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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0364**

State of Minnesota,
Respondent,

vs.

Sarah Mae Dillon,
Appellant.

**Filed February 5, 2018
Affirmed
Johnson, Judge**

Steele County District Court
File No. 74-CR-16-38

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

Daniel A. McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

Melissa Sheridan, Eagan, Minnesota (for appellant)

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

UNPUBLISHED OPINION

JOHNSON, Judge

A Steele County jury found Sarah Mae Dillon guilty of, among other things, aiding and abetting possession of a firearm by an ineligible person. We conclude that the district court did not err by denying Dillon's motion to dismiss that charge on the ground that the

state was required to prosecute her only under a statute that sets forth a lesser offense. We also conclude that the district court did not err by not instructing the jury that it must unanimously agree with respect to which person Dillon aided and abetted. Therefore, we affirm.

FACTS

In December 2015, Dillon had been friends with Frank Tubbs and Kia Lee for several years. Tubbs and Lee had been romantically involved and had children together. Both Tubbs and Lee had been convicted of felonies and, thus, were ineligible to possess firearms.

On December 23, 2015, Dillon purchased a pistol from a Cabela's store. She was accompanied by Tubbs, who had provided the money she used to purchase the pistol.

During the evening of December 31, 2015, and into the early-morning hours of January 1, 2016, Dillon, Tubbs, and Lee socialized with each other and with others in Owatonna at two or more bars and other locations. The evidence shows that, during the evening, both Tubbs and Lee temporarily possessed the pistol that Dillon had purchased on December 23, although it appears that neither Tubbs nor Lee continued to possess it at the end of the evening. During the following days, Dillon attempted to recover the pistol by various means, including sending text messages to Lee and others who, she believed, might have the pistol. On January 4, 2016, Dillon reported to the local police department that the pistol had been stolen. During the ensuing investigation, law-enforcement officers came to believe that the pistol had not been stolen from Dillon but, rather, that she had given it to Tubbs or Lee.

The state charged Dillon with four offenses: (1) aiding and abetting possession of a firearm by an ineligible person, in violation of Minn. Stat. §§ 624.713, subd. 1(2)(2014), 609.05, subd. 1 (2014), based on an allegation that Dillon voluntarily gave the pistol to Tubbs or Lee on December 31 or January 1; (2) obtaining a firearm for a person known to be ineligible to possess a firearm, in violation of Minn. Stat. § 624.7133 (Supp. 2015), based on an allegation that Dillon purchased the pistol on Tubbs's behalf on December 23; (3) transferring a pistol to an ineligible person, in violation of Minn. Stat. § 624.7141, subd. 1(3) (2014), based on an allegation that Dillon voluntarily gave the pistol to Tubbs or Lee on December 31 or January 1; and (4) falsely reporting a crime, in violation of Minn. Stat. § 609.505, subd. 1 (2014), based on an allegation that Dillon falsely told police on January 4 that the pistol had been stolen from her.

In August 2016, Dillon moved to dismiss count 1, a felony, on the ground that the statutes on which it is based are in irreconcilable conflict with the statutes on which counts 2 and 3, gross misdemeanors, are based. Dillon argued that, in light of the irreconcilable conflict, the state was required to charge her only with the lesser gross-misdemeanor offenses. The district court denied the motion on the ground that the statutes are not in irreconcilable conflict with each other.

The case was tried to a jury on four days in August 2016. The state called seven witnesses: Lee, Tubbs, H.S. (whom Lee and Tubbs visited during the evening in question), two Owatonna police officers, and two Cabela's employees. Dillon was the sole witness in her defense. The witnesses provided conflicting testimony as to the whereabouts of the pistol at various times during the evening and as to who possessed it.

