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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1794**

State of Minnesota,
Respondent,

vs.

Gregory Ivan Shines,
Appellant.

**Filed September 30, 2024
Affirmed
Frisch, Judge**

Olmsted County District Court
File No. 55-CR-23-2169

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Joseph McInnis, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Connolly, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant seeks reversal of his conviction for violation of a domestic-abuse no-contact order (DANCO), arguing that the district court erred in instructing the jury on

unanimity and an element of the charged offense, and that the prosecutor committed plain-error misconduct. Because none of the asserted errors affected appellant's substantial rights, we affirm.

FACTS

Respondent State of Minnesota charged appellant Gregory Ivan Shines with one count of felony violation of a DANCO pursuant to Minn. Stat. § 629.75, subd. 2(d)(1) (2022), based on Shines's alleged violation of a DANCO requiring that Shines "have no contact directly, indirectly or through others, in person, by telephone, in writing, electronically or by any other means with [L.R.]." The following facts were elicited at trial.

On March 31, 2023, police officers observed a vehicle parked near a motel entrance in Rochester. One of the officers ran the license-plate numbers of the vehicle and discovered that the vehicle was registered to L.R. and who had outstanding arrest warrants. L.R. was sitting in the driver's seat of the vehicle. One of the officers knew Shines was the subject of a DANCO that prohibited him from being in contact with L.R., reviewed a photo of Shines, and saw someone in the motel lobby who resembled Shines. The officers arrested L.R.

After L.R.'s arrest, Shines exited the motel and walked toward L.R. and the officers. As Shines approached, a dog jumped out of L.R.'s vehicle and ran to Shines, who took the dog's leash. Shines then retrieved a second dog from L.R.'s vehicle.

The officers arrested Shines for violation of the DANCO and placed him in the back of a squad car. The officers placed L.R. in the back of a different squad car. As the squad

car transporting Shines passed the other squad car holding L.R., Shines called out the window, “I love you, sweetheart.” L.R. then said “bye.”

During trial, the state requested, and the district court gave, a jury instruction on unanimity as follows: “You need not be unanimous on which form of contact constituted a violation. You need only be unanimous that contact occurred.” During the state’s closing argument, the prosecutor stated:

You were told about the . . . unanimity issue about contact. That just means that if you all believe beyond a reasonable doubt that contact occurred, you may return a guilty verdict. It does not matter, say eight jurors believe unanimously beyond a reasonable doubt that they pulled up to Motel 6 together and had contact in that route and four believed beyond a reasonable doubt that that communication from squad car to squad car was a violation, it would not matter, that is still a unanimous verdict on your behalf. . . . [Y]ou need not concern yourself about the form of contact so long as you are all convinced beyond a reasonable doubt that contact occurred.

The jury found Shines guilty, and the district court sentenced Shines to 28 months’ imprisonment, stayed for five years.

Shines appeals.

DECISION

Shines argues that his conviction should be reversed because (1) the district court erred in instructing the jury that it could find Shines guilty without agreeing on which contact between Shines and L.R. violated the DANCO, (2) the district court erred in failing to instruct the jury that the state was required to prove that Shines knew that his conduct violated the DANCO, and (3) the prosecutor committed plain-error misconduct during closing statements. We address each argument in turn.

I. The district court’s unanimity instruction was plainly erroneous but reversal of the conviction is not warranted because this error did not affect Shines’s substantial rights.

Shines argues first that the district court abused its discretion because it instructed the jury that it could find Shines guilty of violating the DANCO without a unanimous agreement as to the precise contact between Shines and L.R. that violated that order. We agree that, given the facts elicited at trial, this instruction was plainly erroneous. But we conclude that reversal of the conviction is not warranted because the erroneous jury instruction did not affect Shines’s substantial rights.

