**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-1188**

State of Minnesota,
Respondent,

vs.

Troy Thomas Clayton Tolefree,
Appellant.

**Filed May 6, 2013**
**Affirmed**
**Rodenberg, Judge**

Ramsey County District Court
File No. 62-CR-11-5926

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

Sara R. Grewing, St. Paul City Attorney, Kyle A. Lundgren, Assistant City Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota; and

Samuel L. Walling, Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving 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

**RODENBERG**, Judge

On appeal from his gross misdemeanor conviction of violating an order for protection (OFP), appellant argues that the district court (1) committed plain error by failing to instruct the jury that an element of the charged offense is that he "knowingly violated" the order for protection; (2) abused its discretion by not giving a requested instruction to the jury; and (3) committed plain error by failing to instruct the jury to construe the OFP to include a "safe-harbor provision." We affirm.

## FACTS

Appellant Troy Thomas Clayton Tolefree was charged by complaint with one count of gross misdemeanor violation of an OFP under Minn. Stat. § 518B.01, subd. 14(c) (2010).

Appellant and T.K. have a child in common. On February 16, 2011, T.K. obtained an OFP against appellant. In June 2011, T.K. and the child moved from the address listed in the OFP to her father's home in St. Paul. On July 21, 2011, T.K. arrived at her father's home and found appellant in the living room holding the child. They argued. T.K. testified that the argument was not a "fighting argument" and accepted the prosecutor's characterization of the argument as a "verbal disagreement." She stated that the discussion lasted five to ten minutes, and ended when she told appellant that she was going to call the police and instructed him to leave. T.K. testified that appellant set the child down and left. She then called the police. T.K. testified that appellant had been to her father's home on at least one other occasion since she had moved there. K.T., who is

T.K.'s father, testified that he witnessed the July 21 conversation between T.K. and appellant, which he estimated to have lasted between ten to 15 minutes.

T.H. was the only defense witness. T.H. testified that on July 21, 2011, she drove appellant to K.T.'s house. She testified that she saw appellant walk into the house. She waited for him in the car until he returned one or two minutes later. T.H. claimed not to know that T.K. resided at K.T.'s home.

Prior to trial, appellant moved the district court to instruct the jury that "[t]here is no violation of a no-contact order if a defendant accidentally or unintentionally sees the other person as long as the defendant immediately leaves the presence of the other person." The district court denied the motion.

In preparing its jury instructions, the district court altered the definition of the offense of violation of an OFP found in 10 *Minnesota Practice*, CRIMJIG 13.53 (2006). The district court also altered the wording of the special verdict question[1] found in *10 Minnesota Practice,* CRIMJIG 13.54 (Supp. 2011). The district court added language to the special verdict question so as to require the jury to find beyond a reasonable doubt that appellant "knowingly violate[d]" a term or condition of the OFP. This alteration was made to comply with this court's decision in *State v. Gunderson*, 812 N.W.2d 156, 161–62 (Minn. App. 2012), which held that where a statute requires that an act be done "knowingly," the failure to include that requirement as an element of the offense was plain error.

[1] Appellant declined to stipulate to the prior conviction required to enhance the charge to a gross misdemeanor. As a result, the state had to prove the conviction. The district court put a special verdict question to the jury.

However, despite altering the definition of the charged offense and the special verdict question to conform to *Gunderson*'s holding, the district court did not add the *Gunderson* language to the elements listed in CRIMJIG 13.54.

The district court instructed the jury on the charge as follows:

> The statutes of Minnesota provide that whoever violates an order for protection granted pursuant to the Domestic Abuse Act or similar law of another state, knows of the existence of the order *and knowingly violates the order*, is guilty of a crime.
>
> The elements of violation of an order for protection are, first, there was an existing court order for protection. Second, the defendant violated a term or condition of the order. Third, the defendant knew of the existence of the order. And fourth, the defendant's act took place on or about July 21, 2011, in Ramsey County.
>
> . . . .
>
> If you find the defendant is guilty you have an additional issue to determine. . . . The question is: Did the defendant *knowingly violate a term or condition of the order* within ten years of conviction for a previous qualified domestic violence related offense? . . . You should answer the question "yes" or "no." If you have a reasonable doubt as to the answer, you should answer the question "no."

(Emphasis added.)

The jury returned a verdict of guilty and answered the special verdict question in the affirmative. This appeal followed.

## D E C I S I O N

The district court is afforded considerable latitude in selecting the language of its instructions to the jury. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). We review jury instructions in their entirety to determine whether they fairly and adequately explain

the law of the case. *Id.* In conducting this review, we apply an abuse-of-discretion standard. *State v. Mahkuk*, 736 N.W.2d 675, 681–82 (Minn. 2007).

