STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0788

State of Minnesota,
Respondent,

vs.

Rashad Odell Collins,
Appellant.

Filed June 23, 2025
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CR-22-24940

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

Mary F. Moriarty, Hennepin County Attorney, Britta Nicholson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Smith, Tracy M., Judge.

SYLLABUS

A person guilty of burglary as a principal may also be guilty of intentionally aiding another's commission of the same burglary under Minnesota Statutes section 609.05, subdivision 1 (2022).

OPINION

ROSS, Judge

Men burglarized an apartment and fled from responding police in a car from which one or more of the men shot at a pursuing deputy's squad car. The state charged Rashad Collins with burglary, attempted murder, assault, and fleeing police, and a jury found him guilty of all the crimes except attempted murder. Collins appeals, arguing that his assault and fleeing convictions rest on insufficient evidence, that the district court erroneously instructed the jury, and that the prosecutor engaged in misconduct by misstating the law on accomplice liability. We hold that, because the evidence supports finding Collins guilty of burglary as an accomplice regardless of whether he might also have been found guilty as a principal, he is criminally liable for assault and fleeing under the theory of expansive liability. We also hold that the jury instructions either were not plainly erroneous or did not affect the verdict and that the prosecutor did not engage in misconduct. We therefore affirm.

FACTS

Four or five armed assailants, possibly including Rashad Collins and Damon Davenport, tried to rob a man outside his Brooklyn Center apartment late one evening in September 2022. We will call the robbery victim Gary, a name we have randomly chosen to protect his privacy. Gary escaped by running away, but he dropped his apartment keys. He returned to his apartment after the assailants left in two cars: a white Ford Fusion and a black Jeep Cherokee.

Later, at about 2:00 a.m., Gary heard noises and saw through his blinds Collins and Davenport at the apartment's front door. Collins was using Gary's keys to unlock the door. Gary woke his wife, and they left the apartment through its back door and went upstairs to the apartment of their landlord, who called police. Gary heard the burglars "rambling" through his apartment below. He then saw "four guys"—including Collins, who was carrying Gary's PlayStation 5—"running out" of the apartment building. Gary saw the men get into two vehicles: the Ford Fusion and the "black truck." Gary returned to his apartment to discover that the burglars had also taken cash and jewelry.

A Brooklyn Center police officer saw a white or silver Ford Fusion at about 2:00 a.m. traveling in the area with its headlights off. He shined a light on the car and saw a driver and two passengers inside. An investigator later surmised that Davenport was driving and that Collins and Diontae Moore were the passengers. The officer lost track of the Fusion, but about a half hour later Hennepin County Sheriff's Deputy Michael Kipka located and began chasing it, observing that it was going "really fast, blowing through stop signs." At one point as the fleeing car turned onto a street from an alley, the deputy heard a burst of rapid gunfire. The Fusion continued moving evasively and entered Interstate 94. Deputy Kipka pursued at speeds of about 105 miles per hour when he heard more gunfire from the Fusion and one of the rounds struck his windshield, sending glass and debris into his face and eyes.

Police officers at Gary's apartment began investigating to learn who had committed the burglary and shooting. Gary showed officers Facebook pictures of people he believed were involved. Among them were Collins, whom Gary said went by the Facebook name

"Mooka Hitta Hoe," and Davenport. Investigators watched videos recorded by cameras inside and outside Gary's apartment building. One of the individuals on the recording can be heard uttering a word that sounds like "Mooka," and someone also seemingly shouts, "Damon." The recordings revealed the suspects' apparel. One wore a black jacket with a fur-trimmed hood and an insignia of a triangle on the left breast. Another wore a camouflage balaclava. The video depicted the men armed with guns. An investigator identified one of the suspected burglars as Collins, whom the investigator opined was carrying a gun with an extended magazine.

The video recordings also depict the vehicles and their occupants. They show the white Fusion and dark-colored Jeep pulling into and then leaving the apartment's parking lot a few minutes before the burglary. An investigator believed that video footage shows Collins in the Fusion's front passenger seat. The recordings do not show the suspects re-entering their cars after the burglary, but investigators would later indicate that they believed that Collins, Davenport, and Moore were in the Fusion, with Davenport driving, and that Cortez Williams (a fourth suspect) was not.

