**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-2278**

State of Minnesota,
Respondent,

vs.

Samuel James Lemieux,
Appellant.

**Filed November 19, 2012**
**Affirmed**
**Schellhas, Judge**
**Concurring specially, Larkin, Judge**

St. Louis County District Court
File No. 69DU-CR-11-790

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

Mark S. Rubin, St. Louis County Attorney, Jessica J. Smith, Assistant County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Schellhas, 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.

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

**SCHELLHAS**, Judge

Appellant challenges his conviction of felony violation of a domestic-abuse no-contact order (DANCO), arguing that the district court's erroneous jury instruction—that the intent requirement for a felony DANCO violation is that the defendant knew of the DANCO, not that he knowingly violated the DANCO—constitutes plain error affecting his substantial rights. Appellant further argues that reversal and a new trial are required to ensure fairness and integrity in the judicial proceedings. We affirm.

## FACTS

On May 11, 2010, the district court issued a DANCO, prohibiting appellant Samuel Lemieux from having "contact directly, indirectly or through others, in person, by telephone, in writing, electronically or by any other means with" I.R. The DANCO provides that "[y]our release may be revoked if you violate any aspect of this Order" and that "[a] violation of this order is a crime and may cause you to be arrested and subject to possible further criminal charges." The DANCO further provides: "The terms of this order will remain in effect until further order or modification; until you are acquitted; or the charges against you are dismissed."

On March 11, 2011, respondent State of Minnesota charged Lemieux with a felony violation of the DANCO under Minn. Stat. § 629.75, subd. 2(d)(1) (2010). At trial, Officer Marc Johnson of the Duluth Police Department testified that on the evening of March 10, 2011, he executed a traffic stop of a car because he witnessed the car "run through a red light . . . with [the car's] lights off." After the car stopped, a passenger

exited the car's rear, right door. Officer Johnson stated that this action "is uncommon" because "[t]ypically people stay inside the vehicle when they are stopped." Officer Johnson asked the passenger to step back inside the car, and he did so. Officer Johnson subsequently asked the car's front, right passenger to identify herself. Initially, she gave the officer a false name and date of birth but subsequently admitted that she was I.R. Officer Johnson checked his squad car's mobile data terminal, and learned that an active no-contact order existed with respect to Lemieux and I.R. Officer Johnson identified the male passenger in the car as Lemieux and placed him under arrest.

A jury convicted Lemieux of felony DANCO violation on August 17, 2011. This appeal follows.

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

Although Lemieux did not object to the district court's felony DANCO jury instruction regarding intent, he argues on appeal that he is entitled to a reversal of his conviction because the district court's jury instruction was plainly erroneous, the error affected his substantial rights, and reversal is required to ensure fairness and integrity in the judicial proceedings.

"A defendant's failure to object to a jury instruction before [it is] given to the jury constitutes a waiver of the right to appeal," but "a reviewing court can reverse if the instruction constituted plain error." *State v. Prtine*, 784 N.W.2d 303, 316 (Minn. 2010). "The plain error doctrine is derived from the rules of criminal procedure." *State v. Ramey*, 721 N.W.2d 294, 297–98 (Minn. 2006) (citing Fed. R. Crim. P. 52(b); Minn. R. Crim. P. 31.02). "The plain error analysis allows an appellate court to consider an

unobjected-to error that affects a criminal defendant's substantial rights." *State v. Kuhlmann*, 806 N.W.2d 844, 852 (Minn. 2011); *see* Minn. R. Crim. P. 31.02 (permitting plain-error review).

"[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "If each of these prongs is met, [an appellate court] will address the error only if it seriously affects the fairness and integrity of the judicial proceedings." *Kuhlmann*, 806 N.W.2d at 852–53 (citation omitted).

