

*This opinion is nonprecedential except as provided by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
A20-0483**

State of Minnesota,
Respondent,

vs.

Scott Wendlin Linderman,
Appellant.

**Filed March 1, 2021
Affirmed
Reilly, Judge**

Chisago County District Court
File No. 13-CR-19-647

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

Janet Reiter, Chisago County Attorney, David Hemming, Assistant County Attorney,
Center City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Reilly, Judge; and Smith,
Tracy M., Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant challenges his drive-by-shooting and assault convictions, arguing that (1) the evidence was insufficient to sustain the drive-by-shooting conviction, (2) the district court erred in its final instructions to the jury, and (3) the district court erred in entering a

judgment of conviction for assault because it did not arise out of a separate behavioral incident. We affirm.

FACTS

This appeal arises out of appellant Scott Wendlin Linderman's convictions for drive-by shooting in violation of Minn. Stat. § 609.66, subd. 1e(b) (2018), and second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2018). At the jury trial, respondent State of Minnesota alleged that appellant drove to the victims' house; fired a gun from inside his truck toward the victims, A.S. and B.N. (shot one); and fired a second shot toward the house after A.S. and B.N. ran inside (shot two).

The jury heard the following testimony. A.S. lived with his friend, B.N., and knew appellant through B.N. A.S. received a message one night that appellant planned to come to the house early the next morning to pick up his camper from the property. Early the following morning, A.S. and B.N. were standing outside the house when appellant pulled his truck alongside them. A.S. walked toward the truck and saw appellant inside the truck holding a rifle in his right hand, with the barrel resting on the passenger window. A.S. testified that appellant said, "Take my sh-t, you're f--king dead." A.S. took a step toward the front of the truck and, at the same time, "heard [the rifle] go off" and felt ringing in his ears. A.S. noticed that the rifle was "pointed towards [his] face, towards that direction of [his] face." A.S. and B.N. immediately turned and ran toward the house and A.S. called 911. While he was on the phone, A.S. heard a second shot "right outside" the house. A.S. knew the bullet came into the house because he could "clearly see there was a hole" in the newly remodeled bedroom wall.

B.N. testified that he was outside the house with A.S. when he saw appellant's truck drive toward them. B.N. saw "the barrel of a gun hanging out the passenger window" and heard appellant say, "You took my stuff. I'm going to f--king kill you." B.N. saw the barrel of the rifle pointed "right in between" him and A.S. B.N. testified that "[a]fter [appellant] said he was going to kill us, or me, or whatever it was, all of a sudden the gun went off and [A.S.] and I both ran to the house." While A.S. and B.N. were inside calling the police, B.N. heard a second gunshot outside the home.

Investigating police officers searched appellant's truck and found appellant's expired Minnesota driver's license, a medical device identification card, and a shotgun shell. Officers took photographs of the tire tracks in front of B.N.'s house. Officers also photographed the truck and measured the truck tires. At trial, the officer testified that the photographs of appellant's truck tires matched the photographs of the tire tracks in front of B.N.'s house.

Appellant did not testify at trial. The defense called B.N.'s ex-wife, who testified that she planned to meet appellant the night before the crime, although she did not ultimately meet up with him. The defense also called appellant's fiancée, who testified that appellant was with her at the time of the crime and did not leave her during the evening.

The jury found appellant guilty of both crimes.¹ At sentencing, the district court adjudicated appellant guilty of the drive-by-shooting offense and imposed the presumptive

¹ Appellant does not challenge the sufficiency of the evidence concerning the second-degree assault conviction.

sentence. The district court did not impose sentence on the assault charge. The warrant of commitment reflects that the jury convicted appellant of both charges.

This appeal follows.

