STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0589

State of Minnesota,
Respondent,

vs.

Vernon Eugene Marcus Covington,
Appellant.

Filed January 14, 2013
Affirmed
Cleary, Judge

Ramsey County District Court
File No. 62-CR-11-6903

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

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

David W. Merchant, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Peterson, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

CLEARY, Judge

Appellant challenges his conviction of felony domestic assault under Minn. Stat. § 609.2242, subd. 4 (2010), arguing that he was denied his due process right to a unanimous jury verdict and that the prosecutor committed misconduct during closing arguments. Appellant also raises additional arguments in his pro se supplemental brief. We affirm.

FACTS

At 7:24 p.m. on August 28, 2011, K.M. called 911 to report that her ex-boyfriend, appellant Vernon Covington, had entered her residence, jumped on top of her, grabbed at her, and tried to drag her from the residence. Some of K.M.'s children were present and helped K.M. remove appellant from the residence. Appellant was not present when St. Paul Police Department officers responded to the call.

At 11:03 p.m. that same evening, K.M. called 911 again to report that appellant had just returned to the residence. K.M. told the officers, one of whom had also responded to the earlier call, that she had been on the front steps of her residence when appellant came around the corner, grabbed her by the throat, and squeezed her throat so hard that she could not breathe for 10–11 seconds. She also told the officers that appellant had choked her, dragged her by the neck, screamed at her, called her a name, threatened her, and threw a can of chili at her, barely missing her.

K.M. was crying when the officers arrived the second time, and the officer who spoke with K.M. after both incidents noted that her voice sounded raspy during his

second visit. K.M. told the officers that she had a ten-year on-and-off relationship with appellant and that appellant had a long history of domestic abuse against her during that relationship. The next day, K.M. was interviewed by an officer with the police department's family violence unit and gave him a statement about the events of the previous evening. Her version of the events was consistent with what she had told the responding officers. On August 30, 2011, appellant was charged with felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4.

Shortly before trial, appellant wrote a letter in which she recanted her allegations against appellant. In the notarized letter, K.M. stated that she did not "wish to further cooperate in the prosecution" of appellant because her statements to the officers "were falsified to some degree." She also wrote that she spoke "out of emotion and anger in hopes of hurting [appellant]" in any way possible. At trial, K.M.'s testimony was consistent with her recantation letter. K.M. testified that appellant did not hit her on August 28. She also testified that she was intoxicated that night and that she did not remember talking to officers when they came to her residence the second time. K.M. testified that she did not think that she told the officers that appellant squeezed her neck and did not remember telling them that he called her a name and threatened her. She testified that appellant did not throw the can of chili at her. She claimed that the can fell out of a bag that appellant was carrying and that she threw it on the ground after he left so that it would appear dented, as if appellant threw it. K.M. also testified about the interview she gave to the officer the day after the incidents. She remembered having a

conversation with the officer, but did not remember telling the officer about the events of August 28.

L.M., one of K.M.'s daughters, also testified at trial. L.M. testified that she was present at K.M.'s residence on August 28 and heard appellant and K.M. arguing. The state asked L.M. about a statement that she had given to an investigator the day before she testified at trial. L.M. did not remember telling the investigator that appellant pulled K.M. off the couch by her wrists, that appellant hit K.M., or that K.M. chased appellant out of the house. L.M. stated that she has memory problems and could not remember parts of what had happened the day before. She testified that, although appellant touched K.M. on August 28, he did not hit her. She also testified that she had never seen appellant hit, smack, or choke K.M. in the course of their relationship. L.M. repeatedly stated that she did not remember events from August 28 or from the day before she testified.

During closing arguments, the prosecutor commented on the testimony of L.M. and K.M. The prosecutor emphasized how many times they both could not remember facts from the evening of August 28. She also noted that it appeared that the two women did not even care about the outcome of the case. The prosecutor stated:

> Ladies and gentlemen, when you step back into the jury room at the close of this case you're going to be facing a fork in the road. You're going to have a decision ahead of you. And the decision is not initially whether to find the defendant guilty or not guilty. The decision is whether you're going to care enough to go forward and listen to all the facts of this case, consider all the facts of this case, and even think about what you're going to do because [K.M.] came here and

said nothing ever happened. If she doesn't care, why should you?

. . . .

. . . You took an oath to decide this case based on the law, based on the judge's instructions to you. That oath is a serious matter. The state, our community, we depend on jurors to take these cases seriously and to suss out the details, but you are probably wondering why should you care, why should you care about what happened on August 28th, when it is so clear that neither [L.M.] nor [K.M.] take it seriously. Why should you care?

You should care, number one, because you took that oath; but number two, because the law in our state is designed to protect everybody. It's designed to protect those people who stand up for themselves and who can deal with a situation, who can fight for themselves, who can advocate for themselves, but it's also designed to protect the people who can't. And could it be more clear that [K.M.] is somebody who can't? And you know why she can't. She can't because she's afraid. She can't because the [appellant] is the father of her child. These are things that she told you. She can't because she wants him involved in her son's life growing up. She can't because he threatens her.

