STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1978

State of Minnesota,
Respondent,

vs.

Obuey Abella Thowl,
Appellant.

Filed June 16, 2014
Reversed
Schellhas, Judge

Mower County District Court
File No. 50-CR-13-823

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Jeremy Clinefelter, Assistant County Attorney, Austin, Minnesota (for respondent)

Michael D. Schatz, Adams, Rizzi & Sween, P.A., Austin, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges his conviction of fifth-degree controlled-substance crime, arguing that (1) the district court erred by (a) denying his motion for judgment of

acquittal and (b) instructing the jury on willful blindness, and (2) the evidence is insufficient to support his conviction. Because the district court erred by instructing the jury on willful blindness, we reverse appellant's conviction.

FACTS

While on his way home from work, an officer from the Austin Police Department stopped appellant Obuey Thowl because he was not wearing a seatbelt. Thowl identified himself with his Minnesota driver's license and told the officer that he was from Ethiopia. When Thowl opened his glove compartment to retrieve his proof of insurance, the officer noticed a sandwich-sized plastic bag filled with what he believed to be either marijuana or khat. Khat is a plant native to Ethiopia and the Arabian peninsula that contains cathinone. Although khat is used legally and widely in Ethiopia by chewing it or placing it in a drink, cathinone is a schedule I controlled substance under Minnesota law.

When the officer arrested Thowl and told him that he was under arrest for possession of khat, Thowl immediately said that the bag contained khat from Ethiopia, not marijuana. In a statement recorded in the officer's squad car, Thowl said that the substance in the bag was "a medicine drug" that he uses "for fun"; he denied that he knew the English name of the substance but called it "chat"; and said that the substance was "not a drug." A chemical analysis of the substance in the bag revealed it to be 76.6 grams of plant product containing cathinone.

Respondent State of Minnesota charged Thowl with fifth-degree controlled-substance possession under Minn. Stat. § 152.025, subd. 2(a)(1) (2012). The district court conducted a jury trial at which Thowl's defense was that he did not know that khat

contained an illegal substance. After the state rested its case, Thowl moved for a judgment of acquittal, arguing that the state had not proved beyond a reasonable doubt that Thowl knew that he possessed an illegal substance. The district court denied the motion. Relying on *United States v. Florez*, 368 F.3d 1042 (8th Cir. 2004), the state requested a willful-blindness jury instruction.[1] Over Thowl's objection, the district court gave the jury a modified version of the willful-blindness instruction, as given in *United States v. Woodard*, 315 F.3d 1000, 1004 (8th Cir. 2003). The district court submitted two questions to the jury on a special-verdict form. The jury answered no to the question, "Did the State prove, beyond a reasonable doubt, that the defendant had actual knowledge that he possessed a controlled substance?" And the jury answered yes to the question, "Did the State prove, beyond a reasonable doubt, that the defendant deliberately ignored that he possessed a controlled substance?" The district court sentenced Thowl for fifth-degree possession of a controlled substance.

This appeal follows.

D E C I S I O N

I.

Thowl argues that the district court erred by denying his motion for judgment of acquittal at the close of the state's case-in-chief. He argues that the only mens rea standard before the district court was actual knowledge of possession of a controlled substance and that the state presented no evidence or testimony that would lead a rational

[1] The state refers to the instruction in its brief as a "deliberate ignorance instruction." Federal courts use the terms "willful blindness" and "deliberate ignorance" interchangeably.

fact-finder to conclude that Thowl possessed actual knowledge. Minnesota Rule of Criminal Procedure 26.03, subdivision 18(1)(a), provides that a "defendant may move for, or the court on its own may order, a judgment of acquittal on one or more of the charges if the evidence is insufficient to sustain a conviction." "A motion for acquittal is procedurally equivalent to a motion for a directed verdict." *State v. Slaughter*, 691 N.W.2d 70, 74 (Minn. 2005). "A motion for a directed verdict presents the district court with a question of law." *M.W. Ettinger Transfer & Leasing Co. v. Schaper Mfg., Inc.*, 494 N.W.2d 29, 34 (Minn. 1992). We therefore review a denial of a judgment of acquittal de novo. *State v. McCormick*, 835 N.W.2d 498, 506 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013).

"The test for granting a motion for a directed verdict is whether the evidence is sufficient to present a fact question for the jury's determination, after viewing the evidence and all resulting inferences in favor of the state." *Slaughter*, 691 N.W.2d at 74−75. Here, the jury concluded that the state did not prove beyond a reasonable doubt that Thowl "had actual knowledge that he possessed a controlled substance." We conclude that, when viewed in the light most favorable to the state, the evidence was sufficient to sustain a conviction of fifth-degree controlled-substance crime depending on the jury's weighing of the credibility of witnesses. We therefore conclude that the district court did not err by denying Thowl's motion for judgment of acquittal.

