*This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A23-1400**

State of Minnesota,
Respondent,

vs.

Tracey Dee Keyes,
Appellant.

**Filed July 22, 2024**
**Affirmed**
**Connolly, Judge**

Ramsey County District Court
File No. 62-CR-22-661

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Segal, Chief Judge; and Larson, Judge.

**NONPRECEDENTIAL OPINION**

**CONNOLLY**, Judge

On appeal from his convictions of first-degree criminal sexual conduct, third-degree assault, and threats of violence, appellant argues that the district court (1) erred by denying his request for a specific unanimity jury instruction; (2) erred by denying his motion for an

order guaranteeing him a jury trial before a fair cross-section of the community; and (3) abused its discretion by allowing respondent to amend its complaint. Appellant also filed a pro se supplement brief asserting his innocence. We affirm.

## FACTS

Respondent State of Minnesota charged appellant Tracey Dee Keyes with first-degree criminal sexual conduct—fear of great bodily harm; third-degree assault; threats of violence; and false imprisonment. Keyes subsequently filed a motion challenging jury representation in Ramsey County. Keyes was one of "[m]ultiple defendants" who filed similar motions arguing that the "pool from which the juries will be drawn in Ramsey County do not represent a fair cross-section of the community, in violation of the Sixth Amendment." After consolidating the motions, the district court denied them, concluding that the "Defendants [including Keyes] have failed to make a prima facie showing that the statewide jury source list systematically excludes Black and African American eligible citizens from the list."

A jury trial was held in January 2023, which ended in a mistrial. The state then filed an amended complaint, adding charges of first-degree criminal sexual conduct—use of force causing personal injury; first-degree criminal sexual conduct—use of coercion causing personal injury; and two counts of obstruction of justice. The state, however, dropped the false-imprisonment charge. Although the amended complaint was filed on February 16, 2023, the district court found that Keyes was not served with the amended complaint until February 27, 2023, which was the morning of the commencement of the second jury trial.

Keyes objected to the amended complaint, arguing that he was not "given time to prepare for the additional counts." The district court dismissed the obstruction counts for lack of probable cause, but otherwise overruled Keyes's objection. Keyes also renewed his cross-section motion, which was denied.

At trial, evidence was presented that Keyes had moved in with S.B. in August 2021. Shortly thereafter, Keyes began accusing S.B. of cheating on him and started calling her names. According to S.B., the couple had an argument on January 30, 2022, where she felt "threatened," and told him that he could not stay with her anymore.

S.B. testified that, in the early morning hours of February 4, 2022, Keyes arrived at her home and asked her if he could retrieve some of his belongings from the house. S.B. acquiesced, and Keyes went to S.B.'s bedroom. But after waiting about 20 or 30 minutes, and not hearing "any bags rattling," S.B. went to the room to tell Keyes to leave.

S.B. testified that, as soon as she entered the bedroom, Keyes punched her in the head, knocking her to floor and causing her to "see stars." Keyes then sat on S.B.'s back and repeatedly punched her in the head. According to S.B., she told Keyes, "You're going to kill me," to which he responded, "That's what I came here to do." S.B. claimed that Keyes then forced her to perform oral sex on him.

S.B. testified that, as she performed oral sex on Keyes, he punched her because she "wasn't doing it right." S.B. claimed that the two then moved to the living room, where Keyes continued punching her, and forced her to perform oral sex on him again. According to S.B., the oral sex stopped when her children entered the room.

S.B. cleaned herself up and drove two of her children to the bus stop. S.B. then drove to the police station and reported the assault. She later went to the hospital, where she described the assault to the examining nurse. The examining nurse noted that S.B. was "very distraught," and documented S.B.'s injuries, which included abrasions; bruising on both sides of her face; a 3.5-centimeter gash above her right eyebrow; blood coming out of her ears; and severe swelling of her eyes. S.B. was also diagnosed with a ruptured eardrum, and an oral swab collected from S.B. revealed a mixture of DNA from two or more people, with a major profile that matched Keyes.