DECISION

I. The evidence was sufficient to prove beyond a reasonable doubt that appellant is guilty of a drive-by shooting.

a. Standard of Review

Appellant argues that the evidence is insufficient to support his drive-by-shooting conviction. To evaluate the sufficiency of the evidence, appellate courts “carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the factfinder to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). We review the evidence “in the light most favorable to the conviction” and “assume the jury believed the State’s witnesses and disbelieved any evidence to the contrary.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). Appellate courts “will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Id.*

The parties disagree about the nature of the evidence presented. Appellant claims that the case rests solely on circumstantial evidence, while respondent argues that the jury’s verdict can be sustained on direct evidence alone. Circumstantial evidence is “evidence

from which the factfinder can infer whether the facts in dispute existed or did not exist.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Direct evidence, by contrast, is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* (quotation omitted). For the reasons set forth below, we determine that direct evidence supports the conviction.

b. Direct Evidence Supports the Conviction for Shot One

The jury convicted appellant of drive-by shooting under Minn. Stat. § 609.66, subd. 1e(b). This section provides that “[a]ny person who violates this subdivision by firing at or toward a person, or an occupied building or motor vehicle, may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both.” Minn. Stat. § 609.66, subd. 1e(b). To prove that appellant committed a drive-by-shooting offense, the state must establish beyond a reasonable doubt that (1) appellant was in or had just exited a motor vehicle, (2) appellant recklessly discharged a firearm at or toward a building or motor vehicle, (3) appellant fired at or toward a person or an occupied building or motor vehicle, and (4) venue. *State v. Vang*, 847 N.W.2d 248, 259 (Minn. 2014); *State v. Hayes*, 826 N.W.2d 799, 804-05 (Minn. 2013).

Here, both victims testified that appellant approached them in his truck outside their home, threatened to kill them, aimed a rifle at them, and fired a shot from inside his vehicle toward A.S. and B.N. A.S. saw appellant sitting in his truck outside their home with a rifle in his right hand. A.S. heard appellant say, “you’re f--king dead” and almost immediately “heard [the rifle] go off.” B.N. also testified that appellant was sitting in his truck with “the barrel of a gun hanging out the passenger window.” B.N. heard appellant say, “I’m

going to f--king kill you,” and saw the barrel of the rifle pointed “right in between” the victims. B.N. said that the barrel was pointed “right up the driveway,” which was in the direction of the house. B.N. also stated that “[a]fter [appellant] said he was going to kill us . . . all of a sudden the gun went off and [A.S.] and I both ran to the house.”

The testimony presented by A.S. and B.N. constitutes direct evidence of the crime; they testified about what they saw and heard that night. And the testimony of even a single credible witness can support a conviction. *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004). Based on the evidence presented, and viewed in the light most favorable to the jury’s verdict, we conclude that respondent proved the elements of the crime beyond a reasonable doubt.

II. The district court did not err in its instructions to the jury.

Appellant argues that the district court erred in failing to provide a unanimity instruction. “Jury verdicts in all criminal cases must be unanimous.” *State v. Pendleton*, 725 N.W.2d 717, 730 (Minn. 2007). “[A] jury must unanimously find that the government has proved each element of the offense. But the jury does not have to unanimously agree on the facts underlying an element of a crime in all cases.” *Id.* at 730-31 (citation and quotation omitted). While “unanimity is not required with respect to the alternative means or ways in which the crime can be committed,” the district court must provide a unanimity instruction when the defendant is charged with a single crime but the state presents evidence of different acts that could each independently constitute the crime. *State v. Stempf*, 627 N.W.2d 352, 354-56 (Minn. App. 2001) (quotation omitted).

Appellant claims the district court erred because it failed to instruct the jury to unanimously find which drive-by-shooting act occurred: shot one, fired at A.S. and B.N. as they stood outside; or shot two, fired at the occupied building after A.S. and B.N. ran into the house. Appellant argues that because alternative factual scenarios are present, each of which could qualify as a drive-by-shooting crime, the district court erred by failing to provide a unanimity instruction.

Appellant did not request a unanimity instruction at trial or object to the jury instructions given by the district court. Generally, a defendant's failure to propose specific jury instructions or object to instructions constitutes a forfeiture of that issue on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). That said, a reviewing court may evaluate the jury instructions for plain error. *State v. Crowsbreast*, 629 N.W.2d 433, 437-38 (Minn. 2001) (providing 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).

