

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0632**

State of Minnesota,  
Respondent,

vs.

David Berdel Tongen,  
Appellant.

**Filed June 2, 2009  
Affirmed  
Halbrooks, Judge**

Benton County District Court  
File No. 05-CR-05-2390

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Robert Raupp, Benton County Attorney, Benton County Courts Facility, 615 Highway 23, Foley, MN 56329 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Susan Andrews, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Ross,  
Judge.

## UNPUBLISHED OPINION

**HALBROOKS**, Judge

Appellant challenges his conviction of fourth-degree criminal sexual conduct on the ground that structural error resulted from the district court providing the jury with a pamphlet titled *Behind Closed Doors: A Guide for Jury Deliberations*. Because we conclude that the district court did not err, we affirm.

### FACTS

On October 17, 2005, appellant David Berdel Tongen was charged with third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subds. 1(d), 2 (2004 & Supp. 2005), and fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subds. 1(d), 2 (2004 & Supp. 2005).

Appellant's trial began on December 20, 2007. After the submission of evidence, the district court distributed jury instructions to which neither party objected. The district court instructed the jurors that they were to "follow and apply the rules of law as I give them to you, even if you believe the law is or should be different." The district court correctly explained in several instances that the burden was on the state to prove every element beyond a reasonable doubt and defined with particularity what is meant by reasonable doubt. After instructing the jury regarding the necessity of a foreperson, the district court explained that when the jurors arrived in the jury room they would find a pamphlet titled *Behind Closed Doors: A Guide for Jury Deliberations* (the pamphlet). Jurors were asked to read the pamphlet before beginning their deliberations and told that they "may find that [the pamphlet] will assist you in your deliberations, particularly with

respect to the kind of housekeeping-type issues that arise during the deliberation process.”

The pamphlet contains nine sections: Introduction; Getting Started; Selecting the Presiding Juror; Getting Organized; Discussing the Evidence and the Law; Voting; Getting Assistance from the Court; The Verdict; and Once Jury Duty is Over. The inside cover of the pamphlet states that “[t]he Guide is not intended to take the place of any instructions given to you by the judge.” In the Introduction section, the pamphlet states: “You are free to deliberate in any way you wish. These are suggestions to help you proceed with the deliberations in a smooth and timely way.” In the Getting Started section, the pamphlet suggests that jurors “[t]alk about your feelings and what you think about the case.” In the Discussing the Evidence and the Law section, the pamphlet states: “First, review the judge’s instructions on the law because the instructions tell you what to do.” Then the pamphlet instructs that “[t]he judge’s instructions will tell you if there are special rules or a set process you should follow. Otherwise, you are free to conduct your deliberations in whatever way is helpful.” After this, the pamphlet suggests that jurors “[f]or each of these elements, review the evidence, both the exhibits and witness testimony, to see if each element has been established by the evidence.”

Appellant was acquitted of the greater charge and found guilty of fourth-degree criminal sexual conduct. This appeal follows.

## DECISION

### I.

Appellant argues that the district court's decision to provide jurors with the pamphlet constituted a structural error because it minimized the presumption of innocence and the seriousness of the jury's role. The supreme court has recognized that errors are "divided into two categories: trial errors and structural defects." *State v. Dorsey*, 701 N.W.2d 238, 252 (Minn. 2005) (quotation omitted). "[S]tructural errors are 'defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards.'" *Id.* (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 1265 (1991)). These errors "require automatic reversal because such errors 'call into question the very accuracy and reliability of the trial process,'" regardless of a timely objection. *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007) (quoting *State v. Osborne*, 715 N.W.2d 436, 448 n.8 (Minn. 2006)). To differentiate between the two types of errors, the United States Supreme Court has outlined two factors: (1) "the difficulty of assessing the effect of the error"; and (2) "the irrelevance of harmlessness." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4, 126 S. Ct. 2557, 2564 n.4 (2006). The Supreme Court has also identified examples of structural errors: "the denial of counsel, . . . the denial of the right of self-representation, . . . the denial of the right to public trial, . . . and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction." *Id.* at 149, 126 S. Ct. at 2564.

In *State v. Peterson*, the Minnesota Supreme Court held that a district court's failure to include in its final charge to the jury an explanation of the presumption of

innocence and the definition of proof beyond a reasonable doubt, harmless-error review was inappropriate, and no analysis of prejudice to the defendant was needed to reverse the conviction. 673 N.W.2d 482, 487 (Minn. 2004). The supreme court reasoned that “[h]armless error analysis is not possible in such a case because ‘the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury’s findings,’ leaving the reviewing court only to speculate on its own as to ‘what a reasonable jury would have done.’” *Id.* (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 2082 (1993)).

Appellant asserts that providing the pamphlet was a structural error, requiring no analysis as to prejudice, because there is no way of quantifying the effect of the pamphlet on the jury. But appellate courts routinely review whether prejudice resulted from erroneous jury instructions. *See, e.g., State v. Vance*, 734 N.W.2d 650, 659–62 (Minn. 2007) (analyzing whether an erroneous intent instruction was harmless). Further, this case is not analogous to *Peterson*, where the district court failed to provide the jury with instructions regarding the presumption of innocence and definition of beyond a reasonable doubt. 673 N.W.2d at 487. Here, the transcript shows that the district court correctly instructed the jury as to the state’s burden of proof and the presumption of innocence, and the pamphlet itself reminded jurors that the pamphlet “is not intended to take the place of any instructions given to you by the judge.” Accordingly, determining whether any prejudice resulted is possible, thereby precluding any structural error.

