

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1483**

State of Minnesota,
Respondent,

vs.

Tywan Rulford,
Appellant.

**Filed January 4, 2021
Affirmed
Reilly, Judge**

Hennepin County District Court
File No. 27-CR-18-23182

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Worke, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant challenges his conviction for unlawful possession of ammunition, arguing that the district court erred in its jury instructions and that he is entitled to relief on the merits of his pro se claims. We affirm.

FACTS

In September 2018, police officers executed a search warrant at a home where appellant was living with several other people. Officers searched a bedroom, which appellant stated belonged to him. In one of the drawers in a television stand they found a box of 9-millimeter ammunition, a 30-round extended magazine containing 9-millimeter ammunition, a W-2 tax form in appellant's name listing the home's address, and an expired credit card in appellant's name. Officers also found a loaded firearm in a filing cabinet in the same bedroom. In the nightstand, officers found a wallet with appellant's driver's license, a baggie with a substance later confirmed to be cocaine, pills that were later confirmed to be methamphetamine, and a cigarette box containing .22-caliber ammunition. In a post-*Miranda* statement, appellant admitted that there were "clips" with "bullets in it" inside the home, although he denied knowing about the drugs or the firearms.

The state charged appellant with unlawful possession of a firearm; unlawful possession of ammunition—.22-caliber ammunition; unlawful possession of ammunition—9-millimeter-caliber ammunition; and two counts of fifth-degree controlled-substance possession. The district court conducted a jury trial. Appellant testified on his own behalf and denied knowing anything about the firearms, ammunition, or drugs in the home. Appellant stated he did not sleep in the bedroom because the bed had bedbugs, although he admitted to storing his possessions in the room. The jury found appellant guilty of unlawful possession of the 9-millimeter-caliber ammunition, and not guilty of the other four charges. The district court sentenced appellant to 60 months in prison.

This appeal follows.

DECISION

I. The district court did not plainly err by failing to give a unanimity instruction.

A. Legal standard

Appellant argues that the district court erred by failing to provide a unanimity instruction. Appellant did not request a unanimity instruction or object to the district court's jury instructions. A defendant's 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). Despite appellant's failure to object to the instructions, we may review the jury instructions for plain error. *State v. Crowsbreast*, 629 N.W.2d 433, 437-38 (Minn. 2001) (noting that an unpreserved claim of an omitted specific-unanimity jury instruction is reviewed for plain error). Under the plain-error test, we examine the instructions to determine whether there was (1) an error, (2) that was plain, and (3) that affected appellant's substantial rights. *State v. Gunderson*, 812 N.W.2d 156, 159 (Minn. App. 2012). If these elements are satisfied, we will reverse if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). But if "any one of the requirements" of the plain-error test is not satisfied, we "need not address any of the others." *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017) (quotation omitted).

B. The instructions were not plainly erroneous because appellant engaged in a single behavioral incident.

Under the first two plain-error factors, appellant must show that an error occurred, and that the error was plain. "An error is plain if it is clear or obvious." *State v. Webster*,

894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). An error is “clear or obvious” if it “contravenes case law, a rule, or a standard of conduct.” *Id.* (quotation omitted). An alleged error does not contravene case law unless the issue is “conclusively resolved.” *State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008). “District courts are entitled to considerable latitude when selecting language for jury instructions,” but a jury instruction cannot materially misstate the law. *State v. Carridine*, 812 N.W.2d 130, 144 (Minn. 2012). “We review jury instructions as a whole to determine whether the instructions accurately state the law in a manner that can be understood by the jury.” *Kelley*, 855 N.W.2d at 274.