We review jury instructions, including whether an instruction violated a defendant’s right to a unanimous verdict, for an abuse of the district court’s discretion. *State v. Stempf*, 627 N.W.2d 352, 354 (Minn. App. 2001). But when there is no objection, we review for plain error. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001).¹

To demonstrate that a jury instruction constituted plain error, Shines must show that “(1) there was an error, (2) the error was plain, and (3) the error affected [his] substantial rights.” *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). “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

¹ We note that the parties dispute the applicable standard of review. Because we conclude that Shines has demonstrated that the district court plainly erred—a more onerous burden than whether the district court abused its discretion—we need not decide which standard applies. To the extent that the plain-error test analyzes the effect on Shines’s substantial rights, this analysis is “the equivalent of a harmless error analysis” under the abuse-of-discretion standard of review. *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011).

omitted). If the first three elements are satisfied, we need only grant relief if the “failure to do so will cause the public to seriously question the fairness and integrity of our judicial system.” *Pulczynski v. State*, 972 N.W.2d 347, 359 (Minn. 2022).

A “jury’s verdict must be unanimous in all cases.” Minn. R. Crim. P. 26.01, subd. 1(5). “To achieve that end, a jury must unanimously find that the [state] has proved each element of the offense.” *State v. Pendleton*, 725 N.W.2d 717, 730-31 (Minn. 2007) (quotation omitted). “[T]he jury must unanimously agree on which acts the defendant committed if each act itself constitutes an element of the crime,” but the jury need not agree on “alternative means or ways in which the crime can be committed.” *Stempf*, 627 N.W.2d at 354-55 (quotation omitted). “Thus, a jury must reach a unanimous verdict on all elements of the crime but need not agree on the underlying facts.”² *State v. Dalbec*, 789 N.W.2d 508, 511 (Minn. App. 2010), *rev. denied* (Minn. Dec. 22, 2010).

Shines argues that the two alleged contacts between him and L.R. constitute two distinct behavioral incidents that could independently form the basis of the crime and thus the district court was required to instruct the jury that it must agree on which contact violated the DANCO. *Compare Stempf*, 627 N.W.2d at 358-59 (concluding that a

² Minn. Stat. § 629.75, subd. 2(b) (2022), provides that a person commits an offense if they “know[] of the existence of a [DANCO] issued against the [protected] person and violate[] the order.” Unlike cases where we have concluded that the plain language of the statute provides for alternative means of accomplishing an element, Minn. Stat. § 629.75, subd. 2(b), has no disjunctive language. *See State v. Epps*, 949 N.W.2d 474, 482 (Minn. App. 2020) (concluding that a charging statute provided “alternative means” of accomplishing the crime where the statute disjunctively “lists different circumstances that must be present”), *aff’d*, 964 N.W.2d 419 (Minn. 2021). Because there is no disjunctive language here, there are no “alternative means” for the state to prove criminal liability such that a jury would be permitted to disagree on means but still return a guilty verdict.

unanimity instruction was required where the state charged one count but alleged two “separate and distinct culpable acts” that “lack[ed] unity of time and place”) *with Dalbec*, 789 N.W.2d at 512 (concluding that the district court did not plainly err by not instructing the jury on unanimity where “the various acts occurred over a period of time, but they all occurred at the same place and involved a single victim”). We agree that the two contacts between Shines and L.R. were distinct behavioral incidents requiring an instruction on unanimity.

“A single behavioral incident is the result of a single motivation directed towards a single criminal goal.” *State v. Infante*, 796 N.W.2d 349, 356 (Minn. App. 2011) (citing *State v. Eaton*, 292 N.W.2d 260, 266 (Minn. 1980)), *rev. denied* (Minn. June 28, 2011); *see also State v. Ihle*, 640 N.W.2d 910, 919 (Minn. 2002) (where the defendant’s actions in obstructing-legal-process case were part of a “single behavioral incident,” jury was not required to unanimously agree on his specific actions). This principle is illustrated in *Stempf*, where we concluded that the district court abused its discretion in declining to instruct the jury that it needed to agree on a single act of possession to convict the defendant of one count of a controlled-substance possession. 627 N.W.2d at 354, 357-58. We reasoned that because the unlawful-possession statute provided that the act of possession is an element of the crime, the jury was required to unanimously agree “on one act of possession” to satisfy that element. *Id.* at 357.

