STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0085

State of Minnesota,
Respondent,

vs.

Jason Lee Cooley,
Appellant.

Filed December 10, 2018
Affirmed
Smith, John, Judge[*]

Crow Wing County District Court
File No. 18-CR-16-4220

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

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota; and

Scott A. Hersey, Special Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Smith, John, 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

SMITH, JOHN, Judge

We affirm appellant Jason Lee Cooley's conviction of aggravated stalking because the evidence was sufficient to sustain the jury's verdict and any errors in the admission of other acts evidence did not unfairly prejudice the appellant.

FACTS

On May 17, 2016, a Crow Wing County deputy sheriff responded to a report by F.C., who is the father of appellant, regarding two stolen tractors. F.C. claimed that his other son, C.C., had taken the tractors. After speaking with F.C. over the phone, the deputy paid a visit to C.C.'s residence, where C.C. stated that "the issue between the tractors was being handled in civil court." The deputy observed that C.C. was "frustrated" by the situation and "felt that he was being harassed by [F.C.] and [Cooley]."

After this visit, the deputy proceeded to F.C.'s sister's house, where F.C. was staying, to discuss the allegedly stolen tractors. While the deputy was speaking with F.C., Cooley arrived. The deputy testified that Cooley "immediately had a hostile attitude" and that both Cooley and F.C. became upset. They asked the deputy for his badge number and supervisor's name, at which point the deputy called his supervisor and asked that he respond to the residence. "[D]ue to [Cooley's] hostile behavior" and because he was concerned for his own safety, the deputy waited outside until his supervisor arrived. The supervisor and deputy spoke to Cooley and F.C. about the tractors, again telling them that it was a civil issue to be handled in civil court. Eventually, Cooley asked the officers to leave. The deputy recorded audio of his conversation with F.C. and Cooley.

Later that evening, the deputy received a phone call from C.C. stating that C.C.'s seventeen-year-old son (and Cooley's nephew), L.C., had had an encounter with Cooley on County Road 8. Cooley's and C.C.'s homes are adjacent to each other along County Road 8, and much of the nearby land is owned by members of the Cooley family. The deputy responded to C.C.'s home and separately interviewed L.C. and N.M, a friend of L.C.'s who was present during the incident. The deputy also interviewed W.S., another friend who was present during the incident, over the phone. L.C., N.M., and W.S. all testified to a substantially similar version of what happened that evening.

L.C. testified that on the night of May 17, 2016, he, with the assistance of N.M. and W.S., placed a flag on a pole in the back of his truck, which was parked in his family's driveway. L.C. started down his driveway toward County Road 8 with the intention of testing how well the flag flew. He stopped near the end of the driveway when the flag became tangled. After he fixed the flag, L.C. saw the headlights of a car approaching on County Road 8. The car swerved onto the driveway, at which point L.C. saw that his uncle, Cooley, was driving and that Cooley's girlfriend, E.K., was in the passenger seat. L.C. also saw that Cooley had his middle finger out, "flicking [L.C.] off."

Cooley then continued down County Road 8. L.C. turned onto County Road 8, going in the same direction as Cooley, in order to continue testing the flag. As Cooley approached an intersection, he put on his blinker to indicate he was making a right turn. L.C. then passed Cooley and continued on County Road 8. Cooley did not turn off the road, however, but instead sped up until he was following closely behind L.C.'s truck. At that point, L.C. was "nervous" because Cooley's vehicle "shouldn't have been that close."

L.C. testified that Cooley then sped up and around L.C. before "stomping on his brakes for no reason," causing L.C. to also stomp on his brakes so as to avoid a collision. L.C. admitted on direct examination that he could not remember if this incident occurred before or after Cooley signaled that he was going to turn off of County Road 8. Not long after Cooley drove up quickly behind L.C., L.C. pulled into a field and N.M. called C.C. C.C. told them to "come back to the house," at which point L.C. pulled onto County Road 8, this time driving back toward his home.

After L.C. turned around, he and Cooley were traveling in opposite directions. N.M. testified that Cooley "cut in on" L.C.'s truck, forcing him to "go over on the shoulder." N.M. further testified that Cooley was not fully in their lane but was close. L.C. testified that Cooley turned around so that the two vehicles were driving in opposite directions and that Cooley swerved onto L.C.'s side of the road, which made L.C. drive into the ditch. After this incident, L.C. drove home.

