

STATE OF MINNESOTA

IN SUPREME COURT

A24-0228

Court of Appeals

Gaitas, J.
Dissenting, Moore, III, McKeig, Hennesy, JJ.

State of Minnesota,

Respondent,

vs.

Filed: July 22, 2026
Office of Appellate Courts

Ge Yang,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Adam Petras, Senior Assistant County Attorney, N. Nate Summers, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Stacy L. Bettison, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

Because the State charged one count of first-degree criminal sexual conduct but presented evidence of more than one distinct act, each of which on its own could prove the elements of the charged offense, the district court plainly erred by failing to provide a specific-unanimity jury instruction.

Reversed and remanded.

OPINION

GAÏTAS, Justice

A jury found appellant Ge Yang guilty of first-degree criminal sexual conduct and second-degree criminal sexual conduct for sexually abusing his minor stepdaughter. The district court entered a conviction for first-degree criminal sexual conduct and sentenced Yang to 144 months in prison. Yang appealed the conviction to the court of appeals, arguing that because the State alleged that multiple penetrative acts occurred at different times and in different locations, the district court plainly erred by failing to provide the jury with a specific-unanimity instruction. The court of appeals, relying in part on its decision in *State v. Rucker*, 752 N.W.2d 538 (Minn. App. 2008), rejected Yang's argument and affirmed. We granted Yang's petition for further review.

Recently, in *State v. Keyes*, ___ N.W.3d ___, No. A23-1400, 2026 WL 2053029 (Minn. July 15, 2026), we established a framework for determining whether a specific-unanimity jury instruction is required. Because the court of appeals' decision in *Rucker* is inconsistent with that framework, we overrule *Rucker*. Applying the framework from *Keyes* here, we conclude that Yang was entitled to a specific-unanimity instruction. We further conclude that the district court's failure to provide such an instruction was plain error that affected Yang's substantial rights and that we must address the error to ensure the fairness, integrity, and public reputation of judicial proceedings. Accordingly, we reverse Yang's conviction for first-degree criminal sexual conduct and remand for a new trial on that charge.

FACTS

In February 2022, 16-year-old A.K. disclosed to her high school advisor that her stepfather, appellant Ge Yang, had sexually abused her. Based on the advisor's mandatory report, Minneapolis police opened an investigation into the allegations of sexual abuse.

In October 2022, respondent State of Minnesota charged Yang with two counts of criminal sexual conduct. Count 1, first-degree criminal sexual conduct, was charged under Minnesota Statutes section 609.342, subdivision 1(g) (2014),¹ which criminalizes sexual penetration if “the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual penetration.” Count 2, second-degree criminal sexual conduct, was charged under Minnesota Statutes section 609.343, subdivision 1(h)(iii) (2014), which criminalizes “sexual contact with another person” if “the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual contact,” and “the sexual abuse involved multiple acts committed over an extended period of time.” Yang pleaded not guilty to both charges, and a jury trial was held in August 2023.

The State's Trial Evidence

During the State's case in chief, the jury heard the testimony of A.K., as well as the testimony of A.K.'s mother, aunt, uncle, and high school advisor. A Minneapolis

¹ The alleged conduct in this case occurred in 2015 and early 2016. At that time, the 2014 version of Minnesota Statutes was in effect. When discussing the alleged offenses here, we cite to the statutes in effect in 2014. In 2019, the Legislature amended Minnesota Statutes section 609.342, subdivision 1(g), by replacing “the sexual penetration” with “the act.” Act of May 30, 2019, ch. 5, art. 4, § 5, 2019 Minn. Laws 947, 986. This amendment does not affect our analysis.

police sergeant, a child protection investigator, and a forensic interviewer also testified. Those witnesses testified as follows.

In 2013, A.K.'s mother began dating Yang. Around May 2015, A.K. and her mother moved into Yang's apartment. A few months later, A.K.'s mother and Yang married. At that time, A.K. was around nine years old. A.K. testified that while she lived in Yang's apartment, Yang inappropriately touched her. He would grab her butt and reach under her shirt to squeeze her breasts. A.K. does not remember when the inappropriate touching began or how many times it occurred, but she testified that it happened "a lot."

A.K. also testified to sexual abuse that specifically began in the summer of 2015. That summer, A.K. stayed at her grandparents' home because both her mother and Yang worked during the day. A.K. testified that Yang would pick her up from her grandparents' home to drive her to dance classes once a week. Before dance practice, Yang would take her to his apartment, where he would be alone with A.K. and would sexually abuse her.

A.K. testified that the abuse primarily took place in two locations in the apartment: A.K.'s bedroom and Yang's bedroom. A.K. testified that when Yang and A.K. were in A.K.'s bedroom at the apartment, Yang would "tell [A.K.] to take off [her] clothes so [Yang] could touch [A.K.'s] breast and vagina. And [Yang] would go down and lick [A.K.'s] vagina." He would also "take [A.K.'s] hand and put it in his pants to his penis. And he would force [A.K.'s] hand to go up and down so that he was able to, like, relieve himself." A.K. stated that this happened "[m]ore than one time" and would occur during the same times that Yang made her take her clothes off and lay down on the bed. Additionally, A.K. testified that Yang sexually abused her in Yang's bedroom of the

apartment. While in Yang's bedroom, Yang "would sit down on the bed and tell [A.K.] to put [her] mouth on his penis so that [she] was able to suck on his penis." A.K. testified that the abuse continued for the two years that she attended dance class.

In January 2016, the family moved from the apartment to a townhome in Minneapolis. A.K. testified that, while living at the townhome, Yang continued to touch A.K.'s breasts and butt but no longer made A.K. do anything to his body and no longer made her lay down naked. A.K. testified that one day, while they were living in the townhome, she was sick with a fever and had to stay home from school. She stated that Yang "told [her] to take off [her] clothes so that he could wash [her]. He was very focused on washing [A.K.'s] vagina."

A.K. testified that she told her aunt that Yang was touching her inappropriately. The aunt testified about such a conversation, which she said took place in February 2015. According to the aunt, she affirmatively raised the issue of abuse with A.K., telling A.K. that if Yang ever did anything inappropriate, A.K. should report it to her. During this conversation, A.K. began crying. But the aunt did not pursue the issue.

Afterwards, the aunt bought A.K. a cell phone so that A.K. could contact her if anything were to happen with Yang. But the aunt did not bring up the subject again or tell anyone about her 2015 conversation with A.K.

In January 2022, A.K. told her mother and other family members that Yang had sexually abused her.

Although A.K.'s mother did not support the State's case against Yang, she was called as a witness during the State's case in chief. The mother testified that A.K. accused

Yang of sexually abusing A.K. in January of 2022. According to the mother, when she asked A.K. for details, A.K. did not answer, and instead, put her head into her hands and cried. The mother testified that she did not believe A.K.'s allegations. She also testified that, contrary to A.K.'s testimony, she and Yang would pick A.K. up for dance class together. The mother testified that Yang would pick her up from work at 5:00 p.m., they would pick up A.K. from her grandparents' home together, and she personally would take A.K. into the class.

A.K.'s uncle also testified on behalf of the State. He testified that A.K. told him about the sexual abuse a few days after A.K. reported it to her mother. According to A.K.'s uncle, after disclosing the sexual abuse, A.K. moved out of the townhome and moved in with the uncle and grandparents. A.K.'s uncle testified that A.K. continued to live with him at the time of the trial.

