

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2019-289

APRIL TERM, 2020

State of Vermont v. Keith N. Powers*	}	APPEALED FROM:
	}	
	}	Superior Court, Caledonia Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 676-12-18 Cacr
		Trial Judge: Robert R. Bent

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction by a jury for obstruction of justice. On appeal, he argues that the court’s instruction was plain error because it did not require jury unanimity. We affirm.

The following facts were introduced at trial. In 2018, defendant’s brother was charged with attempted murder and aggravated assault after defendant’s nephew reported to police that the brother chased the nephew in his truck and shot at him. Two days later, the nephew reported to police that defendant stopped the nephew in his truck and told the nephew that he better retract what he said about defendant’s brother or the nephew would end up missing or dead. Defendant was charged with obstruction of justice. At trial, defendant testified that he did speak to his nephew on that afternoon but that he had only asked his nephew where the bullet holes in the truck were. He denied that he told his nephew to retract his statement.

The court instructed the jury on the elements of the offense. The court explained that the State could prove obstruction in two ways: either that defendant “by threats or by threatening communication, intimidated any witness in any court of the State of Vermont,” or that defendant “endeavored to obstruct the due administration of justice by threatening [nephew’s] life if he did not retract statements involving another criminal matter.” The court further explained that

For both methods of the way the State may prove its case, all of the elements of the offense must have been present at the same time. You all must unanimously agree on the same facts for the State to prove its case.

If the State has not proven each of the essential elements of the charge beyond a reasonable doubt for either method, you must find [defendant] not guilty.

However, if the State has proven all of the essential elements beyond a reasonable doubt for one or both methods the State may use to prove its case, you must return a verdict of guilty.

There were no objections to the jury instructions. The jury returned a guilty verdict and defendant filed this appeal.

Because defendant did not object to the jury instruction, he argues on appeal that the court committed plain error. “When reviewing alleged plain error in a jury instruction, we determine whether there was obvious error affecting the defendant’s substantial rights, thereby resulting in prejudice to the defendant and seriously affecting the fairness or integrity of the judicial proceedings.” *State v. Nicholas*, 2016 VT 92, ¶ 13, 203 Vt. 1. “This Court will find plain error only in extraordinary cases.” *State v. Green*, 2006 VT 64, ¶ 7, 180 Vt. 544 (mem.)

Defendant asserts that the instruction here failed to require that the jury unanimously agree on which theory the State had proven. Defendant argues that although the instruction required the jury to find that all of the elements of the offense were present at the same time and to agree on the same facts, the instruction did not require the jurors to agree on how defendant broke the law.

Viewing the instructions as a whole, we conclude that the court’s instruction was not plain error, if error at all. The trial court’s instructions required the jury to find unanimously that the State had proven all elements of at least one method of committing the crime before returning a verdict of guilty. The instruction properly required unanimity as to both the facts and the law. This instruction was sufficient to safeguard defendant’s substantial rights and there is no basis for reversal. *Id.* ¶ 8 (concluding that there was no plain error in jury instruction where court provided general unanimity instruction).

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice