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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1955**

State of Minnesota,
Respondent,

vs.

Travis Clay Andersen,
Appellant.

**Filed November 25, 2013
Reversed and remanded
Rodenberg, Judge**

Carver County District Court
File No. 10-CR-11-445

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

Mark Metz, Carver County Attorney, Dawn M. O'Rourke, Assistant County Attorney, Chaska, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief State Public Defender, Lydia M. Villalva Lijò, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Worke, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

On appeal from his felony conviction of violating an order for protection (OFP), appellant Travis Clay Andersen argues that the district court committed plain error by

failing to instruct the jury that an element of the charged offense is that he knowingly violated the OFP. Because the district court improperly instructed the jury on the elements of the felony OFP offense, we reverse and remand for a new trial.

FACTS

I.H. ended her four-year relationship with appellant around December 2010. On January 4, 2011, I.H. requested and obtained an OFP in Hennepin County prohibiting appellant from contacting her. That same day, appellant was personally served with the OFP at his home by Carver County Sheriff's Deputy Rick Raschke. Deputy Raschke testified that he specifically told appellant at the time of service that the OFP prohibited contact with I.H. directly, by e-mail, "third parties or anything of that nature."

I.H. testified that, on April 3, 2011, and with the OFP still in effect, she was at the home of E.B. I.H. and E.B. returned from a trip to Target in the early evening. As they pulled into the driveway, appellant approached their vehicle from the direction of a neighbor's house. Appellant said he wanted to speak with I.H. and I.H. refused. E.B. told appellant that he needed to leave and then called 911. Appellant walked across the street and sat down. He approached I.H. and E.B. again before getting in his car and leaving the area. I.H. and E.B. both testified that appellant drove his car in reverse until he was out of the area.

Carver County Deputies Matthew Beck and Jamie Horvath responded to E.B.'s 911 call. Deputy Beck spoke to I.H. and E.B. while Deputy Horvath drove around the area looking for appellant. Later, Deputy Beck called appellant and asked where he was. Appellant responded that he was "not in the area." Prior to this statement, Deputy Beck

had not provided information about the reason for the call. Despite additional searching, officers were unable to locate appellant on that day.

Appellant was charged with a felony violation of an OFP under Minn. Stat. § 518B.01, subd. 14(d)(1) (2010). The district court instructed the jury regarding the elements of the offense:

The elements of this offense are first, that there was an existing court order for protection. Second element is that the defendant violated a term or condition of that order. The third element that the State must prove is that the defendant knew of the existence of the order. The fourth element, the defendant's act took place on or about April 3rd, 2011 in Carver County.

The jury convicted appellant of felony violation of an OFP. This appeal followed.

D E C I S I O N

Although appellant did not object at trial to the jury instructions given by the district court, he argues that the district court plainly erred by not instructing the jury that an element of the charged offense is that appellant knowingly violated the OFP. When a defendant fails to object to a jury instruction at trial, we review the instruction under the plain-error standard. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). To establish a plain error, there must be 1) an error, 2) that is plain, and 3) that affects the substantial rights of a party. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.” *Id.*

A felony violation of an OFP requires proof that the defendant knowingly violated the OFP within ten years of a previous qualified domestic-violence-related offense. Minn. Stat. § 518B.01, subd. 14(d)(1). To satisfy the intent element, the state must prove both that the defendant knew of the existence of the OFP and that he knew his conduct violated that order. *See State v. Gunderson*, 812 N.W.2d 156, 160-61 (Minn. App. 2012) (discussing these requirements in the context of an HRO violation). The district court here instructed the jury only that appellant must know of the OFP. “[F]ailure to properly instruct the jury on all elements of the offense charged is plain error.” *Vance*, 734 N.W.2d at 658. Although the parties agree that the district court’s omission of the knowingly violated element was plain error, the parties dispute whether the plain error affected appellant’s substantial rights.

In *State v. Watkins*, the district court instructed the jury in a similar manner regarding a felony violation of a domestic abuse no-contact order (DANCO). 820 N.W.2d 264, 266 (Minn. App. 2012), *review granted* (Minn. Nov. 20, 2012). Like the OFP statute, to convict a defendant of a felony violation of a DANCO, the DANCO statute requires the state to prove that the defendant knowingly violated the DANCO. *Id.* at 267. We concluded in *Watkins* that, “as a matter of law, omission of an element of a charged offense from the jury instructions affects a party’s substantial rights.” *Id.* at 269. Moreover, and as discussed below, whether appellant was subjectively aware that his conduct violated the OFP was reasonably in dispute. Because the district court here omitted an element of the charged offense and that element was reasonably in dispute, appellant’s substantial rights were affected. *Gunderson*, 812 N.W.2d at 163.

Having concluded that the district court's jury instructions were plainly erroneous and that the instructions affected appellant's substantial rights, we next consider whether the fairness and integrity of the judicial proceedings require a new trial. *Id.* In *Gunderson*, the district court similarly failed to instruct the jury regarding the knowingly violated element of a felony violation of a harassment restraining order (HRO). 812 N.W.2d at 159-60. We concluded that "[t]he fairness and integrity of the judicial proceedings are called into question by the erroneous instructions and the verdict based on those instructions when the jury may not have considered a disputed element of the crime." *Id.* at 163 (quotation omitted).

Appellant has consistently maintained that service of the OFP was insufficient, pointing out inconsistencies between the effective date of the OFP and the file stamp thereon, among other claimed deficiencies. At trial, the state provided testimony from which the jury could conclude that appellant was properly served. Furthermore, Deputy Raschke testified that he told appellant at the time of service that appellant was not to contact I.H. directly, by e-mail, or through a third party. Therefore, it seems likely that appellant actually knew he was violating the OFP on April 3, 2011. However, the state must prove that element to the satisfaction of the jury and appellant at least placed that issue in dispute at trial. Therefore, the plainly erroneous jury instructions here improperly relieved the state of the burden to prove that disputed element, calling into question the fairness and integrity of the proceeding. *Watkins*, 820 N.W.2d at 269; *Gunderson*, 812 N.W.2d at 163.

In context, and in light of appellant's contention that service of the OFP was insufficient, we conclude that the district court's plainly erroneous jury instruction affected appellant's substantial rights and compromised the fairness and integrity of the judicial proceedings. Therefore, we reverse appellant's conviction for felony violation of an OFP and remand to the district court for further proceedings. Because we reverse appellant's conviction and remand for a new trial, we need not address the additional arguments in appellant's pro se supplemental brief.

Reversed and remanded.