One month after revealing the sexual abuse to her family, A.K. disclosed it to her high school advisor. The high school advisor testified that, as a mandated reporter, he reported A.K.'s allegations to child protection.

As a result of the advisor's mandated report, a child protection investigator for Hennepin County interviewed A.K. During the interview, A.K. disclosed that she had been sexually abused by Yang. The investigator contacted the police department and referred A.K. to a forensic interviewer. A.K. described details of the sexual abuse during a forensic interview the next day.

At trial, the State admitted a video of A.K.'s forensic interview as a trial exhibit, and this exhibit was played for the jury. The interview was generally consistent with

A.K.'s trial testimony but contained more details about the alleged abuse. During the interview, A.K. recounted an incident that she did not describe during her trial testimony: A.K. told the forensic interviewer that Yang had showed A.K. a video of Yang and A.K.'s mother engaging in sexual activity. A.K.'s aunt told the jury that A.K. sent her a message over a social media platform about being shown the video of Yang and A.K.'s mother engaging in sexual activity. The aunt testified that she no longer had access to A.K.'s message, however, because A.K. deleted it.

A.K. also underwent a physical examination. The parties stipulated that the doctor did not find any physical injuries and that A.K. disclosed sexual abuse consistent with her forensic interview during the examination.

Yang's Trial Evidence

During his testimony at trial, Yang denied all of A.K.'s allegations. He told the jury that he was never alone with A.K. because he "didn't know her that much." Yang denied ever taking A.K. to dance class alone, testifying that "[i]t was always either me and her mom or just her mom" that picked her up for class. He also testified that he never bathed A.K., but recalled one instance when A.K. was sick at home with a fever.

According to Yang, he called A.K.'s mom during this incident and put a cold cloth on A.K.'s head and neck. He testified that A.K. was fully clothed, and he denied touching any part of her body other than her head and neck. Yang also denied purposely showing A.K. the video of his sexual encounter with A.K.'s mother. But he acknowledged that A.K. accidentally saw the video on his cell phone when she was using his phone to access the internet.

A.K.'s grandmother also testified on behalf of the defense. She testified that Yang never picked up A.K. for dance class by himself. The grandmother also recalled an instance when she brought her family together to pray to "get rid of this case" against Yang. She recalled that following the prayer, A.K.'s uncle stated that A.K. could not "erase" the case without getting into legal trouble. The grandmother also testified that A.K.'s uncle told her that without "these issues," A.K. would not have money to attend college. A.K. received college tuition assistance based on her status as a foster child.

Jury Instructions

After the defense rested, the district court reviewed its proposed jury instructions with the attorneys. Yang's attorney did not request a specific-unanimity instruction during this discussion or at any other time.

The jury was provided with a general-unanimity instruction, which advised that the jury's verdict was to be unanimous. But the jury was not instructed on specific unanimity and the jurors were not told that they were required to unanimously agree as to which act had been proven beyond a reasonable doubt.

Closing Arguments

During closing arguments, the prosecutor focused on the consistency of A.K.'s story across each of the separate disclosures to her family members, to the forensic interviewer, and in her own testimony. The prosecutor's closing argument referenced multiple alleged instances of penetration by Yang. The prosecutor did not focus on specific instances of penetration, and acknowledged that certain details, like the timing of the abuse, were unclear:

Maybe he did pick her up from dance on occasion. And maybe he did abuse her then. Maybe he was abusing her when Mom was at work and he was home with her after school. [A.K.] wasn't quite clear. Was it in the evening? Was it the morning? Maybe it was both. Maybe she doesn't remember because sometimes it would happen in the morning, and maybe sometimes it did happen in the evening. She told you—all this happened a lot.

Yang's trial attorney argued that A.K. had fabricated her allegations. The defense highlighted inconsistencies in A.K.'s testimony and emphasized the testimony of Yang, A.K.'s mother, and A.K.'s grandmother that Yang never took A.K. to dance class alone.

Verdicts, Sentencing, and Appeal

Following deliberations, the jury found Yang guilty of both counts of criminal sexual conduct. The district court entered a conviction for first-degree criminal sexual conduct and sentenced Yang to 144 months in prison for that offense.

Yang appealed to the court of appeals, arguing that the district court plainly erred by failing to provide the jury with a specific-unanimity instruction for the offense of first-degree criminal sexual conduct.² The court of appeals affirmed Yang's conviction.

We granted Yang's petition for review.

ANALYSIS

Yang argues that he was entitled to a specific-unanimity instruction for the offense of first-degree criminal sexual conduct, which would have required the jury to unanimously agree on the specific penetrative act that the State proved beyond a reasonable doubt. He acknowledges that he did not request a specific-unanimity

² Yang did not challenge the district court's jury instructions for the second-degree criminal sexual conduct offense, which involved a count alleging multiple acts committed over an extended period of time. *See* Minn. Stat. § 609.343, subd. 1(h)(iii).

instruction at trial. But he contends that the district court’s failure to provide such an instruction was plain error.

In *State v. Keyes*, ___ N.W.3d ___, 2026 WL 2053029, at *15–16, we recently announced a framework for determining whether a specific-unanimity jury instruction is required. Applying that framework here, we conclude that Yang was entitled to a specific-unanimity instruction and that the district court’s failure to provide one was plain error under *Keyes*. In doing so, we overrule the court of appeals’ decision in *State v. Rucker*, 752 N.W.2d 538 (Minn. App. 2008), as inconsistent with *Keyes*. Because we also determine that the district court’s error in failing to provide a specific-unanimity jury instruction prejudiced Yang’s substantial rights and that we should address the error to ensure the fairness, integrity, and public reputation of judicial proceedings, we conclude that Yang is entitled to a new trial for the charge of first-degree criminal sexual conduct.

We begin our analysis by examining the right to jury unanimity and by applying our *Keyes* framework to the facts presented here.

A.

The right to jury unanimity is derived from the due process requirement that the government must present proof beyond a reasonable doubt of each element of a charged offense in order to convict the accused. *See In re Winship*, 397 U.S. 358, 364 (1970) (stating that due process requires “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged”); *see also Ramos v. Louisiana*, 590 U.S. 83, 93 (2020) (holding that the federal constitutional right to a unanimous jury verdict is incorporated against the states through the Fourteenth

Amendment). Correspondingly, a jury must unanimously agree on the ultimate verdict. Additionally, a jury must agree that the government’s evidence proved each *element* of the charged offense beyond a reasonable doubt. *Richardson v. United States*, 526 U.S. 813, 817 (1999). But a jury need not agree as to the means of satisfying an element of an offense. *See id.* (stating that a jury need not be unanimous as to “which of several possible sets of underlying brute facts make up a particular element,” including, for example, “which of several possible means the defendant used to commit an element of the crime”).

When the State charges one count of criminal conduct and presents evidence of a distinct act to prove the offense, application of these rules is straightforward: to find the defendant guilty, the jury must unanimously agree that each element of the offense was proven beyond a reasonable doubt and must unanimously agree on a guilty verdict. This requirement is referred to as general unanimity. But when the State charges one count of criminal conduct and presents evidence of more than one distinct act, each of which on its own could prove the elements of the charged offense, there is an additional unanimity requirement. The jury must also unanimously agree on the distinct act that proves the elements of the charged offense. *Keyes*, ___ N.W.3d ___, 2026 WL 2053029, at *13. This requirement is referred to as specific unanimity.

