STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1879

State of Minnesota,
Appellant,

vs.

Kevin Earl Victor Barsch,
Respondent.

Filed August 19, 2013
Affirmed in part, reversed in part, and remanded
Peterson, Judge

Polk County District Court
File No. 60-CR-11-595

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

Greg Widseth, Polk County Attorney, Crookston, Minnesota (for appellant)

Charles F. Clippert, Clippert Law Firm, St. Paul, Minnesota (for respondent)

Considered and decided by Chutich, Presiding Judge; Peterson, Judge; and Smith, Judge.

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

PETERSON, Judge

A jury found respondent guilty of one count of engaging in a pattern of stalking conduct and 13 counts of violation of an order for protection. Respondent moved for judgment of acquittal, alleging that appellant failed to prove venue. The district court

granted the motion. Appellant challenges the district court's ruling that the evidence offered at trial was insufficient to prove venue. We affirm in part, reverse in part, and remand.

FACTS

Respondent Kevin Earl Victor Barsch and K.B. married in 2000. Following a hearing at which respondent and K.B. testified, K.B. obtained an order for protection (OFP) on March 1, 2011. The OFP stated that "[r]espondent shall have no contact, either direct or indirect, with [K.B.], [or the] children, whether in person, by telephone, mail, or electronic mail or messaging, through a third party, or by any other means[.]" At that time, respondent lived in Fosston and K.B. lived in McIntosh. Both cities are in Polk County.

Within three days after the OFP was issued, respondent began to make cell-phone calls to K.B. At first, K.B. received some calls when she was at a conference at a location that is not established in the trial record. After reporting these calls to Polk County Deputy Sheriff Jesse Haugen, K.B. went to the Fosston Law Enforcement Center, and Haugen recorded the messages from K.B.'s cell phone, photographed the display on her cell phone that showed the incoming calls, and took K.B.'s statement. K.B. recognized both respondent's voice and the cell-phone numbers from which the calls originated, and she identified respondent as the person who left the messages on her cell phone. K.B. did not know where respondent was, but she suspected that he still lived in Fosston. When asked at trial if there was any evidence that supported that belief, K.B.

testified that when she went with law enforcement to respondent's Fosston residence in "late March" to retrieve her property, "the coffee pot was on."

Haugen contacted respondent by calling one of respondent's cell-phone numbers. Respondent answered and admitted that he knew about the OFP, but he refused to provide information about where he was. He said to Haugen, "I'm not in Iowa. I'm not in the northern states or midwest states and I don't want to get arrested, so I'm not telling you where I am." Haugen testified that one of respondent's cell-phone numbers was from an area code that he did not recognize as a Minnesota area code.

On March 8, Haugen took a second report from K.B. regarding a second series of calls that respondent made to K.B., and on March 16, K.B. reported a third series of calls from respondent. This time, she reported the calls to Polk County Deputy Sheriff James Juve. Juve phoned respondent, who answered and admitted making the calls in violation of the OFP and again said that he would not reveal his location because he did not want to be arrested.

For placing these phone calls, respondent was charged with one felony count of a pattern of stalking conduct, in violation of Minn. Stat. § 609.749, subd. 5(a) (2010), and 13 misdemeanor counts of violation of an OFP, in violation of Minn. Stat. § 518B.01, subd. 14(b) (2010). At the beginning of trial, outside the jurors' presence, defense counsel questioned respondent on the record as follows:

> [DEFENSE COUNSEL]: . . . [W]e've reviewed the evidence in this case, is that correct?
> THE DEFENDANT: Correct.
> [DEFENSE COUNSEL]: And we've reviewed the law as it pertains to these counts?

> THE DEFENDANT: Yes.
> [DEFENSE COUNSEL]: And we've discussed, I guess, the reasonable probabilities of success on the different counts, would that be fair?
> THE DEFENDANT: Yes.
> [DEFENSE COUNSEL]: And is it correct that you, as a matter of strategy, would give me your permission to basically – or not basically, but concede your guilt on Counts 2 through 14?[1]
> THE DEFENDANT: Yes.
> [DEFENSE COUNSEL]: And is this your decision? I haven't put any undue pressure on you or anything like that, is that fair to say?
> THE DEFENDANT: Yeah, that's fair.
> [DEFENSE COUNSEL]: I don't have any other questions, Your Honor.
> THE COURT: All right. We'll note that for the record then and that is the trial strategy that's going to be used by the defense.

