STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1694

State of Minnesota,
Respondent,

vs.

Michael Douglas Capshaw,
Appellant.

Filed December 19, 2022
Affirmed
Wheelock, Judge

Hennepin County District Court
File No. 27-CR-19-5780

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Bratvold, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

In this appeal from the final judgment of conviction for first-degree criminal sexual conduct, appellant argues that (1) the district court erred in failing to give a specific-unanimity jury instruction; (2) the prosecutor committed misconduct by

encouraging the jury to return a nonunanimous verdict; and (3) the district court violated appellant's Sixth Amendment right to a sentencing jury by imposing an upward durational departure based on the finding that appellant committed multiple forms of sexual penetration. Because we discern no plain error by the district court, and any error as to the durational departure was harmless beyond a reasonable doubt, we affirm.

FACTS

The following facts are taken from the evidence received during the jury trial. Appellant Michael Douglas Capshaw met V.L. on an online dating site in 2014 or 2015. They became friends and had an on-and-off sexual relationship for the following four years.

V.L. and Capshaw arranged to meet over the lunch hour on March 7, 2019. V.L. came to Capshaw's apartment at approximately 12:00 p.m. Once they were in the apartment, Capshaw began to kiss V.L. "really hard." According to V.L., Capshaw's demeanor "was very aggressive," which she found "unusual." The two then moved to Capshaw's bedroom. Capshaw told V.L. to start undressing. After she did so, Capshaw forced V.L. to her knees, and she began to perform consensual oral sex on him. V.L. wanted to stop performing oral sex, but when she stopped, Capshaw slapped her face with an open hand.

Capshaw then pushed V.L. onto his bed and engaged in vaginal intercourse with her. Next, Capshaw grabbed V.L. by the hair and told her to crawl on her hands and knees through the kitchen into the living room. She told him that the hardwood floor hurt her knees.

When they entered the living room, Capshaw made V.L. kneel on the couch and told her to stare at the wall. He poured cooking oil on her breasts and genitals. Capshaw then began to perform anal sex on V.L., and V.L. told him, "I don't want to do this. I don't like doing this." She testified that the penetration was "extremely painful," but Capshaw did not stop.

Capshaw then grabbed V.L.'s hair and again made her crawl back through the kitchen, where he used a cut portion of a belt to hit her buttocks. He also slapped her right buttock with his hand. V.L. again told Capshaw to stop, but he did not.

Instead, Capshaw took V.L. back to his bedroom. While she was on his bed, he bound her wrists to her ankles with tape. He blindfolded her with her leggings. He then penetrated her vagina with multiple fingers for several minutes, causing her "immense pain." V.L. again told Capshaw, "No. Don't. Please stop," but Capshaw continued.

After the digital penetration, Capshaw left the room and returned with bottles from his kitchen. Capshaw inserted the wider end of a bottle into V.L.'s vagina. She again asked him to stop, but he did not stop. Capshaw next inserted a bottle into her anus. At one point, he penetrated her anus and her vagina at the same time. V.L. explained at trial that she did not resist because she was afraid that if she fought against Capshaw, he would overpower her and hurt her more.

V.L. tried to move away from Capshaw, which caused her head to fall off the side of the bed. Capshaw then forced his penis into her mouth. V.L. was unable to breathe and attempted to shake her head "no." After this, Capshaw again penetrated V.L. until he ejaculated; however, V.L. was unsure whether the penetration was vaginal or anal.

Capshaw informed V.L. that she had defecated on his bed and told her to shower. V.L. attempted to urinate in the bathroom, but she could not because "everything hurt," and she was bleeding. V.L., and then Capshaw, showered. She left his apartment at approximately 1:00 p.m. V.L. went to the hospital that evening and underwent a sexual-assault examination. The following day, V.L. reported to police that Capshaw had sexually assaulted her.

Respondent State of Minnesota charged Capshaw with one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2018). The complaint alleged that Capshaw engaged in sexual penetration with V.L., causing her personal injury, and that he used force or coercion to accomplish the sexual penetration.

At trial, the state introduced numerous exhibits, including records from the sexual-assault examination documenting V.L.'s injuries. The state called several witnesses to testify and corroborate V.L.'s testimony, including the nurse who performed the Sexual Assault Nurse Examination (SANE). The nurse testified that V.L. had multiple external and internal injuries that were consistent with V.L.'s statement of what had occurred. She further testified that these were the "worst injuries [she had] ever seen" in her experience working on approximately 400 cases in her 11 years as a SANE nurse.

