IN THE COURT OF APPEALS OF IOWA

No. 9-909 / 09-0113
Filed March 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRANDON REEVES TYERMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, James B. Malloy, District Associate Judge.

Brandon Tyerman appeals from his convictions for stalking, going armed with intent, and vehicle burglary. **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Stephen Holmes, County Attorney, and Brendan Greiner and Travis Johnson, Assistant County Attorneys, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.

Brandon Tyerman appeals from his convictions for stalking, going armed with intent, and vehicle burglary. For the reasons that follow, we affirm.

I. Background Facts & Proceedings.

Defendant Brandon Tyerman and his wife Jamie Tyerman were married for five years.[1] In December 2007, Jamie retained counsel to pursue a divorce, but, at Brandon's insistence, obtained a refund of her retainer. In March 2008, Jamie filed for divorce, after which the parties continued to reside together until Jamie requested and received a protective order on the morning of April 29, 2008. The events described in Jamie's application for a protective order began the evening of April 28 and continued through the early morning hours of April 29 and included drinking, threats and assault by Brandon. According to Jamie, Brandon at one point yanked a phone out of the wall, tied a noose with the cord, wrapped it around his neck, and said he was going to end both of their lives.

The next morning, April 29, 2008, Jamie awoke first. She dressed and went to work where she typed her recollections of the previous night. She then went to the Dallas County courthouse to obtain a protective order. After the protective order was in place, Jamie moved to her parents' home. No criminal charges were filed against Brandon.

On May 2, 2008, Deputy Shelley Reese served Brandon with the protective order. She explained to him that he could have no contact with Jamie,

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[1] We refer to both the Defendant and his spouse by their first names, since our usual use of last names would be confusing.

including telephone calls and emails. Despite the no-contact order, Brandon repeatedly called and text-messaged Jamie on her cell phone, work phone, and parents' home phone. Between May 3 and June 4, 2008, Brandon used his cell phone to call Jamie's cell phone forty-seven times and sent her sixty-nine text messages. He called her work phone numbers an additional twelve times. He called her parents' phone numbers eighty-nine times and sent five text messages. On at least one occasion, Brandon called Jamie's work number and informed her secretary to connect him to Jamie by claiming to be "Brian with the Dallas County Sheriff's Office." Brandon's actions between May 3, 2008, and June 16, 2008, while the protective order was in effect, are the basis for the stalking charge for which he was convicted.

While the protective order was in effect, Jamie became concerned that Brandon was following her. On one occasion, a taxi followed her from her office and continued to follow her for some time.[2] On another occasion, Jamie delivered a birthday card to the home of Leticia Williams, the mother of Brandon's child. Almost immediately after Jamie left, Williams discovered Brandon on her back porch. Brandon asked if Jamie had been there, indicated that he knew where Jamie had been earlier in the day, and then asked if Williams had internet access. Williams told him no and "not more than a minute later he left." Williams called Jamie to let her know Brandon had appeared at Williams's home and that he knew where Jamie had been earlier in the day.

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[2] According to Jim Collins, Jamie's father, Brandon came to see him at the farm on May 5. When Collins asked him where his vehicle was, Brandon stated he did not have a driver's license and had taken a taxi.

Jamie took her car, which has a navigation system, and her cell phone to their respective dealers to determine whether there was a way for somebody to track her using them. She was told there was not.

Brandon made numerous appearances on or near her parents' farm where Jamie was staying while the protective order was in place. Brandon hand-delivered a Mother's Day card to Jamie by placing it in the parents' mailbox. On about May 5 and May 13, Brandon came to the farm to talk in person with Jamie's father, Jim Collins. On May 16, Brandon repeatedly phoned Collins. Later that evening, Collins spotted Brandon walking in the ditch near the farm. The police were called. On May 17, Brandon brought Collins a letter to give to Jamie.

On May 18, Mrs. Collins saw an unfamiliar car parked in a field drive off the highway less than a quarter of a mile from their home. Jamie again called the sheriff's office. When deputies arrived, Collins took them to a trailer located on their property about 100 feet from the house. The deputies found Brandon locked in the bathroom of the trailer. He eventually came out, was placed under arrest, and searched. In his pocket, deputies discovered a set of keys to Jamie's car. Deputies then searched the car parked in the field drive—a black 2006 Hyundai Azera Brandon had borrowed from a friend. The car was packed with items, including binoculars and many of Jamie's personal belongings, such as her wedding dress, wedding photos, clothing, jewelry, computer, and mail.

Later that day, Jamie and her father searched Jamie's car "looking for some kind of a device to know where she was being tracked." Wedged under

the back seat on the passenger side of Jamie's car, Collins found a "TrimTrac" brand tracking device. Jamie reported the device to the sheriff's department, which began an investigation. Deputies searched Brandon's office pursuant to a warrant and seized a user's manual for a TrimTrac GPS tracking device, a shipping receipt addressed to Brandon indicating a purchase date of May 3 and next day delivery charges of $49.50, and a laptop computer and cell phones they suspected could be used with the tracking device. The serial number on the receipt matched the serial number of the device Jamie found in her car.

