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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0430**

State of Minnesota,
Respondent,

vs.

Brandon Christopher Bush,
Appellant.

**Filed March 13, 2017
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge**

Clay County District Court
File No. 14-CR-15-282

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Moorehead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Stauber, Judge; and Rodenberg,
Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Brandon Christopher Bush challenges the district court's jury instruction concerning the charge of attempted second-degree intentional murder and its upward sentencing departure. We affirm in part, reverse in part, and remand for resentencing.

FACTS

On January 22, 2015, R.B. was hospitalized after being stabbed in his face, chest, and left arm. At the hospital, R.B. reported to police that appellant stabbed him at the home of R.C., appellant's ex-girlfriend. Police arrested appellant and charged him with one count of attempted second-degree intentional murder, one count of second-degree assault with a dangerous weapon, four counts of kidnapping, two counts of terroristic threats, and two counts of first-degree burglary. The charge of second-degree assault with a dangerous weapon was dismissed by the state during the course of the trial. The remaining nine counts were tried to a jury.

R.B. testified that he went to R.C.'s trailer on the evening of January 21, 2015, fell asleep in bed with R.C., and woke to appellant standing over him with a knife. R.B. testified that appellant then stabbed him in the face. R.B. sustained further cuts when he struggled with appellant to stop the stabbing. Even after appellant stopped stabbing him, he remained at R.C.'s trailer and would not let either R.B. or R.C. leave for one to two hours. Appellant finally left, and R.B. went to the hospital.

R.C. testified at trial that appellant was her former boyfriend, and that he is the father of her child. R.C.'s testimony regarding the attack was similar to R.B.'s description, stating that, when she woke up, appellant was on top of R.B., stabbing him with a knife.

At trial, the state introduced an audio recording of an interview between appellant and police, during which appellant admitted he "cut" R.B. but claimed it was in self-defense. Appellant did not testify and called no witnesses at trial.

Before closing arguments, the district court judge discussed jury instructions with the attorneys. During these discussions, appellant did not object to either the proposed instruction concerning attempted second-degree intentional murder or the portion of the instruction concerning the requirement that appellant must have taken a “substantial step” toward the offense to support a guilty verdict on that count. The jury found appellant guilty of all counts.

This appeal followed.

D E C I S I O N

I. Jury instructions

Appellant argues that the district court plainly erred when it instructed the jury on the charge of attempted second-degree intentional murder. Specifically, he argues that the district court erred by omitting the requirement that he must have taken a “substantial step” toward the commission of the crime in order to be guilty of that charge. Appellant also argues that the instructions did not adequately identify the intent element.

The district court instructed the jury as follows:

This matter has been brought under the statutes of Minnesota which defines the offense, Count 1, attempted murder in the second degree, with intent, not premeditated. The statutes of Minnesota provide that a person is guilty of an attempt to commit a crime when, with intent to commit the crime, the person does an act that is a substantial step toward, and more than mere preparation for, the commission of the crime. An attempt to commit a crime requires both an intent to commit the crime and a substantial step towards the commission of the crime.

In determining whether a substantial step has been taken, you must distinguish between mere preparation for and actually beginning to commit the criminal act. Mere

preparation, which may consist of planning the offense or of obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. An act by a person who intends to commit a crime is an attempt if the act itself clearly indicates the intent to commit that specific crime and it tends directly to accomplish the crime. The act itself need not be criminal in nature.

The statutes of Minnesota provide that whoever, with intent to cause the death of that person or another, but without premeditation, causes the death of a human being is guilty of a crime.

. . . [T]he elements of attempted murder in the second degree, with intent, not premeditated are:

First, the defendant attempted to cause the death of [R.B.].

Second, the defendant acted with the intent to kill [R.B.]. To find the defendant had an intent to kill, you must find that the defendant acted with the purpose of causing death or believed that the act would have that result. Intent, being a process of the mind, is not always susceptible to proof by direct evidence but may be inferred from all the circumstances surrounding the event.

Third, the defendant's act took place on or about January 22, 2015, in Clay County.

Appellant did not object to any part of this instruction.

“We review a district court’s jury instructions for an abuse of discretion,” and give the district court “considerable latitude in selecting jury instructions.” *State v. Peltier*, 874 N.W.2d 792, 797 (Minn. 2016). A district court does not abuse its discretion when jury instructions “fairly and adequately explain the law” and properly instruct the jury on all elements of the offense charged. *Id.* “[I]t is desirable for the court to explain the elements of the offense rather than simply to read statutes.” *State v. Kuhnau*, 622 N.W.2d 552, 556

(Minn. 2001). When reviewing jury instructions, “the court’s charge to the jury must be read as a whole, and if, when so read, it correctly states the law in language that can be understood by the jury, there is no reversible error.” *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998).

We review unobjected-to jury instructions for plain error. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012); *State v. White*, 684 N.W.2d 500, 508 (Minn. 2004). When deciding if there was plain error, we analyze “whether the jury instructions contained an (1) error (2) that was plain and (3) that affected the defendant’s substantial rights.” *Milton*, 821 N.W.2d at 805. An error is plain if it is clear and obvious at the time of appeal. *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014) (quotation omitted).

Appellant argues that the district court erred by deviating from the Minnesota Jury Instruction Guides—Criminal (CRIMJIG) instructions for attempted murder. Concerning the definition of attempt, the CRIMJIG recommends that the district court instruct as follows:

Under Minnesota law, a person is guilty of an attempt to commit a crime when, with intent to commit the crime, the person does an act that is a substantial step toward, and more than mere preparation for, the commission of the crime.

