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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0418**

State of Minnesota,
Respondent,

vs.

Justin Arthur Barron,
Appellant.

**Filed February 3, 2020
Affirmed in part, reversed in part, and remanded
Cochran, Judge**

Dakota County District Court
File No. 19HA-CR-18-1927

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

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Hastings, Minnesota (for respondent)

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Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and
Cochran, Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

In this direct appeal from a judgment of conviction for threats of violence and two
counts of felony domestic assault, appellant Justin Arthur Barron argues that (1) the district

court denied him due process of law by failing to deliver sufficient oral instructions to the jury in the final charge; and (2) the district court erred in entering convictions for two counts of domestic assault. We affirm on the issue of the jury instructions, but reverse and remand with instructions to vacate one of the domestic-assault convictions.

FACTS

In July 2018, the state charged appellant Justin Arthur Barron with one count of threats of violence under Minn. Stat. § 609.713, subd. 1 (2016), one count of domestic assault by strangulation under Minn. Stat. § 609.2247, subd. 2 (2016), and two counts of felony domestic assault under Minn. Stat. § 609.2242, subd. 4 (2016) (one count under the theory that Barron intentionally caused fear of harm and one count under the theory that Barron intentionally inflicted or attempted to inflict bodily harm). The complaint described an incident in which Barron physically assaulted a woman he had been living with by hitting her, dragging her on the ground, and choking her. Barron also allegedly told the victim that he was going to kill her, and the victim feared that she was going to die.

The case proceeded to trial. At the start of trial, the district court gave each juror a written copy of the preliminary jury instructions and also read the instructions aloud to the jury. The district court orally instructed the jury as to the elements of each offense. After providing the elements of each offense, the district court instructed the jury that it could not convict Barron of an offense unless it found that each element of the offense had been proven beyond a reasonable doubt. The district court instructed the jury that Barron was presumed innocent, and that the burden of proving guilt beyond a reasonable doubt was on the state.

While giving closing instructions to the jury, the district court orally restated the instructions regarding the presumption of innocence and the definition of proof beyond a reasonable doubt. The district court did not orally restate the elements of the four charged offenses. Instead, the district court told the jury to refer to the written preliminary instructions that the district court read aloud at the beginning of trial. The district court reminded the jury where it could find the elements of each offense within the preliminary instructions. Barron did not object to the district court's final instructions. The jury found Barron guilty of threats of violence and both counts of domestic assault. The jury found Barron not guilty of domestic assault by strangulation.

The district court sentenced Barron to 39 months in prison for the threats of violence count. The district court indicated that it would not sentence Barron on the two domestic assault counts. The warrant of commitment shows that the district court formally convicted Barron of all three offenses for which he was found guilty.

Barron appeals.

D E C I S I O N

Barron raises two issues on appeal: (1) whether the district court's closing instructions deprived Barron of due process of law and require a new trial; and (2) whether the district court erred by formally convicting Barron of both domestic-assault counts. We address each issue in turn.

I. The district court's final instructions do not constitute reversible error.

Relying almost exclusively on *State v. Peterson*, 673 N.W.2d 482, 485-86 (Minn. 2004), Barron argues that the district court's oral instructions in its final charge

deprived him of due process of law. He maintains that the district court's decision to omit the elements of the charged offenses and omit the requirement that each element must be proved beyond a reasonable doubt from its final oral charge was a structural error in the trial requiring a remand for a new trial. The state contends that the district court's oral closing instructions complied with *Peterson* and that, when the unobjected-to jury instructions are reviewed for plain error, there is no basis to reverse Barron's convictions.

A district court has "considerable latitude" in selecting the language for its jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). A district court abuses its discretion, however, if its jury instructions "confuse, mislead, or materially misstate the law." *State v. Taylor*, 869 N.W.2d 1, 14-15 (Minn. 2015) (quotation omitted). We review jury instructions "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). We will not reverse for an erroneous omission of a jury instruction if the error is harmless. *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004).

Ordinarily, we do not consider an alleged error in jury instructions unless the instructions were objected to at trial. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). But an appellate court may review unobjected-to instructions for plain error. *See id.*; *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). "To establish plain error, an appellant must show that a district court's ruling (1) was error, (2) that the error was plain, and (3) that the error affected appellant's substantial rights." *Ihle*, 640 N.W.2d at 916.

