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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1236**

State of Minnesota,
Respondent,

vs.

Andrew Joseph Casserly,
Appellant.

**Filed June 3, 2019
Affirmed
Schellhas, Judge**

Dakota County District Court
File No. 19HA-CR-17-770

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

James C. Backstrom, Dakota County Attorney, Torrie J. Schneider, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa A. Haley, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Schellhas,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his conviction of third-degree burglary, arguing that his conviction is not supported by sufficient evidence and that the district court plainly erred in its jury instructions. We affirm.

FACTS

Respondent State of Minnesota charged appellant Andrew Casserly with third-degree burglary, alleging that he burglarized L.H.'s storage unit in Burnsville on October 29, 2016. L.H. claimed that the storage-unit key had been stolen from her home and that over \$85,000 worth of belongings were stolen from the storage unit. The jury found Casserly guilty, and the district court sentenced him to 32 months.

This appeal follows.

DECISION

I. Sufficiency of the evidence

Casserly argues that his conviction is not supported by sufficient evidence.

When an appellant challenges the sufficiency of the evidence presented at trial, we undertake a painstaking review of the record, and review the evidence to determine whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a fact-finder could reasonably conclude that the defendant was guilty of the offense charged.

State v. Barshaw, 879 N.W.2d 356, 362 (Minn. 2016) (quotations and citations omitted).

We view the evidence in the light most favorable to the verdict and assume that “the fact-

finder disbelieved any evidence that conflicted with the verdict.” *Id.* at 363 (quotation omitted).

Here, the state’s case was based on a combination of direct and circumstantial evidence. At trial, the state presented testimony from L.H.; her son, J.N.; Matt Underwood, manager of a U-Haul store; M.M., renter of a U-Haul van; Patrol Officer Casey Smith, dispatched officer when L.H. reported the burglary; Charles Grant, leasing manager at the storage facility; Michael Bosillo, T-Mobile cellphone-records custodian; and Detective Luchsinger, investigating officer. The state also introduced security-camera video from the U-Haul store and from the storage facility where the burglary occurred, cellphone records, and accompanying cellphone-location maps.

The storage-facility video showed a white U-Haul van make two separate trips in and out of the storage facility on October 29, 2016. Detective David Luchsinger testified that M.M. rented the van at 10:00 a.m. on October 29. M.M. was a friend of Casserly’s girlfriend, D.K. Casserly accompanied M.M. into the U-Haul store, but M.M. completed the rental application and solely interacted with the U-Haul manager regarding the rental transaction. Underwood testified that he remembered Casserly, and that he wore a “Bulls hat” and a “hoodie sweatshirt” when M.M. rented the van.

When the van was not timely returned to the U-Haul store, Underwood called a telephone number provided in the rental agreement. A male answered the call, identified himself as “Drew,” and immediately hung up when Underwood asked about the van’s whereabouts. Detective Luchsinger subsequently discovered that the telephone number that Underwood called was a cellphone number linked to a Facebook profile with

Casserly's photograph and name. The cellphone was registered to "Michael Jordan" with the same birthdate as Casserly's. Using cellphone records, Detective Luchsinger tracked the location of Casserly's cellphone to the U-Haul store at the time that M.M. rented the van and to the storage facility at the time that the burglary occurred.

A jury found Casserly guilty of third-degree burglary under Minn. Stat. § 609.582, subd. 3 (2016), which states:

Whoever enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building, or enters a building without consent and steals or commits a felony or gross misdemeanor while in the building, either directly or as an accomplice, commits burglary in the third degree and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000 or both.

To convict Casserly, the state was required to prove the elements of third-degree burglary beyond a reasonable doubt.

When the state proves a crime through circumstantial evidence, we review the sufficiency of the evidence using a two-step analysis. *Barshaw*, 879 N.W.2d at 363. "We first identify the circumstances proved, deferring to the fact-finder's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id.* (quotation omitted). "Even in cases involving circumstantial evidence, the factfinder is generally in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony." *Id.* (quotation omitted); see *State v. Fairbanks*, 842 N.W.2d

297, 307 (Minn. 2014) (“A jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference.”).

Here, by direct evidence, the state proved the following circumstances: during the morning of October 29, 2016, Casserly accompanied M.M. to a U-Haul store, where M.M. rented a van; M.M. left the U-Haul store with D.K., and Casserly drove away in the van alone; the storage-facility security video shows a white van, with the same unique markings as the one rented and driven by Casserly, enter the storage facility; the storage-facility video shows two males, one wearing a Bulls hat and a hoodie, enter the storage facility and cart out items, which L.H. identified as her stored property; and L.H. testified that she did not consent to the removal of her property from her storage unit.

