

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1813**

State of Minnesota,
Respondent,

vs.

Cody Michael Bauer,
Appellant.

**Filed December 23, 2024
Affirmed in part, reversed in part, and remanded
Wheelock, Judge**

Wadena County District Court
File No. 80-CR-23-421

Keith Ellison, Attorney General, Lisa Lodin, Assistant Attorney General, St. Paul, Minnesota; and

Kyra Ladd, Wadena County Attorney, Wadena, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Patrick Monnens, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Reyes, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges his convictions following a jury trial, arguing that the district court (1) incorrectly instructed the jury on the elements for each of two counts of first-degree burglary, (2) erroneously failed to obtain appellant's consent before providing

a no-adverse-inference instruction to the jury, and (3) abused its discretion by imposing consecutive sentences. Because the errors were not plain or did not affect appellant's substantial rights and the district court did not abuse its discretion when imposing consecutive sentences, we affirm. Appellant also challenges the district court's entry of judgments of conviction on both counts of first-degree burglary. Because the charges were brought pursuant to the same criminal statute and arose from the same act, we reverse and remand for the district court to vacate the judgment of conviction on count three.

FACTS

The following facts were established at trial. Shortly before midnight on May 9, 2023, appellant Cody Michael Bauer approached two teenagers who were walking through the grounds of an apartment complex and asked them where he could find P.K. After they indicated A.A.'s apartment, Bauer walked to a nearby garage that was open and grabbed what was later identified as a yellow crowbar.¹ He then followed the teenagers to A.A.'s apartment. As P.K. opened the apartment door for the teenagers, Bauer "barged his way in," pulling the crowbar out from behind his back and raising it toward P.K.'s face. Bauer hit P.K.'s nose with the crowbar, leaving a bump and abrasion and causing P.K. to feel "scared" before he wrested the crowbar from Bauer. Witnesses heard Bauer repeatedly ask P.K. "if he wanted to know what it feels like to get stabbed." They also heard A.A. tell Bauer to leave the apartment multiple times. A.A. eventually "grabbed [Bauer] by the

¹ All four witnesses of the incident identified the yellow crowbar at trial and testified that it was heavy, made of metal, and had sharp edges.

shoulder” and directed him outside. Bauer demanded that A.A. return some of his personal property. A.A. complied, and P.K. called law enforcement after Bauer left.

Respondent State of Minnesota charged Bauer with four felonies: first-degree burglary with assault in violation of Minn. Stat. § 609.582, subd. 1(c) (2022) (count 1); second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2022) (count 2); first-degree burglary with a dangerous weapon in violation of Minn. Stat. § 609.582, subd. 1(b) (2022) (count 3); and threats of violence in violation of Minn. Stat. § 609.713, subd. 1 (2022) (count 4).

Among the state’s witnesses at the jury trial were A.A., P.K., and the two teenagers, all four of whom testified consistently with one another.² Bauer chose not to testify in his own defense and waived his right to do so on the record. The jury found Bauer guilty of all four counts.

The state requested that the district court impose consecutive sentences because there were separate victims, Bauer was not amenable to probation and had not shown remorse, and A.A. had an expectation of privacy in her home. The district court agreed,

² Bauer argues that the witnesses’ testimonies were not consistent with one another; for example, he asserts that “it is unclear at what point in time Bauer swung the crowbar”—as he entered the apartment or once he was inside the apartment. He also points out that P.K. did not tell the officers that he was hit by the crowbar and that the officers did not initially notice any harm to P.K.’s nose. But these minor differences in testimony do not call into question the order of events or the facts necessary to support the jury’s findings of guilt. Moreover, we do not reweigh conflicting evidence as that is the province of the fact-finder. *See In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 223 (Minn. 2021) (“When the record reasonably supports the findings at issue on appeal, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.” (quotation omitted)).

and it entered judgments of conviction on all four counts and imposed consecutive sentences for first-degree burglary with assault and second-degree assault with a dangerous weapon, but it did not impose a sentence for first-degree burglary with a dangerous weapon or threats of violence.

Bauer appeals.

DECISION

Bauer argues that the district court erred in four ways. First, he argues that the district court plainly erred in its jury instructions for both counts of first-degree burglary—specifically, that the instruction on count one was contradictory and led the jury to an inconsistent verdict and that the instruction on count three omitted the element of intent. Second, he argues that the district court plainly erred by failing to obtain his personal consent before reading the no-adverse-inference instruction. Third, he argues that the district court abused its discretion by imposing consecutive sentences without first finding facts to support the higher sentence. And fourth, he argues that the district court erred by entering convictions on two counts of first-degree burglary. We address each argument in turn.

