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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0743**

State of Minnesota,
Respondent,

vs.

Ambakisye Adam Holmes,
Appellant.

**Filed June 3, 2013
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge**

Ramsey County District Court
File No. 62CR116362

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

John J. Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public
Defender, Raina Urton, Certified Student Attorney, St. Paul, Minnesota (for appellant),

Considered and decided by Kirk, Presiding Judge; Johnson, Chief Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges his convictions of four counts of felony violation of a
criminal domestic-abuse-no-contact order (DANCO) and one count of misdemeanor

witness tampering, arguing that there is insufficient evidence to support two of the DANCO-violation convictions and cumulative errors require reversal of the remaining convictions. Appellant also argues, for the first time on appeal, that the DANCO statute is unconstitutional. He also challenges imposition of separate sentences for three of the convictions, arguing that those convictions all arose out of the same behavioral incident. Appellant raised several issues in a pro se supplemental brief as well.

Because the evidence is insufficient to support the convictions of DANCO-violations charged in counts one and two, we reverse those convictions. Because the district court committed plain and prejudicial error by allowing the jury, during deliberations, to review the primary evidence of witness tampering charged in count five, we reverse that conviction. Because (1) the district court's plain errors in jury instructions did not affect the convictions of DANCO-violations charged in counts three and four); (2) any constitutional challenge to those convictions was waived; and (3) issues raised in appellant's pro se supplemental brief do not entitle him to relief from convictions on those counts, we affirm appellant's convictions of counts three and four. These rulings render appellant's sentencing challenge moot, but we remand for sentencing consistent with this opinion.

FACTS

On July 23, 2011, appellant Ambakisye Adam Holmes was arrested and charged with felony domestic abuse against C.A.T. From the jail, Holmes made several telephone calls. All telephone calls made by inmates from the jail are monitored and recorded, and

each inmate is assigned a personal identification number that must be entered to initiate calls and can be used to identify which inmate initiates a call.

On the day of his arrest, Holmes telephoned C.A.T. and discussed what she needed to tell the police to get the charges against him dropped. Holmes told C.A.T. that “Serita” would tell her what to do because she had “been through it before.”

On July 27, 2011, the district court issued a DANCO, ordering that Holmes have no contact, directly, indirectly, or through others, with C.A.T. The same day, after the DANCO was issued, Holmes made two telephone calls: one to his mother and one to a person identified as “Serita.” In these calls, Holmes asked both his mother and Serita to relay information to C.A.T. about what she should do and say. In the call to Serita, Holmes told her that he needed her to place a three-way call. On July 28, 2011, and July 29, 2011, Holmes called Serita, and, on both days, Serita made a three-way call so that Holmes could talk directly to C.A.T.

Holmes was charged with four felony DANCO violations, one for each telephone call made after the DANCO was issued on July 27, 2011. The parties do not dispute that counts one and two of the complaint relate to the calls appellant made on July 27, asking his mother and Serita to contact C.A.T., that count three relates to the July 28 three-way call with Serita and C.A.T., and that count four relates to the July 29 three-way call with Serita and C.A.T. In count five of the complaint, Holmes was charged with misdemeanor witness tampering based on the July 25, pre-DANCO call to C.A.T. and the July 27 calls to his mother and Serita.

The only witness at the jury trial on these charges was Officer Jeffrey Schwab, who testified that, in connection with his investigation of the charges, he had reviewed the recordings of the five calls made by Holmes. Officer Schwab testified that he had personally spoken with C.A.T. about the domestic-abuse incident, and he recognized her voice on the recordings of the calls made on July 25, July 28, and July 29. Officer Schwab testified that the July 28 and July 29 calls to Serita resulted in three-way conferencing with C.A.T. Over Holmes's objection, the recordings of the July 25 and July 27 calls were played to the jury, and transcripts of each call were provided to the jury so that they could follow the conversations as the recordings were played. The recordings and the transcripts of these three calls were not admitted into evidence, but the transcripts of the calls became court exhibits. No evidence of the content of the July 28 and 29 calls was admitted.

At the conclusion of the state's case, Holmes moved for acquittal, arguing that because the state failed to introduce the recordings that were played for the jury into evidence as exhibits, there was insufficient evidence in the record to support the charges. The district court denied the motion.