The TrimTrac device relies upon GPS satellites to triangulate its position and sends that information via cellular telephone transmission. The user logs onto www.ifindwhere.com to access mapping software that puts a dot on a map where the device is located. A certified computer examiner searched the hard drive of the laptop seized from Brandon's office, finding over 1700 hits for the term "TrimTrac" and over 5000 hits for terms like "iFind" and "FindWhere" in the temporary internet memory. Although the examination revealed that the computer had been used to access the tracking website, the examiner was unable to determine whether the computer had actually been used to track any particular person.

Brandon told Leticia Williams he had placed the tracking device in Jamie's car. He explained to her how the device worked. He added, "remember when I asked you if you had internet the other day at your house, that was why."

In the early morning hours of June 5, 2008, Chad Struthers was awakened by Brandon beating on the bedroom window of his home, which is located about

one-eighth of a mile from the Collins farm. Struthers got up and met Brandon at the front door. The weather was stormy, windy, cold, and wet. Brandon was wearing shorts and a sweatshirt and had no shoes. He was soaked and freezing and "extremely drunk." Brandon claimed that he had run out of gas on his way home from the Meskwaki casino and that he had left his car at Casey's. Brandon used Struthers's phone to call a taxi, but he could not find a driver willing to travel the twenty-five miles from Des Moines to pick him up. Struthers offered to give him a ride "just to get him out of my house." He took Brandon to Bosselman's truck stop in Altoona. While they were driving, Brandon made several calls on Struthers's cell phone, using different names. Driving home, Struthers sensed "something just didn't seem right," so he called 9-1-1 and reported the incident to the sheriff's department. Deputies arrived at the Struthers's home at about 2:30 a.m. on June 5. They learned that Brandon was involved and they went to the Collins's residence to check on Jamie.

Meanwhile, at Bosselman's truck stop, Brandon came into contact with Roberta Putney and two men named Jake and Blake. Brandon offered to fill Putney's purple minivan with gas if she would take him to his friend's bar on Merle Hay Road. Putney agreed, but first patted down Brandon's clothing to check for a weapon. She found none. During the ride, Brandon asked Putney if she knew anyone who owned a pickup that could help pull his truck out of a cornfield. Brandon offered $500 for the chore. Putney called her son, Daryn Foley, who said he could help. The four (Brandon, Putney, Jake, and Blake) met Foley at a gas station, and Brandon led them to a field in rural Story County.

Brandon directed them to stop on a gravel road. He indicated his truck was stuck in the middle of the cornfield, not in the ditch where Foley expected it to be. Foley and Blake tried to rock the truck back and forth to get it out of the mud, but were unable to move it. In the cab of Brandon's truck, Foley saw a box of bullets sitting on the floorboard. When he asked Brandon about the bullets, Brandon told him to bury them in the mud. Foley declined.

After several hours waiting, and with the sun coming up, Putney decided to leave. Brandon left with her. At about the same time, the owner of the field noticed the men trying to remove the truck and called the sheriff's office. A deputy arriving at the scene noticed a purple van leaving and called in the license plate number. Several more officers arrived at the scene and found Jake, Blake, Foley, and the two trucks in the field. Brandon's truck was stuck on a fence row facing toward the Collinses' home, which was within sight. Deputies searched Brandon's truck and noted a box of 9mm bullets. While searching the bed of the truck, they found an empty Beretta handgun case and a spare magazine.

Brandon and Putney arrived at the Bondurant home of Putney's boyfriend at about 7:00 a.m. Putney heard Brandon fumbling behind his seat in the back seat and rattling a bag of empty pop cans. When she looked back, she saw Brandon remove a black handgun from behind her back seat. Putney said, "You motherfucker, you told me you didn't have a gun." Brandon "just kind of mumbled it off."[3] Brandon asked to come inside to call a cab, but Putney made

[3] Deputies interviewed Putney on June 5. She did not tell them about Brandon having a gun at that initial interview.

him use her cell phone outside. The next time she looked out, Brandon had disappeared with her cell phone.[4]

The evening of June 6, 2008, Brandon repeatedly called Jamie on her cell phone and the Collinses' house phone. The calls were so frequent that Jamie phoned the sheriff. When deputies arrived, Brandon called again, and Deputy Gary Bakous told Jamie to answer the phone. In the course of the conversation, Brandon made references to trying to work things out between them. He also spoke about his truck being found on the fence line, claiming he had loaned his truck to some people and they had gone off-roading. Deputy Bakous looked at Jamie's cell phone, which indicated Brandon had called forty-three times that evening. He did not count the number of text messages, and was not able to determine the number of phone calls to the land line at that time.