In his testimony, Capshaw admitted to some of the sexual acts to which V.L. testified at trial. However, he claimed the entire encounter was consensual. In his description, V.L. "seemed fine" after the encounter, but then she became "really upset" when he told her that he had a significant other and could no longer see V.L.

The jury found Capshaw guilty of first-degree criminal sexual conduct as well as the lesser-included offense of third-degree criminal sexual conduct. The court submitted a special-verdict form for the jury to make findings about what forms of sexual penetration occurred. The special-verdict form posed the following questions to the jury:

1. Did the defendant penetrate the victim's vagina with his penis?

2. Did the defendant penetrate the victim's anus with his penis?

3. Did the defendant penetrate the victim's mouth with his penis?

4. Did the defendant penetrate the victim's vagina with his fingers?

5. Did the defendant penetrate the victim's vagina with an object held by the defendant?

6. Did the defendant penetrate the victim's anus with an object held by the defendant?

The jury unanimously agreed on what specific acts of penetration Capshaw committed by answering the first five questions in the affirmative.

Capshaw's presumptive sentence for first-degree criminal sexual conduct was 144 months in prison. However, the district court imposed an upward durational departure based on the aggravating factor of multiple forms of penetration and sentenced Capshaw to 180 months in prison.

Capshaw appeals.

DECISION

I. The district court did not err in failing to give a specific-unanimity jury instruction.

Capshaw argues that the district court and the prosecutor committed plain error that violated his right to a unanimous verdict. He first contends that the district court plainly erred by failing to give the jury a specific-unanimity instruction. Such an instruction would have required the jurors to unanimously agree on which act(s) of criminal sexual penetration Capshaw committed.

The district court gave a standard jury instruction regarding the unanimous-verdict requirement, stating: "When you reach a verdict, it must be agreed upon by all of you. In other words, your verdict must be unanimous."[1] Capshaw did not request a specific-unanimity jury instruction or object to the standard instruction at trial.

"Generally, failure to object at trial to the given jury instructions forfeits the right to appeal on that error." *State v. Hart*, 477 N.W.2d 732, 738 (Minn. App. 1991), *rev. denied* (Minn. Jan. 16, 1992). However, we may consider an alleged error in unobjected-to jury instructions if it was a plain error that affected the appellant's substantial rights. *State v. Pendleton*, 725 N.W.2d 717, 730 (Minn. 2007); *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001).

Under the plain-error test, we determine whether there was (1) an error (2) that was plain and (3) that affected appellant's substantial rights. *Crowsbreast*, 629 N.W.2d at 437.

---

[1] *See* 10 *Minnesota Practice*, CRIMJIG 3.04 (2015) ("In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous.").

If the three prongs of the plain-error test are met, then we may correct the error to ensure fairness and the integrity of the judicial proceedings. *Id.*; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). However, if we conclude that any one of the plain-error prongs is not satisfied, we need not address the others. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017).

"An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). An error does not contravene caselaw, and therefore is not plain error, if "neither [the state appellate] court nor the federal courts have conclusively resolved [the] issue." *State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008).

It is settled law that a jury must unanimously agree on the verdict in a criminal case. Minn. R. Crim. P. 26.01, subd. 1(5); *Pendleton*, 725 N.W.2d at 730. It follows that the jury must also unanimously agree that the state proved each element of the offense beyond a reasonable doubt in order to return a guilty verdict. *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002). If the state offers evidence of distinct acts by a defendant to prove a single offense, and each act itself constitutes an element of the offense—and not alternate means of proving an element—the jury must unanimously agree on which acts the defendant committed. *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001).

However, "[t]he jury need not unanimously agree on each element's underlying facts." *State v. Infante*, 796 N.W.2d 349, 356 (Minn. App. 2011) (concluding that the district court did not err when it did not give a specific-unanimity instruction requiring the jury to agree as to which of the defendant's actions constituted assault), *rev. denied* (Minn.

June 28, 2011); *see Schad v. Arizona*, 501 U.S. 624, 632 (1991) (plurality opinion) ("Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." (quotation omitted)); *Pendleton*, 725 N.W.2d at 731 (stating that "the jury does not have to unanimously agree on the facts underlying an element of a crime in all cases"). Furthermore,

> if [a] statute establishes alternative means for satisfying an element, unanimity on the means is not required. . . . [T]he jury need not always decide unanimously which of several possible means the defendant used to commit the offense in order to conclude that an element has been proved beyond a reasonable doubt.

