STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1192

State of Minnesota,
Respondent,

vs.

Geoffrey Robinson,
Appellant.

Filed July 9, 2018
Affirmed
Florey, Judge

Dakota County District Court
File No. 19HA-CR-17-46

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

James C. Backstrom, Dakota County Attorney, Anna Light, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and Florey, Judge.

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

FLOREY, Judge

Appellant Geoffrey Robinson challenges his conviction of felony possession of burglary or theft tools, arguing that (1) the district court erroneously directed a verdict on

an element of the offense; (2) the district court's jury instructions were erroneous; and (3) he received ineffective assistance of trial counsel. Because we discern no error, we affirm.

FACTS

In May 2017, a jury found appellant Geoffrey Robinson guilty of felony possession of burglary or theft tools and of misdemeanor theft as a result of his actions on December 31, 2016. On that date, appellant pried open a store's cash register with a hammer and a screwdriver, removed approximately $200, and left the store. Using surveillance video, a police officer captured a photograph of the suspect's vehicle and identified it as belonging to appellant. Officers later detained appellant and conducted a vehicle search. The search uncovered a black fabric bag containing a screwdriver, a hammer, a pair of pliers, and a tag for another tool inside the car. The state charged appellant with felony possession of burglary or theft tools in violation of Minn. Stat. § 609.59 (2016), and with misdemeanor theft in violation of Minn. Stat. § 609.52, subds. 2(a)(1), 3(5) (2016). Following the jury's verdict, the district court adjudicated appellant guilty of both offenses and pronounced the sentence. This appeal follows.

D E C I S I O N

I.

Appellant asserts that the district court erred by directing a verdict for the state on an element of the offense of possessing burglary or theft tools. Appellant did not object to the district court's instructions at trial, and we review the unobjected-to jury instructions for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). This standard involves

consideration of three factors: whether there was an error, whether the error was plain, and whether it affected the defendant's substantial rights. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). If all three prongs of plain-error review are satisfied, we consider whether the error seriously affected the "fairness and the integrity of the judicial proceedings." *Id*. (quotation omitted).

A district court has "considerable latitude" in the selection of language for jury instructions, *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011), and "we will not reverse where jury instructions overall fairly and correctly state the applicable law." *State v. Hokanson*, 821 N.W.2d 340, 356 (Minn. 2012). Here, the district court provided the standard jury instructions for the elements of possessing burglary or theft tools. *See* 10 *Minnesota Practice*, CRIMJIG 16.97 (2017) (articulating elements of offense). The standard jury instructions closely mirror the language of the possession-of-burglary-or-theft-tools statute, which provides that: "Whoever has in possession any device, explosive, or other instrumentality with intent to use or permit the use of the same to commit burglary or theft may be sentenced to imprisonment. . . ." Minn. Stat. § 609.59. While the word "instrumentality" is not specifically defined in the statute, "instrumentality" is broadly defined as "[a] thing used to achieve an end or purpose." *Black's Law Dictionary* 919 (10th ed. 2014); *see also State v. Haywood*, 886 N.W.2d 485, 490 (Minn. 2016) (stating principle that courts may ascertain ordinary usage of words with the aid of dictionary definitions).

The district court instructed the jury that the first element of the offense "is that the defendant had in possession a hammer or screwdriver for the purpose of the commission

of the theft." Appellant contends that the district court should have used the words "device or instrumentality" instead of the words "hammer and/or screwdriver" because whether a particular object constitutes a "device or instrumentality" is a fact question for the jury. We disagree. The district court's instructions, when viewed overall, fairly and correctly state the applicable law. *See Hokanson*, 821 N.W.2d at 356; *see also State v. Bowen*, 910 N.W.2d 39, 47-48 (Minn. App. 2018) (rejecting defendant's argument that court directed verdict by using phrase "bottle of liquor" in place of "personal property" because "that issue is not a question of fact, nor does it require the application of law to facts").

Appellant failed to demonstrate that the district court plainly erred in its instructions to the jury. If we determine upon review that any one of the three prongs of the plain-error test is not satisfied, we need not address the remaining elements. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011). Having concluded that appellant failed to establish error, we do not consider whether the error was plain or whether his substantial rights were affected.

II.

