STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0005

State of Minnesota,
Respondent,

vs.

Donald Leland Quick,
Appellant.

Filed November 27, 2017
Affirmed
Bratvold, Judge

Ramsey County District Court
File No. 62-CR-16-4088

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

Samuel J. Clark, St. Paul City Attorney, Michael A. Seasly, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

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

BRATVOLD, Judge

Appellant challenges his conviction of disorderly conduct, arguing that the district court denied his right to a unanimous jury verdict. Because the district court did not plainly err, we affirm.

FACTS

On June 5, 2016, N.A. and T.S. were walking near the intersection of Lexington and Grand Avenues in Saint Paul at about 2:00 p.m. during Grand Old Day. N.A. accidently bumped shoulders with appellant Donald Leland Quick; N.A. and Quick did not know each other. N.A. apologized, but Quick began swearing and asked N.A. if he wanted to fight. N.A. replied that he did not want to fight. Quick attempted three "haymaker" punches, which N.A. parried.

Meanwhile, T.S. walked on, but then looked over at N.A., and attempted to help him. T.S. jumped on Quick's back and wrapped her arms around him. Quick threw his arms out and pushed T.S. to the ground.

Two employees who were working at a nearby booth, R.P. and A.C., saw some of what happened, but passersby obscured their view. R.P. testified that she saw N.A. gesturing to Quick and then T.S. positioning herself between N.A. and Quick. Shortly after, Quick struck T.S., who fell to the ground. A.C. testified that she heard Quick "yelling" and "being very belligerent" to T.S. before striking T.S. and causing her to "fly." A.C. confronted Quick and testified that Quick was angry and belligerent and she believed "he would have hit" her, although he did not.

Soon after A.C. intervened, the police arrived, at which point T.S. was holding the side of her face, crying, and sitting on the ground. Officers observed that Quick was sweating, tense and agitated. Quick claimed that T.S. assaulted him, but after questioning N.A., T.S., and others at the scene, police determined that Quick was the aggressor and arrested him. After his arrest, Quick yelled at police and appeared angry while in the squad car and at the police station.

The state charged Quick with assault in the fifth-degree and disorderly conduct. Minn. Stat. § 609.224 (2016); Minn. Stat. § 609.72 (2016). The state tried its case against Quick on November 15, 2016. The jury heard testimony from N.A., T.S., A.C., R.P., and three police officers. After deliberations, the jury found Quick not guilty of fifth-degree assault and guilty of disorderly conduct. The court sentenced Quick to 90 days in jail, but stayed 70 of those days and ordered a $50 fine.

D E C I S I O N

A. Standard of review

Quick argues that the district court's jury instructions denied his right to a unanimous verdict, but he did not challenge the jury instructions at trial. Generally, an appellant waives his right to challenge jury instructions on appeal when he does not object during trial. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). This court may review unobjected-to jury instructions for plain error. Minn. R. Crim. P. 31.02. Plain-error review requires us to determine whether there was "(1) error (2) that was plain and (3) that affected [appellant's] substantial rights." *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). If we determine the appellant has met each prong, we must then decide whether addressing the

plain error is necessary to "ensure the fairness and integrity of the judicial proceedings." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

B. The district court did not err in instructing the jury on disorderly conduct.

During Quick's trial, the district court instructed the jury on disorderly conduct by closely following the pattern instruction.[1] *See* 10 *Minnesota Practice*, CRIMJIG 13.120-13.121 (2015). The district court also instructed that "[i]n order for [the jury] to return a verdict, whether guilty or not guilty, each juror must agree with that verdict" and that the jury's "verdict must be unanimous." *See* CRIMJIG 3.04.

Quick argues that the district court plainly erred and violated his right to a unanimous jury verdict by failing to instruct the jury that, to convict, it must unanimously agree on the specific conduct Quick committed in violation of the disorderly conduct statute. The state responds that no error occurred.

In Minnesota, the jury's verdict must be unanimous "in all cases." Minn. R. Crim. P. 26.01, subd. 1(5). This means that, to convict, a jury must unanimously find that the

[1] The district court instructed the jury as to the relevant elements of disorderly conduct, as follows:

> The relevant elements of disorderly conduct are, first, the defendant engaged in brawling or fighting, or the defendant engaged in offensive, obscene, abusive, boisterous, or noisy conduct, or in offensive, obscene, abusive language tending to reasonably arouse alarm, anger, or resentment in others. Second, the defendant knew or had reasonable grounds to know that the conduct would or could tend to alarm, anger, disturb, provoke an assault, or provoke a breach of the peace by others. Third, the defendant's act took place in a public or private place. Fourth, the defendant's act took place on or about June 5th, 2016, in Ramsey County.

government "has proved each element of the offense." *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002) (citing *Richardson v. United States*, 526 U.S. 813, 817-18, 119 S. Ct. 1707, 1710 (1999). When a statute provides alternative means to satisfy one statutory element, however, jurors are not "required to agree upon a single means of commission." *Ihle*, 640 N.W.2d at 918 (quoting *Schad v. Arizona*, 501 U.S. 624, 631-32, 111 S. Ct. 2491, 2497 (1991)). Stated somewhat differently, "the jury need not unanimously agree on each element's underlying facts so long as the differing factual circumstances show 'equivalent blameworthiness or culpability.'" *State v. Infante*, 796 N.W.2d 349, 356 (Minn. App. 2011) (quoting *State v. Pendleton*, 725 N.W.2d 717, 731 (Minn. 2007)), *review denied* (Minn. June 28, 2011).

The Minnesota Supreme Court's decision in *Ihle* guides our analysis. 640 N.W.2d at 910. In that case, Ihle verbally abused a police officer and swung his arms, saying he would "take care" of her. *Id.* at 913. After the officer told Ihle he was under arrest, Ihle ran into his house and tried to close the door. *Id.* Two police officers gave chase and stopped Ihle from fully closing the door. *Id.* Ihle attempted to punch the officers, who wrestled Ihle to the floor, where he continued to struggle. *Id.* Even in handcuffs, Ihle screamed, kicked, and swore at the officers and continued to do so as they brought him to jail. *Id.* A jury convicted Ihle of obstruction of legal process with force or violence. *Id.* at 914-15; *see also* Minn. Stat. § 609.50 (2000) (criminalizing obstruction of legal process).

On appeal, Ihle argued that the district court plainly erred by failing to instruct the jury that it needed to unanimously agree on which of Ihle's specific acts satisfied the elements of obstruction of legal process. *Id.* at 917. The supreme court reasoned that the

obstruction statute sets out different means by which a defendant could commit the offense. *Id.* at 919. The court concluded that because the prohibited conduct was not "inherently different types of conduct" and, in Ihle's case, was part of a "single behavioral incident," a jury was not required to decide unanimously which of several means Ihle used to commit the offense in order to conclude that each element had been proven beyond a reasonable doubt. *Id.* After determining that Ihle's actions were similar enough to not require separate charges, the supreme court affirmed because there was no fundamental unfairness to Ihle. *Id.*

Like the obstruction of legal process statute the supreme court analyzed in *Ihle*, the disorderly conduct statute at issue here provides alternative means by which a defendant may commit the offense. The disorderly conduct statute reads, in relevant part:

> Whoever does any of the following in a public or a private place, including on a school bus, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor:
> (1) engages in brawling or fighting; or . . .
> (3) engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

Minn. Stat. § 609.72. Based on *Ihle*, we conclude that the alternative acts prohibited in section 609.72 are different means of committing disorderly conduct. Grouping them together under one statute does not result in "fundamental unfairness" to Quick. *See Ihle*, 640 N.W.2d at 919. Further, committing any one of the prohibited acts is a misdemeanor, which supports the conclusion that they hold equivalent "blameworthiness or culpability." *Pendleton*, 725 N.W.2d at 732.

