STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0575

State of Minnesota,
Respondent,

vs.

Mark Anthony Burciaga,
Appellant.

Filed April 14, 2025
Affirmed
Bjorkman, Judge

Steele County District Court
File No. 74-CR-23-1111

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Robert J. Jarrett, Steele County Attorney, Owatonna, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Joseph McInnis, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Harris, Judge; and Jesson, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges his conviction of first-degree burglary, arguing that (1) the evidence is insufficient because the state did not prove that he was not in lawful possession of the residence, (2) the district court plainly erred by failing to instruct the jury that more than one person can lawfully possess a residence, and (3) the district court judge deprived him of his right to an impartial judge because the judge knew the victim and counseled her about her Fifth Amendment privilege against self-incrimination. We affirm.

FACTS

In July 2023, appellant Mark Anthony Burciaga and T.O. were in a romantic relationship. T.O. rented and lived in an apartment in Owatonna. During the evening of July 20, Burciaga and T.O. argued over the phone. At 2:30 the following morning, Burciaga went to T.O.'s apartment and rang the doorbell. After T.O. let Burciaga in, the two continued to argue and a physical altercation ensued. Burciaga "grabbed" T.O. by the shoulders, "shoved" her into the sofa, and hit her on the side of her face, shoulder, and neck.

At approximately 6:00 a.m., T.O. threw Burciaga's phone out of the apartment and told him to leave. When Burciaga went outside to retrieve his phone, T.O. closed and locked the apartment door. Burciaga returned and forcibly opened the door, breaking its frame. He reentered the apartment and started "packing up his stuff." T.O. told him that "he needed to fix the door and then leave again." They argued further, and Burciaga again hit T.O. in the face.

Later that day, T.O. called police to inquire about selling a vehicle that contained items belonging to Burciaga. The responding officer decided to speak with T.O. in person, in part to complete a "drug court check-in."[1] While speaking to T.O., the officer noticed and asked T.O. about her injuries. T.O. recounted the altercation with Burciaga.

Burciaga was charged with first-degree burglary with assault and felony domestic assault. The case proceeded to a jury trial during which the state called three witnesses—T.O.,[2] the responding officer, and T.O.'s neighbor. The defense called one witness—an investigator with the Minnesota Board of Public Defense.

The state's witnesses testified consistent with the facts stated above. In addition, T.O. testified that she rented and lived in the apartment with her daughter, who was also on the apartment lease. T.O. described the apartment as her primary place of residence, indicating that she had a right to be at the apartment and that she "could have who [she] wanted . . . there." She acknowledged that Burciaga was at the apartment daily and stored items there. On the morning in question, T.O. threw Burciaga's phone out of the apartment and locked the door because she wanted him to leave. She did not give him permission to reenter the apartment; he did so by breaking the door.

[1] At all relevant times, T.O. has been on probation and participating in the district court's drug court program.

[2] T.O. was a reluctant witness. She repeatedly stated that she did not want to testify because she loves Burciaga and they were both responsible for the altercation. As discussed below, at defense counsel's request the district court advised T.O. several times of her obligations as a sworn witness and her Fifth Amendment privilege against self-incrimination.

T.O.'s neighbor testified that she saw Burciaga near the apartment the morning of July 21. The neighbor observed Burciaga walking "towards his van that he always has parked there."

The jury found Burciaga guilty as charged. The district court imposed a 75-month prison sentence for the first-degree burglary offense and a concurrent sentence of 21 months for the felony domestic-assault offense.

Burciaga appeals.

DECISION

I. Sufficient evidence supports Burciaga's burglary conviction.

When considering a sufficiency-of-the-evidence challenge, we carefully review the record "to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict they did." *State v. Crockson*, 854 N.W.2d 244, 247 (Minn. App. 2014), *rev. denied* (Minn. Dec. 16, 2014). We assume that the jury "disbelieved any testimony conflicting with that verdict." *State v. Bradley*, 4 N.W.3d 105, 110-11 (Minn. 2024) (quotation omitted).

