

*This opinion is nonprecedential except as provided by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
A20-0255**

State of Minnesota,
Respondent,

vs.

Jose Juan Garcia Rivera,
Appellant.

**Filed April 12, 2021
Affirmed
Segal, Chief Judge**

Hennepin County District Court
File No. 27-CR-18-17774

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

Michael O. Freeman, Hennepin County Attorney, Linda Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Segal, Chief Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges his conviction of second-degree criminal sexual conduct, claiming that the district court erred by denying appellant's *Batson* challenge and by failing

to issue a specific-unanimity instruction to the jury. Appellant also alleges prosecutorial misconduct and ineffective assistance of counsel in a pro se brief. We hold that the district court's decision to deny appellant's *Batson* challenge was not clearly erroneous, it was not plain error to omit the specific-unanimity instruction, and appellant's arguments in his pro se brief lack legal and factual support. We therefore affirm.

FACTS

In 2018, a child (the child) reported that appellant Jose Juan Garcia Rivera had engaged in sexual contact with her several times two or three years earlier when she was nine to ten years old. Respondent State of Minnesota charged Garcia Rivera with a single count of criminal sexual conduct in the second degree. At trial, the district court accepted January 1, 2014 to December 31, 2015, for the date range in which the alleged events occurred.

The case proceeded to a jury trial. At trial, the child testified that Garcia Rivera first touched her when she was about nine and a half years old. She and her two younger sisters were home alone with Garcia Rivera and, while her sisters were distracted by his phone, Garcia Rivera touched the child's genital area. She testified that when her parents¹ came home, Garcia Rivera told her that she should not tell anyone or he would go to jail, and that scared her.

¹ The child's mother and the mother's partner were in a long-term relationship and shared parenting of the child and her sisters. The partner was referred to during the trial as the child's parent and father. For ease of reference, we also use these terms to refer to the partner in this opinion. Garcia Rivera is the partner's brother and lived with the family for a period of time.

The child testified that Garcia Rivera also touched her some months later while in a car on a late-night ride home from a family party. The child and her two sisters were in the backseat of her parents' car with Garcia Rivera, and a blanket was across their laps. Garcia Rivera began touching the child's "bare private parts" under the blanket with his hand. When they arrived home, the child testified that Garcia Rivera told her that if she would come to the living room, where he slept, to "play with him" he would give her a dollar. The child did not go into the living room as he asked, but after the rest of the family went to sleep in the bedroom, Garcia Rivera entered the bedroom and woke the child's younger sister. After the child's parents learned that Garcia Rivera had entered the bedroom in the night, they spoke with him and he no longer lived with the child's family.

The child testified that the sexual touching occurred a third time, sometime later, when Garcia Rivera and his partner took the child and her sisters to the mall, and then returned to the child's house. The child watched television in the living room with Garcia Rivera and his sleeping partner. She testified that while they watched television Garcia Rivera touched her "boobs."

The child also testified that Garcia Rivera texted her around 9:00 p.m. one night asking her to come outside the house by herself because he would be nearby getting tacos. The child did not go outside alone, and testified that Garcia Rivera then texted her asking for a picture of her chest. The child's siblings and mother saw the text messages and also saw Garcia Rivera in his car outside their house.

Garcia Rivera and his former partner testified that the relationship between Garcia Rivera and the child's parents was strained. Garcia Rivera's primary defense at trial was

that the child's allegations were false, and that the parents had a motive to encourage the child to lie.

The jury returned a verdict of guilty and Garcia Rivera was convicted of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(a) (2012). The district court stayed imposition of sentence and placed Garcia Rivera on probation for five years. Garcia Rivera now appeals.

DECISION

Garcia Rivera asserts two central grounds for a reversal of his conviction. First, he claims that the district court erred by denying his challenge to the selection of jurors based on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). Second, he claims that he is entitled to a new trial because the district court committed plain error by failing to provide a specific-unanimity instruction to the jury. Garcia Rivera asserts several additional arguments in his pro se brief. We address each in turn.

