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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0530**

State of Minnesota,
Respondent,

vs.

James Earl Bailey,
Appellant.

**Filed February 11, 2019
Affirmed
Worke, Judge**

Wabasha County District Court
File No. 79-CR-17-476

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Karrie Kelly, Wabasha County Attorney, Wabasha, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Bjorkman, Judge; and
Klaphake, Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his conviction of violation of a domestic-abuse no-contact order (DANCO), arguing that the district court erred in denying his motion for judgment of acquittal, and plainly erred in instructing the jury. We affirm.

FACTS

In April 2016, appellant James Earl Bailey was charged with burglary and domestic assault. The district court issued a pretrial DANCO preventing Bailey from having contact with the victim, his ex-girlfriend T.S. In June 2016, Bailey pleaded guilty to domestic assault and the state dismissed the burglary charges. In July 2016, the district court placed Bailey on probation and issued a postconviction DANCO that prevented Bailey from having contact with T.S. The postconviction DANCO expired on July 26, 2021. The district court advised Bailey that he could face new charges if he violated the postconviction DANCO.

On June 21, 2016, Bailey was charged with three counts of violation of the pretrial DANCO. On October 31, 2016, Bailey pleaded guilty to gross-misdemeanor violation of the pretrial DANCO. In imposing sentence, the district court ordered Bailey to comply with all no-contact orders. Bailey's attorney asked: "Does the DANCO on this file terminate now, or does it continue?" The district court stated: "I think usually they terminate with conclusion of the case, unless . . . something else is requested." The prosecutor stated: "That's not a term that we're requesting going forward." The district court replied: "Okay, all right. That's all for now then."

In May 2017, Bailey was charged with felony violation of the postconviction DANCO. At Bailey's jury trial, Deputy Speedling testified that on May 28, 2017, he was dispatched to a residence of T.S.'s because an ex-boyfriend was trying to gain entry. While Deputy Speedling was at the residence, he saw Bailey drive by and flagged him down. Deputy Speedling talked to T.S. and Bailey. When Deputy Speedling learned of the DANCO, he arrested Bailey for violating it.

Deputy Speedling's recorded interview with Bailey was played for the jury. Bailey stated that he and T.S. had been living together and broke up the day he was arrested. Bailey told Deputy Speedling that he knew that he was not in trouble because he believed that the DANCO had been vacated after his October 2016 court appearance.

Bailey's probation officer (PO) testified that he met Bailey in early October 2016, and has met with him at least a dozen times since. The PO went over the probation conditions with Bailey, one of which specifically prohibited him from having contact with T.S. and mandated his compliance with the postconviction DANCO. The PO testified that Bailey never expressed that he wanted the DANCO removed, or said anything that left him with the impression that Bailey did not think that the DANCO existed.

After the state rested, Bailey moved for judgment of acquittal, arguing that there was no evidence corroborating his confession. Before addressing Bailey's motion, the district court inquired whether a stipulation regarding prior qualified offenses was put on the record. Bailey's attorney replied: "We are stipulating here." The district court denied Bailey's motion for judgment of acquittal. Bailey then stipulated that the state proved the prior qualified offenses that would make this offense a felony.

Bailey did not testify but he offered transcripts from the July and October 2016 hearings. In closing argument, Bailey's attorney stated that Bailey admitted to having contact with T.S., but believed that the DANCO was vacated. Bailey's attorney stated that if the jury was convinced that the state proved that Bailey knew that the DANCO existed on May 28, 2017, its verdict would be guilty. The jury found Bailey guilty of violation of the DANCO, and the district court sentenced him to 30 months in prison. This appeal followed.

D E C I S I O N

Judgment of acquittal

Bailey first argues that the district court erred by denying his motion for judgment of acquittal. "At the close of evidence for either party, the defendant may move for . . . a judgment of acquittal . . . if the evidence is insufficient to sustain a conviction." Minn. R. Crim. P. 26.03, subd. 18(1)(a). We review the district court's decision on a motion for a judgment of acquittal de novo. *State v. McCormick*, 835 N.W.2d 498, 506 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013). Our analysis requires us to examine whether the evidence and inferences drawn therefrom, viewed favorably to the state, are sufficient to present a fact question to the jury. *Id.*

Corroboration

Bailey argues that the state failed to corroborate his confession. A defendant's confession is insufficient to warrant a conviction without evidence that the charged offense was committed. Minn. Stat. § 634.03 (2016). A confession is a statement that explicitly or implicitly admits guilt. *State v. Vaughn*, 361 N.W.2d 54, 56 (Minn. 1985).