On June 17, Story County detective Anthony Rhoad got a warrant to search a boat Brandon co-owned with Tim Yasunaga, and executed the warrant with Yasunaga present. Yasunaga informed the detective that he owned a black 9mm Beretta handgun. Detective Rhoad and Yasunaga went to Yasunaga's house to check to see if his Beretta was there. It was not. Yasunaga stated that Brandon knew the access code for the garage door, as did several others. Brandon knew Yasunaga owned the handgun and had asked to borrow it for target shooting several months earlier.

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[4] She later found her phone at a nearby Casey's. The clerk stated someone brought it in, claiming to have found it on the curb.

Months later,[5] Yasunaga found the loaded handgun above a heating vent in the basement of his house. He had not put the gun there.

Brandon was arrested and held in lieu of bail. On June 24, 2008, Brandon was charged by trial information with stalking while subject to a no-contact order between May 3 and June 5, 2008, later amended to between May 3 and June 16, 2008, going armed with a firearm with intent to use it against another on June 5, 2008, and vehicle burglary in the third degree between May 3 and May 18, 2008, for breaking into Jaime's car with intent to commit a felony.

At a hearing on Brandon's motion for bond review on June 30, the fact that law enforcement had not been able to locate the Beretta handgun was significant to the issue of Brandon's dangerousness. Another bond review hearing was held on September 22, 2008, at which time Brandon's fourth counsel, Peter Berger, indicated to the court that the handgun had been found in the house of Tim Yasunaga and that counsel had the handgun in his possession. Brandon confirmed counsel's statement to the court at the second bond review hearing that he had worked with his counsel to arrange for the gun to be found and turned over to his counsel.

On October 15, 2008, Brandon informed the court that he wished to represent himself. Attorney Berger was allowed to withdraw. The court appointed stand-by counsel. Brandon did represent himself at the jury trial,

[5] Yasunaga located the gun based on instructions given to him by Peter Berger, former counsel for Tyerman.

which began November 18. On November 24, the jury convicted Brandon of all three offenses.

Brandon now appeals, contending: (1) the district court abused its discretion when admitting evidence of prior bad acts; (2) the district court abused its discretion in failing to give a cautionary instruction regarding the protective order; (3) Brandon was denied effective assistance of counsel when his former attorney revealed the location of the handgun; (4) prosecutorial misconduct infected the trial with unfairness; (5) there is insufficient evidence to support the convictions; (6) the district court abused its discretion in admitting hearsay evidence; and (7) the cumulative effect of trial errors deprived him of due process. We will address each of Brandon's contentions in turn.

II. Discussion.

A. Prior Bad Acts. Iowa Rule of Evidence 5.404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before evidence of prior bad acts can be considered admissible, the court must (1) find the evidence is "relevant and material to a *legitimate* issue in the case other than a general propensity to commit wrongful acts," *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004), and (2) determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant, *State v. Castaneda*, 621 N.W.2d 435, 440, Iowa R. Evid. 5.403 (Iowa 2001).

We review a district court's evidentiary rulings regarding the admission of prior bad acts for abuse of discretion. *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Id.* (citations omitted). However, "it is imperative that the parties preserve error as to any particular item of evidence." *Id*. at 290.

Brandon insists that his objections before and during re-direct examination of Jamie were sufficient to preserve error. The State argues that he failed to make sufficiently specific objections to alert the trial court to problems with the prior bad acts evidence. Because we agree with Brandon that the bad acts evidence played a significant role at trial, we examine the record closely to determine whether error was preserved.

On cross-examination, Brandon questioned Jamie to establish that she had dropped a prior divorce action, that she had not made prior claims of domestic abuse, and that even though she sought a no-contact order, she did not call the police to report Brandon's alleged threats and assault, which were described in her request for a protective order. Brandon asked Jamie whether he had ever possessed a gun and about her knowledge that he was afraid of guns. In order to establish a time frame for Jamie's decision to retain divorce counsel, Brandon also asked her, "Do you recall the defendant getting an OWI on December 17th on your parents' property?" Finally, Brandon questioned Jamie about her statements made contemporaneously with Brandon's first bond review hearing, when Officer Rhoad telephoned her to ask whether she was afraid of

Brandon. Jamie could not recall what she told the officer about Brandon's potential release from jail.