I. The district court's denial of Garcia Rivera's *Batson* challenge was not clearly erroneous.

Prior to the close of jury selection, Garcia Rivera asserted a *Batson* challenge, arguing that the state used its three peremptory jury strikes to eliminate prospective jurors based on their race. The three jurors were all people of color, including the only panel member (Juror 1) who identified as Hispanic, which is the same ethnicity as Garcia Rivera.² After the state's three peremptory strikes, there was only one juror of color left on the

² The other two jurors included a person who identified as Asian and one who identified as multi-racial.

panel. In response to the *Batson* challenge, the prosecutor advised the court that he did not realize his three strikes were all people of color and reversed his peremptory strike of one of the prospective jurors. The prosecutor stated: “Your Honor, the only reason for striking [the third juror] was his comment that he—I have limited one-on-one interactions with children beyond babysitting. A parent . . . probably would be more equipped than me.” The prosecutor then instead used his third strike to eliminate a white juror who also had little experience with children. With regard to his peremptory strikes of the other two prospective jurors of color (Jurors 1 and 2), the prosecutor stated that he struck them because they each said they had been falsely accused of a crime. The prosecutor noted that they were the only two members of the panel who made this claim.

A. The *Batson* Test

Peremptory challenges allow a party to strike a prospective juror for any reason that causes the party to believe the juror will be less fair, unless that reason is based on race or gender. *J.E.B. v. Alabama*, 511 U.S. 127, 143, 114 S. Ct. 1419, 1429 (1994); *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719; *State v. Martin*, 773 N.W.2d 89, 100 (Minn. 2009). Challenges based on the race or gender of a prospective juror violate the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719.

Minnesota courts have adopted the three-step framework established in *Batson* to determine if a peremptory challenge was motivated by racial discrimination. See Minn. R. Crim. P. 26.02, subd. 7(3); accord *Martin*, 773 N.W.2d at 101. In bringing a *Batson* challenge,

(1) the defendant must make a prima facie showing that the prosecutor executed a peremptory challenge on the basis of race; (2) the burden then shifts to the prosecution to articulate a race-neutral explanation for striking the juror in question; and (3) the district court must determine whether the defendant has carried the burden of proving purposeful discrimination.

Martin, 773 N.W.2d at 101. The prosecution’s explanation need not be “persuasive or even plausible” and will be deemed race neutral unless “discriminatory intent is inherent in the explanation.” *Id.* (quotation omitted). Only at the third step will the explanation’s persuasiveness be considered as the defendant argues that the strike was purposefully discriminatory. *Id.* The defendant must prove in the third step “that the peremptory strike was motivated by racial discrimination and that the proffered reasons were merely a pretext for the discriminatory motive.” *State v. Pendleton*, 725 N.W.2d 717, 726 (Minn. 2007) (quotation omitted).

Generally, a district court’s ruling on a *Batson* challenge will not be reversed unless clearly erroneous. *State v. McDonough*, 631 N.W.2d 373, 385 (Minn. 2001). We give deference to district court determinations concerning the credibility of the state’s reasons for a peremptory strike because the district court is in the best position to make such assessments. *State v. White*, 684 N.W.2d 500, 506 (Minn. 2004). This court, nevertheless, must ensure that the district court’s analysis is not contrary to the law and is supported by the record. *Id.* at 506-507; *State v. Henderson*, 620 N.W.2d 688, 703 (Minn. 2001).

B. The District Court’s Ruling

Here, the district court found that Garcia Rivera satisfied the first prong of *Batson* and had made a prima facie showing. The state proffered a race-neutral explanation for

the two peremptory strikes—that the two panel members stated they had been falsely accused of crimes—and so satisfied the second prong.³ With regard to the third prong of the test, the district court concluded that Garcia Rivera failed to carry his burden of demonstrating that “the race-neutral reason was pretextual and that the real reason for the strike was the p[ro]spective juror’s race.” In reaching that conclusion, the district court noted that the prosecutor seemed genuinely surprised when it was pointed out to him that he had struck three out of the four people of color on the jury panel.

