STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0653

State of Minnesota,
Respondent,

vs.

Lee Andrew Bolton,
Appellant.

Filed February 4, 2013
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-11-19451

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, 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

BJORKMAN, Judge

Appellant challenges his convictions of aggravated stalking and disorderly conduct, arguing that (1) there is insufficient evidence that he had the requisite intent to

commit the stalking offense, (2) the district court improperly admitted certain evidence, (3) the trial judge erred by not recusing from the case for bias, and (4) the district court erred by entering convictions for both offenses. In a pro se supplemental brief, appellant argues that he received ineffective assistance of counsel at trial. We affirm.

FACTS

On June 29, 2011, appellant Lee Bolton was in court awaiting sentencing for a domestic-assault conviction. Probation officer T.O. also was present in the courtroom to report on her presentence investigation (PSI) and to make sentencing recommendations. Before the hearing began, Bolton's attorney informed him that T.O. was recommending that Bolton serve additional jail time. Bolton became angry, pointed at T.O., who was seated with a colleague approximately ten feet away from Bolton, and yelled, "She's the one. She's the one . . . that's asking that I do more time." T.O. was startled by the outburst, became nervous and shaky, and was concerned that Bolton might hurt her. T.O.'s colleague left to call a deputy, and Bolton's attorney escorted Bolton from the courtroom, telling him not to make it "personal." Bolton returned to the courtroom two more times, making additional threatening statements each time before being removed. Bolton's words and demeanor were more aggressive each time. As Bolton's attorney led him back out to the hallway the last time, Bolton yelled, "I hope you get raped and robbed," or "You need to be raped." Bolton was arrested in the hallway.

The state charged Bolton with aggravated stalking and disorderly conduct.[1] A jury found Bolton guilty of both offenses, and the district court sentenced Bolton to 28 months' imprisonment. This appeal follows.

D E C I S I O N

I. Sufficient evidence supports Bolton's aggravated-stalking conviction.

In assessing the sufficiency of the evidence, we review the evidence "to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted).

To obtain a conviction of aggravated stalking, the state was required to prove that Bolton "stalk[ed] another . . . with intent to retaliate against . . . [an] officer of the court, because of that person's performance of official duties in connection with a judicial proceeding." Minn. Stat. § 609.749, subd. 3(a)(4) (2010). Stalking means to engage in conduct that the actor knows or has reason to know would cause "the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated," and "causes this reaction on the part of the victim." *Id.*, subd. 1 (2010).

While Bolton's sufficiency challenge focuses on the intent element of the stalking offense, we begin by more broadly reviewing the evidence adduced at trial. All of the state's witnesses testified that Bolton repeatedly threatened T.O. T.O. recalled him

[1] The state originally charged Bolton with making terroristic threats and fifth-degree assault. The state subsequently dismissed those charges and substituted the stalking and disorderly conduct charges.

yelling, "I'm going to bust your head in," "I hope you get in a car wreck," and "You're going to get yours." And after being twice removed from the courtroom, Bolton returned and shouted at T.O., "I hope you get raped and robbed." The colleague who was sitting next to T.O. heard Bolton say that he would like to see T.O.'s "head bashed in." Another probation officer seated in the courtroom recalled Bolton stating, "I hope you get knocked in the head. I hope you get yours. You're going to get raped and beaten," all while pointing at T.O. And an attorney present in the courtroom heard, "I will retaliate," and "something about cracking her—her skull, that he hoped that she was robbed, and he hoped that she was raped." T.O. testified that Bolton's conduct made her fearful; all of the state's witnesses testified that T.O. was visibly shaken.

The record further indicates that Bolton threatened T.O. because she was recommending that he serve additional jail time. T.O.'s testimony regarding Bolton's first outburst establishes his retaliatory motive: "She's the one. She's the one . . . that's asking that I do more time." Other witnesses likewise testified that Bolton's threats related to T.O.'s sentencing recommendation, with Bolton stating that he would like to see T.O.'s "head bashed in and then see if she would recommend more jail time" and asking "how would she like it if she were taken from her family, that she wouldn't be able to see her kids?" One witness testified that Bolton expressly said that he was "going to retaliate."

Bolton argues that the evidence of his intent is insufficient because it is entirely circumstantial and reasonably supports an alternative inference that "at most, he intended to convey to her that he was angry and might retaliate against her at some later point in

time." We are not persuaded. While the sufficiency of evidence establishing an element of an offense is given greater scrutiny when the evidence is circumstantial, Bolton's alternative interpretation of the evidence is not reasonable and therefore does not undermine his conviction. *See Al-Naseer*, 788 N.W.2d at 473-74 (stating that appellate courts examine "the reasonableness of all inferences that might be drawn from the circumstances proved" (quotation omitted)); *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (stating that an alternative theory must be "plausible" and "supported by the evidence").