Before its redirect examination and outside the presence of the jury, the State requested a ruling that prior assaultive actions by Brandon were admissible, arguing that Brandon's cross-examination of Jamie opened the door to all past instances of Brandon's assaultive conduct. Specifically, the State requested permission to ask Jamie about her knowledge that evidence of a gun had been found in Brandon's truck and that a gun ultimately had been located, about prior instances of assault by Brandon against Jamie, and about Brandon's violent behavior toward former girlfriends dating as far back as 2003. The State also requested permission to develop, through redirect questioning of Jamie, circumstances surrounding the 9-1-1 call Jamie placed in December 2007 which resulted in the charge of OWI against Brandon. The prosecutors argued the questioning was required to rebut the inference left by Brandon's cross-examination that Jamie was not afraid of Brandon, and had never reported any abuse to anyone during the marriage.[6]

Brandon resisted the State's oral request, saying:

> Your Honor, she's testified in these proceedings that she never reported to family, to friends, to anybody. She's testified that there has never been domestic abuse until the county attorney in

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[6] To establish that Brandon was guilty of stalking, the State had to prove, among other things, that (1) Brandon had knowledge or should have knowledge that Jamie would be placed in reasonable fear of bodily injury or death by his course of conduct and (2) Brandon's course of conduct induced fear in Jamie of bodily injury or death. See Iowa Code § 708.11(2).

> her deposition pulled her out and refreshed her memory. You are going to find that a lot in this case, if they are allowed to bring in refreshed memory statements, that aren't true or proven, you are prejudicing the minds of the jury.

The trial court ruled:

> Obviously, any testimony about assaultive behavior is prejudicial to Mr. Tyerman. In terms of the State's desire to bring out information about her [Jamie's] knowledge of the gun, that request will be denied at this time. You can try to make proper record on that . . . . The tire slashing incident and the assaultive behavior back in 2003, I think is more prejudicial than probative and I would not allow that into evidence. The other issues regarding assaultive behavior that occurred with Jamie Tyerman, there is some testimony in the record, I think, that she indicated at a minimum that she did not report any other assaultive behaviors during the marriage and whether or not she said any assaults occurred or not, I am not positive, *but you can explore that further and proper objection can be made and I will rule on that at that point in time.*

The court went on to ask for clarification from the State about its request to develop testimony from Jamie about the operating while intoxicated offense. The State responded that, when Brandon heard the 9-1-1 tape, he told Jamie that she sounded like he wanted to kill her, that Brandon had threatened to kill Jamie and/or her family two days before.

Brandon's response: "Then she sent me on a trip with her parents to Cancun."

The court ruled, "I will not preclude the State from getting into that area. Upon proper objection, we will rule on that at that point in time."

Brandon stated:

> I ask the witness be voir dired prior to that testimony being heard by the jury because it would be largely prejudicial if they referenced that I was—that I threatened to kill my wife, so I think we need to do that outside of the presence of the jury, as well.

The court permitted Brandon to voir dire Jamie before the jury returned to the courtroom. Brandon questioned Jamie about the 9-1-1 call, and she responded that she did not remember her words, but did remember that she was "extremely terrified." Brandon lodged a hearsay objection, which the court overruled saying, "Prior bad acts is very relevant in a situation like that. I am going to allow the State to get in so far as it concerns this witness."

On redirect, Jamie testified about the circumstances surrounding Brandon's arrest for OWI on December 17, 2007. She told the jury that earlier that day Brandon threatened Jamie over the phone stating he would kill Jamie's family if she took his money during the divorce. She testified Brandon called her cell phone thirty-eight times after making the threat; and that she then saw his truck, was terrified, and called 9-1-1. Brandon was arrested for OWI. Jamie testified Brandon told her he heard the 9-1-1 tape and said, "you sound like someone is about ready to kill you." During the questioning, Brandon made a leading objection, which was overruled; requested permission to re-cross; and made hearsay and speculation objections.

The State then began to question Jamie about Brandon's previous assaultive conduct against her. Brandon interrupted to object and request that the jury be excused. He stated, "They are bringing in information she's substantially testified to earlier never happened." The court overruled the objection.

Jamie was questioned about an incident in January or February 2008, when Brandon and Jamie were discussing their divorce. Brandon assaulted her,

and Jamie testified that Brandon told her, "I could call my dad and I could walk out of the house or I could leave in a black body bag." Brandon made leading and speculation objections, which were overruled. He then asked again that the jury be excused.

The court excused the jury and granted Brandon's request for a recess to allow him to talk to stand-by counsel. After the recess, Brandon moved for a mistrial, arguing the court had allowed prejudicial, inflammatory evidence, which was "not substantiated by the record." Brandon stated his right to a fair trial had been compromised and, "*Helmers* clearly says only proven allegations should be allowed at trial." The court denied the motion for a mistrial:

> I believe the evidence is highly probative as to the relationship that you have with Jamie Tyerman. It goes to the motivation. It goes to intent. It goes to speak to her reaction to the conduct that took place during the times alleged in the stalking.

Brandon then requested a cautionary instruction on the prior bad acts evidence, which the court agreed to give.

