**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A22-0236**

State of Minnesota,
Respondent,

vs.

Joseph Sean Anthony Porter,
Appellant.

**Filed January 9, 2023**
**Affirmed**
**Jesson, Judge**

Chisago County District Court
File No. 13-CR-19-921

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

Janet Reiter, Chisago County Attorney, John L. Lovasz, David Classen, Assistant County Attorneys, Center City, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Connolly, Judge; and Jesson, Judge.

## NONPRECEDENTIAL OPINION

**JESSON**, Judge

Appellant Joseph Sean Anthony Porter-Crawford[1] spit into a correctional officer's face during a Sunday cell check at Minnesota Correctional Facility-Rush City (Rush City). Respondent State of Minnesota subsequently charged him with felony fourth-degree assault of a correctional officer. After a jury trial, Porter-Crawford was found guilty. He appeals his conviction, challenging the district court's supplemental instruction to the jury. Although supplemental jury instructions must be given in court on the record, which did not occur here, because Porter-Crawford did not object to the procedure and has not met his heavy burden to show that the error impacted his substantial rights, we affirm.

## FACTS

The state charged Porter-Crawford with one count of felony fourth-degree assault[2] for allegedly spitting in a correctional officer's face during a Sunday cell check on September 15, 2019. Porter-Crawford pleaded not guilty, and the matter proceeded to trial.

Two correctional officers who conducted Porter-Crawford's cell check testified. The officers were conducting their weekly cell checks as partners. Officer A went inside Porter-Crawford's cell and Officer B stood by the cell door while his partner searched for contraband, hooch, excessive clothing, or any attempts at escape. After Officer A was done

[1] Porter-Crawford wrote a supplemental pro se brief claiming that the Department of Corrections and Chisago County have made an administrative error regarding his name and that his full last name is Porter-Crawford. Accordingly, that is how he will be addressed in this opinion.

[2] In violation of Minnesota Statutes section 609.2231, subdivision 3(2) (2018).

with his search, Officer B was closing Porter-Crawford's cell when Porter-Crawford "peeked his head around the door" and spit in Officer B's face—on his forehead and in his left eyeball. Both officers heard "spit come out of [Porter-Crawford's] mouth" right before it happened, and Officer A saw spit on his partner's face.

After the incident, a special investigator interviewed Porter-Crawford. During a recorded interview,[3] the special investigator asked Porter-Crawford what happened on the day of the incident, and Porter-Crawford replied, "I don't want to be in this unit and I'm trying to be sent off and I'm gonna do whatever I have to do to be sent off." Porter-Crawford did not verbally admit to spitting on Officer B, but the special investigator testified that Porter-Crawford nodded[4] when he asked him if he spit on the officer's face to get a transfer out of Rush City. At trial, Porter-Crawford testified that he wanted to get "sent out of [Rush City]" because it's "Minnesota's most violent prison," but that he did not recall the day of the offense or his interaction with the officers during the cell check.

At the close of trial, the district court gave the jurors their final instructions, which included this instruction on a unanimous verdict:

> In order for you to reach a verdict, whether guilty or not guilty, each juror must agree with that verdict. *Your 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*. You should decide the case for yourself but only after you have discussed the case with your fellow jurors and have carefully considered their views. You should not hesitate to re-examine your views and change your opinion if you have become convinced that

[3] The entire recorded interview was admitted as evidence for the jury to listen to at trial.
[4] The interview was only audio, so the "nodding" cannot be confirmed outside of the special investigator's testimony.

> they are erroneous, but *you should not surrender your honest opinion because other jurors disagree or merely to reach a verdict*.

(Emphasis added.) The jury retired to deliberate at 1:55 p.m. At 4:15 p.m., 2 hours and 20 minutes into deliberation, the jury sent a note indicating they were deadlocked because "there [was] one juror that [had] a dissenting opinion, [and] will not change." The district court, in the presence of counsel, had the following conversation with the bailiff:

> COURT: I'm telling them that they're going to keep deliberating. That's the next step. Okay. Any—any other response or objection?
> STATE: (Shaking head/nonverbal response.)
> COURT: Okay. All right.
> BAILIFF: So, Your Honor, would you like us to tell them that? Or do you want them in here and you tell them that?
> COURT: No. Just tell them to keep deliberating and—
> BAILIFF: Okay.
> COURT: It's way too early. Yeah. And then if they want to order dinner at 4:30.
> BAILIFF: Okay.
> COURT: All right. I'll keep you posted.

Neither the defense nor the state objected. It is unknown what the bailiff said to the jurors because it was said off the record. At 7:12 p.m., the jury entered the courtroom and announced their guilty verdict—the guilty-verdict slip was signed at 6:58 p.m. The defense requested that the jury be polled, and all jurors agreed it was their verdict.