In *Keyes*, we addressed when a district court in a Minnesota state court prosecution must instruct a jury as to the additional requirement for specific unanimity. We held that “when the State charges one count of a criminal offense but presents evidence of more than one distinct act, each of which on its own could satisfy the

elements of the charged offense, a defendant is entitled to a specific-unanimity jury instruction.” *Id.* at *13. Such an instruction directs a jury to unanimously agree “as to the specific act that proves the elements of the charged offense.” *Id.*

Our decision in *Keyes* articulated a framework for courts to use in determining whether a specific-unanimity instruction is required. *Id.* at *15–16. Under this framework, a court must look to the statute defining the offense to identify the elements of the offense. *Id.* at *15. A court should distinguish any statutory means for committing the elements from the elements themselves. *Id.* Once the elements have been identified from the statutory language, a court should move to the second step of the analysis. *Id.* The second step of the analysis “requires a court to consider the facts that the State alleged at trial to prove a violation of the statute.” *Id.* A court must ask “whether the State alleged a single act to satisfy the elements of the statute or multiple distinct acts, each of which on its own could satisfy the elements of the statute.” *Id.* If the evidence included more than one distinct act, each of which on its own could independently satisfy the elements of the statute, a jury must unanimously agree on which distinct act the defendant committed. *Id.* A specific-unanimity instruction is required when the State has alleged more than one such act and has charged just one count. *Id.*

Applying the *Keyes* framework to the facts of this case, it is evident that Yang was entitled to a specific-unanimity instruction for the single charged count of first-degree criminal sexual conduct. First, we identify the elements of the charged offense. The State charged Yang with one count of first-degree criminal sexual conduct under Minnesota

Statutes section 609.342, subdivision 1(g).³ That statute provides that a defendant is guilty of first-degree criminal sexual conduct if the defendant “engages in sexual penetration” with a complainant and an additional circumstance is present. *Id.*, subd. 1. Here, the additional circumstance is that “the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual penetration.” *Id.*, subd. 1(g). Sexual penetration, as relevant here, is defined as “any of the following acts,” including “sexual intercourse, cunnilingus, fellatio, or anal intercourse.” Minn. Stat. § 609.341, subd. 12 (2014). Based on the plain language of section 609.342, subdivision 1(g), the elements of that offense are: (1) the defendant engaged in sexual penetration with the complainant, (2) the defendant had a significant relationship to the complainant, and (3) the complainant was under 16 years of age at the time of the act.

Second, under the *Keyes* framework, we consider the facts that the State alleged during Yang’s trial to determine whether there was one act or multiple distinct acts alleged, each of which on its own could independently prove the elements of the statute. At Yang’s trial, A.K. testified that when she was under 16 years old, Yang—who was her stepfather—committed multiple acts of cunnilingus and fellatio, which occurred on different days, in different locations, over a period of two years. A.K. testified that Yang

³ Yang was also found guilty of one count of second-degree criminal sexual conduct, which concerned multiple acts committed over an extended period of time. Minn. Stat. § 609.343, subd. 1(h)(iii). He has not challenged the district court’s jury instructions for the second-degree criminal sexual conduct offense, and the jury’s guilty verdict for that offense is not before us.

licked her vagina “[m]ore than one time” in her bedroom during that two-year period. And she testified that, on different occasions, Yang made her suck his penis in his bedroom. Given A.K.’s testimony, we conclude that the State alleged multiple distinct acts of sexual penetration, each of which on its own could have proved the elements of first-degree criminal sexual conduct.⁴

Because the State charged Yang with one count of first-degree criminal sexual conduct but alleged multiple distinct acts, each of which on its own could have proved the elements of the charged offense, Yang was entitled to a specific-unanimity jury instruction.

B.

The State, which did not have the benefit of our *Keyes* decision for briefing or oral argument, argues that Yang was not entitled to a specific-unanimity instruction. We now address the State’s arguments.

The State contends that because A.K. alleged that Yang committed two different forms of penetration—fellatio while in Yang’s bedroom and cunnilingus while in A.K.’s bedroom—this case involves different “means” and not elements. But the State’s argument that this is a “means” case misapprehends the elements-versus-means distinction that the United States Supreme Court established in *Schad v. Arizona*, 501 U.S. 624 (1991), *abrogated in part on other grounds by Ramos v. Louisiana*,

⁴ Although the dissent suggests that A.K.’s testimony alleged just two acts of sexual penetration—one act of cunnilingus and one act of fellatio—we read the record differently. A.K.’s testimony indicated that there were multiple acts of cunnilingus and multiple acts of fellatio that occurred over the course of two years.

590 U.S. 83 (2020), and *Richardson*, 526 U.S. 813, and that we discussed in *Keyes*. It is true that A.K. testified about different forms of sexual penetration. But A.K. testified about multiple distinct instances of sexual penetration that occurred on different dates and in different places. Each of those instances, on its own, could have proved the elements of the charged first-degree criminal sexual conduct offense. Because the State charged a single offense and alleged multiple distinct acts that individually could have proved the elements of that offense, the jury was required to unanimously agree as to which act was proven. Accordingly, a specific-unanimity instruction was required.

The State also argues that A.K.’s testimony did not allege distinct acts, but rather “examples” of the abuse she experienced. In making this argument, the State relies on the court of appeals’ decision in *Rucker*, which holds that specific unanimity is not required for “examples” of an act. 752 N.W.2d at 548. In *Rucker*, the defendant was convicted of criminal sexual conduct for the sexual abuse of two minors. *Id.* at 544–45. The State alleged multiple instances of sexual contact over a two-year period, occurring in different locations and on different dates. *Id.* at 543, 548. The court of appeals concluded that a specific-unanimity instruction was not required. *Id.* at 549. In doing so, the court assessed whether the instances recounted by the victims constituted “distinct allegations” or mere “examples” of abuse:

[T]he 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.

Id. at 548. Thus, the court concluded, the victim’s recollections “served as examples of appellant’s conduct and not distinct allegations of sexual abuse” and specific unanimity was not required. *Id.*

Analogizing this case to *Rucker*, the State points to A.K.’s early disclosures to her aunt and mother, none of which were “tied to a specific time or place.” Although A.K.’s later description of the abuse to the forensic interviewer included more specific details, according to the State, A.K.’s allegations only recounted “many episodes and general themes of the sexual abuse she suffered years ago.” The State also points out that it did not emphasize one instance of penetration or encourage the jury to find that certain incidents were more likely to have occurred than others. And it observes that Yang similarly denied *all* the allegations, focusing instead on discrediting A.K.’s testimony. Given these circumstances, the State urges us to apply the reasoning of *Rucker* and to conclude that no specific-unanimity instruction was required here.

However, the court of appeals’ decision in *Rucker* is at odds with our holding in *Keyes*. *Keyes* makes clear that when multiple distinct acts are alleged, each of which on its own could prove the elements of the charged offense, a jury must unanimously agree on which act the defendant committed. According to *Keyes*, a specific-unanimity instruction is required under these circumstances. Indeed, generalized allegations—or “examples” of a criminal offense—*increase* the risk that jurors will not agree as to the distinct act or acts proven, violating the specific-unanimity right. When the State presents evidence of multiple distinct acts, each of which on its own could prove a single charged offense, there is a danger that a jury will not focus on whether the evidence proved any

particular act but will instead return a guilty verdict because the allegation of multiple acts suggests that the defendant did “something.” See *Richardson*, 526 U.S. at 819 (stating that, by alleging multiple acts, the government “significantly aggravates the risk” that jurors will fail to focus on specific factual details and instead conclude “that where there is smoke there must be fire”). Because *Rucker* is inconsistent with our holding in *Keyes*, we overrule it.

