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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1340**

State of Minnesota,
Respondent,

vs.

Katie Marie McCormick,
Appellant.

**Filed May 29, 2018
Affirmed
Randall, Judge***

Crow Wing County District Court
File No. 18-CR-16-4728

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

Donald F. Ryan, Crow Wing County Attorney, Candace Prigge, Assistant County Attorney, Brainerd, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Hooten, Judge; and Randall, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RANDALL, Judge

A Crow Wing County jury convicted appellant Katie Marie McCormick of one count of first-degree burglary and one count of obstruction of the legal process, after she entered a friend's trailer home and removed several of his firearms and other personal property. On appeal, McCormick challenges her burglary conviction, arguing that the district court erred for three reasons: (1) by denying her request for a multiple-possession instruction, (2) by denying her request for a lesser-included-offense instruction of temporary theft, and (3) by failing to give a specific-unanimity instruction. We affirm.

FACTS

On November 5, 2016, at approximately 5:00 a.m., police responded to a report of a burglary at a trailer home in Brainerd. The owner of the residence, D.A., stated that after being released from jail for an unrelated offense he returned to his trailer home and observed that several items had been stolen during his two-day absence. D.A. reported that the missing items included a shotgun, a rifle, ammunition, an XBOX One, and other personal items. D.A. identified McCormick as the person suspected of having taken these items.

Police next went to J.B.'s residence, where McCormick was believed to have been living at the time. Officer Derek Pallansch knocked on the north-side door of J.B.'s residence. McCormick answered but did not open the door. Instead, she spoke to the officer through the door, off and on, for approximately 30 minutes. During their conversation, the officer peered through the window and noticed a firearm on the kitchen

table. McCormick eventually was detained while trying to leave the residence through the south-side doors. She was placed in the back seat of Officer Pallansch's squad car. The squad car audio recording taped the officer's conversation with McCormick. McCormick admitted to police that she removed the items from D.A.'s trailer home. Inside J.B.'s residence, police officers located D.A.'s items including several firearms, a hunting bow, an XBOX One, and other personal items. Officers placed McCormick under arrest, but first transported her to St. Joseph's Hospital in response to her reported medical needs. After doctors released McCormick, she refused to leave the hospital and removed all her clothing. As officers attempted to get McCormick to stand up, she kicked one of the police officers.

The state charged McCormick with two counts: (1) first-degree burglary, a felony, in violation of Minn. Stat. § 609.582, subd. 1(b) (2016); and (2) obstruction of the legal process by interfering with a peace officer, a gross misdemeanor, in violation of Minn. Stat. § 609.50, subd. 1(2) (2016).

The case was tried to a jury on two days in April 2017. The state called four witnesses: D.A., D.A.'s neighbor, J.B., and Officer Pallansch. D.A. testified that when the officers completed their search of his home, they "left [the keys to his trailer home] on the counter with [the] doors unlocked and everything unlocked." D.A. also testified that McCormick had lived with him in his trailer home for approximately one month, and that she left a couple of weeks before his arrest when her boyfriend, S.S., who also planned to live with D.A., was arrested. D.A. told McCormick that she could no longer live with him. He testified that he never gave McCormick a key to his trailer home.

D.A.'s neighbor's testimony corroborated his statements. The neighbor testified that a couple of people had entered D.A.'s trailer home after he was taken into custody and that she asked them to leave. She then locked the doors to the trailer home and secured the windows. The neighbor testified that she saw McCormick over at D.A.'s "three times in two days" while D.A. was in jail. On one occasion, at approximately 2:00 a.m., the neighbor observed McCormick enter the residence with a key and leave the residence with two guns. She testified that when she confronted McCormick, she denied having a key to the trailer home. J.B. also testified that McCormick was living at his trailer home off and on, approximately three weeks before the incident. J.B. stated that McCormick told him that she wanted to use D.A.'s items as collateral until D.A. returned her purse, which she had left in his trailer home.

The state also offered McCormick's statements and conversation with Officer Pallansch, which were recorded by the squad car's sound recording system. In the recording, McCormick told the officer that she had a key to D.A.'s trailer home and had lived with him about "two, three weeks before [S.S.] went to jail," which was before the November 5 incident. She also stated that she went over to D.A.'s trailer home to take his things so that they would not get stolen, but did not bring her key to the trailer home with her, so she entered through the window. She stated that she never had any intention of stealing D.A.'s guns because she planned to give them to D.A.'s dad. The state also offered demonstrative evidence, which showed D.A.'s items that police found at J.B.'s residence.