Quick argues that a specific unanimity instruction was necessary here because the state presented evidence of "separate acts"—Quick's conduct with N.A. and his conduct with T.S.[2] Quick's argument fails because all of Quick's conduct was part of a single behavioral incident. To determine whether a defendant's actions are part of a single behavioral incident in this context, Minnesota courts have considered (a) whether conduct occurred in the same location, (b) whether conduct occurred over a short period of time, and (c) the number of victims involved. *See, e.g.*, *Infante*, 796 N.W.2d at 357 (holding appellant's conduct was part of a single behavioral incident because it occurred over a short period of time at one location and involved a single victim); *State v. Dalbec*, 789 N.W.2d 508, 512 (Minn. App. 2010) (holding appellant's conduct was part of a single behavioral incident because it occurred at one location and involved one victim), *review denied* (Minn. Dec. 22, 2010).

Here, Quick's conduct with N.A. and T.S. was part of a single behavioral incident and was similar enough to not require separate charges. Quick's conduct occurred in one location over a short period of time. It is true that unlike *Infante* and *Dalbec*, there was no single victim; Quick's conduct involved both N.A. and T.S. But, this factor alone is not dispositive. For example, *Ihle* held a specific unanimity instruction was not required, even though at least two police officers were involved. 640 N.W.2d at 912-14, 919.

[2] Quick also contends that the state presented evidence of his separate conduct with police. We are not persuaded. While some limited testimony was received about Quick's conduct at the police station, the full context of that testimony shows that it was offered to prove who was the aggressor in the incident involving T.S. Moreover, the state never contended Quick was guilty based on his conduct with the police.

Quick relies on two cases in support of his contention that the district court plainly erred by not giving a specific unanimity jury instruction. In *State v. Stempf*, the state charged Stempf with a single count of controlled-substance crime in the fifth degree, but presented evidence that Stempf had possessed methamphetamine during two separate incidents. 627 N.W.2d 352, 354 (Minn. App. 2001). On appeal, this court vacated Stempf's conviction and held the district court's failure to provide a specific unanimity instruction violated Stempf's right to a unanimous jury verdict. *Id.* at 358-59.

Stempf is inapplicable because Quick's conduct was part of a single behavioral incident. In contrast, the incidents of methamphetamine possession in *Stempf* were separate occurrences that "lack[ed] unity of time and place." 627 N.W.2d at 358-59. This court has previously distinguished *Stempf* on similar grounds. *See Infante*, 796 N.W.2d at 356-57 (distinguishing *Stempf*, in part, because appellant's conduct was part of a single behavioral incident).

Quick also relies on an unpublished case in which the defendant was convicted of disorderly conduct, *State v. Jama*, No. A05-822, 2006 WL 1390169, at *1 (Minn. App. May 23, 2006), *review denied* (Minn. July 19, 2006). Unpublished cases are not precedential. Minn. Stat. § 480A.08, subd. 3 (2016); *State v. Ellis-Strong*, 899 N.W.2d 531, 537 (Minn. App. 2017). Yet, these opinions "may have persuasive value." *Ellis-Strong*, 899 N.W.2d at 537. *Jama* does not persuade us that a specific unanimity instruction was necessary in Quick's case.[3]

[3] During trial, the district court rejected Jama's request for a specific unanimity instruction but allowed the state to add a tab charge for a second disorderly conduct charge. *Jama*,

Because it was not necessary for the jury to unanimously decide the means by which Quick violated the disorderly conduct statute, the district court did not err. Quick has not satisfied the plain-error test, therefore, we conclude the jury instructions were not defective regarding Quick's right to a unanimous verdict.

Affirmed.

2006 WL 1390169, at *1. On appeal, this court affirmed and rejected Jama's contention that the district court should have provided a specific unanimity instruction. *Id.* at *2. Quick misreads *Jama* to state that a defendant's right to a unanimous verdict requires either an additional charge or a specific unanimity instruction. But the Minnesota Supreme Court has held that a jury does not need to unanimously agree on the underlying facts if the statute identifies alternative means by which a defendant can violate the statute. *Ihle*, 640 N.W.2d at 910. In fact, *Jama* stated that "[t]he alternatives in the disorderly-conduct statute are means of committing a single offense rather than independent elements of the offense." *Jama*, 2006 WL 1390169, at *2.