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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0464**

State of Minnesota,
Respondent,

vs.

Dakota Lee Olson,
Appellant.

**Filed December 24, 2012
Reversed and remanded
Kalitowski, Judge**

Benton County District Court
File No. 05-CR-11-1668

Lori Swanson, Attorney General, Michael T. Everson, Assistant Attorney General, St. Paul, Minnesota; and

Robert Raupp, Benton County Attorney, Foley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael Wallace Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Cleary, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Dakota Lee Olson challenges his conviction of felony violation of a domestic-abuse no-contact order (DANCO), in violation of Minn. Stat. § 629.75, subd.

2(d)(1) (2010), and argues that the district court committed plain error by failing to instruct the jury on the mental-state element of the crime. We agree, and reverse and remand.

DECISION

Failure to object to jury instructions before they are given to the jury generally is considered a waiver of the right to appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). But “a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights.” *Id.* If the plain-error standard is met, we may correct the error if it seriously affects “the fairness, integrity or public reputation of the judicial proceeding.” *State v. Goodloe*, 718 N.W.2d 413, 421 (Minn. 2006) (quotation omitted).

Appellant argues that the district court’s failure to instruct the jury on the mental-state element of felony violation of a DANCO constitutes plain error requiring reversal. We agree.

We first determine whether the district court erred, and if so, whether the error was plain. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). A person is guilty of felony violation of a DANCO if the person “knowingly violates [a DANCO] . . . within ten years of the first of two or more previous qualified domestic violence-related offense convictions or adjudications of delinquency.” Minn. Stat. § 629.75, subd. 2(d)(1). Under the plain language of the statute, the term “knowingly” is an element of the crime. *See State v. Gunderson*, 812 N.W.2d 156, 161 (Minn. App. 2012) (finding identical language to be an element of felony violation of a harassment restraining order). And “[f]ailure to

properly instruct the jury on all elements of the offense charged is plain error.” *Id.* (quotation omitted).

Here, the district court instructed the jury that

The elements of violation of a Domestic Abuse No Contact Order are:

First, there is an existing Court Domestic Abuse No Contact Order. The parties have stipulated to this element.

Second, the Defendant violated a term or condition of the Order.

Third, the Defendant knew of the existence of the Order. The parties have stipulated to this element.

Fourth, the Defendant’s act took place on August 22nd of 2011 in Benton County.

If you find that each of these elements has been proven beyond a reasonable doubt, the Defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the Defendant is not guilty.

We conclude that the district court plainly erred by not instructing the jury on the “knowingly” element of felony violation of a DANCO.

We next consider whether the district court’s plain error affected appellant’s substantial rights. *Griller*, 583 N.W.2d at 740. An error affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury’s verdict. *State v. Young*, 710 N.W.2d 272, 280 (Minn. 2006). Failure to instruct the jury on an element of the crime has a significant effect on the verdict “when the defendant submits evidence that tends to negate that element, and there is a reasonable likelihood that a

properly instructed jury could have accepted the defendant's version of events." *Gunderson*, 812 N.W.2d at 162 (quotation omitted).

Here, appellant submitted evidence to negate the "knowingly" element of the crime. Appellant testified that he did not know that the victim lived in the apartment at issue, and other witnesses' testimonies supported the notion that appellant had no knowledge of where the victim was living. Thus, the jury could have found that, although appellant violated the DANCO, he did not do so knowingly. Moreover, the record indicates that the jury twice raised questions to the court during deliberations regarding what constituted a DANCO violation. We therefore cannot say that had the jury been properly instructed they would have reached the same result, and we conclude that on these facts the plain error affected appellant's substantial rights.

Because there was plain error affecting appellant's substantial rights, we must determine whether the district court's error seriously affected the fairness, integrity or public reputation of the judicial proceeding so that reversal is required. *Goodloe*, 718 N.W.2d at 421. "Fairness requires that [the defendant] be given an opportunity to present his account of the facts to a jury under the proper instructions." *State v. Baird*, 654 N.W.2d 105, 114 (Minn. 2002). Because the jury was prevented from weighing competing evidence and considering a disputed element of the crime, we conclude that the fairness and integrity of the judicial proceeding requires reversal of appellant's conviction and remand for a new trial.

Appellant also argues that his trial counsel was ineffective by failing to challenge the constitutionality of the DANCO statute, that the prosecutor committed misconduct by

failing to adequately prepare a witness, and that the district court abused its discretion when it denied appellant's motion for a downward dispositional departure. Because the district court's failure to instruct the jury on the mental-state element of felony violation of a DANCO affected appellant's substantial rights and seriously affected the fairness and integrity of the judicial proceeding so that reversal is required, we decline to address appellant's additional arguments.

Reversed and remanded.