I. Any errors in the district court’s first-degree-burglary instructions to the jury were not plain.

Because Bauer did not object to the jury instructions at trial, we conduct a plain-error analysis. *See State v. Watkins*, 840 N.W.2d 21, 27 (Minn. 2013). In a plain-error analysis, appellate courts first consider whether (1) there was an error, (2) the error was plain, and (3) the error affected appellant’s substantial rights. *State v. Griller*,

583 N.W.2d 736, 740 (Minn. 1998). “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). To establish that their substantial rights were affected, an appellant must show that “the error was prejudicial and affected the outcome of the case.” *Griller*, 583 N.W.2d at 741. If the appellant establishes that the district court plainly erred in a manner that affected their substantial rights, then the appellate court proceeds to determine “whether reversal is required to ensure the fairness, integrity, or public reputation of judicial proceedings.” *Watkins*, 840 N.W.2d at 28 (quotation omitted). Reversal will be granted only “in those circumstances in which a miscarriage of justice would otherwise result.” *State v. Huber*, 877 N.W.2d 519, 528 (Minn. 2016) (quotation omitted).

Jury instructions are erroneous if they “confuse, mislead, or materially misstate the law.” *State v. Smith*, 674 N.W.2d 398, 401-02 (Minn. 2004). In a plain-error analysis, we review “jury instructions in their entirety to determine if they fairly and accurately reflect the law of the case.” *State v. Johnson*, 699 N.W.2d 335, 339 (Minn. App. 2005), *rev. denied* (Minn. Sept. 28, 2005). The law requires only that “the charge as a whole convey to the jury a clear and correct understanding of the law of the case.” *Id.* (quotation omitted). The model jury instructions have an important role in criminal jury trials, *State v. Peterson*, 673 N.W.2d 482, 484 n.1 (Minn. 2004), but the statutes are paramount, *State v. Burrell*, 506 N.W.2d 34, 37 (Minn. App. 1993), *rev. denied* (Minn. Oct. 19, 1993). A jury-instruction error “is prejudicial if there is a reasonable likelihood that giving the

instruction in question had a significant effect on the jury’s verdict.” *Watkins*, 840 N.W.2d at 28 (quoting *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006)).

We analyze the jury instructions for count one and count three in turn.

A. Count One—First-Degree Burglary with Assault

As to count one, first-degree burglary with assault, Bauer asserts that the jury instructions for the second and third elements were contradictory, which confused the jury and caused an inconsistent verdict. Bauer argues that the error affected his substantial rights because the jury may have found him guilty of count one even if it found that he did not complete the assault, which may, in turn, have encouraged the jury to find him guilty of second-degree assault with a dangerous weapon and first-degree burglary with a dangerous weapon. And thus, he contends that the appropriate remedy is to grant him a new trial. We disagree.

To commit first-degree burglary, a person must “enter a building without consent and with intent to commit a crime, or enter a building without consent and commit a crime while in the building.” Minn. Stat. § 609.582, subd. 1 (2022). To commit first-degree burglary with assault, the person must also “assault [another] within the building.” *Id.*, subd. 1(c). The statute is written such that the elements of the offense of first-degree burglary with assault are set forth in a logical order—a person first enters a building without

consent and with intent to commit a crime while in the building, *then* assaults another while still in the building.

In contrast, the district court's instructions to the jury on the second and third elements were as follows:

Second, the defendant assaulted the person within the building or on the building's appurtenant property.

Third, the defendant entered the building with the intent to commit the crime of 2nd Degree Assault with a Dangerous Weapon.

It is not necessary that the intended crime was actually completed or attempted, but it is necessary that the defendant had the intent to commit the crime at the time the defendant entered. Whether the defendant intended to commit the crime must be determined from all the circumstances, including the manner and time of entry in the building, the nature of the building and its contents, any things the defendant may have had or any—anything the defendant may have had with the defendant and all other evidence in the case.

This instruction presented the second and third elements in the reverse order of how they are listed in the statute. Bauer argues that the effect of reversing the order of those two elements in the jury instructions was to tell the jury that Bauer did not have to commit assault for the jury to find him guilty of first-degree burglary with assault, which was an incorrect statement of law.

