STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0990, A17-1672

State of Minnesota,
Respondent,

vs.

Jeffery Robert Kampsula,
Appellant.

Filed December 3, 2018
Affirmed in part, reversed in part, and remanded
Ross, Judge

Otter Tail County District Court
File No. 56-CR-15-2464

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

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

Considered and decided by Florey, Presiding Judge; Ross, Judge; and Reyes, Judge.

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

ROSS, Judge

Police suspected that Jeffery Kampsula had sold soybeans and farm equipment from rural property he was renting. The state charged Kampsula with, and a jury convicted him of, theft, theft by swindle, and aggravated forgery. Kampsula argues that the evidence was

insufficient to convict him, that the district court erred by failing to give a specific-unanimity instruction, and that the district court erroneously instructed the jury about accomplice liability. Kampsula's insufficient-evidence and accomplice-liability arguments fail, so we affirm in part. But we reverse in part and remand for a new trial on the theft charge because the lack of a specific-unanimity instruction prevents us from determining whether the jury unanimously found that Kampsula committed that offense.

FACTS

Jeffery Kampsula and Katherine Gaustad were renting an Otter Tail County farmhouse when their landlord died in January 2015. Gary Wendorf, the landlord's brother, visited the farm and saw Kampsula removing soybeans from the farm's grain storage bin. Kampsula told Wendorf that he was disposing of the beans because they were rotten, mouse infested, and worthless.

Wendorf returned later to inventory the equipment belonging to the estate. Wendorf found a Bobcat skid loader in the garage, but not a Big Tex dump trailer or an Allis-Chalmers tractor he had also expected to find. Wendorf asked Kampsula about the missing equipment. Kampsula told him that the dump trailer was at his mother's house full of wood and that the ground was too wet to move it. He said that he had taken the tractor to a friend's house because it was malfunctioning. The two spoke about the condition of the skid loader, and Kampsula said that its fuel pump was failing.

The next month Wendorf noticed that a shed had been broken into. He reported both the break-in and the missing dump trailer and tractor to the sheriff's department. The resulting investigation uncovered the following facts. Kampsula had already sold the

missing dump trailer and tractor before Wendorf asked Kampsula about them. And Kampsula had also sold the soybeans. He sold the dump trailer to Gary Albertson for a car and $2,000. The Henning police chief had pulled Kampsula over a month and a half before Kampsula sold the trailer to Albertson. Kampsula was pulling the trailer, which lacked a license plate. The chief asked Kampsula about the trailer, and Kampsula said he was borrowing it. Albertson said that Kampsula had entered the Weetown Outpost attempting to sell the trailer with an unsigned title. Albertson objected to purchasing the trailer without a signature. Kampsula left, but he soon reappeared with the title, this time bearing the signature of the (deceased) landlord. Albertson bought the trailer and accepted the title. Kampsula sold the tractor to George Lorentz for $2,000 worth of repairs on Kampsula's Chevy Suburban. And he sold the (purportedly rotten, mice-infested, and worthless) soybeans for more than $4,000. By the time the investigation ended, the skid loader had also disappeared from the farm.

The state charged Kampsula with one count of theft, one count of theft by swindle, one count of aggravated forgery, and one count of receiving stolen property. The district court dismissed the charge of receiving stolen property, and trial commenced on the remaining counts.

The jury heard the account just described and also heard from Kampsula's two witnesses. Kampsula called William Roach, who told the jury that he saw Kampsula and the landlord signing papers for the sale of the skid loader soon before the landlord died. Kampsula also called Katherine Gaustad, who identified the skid loader's supposed bill of

sale, purportedly bearing the landlord's signature. The state's handwriting expert told the jury she was almost certain the signature was not the landlord's.