Appellant argues that the district court plainly erred by failing to provide a specific-unanimity instruction on the unlawful-possession-of-ammunition charge. A criminal jury must agree unanimously that the state proved each element of the offense beyond a reasonable doubt. *State v. Pendleton*, 725 N.W.2d 717, 730-31 (Minn. 2007) (“Jury verdicts in all criminal cases must be unanimous.”); *see also* Minn. R. Crim. P. 26.01, subd. 1(5). That said, the jury need not unanimously agree on each element’s underlying facts so long as the differing factual circumstances show “equivalent blameworthiness or culpability.” *Pendleton*, 725 N.W.2d at 731 (quotation omitted). Further, “the jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, such as which of several possible means the defendant used to commit an element of the crime.” *State v. Dalbec*, 789 N.W.2d 508, 511 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. Dec. 22, 2010).

Appellant argues that the jury instructions were plainly erroneous because the verdict relied on two separate acts to comprise one of the counts of unlawful possession of

9-millimeter ammunition: (1) possession of the box of ammunition, and (2) possession of the 30-round magazine containing 9-millimeter ammunition. Appellant relies on *State v. Stempf*, 627 N.W.2d 352 (Minn. App. 2001). In *Stempf*, the state charged the defendant with one count of possession of methamphetamine. *Id.* at 354. But the state introduced evidence at trial that the defendant possessed methamphetamine in two places, in his office and his truck, and on two separate dates. *Id.* The defendant presented different defenses for each allegation. *Id.* On appeal, we concluded that the district court violated the defendant’s right to a unanimous jury verdict because some of the jurors could have believed the defendant possessed the drugs found in his office on one day, while other jurors could have believed he possessed the drugs found in his truck the next day. *Id.* at 358.

Appellant claims this case is like *Stempf* because the jury had to unanimously agree which act of possession supported the guilty verdict—possession of the ammunition in the box, or possession of the ammunition in the magazine. We disagree. The facts here are readily distinguishable from *Stempf*. In *Stempf*, the state charged Stempf with a single count of possession. *Id.* at 354. We noted that “[t]he two acts alleged in this case lack unity of time and place; they are separate and distinct culpable acts, either one of which could support a conviction.” *Id.* at 358-59. One act occurred when the police officers found drugs at the defendant’s workplace, while the other occurred when police officers found drugs in the defendant’s truck the next day. *Id.* at 357. We reversed the conviction, determining that the two acts were separate and distinct, and the district court erred by failing to give a unanimous-verdict instruction. *Id.* at 358.

Here, by contrast, the state presented evidence that appellant committed the charged offense of possessing 9-millimeter ammunition in the same place and at the same time. And *Stempf* does not apply when a defendant engages in single behavioral incident. See, e.g., *State v. Infante*, 796 N.W.2d 349, 356-57 (Minn. App. 2011) (distinguishing *Stempf* and holding that a unanimity instruction is not required when two alleged acts are part of same incident). Police officers discovered a box of 9-millimeter ammunition, a loaded 30-capacity 9-millimeter magazine, and a W-2 tax form with appellant's name on it in the television-stand drawer in appellant's bedroom. Officers found these items in the same place, on the same date, and at the same time. While appellant denied sleeping in the bedroom because there were bedbugs, the jurors gave greater weight to the state's evidence and concluded that appellant engaged in the act of unlawfully possessing ammunition. We determine that the facts presented here satisfy the "unity of time and place" elements set forth in *Stempf*. Thus, the district court did not plainly err by not giving a unanimity instructions.

C. Appellant was not prejudiced by the jury instructions.

While we need not reach the third prong of the plain-error test, we also determine that appellant was not prejudiced by the lack of a unanimity instruction. A defendant's substantial rights are affected if "there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict." *State v. Johnson*, 915 N.W.2d 740, 746 (Minn. 2018) (quotation omitted). Appellant bears a "heavy burden" of proof on the third element of the plain-error test. *Kelley*, 855 N.W.2d at 283. Generally, an erroneous

jury instruction does not have a significant effect on the verdict if there is “considerable evidence of the defendant’s guilt.” *Id.* at 284.

Here, the record contains considerable evidence that appellant was guilty of unlawful possession of ammunition. Police officers found the box and magazine in a television-stand drawer with appellant’s W-2 tax form and an expired credit card with his name on it. Appellant acknowledged that he has “placed . . . storage things in the [television-stand] drawer before.” An officer also testified that appellant admitted there were “clips” with “bullets in it” inside the home. While appellant denied that the ammunition belonged to him, the jury was free to discredit this testimony and resolve conflicting evidence. *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008).