Government cameras along I-94 captured footage of part of the pursuit. Rapid bursts of light, which an investigator concluded were the muzzle flashes of a "machine gun," emanate from the front or back seat of the passenger side of the Fusion. Cellphone location data revealed that Collins's and Davenport's phones were moving together the night of the crimes between 10:42 and 11:07 p.m. from Minneapolis to the neighborhood near Gary's Brooklyn Center apartment. They again moved together around the neighborhood from 11:08 to 11:17 p.m. and then returned together to Minneapolis. After the shooting, from

3:21 a.m. to 9:00 a.m., Collins's and Davenport's phones were together in the vicinity of the apartment of a woman assumed to be Collins's girlfriend. Moore's phone registered two calls through a cell tower near the girlfriend's apartment. Williams's cellphone data was not consistent with his traveling on I-94 around the time of the shooting.

Investigators recovered evidence related to the Fusion. The vehicle was registered to Davenport, and inside it investigators found a temporary driver's license bearing Davenport's name. Investigators found six .45-caliber cartridge casings near where Deputy Kipka thought he heard gunfire as the Fusion turned from the alley into the street. They also found a bullet casing in the seam between the Fusion's trunk and its rear window. An investigator believed that the location of that casing was consistent with a round having been fired from the passenger's side of the Fusion. The investigation revealed that all seven .45-caliber casings were fired from the same gun. Investigators found 19 nine-millimeter cartridge casings on I-94 and a damaged nine-millimeter bullet under the driver's seat of Deputy Kipka's squad car. These casings and the fired bullet were consistent with being fired from a Glock pistol. Investigators discovered a nine-millimeter Glock pistol in a room in the building where they found and arrested Moore and Williams.

Officers arrested Collins about a week after the burglary. Investigators searched his assumed girlfriend's apartment and found a jacket with fur around the hood and a triangular insignia on the breast, a camouflage balaclava, the PlayStation taken from Gary's apartment, empty boxes for firearms including a .45-caliber handgun, and a jail-identification bracelet for Williams.

An investigator searched Collins's phone. One picture recovered from the phone depicts Collins wearing a camouflage face mask and holding a black handgun that had been modified for automatic (machine-gun-like) firing, as well as Davenport wearing a black jacket with a fur-lined hood and a triangular insignia on the left breast. Video with a time stamp from the early morning hours of the day before the burglary shows Collins wearing a camouflage face mask and dark hoodie and displaying a handgun. Another recording from the same day shows Collins and Davenport brandishing handguns. A video on Collins's phone depicts a handgun with a drum magazine, which, according to one of the investigators, was the same type of magazine found in the gun that the burglars fired at Deputy Kipka. An investigator learned that Collins's Facebook history showed that he searched for Gary's name the day before the attempted robbery and that he sought "North Minneapolis Crime and Watch Information" before and after the burglary.

Officers arrested Davenport a day after the burglary while he was a passenger in a vehicle in which investigators found a loaded firearm with an extended magazine. A search at Davenport's assumed girlfriend's residence turned up identification showing Davenport's name, a loaded firearm with an extended magazine, and cash. A video on Davenport's phone depicts him with the gun that an investigator believed was used to fire at Deputy Kipka.

The state charged Collins with four crimes: attempted murder, first-degree assault, fleeing a peace officer in a motor vehicle, and first-degree burglary. A jury could not reach a verdict after a trial in 2023. But, after a 2024 trial in which a jury heard evidence of the facts just outlined, and the district court instructed the jury on the elements of each crime

and also instructed the jury on liability as an accomplice and liability under the expansive-liability statute, the jury found Collins not guilty of attempted murder but guilty of assault, fleeing, and burglary. The district court sentenced Collins to serve 68 months for burglary and 120 months, consecutively, for the assault.

Collins appeals.

ISSUES

I. Was the trial evidence sufficient to support Collins's assault and fleeing convictions?

II. Did the district court erroneously instruct the jury?

III. Did the prosecutor commit misconduct by misstating the law?

ANALYSIS

Collins makes four primary arguments on appeal. He argues that the trial evidence was insufficient to support his assault and fleeing convictions, that the district court's jury instructions on assault were erroneous, that the district court's failure to give specific unanimity instructions was erroneous, and that the prosecutor committed misconduct by misstating the law during closing argument. We address each argument.

