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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1102

State of Minnesota,
Respondent,

vs.

Joseph Thomas Saari,
Appellant.

Filed June 15, 2020
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

St. Louis County District Court
File No. 69DU-CR-18-4166

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

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

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Johnson, Judge; and Cochran, Judge.

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

SMITH, TRACY M., Judge

In this direct appeal from final judgment, appellant Joseph Thomas Saari challenges his convictions for nonconsensual dissemination of private sexual images, felony domestic

assault, and aggravated first-degree witness tampering, and challenges his sentences. First, he argues that he is entitled to a new trial because the district court erred by not severing the nonconsensual-dissemination-of-private-sexual-images charges from other charges against him. Second, he argues that his conviction of aggravated first-degree witness tampering should be reduced to first-degree witness tampering because the district court only instructed the jury on first-degree witness tampering. Third, he argues that his convictions for nonconsensual dissemination of private images must be reversed because the statute under which he was convicted, Minn. Stat. § 617.261 (2018), is unconstitutional. Fourth, he argues that the district court erred by imposing multiple sentences for nonconsensual dissemination of private sexual images because the offenses arose out of the same behavioral incident. We affirm in part, reverse in part, and remand.

FACTS

A trial established the following facts. Saari and A.C. had been close friends for almost 25 years. In May 2018, they began an intimate relationship and began living together. The relationship deteriorated over the summer of 2018. In June, following a dispute between them, Saari sent A.C. messages saying that he would burn the house down while she was sleeping inside. In August, Saari sent A.C. text messages threatening to cut out her youngest child's tongue. He also threatened to skin A.C.'s children in front of her after paralyzing her and burning her with acid.

Threats of violence and assault on September 2, 2018

The couple's disputes escalated to a violent encounter on September 2, 2018. The day before, A.C. had gone shopping with Saari's father. That night, Saari did not return

home and did not respond to A.C.'s texts asking him where he was. On the morning of September 2, A.C. sent Saari a message telling him that she was putting all of his belongings on the porch and wanted him to return any of her belongings. Saari responded, and the two argued over messages until A.C. heard Saari kick in the side door to her home.

Saari entered the home and went downstairs to the basement to confront A.C., saying, "I'm going to kill you, b---h." A.C. saw Saari coming and grabbed a pillow to cover her head. Saari then began hitting A.C., striking her on the side of her body and her arm. A.C., who could hear her fifteen-year-old son moving around upstairs, was screaming and kicking at Saari. Saari stopped hitting A.C., and A.C. ran to the stairs to stop her son from coming down to the basement. A.C. heard Saari say, "It's game time," and saw him make a fist, so she pushed her son up the stairs. When they got to the top of the stairs, A.C. closed the door to the basement. A.C. then went outside and stood out on the porch trying to catch her breath. Saari spent a half hour gathering his belongings and then left.

When A.C. went inside, she saw that Saari had damaged a number of things in the basement, including her cell phone and her children's PlayStation. A.C. then went to the emergency room, where she told health-care staff that her boyfriend beat her up. A.C. did not call the police, but investigators showed up at the hospital to speak with her. After A.C. explained what had happened, the investigators told her that they were going to arrest Saari. Once the hospital discharged A.C., she returned home and contacted Saari using her son's cell phone, telling him that he should "disappear" so that police could not arrest him.

The state arrested Saari and brought multiple charges against him. Trial was set for November 2018.

Posting of private videos

While the legal repercussions from the September 2 encounter were unfolding, A.C. learned that Saari had posted two videos of their sexual activities on a pornography website without her permission. Saari had recorded both videos with his phone on the same day in July. A.C. is identifiable in the videos. A.C. agreed at the time that Saari could record both videos, but she thought that only Saari would view them. Saari told A.C. that, to post them on the pornography website, he used her I.D. and electronically signed a waiver on her behalf. Saari eventually stipulated that he posted the videos to the website between July and August 2018, though he did not recall exactly when he had done so.

Saari's contacts with A.C. after the assault

The state subpoenaed A.C. to testify at the scheduled trial in November 2018, and she appeared but did not testify because, for other reasons, the trial did not proceed and the charges were dismissed without prejudice.

