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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-881**

State of Minnesota,
Respondent,

vs.

Timothy Louis McGhee,
Appellant.

**Filed April 26, 2011
Affirmed
Johnson, Chief Judge**

Benton County District Court
File No. 05-CR-09-2101

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

Robert J. Raupp, Benton County Attorney, Foley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaitas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Johnson, Chief Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

A Benton County jury found Timothy Louis McGhee guilty of taking or driving a motor vehicle worth more than \$1,000 without consent. On appeal, McGhee argues that the district court erred by giving the jury a pamphlet that describes jury deliberations and by instructing jurors to read the pamphlet. We affirm.

FACTS

In September 2009, McGhee drove a 1997 Pontiac Sunfire off a used-car lot. The vehicle was reported stolen. McGhee was arrested when he drove the vehicle into the parking lot of his girlfriend's apartment building.

The state charged McGhee with taking or driving a motor vehicle worth more than \$1,000 without consent, a violation of Minn. Stat. § 609.52, subds. 2(17), 3(3)(a) (2008), and taking or driving a motor vehicle worth not more than \$1,000 without consent, a violation of Minn. Stat. § 609.52, subds. 2(17), 3(3)(d)(v) (2008). In January 2010, the state amended the second count to charge McGhee with intentionally taking with the intent to permanently deprive the owner a motor vehicle worth more than \$1,000, a violation of Minn. Stat. § 609.52, subds. 2(1), 3(3)(a) (2008).

In February 2010, a one-day jury trial was held. At the beginning of trial, the district court instructed the jury on the basics of a trial, the role of a juror, and the elements of the charged offenses. After the presentation of evidence, the district court instructed the jury on the law. After closing arguments, the district court provided a final charge to the jury, which included these statements:

Now, when you get to the jury room, you're going to find a pamphlet entitled *Behind Closed Doors – A Guide to Jury Deliberations*. Please take a minute to read through it before you begin your deliberations. You'll find that it will assist particularly with respect to the kind of housekeeping issues that arise during the process.

Neither the state nor McGhee objected to this part of the district court's instructions or to making the pamphlet available to the jury.

The pamphlet, which is published by the American Judicature Society, provides an explanatory summary of jury deliberations in nine chronologically sequenced sections: (1) Introduction; (2) Getting Started; (3) Selecting the Presiding Juror; (4) Getting Organized; (5) Discussing the Evidence and the Law; (6) Voting; (7) Getting Assistance from the Court; (8) The Verdict; and (9) Once Jury Duty is Over. The pamphlet repeatedly refers jurors to the instructions provided by the court. On the inside cover, the pamphlet notes, "The Guide is not intended to take the place of any instructions given to you by the judge." In the first section, the pamphlet states, "Follow the judge's instructions about the law, and you will do a good job." In the fifth section, the pamphlet encourages jurors to "review the judge's instructions on the law because the instructions tell you what to do." On the same page, the pamphlet states,

The judge's instructions will tell you if there are special rules or a set process you should follow. Otherwise, you are free to conduct your deliberations in whatever way is helpful. . . . Look at the judge's instructions that define each charge or claim and list each separate element that makes up that charge or claim.

The jury found McGhee guilty on the first count but not guilty on the second count. The district court sentenced McGhee to 19 months of imprisonment. McGhee appeals.

DECISION

McGhee argues that the district court erred by giving a copy of the pamphlet to the jury and instructing jurors to read it. More specifically, McGhee argues that the district court's instruction and provision of the pamphlet created a "structural error," which requires reversal of his conviction without regard for whether the pamphlet had a prejudicial effect on the jury's verdict.

As a general rule, procedural errors that occur during a criminal trial ordinarily require the reversal of a conviction, unless the error was harmless. The relevant rule of criminal procedure provides, "Any error that does not affect substantial rights must be disregarded." Minn. R. Crim. P. 31.01. Under the harmless-error test, an error does not require reversal "if the jury's verdict was surely unattributable to the error." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). "If a criminal defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that most constitutional errors are subject to harmless-error analysis." *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010) (citing *Washington v. Recuenco*, 548 U.S. 212, 218, 126 S. Ct. 2546, 2551 (2006)).

"In contrast, structural errors are defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." *State v. Dorsey*, 701 N.W.2d 238, 252 (Minn. 2005) (quotations omitted). Structural errors "necessarily

render a trial fundamentally unfair” and “deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.” *Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 1833 (1999) (quotations omitted). These types of errors are not susceptible to harmless-error analysis because they “affect the framework within which the trial proceeds, and are not simply an error in the trial process itself.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S. Ct. 2557, 2564 (2006) (quotations omitted). “Structural errors require automatic reversal because such errors ‘call into question the very accuracy and reliability of the trial process,’” even if a party fails to make a timely objection. *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007) (quoting *State v. Osborne*, 715 N.W.2d 436, 448 n.8 (Minn. 2006)).

