STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0425

State of Minnesota,
Respondent,

vs.

Sharmarke Sahal Musse,
Appellant.

Filed April 8, 2019
Affirmed
Rodenberg, Judge

Hennepin County District Court
File No. 27-CR-17-16250

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Rodenberg, Judge; and Smith, John, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

RODENBERG, Judge

In this direct appeal from his conviction for aiding and abetting first-degree aggravated robbery, appellant Sharmarke Musse argues that the district court plainly erred by admitting prior bad-act evidence and that the district court failed to properly instruct the jury concerning the state's burden of proof concerning accomplice liability. We affirm.

FACTS

J.B., who made money by shoplifting and selling stolen goods to fences (a colloquial term for people who buy stolen goods), was robbed on June 26, 2017. J.B. and appellant, who J.B. identified as "Shark," were acquaintances. J.B. testified at trial that the two had engaged in "a couple of business dealings" concerning "one of my specialties, in shoplifting." J.B. testified that, no more than two weeks before the robbery, he met with appellant and some of appellant's friends. The purpose of this meeting was to discuss a sale of fragrances and small electronic items. J.B. testified that he arrived to the meeting with a duffle bag containing the items to be sold. Appellant took the bag saying that he was going to "bring this to the guy in the truck and show him," but appellant did not return after he went around the corner.

J.B. said that, after this incident, he spoke with appellant by phone, and appellant told him he would make it up to him. Appellant asked J.B. how much money he had on him, and offered to sell J.B. a "really nice" cell phone. J.B. offered to buy it for $185 because he needed a new cell phone. Appellant arrived at J.B.'s apartment building and asked J.B. to get in a nearby car where another man was sitting in the driver's seat. J.B.

refused because he felt it was unsafe, so he and appellant walked down Park Avenue with the driver of the car following them. J.B. testified that when he and appellant walked around the corner, two men jumped out of another car. Appellant then grabbed J.B. from behind and held a utility knife to his neck. J.B. testified that one of the men reached into his back pocket and grabbed his wallet, and he began to fight back. J.B. was cut. The men took J.B.'s wallet, removed the money ($16), and threw the wallet at J.B.

J.B. walked back to his apartment where he encountered M.W., the apartment-building security guard. M.W. testified at trial that he noticed J.B. bleeding heavily from his hands, and J.B. asked for some rags. M.W. said that he did not have any rags and was going to call an ambulance. According to M.W., J.B. asked him not to call police. M.W. said that he was not calling police and was going to call an ambulance. M.W. testified that he would not allow J.B. to go to his room and J.B. repeatedly asked him not to call an ambulance. M.W. called 911 and relayed that J.B. had told him that a man had attacked him with a box cutter.

When Officer Barlow arrived at the apartment, he found fire-department personnel attending to J.B., who had severe wounds and was bleeding from his hands. J.B. informed Officer Barlow that he did not wish to speak to a uniformed police officer in front of the building. When an ambulance arrived a few moments later, the two moved into the back of the ambulance to speak privately. Officer Barlow testified at trial that J.B. told him that he had been robbed at knifepoint by Shark. J.B. informed him that Shark took the money out of his wallet and returned the wallet to him. Officer Barlow described J.B. as speaking

very quickly and that he "wasn't at a normal state of mind at that time, possibly adrenaline was still going through him."

While the two were in the ambulance, J.B. received a phone call. He told Officer Barlow that it was from Shark. Officer Barlow could not hear the conversation, and J.B. would not tell him what Shark was saying. After the call, the ambulance took J.B. to a hospital.

Sergeant Ali was assigned to investigate the alleged assault and robbery. He interviewed J.B., who said that he was robbed at knifepoint by Shark after he arranged to buy a cell phone, that appellant arrived at his apartment, that the two walked down the street and another vehicle pulled up next to them, and that two men came out of that car and began talking to J.B. Appellant then put a knife to J.B.'s neck and robbed him. Another man assisted by taking J.B.'s wallet and money. J.B. told Sergeant Ali that this was the second time appellant had "ripped him off."

J.B. provided police with a phone number that police verified was connected to appellant, and J.B. identified appellant in a photo lineup. Sergeant Ali viewed surveillance footage from a building near where the robbery occurred, and testified at trial that two men got out of a car and approached J.B. and appellant behind the building, off-camera. Sergeant Ali testified that the video evidence corroborated J.B.'s version of events and his description of appellant.