Bolton was angry with T.O. for recommending that he serve additional jail time. He repeatedly shouted violent threats at her while referencing that recommendation, which had the foreseeable effect of frightening and intimidating T.O. The only plausible interpretation of these circumstances is that Bolton intended for T.O. to feel frightened and intimidated for recommending that he serve additional jail time. *See State v. Ott*, 291 Minn. 72, 75, 189 N.W.2d 377, 379 (1971) (explaining that "[t]he ordinary effect upon others of the acts alleged to constitute the crime" may indicate intent). Based on our thorough review of the record, we conclude that the evidence amply supports Bolton's aggravated-stalking conviction.

II. The district court did not abuse its discretion in its evidentiary rulings.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was

thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Bolton argues that the district court abused its discretion by admitting evidence of his assaultive and criminal history and comparing his conduct to that of defendants in other court proceedings. We address each argument in turn.

Assaultive and criminal history

Bolton first argues that the district court abused its discretion by permitting T.O. to testify that she was aware of Bolton's previous "assaultive behavior" and that she recommended that Bolton serve additional time in a correctional facility, which indicated prior criminal conduct. Bolton contends that this evidence is improper prior bad-acts evidence under Minn. R. Evid. 404(b).

Evidence of a defendant's prior crimes or other bad acts is not admissible to prove the defendant's character for purposes of showing that the defendant acted in conformity with that character. Minn. R. Evid. 404(b). But the general rule against admitting such evidence should not "preclude the state from making out its whole case against the accused based on evidence that may be relevant to the accused's guilt of the crime charged." *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997) (quotation omitted). When the state offers evidence of the defendant's prior crimes or misconduct "as direct evidence" to prove an element of the charged offense, rule 404(b) does not apply. *See State v. Cross*, 577 N.W.2d 721, 725 (Minn. 1998).

The district court ruled that the challenged evidence is directly relevant to elements of the stalking offense. We agree. First, T.O.'s awareness that Bolton has a

history of assaultive conduct bears on the issue of whether Bolton's conduct on June 29 caused her fear. And the district court properly limited the state's use of the evidence to that purpose, excluding testimony describing Bolton's assaultive history but permitting T.O. to explain that she was afraid when Bolton began yelling threats at her because she knew that he has a history of assaultive conduct. Second, evidence that T.O. recommended that Bolton serve additional jail time was necessary to establish the "official conduct" for which he sought to retaliate. Indeed, her testimony as to her sentencing recommendation not only established that element of the offense but was necessary for the case as a whole to make sense to the jury. *See Nunn*, 561 N.W.2d at 908 (holding that evidence of defendant's threatening other acts "provided the jury insight into and an understanding of the [charged offense]" and "[w]ithout that evidence, the jury would have been left in the dark" as to why the defendant would commit the charged offense, outweighing potential prejudice).

Because the challenged evidence was highly probative of T.O.'s fear and her performance of official duties and carefully circumscribed to address only these issues, we conclude that the district court did not abuse its discretion by admitting the evidence.

Comparison evidence

Bolton also argues that the district court abused its discretion by permitting T.O. and the other probation officers who witnessed the incident to testify that they had not previously observed conduct like Bolton's in court or called court security for protection. Bolton contends that this testimony was irrelevant and unfairly prejudicial. We disagree. Like the evidence of T.O.'s awareness of Bolton's prior assaultive conduct, this evidence

provides a context for understanding T.O.'s reaction to Bolton's outbursts. It also bears directly on the plausibility of Bolton's claim that his outbursts did not threaten or otherwise retaliate against T.O. but merely expressed his anger and "wish[ed] ill will on her." And the evidence was limited to a few brief references. We conclude that the district court did not abuse its discretion by admitting brief testimony comparing Bolton's conduct to that of other defendants in court.

III. The trial judge did not err by not recusing from Bolton's case.

Bolton argues that the trial judge should have recused for judicial bias because the judge shared an "employment relationship" with T.O. and other probation-officer witnesses. "The presence of an impartial judge is critical to ensure the fairness and integrity of the judicial process." *State v. Schlienz*, 774 N.W.2d 361, 369 (Minn. 2009). Impartiality is the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." *State v. Pratt*, 813 N.W.2d 868, 876 (Minn. 2012) (quotation omitted). A judge must disqualify himself or herself from any proceeding in which "a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *State v. Jacobs (In re Jacobs)*, 802 N.W.2d 748, 753 (Minn. 2011) (applying Minn. Code Jud. Conduct Rule 2.11(A)).

