STATE OF MINNESOTA
IN COURT OF APPEALS
A11-890

State of Minnesota,
Respondent,

vs.

L C West,
Appellant.

Filed April 2, 2012
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. 62-CR-10-7817

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

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

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

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Bjorkman, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction of violating a domestic-abuse no-contact order, arguing that (1) the evidence was insufficient to convict him when the state

presented no evidence that he knew of the existence of the order and (2) his waiver of his right to testify was coerced by his attorney, who refused to elicit testimony from appellant by asking questions that appellant had prepared. We affirm.

FACTS

On July 30, 2009, Washington County District Court issued a domestic-abuse no-contact order (DANCO) ordering appellant LC West to have no contact with A.L. and to not go to A.L.'s residence or work address. The DANCO states: "THE TERMS OF THIS ORDER WILL REMAIN IN EFFECT UNTIL FURTHER ORDER OR MODIFICATION, OR UNTIL YOU ARE ACQUITTED, OR THE CHARGES AGAINST YOU ARE DISMISSED." A handwritten notation appears at the bottom of the DANCO, as follows: "C: WCSO FVN Oakdale PD WCCC Co. Atty Family."[1] The district court's register of actions reports that West appeared in court on July 30; the court provided him with a statement of his rights; the court appointed him a public defender; the court set interim conditions, including bail of $20,000; the court issued a DANCO; and the court ordered West's conditional release.

West was convicted of two qualified domestic-violence-related offenses: gross-misdemeanor domestic assault and felony domestic assault in July and August 2009. On December 3, 2009, the district court issued another DANCO, ordering West not to have contact with A.L. and not to go to her residence.

[1] The state does not challenge West's allegation that the notation means that a copy of the DANCO was sent to the Oakdale Police Department, the Washington County Attorney's Office, and the victim's family.

On July 27, 2010, A.L. called 911 to report that she saw West walk past, stop, and look into her workplace. A surveillance video shows that West stopped in front of A.L.'s workplace and talked on his cell phone.

Respondent State of Minnesota charged West with violating a DANCO under Minn. Stat. § 518B.01, subd. 22(d)(1) (2008).[2] At West's trial, the investigating officer testified that in all criminal cases, DANCOs, like the July 30 DANCO, are issued in court while a defendant is present, and that the defendant is served with the order and told about the order. After the state rested, outside the presence of the jury, West's attorney questioned him about his right to testify and advised him to waive his right to testify because he could say nothing that would aid his case. West wanted to testify so that his attorney could ask him questions that West had drafted, but West's attorney refused to ask him the questions because, in the attorney's opinion, they would hurt West's case. Following an exchange on the record between West, his attorney, and the district court, West said he would not testify. The jury found West guilty.

This appeal follows.

D E C I S I O N

Sufficiency of the Evidence

West argues that the evidence to support his conviction is insufficient because the state presented no evidence that he was personally served with either the July 30 or

[2] In 2010, the Minnesota legislature repealed subdivision 22 of section 518B.01 and recodified it at section 629.75. 2010 Minn. Laws ch. 299, §§ 14–15, at 746–47; *see* Minn. Stat. § 629.75, subd. 2(d) (2010).

December 3 DANCOs, failed to prove that he was present when the district court issued the DANCOs, and failed to prove that he knew about either DANCO.

To prove a felony violation of a DANCO, the state must prove that a DANCO existed; that the defendant knew the DANCO existed; that the defendant violated the DANCO; and that the defendant's violation occurred "within ten years of the first of two or more previous qualified domestic violence-related offense convictions." Minn. Stat. § 518B.01, subd. 22(a), (d)(1) (2008). The word "know" means "that the actor believes that the specified fact exists." Minn. Stat. § 609.02, subd. 9(2) (2008). Here, the July 30 DANCO prohibited West from going to A.L.'s work address. Therefore, if the evidence is sufficient to prove that West knew about the July 30 DANCO, regardless of whether he knew about the December 3 DANCO, the evidence is sufficient to support his conviction.

When reviewing a sufficiency-of-the-evidence claim that involves circumstantial evidence, "'our first task is to identify the circumstances proved.'" *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quoting *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)) (quotation marks omitted). "In identifying the circumstances proved, we defer, consistent with our standard of review, to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id.* (quotations omitted). We then examine the reasonableness of the inferences that may be drawn from the circumstances proved. *Id.* at 473–74. To sustain the conviction, we must determine that "there are no other reasonable, rational inferences that are inconsistent with guilt." *Id.* at 474 (quotations omitted). "[I]f

any one or more circumstances found proved are inconsistent with guilt, or consistent with innocence, then a reasonable doubt as to guilt arises." *Id.* (quotations omitted).