Lee was the state's first witness. She testified that she has "a short-term memory" and does not fully remember the events of the evening in question. But she testified that, while she, Tubbs, and Dillon were at a man's house that evening, Dillon took out the pistol and showed it to everyone present. Lee also testified that, later in the evening, while she and Tubbs were parked outside Dillon's apartment in Tubbs's sport-utility vehicle, Dillon got out of the vehicle, placed the pistol on the driver's seat, and walked away toward her apartment. Lee testified that, after Dillon placed the pistol on the driver's seat, Lee drove the vehicle to the home of her friend, H.S., while sitting on the pistol so that Tubbs, with whom Lee was arguing, could not get access to it. Lee testified further that, after she and Tubbs arrived at H.S.'s house, they continued to argue inside the vehicle. Lee testified that H.S. came outside and intervened by reaching into the vehicle and taking the pistol away from Lee, at which point Lee exited the vehicle, took the pistol away from H.S., and left the scene on foot.

Tubbs testified that he does not remember much of the evening in question except that he spent the evening with Lee and Dillon. He testified that he does not remember seeing the pistol and does not remember arguing with Lee outside H.S.'s house.

H.S. testified that she saw Lee and Tubbs inside Tubbs's vehicle while it was parked in her driveway. She testified that Tubbs was holding the pistol in his hands and that Lee got it away from him and then exited the vehicle and ran away.

Officer Munn of the Owatonna Police Department testified that he interviewed Dillon twice after her January 4 report. The state played video-recordings of the two interviews for the jury. In the first interview, Dillon stated that Lee had taken the pistol

from her apartment. When Officer Munn interviewed Dillon a second time, after he had interviewed Tubbs and Lee, Dillon then stated that Lee did not take the pistol. Dillon further stated that she had placed it on the driver's seat of Tubbs's vehicle after he asked for it.

Dillon testified that, at approximately 11:00 p.m. on December 31, Lee and Tubbs came to her apartment and asked her to go out with them. Dillon testified that she drove the three of them to a bar in Tubbs's vehicle because Lee did not have a driver's license and Tubbs was drunk. Dillon testified that, later in the evening, after she had driven the trio to a bar closer to her home, Tubbs yelled at her and told her to give him the pistol that she recently had purchased. Dillon testified that she drove the group to her apartment building, exited the vehicle, and went inside, intending to retire for the evening. Dillon further testified that, at approximately 2:00 a.m., Lee visited her apartment, said that Tubbs had "kicked her out," and asked to spend the night at Dillon's apartment. Dillon testified that she went to get some blankets and pillows for Lee and, when she returned, saw Lee running out of the apartment. Dillon testified that when she awoke the following day, she noticed that the pistol, which had been on the kitchen table, was missing. Dillon testified that she believed at the time that Lee may have taken the pistol.

In closing argument, the prosecutor urged the jury to conclude, based on the testimony of Lee and H.S., that Dillon gave the pistol to Lee or Tubbs when she placed it on the driver's seat of Tubbs's vehicle. Dillon's trial attorney, on the other hand, urged the jury to conclude, based on Dillon's testimony, that Lee took the pistol from Dillon's kitchen table without Dillon's knowledge or consent. Dillon's attorney argued that the jury

should not believe Lee's testimony and that H.S.'s testimony was not inconsistent with Dillon's testimony because H.S. described events that occurred after Lee had taken the pistol.

The jury found Dillon guilty on counts 1, 3, and 4 and not guilty on count 2. The district court imposed concurrent sentences of 60 months of imprisonment on count 1 and 30 days of jail on count 4. Dillon appeals.

D E C I S I O N

I. Prosecutor's Charging Discretion

Dillon argues that the district court erred by denying her pre-trial motion to dismiss count 1. She contends that the statutes setting forth the offense alleged in count 1 are in irreconcilable conflict with the statute setting forth the offense alleged in count 3. She contends that the prosecutor was required to charge her under the statute cited in count 3, which alleges a gross misdemeanor offense, rather than the statutes cited in count 1, which alleges a felony offense.

