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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2011**

State of Minnesota,
Respondent,

vs.

David A. Caroon,
Appellant.

**Filed January 20, 2009
Affirmed
Stauber, Judge**

St. Louis County District Court
File No. CR066378

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Melanie S. Ford, St. Louis County Attorney, St. Louis County Courthouse, 100 North Fifth Avenue West, Duluth, M 55802 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from his conviction of conspiracy to commit first-degree murder, appellant argues that (1) the district court committed structural error when it allegedly removed the requirement of an overt act, which is an element of conspiracy, from the jury's consideration and directed the jury that acts allegedly committed by appellant amounted to overt acts and (2) the court committed plain error when it failed to instruct the jury that it was required to unanimously agree on the particular overt act or acts that appellant committed in furtherance of the conspiracy and instead gave the jury the standard instruction that allowed it to find appellant guilty while potentially disagreeing about the specific overt acts proven. We affirm.

FACTS

In the fall of 2005, appellant David Caroon became romantically involved with B.K. Shortly thereafter, appellant moved in with B.K. at her trailer house. Eventually, the relationship deteriorated, and B.K. obtained an order for protection (OFP) against appellant. Appellant was subsequently charged with a felony violation of that OFP and incarcerated in the St. Louis County jail.

In August 2006, J.S. was arrested and incarcerated in the St. Louis County jail on charges of possession of methamphetamine. Shortly after his arrest, J.S. approached jail Sergeant Scott Ronning about a proposition appellant made to him. J.S. told Sergeant Ronning that appellant had offered him \$10,000 to kill B.K. J.S. also gave Sergeant Ronning a map that appellant had purportedly drawn of B.K.'s residence. This

information was passed along to Deputy Mark Steel, who subsequently met with J.S. to investigate his claims. J.S. reiterated the allegations to Deputy Steel and agreed to wear a wire despite Deputy Steel's refusal to make any specific promises regarding a possible reduction of the charges against J.S.

On September 14, 2006, Deputy Steel concealed a wire under J.S.'s clothing. J.S. then met with appellant in the "common room" of the St. Louis County jail, where appellant asked J.S. whether he "remember[ed] the layout of the place." J.S. replied that he did, but asked appellant to "draw a new picture." As appellant drew a new picture of the trailer, he and J.S. discussed the layout of the trailer, and appellant told J.S. where he could find money, coins, and fur coats. When asked what would be the "best" way to kill B.K., appellant stated: "I think the best way would be, um, just to grab a hold of her and f-cking suffocate her and then loosen up the gas line, cycle the furnace so that it turns on and let the place fill up with gas and explode." Appellant further instructed J.S. to send him a friendly letter purportedly from B.K., and typed on B.K.'s computer. Appellant urged J.S. to send the letter immediately and to use B.K.'s return address labels to make the letter appear more authentic.

After the recorded conversation between appellant and J.S. ended, J.S. met with Deputy Steel and gave him the second map that appellant had drawn. A few days later, Deputy Steel met with J.S. again at the St. Louis County jail, where J.S. gave the deputy a handwritten letter purportedly given to J.S. by appellant. According to J.S., appellant asked him to transcribe the letter on B.K.'s computer, and then mail the letter to appellant at the jail. The "Dear Dave" letter, which was addressed to "Dave" and signed "Love

[B.K.],” apologized for lying “to set you up.” The letter ended by stating, “I will always love you. I’m not going to testify against you.”

On October 13, 2006, appellant was charged with conspiracy to commit first-degree murder. Following a trial by jury, appellant was found guilty of the charged offense. The district court subsequently sentenced appellant to 240 months in prison. This appeal followed.

D E C I S I O N

I.

Generally, this court reviews the adequacy of jury instructions for an abuse of discretion. *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998). The district court “has considerable latitude in the selection of the language of a jury charge . . . [but] a jury instruction must not materially misstate the law.” *State v. Pendleton*, 567 N.W.2d 265, 268 (Minn. 1997). “[T]he court’s charge to the jury must be read as a whole, and if, when so read, it correctly states the law in language that can be understood by the jury, there is no reversible error.” *Peou*, 579 N.W.2d at 475.

Appellant was charged with conspiracy to commit first-degree murder. Under Minnesota law, the crime of conspiracy has two elements: “(1) an agreement between two or more people to commit a crime, and (2) an overt act in furtherance of the conspiracy.” *State v. Brown*, 732 N.W.2d 625, 628 (Minn. 2007). “An overt act can be the slightest action on the part of a conspirator.” *State v. Stewart*, 643 N.W.2d 281, 297 (Minn. 2002).

