STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0209

State of Minnesota,
Respondent,

vs.

Jerome William Darkow,
Appellant.

Filed June 7, 2021
Affirmed in part, reversed in part, and remanded
Bryan, Judge

Hennepin County District Court
File No. 27-CR-18-22957

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County 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 Bryan, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this direct appeal from final judgment of conviction for second-degree assault, appellant challenges the district court's jury instructions for second-degree assault and the district court's sentencing order requiring lifetime predatory offender registration. First,

we conclude that the district court did not commit a clear or obvious error of law when it instructed the jury, and we affirm the judgment of conviction. Second, we conclude that the record does not support imposition of lifetime registration terms. We reverse that portion of the sentence imposed and remand for resentencing.

FACTS

On September 12, 2018, respondent State of Minnesota charged appellant Jerome Darkow with second-degree assault with a dangerous weapon, in violation of Minnesota Statutes section 609.222, subdivision 1 (2016). The case proceeded to trial. Witness testimony and security footage[1] of the incident established the following facts.

On June 20, 2018, Darkow and C.J. were in a parking lot outside an apartment complex. According to one witness, Darkow told C.J. "I oughta punch you in the face" and then attempted to hit C.J., but did not make contact. C.J. testified that Darkow punched him in the back of the head. C.J. ran away and Darkow chased after him. C.J. testified that Darkow "was chasing me around telling me he was going to kill me." At some point during the chase, C.J. slipped on a patch of oil and scraped his arm. Darkow continued to chase C.J. on foot. Darkow eventually got into a minivan and drove after C.J. Darkow

[1] In his pro se supplemental brief, Darkow states that his conviction should be reversed because the security video was played at a faster-than-normal speed. Darkow also asserts that he did not have an opportunity to call witnesses and that we should reverse the lifetime registration requirement. He cites no authority and develops no argument supporting these statements. An assignment of error based on mere assertion and not supported by any argument or authorities is forfeited and will not be considered on appeal unless prejudicial error is obvious on mere inspection. *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015). Although we address the registration argument based on the similar argument in appellant's principal brief, we decline to address Darkow's remaining pro se arguments.

drove up onto and through the grassy area where C.J. was standing such that C.J. had to jump out of the way to avoid being hit. Darkow then drove away and C.J. called 911.

Darkow requested that the district court instruct the jury regarding the second-degree assault offense and regarding a fifth-degree assault as a possible lesser-included offense. The district court granted this request, instructing the jury on second-degree assault as follows:

> Assault in the second degree, dangerous weapon, defined. Under Minnesota law, whoever assaults another with a dangerous weapon is guilty of a crime. The elements of assault in the second degree are: First, [Darkow] assaulted [C.J.]. The term assault as used in this charge means an act done with intent to cause [C.J.] to fear immediate bodily harm or death or the attempt to inflict bodily harm upon [C.J.].

The district court also instructed the jury on fifth-degree assault, differentiating between assault-fear and assault-harm:

> Assault in the fifth degree—intent to cause fear or inflict bodily harm defined. Under Minnesota law, whoever 1) commits an act with the intent to cause fear in another of immediate bodily harm or death or 2) intentionally inflicts or attempts to inflict bodily harm upon another is guilty of a crime.
>
> The elements of assault are: First, the defendant assaulted [C.J.]. The term assault as used in this charge means an act done with the intent to cause [C.J.] to fear immediately bodily harm or death. Bodily harm means physical pain or injury, illness or any impairment of a person's physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death but only that the defendant acted with the intent that would fear that the defendant would so act.
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> . . . .

> Assault in the fifth degree—infliction of bodily harm elements. The elements of assault are: First, the defendant assaulted [C.J.]. The term assault as used in this charge means intentional infliction of bodily harm upon [C.J.]. Bodily harm means physical pain or injury, illness or any impairment of a person's physical condition. In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.

The jury verdict form did not differentiate between assault-harm and assault-fear. Darkow did not object to these instructions, and the jury found Darkow guilty of second-degree assault with a dangerous weapon.

The district court then ordered a presentence investigation (PSI) report. The PSI noted a 2001 conviction for "Crim Sex 4th Degree, Age" and dismissal of the charge as it related to force. The PSI also noted a felony conviction for failing to register as a predatory offender from 2006 and a gross misdemeanor conviction for failing to register from 1999 that was subsequently dismissed. The district court sentenced Darkow to a term of 52 months' imprisonment and ordered Darkow to register as a predatory offender for life.[2] Darkow appeals.

DECISION

I. Failure to Instruct the Jury Regarding Unanimity

Darkow argues that the district court committed plain error when it instructed the jury that it could convict Darkow of second-degree assault without unanimously agreeing

[2] While this appeal was pending, the district court amended the sentencing order, vacating the lifetime registration and ordering registration for ten years. This order is not part of the appellate record and Darkow correctly points out that the district court did not have authority to amend the order while this appeal was pending. Minn. R. Civ. App. P. 108.01, subd. 2.

whether Darkow intended to cause fear or attempted to inflict bodily harm. Because the district court did not contravene settled law, Darkow cannot demonstrate plain error.

