STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1354

State of Minnesota,
Respondent,

vs.

Elvis Joko Porte,
Appellant.

Filed August 7, 2023
Affirmed
Worke, Judge

Olmsted County District Court
File No. 55-CR-20-4733

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Assistant County Attorney, Rochester, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Segal, Chief Judge; and Worke, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his witness-tampering conviction, arguing that the district court's jury instructions violated his right to a unanimous verdict. We affirm.

FACTS

On July 29, 2020, K.B. went shopping at a mall. As he was exiting the mall, appellant Elvis Joko Porte confronted him in a truck. Porte got out of the truck, approached K.B., punched him several times, and took his backpack.

K.L. exited the mall just after and saw K.B. and Porte. K.B. asked K.L. to call the police. According to K.L.'s trial testimony, Porte was walking past her and K.L. was "a couple feet away" as K.B. asked her to call the police, at which point Porte stated, "[B]-tch, I'll f-ck you up if you call the" police. K.L. understood this as a threat directed at her. In a statement to police soon after the confrontation, K.L. similarly recounted twice that Porte said to her, "Call the cops b-tch I'll f-ck you up."

In a postarrest statement offered into evidence, Porte admitted punching K.B. and taking the backpack to collect a debt. But Porte denied threatening K.L., stating that K.L. must have been "interpreting what [Porte] said to" K.B.

The state charged Porte with offenses including first-degree witness tampering under Minn. Stat. § 609.498, subd. 1(d) (2018). In the statement of probable cause, the state alleged that Porte "yelled at [K.L.,] 'Call the cops, b-itch and I will f*** you up[.]'" The case went to trial. In its opening statement, the state identified K.L. as the alleged witness-tampering victim.

After the state rested, the district court raised the possibility of Porte arguing that he intended to tamper with a witness other than K.L. The district court wondered if it would result in "no unanimity" regarding one of the elements of the offense if Porte made this argument. But the district court opined otherwise, suggesting that the jury be instructed

that witness tampering requires an attempt to "prevent or dissuade a person"—that is, not any specific individual—"from providing information to law enforcement authorities concerning a crime."

Defense counsel disagreed, arguing that the court's suggested instruction would cause "unanimity issues" regarding intent. According to defense counsel, to be guilty of witness tampering, the defendant must "direct th[eir] intent at a specific person." Defense counsel argued that the state needed to "add an additional charge with a different victim" if it wanted to prosecute Porte for tampering with a witness other than K.L. The district court disagreed and submitted its suggested instruction to the jury.

In closing argument and rebuttal, the prosecutor emphasized three times to the jury that which witness Porte intended to tamper with did "not matter as long as [Porte] was truly attempting to prevent or dissuade a person [from] providing information to law enforcement."

The jury found Porte guilty of first-degree witness tampering and fifth-degree assault but acquitted him of aggravated and simple robbery. The district court sentenced Porte to 38 months in prison for the witness-tampering conviction and 232 days in jail for the fifth-degree assault conviction. This appeal followed.

DECISION

Porte argues that the district court violated his right to a unanimous verdict by instructing the jurors such that they could find him guilty of witness tampering but not agree on who was the intended victim of the crime. As a preliminary matter, the state suggested in its brief that Porte failed to preserve his claim for appeal by failing to formally

object when the district court submitted the witness-tampering instruction to the jury. *See State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016) (explaining that unobjected-to jury instructions may be reviewed for plain error). We also note that Porte did not specifically request an instruction requiring unanimity as to the intended victim of witness tampering.

But "[i]f a defendant's trial objection [to a jury instruction] embodies the arguments raised on appeal, the claim has been properly preserved, even if the defendant did not clearly articulate his objection to the instruction at trial." *State v. Porter*, 674 N.W.2d 424, 428 (Minn. App. 2004). Based on the discussion between the district court and defense counsel after the state rested, we infer that Porte's unanimity objection to the jury instruction at issue encompasses "the substance of [his] argument on appeal." *See id.* And during appellate oral argument, the state conceded that we may review the instruction under our typical standard for objected-to jury instructions. We accordingly review the instruction for an abuse of discretion. *State v. Stempf*, 627 N.W.2d 352, 354 (Minn. App. 2001) (reviewing whether jury instruction violated defendant's right to unanimous verdict).

Turning to Porte's claim, we start with the principle that "[j]ury verdicts must be unanimous in criminal cases." *State v. Lagred*, 923 N.W.2d 345, 348 (Minn. App. 2019) (citing Minn. R. Crim. P. 26.01, subd. 1(5)); *see also Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (holding that Sixth Amendment right to jury trial as incorporated against states requires jury unanimity for serious offenses). "To achieve that end, a jury must 'unanimously find [ ] that the [state] has proved each element of the offense." *State v. Pendleton*, 725 N.W.2d 717, 730-31 (Minn. 2007) (first alteration in original) (quoting *State v. Ilhe*, 640 N.W.2d 910, 918 (Minn. 2002)). We have held this to mean that "the

jury must unanimously agree on which acts the defendant committed if each act itself constitutes an element of the crime." *Stempf*, 627 N.W.2d at 354-55 ("Whe[n] jury instructions allow for possible *significant* disagreement among jurors as to what acts the defendant committed, the instructions violate the defendant's right to a unanimous verdict." (emphasis added)). Applying that rule, we held unconstitutional an instruction permitting each juror to find guilt on one count of controlled-substance possession from one of two "separate and distinct culpable acts." *Id.* at 359. We reasoned that these acts lacked "unity of time and place" and that each act "could support a conviction" independently. *Id.* at 358-59.