Here, the state charged Shines with one count of violating the DANCO notwithstanding the evidence submitted by the state that Shines contacted L.R. in two distinct ways—driving together to the motel and Shines calling out to L.R. from the squad

car. And at trial, the state argued that either of those contacts could form the basis of the crime. But these contacts are separated by an intervening event, namely the officers arresting both L.R. and Shines and moving them from the motel parking lot to police squad cars. The two alleged contacts that occurred before, and then after, the arrests and corresponding changes of location constitute two “separate and distinct culpable acts” that could independently form the basis of the charged crime. *See id.* at 359.

The distinction between these two contacts is underscored by the different defenses asserted by Shines with respect to each contact. Shines argued that the circumstantial evidence did not establish the first contact because his presence in the motel was coincidental and because he did not drive to the motel with L.R. But Shines did not make this argument with respect to his contact with L.R. from the squad car. *See id.* at 358 (noting two distinct defenses to the separate allegations of controlled-substance possession); *cf. State v. Rucker*, 752 N.W.2d 538, 548 (Minn. App. 2008) (concluding that the district court was not required to provide a unanimity instruction where appellant’s defense to multiple charges of criminal sexual conduct stemming from dozens of acts was consistent across all the acts), *rev. denied* (Minn. Sept. 23, 2008). Because two separate and distinct culpable acts could each independently form the basis of the charged offense, the district court’s unanimity instruction contravened the law and was plainly erroneous. *See Webster*, 894 N.W.2d at 787.

Having concluded that the district court’s error was plain, we consider whether Shines satisfied his burden to demonstrate that the error affected his substantial rights. *Myhre*, 875 N.W.2d at 804. An error affects a defendant’s substantial rights where “there

is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted).

The supreme court's decision in *State v. Wenthe* is instructive. 865 N.W.2d 293, 299-301 (Minn. 2015). In *Wenthe*, the supreme court was asked to consider whether the district court's omission of a specific-unanimity jury instruction was plain error. *Id.* The supreme court opined that "[t]he State's charging decisions and presentation of evidence [were] very troubling," observing that the state charged a single count but then alleged multiple violations over two months and that this charging decision "invited ambiguity." *Id.* at 299. But the court ultimately concluded that there was "no reasonable possibility" that the jury could have concluded that one offense violation occurred without concluding that the later violation did not. *Id.* at 300.

As in *Wenthe*, we acknowledge that the state's charging decision invited ambiguity. But also like the circumstances in *Wenthe*, it is unlikely that the jury could have reasonably concluded that Shines was guilty by determining that the first contact, which was demonstrated by circumstantial evidence, violated the DANCO while at the same time concluding that the second contact, which was proven by clear and undisputed direct evidence, including video evidence, did not. Because it is not reasonably likely that the district court's unanimity jury instruction significantly affected the verdict, we conclude that Shines has not met his burden to show the district court's error affected his substantial rights.

II. Any asserted error in the district court's mens rea instruction did not affect Shines's substantial rights.

Shines next argues that the district court misstated the law because it did not instruct the jury that the state was required to prove that Shines knowingly violated the DANCO. Because Shines did not object to the jury instructions on these grounds at trial, we again review this argument on appeal for plain error. *Crowsbreast*, 629 N.W.2d at 437.

Assuming without deciding that the jury instruction was plainly erroneous, we conclude that any error did not affect Shines's substantial rights. In evaluating whether a plainly erroneous jury instruction affected substantial rights, we

look to all relevant factors including, but not limited to: (1) whether [Shines] contested the omitted elements at trial and submitted evidence to support a contrary finding; (2) whether the State presented overwhelming evidence to prove those elements; and (3) whether the jury's verdict nonetheless encompassed a finding on those elements notwithstanding their omission from the jury instructions.