I

Collins argues that the trial evidence was insufficient to convict him of assault and fleeing police. The state counters, arguing convincingly that, whether or not there was enough evidence to show that Collins was directly liable for assault and fleeing as a principal or accomplice, he was guilty of the crimes under the theory of expansive liability.

The state's expansive-liability theory rests on related statutes. The first, Minnesota Statutes section 609.05, subdivision 1 (2022), establishes that a defendant who intentionally aids an accomplice may be liable for the accomplice's crime:

> A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.

The second, Minnesota Statutes section 609.05, subdivision 2 (2022), expands a defendant's criminal liability to include other crimes if he intentionally aided another person's crime:

> A person liable under subdivision 1 is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended.

The district court expressly instructed the jury that Collins could be found liable for the crimes of assault and fleeing police under a theory of expansive liability.

The state maintains that, under these provisions, evidence establishing that Collins participated in the burglary makes him also liable for the reasonably foreseeable fleeing and assault even if his accomplices committed those offenses. This comports with the application of these plainly stated statutes; by intentionally aiding his fellow burglars, Collins is liable for burglary under section 609.05, subdivision 1. And by being liable for burglary under subdivision 1, he is liable under subdivision 2 for "any other" reasonably foreseeable and probable crime, including fleeing and assault, committed in the furtherance of the burglary.

Collins challenges this plain-language application of these statutes, however, contending that expansive liability under section 609.05, subdivision 2, expands the criminal liability of a person who committed a crime as an accomplice under subdivision 1, and does not extend the liability of a person who committed the crime as a principal. Put differently, Collins maintains that a person guilty of burglary as a principal may not also be guilty of intentionally aiding another's commission of the same burglary. This challenge presents an issue of statutory interpretation, which we review *de novo*. *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017). Our *de novo* review leads us to reject Collins's contention and hold that a person guilty of burglary as a principal may also be guilty of intentionally aiding another's commission of the same burglary, for the following three reasons.

First, Collins's interpretation requires us to read into the accomplice-liability provision a substantive clause that the legislature did not include. The judicial function, restrained by the constitutional separation of governmental powers, *see Limmer v. Ritchie*, 819 N.W.2d 622, 627 (Minn. 2012), does not authorize our legislating from the bench. *See* Minn. Const. art. III, § 1. We therefore will not add words that the legislature did not draft into a statute: "[C]ourts cannot supply that which the legislature purposely omits or inadvertently overlooks." *Martinco v. Hastings*, 122 N.W.2d 631, 638 (Minn. 1963). Collins would have us add another condition to the accomplice-liability provision so that the subdivision would essentially say, "A person is criminally liable for a crime committed by another if the person intentionally aids . . . the other to commit the crime [*and has not himself directly committed the crime as a principal*]." Nothing in the text or any caselaw

that Collins cites justifies inferring the additional clause, and we will not embellish the statute.

Second, caselaw both implicitly belies Collins's contention and supports our holding. In *State v. Filippi*, for example, the supreme court concluded that a defendant who had "judicially admitted" to participating in a two-man burglary could be held liable for his accomplice's shooting at police during the burglary. 335 N.W.2d 739, 742–43 (Minn. 1983). The court reached this conclusion by determining that the defendant had satisfied the elements of the expansive-liability provision in section 609.05, subdivision 2 (1980). *Id.* The version of section 609.05, subdivision 2, that the court considered, like the current version of the statute, required that the defendant first have been liable under subdivision 1 as an accomplice. *Id.* at 741–42; Minn. Stat. § 609.05, subds. 1, 2 (2022). By concluding that the defendant—who was implicitly a principal to the burglary—could also be expansively liable for his associate's additional crime, the *Filippi* court indirectly concluded that a principal to a crime may also be liable as an accomplice for the same crime committed by another person.

And third, by Collins's reasoning, an offender who commits a crime vicariously only by helping the principals commit the crime faces more criminal liability than the principals. That is, if Collins is correct, only those *indirectly* responsible for the underlying crime, but not those *directly* responsible, are also liable for the subsequent foreseeable criminal actions of any of the offenders. Nothing in the text or apparent purpose of the statute draws us to accept Collins's invitation to interpret it as expanding criminal liability for a mere accomplice while immunizing the principal from the same.

