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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2246**

State of Minnesota,
Respondent,

vs.

Jonathan Rubio-Segura,
Appellant.

**Filed November 5, 2012
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-10-14076

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Bradford W. Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Collins,
Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of second-degree unintentional felony murder, arguing that the district court erred by (1) convicting appellant of that offense instead of first-degree misdemeanor manslaughter, (2) not instructing the jury, sua sponte, on the offense of first-degree misdemeanor manslaughter, and (3) basing appellant's conviction of second-degree unintentional felony murder on the predicate offense of first-degree assault. Because the first and third arguments were not raised in the district court and review in the interests of justice is not appropriate, we do not address the merits of those arguments. As to the second argument, appellant does not establish plain error, which is necessary to obtain relief. We therefore affirm.

FACTS

During the early morning hours of March 26, 2010, after having consumed a significant amount of alcohol, appellant Jonathan Rubio-Segura encountered A.G. in downtown Minneapolis. Rubio-Segura spoke with A.G. for approximately two minutes. Rubio-Segura repeatedly hugged A.G., draped his arm around A.G., and shook A.G.'s hand. Eventually, Rubio-Segura walked away from A.G., but he returned to A.G.'s location approximately one minute later. Rubio-Segura approached A.G. and punched him in the face. A.G. fell flat on the ground and his head hit the concrete surface. While A.G. lay motionless, Rubio-Segura attempted to punch him a second time. A bystander intervened and restrained Rubio-Segura. After approximately 30 seconds, Rubio-Segura

began to walk away from the scene, but then turned back, extended his left arm, and punched A.G. again with his right fist. Then, Rubio-Segura fled from the scene.

The police arrived and found A.G. unconscious in a large pool of blood. Blood was coming out of his ears. Two officers apprehended Rubio-Segura outside of a nearby bar. Rubio-Segura had blood on his hands and clothes and “said that he was sorry.” The officers transported Rubio-Segura to the crime scene, and two witnesses identified him as the person who assaulted A.G. The state charged Rubio-Segura with first-degree assault under Minn. Stat. § 609.221, subd. 1 (2008).

A.G. was hospitalized as a result of his injuries, which included multiple skull fractures, bruising and bleeding of the brain, and nerve damage. A.G. never left the hospital—he died from his injuries 13 days after the assault. The state amended the complaint against Rubio-Segura to remove the charge of first-degree assault and to add a charge of second-degree unintentional felony murder under Minn. Stat. § 609.19, subd. 2(1) (2008). At the ensuing jury trial, Rubio-Segura requested an instruction on the lesser-included offense of second-degree manslaughter under Minn. Stat. § 609.205(1) (2008). The district court granted the request, and the jury found Rubio-Segura guilty of both offenses. The district court sentenced Rubio-Segura to 162 months in prison for his conviction of second-degree unintentional felony murder. This appeal follows.

D E C I S I O N

I.

For the first time on appeal, Rubio-Segura argues that he was erroneously charged and convicted under the second-degree unintentional-felony-murder statute, Minn. Stat.

§ 609.19, subd. 2(1), because the first-degree misdemeanor-manslaughter statute, Minn. Stat. § 609.20(2) (2008), is a conflicting and more specific statute. “[W]hen two criminal statutes, one general and one specific, conflict because they have the same elements but differing penalties, the more specific statute governs over the more general statute, unless the legislature manifestly intends for the general statute to control.” *State v. Meyer*, 646 N.W.2d 900, 903 (Minn. App. 2002) (quotation omitted); *see also* Minn. Stat. § 645.26, subd. 1 (2008) (providing that when there is an irreconcilable conflict between two statutory provisions, the specific provision generally governs over the general provision).

Rubio-Segura was convicted under Minn. Stat. § 609.19, subd. 2(1), which states that if a person “causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense,” the person is guilty of second-degree unintentional felony murder. Rubio-Segura argues that he should have been charged and convicted under Minn. Stat. § 609.20(2), which states that if a person commits fifth-degree assault and “causes the death of another. . . and murder in the first or second degree was not committed thereby,” the person is guilty of first-degree misdemeanor manslaughter. This court has recognized that second-degree unintentional felony murder and first-degree misdemeanor manslaughter “differ by the degree of seriousness of their underlying offenses—the severity of the bodily harm inflicted by the assailant.” *State v. Olson*, 459 N.W.2d 711, 716 (Minn. App. 1990), *review denied* (Minn. Oct. 25, 1990).

Under Minnesota law, a person who “assaults another and inflicts great bodily harm” commits first-degree assault—a felony offense. Minn. Stat. § 609.221, subd. 1.

“Great bodily harm” is “bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.” Minn. Stat. § 609.02, subd. 8 (2008). A person who “intentionally inflicts or attempts to inflict bodily harm upon another” commits fifth-degree assault—a misdemeanor offense. Minn. Stat. § 609.224, subd. 1(2) (2008). “Bodily harm” is “physical pain or injury, illness, or any impairment of physical condition.” Minn. Stat. § 609.02, subd. 7 (2008).