At the close of trial, the district court instructed the jury on first-degree burglary, obstructing legal process, and trespass, the lesser-included offense of first-degree burglary.

The jury found McCormick guilty of first-degree burglary and obstructing legal process and acquitted her of trespass.

This appeal follows.

D E C I S I O N

“A defendant is entitled to an instruction on his [or her] theory of the case if there is evidence to support it.” *State v. Lilienthal*, 889 N.W.2d 780, 787 (Minn. 2017) (quoting *State v. Pendleton*, 567 N.W.2d 265, 270 (Minn. 1997)). If the district court “determines that the substance of the defendant’s request is contained in the court’s charge, it need not give the requested instruction.” *State v. Vazquez*, 644 N.W.2d 97, 99 (Minn. App. 2002). The district court will look at record evidence to decide if the defendant’s theory should be included in the jury instructions. *Id.* Appellate courts, like district courts, determine whether a jury instruction is warranted by “view[ing] the evidence in the light most favorable to the defendant.” *State v. Radke*, 821 N.W.2d 316, 328 (Minn. 2012). We apply an abuse-of-discretion standard of review to examine a district court’s decision not to give a requested jury instruction. *Lilienthal*, 889 N.W.2d at 787.

I. Multiple-Possessor Jury Instruction

McCormick first argues that the district court erred by denying her requested multiple-possessor jury instruction on count one of first-degree burglary.

A defendant is guilty of first-degree burglary if she

enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building, either directly or as an accomplice . . . if . . . the burglar possesses, when entering or at any time while in the building, . . . a dangerous weapon.

Minn. Stat. § 609.582, subd. 1(b). Chapter 609 defines “enters a building without consent” as entry “without the consent of the person in lawful possession.” Minn. Stat. § 609.581, subd. 4(a) (2016). A “person in lawful possession” is defined as “a person who has a legal right to exercise control over the building in question.” *State v. Spence*, 768 N.W.2d 104, 108-09 (Minn. 2009); *see also* *Jury Instructions*, 10A Minnesota Dist. Judges’ Ass’n, *Minnesota Practice – Jury Instruction Guides*, § 17.15, at 26 (6th ed. 2015). The term “lawful possession” is “without regard to ownership” because attention is accorded “to the distinct legal right to possess.” *State v. Evenson*, 554 N.W.2d 409, 412 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). Courts have concluded that this legal right “necessarily includes the right to consent to the entry of others into that building.” *Spence*, 768 N.W.2d at 109. Thus, a lawful possessor may include the owner of the residence, a co-tenant of the residence, and, in certain cases, a guest in the residence. *See, e.g., Lilienthal*, 889 N.W.2d at 787-88 (co-tenant of property); *Spence*, 768 N.W.2d at 109, 108 n.2 (co-owner of property); *State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014) (guest of co-tenant), *review denied* (Minn. Dec. 16, 2014). The supreme court has stated that Minnesota law is consistent with foreign jurisdictions which have held that “occupancy or possession of property at the time the offense was committed . . . determines whether one can be liable for burglary.” *Spence*, 768 N.W.2d at 110 n.5.

In this case, McCormick’s theory of the case focuses, in part, on the element of entry with consent. McCormick argues that S.S. did not relinquish his possessory rights as a co-tenant in D.A.’s trailer home merely because he did not live there at the time of the alleged

burglary. Specifically, McCormick argues that because S.S. was “moving in[to]” D.A.’s residence when S.S. was arrested, he, therefore, retained the ability as a lawful possessor to grant McCormick permission to enter the trailer home even if he was not currently living there. The state, on the other hand, argues that there is insufficient evidence to show that S.S. was a lawful possessor. In the alternative, the state argues that even if S.S. was a lawful possessor, there is insufficient evidence to show that S.S. gave McCormick permission to enter D.A.’s trailer home while D.A. was in jail.

The multiple-possessor pattern jury instruction provides that when “several persons are in lawful possession of a building or of the same part of a building, any one of these persons may consent to the entry or remaining of another person.” *Jury Instruction Guides*, *supra*, § 17.16, subp. 2, at 30. Outside of the presence of the jury, the parties discussed the jury instructions. The district court ruled:

I don’t think I have enough to say anybody else was a lawful possessor. I know there’s testimony that [S.S.] was staying there, but he had been arrested and that [McCormick] had also been staying there up until the point of [S.S.] being arrested. But I don’t think anything has been presented that they were lawful possessors at the time of this.