Our first task is to determine the circumstances proved. On the element of whether West knew about the July 30 DANCO, the circumstances proved are the following:

- The district court issued a DANCO on July 30, 2009;
- West made his first court appearance on July 30, at which time the district court set interim conditions, issued a DANCO, and ordered West's conditional release;
- The handwritten note at the bottom of the July 30 DANCO indicates that copies of the DANCO were provided to the Oakdale Police Department, the Washington County Attorney's Office, and the victim's family.
- The investigating police officer testified that in all criminal cases, the defendant is present during the issuance of a DANCO and is served with and verbally told about the DANCO at the hearing.

Our second task is to determine whether reasonable, rational inferences exist that are inconsistent with guilt. *Id.* West suggests that because the handwritten notation at the bottom of the July 30 DANCO does not list him as a recipient of the order, we should infer that he did not receive a copy of the order. But West does not deny being present in the courtroom when the district court issued the order. We conclude that the only reasonable and rational inference to be drawn from the circumstances proved is that West knew about the July 30 DANCO because he was present at the hearing when it was issued. *See State v. Hanson*, 800 N.W.2d 618, 623 (Minn. 2011) (affirming defendant's

conviction of possessing methamphetamine with intent to sell because even though, "when viewed in isolation," some circumstances proved created reasonable inference that defendant "possessed the methamphetamine solely for personal use," the only reasonable inference to be drawn from all circumstances proved was "that the methamphetamine was possessed for purposes of sale").

Waiver of Right to Testify

West argues that he did not voluntarily waive his constitutional right to testify. We "review[] constitutional challenges de novo." *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005). "A defendant's right to testify is a constitutional right that can only be waived by the defendant." *State v. Berkovitz*, 705 N.W.2d 399, 404–05 (Minn. 2005). "Such waiver must be made voluntarily and knowingly." *Id*. at 405. When a defendant "knew and understood that she had the right to testify and that the decision to testify was hers alone, absent some indication in the record that her lawyers coerced her into not testifying by applying undue pressure, using illegitimate means, or otherwise depriving her of her free will," the supreme court concluded that her claim that her attorneys denied her the right to testify failed.[3] *Id.* at 407. When an attorney advises a client not to testify and informs him that the decision about whether to testify is ultimately his to make, the defendant's right to testify is not denied. *See Marhoun v. State*, 451 N.W.2d 323, 328 (Minn. 1990) (holding that attorney did not deny defendant right to testify because

[3] "Berkovitz's trial counsel told her that they were one hundred and five percent certain that she would be convicted of premeditated first-degree murder if she testified in response to her question as to whether they were one hundred percent certain." *Berkovitz*, 705 N.W.2d at 408.

attorney told defendant that attorney would make recommendations but defendant could decide whether to testify).

The defendant bears the burden of proving that her waiver of her right to testify was not knowing and voluntary, and if the defendant successfully shows that her attorney coerced her into waiving her right to testify, then the court must grant the defendant a new trial. *Berkovitz*, 705 N.W.2d at 405. In this case, West argues that his counsel coerced his waiver of his right to testify by refusing to elicit testimony from him by asking questions that West prepared. As mistaken support for his argument that his right to testify was violated, West cites three cases: *State v. Brechon*, 352 N.W.2d 745 (Minn. 1984); *State v. Thompson*, 617 N.W.2d 609 (Minn. App. 2000); and *State v. Rein*, 477 N.W.2d 716 (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992). But in all of the cases, the district court restricted the defendants' testimony, and the issue before the appellate courts was whether the district court had therefore infringed on the defendant's due-process right to explain his or her conduct to a jury. *See Brechon*, 352 N.W.2d at 750–51 (district court excluded defendants' testimony about their motives and intent); *Thompson*, 617 N.W.2d at 612 (district court suppressed defendant's testimony that explained her actions); *Rein*, 477 N.W.2d at 719–20 (district court restricted defendants' testimony about their motivation). Here, the district court did not restrict West's testimony or any portion of it; West waived his right to testify.

Based on our careful review of the record, we conclude that West knew that he had the right to testify and that whether to testify or waive his right to testify was his decision to make. West's attorney informed him twice on the record that whether to

testify was his choice. West acknowledged that he understood this right. When his attorney advised him to not take the stand, West acknowledged that he understood the advice. West's attorney explained that if West chose to testify, he would not ask him the questions that he had prepared because they would hurt his case. The attorney correctly explained that questions had to be relevant and that, as West's attorney, he had the final choice on which questions to ask. After consultation with a defendant, trial counsel makes the final decision on strategy and tactics, and whether to ask a defendant specific questions during testimony is trial strategy. *See State v. Rosillo*, 281 N.W.2d 877, 879 (Minn. 1979) ("[D]ecisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." (quotation omitted)). The district court also discussed with West his right to testify, which supplemented the attorney's explanation. When West's attorney asked West whether he was "choosing to not testify," he said yes.

We conclude that West's trial counsel engaged in no undue pressure, illegitimate means, or other methods of coercion to prevent West from testifying. The record reflects that West's waiver of his right to testify was knowing and voluntary.

Affirmed.