STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1460, A12-1866

State of Minnesota,
Respondent,

vs.

Kerry Leigh Kelly,
Appellant.

Filed May 13, 2013
Affirmed in part, reversed in part, and remanded
Worke, Judge

Koochiching County District Court
File No. 36-CR-11-760

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

Jeffrey Naglosky, Koochiching County Attorney, International Falls, Minnesota (for respondent)

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

WORKE, Judge

Appellant challenges her pattern-of-stalking-conduct and violation-of-a-restraining-order convictions, arguing that (1) the evidence is insufficient to support the convictions, (2) the district court erred by awarding restitution, and (3) the district court

erred by imposing multiple sentences for conduct stemming from a single-behavioral incident. We affirm appellant's convictions, but reverse and remand the restitution award and the sentence for the violation-of-a-restraining-order conviction.

D E C I S I O N

Sufficiency of the evidence

A jury found appellant Kerry Leigh Kelly guilty of pattern of stalking conduct and violation of a harassment restraining order (HRO). She first argues that the evidence is insufficient to sustain the convictions.

In considering a claim of insufficient evidence, this court's review is limited to an analysis of the record to determine whether the evidence, viewed in a light most favorable to the conviction, is sufficient to allow the jury to reach the verdict that it did. *State v. Hurd*, 763 N.W.2d 17, 26 (Minn. 2009). 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 appellant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). We 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). And we defer to the jury's credibility determinations. *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002).

Appellant claims that the evidence is insufficient to support her conviction of violating an HRO because the state failed to introduce an HRO into evidence or otherwise establish the prohibited conduct. At the commencement of appellant's jury

trial, although not offering the HROs into evidence, the parties stipulated that the victim, S.A., obtained two HROs against appellant.

S.A. testified at trial that she obtained the first HRO against appellant in early March 2008, following an incident on February 3, 2008, when appellant made ten hang-up phone calls to S.A.'s home between 1:37 a.m. and 2:21 a.m. Despite awareness of the HRO, appellant followed S.A. home from work in July 2008, and in August 2008, someone threw an object out of a window of appellant's vehicle that hit S.A.'s vehicle.

S.A. testified that she obtained the second HRO against appellant on June 10, 2010. Despite awareness of the HRO, appellant followed S.A. on July 13, 2011, and someone threw a water bottle out of a window of appellant's vehicle that hit S.A.'s vehicle, and appellant called S.A. a "b---h." On July 24, appellant followed S.A. and S.A.'s mother, E.A., to a store and parked her vehicle in the parking space in front of S.A., so that the vehicles were bumper to bumper. As S.A. and E.A. left the parking lot, appellant yelled "c--t" at her. And on September 3, 2011, as E.A. drove S.A. home, someone threw a soda pop can out of a window of appellant's vehicle that burst on E.A.'s vehicle's windshield.

In order to find appellant guilty of violating an HRO, the jury had to find that appellant knew that there was an HRO and violated it. Minn. Stat. § 609.748, subd. 6(b) (2010).[1] Appellant testified that she was aware of the HROs. She contends, however, that the evidence is insufficient to show that she violated an HRO.

[1] The offenses occurred between 2008 and 2011, but the statutory language did not change in any relevant or substantial way.

When the evidence is construed in a light most favorable to the verdict, it established that appellant: (1) followed S.A. on July 6, 2008; (2) followed S.A. and threw something out of a window of her vehicle that hit S.A.'s vehicle on August 6, 2008; (3) followed S.A., threw a water bottle out of a window of her vehicle that hit S.A.'s vehicle, and called S.A. a "b---h" on July 13, 2011; (4) followed S.A. and E.A. to a store, parked in front of S.A., and yelled "c--t" at S.A. on July 24, 2011; and (5) threw a soda pop can out of a window of her vehicle that burst on E.A.'s vehicle's windshield on September 3, 2011. This evidence was sufficient to prove that appellant violated the HROs. *See id.*, subd. 1(a)(1) (2010) (defining harassment to include "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another).

In order to find appellant guilty of pattern of stalking conduct, the state had to prove that appellant (1) engaged in a pattern of stalking conduct, meaning two or more criminal acts within a five-year period, with respect to a single victim; (2) while knowing, or having reason to know, that her conduct would cause S.A., under the circumstances, to feel terrorized or to fear bodily harm; and (3) caused S.A. to react this way. Minn. Stat. § 609.749, subd. 5 (2010). Appellant asserts that the evidence was insufficient to establish any of the three elements of this offense.

Again, viewed in a light most favorable to the verdict, the evidence showed that appellant committed "two or more criminal acts" within a five-year period, including: (1) making harassing phone calls on February 3, 2008; (2) violating a restraining order on

July 6, 2008; (3) violating a restraining order on August 6, 2008; (4) violating a restraining order on July 13, 2011; (5) violating a restraining order on July 24, 2011; and (6) violating a restraining order on September 3, 2011.