The district court instructed the jury. It told the jury that, to find Kampsula guilty of theft, it must find that he took "the soybeans, Allis-Chalmers tractor, Big Tex dump trailer, *or* Bobcat skid loader," and it must find that Kampsula intended to deprive the owner permanently of "the soybeans, Allis-Chalmers tractor, Big Tex dump trailer, *or* Bobcat skid loader." (Emphasis added.) The district court did not instruct the jury that it must unanimously agree as to which of the items was stolen. The court also instructed the jury that it could find Kampsula guilty of theft by swindle if he swindled Lorentz into repairing Kampsula's Chevy Suburban or if Kampsula swindled Albertson into giving up a car and $2,000 cash. And it told the jury that it must decide whether the property obtained by the swindle included Kampsula's obtaining a motor vehicle. The jury found Kampsula guilty of theft, theft by swindle, and aggravated forgery.

Kampsula appeals.

D E C I S I O N

Kampsula challenges his convictions on four grounds. He argues first that we must reverse because the evidence was insufficient to prove any of the charges. He argues second that the district court failed to instruct the jury that it must unanimously agree which of the several alleged acts of theft and theft by swindle supports the single charged count of each crime. He argues third that the district court erroneously instructed the jury about accomplice liability and fourth that the errors, considered together, unfairly prejudiced him. Only one of his arguments merits reversal.

I

Kampsula contends that the evidence was insufficient to prove he committed theft, theft by swindle, or aggravated forgery. We review the evidence in the light most favorable to the verdict to determine whether those facts and the inferences drawn from them would allow a jury to conclude that the defendant is guilty beyond a reasonable doubt. *State v. Salyers*, 858 N.W.2d 156, 160 (Minn. 2015). On this standard, we have no difficulty deciding that the evidence supports the guilty verdict on each charge.

We reject Kampsula's argument that the state failed to prove that anyone besides him had a possessory interest in the allegedly stolen items after the landlord's death. A person who intentionally takes the property "of another" without the other's consent to deprive the owner permanently of the property is guilty of theft. Minn. Stat. § 609.52, subd. 2(a)(1) (2016). Wendorf testified that all of the interest in the landlord's property transferred from his deceased brother to him and his siblings. And he discussed the ownership of each item. He testified that he combined the soybeans himself and stored them on the farm. He said that the equipment was also part of his brother's estate. He remembered his brother buying the tractor, and he identified a photograph of a stamp on the tractor bearing the name "Wendorf Farms" along with the farm's address. This testimony was sufficient to convince a reasonable jury that the property belonged to someone other than Kampsula.

This conclusion is not hindered by Kampsula's tardy suggestion on appeal that Wendorf's testimony lacked foundation. A defendant waives foundational challenges not

raised at trial. *See State v. Pearson*, 189 N.W. 404, 405 (Minn. 1922). Kampsula failed to challenge the testimony at trial. Our conclusion as to ownership by "another" stands.

Kampsula argues next that the circumstantial evidence was insufficient to prove that he took the Wendorfs' property without consent. The evidence supporting this element is circumstantial. We scrutinize the evidence more restrictively when we review convictions based on circumstantial evidence. *See State v. Al–Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). Our review as to whether the circumstantial evidence sufficiently proved that Kampsula took the Wendorfs' property without consent involves two steps. We first identify the circumstances proved. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). To determine the circumstances proved, we consider only those circumstances consistent with the guilty verdict. *State v. Sterling*, 834 N.W.2d 162, 175 (Minn. 2013). We then independently consider the reasonableness of the inferences that can be made from these circumstances, including inferences consistent with innocence. *Id*. at 176. We will affirm a guilty verdict only if "there are no other reasonable, rational inferences that are inconsistent with guilt." *Hanson*, 800 N.W.2d at 622 (quotation omitted). Even on our more exacting circumstantial-evidence review, we hold that ample evidence proved that Kampsula lacked consent to take the soybeans, tractor, dump trailer, or skid loader.

Kampsula offers the hypothesis that the landlord had consented to Kampsula's taking the soybeans, tractor, dump trailer, and skid loader. The circumstances proved belie that theory.