During deliberations, the jury asked to see the transcripts of the July 27 calls. Over Holmes's objection, the district court replayed the audio recordings of those calls in open court and allowed the jury to follow along with the transcripts while the recordings were played. The jury found Holmes guilty of all five charges. He was sentenced to concurrent sentences of 24, 27, and 30 months for the first three DANCO violations, a consecutive year-and-a-day sentence for the fourth DANCO violation, and 90 days for

the witness tampering conviction, for which he was given credit for time served. This appeal followed.

D E C I S I O N

I. Challenge to sufficiency of evidence to support convictions for the calls made on July 27, 2011

A. Standard of review

When considering a claim of insufficient evidence, this court’s review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

B. Sufficiency of the evidence

“A person is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both, if the person knowingly violates [a DANCO].” Minn. Stat. § 629.75, subd. 2(d) (2010). The DANCO prohibited contact with C.A.T. through third parties. Holmes concedes that the state proved that he contacted third parties and asked them to contact C.A.T. But Holmes

argues that, to prove that he violated the DANCO, the state had to show beyond a reasonable doubt that his mother and Serita actually contacted C.A.T. as a result of Holmes's request. Because the state failed to present any evidence that his mother or Serita actually contacted C.A.T. as a result of his July 27 telephone calls, Holmes argues that the evidence is insufficient to support his convictions of counts one and two. At oral argument on appeal, the state conceded that to prove a DANCO violation it was obligated to prove beyond a reasonable doubt that contact with C.A.T. actually occurred and that the evidence presented at trial was insufficient to meet this burden. We agree.

In its brief on appeal, the state had argued that a DANCO violation was complete when Holmes solicited third-party contact with C.A.T. and, alternatively, that circumstantial evidence was sufficient to prove that actual contact occurred. *See State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (stating that in order for a fact to be proven by circumstantial evidence, we consider whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt). Based on the state's concession at oral argument that the evidence was insufficient to support convictions of counts one and two, we consider these arguments withdrawn. Our painstaking review of the record demonstrates that the circumstances proved are that Holmes asked his mother and Serita to contact C.A.T. But there is no evidence from which the only rational inference that can be drawn is that either Holmes's mother or Serita actually contacted C.A.T. as a result of his July 27 requests. The state has properly conceded that the evidence was insufficient to support Holmes's convictions of counts one and two, and those convictions are reversed.

II. Playing unadmitted recordings of the telephone calls to the jury during trial and during jury deliberations

Holmes argues that because the audio recordings of the telephone calls made on July 25 and 27 were not admitted as exhibits, the district court erred by allowing the jurors to hear the recordings during the trial. “Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

If the district court has erred by admitting evidence, the reviewing court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id.*

At trial, Holmes objected to the recordings being played to the jury on the basis of lack of foundation and violation of the Confrontation Clause. The objections were overruled and the state was allowed to play the recordings of the July 25 and July 27 telephone calls. A transcript of each call was marked as a court exhibit and was available to the jury during the playing of the recordings. But the transcripts were admitted only as court exhibits. At the close of the state’s case, Holmes moved for acquittal, arguing that the only exhibit in the record is the DANCO and that the state should not “get the benefit of the phone calls being considered as evidence, as they were not properly introduced.”

The state argued that the issue of the recordings being exhibits is separate from the issue of whether there is sufficient evidence to allow the jury to deliberate. The state argued that what the jurors heard in the recordings is evidence despite its failure to introduce the recordings into the record. The district court agreed with the state and denied Holmes's motion to dismiss.

On appeal, Holmes does not argue that the recordings were not admissible due to lack of foundation or on any other ground. Holmes argues that the actual admission of evidence is a fundamental rule of courtroom procedure and the law of evidence. Having exhibits identified and marked and, after laying a foundation for admission, having the exhibits admitted are "steps [that] ensure that an adequate appellate record is made and give the opposing party a fair opportunity to make appropriate and timely evidentiary objections to the offered exhibit[s]." Thomas A. Mauet & Warren D. Wolfson, *Trial Evidence* 311 (4th ed. 2009).