When the jury returned to the courtroom, the prosecutor addressed Jamie to recommence the redirect examination. Brandon interrupted and asked that the limiting instruction be given at that point in time.[7] The court responded that

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[7] Brandon argues on appeal that the instruction he requested was an instruction cautioning the jury about the meaning of the protective order, referring to *State v. Helmers*, 753 N.W.2d 565 (Iowa 2008). *Helmers* recognizes that evidence of a no-contact order is a "key piece of evidence to prove one of the elements of stalking," i.e., that the restrained party had knowledge or should have had knowledge that the victim would be placed in reasonable fear of bodily injury by his course of conduct. *Helmers*, 753 N.W.2d at 568. Brandon requested and received an instruction that the jury should not give weight to the bad acts testimony and should not use it to convict.

the instruction was being prepared and would be ready momentarily.

The prosecutor asked Jamie for details of the January–February 2008 assault. She described Brandon pushing her on the bed and hitting her, saying, "[T]his is what you get for not listening to me. Do you want more? Do you want more?"

The prosecutor's questions then moved back in time. He asked whether Jamie made any 9-1-1 calls due to Brandon's assaults when they lived together in Urbandale. Brandon objected again, without specifying the basis for his objection. He stated, "If the State plans on bringing in this evidence, I would encourage them to bring in a 9-1-1 call." His objection was overruled. Jamie testified about an incident when it was snowing and Jamie and Brandon were out with friends. She stated that when they returned home, Brandon got angry with Jamie, stepped on her foot, poked her in the face, and threw her on the ground. Jamie called the police and Brandon was arrested. Jamie asked the police not to put her name on the report because she would be in trouble if Brandon knew she had sent him to jail. Brandon raised objections such as hearsay, speculation, leading, and lack of personal knowledge. He did not, however, challenge the evidence on rule 5.404(*b*) grounds.

Just before a lunch break, the court instructed the jury:

> Ladies and gentlemen, we are going to take a noon break. But, I would like to just advise you that there has been certain evidence that's been presented here in the last few minutes, evidence of other crimes, wrongs or acts. Those are not admissible to show or to prove the character of a person or in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

> intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

At a hearing after the noon recess and outside the presence of the jury, Brandon did not object to the instruction.

We conclude that Brandon minimally preserved the error he now raises with regard to Jamie's testimony on re-direct describing the events of December 2007, and January and February 2008, since the court understood his objections to be related to Iowa R. Evid. 5.404(*b*). However, he did not preserve error on the 9-1-1 call in Urbandale or on the cautionary instruction given by the court.

With regard to the assaults in December 2007 and early 2008, the district court considered the evidence within the context of the exceptions to the general inadmissibility of prior bad acts. *See* Iowa R. Evid. 5.404(*b*). The court concluded that the evidence was relevant to Brandon's intent, plan, and course of conduct. The elements of stalking required the State to show Brandon engaged in a course of conduct that would cause a reasonable person to fear bodily injury or death to Jamie, that Brandon knew or should have known that his course of conduct would cause such fear, and that Brandon's course of conduct induced fear in Jamie. *See* Iowa Code § 708.11(2) (2007); *State v. Evans*, 671 N.W.2d 720, 725 (Iowa 2003). In the unique context of a stalking trial, where the reaction of the alleged victim and the defendant's awareness of her likely reaction are elements that must be proved, prior assaults against the alleged stalking victim are highly relevant. *See Helmers*, 753 N.W.2d at 568 (noting that evidence prior to charged stalking conduct may "shed light on instances of unwelcome conduct that may not appear frightening to fact finder"); *see also*

State v. Taylor, 689 N.W.2d 116, 128 (Iowa 2004) (discussing prior bad acts and noting that there are instances where only by showing the history of a relationship can the state establish the justifiable inference that a defendant's charged conduct was in fact intended to engender fear on the part of the victim and that the defendant knew that it was likely to do so). Further, once Brandon attempted in cross-examination of Jamie to suggest that Jamie was not afraid of him, had never called law enforcement, and had never complained of domestic violence, the evidence became even more probative to rebut those suggestions.

The assaultive incidents of late 2007 and early 2008 were close in time to the stalking offense and were directed against the same person as was the charged stalking conduct. *See generally State v. Reynolds*, 765 N.W.2d 283, 290-92 (Iowa 2009) (discussing relevance of prior relationship of perpetrator and victim in assault causing bodily injury case). Proof of the prior assaults was clear; Jamie was an eyewitness/victim able to place the events in an approximate time frame and to describe them in detail. The relevance of these prior assaults outweighed any unfair prejudice to Brandon. Iowa R. Evid. 5.403. We find no abuse of discretion.

B. Failure to Instruct. Brandon did not object to the instructions given by the trial court, which included the following:

> Evidence has been received concerning other wrongful acts alleged to have been committed by the defendant. The defendant is not on trial for those acts.
>
> The State has the burden of presenting clear proof that the defendant committed the acts in question, and that the acts can only be used as bearing on the knowledge element of stalking as set forth in [the stalking elements instruction].

