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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0406**

State of Minnesota,
Respondent,

vs.

Brandon Joseph Rossbach,
Appellant.

**Filed April 9, 2018
Affirmed in part, reversed in part, and remanded
Peterson, Judge**

Beltrami County District Court
File No. 04-CR-15-3928

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

David L. Hanson, Beltrami County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Ross, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction of aiding an offender, appellant argues that the district court (1) erred by failing to instruct the jury to identify the specific crime that he aided; (2) violated his Sixth Amendment right to a jury trial by finding that he aided a

second-degree murder and setting the statutory maximum sentence accordingly; and (3) erred by ranking the offense at severity-level nine. We affirm in part, reverse in part, and remand.

FACTS

On October 20, 2015, Marchello Cimmarusti caused his girlfriend's death when he physically assaulted her during an argument. After hiding the victim's body in the basement of his home for several hours, Cimmarusti contacted his friend, Christopher Davis, via a Facebook application. Cimmarusti told Davis that the victim was dead and asked him for help with the situation. Davis and a friend, Marciano Guerra, drove from St. Paul to Cimmarusti's residence in Bemidji, arriving there at about 11:30 p.m. Davis went into the house and was inside for about ten minutes.

Before arriving at Cimmarusti's, Davis made several telephone calls to a number that belonged to appellant Brandon Rossbach's girlfriend, A.N. At 11:21 p.m., Rossbach sent Cimmarusti a Facebook message in which he told Cimmarusti to call him and provided A.N.'s phone number. At 11:30 p.m., Davis's phone was used to run a search for a resort north of Bemidji where Rossbach was living in a cabin with A.N. A.N.'s cousin, C.S.J., who was spending the night with Rossbach and A.N. on October 20, saw Davis come to the cabin late that night and leave with Rossbach a short time later.

Davis and Rossbach got into the car with Guerra, and the three went to a nearby Wal-Mart store.¹ Initially, Davis went into the store alone, but after a minute, he returned

¹ Guerra was unable to identify Rossbach at trial; he testified that it was very dark outside, and he could not see who had joined them.

to the car, and he and Rossbach went into the store together. They bought six packages of Styrofoam cups, two packages of Styrofoam plates, and two packages of Styrofoam bowls.

Davis, Rossbach, and Guerra went to Cimmarusti's house, where they arrived at about 1:00 a.m., and Davis and Rossbach went inside. Rossbach told Cimmarusti to stop drinking and sit down. He then asked, "Do you want your kids to have no parents or one parent?" The three men agreed that they would move the body to another location, bury it, and not report the crime. Cimmarusti knew that Rossbach had a close relationship with the victim's family, so he was surprised that Rossbach did not say that they would go to the police.

Davis and Cimmarusti brought the body up from the basement and placed it in Cimmarusti's SUV. The men also put the Styrofoam products and a can of fuel from Davis's car and a shovel from Cimmarusti's garage into the SUV. Davis, Rossbach, and Cimmarusti left in the SUV with the victim's body, and Guerra stayed at the house with Cimmarusti's children, who were asleep.

Davis directed Cimmarusti to a location about 20 minutes away that was familiar to Rossbach. They pulled off the road and drove down a steep, narrow trail. Cimmarusti and Davis took turns digging a hole, which took them about 30 minutes. Davis carried the body from the SUV and put it in the hole. The Styrofoam products were placed on the body, which was wrapped in a blanket, and the fuel was used to ignite the body. Davis tended the fire, Cimmarusti paced between the SUV and the burn site, and Rossbach stood nearby. After an hour or two, a decision was made to put out the fire, Davis extinguished the fire by shoveling dirt on it, and branches and shrubs were pulled over the hole to conceal it.

The three men then went to Rossbach's cabin to drop him off. During the drive, Davis and Cimmarusti discussed what Cimmarusti would tell investigators when questioned about the victim's disappearance, and Rossbach stated that he would give Cimmarusti Diazepam pills so that he would be relaxed when talking to investigators. When they got to the cabin, Davis went inside with Rossbach and returned to the SUV with the Diazepam pills. Davis and Cimmarusti returned to Cimmarusti's house.