State v. Peltier, 874 N.W.2d 792, 800 (Minn. 2016). We conclude that Shines has not met his burden to demonstrate that the omitted jury instruction affected his substantial rights for two reasons. See *Wenthe*, 865 N.W.2d at 299 (noting that a defendant "bears the heavy burden of proving prejudice" where they allege that the district court plainly erred in omitting a jury instruction (quotation omitted)).

First, neither of the two alleged contacts between Shines and the protected party were incidental. The state alleged two contacts between Shines and L.R.: (1) Shines and L.R. driving together to the motel before the officers arrived and (2) Shines calling out "I love you, sweetheart" at L.R. from the back of the squad car. Both contacts are volitional

acts by Shines and not incidental contacts with L.R. Thus, any failure to include a mens rea requirement in the jury instruction would not have affected the jury's perception of these two volitional acts.

Second, the evidence of the second contact by Shines is overwhelming, and Shines did not offer a robust defense to that allegation. The videos submitted to the jury show a clear statement from Shines directed toward L.R. from multiple perspectives. And while the evidence of the first contact was circumstantial, the second contact is plainly reflected by the record. In sum, Shines has not established that the district court's failure to instruct the jury that the state needed to prove that he knew of the underlying facts of the alleged DANCO violation affected his substantial rights.

III. The prosecutor did not commit plain-error misconduct during closing statements.

Shines argues that the prosecutor committed plain-error misconduct by inviting the jury to return a verdict that was not unanimous and by misstating the presumption of innocence. We apply the modified plain-error test to these unobjected-to assignments of error. *State v. Portillo*, 998 N.W.2d 242, 248 (Minn. 2023). Under that test, Shines bears the burden to “demonstrate that the misconduct constitutes (1) error, (2) that was plain.” *Id.* (quotation omitted). Again, an error is plain if it is “clear or obvious,” such that it “contravenes case law, a rule, or standard of conduct” that is “conclusively resolved at the time of appeal.” *Id.* at 250 (quotations omitted). If Shines establishes plain error, “the burden then shifts to the State to demonstrate that the error did not affect the defendant’s substantial rights.” *Id.* at 248 (quotation omitted). “If these three prongs are satisfied, [we]

then assess whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.* (quotation omitted).

Shines asserts that the prosecutor committed misconduct by repeating the district court’s erroneous unanimity instruction during closing argument. But Shines does not explain how the prosecutor committed an error that “contravene[d] case law, a rule, or standard of conduct” where the prosecutor’s argument conformed to the district court’s unanimity instruction. *See id.* at 250 (quotation omitted). An assignment of error based on “mere assertion” and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Anderson*, 871 N.W.2d 910, 915 (Minn. 2015) (quotation omitted). Thus, we decline to consider this assertion of error.

Shines also argues that the prosecutor committed misconduct by asserting that the “presumption of innocence should not benefit Mr. Shines during their deliberations.” This argument is unavailing because it does not appear that the prosecutor’s statements warrant reversal for plain error.

“It is axiomatic that criminal defendants are presumed innocent until proven guilty beyond a reasonable doubt.” *Portillo*, 998 N.W.2d at 248-49. And “one accused of crime has the right to have the jury take the presumption of innocence to the jury room with them as the voice of the law.” *Id.* at 249 (quotation omitted). In *Portillo*, the supreme court held that a prosecutor committed plain-error misconduct when the prosecutor “said on three

separate occasions during the closing-argument rebuttal that [the defendant] had *already* lost the presumption of innocence.” *Id.* The prosecutor in *Portillo* stated:

He no longer has that presumption. You’ve heard all of the evidence. You’ve heard all of the state’s case against Mr. Portillo. *He no longer has that presumption of innocence.* He has been proven guilty beyond a reasonable doubt. We’ve gone through those elements. You’ll be able to talk and consider each other’s thoughts and the information you heard throughout the course of the case, but *he no longer has that presumption of innocence.*