The state argues that its failure to admit the recordings only put it at risk of having an inadequate record for review and does not affect the evidentiary status of the content of the recordings heard by the jurors. The state argues that the district court did not abuse its discretion by failing to require that the recordings be admitted before they were played to the jury, and because Holmes does not challenge the admissibility of the content of the recordings, any abuse of discretion in failing to admit the recordings was harmless error.

But we need not decide whether playing the recordings to the jury was error because we conclude that the district court committed plain and prejudicial error by playing the two unadmitted recordings of the July 27 calls to the jury during

deliberations. *See State v. Graham*, 371 N.W.2d 204, 209 (Minn. 1985) (stating, with regard to a videotape, “[n]ot being in evidence, the jury cannot use it in its deliberations”).

The recordings of the July 27 calls were used by the state not only to support the DANCO violations charged in counts one and two, but also to support the witness-tampering charge in count five. Those recordings and the recording of the July 25 pre-DANCO call are the only evidence offered to support the charge of witness tampering. We conclude that allowing the jury to consider unadmitted evidence of this charge during deliberations was prejudicial and that there is a reasonable possibility that the verdict on count five might have been different had the jury not been allowed to rehear the recordings of the July 27 calls. Although some inference of witness tampering could be made from Holmes’s July 25 call to C.A.T. because Holmes instructed C.A.T. on what to tell the police, Holmes also tells C.A.T. in that call to “just tell ‘em the truth . . . just tell them the truth about what happened and stuff.” The primary evidence for the charge of witness tampering was the content of the July 27 calls. Holmes has established plain, prejudicial error as a result of the recordings being played during deliberations. We therefore reverse his conviction of witness tampering.

Holmes also argues, for the first time on appeal, that prejudicial error occurred when the district court allowed the jury to hear the July 25 recording because references in that conversation to his prior conviction of third-degree assault denied him the benefit

of a stipulation that the prior conviction would not be mentioned at trial.¹ Because this objection was not made at trial, we would review only for plain error. See Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). But Holmes has failed to brief the plain-error issue, and it is waived on appeal. See *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997).

III. Omission of “knowingly” from jury instructions

Holmes was charged with felony violations of the DANCO, which require proof beyond a reasonable doubt that he *knowingly* violated the DANCO. Minn. Stat. § 629.75, subd. 2 (2010); *State v. Watkins*, 820 N.W.2d 264, 268 (Minn. App. 2012) (holding that a district court’s failure to follow the clear statutory language in instructing the jury on a felony DANCO violation was plain error), *review granted* (Minn. Nov. 20, 2012). Holmes asserts, and the state concedes, that the district court committed plain error by omitting “knowingly” from the jury instructions on the DANCO violations.

In *Watkins*, after concluding that omission of “knowingly” from the jury instructions constituted plain error, we held that the error “prevented the jury from weighing the competing evidence and considering a disputed element of the crime,” and concluded that reversal and remand for a new trial was necessary to ensure the fairness and integrity of the judicial proceedings. 820 N.W.2d at 269; *see also Griller*, 583 N.W.2d at 742 (“[U]nder Minn. R. Crim. P. 31.02, review of unobjected-to errors is discretionary. Therefore, before granting a new trial on the basis of an unobjected-to

¹ The record reflects that Holmes admitted the existence of the prior conviction but the record does not contain a specific stipulation that the conviction would not be mentioned at trial.

error, we will consider whether a new trial is necessary to ensure fairness and the integrity of judicial proceedings.”). Holmes argues that reversal and remand for a new trial is required in his case.

The state argues that, because the supreme court has accepted review of *Watkins*, its precedential value is minimal. *See Fabio v. Bellomo*, 489 N.W.2d 241, 245 n.1 (Minn. App. 1992) (stating that because the supreme court had granted further review of a decision of this court, the decision had only “minimal precedential value”), *aff’d* (Minn. Aug. 20, 1993). The state argues that *Watkins*, in concluding that the omission of “knowingly” from the jury instructions met the third prong of the plain-error analysis (the error must affect substantial rights), overlooked the inconsistency in caselaw regarding the application of the harmless-error analysis to omission of an element of the offense from a jury instruction. But the *Watkins* plain-error analysis is not determinative of whether a new trial is necessary to ensure fairness and the integrity of judicial proceedings.

