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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-27**

State of Minnesota,
Respondent,

vs.

Jorge Juan Rocha,
Appellant.

**Filed April 30, 2012
Affirmed
Crippen, Judge***

Steele County District Court
File No. 74-CR-10-874

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

Daniel A. McIntosh, Steele County Attorney, Christy M. Hormann, Assistant County Attorney, Owatonna, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Benson Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Crippen,
Judge.

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

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant Jorge Rocha disputes his felony conviction for violating an order for protection (OFP), questioning whether the district court omitted an instruction to the jury on an element of the offense and challenging the sufficiency of the evidence to support the jury's conviction. Because the record shows sufficient evidence for a conviction and any error in the district court's instructions was harmless, we affirm.

FACTS

On April 19, 2010, appellant's former girlfriend, D.G., reported to police that appellant violated an April 2008 OFP. According to her testimony, she was walking along a street, she heard a car honk, and the car pulled to the side of the road. Appellant got out of the car's backseat and "went to grab" D.G. When appellant put his arms around her, D.G. "hit him on his chest," pushing him away. When appellant commanded D.G. to get in the car, she refused. D.G. reminded appellant of the OFP and urged him to "get it through [his] head that it's over with, done with." After the encounter, appellant left the scene and made the police report.

Appellant was charged with felony violation of an OFP, Minn. Stat. § 518B.01, subd. 14(d)(1) (2008). At trial, the district court denied appellant's motion for acquittal and instructed the jury according to Minnesota's criminal jury instruction guides, 10 *Minnesota Practice*, CRIMJIG 13.54 (2006). The district court's instructions stated as an element of the offense "the defendant knew of the existence of the order." This instruction also presented the jury with a supplemental question to be reached in the event

that the jury found appellant guilty: “Did the defendant knowingly commit this crime within ten years of the first of defendant’s two or more previous qualified domestic-violence-related offense convictions?”¹

The jury found appellant guilty of the charged offense and answered the question in the affirmative. The district court sentenced appellant to 36 months’ incarceration.

D E C I S I O N

1.

At trial, appellant did not object to the district court’s use of the standard jury instruction for the offense. Under Minn. R. Crim. P. 31.02, despite the general waiver of an issue that is not the subject of an objection, we may review an unobjected-to jury instruction for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). We are to consider whether there is an error that is plain and affects the defendant’s substantial rights. *Griller*, 583 N.W.2d at 740. An error is plain if it is “clear” or “obvious,” contravening “case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects substantial rights “if there is a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury.” *Griller*, 583 N.W.2d at 741 (quotation omitted). If plain error is established, we then are to determine whether imposition of a remedy will ensure fairness and the integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740.

¹ This supplemental question is added if, like appellant, a defendant does not stipulate to the prior convictions underlying a felony-level charge. *See* CRIMJIG 13.54.

Appellant contends that the district court did not instruct the jury as to the statutory elements of a felony-level violation of an OFP, which occurs when an individual “knowingly violates” the order within a prescribed time since earlier convictions. Minn. Stat. § 518B.01, subd. 14(d) (2008).² Appellant argues that a knowing violation is not proved by merely showing that an individual knew of the existence of an order and in fact violated the order.

Because appellant disputed the prior convictions underlying the state’s felony accusation, the district court instructed the jury that, if it found appellant guilty of the described offense, it must decide if appellant “knowingly commit[ed] this crime within the years designated by statute.” Still, the district court’s earlier instruction stated as an element of the offense only that “the defendant knew of the existence of the order.”

This court recently determined that the trial court must instruct the jury on the “knowingly” element stated by law for a felony violation of an order for protection, and the HRO-violation statute employs almost identical language. *See State v. Gunderson*, ___ N.W.2d ___ (Minn. App. Feb. 6, 2012). But the immediate case is differently affected on the question of whether this error affected appellant’s substantial rights.

An error as to jury instructions affects substantial rights if there is a reasonable likelihood that a more accurate instruction would have had a significant effect on the jury verdict. *State v. Vance*, 734 N.W.2d 650, 656, 660-61 (Minn. 2007), *overruled on other grounds by State v. Fleck*, ___ N.W.2d ___ (Minn. 2012).

² A misdemeanor-level violation occurs when an individual “knows of the existence” of an OFP and violates the order. Minn. Stat. § 518B.01, subd. 14(b) (2008).

In *Neder v. United States*, the United States Supreme Court applied a harmless-error analysis to the district court's failure, over the defendant's objection, to instruct the jury on an element of the charged offense. 527 U.S. 1, 6, 19-20, 119 S. Ct. 1827, 1832, 1839 (1999). The *Neder* Court concluded that this analysis "serves a very useful purpose insofar as it blocks setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Id.* at 19, 119 S. Ct. at 1839 (quotation omitted). Although *Neder* applies the harmless error analysis to an error that the defendant had challenged at trial, its rationale is persuasive in applying the third prong of the plain-error analysis in the case we are reviewing. *See Ihle*, 640 N.W.2d at 917 (declining to grant relief for plain error when there was "no reasonable likelihood that a more accurate instruction would have changed the outcome").³

Here, appellant did not dispute at trial that he knew that his conduct was prohibited. The victim reminded appellant of the OFP during the incident. In addition, the jury specifically answered "Yes" to the question "Did the defendant knowingly commit this crime within ten years of the first of defendant's two or more previous qualified domestic violence-related offense convictions?" Under these circumstances, appellant fails to establish that any variation in the district court's instructions from the

³ The Minnesota Supreme Court has acknowledged, with respect to the substantial-rights factor, that "the law is unclear regarding whether the omission of an element from jury instructions is necessarily prejudicial or may instead be subject to a harmless error analysis." *Vance*, 734 N.W.2d at 661. But the *Vance* court declined to resolve this issue, concluding that it "need not address the lack of clarity in the law" because the facts in *Vance* were distinguishable from cases in which a court "deemed harmless the failure to submit an element of the offense to the jury." *Id.*

demands of the statute affect his substantial rights. Appellant is not entitled to relief premised on the district court's challenged instructions.⁴

2.

When reviewing a challenge to the sufficiency of the evidence, this court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010).

For a finding of guilt on the charged offense, the statute requires the state to prove that appellant knowingly violated an OFP within ten years of the first of two or more previous qualified domestic-violence-related offense convictions or adjudications of delinquency. *See* Minn. Stat. § 518B.01, subd. 14 (d)(1). Appellant argues that there is insufficient evidence to support his conviction because D.G.'s testimony is not credible.

It is the exclusive function of the jury to determine witness credibility. *State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998). And "a conviction may rest on the testimony of a single credible witness." *State v. Miles*, 585 N.W.2d 368, 373 (Minn.

⁴ Because appellant fails to establish the third prong of the plain-error analysis, we do not reach the question of whether granting the remedy which he seeks is necessary to ensure fairness and the integrity of the judicial proceedings. *See Griller*, 583 N.W.2d at 740 (stating that remedy to ensure fairness and integrity of judicial proceedings considered only after three plain-error factors are established).

1998). In support of its verdict, the jury was presented with evidence of an OFP that prohibited appellant from having any contact with D.G. for two years, beginning April 25, 2008. The jury heard D.G. testify that appellant had contact with her on April 19, 2010, which violated the 2008 order. Her testimony was corroborated by her consistent statement to police on the day of the alleged incident. The jury was also presented with evidence that appellant was served with a copy of the relevant OFP and that appellant had two previous qualified domestic-violence-related offense convictions within the past ten years. Viewed in the light most favorable to the verdict, the evidence is sufficient to support the jury's determination that appellant is guilty of a felony violation of an OFP.

Affirmed.