***Error***

Both parties argue, and we agree, that the district court erroneously instructed the jury that the intent requirement for a felony DANCO violation is that the defendant "knew of the existence of" the DANCO—the intent requirement for a *misdemeanor* DANCO violation—instead of "knowingly violated" the DANCO—the intent requirement for a *felony* DANCO violation. *See State v. Watkins*, 820 N.W.2d 264, 268−69 (Minn. App. 2012) (concluding that jury instruction erroneously instructed jury that intent requirement for felony DANCO violation is intent requirement for misdemeanor DANCO violation), *pet. for review filed* (Minn. Oct. 2, 2012); *see also State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011) ("A jury instruction is erroneous if it materially misstates the applicable law."); *compare* Minn. Stat. § 629.75, subd. 2(b) (establishing intent requirement for misdemeanor DANCO violation as "know[ing] of the existence" of the DANCO), *with* Minn. Stat. § 629.75, subd. 2(d) (establishing intent requirement for felony DANCO violation as "knowingly violat[ing]" this subdivision).

***Plain Error***

Both parties argue, and we agree, that the district court's jury instruction was plainly erroneous. "An error is 'plain' if it is clear or obvious." *State v. Jackson*, 714 N.W.2d 681, 690 (Minn. 2006) (quoting *State v. Ihle,* 640 N.W.2d 910, 917 (Minn. 2002)). "To satisfy the second prong, the error must be plain at the time of the appeal." *Id*. at 690.

This court in *Watkins* recently held that a district court plainly erred by erroneously instructing a jury that the intent requirement for a felony DANCO violation is that the defendant "knew of the existence of" the DANCO—the intent requirement for a *misdemeanor* DANCO violation—instead of "knowingly violated" the DANCO—the intent requirement for a *felony* DANCO violation. 820 N.W.2d at 268; *see State v. Vance*, 734 N.W.2d 650, 658 (Minn. 2007) ("[F]ailure to properly instruct the jury on all elements of the offense charged is plain error."), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303, 311 (Minn. 2012) (rejecting *Vance*'s "discussion of specific-intent and general-intent crimes"). In addition to *Watkins*, the parties' arguments are persuasive in light of *State v. Gunderson* in which this court held that the district court plainly erred by instructing a jury that the intent requirement for a felony *harassment-restraining-order* (HRO) violation is that the defendant "knows of the order"—the intent requirement for a misdemeanor HRO violation—instead of "knowingly violates the order"—the intent requirement for a felony HRO violation. 812 N.W.2d 156, 160–62 (Minn. App. 2012) (quotations omitted).

In this case, Lemieux stipulated to two prior convictions. We note that the district court's jury instruction, although plainly erroneous, is consistent with the jury instructions contained in 10 *Minnesota Practice*, CRIMJIG 13.54 (Supp. 2010). That version of CRIMJIG 13.54 provides that, for felony DANCO violations, a district court should instruct a jury that it need only determine whether a defendant "knew of the existence of the order" when a defendant "stipulates to a prior conviction." But that version CRIMJIG 13.54 materially misstates the law because section 629.75, subdivision 2(d), provides that the intent requirement for a felony DANCO violation is that a defendant "knowingly violates" that subdivision and does not provide an exception for prior-conviction stipulations. *See Watkins*, 820 N.W.2d at 268 (concluding that jury instruction that "mirrors" 10 *Minnesota Practice*, CRIMJIG 13.54 (Supp. 2009), "conflicts with the plain language of [section 629.75, subdivision 2(d)(1),] by omitting the 'knowingly' element from" felony DANCO instruction). "'[W]hen the plain language of the statute conflicts with the CRIMJIG, the district court is expected to depart from the CRIMJIG and properly instruct the jury regarding the elements of the crime.'" *Watkins*, 820 N.W.2d at 268 (quoting *Gunderson*, 812 N.W.2d at 162); *see Koppi*, 798 N.W.2d at 364 (concluding that a district court abuses its discretion by "instructing [a] jury on the . . . element of [a crime] in accordance with the language of" a model jury instruction when the jury instruction "is an erroneous statement of the law" (quotation omitted)).[1]

[1] The current version of 10 *Minnesota Practice*, CRIMJIG 13.54 (2012) correctly provides that a district court should instruct a jury to determine whether a defendant "*knowingly violated* the terms of the order." (Emphasis added.)

