**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-1072**

State of Minnesota,
Respondent,

vs.

Cordell Martez Hall,
Appellant.

**Filed July 27, 2010**
**Affirmed**
**Worke, Judge**
**Concurring specially, Johnson, Judge**

Stearns County District Court
File No. 73-CR-08-12725

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

## U N P U B L I S H E D  O P I N I O N

**WORKE**, Judge

Appellant challenges his convictions of two counts of felony domestic assault, arguing that the district court erred in not instructing the jury that it had to unanimously agree on which specific acts appellant committed. We affirm.

## FACTS

Appellant Cordell Martez Hall and J.N. began dating in early 2005. Approximately one year into the relationship, appellant became physically abusive. On September 30, 2008, J.N. returned to her residence, where appellant was living with her in violation of a domestic abuse no-contact order. J.N. informed appellant that the police were trying to locate him to arrest him on an active warrant. Appellant became upset and threatening, and J.N. decided she needed to leave. J.N. drove to the home of her sister, who lived nearby, and J.N. and her sister then returned to J.N.'s residence to retrieve some belongings.

While J.N. was in a bedroom packing, appellant entered the room and started to choke her. J.N. tried to flee, but appellant struck her in the head with his fist. Appellant then threatened J.N. with a chair before she was finally able to escape to a neighbor's house and called 911.

In October 2008, the state charged Hall with two counts of felony domestic assault against J.N. in violation of Minn. Stat. § 609.2242, subd. 4 (2008); one count of felony domestic assault against their child in violation of Minn. Stat. § 609.2242, subd. 4; one count of felony fifth-degree assault against J.N.'s sister in violation of Minn. Stat.

§ 609.224, subd. 4(b) (2008); and felony violation of a domestic abuse no-contact order, Minn. Stat. § 518B.01, subd. 22(d)(1) (2008). After a two-day trial, the jury found appellant guilty of the two counts of felony domestic assault against J.N. and of felony violation of a domestic abuse no-contact order and acquitted appellant of the remaining assault charges. Appellant was sentenced to 21 months on the violation of a domestic abuse no-contact order conviction and 24 months on one of the domestic-assault convictions, with the sentences to run concurrently. This appeal follows.

**D E C I S I O N**

Appellant argues that the district court's failure to *sua sponte* give a specific-unanimity instruction to the jury deprived him of his right to a unanimous verdict. Appellant concedes that he did not request a specific-unanimity instruction at trial. "A defendant's failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver of the right to appeal." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Nonetheless, "a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law." *Id.*; *see also* Minn. R. Crim. P. 26.03, subd. 18(3); *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). Thus, we review the issue for plain error. *See* Minn. R. Crim. P. 31.02.

Under the plain-error test, this court may not grant appellate relief on an issue to which there was no objection unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is "plain" if it is clear or obvious under current law, *State v.*

*Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotation omitted), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, this court then considers the fourth requirement, whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

Minnesota requires unanimous jury verdicts in all criminal cases. Minn. R. Crim. P. 26.01, subd. 1(5); *State v. Hart*, 477 N.W.2d 732, 739 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992). The district court in this case properly instructed the jury on this unanimity requirement. Nonetheless, appellant argues that he was deprived of his right to a unanimous jury verdict because the district court never instructed the jury that it had to unanimously agree on the specific acts appellant committed that constituted domestic assault against J.N.

Jurors must unanimously agree on which acts the defendant committed if each act itself constitutes an element of the charged crime. *State v. Rucker*, 752 N.W.2d 538, 548 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008); *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001). "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." *Stempf*, 627 N.W.2d at 354. "But the jury does not have to unanimously agree on the facts underlying an element of a crime in all cases," *State v. Pendleton*, 725 N.W.2d 717, 731 (Minn. 2007), and "unanimity is not required with respect to the alternative means or ways in which the

crime can be committed," *State v. Begbie*, 415 N.W.2d 103, 106 (Minn. App. 1987) (quotation omitted), *review denied* (Minn. Jan. 20, 1988). Thus, "the jury need not always decide unanimously which of several possible means the defendant used to commit the offense in order to conclude that an element has been proved beyond a reasonable doubt." *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002).

Minnesota courts have "recognized the distinction between the basic elements of the crime and the facts underlying those basic elements." *State v. Hager*, 727 N.W.2d 668, 674 (Minn. App. 2007) (citing *Pendleton*, 725 N.W.2d at 731). "The *Pendleton* analysis limits the unanimous verdict requirement to situations where the offenses of the accused are inherently separate and juror confusion or disagreement would deny the accused due process." *Id*. "The cases across the country . . . recognize and note that it is sufficient that all jurors unanimously agree on their ultimate conclusion that the defendant was guilty of the crime charged, though they may not agree on the manner in which the defendant participated in the crime . . . ." *Begbie*, 415 N.W.2d at 106.

