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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1321**

State of Minnesota,
Respondent,

vs.

Roberto Ortega-Herrera,
Appellant.

**Filed December 1, 2025
Reversed and remanded
Reyes, Judge
Johnson, Judge, dissenting**

Hennepin County District Court
File No. 27-CR-23-5099

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Considered and decided by Reyes, Presiding Judge; Frisch, Chief Judge; and
Johnson, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Following his conviction of first-degree criminal sexual conduct, appellant
challenges the district court's (1) deadlocked jury instruction and (2) failure to provide a

specific unanimity instruction. We reverse and remand for a new trial because appellant was denied a unanimous jury decision.

FACTS

The following facts are based on evidence presented at appellant's jury trial. Respondent State of Minnesota presented evidence that, in 2008, appellant Roberto Ortega-Herrera began grooming¹ his 13-year-old stepdaughter, M.P., at his home. Soon, appellant started physically grooming M.P. During M.P.'s ninth-grade year, when she was 14 years old, appellant began penetrating her vagina with his penis.

Appellant penetrated M.P. almost daily until her eleventh-grade year. Most often, appellant penetrated M.P. in the home's unfinished basement, but he also penetrated M.P. in a bedroom, in the living room, and in the back of a van during an early morning paper route. Appellant also took pictures of M.P. while she was naked.

Appellant used threats and coercion to discourage M.P. from reporting his conduct, such as "if I don't do this to you, I'm going to do it to your sister." Appellant also coerced M.P. by threatening to share the intimate photos he had taken of her. For many years, these threats discouraged M.P. from reporting appellant's abuse to law enforcement.

After the abuse began, M.P.'s teachers noticed an unusual decline in her academic performance and referred her to a school counselor. M.P. did not disclose appellant's abuse to the counselor. In 2010, M.P. told N.L., a friend from church whom she would later

¹ "'Grooming' is a process sexual predators use to shape a child's perspective and lower the child's inhibitions with respect to later criminal sexual acts." *State v. Muccio*, 890 N.W.2d 914, 924 (Minn. 2017).

marry, that appellant was raping her. N.L. encouraged M.P. to go to law enforcement, but she declined due to appellant's threats. In 2011, M.P. told her mother about appellant's abuse. M.P.'s mother confronted appellant. When the abuse continued, M.P.'s mother confronted him a second time, and appellant moved out of the house. Several years later, M.P. disclosed the abuse to her pastor after she saw appellant at the church she attended. In the summer of 2022, M.P. reported appellant to law enforcement.

In March 2023, the state charged appellant with a single count of first-degree criminal sexual conduct by an actor in a significant relationship with a minor victim in violation of Minn. Stat. § 609.342, subd. 1(g) (2006). The district court held a jury trial beginning on April 1, 2024.

At trial, appellant denied all allegations and argued that M.P.'s now-husband, N.L., had pressured her to fabricate the claims against him. Appellant presented testimony from co-workers to establish that he worked construction and carpentry jobs during the early morning hours when M.P. claimed appellant abused her. Appellant also called his mother, brother, and son to establish that ongoing sexual assaults would not have been possible in either the house or the delivery van because of the house's layout and the number of people normally present in both places.

The state called M.P., N.L., M.P.'s brother, the lead law-enforcement investigator, and the forensic interviewer with whom M.P. met when she reported appellant to law enforcement. These witnesses corroborated details of M.P.'s account, including circumstances that created an opportunity for the abuse to take place and the existence of

the photos appellant took of M.P. The lead investigator discussed the investigation, and the forensic interviewer explained concepts of delayed disclosure and grooming behaviors.

Appellant's counsel reviewed the draft jury instructions and did not object to them on the record, nor when the district court instructed the jury.

The jury began deliberating the afternoon of Friday, April 5. On Monday, April 8, the jury submitted two notes to the district court. The first note contained three questions:

- (1) If any of the 1st point in Count 1 is true, is that element satisfied?
- (2) I[f] testimony that describes Count 1 is believed, is that enough for a guilty verdict?
- (3) Is the lack of testimony (like [M.P.'s mother], pastor, school counselor) something we are allowed to consider as reasonable doubt?

