STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1850

State of Minnesota,
Respondent,

vs.

Christopher Robert Boyd,
Appellant.

Filed August 25, 2009
Affirmed
Stoneburner, Judge

Mille Lacs County District Court
File No. 48CR071197

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Jan Kolb, Mille Lacs County Attorney, Mille Lacs County Courthouse, 525 Second Street Southeast, Millaca, MN 56353 (for respondent)

Marie Wolf, Interim Chief Appellate Public Defender, G. Tony Atwal, Assistant State Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

STONEBURNER, Judge

Appellant challenges his convictions of possession of a controlled substance and drug paraphernalia, arguing that the district court erred by failing to instruct the jury that they must unanimously agree on what item appellant possessed. We affirm.

FACTS

Appellant Christopher Robert Boyd was the driver of a vehicle in which three straws with traces of a controlled substance were found. One straw was found in Boyd's pocket; one straw was found in a passenger's purse; and one straw was found in a package of bottled water on the floor of the back seat. There was evidence that, after the stop, the straw found in the back seat had been moved there from the glove compartment.

The district court, over Boyd's objection, instructed the jury on constructive possession.[1] Without objection, the district court gave the standard jury instruction on jury unanimity and did not instruct the jurors that, in order to find Boyd guilty, they must agree on which straw Boyd possessed.[2] In closing argument, the prosecutor told the jury that it could convict Boyd based on actual or constructive possession of any of the three straws.

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[1] The district court instructed the jury that in order to find that Boyd possessed the controlled substance and drug paraphernalia it was not necessary that it was found on his person and he possessed it "if it was in a place under the [Boyd]'s exclusive control to which other people did not normally have access and [Boyd] knowingly exercised dominion and control over it. A person may also jointly exercise dominion and control over a controlled substance [and drug paraphernalia] with another person." On appeal, Boyd does not challenge the constructive possession instruction.

[2] The district court instructed the jury that in order to return a verdict of guilty, "each juror must agree with the verdict. Your verdicts must be unanimous."

Boyd was convicted of fifth-degree possession of a controlled substance and possession of drug paraphernalia. After sentencing, Boyd appealed, asserting that he was denied the right to a unanimous verdict.

D E C I S I O N

I. Standard of Review

The state argues that because Boyd did not object to the unanimity instruction at trial, he waived his right to appeal on this issue. *See State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998) (stating that failure to object to instructions before they are given generally constitutes a waiver of the right to challenge the instruction on appeal). But even in the absence of an objection, this court may review a jury instruction for plain error: "[a]n error in the instruction *with respect to fundamental law or controlling principle*." Minn. R. Crim. P. 26.03, subd. 18(3) (2008) (emphasis added); *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001).

Boyd argues that his objection to the constructive possession charge constituted a challenge to the unanimity instruction such that the standard of review is abuse of discretion, citing *State v. Blasus*, 445 N.W.2d 535, 542 (Minn. 1989) (stating that the refusal to give a requested instruction lies within the discretion of the trial court and no error results if no abuse of discretion is shown). We disagree. "An objection must be specific as to the grounds for the challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). Therefore, Boyd's challenge to the unanimity instruction will be reviewed under the plain-error standard. Plain error

consists of error that is plain and that affects a substantial right. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

II. Jury Instruction

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). The jury charge must be read as a whole, and if the charge correctly states the law in language that can be understood by the jury, there is no reversible error. *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998).

In *State v. Stempf*, where there was evidence that the defendant possessed a controlled substance at work and evidence that he possessed a controlled substance in his truck, we held that "[w]here 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." 627 N.W.2d 352, 354 (Minn. App. 2001) (reversing conviction of possession of a controlled substance when jurors could have relied on different instances of possession that were distinct in time and place). But "unanimity is not required with respect to the alternative means or ways in which the crime can be committed." *State v. Begbie*, 415 N.W.2d 103, 106 (Minn. App. 1987) (affirming conviction of terroristic threats, concluding that failure to instruct jury that they must unanimously agree on which of two victims the defendant intended to terrorize was not error where there was sufficient evidence for the jury to find him guilty of terroristic threats to both victims), *review denied* (Minn. Jan. 20, 1988).

The Minnesota Supreme Court, based on a review of United States Supreme Court and state court decisions, has "recognized the distinction between the basic elements of the crime and the facts underlying those basic elements." *State v. Hager*, 727 N.W.2d 668, 674 (Minn. App. 2007) (citing *State v. Pendleton*, 725 N.W.2d 717, 731–32 (Minn. 2007)). "The *Pendleton* analysis limits the unanimous verdict requirement to situations where the offenses of the accused are inherently separate and juror confusion or disagreement would deny the accused due process." *Id.* "The cases across the country . . . recognize and note that it is sufficient that all jurors unanimously agree on their ultimate conclusion that the defendant was guilty of the crime charged, though they may not agree on the manner in which the defendant participated in the crime . . . ." *Begbie*, 415 N.W.2d at 106 (citing *Holland v. State*, 280 N.W.2d 288, 292 (Wis. Ct. App. 1979), *cert. denied*, 445 U.S. 931, 100 S. Ct. 1320 (1980)).

Boyd's reliance on *Stempf* is misplaced because *Stempf* involved distinct acts of alleged possession that occurred in different places at different times, whereas the evidence in this case is that Boyd, at the time of the stop, actively or constructively possessed at least one of the three items found in the car he was driving. We find no error, and certainly no plain error, in the district court's failure to sua sponte instruct the jury that it had to agree unanimously on which straw Boyd possessed.

Additionally, we note that because the evidence was undisputed that one of the straws was found in Boyd's pocket, even if the jury had been instructed as Boyd now argues it should have been, the outcome of this case would not be different. Therefore,

even if we had found error, Boyd's substantial rights were not affected and he would not have been entitled to relief based on his challenge to the unanimity instruction.

Affirmed.