To convict Burciaga of first-degree burglary with assault, the state was required to prove that he (1) entered a building without consent and (2) assaulted "a person within the building or on the building's appurtenant property." Minn. Stat. § 609.582, subd. 1(c) (2022). The first element requires proof that the person entered "a building without the consent of the person in lawful possession." Minn. Stat. § 609.581, subd. 4(a) (2022). Whether a person received consent to enter a building from a person in legal possession is generally a question of fact for the fact-finder. *State v. Spence*, 768 N.W.2d 104, 109

(Minn. 2009). A person is in lawful possession of a building when they have "a legal right to exercise control over the building in question." *Id.* at 108-09. Lawful possession does not require an ownership interest "but does require more than mere presence in the building." *Crockson*, 854 N.W.2d at 248. "The legal right to exercise control over a building necessarily includes the right to consent to the entry of others into that building." *Spence*, 768 N.W.2d at 109. A person in lawful possession of a building cannot be convicted of burglary. *See id.* at 110 n.5 (concluding that "it is not title to property, but the occupancy or possession of property at the time the offense was committed, that determines whether one can be liable for burglary").

Burciaga contends that the evidence is insufficient to establish that he entered the apartment without consent because he was a "lawful possessor of the apartment and a residential co-tenant with T.O." He specifically points to T.O.'s testimony that he stayed at the apartment "daily" and stored belongings there and the neighbor's testimony that he "always" parked his van in the apartment building's parking lot. We are not persuaded.

As noted above, T.O. rented the apartment, was on the lease, and "could have who [she] wanted" there. While it is undisputed that Burciaga often stayed at the apartment, on the morning in question T.O. repeatedly told him to leave, eventually throwing his phone out the door so that he would leave. T.O.'s act of locking the door behind Burciaga is further evidence that T.O. revoked any prior consent she may have given Burciaga to be in the apartment. The evidence amply establishes that Burciaga did not have T.O.'s consent and was not in lawful possession of the apartment at the time he broke the door, entered the apartment, and assaulted T.O.

To convince us otherwise, Burciaga cites *Crockson* for the proposition that a person is in lawful possession of a residence even if they are only temporarily staying there with a tenant. 854 N.W.2d at 248. In *Crockson*, this court considered whether a person (guest) who lived in an apartment with the tenant's express permission was in lawful possession and could, in turn, permit or exclude others from the apartment. *Id.* at 247-48. We answered in the affirmative and concluded that sufficient evidence supported Crockson's burglary conviction because he remained in the apartment and directed others to assault the residents after the guest told him to leave. *Id.* at 248.

Burciaga's reliance on *Crockson* is misplaced. Indeed, T.O.'s testimony that she "could have who [she] wanted" at the apartment and did not give Burciaga permission to reenter the apartment on the morning in question aligns with the guest's testimony in *Crockson* that she *gave* and then *revoked* Crockson's permission to be in the tenant's apartment. *Id.* at 247. As in *Crockson*, the evidence supports the jury's finding that any permission T.O. may have given Burciaga to afford him lawful possession of the apartment in the past ceased to exist when T.O. told him to leave, threw his phone outside, and locked the door behind him. "As the sole judge of credibility, the jury is free to accept part and reject part of the testimony of a particular witness." *State v. Hassan*, 977 N.W.2d 633, 640 (Minn. 2022) (quotation omitted). In short, the jury was entitled to weigh the evidence—including T.O.'s testimony indicating Burciaga lived at the apartment and her testimony that she told him to leave on the morning of the incident. *See State v. Mitchell*, No. A19-1452, 2020 WL 4578996, at *4-5 (Minn. App. Aug. 10, 2020) (concluding that this court will not "revisit the jury's determination that appellant did not have a right to remain on

the property" after the tenant told him to leave and evidence was presented that the appellant lived in the house, possessed a key to the house, and "kept his belongings" there), *rev. denied* (Minn. Nov. 17, 2020).[3]

Burciaga also contends that he was in lawful possession of the apartment because he could not have been evicted without written notice under landlord-tenant law. *See* Minn. Stat. §§ 504B.001-.501 (2024); *see also State v. Lilienthal*, 889 N.W.2d 780, 788 (Minn. 2017) (concluding that a defendant in a first-degree murder case was not entitled to a defense-of-dwelling instruction because the victim and defendant created a tenancy at will, which had not been terminated according to landlord-tenant law). This argument is unavailing. The record contains no evidence that even suggests Burciaga was a tenant.[4] *See Mitchell*, 2020 WL 4578996, at *4 (concluding that *Lilienthal* did not apply in a first-degree burglary case because there were "no facts in the record showing that appellant was a tenant entitled to notice of eviction").