At the close of evidence, Keyes raised concerns that a specific-unanimity instruction on the sexual-assault charges may be necessary. But after discussion, the parties agreed that, if necessary, the issue would be revisited following closing arguments. During closing arguments, defense counsel conceded that Keyes physically assaulted S.B., but argued that S.B. fabricated the sexual-assault allegation. After closing arguments, Keyes did not readdress the specific-unanimity-instruction issue, and no such instruction was provided.

The jury found Keyes guilty as charged. He was sentenced to 360 months in prison for first-degree criminal sexual conduct—fear of great bodily harm. This appeal follows.

## DECISION

### I.

Keyes challenges the district court's denial of his request for a specific unanimity jury instruction on the criminal-sexual-conduct charges. District courts have broad discretion regarding jury instructions, and we will not reverse a district court's decision on the matter unless there was an abuse of that discretion. *State v. Taylor*, 869 N.W.2d 1, 14-

15 (Minn. 2015). But when there is no objection to the district court's jury instruction, we review for plain error. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001).

As an initial matter, the parties dispute the applicable standard of review. The state asserts that, although Keyes discussed having a specific unanimity instruction, no ruling was made on the issue because the parties agreed to revisit the issue after closing arguments. The state claims that, because Keyes never requested a unanimity instruction after closing arguments, he has forfeited the issue. Thus, the state contends that this issue should be reviewed for plain error. We agree.

"A defendant's failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver of the right to appeal." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Here, the record reflects that, because there was "testimony of two distinct acts of penetration," defense counsel had "concerns about the need for a specific unanimity instruction." In response, the prosecutor argued that a unanimity instruction was not necessary because Keyes's conduct was part of a single behavioral incident. After discussion, defense counsel stated, "I think it's another - we'll jump off that bridge if we get to it," and the district court responded by stating, "Okay. Fair enough. So perhaps enough said about that for now." Keyes did not readdress the issue after closing arguments or otherwise seek a unanimity instruction.

In his reply brief, Keyes argues that the plain-error standard is not applicable because he "clearly and unequivocally requested the instruction," the "district court ruled that it would not give Keyes' requested instruction," and "Keyes accepted that ruling, . . . but gave notice that he might renew the motion." But this argument misconstrues the

record. Defense counsel specifically stated on the record that she was "not specifically asking for [a unanimity instruction]." Rather, the record indicates that defense counsel merely expressed concern that one might be necessary depending on the state's closing arguments. And the record indicates that the district court never ruled on the issue. In fact, defense counsel acknowledged that the issue would only need to be addressed "if we get to it." Therefore, the plain-error standard is applicable because Keyes never specifically requested a specific-unanimity instruction, the district court never ruled on the issue, and Keyes failed to request the instruction after closing arguments. *See Cross*, 577 N.W.2d at 726.

"In order to meet the plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights." *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). "An error is plain if it is 'clear' or 'obvious,' which is typically established 'if the error contravenes case law, a rule, or a standard of conduct.'" *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quoting *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). If a defendant satisfies the first three elements of the plain-error standard, we will only exercise our discretion to grant relief when the "failure to do so will cause the public to seriously question the fairness and integrity of our judicial system." *Pulczinski v. State*, 972 N.W.2d 347, 359 (Minn. 2022).

A unanimous verdict is required in all criminal cases. Minn. R. Crim. P. 26.01, subd. 1(5); *State v. Pendleton*, 725 N.W.2d 717, 730 (Minn. 2007). This means that a jury must unanimously agree that the state proved each element of the offense beyond a reasonable doubt. *Pendleton*, 725 N.W.2d at 730-31. But a jury need not unanimously

agree on the facts underlying each element of an offense if different facts show "equivalent blameworthiness or culpability." *Id.* at 731; *see also State v. Hager*, 727 N.W.2d 668, 674 (Minn. App. 2007). A jury, therefore, must unanimously agree on which acts a defendant committed if different acts could satisfy a single element. *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001). However, unanimity is not required as to the "alternative means or ways in which the crime can be committed." *Id.* at 354 (quotation omitted).