The district court went on the record and discussed the questions with both counsel before responding to the jury. In response to the first question, the district court instructed the jury that "the state only has to prove one act, and that act can have occurred anytime during the time frame" between January 1, 2008, and December 31, 2011. The district court further stated that there were three possible means or ways in which sexual penetration could have occurred. In response to the second and third questions, the district court referred the jury back to instructions previously given.

Later, the jury submitted a second note, which stated: "We are a split jury, we are unable to unanimously agree on a verdict." The district court discussed the note with both counsel off the record. In response to the second note, the district court asked the jury to continue deliberating and reminded them that their verdict must be unanimous. Appellant's counsel did not object on the record to the district court's instruction. The jury returned a

guilty verdict. The district court sentenced appellant to 144 months of imprisonment. This appeal follows.

DECISION

Appellant argues that the district court plainly erred by failing to instruct the jury that it had to agree unanimously that the state proved a specific act of sexual penetration during the alleged time period. We agree.

I. Standard of Review

Jury verdicts in all criminal cases must be unanimous. Minn. R. Crim. P. 26.01, subd. 1(5) (2024). If an act constitutes an element of a crime, the jury must agree unanimously on *which specific act* the defendant committed. *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001) (citing *Richardson v. United States*, 526 U.S. 813, 824 (1999)). But a jury need not agree unanimously with respect to *the alternative means or ways* in which an element may be satisfied. *State v. Begbie*, 415 N.W.2d 103, 105-06 (Minn. App. 1987), *rev. denied* (Minn. Jan. 20, 1988); *see also State v. Pendleton*, 725 N.W.2d 717, 729-33 (Minn. 2007) (finding no error when district court did not require jury to agree unanimously on single purpose for which defendant acted if purpose could be satisfied by alternative means). “This occurs when . . . ‘certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime.’” *Stempf*, 627 N.W.2d at 354-55 (citation omitted).

Appellate courts review unobjected-to jury instructions for plain error. *State v. Reek*, 942 N.W.2d 148, 158 (Minn. 2020); *see also* Minn. R. Crim. P. 31.02 (2024). Under the plain-error test, an appellant must show: (1) error, (2) that is plain, and (3) that affects

the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three elements are satisfied, the appellant must also show that the error “seriously affects the fairness and integrity of the judicial proceedings.” *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014). If any element is not met, the appellate court need not consider the other elements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

For a person to be found guilty of first-degree criminal sexual conduct under Minnesota Statutes section 609.342, subdivision 1(g), the state must prove: (1) that the defendant engaged in sexual penetration with the complainant; (2) at the time of the sexual penetration, the complainant was under 16 years of age; and (3) that the defendant had a significant relationship with the complainant. The statute defines alternative means by which the element of sexual penetration may be satisfied, such as “sexual intercourse, cunnilingus, fellatio, or anal intercourse.” Minn. Stat. § 609.341, subd. 12 (2006). Appellant challenges only that the state proved that he engaged in a particular act of sexual penetration under section 609.342, subdivision 1(g).

II. The district court plainly erred because it did not require the jury to agree unanimously on which act of penetration the state proved beyond a reasonable doubt.

A. The district court erred when it did not require the jury to agree unanimously on which act of penetration the state proved beyond a reasonable doubt.

Relying on *Stempf*, appellant argues that, because the state alleged separate acts of unlawful sexual penetration, the district court erred by not instructing the jury that it had to agree unanimously that appellant committed one single act of unlawful sexual penetration beyond a reasonable doubt. *See* 627 N.W.2d at 355. We agree.