Appellant argues that the district court's instructions to the jury removed the "overt act" element from the instructions. Although appellant concedes that he did not object to the jury instruction, he argues that by removing an element from the jury instructions, the district court committed "structural error." Thus appellant contends that his conviction should be reversed.

The supreme court has distinguished between "trial errors," which "occur during the presentation of the case to the jury" and "may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt," and "structural errors." *State v. Dorsey*, 701 N.W.2d 238, 252 (Minn. 2005) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 1264 (1991)). The court has defined "structural errors" as "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* (quoting *Fulminante*, 499 U.S. at 310, 111 S. Ct. at 1265). Structural errors always invalidate a conviction whether or not a timely objection to the error was made. *See Sullivan v. Louisiana*, 508 U.S. 275, 276-82, 113 S. Ct. 2078, 2080-83 (1993).

Here, the district court instructed the jury as follows:

Now, the next several instructions go into the details of the charge against [appellant]. The statutes of Minnesota provide that whoever conspires with another to commit a crime is guilty of conspiracy if one or more of the parties to the conspiracy does some overt act in furtherance of the conspiracy.

Here are the elements of the crime. Elements of Conspiracy to Commit Murder in the First Degree – Premeditation, are: First, [appellant] conspired with [J.S.] to commit the crime of Murder in the First Degree, -

Premeditation. A person conspires with another when he agrees with the other to commit a crime.

The statutes of Minnesota define the crime of Murder in the First Degree – Premeditation, as follows: The statutes of Minnesota provide that whoever, with premeditation and with intent to effect the death of a person, causes the death of a human being is guilty of a crime.

Second, [appellant] did any of the overt acts alleged and did so with the purpose of furthering the conspiracy. Now, in this case, the overt acts alleged included the creation of maps allegedly showing the location and layout of [B.K.'s] trailer home and/or the alleged creation of the “Dear Dave” letter.

Third, the [appellant] entered the agreement or an overt act took place on September 14, 2006, in St. Louis County.

If you find that each of these elements has been proven beyond a reasonable doubt, the [appellant] is guilty. If you find that any element has not been proven beyond a reasonable doubt, the [appellant] is not guilty.

Now, an overt act is any action taken by one of the conspirators with the intention of furthering the accomplishment of any object of the conspiracy. The act does not itself have to be a criminal act, but it must be done with the purpose of furthering the conspiracy.

It is not necessary that the crime that was the object of the conspiracy actually had been completed or committed. As long as there was an agreement to commit the crime and an overt act was committed with the purpose of furthering the conspiracy, the crime of conspiracy is complete.

Appellant argues that the district court’s conspiracy instructions involved structural error because the instructions removed the “overt act” element from the jury’s consideration by concluding for the jury that the overt acts alleged by the state—the two

maps that appellant allegedly drew for J.S., and the “Dear Dave” letter allegedly written by appellant—actually constituted “overt acts” for the purpose of the conspiracy offense. We disagree. The district court specifically instructed the jury that in order to find appellant guilty of conspiracy, it must find that appellant (1) conspired with J.S. to commit murder and (2) did *any* of the three overt acts alleged and that the acts were done “with the purpose of furthering the conspiracy.” The district court further instructed the jury that “an overt act is any action taken by one of the conspirators with the intention of furthering the accomplishment of any object of the conspiracy.” The instructions follow the standard jury instructions for conspiracy, and when read together, do not omit any elements of the offense. *See Peou*, 579 N.W.2d at 475 (stating that “the court’s charge to the jury must be read as a whole, and if, when so read, it correctly states the law in language that can be understood by the jury, there is no reversible error). Accordingly, the jury instructions are not structurally deficient.

II.

Appellant also argues that the district court erred when it failed to instruct the jury that it was required to unanimously agree on the particular overt act or acts that appellant committed in furtherance of the conspiracy. But appellant concedes that he failed to object to the instructions at trial. A defendant’s failure to object to instructions before the judge instructs the jury generally constitutes a waiver of the right to appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Nonetheless, we will review the instructions if they amount to plain error affecting substantial rights or were misleading or confusing on fundamental points of law. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001).

Error is prejudicial when there is a reasonable likelihood that the error would have had a significant effect on the jury's verdict. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

Criminal defendants have the constitutional right to a unanimous verdict. *Burns v. State*, 621 N.W.2d 55, 61 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001).

Juries must unanimously agree on whether a defendant committed the act or acts that constitute an element of the crime charged. *See State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001). This court has cautioned against the use of "either/or" jury instructions as unclear and potentially raising doubt about the unanimity of the jury verdict. *State v. Hart*, 477 N.W.2d 732, 739 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992).

