

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2016).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2060**

State of Minnesota,
Respondent,

vs.

Joshua Daniel Kable,
Appellant.

**Filed October 22, 2018
Affirmed
Worke, Judge**

McLeod County District Court
File No. 43-CR-17-802

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

Michael K. Junge, McLeod County Attorney, Daniel R. Provencher, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Worke, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his conviction for violation of a harassment restraining order (HRO), arguing that the district court plainly erred in instructing the jury. We affirm.

FACTS

H.M. is a leasing agent for two apartment complexes. Appellant Joshua Daniel Kable lived at one of the complexes until a trespass order removed him from his tenancy. Kable then began harassing and stalking H.M. On March 25, 2016, H.M. was granted an HRO that prevented Kable from having direct or indirect contact with her for two years. After the HRO, Kable's harassing and stalking behavior temporarily ceased.

On May 24, 2017, H.M. received a letter at work from Kable. The envelope was addressed to H.M. as management for the apartment complex. The letter requested that H.M. send Kable a rental application. H.M. contacted the police and Kable was charged with felony violation of an HRO, in violation of Minn. Stat. § 609.748, subd. 6(d)(1) (2016).

At Kable's jury trial, Deputy Schultz testified that he personally served Kable with the HRO. A copy of the certificate of service was admitted into evidence, which indicated that the HRO was served "[b]y personally leaving a copy with" Kable. Officer Hemling testified that when he arrested Kable for violation of the HRO, Kable stated that he was "just asking for an application," and that he "thought that [the HRO] wasn't valid."

Kable testified that after he was trespassed from the apartment complex he became homeless and then was civilly committed for mental-health reasons. In later working with a program that assisted him in finding housing, Kable wrote to the apartment to find a rental. He addressed his request to H.M. because he heard a "rumor" that she was the apartment manager.

Kable testified that he did not recall being served with the HRO because he believed that he would have signed for it and his signature is not on the certificate of service. Kable also testified that when the police officer asked him if he had contact with H.M. by sending a letter, he recalled the trespass order and knew that it had expired, so he could not understand what he had done wrong. Kable testified that he did not harass or stalk H.M. and that he did not think that the “trespass order or order for protection should have been granted.”

In discussing jury instructions, the parties addressed whether the word “knew” should be defined because an element of the offense is whether Kable knew of the HRO. Kable argued that a definition should be included because whether he “knew” of the HRO went directly to his contention that he was not properly served. The district court stated that although the standard jury instruction for the elements of the offense does not include a definition for the word “knew,” it would include a jury instruction that defined the word. The district court instructed the jury that “whoever violates a[n] [HRO] and knows of the order is guilty of a crime.” The district court instructed the jury that the elements of the offense include: an existing HRO, Kable violated a condition of the HRO, and Kable “knew of the order.” The district court defined the word “knew” to require “only that the actor believed that the specified fact exists.”

The jury found Kable guilty of violation of an HRO and that he committed the crime within ten years of the first of his two or more previous qualified domestic-violence-related-offense convictions. The district court sentenced Kable to a stay of imposition and placed him on supervised probation for three years. This appeal followed.

DECISION

Kable challenges the district court's jury instructions. Kable did not object to the jury instructions. Generally, an appellate court will not consider an alleged error in jury instructions unless an objection was made at trial. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). However, this court has the discretion to consider an alleged error in jury instructions absent an objection if there is plain error affecting the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under these circumstances, Kable must show that there was (1) an error; (2) that is plain; and (3) that affects substantial rights. *See id.*

In this plain-error context, an "error" is a "[d]eviation from a legal rule [] unless the rule has been waived." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014) (quotation omitted). "An error is plain if it was clear or obvious." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotations omitted). An error is clear or obvious when it "contravenes caselaw, a rule, or a standard of conduct." *Id.* An error affects an appellant's substantial rights "if the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. Prejudice is shown if there is a "reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). Each plain-error prong must be satisfied in order for the error to be corrected. *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007). If the appellant meets his burden and satisfies the three plain-error prongs, this court "may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Crowbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted).

Kable argues that the jury instructions “failed to require the jury to find that [he] knew the HRO was in effect at the time of the alleged violation.” A district court has broad discretion in the selection of jury instructions. *State v. Anderson*, 789 N.W.2d 227, 239 (Minn. 2010). A district court abuses this broad discretion if its jury instructions confuse, mislead, or materially misstate the law. *State v. Vang*, 774 N.W.2d 566, 581 (Minn. 2009).

Jury instructions must define the crime charged and explain the elements of the offense. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). Kable was charged with violation of an HRO. The statute provides that if a person violates an HRO, he is guilty of a felony if he violates the HRO “within ten years of the first of two or more previous qualified domestic violence-related offense convictions or adjudications of delinquency.” Minn. Stat. § 609.748, subd. 6(d)(1). The elements include: “there was an existing” HRO, “the defendant violated a term or condition” of the HRO, “the defendant knew of the” HRO, and the act took place on a particular date in a particular county. 10 *Minnesota Practice*, CRIMJIG 13.65 (2015). The district court read this standard instruction to the jury. The district court also added a definition for the word “knew,” as requiring “only that the actor believes that the specified fact exists.” 10 *Minnesota Practice*, CRIMJIG 3.32 (2015). In this case, the district court did not err, much less plainly err. *See State v. Taylor*, 869 N.W.2d 1, 18 (Minn. 2015).

Kable argues that these model jury instructions “did not fully explain the meaning of ‘knew of the order’ because the jury was not required to find that [he] knew the HRO was in effect at the time of the alleged violation.” The district court provided the jury with a definition of the word “knew” to mean that Kable believed that the specified fact exists.

The jury heard Kable testify that he did not believe that the HRO existed. But the jury also heard evidence that Deputy Schultz personally served Kable with the HRO, that Kable's harassing and stalking behavior temporarily ceased after he was served with the HRO, and that when Kable was arrested for violation of the HRO, he stated that he "thought that [the HRO] wasn't valid." This evidence could lead a jury to conclude that Kable knew that the HRO existed and was in effect at the time of the violation. Kable has failed to establish plain error because the jury instruction did not deviate from a legal rule, it did not contravene caselaw, and it was not prejudicial and likely to affect the outcome of the case.

Affirmed.