We turn to whether the evidence supports the jury's verdict finding Collins guilty of burglary as an accomplice. A defendant is criminally liable for a crime committed by another person if he "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1. The state must prove the defendant "knew his alleged accomplice was going to commit a crime and the defendant intended his presence or actions to further the commission of that crime." *See State v. Huber*, 877 N.W.2d 519, 523–24 (Minn. 2016) (quotation omitted). These accomplice-liability elements were met here by two types of evidence: direct and circumstantial. Direct evidence is evidence that "is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence, on the other hand, is evidence from which the fact-finder must rely on inferences to decide a disputed fact. *Id.* Convictions based on direct or circumstantial evidence require us to apply different standards. For an element of a conviction based on direct evidence, we carefully assess the record to determine whether the evidence, viewed favorably toward the conviction, is sufficient for the jurors to have found the defendant guilty beyond a reasonable doubt. *See State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). But we assess an element of a conviction based on circumstantial evidence using a two-step analysis. *See State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). In the first step we identify the circumstances proved, which are the circumstances consistent with the verdict. *Id.* at 598–99. In the second step we consider whether the circumstances proved are consistent only with guilt and not with any other rational hypothesis. *Id.* at 599. The trial record informs

us here that direct and circumstantial evidence support the jury's guilty verdict on the theory that Collins was guilty of burglary as an accomplice.

Sufficient direct evidence supports a finding that Collins aided the commission of the burglary. *See* Minn. Stat. § 609.05, subd. 1. Gary testified that he saw Collins and Davenport at his apartment's entry door immediately before the burglary and that Collins unlocked the door using the keys that Gary had dropped during the earlier attack. Accessing Gary's apartment building was necessary for the burglars to reach Gary's apartment to commit the crime. *See* Minn. Stat. § 609.582, subd. 1 (2022) (defining first-degree burglary as "enter[ing] a building without consent and with intent to commit a crime"). Considering Gary's testimony in the light most favorable to the jury's verdict, this direct evidence was sufficient to establish that Collins aided in the burglary.

Sufficient circumstantial evidence establishes that Collins knew his accomplices were going to commit a crime and that he intended his presence or actions to further the commission of the burglary. *See Huber*, 877 N.W.2d at 524. The relevant circumstances proved include that Collins opened Gary's apartment entry door using Gary's lost keys; that Gary heard men "rambling" through his apartment below; that Gary saw four men running out of his apartment building, including Collins carrying Gary's PlayStation; and that Gary recounted that the men took his PlayStation, cash, and jewelry. These circumstances proved are consistent with a finding that Collins knew that his accomplices were going to commit a burglary and that he intended his actions to further the commission of the burglary. And they are inconsistent with any rational, innocent hypothesis. The direct

and circumstantial evidence presented to the jury was sufficient to establish Collins's guilt of the burglary.

Based on these conclusions and the other evidence, we have no difficulty holding that the evidence was sufficient for the jury also to find Collins guilty of assault and fleeing police based on expansive liability. The expansive-liability statute establishes that a person who is criminally liable for a crime as an accomplice "is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." Minn. Stat. § 609.05, subd. 2. Collins does not argue that the assault and fleeing were not committed "in pursuance of" the burglary. And the evidence here easily supports the conclusion that the fleeing and assault were reasonably foreseeable consequences.

We begin with the assault, which occurred when one or more of the occupants of the fleeing Fusion fired gunshots at Deputy Kipka in pursuit. The circumstantial evidence supports the implied finding that the assault was a reasonably foreseeable consequence of the burglary. "Burglaries always carry with them a heightened risk to human life . . . which is undoubtedly enhanced when the perpetrators knowingly carry dangerous weapons." *State v. King*, 990 N.W.2d 406, 417 (Minn. 2023). The *King* court held that a defendant's role in planning a burglary and knowledge that his associates carried handguns, among other circumstances, was evidence tending to support the finding that a murder during the burglary was reasonably foreseeable. *Id.* at 416–17. Collins's situation is similar. The circumstances proved include that Collins's and Davenport's phones moved together from Minneapolis to near Gary's Brooklyn Center neighborhood and then returned to

Minneapolis about three hours before the burglary; that several firearms were carried during the burglary (including by Collins), at least one of which had been modified to rapidly fire rounds as a fully automatic weapon; and that there were videos from Collins's phone dated soon before the burglary depicting him and Davenport brandishing firearms like the ones carried during the burglary and used during the flight. These circumstances proved are consistent with a finding that a person in Collins's position could foresee that he or one of his associates would commit an assault by firing one of the weapons at a pursuing officer. And the above circumstances establishing Collins's close role in preparing for the burglary, his carrying of a gun, and his implied knowledge that his associates were armed, removes any possibility of a reasonable hypothesis that the shooting was not foreseeable. The evidence established that the assault on Deputy Kipka by Collins, Davenport, or Moore was a reasonably foreseeable crime to facilitate the escape from the burglary.