And while courts are generally afforded ample discretion in their jury instruction, "[a] constitutional defect in a jury instruction defining reasonable doubt requires automatic

reversal of a conviction.” *Peterson*, 673 N.W.2d at 487. Reversal is required “in such a case because the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury’s findings, leaving the reviewing court only to speculate on its own as to what a reasonable jury would have done.” *Id.* (quotations omitted). In *Peterson*, the supreme court held that a district court’s failure to orally instruct the jury on the presumption of innocence and the definition of reasonable doubt in its closing instructions deprives the defendant of due process because it “obscure[s] and dilute[s]” the state’s burden of proof. *Id.* The fact that the district court accurately delivers the instructions in its oral preliminary instructions and provides the jury with the instructions in writing for use during deliberations does not remedy the error. *See id.* at 486. Under *Peterson*, such an error is subject to reversal regardless of whether the defendant suffered any prejudice as a result of the instructions. *Id.* at 487.

The parties disagree over whether the alleged error in this case is subject to plain-error review or if it is an error of the magnitude described in *Peterson*, requiring a new trial regardless of any prejudice claimed by Barron. We conclude that plain-error review is appropriate.

In *Peterson*, the supreme court placed great emphasis on the district court’s failure to deliver oral closing instructions on the presumption of innocence and the reasonable doubt standard of proof. *Id.* at 486-87. The supreme court indicated that the district court, “in the final charge to the jury, has an obligation to clearly instruct the jurors on exactly what it is that they must decide.” *Id.* at 485; *see also* Minn. R. Crim. P. 26.03, subd. 19(6) (“The court must instruct the jury on all matters of law necessary to render a verdict and

must instruct the jury that they are the exclusive judges of the facts.”). Because the presumption of innocence is a “bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law,” and because the reasonable-doubt standard “provides concrete substance for the presumption of innocence,” the district court *must* orally deliver instructions on these principles in its final charge. *Peterson*, 673 N.W.2d at 486-87 (quotations omitted). Providing written instructions on these principles to the jury, even if the instructions were delivered orally in preliminary instructions, is not sufficient to satisfy the defendant’s right to due process. *Id.* Moreover, by focusing only on instructing the jury on the elements of the offense and not providing instructions on the burden of proof, the district court in *Peterson* “impermissibly elevat[ed] some of the instructions over others.” *Id.* at 487. Instructions that “obscure[] or dilute[]” the state’s burden of proof or the presumption of innocence, such as the instructions delivered in *Peterson*, deprive the defendant of due process and entitle the defendant to a new trial. *Id.*

We conclude that the district court’s instructions in this case did not obscure or dilute the state’s burden of proof and therefore did not deprive Barron of due process. Unlike in *Peterson*, the district court here orally reiterated both the presumption of innocence and the definition of proof beyond a reasonable doubt in its final charge to the jury. And, while the district court did not deliver final oral instructions on the elements of each charged offense, it read the elements of each offense to the jury in its preliminary instructions, provided the jury with written instructions that contained the elements of each offense, and orally instructed the jury in its final charge on where the jury could find the

elements of each offense in the written preliminary instructions. The district court also told the jury in its oral preliminary instructions that in order to convict on a given charge, it must find that each element of the offense was proved beyond a reasonable doubt. The district court's instructions accurately defined the presumption of innocence and the proof-beyond-a-reasonable-doubt standard.

We also note that Barron's reliance on *Peterson* to argue that the failure to orally instruct the jury on each element of the offense in the final charge is a structural error, not subject to harmless-error review, is greatly diminished by a more recent supreme court decision—*State v. Watkins*, 840 N.W.2d 21 (Minn. 2013). In *Watkins*, the supreme court held that a district court's failure to instruct the jury on an element of an offense entirely was trial error subject to harmless-error analysis. 840 N.W.2d at 26-27. We cannot conclude that the district court's failure to deliver oral instructions on the elements of the charged offenses is a structural error requiring reversal if the total omission of instructions on an element of the offense is merely a trial error.