We are mindful of the challenges of prosecuting criminal sexual conduct cases, particularly cases involving child victims who were abused over a period of time. In those cases of persistent abuse, the allegations often do take the form of “examples” of abuse. We observe that Minnesota law includes some charging options for such cases. For example, the State can prosecute a defendant for first-degree criminal sexual conduct when the defendant “has a significant relationship to the complainant” and “the sexual abuse involved multiple acts committed over an extended period of time.” Minn. Stat. § 609.342, subd. 1a(h)(iii) (formerly Minn. Stat. § 609.342, subd. 1(h)(iii) (2014)).⁵ But

⁵ In this case, the jury found Yang guilty of second-degree criminal sexual conduct charged under a similar provision that criminalizes “sexual contact” if “the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual contact,” and “the sexual abuse involved multiple acts committed over an extended period of time.” Minn. Stat. § 609.343, subd. 1(h)(iii).

The dissent asserts that there is “tension between [the *Keyes*] bright-line rule and the constitutionality of such a course-of-conduct charge.” We do not decide here whether the “multiple acts committed over an extended period of time” in section 609.643, subdivision 1(h)(iii) (2014), are individual elements of the offense. But in considering a similar statute, we held that specific unanimity was not required as to the acts underlying a course-of-conduct element. See *State v. Hayes*, 831 N.W.2d 546, 556 (Minn. 2013) (holding that a jury is not required to unanimously agree on which acts comprised the “past pattern of domestic abuse” element of first-degree domestic abuse murder).

when, as here, the State opts to charge a single count of an offense that requires proof of a distinct act, and the State alleges multiple distinct acts, each of which on its own could prove the elements of the offense, specific unanimity is required. And when specific unanimity is required, the district court must instruct the jury on that requirement.⁶

C.

Having determined that the district court erred by failing to provide Yang’s jury with a specific-unanimity instruction, we next consider whether we may correct that error. Because this issue was not preserved for appeal, we review it for plain error. *See State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998) (holding that “[a] defendant’s failure to propose specific jury instructions or to object to instructions before they are given” forfeits the issue on appeal unless there is plain error). To obtain relief for plain error, an “appellant must show that there was (1) an error; (2) that is plain; and (3) the error must affect substantial rights.” *State v. Kelley*, 855 N.W.2d 269, 273–74 (Minn. 2014). When the appellant satisfies these requirements, the appellate court may correct the error only when it “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Pulczynski v. State*, 972 N.W.2d 347, 356 (Minn. 2022).

An error is plain if it is “clear or obvious, usually shown by an error that contravened case law, rules, or a standard of conduct.” *State v. Pendleton*, 759 N.W.2d

⁶ Contrary to the assertion of our dissenting colleagues, we do not conclude that the State commits a “per se constitutional violation” by charging a single count and alleging multiple distinct acts to satisfy that count. We hold only that specific unanimity is required under those circumstances. To ensure specific unanimity, a district court must provide jurors with a brief instruction explaining the requirement.

900, 913 (Minn. 2009). In determining whether an error is plain, this “court examines the law in existence at the time of appellate review, not the law in existence at the time of the district court’s error.” *Kelley*, 855 N.W.2d at 277.

We begin by considering whether the error—the district court’s failure to provide a specific-unanimity instruction—was plain. Although our *Keyes* decision did not exist when the district court instructed Yang’s jury, it was the law at the time of appellate review. Under *Keyes*, the district court should have provided a specific-unanimity jury instruction to Yang’s jury on the offense of first-degree criminal sexual conduct. Because the district court did not provide this instruction, there is error that is plain.

Next, we consider whether the error affected Yang’s substantial rights. An error affects a defendant’s substantial rights if it “was prejudicial and affected the outcome of the case.” *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). An erroneous jury instruction was prejudicial if there is a reasonable likelihood that the lack of the instruction had a significant effect on the verdict. *Cf. id.* (“We have defined plain error as prejudicial 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.” (citation omitted) (internal quotation marks omitted)). In the specific-unanimity context, we have stated that a district court’s failure to provide a specific-unanimity instruction was prejudicial if it is “reasonably likely” that the lack of instruction resulted in a non-unanimous verdict. *State v. Wenthe*, 865 N.W.2d 293, 300–01 (Minn. 2015) (determining that the defendant was not prejudiced because it was not reasonably likely that the jury was split on which acts they believed satisfied the element).

Here, it is reasonably likely that the lack of a specific-unanimity instruction resulted in a non-unanimous verdict. The prosecutor acknowledged, and perhaps even capitalized on, the vagueness of A.K.'s allegations, stating, for example: "Maybe [Yang] did pick her up from dance on occasion. And maybe he did abuse her then. Maybe he was abusing her when Mom was at work and he was home with her after school." Given the multiple acts alleged and the vagueness of A.K.'s allegations, it is reasonably possible that the jurors were split on the acts that they believed had been proven. For example, six jurors could have believed that a penetrative act occurred when Yang picked up A.K. from dance class, and six jurors could have believed that a penetrative act occurred at some other time.

More likely is the possibility that the jury never discussed the factual details of each alleged penetrative act, thus allowing the jury to avoid confronting "wide disagreement among the jurors about just what the defendant did, or did not, do." *Richardson*, 526 U.S. at 819. After all, the trial record reflects many alleged acts, the details of which were often vague, committed on unspecified dates, over a period of potentially two years. Some of the acts were alleged by A.K. at trial, some were alleged by other witnesses, and still other acts were alleged by A.K. only during an out-of-court video-recorded interview that was introduced as evidence at trial. Given these circumstances, there is a real possibility that, without a specific-unanimity instruction, the jury may have instead decided that "where there is smoke there must be fire." *Id.* We thus conclude that the lack of a specific-unanimity instruction had a significant effect on the verdict, and that the error was prejudicial, affecting Yang's substantial rights.

Finally, we assess whether this court should address the error to ensure the fairness, integrity, and public reputation of judicial proceedings. *Pulczynski*, 972 N.W.2d at 356. Because the error was serious, implicating Yang’s right to a unanimous jury verdict, failing to correct the error would “caus[e] the public to seriously question whether our court system has integrity and generally offers accused persons a fair trial.” *Id.*; see also *State v. Portillo*, 998 N.W.2d 242, 256 (Minn. 2023) (addressing plain error when an error strikes at “bedrock” principles that are foundational to the administration of Minnesota’s criminal law). It follows that addressing the error is necessary to ensure the fairness, integrity, and public reputation of judicial proceedings. See *Portillo*, 998 N.W.2d at 256 (addressing plain error where there was a reasonable likelihood that the error affected the outcome of the defendant’s trial, and thus, affirming the defendant’s conviction would “adversely affect the public’s confidence in the fairness and integrity of judicial proceedings” (citation omitted) (internal quotation marks omitted)).

