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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1482

State of Minnesota,
Respondent,

vs.

Steven Douglas Nelson,
Appellant.

Filed September 3, 2019
Affirmed
Reyes, Judge

Pine County District Court
File No. 58-CR-16-1381

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Reese Frederickson, Pine County Attorney, Pine City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

REYES, Judge

In a direct appeal from his convictions of second- and third-degree burglary, bribery, and fleeing a police officer, appellant argues that (1) his burglary convictions must be

reversed because the state failed to present sufficient evidence to prove beyond a reasonable doubt that he intended to permanently deprive the victim of possession of her property; (2) the district court committed reversible error because its jury instructions amounted to a directed verdict; and (3) his attorney provided ineffective assistance of counsel by conceding appellant's guilt on an element of the offense without his consent or acquiescence. We affirm.

FACTS

In December 2016, N.O. came home one evening to discover that her house had been rummaged through. When law enforcement arrived at N.O.'s house, a man, unknown to N.O., drove in at the same time. Deputies identified him as appellant Steven Douglas Nelson. Appellant informed law enforcement that he had broken into the house to pick up communication equipment for his work with the Drug Task Force, though he has never worked with the agency in any capacity.

On appellant's person, deputies found a fake sheriff's badge, a collapsible baton, and a key for N.O.'s house. Deputies also found an employee badge belonging to N.O.'s sister in appellant's vehicle. When Deputy Pepin told appellant he was under arrest, appellant offered to perform oral sex if Deputy Pepin agreed to let him go.

After a trial, a jury found appellant guilty of second- and third-degree burglary, fleeing a police officer, and bribing a public officer. The district court sentenced appellant to 57 months in prison with the Commissioner of Corrections. This appeal follows.

D E C I S I O N

I. The state presented sufficient evidence to sustain appellant's convictions of second- and third-degree burglary.

Appellant argues that the state failed to present sufficient evidence to sustain his convictions because it did not prove that he intended to permanently deprive N.O. of the possession of her property. We are not persuaded.

When reviewing a claim of insufficient evidence, we carefully review the record "to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *Lapenotiere v. State*, 916 N.W.2d 351, 360-61 (Minn. 2018) (quotation omitted). Intent is a state of mind, based on inference, and is generally proved by circumstantial evidence. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). When the challenged conviction is based, at least in part, on circumstantial evidence, we apply a two-step analysis. *State v. Harris*, 895 N.W.2d 592, 598-601 (Minn. 2017). First, we identify the circumstances proved "by resolving all questions of fact in favor of the jury's verdict." *Id.* at 600. Second, we independently consider the "reasonable inferences that can be drawn from the circumstances proved." *Id.* at 601. The circumstances proved must, as a whole, "be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.* We assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

To convict appellant of second-degree burglary, the state needed to prove that appellant entered N.O.'s house without consent and either committed or intended to commit a crime while in the building. Minn. Stat. § 609.582, subd. 2(a) (2016). To convict appellant of third-degree burglary, the state needed to prove that appellant entered N.O.'s pole barn without her consent and with the intent to steal or commit any felony or gross misdemeanor or that he stole or committed any felony or gross misdemeanor. *Id.* at subd. 3. The state alleged that appellant committed the crime of theft while in N.O.'s house, which occurs when someone intentionally and without claim of right takes, uses, transfers, or retains possession of movable property of another without consent and with the intent to deprive the owner permanently of possession of the property. Minn. Stat. § 609.52, subd. 2(a)(1) (2016).

The circumstances proved are as follows. On December 21, 2016, N.O. arrived home and noticed some of her belongings piled up by her front door and in her living room. She called her father and the police to come to the house. When her father arrived, they saw that someone had been in her pole barn and had left piles of items in there.