Bolton did not challenge the judge's impartiality at trial. As a result, the issue is subject to plain-error review. *See Schlienz*, 774 N.W.2d at 365. Accordingly, Bolton must establish (1) error, (2) that was plain, and (3) that affected his substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). And because he did not

raise the impartiality issue at trial, he must demonstrate actual bias to merit reversal. *See State v. Plantin*, 682 N.W.2d 653, 663 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). A claim of bias is considered based on the record as a whole, and we presume that a trial judge has properly discharged her duties. *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008).

Bolton's impartiality challenge is not specific to the judge who presided over his trial. Rather, Bolton focuses on the fact that T.O. and two of the other state witnesses work for the Hennepin County Court Services, which provides investigative and probation services to the district court. Because Bolton does not establish, or even assert, actual bias on the part of the trial judge, he is not entitled to reversal on this basis. *See Plantin*, 682 N.W.2d at 663.

Moreover, our supreme court rejected a similar impartiality challenge that extended to an entire group of participants in the Fourth Judicial District. In *Jacobs*, the supreme court held that the trial judge's marriage to an attorney who works in the Hennepin County Attorney's Office did not warrant recusal based on apparent bias. 802 N.W.2d at 755. The court concluded that because the judge's spouse had no personal involvement in the case, worked for a different division than the one prosecuting Jacobs, and the office is "a large organization that handles a high volume and wide variety of cases," a reasonable examiner would not question the judge's impartiality. *See id.* at 753. Likewise, Bolton identifies no connection between the trial judge and the victim or other probation-officer witnesses beyond their mutual connection to the large Hennepin County District Court system; Bolton's impartiality challenge would extend to all Hennepin

County judges. Indeed, the type of institutional connection of which Bolton complains is so apparent that it would not require disclosure, yet the connection did not cause Bolton to object to the judge presiding over his trial. This failure suggests that a reasonable examiner, with full knowledge of the facts and circumstances, would not question the judge's impartiality.

Because Bolton has not demonstrated actual bias or any reasonable basis to question the trial judge's impartiality, we conclude that the trial judge did not err by failing to recuse herself from Bolton's trial.

IV. The district court properly entered convictions for both stalking and disorderly conduct.

Bolton argues that Minn. Stat. § 609.04 (2012) precludes entry of a conviction for both stalking and disorderly conduct. "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1. To determine whether one offense necessarily is proved by the proof of another, we "must look at the statutory definitions rather than the facts in a particular case." *State v. Gayles*, 327 N.W.2d 1, 3 (Minn. 1982). Because the analysis relies on statutory interpretation, we review de novo. *See State v. Tomlin*, 622 N.W.2d 546, 548 (Minn. 2001).

A stalking conviction requires proof that the defendant engaged in conduct knowing it would cause a particular victim to feel frightened or intimidated and that he caused this reaction on the part of the victim. Minn. Stat. § 609.749, subd. 1. Aggravated stalking, as charged here, requires additional proof that the stalking was

committed with intent to retaliate against an officer of the court because of that person's "performance of official duties in connection with a judicial proceeding." *Id.*, subd. 3(a)(4). By contrast, a disorderly conduct conviction requires proof that the defendant "engage[d] in offensive, obscene, abusive, boisterous, or noisy conduct" and knew or had reason to know that his conduct "will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace." *See* Minn. Stat. § 609.72, subd. 1 (2010). Thus, aggravated stalking is a crime focused on a single victim, while disorderly conduct is a crime against the public, a "breach of the peace." *See State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000) (stating that section 609.04 "prevents multiple convictions based on the same conduct committed against the same victim").

Here, Bolton's aggressive and threatening behavior on June 29 was aimed at T.O., amounting to stalking. Because that conduct occurred in a courtroom, it also foreseeably affected all those present and undermined the peace and safety of the courthouse, amounting to disorderly conduct. But Bolton could have committed the stalking offense under circumstances where his conduct would not have amounted to disorderly conduct. *See State v. Kinsky*, 348 N.W.2d 319, 326 (Minn. 1984) (explaining that an offense is not necessarily a lesser-included offense if "a person can commit the greater offense, as legally defined, without committing the lesser offense, as legally defined"). Accordingly, we conclude that the district court properly entered convictions for both offenses.

V. Bolton's trial counsel was not ineffective.

In a pro se supplemental brief, Bolton argues that his trial counsel was ineffective because he did not obtain footage from the courtroom security cameras, which Bolton

contends would exonerate him. We disagree. To establish ineffective assistance of counsel, a defendant "must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Caldwell*, 803 N.W.2d 373, 386 (Minn. 2011). There is a strong presumption that counsel's representation was reasonable, *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009), and we generally do not review matters of trial strategy for competence, *Voorhees v. State*, 627 N.W.2d 642, 651 (Minn. 2001). Determining what evidence to present to the jury is a matter of trial strategy. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). We conclude that Bolton's trial counsel was not ineffective for electing not to pursue security footage of incidents to which numerous witnesses testified.

Affirmed.