STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0562

Bashir Mohamud Hassan,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 5, 2012
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-CR-07-128391

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

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

KIRK, Judge

This is an appeal from the postconviction court's denial of appellant's petition for postconviction relief. Because we find no error in the district court's jury instructions or sentence, we affirm the postconviction court's denial of the postconviction petition.

FACTS

Appellant Bashir Mohamud Hassan and four other men, two of whom were armed, entered an apartment in Minneapolis and robbed its five occupants. Appellant was charged with five counts of first-degree aggravated robbery. When the jury first returned with its verdict, the district court's poll revealed that the jury had not reached a unanimous decision. The court instructed the jury to continue deliberating. This was a Friday afternoon, and the jury returned on Monday to continue deliberating. When it indicated on Monday morning that it was still at an impasse, the district court instructed the jury to continue deliberating. That afternoon, the jury found appellant guilty of two counts of aiding and abetting first-degree aggravated robbery. It deadlocked on three additional counts for the same crime. The district court sentenced appellant to two consecutive 57-month sentences, with credit for 323 days of custody time.

Appellant now appeals from the denial of his petition for postconviction relief, which challenged the district court's jury instructions and the sentence the court imposed.

D E C I S I O N

In reviewing a postconviction court's decision to grant or deny relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence.

Leake v. State, 737 N.W.2d 531, 535 (Minn. 2007); *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003) (noting also that appellate courts "extend a broad review of both questions of law and fact" when reviewing postconviction proceedings (quotation omitted)). This court "review[s] a postconviction court's findings to determine whether there is sufficient evidentiary support in the record." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001).

I. The district court did not err in its jury instructions.

Appellant argues that the district court's instructions misled the jury into believing that it was required to reach a verdict, improperly required the jury to continue deliberating after reaching an impasse, and coerced a minority faction of jurors into acceding to the verdict. District courts are afforded "considerable latitude" in the selection of language for the jury instructions. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). When a jury instruction has not been objected to at trial, this court determines if the instruction "contain[s] plain error affecting substantial rights or an error of fundamental law." *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002); *State v. Martin*, 297 Minn. 359, 363, 211 N.W.2d 765, 767 (1973) ("[W]e regard the question as one so basic and the rights involved so fundamental that we deem it proper to consider the matter on appeal."). Under the plain-error test, the appellant must show: (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Radke*, ___ N.W.2d___, ___, 2012 WL 3965142, at *8 (Minn. Sept. 12, 2012).

A. Misleading instruction.

On Friday afternoon, the jury told the district court it had reached a verdict. However, once the jury assembled and was polled, it was revealed that one of the jurors

did not agree to the verdict. The court instructed the jury, "it appears that you do not have a unanimous verdict, which is required in a criminal case. So what I am going to ask you to do is to continue deliberating and arrive at a unanimous verdict one way or the other, just see if you can do that." Appellant argues that this instruction was in error because the jury may have concluded that it was required to arrive at a unanimous verdict.

A deadlocked jury may be instructed to continue deliberating. *State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996). However, it is impermissible to instruct a jury that it is required to reach a verdict. *Martin*, 297 Minn. at 368-69, 211 N.W.2d at 770. While a district court may give additional instructions to a jury after it has begun deliberating, *State v. Kelley*, 517 N.W.2d 905, 908-09 (Minn. 1994), such instructions must be cautiously circumscribed so as not to coerce a jury towards unanimity. *State v. Cox*, 820 N.W.2d 540, 550 (Minn. 2012). This court does not review the district court's instructions piecemeal, but as a whole to determine whether "the jury was fully able to discern the limits of its obligations and was not coerced to reach a verdict." *State v. Buggs*, 581 N.W.2d 329, 338 (Minn. 1998).

The district court's jury charge instructed on both the duty to deliberate towards reaching a verdict and the duty not to abandon sincere beliefs just to arrive at the verdict. However, when the poll of the jury revealed that its verdict was not unanimous, the court instructed it to continue deliberating and to arrive at a "unanimous verdict one way or the other, just see if you can do that."

