STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1021

State of Minnesota,
Respondent,

vs.

Mitchell Gary Johannessohn,
Appellant.

Filed July 1, 2024
Affirmed
Schmidt, Judge

Clearwater County District Court
File No. 15-CR-21-248

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Kathryn Lorsbach, Clearwater County Attorney, Bagley, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Schmidt, Judge; and Harris, Judge.

NONPRECEDENTIAL OPINION

SCHMIDT, Judge

Appellant argues that his criminal-sexual-conduct convictions must be reversed because the absence of a specific unanimity instruction deprived him of a unanimous verdict. We affirm.

FACTS

Respondent State of Minnesota charged appellant Mitchell Gary Johannessohn by amended complaint with one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2020), one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1a (2020), and one count of fifth-degree criminal sexual conduct in violation of Minn. Stat. § 609.3451 (2020). The amended complaint alleged a similar factual allegation for each count: "From approximately 2016 to early 2021, the above-named defendant engaged in multiple acts of nonconsensual sexual contact over an extended period of time, with H.A., who was less than 13 years of age at the time." For the first and second count, the complaint added that "Defendant was more than 36 months H.A.'s senior. H.A. indicated that defendant engaged in multiple acts of digital penetration during this time period."

During the four-day trial, the jury heard testimony from H.A., H.A.'s mother, H.A.'s father, H.A.'s best friend, Johannessohn's ex-wife, the Clearwater Sherriff, the forensic interviewer, and two experts. Johannessohn did not testify in his own defense.

At the time of trial, H.A. was 16 years old. She testified that, as her father's close friend, she had known Johannessohn her entire life, and that he began touching her arms and lower back when she was six, seven, or eight years old. H.A. testified that Johannessohn began penetrating her vagina with his fingers and penis when she was nine or ten years old. She recounted four main incidents of Johannessohn penetrating her vagina. She also testified about many instances in which Johannessohn had touched her inner thighs, breasts, butt, and vagina.

H.A. also testified about her disclosures of Johannessohn's abuse. In 2021, H.A. testified that she told her best friend that Johannessohn had raped her. H.A.'s friend's mother encouraged her daughter to tell her therapist, which she did, and the county began an investigation. H.A. also told her father, who did not believe her. H.A. also disclosed the abuse to her mother, but her mother "was just high out of her mind, and she didn't believe me, and she didn't know I was talking to her."

As part of the county's investigation, Clearwater Sheriff and a forensic interviewer at the Family Advocacy Center interviewed H.A. three times. The transcripts of these interviews were admitted at trial. Throughout these interviews, H.A. described several incidents of abuse and penetration, but also repeatedly said that she could not remember, she had not had sex, and she was not sure if the abuse happened. When asked about these statements at trial, H.A. stated that she was not "ready to come out with [her] full story" and that she was under a lot of stress, pressure, and was "not okay mentally." She also testified that she told the Clearwater Sherriff that she did not remember because she "didn't want to talk to him" and did not trust him when they first met. H.A. admitted that she lied or exaggerated about Johannessohn's actions unrelated to sexual conduct or penetration because she was concerned people would not believe her.

Both the defense and the state presented testimony from experts. The defense's expert testified about patterns of disclosure in children. The state's expert testified about forms of bias in the Clearwater Sheriff's interviews and criticized his use of leading questions.

When instructing the jury, the district court included a unanimity instruction that stated: "In order for you to return a verdict whether not guilty or guilty each juror must agree with that verdict. Your verdict must be unanimous." Both before and after the instructions were read, the district court asked both parties if they had any additions or questions about the instructions and there were none.

The jury found Johannessohn guilty of all three counts. The district court sentenced Johannessohn to concurrent sentences of 144 months, 70 months, and 365 days.

Johannessohn appeals.

DECISION

Johannessohn requests this court to reverse and remand for a new trial because the lack of a specific unanimity instruction allowed the jury to reach a non-unanimous verdict. We begin by providing an overview of the applicable law and then turn to the specific arguments raised in Johannessohn's appeal.