Ihle, 640 N.W.2d at 918 (citing *Richardson v. United States*, 526 U.S. 813, 817-18 (1999)); *accord Stempf*, 627 N.W.2d at 354-55; *see also Crowsbreast*, 629 N.W.2d at 439 (concluding that the district court did not err when it did not give a specific-unanimity jury instruction because the jury was not required to unanimously agree on which acts occurred to satisfy the "past pattern of domestic abuse" element of domestic-abuse homicide); *State v. Lagred*, 923 N.W.2d 345, 355 (Minn. App. 2019) (holding that the district court did not err when it did not give a specific-unanimity jury instruction because the jury was not required to unanimously decide what means the defendant used to commit the alleged robbery). Neither state nor federal caselaw has established a bright-line rule to distinguish whether an act constitutes a means of satisfying an element of an offense or a separate element itself. *See, e.g.*, *Schad*, 501 U.S. at 643 ("It is . . . impossible to lay down any single analytical model for determining when two means are so disparate as to exemplify two inherently separate offenses.").

Here, Capshaw claims that the district court's standard jury instruction on unanimity was plain error because it allowed the jury to disagree about which acts of nonconsensual sexual penetration he committed. Capshaw relies primarily on this court's decision in *Stempf* to support his argument. In *Stempf*, the defendant was charged with one count of methamphetamine possession, but the state alleged two separate instances of possession to support the charge: first, that Stempf possessed methamphetamine found at his workplace and second, that he possessed methamphetamine found in a truck in which he was a passenger. 627 N.W.2d at 357. This court concluded that the district court violated Stempf's right to a unanimous verdict by refusing to give a specific-unanimity instruction when he requested it because "[s]ome 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." *Id.* at 358.

We recognized in *Stempf* that the jury is not required to unanimously agree on "alternative means or ways in which the crime can be committed." *Id.* at 355-56. Therefore, Capshaw's argument that the district court erred hinges on whether the different forms of sexual penetration constitute alternative means of accomplishing a single element of the offense or stand alone as separate elements.

This court recently applied a "means-versus-elements analysis" to the first-degree criminal-sexual-conduct statute at issue here. *State v. Epps*, 949 N.W.2d 474, 481 (Minn. App. 2020) (*Epps I*), *aff'd*, 964 N.W.2d 419 (Minn. 2021) (*Epps II*). In *Epps I*, we stated:

> A plain reading of the statute dictates that the elements of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(i), are: (1) the intentional act of sexual

> penetration, (2) without the consent of the complainant, (3) causing personal injury to the complainant, and (4) through the use of force or coercion.

Id. at 482. We concluded that "force" and "coercion" are alternative means of accomplishing the fourth element of first-degree criminal sexual conduct. *Id.* at 484.

A plain reading of the relevant statute here yields the same conclusion. The definition of "sexual penetration" in Minn. Stat. § 609.341, subd. 12 (2018), indicates that the element of sexual penetration can be accomplished in several ways:

> "Sexual penetration" means any of the following acts committed without the complainant's consent, except in those cases where consent is not a defense, whether or not emission of semen occurs:
>
> (1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or
>
> (2) any intrusion however slight into the genital or anal openings:
>
> (i) of the complainant's body by any part of the actor's body or any object used by the actor for this purpose[.]

Applying the same logic in this case as in *Epps I*, we conclude that the different types of sexual penetration identified in subdivision 12 are alternative means of accomplishing the first element of first-degree criminal sexual conduct.

This court reached a similar conclusion regarding the means of accomplishing an element of second-degree assault in *Infante*, 796 N.W.2d at 358. There, the state charged Infante with second-degree assault based on his actions during an argument with his wife—he tapped her on the head with a gun and later loaded a gun while staring at her. *Infante*, 796 N.W.2d at 352. Infante argued that the district court erred by failing to instruct the

jury that it must reach a unanimous decision as to which of the two acts constituted the assault. *Id.* at 355. Infante's argument, like Capshaw's, relied on *Stempf*. *Id.* at 356.

However, this court determined that *Infante* was distinguishable from *Stempf* for two reasons: first, Infante's two acts were part of the same behavioral incident, and second, the two acts were alternative means of proving the intent-to-cause-fear element of assault. *Id.* at 356-58. Thus, we concluded that "[t]he district court need not instruct the jury that it must unanimously agree on which of two physical acts constitutes an assault if the two acts are part of a single behavioral incident." *Id.* at 351.