Appellant argues that the district court's failure to give a specific-unanimity instruction deprived him of his right to a unanimous verdict because the jurors may have convicted him of domestic assault in violation of subdivision 1(2) based on any of the following alleged acts: (1) that he punched J.N. in the head after she fled downstairs; (2) that he choked J.N. in the bedroom; (3) that he choked J.N. in the living room; and (4) that he hit, scratched, and pushed J.N. while upstairs. Likewise, with respect to subdivision 1(1), appellant asserts that he was deprived of a unanimous verdict because the jurors may have convicted him based on any of the following alleged acts: (1) that he

threatened J.N. after she informed him that she would not accompany him to Kentucky; (2) that he threatened J.N. while she was packing her suitcase by telling her that she was going to "get it"; and (3) that he threatened J.N. with a chair in the kitchen. Appellant relies on *Stempf* to support his argument.

In *Stempf*, the defendant was charged with a single count of possession of methamphetamine, but the state introduced evidence of "two distinct acts to support a conviction: (1) that he possessed methamphetamine found at the premises of his workplace; and (2) that he possessed methamphetamine found in the truck in which he was riding when he arrived at work." 627 N.W.2d at 357. The district court denied Stempf's request for an instruction requiring "jurors to evaluate the two acts separately and unanimously agree that the state had proven the same underlying criminal act beyond a reasonable doubt." *Id.* at 354. On appeal, we concluded that the district court erred in refusing to give the requested specific-unanimity instruction because "nothing in Minnesota law permits trial on one count of criminal conduct that alleges different acts without requiring the prosecution to elect the act upon which it will rely for conviction or instructing the jury that it must agree on which act the defendant committed." *Id.* at 356. Accordingly, we stated that because the act of possession was an element of the charged crime, the jury had to unanimously agree as to which of the two distinct acts of possession had been proven beyond a reasonable doubt. *Id.* at 357. But appellant's reliance on *Stempf* is misplaced for several reasons.

*Stempf* involved distinct and separate acts, whereas here, appellant was engaged in a continuing course of conduct during which he used multiple means to cause J.N.'s

injuries and fear. Also, both of the acts alleged in *Stempf* occurred in different places and at different times. But here, all of the alleged instances of assaultive behavior occurred at J.N.'s residence during a period of approximately 50 minutes. Moreover, unlike the "act" of possession of a controlled substance, which the legislature has deemed criminal, the "act" of using certain language or conduct is not in and of itself criminal. Rather, such "acts" are only criminal when the actor inflicts bodily harm upon another in a manner that violates Minnesota's basic assault statutes or when the actor's intent is to cause fear in another of immediate bodily harm. Thus, a specific-unanimity instruction was not required in this case because the words and conduct were simply the means that the appellant used to accomplish the two counts of domestic assault.

**Affirmed.**

**JOHNSON**, Judge (concurring specially)

I concur in the judgment. I would affirm Hall's conviction based on the third requirement of the plain-error test, which asks whether an alleged error affects an appellant's substantial rights. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Because the resolution of that issue is dispositive of the appeal, there is no need to analyze Hall's arguments at the first and second steps of the plain-error test. *See State v. Tomassoni*, 778 N.W.2d 327, 333 (Minn. 2010); *State v. Martinez*, 725 N.W.2d 733, 739 (Minn. 2007); *State v. Jackson*, 714 N.W.2d 681, 697 (Minn. 2006).

Hall cannot succeed at the third step of the plain-error test unless he can show that "the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. An alleged error is prejudicial "if there is a 'reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury.'" *Id.* (quoting *State v. Glidden*, 455 N.W.2d 744, 747 (Minn. 1990)). Hall bears the burden of persuasion at the third step of the plain-error test, and it is "a heavy burden." *Id.*

Hall's argument for reversal fails at the third step of the plain-error test for two reasons. First, he concedes that "it is impossible to determine whether [the jury's] verdict was unanimous." This statement essentially is an admission that there is not a "reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). The United States Supreme Court recently held that an appellant cannot satisfy the third step of the federal plain-error test if there is merely a "possibility" of prejudice. *United States v. Marcus*, 130 S. Ct. 2159, 2164-67 (2010). It is appropriate to rely on *Marcus* because the

Minnesota Supreme Court previously has relied on the United States Supreme Court's opinions interpreting the federal plain-error rule. *See, e.g.*, *Griller*, 583 N.W.2d at 740 n.8, 741 n.14 (citing *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549 (1997); *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777-78 (1993)). Second, Hall makes no attempt to identify any facts that might tend to show that the jury did not reach a unanimous verdict in this case. He argues that the "right to a unanimous verdict is a substantial right," but he does not explain why, in this particular case, the jury likely did not reach a unanimous verdict. Thus, Hall cannot satisfy his burden of persuasion on the third requirement of the plain-error test.