In *Stempf*, this court concluded that the district court abused its discretion by refusing to give a specific unanimity instruction after Stempf requested one at trial. 627 N.W.2d at 354, 359. Stempf had been charged with and convicted of one count of drug possession, but at trial the state introduced evidence of two distinct acts of drug possession. *Id.* at 357-58. The two acts were separate in time and location; one was at Stempf's workplace, and one was in a truck where Stempf was recently a passenger. *Id.* Importantly, Stempf presented separate defenses to each incident. *Id.* at 358. And during closing argument, the state told the jury "That it could convict if some jurors found appellant possessed the [drugs] found in the truck while others found he possessed the [drugs] found on the premises." *Id.* at 354. We concluded that the district court should have provided a specific unanimity instruction because "the state did not elect which act of possession it was relying on for conviction" and because "[s]ome jurors could have believed appellant possessed the [drugs] found on the [workplace] premises while other jurors could have believed appellant possessed the [drugs] found in the truck." *Id.* at 358.

In this case, like in *Stempf*, the state presented evidence of specific acts of penetration that occurred at different times and locations. The locations included the appellant's basement, bathroom, bedroom, and living room, as well as in the van on the paper route. Also, like *Stempf*, while denying the allegations in their entirety, appellant presented different defenses and explanations for the various alleged incidents. 627 N.W.2d at 357-58. Appellant presented evidence that: (1) the numerous alleged acts of sexual penetration could not have occurred in the house because multiple family members lived at the house; (2) any sexual penetration that allegedly took place in the morning inside

the house could not have occurred because appellant worked during the early mornings; and (3) sexual penetration could not have occurred in the van during the paper route because there were other family members present, and no one ever witnessed the incidents.

Stempf is clear: if an “act itself constitutes an element of the crime,” then “the jury must unanimously agree on which acts the defendant committed.” 627 N.W.2d at 355. In this case, the act of sexual penetration constitutes an element of first-degree criminal sexual conduct under Minnesota Statutes section 609.342, subdivision 1(g). While the jury did not have to agree unanimously on the alternative means by which appellant penetrated M.P., the jury had to agree unanimously as to which act of penetration appellant committed. *See Stempf*, 627 N.W.2d at 355, 358; *see also Begbie*, 415 N.W.2d at 106; *Pendleton*, 725 N.W.2d at 729-33. The state did not elect one act only on which to rely for a conviction, and the district court did not instruct jurors that they were required to render a unanimous verdict regarding which act of penetration appellant committed. The element of the offense at issue here is an act of penetration and it is the state’s burden to prove that act. And the jury must agree on which act occurred. Some jurors could have agreed that the act occurred in the basement while others did not. Some jurors could have agreed that the act occurred in the van while others did not. But by not instructing the jury that it must agree unanimously on a singular act, the district court effectively relieved the state of its burden to prove that element of the offense beyond a reasonable doubt. *See Stempf*, 627 N.W.2d at 359.

In response, the state relies on *State v. Rucker*, 752 N.W.2d 538 (Minn. App. 2008), *rev. denied* (Minn. Sept. 23, 2008), to argue that the district court did not err by not

instructing the jury that it must agree unanimously on which specific incident formed the basis of appellant's convictions. The state's reliance is unavailing because *Stempf* is controlling, and *Rucker* is distinguishable.

As relevant here, Rucker was charged with and convicted of two counts of first-degree criminal sexual conduct under a different statutory provision: Minnesota Statutes section 609.342, subdivision 1(b) (2002). *Rucker*, 752 N.W.2d at 544, 545 n.1. At trial, the state introduced testimony describing several incidents of sexual contact and penetration between the defendant and the victims over a two-year period. *Id.* at 543. On appeal, Rucker relied on *Stempf* to argue that the district court should have given the jury a specific unanimity instruction "as to which specific acts [Rucker] committed." *Id.* at 548. This court distinguished *Rucker*'s particular facts from *Stempf* and concluded that the district court did not need to provide an unanimity instruction because Rucker raised only a single defense to all acts, "that he never had sexual contact with either child-victim," and the state did not "encourage the jury to find certain incidents were more likely to have occurred than other incidents." *Id.*

Here, by contrast, the state *did* emphasize certain incidents, *did* distinguish as to the proof of some incidents compared to others, and, most notably, appellant *did* present separate defenses for each incident of alleged sexual penetration. Additionally, as explained further below, the state charged Rucker under a completely different statutory provision than the state charged appellant in this case. We conclude that, because *Stempf* is controlling and *Rucker* is distinguishable, the district court erred by not requiring the

jury to agree unanimously on which act of sexual penetration the state proved beyond a reasonable doubt.

