

*This opinion is nonprecedential except as provided by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
A22-0152**

State of Minnesota,
Respondent,

vs.

David James Whitebird, Jr.,
Appellant

**Filed January 3, 2023
Affirmed
Frisch, Judge**

Cass County District Court
File No. 11-CR-21-1248

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

Benjamin T. Lindstrom, Cass County Attorney, Walker, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

FRISCH, Judge

Following his convictions for aiding and abetting first-degree burglary and fourth-degree criminal damage to property, appellant argues that he is entitled to a new trial because the district court erroneously instructed the jury on an aiding and abetting theory

of liability not argued by the state or supported by the evidence at trial. Because any error in instructing the jury did not affect appellant's substantial rights or the fairness and integrity of the proceedings, we affirm.

FACTS

On September 24, 2021, respondent State of Minnesota charged appellant David James Whitebird with one count of first-degree burglary either as a principal or as an accomplice in violation of Minn. Stat. § 609.582, subd. 1(c) (2020), and one count of criminal damage to property in violation of Minn. Stat. § 609.595, subd. 3 (2020). The state alleged that on July 28, 2021, Whitebird and B.B. entered a house without consent and assaulted C.D. The state further alleged that Whitebird later broke a window of C.D.'s truck. At trial, the jury heard testimony from C.D., his mother C.A., C.D.'s girlfriend K.W., Whitebird's girlfriend T.W., and the deputy who responded to the incident that night. The jury's verdict was based on the following evidence presented at trial.

C.D. testified that he was at his mother's house the night of the incident. C.D. stated that Whitebird and B.B. entered the house without permission, and they both physically assaulted him. C.A. testified that she saw Whitebird and B.B. in her home, did not give either permission to enter the home, witnessed Whitebird assaulting C.D. in the home, and was able to throw Whitebird off C.D. She testified that she later saw Whitebird break a window on C.D.'s truck outside her house. C.D.'s girlfriend K.W. testified that she was at C.A.'s house the night of the incident, and she witnessed Whitebird, B.B., and C.D. fighting at the house.

The officer who responded to the incident testified that he observed that C.D. had injuries and was bloody, and there was blood in the house. C.D. told the officer that Whitebird and B.B. had assaulted him. The officer tried to locate Whitebird by checking local residences and roads, including Whitebird's residence, but the officer did not locate Whitebird. Later that same night, the officer arrived at C.A.'s house in response to a report of a broken window on C.D.'s truck. The officer observed the broken window, and C.A. provided a statement to the officer that she saw Whitebird break the window.

Whitebird's girlfriend T.W. testified that Whitebird was with her the evening of the incident, and that he did not go to C.A.'s house that night. T.W. said that she and Whitebird were sleeping at Whitebird's house when B.B. woke them by knocking on the door. B.B. tried to convince Whitebird "into going down to [C.A.'s house] to have his back." B.B. told them that he had been at C.A.'s house before arriving at Whitebird's house. Whitebird and T.W. started walking with B.B. to C.A.'s house. T.W. tried to talk Whitebird out of going to C.A.'s house because she "had a bad feeling." About halfway to C.A.'s house, T.W. turned around, and "not three seconds later," Whitebird joined her to return to his house. T.W. said she did not recall police at Whitebird's house that night and that Whitebird remained with her the entire evening.

In both its opening statement and closing argument, the state presented to the jury its theory of principal liability against Whitebird for the burglary charge. The state made no reference to or argument in support of an accomplice-liability theory in either opening statement or closing argument. After closing arguments, the district court issued jury instructions that included instructions on liability as a principal and as an accomplice for

the burglary charge. The jury found Whitebird guilty of first-degree burglary and fourth-degree criminal property damage. Whitebird moved for a new trial based on erroneous jury instructions. The district court denied Whitebird's motion.

Whitebird appeals.

DECISION

Whitebird argues that the district court erred in instructing the jury on an aiding and abetting theory because (1) the instructions suggested that the jury could find Whitebird guilty even if the state did not prove every element of the offense beyond a reasonable doubt, and (2) the state did not offer evidence or argument in support of an aiding and abetting theory.

Because Whitebird did not object to the jury instructions on these grounds during trial, we consider whether the district court's instructions amount to a plain error, and if so whether the error affected Whitebird's substantial rights. *State v. Zinski*, 927 N.W.2d 272, 275 (Minn. 2019). If Whitebird establishes that the district court committed plain error affecting his substantial rights, we may correct the error "only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Mouelle*, 922 N.W.2d 706, 718 (Minn. 2019). We address each of Whitebird's arguments in turn.

