STATE OF MINNESOTA
IN COURT OF APPEALS
A11-502

State of Minnesota,
Respondent,

vs.

Albino Almanza, Jr.,
Appellant.

Filed March 7, 2012
Affirmed
Peterson, Judge
Dissenting, Hudson, Judge

Blue Earth County District Court
File No. 07-CR-10-2221

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

Ross E. Arneson, Blue Earth County Attorney, Christopher J. Rovney, Assistant County Attorney, Mankato, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

PETERSON, Judge

In this appeal from a conviction of first-degree test refusal, appellant argues that the conviction must be reversed because, without his consent, 13 jurors deliberated and reached a guilty verdict. Because appellant did not object when he learned that the district court had not discharged the alternate juror, and appellant has not shown that the failure to discharge the alternate juror is a plain error that affected appellant's substantial rights, he has waived this issue and is not entitled to relief on appeal. Therefore, we affirm.

FACTS

Appellant was charged with one count of first-degree test refusal, a felony, in violation of Minn. Stat. 169A.20, subd. 2 (2010). Twelve jurors and one alternate juror were in the jury room during jury deliberations. The first indication in the record that the alternate juror was in the jury room during deliberations appears after the jury delivered its verdict. At that point, the following bench conference occurred:

> DEFENSE COUNSEL: We have 13 jurors.
> THE COURT: Yeah I know, we did that. But it is an unanimous verdict anyway.
> . . . .
> DEFENSE COUNSEL: Okay, I just want to make a record of that (inaudible)
> THE COURT: Okay we can do that when they leave.
> . . . .
> [The court excuses the jury]
> THE COURT: Whose counting [defense counsel]?
> DEFENSE COUNSEL: I was counting.
> THE COURT: No I thought about that, I actually thought about it after─about half way through the whole thing is that

> we forgot to dismiss the . . . alternate juror, but I don't think it mattered because it was an unanimous verdict anyway. You can make a record of it if you wish.
> DEFENSE COUNSEL: I am not sure—no—just as it is clear on the record that the alternate did deliberate with the rest of the jury and what impact that has I guess remains to be seen.
> THE COURT: I guess I will say that—that neither of the objected nor did we even think about it and neither did I, but it was a unanimous verdict and there wasn't—I don't believe there is an issue about it.
> PROSECUTOR: And your Honor I would also state on the record and I don't believe there is and I don't see any prejudice to the defendant . . . because he had 13 jurors, if anything there would have been a prejudice to the State, because that is one more person they had to convince I guess, so I just want that on the record.
> THE COURT: And I agree with that also.

Appellant did not make any objection and did not bring a motion for a new trial.

D E C I S I O N

The rules of criminal procedure require that "[a]n alternate juror who does not replace a principal juror must be discharged when the jury retires to consider its verdict." Minn. R. Crim. P. 26.02, subd. 9. Under the plain language of this rule, the alternate juror should have been discharged when the jury retired to consider its verdict. Appellant, however, made no objection when he learned that the alternate juror was not discharged and was with the jury in the jury room during deliberations.

> Failure to object to an alleged error in the district court generally constitutes waiver of the right to raise the issue on appeal. *State v. Vick*, 632 N.W.2d 676, 684-85 (Minn. 2001) (applying waiver standard to evidentiary error). But an appellate court may still consider a waived issue if it is (1) error, (2) that is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); Minn. R.Crim. P. 31.02 (plain error rule). If the defendant establishes plain error that affects

> substantial rights, then the appellate court assesses whether it should address the error to ensure fairness and the integrity of the judicial proceeding. *Id.*

State v. Roberts, 651 N.W.2d 198, 201 (Minn. App. 2002).

