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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2236**

State of Minnesota,
Respondent,

vs.

Christopher Bernard Matthews,
Appellant.

**Filed December 28, 2010
Affirmed
Lansing, Judge**

Hennepin County District Court
File No. 27-CR-08-46982

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County
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David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
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Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

LANSING, Judge

Following a mistrial, a jury found Christopher Matthews guilty of first-degree burglary and illegal possession of a firearm. Matthews challenges his conviction on grounds of double jeopardy, an asserted violation of his right to a speedy trial, and the district court's failure to give a specific instruction on jury-verdict unanimity. Because we conclude the double-jeopardy prohibition did not bar retrial; that Matthews's right to a speedy trial was not violated; and the absence of a specific instruction on jury-verdict unanimity, although error, was not plain error, we affirm.

FACTS

The facts of this case are largely based on the testimony of MS. MS and Christopher Matthews were estranged friends, and it was MS's duplex in Minneapolis that Matthews entered and from which he removed items in September 2008.

Matthews entered MS's duplex through a window shortly after midnight. MS awakened when she heard Matthews in the house, and, when Matthews saw her, he began yelling at her. Matthews said that he was there to get his "stuff," and took some clothes and a blue duffel bag. In the course of gathering these items, he knocked MS down, put his hands around her throat, and choked her. He then telephoned someone and told that person to pick him up at MS's house. Before leaving, Matthews held up the blue duffel bag and said to MS, "This is going to be for you." MS knew that the blue duffel bag contained a firearm. After Matthews left, MS called the police and reported that Matthews had broken into her home and robbed and assaulted her.

Officers located Matthews a short time later in a car that matched the description provided by MS. When the officers did not find a firearm in the car, they sought and obtained consent from Matthews's friend, a passenger in the car, to look for the firearm in her house. The officers found the gun in the blue duffel bag at the friend's house next to Matthews's cap and identification card. The firearm, an AK-47 assault rifle, was sticking out of the duffel bag. Officers also found drugs and a TEC-22 assault pistol that allegedly belonged to Matthews.

The state charged Matthews with first-degree burglary and illegal possession of a firearm, based on his convicted-felon status. Before trial started on January 20, 2009, the district court ruled that evidence of the drugs found at the friend's house was inadmissible. Because Matthews stipulated to his prior felony conviction, the district court also ruled that evidence of Matthews's past record was inadmissible.

During the first trial, state witnesses made two references to the drugs that were found at the friend's house and one reference to Matthews's status as a felon. Matthews objected and moved for a mistrial. The court granted Matthews's motion, reasoning that Matthews could not receive a fair trial in light of the references to the inadmissible evidence.

After the district court declared a mistrial, the state moved to obtain a new palm print and a buccal swab from Matthews. Matthews resisted the motion, arguing that it would violate his right to a speedy trial and that it would prejudice his case. The court granted the state's motion to obtain the palm print and also allowed additional time for the state to obtain DNA test results.

Before his second trial, Matthews moved for dismissal on double-jeopardy grounds. At a pretrial hearing, the district court denied the motion because the state did not intentionally provoke Matthews into requesting the mistrial.

The second trial began on July 7, 2009. The jury found Matthews guilty of both charges, and he appeals both convictions.

D E C I S I O N

On appeal Matthews contends that the district court erred when it denied his motion to dismiss on double-jeopardy grounds; that the delay in trial scheduling violated his constitutional right to a speedy trial; and that the district court's failure to provide a specific jury-unanimity instruction denied him the right to a unanimous verdict.

I

Matthews's double-jeopardy challenge has two prongs. First, he argues that the district court erred by finding that the prosecutor did not intentionally elicit inadmissible evidence. Second, he argues that in interpreting the Minnesota Constitution's double-jeopardy clause, we should reject the "intent" standard the supreme court adopted in *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985), and adopt a gross-negligence standard instead.

The Minnesota Constitution prohibits putting a person twice in jeopardy for the same offense. Minn. Const. art. I, § 7. "When a criminal trial is terminated over a defendant's objection, the double-jeopardy clause of the federal constitution bars a second trial unless there was a 'manifest necessity' that the first trial be terminated." *Fuller*, 374 N.W.2d at 726 (citing *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S. Ct. 2083, 2087 (1982)). But when a criminal trial is terminated at a defendant's request, the

double-jeopardy clause bars a second trial only if “the mistrial resulted from governmental misconduct intended to provoke the mistrial request.” *Id.* We review legal issues relating to double jeopardy de novo. *State v. Large*, 607 N.W.2d 774, 778 (Minn. 2000). But a district court’s factual findings on whether double jeopardy bars retrial are reviewed for clear error. *Fuller*, 374 N.W.2d at 726.

