STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1936

State of Minnesota,
Respondent,

vs.

Dustin Brock Metcalfe,
Appellant.

Filed September 17, 2012
Affirmed
Halbrooks, Judge

Stearns County District Court
File No. 73-CR-10-5777

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

John C. Lillie, III, Kathleen M. Wagner, Dudley & Smith, P.A., St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HALBROOKS, Judge

Appellant challenges his conviction of gross misdemeanor harassment/stalking, arguing that there was insufficient evidence for the jury to find him guilty. Appellant also argues that the district court plainly erred in its handling of multiple jury-verdict forms. Because we conclude that the evidence was sufficient to support the guilty verdict and that the district court properly handled the multiple jury-verdict forms, we affirm.

FACTS

Appellant Dustin Metcalfe and E.W. have a child together. Their relationship ended in April 2010. On July 2, 2010, Metcalfe attempted to serve E.W. with co-parenting paperwork. He parked his car near E.W.'s place of employment and waited for her to leave work. When she did, Metcalfe followed E.W. in her car for approximately 12 blocks. E.W., who was frightened, called 911. As he followed E.W., Metcalfe twice attempted to "pin" E.W. by positioning his car at an angle in front of her car. After Metcalfe performed the second pin, he drove away and was quickly intercepted by law enforcement.

The state charged Metcalfe with gross misdemeanor harassment/stalking, a violation of Minn. Stat. § 609.749, subd. 2(a)(2) (2008). At the close of Metcalfe's trial, the jury foreperson erroneously gave the bailiff a "not guilty" verdict form. Realizing his error, the foreperson retrieved the "guilty" verdict form, signed it outside the presence of the other jurors, and incorrectly dated the form. Due to the confusion, the district court polled the jury to confirm the "guilty" verdict and then instructed the jury to redeliberate

and return with a new, correctly dated verdict form. The jury did so, and returned with a new "guilty" verdict form. The jury was polled again and confirmed that its true verdict was guilty. Metcalfe was sentenced to 365 days in jail. This appeal follows.

D E C I S I O N

I.

Metcalfe argues that the state failed to prove that he knew or had reason to know that his conduct would cause E.W. to feel frightened. In considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A person is guilty of gross misdemeanor harassment/stalking if he harasses another by stalking, following, monitoring, or pursuing another. Minn. Stat. § 609.749, subd. 2(a)(2) (2008). The term "harass" is statutorily defined and means "to engage in intentional conduct which: (1) the actor knows or has reason to know would cause the

victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated; and (2) causes this reaction on the part of the victim." *Id.*, subd. 1 (2008). In a prosecution for harassment/stalking, the state need not prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated. *Id.*, subd. 1a (2008). Rather, the state need only prove that the actor knew or had reason to know that his conduct would cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated. *Id.*, subds. 1, 1a.

In *State v. Stockwell*, this court held that an actor knows or has reason to know that his or her conduct would cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated when the actor follows or pursues another by car in an aggressive and dangerous manner. 770 N.W.2d 533, 542 (Minn. App. 2009). In that case, the trial testimony revealed that the appellant drove her vehicle "dangerously close [to the victim] for several blocks," refused to pass the victim when given opportunity to do so, and then followed the victim to a parking lot where the appellant accosted the victim. *Id.* This court held that, "at minimum, appellant followed or pursued [the victim] by car in an aggressive and dangerous manner," which supported the jury's verdict that appellant "knew or had reason to know that her driving conduct would cause [the victim] to feel frightened, threatened, oppressed, persecuted, or intimidated." *Id.*

In this case, the trial testimony revealed that Metcalfe drove two to four feet behind E.W. for approximately 12 blocks, that Metcalfe was visibly upset, yelling, and screaming, and that Metcalfe twice attempted to maneuver his car in front of E.W.'s car to prevent her from moving. Two law-enforcement officers witnessed the second pin

attempt, and both officers testified that it appeared that Metcalfe was going to hit E.W. with his car, but then stopped just short. Based on this evidence, "at minimum" Metcalfe followed or pursued E.W. by car in an aggressive and dangerous manner, which supports the jury's verdict that Metcalfe knew or had reason to know that his driving conduct would cause E.W. to feel frightened, threatened, oppressed, persecuted, or intimidated. *See id.* Accordingly, the evidence is sufficient to support the jury's guilty verdict.

II.

Metcalfe argues that the district court erred in its handling of the multiple jury-verdict forms. Specifically, he contends that because of the inconsistent verdicts, the district court should have taken affidavits from the jurors or, alternatively, conducted a *Schwartz* hearing.

Because Metcalfe did not make these arguments to the district court, we review them only for plain error. *See State v. Kuhlmann*, 806 N.W.2d 844, 852 (Minn. 2011). For us to find plain error, there must be (1) error, (2) that is plain, and (3) that affected the defendant's substantial rights. *Id.* "An error is 'plain' if it is clear or obvious." *Id.* at 853. An error affects a defendant's substantial rights "if the error was prejudicial and affected the outcome of the case." *Id.*

A jury verdict must be protected from clerical errors. *Bauer v. Kummer*, 244 Minn. 488, 491, 70 N.W.2d 273, 276 (1955). But a jury is not allowed to impeach its own verdict. *Id.* "Great caution must therefore be exercised in granting relief for clerical error lest it become a shield behind which to conceal an attack upon the verdict itself."

Id. at 492, 70 N.W.2d at 276; *see also Paul v. Pye*, 135 Minn. 13, 15, 159 N.W. 1070, 1071 (1916).

In *Paul*, the supreme court held that, while a jury could not impeach its own verdict, affidavits could be used to show "what their verdict really was." 135 Minn. at 15, 159 N.W. at 1071. The supreme court stated, "[A] unanimous error of the jury in delivering the verdict as already unanimously agreed on in the jury room may be shown by the affidavits of the jurors themselves as a basis for application for relief by ordering a new trial." *Id.* (quotation omitted). In *Bauer*, the supreme court upheld the district court's rejection of juror affidavits because the jury was attempting to impeach its verdict rather than correct a clerical error. 244 Minn. at 493-94, 70 N.W.2d at 276-77.

Because the jury in this case needed to show "what their verdict really was," the district court could have accepted affidavits from the jurors. *See Paul*, 135 Minn. at 15, 159 N.W. at 1071. But such action was not required, for two reasons. First, the caselaw makes clear that accepting affidavits is just one way in which the district court can exercise great caution in granting relief from clerical error. *See id.* ("[A]ffidavits of jurors *may* be received" to "show what their verdict really was." (emphasis added)). Second, in criminal cases, there is no final verdict until the verdict is read in open court and there is no disagreement expressed by the jury. Minn. Stat. § 631.17 (2008). Here, the "not guilty" verdict never became final because the jurors disagreed with that verdict. *See id.* The district court then complied with section 631.17 by sending the jury to deliberate further, and the jury returned with a final verdict of guilty. *See id.*

Further, the district court was not required to conduct a *Schwartz* hearing before correcting the clerical error. Metcalfe has not identified any caselaw requiring such action, and, in any event, Metcalfe presented no evidence of juror misconduct to the district court to warrant a *Schwartz* hearing. *See State v. Everson*, 749 N.W.2d 340, 349 (Minn. 2008) ("[T]o obtain a *Schwartz* hearing, the defense has the burden of adducing sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." (quotations omitted)). Although the circumstances presented here are somewhat unusual, the district court ensured that the jury's verdict was "crystal clear," and it handled the situation most appropriately. We find no error, plain or otherwise, in the district court's handling of the multiple jury-verdict forms.

Affirmed.