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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1863**

State of Minnesota,
Respondent,

vs.

Bradley D. Christiansen,
Appellant.

**Filed December 23, 2008
Reversed and remanded
Ross, Judge**

St. Louis County District Court
File No. CR-07-1448

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appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Bradley Christiansen appeals from his conviction of interference with an
emergency call. Christiansen argues that the district court plainly erred because it

admitted hearsay testimony and, without that testimony, there was insufficient evidence to convict him. He also argues that the district court failed to instruct the jury on all the elements of the crime and that it erroneously responded to the jury's question about uncharged conduct by stating, "You can consider any evidence you want on any issue." Because the district court's response tended to instruct the jury to consider uncharged conduct, we reverse Christiansen's conviction of interference with an emergency call and remand for a new trial.

FACTS

Bradley Christiansen and A.P. had a six-year romantic relationship. They lived together for a short time, and at the time of the incident underlying this appeal they had a two-year-old daughter. They had a fight in March 2007 that resulted in Christiansen being charged with interference with an emergency call and misdemeanor domestic assault. Only A.P. and Officer Jason Salo, who had interviewed A.P. after the incident, testified at the June 2007 trial. The jury found Christiansen guilty on both charges based on the following facts as presented through the testimony.

Christiansen went to A.P.'s home in Hermantown to watch their daughter for the night on March 2, 2007, while A.P. went out with friends. Christiansen told A.P. to return home by midnight, but A.P. did not return until about 1:30 a.m.

The next morning, Christiansen woke up angry. He threatened and pushed A.P., yelling and spitting at her and grabbing her head and shaking it. Christiansen pushed her to the ground, and A.P. retrieved her cellular telephone to call for emergency assistance. But before she could dial 911, Christiansen snatched her telephone and threw it across the

room. He also disconnected the standard telephone from its wall jack. This assault occurred in the living room of A.P.'s home with their daughter present.

Christiansen demanded that A.P. withdraw money from her bank account for him. A.P. testified that she "played along with it because [she] wanted to get out." So Christiansen agreed to let A.P. drive to the bank in her own car. On A.P.'s way to the bank, Christiansen called A.P. on her cellular telephone. A.P. told Christiansen that she would "call the cops" if he followed her, and then she realized that he was already following in his car. A.P. testified that Christiansen threatened to run her off the road if she hung up the telephone. A.P. told Christiansen that she had to drive with both hands on the wheel, so she hung up. She dialed 911 without Christiansen noticing, and the dispatcher told her to drive to a nearby store. When A.P. drove into the store's parking lot, Christiansen pulled up behind her, but the police arrived within seconds and arrested him.

A.P. met with Officer Salo and gave an oral and written statement describing the incident. Officer Salo testified at trial and described the incident in the same manner as A.P. had described it in her testimony. He testified that A.P. told him that she "told Mr. Christiansen that she was going to call 911, and she grabbed her cell phone and began the call." Then Christiansen "took the phone out of her hand and threw it." Christiansen did not object when Officer Salo testified about A.P.'s out-of-court statement to him.

During its deliberations, the jury submitted a question to the district court. The note from the jury, which the judge read to the attorneys out of the jury's presence, regarded the charge of interference with an emergency call and stated, "Focus was on the throwing of the cell phone as interference. Can we as a jury take into consideration the

threat he made while driving as interference as well?” After the district court read this note, the prosecutor said, “No.” Defense counsel said nothing. Rather than accepting the prosecutor’s direct negative answer, the district court elaborated as follows:

All I can tell them is they can take into consideration anything that’s in evidence; but I think that what they’re asking me to do is apply fact—or make a fact determination and apply it to the law which is their job really, so I’m not going to go beyond that.

Neither attorney offered any further recommendation or objection. When the jury entered the courtroom, the district court answered as follows:

Juries are never happy with the instructions that I have to give you in this regard, which is simply that *you can consider any evidence you want on any issue*. Now, what this question sounds to me like, however, is a request of me to apply facts to law and that’s your job. I can’t do that. You have to make those determinations by yourself, and so I know that is particularly unsatisfactory, but that’s about all I can tell you. So with that, back to deliberations.

(Emphasis added.) Eight minutes later, the jury returned guilty verdicts on both charges.

Christiansen appeals.

DECISION

Christiansen appeals from his conviction of interference with an emergency call and argues that the officer’s unobjected-to hearsay testimony should have been precluded and that without it the evidence was insufficient to convict him. He also contends that the district court erred by misinstructing the jury on the elements of the crime and that its erroneous answer to the jury’s question “constructively amend[ed] the complaint” and “potentially den[ied] appellant of his right to a unanimous jury verdict.” We resolve this appeal on the last argument; Christiansen argues that the district court erroneously

responded to the jury's question. The argument persuades us, and the state filed no brief contending otherwise.

