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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0811**

State of Minnesota,
Respondent,

vs.

Benjamin Charles Tabaka,
Appellant

**Filed April 3, 2017
Affirmed
Stauber, Judge**

Hennepin County District Court
File No. 27-CR-14-34778

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, 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 Ross, Presiding Judge; Stauber, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the district court erred by denying his request for a unanimous-verdict jury instruction. We affirm.

FACTS

Appellant Benjamin Charles Tabaka was charged with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(i), (2014). At trial, N.O. testified that on the evening of Thanksgiving 2014, she and appellant engaged in consensual oral and vaginal sex. N.O. testified that while they were having sex, appellant asked her if she had “ever been fisted.” N.O. replied, “no, that’s not something that sounds very great, not something that I would enjoy and I’m not like that.” But according to N.O., the “next thing [she knew, her] body was jerking violently forward” and she felt something “painful” and “not at all enjoyable.” N.O. testified that she told appellant “ow, stop, ow that hurts, stop, [appellant], please stop,” but appellant continued to penetrate N.O. with his hand for what “seemed like forever.”

N.O. also testified that when appellant stopped fisting her, he “wrapped his arm round [her] neck” in a “choke hold” and resumed vaginal intercourse. N.O. stated that while this was happening, she “couldn’t breathe,” and that the intercourse “hurt” and “stung” after being fisted. After appellant released her from the choke hold, N.O. laid on her side on the bed, and appellant moved in front of her, placed his hand on the wall, and “shoved his penis down [her] throat.” N.O. stated that she “couldn’t breathe” and “kept

choking,” and that she tried “to pull her head back as far as [she] could,” but was unable to move her head because it was up against the wall. N.O. further testified that when appellant was done, he took a shower, “thanked [her] for doing something for him that his wife could never do,” and then she took him home.

The next day, N.O. told her ex-boyfriend about the incident, who then called police. N.O. was taken to the hospital where a sexual-assault examination was conducted. The examining nurse testified that N.O. sustained injuries to her genitals that were consistent with “forcible fisting” and that bled when touched. And, a crime-scene investigator from the Hennepin County Sheriff’s Office testified that a visible spot on the wall in N.O.’s apartment near where appellant allegedly placed his hand when he penetrated N.O.’s mouth with his penis tested positive for the presence of blood.

Appellant testified that after arriving at N.O.’s apartment, they went to her bedroom where they had consensual oral and vaginal sex. But according to appellant, they eventually went into the kitchen to get something to drink. Appellant testified that when they were in the kitchen, he “started fingering her again” and eventually inserted four fingers into her vagina. Appellant testified that “[a]fter a little bit” she said that was “uncomfortable,” so he stopped and apologized. Appellant further testified that he never put N.O. in a choke hold or forced his penis into her mouth.

After the jury was instructed and escorted from the courtroom to begin deliberations, counsel for appellant noted on the record that it was “discussed in chambers” that he “wanted to have unanimous acts spelled out in the jury instructions.” The district court acknowledged the discussion and its decision that a “unanimous verdict

instruction was not required.” The jury subsequently found appellant guilty of the charged offense and appellant was sentenced to 156 months in prison. This appeal followed.

D E C I S I O N

I. Standard of review

Appellant challenges the district court’s decision not to give a unanimity jury instruction. Generally, this court reviews a district court’s choice of jury instructions for abuse of discretion. *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005). An erroneous omission of a requested instruction only results in appellate relief if prejudice is demonstrated on appeal. *Id.* But a failure to propose specific jury instructions or object to instructions generally constitutes a forfeiture of that issue on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). When a specific instruction has not been requested, we may only review the instructions for plain error that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *see also State v. Gunderson*, 812 N.W.2d 156, 159 (Minn. App. 2012) (reviewing unobjected-to jury instructions for plain error).

At the outset, the parties disagree on the proper standard of review; the state argues that the issue should be reviewed for plain error because appellant did not request the instruction. Conversely, appellant argues that the harmless-error standard applies because he “requested an instruction during the chambers instruction conference, made a record of that request, and even stated, ‘I object.’”