"But the jury does not have to unanimously agree on the facts underlying an element of a crime in all cases." *Pendleton*, 725 N.W.2d at 731. Differing juror resolutions of "preliminary factual issues" may permissibly establish "'alternative means of committing a single offense.'" *Id.* (quoting *Schad v. Arizona*, 501 U.S. 624, 632 (1991) (plurality opinion)); *see Ilhe*, 640 N.W.2d at 919 (holding that finding guilt of obstructing legal process based on alternative means did not violate defendant's right to unanimous verdict in part because separate acts at issue were "part of a single behavioral incident"); *State v. Epps*, 949 N.W.2d 474, 481-82 (Minn. App. 2020) (explaining that the "means-versus-elements analysis" requires us to examine "the plain language" of the charging statute), *aff'd*, 964 N.W.2d 419 (Minn. 2021). Alternative means include "different . . . states of mind . . . offered to prove an element of a crime." *State v. Dalbec*, 789 N.W.2d 508, 511 (Minn. App. 2010), *rev. denied* (Minn. Dec. 22, 2010). To comport with due process, the alternative means must "show 'equivalent blameworthiness or

culpability,'" *id.* at 511 (quoting *Pendleton*, 725 N.W.2d at 731), and must not be "distinct, dissimilar, or inherently separate." *Lagred*, 923 N.W.2d at 354 (explaining that ultimate due-process question is "whether the alternative means are consistent with fundamental fairness").

Here, the district court instructed the jury on witness tampering under Minn. Stat. § 609.498, subd. 1(d). Under the relevant language, whoever "intentionally . . . attempts to prevent or dissuade, by . . . threats of injury to *any person* . . . , *a person* from providing information to law enforcement authorities concerning a crime" is guilty of witness tampering. Minn. Stat. § 609.498, subd. 1(d) (emphasis added).

Porte argues that the district court violated his right to a unanimous verdict by instructing the jurors such that they could find him guilty of the sole witness-tampering charge but internally disagree about the "factual scenario[]" that the state proved—with which "person" Porte intended to tamper. Porte emphasizes that witness tampering is a crime of specific intent—"an intent to cause a particular result." *State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012) (quotation omitted); *see State v. Zupetz*, 322 N.W.2d 730, 734 (Minn. 1982) ("[A]n attempt to commit any crime requires a specific intent to commit that particular offense." (quotation omitted)); *State v. Collins*, 580 N.W.2d 36, 44 (Minn. App. 1998) ("[T]he word 'intentionally' makes witness tampering a specific[-]intent offense." (quotation omitted)), *rev. denied* (Minn. July 16, 1998). Porte appears to suggest that finding guilt based on alternatives of which witness he specifically intended to tamper with is tantamount to proving an element of the offense based on separate and distinct culpable acts.

We rejected a similar argument in *State v. Begbie*, 415 N.W.2d 103, 105-06 (Minn. App. 1987), *rev. denied* (Minn. Jan. 20, 1988). In *Begbie*, the defendant told victim 1 in a recorded phone call that he had hired someone to kill victim 1 and her husband (victim 2) if the victims did not assume the defendant's debt. 415 N.W.2d at 104. Victim 2 later listened to the recording. *Id.* The state charged the defendant with terroristic threats under Minn. Stat. § 609.713, subd. 1. *Id.* The applicable provision made it a crime to "threaten[] to commit any crime of violence *with purpose* to terrorize *another*." Minn. Stat. § 609.713, subd. 1 (1986) (emphasis added); *Begbie*, 415 N.W.2d at 105.

On appeal of his terroristic-threats conviction, the defendant argued that the district court's jury instructions "violated his right to a[] unanimous verdict because they did not require the jurors to unanimously agree who [the defendant] intended to threaten." *Begbie*, 415 N.W.2d at 105. This court affirmed, concluding that who the defendant intended to threaten was a question of alternative means. *Id.* at 106. We reasoned that

> the jury could have reasonably found [that the defendant] had intended to terrorize both [victim 2] and [victim 1]. There was sufficient evidence for the jury to find [the defendant] guilty of terroristic threats to both victims. It is sufficient that all jurors unanimously agreed on their ultimate conclusion that [the defendant] was guilty of the crime charged, even though they may not have agreed upon exactly which victim [the defendant] had intended to terrorize.

Id.