II.

Thowl argues that the district court erred by instructing the jury on willful blindness. "We review a district court's decision to give a requested jury instruction for an abuse of discretion." *State v. Koppi*, 798 N.W.2d 358, 361 (Minn. 2011).

Minnesota law provides that "[a] person is guilty of controlled substance crime in the fifth degree . . . if (1) the person unlawfully possesses one or more mixtures containing a controlled substance classified in Schedule I . . . ." Minn. Stat. § 152.025, subd. 2(a)(1) (2012). Cathinone is a schedule I controlled substance. Minn. Stat. § 152.02, subd. 2(g)(2) (2012). "[T]o convict a defendant of unlawful possession of a controlled substance, the state must prove that defendant consciously possessed, either physically or constructively, the substance *and that the defendant had actual knowledge of the nature of the substance*." *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975) (emphasis added). Consistent with "precedent from other states and the overwhelming majority of federal circuits," this court has held that "when a defendant is prosecuted for possessing cathinone-containing khat, proof that the defendant was aware that he possessed a controlled substance satisfies the statute's actual-knowledge requirement." *State v. Ali*, 775 N.W.2d 914, 919 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010); *see United States v. Ali*, 735 F.3d 176, 186−87 (4th Cir. 2013) ("Because khat is not listed on the controlled substance schedules, the mens rea requirement of § 841(a) cannot be satisfied merely by proving that the defendant knowingly possessed khat. Instead, . . . the government must prove that the defendant

knew he or she possessed *some regulated substance*." (quotation omitted)), *cert. denied*, 134 S. Ct. 1357 (2014).

Here, as the mens rea element of the crime, the district court instructed the jury as follows:

> the Defendant knew or believed that the substance he possessed was cathinone. In order to find a defendant knew or believed that the substance he possessed was cathinone, it is not necessary for the State to prove the Defendant knew the exact nature or precise chemical name of the substance. It is enough for the State to prove that the Defendant was aware that he possessed a controlled substance.

Then the court instructed the jury on willful blindness, as follows:

> The State may prove that the Defendant acted knowingly by proving beyond a reasonable doubt that this Defendant deliberately closed his eyes to what would otherwise have been obvious to him.
>
> No one can avoid responsibility for a crime by deliberately ignoring what is obvious. A finding beyond a reasonable doubt of intent of the Defendant to avoid knowledge or enlightenment would permit a jury to find knowledge.
>
> Stated another way, a person's knowledge of a particular fact may be shown from a deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact.
>
> It is, of course, entirely up to you as to whether you find any deliberate ignorance or deliberate closing of the eyes and any inferences to be drawn from any such evidence if you find it.
>
> You may not find the Defendant acted knowingly, however, if you find that the Defendant actually believed that he did not possess a controlled substance.

Thowl argues that the district court erred by instructing the jury on willful blindness. Jury instructions must be reviewed in their entirety and must "fairly and

adequately explain the law of the case." *Koppi*, 798 N.W.2d at 362. "A jury instruction is erroneous if it materially misstates the applicable law." *Id.* "A defendant who claims that the district court erred bears the burden of showing the error and any resulting prejudice." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) (citing *State v. Shoop*, 441 N.W.2d 475, 480–81 (Minn. 1989)). Thowl objected to the district court instructing the jury on willful blindness. "Alleged errors in jury instructions are reviewed under the harmless error test." *State v. Gatson*, 801 N.W.2d 134, 147–48 (Minn. 2011). "An erroneous jury instruction is not harmless if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *Id.* at 148; *cf. United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992) ("The improper use of the willful blindness instruction *does affect* constitutional rights because it creates a risk that the defendant will be convicted because he acted negligently or recklessly thereby relieving the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt." (emphasis added) (citations omitted)).

We must address whether the trial court erred by instructing the jury on willful blindness. Minnesota appellate courts have not addressed the use of a willful-blindness instruction, but federal courts have permitted their use. *See United States v. Hernandez-Mendoza*, 600 F.3d 971, 979 (8th Cir. 2010) ("A deliberate ignorance instruction is appropriate when the evidence is sufficient to support a jury's conclusion that the defendants had either actual knowledge of the illegal activity or deliberately failed to inquire about it before taking action to support the activity." (quotation omitted)); *United States v. Hiland*, 909 F.2d 1114, 1130–31 (8th Cir. 1990) ("[E]ven when there is