Bailey was charged with felony violation of a DANCO, in violation of Minn. Stat. § 629.75, subd. 2(d)(1) (2016). Elements of the offense include, an existing DANCO, the defendant's knowledge of the DANCO, and the defendant's violation of the DANCO. 10 *Minnesota Practice*, CRIMJIG 13.56 (2015).

Bailey's statement to Deputy Speedling was not a confession because it was largely exculpatory. Bailey stated that he believed that the DANCO was vacated. Bailey expressed his belief that he did not do anything wrong. Bailey did not admit that there was an existing DANCO or that he knew of the DANCO; rather, he stated that he believed that the DANCO did not exist on the date of the offense.

Bailey admitted having contact with T.S. But Deputy Speedling corroborated this statement. Deputy Speedling testified that T.S. complained that an ex-boyfriend was trying to gain entry to her residence. This evidence could lead a jury to believe that Bailey violated the DANCO by having contact with T.S. The district court did not err by denying Bailey's motion for judgment of acquittal, because the only portion of Bailey's statement that amounted to a confession was corroborated with independent evidence.

Stipulation

Bailey also argues, for the first time on appeal, that the district court erred in denying his motion for judgment of acquittal because the state failed to prove the requisite qualified offenses. Bailey claims that the district court failed to rule on his motion prior to moving to the next stage of the trial. See Minn. R. Crim. P. 26.03, subd. 18(2) (stating when a defendant moves for judgment of acquittal at the close of the state's case, the district court

must rule on the motion, rather than reserve a ruling, which it may do if the motion follows the defendant's case).

Bailey moved for judgment of acquittal, asserting that his confession was not corroborated. He did not base his motion on the state's failure to prove the qualified offenses. The district court denied Bailey's motion, concluding that there was sufficient independent evidence from which the jury could infer the trustworthiness of Bailey's statement. The district court then reopened the record to put Bailey's stipulation on the record. Because Bailey did not move for judgment of acquittal based on the state's failure to prove the qualified offenses, the district court was not required to rule on that claim. Thus, Bailey's issue on appeal should be reframed as a challenge to the district court sua sponte reopening the record to put Bailey's stipulation on the record.

While the state did not move to reopen its case, "[i]n the interests of justice, the court may allow any party to reopen that party's case to offer additional evidence." Minn. R. Crim. P. 26.03, subd. 12(g). Appellate courts review the district court's reopening of a case after the party has rested for an abuse of discretion. *State v. Caine*, 746 N.W.2d 339, 352-53 (Minn. 2008). A district court abuses its discretion when its decision is based on an "erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011).

After the district court denied Bailey's motion for judgment of acquittal, and then inquired about the fact that there was no stipulation on the record prior to the close of the state's case, Bailey's attorney stated that Bailey would stipulate that the state proved the qualified offenses. Bailey agreed that his 2016 domestic-assault conviction and 2016

DANCO-violation conviction enhanced the current offense to a felony. Bailey waived his right to a jury trial and his right to have the state prove that those convictions exist. The district court accepted Bailey's admission and found that he has the requisite qualified offenses before inquiring: "With that the state rests?" And the state rested.

At no time did Bailey object. In fact, immediately after the district court raised the issue, Bailey's attorney stated that Bailey was stipulating. And the stipulation benefitted Bailey because it prevented the jury from hearing evidence about the prior convictions. It was logical for the district court to reopen the record soon after the state rested and before Bailey offered evidence.