B. The district court’s error is plain because, when subdivision 1(g) is read in context with subdivision 1(h), it is clear that a charge under subdivision 1(g) requires unanimity as to a single act.

Appellant argues that the district court’s error is plain because, under *Stempf*, a defendant’s right to a unanimous verdict is violated when jury instructions allow for disagreement by the jury about which acts the defendant committed. In response, the state suggests that, to the extent there is an open question about the legal interplay between *Rucker* and *Stempf*, any error was not plain because the law on when a unanimity instruction is required is unsettled. But *Rucker* is inapplicable to this case because it applies a different statutory provision. Furthermore, a comparison of Minnesota Statutes section 609.342, subdivision 1, subparts (g) and (h) (2006), makes clear that subpart (g) requires proof of a single act and therefore requires a specific unanimity instruction.

“An error is plain if it is clear or obvious, which is typically established if the error contravenes [caselaw], a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). “[A]ll provisions in [a] statute must be read and interpreted as whole.” *State v. Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019). “Every law shall be construed, if possible, to give effect to all its provisions.” Minn. Stat. § 645.16 (2024); *see also State v. Thonesavanh*, 904 N.W.2d 432, 436-37 (Minn. 2017). “When the Legislature uses limiting or modifying language in one part of a statute, but omits it in another, we regard that omission as intentional and will not add those same words of limitation or modification to parts of the statute where they were not used.” *General Mills*,

Inc. v. Commissioner of Revenue, 931 N.W.2d 791, 800 (Minn. 2019); *see also Seagate Tech, LLC v. W. Digital Corp.*, 854 N.W.2d 750, 759 (Minn. 2014) (“[A] condition expressly mentioned in one clause of a subdivision provides evidence that the Legislature did not intend for the condition to apply to other clauses in which the condition is not stated.”).

Minnesota Statutes section 609.342, subdivision 1, subparts (g) and (h), are related, corollary provisions that must be read together. Both provisions contain identical language that criminalizes sexual conduct by an actor in a “significant relationship” with a complainant under 16 years of age. *See* Minn. Stat. § 609.342, subd. 1(g), (h). However, unlike subpart (g), subpart (h) has three caveats, including: “(iii) the sexual abuse involved *multiple acts committed over an extended period of time.*” Minn. Stat. § 609.342, subd. 1(h)(i)-(iii) (emphasis added).

We must regard the omission of the language of subdivision 1(h)(iii) from subdivision 1(g) as intentional and cannot add those same words of modification to subdivision 1(g). It is therefore clear that subdivision 1(g) requires proof of a *single* incident of criminal sexual conduct, whereas subdivision 1(h)(iii) requires proof of multiple acts committed over a period of time. Minn. Stat. § 609.342 subd. 1(g), 1(h)(iii) (2006); *Gen. Mills, Inc.*, 931 N.W.2d at 800. In other words, a charge under subdivision 1(h)(iii) does not require the jury to agree unanimously on which specific instances of criminal sexual assault occurred over an extended period of time. *Cf. State v. Crowsbreast*, 629 N.W.2d 433, 434, 439 (Minn. 2001) (finding no error when district court did not instruct jury that it must agree unanimously on which acts comprised “past pattern of

domestic abuse” element for domestic-abuse homicide under Minn. Stat. § 609.185(6) (2000)). However, as reinforced by *Stempf*, a charge under subdivision 1(g) does require the jury to agree unanimously on which specific act of penetration a defendant committed because a single act of penetration constitutes an element of a crime. *See* 627 N.W.2d at 355; Minn. Stat. § 609.342, subd. 1(g).