Regarding the soybeans, Kampsula contends that he had a deal with the landlord to clean out and disassemble the grain bins in exchange for the beans. This is not among the

relevant circumstances proved. Three of the circumstances proved are that Kampsula removed the soybeans, took only the beans he sold, and never cleaned or disassembled the bins. Another circumstance is that, even as Kampsula was actively collecting the soybeans that he sold for $4,000, he falsely represented to Wendorf that they were worthless. Kampsula's dishonest report of the beans' condition, his removal of only the sellable beans, and his failure to clean and disassemble the bins after taking the beans render unreasonable his hypothesis that he was acting on the landlord's consent to his owning the beans in the alleged bartered exchange. The only reasonable inference from these circumstances is that Kampsula lacked the landlord's consent to take or sell the soybeans.

Regarding the equipment, the circumstances proved indicate that Kampsula lied when he reported to Wendorf that the dump trailer was at his mother's house and the tractor was at a friend's house when, in fact, Kampsula had already sold both of them. The circumstances also include Kampsula's admission to the Henning police chief that he did not own the trailer. And they show that, after a potential buyer refused to purchase the trailer from Kampsula because its title was unsigned, Kampsula left and soon reappeared with the title bearing the forged signature of his deceased landlord. When Wendorf inquired about the condition of the skid loader, Kampsula did not suggest that the landlord had already given it to him. And Kampsula presented a trial witness who claimed to have seen Kampsula purchase the loader from the landlord but who identified a purported bill of sale that bore a poor forgery of the landlord's signature. The only reasonable inference from these and other circumstances proved about the equipment is that Kampsula lacked the landlord's consent to take or dispose of any of it.

Kampsula also relies on his consent theory to assert that the evidence supporting his theft-by-swindle and aggravated-forgery convictions is insufficient, and the argument fails on the same proved circumstances just outlined. A person commits theft "by swindling, whether by artifice, trick, device, or any other means" to obtain property or services "from another person." Minn. Stat. § 609.52, subd. 2(a)(4) (2016). And a person commits aggravated forgery by falsely making or altering a writing or object "so that it purports to have been made by another" with the intent to defraud. Minn. Stat. § 609.625, subd. 1 (2016). The circumstances consistent with the verdict indicate that Kampsula lacked consent to take either the skid loader or the trailer and that he forged the landlord's signature on an alleged bill of sale to fraudulently represent that the landlord had sold the skid loader and to fraudulently represent that he had the right to sell the trailer. The circumstances proved lead only to guilt and cannot reasonably support Kampsula's innocent hypothesis.

II

More persuasive is Kampsula's argument that the district court erred by failing to instruct the jury that, to find Kampsula guilty of the single count of theft, it must unanimously agree as to which of the different alleged acts of theft Kampsula committed. He makes the same argument regarding the theft-by-swindle conviction.

Kampsula did not ask the district court to instruct the jury about the specific-unanimity requirement, so we review only for plain error. *State v. Webster*, 894 N.W.2d 782, 786 (Minn. 2017). Under this standard, we will consider reversing only if we conclude that the district court erred, the error was plain, and the error affected Kampsula's

substantial rights. *Id.* If we reach all of these conclusions, we will use our discretion to correct the error only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Kampsula contends that the district court erred by failing to instruct the jury that it could find him guilty of theft only if all jurors unanimously agreed as to which of the four items he stole. The argument is well taken. The Sixth Amendment guarantees every accused the right to "an impartial jury" in all criminal prosecutions. U.S. Const. amend. VI. And in Minnesota, "The jury's verdict must be unanimous in all cases." Minn. R. Crim. P. 26.01, subd. 1(5). But when "jury instructions allow for possible significant disagreement among jurors as to what acts the defendant committed, the instructions violate the defendant's right to a unanimous verdict." *State v. Stempf*, 627 N.W.2d 352, 354 (Minn. App. 2001); *see also Richardson v. United States*, 526 U.S. 813, 824, 119 S. Ct. 1707, 1713 (1999) (holding that the jury must unanimously agree as to which acts the defendant committed if each act alone constitutes an element of the crime). Applying this rule, when the state charges a defendant with a single crime but alleges more than one act that could independently constitute the crime, the jury vindicates the defendant's right to a unanimous verdict only if it unanimously agrees as to which act the defendant committed. *Stempf*, 627 N.W.2d at 356.

