STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1779

State of Minnesota,
Respondent,

vs.

Maurice Joel Dow,
Appellant.

Filed October 30, 2023
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-21-16805

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

Mary F. Moriarty, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Worke, Presiding Judge; Ross, Judge; and Halbrooks, Judge.*

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

NONPRECEDENTIAL OPINION

WORKE, Judge

In this direct appeal from final judgment, appellant challenges his first-degree burglary conviction, arguing that the district court's jury instructions violated his right to a unanimous verdict. We affirm.

FACTS

On September 4, 2021, J.M. was asleep in his home alone when appellant Maurice Joel Dow entered J.M.'s home without permission. At about 3:00 a.m., J.M. was awakened by a loud noise that he thought came from inside of his home. J.M. left his upstairs bedroom to investigate the noise and saw Dow standing in the doorway of his upstairs office, "sort of lilting and holding something in his hand." J.M. shouted at Dow and told him to get out of his home. J.M. testified that Dow responded by saying something like, "Then let me out of the room." J.M. also testified that he was afraid and that when he "saw [Dow], [he] experienced a surge of adrenaline."

Dow approached J.M. and put his hand on J.M.'s neck. Dow demanded that J.M. let him "in the room." Dow let go of J.M.'s neck and walked into J.M.'s bedroom, allowing J.M. to run down the stairs and out of the house. J.M. ran into the street, flagged down a passing car, and told the driver to call 911. Police officers arrived and briefly spoke to J.M. before they entered J.M.'s home. The officers found and arrested Dow inside.

Respondent State of Minnesota charged Dow by amended complaint with first-degree burglary under Minn. Stat. § 609.582, subd. 1(c) (2020) (assault), first-degree burglary under Minn. Stat. § 609.582, subd. 1(a) (2020) (disorderly conduct), and

misdemeanor trespass under Minn. Stat. § 609.605, subd. 1(b)(4) (2020). A jury trial was scheduled for August 2022.

Following a four-day trial, the district court gave the jury an instruction that included the elements of first-degree burglary involving an assault. Dow made no objection to the district court's instructions. The jury found Dow guilty of all three counts.

The district court sentenced Dow to 92 months in prison for the first-degree burglary (assault) conviction. In so doing, Dow claims that it was plain error for the district court to not sua sponte instruct the jurors that they had to agree on which type of assault Dow committed, assault-fear or assault-harm. This appeal followed.

DECISION

Dow seeks reversal of the final judgment and a new trial, arguing that the district court erred when it failed to give the jury a specific unanimity instruction. Because the district court's jury instruction did not contravene settled law, Dow cannot demonstrate plain error.

"Jury verdicts must be unanimous in criminal cases." *State v. Lagred*, 923 N.W.2d 345, 348 (Minn. App. 2019); *see also Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (holding that Sixth Amendment right to jury trial as incorporated against states requires jury unanimity for serious offenses). "To achieve that end, a jury must 'unanimously find [] that the [state] has proved each element of the offense.'" *State v. Pendleton*, 725 N.W.2d 717, 730-31 (Minn. 2007) (first alteration in original) (quoting *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002)). This court has previously held this to mean that "the jury must

unanimously agree on which acts the defendant committed if each act itself constitutes an element of the crime." *State v. Stempf*, 627 N.W.2d 352, 354-55 (Minn. App. 2001).

When there is no objection to the district court's jury instruction, we review for plain error. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). Plain error exists if: (1) there is error; (2) that is plain; and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If any prong is not satisfied, the reviewing court need not address the others. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017). However, when the three prongs are met, appellate courts "may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Crowsbreast*, 629 N.W.2d at 437 (quotation omitted). We may consider a district court's failure to give a jury instruction if the plain error affected the defendant's substantial rights. *State v. Montermini*, 819 N.W.2d 447, 459 (Minn. App. 2012), *rev. denied* (Minn. Nov. 20, 2012); *see also* Minn. R. Crim. P. 31.02. "Whe[n] jury instructions allow for possible significant disagreement among jurors as to what acts the defendant committed, the instructions violate the defendant's right to a unanimous verdict." *Stempf*, 627 N.W.2d at 354-55.