We conclude that the district court’s failure to provide a specific-unanimity jury instruction was plain error affecting Yang’s substantial rights and is the type of error that this court should address. Accordingly, we reverse Yang’s conviction for first-degree criminal sexual conduct and remand for a new trial on that offense.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to the district court for further proceedings consistent with this opinion.

Reversed and remanded.

D I S S E N T

MOORE, III, Justice (dissenting).

By broadly applying the rigid framework announced in *State v. Keyes*, ___ N.W.3d ___, No. A23-1400, 2026 WL 2053029 (Minn. Jul. 15, 2026), the court creates uncertainty for district courts and risks unpredictable, inconsistent, and unjust outcomes in criminal sexual conduct cases in two respects. First, it concludes that the district court plainly erred by failing to sua sponte instruct the jury to unanimously identify the specific acts of sexual penetration supporting appellant Ge Yang’s conviction, even though he never raised a specific-unanimity issue at trial. Second, it discards *State v. Rucker*, 752 N.W.2d 538 (Minn. App. 2008), which until today provided a workable—if imperfect—framework for ensuring jury unanimity in these most sensitive cases involving ongoing sexual abuse. Because I continue to disagree with the court’s reasoning in *Keyes* and have deep concerns with the application of the test it adopts, I respectfully dissent from the court’s opinion reversing Yang’s conviction for first-degree criminal sexual conduct.

In reversing Yang’s conviction, the court seems to conclude that the State’s charging or presenting evidence of multiple acts in a single count is a per se constitutional violation that can be cured only by instructing the jury that they must specifically agree on which act(s) the defendant committed before returning a guilty verdict. But as I explained in my *Keyes* dissent, the United States Supreme Court’s decisions in *Schad v. Arizona*, 501 U.S. 624 (1991), *abrogated in part on other grounds by Ramos v. Louisiana*, 590 U.S. 83 (2020), and *Richardson v. United States*, 526 U.S. 813 (1999), do not compel this result because they considered a different issue than one presented here.

Unanimity as to an *element*—that is, which of several possible *alternative* factual circumstances may constitute an element of an offense—is different from unanimity as to *multiple* instances of conduct which could satisfy that element (a so-called “duplicitous” charge). As nearly all federal and state supreme court cases to have considered the issue agree, determining that a charge is duplicitous is the beginning of the constitutional analysis, not the end. Properly applied, the theoretical possibility that jurors might disagree as to the facts constituting an element based on the nature of the charge itself is only one factor in this analysis. We must also consider the actual risk that a general verdict of guilty would conceal a finding of guilty as to one act but not another considering the actual evidence presented and the State’s characterization of the acts at trial, as well as the effects of the State’s charging decision on notice to the defendant and appropriate sentencing.

In my view, the charge at issue does not implicate the due process concerns underlying the duplicity doctrine as other courts have developed it. The facts here present a closer call than those in *Keyes*, but here, too, I believe there was no genuine risk of a non-unanimous verdict as to the penetration charge for several fact-specific reasons. Moreover, defense counsel chose not to request a specific-unanimity instruction and instead strategically relied on A.K.’s allegations of multiple acts to challenge A.K.’s credibility during closing argument. And unlike in *Keyes*, the district court could have justifiably sentenced Yang separately for each violation under our sentencing law had the State elected to charge them individually. For these same reasons, the interests of justice and public perception of the fairness of judicial proceedings do not compel us to reverse

Yang’s conviction on the first-degree count on plain-error review.¹ Finally, my concerns with the impact of the court’s approach on cases depending on the testimony of traumatized witnesses only multiply when those cases involve sexual abuse of minors. *See Keyes*, ___ N.W.3d ___, 2026 WL 2053029, at *31–33.

For these reasons, I respectfully dissent.

A.

Before turning to this case, I briefly note several points discussed in my *Keyes* dissent. *Schad* expressly warns of “the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution”—a caution the court does not heed. 501 U.S. at 637. Likewise, *Richardson* did not purport to develop such a test—it confirmed *Schad*’s core proposition: the due process clause limits the State’s power to define criminal offenses such that the statutory alternatives for satisfying a particular element vary so dramatically that they cannot reasonably be considered alternative means. 526 U.S. at 820. These offenses would risk “serious unfairness” to the defendant because charging a single count in the absence of a specific-unanimity instruction might conceal “wide disagreement among the jurors about just what the defendant did, or did not, do.” *Id.* at 820. At the same time, these cases only consider “*alternative* statutory means for committing one offense” and “do not ... control” cases involving “distinct instances of the same crime which could have resulted

¹ Whether or not defense counsel intended it, the course of this case illustrates the “double-or-nothing” concern I described in my *Keyes* opinion, ___ N.W.3d ___, 2026 WL 2053029, at *19 n.1, as explained below.

in potentially multiple convictions.” *United States v. Correa-Ventura*, 6 F.3d 1070, 1080–81 (5th Cir. 1993).

The issue of unanimity as to an element of the offense “implicates different concerns” than a duplicitous charge. *State v. Douglas C.*, 285 A.3d 1067, 1082–83 (Conn. 2022); *see also United States v. Newell*, 658 F.3d 1, 21 (1st Cir. 2011) (differentiating unanimity concerns based on elements of the offense from those based on the “*structure* of [an] indictment” that “bundle[s] multiple discrete violations of the statute under single counts”). In the former situation, as in *Schad* and *Richardson*, the issue is whether the statutory language reasonably contemplates alternative means of satisfying a *single* element, or in fact creates *multiple* alternative or distinct elements. In the latter, the issue is whether the defendant may be convicted on a single count based on evidence of multiple, separate violations of the statute. *Schad* and *Richardson* simply did not address the latter issue. Yet the court treats these cases as declaring a duplicitous charge per se unconstitutional absent a specific-unanimity instruction, effectively finding plain error where precedent does not require it and sowing uncertainty in the trial courts.

By my reading, few, if any, federal courts of appeals and high courts of other states have adopted the court’s approach in *Keyes*. These other courts appropriately hold that a duplicitous charge is not “presumptively invalid”; rather, constitutional concerns arise only when the charge “affects [the duplicity] doctrine’s underlying policy concerns.” *E.g.*, *United States v. Olmeda*, 461 F.3d 271, 281 (2d Cir. 2006); *see also Keyes*, ___ N.W.3d ___, 2026 WL 2053029, at *24 (collecting cases). On the other hand, “an assessment of such policy considerations is critical to any duplicity analysis, for fundamental fairness

and due process of law may *prohibit* combining what could be several independent charges into a single count, even if the text of a particular statute allows it.” *United States v. Root*, 585 F.3d 145, 154 (3d Cir. 2009) (emphasis added). Thus, “ ‘[i]f the doctrine of duplicity is to be more than an exercise in mere formalism, it must be invoked only when’ ” the nature of the specific charge at issue implicates “ ‘policy considerations’ that underlie that doctrine.” *United States v. Margiotta*, 646 F.2d 729, 732–33 (2d Cir. 1981) (alteration in original) (quoting *United States v. Murray*, 618 F.2d 892, 897 (2d Cir. 1980)).

