STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0827

State of Minnesota,
Respondent,

vs.

Jarrett Thomas Hill,
Appellant.

Filed April 15, 2019
Affirmed
Ross, Judge

St. Louis County District Court
File No. 69DU-CR-17-2253

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

ROSS, Judge

A jury convicted Jarrett Hill of violating a harassment restraining order after the state accused him of sending numerous emails to his former girlfriend. He argues on appeal

from his conviction that the district court plainly erred by admitting extrinsic evidence of his accuser's prior statements and by failing to give the jury a specific-unanimity instruction. Because the statements are not obviously inadmissible hearsay, the district court did not plainly err by not *sua sponte* prohibiting them. Although the district court did plainly err by not giving the jury a specific-unanimity instruction, the error did not affect Hill's substantial rights. We therefore affirm.

FACTS

Jarrett Hill and S.P. were romantically involved on and off for almost eight years until S.P. successfully petitioned the district court in May 2017 to issue a restraining order. The order prohibited Hill from contacting S.P. in any way, directly or indirectly, including visits, phone calls, or electronic communications. But S.P. soon missed Hill, and she contacted him. Hill responded in an email exchange lasting two weeks, using three different email addresses and complaining about S.P.'s infidelity.

On June 15 Duluth police officer Richard LeDoux responded to S.P.'s 9-1-1 report that a man was in her barn. S.P. suspected that the man was Hill and told Officer LeDoux about the restraining order. Officer LeDoux found no one in the barn. S.P. reported that Hill had been violating the restraining order, and she showed police the emails she had received from him. The state charged Hill with violating the order under Minnesota Statutes section 609.748, subdivision 6(d)(1) (2016).

S.P. testified at Hill's trial about the emails, saying that Hill sent them. She did not recall some of their details, noting that "[t]hey all [ran] together in [her] mind." On cross-examination, Hill attempted to impeach S.P.'s testimony with questions about her

own crimes and her hazy memory. Without objection, the district court allowed the prosecutor to show the jury video footage from Officer Cheney's body camera depicting his interaction with S.P., and Officer LeDoux testified about S.P.'s statements. The district court instructed the jury to find Hill guilty if it found four facts:

> First, there was an existing court restraining order.
> Second, the defendant knew of the existence of the order.
> Third, the defendant violated a term or condition of the order.
> Fourth, on or about June 2-16, 2017, the victim received an email communication from the defendant on Martin Road where the victim resides in St. Louis County.

The jury found Hill guilty based on the email evidence. Hill appeals his conviction.

D E C I S I O N

Hill seeks reversal based on two alleged errors: the district court's admitting prior statements made by S.P. and its failing to give a specific-unanimity instruction. Because Hill objected to neither the evidence's omission at trial nor the failure to give a unanimity instruction, we will review only for plain-error. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Hill must therefore show that there was an error, that the error was plain, and that the error affected his substantial rights. *See State v. Kelley*, 855 N.W.2d 269, 273–74 (Minn. 2014). If he meets these elements, we will reverse if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 274.

I

We are not persuaded by Hill's contention that the district court plainly erred by allowing evidence of S.P.'s out-of-court statements made to the police officers. Because hearsay rules are complex and require nuanced application, statements must be "clearly or

obviously inadmissible hearsay" to provide a premise for plain error. *See State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). Even if the statements are hearsay, they are not inadmissible if the district court correctly admitted them as prior consistent statements. *State v. Nunn*, 561 N.W.2d 902, 908 (Minn. 1997). Evidence of a witness's out-of-court statements is admissible to bolster the credibility of her testimony after the testimony has been challenged. *Id.* at 909. Hill's counsel attempted to impeach S.P.'s testimony by highlighting her inability to remember details about the emails and by exposing her prior felonies:

> Hill's counsel: Okay. Okay. So essentially, to conclude, really, you're not sure who sent those e-mails and you're sure you've been convicted of a couple of felonies at — at least. Right?
> S.P.: Yes.
> Hill's counsel: Okay. And you're sure — really, that's all kind of you're sure of, huh, is just that?
> S.P.: Yes.

S.P.'s now-challenged prior statements illuminated her knowledge about the emails and about who sent them to her based on the sender's address, tending to bear on the credibility of her testimony. The district court therefore properly admitted the statements.

Hill argues that accepting the statements was plain error because they were admitted as prior *inconsistent* statements for which the state failed to follow the admission procedure. *See* Minn. R. Evid. 613(b) (defining procedural steps for admitting extrinsic evidence of prior inconsistent statements). The argument fails. By not objecting to the statements as hearsay, Hill did not afford the state any opportunity to establish which hearsay exception applied. Hill assumes that they were admitted as prior *inconsistent* statements because the state gave pretrial notice that it may be impeaching S.P. But as it

turned out, the statements were consistent with S.P.'s testimony that the emails came from Hill. To the extent the statements might be construed as inconsistent rather than consistent, the argument for reversal triggers the concern discussed in *Manthey* about the requirement that alleged improper testimony must constitute clear and obvious hearsay to support a plain-error challenge. The statements are not clearly or obviously hearsay unprotected by an exception, and we do not address them further.

II

Hill argues that the district court should have issued a specific-unanimity instruction. The district court may not convict a defendant on a guilty verdict that is not unanimous. Minn. R. Crim. P. 26.01, subd. 1(5). A verdict is unanimous only if the jury finds that the state proved all elements of the crime. *State v. Pendleton*, 725 N.W.2d 717, 730–31 (Minn. 2007). A person violates a harassment restraining order if a harassment restraining order exists, the person knows of the order, and he violates one of its terms or conditions. Minn. Stat. § 609.748, subd. 6(b) (2016). One term of the order restraining Hill prohibited him from having any contact with S.P., including sending her an email, regardless of whether S.P. initiated the contact. This means that Hill's sending any one of the emails could, standing alone, constitute the crime of violating the order.

When a defendant faces a single charge but the jury hears evidence of different acts that could each independently constitute the crime, the district court must advise the jury to find the defendant guilty only if it unanimously agrees which act the defendant committed. *See State v. Stempf*, 627 N.W.2d 352, 356 (Minn. App. 2001); *but see also State v. Infante*, 796 N.W.2d 349, 356–57 (Minn. App. 2011) (distinguishing *Stempf* and

not requiring unanimity instruction in assault trial where the two alleged actions were part of the same behavioral incident rather than two independent acts constituting separate crimes).

But we need not decide whether the district court should have advised the jury to find Hill guilty only if it agreed unanimously as to which one (or more) of the emails Hill sent. This is because even if not so advising the jury was plain error, the error did not affect Hill's substantial rights. A plainly erroneous jury instruction affects a defendant's substantial rights if there is a reasonable likelihood that the instruction would have significantly affected the jury's verdict. *State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015). We reversed in *Stempf*, for example, in part because the defendant gave two separate defenses for each act that allegedly constituted the drug-possession charge. 627 N.W.2d at 358. We reasoned that omitting the unanimity instruction could not have been harmless because, based on the facts presented at trial, "the jury could have believed appellant's defense as to one act but not the other." *Id.* Hill's jury faced no such conundrum. Hill did not present various defenses to the different emails, but instead offered a single defense to be applied to all of them: S.P. was unbelievable because she was unsure about who sent her the emails and she had herself previously been convicted of a crime. We must infer from the guilty verdict that the jury rejected Hill's catch-all credibility defense. In this context, the lack of a unanimity instruction did not affect Hill's substantial rights.

Affirmed.