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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-8**

State of Minnesota,  
Respondent,

vs.

Nhia Lee,  
Appellant.

**Filed March 5, 2012  
Affirmed  
Peterson, Judge**

Ramsey County District Court  
File No. 62-CR-10-3416

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

John J. Choi, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney,  
St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle Rene Winn, Assistant  
Public Defender, St. Paul, Minnesota (for appellant)

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

**UNPUBLISHED OPINION**

**PETERSON**, Judge

In this appeal from a conviction of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2008), appellant argues that the district

court committed an error of fundamental law by failing to instruct the jury that it could not find appellant guilty based on acts of groping and grabbing and that it had to find at least one act of sexual penetration in addition to sexual contact to satisfy the multiple-act element. We affirm.

## **FACTS**

Appellant Nhia Lee was charged with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (sexual penetration, defendant has significant relationship to victim, victim was under age 16, and sexual abuse involved multiple acts over extended time period). The victim was appellant's stepdaughter. The complaint alleged that the sexual abuse began when the victim was seven years old and continued for more than four years. The case was tried to a jury.

The victim testified at trial that, when she was in second grade and about seven years old, appellant began touching her intimate parts, sometimes over her clothing and sometimes on her skin, when no one else was present. The sexual abuse happened "a couple times every day," and the victim "would yell or scream" and "tell [appellant] to stop," and he would get mad. The victim did not tell her mother because she "felt ashamed" and because appellant told the victim that she would be the one who got in trouble and her mother would no longer love her.

The victim testified that, sometime later, appellant began having intercourse with her. The first time, appellant told her mother that he was going to run an errand with the victim but instead brought her to an empty parking lot when it was dark outside, forced her to bend over the center console, and "stuck his penis in my butt hole." The victim did

not recall when it happened but thought it was after second grade, although she was still “like really little.” Appellant penetrated the victim anally a couple of times after that.

The victim testified that, when she was about 12 or 13, appellant began penetrating her vaginally. The sexual assaults occurred when the victim got home from school, while her sister and brothers were still at school and her mother was at work, and happened once or twice a week. When the victim resisted, appellant would hit her, causing bruises.

In April 2010, after an incident of attempted sexual abuse, the victim’s sister could tell that the victim was upset and talked to the victim to find out what was wrong. The victim disclosed the sexual abuse to her sister and later that evening to her mother. The next morning, the sister and mother brought the victim to a police station.

Appellant testified on his own behalf at trial and denied that he had sexually abused the victim.

The district court instructed the jury as follows on the elements of first-degree criminal sexual conduct:

First, [appellant] intentionally sexual penetrated [the victim]. Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening. Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person. Any intrusion, however slight, of any part of one person’s body into the genital or anal openings of another person’s body constitutes sexual penetration. . . .

Second, [appellant] had a significant relationship with [the victim]. . . .

Third, [the victim] was under 16 years of age at the time of the sexual penetration. . . . Fourth, the sexual abuse involved multiple acts committed over an extended period of time. Fifth, [appellant's] act took place on or about the first day of March, 2006 to the 30th day of April, 2010 in Ramsey County.

During deliberation, the court received the following question from the jury: “Charge #1 defines sexual intercourse. Charge #4 identifies multiple acts. Does ‘act’ only indicate sexual intercourse or can it include groping, grabbing, etc.” After obtaining the agreement of the prosecutor and defense counsel, the court answered by repeating one of its initial instructions:

During these instructions – and I’m referring to the instructions that you’ve been provided a copy of. During these instructions, I have defined certain words and phrases. If so, you are to use those definitions in your deliberations. If I have not defined a word or phrase, you should apply the common, ordinary meaning of that word or phrase.

The jury found appellant guilty as charged, and the district court sentenced him to 144 months in prison. This appeal followed.

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

Generally, failure to object to a particular jury instruction forfeits the issue for appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). But review is permitted if the instruction was plain error that affected a substantial right or an error of fundamental law. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998); *see also* Minn. R. Crim. P. 31.02 (permitting review of plain error affecting substantial right absent objection). Under the plain-error test, a defendant must make a showing of three elements: (1) there must be error; (2) that is plain; and (3) the error must affect the defendant’s substantial

rights. *State v. Morton*, 701 N.W.2d 225, 234 (Minn. 2005). The failure to instruct on an essential element of a crime has been held to be fundamental error. *State v. Williams*, 324 N.W.2d 154, 157 (Minn. 1982).