C. Analysis of the Pretext Claim

Garcia Rivera argues the district court erred in its evaluation of the third prong of the *Batson* test and claims that racial pretext is evident because the prosecutor treated people of color differently from white people with equivalent backgrounds and answers. He claims that his case is similar to the case of *Miller-El v. Dretke*, where the Supreme Court struck down a conviction on the basis of *Batson* stating, “If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.” 545 U.S. 231, 241, 125 S. Ct. 2317, 2325 (2005). Specifically, Garcia Rivera points to the fact that the state did not strike white jurors who had been convicted of crimes and contends that Jurors 1 and 2 were similarly situated to these white jurors. We are not persuaded that, in the context of this case, the jurors were similarly situated.

³ Garcia Rivera notes that the district court did not explicitly make this finding, but acknowledges that the state satisfied the second prong of *Batson*.

Here, Garcia Rivera's defense against the criminal-sexual-conduct charge was based on his claim that the child's accusations against him were false and that the child had been influenced to lie by her parents. During jury selection, Juror 1 stated that he had been falsely accused of physically assaulting a young nephew and shared his belief that the nephew had been influenced by family members to lie. Juror 1 stated:

[T]he facts are very important here, and people can say one thing but the facts say another. People are influenced, family members could put things into children's heads. . . . It happened to me. It was a custody battle and they used the physical assault accusation against me that was totally false and thrown out, and that actually helped us in our case but it affected me, and I understand that parents can influence their children to say things.

Juror 2 said she was arrested and charged based on a co-worker's false accusation that Juror 2 had stabbed her when they were at work. Juror 2's case was ultimately dismissed by the prosecutor, but not until the trial date was near. Both jurors thus related experiences of having been subjected to false accusations of criminal activity.

While both jurors stated that they could be fair and judge the case based on the facts, a juror who had been falsely accused in the past could have reason to judge an alleged victim's allegations in a more skeptical light. *See, e.g., State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000) (affirming the district court's finding that juror's experience of being falsely accused of stealing and juror's connection with potential witnesses were acceptable reasons for peremptory challenge). Members of the jury panel who had been convicted of a crime, but did not challenge the outcome as being based on a false accusation, would not necessarily present the same risk of being more skeptical of the testimony presented against

a defendant. In light of the fact that none of the jurors who had been convicted of crimes (white jurors) claimed that they had been *falsely* accused of the crimes, we conclude that the record supports the district court's findings that Jurors 1 and 2, and the white jurors who had been convicted of a crime, did not have equivalent answers and were not similarly situated.

Garcia Rivera further argues that racial animus can be found in the fact that the prosecutor inaccurately characterized Juror 1's responses as a "he said/she said" situation and referred to Juror 1 as "the defendant" before correcting himself and referring to him as a "juror." Garcia Rivera is correct that Juror 1 did not actually use the phrase "he said/she said," but the use of the phrase appears to be a relatively benign shorthand summary of Juror 1's responses. Similarly, while the prosecutor's reference to the only Hispanic juror as "the defendant" could be construed as evidence of bias, the prosecutor explained that he simply misspoke because he uses the term "defendant" so regularly in his job. He also immediately corrected himself without being prompted by others.⁴

Finally, Garcia Rivera points to the prosecutor's statement that, in addition to striking Juror 2 because of her experience of being falsely accused of a crime, he also had the concern that Juror 2 could not engage in a "meaningful discussion with the other jurors based on the way she answered . . . questions." While the comment about Juror 2's

⁴ The misstatement was made in response to a request from the court for the prosecutor to explain his reason for striking Juror 1: "Your Honor—. . . the defendant—or, the defendant, I apologize. The juror said that he was falsely [ac]cused"

communication skills again could be attributed to racial bias, we discern no clear error in the district court's finding that there was not purposeful discrimination on the basis of race.