We conclude for the same reasons that the evidence supports the finding that Collins was guilty of fleeing police under the expansive-liability statute. The same logic that precludes a rational hypothesis that Collins's or his associates' assaulting an officer was unforeseeable also precludes a rational hypothesis that fleeing from officers to escape from the burglary was unforeseeable. Both additional offenses are designed to avoid capture, and avoiding capture is an essential component of a successful crime. As with the assault, the evidence was sufficient to prove beyond a reasonable doubt that fleeing was a foreseeable result of the burglary.

Because we conclude that the evidence supports the finding that Collins was guilty of assault and fleeing police under a theory of expansive liability, we need not address his argument that the evidence was insufficient to support the guilty verdicts on the theory that he was a principal or an accomplice in the assault or fleeing. We turn to his jury-instruction arguments.

II

Collins presents six main arguments challenging the district court's jury instructions. The district court enjoys discretion when fashioning jury instructions, and we ordinarily review allegedly improper instructions under an abuse-of-discretion standard. *State v. Shane*, 883 N.W.2d 606, 613 (Minn. App. 2016). But Collins concedes that he failed to object to the now-contested instructions and therefore forfeited the right to challenge them on appeal except to contend that they constitute plain error. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). Under a plain-error review, we may reverse only if we identify an error, determine that the error was plain, and hold that the error affected Collins's substantial rights. *See id.* An error is "plain" when it is "clear" or "obvious." *Id.* at 807 (quotations omitted). And an error affects substantial rights if it was prejudicial and affected the outcome of the trial. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Even if Collins establishes that a plain error occurred and that it affected his substantial rights, we may in our discretion correct the error only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.* at 740; *Pulczinski v. State*, 972 N.W.2d 347, 356 (Minn. 2022). For the following reasons, each of Collins's jury-instruction challenges fails at some point in our analysis.

Assault Instruction: Fear

Collins contends first that the district court plainly erred when it instructed the jury that it could find him guilty of assault if he intended to cause Deputy Kipka merely to fear immediate bodily harm or death. The district court instructed the jury that, to find Collins guilty under the peace-officer-assault statute, the state had to prove that Collins "assaulted" Deputy Kipka, that Kipka was a peace officer performing his duties, and that Collins "used or attempted to use deadly force" against him. The jury instructions defined assault as "an act done with the intent *to cause another to fear immediate bodily harm or death* or the intentional infliction of bodily harm upon another or the attempt to inflict bodily harm upon another." (Emphasis added.) This emphasized language in the instruction, argues Collins, conflicts with the elemental liability provisions of the peace-officer-assault statute, which criminalizes an "assault[] [on] a peace officer . . . by using or attempting to use deadly force against the officer . . . while the person is engaged in the performance of a duty imposed by law, policy, or rule." Minn. Stat. § 609.221, subd. 2 (2022). Collins maintains that the instructions erroneously failed to recognize that the statutory definition of "deadly force" narrows the definition of assault so as to exclude liability based on causing the deputy to fear bodily harm.

Put plainly, Collins would have us conclude that the peace-officer-assault statute establishes that an "assault" occurs not by engaging in conduct that meets the general "assault" definition of Minnesota Statutes section 609.02, subdivision 10 (2022) (which includes "an act done with intent to cause fear in another of immediate bodily harm or death"), but only by engaging in the conduct mentioned in the officer-assault statute of

section 609.221: "using or attempting to use deadly force against the officer." A potential problem with Collins's argument is that the supreme court has said, "For purposes of Minn. Stat. § 609.221, subd. 2(a), assault includes 'an act done with intent to cause fear in another of immediate bodily harm or death.'" *State v. Barshaw*, 879 N.W.2d 356, 366–67 (Minn. 2016) (quoting Minn. Stat. § 609.02, subd. 10 (2014), and rejecting an insufficient-evidence argument in part because "the events leading up to the assault support an inference that [the gun-brandishing defendant] intended to cause [a peace officer] fear of bodily harm"). But *Barshaw*'s statement characterizing the law was not necessary to its holding, and it is not necessary to ours. We therefore decline the state's suggestion that we rest our opinion on that statement.