The state’s reliance on *Rucker* is misguided. The legislature created two separate statutory frameworks, one for a person in a “position of authority”² over the complainant under Minnesota Statutes section 609.342, subdivision 1(b), and one for a person who has a “significant relationship”³ with the complainant under Minnesota Statutes subdivisions (g) and (h). But, as discussed above, the legislature created two related provisions for a person in a “significant relationship” with a complainant. *See* Minn. Stat. § 609.342, subd. 1(g), (h). Subdivision 1(g) requires proof of a single act of criminal sexual conduct whereas subdivision 1(h)(iii) requires proof of multiple acts committed over an extended period of time. *Id.*

² Minnesota Statutes section 609.341, subdivision 10 (2002), provides that a person in a “‘position of authority’ includes but is not limited to”: (1) “any person who is a parent or acting in the place of a parent and charged with any of a parent’s rights, duties or responsibilities to a child” and (2) “a person who is charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of the act.”

³ Minnesota Statutes section 609.341, subdivision 15 (2006), provides that “‘significant relationship’ means a situation in which the actor is: (1) the complainant’s parent, stepparent, or guardian; (2) any of the following persons related to the complainant by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt; or (3) an adult who jointly resides intermittently or regularly in the same dwelling as the complainant and who is not the complainant’s spouse.”

In *Rucker*, the state charged Rucker under subdivision 1(b), which provides that the state must prove that the actor engaged in sexual penetration with a complainant who is between 13 and 16 years of age, the actor is more than 48 months older than the complainant, and the actor is in *a position of authority* over the complainant. Minn. Stat. § 609.342, subd. 1(b). But unlike subdivision 1(g), which has a related, corollary provision in subdivision 1(h), subdivision 1(b) is a standalone provision with no related, corollary provision limiting it to a single act. *Compare* Minn. Stat. § 609.342, subd. 1 (g), (h)(iii), *with id.*, subd. 1(b).

Accordingly, while *Rucker* implicitly interpreted subdivision 1(b) as applying to ongoing acts of penetration, the specific language in subdivision 1(h) precludes such an interpretation for subdivision 1(g). *See* Minn. Stat. § 609.342, subd. 1(b), (g), (h)(iii). Because a single act of penetration is an element of subdivision 1(g), and therefore a unanimity instruction as to which act of penetration appellant committed is required, this case is distinguishable from and not controlled by *Rucker*.⁴ Therefore, the district court plainly erred because, when subdivision 1(g) is read in context with subdivision 1(h), it is clear that a charge under subdivision 1(g) requires unanimity as to which act of sexual penetration the defendant committed. *See* Minn. Stat. § 609.342, subd. 1(g), (h)(iii).

⁴ In a nonprecedential decision in *State v. Utech*, No. A09-1766, (Minn. App. 2010), we rejected the proposition that *Crowsbreast* overturned *Stempf*, noting that *Crowsbreast* does not require specific unanimity for elements of crimes involving multiple pattern acts but crimes involving singular act elements, like here and like *Stempf*, do require unanimity as to the specific act. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) (providing that nonprecedential opinions are “not binding” but “may be cited as persuasive authority”).

C. The district court's plain error affected appellant's substantial rights.

An error affects a defendant's substantial rights “if the error was prejudicial and affected the outcome of the case.” *Griller*, 583 N.W.2d at 741. An erroneous jury instruction “affects substantial rights when there is a reasonable likelihood that a more accurate instruction would have changed the outcome in this case.” *State v. Gutierrez*, 667 N.W.2d 426, 434-35 (Minn. 2003) (quotation omitted).