During his opening statement, defense counsel told the jurors that they should find respondent guilty of the 13 misdemeanor counts for violating the OFP. And during his closing argument, defense counsel said, "As I told you in my opening statement, this isn't really a case about . . . violating a restraining order. I concede that [respondent] did in fact do that 13 times."

Following a two-day trial, the jury returned guilty verdicts on all charges. Respondent moved for judgment of acquittal on the ground that the state failed to prove venue.[2] The district court granted the motion and entered a judgment of acquittal on all charges. This appeal followed.

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[1] Counts 2 through 14 were the 13 misdemeanor counts.

[2] Respondent had also moved for judgment of acquittal at the close of the prosecution's case, and his motion was denied. Respondent did not assert a failure to prove venue as a

Respondent moved to dismiss the appeal for lack of jurisdiction, claiming double jeopardy. By special-term order, this court denied the motion, ruling that double jeopardy does not apply because if the judgment of acquittal were reversed, the guilty verdict would be reinstated, and no second trial would occur.

D E C I S I O N

"If the jury returns a verdict of guilty . . . a motion for a judgment of acquittal may be brought within 15 days after the jury is discharged or within any further time as the court may fix during the 15-day period." Minn. R. Crim. P. 26.03, subd. 18(3)(a). "A district court may grant a motion to acquit if it determines that the state's evidence, when viewed in the light most favorable to the state, is insufficient to sustain a conviction." *State v. Hormann*, 805 N.W.2d 883, 892 (Minn. App. 2011), *review denied* (Minn. Jan. 17, 2012); *see State v. Slaughter*, 691 N.W.2d 70, 74-75 (Minn. 2005) (stating that an acquittal motion is "procedurally equivalent" to a directed-verdict motion, which requires the motion to be granted if, after viewing the evidence and all inferences in the light most favorable to the state, the evidence is insufficient to present a fact question for the jury). To determine whether the state's evidence is sufficient to sustain a conviction, "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-Nasseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted).

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basis for that motion. He argued that another element of the felony offense had not been proved.

Venue is an element of an offense that must be proved beyond a reasonable doubt. *State v. Ehmke*, 752 N.W.2d 117, 120 (Minn. App. 2008). It may be proved by direct or circumstantial evidence. *State v. Bahri*, 514 N.W.2d 580, 582 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). Whether the state has met its burden to prove venue is a legal question subject to de novo review. *State v. Pierce*, 792 N.W.2d 83, 86 (Minn. App. 2010).

The legislature has enacted a general venue statute, which states that "[e]xcept as otherwise provided by rule 24 of the Rules of Criminal Procedure,[3] every criminal cause shall be tried in the county where the offense was committed." Minn. Stat. § 627.01, subd. 1 (2010). "'County where the offense was committed' means any county where any element of the offense was committed or any county where the property involved in an offense is or has been located or where the services involved in an offense were provided." Minn. Stat. § 627.01, subd. 2 (2010). Applying this general venue statute, the district court determined that the evidence was not sufficient to prove venue.

But, in addition to this general venue statute, the legislature has enacted a specific venue statute that applies to stalking offenses. To determine whether the state presented evidence sufficient to prove venue under this specific venue statute, it is necessary to understand the stalking offenses to which the venue statute applies.

Pattern-of-Stalking-Conduct Offense.

When used in the Minnesota stalking statute, "'stalking' means to engage in conduct which the actor knows or has reason to know would cause the victim under the

[3] The exceptions in Minn. R. Crim. P. 24 do not apply to this case.

circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim regardless of the relationship between the actor and victim." Minn. Stat. § 609.749, subd. 1 (2010). The statute includes a list of specific acts that constitute a gross misdemeanor, if committed with the knowledge and effect described in the definition of "stalking." Minn. Stat. § 609.749, subd. 2 (2010). Under the statute, a person is guilty of a gross misdemeanor if the person "repeatedly makes telephone calls, sends text messages, or induces a victim to make telephone calls to the actor, whether or not conversation ensues." Minn. Stat. § 609.749, subd 2(4).