At trial, the jury was provided with a transcript of and heard a recording of Sergeant Ali's interview of appellant. After appellant claimed he did not know J.B., Sergeant Ali showed appellant a picture of J.B. and appellant said he knows who J.B. is. Appellant

acknowledged that his nickname is Shark, told Sergeant Ali that he received a call from J.B., but denied ever going to J.B.'s apartment building. Appellant denied robbing J.B.

Appellant testified at trial and acknowledged meeting J.B. on the night of the alleged robbery. Appellant testified that he met with J.B. because J.B. wanted to buy drugs. When J.B. did not have enough money, one of appellant's friends pulled out the blade. Appellant said he told his friend that J.B. is also his friend, but the friend nevertheless took J.B.'s wallet. Appellant testified that he called J.B. after the incident to see if J.B. was okay and to ask how much money was taken from him. Appellant acknowledged that he lied to Sergeant Ali during the interview about not having been at J.B.'s apartment because he did not want to admit having been part of an attempted drug deal.

The jury found appellant guilty of two counts of aiding and abetting aggravated robbery, but acquitted appellant of aiding and abetting second-degree assault with a dangerous weapon. Appellant moved posttrial for a new trial, arguing that the district court erred by not instructing the jury on the state's burden to prove accomplice liability beyond a reasonable doubt. The district court denied appellant's motion.

This appeal followed.

D E C I S I O N

I. The district court did not plainly err by admitting evidence of appellant's prior theft.

Appellant argues that the district court plainly erred by allowing the state to present J.B.'s testimony that appellant stole merchandise from him approximately two weeks before the incident charged in the complaint. There was no objection at trial. Failure to

object to the admission of evidence generally results in a waiver of the right to challenge the admission of that evidence on appeal. *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007). An appellate court may review and correct an unobjected-to alleged error only if there is (1) error; (2) that is plain; and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the error is plain and affects defendant's substantial rights, appellate courts may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 742.

"An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). Generally, "evidence showing that the accused has committed another crime unrelated to the crime for which he or she is on trial is inadmissible because it is not competent to prove one crime by proving another." *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997). Evidence of prior bad acts is inadmissible except where the evidence fits within a specific exception, such as immediate-episode evidence, which is a narrow exception to the general character-evidence rule. *State v. Riddley*, 776 N.W.2d 419, 424-25 (Minn. 2009).

The state argues that evidence of the prior theft is admissible as immediate-episode evidence.[1] The supreme court has explained that the general rule against admitting other-

[1] As an initial matter, this evidence was not introduced as *Spreigl* evidence and neither party contends that it was. *Spreigl* notice is not required where evidence of the other bad act is part of the immediate episode out of which the charges arose. *State v. Leecy*, 294 N.W.2d 280, 282 (Minn. 1980); *see also State v. Kendell*, 723 N.W.2d 597, 608 (Minn. 2006) ("Immediate episode evidence is a separate category from evidence of other bad acts

crime evidence should not necessarily preclude the state from making out its whole case against the accused based on evidence that may be otherwise relevant to the accused's guilt of the crime charged.

> [W]here two or more offenses are linked together in point of time or circumstances so that one cannot be fully show without proving the other, or where evidence of other crimes constitutes part of the res gestae, it is admissible. . . . Such evidence may be considered only for the purpose for which it is sought to be introduced, regardless of the fact that it may incidentally show commission of some other offense. Such evidence, however, must show a casual relation or connection between the two acts so that they may reasonably be said to be part of one transaction.

State v. Wofford, 114 N.W.2d 267, 271-72 (1962). The supreme court has addressed the exception for immediate-episode evidence several times since *Wofford*, with the underlying theme being relatively clear: the state may prove all relevant facts and circumstances which tend to establish any of the elements of the offense with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant also committed other crimes. *Nunn*, 561 N.W.2d at 907.

In order for evidence to be properly admissible as immediate-episode evidence, the supreme court has "emphasize[d] the need for a close causal and temporal connection between the prior bad act and the charged crime." *Riddley*, 776 N.W.2d at 426. In *Riddley*, the defendant was charged with murder and the district court admitted evidence of a robbery that occurred approximately 15 minutes earlier. *Id.* at 426-27. The supreme court

---

under Minn. R. Evid. 404(b). Immediate episode evidence is not subject to the notice requirement announced in *State v. Spreigl*." (citation omitted)).

held that, although there was a close temporal connection between the two events, there was not a close causal connection between the murders and the robbery, and therefore, the district court abused its discretion by admitting evidence of the robbery. *Id.* at 427.