Against this backdrop, two aspects of the court’s analysis strike me as particularly puzzling. First, the two acts of sexual penetration alleged here for purposes of first-degree criminal sexual conduct were committed through different means. *See* Minn. Stat. § 609.341, subd. 12(1) (defining both “fellatio” and “cunnilingus” as forms of sexual penetration). The State therefore mistakenly relies on *Richardson* to argue that Yang was not entitled to a specific-unanimity instruction, contending that the different instances of penetration constitute alternative means of committing the same offense. Yet in rejecting this argument, the court does not articulate the elements-versus-means test as *Richardson* actually developed it or explain why that framework does not apply here. Instead, it simply invokes *Keyes* to conclude that a specific-unanimity instruction was required because “[e]ach of those instances [of penetration], on its own could have proved the elements” of the offense. *Supra* at 15. By omitting any discussion of the *Richardson* test in response to an argument grounded entirely in that test, the court implicitly acknowledges that the unanimity-as-to-elements inquiry addressed in *Schad* and

Richardson is distinct from unanimity as to instances of conduct—the issue presented here. The likely explanation is that the *Richardson* test is ill-suited to this context: neither *Schad* nor *Richardson* grapples with how the introduction of evidence of multiple acts affects the constitutional protections underlying the requirement of specific unanimity.

Second, and more perplexing, is the court’s suggestion that specific unanimity may not have been required had the State charged Yang under Minn. Stat. § 609.342, subd. 1a(h)(iii) (formerly Minn. Stat. § 609.342, subd. 1(h)(iii) (2014)). *See supra* at 17. This statute permits charging a single count of first-degree criminal sexual conduct if the defendant “has a significant relationship to the complainant” and the defendant’s course of conduct “involved multiple acts [of penetration] committed over an extended period of time.” *Id.* But the court’s opinion does not address the tension between its bright-line rule and the constitutionality of such a course-of-conduct charge.

In my view, under the court’s new framework, most course-of-conduct charging—even under this statute—would appear to violate the defendant’s right to a unanimous jury absent a specific-unanimity instruction because it almost always involves a single charge alleging multiple acts that independently satisfy an element of the offense.²

² The court’s response to this concern is simply that it is not deciding whether the “multiple acts” in section 609.342 specifies one element or several. Indeed, it is possible to interpret the series of acts, rather than the individual instances of sexual penetration or contact that comprise it, as the relevant element of the statute. But that interpretation runs headlong into *Richardson* because it recreates almost the same risk of a non-unanimous verdict as the government’s interpretation of the continuing-criminal-enterprise statute at issue in that case.

To see why, suppose the State charged a defendant with a single count of first-degree criminal sexual conduct under section 609.342, subdivision 1a(h)(iii), and alleged four separate instances of penetration over an extended period as the “multiple acts”

Presumably the court would agree that *Schad* and *Richardson* place *constitutional* limits on the State’s ability to define a criminal offense in a way that creates serious risks of non-unanimous verdicts. But if that is true, the *Legislature’s* designation of an offense as chargeable as a course of conduct does not magically cure the constitutional violation arising from such risks. Put differently, the Legislature lacks the power to transform an unconstitutional charge into a constitutional one simply by designating a course of conduct as an element of the offense. *See Root*, 585 F.3d at 154 (“[F]undamental fairness and due process of law may prohibit combining what could be several independent charges into a single count, even if the text of a particular statute allows it.”). If we take this apparent exception for course-of-conduct offenses seriously, application of the majority’s adopted test “not only would *prohibit* course of conduct charging in cases in which it may be warranted, but also may *permit* it in cases in which it could be

constituting the course of conduct. If six jurors agreed that instances 1 and 2 happened, but not instances 3 and 4, and the other six agreed that instances 3 and 4 happened but not 1 and 2, the jurors could still unanimously conclude that the defendant is guilty even though they fundamentally disagree on which specific acts comprise the series element. But, on the other hand, Minnesota courts have consistently interpreted language referring to multiple acts or a pattern of conduct as akin to a single element that does not require unanimity as to the underlying acts. *See, e.g., State v. Crowsbreast*, 629 N.W.2d 433, 437–39 (Minn. 2001); *State v. Johannessohn*, 2024 WL 3250423, at *5 (Minn. App. July 1, 2024); *cf. State v. Stempf*, 627 N.W.2d 352, 358 (Minn. App. 2001) (declining to decide whether a specific-unanimity instruction “would be warranted when the separate acts constitute a continuing course of conduct”). To me, this puts the court in an untenable position. It must either (1) acknowledge that *Richardson’s* analysis depended on the unique nature and breadth of the criminal enterprise statute it considered, in which case it provides little to no support for the categorical rule *Keyes* announces, or (2) risk seriously unsettling Minnesota law on course-of-conduct charging.

unconstitutional.” *Douglas C.*, 285 A.3d at 1104 (Mullins, J., concurring) (emphasis added).

The most plausible explanation is that course-of-conduct charging can be constitutionally permissible because, until now, the Legislature has authorized it only when charging multiple acts in a single count is not so “fundamental[ly] [un]fair[]” as to violate due process. *Cf. Schad*, 501 U.S. at 637. The court’s categorical “separate offenses” rule is difficult to reconcile with that understanding.

For those reasons, I agree with the *Correa-Ventura* court that “defining unanimity in terms of ‘separate offenses’ or ‘separate crimes’ would result in an unworkable ‘brightline’ test.” 6 F.3d at 1081. Moreover, as that court explained:

Factual concurrence must be viewed on a case-by-case basis “[S]ince the set of material issues changes composition with the facts of each case, precedents cannot necessarily be used to construct a clear definition of materiality.” Statutory language and construction, legislative intent, historical treatment of the crime by the courts, duplicity concerns with respect to defining the offense, and the likelihood of jury confusion in light of the specific facts presented are all necessary inquiries to be addressed before a trial judge can ascertain whether he must instruct the jury to concur in predicate facts as well as in result.

Id. at 1082 (second alteration in original) (quoting Note, *Right to Jury Unanimity on Material Fact Issues*: *United States v. Gipson*, 91 Harv. L. Rev. 499, 502 & n.27 (1977)).

As I stated in *Keyes*, the core inquiry should center on “a distillate of the concept of due process with its demands for fundamental fairness,” ___ N.W.3d ___, 2026 WL 2053029, at *23 (quoting *Schad*, 526 U.S. at 637), which, in the duplicity context, depends on “whether the actions charged are so dissimilar” so as to implicate the due process considerations I discuss below, *see Correa-Ventura*, 6 F.3d at 1081.

B.

Considering the specifics of this case, the State presenting evidence of multiple acts that could satisfy the penetration element of the relevant statute absent a specific-unanimity instruction does not by itself warrant reversal. I agree with the court that Minn. Stat. § 609.342, subd. 1(g) (2014),³ under which Yang was charged, unambiguously has a single instance of sexual penetration as an element. If subdivision 1(g) contemplated multiple acts of penetration occurring over a period of time, subdivision 1(h)—which criminalizes ongoing sexual abuse of minors—would be superfluous. Indeed, the only difference between the statutory language of these two subsections is the Legislature’s addition of “and . . . the sexual abuse involved multiple acts committed over an extended period of time” in subdivision 1(h). *Compare* Minn. Stat. § 609.342, subd. 1(g) (2014), *with id.*, subd. 1(h) (2014). Thus, the first-degree charge under subdivision 1(g) was duplicitous because it charged multiple completed offenses under a single count.⁴ Even

³ In 2021, the Legislature recodified subdivision 1(g) as subdivision 1a(g) but made no substantive amendments to the statutory language or the elements of the offense. Act of June 30, 2021, ch. 11, art. 4, § 16, 2021 Minn. Laws 1st Spec. Sess. 1947, 2038–40 (effective Sep. 15, 2021).