The record shows that the jury had questions about the sexual-penetration element. In the first note to the district court, the jury asked about the means of satisfying the penetration element, whether testimony describing acts of penetration was sufficient to convict, and whether the lack of additional corroborating witnesses constitutes reasonable doubt. Given the fact that the jury later indicated that it was deadlocked, it is reasonably possible that an instruction requiring all the jurors to agree to one of the specific incidents of sexual penetration would have altered the outcome of jury deliberations. Appellant provided different explanations and defenses in response to testimony describing multiple incidents of sexual penetration. Individual jurors therefore could have reasonably disagreed on which incidents of penetration could have taken place but still found appellant guilty because they were not instructed to agree unanimously that appellant committed a single act of sexual penetration as required by the statute. We conclude that the district court's plain error affected appellant's substantial rights.

D. The district court’s plain error seriously affects the fairness and integrity of judicial proceedings.

Even when an appellant satisfies the other prongs of the plain-error standard, we will not exercise our limited discretion to grant relief to correct the error unless 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, 359-60 (Minn. 2022).

The law is clear: jury verdicts in all criminal cases must be unanimous. Minn. R. Crim. P. 26.01, subd. 1(5). It is also clear that the legislature created a specific provision under which to prosecute sexual abuse when the parties are in a “significant relationship” involving multiple acts committed over an extended period of time. *See* Minn. Stat. § 609.342, subd. 1(h)(iii). Minnesota Statutes section 609.342, subdivision 1(g), is not that provision. The unanimity issue in this case could have been avoided had the state made a different charging decision. *See State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015) (“The unanimity problems created by the State’s vague drafting of the complaint could have easily been avoided” by a different charging decision.).

“If [citizens] must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.” *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021). A verdict that allows an individual to be convicted without a unanimous verdict as to the criminal act they committed cannot

stand. To do so would undermine the integrity and reputation of Minnesota's criminal-justice system. We therefore reverse and remand for a new trial.⁵

Reversed and remanded.

⁵ Because we reverse on the second unanimity issue, we decline to decide the first deadlocked-jury-instruction issue.

JOHNSON, Judge (dissenting)

I respectfully dissent from the opinion of the court. In my view, the district court did not err—let alone plainly err—by not giving the jury a specific-unanimity instruction.

Under well-established caselaw concerning the plain-error test, an error is “plain” only if the error is “clear” or “obvious.” *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). “An error is clear or obvious if it contravenes case law, a rule, or a standard of conduct.” *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014) (quotation omitted). If the applicable law is found in caselaw, an error is clear or obvious only if the district court acted contrary to a precedential opinion. *State v. Portillo*, 998 N.W.2d 242, 250 (Minn. 2023) (stating in parenthesis that “an error cannot be deemed ‘plain,’ in the absence of binding precedent”) (quoting *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004)). Furthermore, the precedent must be clear; if the applicable caselaw is unclear or unsettled, an error cannot be plain. *See State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008) (stating that plain error did not exist because “neither this court nor the federal courts have conclusively resolved this issue”); *State v. Ayala-Leyva*, 848 N.W.2d 546, 555 (Minn. App. 2014) (reasoning that, even if jury instruction was erroneous, error was not plain because applicability of *Stempf* in case of conspiracy to commit first-degree drug crime was “‘cloudy’ or ‘unsettled’”), *rev. denied* (Minn. Aug. 11, 2015).

As an initial matter, it is notable that, on five occasions, the supreme court has held that a district court did not err by not giving a specific-unanimity instruction. *See State v. Hayes*, 831 N.W.2d 546, 556 (Minn. 2013); *State v. Pendleton*, 725 N.W.2d 717, 729-33

(Minn. 2007); *State v. Kelbel*, 648 N.W.2d 690, 699-703 (Minn. 2002); *Ihle*, 640 N.W.2d at 917-19; *State v. Crowsbreast*, 629 N.W.2d 433, 438-39 (Minn. 2001). Indeed, it appears that the supreme court *never* has held that a district court erred by not giving a specific-unanimity instruction.