"The basic rule is that absent legislative intent to the contrary . . . , the prosecutor may prosecute under any statute that the defendant's acts violate without regard to the penalty." *State v. Chryst*, 320 N.W.2d 721, 722 (Minn. 1982). But if two criminal statutes apply to a defendant's alleged conduct, and if one statute is more specific than the other statute, and if the legislature has expressed a policy that the more specific statute should govern to the exclusion of the more general statute, then the prosecutor is not free to charge the offense set forth in the more general statute. *State v. Kalvig*, 296 Minn. 395, 397-400, 209 N.W.2d 678, 680-81 (1973). In that situation, the statutes are deemed to be in

irreconcilable conflict. *Id.* at 398, 209 N.W.2d at 680 (citing Minn. Stat. § 645.26, subd. 1 (1970)). But two criminal statutes are not in irreconcilable conflict, as that term is used in *Kalvig*, unless, in every conceivable circumstance, the actions that violate the more specific statute also violate the more general statute. *See Chryst*, 320 N.W.2d at 722-23. This court applies a *de novo* standard of review to the interpretation of statutes. *State v. Barrientos*, 837 N.W.2d 294, 298 (Minn. 2013).

In this case, the district court reasoned that the statutes on which count 1 are based are not in irreconcilable conflict with the statute on which count 3 is based. We agree. The statutes on which count 1 are based impose criminal liability on a person who “intentionally aids, advises, hires, counsels, or conspires with or otherwise procures [another person] to commit the crime” of “possess[ing] a pistol or semiautomatic military-style assault weapon . . . or any other firearm” if the other person “has been convicted of . . . a crime of violence.” Minn. Stat. §§ 609.05, subd. 1, 624.713, subd. 1(2). The statute on which count 3 is based imposes criminal liability on a person who “intentionally transfers a pistol or semiautomatic military-style assault weapon to another if the person knows that the transferee . . . is disqualified under section 624.713 from possessing a pistol or semiautomatic military-style assault weapon.” Minn. Stat. § 624.7141, subd. 1(3).

The two offenses are different in scope with respect to the reasons why a person is ineligible or disqualified from possessing a pistol or semiautomatic military-style assault weapon. The ineligibility that is the underlying basis of the offense alleged in count 1 is a prior conviction of “a crime of violence.” Minn. Stat. § 624.713, subd. 1(2). That is only one of 13 reasons why a person may be ineligible to possess a pistol or a semiautomatic

military-style assault weapon. *See* Minn. Stat. § 624.713, subd. 1(1)-(13). The ineligibility that is the underlying basis of the offense alleged in count 3 could be any one of those 13 reasons. Minn. Stat. § 624.7141, subd. 1(3) (referencing Minn. Stat. § 624.713). In some conceivable circumstances, the same conduct would be a crime under the statute on which count 3 is based but would not be a crime under the statutes on which count 1 is based. For example, the offense charged in count 3 would encompass a person who has been civilly committed as mentally ill or a person who has been civilly committed to a treatment facility for chemical dependency. *See* Minn. Stat. § 624.713, subd. 1(3), (5). Accordingly, contrary to Dillon’s argument, the offense alleged in count 3 is *not* more specific than the offense alleged in count 1. *See Chryst*, 320 N.W.2d at 722-23. Furthermore, unlike *Kalvig*, there is no expression of legislative policy to the effect that the statute on which count 3 is based should be utilized instead of the statutes on which count 1 is based. *See id.* Consequently, the statutes on which count 1 is based are not in irreconcilable conflict with the statute on which count 3 is based, so the state was free to prosecute Dillon under any or all of the statutes.

Thus, the district court did not err by denying Dillon’s motion to dismiss count 1.

II. Instruction on Unanimity

Dillon also argues that the district court erred by not instructing the jury that its verdict must be unanimous with respect to which ineligible person Dillon aided and abetted in the unlawful possession of the pistol. More specifically, Dillon argues that the district court should have instructed the jury that it must unanimously agree with respect to whether Dillon aided and abetted Tubbs or whether Dillon aided and abetted Lee. Dillon contends

that, in the absence of such an instruction, the jury might not have been unanimous about the conduct for which it found Dillon guilty.

