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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1804

State of Minnesota,
Respondent,

vs.

Lenny Paul Bissell,
Appellant.

Filed October 1, 2018
Affirmed
Schellhas, Judge

Stearns County District Court
File No. 73-CR-17-2864

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Smith, John, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his convictions of threats of violence and gross-misdemeanor assault, arguing that the district court (1) plainly erred by failing to instruct the jury that it must unanimously agree on which specific threat of violence he made; and (2) erroneously calculated his criminal-history score to include 1.5 felony points for a decayed offense. We affirm.

FACTS

Respondent State of Minnesota charged appellant Lenny Bissell with one count of threats of violence, and one count of gross-misdemeanor domestic assault, stemming from an incident involving Bissell and his girlfriend, H.S. Bissell and H.S. got into an argument because Bissell thought she was flirting with another person through a cellphone video game. H.S. claimed that Bissell threatened to "bash [her] head into the wall," and later threatened to "beat [her] to death." A jury found Bissell guilty as charged and, using a criminal-history score of seven, the district court sentenced Bissell to 39 months in prison.

This appeal follows.

DECISION

I. Unanimity jury instruction

Bissell argues that the district court erred by not instructing the jury that it must unanimously agree on which of his threats constituted the threat of a crime of violence. Bissell did not object to the jury instructions at trial. "When a defendant fails to object at trial, the forfeiture doctrine generally precludes appellate relief." *State v. Webster*, 894

N.W.2d 782, 786 (Minn. 2017). But we may consider a forfeited error under Minn. R. Crim. P. 31.02 when the defendant establishes (1) an error, (2) that is plain, and (3) that affected the defendant's substantial rights. *Id.* "If we conclude that any of the requirements of the plain-error analysis are not satisfied, we need not consider the others. *Id.* "If the defendant establishes all three requirements, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* "An error is plain if it is 'clear' or 'obvious,' which is typically established 'if the error contravenes case law, a rule, or a standard of conduct.'" *Id.* at 787 (quoting *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)).

The district court has broad discretion to choose the language for jury instructions. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). We review jury instructions as a whole to determine whether they accurately state the law in a manner that the jury could understand. *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). The jury instructions must describe the crime charged and explain the elements of the crime. *Milton*, 821 N.W.2d at 805. "To determine if a jury instruction correctly states the law, [this court] analyzes the criminal statute and the case law under it." *State v. Taylor*, 869 N.W.2d 1, 15 (Minn. 2015).

To be found guilty of threats of violence, the record must show that Bissell (1) threatened, directly or indirectly, to commit a crime of violence, and (2) acted either (a) with a purpose to terrorize another, or (b) in reckless disregard of the risk of causing such terror. *See* Minn. Stat. § 609.713, subd. 1 (2016) (listing elements of crime). The statute provides that '"crime of violence' has the meaning given 'violent crime' in section 609.1095, subdivision 1, paragraph (d)." *Id.* The definition of "violent crime" includes

second-degree intentional murder and third-degree assault. Minn. Stat. § 609.1095, subd. 1(d) (2016). This court has determined that the jury must be instructed on the definition and elements of the specific crime of violence that the defendant allegedly threatened. *State v. Jorgeson*, 758 N.W.2d 316, 325 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009).

Here, consistent with *Jorgeson*, the district court instructed the jury on the elements of the crime of threats of violence, and the crimes of violence that Bissel allegedly threatened, second-degree murder and third-degree assault. Although the court instructed the jury that its verdict must be unanimous, it did not instruct the jury that it must unanimously agree on whether Bissell threatened the crime of murder or the crime of third-degree assault. Bissell argues that the court committed plain error in instructing the jury because it "included *two* potential crimes of violence threatened by Bissell" but failed to instruct the jury that it must unanimously agree on which of Bissell's threats constituted the threat of a crime of violence. We disagree.

"Jury verdicts in all criminal cases must be unanimous." *State v. Pendleton*, 725 N.W.2d 717, 730 (Minn. 2007). "To achieve that end, a jury must unanimously find that the government has proved each element of the offense." *Id.* at 730–31 (quotation omitted). But the jury need not unanimously agree on each element's underlying facts so long as the differing factual circumstances show "equivalent blameworthiness or culpability." *Id.* at 731 (quotation omitted); *see also State v. Ihle*, 640 N.W.2d 910, 913–14 (Minn. 2002) (holding that jury was not required to unanimously decide which of defendant's modes of conduct constituted crime of obstructing legal process). In *State v. Infante*, this court

described the difference between two acts that constitute means of committing an element of a crime, and two distinct instances of an element of the crime itself, as follows:

> Where, for example, an element of robbery is force or threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.