Our reasoning in *Stempf*, where we expressly adopted the requirement for a specific-unanimity instruction, controls here. We reversed Stempf's conviction of a single count of controlled-substance crime for possessing methamphetamine. 627 N.W.2d at 357–58. The state had presented evidence that Stempf possessed drugs both at his workplace and in his

truck, but the district court refused to instruct the jury that it could find him guilty only if it unanimously agreed which of the two alleged acts occurred. *Id.* In reversing the conviction, we explained that failing to instruct the jury to specify which act Stempf committed opened the possibility that the verdict was not truly unanimous, as some jurors might have believed that Stempf possessed the methamphetamine only at work while others believed he possessed the drugs only in his truck. *Id.* at 358.

Similarly here, without a specific instruction, we cannot say that the jury unanimously found that Kampsula stole any one of the alleged objects taken in the theft—the soybeans, the tractor, the trailer, or the skid loader. And jurors might have reasonably interpreted the ambiguous instruction given (advising the jury to convict Kampsula of theft if it found that Kampsula took "the soybeans, Allis-Chalmers tractor, Big Tex dump trailer, *or* Bobcat skid loader") as inviting jurors individually—rather than the whole jury as a unanimous body—to rest the verdict specifically on any of the four items. This situation leaves open the possibility that, despite the purportedly unanimous guilty verdict, the jury might not have unanimously found that Kampsula stole the same particular item.

We are not persuaded otherwise by the state's assertion that jurors are not always required to agree on a single act that constitutes a charged crime. It is true that a jury need not "unanimously agree on the facts underlying an element of a crime in all cases." *State v. Pendleton*, 725 N.W.2d 717, 731 (Minn. 2007). The *Pendleton* court reminds us that "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line." *Id.* at 733 (quotation omitted). So, for example, when a defendant is charged with kidnapping under a statute that defines the crime as the nonconsensual

confining or removing of a person from one place to another for any of four listed purposes, the district court need not give a specific-unanimity instruction as to which of those four purposes each juror found to have been the defendant's motive. *Id*. at 729–32. The jury-unanimity requirement is satisfied if the jury was instructed to agree that the defendant had any of the listed purposes under the *mens rea* element. *Id*. Likewise the district court is not bound to require jurors to agree on any specific predicate act that meets the element of a "past pattern of domestic abuse" before finding a defendant guilty of a domestic-abuse homicide. *State v. Crowsbreast*, 629 N.W.2d 433, 438–39 (Minn. 2001). Similarly the district court need not instruct the jury in a domestic-assault trial that it must unanimously find which of several means of committing an assault the defendant's actions satisfied, as between intentionally causing fear of bodily harm, intentionally inflicting harm, and attempting to inflict bodily harm. *State v. Dalbec*, 789 N.W.2d 508, 513 (Minn. App. 2010).

Unlike in this line of cases involving potentially different means of committing a criminal act, in this case, as in *Stempf*, without a specific-unanimity instruction, the guilty verdict does not reveal whether every juror agreed that the defendant committed any one criminal act. Failing to give a specific-unanimity instruction was therefore error. And because it was an error that contravenes well-established case law, *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006), the error was plain.