> If you find other wrongful acts (1) occurred; (2) were so closely connected in time; and (3) were committed in the same or similar manner as the crime charged, so as to form a reasonable connection between them, then and only then may such other wrongful acts be considered for purpose of establishing that the defendant knew or should have known that the particular course of conduct placed Jamie Tyerman in reasonable fear of bodily injury or death.

On appeal, Brandon argues the trial court should have instructed the jury on the limited use of the no-contact order. Brandon did previously submit a proposed limiting instruction, and mentioned a "*Helmers* instruction" before receiving the court's proposed instructions. However, although he made several objections to the court's instructions, at the instruction conference he failed to object to the absence of the *Helmers* limiting instruction, when it was not included. He has thus waived this claim. *See* Iowa R. Crim. P. 2.19(5)(*f*); Iowa R. Civ. P. 1.904; *State v. Morrison*, 368 N.W.2d 173, 175 (Iowa 1985) (holding that failure to object to instructions on particular basis waived error on that ground).

C. Ineffective-Assistance-of-Counsel. Brandon next asserts he was denied effective assistance of counsel based upon conduct of his attorney prior to trial. Brandon moved in limine to exclude any reference to the Berretta handgun based on attorney-client privilege.[8] The court ruled that any communications between Brandon and his former attorney were privileged, and no evidence about any such communications was received. The court further prohibited any testimony regarding conversations between Yasunaga and

[8] As noted previously, the fact that Yasunaga's handgun had not been found weighed against Brandon in his first motion for bond review.

Brandon's counsel. However, the court ruled the gun could be admitted into evidence, and a photo of the gun was admitted through the testimony of Yasunaga. Brandon claims he was prejudiced by the court's ruling allowing testimony by Yasunaga and Deputy Rhoad that the handgun was found and where it was found. He asserts the testimony of Yasunaga and Deputy Rhoad was instrumental in securing a conviction on the charge of going armed with intent because, without the gun, there was no corroboration for Putney's claim that she saw Brandon with the gun.

We review ineffective-assistance claims de novo. *State v. Cromer*, 765 N.W.2d 1, 6 (Iowa 2009).

> Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. Rather, we preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims.

State v. Biddle, 652 N.W.2d 191, 203 (Iowa 2002) (citation omitted).

In *Wemark v. State*, 602 N.W.2d 810, 813 (Iowa 1999), the postconviction applicant contended he was denied effective assistance of counsel by trial counsel's disclosure of the location of the instrumentality of the crime. On appeal, the court stated, "Evidence protected by the attorney-client privilege which the State obtains in the course of a criminal case from counsel and introduces at trial is a paradigm example of the denial of the right to counsel." *Wemark*, 602 N.W.2d at 817. However, the court continued:

> Yet, the duty of a lawyer not to disclose the location of an instrumentality of a crime does not always mean disclosure to the prosecution

> compromises the right to effective counsel. Disclosure may be justified as a tactical choice or strategy.

Id.

We preserve for postconviction proceedings Brandon's claim that counsel was ineffective for disclosing information in violation of the attorney-client privilege.

D. Prosecutorial Misconduct. Brandon candidly concedes he did not object to the specific instances of prosecutorial misconduct during opening and closing arguments about which he now complains.[9] He argues, however, that because he was proceeding pro se, the prosecutor's argument was "flagrantly improper," and because we are reviewing a claim of violation of federal due process, we should adopt a plain error rule. We decline.

Iowa courts have consistently adhered to the principle that error must be preserved before we will address it on appeal. *See*, *e.g.*, *State v. Seering*, 701 N.W.2d 655, 661-62 (Iowa 2005) (discussing error preservation and refusing to address issues "deemed unpreserved"); *State v. Hernandez-Lopez*, 639 N.W.2d

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[9] Brandon also claims the prosecutor "on his sixth question to the agent intentionally elicited that Tyerman was a convicted felon in possession of a firearm." The record does not support Brandon's attempt to hold the prosecutor responsible for the witness's non-responsive answer.

Additionally, the district court gave the following curative instruction:

> Reference has been made to the prior witness, Agent Johnson, coming to Story County for the purpose of investigating a possible crime of a convicted felon being in possession of a firearm. There is no evidence that Brandon Tyerman was ever convicted of a felony, and any reference to Agent Johnson's statement should not be construed by you to imply that Brandon Tyerman has ever been convicted of a felony.

A jury is presumed to follow the instructions of the court. *State v. Ondayog*, 722 N.W.2d 778, 785 n.2 (Iowa 2006).