In the district court, Dillon did not request any particular instruction on unanimity and did not object to the district court's proposed instructions for the reasons urged. Accordingly, we apply the plain-error test on appeal. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). Under the plain-error test, we may not grant appellate relief on an issue to which there was no objection unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a criminal defendant has a right to a unanimous verdict. *State v. Crowsbreast*, 629 N.W.2d 433, 438-39 (Minn. 2001); *see also* Minn. R. Crim. P. 26.01, subd. 1(5). But the right to a unanimous verdict does not mean that "jurors should be required to agree upon a single means of commission" of a criminal offense. *Crowsbreast*, 629 N.W.2d at 439 (quoting *Schad v. Arizona*, 501 U.S. 624, 631-32, 111 S. Ct. 2491, 2497 (1991) (plurality opinion)). Rather, "different jurors may be persuaded by different pieces of

evidence, even when they agree upon the bottom line.’” *Id.* (quoting *Schad*, 501 U.S. at 631-32, 111 S. Ct. at 2497 (plurality opinion) (internal quotation omitted)); *see also State v. Ihle*, 640 N.W.2d 910, 917-19 (Minn. 2002). The right to a unanimous verdict forbids the grouping of different alleged acts that are “inherently separate” or the grouping of different alleged acts in a manner that is “irrational or unfair.” *State v. Pendleton*, 725 N.W.2d 717, 731-32 (Minn. 2007). For example, a state may not define a crime in such a way that a person could be found guilty either by committing robbery or by failing to file an income tax return. *See Crowsbreast*, 629 N.W.2d at 439 (citing *Schad*, 501 U.S. at 650, 111 S. Ct. at 2491 (Scalia, J., concurring)).

In this case, Dillon is correct as a factual matter that the district court’s instructions allowed a juror to conclude that Dillon is guilty on count 1 either because she aided and abetted Tubbs’s unlawful possession of the pistol or because she aided and abetted Lee’s unlawful possession of the pistol. But the two alternative means of committing the offense alleged in count 1 are not “inherently separate.” *See Pendleton*, 725 N.W.2d at 731-32. Furthermore, the state sought to establish Dillon’s guilt on count 1 by proving a single act: her placing of the pistol on the driver’s seat of Tubbs’s vehicle while both Tubbs and Lee were in the vehicle. Because both Tubbs and Lee were ineligible to possess the pistol, it does not matter whether Dillon intended to aid and abet Tubbs’s unlawful possession or Lee’s unlawful possession. Given the allegations and evidence in this case, it is not “irrational or unfair” to allow the jury to find Dillon guilty without determining unanimously whether Tubbs or Lee was the object of her aiding and abetting. *See id.*

Dillon relies heavily on this court's opinion in *State v. Stempf*, 627 N.W.2d 352 (Minn. App. 2001), which was issued before the supreme court's opinions in *Crowsbreast*, *Ihle*, and *Pendleton*. In *Stempf*, the state charged the defendant with one count of possession of a controlled substance, but the state introduced evidence at trial that the defendant possessed methamphetamine in two different places: at his office and in his truck. *Id.* at 354. The defendant had different defenses with respect to each allegation. *Id.* We concluded that the defendant's right to a unanimous verdict was violated by the lack of a specific instruction requiring the jury to unanimously agree that the defendant either possessed the methamphetamine found in his office or possessed the methamphetamine found in his truck. *Id.* at 358-59.

This case is distinguishable from the rather unusual circumstances of *Stempf*, in which the prosecutor pleaded a single count of possession instead of two counts. In this case, the state sought to prove that Dillon committed the offense alleged in count 1 by engaging in one act at a particular place at a single point in time: by placing the pistol on the driver's seat of Tubbs's vehicle while both Tubbs and Lee were inside the vehicle when it was parked outside Dillon's apartment building. If a juror believed the state's evidence and concluded that Dillon engaged in that act at that place at that time, the juror could find her guilty, regardless whether Tubbs or Lee thereafter possessed the pistol. See *State v. Infante*, 796 N.W.2d 349, 356-57 (Minn. App. 2011) (distinguishing *Stempf* on ground that defendant was alleged to have engaged in single behavioral incident); *State v. Begbie*, 415 N.W.2d 103, 106 (Minn. App. 1987) (concluding that right to unanimous verdict was not violated because appellant threatened both wife and husband), *review denied* (Minn.

Jan. 20, 1988). Dillon's right to due process is not violated by an instruction that allowed jurors to find her guilty on count 1 without requiring unanimity with respect to whether Dillon aided and abetted Tubbs or whether Dillon aided and abetted Lee.

Thus, the district court did not err by not giving the jury an instruction that required unanimity with respect to which person Dillon aided and abetted.

Affirmed.