Having determined that our ordinary standard of review applies, we review the district court's unobjected-to jury instructions for plain error. To establish plain error, the appellant must demonstrate that (1) the district court erred, (2) the error was plain, and (3) the error "affected appellant's substantial rights." *Ihle*, 640 N.W.2d at 916. Only where all three prongs are met will an appellate court consider whether reversal is necessary to "ensure fairness and the integrity of the judicial proceedings." *Id.*

Barron argues that the district court's final oral instructions to the jury constituted error because the instructions failed to identify the elements of each offense and failed to

specify that each element must be proved beyond a reasonable doubt. Even assuming, without deciding, that the district court's final charge to the jury constituted error and that the error was plain, we conclude that Barron has not demonstrated that any such error in the instructions affected his substantial rights.

Appellate courts presume that the jury followed the district court's instructions. *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). In its preliminary written and oral instructions, the district court instructed the jury on the elements of each offense, instructed the jury that it may only find Barron guilty if it finds that the state proved each element of an offense beyond a reasonable doubt, and gave the jury accurate instructions on the presumption of innocence and the state's burden of proof beyond a reasonable doubt. In its closing instructions, the district court orally reiterated the instructions regarding the presumption of innocence and the definition of the burden of proof beyond a reasonable doubt. And, while the district court did not orally restate the elements of the four charged offenses or restate that each element must be proved beyond a reasonable doubt, the district court referred the jury back to the written preliminary instructions that included these specific instructions. Barron offers no argument as to how the jury may have not followed these instructions.

Moreover, the jury's verdicts demonstrate that they understood that they were required to consider whether each element of an offense was proved beyond a reasonable doubt because the jury found Barron guilty of domestic assault-harm under Minn. Stat. § 609.2242, subd. 4, but found Barron not guilty of domestic assault by strangulation under Minn. Stat. § 609.2247, subd. 2. The only difference in the elements of these two

offenses is that for the strangulation charge, the state must prove that the assault happened by strangulation. *Compare* Minn. Stat. § 609.2242, subd. 1 (2016) (defining domestic assault as an assault against a family or household member) *with* Minn. Stat. § 609.2247, subd. 2 (defining domestic assault by strangulation as an assault against a family or household member done by strangulation). To reach these verdicts, the jury necessarily found that the state had proved beyond a reasonable doubt that Barron assaulted the victim by inflicting or attempting to inflict bodily harm, but found that the state had not proved beyond a reasonable doubt that Barron committed the assault by strangulation.

Because Barron has not demonstrated a plain error that affected his substantial rights, we discern no basis to reverse all of Barron’s convictions and remand for a new trial.

II. The district court erred by formally convicting Barron of two counts of domestic assault under Minn. Stat. § 609.2242, subd. 4.

The district court formally convicted Barron of both counts of domestic assault (fear and harm) under Minn. Stat. § 609.2242, subd. 4, and of the threats-of-violence count, but only pronounced a sentence on the threats-of-violence count. The parties agree that the district court erred by entering convictions for both domestic-assault charges in violation of Minn. Stat. § 609.04 (2016). We also conclude that multiple convictions under Minn. Stat. § 609.2242, subd. 4, violates Minn. Stat. § 609.04 in this case.

Section 609.04 provides that a person may be convicted “of either the crime charged or an included offense, but not both.” Application of Minn. Stat. § 609.04 is a question of law, which this court reviews de novo. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522

(Minn. 2013). This statute “bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985); *see also State v. Smith*, 299 N.W.2d 504, 506 (Minn. 1980) (noting that Minn. Stat. § 609.04 prevents “convicting a defendant twice for the same offense (or of one offense and a necessarily included offense) on the basis of the same act” (quotation omitted)).

Here, both counts of domestic assault alleged conduct—intentionally causing fear of harm and intentionally inflicting or attempting to inflict bodily harm—occurring over the course of a single incident against the victim. The crimes are undoubtedly part of a single behavioral incident. *See State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014) (explaining that offenses are part of a single behavioral incident “if the offenses occurred at substantially the same time and place and were motivated by a single criminal objective”). The convictions are under the same section of the same criminal statute. Thus, entering convictions for both counts of domestic assault violates Minn. Stat. § 609.04. We remand to the district court to vacate one of the domestic-assault convictions and correct the warrant of commitment, leaving the jury’s finding of guilt on the vacated count in place. On remand, the district court must follow the procedure first outlined by the supreme court in *State v. LaTourelle*:

We hold that the proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of

the remaining adjudicated convictions can then be formally adjudicated and sentence imposed, with credit, of course, given for the time already served on the vacated sentence.

343 N.W.2d 277, 284 (Minn. 1984).

Affirmed in part, reversed in part, and remanded.