L.C. testified that during the incident on County Road 8 he "was scared" and "didn't know what [Cooley] was going to do, try and run [him] off the road or something." L.C. was afraid of being "[run] off the road or hit." N.M. testified that he was "scared" and "nervous." W.S. described the incident as "scary" and said he "had no idea what was happening."

Cooley testified in his own defense. He testified that on the night of May 17, 2016, while he and E.K. were driving past C.C.'s driveway on County Road 8, a vehicle there flashed its "high beam" lights at him. Cooley continued down the road and slowed to make a right turn when he noticed that the vehicle had driven up behind his vehicle. As Cooley

prepared to make the turn, the vehicle moved into the other lane and passed by so closely that he "could reach [his] hand out and touch their vehicle." Cooley testified that the vehicle moved in front of his vehicle, stopped and slammed on its brakes, and then sped off. Instead of turning, Cooley continued down County Road 8 in an unsuccessful attempt to "get the license plate number" of the vehicle. Cooley testified that the vehicle quickly turned around in a ditch and came back in the other direction. According to Cooley, the whole incident "happened in a 16th of [a] mile" and "lasted about 45 seconds, maybe a minute."

Respondent State of Minnesota charged Cooley with two counts of stalking and two counts of aggravated stalking. At trial, the state offered an audio recording of Cooley's heated conversation with the deputy concerning the allegedly stolen tractors. Cooley objected, arguing that the recording did not qualify as relationship evidence, was inadmissible other-acts evidence, and was cumulative. The state argued that the evidence was relevant to show Cooley's "demeanor, his state of mind, his intentions, his thoughts at that point." The district court agreed, stating, "I do find that [the recording] is relevant and it appears that the state of mind, in this case, the probative value is greater than the prejudice that it would bring."

After the jury heard the recording, the district court gave a cautionary instruction reminding the jurors that the subject matter of the recording was part of a civil matter that was not before them, and also noted, "I believe you heard some testimony as to whether or not somebody's opinion that somebody else was lying, that's generally not admissible and

you should disregard that as well, okay?" The parties had agreed to this cautionary instruction after a bench conference.

Following the trial, the jury found Cooley guilty of the two aggravated-stalking counts, finding that Cooley (1) intended to injure L.C. by an unlawful act and (2) followed, monitored, or pursued L.C.

D E C I S I O N

I.

Cooley challenges the sufficiency of the evidence for his aggravated stalking convictions. In considering a claim of insufficient evidence, an appellate court's 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, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "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 assumption "is particularly appropriate when resolution of the case depends on conflicting testimony, as it is the function of the jury to evaluate the credibility of the witnesses." *State v. Pippitt*, 645 N.W.2d 87, 92 (Minn. 2002). We "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

Cooley was convicted under Minn. Stat. § 609.749, subd. 2(1) and (2) (2014), which prohibits "directly or indirectly . . . manifest[ing] a purpose or intent to injure the person, property, or rights of another" and "follow[ing], monitor[ing], or pursu[ing] another." Cooley's convictions are classified as felonies under Minn. Stat. § 609.749, subd. 3(a)(5) (2014), which defines "aggravated stalking offense" as including the commission of "any offense described in subdivision 2 against a victim under the age of 18, if the actor is more than 36 months older than the victim." Stalking is a general intent crime. See Minn. Stat. § 609.749, subd. 1a (2014) ("[T]he state is not required to prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated . . . .").

When viewed in the light most favorable to the convictions, the evidence showed the following: Cooley was involved in a dispute with C.C. over family property. On May 17, 2016, Cooley and his father, F.C., had a heated discussion with two police officers about this dispute. Later that evening, Cooley was driving by C.C.'s house when he pulled into the driveway, "flicked off" C.C.'s son, L.C., and then continued down the road. L.C., N.M., and W.S. then turned onto the road, traveling in the same direction. Cooley slowed down and signaled a right turn, but did not actually make the turn after L.C. drove around him. Instead, Cooley drove up directly behind L.C., close enough to make L.C. nervous. At some point, either before or after he signaled the turn, Cooley "brake-checked" L.C. by braking suddenly, forcing L.C. to brake as well to avoid a collision.

