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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2456**

Shane James Johnson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 8, 2008
Affirmed as modified
Randall, Judge**

Olmsted County District Court
File No. K4-92-3639

Shane James Johnson, 1000 Lake Shore Drive, Moose Lake, MN 55767 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mark A. Ostrem, Olmsted County Attorney, 151 Southeast Fourth Street, Rochester, MN 55904 (for respondent)

Considered and decided by Randall, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

RANDALL, Judge

Appellant Shane James Johnson appeals from a summary denial of his second postconviction petition arguing that (1) the jury instructions given were erroneous; (2) he

was denied effective assistance of counsel; (3) he was deprived of his right to present a complete defense; (4) the evidence was insufficient to support his convictions; and (5) his convictions violated double jeopardy. We affirm the postconviction court's denial of relief, but we vacate the convictions for the three crimes constituting lesser-included offenses of attempted first-degree murder.

FACTS

We have previously recounted the facts of this case. *Johnson v. State*, No. C6-96-1961, 1997 WL 88952 (Minn. App. 1997), *review denied* (Minn. Apr. 15, 1997). For purposes of our decision today, it is sufficient to note that on February 18, 1994, appellant was found guilty by an Olmsted County jury of first- and second-degree attempted murder, in violation of Minn. Stat. §§ 609.17, .19(1), .185(3), (1992); aggravated robbery, in violation of Minn. Stat. §§ 609.05, .245, (1992); and assault in the second degree, in violation of Minn. Stat. § 609.222, subd. 1 (1992). On October 10, 1994, appellant was formally adjudicated guilty of each of the four counts and sentenced to the presumptive 180 months imprisonment for first-degree attempted murder.

Several years into his sentence, appellant filed his first petition for postconviction relief. He argued that (1) he was denied effective assistance of counsel because his lawyer conceded his guilt on the aggravated robbery and second-degree assault charges; (2) the evidence was insufficient to support the guilty verdicts on the attempted murder charges; and (3) his sentence must be reduced in the interests of justice. The postconviction court denied appellant's motion in its entirety and that denial was affirmed by this court following an appeal. *Johnson*, 1997 WL 88952 at *3.

Almost ten years after the denial of his first postconviction petition was affirmed by this court, appellant filed a second postconviction petition pro se. Appellant's petition was summarily denied without an evidentiary hearing, and this appeal followed.

D E C I S I O N

On review of a postconviction court's denial of relief, we "extend a broad review of both questions of law and fact." *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003). Generally this court defers to the decision of a postconviction court unless it was an abuse of its discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). All matters appellant knew or should have known at the time of his first postconviction petition may not be raised in a subsequent petition.¹ *Dunn v. State*, 578 N.W.2d 351, 352 (Minn. 1998). But this court may consider any newly presented issue as justice requires. Minn. R. Civ. App. P. 103.04.

I.

Appellant argues that omissions in the district court's jury instructions constitute plain error requiring a reversal of his convictions. Specifically he argues that the errors included (1) failure to instruct on the charge of first-degree aggravated robbery and (2) failure to include reference to Minn. Stat. § 611.02 (1992). We disagree. As a general rule jury instructions are subject to appellate review "only if there has been a motion for a new trial in which such matters have been assigned as error." *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986). Appellant did object to the jury instructions in a

¹ An exception exists for novel claims where the legal basis was not available at the time of the earlier petition. *Roby v. State*, 531 N.W.2d 482, 484 (Minn. 1995). Appellant's arguments here are not based on any novel legal theories.

postverdict motion requesting a new trial but did not object to the “omissions” claimed here. And this issue was not raised in appellant’s first postconviction petition. Although improperly presented, this court has discretion to address appellant’s arguments. Minn. R. Civ. App. P. 103.04.

Appellant argues that the district court’s jury instructions were erroneous. But appellant did not object to the form of the instructions. Generally, a party waives any objection to a jury instruction if the objection is not raised at trial. Minn. R. Crim. P. 26.03, subd. 18(3). Plain errors affecting substantial rights or creating errors of fundamental law may be considered on appeal. Minn. R. Crim. P. 31.02: *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). Under the *Griller* test, the challenging party must show (1) error; (2) that is plain; and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the *Griller* prongs are satisfied, then the court must assess whether to remedy the error to ensure the fairness and integrity of the judicial proceedings. *Id.* “District courts are allowed considerable latitude in the selection of language for jury instructions.” *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). But an instruction is in error if it materially misstates the law. *Id.* Questions of law are reviewed de novo. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

Here the district court *did* instruct the jury on the charge of first-degree aggravated robbery. Because appellant incorrectly claims these instructions were omitted, no

analysis is required to conclude his argument is not persuasive.² The postconviction court did not err in finding appellant's claim is not supported by the record.

