with the fact that he was the one connected to B.Z., Purinton claimed that somebody must have read B.Z.'s text messages on his phone or overheard a conversation to learn B.Z.'s address. Sergeant Jeanetta collected a sample of Purinton's DNA.

On March 31, 2016, Sergeant Jeanetta told Purinton that his DNA was found on tools in the home. Purinton then admitted that he and A.H. went to the home on Christmas Eve on a "scouting mission." He stated that he brought tools from the garage into the house because they planned to take them. He admitted that he took some items, but claimed that the gun safe was upright when they left. Purinton was charged with first-degree burglary while possessing a dangerous weapon.

At Purinton's jury trial, D.P. testified that Purinton and A.H. told him that they were going to burglarize a home because the homeowners were going to be away. Purinton told D.P. that he used to be friends with the homeowners' son. D.P. testified that Purinton told him that he got into a safe by using the homeowners' tools. R.Z. testified that several tools that he had stored in his garage were found lying around the damaged gun safe. A forensic scientist testified that the DNA mixtures found on a hammer and a "yellow flat bar" had dominant male profiles that matched Purinton's DNA. The DNA mixture from a Skilsaw had a dominant male profile that matched A.H.'s DNA.

Purinton testified that A.H. saw a message from B.Z. on Purinton's phone indicating that B.Z. would not be home on Christmas Eve. According to Purinton, A.H. stated that it would "be a good way to get some money and stuff," so they planned with D.P. to take tools and electronics to sell.

Purinton testified that A.H. picked him up around 5:30 p.m. on Christmas Eve and drove to B.Z.'s home. Purinton testified that he grabbed tools from the garage and he and A.H. packed items in a backpack. Purinton testified that they were in the home for 30-45 minutes. When their "hands were full," they decided to leave and return for the tools and other items, but Purinton claimed that he never returned. Purinton testified that he did not take any weapons.

Purinton's attorney asked the district court to include a lesser-included offense of second-degree burglary based on Purinton's testimony. The district court agreed to include the lesser-included offense and stated that it would also include an aiding-and-abetting jury instruction for the first-degree burglary charge. In closing argument, the prosecutor stated:

> If . . . it is reasonably foreseeable that an additional crime occurs as a result of Mr. Purinton's aiding, advising, hiring, counseling, assisting; he is also guilty of first degree burglary. What that means . . . is if after all of your evaluation of the evidence you believe . . . where [Purinton] says, "jeez, I…yep, yep, I was actually in the property. I actually gathered the tools. I actually did that. [But] the safe was upright."
>
> If you choose to believe [Purinton's] version of the events and that someone else came back and someone else, after . . . Purinton's own words that they scouted throughout the house, if someone came back to that house based on his aiding, advising, counseling, hiring; he's guilty of that crime too. If it's reasonably foreseeable.

The jury found Purinton guilty of first- and second-degree burglary. The district court sentenced Purinton to 48 months in prison. This appeal followed.

D E C I S I O N

Purinton argues that the district court plainly erred by not giving a specific unanimity jury instruction when "the state's theory was that Purinton was guilty of burglary either for personally burglarizing a house on Christmas Eve or if an alleged accomplice burglarized the house at a later time." Purinton failed to object to the district court's jury instructions; thus, this court reviews his challenge for plain error. *See State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012).

Under the plain-error test, this court must consider whether the district court's jury instructions contained (1) an error, (2) that was plain, and (3) that affected the defendant's substantial rights. *Id.* If this court concludes that any of the requirements of the plain-error test are not satisfied, it need not consider the others. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012). If the appellant establishes all three requirements, this court may correct the

error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017).

"The jury's verdict must be unanimous in all cases." Minn. R. Crim. P. 26.01, subd. 1(5). "[T]he jury must unanimously agree on which acts the defendant committed if each act itself constitutes an element of the crime." *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001). "But a jury need not agree unanimously with respect to the alternative means or ways in which a crime can be committed." *State v. Rucker*, 752 N.W.2d 538, 547 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008).