What happens to her if she sticks up for herself? She can't protect herself, and so it's your job today to apply the law to the facts and to protect [K.M.] even though she can't protect herself, because she, as a member of our community, is as important as every one of us, and that is the oath that you took as a juror, to apply the law as the judge has given it to you.

The jury found appellant guilty of felony domestic assault under Minn. Stat. § 609.2242, subd. 4. This appeal followed.

D E C I S I O N

I

Appellant argues that his right to a unanimous jury verdict was denied. Appellant did not object to the unanimity instruction given to the jurors at trial, but he argues now that a specific unanimity instruction also should have been given because the state presented evidence of separate factual incidents that could have each supported a conviction.

Generally, a party's failure to object to jury instructions results in a waiver of the issue on appeal. *State v. Laine*, 715 N.W.2d 425, 432 (Minn. 2006). However, appellate courts have discretion to review unobjected-to jury instructions for plain error. *See State v. Brown*, 815 N.W.2d 609, 621 (Minn. 2012) (citing *Laine*, 715 N.W.2d at 432). Plain error exists if there was "(1) error, (2) that is plain, and (3) affects substantial rights." *Laine*, 715 N.W.2d at 432 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740.

"A unanimous verdict shall be required in all cases." *State v. Stempf*, 627 N.W.2d 352, 354 (Minn. App. 2001) (quoting Minn. R. Crim. P. 26.01, subd. 1(5)) (quotation marks omitted). "To achieve that end, a jury must unanimously find [] that the government has proved each element of the offense." *State v. Pendleton*, 725 N.W.2d 717, 730–31 (Minn. 2007) (quotation omitted) (alteration in original). A district court does not need to instruct the jury that it must unanimously agree about which actions by a

defendant constituted a crime when those actions are part of a "single behavioral incident." *State v. Infante*, 796 N.W.2d 349, 356–57 (Minn. App. 2011).

Appellant relies on *Stempf* to argue that the verdict was not unanimous because the jurors could have believed that appellant committed an assault at 7:24 p.m., but not at 11:03 p.m., or vice versa. In *Stempf*, the state charged the defendant with one count of possession of a controlled substance, but presented evidence that the defendant possessed the substance both at his place of employment and in a vehicle in which he had been a passenger. 627 N.W.2d at 354. At the end of the trial, the defendant requested an instruction that required the jurors to unanimously agree on which act of possession was proven. *Id.* The district court refused to give the instruction, and the jurors found the defendant guilty. *Id.* This court held that, because some jurors could have believed that the defendant possessed the substance in the vehicle while other jurors could have believed that he possessed the substance at his place of employment, it was possible that the verdict was not unanimous. *Id.* at 358. The court also pointed out that the "two acts alleged in this case lack unity of time and place; they are separate and distinct culpable acts, either one of which could support a conviction." *Id.* at 358–59. The defendant's conviction was vacated. *Id.* at 359.

This court has noted an exception to *Stempf* when charged acts are part of "single behavioral incident." In *Infante*, the defendant was charged with one count of second-degree assault when he became angry with his wife and committed various acts over a period of several hours. 796 N.W.2d at 352–53. Around 8:00 or 8:30 a.m., the defendant put a gun to his wife's head, called her names in an angry tone, and accused her of

sleeping with his friends. *Id.* at 352. The defendant left the house, but called his wife four times over the next two hours and left her threatening messages. *Id.* He returned to the house around 10:30 or 11:30 a.m. and told his wife that he had taken an entire bottle of prescription pills. *Id.* He threw the empty prescription pill bottle at her and sat on their couch methodically loading a gun. *Id.* He left after about three hours. *Id.*

The district court gave the jurors a general unanimity instruction, but did not specifically instruct that they needed to agree which of the defendant's actions constituted assault. *Id.* at 353. The defendant did not object to the instruction given or request a specific unanimity instruction, but on appeal he relied on *Stempf* to argue that the district court committed plain error. *Id.* at 355–56. This court noted that "while *Stempf* combined two separate and distinct culpable acts that lack[ed] unity of time and place under a single charge," the defendant's actions "were part of a single behavioral incident." *Id.* at 356 (quotations omitted) (alteration in original). The court observed that the defendant's actions "occurred at the same place and involved the same victim. Moreover, they occurred over a short period of time, and were connected by [the defendant's] four threatening voicemails. Both actions shared a single criminal goal—to cause [his wife] to fear for her life or her safety . . . ." *Id.* at 357. For these reasons, the court held that the defendant's actions could not be considered "distinct acts" like the two acts of possession in *Stempf*. *Id.*