As the police arrived at N.O.'s farm, a man who police identified as appellant drove into the driveway at the same time. Neither N.O. nor her father knew appellant or why he was there. Appellant got out of his truck and told officers that he was there to pick up some communication equipment from the property because he had just recently started working with the Drug Task Force. Deputy Pepin patted appellant down and found a collapsible baton, a toy sheriff's deputy badge, and a key for N.O.'s house. Deputy Pepin handcuffed appellant while he and another deputy searched the house.

In the house, the deputies observed all the drawers rummaged through, a broken door with the windows shattered out of it, a pile of N.O.'s belongings by the front door, and the house in disarray. They also found a set of keys that they later determined belonged to appellant.

Back outside, appellant told Deputy Pepin that he broke the window of one of the doors to get in, piled up belongings, and found a key to get back into the house to get the belongings. Deputy Pepin brought appellant to the car in the pole barn and saw that appellant had piled more items.

Deputy Pepin placed appellant under arrest and tried to walk appellant out of the pole barn to his squad car. Appellant began resisting. He then offered to perform oral sex if Deputy Pepin let him go. Deputy Pepin put him in the back of another deputy's squad car but decided to transfer appellant to his own squad to transport him to jail. Appellant took off running but Deputy Pepin detained him. The deputies performed an inventory search on appellant's vehicle and found an employee badge belonging to N.O.'s sister that had been in N.O.'s vehicle in the pole barn.

Appellant previously reached out to an agent with the Drug Task Force about working as an informant but has never worked with them in any capacity. The agent told appellant specifically not to do anything until he could meet with appellant and until he formally became part of the informant program. The Drug Task Force never designated N.O.'s home as part of any sort of training for appellant as an informant.

The circumstances proved support a reasonable inference that appellant committed theft.

Appellant contends that the circumstances support a rational theory that he returned to N.O.'s house to explain himself, repair the window, and return the property.[1] But appellant told the officers that he came back to N.O.'s house to retrieve the rest of the property that he had left in piles, not to return the property he already took. Appellant's claimed intent to give N.O.'s property back to her is not a circumstance proved. Further, appellant spoke to N.O.'s father, and he made no attempt at returning the key or the employee badge or offer to repair the broken window. Appellant's alternative theory of innocence is not reasonable.

II. The district court's jury instruction on bribery did not amount to a directed verdict.

Appellant contends that, by instructing the jurors that, "the defendant offered, gave or promised to give Deputy Pepin oral sex," the district court relieved the state of having to prove that appellant's offer constituted "any benefit, reward, or consideration" under the bribery statute. We disagree.

Appellant did not object to the jury instruction at trial. We review unobjected-to jury instructions for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).[2] We

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[1] Appellant's argument that his guilt can be based only on his intent to commit the crime of theft because that is how the district court instructed the jury is based on a false premise. Our sufficiency-of-the-evidence analysis does not depend on the district court's instruction to the jury. *Musacchio v. U.S.*, 136 S. Ct. 709, 715 (2016).

[2] The state contends that appellant cannot raise this argument on appeal under *State v. Geleneau*, 873 N.W.2d 373, 381 (Minn. App. 2015) (holding that failing to object to jury panel at trial constitutes waiver of right to raise biased-juror argument on appeal). Critical to the analysis in *Geleneau* was existing caselaw stating that a defendant cannot accept a jury panel only to later challenge jurors on appeal. *Id.* Here, our caselaw permitting plain error review of unobjected-to jury instructions is well established. Thus, we conclude that *Geleneau*'s holding is limited to challenges to jurors on appeal and does not apply here.

consider three factors: (1) whether error exists, (2) that is plain, and (3) that affected the appellant's substantial rights. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). If all three prongs are met, we consider whether the error affected the "fairness and integrity of the judicial proceedings." *Id.* (quotation omitted). A district court has "considerable latitude" in selecting jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011). A jury instruction is erroneous if it materially misstates the law. *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

A person is guilty of bribing a public officer if he "offers, gives, or promises to give, directly or indirectly, to any person who is a public officer or employee any benefit, reward or consideration to which the person is not legally entitled with intent thereby to influence the person's performance of the powers or duties as such officer or employee." Minn. Stat. § 609.42, subd. 1(1) (2016). The district court gave the following instructions to the jury:

> The elements of bribery are: First, the defendant offered, gave, or promised to give Deputy Pepin oral sex. Second, Deputy Pepin was a public officer. A law enforcement officer is a public officer. Third, Deputy Pepin had no legal right to the oral sex. Fourth, the defendant made the offer, gift, or promise with the intent of influencing Deputy Pepin in his capacity as a public officer. Fifth, the defendant's act took place on or about December 21, 2016 in Pine County.