When a challenge to a jury instruction has been preserved for appeal, an erroneous jury instruction merits a new trial "if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *Id.* at 682. Jury instructions are erroneous when they materially misstate the law. *Id.* "A jury instruction that eliminates a required element of the crime is error that is not harmless beyond a reasonable doubt." *Id.* (citing *State v. Hall*, 722 N.W.2d 472, 479 (Minn. 2006)). Such an omission occurs when a jury instruction relieves the state of the burden of proving a required element of the crime. *Id.* at 683; *Hall*, 722 N.W.2d at 479.

When a defendant fails to propose specific jury instructions or object to instructions before they are delivered to the jury, a challenge to the instructions has not been preserved for appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). However, review on appeal is still available if the jury instructions are plainly erroneous. *Id.* A "plain error" is defined as (1) an error, (2) that is plain, and (3) that affects the substantial rights of a party. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). A jury instruction that omits an element of an offense is an error that is plain. *Ihle*, 640 N.W.2d at 916–17; *Gunderson*, 812 N.W.2d at 161–62. Such an error affects a defendant's substantial rights if there is a reasonable likelihood that it had a significant effect on the jury verdict. *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006).

**I**

Appellant argues that the district court plainly erred by not instructing the jury that an element of the charged offense is that appellant "knowingly violated" the OFP. Appellant did not raise this argument below and thus the plain-error standard applies. *See Cross*, 577 N.W.2d at 726.

Appellant was charged with gross misdemeanor violation of an OFP. While a misdemeanor violation of an OFP requires only that the defendant violate the OFP while knowing of its existence, a gross misdemeanor charge requires proof that the defendant *knowingly* violated the OFP within ten years of a previous qualified domestic-violence-related offense. Minn. Stat. § 518B.01, subd. 14(b), (c) (2010). Therefore, the gross misdemeanor provision adds an intent element: that the violation of the OFP be committed *knowingly*. *Cf. Gunderson*, 812 N.W.2d at 160–61 (analyzing a similar enhancement provision in Minn. Stat. § 609.748, subd. 6 (2008)).

In *State v. Watkins*, 820 N.W.2d 264, 267 (Minn. App. 2012), *review granted* (Minn. Nov. 20, 2012), and *Gunderson*, 812 N.W.2d at 159–60, the defendants were charged with violating a domestic abuse no-contact order (DANCO) and a harassment restraining order (HRO) respectively. Like the OFP statute, both the DANCO statute and the HRO statute contain a provision that enhances a violation from a misdemeanor to either a gross misdemeanor or a felony if the defendant knowingly violates the order and has a threshold number of qualified domestic-violence-related offenses. Minn. Stat. §§ 518B.01, subd. 14 (OFP statute), 609.748, subd. 6 (HRO statute), 629.75, subd. 2 (DANCO statute) (2010). In both *Watkins* and *Gunderson*, the district courts failed to

amend the standard jury instructions to include the knowledge element. *Watkins*, 820 N.W.2d at 268; *Gunderson*, 812 N.W.2d at 161. In both cases, this court found plain error affecting the defendants' substantial rights, and reversed and remanded for new trials. *Watkins*, 820 N.W.2d at 271; *Gunderson*, 812 N.W.2d at 165.

Here, appellant argues that because the jury instructions in this case also omitted the knowledge requirement from the district court's recitation of the elements, *Watkins* and *Gunderson* require reversal and remand for a new trial. However, the present case is distinguishable from *Watkins* and *Gunderson* because the juries in those cases were not presented with special verdict questions that included the "knowingly violated" element. *See Watkins*, 820 N.W.2d at 267; *Gunderson*, 812 N.W.2d at 159. Rather, the jury instructions given here are more akin to those given in *Ihle*.

In *Ihle*, the defendant was charged with gross misdemeanor obstruction of legal process. 640 N.W.2d at 914. When instructing the jury on the elements of the charge, the district court failed to include additional language in the elements of the offense required by applicable caselaw. *Id.* at 914, 916–17. But the jury instructions included a special verdict question that required the jury to find the omitted elements beyond a reasonable doubt. *Id.* at 914, 917. The jury found the defendant guilty of obstruction of legal process and answered the special verdict question in the affirmative. *Id.* at 915.

*Ihle* states that, "without the special verdict question" the elements recited in the jury instructions "materially misstated the law" and holds that the omission of the additional elements was an error that was plain. *Id.* at 916–17. *Ihle* also states that, because the special verdict question required the jury to find the omitted elements beyond

a reasonable doubt, "it is not reasonably likely that the error had a significant effect on the verdict in view of the jury's answer to the special verdict question." *Id.* at 917.