By circumstantial evidence, the state proved the following circumstances: a telephone number listed in M.M.’s U-Haul rental agreement was the same number listed on Casserly’s Facebook profile; when Underwood called the telephone number listed in the rental agreement and on Casserly’s Facebook profile, a man identifying himself as “Drew” answered the call and immediately hung up when asked about the van’s whereabouts; cellphone records showed that on October 29, 2016, Casserly’s cellphone was located near the U-Haul store at the time that M.M. rented the white van and at the storage facility at the time of the burglary.

“After identifying the circumstances proved, we independently examine the reasonableness of all inferences that might be drawn from the circumstances proved to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Barshaw*, 879 N.W.2d at 363 (quotation

omitted). Casserly argues that the record cannot support a guilty verdict because a “[m]yriad [of] other inferences other than criminal intent can be inferred from the circumstances proved that are inconsistent with the jury finding of guilt.” He claims that the state proved only that he assisted his girlfriend in driving the van earlier in the day, not that he was present at the storage facility with the van. Alternatively, he argues that the state proved only that he was at the storage facility to access another storage unit, not L.H.’s storage unit. He argues that the circumstances proved support a rational hypothesis that other men “borrowed the van to help a friend move and those men were on site with or without [the] permission” of L.H.

But the record contains no evidence to support Casserly’s suggested alternative hypotheses. Viewed as a whole, the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. Applying the standard of review for cases proved in part or whole by circumstantial evidence, we therefore conclude that the evidence is sufficient to support Casserly’s conviction of third-degree burglary.

II. Third-degree-burglary jury instructions

Casserly also argues that the district court erred in its jury instructions by not explaining accomplice liability, and that this court therefore should grant him a new trial.

The court instructed the jury as follows:

Under Minnesota law, whoever enters a building without the consent of the person in lawful possession with intent to steal and steals while in the building is guilty of a crime. The elements of burglary are, first, the defendant entered the building. . . . Second, the defendant entered a building without the consent of the person in lawful possession. . . . Third, while in the building, the defendant did steal, *either directly or as an*

accomplice. Fourth the defendant’s act took place on or about October 29th, 2016 If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

(Emphasis added.) The court used the pattern jury instructions for third-degree burglary but added the italicized language to bring the jury instructions into agreement with the third-degree burglary statute. During pretrial discussions about the jury instructions, the court asked the parties specifically if the above-italicized language should be included in the instructions, and Casserly’s attorney said, “Yes. That’s clearer.” Casserly not only did not object to the jury instructions, he agreed with them, and he therefore forfeited the right to contest the jury instructions on appeal. *See State v. Davis*, 864 N.W.2d 171, 176 (Minn. 2015) (“A defendant generally forfeits the right to contest jury instructions on appeal when the defendant fails to object at trial.”).

But appellate courts review a forfeited jury-instructions challenge under the plain-error test. *State v. Taylor*, 869 N.W.2d 1, 15 (Minn. 2015); Minn. R. Crim. P. 31.02. “A defendant is entitled to relief from a plain error if (1) there was an error, (2) the error was plain, and (3) the error affected the defendant’s substantial rights.” *State v. Vasquez*, 912 N.W.2d 642, 650 (Minn. 2018) (quotation omitted). If each prong of the plain-error test is met, then an appellate court “consider[s] whether [it] should address the error to ensure fairness and the integrity of the judicial proceedings.” *Id.* (quotations omitted). If one of the prongs is not met, this court need not analyze the other prongs. *See id.* (“We need not determine in this case if the district court’s admission of medical information was error that

was plain because even if it was plain error, [defendant] has not demonstrated that the admission of the challenged evidence affected his substantial rights.”).

Casserly argues that the district court committed a plain error by including in the jury instructions the language, “or as an accomplice,” without providing the jury with accomplice-liability instructions. He further argues that the error is reversible because it affected his substantial rights because the jury could have made its decision without properly finding that the state proved beyond a reasonable doubt the requisite element of intent. We disagree.

Assuming without deciding that the district court erred by not including the instructions for accomplice liability, we do not conclude that the error was plain. “An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). We can find no authority to support a proposition that a district court errs if it does not include accomplice-liability instructions in a third-degree-burglary case when it uses the statutory phrase “or as an accomplice” in the instructions. And Casserly cites to no such authority. Because Casserly has failed to prove that any alleged error was plain, we need not consider the other prongs of the plain-error test. *See State v. Kelley*, 855 N.W.2d 269, 284 n.13 (Minn. 2014) (declining to address each prong of plain-error test where defendant did not prove other prongs).

Affirmed.