Keyes argues that a unanimity instruction should have been given because the "state introduced evidence of two instances of alleged penetration" and, without a unanimity instruction, "the jury very likely reached non-unanimous verdicts on those counts." To support his position, Keyes relies on *Stempf*. In that case, the defendant was charged with one count of possession of drugs, but the state alleged two distinct acts: (1) the defendant possessed drugs found at his workplace and (2) the defendant possessed drugs found in a truck. *Id.* at 357. This court concluded that the defendant was deprived of his right to a unanimous verdict because the state did not elect which act of possession it relied on for the conviction, and the jurors may have disagreed on which act of possession constituted the crime. *Id.* at 358. This court further concluded that the two alleged acts lacked "unity of time and place" and were "separate and distinct culpable acts, either one of which could support a conviction." *Id.* at 358-59. This court, therefore, reversed and remanded because it was possible that the guilty verdict was not unanimous. *Id.* at 359.

This case is different from *Stempf* because, in that case, the district court refused to give a specific unanimity instruction even though one was requested. *Id.* at 357-58. Here, as noted above, Keyes never requested a specific unanimity instruction. Moreover, in

*Stempf*, there were two separate acts of possession that occurred at different times and different places, and the defendant in *Stempf* offered different defenses for both. Thus, the jury in *Stempf* could have reached different conclusions on each of those acts of possession. *Id.* at 358; *see State v. Dalbec*, 789 N.W.2d 508, 512 (Minn. App. 2010) (discussing *Stempf*), *rev. denied* (Minn. Dec. 22, 2010). In contrast, Keyes's closing argument demonstrates that he offered a single defense—that the state failed to prove that any sexual assault occurred because S.B.'s story was not credible. *See State v. Rucker*, 752 N.W.2d 538, 548 (Minn. App. 2008) (noting that the defendant did not present separate defenses for each incident of alleged sexual abuse, rather he maintained that the abuse did not occur), *rev. denied* (Minn. Sept. 23, 2008). And finally, in contrast to *Stempf*, Keyes's actions were not separated by time and place; the alleged acts of penetration all occurred at S.B.'s house within, at most, 45 minutes of each other, and had the same criminal objective. As such, Keyes's actions were part of a single behavioral incident. *See State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014) ("Offenses are part of a single course of conduct[1] if the offenses occurred at substantially the same time and place and were motivated by a single criminal objective." (footnote added)).

This case is more akin to *State v. Infante*, in which the defendant was found guilty of second-degree assault. 796 N.W.2d 349, 352-53 (Minn. App. 2011). On appeal, the defendant argued that the district court erred by failing to instruct the jury that they must

[1] "Legal authorities use the terms 'single course of conduct' and 'single behavioral incident' interchangeably." *State v. Mitchell*, 881 N.W.2d 558, 563 n.2 (Minn. App. 2016), *rev. denied* (Minn. Aug. 23, 2016).

reach a unanimous decision as to which of his acts constituted the assault—putting the small gun to the complainant's head in the bedroom, or "methodically load[ing]" the larger gun on the sofa two or three hours later. *Id.* at 355. This court held that a specific unanimity instruction is unnecessary if the two acts that would support a conviction occurred at the same place, involved the same victim, and took place over a short period of time. *Id.* at 357. The court determined that, because the two acts supporting an assault charge occurred at the same cabin, involved a single victim, and were separated by a span of two to three hours, they were part of a single behavioral incident. *Id.* at 352, 357; *see also Dalbec*, 789 N.W.2d at 512 (concluding that the district court did not plainly err by not providing a unanimity instruction where the acts committed by the defendant spanned a period of time, but all occurred at the same place and involved a single victim).