Watkins states 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.*” 820 N.W.2d at 269 (emphasis added) (quotation omitted). In *Watkins*, the defendant asserted that he did not know that his conduct violated the no-contact order at issue. *Id.* at 266. In contrast, the record in this case demonstrates that Holmes knew about the DANCO and knew that contacting C.A.T. directly or indirectly would violate the DANCO. Holmes has never claimed that he unknowingly violated the DANCO: he

successfully claimed that the state failed to prove that his request for third-party contact resulted in actual contact, and he has challenged evidentiary rulings and jury instructions. As the supreme court stated in *Griller*, “the integrity of judicial proceedings would be thwarted by granting [the defendant] a new trial” because “[g]ranted [] a new trial under these circumstances would be an exercise in futility and a waste of judicial resources.” 583 N.W.2d at 742.

In this case, the evidence is conclusive that on July 28 and July 29, Holmes had direct contact with C.A.T. when he knew that the DANCO prohibited direct contact. The jury’s verdict is not attributable to the omission of “knowingly” from the jury instructions, therefore the omission error did not seriously affect the fairness and integrity of judicial proceedings. *See Griller*, 583 N.W.2d at 740.

IV. Failure to instruct the jury that it must consider each charge separately

Holmes asserts that the district court committed error that was plain by failing to instruct the jury to consider each charge separately when determining guilt. He argues that, because the error may have resulted in jury confusion, the error affected his substantial rights, entitling him to a new trial.

“When the defendant’s conduct constitutes more than one offense, each offense may be charged in the same indictment or complaint in a separate count.” Minn. R. Crim. P. 17.03, subd. 1. Multiple offenses may be tried together as long as (1) the offenses are related and (2) trying the offenses together is not prejudicial. *State v. Profit*, 591 N.W.2d 451, 458-59 (Minn. 1999); see Minn. R. Crim. P. 17.03, subd. 3(1) (establishing the test for severance of offenses). “[F]or trial of all offenses joined under

Minn. R. Crim. P. 17.03, subd. 1, the jury must be instructed to consider each of the charges separately.” *State v. Kates*, 610 N.W.2d 629, 631 (Minn. 2000). As the state concedes, the district court committed error when it failed to give what has come to be called the “*Kates* instruction”: that each count be considered separately. The state also concedes that the error was plain, but argues that it did not affect Holmes’s substantial rights. *See State v. Kendell*, 723 N.W.2d 597, 609 n.10 (Minn. 2006). We agree.

Holmes argues that this omission affected his substantial rights because failing to instruct the jury that each count was to be considered separately “encouraged the jury to see the charges not as four counts but [as] one.” He points out that the district court did not separately state the elements for each DANCO-violation charge and that, apart from identifying each charge by the count number, the separate verdict forms for each charge are identical.²

The state argues that the error did not affect Holmes’s substantial rights because the district court judge informed the jury that they would get a separate form for each charged DANCO violation. The state argues the provision of separate forms for each count charged made it clear to the jury that each count should be considered independently. We agree. The instructions given indicated that each count was to be considered individually. The need to consider each charge independently was reinforced

² The jury was provided with a “guilty” and “not guilty” form for each of the four counts of violation of the DANCO. The forms for each outcome are identical except for the number of the count. For example: “We, The Jury, find the Defendant [] of Count [] charging Violation of a Domestic Abuse No Contact Order.” Each form contains a signature line for the presiding juror and a date line for the date and time the form is signed.

in both the state's and Holmes's closing arguments. The state highlighted each phone call as supporting a specific DANCO violation and discussed the witness tampering charge separately. Holmes also highlighted the separate charges and the need to consider them separately:

You're going to get the jury instructions. *There are five crimes alleged.* What you have to remember here is *the state has offered five crimes.* To put it in layman's terms, *that's five puzzles that they said they have offered pieces that they provided every piece that makes those puzzles complete.* And that is the entire problem with what's going on here.

(Emphasis added).