Appellant's second claimed omission, failure to instruct a jury on Minn. Stat. § 611.02, has been considered error. *See State v. Dahlstrom*, 276 Minn. 301, 310-11, 150 N.W.2d 53, 60-61 (1967). (noting that "[w]here appropriate exception is taken, the omission [of the instruction] could constitute error"). But the omission may not always be plain error warranting reversal if the jury was instructed as to the state's burden of proof and no objection was made at trial. *Id.*

Here the jurors were given reasonable general instructions by the district court: "The State must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged." After reciting the elements for each offense the jurors were told to find appellant not guilty unless each element was proved beyond a reasonable doubt. When explaining the verdict forms the district court judge told the jurors again "[i]f in considering the charges against the defendant you find that the State has failed to sustain its burden of proving defendant guilty beyond a reasonable doubt, you will use the not guilty verdict form." And the jurors were told "it is fair and proper to find defendant not guilty unless you are convinced of guilt beyond a reasonable doubt." The jurors were informed that if they had reasonable doubt they should return a

² Appellant may have been attempting to argue that the jury should have been instructed that if they had a reasonable doubt of what crime appellant committed they should convict him only of the lesser offense. Minn. Stat. § 611.02. Here, appellant may have been suggesting the jurors should have convicted him only of the aggravated robbery if they had reasonable doubts regarding the attempted murder charge. But, as explained below, this omission does not constitute plain error if the argument is considered.

not guilty verdict. The omission of Minn. Stat. § 611.02 from the jury instructions, on these facts, was not reversible error. The jury instructions given were sufficient.

II.

Appellant argues that he received ineffective assistance of counsel because his counsel did not object to the district court's jury instructions. We disagree. The appellant bears the burden of proof on this claim. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Appellant must show he received representation "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984); *see also Gates v. State*, 398 N.W.2d 558, 561-62 (Minn. 1987) (adopting the *Strickland* standard in Minnesota). Appellant must overcome the strong presumption that his counsel's performance *was* reasonable. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Courts generally defer to counsel's judgment regarding trial strategy. *Id.*

And without prejudice to appellant it is irrelevant if his counsel was ineffective. There must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). If the probability is "sufficient to undermine confidence in the outcome" the probability is reasonable. *Gates*, 398 N.W.2d at 561. A postconviction decision regarding a claim of ineffective assistance of counsel is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). Here failure to object was not prejudicial because this addition to the jury instruction would not have changed the outcome of the case. The jurors found

appellant guilty of all charges evidently concluding that the state had proven his guilt beyond a reasonable doubt. Reversal is not warranted because, under the plain error analysis, the failure to object was not prejudicial.

III.

Appellant argues that he was denied his constitutional right to present a complete defense.³ Specifically he argues the testimony of his two co-defendants violated his due process right to an opportunity to be heard. And appellant argues that he was prohibited from calling character witnesses at trial. Appellant's rights were not violated. Due process requires that every defendant be "afforded a meaningful opportunity to present a complete defense. This means that the defendant has the right to present the defendant's version of the facts through the testimony of witnesses." *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003) (quotations and citations omitted). And generally due process requires notice and an opportunity to be heard. *Graham v. Itasca County Planning Comm'n*, 601 N.W.2d 461, 464 (Minn. App. 1999). Appellant had notice his co-defendants would be testifying as prosecution witnesses and cross-examined them both at trial. And although appellant did not have character witnesses at trial there is no evidence that appellant was prohibited from doing so. The post-conviction court did not err in finding appellant's claims to be meritless.

³ We are addressing these constitutional arguments as an exercise of our discretion. Minn. R. Civ. App. P. 103.04.

IV.

Appellant argues that the evidence was insufficient to support a first- or second-degree attempted murder conviction. A post-conviction court “may summarily deny a petition when the issues raised in it have been previously decided by the court of appeals or the supreme court in the same case.” Minn. Stat. § 590.04, subd. 3 (1992). This court has previously considered this argument and held that there was sufficient evidence to support appellant’s first-degree attempted murder conviction. *Johnson*, 1997 WL 88952 at *2. The post-conviction court’s summary denial was proper.

V.

Appellant argues that the district court violated double jeopardy by convicting him of both first- and second-degree attempted murder. His convictions did not violate double jeopardy, but his multiple *convictions* were barred by statute. That issue is resolved in appellant’s favor. *See State v. Kemp*, 305 N.W.2d 322, 325-326 (Minn. 1981).

Although double jeopardy was not violated because appellant was not subjected to duplicitous prosecutions or punishments, he was erroneously *convicted* of multiple offenses. Minn. Stat. § 609.04 (1992). This argument, not made in his first postconviction petition, was not waived because this court may consider constitutional issues not raised below where justice requires, when parties have adequate briefing time, and when the issue was implied below. *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982). Courts are empowered “at any time” to correct unlawful sentences. Minn. R. Crim. P. 27.03, subd. 9.

The Double Jeopardy Clauses of the United States and Minnesota Constitutions prohibit the state from putting a defendant in jeopardy of punishment for the same offense more than once. U.S. Const. amend. V, Minn. Const. art. I, § 7. Accordingly, both clauses protect a criminal defendant against (1) a second prosecution for the same offense following either a conviction or an acquittal and (2) against multiple punishments for the same offense. *State v. Humes*, 581 N.W.2d 317, 320 (Minn. 1998) (footnote omitted). This court reviews the constitutional issue of double jeopardy de novo. *State v. Watley*, 541 N.W.2d 345, 347 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996).