At about 11:00 a.m. on October 21, Cimmarusti called 911 to report that the victim was parked outside of his house in violation of a no-contact order. This was the first of many things that Cimmarusti did to try to make it appear that the victim was alive. The victim's family became increasingly concerned over the next few days when they were not able to locate or contact her.

Bemidji Police Officer Bidal Duran went to Cimmarusti's residence and spoke with Cimmarusti in response to the October 21 911 call. Duran determined that there had been no violation of the no-contact order because there had been no contact between the victim and Cimmarusti and, according to Cimmarusti, the victim had been on the road.

On October 24, Duran returned to Cimmarusti's house and spoke to him after the victim's family contacted the police about her disappearance. Duran noted that Cimmarusti appeared nervous. Cimmarusti stated that he had not spoken to the victim in some days and that it was uncharacteristic for her to be out of contact. With Cimmarusti's consent, Duran searched the house. In the basement, Duran found dry white paint spread throughout the basement floor with some footprints in it. Cimmarusti claimed that the children had spilled the paint.

In an October 26 Facebook exchange between Rossbach and Davis, Davis stated, “lol I almost got burned alive last night because I . . . fell asleep with a candle lit. I woke up to the bedside table on fire hahaha” Rossbach responded, “lmao poor baby lol.” Davis stated, “I was like karma a b--ch hahaha.” Rossbach replied, “And quick too lol.”

On October 26, Senior Special Agent Don Newhouse of the Minnesota Bureau of Criminal Apprehension began an investigation into the victim’s disappearance. After learning from Cimmarusti that Davis had been at Cimmarusti’s house about the time of the victim’s disappearance, Newhouse obtained a search warrant and seized Davis’s cell phone. An examination of the phone showed that an Internet search for the resort where Rossbach was staying had occurred at 11:30 p.m. on October 20.

Newhouse and Bemidji Police Detective Michael Solheim went to the resort and spoke with Rossbach. Rossbach admitted knowing Cimmarusti and Davis but denied knowing anything about the victim’s disappearance. Rossbach stated that it was not uncommon for the victim and Cimmarusti to have disagreements and for the victim to leave.

On November 5, investigators returned to the resort to talk to Rossbach again and to execute a search warrant for his cell phone. Rossbach claimed that he had lost his phone while hunting the day before. Rossbach stated that he had been hunting on October 20 and had gone right to bed when he got home at 8:30 or 9:00 p.m. Investigators told Rossbach that Davis’s phone showed multiple calls between Davis’s phone and Cimmarusti’s phone when Davis was driving to Bemidji. Initially, Rossbach denied having talked to Davis on October 20 but then stated that they might have talked. He denied having seen Davis.

On November 9, investigators interviewed Rossbach again. He stated that he was very close to the victim's family and that they were like family to him. He denied having seen Davis on October 20 or 21 and stated that Davis had "plead[ed] his innocence" to him. Rossbach claimed that if Davis had come to the cabin, he would have been sleeping too heavily to have heard him. When asked if he knew anything that Cimmarusti may have disclosed to Davis, Rossbach stated that within the past two days, Davis had disclosed that Cimmarusti had said that he "had done something really bad." Rossbach claimed that he had "grilled" Davis about whether he knew anything more but that Davis denied knowing anything about the victim's disappearance.

Investigators returned to speak to Rossbach on November 13 after learning from C.S.J. that she saw Rossbach leave the cabin at about 11:00 p.m. on October 20 and not return until 4:00 a.m. the next morning. When told about the information from C.S.J., Rossbach continued to maintain his innocence and stated that he had told the truth during every interview.

During November 2015, the victim's family organized daily search parties to look for the victim in the Bemidji area. During one search, the victim's mother was at a gas station with a group of volunteers when Rossbach drove by in a vehicle. She testified at trial that as Rossbach drove by, he had "a huge grin on his face," and she described it as a look that she "will never forget."

On November 13, a volunteer searching near the resort saw Rossbach and his girlfriend as they stopped at a stop sign. Rossbach smiled, waved, rolled down the window, and said, "You're looking in the wrong area. She's not here."

The victim's mother testified that, on November 23, Rossbach contacted her via social media, asking to talk to her and objecting to "the cops . . . trying to make him lose" her. She also testified that, in the message, Rossbach described her as "someone I have known my whole life" and said, "I love you to death and would never do anything to harm you or our family. I know deep down that you know that."

