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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1541**

Hunter Lee Briscoe, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 13, 2019
Affirmed
Ross, Judge**

Clay County District Court
File No. 14-CR-14-1410

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

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

Brian J. Melton, Clay County Attorney, Matthew C. Spielman, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Hunter Briscoe broke into the Barnesville animal control kennel and retrieved his impounded dog, refusing to pay the prescribed fee for allowing it to roam untagged. A jury

found Briscoe guilty of third-degree burglary and theft. Briscoe unsuccessfully petitioned the district court for postconviction relief, arguing that he could not have committed burglary because he broke in to get his own dog. We affirm the district court's decision to deny Briscoe's petition because stealing under the burglary statute includes taking property that someone else has a legal right to possess and because the district court instructed the jury accordingly.

FACTS

Barnesville animal-control officer Lisa Cook received a call that an untagged dog was roaming on the caller's property. Cook found the dog and put it in one of the kennels in the animal-control facility. Hunter Briscoe went to claim the dog, Nala. Cook informed Briscoe that the impoundment fee for an untagged dog running at large was \$25 and the fee to license it was another \$10. Cook told Briscoe that the dog would have to stay in the facility until he paid the fees, which would increase daily. Briscoe boasted that he would just come back later, cut the wire fence to the kennel, and get his dog. He left without paying the fee.

When Cook went to the animal-control kennel the next morning, she discovered that Nala was gone. That afternoon police chief Dean Ernst found Briscoe and the dog in Briscoe's car. Chief Ernst arrested Briscoe. On the way to jail, Briscoe told the chief that he climbed onto the kennel's roof and used his belt to lift Nala out.

The state charged Briscoe with third-degree burglary and theft. A jury heard about Briscoe's forewarning to Cook and about his confession to the chief. It also received evidence of Briscoe's social-media posting of a message with a photograph of Nala: "[S]he

broke her chain while I was workin and the animal control bitch tried charging me 50 bucks. I said shit you can keep her. then I went back climbed the fences and threw my dog out to freedom . . . almost broke my neck, but hell it's all good. ☺”

The jury found Briscoe guilty, and the district court convicted him and sentenced him to a stayed prison sentence of 18 months for the burglary conviction. It issued no sentence on the theft conviction. Briscoe did not directly appeal but petitioned for postconviction relief. The district court dismissed the petition on procedural grounds, and we reversed and remanded for consideration on the merits. *Briscoe v. State*, No. A17-0388, 2017 WL 5985403, at *1–3 (Minn. App. Dec. 4, 2017). The district court addressed the petition’s merits and denied it.

Briscoe appeals.

D E C I S I O N

Briscoe argues that the state did not prove he engaged in stealing under the burglary statute because one cannot steal his own property, and the dog was his property. He argues relatedly that the district court improperly instructed the jury that it could find him guilty of burglary if, among other elements, he intended “to commit a crime of [t]heft” while the burglary statute instead uses the word “steal.” The arguments have no bite.

I

Briscoe maintains that the evidence was insufficient to prove that he committed third-degree burglary because he did not intend to “steal” anything. The third-degree burglary statute criminalizes the entry into “a building without consent and with intent to steal . . . while in the building.” Minn. Stat. § 609.582, subd. 3 (2012). Briscoe’s theory is

that he could not “steal” Nala by breaking her out of the pound because one cannot steal his own property. We must interpret the statute to evaluate Briscoe’s insufficient-evidence claim, and we do so de novo. *See State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017).

Although the word “steal” is undefined in the Minnesota Statutes, the word “theft” is not. “Theft” includes the taking of property from another who has “a superior right of possession,” even if the one taking the property has a legal interest in it. Minn. Stat. § 609.52, subd. 2(a)(2) (2012). Briscoe does not dispute that the city had a superior legal right to possess Nala at the time he entered the police kennel to take her. And such a dispute would be futile, because a Barnesville ordinance authorized police to seize and impound Briscoe’s dog for his allowing her to run at large. Barnesville City Ord. Code No. 2004–13, subd. 2 (2004). And it required Briscoe to pay the impound fee to regain his right to possess her. *Id.*, subd. 4. Deriving the meaning of “steal” from the statutory definition of “theft,” Briscoe’s taking of Nala was stealing.

Briscoe counters that, by using the two words “theft” and “steal” but defining only one of them, the legislature must have intended the two words to carry different meanings. Of course the two words do carry different meanings, but that is necessary only because one is a noun and the other is its correlated verb. *See Merriam-Webster’s Colleg. Dict.* (11th ed. 2014) (defining “theft” as “the act of stealing”). We presume that the legislature was aware of this basic semantic relationship in 1987 when it drafted the current third-degree burglary statute, as evidenced by the common, contemporaneous dictionary definitions. *See, e.g., Random House Dict. of the Eng. Lang.* (2nd ed. 1987) (defining “steal” as “to commit or practice theft,” among other things, and “stealing” as “given to or

characterized by theft”); *see also* Minn. Stat. § 609.582, subd. 3 (1988) (establishing third-degree burglary to include building entry to “steal” property). It is true that the legislature might have made the relationship between “stealing” and “theft” clearer by defining the element as the “intent to commit theft” rather than “the intent to steal.” But the relationship between these everyday words is so obvious that we cannot reasonably infer that, by not using the wordier “commit theft” option, the legislature intended some narrower meaning.

II

Briscoe’s related jury-instruction argument fails under the same reasoning. He did not object to the now-challenged instruction, so we review it only for plain error. To succeed under that standard, Briscoe must show that there was an error, the error was plain, and the error affected his substantial rights and seriously undermined the fairness and integrity of the judicial proceeding. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Briscoe identifies no error, so our analysis ends at the first step.

Briscoe argues that the district court erred by instructing the jury to consider whether he “entered the building with the intent to commit a crime of [t]heft” rather than “with the intent to steal.” A district court has “considerable latitude” choosing jury-instruction language, but instructions that materially misstate the law are erroneous. *See Gulbertson v. State*, 843 N.W.2d 240, 247 (Minn. 2014). An instruction materially misstates the law if, for example, it is “inconsistent with the statutory language.” *See State v. Davis*, 864 N.W.2d 171, 178 (Minn. 2015) (holding a burglary instruction to be erroneous when it failed to track the statutory element that a defendant must have developed the intent to

commit a theft before a building entry rather than after entry). Contrary to Briscoe's suggestion, in *Davis* it was not the district court's failure to use the exact statutory language that made its instruction erroneous, it was using language that was inconsistent with the statutory language. And reversing a conviction based on an instruction's failure to include verbatim statutory language would render meaningless the direction to afford the district court "considerable latitude" in instructing the jury. *See Gulbertson*, 843 N.W.2d at 247. We need not repeat our discussion recognizing the link between stealing and theft, but based on that discussion, we hold that the challenged jury instruction accurately stated the law.

Affirmed.