Here, appellant did not stipulate to the prior conviction which enhanced the offense to a gross misdemeanor. Rather, the jury was asked to answer a separate question, to wit: whether appellant had "*knowingly* violate[d] a term or condition of the order within ten years of conviction for a previous qualified domestic violence related offense." (Emphasis added.) The jury was instructed that it could not answer "yes" to the special verdict question if it had a reasonable doubt as to the answer. The jury answered "yes."

Looking at the jury instructions as a whole, the omission of the "knowingly violated" element was an error that was plain. *See id.* at 916–17. However, because the jury was required to find that appellant committed a knowing violation of the OFP beyond a reasonable doubt in order to answer the special verdict question in the affirmative, the district court's error did not relieve the state of the burden of proving that appellant knowingly violated the OFP. *See Mahkuk*, 736 N.W.2d at 683; *Hall*, 722 N.W.2d at 479. Moreover, because the jury answered the special verdict question in the affirmative, "it is not reasonably likely that the error had a significant effect on the verdict." *Ihle*, 640 N.W.2d at 917. Therefore, the error did not affect appellant's substantial rights. *See Gomez*, 721 N.W.2d at 880.

**II**

Appellant argues that the district court abused its discretion by declining to give his proposed jury instruction that accidental or unintentional contact is not a violation of a

no-contact order "as long as the defendant immediately leaves the presence of the other person." Because appellant raised this issue below, the district court's decision is reviewed for an abuse of discretion. *See Mahkuk*, 736 N.W.2d at 681–82.

We note that appellant's proposed jury instruction was modeled on an instruction that this court, in an unpublished opinion, held was not plainly erroneous. *State v. Morgan*, No. A09-1705, 2010 WL 3396293 (Minn. App. Aug. 31, 2010). As an unpublished opinion, *Morgan* is not precedential, and the district court in this case did not abuse its discretion by declining to give the instruction approved in that case. *See* Minn. Stat. § 480A.08, subd. 3 (stating that the unpublished opinions of this court are not precedential). *Morgan* applied a different standard of review than is applicable here. The conclusion that a district court commits an abuse of discretion by declining to give an instruction does not logically follow from a case holding that giving a similar instruction was not plainly erroneous.

"[D]etailed definitions of the elements to the crime need not be given in the jury instructions if the instructions do not mislead the jury or allow it to speculate over the meaning of the elements." *Peterson v. State*, 282 N.W.2d 878, 881 (Minn. 1979). A criminal defendant "is entitled to an instruction on his or her theory of the case if there is evidence to support it, but if the court determines that the substance of the defendant's request is contained in the court's charge, it need not give the requested instruction." *State v. Vazquez*, 644 N.W.2d 97, 99 (Minn. App. 2002). We are not persuaded that the record is sufficient to demonstrate that the district court's denial of the requested instruction was an abuse of discretion. The only testimony from witnesses who were

present when appellant encountered T.K. testified that appellant did not immediately leave, but instead argued with T.K. Furthermore, the district court here concluded that instructing the jury to address whether appellant "knowingly" violated the OFP was sufficient notice to the jury that accidental contact would not support a guilty verdict. This reasoning is sound, and we conclude that the district court properly "determin[ed] that the substance of the defendant's request [was] contained in the court's charge" and that the additional instruction was not required. *Id.* Therefore, the district court did not abuse its discretion by declining to give the proposed instruction.

**III**

Finally, appellant argues that the OFP was unconstitutionally vague because the district court did not include a "safe-harbor provision." He contends that the district court should have sua sponte recognized the claimed constitutional infirmity and instructed the jury to construe the OFP to include a provision that if appellant came into accidental contact with T.K. or was accidentally present within or near a previously unidentified residence of T.K., appellant would not be in violation of the OFP if he left the area immediately upon learning the facts that would place him in violation of the OFP.

Appellant bases his argument on *State v. Phipps*, wherein this court held that an ex parte OFP could be challenged as unconstitutionally vague in a criminal proceeding alleging that the defendant violated it. 820 N.W.2d 282, 285–86 (Minn. App. 2012).[2]

[2] *Phipps* ultimately concluded that the OFP before it was not unconstitutionally vague and upheld the conviction. 820 N.W.2d at 286–87.

Constitutional questions will generally not be considered for the first time on appeal. *State v. Frazier*, 649 N.W.2d 828, 839 (Minn. 2002). The defendant in *Phipps* raised the constitutional issue before the district court in a motion to dismiss and his appeal from the district court's ruling was therefore properly before this court. 820 N.W.2d at 284–85. Because appellant raises the issue for the first time on appeal, we decline to consider it. *See Frazier*, 649 N.W.2d at 839.

**Affirmed.**