Similar reasoning applies here. Analogous to the defendant in *Begbie*, Porte argues that the jury needed to unanimously agree on who was the intended victim. But like the terroristic-threats provision in *Begbie*, the witness-tampering provision here "does not

make the identity of the person who is [tampered with] an element of the crime." *Stempf*, 627 N.W.2d at 356 (explaining *Begbie*); *see also State v. Winford*, No. A13-1719, 2014 WL 4288881, at *3 (Minn. App. 2014) (concluding that instruction permitting jury to find defendant guilty of burglary based on assaulting one of three alternative people in the building did not violate defendant's right to unanimous verdict because first-degree burglary statute "merely require[d] the state to prove that appellant assaulted '*a person*' within the home" (emphasis added)), *rev. denied* (Minn. Nov. 25, 2014).[1] And "the jury could have reasonably found [that Porte] had intended to" tamper with K.L., K.B., or both. *Begbie*, 415 N.W.2d at 106. It is therefore "sufficient that all jurors unanimously agreed on their ultimate conclusion that [Porte] was guilty of" witness tampering even if they disagreed about the intended victim. *Id.*

The specific-intent requirement for witness tampering does not change this conclusion. The "with purpose" clause in *Begbie* plainly created such a requirement too. *Id.* at 105 (noting that "'purpose' in the context of this statute means 'aim, objective, or intention.'" (quoting *State v. Schweppe*, 237 N.W.2d 609, 614 (Minn. 1975)); *see also State v. Wilson*, 830 N.W.2d 849, 853 (Minn. 2013) (holding that phrase "for the purpose of" created specific-intent crime because "'purpose' is synonymous with 'intention' and is defined as the 'result or an effect that is intended or desired.'" (quoting *American Heritage Dictionary* 1471 (3d ed. 1996)). *Begbie*'s reasoning holds up here.

[1] Nonprecedential opinions are not binding but may be persuasive, as *Winford* is here. Minn. R. Civ. App. P. 136.01, subd. 1(c).

Porte's reliance on our use of the single-behavioral-incident analysis from the sentencing context when determining whether lack of unanimity as to means violates due process is misplaced. *See State v. Infante*, 796 N.W.2d 349, 356-57 (Minn. App. 2011). Porte points out that "acts committed against separate victims" do not constitute a single behavioral incident that would otherwise allow a defendant to avoid multiple sentences for multiple offenses arising from those acts. *Munt v. State*, 920 N.W.2d 410, 417 (Minn. 2018). But Porte ignores that this rule is intended to recognize that "whe[n] multiple victims are involved, a defendant is equally culpable to each victim." *State v. Edwards*, 774 N.W.2d 596, 605 (Minn. 2009). Here, Porte's argument would "permit the guilty defendant to escape accountability under the law because jurors could not unanimously choose beyond a reasonable doubt which of several alternate ways the defendant actually participated, even though all agree that he was, in fact, a participant." *Begbie*, 415 N.W.2d at 106 (quotation omitted).

Accordingly, this court has not strictly applied the single-behavioral-incident analysis in the alternative-means context. For example, we held due process satisfied in the alternative-means context when "various acts occurred over a period of [24 hours] but . . . all occurred at the same place and involved a single victim." *Dalbec*, 789 N.W.2d at 512. Yet "acts that lack a unity of time" typically "do not constitute a single behavioral incident." *Munt*, 920 N.W.2d at 416-17.

We likewise decline to rigidly apply the single-behavioral-incident analysis here as Porte suggests. At issue is a single act of witness tampering—not separate and distinct culpable acts—unified by time and place with "undisputed facts" on appeal. *Ilhe*,

640 N.W.2d at 919 (concluding that jury instruction did not risk unfairness to defendant in part because "the facts were undisputed"). And any factual separation between finding guilt from alternative specific intents during this single act was even less than that in *Begbie*. There, victim 2 received the threat after the fact, whereas K.L. and K.B. immediately heard Porte's threat. We therefore discern no risk of "serious unfairness" to Porte from any factual separation between alternative states of mind here. *See id.* at 918 (quoting *Richardson v. United States*, 526 U.S. 813, 820 (1999)).

Porte does not contend that these alternative means are somehow different in terms of blameworthiness or culpability. Nor does he contend that they are inherently distinct, dissimilar, or separate. We observe no relevant difference between intending to threaten one person or another from contacting law enforcement concerning a crime, particularly when a single act of witness tampering unified by time and place is at issue. This is not a case where the jury could choose from alternative statutory mental states that are qualitatively different, which nonetheless may comport with fundamental fairness. *See Pendleton*, 725 N.W.2d at 732 (holding due process satisfied when instruction permitted jury to find defendant guilty of kidnapping but internally disagree about whether he committed offense for purpose of "committing great bodily harm, committing murder, or facilitating flight after third-degree assault"). As such, we conclude that the district court's instruction permitting the jury to internally disagree about with whom Porte specifically intended to tamper did not violate Porte's right to a unanimous verdict.

Affirmed.