L.C. and his passengers pulled off of the road and called C.C., who told them to come home. L.C. began driving back toward his house. Cooley was driving in the opposite direction and swerved into the other lane, forcing L.C. to drive into the ditch to avoid a

collision. During this incident, L.C., N.M., and W.S. were scared and nervous, and did not know what was happening. They did not know what Cooley's intentions were and feared his actions might result in a collision.

By "brake-checking" L.C. and later swerving into his lane, Cooley twice acted in a manner that nearly caused L.C.'s truck to collide with his vehicle, and these actions caused L.C. and his passengers to be scared and unsure of what was happening. Thus, Cooley directly or indirectly manifested a purpose or intent to injure L.C.'s person or property. And by speeding up behind L.C. after signaling his intent to turn right, Cooley followed or pursued L.C. These actions are sufficient evidence of aggravated stalking.

Cooley argues that the state conceded at trial that he did not intend to injure L.C.'s person or property, instead focusing on an injury to L.C.'s "right to use the road." Cooley argues that "[a]t most, L.C.'s right to travel down the road was temporarily impaired" but not "materially injured," and that as a result L.C. suffered no injury from Cooley's actions. This argument is unpersuasive. Under Minn. Stat. § 609.749, subd. 2(1), Cooley is guilty of aggravated stalking if he *manifested* an intent to injure L.C.'s person or property; whether Cooley actually intended this result is irrelevant. We therefore do not disturb the jury's guilty verdict on the charges of aggravated stalking.

II.

Cooley next contends that the district court improperly admitted other-acts evidence at trial. He argues that the audio recording of his interaction with the deputy regarding the stolen tractors was a prior bad act that was not properly noticed, was not relevant, and was more prejudicial than probative. He also argues that the district court failed to provide the

jury with a limiting instruction on the proper use of other-acts evidence, constituting plain error.

Admission of the Recording

"A district court's decision to admit *Spreigl* evidence is reviewed for an abuse of discretion. A defendant who claims the [district] court erred in admitting evidence bears the burden of showing an error occurred and any resulting prejudice." *State v. Griffin*, 887 N.W.2d 257, 261-62 (Minn. 2016) (citations omitted); *see State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965) (stating that other-acts evidence is generally inadmissible to prove that a defendant committed the present offense). If this court "determines that the district court erroneously admitted *Spreigl* evidence, the court must then determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id.* at 262.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that the person acted in conformity therewith on a particular occasion. Minn. R. Evid. 404(b). Further, such evidence may not be introduced if its probative value is substantially outweighed by its tendency to unfairly prejudice the fact-finder. Minn. R. Evid. 403. District courts must follow a five-step process to determine whether to admit other-acts evidence:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006).

Cooley argues that the state did not provide proper notice of the audio recording. The record includes a motion from the state, filed on the first day of trial, asking the court for permission to admit "evidence of the history of the relationship between the defendant and the victim as reflected in reports previously disclosed." When the court inquired on the record about this motion, the state clarified that this is a reference to Cooley's interaction with the deputy, but also stated that it intended only to introduce that evidence through the testimony of the deputy; the audio recording is not mentioned. The state did not give proper notice of its intent to use the recording as other-acts evidence.

Moreover, the recording was not relevant, was cumulative, and was more prejudicial than probative. First, stalking is a general intent crime and Cooley's specific intent was not relevant to the jury's guilty verdict. *See* Minn. Stat. § 609.749, subd. 1a. However, the state offered the recording as evidence of his intent. Thus, the state failed to demonstrate that the evidence was relevant and material to its case. *See* Minn. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Second, the deputy testified to his recollection of the conversation, specifically noting Cooley's "hostile behavior" and the fact that the deputy was concerned for his own safety. Cooley did not object to this testimony. Having heard the deputy's testimony, the jury had no need to listen to the recording as well. And third, because the recording was cumulative and not relevant, its potential for prejudice outweighed its probative value. *See*

Ness, 707 N.W.2d at 689 (concluding that other-acts evidence was more prejudicial than probative where "the evidence was not relevant" and "was not needed to strengthen otherwise weak or inadequate proof of an element of the charged offense"). In sum, because the recording was not properly noticed, was not relevant, was cumulative, and was more prejudicial than probative, the district court abused its discretion by admitting it into evidence.