796 N.W.2d 349, 358 (Minn. App. 2011) (quoting *Richardson v. United States*, 526 U.S. 813, 817, 119 S. Ct. 1707, 1710 (1999)).

Bissell relies on *State v. Stempf*, in which the state charged the defendant with a single count of possession of methamphetamine "but alleged two distinct acts to support the conviction: (1) that he possessed methamphetamine found at . . . his workplace; and (2) that he possessed methamphetamine found in the truck in which he was riding when he arrived at work." 627 N.W.2d 352, 357 (Minn. App. 2001). This court held that the district court's "refusal to give a specific unanimity instruction violated [the defendant's] right to a unanimous verdict" because "[s]ome jurors could have believed [the defendant] possessed the methamphetamine found on the premises while other jurors could have believed [the defendant] possessed the methamphetamine found in the truck." *Id.* at 358.

But *Stempf* is distinguishable from this case because the two acts in *Stempf* were elements of the crime, whereas Bissell's actions in this case were mere *means* for accomplishing an element. The defendant in *Stempf* was charged with a single count of possession of methamphetamine, which comprised two elements: "(1) unlawful possession; and (2) one or more mixtures containing methamphetamine." *Id.* at 357. The

state introduced evidence of two distinct instances of the possession element: possession at the defendant's workplace and in his truck. *Id.* at 354. In this case, the state charged Bissell with one count of threats of violence, which requires that the state prove that he threatened, directly or indirectly, to commit a crime of violence. *See* Minn. Stat. § 609.713, subd. 1 (listing elements). The "crime of violence" element that Bissell threatened to commit can be proved several different ways, including that Bissell threatened second-degree murder or third-degree assault. *See* Minn. Stat. § 609.1095, subd. 1(d) (defining "violent crime").

Bissell argues that this case does not involve an alternative means because the presence of an alternative means is not found in section 609.713, subdivision 1. Bissell's argument is unavailing. Although section 609.713, subdivision 1, does not specifically list the alternative means of threatening to commit a crime of violence, the statute references a different statute that does list the alternative means. Specifically, the statute provides: "As used in this subdivision, 'crime of violence' has the meaning given 'violent crime' in section 609.1095, subdivision 1, paragraph (d)." Minn. Stat. § 709.713, subd. 1. Section 609.1095, subdivision 1, paragraph (d), provides a list of offenses that qualify as a "violent crime," including second-degree murder and third-degree assault, which, if threatened, qualify as a threat of a "crime of violence" under section 609.713, subdivision 1. The district court instructed the jury on the elements of these offenses and that its decision about whether Bissell threatened to commit a crime of violence must be unanimous. But because the threat of second-degree murder and third-degree assault are means of committing the threat of a "crime of violence" element, the jury was not required

to unanimously agree on which violent crime Bissell threatened to commit since either offense "reasonably reflect[s] notions of equivalent blameworthiness or culpability." *See Pendleton*, 725 N.W.2d at 731 (quotation omitted) ("The jury was not required to agree on one of those two mental states, so long as the jury agreed that the defendant committed first-degree murder."). We conclude that the district court did not err by not giving the jury a specific-unanimity instruction. The court therefore did not plainly err by not giving the jury a specific-unanimity instruction on whether Bissell threatened to commit second-degree murder or third-degree assault.

II. Criminal-history score

District courts are generally afforded "great discretion in the imposition of sentences," and a reviewing court will reverse a sentencing decision only when a district court abuses its discretion. *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014) (footnote and quotation omitted). But when the sentencing issue involves interpretation of the sentencing guidelines, this court reviews the statutory construction and interpretation of the sentencing guidelines de novo. *State v. Washington*, 908 N.W.2d 601, 606 (Minn. 2018). Like statutes, when the language of the sentencing guidelines is "plain and unambiguous, it is presumed to manifest legislative intent and [a reviewing court] must give it effect." *State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012).