“If the jury asks for additional instruction on the law during deliberation, the court may . . . reread portions of the original instructions.” Minn. R. Crim. P. 26.03, subd. 20(3)(b). “A jury instruction is erroneous if it materially misstates the law.” *State v. Goodloe*, 718 N.W.2d 413, 421 (Minn. 2006).

The district court instructed the jury on the elements of first-degree criminal sexual conduct according to CRIMJIG 12.09, and appellant does not claim that the instruction misstated the elements of the offense. The district court complied with Minn. R. Crim. P. 26.03, subd. 20(3)(b) in rereading the initial instructions as a response to the jury’s question, and appellant does not claim that the instruction to apply the common, ordinary meaning of undefined terms misstated the law. Rather appellant argues that the district court “should have instructed the jury that groping and grabbing did not constitute multiple acts of sexual abuse.”

The criminal-sexual-conduct statute states:

A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

...

(h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual penetration, and:

...

(iii) the sexual abuse involved multiple acts committed over an extended period of time.

Minn. Stat. § 609.342, subd. 1(h)(iii).

In *State v. Shamp*, this court concluded that the district court did not commit reversible error when it “defined the phrase mandating that ‘the sexual abuse involved multiple acts’ as requiring only one act of penetration in addition to multiple instances of sexual contact or touching.” 422 N.W.2d 520, 524 (Minn. App. 1988), *review denied* (Minn. June 10, 1988). The statute at issue in *Shamp*, Minn. Stat. § 609.342, subd. 1(h)(v) (1986), contained exactly the same language as the portion of Minn. Stat. § 609.342, subd. 1(h)(iii), that applies in this case. *Id.* at 524. Like the statute at issue in *Shamp*, Minn. Stat. § 609.342, subd. 1(h)(iii), requires one act of penetration and sexual abuse that involved multiple acts over an extended period of time. Neither statute includes a definition of “sexual abuse.” Therefore, under *Shamp*, which interpreted the statute as requiring “multiple instances of sexual contact or touching,” the district court’s failure to instruct the jury that groping and grabbing did not constitute multiple acts of sexual abuse was not plain error or an error of fundamental law.

Appellant also argues that the district court erred by failing to instruct the jury that it “had to find that appellant committed at least one act of sexual penetration in addition to sexual contact as defined in [section] 609.341 to satisfy the multiple act element.” But Minn. Stat. § 609.342, subd. 1(h)(iii), does not refer to sexual contact as defined in

section 609.341; the statute requires that “the sexual abuse involved multiple acts.”<sup>1</sup> In the initial instructions, the district court instructed the jury that sexual penetration and sexual abuse that involved multiple acts committed over an extended time period are required elements of first-degree criminal sexual conduct.

Appellant relies on *State v. Shannon*, in which the prosecutor made a misleading statement about an element of the offense during closing argument and a question by the jury during deliberation indicated that jurors had been confused by the argument. 514 N.W.2d 790, 791 (Minn. 1994). The supreme court concluded that the district court committed plain error by rereading the initial instructions and not giving an additional instruction to correct the jury’s confusion. *Id.* at 791-93. Here, the jury’s question referred separately to element one, “sexual intercourse,” and element four, “multiple acts,” which indicated that the jury understood that both sexual penetration and multiple acts of sexual abuse are required elements of the offense. The district court’s failure to give an additional instruction to the jury that it had to find at least one act of sexual penetration in addition to sexual contact as defined in section 609.341 was not plain error or an error of fundamental law.

**Affirmed.**

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<sup>1</sup> Furthermore, Minn. Stat. § 609.341, subd. 11(2008), contains two definitions of “sexual contact.” The statute provides that the first definition is “for the purposes of sections 609.343, subdivision 1, clauses (a) to (f), and 609.345, subdivision 1, clauses (a) to (e), and (h) to (o).” Minn. Stat. § 609.341, subd. 11(a). The statute provides that the second definition is “for the purposes of sections 609.343, subdivision 1, clauses (g) and (h), and 609.345, subdivision 1, clauses (f) and (g).” Minn. Stat. § 609.341, subd. 11(b). Therefore, neither definition is for the purposes of Minn. Stat. § 609.342, subd. 1(h)(iii).