Despite the district court's adherence to the language in CRIMJIG 13.54, we conclude that its instruction to the jury was plainly erroneous.

***Affecting Substantial Rights***

"The third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. "[P]lain error" is defined "as 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*. (quotation marks omitted). "The defendant bears the burden of persuasion on this third prong," and the burden is heavy. *Id.* The parties dispute whether the district court's plainly erroneous jury instruction affected Lemieux's substantial rights.

In *Watkins*, this court held that "as a matter of law, omission of an element of a charged offense from the jury instructions affects a party's substantial rights." 820 N.W.2d at 269. Based on *Watkins*, we conclude that, as a matter of a law, the district court's omission of the element in its jury instructions affected Lemieux's substantial rights.

***Fairness and Integrity of Judicial Proceedings***

The fourth prong of the plain-error analysis is whether the district court's plainly erroneous jury instruction "seriously affects the fairness and integrity of the judicial proceedings" and consequently requires reversal. *Kuhlmann*, 806 N.W.2d at 853. In *State v. Baird*, the supreme court concluded that "fairness require[d]" that Baird "be given an opportunity to present his account of the facts to a jury under the proper instructions" and concluded that the fourth plain-error-review prong favored reversal. 654 N.W.2d 105,

114 (Minn. 2002). Notably, in *Watkins* and *Gunderson*, this court followed *Baird*, holding that this prong favored reversal. *Watkins*, 820 N.W.2d at 269; *Gunderson*, 812 N.W.2d at 163.

But, on the facts now before us, we conclude that a different approach is warranted. *See Griller*, 583 N.W.2d at 742 (holding that "the integrity of judicial proceedings would be thwarted by granting [the defendant] a new trial" because "[g]ranting [the defendant] a new trial under these circumstances would be an exercise in futility and a waste of judicial resources"); *see also Johnson v. United States*, 520 U.S. 461, 469–70, 117 S. Ct. 1544, 1550 (1997) (concluding that reversal of conviction would seriously affect fairness, integrity, or public reputation of judicial proceedings in a case in which district court's error was failure to submit offense's element to a jury because "overwhelming" and "essentially uncontroverted" evidence established that omitted element and petitioner presented "no plausible argument" to contradict that element's satisfaction (quotation omitted)).

In this case, we conclude that reversing Lemieux's conviction for a new trial would thwart the integrity of judicial proceedings and waste judicial resources because even if the jury had considered the correct intent requirement for a felony DANCO violation, no reasonable likelihood exists that the jury would have acquitted Lemieux instead of convicting him. A felony DANCO violation occurs when a person "knowingly violates" a DANCO "within ten years of the first of two or more previous qualified domestic violence-related offense convictions." Minn. Stat. § 629.75, subd. 2(d)(1). Lemieux's alleged felony violation of the DANCO occurred within ten years of the