On December 9, Cimmarusti told investigators what he, Rossbach, and Davis had done with the victim's body and led them to the burial site. Investigators found the body. Testing showed that gasoline and a heavy petroleum distillate were present on and around the body. Testing also showed that polystyrene, a component of Styrofoam, was present.

Rossbach was charged with aiding an offender after the fact, in violation of Minn. Stat. § 609.495, subd. 3 (2016). In the guilt phase of a bifurcated trial, the jury found Rossbach guilty as charged. In the sentencing phase, the jury found that the victim's family suffered emotional distress as a result of not knowing whether the victim was alive or dead between October 21 and December 9.

Aiding an offender after the fact is an unranked offense under the sentencing guidelines. The district court ranked Rossbach's offense at severity-level nine, which, with Rossbach's criminal-history score of four, resulted in a presumptive sentence of 134 months and a sentencing range from 114 to 160 months. Based on the emotional distress that the victim's family suffered as a result of not knowing whether the victim was alive or dead, the district court imposed an upward durational departure and sentenced Rossbach to 201 months in prison.

DECISION

I.

Rossbach argues that the district court erred by failing to instruct the jury to identify the specific crime that he aided. Because Rossbach did not object to the jury instruction at trial, this court reviews the instruction for plain error. *See State v. Taylor*, 869 N.W.2d 1, 15 (Minn. 2015) (articulating that we review unobjected-to jury instructions for plain error). An appellate court may review unobjected-to jury instructions under a plain-error analysis if the defendant establishes that (1) there was an error, (2) it was plain, and (3) the plain error affected his substantial rights. *State v. Davis*, 864 N.W.2d 171, 176 (Minn. 2015).

Jury instructions must “fairly and adequately explain the law of the case.” *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). “[T]he court’s instructions must define the crime charged and the court should explain the elements of the offense rather than simply read statutes.” *Id.*

The statute that establishes the offense of aiding an offender after the fact states:

Whoever intentionally aids another person whom the actor knows or has reason to know has committed a criminal act, by destroying or concealing evidence of that crime, providing false or misleading information about that crime, receiving the proceeds of that crime, or otherwise obstructing the investigation or prosecution of that crime is an accomplice after the fact and may be sentenced to not more than one-half of the statutory maximum sentence of imprisonment . . . that could be imposed on the principal offender for the crime of violence. For purposes of this subdivision, “criminal act” means an act that is a crime listed in section 609.11, subdivision 9, under the laws of this state

Minn. Stat. § 609.495, subd. 3; *see also* Minn. Stat. § 609.11, subd. 9 (2016) (including first-, second-, and third-degree murder and first- and second-degree manslaughter in listed crimes).

The district court instructed the jury as follows on the elements of aiding an offender after the fact:

First, that [Cimmarusti] committed the crime of homicide;

Second, that [Rossbach] knew or had reason to know that [Cimmarusti] committed a homicide;

Third, that [Rossbach] destroyed or concealed evidence or provided false or misleading information or obstructed the investigation or prosecution of the crime.

The fourth element is that [Rossbach] acted with intent to aid [Cimmarusti]. The phrase – I’m going to go over that last one again. The clause “with intent to” means in this case that [Rossbach] either had a purpose to do the thing or cause the result specified, or believed that the act, if successful, would cause that result.

The district court also instructed the jury that the definition of “criminal act” includes first-, second-, and third-degree murder and first- and second-degree manslaughter and that “[a]ll of these offenses constitute the crime of homicide.”

This court has held that, when instructing the jury on an aiding-an-offender charge, the district court’s failure to specifically identify the criminal offense that a defendant aided was plain error. *State v. Hager*, 727 N.W.2d 668, 673 (Minn. App. 2007). Under *Hager*, because the jury instructions did not specifically identify or require the jury to specifically identify the predicate offense that Rossbach aided, the instructions constituted plain error, and we must determine whether Rossbach’s substantial rights were affected.

An error affects substantial rights if it is prejudicial and affected the outcome of the case. An error in instructing the

jury is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury's verdict. The court's analysis under this third prong of the plain error test is the equivalent of a harmless error analysis.

State v. Ayala-Leyva, 848 N.W.2d 546, 555 (Minn. App. 2014), *review denied* (Minn. Aug. 11, 2015).