Criminal convictions must rest upon a jury determination that an appellant is guilty beyond a reasonable doubt of every element of the charged crime. *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 2313 (1995). Appellant argues that *State v. Moore*, 699 N.W.2d 733 (Minn. 2005), controls here. There, the supreme court held that the jury instruction that "the loss of a tooth is a permanent loss of the function of a bodily member,"

removed from the jury's consideration the fact question of whether the loss of a tooth constituted great bodily harm. *Id.* at 737. This amounted to a directed verdict and required reversal. *Id.* at 737-38. Appellant argues that here, the district court directed the verdict by instructing the jury that appellant's offer for oral sex constituted an offer for any benefit, reward, or consideration.

Conversely, the state argues that *State v. Bowen*, 910 N.W.2d 39 (Minn. App. 2018) controls. The state charged Bowen with simple robbery for stealing a bottle of liquor. *Id.* at 42. On appeal, relying on *Moore*, Bowen argued that the district court directed the verdict by instructing the jury to determine whether Bowen "took a bottle of liquor" rather than whether he "took personal property," as stated in the statute. *Id.* at 47. But this court rejected Bowen's argument because, as a matter of law, a bottle of liquor is personal property, based on the common-law meaning of "personal property," which is all property other than real property. *Id.* at 49.

Under *Bowen*, to determine whether the jury should have considered whether appellant's offer to perform oral sex constituted an offer for "any benefit, reward, or consideration," we must look to the meaning of the statute. *See id.* at 46-47. The first step in a statutory-interpretation analysis is to determine whether the statute's language is ambiguous. *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009). A statute is ambiguous if it is subject to more than one reasonable interpretation. *Bowen*, 910 N.W.2d at 43. If it is unambiguous, we interpret the statute's text according to its plain language. *State v. Struzyk*, 869 N.W.2d 280, 284-85 (Minn. 2015). When the statute does not provide a definition of a word, we look to the plain meaning. *State v. Haywood*, 886 N.W.2d 485,

488 (Minn. 2016). To identify the plain meaning of a particular word used in a statute, we refer to its common usage. *State v. Fitman*, 811 N.W.2d 120, 123 (Minn. App. 2012). Further, "a statute that uses a common-law term, without defining it, adopts its common-law meaning." *Bowen*, 910 N.W.2d at 45 (citation omitted).

A "benefit" is "something that promotes or enhances well-being; an advantage." *The American Heritage Dictionary* 173 (3d ed. 1992). A "reward" is "something given or received in recompense for worthy behavior." *Id.* at 1546. Consideration means that one party to an agreement voluntarily assumes an obligation on the condition of an act or forbearance by another party. *U.S. Sprint Comm. Co., Ltd. v. Comm'r of Revenue*, 578 N.W.2d 752, 754 (Minn. 1998).

We agree with the state that *Bowen* controls here. In *Bowen*, the district court used in its simple-robbery instructions the words, "bottle of liquor," instead of "personal property," and as a result, it removed the question of whether a bottle of liquor constitutes personal property from the jury's consideration. 910 N.W.2d at 49. Similarly, here, the district court used "oral sex" instead of "any benefit, reward, or consideration." The definitions of consideration and reward only require that the offer be for something given in recompense for worthy behavior, appellant offering a sexual act to compensate Deputy Pepin for letting him go, or an act by appellant on the condition of an act or forbearance by Deputy Pepin, which would be appellant performing a sexual act in exchange for Deputy Pepin's act of letting him go. Therefore, once the jury finds that appellant offered something to Deputy Pepin in an attempt to influence him, there is no remaining fact question as to whether or not the offer constituted a benefit, reward, or consideration.

