

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0561**

State of Minnesota,
Respondent,

vs.

Thomas Joseph Kastigar,
Appellant.

**Filed April 6, 2020
Affirmed in part, reversed in part, and remanded
Segal, Judge**

Hennepin County District Court
File No. 27-CR-17-25577

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Segal, Judge; and Peterson,
Judge.*

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

UNPUBLISHED OPINION

SEGAL, Judge

In this direct appeal from final judgment, appellant Thomas Joseph Kastigar argues that the guilty verdicts for felony malicious punishment of a child, felony neglect of a child and felony endangerment of a child must be reversed because the district court omitted essential elements of aiding and abetting liability from the jury instructions. We affirm in part, reverse in part, and remand.

FACTS

Kastigar has four children with his wife, Amil Yonis, and two sons, C.K. and M.O., from relationships with two other women. The criminal charges relate to the treatment of M.O., the younger of the two boys. Kastigar and Yonis married in 2007 and lived with Kastigar's mother (grandmother), along with C.K. and M.O. In 2010, after the birth of their first daughter, Kastigar, Yonis and the children, including C.K. and M.O., moved out of grandmother's home and into an apartment. The two sons were subject to increasingly harsh treatment after the move from grandmother's home. In 2013, when C.K. was 14 years old, he ran away from home and moved in with his mother. C.K. did not return to live with Kastigar and Yonis.

In July 2017, M.O. found money to buy a box of Oreo cookies. M.O. ate the box of cookies, got sick and threw them up. M.O. testified that Kastigar and Yonis yelled at him and said, "You're going to regret it tomorrow," and then told him, "We can't beat you right now because it's late. We don't want to wake up the neighbors." After that Yonis said, "[T]omorrow you're gonna wish you were never born." The next morning M.O. snuck out

of the house and contacted his grandmother through Facebook using a computer at a public library. Grandmother picked M.O. up from the library and took him home with her. Grandmother contacted Kastigar to let him know that M.O. was with her and he would be staying the night. Kastigar never responded to grandmother's text messages. Neither Kastigar nor Yonis had any contact with M.O. or grandmother over the next approximately five weeks.

In mid-August 2017, grandmother initiated contact with Kastigar to request that he allow her to enroll M.O. in school. Kastigar responded that grandmother needed to return M.O. to his house. When grandmother told M.O. this, he laid down on the floor and cried. Grandmother asked M.O., "[D]o you want us to call child protection? Because otherwise we have to bring you home to your dad." M.O. said "yes," and grandmother called child protection. A child-protection case file was opened due to allegations of physical abuse and failure to provide sufficient food to M.O. During the course of the child-protection investigation, M.O. was interviewed at CornerHouse and attended medical appointments at the Center for Safe and Healthy Children. Respondent State of Minnesota then filed charges against both Kastigar and Yonis for felony malicious punishment of a child (substantial and great bodily harm) under Minn. Stat. § 609.377, subds. 5, 6 (2016); felony neglect of a child resulting in substantial harm under Minn. Stat. § 609.378, subd. 1(a)(1) (2016); and felony child endangerment resulting in substantial harm under Minn. Stat. § 609.378, subd. 1(b)(1) (2016).

A joint jury trial was held from November 5-20, 2018. At trial, M.O. testified and the recording of his interview at CornerHouse was played for the jury. M.O. testified that,

starting in the fourth or fifth grade, Yonis and Kastigar hit him and that Yonis hit him on the head so hard he lost consciousness. He told the CornerHouse interviewer that Kastigar hits him with a wooden spoon on his bottom and Yonis hits him “all over [his] head, arms, knees, ankles, elbows, sides, calf.” M.O. also testified that he was forced to stand all night after Kastigar tied M.O.’s hands together with a jump rope that was then tied to the hinge of a door. M.O. testified that, when he would tell a lie, Kastigar would hit him with the leather part of a belt on his butt. And he reported that Yonis would beat him “everywhere.” He said that, when he was 13, Yonis yelled at him and hit him for the first time with the spoon, but his “dad wasn’t home at the time.”

M.O. also testified that he was not allowed to sit down while at home and had to stand in his “spot” in the hallway for long periods of time; he was not allowed to eat with the family and had to eat standing in his hallway spot; he had to ask permission to use the bathroom, which was often denied causing him to have accidents; and he was not allowed to sleep on his bed because of these accidents and had to sleep on the floor. M.O. had bedwetting, bladder and incontinence issues that continued into his teenage years.