Id. The supreme court reasoned that a “defendant is only proven guilty beyond a reasonable doubt, . . . when the jury has deliberated and reached that conclusion, not before.” *Id.* at 250. Therefore, the suggestion that the defendant was not entitled to the presumption at the time of closing arguments was a misstatement of the law. *Id.*

The supreme court distinguished the prosecutor’s statement from that in *State v. Young*, 710 N.W.2d 272, 280 (Minn. 2006). *Id.* at 249-50. In *Young*, the prosecutor stated:

When the trial began, the Court told you that that young man right there is an innocent man. He was. Until the defense stood up and rested. Because at that time the state had presented to you sufficient evidence to find the defendant guilty of all the crimes that the Court just gave you the—instructions on. He’s no long [sic] an innocent man. The evidence that’s been presented to you by the state has shown you that he’s guilty beyond a reasonable doubt.

710 N.W.2d at 280. The supreme court reasoned that, “[r]ead in context,” the prosecutor’s argument “appear[ed] to be that the state had produced sufficient evidence of Young’s guilt to overcome the presumption of innocence, not that he was not entitled to the presumption in the absence of proof beyond a reasonable doubt.” *Id.* at 280-81.

Here, the prosecutor stated:

[Y]ou've been instructed on proof beyond a reasonable doubt so it's important to know what that is and it's also equally important to know what it's not and to know what it requires and what it does not require. So proof beyond a reasonable doubt is not proof beyond all doubt. It's not proof beyond those doubts that are unreasonable. It does not require a particular type of evidence. You didn't hear anything about there must be even direct and circumstantial evidence or anything about a minimum requirement of a number of exhibits the State must produce because a lot of is in favor, circumstantial or direct evidence. What it means is you can have doubt in your mind and still convict. The doubt left in your mind just has to be those unreasonable doubts. But the evidence in this case . . . has demonstrated and proved to you that Mr. Shines had contact with [L.R.]. And at this point after you deliberate and consider all the evidence, the only doubts left in your mind should be those unreasonable ones based on this evidence.

So at the outset of this case you were also questioned about, you know, accepting proof beyond a reasonable doubt and presumption of innocence. So the presumption of innocence we start in this legal default position that the defendant is presumed innocent unless and until you determine that the State has proven its case beyond a reasonable doubt. That's what it requires. It does not require you to look at the evidence in the light most favorable to the defendant. It does not require you to decide the case based on sympathy. It does not require you to put more weight on the defendant's argument just because it's the defendant's argument. Just because he is presumed innocent, it does not require you to search for doubt. It just requires you to hold the State to its burden. It certainly does not require you to abandon your reason. This is a case about your own common sense and reason.

This statement does not rise to the level of misstatement that the supreme court rebuffed in *Portillo*. The prosecutor did not assert that Shines was not entitled to the presumption of innocence before the jury began deliberating. Instead, the prosecutor stated that Shines "is

presumed innocent unless and until you determine that the State has proven its case beyond a reasonable doubt.” The prosecutor’s reference to the state’s burden as a “legal default position” is not sufficient to show that he materially misstated the law regarding the state’s burden. And in reviewing the closing argument as a whole, we conclude that the prosecutor did not assert that Shines was no longer entitled to the presumption of innocence at the time of the prosecutor’s closing argument. *See Portillo*, 998 N.W.2d at 250; *see also State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (“With respect to claims of prosecutorial misconduct arising out of closing argument, we consider the closing argument as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence.” (quotation omitted)).

Because we conclude that the prosecutor did not plainly err in his statement of the law regarding the presumption of innocence, we need not address the remaining prongs of modified plain-error review. *See Epps*, 964 N.W.2d at 423 (“Notably, a negative answer to any one of the three parts of the plain error doctrine may end our analysis and a defendant’s quest for relief.”).

Affirmed.