We conclude instead that, even if the premise of Collins's legal argument has merit, the argument does not entitle him to relief. This is because "deadly force" under the officer-assault statute includes "[t]he intentional discharge of a firearm . . . in the direction of another person, or at a vehicle in which another person is believed to be." Minn. Stat. §§ 609.221, subd. 6(2), 609.066, subd. 1 (2022). And in this case, the only allegedly assaultive conduct against Deputy Kipka by the principal or principals was the discharging of firearms at his squad car. If the jurors found Collins guilty based on the allegedly erroneous assault-fear instruction, they would have had to do so by *first* concluding that Collins, Davenport, or Moore discharged a firearm at the squad car. This means that even under Collins's theory—that he could have been guilty of peace-officer assault only if the shooter used or attempted to use deadly force—the jury would necessarily have had to conclude that the shooter used or attempted to use deadly force to cause the deputy to fear.

The jury's finding that Collins aided an assault establishes that the alleged error could not have possibly affected the verdict. Because we reject Collins's argument on this basis, we need not address his related argument, based on *State v. Lindsey*, 654 N.W.2d 718, 722–23 (Minn. App. 2002), that the instruction fails to incorporate the requirement that the state must prove either that the defendant intended to cause great bodily harm or that the defendant reasonably should have known he created a substantial risk of causing great bodily harm.

Assault Instruction: Attempt

Collins also argues that the district court erroneously failed "to define attempt or list the elements of attempted assault." He is correct that the district court instructed the jury that "assault" included an "attempt to inflict bodily harm upon another" but did not include the elements for attempted assault. But we see no plain error, which is an error typically established when it is clear or obvious because it "contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). The district court's instruction on attempt contravenes no apparent law. "Attempt" to inflict harm is not defined in the first-degree-assault statute, Minnesota Statutes section 609.221 (2022), or in the statute defining "assault," Minnesota Statutes section 609.02, subdivision 10 (2022). Collins cites no authority that states that a district court must spell out what "attempt" to harm means in this context. He suggests that the district court should have defined "attempt" by incorporating the language of Minnesota Statutes section 609.17, subdivision 1 (2022), which defines the offense of attempt. But that statute defines neither "attempt" to harm specifically nor "attempt" generally. It instead

provides the elements of the separate *crime* of attempting to commit another crime, and it defines the *actus reus* of this crime as the taking of "a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1. The state did not charge Collins with attempted assault, but with aiding an actual assault on an officer, based in part on the allegation that he or his peers used or attempted to use deadly force against an officer. Employing the inapt language of section 609.17 might have confused rather than guided the jury, arguably injecting an actual error into the proceeding. *See State v. Davis*, 864 N.W.2d 171, 176 (Minn. 2015) (recognizing that instructions that materially misstate the law or confuse the jury are erroneous). The district court instead properly instructed the jury to "apply the common, ordinary meaning" of words that, like "attempt" to inflict bodily harm, are not defined in the instructions.

We add that we have also carefully considered our reasoning in *State v. Oliver*, and we recognize that our analysis in that case might suggest that section 609.17 applies to crimes including attempt under the officer-assault provision in section 609.221, subdivision 2. 11 N.W.3d 817, 823–24 (Minn. App. 2024), *rev. granted* (Minn. Nov. 27, 2024). But our focus in *Oliver* was not on the officer-assault provision but instead on the great-bodily-harm-assault provision in section 609.221, subdivision 1. *Id.* at 822. And we did not hold in *Oliver* that the district court must instruct the jury on the elements of the crime of attempt from section 609.17 for an officer-assault charge under section 609.221, subdivision 2. We therefore conclude that it was not plain error for the district court not to instruct the jury on the elements of the attempt crime under section 609.17.