Shortly thereafter, Saari called A.C. because he was angry at her for "lying and snitching."[1] He made several threats against A.C., saying that he was going to "smash[] up" her children, paralyze her, skin her children, rape her daughter, and burn their house down while they were sleeping inside. A.C. testified that the threats made her feel "sick and hurt."

Around this time, Saari also sent A.C. a message saying that he was going to publicly post online the discovery materials from his case. On December 7, Saari picked

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[1] Saari was also angry that A.C. had sold an old truck that was in both of their names for less than it was worth.

up a copy of the discovery materials, which included medical records, police reports, and body-camera footage of A.C. speaking with police investigators. He then posted the materials on a social media site. In response to his posting, someone else posted, "Oh sh-t, man. Isn't this about that little brunette you damn near killed in front of her kid?," to which Saari responded, "[Y]up, you know it f--kboy."

Procedural history

In December 2018, the state filed a new complaint, charging Saari with seven counts, including one count of domestic assault, two counts of threats of violence, two counts of aggravated first-degree witness tampering, one count of stalking, and one count of nonconsensual dissemination of private sexual images. The state later amended the complaint to add another count of nonconsensual dissemination of private sexual images.

A trial took place on March 12 and 13, 2019, and a jury found Saari guilty of all counts. The district court convicted Saari and imposed concurrent sentences of imprisonment on four of the counts, with the longest sentence being 158 months.

This appeal follows.

D E C I S I O N

I. Saari forfeited his severance argument.

Saari argues that all of his convictions should be reversed and that he is entitled to a new trial because the district court erred by not severing the nonconsensual-dissemination-of-private-sexual-images charges from the other charges against him. Appellate courts review a district court's decision regarding whether to grant or deny a motion to sever charges de novo. *State v. Ivy*, 902 N.W.2d 652, 658 (Minn. App. 2017).

District courts must, on the motion of the prosecutor or defendant, "sever offenses or charges if . . . the offenses or charges are not related." Minn. R. Crim. P. 17.03, subd. 3(1). Offenses are related if they are part of a single behavioral incident. *State v. Jackson*, 615 N.W.2d 391, 394 (Minn. App. 2000). Whether offenses constitute a single behavioral incident depends on the facts and circumstances of each case, particularly the time and place of each offense and whether the offender was motivated to obtain a singular criminal objective. *Id.*

But a defendant's failure to move for a severance "constitutes a waiver of the issue unless defendant can show good cause for relief from the waiver." *State v. Moore*, 274 N.W.2d 505, 506 (Minn. 1979). This rule is in part because a defendant may deliberately choose not to move to sever offenses for strategic reasons—for example, because the defendant wishes to defend in only one trial or believes that concurrent sentences are more likely if the charges are tried together. *Id.* at 507.

Saari filed a written motion to sever the two charges for offenses that were alleged to have occurred on September 2, 2018—namely, a charge of domestic assault and one charge of threats of violence (together, the September 2 charges). In his written motion, Saari argued that the September 2 charges occurred in a separate time and place from the other charged offenses of witness tampering, harassment/stalking, and threats of violence, which were alleged to have occurred between November 16 and December 12, 2018. The state responded by amending its complaint to correct the dates of the stalking count to a range encompassing September 2, 2018. The district court then denied Saari's motion.

Saari's written motion did not seek severance of the dissemination-of-private-images charges. Saari contends that the motion did not do so because those charges had not been brought when he filed his motion but were only added later in the amended complaint. But, the record reflects that, at the time that Saari filed his written motion to sever, the complaint—which had been filed a month earlier—did include one of the dissemination charges. And the amendment to the complaint that Saari claims added the dissemination charges in fact only updated the offense date of the stalking charge. It is true that, shortly before trial, the state added a second dissemination count in yet another amended complaint after examining Saari's phone and discovering that he had shared a second video. But that count was added after the district court had ruled on Saari's severance motion, and Saari did not bring another motion related to that count.