Based on the record before us, we conclude that the unanimity instruction was never requested. The record indicates that a discussion was held in chambers concerning

the unanimity instruction, but that defense counsel did not request the instruction because the research conducted by defense counsel, the prosecutor, and the district court, revealed that a unanimity instruction was not necessary. In fact, the prosecutor stated on the record to be “absolutely clear” that “it was never requested that different instructions be given before or after.” Both the district court and defense counsel responded by appearing to agree with this statement. And, although defense counsel stated “I object” to the instructions, the objection was made after the instructions were given to the jury. It is well settled that “[a] defendant’s failure to propose *specific* jury instructions or to object to instructions *before they are given* to the jury generally constitutes a waiver of the right to appeal.” *Cross*, 577 N.W.2d at 726 (emphasis added). Therefore, because there was never a *specific request* for the unanimity instruction *before* the jury was instructed, the plain error standard of review is applicable.

II. Unanimity instruction

Appellant argues that the district court erred by refusing to give two specific unanimity instructions; one as to the mode of penetration and another as to force or coercion. A jury’s verdict must be unanimous in all criminal cases. Minn. R. Crim. P. 26.01, subd. 1(5). The jury must unanimously conclude that each element of an offense has been proven. *State v. Pendleton*, 725 N.W.2d 717, 730-31 (Minn. 2007). Although the jury must agree on the elements, the jury need not agree on the facts underlying those elements. *Id.* at 731. If different courses of conduct are offered to prove an element, they must show “equivalent blameworthiness or culpability.” *Id.* (quotation omitted).

A. Mode of penetration

The state charged appellant with one count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(i), alleging that appellant engaged in sexual penetration with N.O. causing personal injury to N.O. and that appellant used force or coercion to accomplish the penetration. At trial, the state introduced evidence of three different forms of nonconsensual penetration: vaginal, oral, and the fisting. But the state argued that the jury could return a guilty verdict even if they could not agree on the form of penetration. Rather, the state argued that “[a]s long as all 12 of you agree that some form of sexual penetration occurred, four of you can think sexual intercourse, four of you can think fellatio, and four of you can think any other intrusion, however slight. This is proof beyond a reasonable doubt.”

Appellant argues that because the jury must unanimously agree on which acts the defendant committed if each act itself constitutes an element of the crime, and because “[e]ach form of penetration [alleged by the state], if proven, would have satisfied the sexual penetration element,” the district court erred by not providing his unanimity instruction. To support his argument, appellant relies on *State v. Stempf*, 627 N.W.2d 352 (Minn. App. 2001). In that case, the defendant was charged with one count of possession of drugs, but the state alleged two distinct acts: (1) the defendant possessed drugs found at his workplace and (2) the defendant possessed drugs found in a truck. *Id.* at 357. This court concluded that the defendant was deprived of his right to a unanimous verdict because the state did not elect which act of possession it relied on for the conviction, and the jurors may have disagreed on which act of possession constituted the crime. *Id.* at

358. This court further concluded that the two alleged acts lacked “unity of time and place” and were “separate and distinct culpable acts, either one of which could support a conviction.” *Id.* at 358-59. This court therefore reversed and remanded because it was possible that the guilty verdict was not unanimous. *Id.* at 359.

This case is distinguishable from *Stempf* for two reasons. First, in *Stempf*, the district court refused to give a specific unanimity instruction, even though one was requested. *Id.* at 357-58. Here, appellant never actually requested a specific unanimity instruction. Second, in *Stempf*, there were two separate acts of possession that occurred at different times and different places, and the defendant in *Stempf* offered different defenses for both, so the jury in *Stempf* could have reached different conclusions on each of those acts of possession. *Id.* at 358; see *State v. Dalbec*, 789 N.W.2d 508, 512 (Minn. App. 2010) (discussing *Stempf*), review denied (Minn. Dec. 22, 2010). In contrast, appellant’s closing argument demonstrates that he offered a single defense, that the state failed to prove that N.O. did not consent, and that appellant used force or coercion. Moreover, in contrast to *Stempf*, appellant’s acts were not separated by time and place; the three alleged acts of penetration all occurred in N.O.’s bedroom within a few minutes of each other. As a result, appellant’s acts were part of a single behavioral incident. See *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014) (“Offenses are part of a single course

of conduct¹ if the offenses occurred at substantially the same time and place and were motivated by a single criminal objective.” (footnote added)).