Here, as in *Infante*, because Keyes's acts were part of a single behavioral incident, a unanimity instruction was not required. *See id.* at 357; *see also State v. Ihle*, 640 N.W.2d 910, 919 (Minn. 2002) (concluding that, if multiple acts are a part of a single behavioral incident, a specific-jury unanimity instruction is not required). Therefore, the lack of a unanimity instruction was not plain error.

**II.**

Keyes argues that he was denied his constitutional right to a trial by a jury that reflects a fair cross-section of the community. We review de novo fair-cross-section challenges. *State v. Griffin*, 846 N.W.2d 93, 99 (Minn. App. 2014), *rev. denied* (Minn. Aug. 5, 2014).

The United States and Minnesota Constitutions guarantee a criminal defendant the right to a "jury venire" that "reflect[s] a fair cross-section of the community." *Id.* at 99-100 (quotation omitted); *see also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the . . . district wherein the crime shall have been committed . . . ."); Minn. Const. art. I, § 6 (same); Minn. R. Crim. P. 26.02, subd. 1 ("The jury list must be composed of persons randomly selected from a fair cross-section of qualified county residents."). But neither federal nor state constitutional law "guarantee[s] a criminal defendant a jury of a particular composition or one that mirrors the community." *State v. Williams*, 525 N.W.2d 538, 542 (Minn. 1994).

To make a prima facie showing that a jury venire did not reflect a fair cross-section of the community, a defendant must show that (1) "the group allegedly excluded is a 'distinctive' group in the community," (2) "the group in question was not fairly represented in the venire," and (3) "the underrepresentation was the result of a 'systematic' exclusion of the group in question from the jury selection process." *Id.* (quoting *Duren v. Missouri*, 439 U.S. 357, 364-67 (1979)). If the defendant makes a prima facie showing of a fair-cross-section violation, the state may rebut this showing by establishing that the jury-selection process advanced a significant state interest. *Hennepin County v. Perry*, 561 N.W.2d 889, 896 (Minn. 1997).

The district court found that Keyes met his burden on the first two elements of the test but failed to satisfy the third element. To satisfy the third element, Keyes was required to show "that over a significant period of time—panel after panel, month after month—the group of eligible jurors in question has been significantly underrepresented on the panels"

due to their "systematic exclusion" from those panels. *Griffin*, 846 N.W.2d at 101 (quotation omitted). "Systematic exclusion" refers to "unfair or inadequate selection procedures used by the state rather than, e.g., a higher percentage of 'no shows' on the part of people belonging to the group in question." *Id.* at 102 (quotation omitted). In other words, systematic exclusion requires the defendant to show that the distinctive group at issue has been consistently underrepresented in jury venires as a result of the procedures used to identify and summon individuals for jury duty, *see Williams*, 525 N.W.2d at 542, and that the underrepresentation could not be explained by "reasonable and plausible alternative possibilities shown by the statistical data," *Griffin*, 846 N.W.2d at 102.

In Minnesota, jurors must be selected "from the broadest possible cross section of people in the area served by the court." Minn. R. Gen. Prac. 801. Potential jurors are summoned from a "source list," which "must" include names from "[t]he voter registration list and the driver's license and ID cardholders list" for each respective county. Minn. R. Gen. Prac. 806(b). Our supreme court has recognized that "[s]ince August of 1990, *all counties* in the state are required to use driver's license lists and state identification lists, as well as voter registration lists, to compile their master juror lists." *Williams*, 525 N.W.2d at 541-42 (emphasis added).

Keyes argues that Ramsey County's use of voter-registration and driver's-license information in its jury-selection process systematically excludes Black jurors because the "numbers do not lie," and the numbers show that "[f]rom 2018 – 2021 . . . the number of Black and African American potential jurors in Ramsey County was barely half or less than half of what it should have been," including his trial where only three out of 55

