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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2137**

State of Minnesota,
Respondent,

vs.

Edward Leroy Milner,
Appellant.

**Filed November 25, 2013
Affirmed
Rodenberg, Judge**

Olmsted County District Court
File No. 55-CR-11-7334

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Jessica Benson Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Worke, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appealing from his convictions of violating a domestic abuse no-contact order (DANCO) and direct criminal contempt during the trial proceedings, appellant argues

that (1) the district court erred in determining that his constitutional challenges are barred as an impermissible collateral attack; (2) the DANCO statute is unconstitutional; (3) the district court committed reversible error by failing to properly instruct the jury; and (4) his direct contempt conviction should be reversed as unsupported by the record. We affirm.

FACTS

Appellant Edward Leroy Milner was charged with violating a DANCO. The DANCO was issued during appellant's rule 5 hearing in a criminal proceeding in which appellant was charged with several crimes relating to a domestic assault on V.L.T., a woman with whom he was previously involved. The district court stated that appellant was "not to have contact with [V.L.T] or be at . . . any location where she resides." On or about August 30, 2011, appellant sent a letter to V.L.T. from the Olmsted County Jail using the name of a different jail inmate in the return address. V.L.T. did not know the inmate whose name was used on the return address of that letter. The letter referred to intimate details from V.L.T.'s past relationship with appellant. It was also written in what V.L.T. described as appellant's distinct handwriting and contained fingerprints of appellant's right thumb and left palm. On October 12, V.L.T. gave the letter to the officer investigating the underlying domestic assault charges.

On October 20, 2011, appellant was charged with felony violation of the DANCO in violation of Minn. Stat. § 629.75 (2010). At the omnibus hearing, appellant argued that the DANCO statute is unconstitutional under several theories. The district court

determined that these challenges were barred as an impermissible collateral attack. Thereafter, appellant entered a plea of not guilty, and the case was tried to a jury.

At trial, the district court instructed the jury on the elements of the charged felony DANCO violation as follows: “First, there was an existing court domestic abuse no-contact order; second, the defendant violated a term or condition of the order; third, the defendant knew of the existence of the order; fourth, the defendant’s act took place on or about August 30, 2011, in Olmsted County.” Additionally, the special verdict form provided to the jury posed this 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?” The judge instructed the jury regarding this special verdict question as follows:

If you find defendant is guilty, you have an additional issue to determine and it will be put to you in the form of a question on the verdict form. The question is: 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? You should answer the question yes or no. If you have a reasonable doubt as to the answer, you should answer the question no.

Appellant did not object to either the special verdict form or to these jury instructions. The jury found appellant guilty of the charged offense and answered the special verdict question in the affirmative. Appellant was sentenced to an executed commitment to prison for one year and one day.

Throughout the trial proceedings, appellant was uncooperative, refused to stand when the judge entered the courtroom, refused to answer the judge’s questions, and was

eventually removed from the courtroom because of his behavior. After the final summations of counsel, appellant was brought back into the courtroom and was asked if he wanted to be present for the return of the verdict. Despite warnings that the district court could hold him in contempt, appellant ignored the district court's questions and repeatedly interrupted the judge while she was speaking. After multiple warnings and admonitions, the district court found appellant in direct contempt of court and imposed a 90-day jail sentence, to be served consecutively to the sentence for the DANCO conviction. This appeal followed.

DECISION

I.

On appeal, appellant raises the same arguments regarding the constitutionality of the DANCO statute that he raised at the omnibus hearing; namely, that it violates (1) procedural due process; (2) the void-for-vagueness doctrine of the due process clauses of the federal and state constitutions; and (3) the separation of powers doctrine of the state constitution. He also argues for the first time on appeal that the statute violates substantive due process and the First Amendment by (1) infringing on a “fundamental liberty interest in forming and preserving personal relationships,” and (2) “making it a crime to have any type of contact, whether harassing or benign, with a particular person.”

We first consider whether appellant's constitutional arguments are barred as an impermissible collateral attack. The district court did not address the merits of appellant's constitutional challenges, but instead ruled that they amounted to an impermissible collateral attack because appellant could have raised arguments concerning

the validity of the DANCO order in the underlying proceeding at which the order was issued.

We held in *State v. Ness* that “[b]ecause there is no right to appeal the issuance of a pretrial DANCO, . . . a challenge to the issuance of the DANCO in a subsequent prosecution for violating that DANCO is not barred as a collateral attack.” 819 N.W.2d 219, 221 (Minn. App. 2012), *aff’d*, 834 N.W.2d 177 (Minn. 2013). The Minnesota Supreme Court did not disturb this holding on appeal. *State v. Ness*, 834 N.W.2d 177, 181 n.3 (Minn. 2013) (“Because the question of whether a collateral attack of the statute is permissible has not been preserved for our review, we have no occasion to address that question in this opinion.”). Based on our opinion in *Ness*, appellant is entitled to challenge the constitutionality of the DANCO statute in this proceeding. 819 N.W.2d at 221. His challenge is not barred as an impermissible collateral attack.