earliest of two previous qualified domestic-violation-related assault convictions to which Lemieux stipulated. And, at trial, the state provided undisputed evidence that supports the jury's verdict of guilty beyond a reasonable doubt. A DANCO existed on the date of Lemieux's alleged DANCO violation, prohibiting his contact with I.R. The written DANCO reflects that Lemieux received a copy of it on May 11, 2010. When Officer Johnson performed the traffic stop on March 11, 2011, he observed Lemieux and I.R. in the car together. At trial, Lemieux's entire defense was that he did not *knowingly* violate the DANCO because he believed that the DANCO was no longer in effect. Inconsistent with Lemieux's defense is the fact that I.R. never told Officer Johnson that the DANCO was no longer in effect. The only evidence that supports Lemieux's defense that he did not knowingly violate the DANCO was I.R.'s testimony that she told Lemieux's mother that the DANCO "was dropped" and Lemieux's mother's testimony that she told Lemieux that I.R. "had called and . . . that she said she got [the DANCO] uplifted (sic) and that everything was going to be alright." But by determining Lemieux's guilt based on the erroneous jury instruction—that the state was required to prove that Lemieux knew of the DANCO—the jury evidenced its rejection of the testimony of Lemieux's mother's and I.R. that the DANCO was no longer in effect on March 11, 2011. *See State v. Spencer*, 298 Minn. 456, 463–64, 216 N.W.2d 131, 136 (1974) (concluding that although district court erroneously instructed jury that state need not prove intent, affirmance of conviction was proper because the issue at trial centered on defendant's identity, not on intent).

Although, based on *Watkins*, we conclude that the district court's plainly erroneous jury instruction affected Lemieux's substantial rights, 820 N.W.2d at 269, we also conclude that reversing Lemieux's conviction for a new trial is unwarranted because doing so would thwart the integrity of judicial proceedings and waste judicial resources.

**Affirmed.**

**LARKIN,** Judge (concurring specially)

Although I concur in the outcome, I write separately to express my misgivings regarding our conclusion that the instructional error in this case affected Lemieux's substantial rights as a matter of law.

Admittedly, there is conflict in the caselaw regarding "whether the omission of an element from jury instructions is necessarily prejudicial or may instead be subject to a harmless error analysis." *State v. Vance*, 734 N.W.2d 650, 661 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). In *Vance*, the supreme court discussed the lack of clarity in the law, explaining that in some cases, "the [United States] Supreme Court, [the Minnesota Supreme Court], and other courts have at times indicated that the failure to submit an element of the offense to the jury is necessarily prejudicial and therefore leads to reversal." *Id.* at 659. But the Minnesota Supreme Court has also held that failure to submit an element of an offense to the jury is harmless under certain circumstances. *See id.* at 660-61 (discussing *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002) (holding that jury instructions that omitted an element of the offense did not satisfy the third prong of the plain-error test because there was "no reasonable likelihood that a more accurate instruction would have changed the outcome") and *State v. Spencer*, 298 Minn. 456, 463-64, 216 N.W.2d 131, 136 (1974) (declining to reverse an aggravated-assault conviction even though the jury was erroneously instructed on the element of intent because the controversy at trial centered on the identity of the shooter and not on the issue of intent and because there was considerable evidence from which the jury could have inferred the requisite intent)). After describing the conflicting

caselaw in *Vance*, the supreme court concluded that it need not resolve "the lack of clarity in the law" because that case was factually distinguishable from other cases in which the failure to submit an element of the offense to the jury was deemed harmless. *Vance*, 734 N.W.2d at 661.

Approximately one month later, the supreme court revisited the issue in *State v. Mahkuk*, 736 N.W.2d 675 (Minn. 2007). *Mahkuk* involved an erroneous instruction on aiding and abetting. 736 N.W.2d at 683. The supreme court stated: "Our conclusion that the trial court erred in instructing the jury on aiding and abetting does not lead automatically to a new trial. An erroneous jury instruction does not require a new trial if the error was harmless beyond a reasonable doubt." *Id.* But the supreme court also stated that it had "'consistently held that when an erroneous jury instruction eliminates a required element of the crime this type of error is not harmless beyond a reasonable doubt.'" *Id.* (quoting *State v. Hall*, 722 N.W.2d 472, 479 (Minn. 2006). Next, the supreme court explained that the erroneous instruction "relieved the state of its burden of proving that [the defendant] aided and abetted [a] killing . . . by instructing the jury that it need only consider, not find beyond a reasonable doubt" that the defendant knew a crime was going to be committed and intended his presence to encourage or further the completion of the crime. *Id.* The court also explained that the erroneous instruction "left the jury with the impression that [the defendant's] intentional presence was sufficient to find guilt without also requiring the jury to find that he intended his presence to encourage or further the commission of the crime." *Id.* For those reasons, the supreme court held that the instructional error was not harmless beyond a reasonable doubt. *Id.*