Assault Instruction: Intent

Collins argues also that "[t]he [district] court instructed the jury it could base liability on 'an act done with the intent to cause another to fear' but failed to instruct the jury on the elements of assault-fear, including specific intent." We infer that he contends that the district court improperly omitted a specific instruction on the meaning of "with the intent to" in the assault-fear statute. The contention fails. The district court's instructions gave the jurors all that they needed to find Collins's state of mind for assault-fear. The instructions advised that assault included "an act done with the intent to cause another to fear immediate bodily harm or death." They defined "intentionally" to mean that "the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause the result." The statutory definition of "with intent to" is, as relevant here, functionally identical to the statutory definition of "intentionally," which the district court's instruction provided in relevant part. *See* Minn. Stat. § 609.02, subd. 9(3), (4) (2022). Jurors could use their common sense and ordinary understanding to recognize, without having to be expressly informed, that "intentionally" and "with the intent to" carry the same or similar meaning. The district court's instruction was not erroneous.

Assault Instruction: Bodily Harm

Collins challenges the portion of the jury instructions about bodily harm, which stated, "It is not necessary for the State to prove the defendant intended to inflict bodily harm or death but only that the defendant acted with the intent that another would fear that the defendant would so act." The upshot of this instruction, Collins says, is that "the State

had to prove 'only' the intent to cause fear, which is incorrect for assault-harm or attempt crimes." We have already addressed Collins's contention about the assault-fear basis of his conviction. Assuming (without deciding) that his challenge here identifies a plain error, he again fails to show that his substantial rights were affected for the same reasons we discussed above, specifically, that the jury would necessarily have found that he had used or attempted to use deadly force to cause Deputy Kipka to fear. The allegedly erroneous instruction provides no ground to reverse.

Unanimity Instruction: Assault

Collins argues that the district court's instructions on the assault and fleeing charges, combined with the absence of instructions requiring the jury to return unanimous verdicts on those charges, means that the jury may not have unanimously found him guilty of either offense. Minnesota jury verdicts must be unanimous on each element of the charged crime to support a conviction, *State v. Pendleton*, 725 N.W.2d 717, 730–31 (Minn. 2007), but to conclude that an element has been proved beyond a reasonable doubt, "the jury need not always decide unanimously which of several possible means the defendant used to commit the offense," *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002). Collins contends that assault-harm, assault-fear, and attempted assault are separate crimes but that the district court instructed the jury on all within a single count, "paving the way for a non-unanimous verdict."

Because the law on assault unanimity is unsettled, Collins fails to identify a plain error. In *State v. Dalbec*, we held that the different subparts of the statutory domestic-assault definition, which were substantially similar to the generic assault definition,

establish different means to commit assault rather than different offenses. 789 N.W.2d 508, 512–13 (Minn. App. 2010), *rev. denied* (Minn. Dec. 22, 2010); Minn. Stat. § 609.02, subd. 10. After our *Dalbec* decision, the supreme court decided *State v. Fleck*, concluding that an assault-fear offense is a specific-intent crime and an assault-harm offense is a general-intent crime, 810 N.W.2d 303, 309 (Minn. 2012), implicitly calling into question but not expressly overruling *Dalbec*'s holding. *See State v. Patzold*, 917 N.W.2d 798, 811–12 (Minn. App. 2018), *rev. denied* (Minn. Nov. 27, 2018). Neither this court nor the supreme court has settled the issue since then. Because an erroneous instruction constitutes a plain error only if it "violate[s] a well-established rule," *State v. Ezeka*, 946 N.W.2d 393, 408 (Minn. 2020), and because the unsettled nature of the issue leaves no established rule, the district court's failure to give a unanimity instruction on the single assault charge was not plain error.

Unanimity Instruction: Principal and Accomplice Liability

Collins unconvincingly maintains that, because the district court instructed the jury on both principal and accomplice liability for the assault and fleeing charges, the district court's failure to instruct on unanimity allowed the jury to split its votes between principal and accomplice liability on each count. The argument fails because "accomplice liability is a theory of criminal liability, not an element of a criminal offense or separate crime." *Dobbins v. State*, 788 N.W.2d 719, 729–30 (Minn. 2010) (rejecting as meritless appellant's argument "that he was wrongly convicted of aiding and abetting the [crime] because the State's theory at trial was that" he was the principal in the crime). We are not persuaded otherwise by Collins's assertion that the two different theories of liability rest on different