Rossbach argues that the district court's failure to instruct the jury to identify the specific offense that he aided deprived him of his right to a unanimous verdict. "[T]he jury must unanimously agree on which acts the defendant committed if each act itself constitutes an element of the crime." *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001). "But a jury need not agree unanimously with respect to the alternative means or ways in which a crime can be committed." *State v. Rucker*, 752 N.W.2d 538, 547 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). "[I]f the statute establishes alternative means for satisfying an element, unanimity on the means is not required." *Ihle*, 640 N.W.2d at 918. Jury instructions violate a defendant's right to a unanimous verdict when the instructions "allow for possible significant disagreement among jurors as to what [criminal] acts the defendant committed." *Stempf*, 627 N.W.2d at 354.

In *Hager*, this court concluded that the failure to identify the specific offense deprived the defendant of his right to a unanimous verdict and affected his substantial rights. 727 N.W.2d at 675. But, unlike this case, in *Hager* there was evidence that the original offender had committed multiple offenses, specifically, methamphetamine possession, theft, possession of drug paraphernalia, and obstructing legal process. *Id.* at 674. This court noted that "the jury had the entire fact scenario to consider and was permitted to choose a crime that [the defendant] may have aided." *Id.*

Here, it was undisputed that the criminal act was homicide and that the homicide resulted from Cimmarusti physically assaulting the victim on October 20 during an argument. Because any level of homicide is a criminal act, aiding Cimmarusti was an offense regardless of the level of homicide that Cimmarusti committed. Therefore, unanimity on the level of homicide was not required, there is no reasonable likelihood that the error in instructing the jury had a significant effect on the jury's verdict, and Rossbach is not entitled to reversal of his conviction.

II.

Rossbach argues that the district court erred by assigning severity-level nine to his offense. Aiding an offender as an after-the-fact accomplice is an unranked offense. Minn. Sent. Guidelines cmt. II.A.03 (2016). Assignment of a severity level for an unranked offense is within the district court's discretion and will only be disturbed upon an abuse of discretion. *State v. Kenard*, 606 N.W.2d 440, 442 (Minn. 2000); Minn. Sent. Guidelines cmt. II.A.05 (2016) (stating that when an offense is unranked, "judges should exercise their discretion by assigning . . . a severity level which they believe to be appropriate").

When assigning a severity level to an unranked offense, the district court considers

the gravity of the specific conduct underlying the unranked offense; the severity level assigned to any ranked offense whose elements are similar to those of the unranked offense; the conduct of and severity level assigned to other offenders for the same unranked offense; and the severity level assigned to other offenders who engaged in similar conduct.

Kenard, 606 N.W.2d at 443 (footnote omitted). No single factor is controlling, and the list is not exhaustive. *Id.*

The district court found:

The first factor the Court considers is the gravity of [Rossbach's] conduct underlying the offense. [Rossbach] was found to have aided Marchello Cimmarusti after Cimmarusti had committed homicide. While the jury found that [Rossbach] did not actively participate in the burning and burying of [the victim's] body, this Court is convinced by the testimony that he was present when the plan was concocted to bury her body, he assisted Davis in buying the products used to burn her body, he directed Cimmarusti to the site where her body was buried; he was present while her body was being desecrated and buried, and he participated in covering up the offense by lying repeatedly to law enforcement over the span of many weeks: The jury found, in the *Blakely* portion of the trial, that [the victim's] family suffered emotional distress from October 21 until December 9, 2015, not knowing whether [the victim] was alive or dead. Their distress was certainly the result, in part, of [Rossbach's] continuing deceit in concealing what had happened to [the victim]. Although [Rossbach] did not cause the death of [the victim] and did not (according to the jury) actively participate in the mutilation of her body, he is still culpable of an extremely serious offense.

On the second factor, the district court found that “[i]n this case, as in *Kenard*, the most similar offense to the one of which [Rossbach] has been convicted” is aiding an offender under Minn. Stat. § 609.495, subd. 1(a). In *Kenard*, the defendant was convicted of aiding an offender under section 609.495, subdivision 3, for aiding in the cover up of a murder. 606 N.W.2d at 442-43. The supreme court noted that the ranked offense with the most similar elements was aiding an offender under subdivision 1, which is a severity-level one, but recognized that subdivision 3 targeted more serious criminal conduct. See *id.* at 444 (stating that “[o]bviously, the legislature considers convictions under subdivision 3 more serious than those under subdivision 1”).