We agree that the statute describes the assault as occurring *after* the person has entered the building; however, it is not clear that reversing the order of the elements of the offense in the jury instructions implied that the assault, which must occur while the person is inside the building, may occur *before* the person has entered the building and that,

therefore, the intended crime (here, the assault) need not be completed to find Bauer guilty. And even if we were to agree that reversing the order of the elements in the jury instructions as compared to the order in the statute confused the jury and thus may have been an error, Bauer identifies no authority to support his assertion that the error was plain. Indeed, the jury instructions, when read as a whole, included all the required elements and conveyed the correct law for the jury to apply. *See Johnson*, 699 N.W.2d at 339.

We therefore conclude that any error by the district court in providing jury instructions that listed the elements of the offense in a different order as compared to the statute was not plain and that we need not reach the next step in the plain-error analysis. Bauer is not entitled to a new trial to remedy the claimed error.

B. Count Three—First-Degree Burglary with a Dangerous Weapon³

As to count three, first-degree burglary with a dangerous weapon, Bauer asserts that the district court erred by omitting the element of intent from the jury instructions. Bauer further asserts that the error affected his substantial rights because the jury could have conflated this error with the error as to count one and concluded that, if he was guilty of count one, then he was guilty of count three. He argues that, therefore, the appropriate remedy for this error is a new trial.

³ We note that because this case must be remanded for the district court to vacate its entry of judgment on count three, we need not reach the merits of Bauer’s argument as to this count to resolve this appeal. Minn. R. Crim. P. 28.02, subd. 2(1) (“A defendant may appeal as of right from any adverse final judgment A final judgment within the meaning of these rules occurs when the district court enters a judgment of conviction and imposes or stays a sentence.”). Without a judgment of conviction, there is no right to appeal. However, because the parties have fully briefed this argument, we elect to address it.

Failure to instruct the jury on an element of an offense is plain error. *Webster*, 894 N.W.2d at 787; *Watkins*, 840 N.W.2d at 28. Omitting an element, however, does not automatically require a new trial; rather, appellate courts use the *Watkins* factors to determine whether a new trial is necessary:

the reviewing court must conduct a thorough examination of the record to determine whether the omission of an element of a charged offense from the jury instruction was sufficiently prejudicial in light of the standard of review. The reviewing court may consider, among other factors, whether: (1) the defendant contested the omitted element and submitted evidence to support a contrary finding, (2) the State submitted overwhelming evidence to prove that element, and (3) the jury's verdict nonetheless encompassed a finding on that element.

Watkins, 840 N.W.2d at 28-29. “For burglary, intent means the state must prove a defendant intended to commit some independent crime other than trespass after illegal entry into the building.” *State v. Ring*, 554 N.W.2d 758, 760 (Minn. App. 1996), *rev. denied* (Minn. Jan. 21, 1997). Intent is generally proved by the circumstances surrounding the acts. *Id.* To commit first-degree burglary with a dangerous weapon, the only intent required is the intent associated with any other first-degree burglary; the possession of a dangerous weapon does not require an additional form of intent. *See State v. Garcia-Gutierrez*, 844 N.W.2d 519, 522 (Minn. 2014) (“There is nothing in the language defining first-degree burglary that imposes a mens rea requirement of any kind with respect to the element of possession.”).

We agree that the district court's omission of the intent element in its jury instructions for count three was plain error; however, this error did not affect Bauer's

substantial rights. Reviewing the *Watkins* factors to determine whether the error affected Bauer's rights demonstrates that there was no prejudice and a new trial is not warranted. First, Bauer did not submit evidence at trial to contest the intent element. Second, the state submitted evidence to prove intent that included testimony from four witnesses who stated that they saw Bauer inside the house with a crowbar that was heavy and sharp-edged, heard A.A. repeatedly telling Bauer to leave, and heard Bauer ask P.K. if he wanted to know what it was like to be stabbed. And finally, the jury determined that Bauer had the intent necessary to find Bauer guilty of count one, first-degree burglary with assault, and count two, second-degree assault with a dangerous weapon; therefore, it is reasonable to conclude that the jury found Bauer guilty of count three, first-degree burglary with a dangerous weapon. For these reasons, although the district court plainly erred by omitting the element of intent in its instructions to the jury on count three, we conclude that the error did not affect Bauer's substantial rights and that we need not reach the final step of the plain-error analysis. Bauer is not entitled to a new trial to remedy the error.⁴

⁴ We also note that, in his brief, Bauer conflates the errors in the jury instructions for counts one and three, arguing that, because the district court improperly instructed the jury as to count one, the jury may have convicted him erroneously of counts two and three and that, because the district court improperly instructed the jury as to count three, the jury may have convicted him erroneously of count one. However, speculating about prejudice and conflating errors to assert prejudice does not demonstrate prejudice. See *State v. Johnson*, 915 N.W.2d 740, 746 (Minn. 2018) ("On plain error review, speculation as to prejudice is not sufficient."); *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) ("Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." (quotation omitted)).