evidence of actual knowledge, . . . a willful blindness instruction is proper if there is sufficient evidence to support an inference of deliberate ignorance."); *see also United States v. Zayyad*, 741 F.3d 452, 463 (4th Cir. 2014) ("A jury may rely upon willful blindness when the defendant asserts a lack of guilty knowledge but the evidence supports an inference of deliberate ignorance." (quotation omitted)); *Ali*, 735 F.3d at 187 ("It is well established that where a defendant asserts that he did not have the requisite *mens rea* to meet the elements of the crime but evidence supports an inference of deliberate ignorance, a willful blindness instruction to the jury is appropriate. . . . To be sure, caution must be exercised in giving a willful blindness instruction, and therefore it is appropriate only in rare circumstances."); *United States v. Sanchez-Robles*, 927 F.2d 1070, 1073 (9th Cir. 1991) (referring to willful-blindness instruction as *Jewell* instruction and stating that it "should not be given in every case where a defendant claims a lack of knowledge, but only in those comparatively rare cases where, in addition, there are facts that point in the direction of deliberate ignorance" (quotation omitted)).

We are concerned that a willful-blindness instruction is inconsistent with Minnesota law because it appears to constitute a permissive-inference instruction, which should be avoided. *See State v. Litzau*, 650 N.W.2d 177, 185−86 (Minn. 2002) ("[A]s a general rule, jury instructions advising that a particular fact may be inferred from other particular facts, if proved, should be avoided."). Permissive-inference instructions "are undesirable in that they tend to inject argument into the judge's charge and lengthen it unnecessarily," *State v. Olson*, 482 N.W.2d 212, 215 (Minn. 1992) (citation omitted), and

can "improperly influence the jury . . . by giving a particular step of logic the official legal imprimatur of the state," *Litzau*, 650 N.W.2d at 186 (quotation omitted).

Under the law developed in the federal courts, particularly the Eighth Circuit, "[a] deliberate ignorance instruction should not be given . . . if the evidence in a case points solely to either actual knowledge or no knowledge of the facts in question." *Hernandez-Mendoza*, 600 F.3d at 979 (quotation omitted); *see United States v. Whitehill*, 532 F.3d 746, 751 (8th Cir. 2008) ("A willful blindness instruction is not appropriate if the evidence implies defendants could only have had 'either actual knowledge or no knowledge of the facts in question.'" (quoting *United States v. Parker*, 364 F.3d 934, 946 (8th Cir. 2004))); *Barnhart*, 979 F.2d at 651 ("[I]f the evidence in the case demonstrates only that the defendant either possessed or lacked actual knowledge of the facts in question—and did not also demonstrate some deliberate efforts on his part to avoid obtaining actual knowledge—a willful blindness instruction should not be given."). The record evidence shows that Thowl *either* possessed actual knowledge that khat is a controlled substance under Minnesota law *or* lacked actual knowledge. The jury found that Thowl did not have actual knowledge that khat is a controlled substance, and the state offered no evidence that Thowl made a deliberate effort to avoid learning that khat is a controlled substance in Minnesota.

Regardless of whether a willful-blindness instruction is permitted under Minnesota law, we conclude that the district court erred by using it in this case. But Thowl is not entitled to a new trial unless the error affected the verdict. *See* Minn. R. Crim. P. 31.01 ("Any error that does not affect substantial rights must be disregarded.") When a

defendant alleges an error that does not implicate a constitutional right, we will grant a new trial if the defendant shows that a "reasonable possibility" exists that the error "significantly affected the verdict." *State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011) (quotations omitted). But, if a defendant alleges error implicating a constitutional right, we will grant a new trial unless we can say that "beyond a reasonable doubt . . . the error had no significant effect on the verdict." *State v. Watkins*, 840 N.W.2d 21, 27 n.3 (Minn. 2013) (quoting *Koppi*, 798 N.W.2d at 364). Under federal caselaw, "[t]he improper use of the willful blindness instruction *does affect* constitutional rights because it creates a risk that the defendant will be convicted because he acted negligently or recklessly thereby relieving the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt." *Barnhart*, 979 F.2d at 652 (emphasis added) (citations omitted). "In determining whether the [improper use of the jury instruction] was harmless, we endeavor to determine whether, absent the error, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty." *Id.* (quotation omitted).

The state argues that any error in giving the willful-blindness jury instruction does not implicate a constitutional right, although the state concedes in its brief that "if giving the deliberate ignorance instruction was error, said error significantly affected the verdict." We do not determine whether the erroneous use of the willful-blindness instruction implicates a constitutional right because we conclude, as the state concedes, that, because the district court erred by using the willful-blindness instruction, Thowl has shown that a reasonable possibility exists that the error significantly affected the verdict.

Indeed, the jury found that Thowl did not have actual knowledge that he possessed a controlled substance. Because the error was not harmless, we reverse Thowl's conviction. We therefore do not address Thowl's remaining arguments.

Reversed.