The constitutionality of a statute is a question of law, which we review de novo. *State v. Crawley*, 819 N.W.2d 94, 101 (Minn. 2012), *cert. denied*, 133 S. Ct. 1493 (2013). We presume a statute is constitutional, *State v. Bussmann*, 741 N.W.2d 79, 82 (Minn. 2007), and the party challenging a statute’s constitutionality must establish, “beyond a reasonable doubt, that the statute violates a provision of the constitution,” *State v. Grossman*, 636 N.W.2d 545, 548 (Minn. 2001).

With respect to appellant’s contentions that the DANCO statute violates procedural due process and is void for vagueness, our supreme court recently rejected those arguments. *Ness*, 834 N.W.2d at 183, 186. *Ness* left open the possibility of as-applied challenges, but appellant has not made such a challenge. *See id.* at 183 n.4.

The separation-of-powers issue was argued to the district court but not addressed in *Ness*, and we therefore analyze it here. *Id.* at 181. The legislature declares what acts are criminal and establishes the punishment for such acts as substantive law. *State v. Lindsey*, 632 N.W.2d 652, 658 (Minn. 2001). The judiciary decides “the method by which the guilt or innocence of one who is accused of violating a criminal statute is determined.” *Id.*

Appellant argues that the legislature has imposed a procedural regulation on the courts by mandating that a DANCO be issued in a proceeding separate from the criminal proceeding from which the DANCO arises. Appellant contends that the Minnesota Supreme Court has the sole authority to issue rules of procedure for the state courts. Therefore, he argues, the legislature has impinged on a judicial function in enacting the DANCO statute.

As part of his separation-of-powers challenge, appellant argues that, by prohibiting the issuance of a DANCO as part of the hearing to set conditions of release, the statute encroaches on the district court’s ability to regulate procedure. This argument ignores a defendant’s constitutional right to unconditional bail in a criminal proceeding. *See State v. Pett*, 253 Minn. 429, 435, 92 N.W.2d 205, 209 (1958) (“[U]nder our constitution the court [has] no discretion except in fixing the amount of bail.”). The DANCO statute provides a mechanism for protecting victims of domestic violence separate and apart from bail, and with the evident purpose of ensuring that a defendant will not have contact with a victim, whether or not bail is posted. The legislature provided that a DANCO shall be issued in a proceeding separate from the criminal case, thereby ensuring that,

even if a defendant makes unconditional bail in the criminal case, a procedure is available by which an enforceable no-contact order may exist and which may give rise to a separate criminal charge in the event of a violation.¹ Minn. Stat. § 629.75, subd. 1(c).

Appellant’s separation-of-powers argument fails. Contrary to appellant’s assertion, the statute does not require a district court to issue a DANCO. Rather, the express language of the statute provides that a DANCO “*may* be issued as a pretrial order before final disposition of the underlying criminal case” Minn. Stat. § 629.75, subd. 1(b) (emphasis added). Although Minn. Stat. § 629.75, subd. 1(c), states that a DANCO “shall be issued,” the words that follow make evident that *if* a DANCO is issued, it must be issued in a proceeding separate from the criminal case. The entire sentence reads: “A no contact order under this section shall be issued in a proceeding that is separate from but held immediately following a proceeding in which any pretrial release or sentencing issues are decided.” Minn. Stat. § 629.75, subd. 1(c). Because the DANCO statute does not deprive the district court of discretion to issue the order, we discern no violation of separation-of-powers principles.

Appellant’s substantive due process and First Amendment arguments were not raised below and we therefore decline to consider them. *Williams*, 794 N.W.2d at 874;

¹ We question whether the district court complied with Minn. Stat. § 629.75 in issuing the DANCO here. The record does not clearly reveal that a separate proceeding was held for the purpose of issuing the order. The hearing at which the DANCO was issued began as a rule 5 hearing. After the DANCO was issued, the parties and the district court dealt with scheduling a rule 8 hearing, seemingly as a continuation of that rule 5 hearing. This issue was not raised on appeal, and so we do not address it. *State v. Williams*, 794 N.W.2d 867, 874 (Minn. 2011). However, we note that noncompliance with the separate proceedings requirement may cause a defendant to conflate a DANCO with a condition of release. But again, appellant does not advance that argument in this appeal.

State v. Kager, 357 N.W.2d 369, 370 (Minn. App. 1984) (declining to rule on the constitutionality of a statute when the issue was not raised or ruled upon by the district court). Appellant’s constitutional challenges to the validity of the DANCO therefore fail.

II.

Appellant also contends that the district court committed reversible error by failing to instruct the jury that he must have “knowingly violated” the DANCO in order to be convicted. The district court is afforded considerable latitude in selecting the language of its instructions to the jury. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). We review jury instructions “in their entirety to determine whether they fairly and adequately explain the law of the case.” *Id.* In conducting this review, we apply an abuse-of-discretion standard. *State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007).