[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts.

Minn. Stat. § 609.035 (1992).

If a defendant commits multiple offenses against the same victim during a single behavioral incident, then Minn. Stat. § 609.035 requires the state to charge in a single prosecution all the offenses committed during that single behavioral incident. Further, Minn. Stat. § 609.035 provides that the defendant may be sentenced for only one of those offenses. (We do note that we do not find any of the governmental overreaching that is prohibited by the double jeopardy clause).

Appellant was convicted of first- and second-degree attempted murder in violation of Minn. Stat. §§ 609.185, subd. 3 .17 .19(2), in a single prosecution. And appellant was sentenced to 180 months imprisonment, the presumptive guidelines sentence for

attempted first-degree murder committed by an individual with a criminal history score of zero. Minn. Sentencing Guidelines § II.G (as amended eff. Aug. 1, 1992). In giving the presumptive disposition on attempted murder in the first-degree the district court made no separate disposition on the remaining counts. Put another way, double jeopardy was not violated here. All four offenses were charged in a single prosecution and appellant was sentenced for only one offense.

Although appellant was not subjected to double jeopardy it was erroneous to *convict* him of first-degree attempted murder *and* its lesser-included offenses. A defendant may be convicted of either the crime charged or a lesser-included offense, but not both. Minn. Stat. § 609.04 (1992). A lesser-included offense is “[a] crime necessarily proved if the crime charged were proved.” *Id.* “A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former.” *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986); *see also LaMere v. State*, 278 N.W.2d 552, 558 (Minn. 1979). Under this section a defendant “cannot be convicted twice for the same offense against the same victim on the basis of the same act.” *State v. Goodridge*, 352 N.W.2d 384, 389 (Minn. 1984). In Minnesota, every lesser degree of murder is considered an included offense. *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005). And in the felony-murder context aggravated robbery is an offense “necessarily proved” if felony murder is proved. *State v. Fratzke*, 354 N.W.2d 402, 410 (Minn. 1984). And assault is a lesser-included offense of aggravated robbery. *State v. Bobo*, 414 N.W.2d 490, 494 (Minn. App. 1987). Recently the Minnesota Supreme Court vacated a conviction for second-degree murder and aggravated robbery

where the appellant was also convicted of first-degree murder because it held convictions of the two lesser-included offenses violated Minn. Stat. § 609.04. *Spann v. State*, 740 N.W.2d 573-74 (Minn. 2007), *see also* Minn. R. Crim. P. 27.03, subd. 9 (providing that courts may correct sentences not authorized by law).

A guilty verdict itself does not constitute a “conviction” because a formal adjudication of guilt is required. *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999). A formal adjudication of guilt occurs “only after the district court judge accepts, records, and adjudicates the jury’s guilty verdict.” *Pierson v. State*, 715 N.W.2d 923, 925 (Minn. 2006) (citing *State v. Lindsey*, 632 N.W.2d 652, 664 (Minn. 2001)).

Here the district court convicted appellant of all four counts of the charge (perhaps not intentionally, but that is not the issue). The jury returned a verdict of guilty for the crimes of attempted first-degree murder, attempted second-degree murder, aggravated robbery, and second-degree assault. The district court judge polled each member of the jury: “You’ve heard me read each of these four verdicts. Are each of these four verdicts your verdicts?” Each juror answered in the affirmative.

The district court formally accepted each of the four jury verdicts at the sentencing hearing. The attorneys spoke of “the four convictions.”

The Sentencing Order states:

Pursuant to the jury’s verdicts of guilty entered February 18, 1994, *the Court hereby enters judgment of guilty* of Count 1, Attempted Murder in the First Degree, in violation of Minn. Stat. § 609.185(3) and § 609.17, a felony, for which the maximum penalty is 20 years; Count 2, Attempted Murder in the Second Degree, in violation of Minn. Stat. § 609.19(1) and § 609.17, a felony, for which the maximum penalty is 20

years; Count 3, Aggravated Robbery, in violation of Minn. Stat. § 609.245 and § 609.05, a felony, for which the maximum penalty is 20 years and/or \$35,000; and Count 4, Assault in the Second Degree, in violation of Minn. Stat. § 609.222, subd. 1, a felony, for which the maximum penalty is seven years and/or \$14,000.

....
The guidelines recommend sentencing (presumptive disposition) as follows: commitment to the Commissioner of Corrections (imprisonment for 21 months, 48 months, 153 months, and 180 months on Counts 4 through 1 respectively.

(emphasis added).

We vacate appellant's three convictions for second-degree attempted murder, aggravated robbery, and second-degree assault. On these facts, they are lesser-included offenses of first-degree attempted murder. Appellant's conviction and sentence for first-degree attempted murder is affirmed.

Affirmed as modified.