Appellant argues that the temporal connection here was too remote for the evidence to be properly characterized as immediate-episode evidence under *State v. Fardan*, where the defendant was charged with first-degree felony murder, second-degree felony murder, and first-degree aggravated robbery in connection with a murder. 773 N.W.2d 303, 311 (Minn. 2009). In that case, the state moved to introduce evidence of other crimes that Fardan and his accomplices completed later in the evening on the night that the murder occurred, and the district court admitted the evidence over Fardan's objection. *Id.* at 312. On appeal, the supreme court held that the district court abused its discretion by admitting evidence of the later robberies and assault, because there was no connection between the other crimes and the murder. *Id.* at 317. It reasoned that the robbery and murder were concluded before the other offenses occurred, and at least an hour had passed between the events. *Id.* at 316-17. Moreover, it explained that, despite the identity of the perpetrators being the same, and the other offenses being part of the same broad plan to commit robbery, the murder was not committed to facilitate the other offenses and the other offenses were not committed to facilitate the murder. *Id.* at 317.

The supreme court has not explicitly held what constitutes a sufficiently close temporal connection in this context. In some cases, like *Riddley*, the supreme court has found a close temporal connection where the events were minutes or days apart. *Cf. Kendell*, 723 N.W.2d at 608-09 (determining that evidence of shooting that occurred

moments after the original shooting was immediate-episode evidence); *State v. Darveaux*, 318 N.W.2d 44, 48 (Minn. 1982) (determining that evidence of drugs found on defendant's person two days after the alleged robbery was immediate-episode evidence of the robbery where the same type of drugs were stolen); *Leecy*, 294 N.W.2d at 282 (concluding that testimony about earlier threats was immediate-episode evidence because those threats escalated into the assault charge). Other cases have found a close temporal connection where weeks or months have elapsed between events. *Cf. Nunn*, 561 N.W.2d at 907-08 (explaining that testimony regarding an earlier kidnapping, occurring months earlier, was immediate-episode evidence because the defendant obtained information during the earlier kidnapping that motivated the murder charge); *State v. Martin*, 197 N.W.2d 219, 226-27 (Minn. 1972) (concluding that the district court properly admitted testimony regarding earlier robberies because the defendant's desire to conceal the robberies that occurred several weeks earlier motivated the charged murder.)

Unlike *Fardan* and *Riddley*, where no causal connection was found, there is a causal connection between the earlier incident and the charged offense here because the prior theft was relevant to explain why J.B. was meeting with appellant on the night in question. This case also differs from *Fardan* and *Riddley* in that appellant here made no objection to the admission of evidence concerning the prior theft. The district court had no occasion to consider the question, much less exclude the evidence sua sponte. We see no error, much less error that was plain, in this circumstance. *See Webster*, 894 N.W.2d at 787 ("An error is plain if it is clear or obvious." (quotation omitted)).

II. The district court did not err in its instructions to the jury.

Appellant argues that the district court's jury instructions were erroneous because they did not adequately instruct the jury regarding the state's burden to prove beyond a reasonable doubt that appellant intentionally aided in the charged offenses.

Appellant did not object to the jury instructions at trial. "Failure to object to jury instructions generally results in a waiver of the issue on appeal." *State v. Earl*, 702 N.W.2d 711, 720 (Minn. 2005). But "we have discretion to consider a claim of error on appeal if there was plain error affecting substantial rights or an error of fundamental law in the jury instructions." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted); *see State v. Milton*, 821 N.W.2d 789, 807-08 (Minn. 2012).

Here, appellant raised the claimed instruction error by posttrial motion. Appellant argues that this challenge to the district court's jury instruction under Minn. R. Crim. P. 26.03, subd. 19(4)(f), preserves the issue for appellate review and that we should therefore apply the harmless-error standard of review. In *State v. Griffin*, we held that "[w]hen an unobjected-to trial error is not one of fundamental law or controlling principle and is first raised by a postverdict motion for a new trial, our review of a denial of the motion for new trial is limited to plain-error review." 846 N.W.2d 93, 96 (Minn. App. 2014), *review denied* (Minn. Aug. 5, 2014). Conversely, if the alleged unobjected-to trial error raised in a postverdict motion is one of fundamental law or controlling principle, the harmless-error standard of review applies. *Id.* at 105.

Here, it matters not whether the harmless-error or plain-error standard of review applies. There was no error in the instructions.

The district court made three conclusions of law when it denied appellant's posttrial motion: (1) aiding and abetting is not a separate substantive offense, but is instead a theory of liability that does not add a criminal element; (2) the instructions provided to the jury did not misstate the law, and they were the exact instructions in CRIM JIG 4.01; and (3) looking at the instructions as a whole, the jury was instructed several times regarding the state's burden to prove appellant's guilt beyond a reasonable doubt.