Because we decide that the district court abused its discretion by admitting the audio recording, the next step is to "determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Griffin*, 887 N.W.2d at 262. In making this determination, we consider such factors as the amount of evidence linking the defendant to the charged offense, the strength (or lack thereof) of the defendant's case, the extent to which the state relied on the evidence in its case-in-chief and closing argument, whether the district court gave a cautionary instruction, and whether other other-acts evidence was admitted. *State v. Bolte*, 530 N.W.2d 191, 198-99 (Minn. 1995).

Cooley has not demonstrated that the admission of the recording significantly affected the verdict. Just as the recording was cumulative of the deputy's testimony and not necessary to the state's case, it was not necessary to prove Cooley's intent. The testimony from L.C., N.M., and W.S. describing Cooley's actions that night were sufficient to establish his manifested intent to injure L.C.'s person or property. The jury did not need the recording to convict Cooley, and had already heard testimony as to its contents. *See Ness*, 707 N.W.2d at 691 (holding that while district court erroneously admitted other-acts

evidence, there was no prejudice to defendant because the evidence merely "bolstered" the finding of guilt and "was not the critical push beyond a reasonable doubt"). Thus, it is unlikely that the jury was swayed by the admission of the recording in a manner that significantly affected the verdict.

Cautionary Instruction

Cooley did not object at trial to the lack of a proper other-acts cautionary instruction either when the audio recording was admitted or during final jury instructions. "Ordinarily, the defendant's failure to object to an error at trial forfeits appellate consideration of the issue." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). However, in the absence of an objection, an appellate court may review an issue first raised on appeal for plain error. Minn. R. Crim. P. 31.02; *State v. Pearson*, 775 N.W.2d 155, 161 (Minn. 2009). The plain-error standard "requires the defendant to show (1) error (2) that was plain and (3) that affected the defendant's substantial rights." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). The party asserting plain error has the burden of establishing all three elements. *State v. Hollins*, 765 N.W.2d 125, 131 (Minn. App. 2009). "If these three prongs are met, the court must then decide whether it should address the issue in order to ensure fairness and the integrity of the judicial proceedings." *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001) (quotation omitted). An appellate court may exercise its discretion to correct an unobjected-to error only after all three plain-error elements are satisfied. *Id.*

"Under the plain-error doctrine, an error is a deviation from a legal rule unless the rule has been waived." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014) (quotation omitted). The legal rule at issue here states that when the district court receives other-acts

evidence it must, "[b]oth at the time the evidence is received and in the final charge," instruct the jury that the testimony is received for a limited purpose and that the defendant "is not being tried and may not be convicted for any offense except that charged." *State v. Billstrom*, 149 N.W.2d 281, 285 (Minn. 1967); *see* Minn. R. Evid. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). The district court must give this cautionary instruction even absent a request from either party. *Vick*, 632 N.W.2d at 685.

The district court here did not instruct the jury on how to evaluate other-acts evidence, either when it was received or during final instructions. This is plain error, and so the issue becomes whether that error affected Cooley's substantial rights. To satisfy this element, Cooley "must show prejudice that forms the basis for a reasonable likelihood the error substantially affected the verdict." *Manthey*, 711 N.W.2d at 504. The supreme court has stated that plain error affects substantial rights "if [the error] had the effect of depriving the defendant of a fair trial." *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008) (quotation omitted).

Although a cautionary instruction is "strongly preferred," the "absence thereof does not *automatically* constitute [reversible] plain error." *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). This court has held that "other evidence offered during trial may negate the allegation that the probative value of [other-acts] evidence is outweighed by its potential for unfair prejudice." *Id.* Such is the case here. When the audio recording was introduced, the jury had already heard the deputy's

testimony regarding his heated conversation with Cooley, as well as testimony from L.C., N.M., and W.S. regarding Cooley's actions on County Road 8. Under the circumstances, it is unlikely that the instructional error significantly affected the jury's verdict. Cooley therefore has not established that he is entitled to reversal of his aggravated stalking convictions under the plain-error standard.

Affirmed.