At sentencing, Porter-Crawford appeared virtually from Minnesota Correctional Facility-Oak Park Heights and was sentenced to 12 months and 1 day, per the Minnesota Sentencing Guidelines, to be served consecutively with the sentence he was then serving.

Porter-Crawford appeals.

## DECISION

Porter-Crawford argues that the district court's instruction to the jury through the bailiff was (1) coercive in that it failed to inform the jury that a deadlock was a permissible outcome and (2) given in error through the bailiff because it was off the record. The district court did not address these arguments because Porter-Crawford did not object to the district court's supplemental instruction to the jury at trial. Although the parties addressed these issues as one, we will address each component in turn.[5]

### I. The district court did not commit plain error in its supplemental instruction to the jury because the instruction was not coercive.

Generally, a party forfeits any error by failing to object to jury instructions. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Even so, we may review unobjected-to error in jury instructions for plain error. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). Under plain-error review, this court examines jury instructions to determine whether there was (1) an error, (2) that was plain, and (3) that affected appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). 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).[6]

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[5] Porter-Crawford and the state, in their arguments on the coercive nature of the supplemental instruction, assumed that the bailiff gave the district court's proposed instruction verbatim. We do the same here for this analysis.

[6] Porter-Crawford and the state both applied the abuse-of-discretion standard of review. Although we apply plain-error review, our decision would have been the same under the abuse-of-discretion standard of review.

In our review for plain error by the district court, we first identify the standards surrounding a district court's supplemental instructions during jury deliberations, specifically when there is a deadlock. If a district court, in its original instructions, did not include directions on how to forestall a deadlock, further instructions may be given if the jury reports itself unable to agree on a verdict—such instructions must not, however, improperly coerce a verdict. *See generally State v. Martin*, 211 N.W.2d 765 (Minn. 1973) (explaining that instructing a deadlocked jury that they must reach a verdict is considered a "dynamite charge" that is improperly coercive, and as such, if a district court decides to give a supplemental instruction, it should reiterate the jury-instruction language on a unanimous verdict). Improperly coercing a verdict occurs when the district court's instructions, in response to a jury's indication of an impasse and question of how to proceed, taken as a whole, communicate to a jury either that it *must* reach a verdict or that deadlock is *not* an option. *State v. Olsen*, 824 N.W.2d 334, 339 (Minn. App. 2012), *rev. denied* (Minn. Feb. 27, 2013).

Further, when a district court is confronted with a deadlocked jury, the Minnesota Supreme Court has adopted the balanced approach of the American Bar Association's *Standards Relating to Trial by Jury* and approved portions of it for use by district courts. *Martin*, 211 N.W.2d at 772; *State v. Packer*, 295 N.W.2d 266, 267 (Minn. App. 1980). One of those portions was Standard 15–4.4(b),[7] which provided that if the trial court believes the jury has been unable to agree, it "may require the jury to continue their

[7] Now, 15-5.4(b) in the American Bar Association's Criminal Justice Standards *Trial by Jury*.

deliberations and may give or repeat an instruction . . . [but] [t]he court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *State v. Jones*, 556 N.W.2d 903, 911-12 (Minn. 1996) (quoting *State v. Kelley*, 517 N.W.2d 905, 909 (Minn. 1994)). Although a jury should not be led to believe that a deadlock is not a permissible result, district courts are not required to affirmatively instruct that a deadlock is a permissible result. *State v. Peterson*, 530 N.W.2d 843, 846 (Minn. App. 1995).

Applying this caselaw to the facts before us, we conclude that the district court did not commit plain error in its offered instruction to "keep deliberating." The directive did not imply that the jurors *must* reach a verdict. According to *Jones*, a district court is allowed to instruct the jury to keep deliberating as long as it is not for an unreasonable amount of time. 556 N.W.2d at 912. Here, where the district court's instruction came after only two hours of deliberation, there was a reasonable probability that agreement could be reached if the jury was given more time. *See* Minn. R. Crim. P. 26.03, subd. 20(4) (stating that the jury *may* be discharged without a verdict if the court finds there is *no* reasonable probability of agreement); *see also State v. Buggs*, 581 N.W.2d 329, 338 (Minn. 1998) (instructing a deadlocked jury to continue deliberating to "try to work through [the] impasse" was considered a permissible instruction).