Consequently, we discern no clear error and therefore affirm the district court's denial of Garcia Rivera's *Batson* challenge.

II. The district court did not commit reversible plain error when it issued jury instructions without a specific-unanimity instruction.

Garcia Rivera argues that the district court erred by failing to issue a specific-unanimity instruction, which would have advised the jury not only that their decision must be unanimous, but also that they must unanimously agree on which act or acts Garcia Rivera committed. Garcia Rivera acknowledges that he never asserted this claim before the district court and, consequently, it is subject to review for plain error. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012).

The district court plainly errs if there is an (1) error, (2) that is plain, and (3) that affected the defendant's substantial rights. *Id.* An error is plain if it contravenes caselaw, a rule, or a standard of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the three prongs of the plain-error test are met, we then decide "whether we must address the error to ensure fairness and the integrity of the judicial proceedings." *Milton*, 821 N.W.2d at 805 (quotation omitted).

We review the jury instructions in their entirety to assess whether the instructions "fairly and adequately explain the law" and we "give district courts broad discretion and considerable latitude in choosing the language of jury instructions." *Id.* (quotations omitted).

A. Unanimity Requirements

Jury verdicts must be unanimous in all criminal cases. Minn. R. Crim. P. 26.01, subd. 1(5). “To achieve that end, a jury must ‘unanimously find that the government has proved each element of the offense.’” *Pendleton*, 725 N.W.2d at 730-31 (quoting *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002)). If each act itself constitutes an element of the crime, the jury must unanimously agree on which acts the defendant committed. *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001). However, “the jury does not have to unanimously agree on the facts underlying an element of a crime in all cases.” *Pendleton*, 725 N.W.2d at 731. When the state offers different means for proving a crime, the jury need not agree on the specific means, “[b]ut different factual courses of conduct or states of mind that are offered to prove an element of a crime must show equivalent blameworthiness or culpability.” *State v. Dalbec*, 789 N.W.2d 508, 511 (Minn. App. 2010) (quotation omitted).

B. Garcia Rivera’s Claim

In this case, the state charged Garcia Rivera with a single count of second-degree criminal sexual conduct. The charge was based on three alleged instances of sexual contact with the child that occurred on unknown dates when the child was nine to ten years old. During closing argument to the jury, the basis for the conviction was narrowed from three instances to two instances of sexual contact because the state conceded that it could not prove that the alleged sexual contact in the backseat of the family’s car during a ride home from a wedding was committed in Hennepin County. The district court instructed the jury

to reach a unanimous verdict, but did not instruct the jury to come to a unanimous verdict regarding the specific instances of sexual contact (a specific-unanimity instruction).

Garcia Rivera relies on *Stempf* to support his argument that it was plain error not to provide a specific-unanimity instruction. In *Stempf*, the defendant was charged with one count of unlawful possession of a controlled substance that was based on two separate instances: first, constructive possession of methamphetamine found when law enforcement executed a search warrant at the defendant's place of work; and, second, constructive possession of methamphetamine residue found the next day in a truck in which defendant had been a passenger. 627 N.W.2d at 354. At trial, Stempf denied possessing the methamphetamine at his workplace, claiming that he only worked there part-time and had no control over the premises. *Id.* He also denied possessing the methamphetamine residue that was found in a cigarette package in the truck, claiming that another occupant of the truck smoked the same brand of cigarettes, that it was not his truck, and that other people had also ridden in the truck. *Id.* Stempf requested, but the district court declined to provide, a specific-unanimity instruction that would have required the jury to agree on which instance Stempf had possessed methamphetamine. *Id.* In closing arguments, the state told the jury that they could convict if some jurors found Stempf possessed the methamphetamine in the truck, while others found he possessed the methamphetamine in the workplace. *Id.* The jury returned a guilty verdict. *Id.*