In *Roberts*, this court considered whether it was plain error to allow 12 jurors and one alternate to deliberate when trial counsel stipulated to having all 13 deliberate and the defendant personally agreed to having a 13-member jury. *Id*. at 201-03. This court concluded that, under the circumstances in *Roberts*, it was not plain error to allow 13 jurors to deliberate. *Id*. at 202. This court then stated:

> But even if a thirteen-member jury could be considered plain error, Roberts has failed to show that allowing thirteen jurors, rather than twelve jurors, affected his substantial rights. *See Griller*, 583 N.W.2d at 741 (defendant must demonstrate that plain error affected substantial rights by showing that error was prejudicial and affected outcome of case).
>
> We have previously decided that the failure to discharge an alternate juror is not so serious that in every situation it requires automatic reversal. *State v. Crandall*, 452 N.W.2d 708, 710-11 (Minn. App. 1990). Roberts has not demonstrated any prejudice in allowing thirteen jurors to deliberate. Roberts's attorney affirmatively assented to the procedure, Roberts consented to the procedure, and it was stipulated that all thirteen jurors would have to agree to Roberts's guilt before he could be convicted. As a federal court observed in similar circumstances, "[a]ll other things being equal, it cannot possibly be less difficult for the government to get thirteen jurors to agree that a defendant is guilty beyond a reasonable doubt than it is to get twelve to so agree." *United States v. Myers*, 280 F.3d 407, 412 (4th Cir. 2002); *see also Ballew v. Georgia*, 435 U.S. 223, 234, 98 S. Ct. 1029, 1036 (1978) (Justice Blackmun observing that statistical studies suggest that the risk of convicting an innocent person rises as the size of the jury diminishes); *United States v. Reed*, 790 F.2d 208, 210 (2d Cir. 1986) (stating that "we are satisfied that there is no likelihood

> whatever that a thirteen-man jury would convict more readily than would a twelve man jury").

Id. at 202-03.

Unlike the circumstances in *Roberts*, appellant did not consent to having a 13-member jury. But, because appellant did not object when he learned that the district court had not discharged the alternate juror, his right to raise the issue on appeal is waived unless appellant shows that the failure to discharge the alternate juror is a plain error that affected appellant's substantial rights. As we have already noted, under the plain language of Minn. R. Crim. P. 26.02, subd. 9, the alternate juror should have been discharged when the jury retired to consider its verdict. Therefore, failing to discharge the alternate juror was plain error. But appellant has not established that this plain error affected his substantial rights.

The record shows only that 12 jurors and one alternate reached a unanimous verdict of guilty. As this court noted in *Roberts*, it is virtually always more difficult to get 13 jurors to agree that a defendant is guilty than it is to get 12 jurors to agree. Also, although we recognize that it is possible that an alternate juror's participation in deliberations could significantly influence a jury's decision, there is no evidence of the alternate's conduct or influence in the jury room and, thus, no basis for us to conclude that the alternate's presence affected appellant's substantial rights.[1] *See United States v. Olano*, 507 U.S. 725, 739, 113 S. Ct. 1770, 1780 (1993) (stating that alternate in jury

[1] The dissent relieves appellant of the burden of demonstrating that plain error affected his substantial rights by applying a presumption of prejudice and placing the burden of rebutting the presumption on the state.

room might affect verdict by participating in deliberations, verbally or through body language, or by mere presence exerting chilling effect on regular jurors). Therefore, we conclude that appellant has waived the right to raise the issue of the 13-member jury on appeal.

Appellant argues that, under *Crandall*, once it is determined that an alternate was present with the jurors during their deliberations, there is a presumption of prejudice and the prosecution bears the burden of showing that the district court's error could not reasonably have affected the verdict. 452 N.W.2d at 711. But in making this argument, appellant fails to recognize that, in *Crandall*, after the district court discovered that an alternate had been with the jury in the jury room for approximately 20 minutes and excused the alternate, the defendant promptly moved for a mistrial, which the district court denied. *Id.* at 709. Then, in a posttrial motion, the defendant requested judgment of acquittal or, alternatively, a new trial, assigning as error the alternate's presence in the jury room. *Id.* Unlike appellant, the defendant in *Crandall* did not have to establish plain error to obtain review of the 13-member-jury issue on appeal because the defendant in *Crandall* objected to the alleged error at trial.