Based on our careful review of the record, we conclude that sufficient evidence supports the jury's determination that Burciaga entered T.O.'s apartment without her consent and assaulted her.

---

[3] We cite nonprecedential cases for persuasive authority only. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

[4] Burciaga also challenges the prosecutor's statement in closing argument that Burciaga's use of the doorbell on the morning of the incident shows that he "never had a key to the apartment." Other than arguing that this inference is "speculative and irrelevant," Burciaga does not explain how the prosecutor's statement prejudiced him.

II. The district court did not plainly err by failing to instruct the jury that more than one person may lawfully possess a building.

"We review unobjected-to jury instructions for plain error." *State v. Reek*, 942 N.W.2d 148, 158 (Minn. 2020). To establish plain error, the appellant must show (1) error, (2) that is plain, and (3) that affects appellant's substantial rights. *State v. Kelley*, 855 N.W.2d 269, 273-74 (Minn. 2014). "An error is plain if it is clear or obvious," meaning that the "error contravenes case law, a rule, or a standard of conduct." *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016) (quotations omitted). If "any one of the requirements" of the plain-error test is not satisfied, we "need not address any of the others." *Lilienthal*, 889 N.W.2d at 785.

Without objection, the district court instructed the jury that "a person is in lawful possession when the person owns the building or has been given the right to control or occupy the building by the owner." Burciaga contends that the district court "plainly erred by failing to instruct the jury that more than one person could be in lawful possession of a residence." He specifically argues that the district court erroneously omitted the pattern multiple-possessor instruction, which reads: "When several persons are in lawful possession of a building or of the same part of a building, any one of these persons may consent to the entry or remaining of another person." 10A *Minnesota Practice*, CRIMJIG 17.14 (2015). We disagree.

It is true that "[a] defendant is entitled to an instruction on his theory of the case if there is evidence to support it." *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011). But the evidence adduced at trial does not support giving the instruction Burciaga urges. As

noted above, the pattern instruction indicates that when several persons are in lawful possession, "any one of these persons may consent to the entry" of another. CRIMJIG 17.14. Burciaga's theory at trial was not that a third party consented to his entrance; it was that he was a lawful possessor of the residence as a co-tenant. And the jury was not prevented from finding that both T.O. and Burciaga were in lawful possession of the apartment based on the evidence presented and the instruction given. *See Kelley*, 855 N.W.2d at 274 ("We review the jury instructions as a whole to determine whether the instructions accurately state the law in a manner that can be understood by the jury."). The jury simply weighed the evidence in favor of the state. Accordingly, we discern no plain error or impact on Burciaga's substantial rights occasioned by the jury instructions.

III. The district court did not violate Burciaga's right to an impartial judge.

Criminal defendants have the right to be tried by an impartial jury. U.S. Const. amend. VI; Minn. Const. art. I, § 6. While a corresponding right to an impartial judge is not specifically enumerated, courts have long recognized this principle. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005).

The Minnesota Rules of Criminal Procedure prohibit judges from presiding over trials if they are disqualified under the Minnesota Code of Judicial Conduct. Minn. R. Crim. P. 26.03, subd. 14(3). A judge is disqualified "in any proceeding in which the judge's impartiality might reasonably be questioned," including when the judge has "personal knowledge of facts that are in dispute in the proceeding." Minn. Code of Jud. Conduct Rule 2.11(A)(1). For purposes of the Code, personal knowledge "does not include the vast

realm of general knowledge that a judge acquires in [their] day-to-day life as a judge and citizen." *Dorsey*, 701 N.W.2d at 247.

Where, as here, the appellant did not raise a claim of judicial bias in the district court, we review the issue for plain error. *See State v. Schlienz*, 774 N.W.2d 361, 365 (Minn. 2009) (applying plain-error review to an unobjected-to claim of judicial partiality). Under plain-error review, we consider whether there was (1) error, (2) that was plain, and (3) affects the appellant's substantial rights. *Id.* at 366. To prevail on claims of unobjected-to judicial bias, an appellant must show actual bias. *See State v. Plantin*, 682 N.W.2d 653, 663 (Minn. App. 2004) ("After a defendant submits to trial before a judge without objecting to the judge on the basis of bias, we will reverse the defendant's conviction only if the defendant can show actual bias in the proceedings."), *rev. denied* (Minn. Sept. 29, 2004).