I. The jury instruction did not alter the state's burden to prove every element of the offense beyond a reasonable doubt.

Whitebird first argues that the district court erroneously instructed the jury by suggesting that the jury could find Whitebird guilty of burglary even if the state did not prove every element of the offense beyond a reasonable doubt. "[I]t is error if the

instructions confuse, mislead, or materially misstate the law.” *State v. Smith*, 674 N.W.2d 398, 401-02 (Minn. 2004). We review the jury instructions as a whole to determine whether the instructions fairly and adequately explain the law. *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). 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. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The law we consider is “the law in existence at the time of appellate review.” *Kelley*, 855 N.W.2d at 277.

After instructing the jury as to the substantive elements of the offense of first-degree burglary under Minn. Stat. § 609.582, subd. 1(c), the district court stated:

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty, unless you find that the State has proven beyond a reasonable doubt that the defendant is liable for this crime committed by another person according to the following instruction.

The district court continued its instructions, stating:

[I]f you have found that the State has proven all of the elements of burglary in the first degree, you need not consider this liability for crimes of another. If, however, you have found that not all the elements have been independently proven, you must consider liability for crimes of another.

Whitebird argues that these instructions directed the jury that the state was not required to prove all elements of the burglary offense beyond a reasonable doubt and suggested the jury was permitted to return a guilty verdict in the absence of proof beyond a reasonable doubt on all the elements of the offense. We disagree.

When viewed as a whole, the district court fairly and adequately instructed the jury that the state must prove all elements of the burglary offense beyond a reasonable doubt. The district court prefaced the instructions of the substantive offenses by stating that it was about to set forth “the law regarding the offenses charged and the elements which the State must prove beyond a reasonable doubt in order for [the jury] to return a verdict of guilty.” The district court then instructed the jury as to the elements of the burglary offense as a principal and again reminded the jury that it could only find Whitebird guilty of the offense as a principal if the state proved each listed element beyond a reasonable doubt. The district court separately instructed the jury as to a different *means* for commission of the burglary offense, as an accomplice. *See State v. Ezeka*, 946 N.W.2d 393, 407-08 (Minn. 2020) (“We have long held that aiding and abetting is not a separate substantive offense. Instead, it is a theory of criminal liability.” (quotations omitted)). In the accomplice instruction, the district court explicitly instructed the jury that Whitebird “is guilty of burglary in the first degree . . . only if the other person commits that crime” and that the “State has a burden of proving beyond a reasonable doubt that the defendant intentionally aided another person in committing the crime of burglary in the first degree,” the elements and burden of proof which the district court had previously listed. As a whole, these instructions fairly and adequately informed the jury that, regardless of whether the means of the offense involved actions as a principal or as an accomplice, the state was required to prove every element of the burglary offense beyond a reasonable doubt. Thus, the jury instructions did not misstate the law or relieve the state of its burden to prove all elements of the burglary offense beyond a reasonable doubt.

II. The district court committed plain error in instructing the jury regarding an aiding and abetting theory of liability, but such error did not affect Whitebird’s substantial rights and a new trial is not necessary to ensure the fairness and integrity of the proceedings.

Plain Error

Whitebird argues that the district court plainly erred in instructing the jury on an aiding and abetting theory of liability when the state did not present evidence of or pursue such a theory of liability at trial. We agree.

In *Ezeka*, the supreme court determined that a district court errs in instructing a jury on an aiding and abetting theory of liability in the absence of evidence that the defendant acted as an accomplice and where the state argued at trial that the defendant was directly liable for his actions as a principal. *Id.* at 408. Like the circumstances in *Ezeka*, the state here argued at trial that Whitebird was liable as a principal and presented no evidence or argument that Whitebird acted as an accomplice. On appeal, the state does not argue that Whitebird was guilty as an accomplice, nor does the state dispute that the evidence at trial only supported a finding of Whitebird’s guilt as a principal.¹ Thus, “there was no need for the district court to instruct the jurors on an aiding and abetting theory of criminal liability,” and the aiding and abetting instruction was plainly erroneous. *Id.*

¹ On appeal, the state suggests that potential uncertainty about the scope or substance of Whitebird’s alibi evidence at trial justified the aiding and abetting instruction. While such uncertainty may have justified the *proposal* of the aiding and abetting instruction before all of the evidence was received, that same uncertainty did not justify the *delivery* of the instruction after the close of the evidence when none of that evidence justified such an instruction and the state did not argue that theory of liability at trial.