M.O. asserted that his parents withheld food and water as a punishment. He testified he would eat at school, but there would be times “on and off” when he was not given food at home. M.O. self-reported that he weighed only 87 pounds when he arrived at grandmother’s house on the 5th of July. When he was weighed at the doctor’s office on August 21, 2018, he weighed 98 pounds.¹

¹ Grandmother testified that she gave M.O. a nutritional supplement when he came to live with her to help him gain weight.

C.K. testified about incidents C.K. observed while C.K. was still living with Kastigar and Yonis five years earlier. C.K. testified that M.O. would get hit with a belt when M.O. would have an accident and that “90 percent of the time” it would be Yonis that hit M.O. Additionally, he testified that Yonis would hit M.O. with hangers and an open hand. He stated that when M.O. would get hit with a belt “they would fold it and hold it leather out, and then on a few occasions, [Yonis] had used the metal part at the end,” and that Yonis hit M.O. on his back more than once with a metal belt buckle. C.K. said he saw cuts on M.O.’s back from the beatings. He testified that Yonis was the one who would not let them sleep in their beds when he and M.O. had accidents. He also testified that on one occasion, after Yonis accused him and M.O. of stealing some of her “fragrance,” they were not allowed to eat dinner for two days and Kastigar beat their feet to get them to confess. C.K. testified that, even though neither of them had stolen the fragrance, M.O. eventually confessed so that they would be allowed to eat. Yonis then beat M.O. on his back with a belt for five minutes.

At trial, the director of the Center for Safe and Healthy Children, a pediatric child-abuse expert, testified. She had conducted M.O.’s medical exam after his grandmother made the child-protection report. Her testimony about the incidents of abuse and neglect by Yonis and Kastigar reported to her during her medical exam of M.O. was consistent with M.O.’s testimony about these incidents at trial. The expert also testified that, during the medical exam, she noticed two linear areas of hyperpigmentation on M.O.’s back. She testified that these patterned injuries were consistent with M.O. having been struck with an

object such as a spoon or a belt. She further testified that she observed signs of M.O. having been malnourished.

Midway through the trial, the state sought an aiding and abetting charge for each defendant. Both Kastigar's and Yonis's attorneys objected to the instruction being given because they claimed the state was adding a new charge. The judge ruled in favor of the state and allowed the added charges.

The jury acquitted Kastigar and Yonis of malicious punishment (great bodily harm), but found both guilty of malicious punishment (substantial bodily harm), neglect resulting in substantial harm, and endangerment resulting in substantial harm. Kastigar was sentenced on the malicious punishment (substantial bodily harm) charge to a year and a day in prison with execution of the sentence stayed, ordered to serve 210 days in the county workhouse, and placed on probation for three years. This appeal follows.

D E C I S I O N

Standard of Review

Kastigar contends that the jury instruction regarding aiding and abetting liability was in error and that he objected to the instruction at trial. The state contends, however, that Kastigar did not object to the specific language of the instruction and that his objection was a general one on whether the instruction should be given at all. Specifically, Kastigar objected on the ground that aiding and abetting was a new charge that should not be added to the case; he did not object to the form or substance of the instruction. We agree with the state's position, but that does not end our inquiry. While a "defendant generally forfeits the right to contest jury instructions on appeal when the defendant fails to object at trial,"

we review unobjected-to jury instructions under the plain-error standard of review. *State v. Davis*, 864 N.W.2d 171, 176 (Minn. 2015); *see also State v. Vance*, 734 N.W.2d 650, 654-55 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012).

“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 these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Under the theory of aiding and abetting liability, a person “is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05, subd. 1 (2016). An aiding and abetting liability jury instruction

must explain to the jury that in order to find a defendant guilty as an accomplice, the jury must find beyond a reasonable doubt that the defendant knew his alleged accomplice was going to commit a crime and the defendant intended his presence or actions to further the commission of that crime.

State v. Milton, 821 N.W.2d 789, 808 (Minn. 2012) (citing *State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007)).

Here, the district court instructed the jury pursuant to the language in Minn. Stat. § 609.05, subds. 1, 2 (2016).² The instructions, however, did not include the “intentionally aided” instruction as required by *Milton*: that the state had to prove Kastigar (1) knew his alleged accomplice was going to commit a crime and (2) intended his presence or actions to further the commission of that crime. Failure of a district court to include the “intentionally aided” definition in an aiding and abetting liability instruction is plain error, a point conceded by the state. *Id.* at 806.

Did the plain error affect Kastigar’s substantial rights?