Making an offer of something to influence a public officer's performance of his powers or duties is making an offer for consideration as a matter of law. The district court did not direct the verdict.

III. Appellant's attorney did not provide ineffective assistance of counsel by conceding an element of the offense.

Appellant argues that he is entitled to a new trial based on ineffective assistance of counsel because one of his attorneys conceded an element of guilt when she told the jury during closing argument that appellant offered oral sex to Deputy Pepin. We are not persuaded.

When an appellant alleges ineffective assistance of counsel based on his attorney's unauthorized concession of guilt, we apply a two-part standard. *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017). First, we review de novo whether defense counsel made a concession of guilt on any element of the offense. *Id.* A defense counsel's concession of guilt can be express or implied. *Id.* Second, we determine whether the appellant acquiesced to the concession. *Id.* If defense counsel concedes guilt without appellant's acquiescence, appellant "is entitled to a new trial, regardless of whether he would have been convicted without the admission." *Id.* at 458-59. (citation omitted); *see also McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018).

Here, defense counsel expressly conceded the element that appellant made an offer to Deputy Pepin for oral sex during closing argument. She told the jury that appellant made, "an entirely reckless, desperate statement about giving oral sex to Deputy Pepin."

If defense counsel concedes an element of a crime, it is not reversible error if appellant consented to the concession. If, as here, there is no evidence of express consent, we look to the record as a whole to determine whether appellant acquiesced to his counsel's strategy. *State v. Prtine*, 784 N.W.2d 303, 318 (Minn. 2010). Acquiescence can be implied when (1) defense counsel used the concession as part of a strategy throughout trial and the appellant does not object or (2) concession was an "understandable" trial strategy and the appellant was present, understood the concession, and failed to object. *State v. Jorgensen*, 660 N.W.2d 127, 132-33 (Minn. 2003). When defense counsel does not concede to an element of the crime until closing argument, the appellant did not acquiesce to the concession. *Luby*, 904 N.W.2d at 459.

Here, defense counsel utilized a strategy throughout trial that appellant did not make a serious offer to Deputy Pepin, given the circumstances. Defense counsel never argued that appellant did not make the statement. During her opening statement, defense counsel said, "we don't run from the state's evidence. We embrace the state's evidence in this case because we submit to you that when you critically examine the evidence . . . it will paint a picture for you both in [appellant's] words and in his bizarre conduct." She told the jury that, "I think you'll hear testimony there is going to be one sentence he said to [Deputy Pepin]" and that "it was blurted out." She further stated that "the facts of this case are not largely in dispute. The interpretation of those facts is."

Further, during cross-examination of Deputy Pepin, appellant's other attorney maintained the theory that appellant did not make a serious offer. He did not attack Deputy Pepin's credibility or attempt to imply that appellant did not actually make the statement.

Instead, he focused on emphasizing the offer as "ridiculous." He asked Deputy Pepin, "it was certainly nothing you would obviously consider?" He also focused on the context in which the statement was made, consistent with his argument that, given the circumstances, no reasonable person would take appellant's statement seriously. He asked, "when this comment was made, I understand, his hands were handcuffed behind his back, right?"

Further, during closing argument, defense counsel argued that Deputy Pepin found the statement to be ridiculous, that Deputy Pepin would not find value in appellant's offer, and that appellant did not truly intend this to be a serious offer. This is consistent with defense counsel's strategy throughout trial that, given the context in which appellant made this statement, a reasonable person would not have taken this offer seriously.

Finally, nothing in the record indicates that appellant objected to defense counsel's strategy throughout trial. Therefore, because defense counsel used it as part of their strategy throughout trial, appellant acquiesced to the concession.

Affirmed.