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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-0520**

State of Minnesota,  
Respondent,

vs.

Nathaniel Jackson,  
Appellant.

**Filed July 15, 2019  
Affirmed  
Connolly, Judge**

Ramsey County District Court  
File No. 62-CR-15-2901

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,  
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Mark D. Nyvold, Special  
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and  
Slieter, Judge.

## **UNPUBLISHED OPINION**

**CONNOLLY**, Judge

Appellant challenges his conviction for burglary and aggravated robbery, arguing that the evidence was insufficient to prove his guilt and that the district court erred in failing to define “assault” in the jury instructions. He also argues, pro se, that he was deprived of effective assistance of counsel. Because there was no error in not defining “assault,” the evidence was sufficient to allow the jurors to reach their verdict, and appellant has not shown that his counsel failed to provide effective assistance, we affirm.

### **FACTS**

A St. Paul couple, R.J., 70, and his wife, K.J., 67, were in their home on the morning of March 24, 2015. R.J. was in his wheelchair; K.J. was seated at the kitchen table. She told him she saw a light-colored Cadillac park across the street and a black man (the intruder) get out, put on a hardhat and a colored vest, and walk towards their home. As the intruder got near the garage, R.J. told K.J. to lock the door, but the intruder was already in the entry when she arrived. He asked K.J. if R.J. was home; K.J. said he was home and asked the man to step outside their house. The intruder then hit K.J. in the head twice. She fell to the floor at the second blow of something hard and heavy and began bleeding. The intruder stepped over her and went further into the house. K.J. went to a neighbor’s house for help.

R.J. heard K.J. scream and was moving in his wheelchair towards the bedroom, where he kept a handgun. The intruder approached him from behind and hit him in the head, knocking him out of the wheelchair on to the floor. Although his glasses were

knocked off, R.J. was able to see the intruder clearly and noticed stubble on his face. The intruder entered the bedroom, took K.J.'s purse, which was lying on the bed, and left.

R.J. did not know the intruder had left and crawled toward the living room. K.J. then returned with a neighbor, and they called the police. When police arrived, they found a hardhat and a comb that did not belong to R.J. or K.J. K.J. was taken to the hospital, where she received 16 staples to close the wound on her head.

About a month later, police showed R.J. and K.J. a photo lineup of six African American men, one of whom was appellant; the others were of similar age and had similar features. K.J. could not identify the intruder in any of the photos; R.J. identified appellant's photo with a 25% degree of certainty. K.J.'s purse was later found by a woman; she called K.J. to tell her it was found, and K.J. notified the police, who picked it up.

DNA testing revealed that the hardhat had DNA from three or more people, that 39% of the population could be excluded from those people, and that appellant could not be excluded. It also revealed that the predominant male DNA on the comb matched appellant's and "would not be expected to occur more than once among unrelated people in the world population."

Appellant was charged with one count of first-degree burglary—assault and two counts of first-degree aggravated robbery—inflicting bodily harm. A jury found him guilty on all three counts. Following a postconviction petition seeking correction of his sentence, he was sentenced to 78 months in prison on the burglary count; 78 months in prison, concurrent, on one robbery count; and 48 months in prison, consecutive, on the other robbery count.

Appellant challenges his convictions, arguing that the evidence, viewed in the light most favorable to the verdict, was insufficient to allow the jurors to reach their verdict and that the district court erred in not defining the word “assault” in the jury instructions; in a pro se brief, he argues that he was deprived of effective assistance of counsel at trial.

## D E C I S I O N

### 1. Sufficiency of the Evidence

In considering a claim of insufficient evidence, this court’s review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach their verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). Review of the sufficiency of circumstantial evidence involves two steps: first, the reviewing court identifies the circumstances proved by the state; it then determines whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). A conviction based on circumstantial evidence should not be overturned on mere conjecture of the possibility of innocence. *See, e.g., State v. Boldman*, 813 N.W.2d 102, 107 (Minn. 2012). A jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430.

The circumstantial evidence here involved a car, a comb, and a hardhat. The car, a light-colored Cadillac, drove up in front of the victims' house one day in March 2015 at about 11:00 a.m. Appellant had access to a light-colored Cadillac during some days in March 2015. The car was registered to appellant's stepdaughter and contained traffic citations issued to appellant, a colored work vest, and, on the seat, a license plate numbered 738RKR. In 2014, appellant had been pulled over in a white Cadillac with the license plate 738RKR. The intruder put on a colored work vest taken from the car before he approached the victims' house.

The comb was found in the entryway where K.J. was assaulted. It did not belong to either of the victims. R.J. testified that there was no reason for a comb to be in that place and that he believed it had been left by the intruder. The comb had DNA from two or more people; the predominant male DNA matched appellant's and would not be expected to occur more than once among unrelated individuals in the world population. Appellant's argument that a third party acquired a comb with appellant's DNA and left it in the victims' house is not persuasive.