In *Gonzalez-Lopez*, the Supreme Court identified four examples of structural errors. See 548 U.S. at 149, 126 S. Ct. at 2564 (citing *Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S. Ct. 792, 797 (1963) (denial of right to counsel); *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8, 104 S. Ct. 944, 950 n.8 (1984) (denial of right to self-representation); *Waller v. Georgia*, 467 U.S. 39, 49 n.9, 104 S. Ct. 2210, 2217 n.9 (1984) (denial of right to public trial); and *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 2083 (1993) (denial of right to jury trial with proper reasonable-doubt instruction)). In addition, the Minnesota Supreme Court has identified two other structural errors. See *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009) (right to public trial); *Dorsey*, 701 N.W.2d at 253 (right to impartial fact-finder).

Neither the United States Supreme Court nor the Minnesota Supreme Court has considered whether the use of a pamphlet to assist jurors in deliberations is a structural error that requires automatic reversal. To determine whether a particular type of alleged error is structural, the United States Supreme Court has looked primarily to “the difficulty of assessing the effect of the error.” *Gonzalez-Lopez*, 548 U.S. at 149 n.4, 126 S. Ct. at 2564 n.4. This consideration does not lead to the conclusion that the use of a pamphlet to assist the jury is a structural error that warrants reversal of a conviction without regard for its prejudicial effect. There is no particular reason why appellate courts would experience “difficulty [in] . . . assessing the effect of the [alleged] error” arising from a juror’s reading of the pamphlet. *Id.* A district court’s instruction that jurors should read a pamphlet means that the pamphlet is akin to a jury instruction, and jury instructions generally are subject to harmless-error analysis. *See, e.g., State v. Vance*, 734 N.W.2d 650, 659-62 (Minn. 2007). Also, a district court’s use of a pamphlet to educate jurors about the deliberative process is analogous to a judicial comment, which also is subject to harmless-error analysis. *See, e.g., State v. Tomassoni*, 778 N.W.2d 327, 336 (Minn. 2010). In addition, a district court’s use of a pamphlet is similar to a judge’s communication to the jury during its deliberations, which also is subject to harmless-error analysis. *See State v. Danforth*, 573 N.W.2d 369, 373 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998). For essentially the same reasons, appellate courts are equipped to assess the nature of information conveyed to jurors in a pamphlet and to determine whether that information likely affected the jury’s verdict.

In determining whether an alleged error is structural, the United States Supreme Court also has considered whether a particular trial procedure would “necessarily render a trial fundamentally unfair,” would “deprive defendants of basic protections,” or would frustrate the reliability of a criminal trial as “a vehicle for determination of guilt or innocence.” *Neder*, 527 U.S. at 8-9, 119 S. Ct. at 1833. None of these concerns is implicated by the procedure used in this case. It is true that trial courts control and sometimes restrict the information provided to jurors, especially between the beginning of trial and the verdict. But it cannot be said that denying jurors information about the trial process—including accurate and helpful information—necessarily is a matter of fundamental fairness or a basic protection of a defendant’s rights. In fact, district courts typically give preliminary jury instructions to familiarize jurors with the trial process. The pamphlet used in this case is designed for that same general purpose. There simply is no basis for saying that a criminal trial in which a pamphlet was used “cannot reliably serve its function as a vehicle for determination of guilt or innocence.” *Id.*

McGhee contends that the district court’s use of the pamphlet is structural error because the practice is contrary to three provisions in Minnesota’s rules of criminal procedure. See Minn. R. Crim. P. 26.03, subds. 13, 19(6), 20(1). This argument fails because the rules that McGhee cites are not a matter of “fundamental[]” fairness or “basic protections.” *Neder*, 527 U.S. at 8-9, 119 S. Ct. at 1833. McGhee also contends that the district court’s use of the pamphlet is structural error because of the wording of the particular pamphlet used in this case. That argument fails because it is essentially a

request that we evaluate whether the pamphlet prejudiced McGhee, which is contrary to the notion of structural error.

Thus, we conclude that the district court did not commit structural error by providing the jury with an explanatory pamphlet and instructing jurors to read it. McGhee has not argued in the alternative that the district court committed an error that is not harmless or an error that would satisfy the plain-error test, *see* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 742 (Minn. 1998). Rather, McGhee rests his appeal solely on the argument that the district court committed a structural error. Having rejected that argument, we need not conduct further analysis of the issue raised by McGhee's appeal.

By affirming McGhee's conviction, we do not endorse the use of the pamphlet used in this case or any similar pamphlet. We simply conclude that a district court's use of such a pamphlet is not a structural error.

Affirmed.