Ortega-Herrera’s argument is based on an opinion of this court, *State v. Stempf*, 627 N.W.2d 352 (Minn. App. 2001), which was a drug case. The state argues in response that Ortega-Herrera’s argument “is foreclosed by controlling legal authority that is directly adverse to his argument: *State v. Rucker*, 752 N.W.2d 538 (Minn. App. 2008), *rev. denied* (Minn. Sept. 23, 2008).” The *Rucker* opinion was concerned with two charges of criminal sexual conduct based on numerous instances of sexual abuse of two children. *Id.* at 542-43. In *Rucker*, we acknowledged *Stempf*, distinguished it based on the nature of the charges and the parties’ arguments, and concluded that the district court did not err by not giving the jury a specific-unanimity instruction. *Id.* at 548-49. In at least eleven cases since *Rucker*, this court has concluded that a district court did not plainly err by not giving a specific-unanimity instruction in a case involving numerous instances of criminal sexual conduct against a minor victim, reasoning that *Rucker* applies and *Stempf* does not.¹

¹See *State v. Yang*, A24-0228, 2025 WL 440433, at *1, 5 (Minn. App. Feb. 10, 2025), *rev. granted* (Minn. May 28, 2025); *State v. Johannessohn*, A23-1021, 2024 WL 3250423, at *1, 5 (Minn. App. July 1, 2024), *rev. denied* (Minn. Oct. 15, 2024); *State v. Redmond*, A23-0744, 2024 WL 2131491, at *1, 7 (Minn. App. May 13, 2024); *rev. denied* (Minn. Aug. 20, 2024); *State v. Moore*, A21-0998, 2022 WL 3152842, at *6-7 (Minn. App. Aug. 8, 2022), *rev. denied* (Minn. Oct. 26, 2022); *State v. Garcia Rivera*, A20-0255, 2021 WL 1343518, at *5-7 (Minn. App. Apr. 12, 2021), *rev. denied* (Minn. June 29, 2021); *State v. Sleen*, A18-1486, 2020 WL 54185, at *2-3 (Minn. App. Jan. 6, 2020), *rev. denied* (Minn. Mar. 25, 2020); *State v. Janish*, A18-0307, 2019 WL 4008469, at *5-6 (Minn. App.

Indeed, it appears that, since *Rucker* was issued in 2008, this court *never* has concluded—until today—that a district court plainly erred by not giving a specific-unanimity instruction in a case involving numerous instances of criminal sexual conduct against a minor victim.

The opinion of the court emphasizes the particular subdivision of Minnesota Statutes section 609.342 under which Ortega-Herrera was charged and convicted. That analysis is unnecessary and inconsequential. The *Rucker* opinion does not focus on the particular subdivision under which the appellant was charged and convicted. *See* 752 N.W.2d at 547-49. The most pertinent language in the statute is the clause that requires “sexual penetration with another person,” and that language appears in both the statute at issue in this case and the statute at issue in *Rucker*. *See* Minn. Stat. § 609.342, subd. 1(g) (2006); *Rucker*, 752 N.W.2d at 545 & n.1 (citing Minn. Stat. § 609.342, subd. 1(b) (2002)). Furthermore, this court has applied *Rucker* instead of *Stempf* in at least three cases in which criminal-sexual-conduct convictions were based on section 609.342, subdivision 1(g). *See Yang*, 2025 WL 440433, at *3 (citing Minn. Stat. § 609.342, subd. 1(g) (2014)); *Redmond*, 2024 WL 2131491, at *1 (citing Minn. Stat. § 609.342, subd. 1(g) (2020)); *Schauer*, 2014 WL 6608790, at *2 (citing Minn. Stat. § 609.342, subd. 1(g) (2012)).