The stalking statute also makes repeated stalking conduct a felony. The felony statute states:

> A person who engages in a pattern of stalking conduct with respect to a single victim . . . which the actor knows or has reason to know would cause the victim under the circumstances to feel terrorized or to fear bodily harm and which does cause this reaction on the part of the victim, is guilty of a felony . . . .

Minn. Stat. § 609.749, subd. 5(a) (2010). For purposes of this felony offense, a "pattern of stalking conduct" means, among other things, two or more acts within a five-year period that violate Minn. Stat. § 609.749. Minn. Stat. § 609.749, subd. 5(b)(1) (2010). Respondent was charged with this felony offense for placing the three series of cell-phone calls to K.B.

The venue provision of the stalking statute states that "conduct described in [Minn. Stat. § 609.749,] subdivision 2, clauses (4) and (5), may be prosecuted at the place where any call is made or received or, in the case of wireless or electronic

communication or any communication made through any available technologies, where the actor or victim resides." Minn. Stat. § 609.749, subd. 1b(b) (2010). The conduct described in section 609.749, subdivision 2, clause 4, includes repeatedly making telephone calls.

In analyzing whether venue was established under the specific venue provision of the stalking statute, the district court determined that the specific provision did not apply because respondent's pattern-of-stalking-conduct offense was charged under Minn. Stat. § 609.749, subd. 5(a), not under Minn. Stat. § 609.749, subd. 2(4). But, under the plain language of the specific venue provision, in the case of wireless communication, *conduct described in* Minn. Stat. § 609.749, subd. 2(4), may be prosecuted where the victim resides; the statute's application is not limited to *conduct charged under* Minn. Stat. § 609.749, subd. 2(4). Respondent was charged under Minn. Stat. § 609.749, subd. 5(a), for repeatedly making telephone calls to K.B., which is conduct described in Minn. Stat. § 609.749, subd. 2(4). Therefore, the specific venue provision in the stalking statute applies. *State v. Kilmer*, 741 N.W.2d 607, 610 (Minn. App. 2007) (stating that "the court must simply apply the statute as written when its meaning is plain and clear and free from ambiguity").

The evidence presented at trial shows that respondent repeatedly made telephone calls to K.B. using a cell phone, which is a form of wireless communication, and that when the calls were made, K.B. resided in Polk County. Therefore, the evidence was sufficient to prove beyond a reasonable doubt that Polk County was the proper venue,

and we reverse the district court's order granting respondent's motion for acquittal on the pattern-of-stalking-conduct offense.

Violation of OFP offenses.

The district court also ruled that appellant failed to prove venue for the 13 misdemeanor violation-of-an-OFP offenses under the Domestic Abuse Act, Minn. Stat. § 518B.01, subd. 14(b) (2010). This act does not contain a specific venue provision, but in *State v. Pierce*, which involved an e-mail message that violated an OFP, this court ruled that "[v]enue to prosecute . . . is proper in the county from which the sender mailed the electronic message or the county in which the recipient opened it." 792 N.W.2d at 90. In *Pierce*, this court concluded that the state failed to prove venue for a claimed violation of the Domestic Abuse Act when it could not prove the location where an electronic message was either sent or received. This court stated:

> At most, one might speculate from various stray references that [the victim] was at home in Minneapolis when she opened the e-mail, but the evidence falls far short of excluding all other reasonable possibilities beyond a reasonable doubt. We appreciate that the district court was in the best position to decide disputed facts, but . . . we do not defer to the factfinder's choice between inferences in circumstantial-evidence cases. On the limited trial record, [the victim] might have opened the e-mail anywhere in Minnesota.

Id. at 89.

