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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1001**

Berry Alan Willis, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 5, 2018
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CR-14-6683

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Connolly, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

In 2014, a jury found appellant Berry Alan Willis guilty of aggravated forgery. Appellant timely filed a postconviction petition, arguing that his conviction should be

reversed because the district court's jury instructions directed a verdict on an element of the offense. The postconviction court denied relief. We affirm.

FACTS

Appellant was charged with aggravated forgery under Minn. Stat. § 609.625, subd. 3 (2012), after he filed a quitclaim deed purporting to transfer residential property from P.H. to appellant for \$500 or less. The residential property had previously been owned by appellant, but P.H. purchased the property after appellant lost the property in foreclosure. At trial, P.H. testified that she did not agree to sell the house to appellant and that the signature on the quitclaim deed was not hers. Appellant testified in his defense that P.H. agreed to sell the property to him, that he drafted the quitclaim deed and mailed it to P.H., and that the quitclaim deed was returned to him by mail with P.H.'s signature affixed to it.

In the final instructions to the jury, the district court defined aggravated forgery as, "whoever with intent to defraud utters or possesses with intent to utter a forged writing knowing it was forged is guilty of a crime." The district court then defined "forged writing" as a "writing that, if genuine, would create or transfer legal rights or obligations, and that has been so made or altered that it purports to have been made by a person other than the person who actually made it or that has been made under an assumed or fictitious name."

The district court then identified the elements of aggravated forgery. It identified the first two elements as: "First, the quitclaim deed was forged. This means that the quitclaim deed was falsely made or altered by a person, not necessarily the defendant, so that it appeared to be made by another person; [s]econd, the defendant knew the quitclaim deed was forged." The district court instructed the jury that the third and fourth elements

required the jury find that “the defendant uttered the forged quitclaim deed or possessed [it] with the intent to utter it” and that the defendant did so with the intent to defraud someone.

The jury returned a guilty verdict, and the district court entered a judgment of conviction on the sole charge.¹ In 2017, appellant filed a petition for postconviction relief. He argued that the district court’s jury instructions directed a verdict on an element of the offense by indicating that a quitclaim deed was a writing that, if genuine, would create or transfer legal rights. He argued that the erroneous instruction amounted to structural error requiring a reversal of the conviction. The postconviction court summarily denied the petition, concluding that the instruction correctly stated the law and did not direct a verdict on an element of the offense. The postconviction court indicated that, even if the instruction was erroneous, it was a matter of omitting an element rather than directing a verdict on an element of the offense, and such an omission was harmless.

This appeal followed.

D E C I S I O N

“We review the denial of a petition for postconviction relief for an abuse of discretion.” *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). We review any legal issues de novo and review any factual issues under the clearly erroneous standard. *Colbert v. State*, 870 N.W.2d 616, 621 (Minn. 2015). “We will not reverse an order unless the

¹ The district court ordered appellant to pay restitution to P.H. and her son. Appellant timely appealed the restitution order in 2016, but did not seek a direct appeal of the forgery conviction. *See State v. Willis*, 883 N.W.2d 838 (Minn. App. 2016), *rev’d*, 898 N.W.2d 642 (Minn. 2017).

postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Matakis*, 862 N.W.2d at 36 (quotation omitted).

District courts have considerable latitude in selecting the precise language to be used in jury instructions. *State v. Pendleton*, 567 N.W.2d 265, 268 (Minn. 1997). We examine jury instructions as a whole to determine if they fairly and accurately state the law in a manner that can be understood by the jury. *Gulbertson v. State*, 843 N.W.2d 240, 247 (Minn. 2014); *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). An instruction is erroneous if it materially misstates the law. *Pendleton*, 567 N.W.2d at 268. The district court must “clearly instruct the jury on exactly what it is they must decide.” *State v. Hersi*, 763 N.W.2d 339, 342 (Minn. App. 2009) (citing *Rosillo v. State*, 278 N.W.2d 747, 749 (Minn. 1979)).

The aggravated-forgery statute under which appellant was charged, Minn. Stat. § 609.625, subd. 3, provides that “[w]hoever, with intent to defraud, utters or possesses with intent to utter any forged writing or object mentioned in [Minn. Stat. § 609.625, subd. 1 (2012)] . . . knowing it to have been so forged,” is guilty of a crime. Subdivision 1 limits culpability for aggravated forgery to certain writings or objects, including “a writing or object whereby, when genuine, legal rights, privileges, or obligations are created, terminated, transferred, or evidenced, or any writing normally relied upon as evidence of debt or property rights” Minn. Stat. § 609.625, subd. 1(1).

At issue in this case is whether the district court should have included the language of Minn. Stat. § 609.625, subd. 1(1), in the elements of the offense provided to the jury.