In all criminal cases, jury verdicts must be unanimous. Minn. R. Crim. P. 26.01, subd. 1(5). "Defendants have a constitutional right to a unanimous verdict." *State v. Plantin*, 682 N.W.2d 653, 662 (Minn. App. 2004), *rev. denied* (Minn. Sept. 29, 2004).

When reviewing jury instructions, district courts have considerable discretion "when selecting language for jury instructions." *State v. Carridine*, 812 N.W.2d 130, 144 (Minn. 2012). But a jury instruction cannot materially misstate the law. *Id.* And when "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." *State v. Stempf*, 627 N.W.2d 352, 354-55 (Minn. App. 2001).

In determining whether a jury has reached a unanimous verdict, caselaw distinguishes between a jury's agreement as to the underlying means a defendant used to commit an offense and the underlying elements of an offense. Juries must unanimously agree on the elements of the offense, but are not required to unanimously agree as to "alternative means or ways in which the crime can be committed." *Stempf*, 627 N.W.2d at 354 (quotation omitted). This concept is illustrated by two cases.

First, in *State v. Pendleton*, the Minnesota Supreme Court concluded that jurors need not agree as to the specific means used to commit a crime. 725 N.W.2d 717, 733 (Minn. 2007). There, the defendant was charged with felony murder predicated on kidnapping. *Id.* at 723. The state may prove kidnapping by showing that the defendant confined or moved another person without consent to among other things, "facilitate commission of any felony or flight thereafter"; or "commit great bodily harm or to terrorize the victim or another." *Id.* at 729-30. The supreme court held that because the kidnapping statute contained multiple means of establishing the act of kidnapping, the jury was not required to unanimously agree as to whether the defendant confined the victim in order to facilitate the commission of the felony, to facilitate flight, to commit great bodily harm, or to terrorize the victim or another. *Id.* at 732-33.

Second, in *Richardson v. United States*, the United States Supreme Court held that a jury is required to unanimously agree on which acts the defendant committed, when the act itself constitutes an element of the crime. 526 U.S. 813, 824 (1999). But "if the statute establishes alternative means for satisfying an element, unanimity on the means is not required." *State v. Ihle*, 640 N.W.2d 910, 913-14 (Minn. 2002) (citing *Richardson*,

526 U.S. at 817-18). The jury need not unanimously agree on each element's underlying facts so long as the differing factual circumstances show "equivalent blameworthiness or culpability." *Pendleton*, 725 N.W.2d at 731 (quotation omitted).

Returning to the circumstances here, based on this means-versus-elements distinction, Johannessohn contends that the district court plainly erred by failing to instruct the jurors that their verdict must be unanimous as to the specific acts of sexual contact and penetration he allegedly committed.[1] Because Johannessohn did not request a specific-unanimity instruction, we review the district court's failure to sua sponte provide a unanimity instruction for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error test, Johannessohn must establish (1) error, (2) that was plain, and (3) that affected his substantial rights. *Id.* If those prongs are met, we consider whether the error must be addressed to ensure the "fairness, integrity, or public reputation of judicial proceedings." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). If any one requirement of the plain-error test is not satisfied, we need not address the others. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017).

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[1] Johannessohn was charged with one count of first-degree criminal sexual conduct, second-degree criminal sexual conduct, and fifth-degree criminal sexual conduct. A person is guilty of first-degree criminal sexual conduct when they engage in (1) sexual penetration; (2) of a complainant under 13 years of age; and (3) they are more than 36 months older than the complainant. Minn. Stat. § 609.342, subd. 1(a). "Sexual penetration" means: (1) sexual intercourse, cunnilingus, fellatio or anal intercourse; or (2) any intrusion into the genital or anal openings, which includes three alternative means. Minn. Stat. § 609.341, subd. 12 (2020). A person is guilty of second-degree criminal sexual conduct, when they engage in (1) sexual contact; (2) with a complainant under 13 years of age; and (3) they are more than 36 months older than the complainant. Minn. Stat. § 609.343, subd. 1a. A person is guilty of fifth-degree criminal sexual conduct "if the person engages in nonconsensual sexual contact." Minn. Stat. § 609.3451, subd. 1(1).