Similarly, in *State v. Dalbec*, the defendant was charged with one count of domestic assault for his actions over a 24-hour period. 789 N.W.2d 508, 509–10 (Minn. App. 2010), *review denied* (Minn. Dec. 22, 2010). In *Dalbec*, the defendant and his

fiancée had an early morning argument during which the defendant pulled a mattress off of the bed, causing his fiancée to fall onto the floor, and then pushed her into a filing cabinet. *Id.* at 509. The defendant threw his fiancée through a doorway and she grabbed and ripped his shirt. *Id.* at 510. The defendant called the police, and after the officer responded, his fiancée left the apartment. *Id.* She and the defendant then communicated via text message for two hours and got back together to talk. *Id.* They argued again and determined that their relationship was over. *Id.* At 10:00 p.m. that evening, the defendant returned to their apartment, kicked the door in when his fiancée tried to lock him out, pushed her around the apartment, and threatened her with a wooden plant stand. *Id.* The defendant left, but returned again during the early morning hours of the next day and pushed his way through a closed bedroom door. *Id.*

The defendant did not request a specific unanimity instruction during trial, but argued on appeal that the district court plainly erred by not including one. *Id.* at 510–11. This court concluded that the district court did not plainly err by not including a specific unanimity instruction and noted that "the various acts occurred over a period of time, but they all occurred at the same place and involved a single victim." *Id.* at 512–13.

Appellant claims that the evidence presented here consists of two distinct acts committed on two separate occasions in two different locations. He argues that the state described both acts in the complaint and that the prosecutor claimed in her closing argument that both acts satisfied the elements of an assault. This argument is unpersuasive. The acts occurred less than four hours apart, and both acts took place at K.M.'s residence, with K.M. as the victim. When K.M. called 911 the second time, she

stated that appellant "just came back to my house," and explained that she had called earlier. The complaint notes that the first 911 call was the "earlier portion of the incident," demonstrating that the responding officers treated appellant's actions as an ongoing incident. Similar to the situations in *Infante* and *Dalbec*, the events here were a single behavioral incident even though they occurred several hours apart.

The district court did not err by failing to give a specific unanimity instruction to the jurors. Because the district court did not err, we do not reach the second and third prongs of the plain-error analysis.

II

Appellant also argues that the prosecutor committed misconduct during her closing argument. Appellant did not object to the prosecutor's statements during trial, but now contends that the prosecutor improperly urged the jurors to "care" about K.M. and told the jurors that they had an obligation to protect K.M.

When the defendant fails to object, claimed prosecutorial misconduct is reviewed under the plain-error standard announced in *Griller*, 583 N.W.2d at 740. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

> [B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

Griller, 583 N.W.2d at 740.

"In a criminal trial the prosecutor may not seek convictions at any price." *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993). "A prosecutor must avoid inflaming the jury's passions and prejudices against the defendant, or otherwise seek to distract the jury from its proper role of deciding whether the state has met its burden." *State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997) (quotation and citations omitted).

Appellant first argues that the prosecutor's comments during her closing argument were improper because they distracted the jurors from determining the legitimate issues in the case. Appellant relies on cases holding that it is improper for a prosecutor to instruct jurors that they must protect society or send the defendant a message, or that their verdict "would determine what kind of conduct would be tolerated on the streets." *See State v. Threinen*, 328 N.W.2d 154, 157 (Minn. 1983); *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000).

Appellant fails to demonstrate how the prosecutor's comments here are comparable to these cases. Although the prosecutor did tell the jurors that they should protect K.M., it appears that this statement was particularized to K.M., not to society as a whole. It also appears that the prosecutor made this statement to emphasize the fact that the state prosecuted the case despite K.M.'s recantation, and she reminded the jurors that "it's your job today to apply the law to the facts." This comment did not shift the focus away from the issues, but rather centered the jurors' attention on the facts at hand.

Appellant next argues that the prosecutor's comments inflamed the passions or prejudices of the jurors by demonizing appellant and garnering sympathy for K.M. Minnesota courts have found that closing arguments have inflamed the passions and

prejudices of jurors based on the specific words that prosecutors chose. *See State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995) (holding that a prosecutor's comments were designed to inflame the jury's passions or prejudices when he told the jury that "he had [a] time share in Santa's condo, they were not that big of suckers, and that there was no salve or sedative to make them feel good" about acquitting the defendant); *Duncan*, 608 N.W.2d at 556 (holding that a prosecutor's repeated reference to the defendant as a "predator" was "intended to inflame the prejudices of the jury").

Appellant does not demonstrate how the prosecutor's comment that the jurors should "care" about the case inflames the passions and prejudices of the jurors. The prosecutor was emphasizing that the jurors should take this case seriously because they took an oath to determine the case based on the law and that the oath was a "serious matter," even though K.M. recanted her allegations. It is not clear how any of the statements demonized appellant. The prosecutor did not commit misconduct by inflaming the passions and prejudices of the jurors. Because the prosecutor's closing argument did not constitute misconduct, we do not reach the second and third prongs of the plain-error analysis.

III

Appellant submitted a supplemental pro se brief arguing that the district court judge improperly asked a witness questions; that the judge improperly scolded a courtroom observer in the presence of the jury; and that there was insufficient evidence to support his conviction. "We will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority if no prejudicial error is

obvious on mere inspection." *State v. Anderson*, 763 N.W.2d 9, 17 (Minn. 2009) (quotation omitted). Because appellant's arguments lack support and legal authority and no prejudicial error is obvious on mere inspection, appellant waives his pro se arguments.

Affirmed.