This court held that the district court had abused its discretion by denying Stempf's request for a specific-unanimity instruction. *Id.* at 354, 357-58. Our court noted that, for the crime of possession, the full jury had to agree that Stempf possessed the drugs during

at least one specific point in time. With no specific-unanimity instruction, “some jurors could have believed appellant possessed the methamphetamine found on the premises while other jurors could have believed appellant possessed the methamphetamine found in the truck[, and] it is possible that the jury’s verdict of guilty was not unanimous.” *Id.* at 359. Garcia Rivera argues that the facts of his case are analogous to *Stempf* and that he is equally entitled to a reversal of his conviction.

The state argues that *Stempf* is easily distinguishable noting, first, that *Stempf* was decided under an abuse-of-discretion standard of review, not plain error. Second, the state points out that in *Stempf* there were two separate acts of possession in two different locations with different defenses and evidence. The state maintains that, by contrast, in sexual-conduct cases no specific-unanimity instruction is required because the state is required to prove neither specific dates nor the way in which the crime was committed.

In support of its argument, the state cites *State v. Rucker*, a case in which the defendant was convicted of four counts of criminal sexual conduct—one count of first degree and one count of second degree for each victim whom he was alleged to have abused over a two-year period of time. 752 N.W.2d 538, 545, 548 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). The jury was instructed only to find whether the acts occurred during the two years. *Id.* They were not required to agree on which specific instances in fact occurred. *Id.* The two victims in the case “referred to a few specific dates in their testimony on which incidents of abuse occurred, but with respect to their testimony and the state’s case as a whole, these recollections served as examples of [defendant’s] conduct and not distinct allegations of sexual abuse.” *Id.* In analyzing whether a specific-

unanimity instruction should have been provided, this court looked at the facts and arguments presented by the state and the defendant:

Unlike *Stempf*, the prosecution here did not emphasize certain incidents, distinguish as to the proof of some incidents compared to others, or encourage the jury to find certain incidents were more likely to have occurred than other incidents, and [the defendant] did not present separate defenses for each incident of alleged sexual abuse; rather, he simply maintained throughout his trial that he never had sexual contact with either child-victim.

Id. This court concluded that the district court did not err by failing to provide a specific-unanimity defense. *Id.*

Applying this framework here, even though the number of instances of sexual contact are much more limited than in *Rucker*, the jury was presented with a similar scenario. Garcia Rivera maintained throughout the trial that the child fabricated the sexual-contact allegations and was told to lie by her parents who disliked Garcia Rivera. The jury either believed the child or believed Garcia Rivera. And there was not particular emphasis placed on one instance over another. Thus, *Rucker*, and not *Stempf*, appears to be the more analogous precedent.

Nevertheless, we need not determine whether the district court erred by failing to require a specific-unanimity instruction, because we conclude that Garcia Rivera cannot satisfy the third element of the plain-error standard of review—that Garcia Rivera suffered prejudice from the absence of the instruction. In this regard, we note first that the written jury instructions included a general unanimity instruction: “In order for you to return any verdict, whether guilty or not guilty, each juror must agree with that verdict. Any verdict

must be unanimous.” To the jury, the district court said “each juror must agree with that verdict. In other words, any verdict must be unanimous. You should discuss the case with one another and deliberate with a view toward reaching agreement, if you can do so without violating your individual judgment.” It is also noteworthy that, unlike *Stempf*, the state did not tell the jury in its closing argument that they did *not* have to agree on which incident or incidents occurred, but rather told them “you only need to find one of them, one touch in those three instances⁵ to find [Garcia Rivera] guilty.”