Under the plain-error standard of review, this court next considers whether the error affected Kastigar’s substantial rights. To determine whether the error affected substantial rights, this court determines whether it was prejudicial and if it affected the outcome of the case. *State v. Huber*, 877 N.W.2d 519, 525 (Minn. 2016). The appellant bears the heavy burden of demonstrating that the error was prejudicial. *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002). An erroneous jury instruction “is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict.” *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006).

Here, the jury found Kastigar guilty of three different felony-level charges: malicious punishment of a child resulting in substantial bodily harm; neglect of a child resulting in substantial harm to M.O.’s physical, mental or emotional health; and

² The applicable section of the instruction provided to the jury is as follows: “The defendant is guilty of a crime committed by another person when the defendant has intentionally aided the other person in committing it, or has intentionally advised, hired, counseled, conspired with, or otherwise procured the other person to commit it.”

endangerment of a child resulting in substantial harm to M.O.'s physical, mental or emotional health. The verdict form did not distinguish between guilt as a principal actor or as an accomplice. Thus, we must assess the evidence supporting each of the three guilty verdicts against Kastigar to determine the likely impact of the erroneous jury instruction for each of the three guilty verdicts.

Turning first to the malicious-punishment count, the jury found Kastigar and Yonis guilty not just of malicious punishment of a child, but of felony-level malicious punishment, which required the jury to find that the conduct resulted in "substantial bodily harm." Minn. Stat. § 609.377, subd. 5. The criminal code defines "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. § 609.02, subd. 7a (2016).

Here, the testimony is that the harshest physical punishments were imposed by Yonis. For example, the state's child-abuse expert testified that there was hyperpigmentation on M.O.'s back that was consistent with child abuse and being hit by an object such as a belt or a wooden spoon. M.O. testified that it was Yonis, not Kastigar, who hit him on the back with a belt buckle and wooden spoon and thereby likely caused the permanent marks on M.O.'s back. There was testimony that Kastigar had hit and punched M.O. "all over" and that it was Kastigar who tied M.O. to a door hinge with a jump rope forcing M.O. to stand all night, among other punishments. Yet the sum of the testimony in the record is that the most severe physical punishments were inflicted by

Yonis.³ This leaves open the possibility that, if the proper instruction had been given, the jury may not have found Kastigar guilty of personally causing “substantial bodily harm” to M.O. as opposed to merely aiding and abetting Yonis in this conduct. We must, therefore, conclude there is “a reasonable likelihood” that the faulty instruction had “a significant effect on the jury verdict” requiring reversal of the conviction and remand of the malicious-punishment charge for a new trial “to ensure fairness and integrity of the judicial process.” *Gomez*, 721 N.W.2d at 880.

The remaining two convictions for neglect and endangerment, however, have different elements. For example, felony neglect involves a willful deprivation of basic necessities that result in substantial harm to the child’s “physical, mental, or emotional health.” Minn. Stat. § 609.378, subd. 1(a)(1). Similarly, a parent is guilty of child endangerment by “intentionally or *recklessly* causing or *permitting* a child to be placed in a situation likely to substantially harm the child’s physical, mental, or emotional health.” *Id.*, subd. 1(b)(1) (emphasis added). The record in this case has ample evidence, both in direct and expert testimony, to support the verdicts against Kastigar as a principal actor for both neglect and endangerment. For example, as evidence of neglect, M.O. was deprived of food and the child-abuse expert testified that he exhibited signs of malnourishment. M.O. also had chronic bedwetting and incontinence issues because he was denied permission to use the bathroom. For endangerment, there is ample evidence that Kastigar, at a minimum, “recklessly caus[ed] or permit[ed]” M.O. to be placed in a situation likely

³ For example, C.K. testified that “90 percent of the time” it would be Yonis that hit M.O.

to cause substantial harm to his physical, mental or emotional health. Since the plain error is only in the aiding and abetting instruction and there is sufficient evidence in the record to support the guilty verdicts against Kastigar as a principal actor on the neglect and endangerment counts, we conclude that the error did not have a “reasonable likelihood” of having “a significant effect on the jury verdict.” *Gomez*, 721 N.W.2d at 880. Therefore, we affirm the convictions for neglect and endangerment under Minn. Stat. § 609.378, subd. 1(a)(1), (b)(1), respectively.

In sum, we reverse and remand for a new trial on the malicious-punishment charge. And we remand for sentencing on the convictions for neglect or endangerment. *See State v. Kebaso*, 713 N.W.2d 317, 323 (Minn. 2006).

Affirmed in part, reversed in part, and remanded.