Here, the district court instructed the jury on the elements for first-degree burglary as follows:

> First, . . . Dow entered a building without the consent of the person in lawful possession. The entry does not have to be made by force or by breaking in. Entry through an open or unlocked door or window is sufficient. A building is a structure suitable for affording shelter for human beings, including any adjacent appurtenances or connected structure.

> Second, . . . Dow assaulted a person within the building or on the building's appurtenant property. To satisfy this element, the [s]tate must separately prove the elements of assault. In this case that means the [s]tate must prove either the crime of assault in the fifth degree, causing bodily harm, or the crime of assault in the fifth degree, causing fear. To satisfy the second element, you do not need to agree on which type of assault occurred so long as each of you agrees that . . . Dow committed some type of assault. Each of the elements must be proven beyond a reasonable doubt.

This instruction does not contravene Minnesota caselaw. It is well settled that "the jury does not have to unanimously agree on the facts underlying an element of a crime in all cases." *Pendleton*, 725 N.W.2d at 731. Differing juror resolutions of "preliminary factual issues" may permissibly establish "alternative means of committing a single offense." *Id.* (quotation omitted); *see Ihle*, 640 N.W.2d at 918-19 (holding that finding guilt of obstructing legal process based on alternative means did not violate defendant's right to unanimous verdict in part because separate acts at issue were "part of a single behavioral incident"). "Alternative means" includes "different . . . states of mind . . . offered to prove an element of a crime." *See State v. Dalbec*, 789 N.W.2d 508, 511 (Minn. App. 2010), *rev. denied* (Minn. Dec. 22, 2010). To comport with due process, the alternative means must "show equivalent blameworthiness or culpability," *id.* (quotation omitted), and must not be "distinct, dissimilar, or inherently separate." *Lagred*, 923 N.W.2d at 354 (explaining that ultimate due-process question is "whether the alternative means are consistent with fundamental fairness").

Whether assault-fear and assault-harm are "alternative means by which an assault may be committed" remains an open question. *Dalbec*, 789 N.W.2d at 512-13; *see, e.g.*,

State v. Darkow, No. A20-0209, 2021 WL 2309895, at *3 (Minn. App. June 7, 2021) (citing *Dalbec* with approval and concluding that there was no plain error), *rev. denied* (Minn. Aug. 10, 2021); *State v. Muniz*, No. A17-1148, 2018 WL 3716374, at *3 (Minn. App. Aug. 6, 2018) (declining to overrule *Dalbec*); *State v. Machacek*, No. A13-0508, 2015 WL 4523505, at *6-7 (Minn. App. June 29, 2015) (concluding no plain error occurred and noting that this court has "cited *Dalbec* with approval in post-*Fleck* unpublished opinions rejecting jury-unanimity arguments in assault cases"), *rev. denied* (Minn. Sept. 15, 2015); *State v. Moallin*, No. A14-0329, 2014 WL 7237037, at *4-5 (Minn. App. Dec. 22, 2014) (citing *Dalbec* with approval and concluding that there was no plain error), *rev. granted* (Minn. Feb. 25, 2015) *and order granting rev. vacated* (Minn. Aug. 11, 2015); *State v. Evans*, No. A13-2256, 2014 WL 7011130, at *2-3 (Minn. App. Dec. 15, 2014) (applying *Dalbec* and concluding there was no plain error), *rev. granted* (Minn. Feb. 25, 2015) *and order granting rev. vacated* (Minn. Aug. 11, 2015).[1]

Under *Dalbec*, a specific unanimity instruction is not required. 789 N.W.2d at 513. In *Stempf*, a specific unanimity problem arose when separate criminal acts were performed with only one charged offense. 627 N.W.2d at 353-54. In which case, it was not clear if the jurors agreed on which criminal act occurred. *Id.* at 354-55. Here, there were not different criminal acts. Dow committed one assault and one burglary. And whether the

[1] This court is not bound by its nonprecedential opinions but may consider them as persuasive authority. *See* Minn. R. Civ. App. P. 136.01(c) (stating nonprecedential opinions may be cited as persuasive authority).

assault could have been committed as an assault-fear assault or an assault-harm assault does not create a specific unanimity issue.

Given this court's continued application of *Dalbec*, Dow cannot establish that the district court contravened settled law. Thus, the district court did not err when it instructed the jury. Because there is no error, we affirm the judgment.

Affirmed.