*Mahkuk* suggests that an erroneous jury instruction that relieves the state of its burden of proof on an element of a charged offense is never harmless beyond a reasonable doubt. *See id*. But it is difficult to reconcile this reading of *Mahkuk* with the supreme court's more recent approach to such instructional errors. For example, in *State v. Larson*, the supreme court held that a purportedly erroneous instruction regarding an element of the charged offense did not satisfy the plain-error test "because any error did not impact [the defendant's] substantial rights."[2] 787 N.W.2d 592, 601 (Minn. 2010). The *Larson* defendant argued that the district court erred in its accomplice-liability instruction, which stated that the defendant was liable for any other crime committed by the accomplice "if that other crime was reasonably foreseeable," rather than "reasonably foreseeable to the person." *Id.* at 600. In so holding, the court engaged in a detailed review of the trial evidence and concluded that because the evidence supported a finding on the relevant element, the jury would not have reached a different verdict if it had been instructed as the defendant requested on appeal. *Id.* at 601. Thus, the court reasoned that it "need not decide in this case whether the district court's use of the [challenged instruction] was error that was plain because any error did not impact [the defendant's] substantial rights."

And in *State v. Koppi*, the supreme court used an in-depth harmless-error analysis to determine whether an objected-to, erroneous jury instruction on the probable-cause element of test refusal necessitated reversal. 798 N.W.2d 358 (Minn. 2011). The court

[2] "Although the harmless error standard differs from the plain error standard, both the harmless error standard and the third prong of the plain error test consider whether the error contributed to the verdict." *Vance*, 734 N.W.2d at 660 n.8.

stated that the erroneous instruction did not "automatically entitle [the defendant] to a new trial" and that "[a] properly objected-to instructional error regarding an element of an offense requires a new trial only if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *Id.* at 364 (quotation omitted). The supreme court concluded that "the seriousness of the instructional error and the conflicting nature of the evidence supporting probable cause require[d] reversal of [the] conviction and remand for a new trial." *Id.* In so concluding, the supreme court observed that "the element of probable cause was fervently disputed by the parties at trial." *Id.* at 365.

If *Mahkuk* resolved the conflict described in *Vance* with a rule that any erroneous instruction that relieves the state of its burden of proof on an element of a charged offense is necessarily prejudicial, it is not apparent why the supreme court continues to thoroughly analyze the impact of such errors before deciding whether the errors necessitate reversal. To the extent that the erroneous instructions in *Larson* and *Koppi* did not correctly explain elements of the charged offenses, the errors relieved the state of its burden of proving the *actual* elements—similar to the error in *Mahkuk*. And although the instructional error in *Larson* may be more nuanced, the erroneous instruction in *Koppi* did "not even 'imply' the correct standard because it [was] an erroneous statement of the law in three significant respects." *Koppi*, 798 N.W.2d at 364. It therefore is difficult to discern how the erroneous instruction in *Koppi* did not relieve the state of its burden to prove the element of probable cause, just as the erroneous instruction in *Mahkuk* relieved the state of its burden to prove an element of aiding and abetting. And yet in *Koppi*, the

supreme court engaged in an in-depth analysis of the impact of the error before determining that the error necessitated reversal. *Id.* at 365-66.

In sum, recent decisions of the Minnesota Supreme Court indicate that it is appropriate to analyze and determine the prejudicial impact of an instructional error that misstates a required element of a charged offense and to do so by considering the seriousness of the error, the extent to which the element was contested at trial, and the evidence presented at trial. *See id.* at 364-65. I therefore have doubts regarding our summary conclusion that the error in this case affected Lemieux's substantial rights as a matter of law.