We hold too that the plain error affected Kampsula's substantial rights. A plainly erroneous jury instruction affects a defendant's substantial rights if there is a reasonable likelihood that giving the proper instruction would have significantly affected the verdict. *State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015). Kampsula offered different evidence

and theories to support his consent defense as to each of the items. Among other theories, to justify the skid-loader sale, he relied on the alleged bill of sale as proof of the landlord's prior consent; to justify his taking and selling the soybeans, he relied on testimony from his acquaintance about an alleged agreement to clean the bins in exchange for the beans; to justify his taking and selling the tractor, he relied on his claimed agreement with the landlord to exchange his labor for the tractor; and to justify his taking and selling the trailer, he claimed that the landlord had given the trailer to him because it was too difficult to maneuver. The state reasonably emphasizes that the evidence rather compellingly established Kampsula's guilt, but this is so only if we conclude that each juror rejected the same theories. In a similar situation where "the jury could have believed appellant's defense as to one act but not the other," we concluded that the record did "not permit a conclusion that violation of appellant's right to a unanimous verdict may have been harmless error." *Stempf*, 627 N.W.2d at 358. This case requires the same conclusion for the same reason. We add that we must reverse the theft conviction to ensure the fairness, integrity, and public reputation of judicial proceedings in light of the failing of the essential requirement that every conviction must result from a unanimous verdict.

We reach a different conclusion as to the theft-by-swindle conviction. The district court directed the jury to decide whether Kampsula swindled one acquaintance into repairing his Chevy Suburban and whether he swindled a different acquaintance into giving up a car and $2,000 in cash. The jury completed a special verdict form finding that "the property obtained by [s]windle [did not] include a vehicle." Because only one of the alleged swindles involved Kampsula's obtaining a motor vehicle, by necessary inference the

verdict unanimously establishes the specific criminal act that the jury found him guilty of. We therefore affirm Kampsula's theft-by-swindle conviction.

III

Kampsula asks us to review the district court's instruction on accomplice liability. The district court issued the following now-challenged instruction:

> A 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.

Kampsula did not object to this instruction at trial, so again, we consider only whether the instruction constitutes plain error. *Webster*, 894 N.W.2d at 786. An instruction is erroneous if the district court abused its discretion by issuing it, such as when the instruction materially misstates the law or is so confusing or misleading that the jury cannot understand it. *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014).

The challenged instruction is plainly erroneous under this standard because it failed to properly advise the jury about accomplice liability. An accomplice-liability instruction must explain that a defendant is criminally liable for the acts of another only if he "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." *State v. Huber*, 877 N.W.2d 519, 524 (Minn. 2016) (quotation omitted). The challenged instruction fails on that point. It is similar to the instruction in *Huber*, which failed to explain the meaning of "intentionally aiding." *Id.* at 525. In *Huber*, the erroneous instruction failed to inform the

jury not to convict unless the evidence proved that the defendant "knew the other person was going to commit a crime and intended his actions or presence to further the commission of that offense." *Id*. And similarly here, the instruction did not explain that Kampsula cannot be guilty of another's crime unless he knew the other person was going to commit a crime and he intended his actions or presence to further its commission. The instruction is therefore plainly erroneous.

But the erroneous instruction does not lead us to reverse because it did not affect Kampsula's substantial rights by prejudicing his defense. The jury received no evidence and heard no argument that any other person was the principal and Kampsula the accomplice in any of the charged crimes. To the contrary, the prosecutor urged the jury, "I'm standing here before you to say though [that] Mr. Kampsula did each and every one of these acts. He is guilty himself of Theft, Theft by Swindle, and the Aggravated Forgery." The lack of any evidence or suggestion that anyone besides Kampsula was the principal offender precludes any reasonable likelihood that the jury found Kampsula guilty as an accomplice.

IV

Kampsula argues finally that the combined, multiple alleged errors warrant reversal of all his convictions. The argument fails because we have identified only one prejudicial error and have corrected it. We reverse Kampsula's conviction of theft alone and remand for a new trial on that charge.

Affirmed in part, reversed in part, and remanded.