This case is more akin to *State v. Infante*, in which the defendant was found guilty of the sole charged offense, second degree assault. 796 N.W.2d 349, 352-53 (Minn. App. 2011). On appeal, the defendant argued that the district court erred by failing to instruct the jury that they must reach a unanimous decision as to which of his acts constituted the assault—putting the small gun to the complainant’s head in the bedroom, or “methodically load[ing]” the .357 on the sofa two or three hours later. *Id.* at 355. This court held that a specific unanimity instruction is unnecessary if the two acts that would support a conviction occurred at the same place, involved the same victim, and took place over a short period of time. *Id.* at 357. In other words, if the acts are part of a single behavioral incident, then a specific unanimity instruction is unnecessary. *Id.* at 356-57. In *Infante*, because the two acts supporting an assault charge occurred at the same cabin, involved a single victim, and were separated by a span of two to three hours, the court concluded that they were part of a single behavioral incident. *Id.* at 352, 357; *see also Dalbec*, 789 N.W.2d at 512 (concluding that the district court did not plainly err by not providing a unanimity instruction where the acts committed by the defendant spanned a period of time, but all occurred at the same place and involved a single victim).

¹ “Legal authorities use the terms ‘single course of conduct’ and ‘single behavioral incident’ interchangeably.” *State v. Mitchell*, 881 N.W.2d 558, 563 n.2 (Minn. App. 2016), *review denied* (Minn. Aug. 23, 2016).

Here, as in *Infante*, because appellant's acts were part of a single behavioral incident, a unanimity instruction was not required. Moreover, the court in *Infante*, distinguished between the elements versus the means. *Id.* at 357. This court determined that *Stempf* was distinguishable because "the two acts in *Stempf* were elements of the crime, whereas [the defendant's] actions in this case were mere means for accomplishing an element." *Id.*

Similarly, the United States Supreme Court has illustrated that acts such as appellant's constitute means of committing an element of a crime, rather than two distinct instances of an element of the crime itself. *Richardson v. United States*, 526 U.S. 813, 817, 119 S. Ct. 1707, 1710 (1999). As the Court explained:

Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.

Id.

In this case, appellant confuses the means of committing the element of penetration with the element of the crime itself. The jury needed to conclude that non-consensual penetration occurred. But because appellant's act was one behavioral incident, the jury was not required to unanimously agree on the means of accomplishing the penetration—whether the non-consensual penetration occurred vaginally, orally, or by fisting. See *Pendleton*, 725 N.W.2d at 732 (declining to find plain error by the lack of a unanimity instruction because that the jury could unanimously agree on the element of

kidnapping without agreeing on the alternative purposes for the kidnapping).

Accordingly, the district court did not plainly err by declining to give a unanimity instruction with respect to the mode of penetration.

B. Force or coercion

Appellant also contends that the district court erred by not giving a unanimity instruction with respect to force or coercion. But the same analysis discussed above applies to this argument. That appellant committed the offense with force or coercion is an element of the charged offense. *See* Minn. Stat. § 609.342, subd. 1(e)(i). The jury, however, need not agree on whether appellant used force or whether he used coercion to commit the offense. The jury must simply agree unanimously that appellant used either force or coercion to commit the act. *See Pendleton*, 725 N.W.2d at 732. Therefore, the district court did not err by declining to give a unanimity instruction with respect to force or coercion.

C. Prejudice

Finally, even if the district court erred by not giving a unanimity instruction, appellant is unable to establish prejudice. An error affects a defendant's substantial rights "if the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. "In other words, there must be a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015) (quotation omitted). The defendant bears the "heavy burden" of demonstrating prejudice. *Id.*

The record reflects that appellant admitted to engaging in the three forms of penetration, but his defense was that the conduct was consensual. The jury rejected this theory by finding him guilty of the charged offense. Moreover, the record reflects that N.O.'s version of the events were consistent throughout the proceedings, but appellant was uncertain of some details due to his inability to remember. And, the record reflects that a photo of N.O.'s injuries was admitted into evidence, which corroborated her testimony. There is simply no reasonable likelihood that the giving of the desired unanimity instruction would have had a significant impact on the jury's verdict. Therefore, appellant is unable to demonstrate prejudice.

Affirmed.