⁴ For the reasons just discussed, I am not convinced the availability of subdivision 1(h) meaningfully bears on the ultimate *constitutional* analysis. The Legislature intended that subdivision to criminalize *ongoing* sexual abuse of minors, precisely because of the evidentiary difficulties associated with proving specific, individual acts in this context. Splitting hairs over which statutory subsection the State elected to charge seems little more than “an exercise in mere formalism.” *Margiotta*, 646 F.2d at 732. Granted, charging *two* acts of penetration would be duplicitous under subdivision 1(g) but not under subdivision 1(h). But charging *three* acts of penetration would be duplicitous even under subdivision 1(h): acts 1 and 2, 2 and 3, or 1 and 3 could each independently satisfy the “multiple acts” element. The statutory language therefore does not meaningfully eliminate the possibility of duplicity. To me, that is a telling indicator that the proper

so, under the framework I would adopt, “a determination of duplicity does not end the analysis.” *Douglas C.*, 285 A.3d at 1085.

As cases from other jurisdictions agree, a duplicitous charge is reversible only if the duplicity prejudices the defendant. *See, e.g., United States v. Singer*, 782 F.3d 270, 276 (6th Cir. 2015), *abrogated on other grounds by Musacchio v. United States*, 577 U.S. 237 (2016); *United States v. Davis*, 471 F.3d 783, 790 (7th Cir. 2006); *United States v. Olmeda*, 461 F.3d 271, 281 (2d Cir. 2006); *State v. Roberts*, 14 P.3d 713, 737 (Wash. 2000) (en banc). This analysis considers whether combining multiple acts in a single charge would result in inadequate notice to the defendant of the State’s theory of liability, create a risk that a general verdict of guilty would conceal a finding of guilty as to one act and not guilty as to another, or affect appropriate sentencing. *See, e.g., Douglas C.*, 285 A.3d at 1078; *United States v. Margiotta*, 646 F.2d 729, 732–33 (2d Cir. 1981). Because we are reviewing Yang’s conviction rather than an indictment, we can and should evaluate the risk of a non-unanimous verdict “in light of the specific facts presented” and the State’s characterization of the acts at trial. *See Correa-Ventura*, 6 F.3d at 1082. I address each of these due process considerations in turn.

1.

Beginning with notice, evidence of multiple acts of penetration had no appreciable effect on Yang’s ability to understand or defend against the charges. A.K.’s prior

unanimity test cannot turn solely on whether the State alleges multiple acts which can independently constitute an element of a criminal offense (or whether the Legislature defines a course of conduct as an element).

statements described with some specificity when, where, and how the penetration occurred: at Yang's apartment before he drove her to dance class. And, as I discuss below, the circumstances surrounding the acts of penetration were materially identical. Yang's primary defenses—that A.K. fabricated her testimony to escape living with her mother and secure financial benefits from the foster system that enabled her to go to college, that A.K. disclosing the abuse to her aunt pre-dated her move to Yang's apartment, and that Yang never picked her up from school or drove her to dance alone—all go to the *overall credibility* of A.K.'s testimony, not the occurrence or non-occurrence of *particular* acts of penetration. And those defenses apply equally to each act.

2.

For related reasons, I disagree with the court's conclusion that the State's charging decisions and presentation of evidence created a genuine risk that the jury's verdict on the first-degree count was not unanimous as to the underlying act(s). Granted, the acts of penetration could have occurred over a much longer period than the 45-minute assault we considered in *Keyes*. The State argued, based on A.K.'s testimony, that the acts of penetration took place during the approximately nine-month period where A.K. and her family lived in Yang's apartment. In most cases, I would be deeply concerned about packaging multiple distinct offenses occurring that far apart into a single charge.

Here, however, it is evident that the State's evidence and arguments did not create a genuine risk of disagreement among the jurors as to which acts supported the first-degree charge for several fact-specific reasons. First, the circumstances of the acts of penetration were identical in every material respect. A.K. testified that both acts took

place at Yang’s apartment when they were alone together after Yang would pick her up from school before driving her to dance practice. A.K.’s testimony neither identified a specific date for any act nor described them in particular detail. Moreover, the State did not meaningfully emphasize any act over others during closing arguments. Second, and relatedly, the State staked its case entirely on A.K.’s credibility. The State repeatedly told the jury that the penetration and sexual contact elements were satisfied “if you believe [A.K.]” The evidence the State offered to corroborate A.K.’s testimony— her disclosure of the abuse to her aunt and uncle and the messages related to those conversations—went to the veracity of A.K.’s testimony as a whole, not the occurrence of specific instances of abuse. Third, with a few exceptions, A.K.’s testimony about other instances of non-penetrative sexual contact was even more non-descript. Yet the jury still found Yang guilty of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(iii) (2014), which requires proof of “multiple acts” of sexual contact “committed over an extended period of time.” Finally, Yang’s counsel argued that the multiple allegations of penetration *undercut* A.K.’s credibility during closing arguments. Defense counsel repeatedly suggested that inconsistencies in her accounts of the nature, timing, and circumstances of these acts made the allegations not believable. All twelve jurors rejected these arguments.

Put together, all of this suggests that the jury believed A.K.’s testimony in its entirety. Although it is *theoretically* possible that a juror could have believed that only fellatio or only cunnilingus occurred, there is simply no plausible basis on this record for concluding that jurors credited A.K.’s testimony on one act of penetration but not others.

Thus, at the time the jury was instructed, there was no genuine risk that a general verdict of guilty would conceal disagreement among the jurors as to the facts constituting the sexual penetration element of first-degree criminal sexual conduct. “[T]he jury either ... believe[d] [A.K.]’s testimony that the consistent, repetitive pattern of acts occurred or disbelieve[d] it. In either event, [Yang had] his unanimous jury verdict ... and the prosecution will have proven beyond a reasonable doubt that [he] committed a specific act” *See People v. Jones*, 792 P.2d 643, 659 (Ca. 1990) (citation omitted) (internal quotation marks omitted).

3.

Finally, we turn to sentencing considerations. *See Douglas C.*, 285 A.3d at 1078. Here, unlike the defendant in *Keyes*, Yang could well have received a separate sentence for each act of penetration had the State elected to add counts of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g) (2014). Because these were separate completed offenses that occurred as far as nine months apart, these crimes would not be considered a single behavioral incident under our sentencing law because they occurred at substantially different times. *See State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014) (“Offenses are part of a single course of conduct if the offenses occurred at substantially the same time and place and were motivated by a single criminal objective.”); *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (clarifying that, when two or more offenses occur in substantially the same place, “we consider [only] whether the offenses occurred at substantially the same time, and whether they were motivated by an effort to obtain a single criminal objective”). And although the criminal objectives

behind each act were qualitatively the same, they were not motivated by a *single* criminal objective. *Cf. id.* (holding that seven downloads of child pornography over an extended period did not form a single behavioral incident because, although the purpose behind each download was the same, each was motivated by a separate and distinct criminal objective).