Following the testimony of the state’s witnesses that referred to inadmissible evidence, the district court granted Matthews’s motion for a mistrial. The district court found that the witnesses’ comments would prevent Matthews from receiving a fair trial but also found that the prosecutor did not intentionally provoke Matthews into requesting a mistrial. The district court concluded that the prosecutor was, at most, negligent, but not grossly negligent because the questions were not aimed at eliciting inadmissible testimony. The district court also noted that the prosecutor argued strenuously against the mistrial and appeared surprised by the witnesses’ testimony. Counsel for Matthews stated on the record that she believed that the prosecutor did not intentionally elicit the improper responses. Because no evidence suggests that the prosecutor intentionally elicited the inadmissible testimony, we conclude that the district court reasonably found that the prosecutor did not intend to provoke Matthews into requesting a mistrial.

On the second prong of his double-jeopardy challenge, Matthews argues that we should interpret the Minnesota Constitution’s double-jeopardy clause to provide greater protection than its federal counterpart. Specifically, Matthews argues that in interpreting the double-jeopardy clause, we should substitute a gross-negligence standard for the “intent” standard the supreme court adopted in *Fuller*.

In *Fuller*, the supreme court left open the possibility that the double-jeopardy clause in the Minnesota Constitution could be read more broadly than its federal counterpart. 347 N.W.2d at 727. But the district court found that the prosecutor's conduct was at most, negligent, not grossly negligent. Therefore, even if the proposed gross-negligence standard were applied, the double-jeopardy clause would not bar a retrial. This case does not present appropriate facts on which to depart from existing precedent and announce a different double-jeopardy standard under the Minnesota Constitution. *See State v. Schroepfer*, 416 N.W.2d 491, 493-94 (Minn. App. 1987) (declining to announce different double-jeopardy standard on grounds that prosecutor's conduct did not exceed negligent conduct). The district court did not err when it denied Matthews's motion for dismissal on double-jeopardy grounds.

II

Both the federal and state constitutions guarantee criminal defendants the right to a speedy trial. U.S. Const. amends. VI, XIV, § 1; Minn. Const. art. I, § 6. Whether delays in trial violate a defendant's speedy-trial right is a question of law, which we review de novo. *See State v. Wiegand*, 645 N.W.2d 125, 129 (Minn. 2002) (stating that constitutional issues are subject to de novo review).

In Minnesota, a defendant's trial must begin within sixty days of a demand for a speedy trial unless good cause is shown for the delay. Minn. R. Crim. P. 11.09, subd. (b). To determine whether a delay deprived a defendant of his right to a speedy trial, we examine "(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his or her right to a speedy trial; and (4) whether the delay prejudiced

the defendant.” *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). These factors are “considered together with such other circumstances as may be relevant”; no factor is independently necessary or sufficient to conclude that the defendant did not receive a speedy trial. *Id.* (quotation omitted).

When a trial occurs more than sixty days after a defendant demands a speedy trial, the length of delay is presumptively prejudicial and triggers consideration of the remaining factors. *Id.* at 315-16. Matthews demanded a speedy trial on November 14, 2008. The first trial began on January 20, 2009, and ended in a mistrial on January 21, 2009. The second trial began on July 7, 2009, over seven months after Matthews demanded a speedy trial. This delay raises the presumption that a violation has occurred, therefore, we consider the remaining three factors.

We review the second factor, which considers the reason for delay, from the perspective of the district court’s finding that the mistrial was not caused by Matthews. Although it was Matthews’s motion that the district court granted, the mistrial was caused by the state’s witnesses’ testimony on inadmissible evidence. The delay in the second trial occurred because the district court granted the state’s motion to obtain a palm print and because the state needed time to obtain DNA test results. Again, the delay was not attributable to Matthews. Because neither delay was caused by Matthews and cannot be attributed to him, the second factor appears to weigh in favor of finding a violation of Matthews’s right to a speedy trial. But a trial delay does not result in a violation if “good cause” is shown for the delay. Minn. R. Crim. P. 11.09, subd. (b). Because the prosecutor did not intentionally provoke Matthews into requesting a mistrial, the new-

trial delay was for good cause. The court also found that the state's need to obtain a new palm print and DNA test results were proper reasons or good cause to delay the second trial. *See State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990) (finding that continuance for DNA testing constitutes good cause). Because the trial delays were supported by a reasonable determination of good cause, Matthews's right to a speedy trial was not violated under the second factor.

The third factor, whether the defendant asserted his right to a speedy trial, weighs in Matthews's favor. Before the first trial began, Matthews asserted his right to a speedy trial. When Matthews objected to the state's motion to allow time for a new palm print and buccal swab, the objection demonstrated a consistent position on his speedy-trial demand. *See Windish*, 590 N.W.2d at 318 (recognizing that action in furtherance of speedy trial represents continued demand). Thus, it is undisputed that Matthews demanded a speedy trial.