Johannessohn relies primarily on *Stempf* in arguing he is entitled to a new trial. The state charged Stempf with one count of a controlled-substance crime for possession of methamphetamine that police seized from Stempf's work and from a truck where Stempf had recently ridden as a passenger. *Stempf*, 627 N.W.2d at 354. At trial, Stempf denied owning the methamphetamine found at his work, and presented evidence that two of his co-workers had access to the location where the drugs were seized. *Id.* Stempf also denied owning the methamphetamine found in the truck and presented evidence suggesting that it could have belonged to the owner of the truck. *Id.*

Stempf "requested an instruction requiring the jurors to evaluate the two acts separately and unanimously agree that the state had proven the same underlying criminal act beyond a reasonable doubt." *Id.* The district court denied Stempf's request. *Id.* During closing argument, the state told the jury that "it could convict if some jurors found appellant possessed the methamphetamine found in the truck while others found he possessed the methamphetamine found on the premises." *Id.* The jury found Stempf guilty of a single count of controlled-substance possession. *Id.*

This court reversed and remanded, concluding that the district court's failure to instruct that the jury must agree on the specific act of possession denied appellant his constitutional right to a unanimous verdict. *Id.* at 359. Because the statute made the act of possession an element of the crime, we held that the jury needed to unanimously agree "on one act of possession that has been proven beyond a reasonable doubt." *Id.* We reasoned that because the two alleged acts of possession lacked "unity of time and place," and that the drugs in the workplace and in the truck were two "separate and distinct culpable acts,"

"[s]ome jurors could have believed appellant possessed methamphetamine found on the [work] premises while other jurors could have believed appellant possessed the methamphetamine found in the truck." *Id.* at 358-59.

Johannessohn argues that in his case, like in *Stempf*, the jury could have disagreed as to which acts of sexual penetration and sexual contact took place. Johannessohn contends the potential disagreement demonstrates the jury failed to reach a unanimous verdict. We disagree that *Stempf* controls.

Instead, we conclude that this case is more similar to *State v. Rucker*. 752 N.W.2d 538 (Minn. App. 2008), *rev. denied* (Minn. Sept. 23, 2008). In *Rucker*, the state charged Rucker with two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct concerning dozens of acts of sexual penetration with two victims. *Id.* at 543-44. Rucker "consistently testified at his trial that he had no sexual contact with" the victims. *Id.* at 544. After the district court instructed the jury—without including an instruction on unanimity—the jury convicted Rucker on all counts. *Id.* at 548.

On appeal, Rucker relied on *Stempf* and argued that the district court should have provided the jury with a unanimity instruction "as to which specific acts [Rucker] committed." *Id.* We disagreed, observing that,

> [u]nlike *Stempf*, the prosecution here did not emphasize certain incidents, distinguish as to the proof of some incidents compared to others, or encourage the jury to find certain incidents were more likely to have occurred than other incidents, and appellant did not present separate defenses for each incident of alleged sexual abuse; rather, he simply maintained throughout his trial that he never had sexual contact

> with either child-victim. The victims referred to a few specific dates in their testimony on which incidents of abuse occurred, but with respect to their testimony and the state's case as a whole, these recollections served as examples of appellant's conduct and not distinct allegations of sexual abuse.

Id. We concluded "that the district court did not err in not instructing the jury that it must unanimously agree on which specific incidents formed the basis of appellant's convictions." *Id.*

This case is more like *Rucker* than *Stempf* for four reasons.