We recognize that this case differs in some respects from cases that have held that failure to give a *Kates* instruction did not affect a defendant's substantial rights and did not require a new trial. For example, in *Kendell*, the supreme court concluded that "the absence of the [*Kates*] instruction did not have a significant impact on the verdict because the court instructed the jury separately on the elements of each of the 12 charged offenses" and the fact that the verdicts all had different signing times on them indicated that the jury considered them separately. 723 N.W.2d at 609 n.10. Here, the district court administered only one instruction for all of the DANCO violations and the verdict forms indicated that they were all signed at the same time. But the district court emphasized that there were separate verdict forms for each count and emphasized that the jury had to sign a verdict for each count. Combined with the parties' clear arguments that each charge was separate, we conclude that omission of the *Kates* instruction, though error, did not have a substantial effect on the verdicts and does not require a new trial.

V. Sentencing

Reversal of Holmes's convictions of counts one, two, and five render his arguments about sentencing moot, but the case is remanded for resentencing solely on counts three and four.

VI. Constitutional challenge to DANCO

Holmes argues, for the first time on appeal, that the DANCO statute is unconstitutional because it violates substantive and procedural due process and is void for vagueness. Because Holmes did not challenge the constitutionality of the DANCO statute at the district court, this argument is waived on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

VII. Issues raised in Holmes's pro se supplemental brief

A. Sufficiency of the evidence on counts three and four³

Holmes challenges the sufficiency of the evidence to support his convictions of DANCO violations based on the July 28 and July 29 calls. As stated above, this court's review for sufficiency of the evidence is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *Webb*, 440 N.W.2d at 430. Holmes argues that the state's failure to play the tapes from the July 28 and 29 three-way phone calls results in insufficient evidence to convict him on counts three and four.

³ Holmes also challenged the sufficiency of the evidence to support conviction of witness tampering. Because we have reversed that conviction, we do not address that claim.

When reviewing for sufficient evidence, however, this court must assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *Moore*, 438 N.W.2d at 108. Specifically in relation to counts three and four, Officer Schwab testified that he listened to two phone calls from July 28 and 29, 2011, and that both of these calls were three-way calls with Holmes, Serita, and C.A.T. The evidence also shows that a DANCO was in effect at the time Holmes made these phone calls. The evidence is sufficient to support the jury’s verdicts on counts three and four.

B. Allegation of judicial bias

Holmes asserts that the district court judge demonstrated bias and a lack of impartiality towards him when the district court denied his request for new counsel and “violated” his right to a speedy trial. Holmes did not raise these issues in the district court, therefore these arguments are waived on appeal, absent, as to the assertion of bias, a showing of actual bias in the proceedings. *See State v. Plantin*, 682 N.W.2d 653, 663 (Minn. App. 2004) (“After a defendant submits to trial before a judge without objecting to the judge on the basis of bias, we will reverse the defendant's conviction only if the defendant can show actual bias in the proceedings.”), *review denied* (Minn. Sept. 29, 2004). Based on our painstaking review of the record, we find no evidence of bias or lack of impartiality and nothing to support Holmes’s claim that his right to a speedy trial was violated or that the district court impermissibly pressured him to enter a guilty plea. We decline to address these issues further.

C. Ineffective assistance of counsel

Holmes also alleges ineffective assistance of trial counsel. “The defendant must affirmatively prove that his counsel’s representation ‘fell below an objective standard of reasonableness’ and ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

Holmes specifically argues that trial counsel’s decision not to call his mother or Serita constitutes a violation of trial counsel’s “duty to make a reasonable investigation, or make a reasonable decision not to investigate” and that he was thereby prejudiced by trial counsel’s decision. “[D]ecisions to present certain evidence and call certain witnesses at trial ‘are tactical decisions properly left to the discretion of trial counsel,’ and such decisions do not prove that counsel’s performance fell below an objective standard of reasonableness.” *State v. Nissalke*, 801 N.W.2d 82, 111 (Minn. 2011) (quoting *State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006)).

D. New evidence

Holmes’s final pro se argument is that this court should stay his direct appeal and remand for post-conviction proceedings because there is new evidence that neither his mother nor Serita actually contacted C.A.T. Because we have reversed the convictions of counts one and two, this issue is moot.

Affirmed in part, reversed in part, and remanded.