The district court then instructed the jury on a single-possessor jury instruction on the count of first-degree burglary. The district court stated, in part, as follows:

[1] First, the Defendant entered a building without the consent of the person in lawful possession. [2] The entry does not have to have been made by force or by breaking in. [3] Entry through an open or unlocked door or window is sufficient. . . . [4] *A person is in lawful possession when the person owns the building or has been given the right to control or occupy the building by the owner.* [5] Such a person is in lawful

possession of the building, although the person is not physically present at the time of the entry.

See Jury Instruction Guides, supra, § 17.15, at 29 (emphasis added).

Lawful possession “does not require an ownership interest in the building but does require more than mere presence in the building.”¹ *Crockson*, 854 N.W.2d at 248. In *Crockson*, this court held that a guest was a lawful possessor of the tenant’s apartment. *Id.* The evidence in *Crockson* revealed that (1) the tenant gave her guest permission to live in the apartment with her boyfriend; (2) the guest invited third parties to enter the apartment; (3) the guest testified that she was living in the apartment; (4) the guest’s testimony was corroborated by another witness who also testified that the guest and her boyfriend were “staying there at the time” of the burglary; and (5) the tenant testified that “she had no choice in [the guest’s] decision to invite [the third parties] in[to]” her apartment. *Id.*

Record evidence supports the district court’s conclusion that a multiple-possessor pattern jury instruction was not required. At trial, D.A. testified that he never gave

¹ The issue of whether a person qualifies as a lawful possessor has been addressed in prior unpublished decisions of this court. *See, e.g., State v. Smith*, No. A11-1287, 2012 WL 1914089, at *4 (Minn. App. May 29, 2012) (holding that defendant was not lawful possessor because he only stayed “off and on,” was not on lease, did not live at home, did not have key, and was told to leave); *State v. Skubinna*, No. A09-360, 2010 WL 934203, at *3 (Minn. App. Mar. 16, 2010) (holding that defendant was not lawful possessor because he did not have consent to enter, permission to stay was revoked, he did not have key, and did not identify apartment as address), *review denied* (Minn. May 18, 2010); *State v. Turner*, No. A09-214, 2010 WL 87400, at *3 (Minn. App. Jan. 12, 2010) (holding that defendant was not lawful possessor because he moved out of home, was not on lease or title, should not have had key, and did not have permission to enter), *review denied* (Minn. Mar. 16, 2010). Unpublished opinions can be cited as persuasive authority on an issue. *See Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993) (holding that unpublished opinions offer persuasive value “[a]t best”).

McCormick a key to his trailer home; that “nobody was living with [him] at the time after [S.S.] got arrested” and during the time of the burglary; that McCormick moved out three weeks before D.A.’s arrest; and that after McCormick moved out, she did not have permission to be in his trailer home. McCormick’s recorded statements support D.A.’s assertion. McCormick told Officer Pallansch that she moved out of the trailer home when S.S. went to jail because D.A. kicked her out of his trailer. She also referred to J.B.’s house as her house.

Other evidence that McCormick asserts is contradicted by D.A.’s testimony. *See, e.g., Vazquez*, 644 N.W.2d at 100 (concluding that defendant’s self-defense theory was contradicted by record). And the parties dispute several relevant facts. Credibility determinations are left to the fact-finder. *Spence*, 768 N.W.2d at 110. McCormick said that she had a key to D.A.’s trailer home (but she told D.A.’s neighbor she did not have a key); that she had left her purse in the trailer home; that she had permission to be in the trailer home; and that she could have been given permission by someone other than D.A. because D.A. had periodically accepted \$200 from friends to live in his trailer home. McCormick asserts that because S.S. was a lawful possessor and because he was moving in on the day he was arrested, the jury could infer that S.S. granted her permission, under the agreement between D.A. and S.S., to co-occupy the premises. But unlike the co-tenant in *Crockson*, S.S. was not present or living in the trailer home at the time of the burglary, and there is no evidence that he was listed on the title or lease. *See* 854 N.W.2d at 248. Rather, the evidence suggests, as the state contends, “that [S.S.] was going to *maybe* stay”

in D.A.'s trailer home. It does not follow that S.S. had the authority to grant McCormick permission to lawfully enter D.A.'s trailer home.