II. The district court erred by not obtaining Bauer’s consent prior to reading the no-adverse-inference instruction, but the error did not affect his substantial rights.

Bauer argues that the district court erred by failing to obtain his personal consent prior to reading the no-adverse-inference instruction. He argues that this affected his substantial rights because the case rested on witness credibility, the witnesses provided inconsistent statements, and the instruction drew unnecessary attention to Bauer’s silence. Bauer again contends that the appropriate remedy is a new trial.

At the close of his case, Bauer decided not to testify, and the district court obtained a waiver of his right to testify on the record. The district court said that it “would be including” the instruction on the defendant’s right not to testify, known as the no-adverse-inference instruction, and asked Bauer’s counsel whether she objected. She replied, “No objection,” in Bauer’s presence. The district court read the following instruction to the jury: “The defendant has a right not to testify. This right is guaranteed by the Federal and State constitutions. You should not draw any inference from the fact that the defendant has not testified in this case.” The district court asked Bauer’s counsel three more times, each time in Bauer’s presence, whether she objected to any jury instructions or wished to make any record: first, after reading the jury instructions; second, after closing arguments; and third, before the jury returned with its verdict. Bauer’s counsel never raised any objection. Because Bauer did not object to this instruction at trial, we conduct a plain-error analysis.

Appellate courts presume that juries follow the district court’s instructions. *State v. Matthews*, 779 N.W.2d 543, 550 (Minn. 2010). A defendant cannot be compelled to be a

witness against himself under either the United States or Minnesota Constitution, U.S. Const. amend. V; Minn. Const. art. I, § 7, and invoking this right cannot be used to create a presumption against the defendant, Minn. Stat. § 611.11 (2022). Additionally, Minnesota caselaw states that the jury instruction on this right “should not be given without the personal and clear consent of the defendant.” *State v. Clifton*, 701 N.W.2d 793, 798 (Minn. 2005). Failure to obtain the defendant’s consent before providing this instruction is plain error, but “absent a showing of prejudice, is harmless.” *Gomez*, 721 N.W.2d at 880-81. There is no remedy if, “given the totality of the evidence, it seems unlikely that the jury would have reached a different verdict but for the no-adverse-inference instruction.” *Johnson*, 915 N.W.2d at 746 (quotation omitted).

In *Gomez*, Gomez did not testify at trial and the district court and Gomez’s counsel discussed on the record whether an instruction should be provided to the jury. 721 N.W.2d at 881. The district court informed Gomez’s counsel that it would not provide the instruction absent counsel’s “specific request”; however, the no-adverse-inference instruction was given to the jury and the record did not include such a request from Gomez or his counsel. *Id.* The record demonstrated that the district court had inquired whether counsel objected to the instructions before they were finalized, after they were read to the jury, and before the jury returned its verdict, and counsel never objected. *Id.* The supreme court concluded that this was plain error. *Id.* Here, the record also does not reflect that either Bauer or his counsel asked for the jury instruction but that counsel did not object to the instruction at any point in the proceeding despite being asked before the instructions were finalized, before and after they were read to the jury, and before the jury returned its

verdict. Because the district court did not obtain Bauer's consent prior to reading the instruction, we conclude that the district court plainly erred.

However, as in *Gomez*, we conclude that the plain error did not affect Bauer's substantial rights because the totality of the evidence demonstrates that it is unlikely the jury would have reached a different verdict absent this instruction. In *Gomez*, the supreme court concluded that it was unlikely that the jury would have reached a different verdict without this instruction because of the totality of the evidence, which included the state's witnesses whose testimony the jury found credible. *Id.* Here, as in *Gomez*, the state presented four witnesses to the incident, the jury found the witnesses credible, and the totality of the evidence supports the convictions on all four charges. Because it is unlikely that the jury would have reached a different conclusion without this instruction, Bauer cannot demonstrate that his substantial rights were affected by the district court's error, and we do not reach the last step in the plain-error analysis.