The district court has discretion to give additional instructions, to clarify or reread previous instructions, or to give no response at all to a jury's question. *See State v. Laine*, 715 N.W.2d 425, 434 (Minn. 2006). If a defendant fails to challenge the district court's decision on how to respond, he waives the right to appeal that issue unless the district court's response abused its discretion and justice requires a new trial. *Id.* Because Christiansen did not object, we review the alleged error to determine whether the response contains a plain error affecting Christiansen's substantial rights. *See id.* (discussing defendant's claim that the district court's response to jury's question constituted plain error after the defendant had failed to object at trial). Christiansen claims that the district court's response essentially instructed the jury that it could convict Christiansen based on uncharged conduct. We agree.

The district court's answer is problematic in its context. During deliberations, the jury asked specifically about the two actions potentially constituting interference: "Focus was on the throwing of the cell phone as interference. Can we as a jury take into consideration the threat he made while driving as interference as well?" After consulting with the attorneys, the district court responded essentially in the affirmative: "Juries are never happy with the instructions that I have to give you in this regard, which is simply that you can consider any evidence you want on any issue."

Christiansen argues that the district court plainly erred because its response amounted to a de facto amendment of the complaint. A conviction may rest on charged conduct only. *See State v. Stempf*, 627 N.W.2d 352, 357–59 (Minn. App. 2001)

(reversing a conviction that was supported by uncharged conduct). In the complaint and at trial, the state focused on Christiansen's conduct that occurred in A.P.'s home as the interference with the emergency call. A.P. testified that after Christiansen threatened her and pushed her to the ground in her apartment, she took out her cellular telephone and attempted to dial 911. Before she could make the call, Christiansen grabbed the phone and tossed it away from her. Arguably, A.P.'s testimony also suggested that Christiansen interfered with her attempt to contact police while she was driving to withdraw money for Christiansen, because he threatened that he would run her off the road if she hung up. But that second theory remained hypothetical, because the state did not amend its complaint to add a second charge of interference with an emergency call or to incorporate both theories as alternative bases for the single count. Christiansen's alleged interference with A.P.'s attempt to contact police while she was driving was therefore uncharged conduct.

The jury's question demonstrates that it wondered whether it could consider either Christiansen's alleged interference in the apartment or the alleged threat he made while driving to satisfy the elements of interference with an emergency call. But because our reading of the state's criminal complaint leads us to conclude that the threat Christiansen made while driving was uncharged conduct, we hold that the jury was not allowed to consider it to convict him of interference with an emergency call. *See Stempf*, 627 N.W.2d at 358–59 (noting that the jury could not consider uncharged acts that occurred at different times and in different places to convict the defendant).

It appears that the district court misunderstood the jury's question. The court explained, “[T]his question sounds to me like . . . a request of me to apply facts to law

and that's your job. I can't do that." The district court's response up to that point was generally a correct statement of the law. Juries are indeed allowed to consider all evidence presented at trial, and the jury's role is to consider the facts in relation to the law. *Sundeen v. Barthel*, 241 Minn. 398, 407–08, 63 N.W.2d 267, 273 (1954). But the jury may not convict based on uncharged conduct. And in the context of this trial, we interpret the jury's question to be whether Christiansen could be convicted based on the threat he made while A.P. was driving. The prosecutor accurately summarized, and Christiansen's counsel tacitly consented, to the best response: "No." But the district court gave a different answer apparently because it misconstrued the question. The district court's response was therefore unintentionally misleading to the jury because it did not clarify that the threat Christiansen made while A.P. was driving could not be considered to satisfy an element of the crime of interference with an emergency call as charged in the complaint.

The error was plain, and it affected Christiansen's substantial rights because it appears that the jury did, in fact, consider the threat that Christiansen allegedly made while A.P. was driving. We recognize that in a plain-error challenge an appellant "bears the heavy burden of showing that there is a reasonable likelihood the error had a significant effect on the verdict." *State v. Patterson*, 587 N.W.2d 45, 52 (Minn. 1998) (quotation omitted). But we hold that Christiansen meets that burden on the facts of this case, and the state offered no argument in response. The jury found Christiansen guilty only eight minutes after the district court answered the jury's question. The relationship between the specific and limited factual description of the offense in the complaint, the trial testimony offering a potentially different factual basis for the charge, and the timing

of the jury's verdict after receiving the court's answer to its question about the uncharged conduct establishes a reasonable likelihood that the mistaken answer affected the verdict. We therefore conclude that the plain error seriously affected the fairness of Christiansen's trial and requires us to reverse his conviction and remand for a new trial on the interference charge alone. *See State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (explaining that this court should correct a plain error that affects defendant's substantial rights if it seriously affects the fairness and integrity of judicial proceedings). Having determined that the error requires reversal, we need not reach Christiansen's other trial challenges.

Reversed and remanded.