STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1855

State of Minnesota,
Respondent,

vs.

Jeremy Michael Kuchenbecker,
Appellant.

Filed September 10, 2018
Affirmed in part, reversed in part, and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CR-16-29229

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

Susan L. Segal, Minneapolis City Attorney, Zenaida Chico, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and Florey, Judge.

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

ROSS, Judge

Jeremy Kuchenbecker stumbled through the lobby of an upscale apartment building carrying a television when a property manager confronted him. Kuchenbecker yelled profanities and threw the television toward her to the floor. A jury found him guilty of fifth-

degree assault and disorderly conduct. On appeal, Kuchenbecker seeks a new trial because the district court failed to instruct the jury that it must unanimously agree on which of his acts constituted each crime, and he seeks to amend his sentence because he cannot be sentenced for both convictions since all his criminal conduct constituted a single behavioral incident. The state concedes that Kuchenbecker's sentence should be amended because his behavior constituted a single incident, and we hold that a unanimity instruction was unnecessary. We affirm Kuchenbecker's convictions but reverse and remand for resentencing.

FACTS

A Loring Park Apartments manager heard a man slam into a lobby door. Two men she did not recognize stumbled into the lobby, apparently drunk. One of them—Jeremy Kuchenbecker—was carrying a large television. She confronted Kuchenbecker, who told her he was "taking [C.B.]'s T.V." The manager asked Kuchenbecker whether C.B., a resident known to the manager, was aware that he was taking her television. Kuchenbecker became enraged and began shouting. He tossed the television toward the manager. It smashed to the floor and hit her shin. Kuchenbecker insulted the manager with a lengthy barrage of crude, sexually explicit vulgarities demeaning her appearance and occupation, the mildest being, a "$9-an-hour front-desk attendant whore." When he approached the manager, the building's security guard stepped in front of him. Kuchenbecker's rant continued for about 20 minutes until police arrived.

The state charged Kuchenbecker with fifth-degree assault and disorderly conduct. The property manager, K.H., testified to the account just described, and footage from a

security camera corroborated her testimony. The district court instructed the jury. The instructions lacked any requirement that the jury must unanimously agree on which act—Kuchenbecker's throwing the television or his berating the manager—constituted the assault. The prosecutor urged the jury to find that both Kuchenbecker's throwing the television and his verbal torrent constituted assault. The prosecutor told the jury that "some of the behavior and some of the conduct is the same" for both charges.

The jury convicted Kuchenbecker of assault and disorderly conduct. Kuchenbecker appeals.

D E C I S I O N

Kuchenbecker asks us to reverse for two reasons. First, he maintains that his conviction is infirm because the district court improperly instructed the jury. Second, he maintains that his sentence is infirm because he cannot be punished for both convictions because all his criminal conduct constituted a single behavioral incident.

I

We first address Kuchenbecker's contention that the district court improperly instructed the jury. The district court has broad discretion in instructing the jury, and we will not reverse if the instructions fairly and correctly state the law. *State v. Kuhnau*, 622 N.W.2d 552, 555–56 (Minn. 2001). By failing to object to the jury instructions at trial, Kuchenbecker effectively waived the right to challenge the instructions on appeal. *See State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). We may nevertheless review the unobjected-to jury instruction, but only for plain error. *State v. Gustafson*, 610 N.W.2d 314, 318–19 (Minn. 2000). Under a plain-error review, we may reverse only if we find an

error, determine that the error was plain, and hold that the error affected substantial rights. *See State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). An error is "plain" when it is "clear" or "obvious." *Id*. at 688. And an error affects substantial rights if it is prejudicial and it affects the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Even if Kuchenbecker can establish that a plain error occurred, we have discretion to correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Strommen*, 648 N.W.2d at 686. Kuchenbecker's jury-instruction challenge fails under this standard.

Kuchenbecker contends that the district court erroneously failed to provide an element-specific unanimity instruction because the state presented evidence of two different "acts" he committed that might independently constitute assault (throwing the television toward the manager and aggressively shouting as he approached her). To find Kuchenbecker guilty, the jury had to conclude that he committed "an act with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.224, subd. 1(1) (2016). Kuchenbecker relies chiefly on *State v. Stempf* for the proposition that jurors must unanimously agree as to the specific acts or instances that constitute the offense even though they need not unanimously agree as to the means by which a specific act might satisfy an element of an offense. 627 N.W.2d 352, 354–57 (Minn. App. 2001). On that premise, Kuchenbecker implies that a specific unanimity instruction was required to protect his right to a unanimous verdict. He is mistaken.

Kuchenbecker reads *Stempf* too broadly. The *Stempf* defendant faced the charge of a single act of possessing methamphetamine, but the state introduced evidence of two

distinct alleged acts of possession, occurring at different times and in different places. 627 N.W.2d at 354. Stempf presented a different defense to each of those alleged acts and unsuccessfully sought an instruction requiring the jury to assess the two acts separately. *Id*. We reversed, holding that a unanimity instruction was necessary because the jury could not find Stempf guilty without unanimously agreeing which of the distinct acts constituted the crime. *Id*. at 357–59. This case does not resemble *Stempf*. Unlike Stempf, Kuchenbecker did not engage in alleged acts that can fairly be described as separate and distinct. The allegations and the evidence indicate that he exploded into an angry rage—smashing a television toward the manager, stepping toward her, and screaming at her—as a single reaction to the manager's questioning his permission to remove the television from a resident's apartment.

This case instead mirrors *State v. Infante*, where we held that a defendant who committed two separate acts hours apart that could constitute assault was not entitled to a specific unanimity instruction because the two acts formed a single behavioral incident. 796 N.W.2d 349, 357 (Minn. App. 2011); *see also State v. Ihle*, 640 N.W.2d 910, 919 (Minn. 2002) (holding that jury instructions need not include a unanimity instruction because the defendant's different acts "were committed as part of a single behavioral incident"). While it is true that some jurors may have believed that Kuchenbecker's smashing the television toward the manager caused her to fear immediate bodily harm, and others may have believed that his screaming and steps toward her caused her to fear, their guilty verdict can stand without their agreement about which of the acts constituted the crime because both acts formed a single behavioral incident.

Kuchenbecker makes the same unanimity-instruction argument for his disorderly-conduct charge. The argument fails for the same reason. Disorderly conduct is proved by evidence that the defendant "engage[d] 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, subd. 1(3) (2016); *and see In re Welfare of T.L.S.*, 713 N.W.2d 877, 881 (Minn. App. 2006) ("[T]he statute may be applied to punish the manner of delivery of speech when the disorderly nature of the speech does not depend on its content."). Kuchenbecker's conduct in smashing the television and shouting in the public area of the apartment building formed a single behavioral incident of creating an abusive atmosphere tending to arouse alarm and the disorderly nature of the speech does not depend on its content. The jurors were not required to agree about which of the acts proved the crime.

The district court did not err by failing to provide the unanimity instruction. The plain-error analysis ends at the first step.

II

Kuchenbecker argues, and the state agrees, that the district court erred by imposing sentences for both his assault and disorderly-conduct convictions. *See* Minn. Stat. § 609.035, subd. 1 (2016) (allowing punishment for only one offense if the same conduct constitutes more than one offense). "[T]o determine whether two intentional crimes are part of a single behavioral incident, we consider factors of time and place and whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (quotation omitted). It is

apparent that Kuchenbecker's offending conduct occurred at the same time and place and was motivated by the same objective to castigate the manager. We therefore reverse the duplicative sentences and remand for the district court to amend the sentence consistent with this opinion.

Affirmed in part, reversed in part, and remanded.