226, 234 (Iowa 2002) ("Generally, we will only review an issue raised on appeal if it was first presented to and ruled on by the district court."). This includes constitutional issues. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) ("Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal."). "In short, we do not recognize a 'plain error' rule which allows appellate review of constitutional challenges not preserved at the district court level in a proper and timely manner." *Id.* Brandon's decision to proceed pro se does not alter our decision. *See State v. Heacock*, 106 Iowa 191, 198, 76 N.W. 654, 656 (1898) ("It may be said in this connection that the appellant was not represented by an attorney in the district court but conducted the defense in his own behalf. He is not an attorney, but that fact does not excuse his failure to observe the settled rules of procedure which govern the trial of causes."); *accord In re Estate of DeTar*, 572 N.W.2d 178, 180 (Iowa Ct. App. 1997); *Metro. Jacobson Dev. Venture v. Bd. of Review*, 476 N.W.2d 726, 729 (Iowa Ct. App. 1991) ("We do not utilize a deferential standard when persons choose to represent themselves. The law does not judge by two standards, one for lawyers and the other for lay persons. Rather, all are expected to act with equal competence. If lay persons choose to proceed pro se, they do so at their own risk.").

E. Sufficiency of the Evidence. We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005).

> We uphold a verdict if substantial evidence supports it. "Evidence is substantial if it would convince a rational fact finder

> that the defendant is guilty beyond a reasonable doubt." Substantial evidence must do more than raise suspicion or speculation. We consider all record evidence not just the evidence supporting guilt when we make sufficiency-of-the-evidence determinations. However, in making such determinations, we also view the "evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence."

Id. (internal citations omitted).

1. Stalking. Brandon argues that the stalking conviction is not supported by substantial evidence because Jamie's claims of fear were not credible, Brandon made no direct threats in his phone calls and text messages, he had "continuing cordial communications" with Jamie's father, and no evidence was presented that the tracking device in Jamie's car was operating.

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in the State's favor, we conclude there is substantial evidence in the record to support each of the elements of stalking. We first note that credibility determinations are for the jury. *See State v. Hulbert*, 481 N.W.2d 329, 332 (1992) ("Assessment of a witness's credibility is uniquely within a lay jury's common understanding."). Brandon's prior assaultive behavior was relevant and probative of Jamie's claims of fear. *See Reynolds*, 765 N.W.2d at 290-92. Here, it must be concluded the jury found Jamie—and her claims that she feared Brandon—credible. And, Brandon's repeated contacts with Jamie, his presence on her parents' property, including hiding in the trailer within sight of the house, his driving his truck through a field with a weapon in the middle of the

night, and the evidence showing that he was tracking her[10]—all at a time there was a civil protective order prohibiting contact between him and Jamie—would cause a reasonable person to fear bodily injury. The stalking conviction is supported by substantial evidence.

2. Going armed with intent. To find Brandon guilty of going armed with intent, the jury was instructed it must find that (1) on or about the 5th of June, 2008, Brandon was armed with a handgun, (2) the handgun was a dangerous weapon, and (3) Brandon was armed with the specific intent to use the handgun to shoot another person. Brandon complains that there was insufficient proof that Brandon was armed with a handgun or had the specific intent to use the handgun to shoot Jamie.

There was sufficient evidence from which the jury could find Brandon committed the offense of going armed with intent. In the early morning hours of June 5, 2008, Brandon's truck became stuck on the fence line of the Collinses' property, within sight of the house where Brandon knew Jamie was staying. Brandon attempted to get the truck removed from the fence line in the middle of

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[10] We reject Tyerman's contention that the record shows the tracking device was not operating. While the expert witness could not conclusively state that the device was being used, the jury could infer its use by the number of "hits" to the relevant web sites on Tyerman's computer. Moreover, Leticia Williams testified that Tyerman admitted tracking Jamie.

> [A]nd I said, okay. How did you do that? And he said, well, I got online and everything and he had mentioned, you remember when I asked you if you had internet the other day at your house, that was why. Because, you can go online, I guess, and go onto Google and you can type in tracking devices or whatever, you can purchase them there, and then the way to track it is to go online and pull up something, he mentioned like it doesn't give an exact location, but like within the vicinity of the area basically . . . .

the night, providing varying explanations for how the truck came to be there. Ammunition was seen in the cab of the truck, which Brandon told Foley to bury in the mud. When the attempt to free the truck was unsuccessful, and daylight was arriving, Brandon left the scene with Putney. Putney later saw Brandon pull a handgun from a bag of cans in her van. An empty Beretta case was found in the bed of the truck when police searched it. Yasunaga testified that Brandon knew about his Berretta handgun and had borrowed it on one occasion. Jeffrey Garrison testified that he showed Brandon how to load a handgun, chamber a bullet, and check the safety. Additionally, on April 28, Brandon had threatened Jamie that he was going to end both of their lives. The totality of this evidence provides substantial support for the charge of going armed with intent.