The hardhat was found in the victims' bedroom, from which K.J.'s purse had been taken. The hardhat did not belong to the victims, and K.J. testified that the man who parked the car in front of their house put on a hardhat before he entered the house. It contained DNA from three or more people and, while 39% of the general population could be excluded from that DNA, appellant could not be excluded.

The jury was in the best position to judge the circumstantial evidence, and that evidence, combined with the victims' testimony and viewed in the light most favorable to the verdict, was sufficient to allow the jury to reach that verdict. *See id.*

## **2. Jury Instructions**

A jury instruction is in error if it materially misstates the law. *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). "Jury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

The jury was instructed that the second element of first-degree burglary is that "the defendant assaulted a person within the building or on the building's [appurtenant] property." Appellant argues that the district court erred by not instructing the jury, sua sponte, on the meaning of the word "assault." "Assault" is defined as "the intentional infliction of or attempt to inflict bodily harm upon another"; "bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." Minn. Stat. § 609.02, subds. 7, 10(2) (2018).

Appellant did not raise any objection to the jury instructions either at the jury-instruction conference or at trial, so the standard of review is whether the district court committed a plain error that affected appellant's substantial rights by not providing, sua sponte, an instruction defining assault. *See State v. Griller*, 583 N.W.2d 736, 743 (Minn. 1998). An error is plain if it contradicts caselaw, a rule, or a standard of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). But there is no "'plain' error when there is no binding precedent." *State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008) (quotation

omitted). Appellant cites no caselaw, rule, or standard of conduct requiring that the term “assault” be defined in a jury instruction on first-degree burglary. Therefore, there was no plain error in not giving such an instruction.

Moreover, this court “evaluate[s] the erroneous omission of a jury instruction under a harmless error analysis.” *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004). Appellant does not explain how he was harmed by the omission of a definition of assault. Appellant never argued during the trial that what was done to K.J. and R.J. was not “assault” within the meaning of the statute. Nor does appellant offer any support for his implied views that the jury would not have known the intruder’s conduct toward each victim was an assault of that victim and would have found appellant innocent of first-degree burglary if assault had been defined in the jury instructions.

Appellant relies on the fact that the first-degree burglary jury instruction has a footnote stating where the definitions of assault and bodily harm may be found. But nothing in the instruction says the definitions must be given as part of that instruction.<sup>1</sup>

### **3. Ineffective Assistance of Counsel**

Appellant argues in his pro se brief that he did not receive effective assistance of counsel. To demonstrate this, appellant must show either that his counsel’s performance fell below an objective standard of reasonableness or that there is a reasonable probability

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<sup>1</sup> The comment to CRIMJIG 13.02 says that “In cases in which a defendant is charged with a degree of an assault with infliction of bodily harm, the court should incorporate this instruction directly into the first element of the appropriate elements instruction.” But appellant was charged with first-degree burglary and aggravated robbery. In any event, a comment to the jury instruction is not “binding precedent” and failure to follow it is not plain error.

that, but for his counsel's unprofessional errors, the result of the proceedings would have been different. *See State v. Yang*, 774 N.W.2d 539, 564-65 (Minn. 2009).

Appellant makes two allegations of ineffective assistance. First, he alleges that his trial counsel failed to promptly investigate the circumstances of his case by exploring all avenues leading to relevant facts, interviewing witnesses, and investigating a television interview of the victims; second, he alleges that counsel failed to challenge the admissibility of the photo lineup evidence. Neither allegation indicates that appellant's counsel's performance fell below an objective standard of reasonableness or that the result would have been different but for his counsel's alleged errors.

Appellant does not say what relevant, admissible evidence counsel's further investigation of the case would have produced or provide any legal support for his claim that the investigation was inadequate. He presents nothing to overcome the presumption that counsel's performance was reasonable. *See Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007) ("We presume that trial counsel's performance was reasonable."); *see also Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2065-66 (1984) ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation . . . . [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.") Appellant explains neither what a further investigation would have revealed nor what advantage he would have derived from whatever might have been revealed. Moreover, the lack of harm suffered from the photo lineup is obvious in light of the facts that K.J. did not

select any of the six photos as depicting the intruder and R.J. selected appellant's photo from the group with only 25% certainty.

If a defendant was unfairly singled out for identification, the identification procedure was unnecessarily suggestive and the resulting evidence may be inadmissible. *State v. Marhoun*, 323 N.W.2d 729, 733 (Minn. 1982). Here, the lineup consisted of six photos of African American males similar in feature and age to appellant, and the officer conducting the procedure did not know whether any of the photos depicted the suspect. Appellant's assertion that "the whole process was tainted from the very start" seems to be based on the fact that the same two police officers who started the investigation of the incident also conducted the photo lineup, but appellant offers no support for the view that this made the identification inadmissible, and he concedes that "it appears on the face of the report that the police followed proper procedure" in conducting the lineup investigation.

Appellant's claim of ineffective assistance of counsel is without merit.

**Affirmed.**