Appellant contends that the district court's instructions allowed the jury to find appellant guilty while disagreeing about which specific overt act appellant committed. Thus, appellant argues that his conviction of conspiracy to commit first-degree murder violated his right to a unanimous jury verdict because the jury instructions did not require the jury to agree on a particular overt act.

To support his claim, appellant relies on *Stempf*, in which the defendant was charged with one count of possessing methamphetamine. 627 N.W.2d at 354. Despite the single possession charge, the state introduced evidence that the defendant possessed methamphetamine at his workplace and in the truck in which he was riding when he arrived at work. *Id.* The district court denied a request for an instruction requiring jurors to evaluate the two acts separately, and unanimously agree that the state had proved the

same underlying criminal act beyond a reasonable doubt. *Id.* On appeal, this court stated: “Where jury instructions allow for possible significant disagreement among jurors as to what acts the defendant committed, the instructions violate the defendant’s right to a unanimous verdict.” *Id.* Specifically, the court stated that there must be unanimous agreement “on which acts the defendant committed if each act itself constitutes an element of the crime.” *Id.* at 355. Thus, the court held that the district court’s refusal to give a specific unanimity instruction violated the defendant’s right to a unanimous verdict because “[s]ome jurors could have believed [the defendant] possessed the methamphetamine found on the premises while other jurors could have believed [the defendant] possessed the methamphetamine found in the truck.” *Id.* at 358.

The state contends that *Stempf* is distinguishable from this case because *Stempf* involved a situation in which a single count submitted to the jury involved two or more separate crimes in violation of the same statute. The state argues that this case is different from *Stempf* because, even though the state’s evidence showed a number of different overt acts in furtherance of the conspiracy, appellant participated in a single conspiracy.

While unanimity is required with respect to an element of a crime, it is not required with regard to the alternative ways a crime could be committed. *State v. Begbie*, 415 N.W.2d 103, 106 (Minn. App. 1987), *review denied* (Minn. Jan. 20 1988). When “certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime,” the jury need not be unanimous as to the means used to commit the crime so long as it is unanimous in finding that the crime’s elements are

met. *Stempf*, 627 N.W.2d at 355 (quoting *Schad v. Arizona*, 501 U.S. 624, 636, 111 S. Ct. 2491, 2499 (1991)). Thus, in *Hart*, this court affirmed a conviction of first-degree criminal sexual conduct when jurors were allowed to convict the defendant if they found either that he caused the victim personal injury or placed her in fear of harm. 477 N.W.2d at 737-39. Because the statute explicitly allowed for either of the circumstances as alternative means of committing first-degree criminal sexual conduct, the defendant's right to a unanimous verdict was not violated. *Id.*

Similarly, in *Begbie*, the defendant made terroristic threats on an answering machine toward both a husband and a wife. 415 N.W.2d at 104. On appeal, the defendant contended that he was denied his right to a unanimous verdict because some jurors could have found that he threatened the wife while others found that he threatened the husband. *Id.* at 105. This court disagreed, holding that: "It is sufficient that all jurors unanimously agreed on their ultimate conclusion that [the defendant] was guilty of the crime charged, even though they may not have agreed upon exactly what victim [the defendant] had intended to terrorize." *Id.* at 106.

In light of *Stempf*, and the subsequent caselaw attempting to analogize or distinguish *Stempf*, we note that the caselaw in this area is unclear. Plain error exists when the court goes against clear and established law. *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). Moreover, the district court followed the recommended jury instruction in 10 *Minnesota Practice*, CRIMJIG 5.07 (2006). See *State v. Sutherlin*, 396 N.W.2d 238, 241 (Minn. 1986) (stating that the district court did not commit plain error

when it followed the recommended instruction without objection). Thus, even if the district court's jury instruction was error, it would not have been plain error.

We further note that even if there was plain error, the alleged error did not affect appellant's substantial rights. J.S. also testified that appellant gave him the "Dear Dave" letter, which J.S. subsequently turned over to law enforcement. Moreover, the handwritten letter and handwritten maps were all submitted into evidence. Appellant did not dispute that he drew the maps, but instead argued that his conversations with J.S. did not amount to an "agreement," but rather appellant was just talking "smack" and did not intend for J.S. to take his comments seriously. Appellant argued that the maps were composed by appellant as part of his "smack talk," and that J.S. used his conversations with appellant as leverage to attempt to get a lighter sentence. Accordingly, we conclude that even if the jury had a more specific instruction, it is not reasonably likely that the verdict would have been affected given the evidence presented at trial and the defense offered by appellant.

III.

Appellant raised a number of issues in his pro se supplemental brief. We have considered these issues and conclude that they are without merit.

Affirmed.