A close look at *Rucker* and the record in this case confirms that *Rucker* applies. In *Rucker*, this court reasoned as follows:

Aug. 26, 2019), *rev. denied* (Minn. Nov. 19, 2019); *State v. Ellis*, A16-1216, 2017 WL 3222008, at *3-4 (Minn. App. July 31, 2017), *rev. denied* (Minn. Oct. 25, 2017); *State v. Schauer*, A13-0500, 2014 WL 6608790, at *4 (Minn. App. Nov. 24, 2014); *State v. Bickel*, A11-982, 2012 WL 2077298, at *5 (Minn. App. June 11, 2012), *rev. granted* (Minn. Aug. 21, 2012), *rev. denied* (Minn. Oct. 15, 2013); *State v. Quach*, A10-385, 2011 WL 1642423, at *5 (Minn. App. May 3, 2011).

[A]ppellant was convicted of one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct as to each victim whom he was alleged to have abused over a two-year period, and the jury was instructed only to find whether the acts occurred between August 2003 and August 2005. 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 appellant 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. The victims 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 appellant's conduct and not distinct allegations of sexual abuse. Based on the particular facts of this case, we conclude that the district court did not err in not instructing the jury that it must unanimously agree on which specific incidents formed the basis of appellant's convictions.

Rucker, 752 N.W.2d at 548.

This case bears many similarities to *Rucker*. The state charged Ortega-Herrera with a single count corresponding to a single victim. The state alleged that Ortega-Herrera committed the charged offense over a multi-year period. On direct examination, M.P. (who, at the time of trial, was 28 years old, married, the mother of three children, and working as a registered nurse) typically testified generally by describing the types of conduct in which Ortega-Herrera repeatedly engaged. For example, M.P. testified that, during one time period, Ortega-Herrera often lay next to her in bed and put his hands under her shirt and underwear and directly touched her breasts and vaginal area. She also testified that, during a later time period, it was "a regular occurrence" for Ortega-Herrera to abuse her by inserting his penis into her vagina. She testified in detail about only one instance of

penetration: the first time Ortega-Herrera inserted his penis into her vagina, when, she said, he brought her to the basement, removed her pants, unzipped his own pants, forced her to sit on his lap, and moved her up and down. In closing argument, the prosecutor acknowledged that M.P. “doesn’t recall every single detail” because “[i]t was a long time ago” and “[s]he was a kid.” Given the nature of the state’s evidence, Ortega-Herrera understandably “did not present separate defenses for each incident of alleged sexual abuse.” *See Rucker*, 752 N.W.2d at 548. In closing argument, Ortega-Herrera’s attorney emphasized the state’s burden of proof, challenged the thoroughness of law-enforcement’s investigation, and questioned the credibility of the state’s secondary witnesses. But Ortega-Herrera’s attorney did not comment on the only specific incident in evidence (the incident in the basement when Ortega-Herrera inserted his penis into M.P.’s vagina for the first time), did not make different arguments in response to different types of general allegations, and never directly challenged M.P.’s credibility. Ortega-Herrera’s attorney simply argued that “the allegations defy logic.” Given these similarities to the *Rucker* case, *Rucker* applies, and *Stempf* does not.

The most that can be said in favor of Ortega-Herrera’s argument is that the caselaw is unclear or unsettled. This court has said as much in two nonprecedential opinions in criminal-sexual-conduct cases in which the parties disputed whether *Rucker* or *Stempf* should apply. *See Yang*, 2025 WL 440433, at *4 (stating that “the law on when a unanimity instruction is required is unsettled”); *Ellis*, 2017 WL 3222008, at *3 (stating that “it is not clear under *Rucker* that the unanimity instruction was required”). But if there is doubt

about whether *Rucker* or *Stempf* applies, that doubt should lead to the conclusion that plain error does not exist. *See Jones*, 753 N.W.2d at 689; *Ayala-Leyva*, 848 N.W.2d at 555.

For these reasons, I respectfully disagree with parts II.A. and II.B. of the court's opinion. I would conclude that the district court did not plainly err by not giving the jury a specific-unanimity instruction. In light of that conclusion, I would not reach the issues discussed in parts II.C. and II.D. In sum, I would affirm the conviction.