K.B. did not testify about where she was when she received the calls. The evidence that K.B. lived in Polk County throughout the period when she received the cell-phone calls is not sufficient to establish venue in Polk County. Each of the counts

alleging an OFP violation alleged that a call was made at a specific time on a specific day, and there is no evidence that K.B. was at home, or in Polk County, when she received the calls. Because locations outside Polk County could not be excluded as locations where K.B. received the calls, the record evidence is insufficient to show that she received the calls in Polk County. *See State v. Hurd*, 819 N.W.2d 591, 598-99 (Minn. 2012) (stating that in reviewing circumstantial evidence, appellate court must consider "whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt, not simply whether the inferences that point to guilt are reasonable" (quotations omitted)). Other than K.B.'s testimony that a coffee pot was left on in respondent's Fosston residence, which suggested that respondent was in Polk County during March 2011, there was no evidence that respondent made the cell-phone calls to K.B. while in Polk County.

Appellant argues that even if the evidence of venue for the violation-of-an-OFP offenses was insufficient, respondent admitted to venue by agreeing to his attorney's trial strategy of conceding respondent's guilt on these offenses. Typically, matters of trial strategy are entrusted to defense counsel. *See, e.g., Faretta v. California*, 422 U.S. 806. 820, 95 S. Ct. 2525, 2534 (1975) ("[W]hen a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy. . . ."). But although there may have been tactical reasons for conceding respondent's guilt on the misdemeanor charges, respondent's agreement to allow the concession of guilt was inadequate to satisfy the requirements of Minn. R. Crim. P. 26.01, subd. 1(2)(a), which states that a defendant's right to a jury trial

on the issue of guilt may be waived only "personally, in writing or on the record in open court," after the defendant is advised of the right by the court, and after the district court approves the waiver. *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983) (recognizing "that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"). Respondent's granting his attorney permission to concede guilt on the violation-of-an-OFP charges was not a valid waiver of his right to a jury trial on those charges.

And it is apparent that neither appellant nor respondent believed that respondent's granting his attorney permission to concede guilt on the violation-of-an-OFP charges was intended to be a waiver of his right to a jury trial on those charges. For each of the 13 counts, the jury was instructed on the elements of an OFP violation, and all 13 counts were submitted to the jury. As the district court explained, respondent's granting his attorney permission to concede guilt was part of a trial strategy.[4]

We agree with the district court that respondent's concession of guilt, made through his counsel, did not satisfy appellant's responsibility to prove venue. We therefore affirm the district court's order granting respondent's motion for acquittal on the 13 misdemeanor violation-of-an-OFP offenses. As this court noted in *Pierce*, "[w]e are aware that our holding invites a form-over-substance criticism. After all, venue restrictions are designed chiefly to protect a defendant from the unfairness and hardship

[4] This strategy was revealed during respondent's attorney's opening argument, before the prosecution presented its evidence.

that may occur when an accused is prosecuted in a remote place." 792 N.W.2d at 90 (quotation omitted). Respondent made numerous cell-phone calls to K.B., and he could expect that she would receive at least some of the calls in the county where she lived. But, "venue, unless properly waived, is an essential part of the government's case in a criminal prosecution and must be established by adequate proof the burden of which is on the government." *Holdridge v. United States*, 282 F.2d 302, 305 (8th Cir. 1960).

Finally, appellant argues that if the evidence was not sufficient to establish venue, the proper disposition was dismissal of the charges, not entry of a judgment of acquittal. The supreme court recently stated that "[a] finding of insufficient evidence to convict amounts to an acquittal on the merits because such a finding involves a factual determination about the defendant's guilt or innocence." *State v. Sahr*, 812 N.W.2d 83, 90 (Minn. 2012); *see Hormann*, 805 N.W.2d at 892 (**"**A district court may grant a motion to acquit if it determines that the state's evidence, when viewed in the light most favorable to the state, is insufficient to sustain a conviction."). This principle is reflected in this court's March 20, 2013 order on respondent's motion to dismiss for lack of jurisdiction, in which this court stated:

> Respondent was convicted after a jury trial. If the district court's order is affirmed on appeal, the judgment of acquittal will stand. If the district court's order entering judgment of acquittal is reversed on appeal, the guilty verdict will be reinstated and respondent will not be subject to a second trial.

(Citation omitted.) The district court's order is affirmed with respect to the 13 misdemeanor offenses, and, for those offenses, the judgment of acquittal will stand. The

district court's order is reversed with respect to the felony offense, and, for that offense, the guilty verdict will be reinstated. Respondent will not be subject to a second trial.

Affirmed in part, reversed in part, and remanded.