Effect on Substantial Rights

Whitebird argues the plain error in the district court's issuance of the aiding and abetting instruction affected his substantial rights because the instruction afforded the jury the ability to convict him as an accomplice in the absence of evidence or argument supporting such a conviction.²

A plain error affects a defendant's substantial rights when "there is a reasonable likelihood that the giving of the instruction in question had a significant effect on the jury verdict." *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006). A defendant generally bears the burden of persuasion to demonstrate that a plain error affected their substantial rights. *Ramey*, 721 N.W.2d at 301-02 (explaining that except in the case of prosecutorial misconduct, a defendant bears the burden of showing that the error affected a substantial right). Whitebird has not met that burden.

The erroneously issued instruction did not affect Whitebird's substantial rights. The aiding and abetting instruction relates only to the alternative *means* of the commission of the offense and did not afford the jury the option to convict Whitebird for a *separate* criminal offense. *See Ezeka*, 946 N.W.2d at 407-08. Even so, the parties do not dispute that the evidence at trial only supported a theory of liability as a principal, not as an accomplice—indeed, that is the cornerstone of Whitebird's argument on appeal. And the state only asked the jury to convict based on a principal-liability theory. Accordingly,

² Whitebird also argues that the plainly erroneous instruction affected his substantial rights because it allowed the jury to find him guilty without proving all the elements of the offense beyond a reasonable doubt. We have already considered and rejected this argument above.

Whitebird has not met his burden to establish that there is a reasonable likelihood that the accomplice liability instruction had a significant effect on the jury's verdict because the evidence could only reasonably support a conclusion that the jury believed and relied upon evidence that Whitebird was the principal. *See State v. Shamp*, 427 N.W.2d 228, 230-31 (Minn. 1988).

Whitebird cites *State v. Khalil*, 956 N.W.2d 627, 643 (Minn. 2021), in support of his argument that the instruction affected his substantial rights because it is impossible to discern whether the jury relied on the erroneously issued instruction. But unlike this case, *Khalil* involved an instruction containing an affirmative misstatement of the law. And Whitebird cites no authority to support a conclusion that, where sufficient evidence supports the jury's verdict as to principal liability for an offense, an erroneously issued instruction regarding alternative means to commit that offense affects a defendant's substantial rights. *Cf. State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002) (recognizing "the jury need not always decide unanimously which of several possible means the defendant used to commit the offense in order to conclude that an element has been proved beyond a reasonable doubt" (citing *Richardson v. United States*, 526 U.S. 813, 817-18 (1999))); *State v. Begbie*, 415 N.W.2d 103, 106 (Minn. App. 1987), *rev. denied* (Minn. Jan. 20, 1988) (same); *see also State v. Rucker*, 752 N.W.2d 538, 548-49 (Minn. App. 2008) (holding jury verdict was not unfair when there was insufficient evidence of some alleged acts and the charged crime did not entitle defendant to know the specifically alleged acts for which he was convicted), *rev. denied* (Minn. Sept. 23, 2008). Accordingly, we do not discern that the accomplice liability instruction affected Whitebird's substantial rights.

Fairness and Integrity of Proceedings

Even if the identified plain error affected Whitebird's substantial rights, we "may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Mouelle*, 922 N.W.2d at 718. We do not discern that the error seriously affected the fairness or integrity of the proceedings.

Whitebird was aware of the possibility that the state may pursue an accomplice-liability theory at trial, and he squarely addressed that theory in the presentation of his case. The complaint placed Whitebird on notice of the accomplice-liability theory. At trial, Whitebird asserted in his opening statement that the evidence would not support an aiding and abetting theory of liability. Whitebird presented affirmative evidence during trial undermining an aiding and abetting theory of liability. After the close of the evidence at trial when it became clear that the state did not present evidence or argument in support of an aiding and abetting theory of liability, Whitebird nevertheless argued to the jury in closing argument that the state had failed to meet its burden to prove such a theory beyond a reasonable doubt. While the evidence does not support a theory of accomplice liability, the state introduced significant direct evidence at trial to support Whitebird's liability for burglary as a principal. Based on the evidence and argument at trial, there is a reasonable likelihood that the jury convicted Whitebird as a principal and we find no basis to conclude the erroneously issued accomplice-liability instruction seriously affected the fairness and integrity of the proceedings.

Affirmed.