Rubio-Segura argues that because “first degree assault has been construed to not require proof of any intent to harm . . . to convict [him] of felony murder, the [s]tate had to prove that [he] committed a misdemeanor assault and caused [A.G.’s] death.” Rubio-Segura relies on *State v. Fleck*, which held that assault-harm is a general-intent crime and assault-fear is a specific-intent crime. 810 N.W.2d 303, 308-10 (Minn. 2012). Rubio-Segura contends that, in light of the *Fleck* holding, the state must “prove exactly the same thing” for a charge of second-degree unintentional felony murder based on the predicate offense of first-degree assault and a charge of first-degree misdemeanor manslaughter based on the predicate offense of fifth-degree assault. In essence, Rubio-Segura contends that because assault-harm is a general-intent crime that does not require proof of intent to cause a specific degree of harm, every assault is the same if death results. This is so, Rubio-Segura argues, because if death results, the assailant by definition has inflicted “great bodily harm.” See Minn. Stat. § 609.02, subd. 8. Rubio-Segura further contends that because first-degree assault is equivalent to fifth-degree assault when death results

from the assault, the criminal statutes governing second-degree unintentional felony murder based on first-degree assault and first-degree misdemeanor manslaughter based on fifth-degree assault have the same elements but different penalties. Rubio-Segura therefore concludes that the statute regarding first-degree misdemeanor manslaughter is more specific and should have governed his conviction. *See Meyer*, 646 N.W.2d at 903.

The state argues that Rubio-Segura's argument that he could not be charged with and convicted of second-degree unintentional felony murder is not properly before this court because it was not raised in the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court will generally not consider matters not argued to and considered by the district court). Rubio-Segura acknowledges that he did not raise this argument in the district court, but he states that this court may nonetheless review any matter "as the interests of justice may require" under Minn. R. Crim. P. 28.02, subd. 11.

An appellate court ordinarily does not consider issues raised for the first time on appeal, even when those issues involve constitutional questions of criminal procedure or challenges to a statute. *See State v. Williams*, 794 N.W.2d 867, 874-75 (Minn. 2011) (declining to consider a constitutional issue raised for the first time on appeal). But it is within the discretion of an appellate court to address constitutional and other issues that were not raised in the district court, when the interests of justice require their consideration and doing so would not work an unfair surprise on a party. *Id.* at 874; *see also* Minn. R. Crim. P. 28.02, subd. 11. Rubio-Segura does not offer specific arguments

to support his request for review in the interests of justice, stating only that “[f]or the reasons cited herein, interests require that this court review this issue.”

Rubio-Segura’s argument, if accepted, has a peculiar outcome. If we were to accept his argument, a first-degree assault that results in death could not be charged under the second-degree unintentional-felony-murder statute; rather, it must be charged under the first-degree misdemeanor-manslaughter statute. The statutory penalty for second-degree unintentional felony murder is imprisonment up to 40 years. Minn. Stat. § 609.19, subd. 2. The statutory penalty for first-degree misdemeanor manslaughter is imprisonment up to 15 years. Minn. Stat. § 609.20 (2008). But the statutory penalty for first-degree assault is imprisonment up to 20 years. Minn. Stat. § 609.221, subd. 1. Thus, under Rubio-Segura’s application of *Fleck*, an offender who commits a first-degree assault faces a *lesser* statutory penalty if the victim dies as a result of the assault. If Rubio-Segura’s argument had been raised in and accepted by the district court, the state may have elected to pursue a first-degree assault charge, which would have carried the highest statutory penalty.¹ But the state will have lost that opportunity if this court grants the relief Rubio-Segura requests: reversal of his conviction of second-degree unintentional felony murder and entry of a conviction of first-degree misdemeanor

¹ The second count submitted to and found by the jury, second-degree manslaughter, carries a maximum statutory penalty of ten years of imprisonment. Minn. Stat. § 609.205 (2008).

manslaughter.² Because consideration of Rubio-Segura’s argument for the first time on appeal would work an unfair surprise on the state, we decline to address it.

II.

Rubio-Segura next argues that the district court committed reversible error by failing to instruct the jury, sua sponte, on the offense of first-degree misdemeanor manslaughter. Generally, failure to request a specific jury instruction results in forfeiture of the issue on appeal. *State v. Goodloe*, 718 N.W.2d 413, 422 (Minn. 2006). But this court has “discretion to consider a district court’s failure to give a jury instruction if the failure constitutes plain error affecting substantial rights.” *Id.* To show plain error, Rubio-Segura must establish that (1) the district court erred, (2) the error was plain, and (3) the error affected his substantial rights. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is “clear” or “obvious,” as shown by “case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotations omitted). If all three prongs are met, an appellate court assesses whether it should address the error to ensure the fairness and integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740.

Rubio-Segura argues that the district court plainly erred³ by failing to instruct the jury on first-degree misdemeanor manslaughter as a lesser-included offense. A lesser-included-offense instruction is warranted “when (1) the lesser offense is included in the charged offense; (2) the evidence provides a rational basis for acquitting the defendant of

² Our observation should not be interpreted as a position on the merits of Rubio-Segura’s argument.