III. The district court did not abuse its discretion when ordering consecutive sentences on counts one and two.

The district court imposed consecutive sentences on Bauer's convictions for first-degree burglary with assault and second-degree assault. Bauer does not dispute that the sentence imposed was lawful, but he argues that the district court abused its discretion when ordering consecutive sentences because it failed to make factual findings that the sentence was not excessive and did not exaggerate the criminality of his conduct. The state asserts that the consecutive sentences were permitted under both the exception for burglary

and for multiple victims. The district court reviewed Bauer’s presentence-investigation report (PSI), heard arguments from counsel, and explained its decision as follows:

I do look at the evidence that’s presented in front of a jury, and I would note in this case there were four counts. The jury found you guilty on all four of those counts. And as a Court, I do acknowledge that they, in their function as the trier of fact, they found the facts to justify each element of each of the four counts, and I do keep that in mind as I’m sentencing. . . . [T]he evidence did show that there was a concerted plan in place to enter the unit with a weapon or with a crowbar that could be—certainly could be easily used as a weapon and that that—it occurred later in the evening. And based on all of that, I do believe the sentences recommended in the PSI and the supplement are correct.

Appellate courts review a district court’s decision to impose consecutive sentences for an abuse of discretion. *State v. Ali*, 895 N.W.2d 237, 247 (Minn. 2017). An appellate court will interfere with a district court’s sentencing discretion only if “the sentence is disproportionate to the offense or unfairly exaggerates the criminality of the defendant’s conduct.” *Id.* (quotation omitted). To determine whether the district court abused its discretion, appellate courts “look to past sentences received by other offenders.” *Id.* (quotation omitted). The appellant bears the burden of showing that the consecutive sentences exaggerate the criminality of his conduct. *State v. Hough*, 585 N.W.2d 393, 398 (Minn. 1998).

Minnesota Statutes section 609.585 expressly states that a person may be convicted of and sentenced for burglary in addition to “any other crime committed . . . while in the building.” Minn. Stat. § 609.585 (2022); *see also* Minn. Sent’g Guidelines 6 (2022) (providing a list of convictions for which consecutive sentences are permitted; both

second-degree assault with a dangerous weapon and first-degree burglary appear on that list). The supreme court has held that these sentences may be imposed consecutively because “[a] burglary and the crime committed after entering the building are not the same offense.” *State v. Alexander*, 290 N.W.2d 745, 748 (Minn. 1980). Minnesota courts have identified another instance in which consecutive sentencing is permitted, and that is when there is more than one victim. *State v. Gartland*, 330 N.W.2d 881, 883 (Minn. 1983).

The district court’s imposition of consecutive sentences is supported by law. First, Minnesota law permits consecutive sentences for burglary and any other crime committed once inside the building. Minn. Stat. § 609.585; *Alexander*, 290 N.W.2d at 748. Second, the facts demonstrate that there were multiple victims: A.A. was the victim of the burglary, and P.K. was the victim of the assault. The presence of multiple victims permits the court to impose consecutive sentences. *Gartland*, 330 N.W.2d at 883. Because the district court considered the facts and arguments for and against imposing consecutive sentences and its decision was supported by law, we discern no abuse of discretion.

IV. Bauer’s conviction on count three should be reversed and remanded for the district court to vacate the entry of judgment of conviction.

Bauer argues that the district court erred by entering a conviction on count three after entering a conviction on count one, and the state agrees. The district court entered judgments of conviction on both count one—first-degree burglary with assault—and count three—first-degree burglary with a dangerous weapon—each of which was pursuant to Minn. Stat. § 609.582, subd. 1(c). The district court then entered a sentence only on count one.

A defendant cannot be convicted 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* Minn. Stat. § 609.04, subd. 1 (2022). Bauer did not waive this argument by not raising it prior to this appeal. *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (“[The supreme court] ha[s] held that an appellant does not waive claims of multiple convictions or sentences by failing to raise the issue at the time of sentencing.”). We previously have held that it was error for a district court to enter two convictions for two counts of first-degree burglary arising from a single course of conduct. *State v. Mitchell*, 881 N.W.2d 558, 565 (Minn. App. 2016), *rev. denied* (Minn. Aug. 23, 2016).

The facts here are like those in *Mitchell*: the district court entered convictions for first-degree burglary with assault and first-degree burglary with a dangerous weapon that were based on one act. *Id.* at 563. In *Mitchell*, we concluded that the district court erred by entering convictions on both charges because, although they were charged under different subdivisions, they arose from the same act and were for the same offense; thus, we remanded for the district court to vacate one of the convictions. *Id.* at 563-64. We reach the same conclusion here.

In sum, because Bauer has not established that he is entitled to relief under a plain-error analysis as to his challenges based on jury instructions and because the district court did not abuse its discretion by imposing consecutive sentences, we affirm in part. However, because the district court erred by entering judgments of conviction on both

counts one and three, we reverse and remand for the district court to vacate its judgment of conviction on count three.

Affirmed in part, reversed in part, and remanded.