This instruction has two plausible meanings. First, it could be understood to instruct the jury that whether it reaches a verdict of guilty or not guilty ("one way or the other") that verdict must be agreed to by everyone ("unanimous"), and that the jury should continue striving for that goal ("just see if you can do that"). The second meaning is that the jury must reach a unanimous verdict ("you do not have a unanimous verdict, which is required in a criminal case") and that a verdict must be arrived at "one way or the other."

The first of these interpretations is a permissible jury instruction, one that aids the jury to discern the limits of its obligations. The second interpretation reflects an instruction that would be plainly erroneous, one that contravenes caselaw by running the risk of coercing a jury into believing that it has no choice but to render a verdict. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (an error is plain if it is clear or obvious that it contravenes caselaw, a rule, or a standard of conduct).

We conclude that, when considered in context and in light of the jury charge, the first interpretation is the natural understanding of the court's instruction. However, even if the jury clung to the second, impermissible meaning, it could only have been misled for a short time. Within an hour after hearing the controverted instruction, the district court told the jury that "it's too soon, in my opinion, to declare an impasse." The unavoidable import of this comment is that an impasse is a permissible result.

A plain error only affects substantial rights "if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Laine*, 715 N.W.2d 425, 432 (Minn. 2006) (quotation omitted). If the court's instruction had confused the jury,

the confusion was cleared up shortly after it was induced and long before the jury rendered its verdict. *See Jones*, 556 N.W.2d at 911 (holding that a potentially damaging jury instruction was ameliorated when the district court delivered a corrective instruction before the jury rendered a verdict). Moreover, the very fact that a mistrial was declared on three counts because the jury was unable to reach a unanimous decision establishes that the jury was not laboring under a misapprehension about its power to arrive at an impasse.

B. Deliberating after an impasse is announced.

Appellant next argues that the district court erred when it required the jury to continue deliberating even after it advised the court that it was at an impasse. Appellant contends that the case presented to the jury was a simple question of robbery with five charges all arising from the same incident that could all be resolved with quickly.

In denying appellant's petition for postconviction relief, the postconviction court observed that the jury had a multitude of issues to contend with, including, "multiple alleged offenders and victims, the concept of aiding and abetting, multiple counts for the jury's consideration, as well as a *Blakely* issue."

"The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *Kelley*, 517 N.W.2d at 909 (quotation omitted). It is plain that numerous factors legitimately extended the amount of time needed for jury deliberations. The district court committed no error when it asked the jury to continue its deliberations.

C. Comments to minority faction of jurors.

When the jury notified the district court on Monday that it was still at an impasse, the court instructed, "as jurors, you should be talking to the others and getting their input, and you shouldn't hang onto any belief for the sake of your pride." Appellant argues that, because this instruction was delivered on Monday morning when the jury was aware that a single holdout juror was preventing unanimity, the instruction must be construed as being aimed at holdout jurors and is therefore coercive. The state contends that the instruction was addressed to the jury as a whole and not to a single juror.

The district court may not place pressure on a minority of the jurors to reexamine their positions without also asking the majority to do the same. *Martin*, 297 Minn. at 370-71, 211 N.W.2d at 771. Our supreme court has advised that a district court should address how to forestall an impasse at the time it delivers its charge to the jury, rather than waiting until a deadlock has developed and majority and minority factions have formed in the jury. *State v. Packer*, 295 N.W.2d 266, 267 (Minn. 1980). And this court has observed that erroneous instructions that are delivered to a deadlocked jury are more likely to coerce a minority of the deadlocked jurors to reach a unanimous verdict. *State v. Petrich*, 494 N.W.2d 298, 300 (Minn. App. 1992), *review denied* (Minn. Feb. 23, 1993).

The district court's admonition that any juror not hold out "for the sake of your pride" was the last instruction the jury heard from the court before it arrived at its verdict. It is quite likely that, when delivered under these circumstances, the court's instruction would impact upon a holdout juror in the minority faction more profoundly than a juror in the majority faction. This is so because a minority juror sits in the unenviable position

of holding back his or her colleagues from delivering a verdict, concluding their jury service, and returning to their private lives. Moreover, the district court's suggestion that a juror had persisted into a second day of deliberations by hanging onto his or her beliefs solely as a matter of pride could be perceived as derisive by a holdout juror.