³ Rubio-Segura does not request plain-error review of his other arguments.

the offense charged; and (3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense.” *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005). “Misdemeanor manslaughter is a lesser included offense of second degree murder.” *State v. Larsen*, 413 N.W.2d 584, 586 (Minn. App. 1987), *review denied* (Minn. Dec. 2, 1987). Thus, Rubio-Segura satisfies the first prong of the test. *See Hannon*, 703 N.W.2d at 509. But to satisfy the second and third prongs, there must have been a rational basis to acquit Rubio-Segura of second-degree unintentional felony murder and to convict him of first-degree misdemeanor manslaughter. *See id.* This determination is based on the underlying offense—Rubio-Segura’s assault of A.G. *See Larsen*, 413 N.W.2d at 586.

Rubio-Segura again relies on his assertion that under *Fleck*, the predicate offense—his assault against A.G.—is the same for second-degree unintentional felony murder and first-degree misdemeanor manslaughter. Rubio-Segura’s argument consists of the following:

The state alleged that [he] caused the death of [A.G.] while committing an assault. As discussed above, this conduct is the same as for felony murder and misdemeanor manslaughter; as a result, the evidence adduced was sufficient to permit the jury rationally to acquit [him] of the charged offense and convict him of the lesser included offense.

Rubio-Segura does not explain how his underlying premise—that the conduct constituting both the charged offense and the proposed lesser-included offense is the same—leads to his conclusion that the jury could rationally acquit him of the charged offense and convict him of the lesser-included offense. If the state must prove exactly the

same thing for both offenses, we fail to discern how a jury could rationally do anything other than convict or acquit him of both offenses.

Nevertheless, Rubio-Segura contends that the purported jury-instruction error was plain. His argument in support of a finding of plain error is limited to the following statements in his brief: “Although this issue has not been addressed by the Minnesota appellate courts, the statutory language could not be more clear. Therefore, the trial court was obligated to instruct the jury on the lesser included offense of misdemeanor manslaughter and its failure to so instruct the jury was plain.”

We disagree that the statutory language clearly supports a finding of plain error. In fact, the plain language of the first-degree misdemeanor-manslaughter statute suggests that there was no error. The statute provides that a person is guilty of first-degree manslaughter if the person commits certain acts “and murder in the first or second degree was not committed thereby.” Minn. Stat. § 609.20(2). Murder in the second degree occurs when a person “causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense.” Minn. Stat. § 609.19, subd. 2(1). If, as Rubio-Segura contends, any assault that results in death necessarily entails great bodily harm and therefore is a first-degree assault, then arguably all such offenses constitute second-degree unintentional murder and not first-degree misdemeanor manslaughter, under the plain language of section 609.20(2).

Moreover, Rubio-Segura’s argument relies on application of *Fleck* in a context that was not considered in *Fleck*. See *Fleck*, 810 N.W.2d at 305 (stating that the issue was whether a defendant charged with assault-harm is entitled to a voluntary-intoxication

jury instruction). As Rubio-Segura concedes, the issue he presents “has not been addressed by the Minnesota appellate courts.” In sum, the alleged instructional error is not clear or obvious, and the district court did not plainly err by not instructing the jury, sua sponte, on the offense of first-degree misdemeanor manslaughter. Rubio-Segura therefore is not entitled to relief.

III.

Rubio-Segura lastly argues that the district court erred by basing his conviction of second-degree unintentional felony murder on the predicate offense of first-degree assault. Because Rubio-Segura did not raise this issue in the district court, it is not properly before this court on appeal. *See Roby*, 547 N.W.2d at 357. Rubio-Segura asserts that the interests of justice require this court to review the issue, without articulating any specific reason in support of that assertion. As discussed in section I, such review is not appropriate in this case.

Nonetheless, we observe that Rubio-Segura’s argument relies on the merger doctrine. Under this doctrine, “a felony cannot support a conviction for felony murder unless the felony is independent of the homicide. . . .” *State v. Marshall*, 358 N.W.2d 65, 66 (Minn. 1984). The Minnesota Supreme Court has, on multiple occasions, “expressly declined to adopt the [merger] doctrine. . . .” *Id.* (citing *State v. Cromey*, 348 N.W.2d 759 (Minn. 1984); *State v. Jackson*, 346 N.W.2d 634 (Minn. 1984)); *see also State v. Loebach*, 310 N.W.2d 58, 65 (Minn. 1981) (rejecting a merger-doctrine argument, noting that it “is an argument which has been made countless times by other defendants and rejected each time by this court”). Rubio-Segura acknowledges that the Minnesota

Supreme Court has rejected the merger doctrine, but he urges this court to adopt it here, relying, once again, on the supreme court's recent holding in *Fleck*. As “an error-correcting court, this court is not in [a] position to overturn established supreme court precedent.” *State v. Grigsby*, 806 N.W.2d 101, 114 (Minn. App. 2011) (quotation omitted), *aff'd on other grounds*, 818 N.W.2d 511 (Minn. 2012).

Affirmed.