Burciaga contends that the district court judge (judge) should have recused because the judge (1) had "intimate knowledge" of T.O.'s background and (2) inappropriately counseled T.O. regarding her testimony and the privilege against self-incrimination. Neither argument persuades us to reverse.

First, the record does not support a determination that the judge's familiarity with T.O. affected his ability to impartially preside over the case. During pretrial discussions, the judge noted that he was familiar with T.O. because he "dealt with her" as a prosecutor and as a judge. The judge also noted T.O. is from the town where the judge lives. But such familiarity alone does not constitute "personal knowledge of facts that are in dispute" nor a relationship that requires the judge to disqualify themself under the Minnesota Code of Judicial Conduct. *See* Minn. Code of Jud. Conduct Rule 2.11(A)(1)-(2); *see also State*

v. Yeager, 399 N.W.2d 648, 652 (Minn. App. 1987) (stating "[t]he fact that a judge is familiar with a defendant is not an affirmative showing of prejudice"). In short, the judge's knowledge did not arise from a personal connection to T.O. or involve any disputed evidentiary facts that would require recusal.

Second, the record does not persuade us that the judge acted as T.O.'s advocate. It is true that a judge "should not act as counsel for a party by raising objections which the party should make." *Hansen v. St. Paul City Ry. Co.*, 43 N.W.2d 260, 264 (Minn. 1950). But judges have a "duty . . . to protect the witness' privilege against self-incrimination by preventing cross-examination in areas which could invade [their] constitutional protection under the Fifth Amendment." *State v. Spencer*, 248 N.W.2d 915, 919 (Minn. 1976). That is what the judge did here.

T.O. was reluctant to testify against Burciaga and concerned that her testimony could subject her to criminal charges. At defense counsel's request, the district court advised T.O. of her obligation to testify truthfully and the privilege against self-incrimination. The judge explained that T.O.'s testimony could be used against her in a criminal proceeding and that she had time to consult a lawyer before testifying. When T.O. asked if she would have to answer a question that incriminates her, the district court informed her:

> THE COURT: You'd have a Fifth Amendment right against self-incrimination. So you—no, you're not—I'm not—I'll tell you this, I'm not going to require you to say anything that might incriminate you. I won't order you to do that. Okay?
> T.O.: Okay.

The privilege against self-incrimination arose at other points in T.O.'s testimony. On one occasion, T.O. invoked the privilege without explanation; the district court did not instruct T.O. to answer the question. At a later point, T.O. asked the judge if she had to answer a question. The district court excused the jury from the courtroom and had the following discussion with T.O.:

> THE COURT: I know there are things you might not want to say, but if they're the truth, you are obligated to answer unless it would—you know, unless it would be self-incriminating, unless it will incriminate you. Okay?
> T.O.: Well, like, I feel like it could incriminate me.
>
> THE COURT: Okay. Well, I mean, I—yeah, I can't advise you on it, so I don't know what—I don't want you to tell me what the answer would be, so I'm not going to advise you whether it would or not. That's—that's your decision to make, but—I don't know, I mean, I think at least it should be—I will tell you one thing in addition to that, I mean—I mean, you're aware that there is a crime called false—giving false information to a peace officer.
> T.O.: Yeah. No, I do.
>
> THE COURT: If that—if that's what you're concerned about is self-incriminating, that's a legitimate concern, but if—if your answer is going to incriminate someone else, it does—then the Fifth Amendment right doesn't apply. You have to answer the question or you'll be in contempt. Okay?
> T.O.: Okay.

Based on our review of the record, we discern no error in the information the judge provided to T.O. And nothing in the record suggests that the judge's interaction with T.O. was intended to or did affect the content of her testimony. To the contrary, the record persuades us that the judge fulfilled his obligation to protect T.O.'s privilege against self-

incrimination. *See Spencer*, 248 N.W.2d at 919 (stating that judges have a "duty . . . to protect the witness' privilege against self-incrimination").

In sum, Burciaga has not demonstrated actual bias. Accordingly, he has not established that his right to an impartial judge was violated.

Affirmed.