The same distinction applies to *State v. Washington*, which appellant contends is the precedent most similar to this case. 632 N.W.2d 758 (Minn. App. 2001). In *Washington*, this court presented the facts as follows:

> The trial court empanelled seven jurors: the standard six jurors for a misdemeanor case and one alternate. The jurors were unaware that one of them was an alternate. All seven jurors participated in the deliberations. Just before the jury returned to the courtroom to publish the verdict,

> appellant Tyree Washington objected to the presence of the alternate. The trial court did not dismiss the alternate juror finding that appellant's attorney had acquiesced to the alternate deliberating with the rest of the jury, and denied appellant's motion for a new trial.

Id. at 760. Because Washington objected at trial to the presence of the alternate in the jury room, he did not have to establish plain error to obtain review of the 13-member-jury issue on appeal.

Affirmed.

HUDSON, Judge

I respectfully dissent. As the majority correctly states, inclusion of an alternate juror in deliberations constitutes plain error. But, unlike the majority, I believe inclusion of the alternate juror in deliberations affected appellant's substantial rights and the fairness and integrity of the judicial proceedings. Accordingly, I would reverse appellant's conviction and remand for a new trial.

A jury comprised of 12 jurors is an "essential" element of the constitutional jury-trial right. *State v. Hamm*, 423 N.W.2d 379, 384 (Minn. 1988), *superseded on other grounds by* Minn. Const. art. I, § 4. In a related context, we have held that, when a juror is erroneously placed on a jury and the juror participated in reaching a guilty verdict, "the error is presumptively substantial and prejudicial," and the only appropriate remedy is a new trial. *State v. Reiners*, 644 N.W.2d 118, 127 (Minn. App. 2002), *aff'd*, 664 N.W.2d 826 (Minn. 2003). This is so because of "the reviewing court's inability to follow the challenged juror into jury deliberation to determine his or her effect, if any, on the resulting verdict." *Reiners*, 664 N.W.2d at 835. The same concern is present when an alternate juror erroneously participates in jury deliberations. And finally, we have held that the presumption of prejudice attaches when the alternate juror begins deliberating. *State v. Crandall*, 452 N.W.2d 708, 711 (Minn. App. 1990).

Once the presumption attaches, as it did here when the alternate juror began deliberating, "[t]he prosecution then bears the burden of showing that the [district] court's error could not have reasonably affected the verdict." *Id.* *Crandall* provides a four-part test to determine if the error affected the verdict: (1) the nature of the

alternate's contact with the jury, (2) the number of jurors exposed to this contact, (3) the weight of the evidence, and (4) whether any curative measure abated the prejudice. *Id.* Admittedly, here, the prosecution had no opportunity to satisfy the *Crandall* test because appellant failed to object. But, on this record, the prosecution could not have satisfied its burden in any event, and therefore prejudice to the appellant was established. Here, the alternate juror deliberated with the jury for the duration of its deliberation; all of the jurors were exposed to the alternate's participation in deliberation; and no curative measures were taken to minimize the prejudice to appellant. *See, e.g., State v. Washington*, 632 N.W.2d 758, 761 (Minn. App. 2001) (concluding state did not rebut presumption where alternate participated in full deliberations, a guilty verdict was rendered, and district court took no curative measures).

The majority relies on *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770 (1993), to assert that the lack of evidence regarding the alternate's conduct in the jury room gives this court no basis to conclude or presume that the alternate's presence affected appellant's substantial rights. But the holding in *Olano* was largely predicated on two circumstances: (1) the district court itself offered the use of the alternates; and (2) the district court specifically *instructed the alternates not to participate in the deliberations*. *Olano*, 507 U.S. 727–28, 113 S. Ct. 1770, 1774–75.