It is useful to contrast the district court's instruction with the language of the model jury instruction. The model instruction does not insinuate a personal vice in the juror who does not agree with the majority. Instead, it advises the juror to "decide the case for yourself" but only after having discussed the case with the other jurors and "carefully consider[ing] their views." 10 *Minnesota Practice*, CRIMJIG 3.04 (2006). It also advises to "reexamine your views" and be ready to change them "if you become convinced they are erroneous," but admonishes not to surrender an honest opinion. *Id.* An instruction that obligates "the minority to consider whether or not its doubts are reasonable without imposing the same obligation on the majority" contravenes the lesson of *Martin*, 297 Minn. at 365, 211 N.W.2d at 769. We recognize that the district court has considerable latitude to select jury instructions, but we note that the model jury instructions have been crafted to deliver a balanced message—especially at the critical moments when the jury is at an impasse. The use of the model instructions could have prevented the questions now being raised about this jury's verdict.

Nonetheless, we are not persuaded that the error is reasonably likely to have had a significant effect on the verdict. *Laine*, 715 N.W.2d at 432. The jury deliberated for another two-and-a-half hours after hearing this instruction and still returned at an impasse on three of the five counts. These lengthy deliberations and the mixed result in the

verdict bear the indicia of a jury earnestly focused on reaching agreement, not a jury where a minority felt coerced to compromise. We also note that the jury had inquired earlier that morning whether it was permissible to split the verdict, and the court instructed that this was permissible. It is reasonable to conclude that once the jury understood it had the power to split the verdict, it may have found a path to breaking the impasse. Finally, we note that the district court's comments to the jury closely mirrored the instructions the court delivered in its charge, where the jurors were also advised not to let pride stand in the way of reaching consensus. This blunts the impact of any coercive effect the comment could have had because it merely repeated an instruction the jury heard before the impasse formed. We conclude that it is not reasonably likely that the instruction affected the verdict.

II. There is no error in the sentence imposed by the district court.

Appellant argues that the sentence imposed by the district court is unreasonable and excessive, especially in light of the protracted jury deliberations and questions of law and fact that the jury submitted to the court while it deliberated. However, appellant concedes that the district court's sentence is within the range permitted by the sentencing guidelines.

A district court's sentencing decision is reviewed for abuse of discretion and "[g]enerally, we will not interfere with the district court's discretion in sentencing unless the sentence is disproportionate to the offense." *State v. Blanche*, 696 N.W.2d 351, 378 (Minn. 2005). This court will not exercise its authority to modify a sentence that is within the presumptive sentence range "absent compelling circumstances." *State v.*

Freyer, 328 N.W.2d 140, 142 (Minn. 1982). This court may review the sentence imposed by the district court "to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2010).

Appellant was convicted of two counts of aiding and abetting first-degree aggravated robbery in violation of Minn. Stat. §§ 609.05, .245, subd. 1 (2006). Appellant had a criminal history score of zero, and aggravated robbery is an offense with a presumptive sentence of 48 months and a range of 41 to 57 months. Minn. Sent. Guidelines IV (Supp. 2007). For his crimes, the district court sentenced appellant to 114 months in prison—two consecutive 57-month sentences, with credit for time he had already been in custody. Aggravated robbery is defined under the sentencing guidelines as an offense that qualifies for permissive consecutive sentences, which may be given by the district court without departing from the sentencing guidelines. *Id*. at II.F & VI. And a sentence within the range provided in the appropriate box on the sentencing guidelines grid is not a departure from the presumptive sentence, and is therefore not an abuse of discretion. *State v. Delk*, 781 N.W.2d 426, 428-29 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

"We will not reverse a district court's imposition of consecutive sentences absent a clear abuse of discretion." *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007). The postconviction court (which was also the trial court) explained in its order denying postconviction relief that appellant's crimes were vicious, involved firearms, and

involved pistol-whipping at least one of the victims. The district court was within its discretion to impose consecutive sentences at the higher end of the presumptive range.

Affirmed.