In addition, as noted above, neither party presented significantly different evidence to prove or disprove each of the alleged incidents. During closing arguments, Garcia Rivera argued that there were numerous inconsistencies in the state’s allegations. However, he did not analyze inconsistencies in each instance and instead used the inconsistencies to speak to the child’s credibility in general. For example, Garcia Rivera argued that there was inconsistency regarding why he moved out of the child’s house, who was driving during the alleged sexual contact in the car, and when and to whom the child disclosed information of the assault. The defense attorney said, “There were inconsistencies about what was touched and when, whether it was just her breasts or whether it was her vagina, whether—she can’t remember what was touched” but did not suggest that those inconsistencies indicated that any specific instance was less likely than any other. Because Garcia Rivera’s defense was that the allegations as a whole were made

⁵ It was only later in his closing argument that the prosecutor conceded that the state could not prove the car-ride incident occurred in Hennepin County, thus reducing the case from three instances of sexual contact to two.

up and his arguments did not focus on the incidents individually, it is not likely that Garcia Rivera suffered prejudice from the lack of a specific-unanimity instruction.

Thus, we conclude that the district court did not plainly err by failing to provide, sua sponte, a specific-unanimity instruction.⁶

III. The issues asserted in Garcia Rivera's pro se brief are without merit.

Garcia Rivera raises three issues in a pro se brief in this appeal. He argues that the prosecutor's references in his opening statement at trial to the movie *Alien* were prejudicial, that Garcia Rivera did not receive a response from a person who he tried to contact in the course of the investigation, and that he received ineffective assistance of counsel at trial.

We note at the outset that the issues raised in Garcia Rivera's pro se brief are not supported by legal argument or detailed facts. *See State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (assignments of error based on assertions and without legal authority are waived on appeal). And we conclude that his arguments, reviewed on the merits, do not warrant a reversal of his conviction.

⁶ This court has issued a number of nonprecedential opinions in accord. *See, e.g., State v. Deflorin*, No. A17-0996, 2018 WL 2187039, at *3 (Minn. App. May 14, 2018) (finding that due to the evidence and arguments presented at trial, "any alleged error regarding the lack of [a specific-unanimity] instruction did not affect [the defendant's] substantial rights"), *review denied* (Minn. Aug. 7, 2018); *State v. Tabaka*, No. A16-0811, 2017 WL 1210120, at *3 (Minn. App. Apr. 3, 2017) (distinguishing *Stempf* because the acts were part of a single behavioral incident, the defendant never requested a specific-unanimity instruction, and the defendant did not offer different defenses for the incidents), *review denied* (Minn. May 30, 2017); *State v. LaDue*, No. A12-0072, 2013 WL 4504303, at *8-9 (Minn. App. Aug. 26, 2013), *review denied* (Minn. Oct. 23, 2013); *State v. Quach*, No. A10-385, 2011 WL 1642423, at *3-4 (Minn. App. May 3, 2011), *review denied* (Minn. July 19, 2011).

First, regarding the alleged prosecutorial misconduct, the prosecutor referenced the movie *Alien*, and it was implied that Garcia Rivera was the “alien.” However, the prosecutor referenced the movie to describe the fear that the child had in raising this issue at all—because “no one [could] hear [her] scream.” This commentary was not objected to by Garcia Rivera at trial, and we discern no plain error.

Second, regarding Garcia Rivera’s attempts to “contact Mr. Christopher Tucker,” it is unclear who “Mr. Tucker” is and why contacting him would be an appealable issue.

Finally, Garcia Rivera argues that his defense attorney at trial did not present all the information he had given her, and did not prepare him for potential outcomes of his case. “To prove ineffective assistance of counsel, a defendant must show that (1) his attorney’s performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that the outcome would have been different, but for counsel’s errors.” *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017) (quotation omitted). Garcia Rivera does not provide sufficient detail so that this court could determine whether the attorney’s performance fell below an objective standard of reasonableness, or that a reasonable probability exists that the outcome would have been different but for counsel’s errors.

Affirmed.