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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1235**

State of Minnesota,
Respondent,

vs.

Mervel Jones, III,
Appellant.

**Filed August 11, 2009
Affirmed
Kalitowski, Judge**

Mille Lacs County District Court
File No. CR-07-3378

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

Janice Kolb, Mille Lacs County Attorney, Courthouse, 635 Second Street Southeast, Milaca, MN 56353 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Klaphake, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Mervel Jones, III, challenges his conviction of ineligible possession of a firearm, arguing that the district court committed plain error when it referred to the “Felon in Possession of a Firearm” offense in its instructions to the jury after appellant had stipulated that he was ineligible to possess a firearm. We affirm.

DECISION

Based on an incident that occurred on December 25, 2007, appellant was charged with two offenses: Count 1 – ineligible person in possession of a firearm, and Count 2 – intentionally pointing a firearm capable of killing another human being at or toward another.

Before trial began, appellant stipulated to having a record of two prior felony convictions and that he was, therefore, ineligible to possess a firearm. But when instructing the jury at the close of trial, the district court mistakenly told the jury that Count 1 was titled “Felon in Possession of a Firearm” instead of “Ineligible Person in Possession of a Firearm.” After realizing its mistake, the district court dismissed the jury for a recess mid-instructions. The district court informed appellant that he was entitled to a mistrial and that the court could either grant a mistrial or issue a curative instruction to correct the error. The district court stated that the curative instruction would:

indicate to the jury that this was mislabeled, ‘Felon in Possession of a Firearm’ . . . I would go so far as to even tell them that . . . it is not being submitted to them as ‘Felon in Possession’ but simply as a person who is ineligible to possess a firearm and that they are to disregard that reference

to ‘felon’ . . . and I might actually mislead ‘em to think that he’s not a felon, to be honest with you. That’s my intent so that we can somehow erase that damage.

Appellant and his counsel discussed the options and decided to have the district court issue a curative instruction.

The jury instructions were retyped to omit the term, “Felon in Possession of a Firearm.” The district court then informed the jury that “Felon in Possession of a Firearm” was mistakenly written at the top of the jury instructions and that such language was “boilerplate language” and inapplicable to this case. The district court further noted that:

[Appellant is] being charged simply as a person who was unlawful to possess but not as a felon in this case. He was in possession. When the label came on, the big black letters . . . for some reason that ‘Felon in Possession’ is what was shown . . . [T]hat’s misleading in this case . . . he is simply a person who cannot lawfully possess one . . . and you are to disregard any reference to that ‘felon.’ In fact, it’s been retyped taking that out. It has no relevance to this particular case and you should not in any way consider it for any purposes . . . as applying to [appellant].

Appellant did not object to the curative instruction. The jury found appellant guilty of ineligible person in possession of a firearm, but not guilty of intentionally pointing a firearm capable of killing another human being at or toward another.

Appellant argues that he should have received a mistrial because the district court erred when giving its jury instructions by stating that appellant was charged under the “felon in possession” statute and also because when the district court issued the curative instruction, the court mentioned the word “felon” several times. We disagree.

We view jury instructions in their entirety to determine whether they fairly and adequately explain the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). “An instruction is in error if it materially misstates the law.” *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). Generally, we review an unobjected-to jury instruction for plain error. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007).

The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If those three prongs are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Here, when given the option of either a mistrial or a curative instruction, appellant chose the latter. It was not until after appellant had been convicted of being an ineligible person in possession of a firearm that he argued for a mistrial due to the erroneous jury instructions. We conclude that no error occurred here because appellant waived the opportunity for a mistrial based on his choice to have the district court issue a curative instruction.

In *State v. Yant*, this court determined that an appellant’s failure to move for a mistrial at the district court, or take other remedial measures, “as a trial tactic” precluded his claims of error on appeal. 376 N.W.2d 487, 490-91 (Minn. App. 1985), *review denied* (Minn. Jan. 17, 1986). In *Yant*, the judge noticed that two jurors were sleeping during the trial and informed the parties. *Id.* at 489-90. The judge requested that the bailiff make sure the jurors refrain from closing their eyes. *Id.* at 489-90. Neither party objected to the judge’s actions, nor did the defendant voir dire the jurors, or move for a

mistrial. *Id.* at 490. After the appellant was convicted, he appealed based on error due to the sleeping jurors. *Id.* at 490. The *Yant* court denied appellant's claim, reasoning that, "appellant gambled on the result and now cries 'foul.'" *Id.* at 491.

As in *Yant*, appellant here "gambled on the result" and is now attempting to seek a mistrial on appeal. To permit appellant to argue that the district court erred in not sua sponte declaring a mistrial, when appellant chose to forego the option of a mistrial, would foster abuse of the judicial system. Thus, we conclude that appellant has waived this argument on appeal. In addition, we conclude that the district court's curative instruction was proper and did not prejudice appellant.

Affirmed.