Federal courts of appeals recognize that aggregating multiple acts into a single charge may be warranted to “avoid unnecessarily complex and confusing allegations and the concomitant prejudice to [the defendant] of charging him with [multiple] substantive counts arising out of the same scheme.” *See, e.g., United States v. Robinson*, 651 F.2d 1188, 1194–95 (6th Cir. 1981). And here, far from *prejudicing* Yang, he arguably “*benefitted* from the aggregation because each discrete count would have been amenable to a separate sentence upon conviction.” *United States v. Kamalu*, 298 F. App’x 251, 254–55 (4th Cir. 2008) (emphasis added); *see also Cohen v. United States*, 378 F.2d 751, 754 (9th Cir. 1967) (“The government is to be commended rather than criticized for treating all such [acts] for the same purpose during a brief period as one crime subject to a single statutory penalty.”).

Given these considerations, it is unsurprising that the federal courts of appeals have routinely “upheld the validity of indictments that consolidate several acts into a single count when such acts represent a single, continuing scheme that occurred within a short period of time and that involved the same defendant.” *United States v. Alsobrook*, 620 F.2d 139, 142 (6th Cir. 1980); *see also United States v. Davis*, 471 F.3d 783, 790 (7th Cir. 2006) (“Where the indictment ‘fairly interpreted’ alleges a ‘continuing course of

conduct, during a discrete period of time,’ the indictment is not prejudicially duplicitous.” (quoting *United States v. Berardi*, 675 F.2d 894, 898 (7th Cir. 1982)); *Kamalu*, 298 F. App’x at 254 (concluding the district court did not err where the defendant was charged with a single count that aggregated “several potentially discrete counts of violating” the same statute because the court of appeals was “unable to find any prejudice to Kamalu”); *United States v. Shorter*, 809 F.2d 54, 56 (D.C. Cir. 1987) (concluding that “tax evasion covering several years may be charged in a single count as a course of conduct in circumstances ... where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes for th[o]se years”); *Cohen*, 378 F.2d at 754 (concluding that the challenged count was not prejudicially duplicitous even though each alleged criminal act “might have been alleged as a separate violation”). Because Yang suffered no prejudice from the allegedly duplicitous charge even in the absence of a specific-unanimity instruction, his conviction should stand.

C.

I agree with the court’s statement in *Keyes* that there is little burden, at least from the district court’s perspective, in providing a specific-unanimity instruction and it is best for the court to do so in close cases. But that does not address the question we are asked to decide. The issue here is whether a specific-unanimity instruction was *required*—and, what’s more, whether it was *plain error warranting reversal* for the district court not to sua sponte provide that instruction on these facts. If the allegedly duplicitous charge does not prejudice, and indeed arguably benefits, the defendant, there is no judicial error to cure.

On that point, Yang has forfeited appellate review of the specific-unanimity issue by failing to object to the jury instructions or otherwise raise the issue at trial, and the court can order relief only if Yang’s claim falls under our plain-error exception. *See, e.g., State v. Gilleylen*, 993 N.W.2d 266, 280 (Minn. 2023).⁵ Even if I were to agree that Yang has carried the “heavy burden,” *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998), of showing that the district court’s decision affected his substantial rights—a doubtful proposition given that there was no actual risk of a non-unanimous verdict—we could reverse his conviction only if failure to grant a new trial would “ ‘seriously affect[] the fairness, integrity, or public reputation of judicial proceedings.’ ” *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)).

That high bar is not met here. Rather than request a specific unanimity instruction before closing arguments, Yang appeared to use the multiple allegations of penetration strategically. His counsel advanced the inconsistencies across A.K.’s trial testimony and her prior statements to law enforcement as a reason that the jury should discredit her testimony *in its entirety*. As in *Keyes*, counsel essentially gambled that the odds of an

⁵ I acknowledge that under our plain-error standard, as announced in *State v. Kelley*, 855 N.W.2d 269, 277 (Minn. 2014), we adopted the “plain-at-the-time-of-appeal” rule as controlling under Minn. R. Crim. P. 31.02. Thus, Yang is entitled to the benefit of the *Keyes* rule in evaluating whether the district court committed plain error. Accordingly, I focus my plain-error analysis only on prongs three and four of the plain error rule: whether the error affected the defendant’s substantial rights, and, if so, whether the error “seriously affect[ed] the fairness, integrity[,] or public reputation of judicial proceedings.” *State v. Griller*, 583 N.W.2d 736, 740, 742 (Minn. 1998) (first alteration in original).

acquittal under a general verdict having called A.K.’s credibility further into question were higher than the odds of an acquittal should the jury be asked to find specifically which act(s) of penetration occurred. The “fairness, integrity, [and] public reputation of judicial proceedings” are not served by reversing Yang’s conviction simply because that strategic choice did not succeed. *See Pulczinski v. State*, 972 N.W.2d 347, 356 (Minn. 2022) (explaining that the relevant inquiry at the fourth prong of the analysis is “whether failing to correct the error would have an impact beyond the current case by causing the public to seriously question whether our court system has integrity and generally offers accused persons a fair trial”). To hold otherwise would explicitly sanction the “double-or-nothing” strategy I warned about in *Keyes*. ___ N.W.3d ___, 2026 WL 2053029, at *23 n.1.

I concluded my *Keyes* dissent by noting that the court’s categorical rule compounds the evidentiary challenges in criminal sexual conduct cases relying primarily on victim testimony, and those challenges are especially acute in child-victim cases. “Cases that involve the sexual abuse of children ... typically turn on the general credibility of the complainants” *Douglas C.*, 285 A.3d at 1124 (Mullins, J., concurring). Thus, the *Keyes* rule and the still-unclear implications of that rule in course-of-conduct cases risk inconsistent and unjust results, especially when paired with expansive plain-error review.

In *Keyes*, I reviewed social and biological science research explaining how trauma can hinder survivors’ capacity to remember and narrate traumatic events coherently. ___ N.W.3d ___, 2026 WL 2053029, at *31–33. That is true even for adult victims of recent

trauma, and even when the trauma’s lasting effects do not rise to the level of diagnosable post-traumatic stress disorder. *See id.* at *32 (citing scholarship). And it is especially true for child victims. A child’s memory and recall are likely to be even more impacted by often-substantial reporting delays, social or family pressure, and cognitive-developmental differences between children’s and adults’ encoding and retention of memories. Meaghan C. Danby, *Five Considerations About Memory Processes for Child Investigative Interviewers*, 18 Policing: J. Pol. & Prac. 1–7 (2024) (further noting that children are more prone to memory errors than adults when recalling and recounting specific incidents in a pattern of ongoing abuse). For exactly those reasons, *Richardson* itself stressed—even if only in dicta—that statutes criminalizing sexual abuse of a minor may “represent an exception” from its analysis because of the “special difficulties of proving individual underlying criminal acts.” 526 U.S. at 821. “To apply strict specific unanimity requirements in [cases involving ongoing sexual abuse of children] would place an unwarranted burden on young victims of sexual assault, essentially penalizing them for providing whatever limited, specific details they might be able to recall to corroborate their stories.” *Douglas C.*, 285 A.3d at 1124 (Mullins, J., concurring). Because the court’s novel categorical rule, unsupported by binding authority, would produce these outcomes and risk inconsistency in cases requiring careful, uniform application of the law—and because Yang cannot meet the plain-error standard for reversal—I respectfully dissent and would affirm his conviction.

McKEIG, Justice (dissenting).

I join in the dissent of Justice Moore, III.

HENNESY, Justice (dissenting).

I join in the dissent of Justice Moore, III.