Appellant also argues that providing the pamphlet resulted in a structural error because there should be “a strict rule prohibiting trial judges from giving nonrecord

material to impaneled criminal juries.” Appellant argues that such a rule “is necessary to maintain accuracy, reliability, and confidence in the trial process.” But “the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court.” *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). Therefore, providing the pamphlet to the jury was not structural error.

## II.

Because we conclude that providing the pamphlet was not a structural error and appellant neither objected to the pamphlet nor moved for a new trial on the ground that providing the pamphlet was an error, application of the plain-error rule is appropriate. *See* Minn. R. Crim. P. 31.02. Under the plain-error rule, this court has discretion to consider an unobjected-to matter on appeal if (1) there was error, (2) the error was plain, and (3) the error affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *see also* Minn. R. Crim. P. 31.02. “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.” *Griller*, 583 N.W.2d at 740.

An error is usually shown to be plain “if the error contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Minn. R. Crim. P. 26.03, subd. 18(4), provides that the district court “shall instruct the jury” and “in the discretion of the court a copy [of the jury instructions] may be taken to the jury room when the jury retires for deliberation.”

Here, providing the jury with the pamphlet was not plain error because the pamphlet is consistent with an approved jury instruction. 10 *Minnesota Practice*, CRIMJIG 3.04 (2006) provides:

When you return to the jury room to discuss this case you must select a jury member to be foreperson. That person will lead your deliberations.

In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous.

You should discuss the case with one another, and deliberate with a view toward reaching agreement, if you can do so without violating your individual judgment. You should decide the case for yourself, but only after you have discussed the case with your fellow jurors and have carefully considered their views. You should not hesitate to reexamine your views and change your opinion if you become convinced they are erroneous, but you should not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict.

The foreperson must date and sign the verdict form when you have finished your deliberations and reached a verdict.

When you agree on a verdict, notify the (bailiff) (jury attendant).

*See also State v. Young*, 610 N.W.2d 361, 363 (Minn. App. 2000) (approving CRIMJIG 3.04), *review denied* (Minn. July 25, 2000). These instructions from CRIMJIG 3.04 are consistent with the suggestions from the pamphlet that direct the jury to “[t]alk about your feelings and what you think about the case” and to select a presiding juror, on voting, on getting assistance, and on the final verdict. The district court noted that the pamphlet might assist jurors, “particularly with respect to the kind of housekeeping-type

issues that arise during the deliberation process.” This assessment of the pamphlet is correct; none of the suggestions amount to anything more than general instructions on holding a meeting and deciding issues as a group. Further, throughout the pamphlet there are instructions to the jurors to consult the district court’s instructions. Therefore, because the pamphlet is consistent with an approved jury instruction, the district court had the authority to provide the pamphlet.

Appellant complains that providing the pamphlet was an error because it did not contain instructions on the state’s burden of proof and the presumption of innocence. This argument is meritless. First, the language that appellant claims is problematic states: “For each of these elements, review the evidence, both the exhibits and witness testimony, to see if each element has been established by the evidence.” This language does not minimize the presumption of innocence or burden of proof, it merely provides a framework for the jury to tackle deliberations. Additionally, directly before this language the pamphlet states to “[f]irst, review the judge’s instructions on the law because the instructions tell you what to do,” and “[t]he judge’s instructions will tell you if there are special rules or a set process you should follow.” Since the district court repeatedly provided the correct instructions related to the state’s burden of proof and the presumption of innocence when it instructed the jury, a juror reading the pamphlet would be referred to the presumption of innocence before reading the language questioned by appellant. Finally, the pamphlet specifically indicates that it “is not intended to take the place of any instructions given to you by the judge.” Therefore, it was not an error to provide the pamphlet to the jury.



Appellant argues that the pamphlet inappropriately detracted from the solemnity of its role and seriousness of its task by describing the jury's role in "touchy-feely terms." Appellant cites *State v. Costello* for the proposition that the jury's "role is limited to deciding dispassionately whether the state has met its burden in the case at hand of proving the defendant guilty beyond a reasonable doubt." 646 N.W.2d 204, 212 (Minn. 2002) (quotation omitted). We find no merit in this argument. First, *Costello* addressed whether it was proper for jurors to question witnesses and had nothing to do with the jury instructions. Second, the pamphlet did not instruct the jurors to do anything improper or to act with passion, and it was consistent with CRIMJIG 3.04. Therefore, the district court did not commit plain error when it provided the jury with the pamphlet.

But even if there was plain error, appellant's substantial rights were not affected. Substantial rights are affected when "the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. This is a "heavy burden," and the defendant is responsible for making this showing. *Id.* Plain error is "prejudicial if there is a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted).

During the trial, the district court clearly explained the duties of the district court and the duties of the jurors. Jurors were provided with a description of the counts and the specific elements of each charge. Additionally, the district court on numerous occasions stated that each element must be proven beyond a reasonable doubt and clearly explained the definition of reasonable doubt. The district court instructed the jurors that they could consider issues in any order they preferred and that nothing said should indicate

otherwise. Further, the pamphlet itself reminded jurors that nothing stated therein should take precedent over the instructions given to them by the district court. Finally, the Minnesota Supreme Court has held that it was not prejudicial error for a district court to suggest a procedure for the jury during deliberations following a trial with multiple charges. *State v. Dahlstrom*, 276 Minn. 301, 311, 150 N.W.2d 53, 61 (1967). Given these correct instructions by the district court and indications in the pamphlet that the district court's instructions should govern, appellant cannot meet his burden of showing that providing the pamphlet to the jury affected his substantial rights. Because appellant cannot show that providing the pamphlet was plain error or that it affected his substantial rights, we affirm.

**Affirmed.**