Appellant argues that the district court erred by not orally restating the jury instructions in their entirety at the close of trial. Appellant did not object to the jury instructions at trial, and we again review for plain error. *Griller*, 583 N.W.2d at 740. Appellant must demonstrate that there was an error, that the error was plain, and that the error affected appellant's substantial rights. *Milton*, 821 N.W.2d at 805. If these elements are satisfied, the 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 and quotations omitted). If we conclude that any prong of the plain-error analysis is not satisfied, we need not consider the remaining prongs. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

We determine that the district court's jury instructions were not erroneous. "An error is plain if it is clear or obvious, and usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007). In reviewing jury instructions for error, we "review the instructions in their entirety to determine whether they fairly and adequately explain the law. An instruction that materially misstates the law is erroneous." *Gatson*, 801 N.W.2d at 147 (citation omitted). A district court may give preliminary instructions "[a]fter the jury has been impaneled and sworn, and before the opening statements." Minn. R. Crim. P. 26.03, subd. 4. With respect to the final instructions, "[t]he [district] court may instruct the jury before or after [closing] argument. Preliminary instructions need not be repeated." Minn. R. Crim. P. 26.03, subd. 19(5). Moreover, adequate information on the topics of circumstantial evidence and the credibility of witnesses, given at the start of the trial, "need not be repeated in final instructions." *State v. Duemke*, 352 N.W.2d 427, 432 (Minn. App. 1984).

Here, after the jury was impaneled and sworn, the district court distributed written jury-instruction booklets to the jurors. The district court delivered a number of preliminary instructions and instructed the jurors on the elements of the charged offenses. Following the close of testimony, the district court provided final instructions. The district court reiterated that appellant was presumed innocent of the charges against him and referred the

jury to the instruction booklet to review the elements of the offenses. We discern no error in the district court's instructions to the jury.

Appellant argues that the district court erred by not orally restating the elements of the offense at the close of trial and relies on *Peterson* for the principle that a court must orally instruct the jury "on exactly what it is that they must decide." 673 N.W.2d 482, 485 (Minn. 2004). In that case, the district court provided preliminary instructions on the presumption of innocence and the definition of proof beyond a reasonable doubt, but did not reread those instructions in its final instructions to the jury. *Id.* at 484-85. The Minnesota Supreme Court held that omitting those instructions from the final jury charge constituted a constitutional defect because "[t]he presumption of innocence is a fundamental component of a fair trial under our criminal justice system" and "[t]he reasonable doubt standard of proof provides concrete substance for the presumption of innocence." *Id*. at 486 (quotation omitted). This case is distinguishable from *Peterson*. Here, the district court reiterated in its final instructions that appellant was presumed innocent of the charges against him and reminded the jurors that the state bore the burden of proof. Because the district court's final instructions neither "obscured" nor "diluted" the state's burden of proof, we determine that appellant is not entitled to a new trial on the ground that the jury instructions were erroneous. *Id*. at 487.

III.

Appellant contends that he was denied effective assistance of trial counsel because his attorney failed to present a complete defense. Ineffective-assistance-of-counsel claims

are reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2070 (1984)).

To prevail on his claim, appellant must show "(1) that his counsel's representation 'fell below an objective standard of reasonableness'; and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068). "The objective standard of reasonableness is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014) (quotations omitted). Trial counsel's performance is presumed reasonable, and we give "particular deference to trial counsel's strategic decisions. . . ." *Schneider v. State*, 725 N.W.2d 516, 521-22 (Minn. 2007). To demonstrate actual prejudice, appellant must prove that his "claim is meritorious and that there is a reasonable probability that the verdict would have been different" absent these errors. *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 2583 (1986).

Appellant cannot prevail on his ineffective-assistance claims. First, appellant claims that his counsel should have sought to dismiss the charges on Fourth Amendment grounds. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV. A law-enforcement officer may temporarily seize an individual suspected of criminal activity if the officer has specific, articulable facts that reasonably

warrant the stop. *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005). A reasonable articulable suspicion is less than probable cause. *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003). In this case, the police officer had a reasonable, articulable suspicion that appellant was involved in a possible burglary. The officer had specific, articulable facts warranting a temporary seizure. Therefore, trial counsel's performance did not fall below an objective standard of reasonableness because a Fourth Amendment challenge regarding an illegal search and seizure would not have been meritorious, and there is not a reasonable probability that the verdict would have been different. *Kimmelman*, 477 U.S. at 375, 106 S. Ct. at 2583. Next, appellant argues that his counsel should have challenged the late disclosure of certain photographic evidence. A review of the record reveals that the prosecutor did not seek to introduce this evidence at trial. Accordingly, appellant's trial counsel had no reason to object.

An assignment of error based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Wilson*, 594 N.W.2d 268, 271 (Minn. App. 1999). Because appellant's ineffective-assistance-of-counsel claim is unsupported by argument or authority and because prejudicial error is not obvious on mere inspection, we conclude that appellant is not entitled to relief on his ineffective-assistance-of-counsel claim.

Affirmed.