On the final factor, we evaluate whether the delay prejudiced Matthews. Three interests govern this evaluation: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired." *Id.* Of the three interests, impairment of the defense is the most serious. *Id.*

To support his argument that the delay resulted in prejudice, Matthews points to his anxiety over the possibility of a stronger case against him if the state were allowed to wait for DNA test results and compare a new palm print. But Matthews's defense was that he did not possess either the assault rifle or pistol. If Matthews did not possess either

firearm, Matthews would not have a basis for additional anxiety over the DNA testing and palm-print analysis. *See State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989) (stating that general stress, anxiety, and inconvenience resulting from rescheduling of criminal trial is not unduly prejudicial). Also, the DNA test results and palm-print analysis were inconclusive. The delay, therefore, did not result in a stronger case against Matthews. Nothing in the record suggests, nor does Matthews argue, that the delay caused excessive pretrial incarceration or impaired Matthews's defense. Thus, the delay allowing the state to obtain additional evidence did not unduly prejudice Matthews.

Because no evidence suggests a deliberate attempt on the part of the state to delay trial and because Matthews failed to demonstrate that the delay in trial was prejudicial, we conclude that Matthews was not denied his right to a speedy trial.

III

The jury found Matthews guilty of being a prohibited person in possession of a firearm. Matthews contends, however, that the district court denied him the right to a unanimous verdict when it instructed the jury that it could convict him for being a prohibited person in possession of a firearm if it found that he possessed a firearm between July 23, 2008 and September 18, 2008.

“District courts are allowed considerable latitude in the selection of language for jury instructions.” *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). When reviewed for error, jury instructions must be viewed “in their entirety to determine whether they fairly and adequately explain the law.” *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007). “Due process requires that every element of the offense charged must be [proved] beyond

a reasonable doubt by the prosecution.” *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). A jury verdict must be unanimous. Minn. R. Crim. P. 26.01, subd. 1(5).

At trial Matthews did not request, or object to the lack of, a specific instruction on jury-verdict unanimity. The failure to object to jury instructions at trial ordinarily results in the appellant forfeiting his right to object on appeal. *State v. Yang*, 774 N.W.2d 539, 557 (Minn. 2009). But “[w]e may review an unobjected-to instruction if there is (1) an error; (2) that is plain; and (3) affects substantial rights.” *Id.* If these three requirements are satisfied, we will correct the error if it “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted).

District courts must avoid jury instructions that “are unclear and potentially raise doubt about the unanimity of the jury verdict.” *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001). If “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.” *Stempf*, 627 N.W.2d at 354 (citing *State v. Begbie*, 415 N.W.2d 103, 105 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988)). “But ‘unanimity is not required with respect to the alternative means or ways in which the crime can be committed.’” *Id.* at 354-55 (quoting *Begbie*, 415 N.W.2d at 106).

The complaint alleged that “on or between July 23, 2008 and September 18, 2008,” Matthews possessed a firearm after having been convicted or adjudicated delinquent of a crime of violence. The probable-cause portion of the complaint alleges four acts of possession: (1) on September 18, 2008, Matthews possessed an assault rifle

outside the house he had just burglarized; (2) on September 18, 2008, officers found a pistol that Matthews owned; (3) that cell phone pictures showed Matthews holding a firearm; and (4) that Matthews admitted to handling a firearm in the weeks prior to September 18, 2008.

Because Matthews stipulated that he was a person who could not possess a firearm, the district court instructed the jury at the close of trial that the issues to be decided were: (1) whether Matthews actually or constructively possessed a firearm; (2) whether Matthews knew he possessed the firearm; and (3) whether the act of possession took place on or between July 23, 2008 and September 18, 2008, in Hennepin County. The third instruction allowed for possible disagreement among the jurors on which act of possession, out of the four acts alleged in the complaint, Matthews committed. Thus, the district court erred in not providing a specific unanimity instruction.

We conclude, however, that the error did not affect Matthews's substantial rights. An error affects substantial rights if it is prejudicial and affects the outcome of the case. *Ihle*, 640 N.W.2d at 917. An "error is prejudicial if there is a reasonable likelihood that [giving the proper jury instruction] would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). We look at the entire record to determine whether the error was prejudicial or affected the outcome of the case. *See State v. Meldrum*, 724 N.W.2d 15, 21-22 (Minn. App. 2006) (examining entire record to determine whether absence of jury instruction was prejudicial error), *review denied* (Minn. Jan. 24, 2007).

A specific unanimous-verdict jury instruction would not have had a significant effect on Matthews's conviction. MS and one other witness testified that they saw Matthews holding a firearm while standing by the car that picked him up from MS's house. Three police officers corroborated MS's testimony by offering similar statements that she made about Matthews possessing a firearm outside her house. This testimony was not contradicted at trial. Considering the strength of the evidence presented at trial, it is not reasonably likely that the verdict would have been affected even if the district court had given a specific instruction on jury-verdict unanimity.

Affirmed.