conduct and that it becomes a "logical fallacy" that he could be both the principal and the principal's accomplice. That some jurors might have found Collins the principal and others the accomplice does not revive Collins's unconvincing argument because jurors need not "unanimously agree on the facts underlying an element of a crime." *See Pendleton*, 725 N.W.2d at 731–32. And we are also not persuaded by Collins's suggestion that instructing on both principal and accomplice liability constitutes inappropriate "hybrid" instructions. *See Ezeka*, 946 N.W.2d at 408. Hybrid instructions are those that combine accomplice liability and the elements of the underlying substantive offense. *State v. Segura*, 2 N.W.3d 142, 166 (Minn. 2024). The district court's instructions here clearly separated accomplice liability from the elements of the underlying offenses such that the state's failure to prove that Collins committed those elements would mean that he was not guilty unless he was liable for the crime of another person based on the instructions on accomplice liability. Collins identifies no error.

III

We turn finally to Collins's contention that the prosecutor committed reversible misconduct when she misstated the law and argued to the jury that it could find Collins guilty even if he "had absolutely no involvement in shooting at the pursuing deputy." A prosecutor's misstating the law may constitute error. *State v. Portillo*, 998 N.W.2d 242, 250 (Minn. 2023). But because Collins did not object to the claimed prosecutorial misconduct, we review by applying only a modified plain-error test. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Collins therefore has the burden of establishing plain

error, and, if he succeeds, the burden shifts to the state to establish that the error had no significant effect on the jury's verdict. *Id.* Collins identifies no error.

The context of the prosecutor's challenged statement prompts our conclusion. We consider claims of erroneous arguments in the context of the argument as a whole. *See State v. Walsh*, 602 N.W.2d 495, 607 (Minn. 1993). The prosecutor had argued, "[F]ar and away the most likely scenario here is that [Collins is] the one firing from the passenger's seat on 94." She reviewed some of the evidence pointing to that conclusion, reminding the jury that Davenport was the Fusion's driver, two guns were used in the shootings, and the shots on Interstate 94 were fired from the passenger's side. The prosecutor then asked the jury:

> "[I]s it reasonable and consistent with your common sense that there is an innocent, uninvolved nonparticipant in that car? The most likely possibility here that is consistent with all of the evidence is that each of the two passengers took a shot at trying to shake Deputy Kipka off their tail as they fled."

The complained-of comment then followed in that context:

> Even if you don't agree with the inferences that I'm asking you to draw from the facts, even if you think it is reasonable and consistent with your common sense that Mr. Collins was in that Fusion and had absolutely no involvement in shooting at the pursuing deputy, the law that the judge gave you still makes him an accomplice. It still makes him guilty of aiding and abetting, of participating in the crimes that were committed, in part or in whole, by other people. If you think he either committed the crime or he aided the commission of the crime, he's guilty.

The prosecutor then outlined how the jury should interpret "reasonably foreseeable" and argued that the other crimes were reasonably foreseeable consequences of the burglary.

In context, the prosecutor's allegedly erroneous argument did not misstate the law. She was properly referring to expansive liability when she told jurors that they could find Collins guilty of the post-burglary crimes even if he had "absolutely no involvement" in the shootings. She expounded promptly on the meaning of "reasonably foreseeable," as reasonable foreseeability is an element of expansive liability, Minn. Stat. § 609.05, subd. 2, and it is one that the district court expressly instructed the jury about regarding the assault and fleeing charges. The prosecutor's "absolutely no involvement" statement did not misstate the law on expansive liability because, if Collins was liable for the burglary as an accomplice, the state had only to prove that the assault and fleeing were committed in the pursuance of the burglary and were "reasonably foreseeable . . . as a probable consequence" of the burglary without regard to whether Collins actively participated in those secondary crimes. Minn. Stat. § 609.05, subd. 2. Because the prosecutor did not misstate the law, Collins's claim of misconduct fails.

DECISION

The state introduced sufficient evidence to support Collins's assault and fleeing convictions under the theory of expansive liability because the evidence supported the conclusion that he was an accomplice to the burglary regardless of whether he was a principal. The district court in general properly instructed the jury, and in any event no alleged error supports reversing Collins's convictions. The prosecutor did not engage in misconduct.

Affirmed.