The instruction used by the district court is a modified version of the instruction found in 10A *Minnesota Practice*, CRIMJIG 19.04 (2015). CRIMJIG 19.04 directs a district court to place a “[w]riting or object listed in [Minn. Stat.] § 609.625, subd. 1” into a blank space within the first element: “First, the _____ was forged.” 10A *Minnesota Practice*, CRIMJIG 19.04 n.1. Appellant argues that the district court should have entered the text of subdivision 1(1) into the blank space, or asked the jury to determine if a quitclaim deed meets the description contained in subdivision 1(1). Appellant argues that, by inserting “quitclaim deed” into the first element, without a finding by the jury that the quitclaim deed qualified as a writing described in subdivision 1, the district court directed a verdict on an element of the crime. The state argues that inserting “quitclaim deed” into the instruction was not “legally incorrect” because “whether a [quitclaim] deed constituted a writing pursuant to Minn. Stat. § 609.625, subd. 1(1), was not in question.” The postconviction court concluded that the district court was permitted to place “quitclaim deed” into the instructions without asking the jury whether it qualified as a writing under Minn. Stat. § 609.625, subd. 1(1), because it was a question of law rather than a question of fact.

The Sixth Amendment to the United States Constitution “indisputably entitles a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *State v. Her*, 862 N.W.2d 692, 695 (Minn. 2015) (quotations omitted). All elements of the charged crime are to be decided by the jury, even if evidence relating to an element is uncontradicted. *State v. Carlson*, 268 N.W.2d 553, 560 (Minn. 1978). A district court “may not instruct the jury that any of the elements of the offense have been proven beyond a reasonable doubt, absent a judicial

admission by the defendant of any of the elements.” *State v. Perkins*, 353 N.W.2d 557, 561 (Minn. 1984).

The parties do not dispute that, in order for a defendant to be guilty of aggravated forgery under section 609.625, subdivision 3, the writing or object at issue must be or purport to be an object or writing mentioned in Minn. Stat. § 609.625, subd. 1. *See State v. Mousel*, 371 N.W.2d 655, 656-57 (Minn. App. 1985) (concluding that the evidence was sufficient to support an aggravated forgery conviction where the document at issue pretended to be “one of the ‘kinds’ of writings covered by the forgery statute”). Nor do the parties dispute that a quitclaim deed would ordinarily satisfy the requirements of Minn. Stat. § 609.625, subd. 1(1). *See Black’s Law Dictionary* 477 (9th ed. 2009) (defining “quitclaim deed” as “[a] deed that conveys a grantor’s complete interest or claim in certain real property but that neither warrants nor professes that the title is valid”). The question presented is whether it was error for the district court to place “quitclaim deed” into the instructions without requiring the jury to find that a quitclaim deed is “a writing or object whereby, when genuine, legal rights, privileges, or obligations are created, terminated, transferred, or evidenced, or any writing normally relied upon as evidence of debt or property rights.” *See* Minn. Stat. § 609.625, subd. 1(1). We conclude that the district court did not err.

A district court invades the province of the jury when, instead of instructing the jury on the law, it applies the law to facts that are determined after assessing the probative value of evidence introduced at trial. *United States v. White Horse*, 807 F.2d 1426, 1430 (8th Cir. 1986). For example, in *United States v. Gaudin*, the United States Supreme Court

determined that a district court infringed a defendant's right to have a jury decide all elements of an offense when it declined to submit to the jury the issue of materiality of a false statement. 515 U.S. 506, 523, 115 S. Ct. 2310, 2320 (1995). In so doing, the Supreme Court examined whether the issue of materiality was purely a legal question to be determined by the judge. *Id.* at 511-12, 115 S. Ct. at 2314. The Supreme Court determined that the question was a mixed question of law and fact to be decided by the jury because it required application of the legal standard of "materiality" to "purely historical fact[s]." *Id.* at 512, 115 S. Ct. at 2314. To establish whether a false statement was material to an agency's decision, a jury would be required to ask two fact-specific questions: (1) "what statement was made?" and (2) "what decision was the agency trying to make?" *Id.* (quotations omitted). To answer the ultimate question of whether the statement was material required the jury to apply the legal standard of materiality to the jury's answers to those factual questions. *Id.*; *see also White Horse*, 807 F.2d at 1430-31 (concluding that a jury was deprived of the ability to decide essential facts when the judge decided that a telephone authority was an Indian tribal organization as defined by statute, a question which required an evaluation of the probative value of evidence to determine if there was a sufficient nexus between the telephone authority and the tribe).

In *State v. Moore*, the Minnesota Supreme Court examined whether a district court removed an element of the offense from the jury's consideration when the district court defined "great bodily harm," a required element of first-degree assault, as including a permanent loss of the function of a part of the body, and then informed the jury that "loss of a tooth is a permanent loss of the function of a bodily member." 699 N.W.2d 733, 736

(Minn. 2005). The supreme court determined that the district court’s instruction removed from the jury’s consideration the question of whether the loss of the tooth amounted to great bodily harm. *Id.* at 737.