Saari claims, though, that, even if his written motion did not reference the dissemination charges, those charges were included in defense counsel's oral presentation to the district court at the hearing on his motion and that the district court addressed severing the dissemination charges. But, at that hearing, defense counsel agreed with the district court that the motion regarded whether to sever the domestic-assault-related charges. Defense counsel then argued that those charges, not the dissemination charge (at that time, there was only one), were separate from the other incidents. The district court's order further reflects that Saari's motion to sever addressed only the domestic-assault-related charges. While, as Saari points out, the district court mentions Saari's dissemination

of A.C's private images as being part of the pattern of stalking, it was not the focus of its analysis.[2]

Because Saari did not move the district court to sever the dissemination charges from the other charges against him, we conclude that he forfeited the argument and has not shown good cause for this court to afford him relief from his forfeiture.

II. Saari is not entitled to a reduction of his conviction for aggravated first-degree witness tampering.

Saari argues that, if his convictions are not reversed for a new trial, one of his two convictions for aggravated first-degree witness tampering must be reduced because, on one of the two counts, the jury was instructed only on first-degree witness tampering. Aggravated first-degree witness tampering requires the state to prove that the defendant threatened to cause death or great bodily harm to the victim. Minn. Stat. § 609.498, subd. 1b(a) (2018). First-degree witness tampering, on the other hand, requires the state to show only that the defendant threatened to cause injury.[3] Minn. Stat. § 609.498, subd. 1(a) (2018).

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[2] On appeal, Saari argues that the evidence shows that the dissemination charges arose out of conduct that took place in the summer of 2018, before the stalking conduct. But the dates of the disseminations are based on a stipulation that Saari made *after* the ruling on his severance motion. At the time of the district court's ruling, the state was alleging that the dissemination took place during the same time period as the stalking charge.

[3] The district court instructed the jury on the second count of aggravated first-degree witness tampering that "whoever intentionally causes injury or threatens to cause injury to any person or property . . . is guilty of a crime" and that an element of the crime included whether Saari "intentionally caused injury or threatened to cause injury to any person or property."

Saari argues that we should be guided by *State v. Meeks*, an unpublished opinion. No. A11-1673, 2012 WL 4052371 (Minn. App. Sept. 17, 2012), *review denied* (Minn. Nov. 20, 2012). In *Meeks*, the state charged the defendant with first-degree aggravated robbery but the verdict form given to the jury was only for second-degree aggravated robbery. *Id.* at *4. The jury returned a guilty verdict on second-degree aggravated robbery. *Id.* Despite the verdict form's content, the district court convicted the defendant of first-degree aggravated robbery. *Id.* We reversed the first-degree conviction and remanded for conviction for second-degree aggravated robbery because we were unwilling to assume that the jury intended to convict the defendant of the more serious crime. *Id.* at *4-5. Saari claims that the alleged error is similar because the jury found him guilty of a lesser offense based on the instruction that it received.

The state argues that *Meeks* is inapposite because that case involved the jury's verdict and this case involves a jury instruction. It argues that the alleged error here is akin to omitting an element of a crime from a jury instruction. The omission of an element from a jury instruction is a trial error and subject to review as such. *State v. Watkins*, 840 N.W.2d 21, 27 (Minn. 2013).

We agree with the state. The error in the jury instruction amounts to the omission of an element—whether Saari threatened to cause death or great bodily harm. We therefore analyze the alleged error accordingly.

Saari did not object to the instruction at the time, so a plain-error standard of review applies. *Id.* at 27-28. Appellate courts "have discretion to consider a claim of error on appeal if there was plain error affecting substantial rights or an error of fundamental law in

the jury instructions." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted). "An error is plain if it was clear or obvious." *State v. Milton*, 821 N.W.2d 789, 807 (Minn. 2012) (quotations omitted). A plain error affects substantial rights if it is reasonably likely that it had a significant effect on the jury's verdict. *State v. Gunderson*, 812 N.W.2d 156, 162 (Minn. App. 2012). If all elements of the test are met, this court has discretion to correct the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Crowsbreast*, 629 N.W.2d at 437 (quotation omitted).

The state concedes that the instruction was plain error. We agree. The district court instructed that the state must prove a threat of injury; it did not instruct that aggravated tampering required the threat of death or great bodily injury. It is therefore "clear or obvious" that the instruction provided on the second count of aggravated first-degree witness tampering was error. *See Milton*, 821 N.W.2d at 807.