3. Vehicle burglary. Brandon argues that there is insufficient evidence that he entered Jamie's vehicle between May 3 and May 18, 2008, or that at the time he entered Jamie's vehicle, he had the specific intent to commit the offense of stalking. However, there was substantial evidence from which the jury could infer Brandon entered Jamie's vehicle without her consent, placed a tracking device in that vehicle, and then used the device to track Jamie in the relevant time period. He had a key to Jamie's vehicle when he was found in the trailer on the Collinses' property on May 18. That same date, Jamie and her father discovered a tracking device under the back seat of her vehicle. The tracking device was ordered on May 3, the day after Brandon was served with a protective order. The order specified next-day delivery. Brandon admitted to Williams that he had placed the tracking device in Jamie's car and was able to go

on line and track her general location. Brandon was discovered on Williams's back porch just moments after Jamie departed; Brandon asked if Williams had internet access. Brandon told Williams he knew where Jamie had been earlier in the day. There was substantial evidence from which a rational fact finder could conclude Brandon committed burglary as charged.

Brandon also argues that his conviction for burglary should be reversed because Jamie's car was marital property to which he had a key, giving him "right, license or privilege to enter." Iowa Code section 713.1 defines burglary:

> Any person, having the intent to commit a felony, assault or theft therein, who, *having no right, license or privilege to do so,* enters an occupied structure, such occupied structure not being open to the public, . . . commits burglary.

(Emphasis added.) Our supreme court has ruled that a spouse's entry on or into marital property in a domestic violence situation may be prosecuted as burglary depending on "whether the defendant had any possessory or occupancy interest in the premises at the time of entry." *State v. Hagedorn*, 679 N.W.2d 666, 670 (Iowa 2004) (citing *State v. Lilly*, 87 Ohio St. 3d 97, 717 N.E.2d 322, 327 (1999) ("Because the purpose of burglary law is to protect the dweller, we hold that custody and control, rather than legal title, is dispositive.")). Although Brandon had a key to Jamie's car, the car was in Jamie's name and Brandon rarely drove it. There is nothing in the record that shows he had belongings in the car. The terms of a restraining order are not dispositive of the issue. *Hagedorn*, 679 N.W.2d at 670 (rejecting defendant's argument that he had an absolute right to enter the marital home unless prohibited from doing so by court order). We conclude there was substantial evidence from which the jury could conclude

Brandon had no right, license, or privilege to enter his estranged wife's car. *See id*. at 671 (noting there was substantial evidence from which a jury could find the defendant had no possessory or occupancy interest in a duplex where, though married to resident, he no longer resided in the duplex, his personal belongings had been boxed up, and he was told he was no longer welcome and should stay away). The evidence was sufficient to prove burglary.

F. Evidentiary rulings concerning 319 area code text messages. Over Brandon's hearsay and foundation objections, the court allowed evidence relating to the contents of a text message sent to Jamie on June 13, 2008, from a 319 area code telephone number.[11] On appeal, Brandon contends it was never established that the phone number was his, that he sent the text message, or that Jamie had personal knowledge about who sent the text message.

We review a trial court's rulings on the admission of evidence for abuse of discretion. *See State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). Brandon argues that the evidence was inadmissible because there was an implied assertion that the message came from him. Even assuming the implied assertion about which Brandon complains might otherwise constitute hearsay, we agree with the State that sufficient foundation was laid to show that the text message was an admission of a party opponent. Iowa R. Evid. 5.801(*d*)(2)(A). Jamie testified that Brandon used various phones to contact her, Brandon had telephoned her from a 319 area code number, and the text message came from

[11] The message read, "You are fucked in the head." No one claims the substance of the message was offered to prove the truth of the statement. Rather, the complaint is that the message was offered to prove that Tyerman sent it.

that 319 number. The district court did not err in allowing the evidence to be admitted.

Moreover, in light of the extensive evidence of Brandon's other telephone calls and text messages to Jamie while the no-contact order prohibited such contact, we are hard pressed to conclude any prejudice occurred as a result of this evidence. *See State v. Newell*, 710 N.W.2d 6, 20 (Iowa 2006) ("Considering the evidence that was properly admitted, we think the record affirmatively establishes a lack of prejudice in this case.").

G. Cumulative error. Finally, Brandon argues that the cumulative effect of the district court's evidentiary and constitutional errors denied him a fair trial and due process. Whether the claims of error are considered individually or collectively, we conclude the defendant is not entitled to a new trial.

III. Conclusion.

The district court did not abuse its discretion when admitting evidence of prior bad acts. The defendant failed to preserve error concerning the trial court's asserted failure to give a cautionary instruction regarding the protective order. We preserve for possible postconviction proceedings defendant's claim that his former counsel was ineffective for disclosing information in violation of the attorney-client privilege. The defendant did not preserve his claims of prosecutorial misconduct. Substantial evidence supports the convictions of stalking, going armed with intent, and burglary. The district court did not abuse its discretion in admitting evidence of a text message from a 319 telephone

number. We reject defendant's claim that cumulative error deprived him of a fair trial.

AFFIRMED.