First, *Stempf* involved a district court's refusal to give a requested jury instruction, which this court reviewed for an abuse of discretion. *Stempf*, 627 N.W.2d at 354. Here, Johannessohn failed to object to the jury instructions which limits our review to the more onerous standard of plain error. *See Griller*, 583 N.W.2d at 740.

Second, *Stempf* concerned drug possession that lacked unity of time and place for the element of possession. Unlike in *Stempf*, Johannessohn's convictions and *Rucker*'s facts both involved ongoing criminal sexual conduct against a child.

Third, like in *Rucker*, the state did not emphasize certain incidents and Johannessohn did not assert a separate defense for each incident. *See Rucker*, 752 N.W.2d at 548 ("Unlike *Stempf*, the prosecution here did not emphasize certain incidents, distinguish as to the proof of some incidents compared to others, or encourage the jury to find certain incidents were more likely to have occurred than other incidents, and appellant did not present separate defenses for each incident of alleged sexual abuse."). Johannessohn does not point to any statements from the prosecution in which they told the jury that they could disagree about whether certain acts occurred. *See Stempf*, 627 N.W.2d

at 354. Johannessohn also does not assert a separate defense for each incident. Instead, and like the defendant in *Rucker*, Johannessohn merely maintained that he did not have sexual contact with H.A. *See Rucker*, 752 N.W.2d at 548.

Fourth, this case was charged and tried under a multiple-acts theory. Johannessohn was convicted of one count of first-degree criminal sexual conduct, one count of second-degree criminal sexual conduct, and one count of fifth-degree criminal sexual conduct for abuse over a five-year period.[2] H.A. testified to several instances of sexual penetration and sexual contact over that period. Like in *Rucker*, H.A. referred to a few specific dates in her testimony on which incidents of abuse occurred, but with respect to her testimony and the state's case as a whole, these recollections served as examples of Johannessohn's conduct and not distinct allegations of sexual abuse. *See id.*[3]

Moreover, we note that this conclusion is supported by *Stempf*. In *Stempf*, we specifically declined to decide whether "a different result would be warranted when the separate acts constitute a continuing course of conduct." *Stempf*, 627 N.W.2d at 358 (citing *Langdon v. State*, 375 N.W.2d 474, 476-77 (Minn. 1985)). Here, like in *Rucker*,

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[2] Although the amended complaint alleged, and this case was tried under, the theory that Johannessohn committed multiple acts of sexual penetration and sexual conduct over a five-year period, he was not charged under the statutory provision specifying multiple acts over an extended period of time. *See* Minn. Stat. § 609.342, subd. 1(h)(iii) (2020).

[3] The caselaw has also distinguished between crimes that involve a single-behavioral incident versus a continuing course of conduct. *See State v. Infante*, 796 N.W.2d 349, 356-57 (Minn. App. 2011) (noting that while the concept of single-behavioral incident is generally employed in the sentencing context, the Minnesota Supreme Court has also used the concept in the context of jury-unanimity arguments). This court has previously relied on this distinction to distinguish *Stempf*. *See id.*; *see also State v. Dalbec*, 789 N.W.2d 508, 512 (Minn. App. 2010), *rev. denied* (Minn. Dec. 22, 2010).

Johannessohn was charged with a continuing course of criminal conduct that took place over several years.[4]

The district court did not err by failing to, sua sponte, give the jury a more specific unanimity instruction. Because we conclude that the district court did not err, we need not consider the remaining plain-error prongs.

Affirmed.

[4] We also note that this court has distinguished *Stempf* and applied *Rucker* in other cases involving criminal sexual conduct and multiple-acts theory in another nonprecedential case. *See State v. Ellis*, A16-1216, 2017 WL 3222008 (Minn. App. July 31, 2017), *rev. denied* (Minn. Oct. 25, 2017); Minn. R. Civ. App. P. 136.01, subd. 1(c) (authorizing nonprecedential opinions to be cited as persuasive authority).