A defendant's criminal-history score is comprised, in part, on the defendant's prior felony record. Minn. Sent. Guidelines 2.B. (2016). But the sentencing guidelines provide that "[a] prior felony sentence . . . must not be used in computing the criminal history score

if a period of fifteen years has elapsed since the date of discharge from or expiration of the sentence to the date of the current offense." Minn. Sent. Guidelines 2.B.1(c) (2016).

Here, Bissell had a total of 6.5 criminal-history points, which included 1.5 criminal-history points for a 1997 second-degree criminal-sexual-conduct conviction. The district court rounded down Bissell's criminal-history score to six, but with the addition of a custody-status point, his total criminal-history score was seven. Threats of violence is a severity-level four offense, and the presumptive sentence for this offense with six or more criminal-history points, including a three-month custody-status enhancement, is 29-39 months. Minn. Sent. Guidelines 2.B.2.c.(1), 4.A., 5.A. (2016). The court sentenced Bissell to a top-of-the-box sentence for this offense.

Bissell asserts that because he was sentenced on November 21, 1997, to a term of 47 months for the 1997 offense, his "sentence expired, at the latest, on October 21, 2001," more than 15 years before the offense occurred in this case. Although Bissell concedes that he was on conditional release within 15 years of the date of the current offense,[1] he argues that because his conditional-release term was not part of his prior sentence, his sentence expired on the last date of his executed prison sentence, not the last date of his conditional-release period. Thus, Bissell contends that the 1997 offense decayed and "should not have produced criminal history points in this case." We disagree.

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[1] Bissell indicates that this court can take judicial notice of the MNCIS record for his 1997 conviction, which Bissell claims "seems to indicate that in addition to the 47 month sentence, [he] had a 5-year conditional release term."

The supreme court has recognized that the sentencing guidelines refer to a conditional-release term as a mandatory part of a sentence for a criminal-sexual-conduct offense. *State v. Brown*, 606 N.W.2d 670, 673 n.3 (Minn. 2000); *see also Stone v. State*, 675 N.W.2d 631, 634 (Minn. App. 2004) (stating that the conditional-release period that is required to be imposed on offenders convicted of criminal sexual conduct is part of the maximum sentence that an offender may receive for his crime). In fact, because a conditional-release period is mandatory and considered part of a defendant's sentence by contributing to the length of a defendant's sentence, the supreme court has established the general rule that if a maximum sentence is negotiated as part of a plea agreement and the defendant is not made aware of a mandatory conditional-release period before pleading guilty, the conditional-release period cannot later be imposed if it would violate the negotiated sentence without giving the defendant an opportunity to withdraw his or her plea. *James v. State*, 699 N.W.2d 723, 730 (Minn. 2005); *State v. Jumping Eagle*, 620 N.W.2d 42, 44 (Minn. 2000).

Bissell argues that under *State v. Schnagl*, 859 N.W.2d 297 (Minn. 2015), "an offender's conditional-release term is not part of the district court's sentence." But the supreme court in *Schnagl* made no such holding. Rather, the supreme court in *Schnagl* held that an offender may bring a rule 27.03 motion to correct sentence only when the offender challenges the legality of the original sentence imposed by the district court. 859 N.W.2d at 301. The court explained that because a request to correct a release term is a challenge to an administrative decision made by the Minnesota Department of Corrections (DOC), which does not "involve the legality of the sentence imposed by the district court," judicial

review of those decisions may be obtained only by filing a petition for a writ of habeas corpus. *Id.* at 303. Here, the imposition of Bissell's conditional-release term for the 1997 conviction was mandated by statute, not as part of an administrative decision made by the DOC. *Schnagl* therefore does not apply.

Because the imposition of Bissell's conditional-release term for the 1997 conviction was mandated by statute, the conditional-release term was part of Bissell's sentence. *See Brown*, 606 N.W.2d at 673 n.3 (recognizing that a conditional-release term is a mandatory part of a sentence for criminal-sexual-conduct offenses). And because the conditional-release term was part of Bissell's prior sentence, his sentence did not expire more than 15 years before the commission of the present offense. Bissell concedes that if the expiration of his sentence "occurred at the conclusion of the conditional release term, [his sentence] did not decay." The district court therefore did not abuse its discretion by including Bissell's 1997 conviction in the calculation of Bissell's criminal-history score.

Affirmed.