A district court is given “considerable latitude in selecting jury instructions.” We conclude the district court did not err in refusing McCormick’s requested multiple-possessors jury instruction. *See State v. Anderson*, 789 N.W.2d 227, 239 (Minn. 2010). The evidence was insufficient to show that S.S. was a co-tenant of D.A.’s trailer home.

II. Lesser-Included-Offense Jury Instruction

McCormick next argues that the district court erred by denying her requested jury instruction on temporary theft as a lesser-included offense of first-degree burglary.

“[A] defendant ‘may be convicted of either the crime charged or an included offense, but not both.’” *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005) (quoting Minn. Stat. § 609.04, subd. 1 (2004)). “An included offense includes a lesser degree of the same crime.” *Id.* We apply an abuse-of-discretion standard of review to a district court’s denial of a requested lesser-included-offense instruction. *Id.* If “the evidence warrants a lesser-included offense instruction, the trial court *must* give it.” *Id.* Thus, failure to submit a lesser-included-offense instruction where the evidence so warrants “is grounds for reversal only if the defendant is prejudiced thereby.” *Id.* (quoting *State v. Shepherd*, 477 N.W.2d 512, 516 (Minn. 1991)).

Dahlin set forth a three-part test that applies when a defendant requests a lesser-included-offense jury instruction. The supreme court held:

[T]rial courts *must* give a lesser-included offense instruction when (1) the lesser offense is included in the charged offense; (2) the evidence provides a rational basis for acquitting the

defendant of the offense charged; and (3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense.

Id. at 598 (emphasis added); *see also State v. Zumberge*, 888 N.W.2d 688, 697 (Minn. 2017). A district court considers the evidence in the light most favorable to the party requesting the instruction and must “not weigh the evidence or make credibility determinations” for lesser-included-offense considerations. *Dahlin*, 695 N.W.2d at 598.

In this case, the district court instructed the jury on the offense of first-degree burglary:

First, the Defendant entered a building without the consent of the person in lawful possession. The entry does not have to have been made by force or by breaking in. Entry through an open or unlocked door or window is sufficient.

. . . .

Second, the Defendant possessed a dangerous weapon when entering or at any time while in the building. . . .

Third, the Defendant committed the crime of theft while in the building.

This instruction follows the statutory language in section 609.582, subdivision 1, which requires that a defendant “enter[] a building without consent and with intent to commit a crime, *or* enter[] a building without consent and commit[] a crime while in the building.” Minn. Stat. § 609.582, subd. 1 (2016) (emphasis added). Here, the district court instructed the jury only on the commission of a crime while in the building.

The district court instructed the jury on the predicate offense of theft, which included an instruction on theft and temporary theft. The jury had to find that McCormick

either permanently deprived D.A. of the rights to his property *or* temporarily deprived D.A. of the rights to his property. See Minn. Stat. § 609.52, subd. 2 (2016).

Theft is not an automatic lesser-included offense of burglary. Minnesota courts have held that “an actual theft does not have to occur in order to be convicted of burglary,” *State v. Williams*, 403 N.W.2d 322, 324-25 (Minn. App. 1987), *review denied* (Minn. Mar. 30, 2010), and as a result, “[t]heft is neither a lesser degree of burglary nor a crime necessarily proved upon proof of burglary,” *State v. Minton*, 276 Minn. 213, 215, 149 N.W.2d 384, 386 (1967). In *Minton*, the supreme court reasoned that the defendant’s plea of guilty as to theft was improper because the state charged the defendant only with burglary and “the crime of theft is not a lesser included offense of burglary.” 276 Minn. at 215, 149 N.W.2d at 386. The supreme court held, “Theft is neither a lesser degree of burglary nor a crime necessarily proved upon proof of burglary.” *Id.*