When a defendant fails to propose specific jury instructions or object to instructions before they are delivered to the jury, a challenge to the instructions has not been preserved for appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). However, appellate review is still available when jury instructions are plainly erroneous. *Id.* A “plain error” is defined as (1) an error, (2) that is plain, and (3) that affects the substantial rights of a party. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). A jury instruction that omits an element of an offense is an error that is plain. *Ihle*, 640 N.W.2d at 916-17; *State v. Gunderson*, 812 N.W.2d 156, 161-62 (Minn. App. 2012). Such an error affects a defendant’s substantial rights when there is a reasonable likelihood that it had a significant effect on the jury verdict. *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006).

In *State v. Watkins*, the defendant was charged with a felony DANCO violation. 820 N.W.2d 264, 265 (Minn. App. 2012), *review granted* (Minn. Nov. 20, 2012). The district court failed to include the knowingly violated element. *Id.* at 267. Because we found plain error affecting the defendant's substantial rights, we reversed and remanded for a new trial. *Id.* at 271.

Appellant argues that, because the jury instructions here also omitted the knowingly violated element, *Watkins* requires us to reverse his conviction and remand for a new trial. However, the present case is distinguishable from *Watkins* because the jury in that case was not presented with a special verdict question that included the knowingly violated element. 820 N.W.2d at 266. Rather, the district court's jury instructions here are more akin to those given in *Ihle*.

In *Ihle*, the defendant was charged with gross misdemeanor obstruction of legal process. 640 N.W.2d at 914. When instructing the jury on the elements of the charge, the district court failed to include additional language in the element of the offense required by applicable caselaw. *Id.* at 914, 916. But the jury instructions included a special verdict question that required the jury to find the omitted elements beyond a reasonable doubt. *Id.* at 914, 917. The jury found the defendant guilty of obstruction of legal process and answered the special verdict question in the affirmative. *Id.* at 915.

We held in *Ihle* that, "without the special verdict question," the elements recited in the jury instructions "materially misstated the law," which was an error that was plain. *Id.* at 916-17. Because the special verdict question required the jury to find the omitted elements beyond a reasonable doubt, it was "not reasonably likely that the error had a

significant effect on the verdict in view of the jury's answer to the special verdict question.” *Id.* at 917. It is just so in this case. The jury was required to find that appellant committed a knowing violation of the DANCO beyond a reasonable doubt in order to answer the special verdict question in the affirmative. Therefore, the district court's error in instructing on the elements did not relieve the state of the burden of proving that appellant knowingly violated the DANCO. *See Mahkuk*, 736 N.W.2d at 683; *State v. Hall*, 722 N.W.2d 472, 479 (Minn. 2006). Because it was “not reasonably likely that the error had a significant effect on the verdict,” the error in the jury instructions here did not affect appellant's substantial rights. *Ihle*, 640 N.W.2d at 917. We therefore affirm appellant’s conviction of the felony DANCO violation.

III.

Appellant also urges us to reverse his conviction of direct criminal contempt. The contempt power is meant to summarily punish offenses that undermine the dignity of courtroom proceedings. *State v. Tatum*, 556 N.W.2d 541, 547 (Minn. 1996). A finding of direct contempt is reviewed for “arbitrariness, capriciousness and oppressiveness.” *Id.* We employ this deferential standard of review because “the sneering, sarcastic and insolent manner in which words are spoken is obvious to those who hear them, but is shown very imperfectly, if at all, by the printed record.” *In re Cary*, 165 Minn. 203, 207, 206 N.W. 402, 403 (Minn. 1925).

Appellant makes several arguments as to why his contempt conviction should be reversed. He first argues that his comments were neither profane nor contemptuous, and that he was merely attempting “to make a record of issues that were important to him”

because of his (self-imposed) absence from trial.² In his reply brief, appellant also argues that his behavior immediately prior to the return of the verdict should be viewed separately and not as part of a continuing pattern of contemptuous behavior because his behavior earlier in the proceedings was used as a basis to determine that he was waiving his right to be present for trial. We find appellant's arguments unpersuasive.

Throughout the proceedings before the district court, appellant repeatedly refused to answer the judge's questions, refused to stand before the judge, and made continued threats to disrupt the proceedings. When asked whether he would like to be present for the return of the verdict, appellant repeatedly interrupted the judge while she was speaking, despite warnings that he could be held in contempt. From our review of the record, the judge appears to have been commendably patient with appellant throughout the entirety of the proceedings. The conviction of direct contempt here was not reflexive or hasty. It followed multiple warnings from the judge. Although appellant maintains that he was attempting to protect his legal rights immediately prior to the finding of contempt, the finding of contempt was, from our careful review of the record, not based on an isolated instance of contemptuous behavior. The district court judge was much better situated than are we to discern the overall effect of appellant's behavior, but in this case even the printed record reveals clearly contemptuous behavior. *Cf. id.* We therefore affirm appellant's conviction of and sentence for direct contempt.

Affirmed.

² Appellant does not argue on appeal that his removal from the courtroom for obstreperous behavior was error.