In contrast, here, the alternate was given no such instruction, no doubt because, at that point in the trial, neither the parties nor the district court realized the alternate was still present. Thus, the alternate was charged along with the jury, retired and deliberated with the jury, and assented with the verdict when it was delivered. Just as *Olano*

presumed that the jurors followed the district court's instructions *not* to deliberate, I likewise presume that the jury here—including the alternate—followed the district court's instructions and deliberated as a body. *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005).

That appellant did not object to the error does not deprive him of the *Crandall* presumption of prejudice. Relying on *Crandall* and *Washington*, the majority's holding rests largely on the notion that the analysis should turn on whether appellant objected at trial to the presence of the alternate in deliberations. But neither case states, nor indicates in any fashion, that an objection from the defendant is necessary to the analysis. Furthermore, in *Washington*, we held that a defendant must expressly waive a change to the number of jurors required, stating that this waiver requirement "is as critical where more jurors deliberate as where fewer jurors deliberate." *Washington*, 632 N.W.2d at 762. Here, appellant did not waive his right to 12 jurors. Therefore, appellant did not abdicate his constitutional jury-trial right or the *Crandall* presumption of prejudice by failing to object.

Once prejudice to appellant is established, the plain-error test requires that the error affect the fairness or integrity of judicial proceedings. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). In my judgment, this error unquestionably affected the fairness and integrity of the judicial proceeding. In fact, this court has already determined that such an error violates the integrity of a jury trial, stating that "certain errors . . . are serious enough to trigger a presumption of prejudice." *Crandall*, 452 N.W.2d at 710 (stating that presence of alternate juror in jury room would trigger

presumption of prejudice). In addition, the facts here are more egregious than the facts in the cases relied on by the majority. In *Crandall*, for instance, the alternate juror deliberated for only 20 minutes with the jury before being removed, and, in *State v. Roberts*, defense counsel stipulated to the inclusion of the alternate, and the defendant expressly agreed to the inclusion of the alternate juror in deliberations. *See Crandall*, 452 N.W.2d at 709, 711 (remanding for evidentiary hearing and findings regarding nature of alternate's contacts with jury); *Roberts*, 651 N.W.2d 198, 202–03 (Minn. App. 2002) (concluding defendant failed to show 13th juror affected substantial rights because of agreement to juror's participation in deliberations), *review denied* (Minn. Dec. 17, 2002). Granted, we do not know the specific nature of the alternate's participation in this case, but we do know that the alternate juror deliberated from beginning to end, and neither appellant's counsel nor appellant agreed to the inclusion of the alternate juror.

Additionally, the district court had an opportunity to remedy the error or at least mitigate the harm, but it failed to do so. Although defense counsel did not formally object to the inclusion of the alternate, it was defense counsel who alerted the district court to the alternate's presence when the jury returned to render its verdict. Interestingly, once defense counsel brought the issue to the district court's attention, the district court stated, "No, I thought about that, I actually thought about it . . . about half way through the whole thing is that we forgot to dismiss the . . . alternate juror." Thus, it appears from the record that the district court realized it had not discharged the alternate even *before* defense counsel raised the issue. In any event, the district court failed to remove the additional juror or take any other curative measure.

The presence of an alternate juror in the jury room during deliberations contravenes the cardinal principle that "deliberations of the jury shall remain private and secret" so as to protect the jury's deliberations from improper influence. *Crandall*, 452 N.W.2d at 710 (quotation omitted). And, while the presence of an alternate juror may not rise to the level of structural error, it is a serious error that deprives a defendant of a fair trial and should be corrected by this court even when the defendant fails to object. This is an error that goes to the heart of our criminal jurisprudence—the secrecy of jury deliberations—and one that seriously affects the fairness, integrity, and public reputation of our judicial proceedings. "Without the right to a fair . . . trial . . ., all of the other rights could become meaningless." *Hamm*, 423 N.W.2d at 385 (affirming criminal defendant's right to jury of 12). I would conclude that appellant is entitled to a new trial.