Jury instructions

Bailey challenges the district court's jury instructions, but he did not object in district court. Generally, an appellate court will not consider an alleged error in jury instructions unless an objection was made at trial. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). However, this court has discretion to consider an alleged error absent an objection if there is plain error affecting the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under these circumstances, Bailey must show that there was (1) an error; (2) that is plain; and (3) that affects substantial rights. *See id.*

In this plain-error context, an error is a "[d]eviation from a legal rule [] unless the rule has been waived." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014) (quotation omitted). "An error is plain if it was clear or obvious." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotations omitted). A clear or obvious error "contravenes caselaw, a rule, or a standard of conduct." *Id.* Plain error affects substantial rights when it was

prejudicial. *Griller*, 583 N.W.2d at 741. Prejudice is shown if there is a “reasonable likelihood” that the error “had a significant effect” on the jury’s verdict. *Id.* The appellant must satisfy each plain-error prong. *Kelley*, 855 N.W.2d at 273. If the appellant satisfies all prongs, this court “may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted).

Bailey argues that the jury instructions failed to require the jury to find that he knew that the DANCO was in effect on May 28, 2017. Jury instructions must define the crime charged and explain the crime’s elements. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). But a district court has broad discretion in selecting jury instructions. *State v. Anderson*, 789 N.W.2d 227, 239 (Minn. 2010). A district court abuses this broad discretion if its jury instructions confuse, mislead, or materially misstate the law. *State v. Vang*, 774 N.W.2d 566, 581 (Minn. 2009).

Bailey was found guilty of violating a DANCO. See Minn. Stat. § 629.75, subd. 2(d)(1). An element of the offense is that Bailey knew that the DANCO existed. See 10 *Minnesota Practice*, CRIMJIG 13.56. Bailey requested that the district court include a jury instruction for the phrase “to know,” requiring “only that the actor believes that the specified fact exists.” See 10 *Minnesota Practice*, CRIMJIG 3.32 (2015). Although the district court instructed the jury in accordance with the model jury instructions and provided the additional instruction that Bailey requested, Bailey argues that the “statute fails to identify at what point the defendant is required to know of the existence of the

order.” See Minn. Stat. § 629.75, subd. 2(b) (stating that a person who knows of the existence of a DANCO and violates it is guilty of a crime).

Bailey’s critique of the statute, however, raises an issue regarding the statutory language. Bailey did not raise an issue regarding statutory interpretation; rather, he challenges jury instructions. Thus, Bailey’s argument deviates from the issue raised, and our focus is on the jury instructions, not the wording of the statute. Additionally, Bailey attempts to find support in an unpublished case, but in that case, the district court declined to include the instruction defining the word “knows.” We are not presented with that issue because the district court here included that jury instruction.

Additionally, the jury heard evidence that Bailey did not believe that the DANCO existed on May 28, 2017. Bailey told Deputy Speedling that he believed that the DANCO was vacated following the October 2016 hearing. The jury also read the transcript from the October 2016 hearing, which shows that Bailey’s attorney asked if the “DANCO on this file terminate[s] now, or does it continue?” The district court stated that they usually terminate with the conclusion of the case, and the prosecutor stated that it was not a term it requested. But the transcript also show that at the October 2016 hearing, Bailey pleaded guilty to violation of the pretrial DANCO. The DANCO relevant here is the postconviction DANCO issued in connection with Bailey’s sentencing in July 2016 that did not expire until July 26, 2021.

Bailey’s PO testified that Bailey’s compliance with the DANCO is a condition of his probation, and that Bailey never asked to remove the DANCO. Bailey’s PO also testified that Bailey never said anything that left him with the impression that Bailey did

not think that a DANCO existed. While Bailey asserted that he did not believe that the DANCO existed on May 28, 2017, this evidence could lead a jury to conclude that Bailey knew that the DANCO existed at the time of the violation.

Finally, in closing argument, Bailey's attorney stated that Bailey believed that the DANCO was vacated. Bailey's attorney stated that if the jury was convinced that the state met its burden of showing that Bailey knew that the DANCO existed on May 28, 2017, its verdict would be guilty. This statement relates to whether Bailey knew that the DANCO was in effect on May 28, 2017. Bailey has failed to establish plain error because the jury instruction did not deviate from a legal rule, it did not contravene caselaw, and it was not prejudicial and likely to affect the outcome of the case.

Affirmed.