"[I]f the statute establishes alternative means for satisfying an element, unanimity on the means is not required." *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002). The jury need not unanimously agree on each element's underlying facts so long as the differing factual circumstances show "equivalent blameworthiness or culpability." *State v. Pendleton*, 725 N.W.2d 717, 731 (Minn. 2007) (quotation omitted). Additionally, if the acts are part of a single behavioral incident, then a specific unanimity instruction is unnecessary. *State v. Infante*, 796 N.W.2d 349, 356-57 (Minn. App. 2011). "[A] single behavioral incident is the result of a single motivation directed towards a single criminal goal." *Id.* at 356 (quotation omitted). Separate, distinct acts "lack unity of time and place." *Stempf*, 627 N.W.2d at 358-59. Jury instructions violate a defendant's right to a unanimous verdict when the instructions "allow for possible significant disagreement among jurors as to what [criminal] acts the defendant committed." *Id.* at 354.

Here, the district court did not err by instructing the jury that its verdict "must be unanimous," rather than giving a specific unanimity instruction. Purinton challenges his

first-degree burglary conviction. A person is guilty of first-degree burglary when he enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime in the building, either directly or as an accomplice, and possesses when entering or at any time while in the building a dangerous weapon. Minn. Stat. § 609.582, subd. 1(b) (2014). Purinton challenges the element that he possessed a dangerous weapon.[1] Purinton claims that the prosecutor alleged that Purinton or A.H. possessed a dangerous weapon during the initial break-in on Christmas Eve and then relied "on an alternative theory involving a second break-in" in which Purinton was not involved. Purinton claims that "[b]y alleging two separate break-ins, which were not part of the same behavioral incident, the state created a unanimous verdict problem."

First, the state did not present the theory of two burglaries. The state's theory was that Purinton and A.H. burglarized the home on Christmas Eve. Purinton testified that during the first burglary, he did not take any weapons; thus, the state responded in closing argument to Purinton's implication that a second burglary had occurred.

Second, the first-degree burglary statute provides alternate ways in which it can be violated—"either directly or as an accomplice." *Id.* The district court instructed the jury that Purinton

> is guilty of a crime committed by another person when [he] has played an intentional role in aiding the commission of the

[1] The dangerous weapon here could be the guns from the gun safe, L.Z.'s father's "antique loaded handgun," or B.Z.'s "good sized hunting knife." Sergeant Jeanetta testified that Purinton told him that he heard that A.H. had a gun, but that it was stolen from him. Officers found B.Z.'s "large Rambo style knife" inside his backpack that Purinton brought to J.R.'s home.

> crime and made no reasonable effort to prevent the crime before it was committed. "Intentional role" includes aiding, advising, hiring, counseling with, or procuring another to commit the crime.

The state asserted that Purinton was guilty because he or A.H. possessed a dangerous weapon when they burglarized the home. The state was not required to prove that it was Purinton *or* A.H. who possessed the dangerous weapon.

Third, even if there had been a second burglary during which dangerous weapons were possessed, Purinton would have been guilty because it was part of a single behavioral incident. Two burglaries would have been the result of "a single motivation directed towards a single criminal goal," *Infante*, 796 N.W.2d at 356, because Purinton testified that he, A.H., and D.P. agreed that burglarizing the home would "be a good way to get some money and stuff" and that they planned to take tools and electronics to sell. Two burglaries also would have shared unity of place and time because a second burglary would have had to occur within 24 hours—between 6:15 p.m. Christmas Eve and 6:00 p.m. Christmas Day.

But even if the district court erred and should have given the specific unanimity instruction, Purinton's substantial rights were not affected. Purinton has a "heavy burden" in establishing that any error was prejudicial. *See State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Purinton must show that there was a reasonable likelihood that the error had a significant effect on the verdict. *See id.* The evidence of Purinton's guilt was strong. First, Purinton admitted that he committed second-degree burglary. Second, if a second burglary occurred, it was only because Purinton contacted B.Z., knew that B.Z.'s family would be out of town, knew where B.Z. lived, and was familiar with the items in the home.

Third, the evidence supports a conclusion that there was one burglary during which Purinton attempted to cut the gun safe open with the homeowners' tools. Purinton had fresh cuts on his hands in the early morning of December 26. D.P. testified that Purinton told him that he got into a safe by using the homeowners' tools. And Purinton's DNA was the dominant profile on tools collected from the scene. Finally, even if the gun safe was damaged during a second burglary, a large hunting knife was taken from the home. The knife was found in B.Z.'s backpack that Purinton admitted taking during the burglary. The backpack was found at J.R.'s house and Purinton admitted that he brought the backpack to J.R.'s house. Purinton fails to meet the plain-error test.

Affirmed.