The evidence also established that appellant knew or had reason to know that her conduct would cause S.A. to feel terrorized or to fear bodily harm. That element is satisfied by evidence that appellant made ten consecutive phone calls to S.A. in the early morning hours, threw a full can of soda out of a fast-traveling vehicle at a vehicle in which S.A. was a passenger, threw a bottle of water or another item out of a vehicle at S.A.'s vehicle, and followed a vehicle in which S.A. was a passenger, parked directly in front of it, and yelled profanity at S.A.

Finally, S.A. testified that she is uncomfortable leaving her house or doing anything "unless somebody is with [her]" or unless she knows that appellant is not around. S.A. stated that the incidents have affected every part of her life, and that appellant causes her to feel "scared." This evidence is sufficient to prove that S.A. feels terrorized by appellant. Therefore, the evidence is sufficient to sustain appellant's convictions.

Restitution

Appellant argues that the district court erred by ordering restitution for damages that resulted from an act not proven as part of the offense of conviction. Although the district court has broad discretion in granting restitution, *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000), "determining whether an item meets the statutory requirements

for restitution is a question of law that is fully reviewable by the appellate court." *State v. Nelson*, 796 N.W.2d 343, 346-47 (Minn. App. 2011).

A request for restitution may include out-of-pocket losses resulting from the crime. Minn. Stat. § 611A.04, subd. 1(a) (2010). But "a loss claimed as an item of restitution by a crime victim must have some factual relationship to the crime committed—a compensable loss must be directly caused by the conduct for which the defendant was convicted." *Nelson*, 796 N.W.2d at 347 (quotation omitted). The prosecution bears the burden of demonstrating the amount of loss sustained by a victim as a result of the offense and the appropriateness of a particular type of restitution. Minn. Stat. § 611A.045, subd. 3(a) (2010).

Prior to trial, the state indicated that it would seek to prove that appellant committed 14 criminal acts. But the district court rightfully limited the admission of evidence to incidents in which appellant's identification was proved. The district court allowed the state to present evidence of the six previously discussed incidents. The district court issued a restitution order, requiring appellant to pay $600 for the cost of repairing damage appellant caused to S.A.'s vehicle by writing on it with marker and "keying" it. But those losses were not directly linked to appellant's conduct for which she was convicted. *See State v. Olson*, 381 N.W.2d 899, 901 (Minn. App. 1986) (holding that restitution was appropriately awarded to burglary victim for losses directly caused by burglary even though the appellant was acquitted of theft charges). The jury was given specific dates and specific conduct to consider in determining whether appellant violated the HROs. None of the incidents presented to the jury involved appellant writing on

S.A.'s vehicle with a marker or "keying" S.A.'s vehicle. Thus, the district court erred by awarding restitution for losses that were not directly related to the conduct for which appellant was convicted. Therefore, we reverse the restitution award.

Sentence

The district court sentenced appellant to five years' probation on the pattern-of-stalking-conduct conviction, and imposed a concurrent sentence for the violation-of-a-restraining-order conviction. Appellant argues that she should not have been sentenced on both counts because the offenses were part of a single behavioral incident. When the facts are not in dispute, whether multiple offenses are part of a single behavioral incident is a question of law that we review de novo. *State v. Bauer*, 776 N.W.2d 462, 477 (Minn. App. 2009), *aff'd*, 792 N.W.2d 825 (Minn. 2011).

"[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2010). This statute has been interpreted to bar multiple sentences for crimes that arise out of a single behavioral incident. *Bauer*, 792 N.W.2d at 827. There must be a single criminal objective; there is no single criminal objective when the crimes "simply [take] place as an idea came into [appellant's] head." *Id.* at 829 (quotation omitted). If the statute is applicable, the bar to multiple sentences extends to concurrent sentences. *State v. Edwards*, 380 N.W.2d 503, 511 (Minn. App. 1986).

This court determines if appellant's conduct constitutes a single behavioral incident by considering whether (1) the offenses occurred at the same time and place; and (2) if the offenses arose out of a continuous and uninterrupted course of conduct,

"manifesting an indivisible state of mind or coincident errors of judgment." *State v. Johnson*, 273 Minn. 394, 405, 141 N.W.2d 517, 525 (1966).

Appellant's conviction of pattern of stalking conduct depended on appellant committing two or more criminal acts against S.A. within a five-year period. Five of the six alleged criminal acts included violations of an HRO. The jury could not have found appellant guilty of pattern of stalking conduct without finding that she violated an HRO. Therefore, appellant's conduct was part of a single behavioral incident, her singular criminal objective being stalking S.A. The district court erred by imposing a concurrent sentence for the violation-of-a-restraining-order conviction. *See Edwards*, 380 N.W.2d at 511. We reverse and remand to the district court to vacate the impermissible sentence and the restitution award.

Affirmed in part, reversed in part, and remanded.