Jury instructions must "fairly and adequately explain the law." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). In determining whether jury instructions correctly state the law, an appellate court analyzes the criminal statute and relevant case law. *State v. Taylor*, 869 N.W.2d 1, 15 (Minn. 2015). As relevant here, "[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2016).[2]

The district court defined the reasonable-doubt standard and instructed the jury that it is the state's burden to prove appellant's guilt beyond a reasonable doubt. The district court also instructed the jury concerning accomplice liability, in accordance with 10 *Minnesota Practice*, CRIMJIG 4.01 (2015), as follows:

> Liability for crimes of another. 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. The intentional role includes

[2] We cite to the 2016 statute because the offense for which appellant was charged occurred in 2017.

> intentionally aiding, advising, hiring, counseling, conspiring with, or procuring another to commit the crime.
>
> The defendant's presence or actions constitute intentionally aiding if, first, the defendant knew others were going to commit or were committing a crime. Second, the defendant intended that his presence or actions aid the commission of the crimes. The defendant is guilty of a crime, however, only if the other person commits a crime. The defendant is not guilty for aiding, advising, hiring, counseling, conspiring or otherwise procuring the commission of a crime unless some crime, including an attempt, is actually committed.
>
> You should apply this instruction to determine whether the defendant aided others in committing the offenses of aggravated robbery in the first degree with a dangerous weapon; aggravated robbery in the first degree, inflicting bodily harm; and assault in the second degree.

The district court then provided the elements to each of the charged offenses and instructed the jury, "If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty."

The Minnesota Supreme Court has expressly encouraged district courts to instruct the jury in this manner. *See State v. Huber*, 877 N.W.2d 519, 524-25 n.3 (Minn. 2016) (explaining that district courts are encouraged "to separately instruct the jury on accomplice liability and on the underlying elements of the substantive offenses because when the district court conflates the elements of accomplice liability and the underlying substantive offense, the instruction risks omitting the 'intentionally aiding' element of accomplice liability").

Appellant argues that the accomplice-liability instruction was deficient because it failed to clearly convey the state's burden to prove accomplice liability beyond a reasonable doubt. Specifically, appellant notes that, "[w]hile the court properly instructed the jurors on the elements of accomplice liability, it did not call them 'elements' and it did not state that each element must be proven beyond a reasonable doubt."

Appellant relies on *State v. Mahkuk*, where the supreme court held that the district court erred by instructing the jury that it need only consider, not find beyond a reasonable doubt, that the defendant had knowledge that a crime was going to be committed and that the defendant intended for his presence to further commission of that offence. 736 N.W.2d 675, 683 (Minn. 2007). Here, the district court made no similar remark, and made no suggestion that the state need not meet the reasonable-doubt standard of proof. In *Milton*, the defendant argued for the first time on appeal that the jury instruction on accomplice liability was legally erroneous because the district court did not require the jury to find that the defendant knowingly and intentionally aided another to commit the robbery. 821 N.W.2d at 805. The supreme court concluded that an accomplice-liability instruction must explain that, in order to convict, the jury must 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 that crime. *Id.* at 808.

In *State v. Kelley*, the supreme court explained that, to convict Kelley as an accomplice of first-degree aggravated robbery, the state had to prove beyond a reasonable doubt that he (1) knew his friend was going to commit the robbery and (2) intended his presence to further commission of the crime. 855 N.W.2d 269, 283 (Minn. 2014). In

Kelley, the district court read the standard accomplice-liability jury instructions. *Id.* at 274, n.5 (quoting 10 *Minnesota Practice*, CRIMJIG 4.01 (2006)). The supreme court determined that "[t]he instruction on accomplice liability in this case failed to explain the intentionally aiding element as required by *Milton*, and therefore was error." *Id.* at 275.

The critical distinction between what the supreme court determined were erroneous jury instructions in *Kelley* and the instructions that the district court provided here, is the additional language read by the district court here: "The defendant's presence or actions constitute intentionally aiding if, first, the defendant knew others were going to commit or were committing a crime. Second, the defendant intended that his presence or actions aid the commission of the crimes." Coupled with the beyond-reasonable-doubt instruction, the jury was properly instructed concerning the "intentionally aiding" element. We discern no error in the accomplice-liability instructions.

The district court did not plainly err by not sua sponte excluding the state's proffered evidence concerning the prior theft of J.B., and the district court properly instructed the jury concerning accomplice liability and the state's burden of proof.

Affirmed.