The instant case is factually similar to *Infante*. Here, the state alleged multiple forms of sexual penetration that were part of a single behavioral incident occurring over a period of one hour. The different forms of penetration alleged did not lack unity of time and place, nor were they "separate and distinct culpable acts" as in *Stempf*, 627 N.W.2d at 358-59. Rather, they were alternative means of accomplishing the sexual-penetration element under Minn. Stat. § 609.342, subd. 1(e)(i). Therefore, we conclude that the district court did not err by not providing a specific-unanimity jury instruction.[2]

[2] Notwithstanding our rejection of Capshaw's argument, the jury's answers to the special-verdict form show that the jury unanimously agreed on five of the six alternative means offered to prove the element of sexual penetration. Thus, even if Capshaw had properly requested, and the district court had given, a specific-unanimity instruction that required the jurors to unanimously agree on which act(s) of nonconsensual sexual penetration Capshaw committed, the outcome would have been the same. It is abundantly clear that the jury in fact unanimously agreed that Capshaw committed at least five different acts of penetration that each independently met the definition of "sexual penetration" in Minn. Stat. § 609.341, subd. 12.

II. The prosecutor did not err in her closing-argument statements regarding unanimity.

Capshaw next argues that the prosecutor misstated the law regarding jury unanimity in her closing argument "by encouraging the jurors to find Appellant guilty without unanimously agreeing that the State proved one act of non-consensual sexual penetration beyond a reasonable doubt." During the state's closing argument, the prosecutor said:

> The State doesn't have to prove every act of nonconsensual sexual penetration beyond a reasonable doubt, only one.
>
> And not all 12 of you have to say he performed one particular form of penetration. As long as all 12 of you agree that some form of sexual penetration occurred—four of you can think sexual intercourse, four of you can think oral, four of you can think any object inserted into the genital or anal opening—that's proof beyond a reasonable doubt. It's your agreement upon the verdict overall that must be unanimous, that each element, as a whole, is met in some way.

Capshaw did not object to the prosecutor's statements at trial; in fact, his attorney reiterated the state's argument in Capshaw's closing argument: "Just as [the prosecutor] says you don't have to necessarily agree on what act might be nonconsensual and consensual, you also don't have to agree on what a reasonable doubt is."

A prosecutor's misstatement of the law may constitute misconduct. *See State v. Strommen*, 648 N.W.2d 681, 690 (Minn. 2002) (reversing and remanding when the prosecutor's misstatement of the law and the burden of proof denied the defendant a fair trial). This court reviews unobjected-to prosecutorial misconduct under a modified version of the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). Under this standard, the appellant has the burden to show that there was plain error. *Id.* at

299-300. Prosecutorial error is plain if it is "clear or obvious." *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008), *rev. denied* (Minn. Sept. 23, 2008). Prosecutorial error can be shown if the prosecutor's conduct "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. Once the appellant shows plain error, the burden shifts to the state to show that the error did not affect the appellant's substantial rights. *Id.* at 300.

The reasoning we applied to conclude that the district court did not err in its jury instructions applies equally to the prosecutor's purported plain error during closing argument. The different forms of penetration that the state alleged here were alternative means of accomplishing one element of the offense. Therefore, the prosecutor was correct in stating that the jury need not unanimously agree on which forms of sexual penetration occurred, only that some form of sexual penetration occurred. The prosecutor's statements did not contain any "clear or obvious" error or contravene caselaw regarding jury unanimity, and therefore were not plain error. *Jones*, 753 N.W.2d at 689 (quotation marks omitted).

Even if we concluded the prosecutor's statements were plain error, the Minnesota Supreme Court's analysis in its review of *Epps I* convinces us that the error Capshaw alleges would not affect his substantial rights and thus, would not warrant relief. In *Epps II*, the supreme court "consider[ed] the full context of the prosecutor's statement, the district court's instructions, the verdict form, and the jury polling" and concluded that "it is undisputed that the jury unanimously found" that the elements of the criminal-sexual-conduct offense were satisfied. 964 N.W.2d at 424. In concluding that

the appellant was not prejudiced, the supreme court also noted that the state had a strong case supported by the record, and the prosecutor's challenged statements were brief. *Id.*

Ample evidence exists in the record of these proceedings upon which the jury could base its guilty verdict, and the prosecutor's challenged statements were brief. The state called eight witnesses in addition to V.L. and introduced dozens of exhibits to corroborate her testimony. The state's case spans hundreds of pages of the record, while the prosecutor's challenged statements make up only two paragraphs of a twenty-page closing argument.