potential jurors identified as Black. But the challenged process must be used when creating a master jury list for each county. *See id.* And the supreme court has repeatedly held that a "jury selection system that 'used registered voters, driver's licenses, and registered Minnesota identification card holders' d[oes] not systematically exclude people of color." *Andersen v. State*, 940 N.W.2d 172, 182 (Minn. 2020) (quoting *State v. Roan*, 532 N.W.2d 563, 569 (Minn. 1995)); *see State v. Willis*, 559 N.W.2d 693, 700 (Minn. 1997) ("Even if [the defendant] were to show the necessary underrepresentation, as a matter of law, he could not demonstrate that the underrepresentation resulted from the state's procedures because . . . this court upheld the same Hennepin County selection process."); *State v. Gail*, 713 N.W.2d 851, 861-62 (Minn. 2006) (rejecting a challenge to a Hennepin County jury venire because, although "only one person self-identified as African-American on the 50-person venire," the defendant "provided no evidence to satisfy the *Williams* standard," and even if the court assumed underrepresentation, the court previously upheld the selection process, and the defendant "did not show that [Hennepin County's] procedures [had] changed in any material respect since *Willis* and *Roan*").

The jury-selection process here is the same process that has repeatedly been upheld by our supreme court. And Keyes has produced no evidence to factually support his argument that the jury selection conducted at the time of his trial systematically excluded Black people from juries. Accordingly, Keyes's argument that the jury pool was not representative of a fair cross-section of the community fails.

## III.

Keyes challenges the district court's decision allowing the state to amend its complaint on the morning of trial, arguing that the "court erred by accepting the amended complaint because the state did not even ask for a continuance, and the relevant rule makes doing so a prerequisite to the ability to proceed on an amended complaint." We review a district court's decision to permit an amendment to the complaint for an abuse of discretion. *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004).

Under Minn. R. Crim. P. 3.04, the district court "is relatively free to permit amendments to charge additional offenses before trial is commenced, provided the [district] court allows continuances where needed." *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990). Here, Keyes acknowledges that he would have objected to a continuance if one had been requested by the prosecutor. Moreover, Keyes's defense at trial was that the sexual assault did not occur and S.B.'s testimony to the contrary was not credible. And he does not explain on appeal how his defense would have been different had the new charges been added earlier or omitted. Thus, Keyes is unable to show that the district court improperly allowed the state to amend the complaint without asking for a continuance.

Keyes also argues that the district court abused its discretion by allowing the state to amend the complaint because the motion to amend was "untimely and unfairly prejudicial." The state "acknowledges that it should have ensured that Keyes had been served with the amended complaint at the same time it was filed, which was two weeks before trial." But the state argues that the district court correctly determined that the "amendments were not overly prejudicial to Keyes." We agree.

The original complaint charged Keyes with third-degree assault—substantial bodily harm, and first-degree criminal sexual conduct—fear of great bodily harm. The amended complaint added charges of first-degree criminal sexual conduct—use of force causing personal injury, and first-degree criminal sexual conduct—use of coercion causing personal injury. As the state points out, "the added sexual assaults overlapped the existing charges to a significant degree . . . and required no additional evidence or investigation" because the new charges only added "elements of force, coercion, and personal injury." Moreover, as noted above, Keyes's defense to the sexual-assault charges was that no sexual assault occurred and that S.B. was not credible. The additional charges did not affect this defense. Finally, the evidence of force, coercion, and personal injury was abundant; S.B. testified that Keyes beat her and forced her to perform oral sex on him in her bedroom and in the living room. She also testified about her injuries, and multiple sources of evidence were admitted corroborating S.B.'s testimony regarding her injuries. And the state submitted DNA evidence, which further supported the sexual-assault allegations. As such, Keyes cannot show he was prejudiced by the district court's decision to allow the state to amend its complaint.[2]

**Affirmed.**

[2] Keyes filed a pro se supplemental brief in which he recounts his version of various events and generally argues that he is innocent. But Keyes makes no discernible claim of error and offers neither legal argument nor supporting authority. Accordingly, we decline to consider Keyes's pro se supplemental brief. *See State v. Reek*, 942 N.W.2d 148, 165 (Minn. 2020) ("We will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority." (quotation omitted)).