"Jury verdicts in all criminal cases must be unanimous," and the jury must unanimously agree that each element of the offense has been proven. *State v. Pendleton*, 725 N.W.2d 717, 730-31 (Minn. 2007) (citing Minn. R. Crim. P. 26.01, subd. 1(5)). "[T]he jury must unanimously agree on which acts the defendant committed if each act itself constitutes an element of the crime." *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001) (citing *Richardson v. United States*, 526 U.S. 813, 824, 119 S. Ct. 1707, 1713 (1999)). But unanimity is not required with respect to alternate means of satisfying an element of the offense. *Pendleton*, 725 N.W.2d at 731; *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002).

We review unobjected-to jury instructions for plain error. *Ihle*, 640 N.W.2d at 918. "Under the plain-error doctrine, the appellant must show that there was (1) an error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Kelley*, 855 N.W.2d 269, 273-74 (Minn. 2014). If "any one of the requirements" of the plain-error test is not satisfied, we "need not address any of the others." *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017) (quotation omitted). "An error is plain if it is clear or obvious; this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct." *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014). Conversely, an error that violates or contradicts law that is unsettled at the time of appellate review is not plain. *Kelley*, 855 N.W.2d at 277, 280 n.9; *State v. Crowsbreast*, 629 N.W.2d 433, 438 (Minn.

2001) (explaining that continuing doubt regarding the controlling law cut against the defendant's plain-error argument because it confirmed that the error was not plain).

Assuming without deciding that the district court erred, we conclude that the alleged error is not plain. Minnesota law defines assault as "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2016). In *State v. Dalbec*, this court determined that these subparts present alternative means of committing assault. 789 N.W.2d 508, 512-13 (Minn. App. 2010), *review denied* (Minn. Dec. 22, 2010). Under *Dalbec*, unanimity is not required. *Id.* at 513. Two years after this court decided *Dalbec*, the supreme court considered the type of intent required to prove assault-fear and assault-harm offenses in *State v. Fleck*, 810 N.W.2d 303, 309 (Minn. 2012). The supreme court concluded that an assault-fear offense is a specific-intent crime and an assault-harm offense is a general-intent crime. *Fleck*, 810 N.W.2d at 309. Distinguishing these two subparts in that way calls into question the holding in *Dalbec*. *See State v. Patzold*, 917 N.W.2d 798, 811-12 (Minn. App. 2018), *review denied* (Minn. Nov. 27, 2018).

Neither this court nor the Minnesota Supreme Court, however, has determined whether *Dalbec* survives *Fleck* unaltered. *See, e.g.*, *State v. Machacek*, No. A13-0508, 2015 WL 4523505, at *6-7 (Minn. App. June 29, 2015) (concluding no plain error occurred and noting that this court has "cited *Dalbec* with approval in post-*Fleck* unpublished opinions rejecting jury-unanimity arguments in assault cases"), *review denied* (Minn. Sept. 15, 2015); *State v. Moallin*, No. A14-0329, 2014 WL 7237037, at *4-5 (Minn. App. Dec.

22, 2014) (citing *Dalbec* with approval and concluding that there was no plain error), *review granted* (Minn. Feb. 25, 2015) *and order granting review vacated* (Minn. Aug. 11, 2015); *State v. Evans*, No. A13-2256, 2014 WL 7011130, at *2-3 (Minn. App. Dec. 15, 2014) (applying *Dalbec* and concluding there was no plain error), *review granted* (Minn. Feb. 25, 2015) *and order granting review vacated* (Minn. Aug. 11, 2015). We need not determine whether any aspects of *Dalbec* survive *Fleck*. Instead, we review whether the district court committed a clear and obvious error in violation of settled law. *See Kelley*, 855 N.W.2d at 277, 280 n.9; *Crowsbreast*, 629 N.W.2d at 438. Given this court's discussion of and continued approval of *Dalbec*, Darkow cannot establish that the district court contravened settled law. Because the alleged error is not plain, we affirm the judgment.

II. Lifetime Predatory Offender Registration

Darkow argues that the district court erred when it ordered lifetime predatory offender registration. The state agrees and makes no argument that the district court properly imposed a registration requirement under any other statutory provision. Instead, the state requests reversal of the registration requirement. We agree with the parties that given the record before it, the district court erred in imposing a lifetime registration requirement.

Minnesota Statutes sections 243.166 and .167 (2016) govern predatory offender registration. Section 243.166, subdivision 1b, provides an enumerated list of circumstances requiring registration. In addition to those requirements, section 243.167 requires registration in certain situations. Minn. Stat. § 243.167, subd. 2 (2016). Whether a

defendant's conduct requires predatory offender registration is a question of law reviewed de novo. *Boutin v. LaFleur*, 591 N.W.2d 711, 714-15 (Minn. 1999); *see also State v. Lopez*, 778 N.W.2d 700, 705 (Minn. 2010) (reviewing de novo the application of section 243.166 to undisputed facts). Even when parties agree that the district court erred, appellate courts independently review the legal issue. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

In this case, Darkow's current offense does not require registration under section 243.166, subdivision 1b. In addition, although Darkow's current offense qualifies as a crime against the person, Darkow's previous convictions do not satisfy the requirements of section 243.167, subdivision 2(a)(2), and the record below does not establish the requirements of section 243.167, subdivision 2(b). We conclude that on this record, the district court erred when it imposed the lifetime registration requirement. We reverse the imposition of registration terms and remand to the district court to vacate the lifetime predatory registration requirement.

Affirmed in part, reversed in part, and remanded.