It is also unlikely that any prosecutorial error affected Capshaw's substantial rights, given that the jury gave unanimous answers on the special-verdict form. *See Ihle*, 640 N.W.2d at 917 (concluding that appellant was not entitled to a new trial despite an error in the district court's jury instructions because the jury's answer to the special-verdict question showed "no reasonable likelihood that a more accurate instruction would have changed the outcome" of the case). Here, the prosecutor's challenged statement began, "And not all 12 of you have to say he performed one particular form of penetration." Yet all twelve jurors agreed that Capshaw performed five forms of sexual penetration in their answers to the questions on the special-verdict form. Even if the prosecutor erred in her closing argument, the error did not affect the unanimity of the jury's verdict as shown by the special-verdict form and thus, would not require reversal.

In sum, we conclude that the district court's jury instructions and the prosecutor's closing-argument statements were not erroneous. We therefore affirm Capshaw's conviction.

III. The district court did not err by imposing an upward durational departure when sentencing Capshaw, based on the jury's finding that multiple forms of penetration occurred.

Capshaw's final argument is that the district court violated his Sixth Amendment right to a sentencing jury. He claims that the district court, not the jury, made the finding of fact that multiple forms of nonconsensual sexual penetration occurred in this case, which is an aggravating factor that would support an upward durational departure. He contends that the special-verdict form that the district court gave to the jury required the jury to find only whether there were multiple forms of sexual penetration, not whether there were multiple forms of *nonconsensual* sexual penetration.

"[A] criminal defendant has a right under the Sixth Amendment . . . to be sentenced based solely upon factual findings made by a jury." *State v. Reimer*, 962 N.W.2d 196, 198 (Minn. 2021) (citing *Blakely v. Washington*, 542 U.S. 296, 303-05 (2004)). Appellate courts review alleged *Blakely* violations under a "harmless beyond a reasonable doubt" standard. *Id.* at 199. "A *Blakely* error is harmless if the reviewing court can say with certainty that a jury would have found the aggravating factors used to enhance [the defendant's] sentence had those factors been submitted to a jury in compliance with *Blakely*." *State v. Essex*, 838 N.W.2d 805, 813 (Minn. App. 2013) (quotation omitted), *rev. denied* (Minn. Jan. 21, 2014).

"An error is not harmless if there is any reasonable doubt the result would have been different if the error had not occurred." *State v. DeRosier*, 719 N.W.2d 900, 904 (Minn. 2006). If an error is not harmless beyond a reasonable doubt, appellate courts must remand the case for resentencing. *Reimer*, 962 N.W.2d at 199.

While it is true that the special-verdict form did not include the word "nonconsensual," the special-verdict form and the jury instructions, taken as a whole, make clear that the jury found that multiple forms of nonconsensual sexual penetration occurred. *See State v. Scruggs*, 822 N.W.2d 631, 642 (Minn. 2012) (stating that there is no reversible error when a district court's jury instructions "read as a whole correctly state the law in language that can be understood by the jury" (quotation omitted)). Specifically, the special-verdict form directed the jury to consider what forms of sexual penetration occurred in the context of its unanimous verdict that Capshaw was guilty of first-degree criminal sexual conduct.[3] For purposes of that offense, the term "sexual penetration" means any of several enumerated sexual acts "committed without the complainant's consent," Minn. Stat. § 609.341, subd. 12, and the record contained ample evidence that the forms of sexual penetration the jury found were all nonconsensual. The district court also instructed the jury that one of the elements of first-degree criminal sexual conduct is that the sexual penetration occurred without V.L.'s consent.

Based on these considerations, we are persuaded that *the jury* made the finding that Capshaw committed multiple forms of nonconsensual sexual penetration. Furthermore, we are also persuaded that the jury would have reached the same conclusion had the special-verdict form included the word "nonconsensual." Therefore, we conclude that any error in the special-verdict form was harmless beyond a reasonable doubt and that the

[3] The special-verdict form begins with the phrase, "We, THE JURY, having found the defendant guilty of the charge of Count 1: Criminal Sexual Conduct in the First Degree, have decided the following . . . ."

district court did not err by imposing an upward durational departure when it sentenced Capshaw.

Affirmed.