Foreign jurisdictions also have held that theft is not a lesser-included offense of burglary. See, e.g., *Illinois v. Poe*, 896 N.E.2d 453, 456-59 (Ill. App. Ct. 2008); *Ohio v. Harris*, 417 N.E.2d 573, 575 (Ohio Ct. App. 1979); *Garcia v. State*, 571 S.W.2d 896, 898-99 (Tex. Crim. App. 1978). In *Garcia*, the Texas Criminal Court of Appeals reviewed three modes of the offense of burglary: “(1) burglary with intent to commit felony or theft, (2) burglary by remaining concealed, and (3) burglary by committing or attempting to commit a felony or theft.” 571 S.W.2d at 899. The court held that the first mode of burglary does not include theft as a lesser-included offense because “the offense of burglary in the first mode may be complete whether any theft ever occurs or not.” *Id.* The court did not comment whether the same was true for the third mode of burglary—the actual

commission of the crime in the building. *See id.* As to the third mode of burglary, the court held that the commission of theft could be included but did not apply in the instant case. *Id.* In *State v. Poe*, the Illinois Court of Appeals held that a defendant's convictions did not violate the one-act, one-crime rule because theft and burglary have different elements: "Burglary does not require a taking and theft does not require an entry." 896 N.E.2d at 455-56 (quotation omitted). The court reasoned:

Burglary, in general and as charged in this case, is a *fait accompli* the moment defendant makes an unauthorized entry with the requisite intent regardless of whether a subsequent felony or theft is ever committed. It is the entry coupled with the intent to commit the theft or felony that completes the burglary. Once the burglary was complete, defendant then committed the theft.

Id. at 456. In light of this record, we concluded that not giving a lesser-included instruction on theft was not improper.

III. Specific-Unanimity Jury Instruction

McCormick last argues that the district court erred by failing to give a specific-unanimity jury instruction as to the element of theft. Specifically, McCormick argues that the district court did not instruct the jury that it must unanimously agree whether McCormick intended to permanently or temporarily deprive D.A. of his property.

Because McCormick did not request a specific-unanimity jury instruction, we apply a plain-error standard of review. *State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The plain-error test examines if (1) there is an error; (2) the error is plain; and (3) the error affects the defendant's substantial rights. *Griller*, 583 N.W.2d at 740. A plain error is one that is "clear" or

“obvious” and “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). If all three prongs are met, courts assess whether they “should address the error to ensure fairness and the integrity of the judicial proceedings.” *Griller*, 583 N.W.2d at 740.

“The jury’s verdict must be unanimous in all cases.” Minn. R. Crim. P. 26.01, subd. 1(5); *see also State v. Stempf*, 627 N.W.2d 352, 354 (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) (emphasis added), *review denied* (Minn. Sept. 23, 2008). Alternative means to commit a crime exist if the district court concludes that “certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime.” *Stempf*, 627 N.W.2d at 354-55 (quoting *Schad v. Arizona*, 501 U.S. 624, 636, 111 S. Ct. 2491, 2499 (1991)).

State v. Pendleton, 725 N.W.2d 717 (Minn. 2007), is instructive. In *Pendleton*, the jury unanimously agreed that the defendant committed felony murder, but the jury was permitted to consider different mental purposes as alternative means for the underlying felony of kidnapping. 725 N.W.2d at 730-31. In relying on the United States Supreme Court decision in *Schad*, the supreme court held that “jurors are not always required to agree on *alternative ways* in which a crime can be committed.” *Id.* at 732 (emphasis added). The supreme court restated the plurality holding in *Schad* that due process principles are met “if the two alternative mental states ‘reasonably reflect notions of

equivalent blameworthiness or culpability.’” *Id.* at 731 (quoting *Schad*, 501 U.S. at 643, 111 S. Ct. at 2491).

In this case, the district court instructed the jury that it must unanimously determine whether the elements of first-degree burglary were satisfied, but that it was permitted to consider different mental purposes for the underlying offense of theft. The district court instructed the jury on two alternative means by which McCormick could have committed the underlying criminal act of theft—with intent to permanently deprive or the intent to temporarily control. Either alternative required intent to act. The burglary “statute establishes alternative means for satisfying an element.” *See State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002). In this case, theft was the crime that the state alleged that McCormick committed after unlawfully entering D.A.’s trailer home. The jury was not required to unanimously agree on the underlying facts of each burglary element, “so long as the jury unanimously agreed that [McCormick] committed first-degree [burglary].” *See Pendleton*, 725 N.W.2d at 731. Here, the differing factual circumstances of theft “reasonably reflect[ed] notions of equivalent blameworthiness or culpability” as to the burglary charge. *See id.*

The district court did not err by not providing a specific-unanimity jury instruction on the element of theft.

Affirmed.