An attempt to commit a crime requires both an intent to commit the crime and a substantial step toward the commission of the crime.

In determining whether a substantial step has been taken, you must distinguish between mere preparation for and actually beginning to commit the criminal act on the other. Mere preparation, which may consist of planning the offense or of obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. An act by a person who intends to commit a crime is an attempt if the act itself clearly

indicates the intent to commit that specific crime, and it tends directly to accomplish the crime. The act itself need not be criminal in nature.

The statutes of Minnesota define the crime of [insert crime] as follows: [insert appropriate CRIMJIG section].

The elements of a completed crime of [insert crime] are: [Insert appropriate elements section of CRIMJIG].

10 *Minnesota Practice*, CRIMJIG 5.01 (2015); *see also* 10 *Minnesota Practice*, CRIMJIG 5.02 (2015) (providing elements of “attempt”). Appellant argues that the district court failed to correctly define “intent” and omitted the requirement that the state prove a “substantial step” toward commission of the crime.

We first observe that the district court’s instructions largely complied with the CRIMJIG instruction. A district court may deviate from the patterned instructions, but it abuses its discretion when it gives jury instructions that are either unclear or relieve the state of its burden to prove an element of the crime. *State v. Mahkuk*, 736 N.W.2d 675, 682-83 (Minn. 2007) (finding error when the hybrid jury instructions “allowed the jury to find [the defendant] guilty if it found that [he] was intentionally present at the scene of the crime without also finding that it was [his] intent that his presence aid or encourage the commission of the crime” and that as a result, “the instruction relieved the state of its burden to prove that [the defendant] intended his presence to further the commission of the crime”). An appellant must show that “the substituted instruction contained a material misstatement of law when read in the context of the instructions as a whole.” *State v. Turnipseed*, 297 N.W.2d 308, 312 (Minn. 1980).

Second-degree intentional murder has two elements: (1) causing the death of a human being and (2) intent to effect the death of that person or another, without premeditation. Minn. Stat. § 609.19, subd. 1(1) (2014). Because attempt requires the same intent element as the predicate offense, attempted second-degree intentional murder requires both (1) an intent to effect the death of a person and (2) a substantial step taken towards causing the death.

The district court instructed the jury on the elements of attempted second-degree intentional murder, by first defining an attempt. “Whoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime” Minn. Stat. § 609.17, subd. 1 (2014). The required elements of an attempt are “(1) an intent to commit a crime, and (2) a substantial step taken toward the crime’s commission.” *State v. Olkon*, 299 N.W.2d 89, 104 (Minn. 1980). The district court then provided an elemental definition of second-degree intentional murder, defined by statute as causing “the death of a human being with intent to effect the death of that person or another, but without premeditation.” Minn. Stat. § 609.19, subd. 1(1).

The district court’s instruction accurately defined “attempt” as including “both an intent to commit the crime and a substantial step towards the commission of the crime.” Then, the district court defined the elements of attempted second-degree intentional murder, including the element that “the defendant acted with the intent to kill [R.B.]” Having previously defined “attempt” as including both intent to commit a crime and a

substantial step towards its commission, the jury was instructed that proof of a substantial step toward commission of the crime was necessary to prove the offense.

The Minnesota Supreme Court has held that this method of providing jury instructions—defining a term and then using the term in the elements of the crime—is not error when the district court instructs the jury to use the definitions provided. *Gulbertson v. State*, 843 N.W.2d 240, 248 (Minn. 2014). Here, the district court defined the term “attempt”—including the requirement of a substantial step—immediately before using “attempt” in the elements of the crime. Considering the use of the same word twice in close succession, the district court acted within its “considerable latitude” in instructing the jury on both the intent and the substantial-step elements of the attempted crime. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011).

The district court’s jury instructions conformed to Minnesota law concerning attempted crimes. Because the district court’s jury instructions accurately state the law, it matters not that the instructions do not precisely follow the CRIMJIG pattern. The district court did not err.

II. Sentencing

Appellant also argues that the district court erred when it sentenced him on count 8, kidnapping to facilitate felony or flight under Minn. Stat. § 609.25, subd. 1(2) (2014). Respondent agrees.

“[I]nterpretation of the sentencing guidelines are subject to de novo review.” *State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012).

Under Minnesota law, kidnapping may be sentenced at severity level 6, 8, or 9, depending on the facts of the case. It is ordinarily a severity level 6 offense “if the victim is released in a safe place without great bodily harm.” Minn. Stat. § 609.25, subd. 2(1) (2014); Minn. Sent. Guidelines 5.A (2015). It is a severity level 8 or 9 offense “if the victim is not released in a safe place, or if the victim suffers great bodily harm during the course of the kidnapping, or if the person kidnapped is under the age of 16.” Minn. Stat. § 609.25, subd. 2(2) (2014); Minn. Sent. Guidelines 5.A.

Here the verdict form did not include a special interrogatory regarding section 609.25, subd. 2(2), the factors that would justify sentencing appellant for a severity level 9 offense. The district court sentenced appellant without identifying any reason for applying the higher severity level. As the state concedes, the district court should have sentenced appellant under Minn. Stat. § 609.25, subd. 2(1), a severity level of 6. We therefore reverse the district court’s sentence on count 8, and remand for resentencing at a severity level of 6. *See State v. Rannow*, 703 N.W.2d 575, 580 (Minn. App. 2005) (stating that when no reasons are given for departure, it is clear that the remand is for the presumptive sentence and not an opportunity to state reasons for departure).

Affirmed in part, reversed in part, and remanded.