We need not address all the plain-error factors because, assuming without deciding that the district court erred and that the error was plain, appellant's substantial rights were not affected. 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) (emphasis omitted) (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 283-84. Here, respondent presented considerable direct evidence of appellant’s guilt. A.S. and B.N. testified that appellant drove onto their property, threatened to kill them, pointed a rifle at them, and fired a shot in between them. The victims testified that appellant fired a second shot after they ran into the home. While appellant presented testimony from his own witnesses, the jury evidently found the state’s witnesses more credible and we defer to those credibility assessments. *See State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005) (“It [is] up to the jury to judge the weight and credibility of the witnesses’ testimony.”).

Thus, we determine that appellant has not satisfied his heavy burden of demonstrating that the lack of a specific unanimity instruction significantly impacted the jury’s verdict. And based on this determination, we need not consider the remaining factors. *See State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017) (noting that if “any one of the requirements” of the plain-error test is not satisfied, we “need not address any of the others” (quotation omitted)). Appellant has not established that he is entitled to reversal of his conviction under the plain-error test.

III. The district court did not err by entering judgment of conviction for assault.

Appellant argues that the assault conviction must be vacated because the two convictions arose out of the same behavioral incident. When the facts are established, as

they are here, this determination presents a question of law subject to de novo review. *State v. Grampre*, 766 N.W.2d 347, 354 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009).

The jury found appellant guilty of drive-by shooting and assault. But the district court adjudicated only on the drive-by-shooting charge. During sentencing, the district court explained its reasoning:

I do believe that pursuant to Minn. Stat. 609.035, subd. 1, that it is the same behavioral incident, specifically, because I reviewed the testimony and I think it's unclear from the testimony that was provided if it was the first shot that hit the house or the second shot that hit the house. So, I'm going to sentence only on the drive by shooting. I'll note that the jury convicted him on Assault in the Second Degree, but I am only going to sentence on Count 1.

The district court did not state whether it was convicting appellant of the assault offense. But the warrant of commitment that followed reflects that the district court convicted appellant of both counts but sentenced appellant only on the drive-by-shooting offense.

Section 609.035, on which the district court relied, provides that “if a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them.” Minn. Stat. § 609.035, subd. 1 (2018). Under this section, “a person may be punished for only one of the offenses that results from acts committed during a single behavioral incident and that did not involve multiple victims.” *State v. Branch*, 942 N.W.2d 711, 713 (Minn. 2020).

Contrary to appellant's assertion, the district court was not prohibited from entering multiple convictions for the drive-by shooting and assault crimes. Indeed, Minnesota caselaw recognizes that not only may a district court convict on both offenses, it may impose multiple sentences for drive-by shootings and any assaults that occur as a result. In *State v. Ferguson*, the defendant was involved in a drive-by shooting at a building occupied by eight people. 808 N.W.2d 586, 588 (Minn. 2012). The defendant was convicted of drive-by shooting and one count of assault for each of the eight people in the dwelling at the time of the shooting. *Id.* The district court imposed nine sentences in total. *Id.* at 589. While the court of appeals vacated the eight assault sentences under section 609.035, the supreme court reversed and upheld the sentences originally imposed by the district court. *Id.* at 592. The *Ferguson* court held that the defendant could be sentenced for the drive-by shooting and for the eight assaults because "a single sentence for drive-by shooting at an occupied building is not commensurate with [the defendant's] culpability for using a dangerous weapon to intentionally cause eight persons to fear immediate bodily harm." *Id.*

In *Branch*, the supreme court considered whether a defendant could receive sentences for both drive-by shooting at an occupied vehicle and second-degree assault, when the crimes arose from the same behavioral incident and involved the defendant shooting at an occupied vehicle. 942 N.W.2d at 711-12. The district court imposed two sentences. *Id.* With the *Ferguson* holding in mind, the *Branch* court held that section 609.035 does not prohibit multiple sentences for drive-by shooting and assault. *Id.* at 715-16.

Given the holdings in *Ferguson* and *Branch*, we conclude that section 609.035 does not prohibit the district court from imposing multiple convictions for both the drive-by-shooting and assault crimes. Thus, the district court did not err by entering separate convictions, even though the district court found that the offenses were committed as part of a single behavioral incident. We also note that, following *Branch*, the district court could have imposed two sentences.

Affirmed.