In fact, three hours later, the jury reached a verdict. An additional three hours of deliberation is not "unreasonable," especially after only the first indication of deadlock. *See Jones*, 556 N.W.2d at 912 (continuing deliberations for two additional days was reasonable in light of length of trial, number of witnesses, and nature of charges); *see also*

*Peterson*, 530 N.W.2d at 846 (instructing jury to keep deliberating until they reached a unanimous verdict was coercive because it implied that they had to stay sequestered and deliberate until they reached a unanimous verdict); *Kelley*, 517 N.W.2d at 907-08, 910 (urging jurors to continue deliberating twice, adding another day of deliberation, was unreasonable given the district court knew a unanimous verdict had been reached on a lesser charge and the deadlock was on the more serious charge).[8]

Nor are we persuaded by Porter-Crawford's argument that the supplemental jury instruction here is equally coercive in nature to the instruction in *Peterson*. 530 N.W.2d at 846. *Peterson* is easily distinguishable from this case. Unlike *Peterson*, where the "judge told the deadlocked jury that it was his intention to keep the jury sequestered until they reached a unanimous verdict," the district court here said only to "keep deliberating," which does not have the same coercive effect. *Id.* at 846.

Because the district court's supplemental instruction to the jurors was not error, we need not address the other two prongs of the plain-error standard with regard to the substance of the instruction.

[8] Nor was the district court's statement of "it's way too early" error because it does not imply that a deadlock was not a permissible outcome. Still, Porter-Crawford argues that the district court erred by not telling the jury that a deadlock was a permissible outcome and that, as a result, the jury was "without guidance as to how to conduct their deliberations in a productive manner." But this argument is not persuasive given *Peterson*, which holds that the district court does not have an affirmative duty to tell the jury a deadlock is a permissible outcome. 530 N.W.2d at 846.

## II. The district court's error in instructing the jury through the bailiff in an off-the-record communication did not affect Porter-Crawford's substantial rights.

Next, we identify the applicable law governing off-the-record communications with the jury during deliberations. Under rule 26.03, subdivision 20(3), of the Minnesota Rules of Criminal Procedure, "[i]f the jury asks for additional instruction on the law during deliberation, the court must give notice to the parties [and] [t]he court's response *must* be given in the courtroom." (Emphasis added.) But if such trial procedure is not followed, the district court's decision will only be reversed if the error substantially prejudiced defendant's rights. *State v. Duemke*, 352 N.W.2d 427, 432 (Minn. App. 1984). Because Porter-Crawford did not object to the bailiff providing the instruction to the jury, we apply plain-error review here as well.

On this record, the district court erred when it allowed the bailiff to give the jury a supplemental instruction outside of the courtroom in violation of Minnesota Rule of Criminal Procedure 26.03, subdivision 20(3). This error was also plain, because this direct violation of a rule of criminal procedure is "clear or obvious" since it contravenes a rule of the court. *See State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (holding that an error is plain if it is clear or obvious, meaning the error contravenes case law, a rule, or a standard of conduct) (quotation omitted). But Porter-Crawford is only entitled to relief if this plain error effected his substantial rights. *Griller*, 583 N.W.2d at 741. Porter-Crawford carries the burden of showing this prejudice. *Id.* (holding that the defendant bears the burden of persuasion, which is a heavy burden, for the prejudice requirement of plain-error review).

Turning to the circumstances here, Porter-Crawford did not meet his burden because he did not articulate how the supplemental jury instruction affected his substantial rights. Rather, Porter-Crawford, in applying the abuse-of-discretion standard of review, focuses on the coercive nature of the proposed instruction and its misstatement of the law as reversible error, and provides no further analysis into whether the error was harmless.[9] But as discussed in detail above, we apply plain-error review, not abuse of discretion, and the substance of the instruction was not error. Accordingly, our only remaining question is whether its delivery by the bailiff alone affected Porter-Crawford's substantial rights.

Although we agree that the district court should have instructed the jury in open court with counsel present, we cannot assume prejudice where the defendant has not met his own burden. *Id.* (holding that the defendant has the burden of showing that there was a reasonable likelihood that the supplemental instruction had a significant effect on the jury's verdict). Porter-Crawford asserted that it is "troubling" that it is unknown what the bailiff actually said to the jurors, but this does not satisfy his burden. And on appeal he assumes the instruction was given as directed by the district court. Since Porter-Crawford does not assert any arguments to demonstrate how his substantial rights were affected by this procedural error, a reversal of his conviction is not justified.

[9] Porter-Crawford also argues that the off-the-record nature of the supplemental instruction "deprived the parties of the opportunity . . . to object to it." But Porter-Crawford did have the opportunity to object to it. The district court asked if there were any objections to the proposed supplemental instruction, and Porter-Crawford did not object.

In sum, even though the district court erred in instructing the jury out of court through the bailiff, because the instruction was neither coercive nor misstated the law and Porter-Crawford did not meet his burden of showing that his substantial rights were affected by the plain error in trial procedure, the district court did not commit plain error.

**Affirmed.**