But the state disputes that the error affected Saari's substantial rights. In *Watkins*, the supreme court explained that, when reviewing whether omitting an element from a jury instruction had a significant effect on the jury's verdict, an appellate court may consider whether: "(1) the defendant contested the omitted element and submitted evidence to support a contrary finding, (2) the State submitted overwhelming evidence to prove that element, and (3) the jury's verdict nonetheless encompassed a finding on that element." *Watkins*, 840 N.W.2d at 29.

The state charged Saari with two counts of first-degree aggravated witness tampering. The sole difference between the charges was the status of the victim, who, in both counts, was A.C. The first count of witness tampering was for threatening to retaliate

against a person summoned as a witness to a criminal trial. *See* Minn. Stat. § 609.498, subd. 1b(a)(3). The second count was for threatening to retaliate against someone who has provided information to law enforcement. *See* Minn. Stat. § 609.498, subd. 1b(a)(6).

While the charges differed with respect to A.C.'s status (specifically, as a witness to a criminal trial and as someone who provided information to law enforcement), the charges were based on the same threatening conduct by Saari. Both charges rested on evidence of Saari's threats to paralyze A.C., rape her daughter, and skin her children. Saari does not argue that the error in instructing the jury was prejudicial under the factors identified in *Watkins*, and the factors do not support such a conclusion for a number of reasons: (1) Saari did not contend at trial that such threats did not constitute threats of great bodily harm; (2) the evidence that the threats were threats of great bodily harm was overwhelming given the nature of the threats made, *see* Minn. Stat. § 609.02, subd. 8 (2018) (defining "great bodily harm" as including "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement"); and (3) the jury's verdict encompassed a finding of threats of great bodily harm since the jury found the same threats to satisfy the definition of aggravated first-degree witness tampering on the first count, on which the jury was properly instructed. *See Watkins*, 840 N.W.2d at 29. In addition, that the same aggravated-witness-tampering behavior supported both counts is reflected in the district court's decision to convict Saari of only one of the two counts. In sum, Saari has not shown that the error had a significant effect on the jury's verdict.

Saari has also directed our attention to two cases that indicate that, if there is confusion over a jury's verdict, fairness requires that the defendant receive the benefit of

the doubt. *See State v. Cromey*, 348 N.W.2d 759, 760-61 (Minn. 1984) (stating that, because a general verdict form did not describe whether the jury found the defendant guilty of intentional murder or felony murder, fairness meant the defendant was entitled to the lesser sentence); *State v. Lockhart*, 376 N.W.2d 249, 253 (Minn. App. 1985) (vacating a trespass conviction on fairness grounds when the jury verdict form was confusing), *review denied* (Minn. Dec. 30, 1985). But there is no confusion about whether the jury found Saari guilty of making threats of death or great bodily harm: it unquestionably did so when it found Saari guilty on the properly instructed count of first-degree aggravated witness tampering.

We conclude that Saari has not shown that the plain error in the jury instructions affected his substantial rights. He therefore is not entitled to have his conviction reduced from aggravated first-degree witness tampering to first-degree witness tampering.

III. Pursuant to a recent court of appeals opinion, Saari's convictions under Minn. Stat. § 617.261 are unconstitutional.

Saari contends that his convictions under Minn. Stat. § 617.261 for nonconsensual dissemination of private sexual images are unconstitutional and must be reversed. After Saari was convicted, we held in *State v. Casillas* that section 617.261 was unconstitutionally overbroad. 938 N.W.2d 74, 77 (Minn. App. 2019), *review granted* (Minn. Mar. 17, 2020). The state acknowledges that *Casillas* controls in this case but makes its arguments to preserve the issue pending the supreme court's review of *Casillas*. Because *Casillas* controls this case, we reverse Saari's convictions for the nonconsensual dissemination of private sexual images. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn.

App. 2010) (noting that this court is "bound by supreme court precedent and the published opinions of the court of appeals"), *review denied* (Minn. Sept. 21, 2010). The district court used these convictions in calculating Saari's criminal history score when it sentenced him on the other convictions, so we also remand the matter to the district court for resentencing. Because we reverse Saari's convictions for these offenses, we do not reach Saari's argument that the state failed to prove that his dissemination convictions arose out of separate behavioral incidents.

Affirmed in part, reversed in part, and remanded.