The third and fourth factors are the severity levels assigned in other cases involving the same unranked offense and to offenders who committed similar conduct. In *Kenard*, the supreme court noted that in cases in which severity-levels seven and eight had been assigned to convictions under section 609.495, subdivision 3, “the offender was either present at the time of the underlying offense, participated to some degree in the underlying offense, or readily participated in covering up the underlying offense.” *Kenard*, 606 N.W.2d at 445.

Rossbach encouraged Cimmarusti to conceal the crime when he asked Cimmarusti if he wanted his children to have no parents or at least one parent. Rossbach participated in buying the Styrofoam products and directing Cimmarusti to the burial site. Rossbach was present during the burning. He repeatedly lied to investigators. He provided Diazepam to Cimmarusti to help him be relaxed when talking to investigators. The district court properly considered the *Kenard* factors and did not abuse its discretion when it assigned severity-level nine to Rossbach’s offense.

III.

Rossbach argues that he was deprived of his right to a jury trial by the district court’s failure to submit the issue of the specific predicate offense to the jury because the statutory maximum sentence for aiding an offender in a second-degree murder is 240 months, Minn. Stat. § 609.19 (2016), while the maximum sentences for the lesser homicide offenses ranged from 150 to 120 months. Minn. Stat. §§ 609.195-.205 (2016); *see also* Minn. Stat. § 609.495, subd. 3. Rossbach argues that even though he did not object to judicial fact-finding on this element, this court can review the issue *de novo*. We need not determine

this issue because, even under the more stringent plain-error standard, Rossbach is entitled to resentencing. *See State v. Little*, 851 N.W.2d 878, 884-85 (Minn. 2014) (assuming without deciding that plain-error standard applied to unobjected-to-jury-trial-waiver issue and concluding that defendant prevailed under plain-error standard).

A fact that increases the statutory maximum sentence is by definition an element of the offense to be determined by the jury. *Alleyne v. United States*, 570 U.S. 99, 107, 133 S. Ct. 2151, 2158 (2013); *see also State v. Derosier*, 719 N.W.2d 900, 903-04 (Minn. 2006) (concluding that the right to a jury trial under *Blakely* may not be waived by silence). Therefore, the district court plainly erred by not submitting the determination of the specific predicate offense to the jury without obtaining a personal waiver of Rossbach's right to a jury trial on that element. *See Little*, 851 N.W.2d at 884.

Based on the record evidence, the jury could have found that Cimmarusti committed a homicide other than second-degree murder. *See* Minn. Stat. §§ 609.19-.205. The *Little* court stated:

[T]he record here is silent and provides no reliable evidence suggesting that, had [the defendant] known of the amended charge, he would have waived his right to a jury trial. Accordingly, we conclude that, had the district court personally questioned [the defendant] about his right to a jury trial on the first-degree criminal sexual conduct charge in accordance with the requirements of Minn. R. Crim. P. 26.01, there is a reasonable possibility that [the defendant] would not have waived that right.

851 N.W.2d at 886. As in *Little*, the record here is silent and provides no reliable evidence that, had Rossbach known that the degree of the homicide affected the statutory maximum sentence, he would have waived his right to have the jury determine the specific predicate

offense. Consequently, we conclude that, had the district court questioned Rossbach about his right to have the jury determine the specific predicate offense, there is a reasonable possibility that he would not have waived that right, and the error in not obtaining a personal waiver affected Rossbach's substantial rights.

If the first three prongs of the plain-error test are satisfied, we may address the error to ensure fairness and the integrity of the judicial proceedings. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). As the supreme court stated in *Little*,

Allowing [a defendant] to stand convicted of a much more serious offense when there is a reasonable likelihood that but for the district court's error he would not have waived his constitutional right to a jury trial . . . will adversely affect the public's confidence in the fairness and integrity of judicial proceedings.

851 N.W.2d at 886. We, therefore, reverse Rossbach's sentence and remand for resentencing. Because we are remanding for resentencing, we do not reach the remaining issues that Rossbach has raised regarding the sentencing departure.

Affirmed in part, reversed in part, and remanded.