Nor did appellant raise separate defenses at trial for the ammunition found in the box and the ammunition found in the magazine. *See State v. Rucker*, 752 N.W.2d 538, 548 (Minn. App. 2008) (distinguishing case from *Stempf* because, among other things, appellant did not present separate defenses and “simply maintained throughout his trial that he [did not commit the crime]”), *review denied* (Minn. Sept. 23, 2008). Appellant denied that any of the ammunition belonged to him no matter where it was discovered. Appellant testified that he told a police officer “[t]here’s nothing in the house,” and he “wasn’t aware of other contraband in the house.” Thus, we conclude that even if the district court erred by not giving a unanimity instruction, appellant is not entitled to a new trial because he has not met the heavy burden of proving prejudice.

II. Appellant is not entitled to relief on his pro se claims.

Appellant raises additional arguments in his pro se supplemental brief, claiming that: (1) the search warrant was not supported by probable cause, (2) his trial counsel's assistance was ineffective, and (3) the state violated his rights under the compulsory process clause. We address each argument in turn.

A. Probable-Cause Challenge

Appellant challenges the probable cause supporting the search warrant for the home. A search warrant must be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Appellant claims that a confidential informant told police officers that drug transactions took place at appellant's place of residence. Appellant argues that the confidential informant's statements constitute hearsay and were inconsistent. But appellant failed to raise this issue in district court and we do not consider it for the first time on appeal. *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). Thus, appellant forfeited his probable-cause challenge.

B. Ineffective Assistance of Counsel

Appellant argues that his trial counsel was ineffective. When a defendant raises an ineffective-assistance-of-counsel claim in a direct appeal, we examine the claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064-65 (1984). *See State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (discussing *Strickland*). Under this test, "an appellant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors."

State v. Rhodes, 657 N.W.2d 823, 842 (Minn. 2003) (quotation omitted). Appellate courts need not address both prongs if one is dispositive. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

Appellant argues that his defense attorney missed or prolonged court dates, failed to file a motion to suppress, and failed to challenge the legality of his arrest. Generally, when the trial record provides a sufficient basis to adjudicate an ineffective-assistance-of-counsel claim, the claim must be brought on direct appeal. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). “But a claim of ineffective assistance of trial counsel that cannot be resolved on the trial court record alone need not be brought in a direct appeal and may be brought in a postconviction petition.” *Id.* at 535-36. We conclude that the record before us cannot fully resolve appellant’s ineffective-assistance-of-counsel claims. As a result, we cannot decide appellant’s argument, which may be pursued in postconviction proceedings.

C. Violation of Compulsory Process Clause

Appellant argues that the district court violated his rights under the compulsory process clause. The compulsory process clause of the Sixth Amendment protects a defendant’s right to call witnesses and the right to call oneself as a witness. *State v. Holloway*, 905 N.W.2d 20, 25 (Minn. App. 2017), *aff’d*, 916 N.W.2d 338 (Minn. 2018). But the rights afforded under the compulsory process clause are not unlimited and “the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 3446 (1982).

Appellant claims the district court interfered with his attempt to call a defense witness. The district court asked appellant if he talked to the potential witness in the presence of a third party. Appellant said that he spoke to the witness alone. The district court informed appellant that he “made [himself] a witness in this case” by speaking to the witness alone, and refused to allow any testimony from the witness.

Appellant must show that the district court improperly excluded the testimony of his witness and that the testimony “would have been both material and favorable to his defense.” *Id.* at 867, 102 S. Ct. at 3446. Appellant has not explained how the witness’s testimony would have been material and favorable to his defense. In fact, appellant informed the district court that after speaking with the witness, it was “unlikely” they were going to call the witness. Appellant has not shown that the district court violated the compulsory process clause.

Affirmed.