Unlike the issues in *Gaudin*, *Whitehorse*, and *Moore*, which required consideration of evidence adduced at trial and the application of a legal standard to that evidence, the issue of whether a quitclaim deed is “a writing or object whereby, when genuine, legal rights, privileges, or obligations are created, terminated, transferred, or evidenced, or any writing normally relied upon as evidence of debt or property rights” does not require a determination of “purely historical fact[s]” nor an assessment of the probative value of evidence introduced at trial. *See Gaudin*, 515 U.S. at 512, 115 S. Ct. at 2314; *Whitehorse*, 807 F.2d at 1430. A quitclaim deed, by definition, is a writing that transfers legal rights in property. This determination required no probative assessment of evidence presented at trial, nor did it require the application of a legal standard to evidence adduced during the trial. A quitclaim deed, regardless of case-specific facts, satisfies Minn. Stat. § 609.625, subd. 1(1). The absence of an instruction requiring the jury to find that a quitclaim deed satisfies the statutory element was not error.²

Appellant also argues that the omission of the language of Minn. Stat. § 609.625, subd. 1(1), from the jury instruction, and its replacement with the phrase “quitclaim deed,”

² Our holding is limited to the issue of whether a quitclaim deed satisfies Minn. Stat. § 609.625, subd. 1(1). In other circumstances or with other writings, there may be a factual question that will require the district court to present to the jury the question of whether the writing or object at issue meets the description of a writing or object mentioned in Minn. Stat. § 609.625, subd. 1.

constituted structural error requiring reversal. *See Moore*, 699 N.W.2d at 738 (concluding that a directed verdict on an element of an offense requires reversal); *see also Rose v. Clark*, 478 U.S. 570, 578, 106 S. Ct. 3101, 3106 (1986) (indicating that “harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury”); *State v. Nunn*, 351 N.W.2d 16, 19 (Minn. App. 1984) (concluding that it was fundamental error for the district court to inform the jury that a robbery occurred, where it was “an essential element of the offense” of aggravated robbery (quotation omitted)).

Although we conclude that it was not error to omit the language in this case, even if it were, we conclude it would be an omission of an element from the jury’s consideration, reviewed for harmless error or plain error, rather than structural error. The jury was not presented with the question of whether a quitclaim deed qualified as a writing mentioned in Minn. Stat. § 609.625, subd. 1, nor did appellant request an instruction. The Minnesota Supreme Court has previously considered unobjected-to instructions that fail to present an element to the jury as subject to plain-error review. *State v. Watkins*, 840 N.W.2d 21, 27 (Minn. 2013); *State v. Vance*, 734 N.W.2d 650, 660-661 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012); *see also Neder v. United States*, 527 U.S. 1, 16, 119 S. Ct. 1827, 1837 (1999) (concluding that the omission of the element of “materiality” from jury consideration is subject to harmless-error analysis, and that the omission was harmless because the element was not contested at trial and supported by ample evidence).

Under a plain-error analysis, even if there was an error in the jury instructions, appellant is unable to establish that his substantial rights were prejudiced by the district court's failure to instruct the jury on whether a quitclaim deed satisfies Minn. Stat. § 609.625, subd. 1(1). When considering whether an error was sufficiently prejudicial to require reversal, we consider, "among other factors, whether: (1) the defendant contested the omitted element and submitted evidence to support a contrary finding, (2) the State submitted overwhelming evidence to prove that element, and (3) the jury's verdict nonetheless encompassed a finding on that element." *Watkins*, 840 N.W.2d at 29; *see State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002) (indicating that an omission of a required instruction is harmless error when "there is no reasonable likelihood that a more accurate instruction would have changed the outcome).

Appellant did not contest the issue of whether a quitclaim deed qualified as a writing under the statute at trial. On cross-examination, appellant agreed that a deed transfers property rights from one person to another, and did not deny that the writing at issue was intended to create or transfer rights. Nor did he make argument or present evidence to contest the omitted element. During closing argument, counsel for appellant agreed that appellant filed the quitclaim deed "so he could have some interest in the home." The supreme court has reversed convictions where the omitted element was contested at trial and evidence was presented on both sides of the issue, *see Vance*, 734 N.W.2d at 661, *State v. Williams*, 324 N.W.2d 154, 158 (Minn. 1982), but here, appellant neither contested the issue of whether a quitclaim deed would transfer rights, nor did he present evidence indicating that it was not intended to represent a transfer of property rights. Even if it was

error to omit an instruction requiring the jury to consider whether a quitclaim deed qualifies as a writing under Minn. Stat. § 609.625, subd. 1, appellant has not established that he was prejudiced thereby.

Affirmed.