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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0085

State of Minnesota,
Respondent,

vs.

Brock William Fredin,
Appellant.

Filed April 27, 2020
Affirmed
Bratvold, Judge

Ramsey County District Court
File No. 62-CR-17-3156

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Lyndsey M. Olson, St. Paul City Attorney, Judith A. Hanson, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Brock Fredin, Baldwin, Wisconsin (pro se appellant)

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

In this direct appeal from a final judgment of conviction for violating a harassment restraining order (HRO), appellant argues that the district court prejudicially erred by instructing the jury to draw no inference from his decision not to testify. He also

argues that the HRO-violation statute, Minn. Stat. § 609.748, subd. 6(b) (2014), is unconstitutional, the district court erred when it denied his request for a "First Amendment" jury instruction, and the district court abused its discretion during sentencing. First, we conclude that the district court erred in giving the "no-inference" jury instruction without obtaining appellant's personal consent on the record, but the error was not plain and there is no reasonable likelihood the no-inference instruction significantly affected appellant's substantial rights. Next, we determine that appellant forfeited his as-applied constitutional challenge to the HRO-violation statute, the district court did not err by denying appellant's requested jury instruction, and the district court did not abuse its discretion during sentencing. Thus, we affirm.

FACTS

Appellant Brock William Fredin met G.M. through an internet dating website in late August or early September 2015. Fredin and G.M. went on dates about twice a week for the next two months. In November 2015, G.M. became concerned about Fredin's behavior and told him that she no longer wanted to date him exclusively. Fredin's behavior worsened and G.M. petitioned for an HRO, which the district court granted on January 28, 2016. The HRO prohibited Fredin from having "direct or indirect contact" with G.M. A Ramsey County sheriff served the HRO on Fredin on February 2, 2016. This court affirmed the HRO on appeal. *See Miller v. Fredin*, A16-0613 (Minn. App. Jan. 23, 2017).

On February 9, 2016, G.M. returned to the same dating website where she first met Fredin. She read a notice from the dating website stating that Fredin had viewed her profile that day. The notice included a preview of Fredin's profile, which said, "To a lost love:

Incredibly sorry [G.M.]. Sorry for what happened." Fredin's profile also apologized and said that he wanted to speak to G.M. again. G.M. sent Fredin messages through the dating website, asking him to remove her name and leave her alone. Fredin did not respond but edited his profile several times so that, in the final version, Fredin stated that G.M. was "abusive" and speculated that G.M. had post-traumatic stress disorder.

G.M. reported Fredin's conduct to the St. Paul Police Department and Sergeant McCabe investigated. One year later, on February 28, 2017, Fredin called McCabe to talk about the investigation. McCabe recorded the exchange, during which Fredin said, "Let's be honest. I was harassing [G.M.]"

The state charged Fredin by complaint on May 2, 2017, and later amended the complaint, alleging that Fredin had committed stalking by mail under Minn. Stat. § 609.749, subd. 2(6) (2014) (count one), and had violated an HRO under Minn. Stat. § 609.748, subd. 6(b) (count two). Before trial, Fredin, represented by an attorney, asked the district court to give a jury instruction stating, "The defendant asserts a defense to the crime of stalking. . . . It is a defense to this charge if the defendant's acts were performed and are authorized, required, or protected" by law. The district court denied Fredin's request.

During a four-day jury trial in July 2018, G.M. and McCabe testified to the facts summarized above. The district court received three notes from the jury during deliberations. First, the jury stated that it agreed on the HRO-violation charge but was "at an impasse" on the stalking charge. Second, the jury asked about an element of the stalking charge. Third, a juror asked whether she could call her husband about a personal matter.

The jury returned verdicts finding Fredin guilty of both counts. At sentencing, the district court entered a judgment of conviction for the stalking-by-mail charge and sentenced Fredin to serve 365 days in jail and pay fines and court costs. The district court found that the HRO-violation count was a lesser-included offense and did not enter a judgment of conviction or sentence Fredin for that count.

Fredin appealed. After Fredin's appellate attorney filed his opening brief, the supreme court invalidated the stalking-by-mail statute, Minn. Stat. § 609.749, subd. 2(6), as unconstitutionally overbroad under the First Amendment. *See In re Welfare of A.J.B.*, 929 N.W.2d 840, 864 (Minn. 2019). This court granted Fredin's motion to stay his appeal and remand for resentencing because of *A.J.B.* The district court vacated Fredin's conviction and sentence for stalking-by-mail and entered a judgment of conviction for the HRO violation. The district court sentenced Fredin to serve 90 days in jail with credit for 90 days already served. This court dissolved the stay and allowed this appeal to proceed. Fredin discharged his appellate attorney and continued by representing himself on appeal.[1]

D E C I S I O N

I. The district court did not plainly err by reading a no-inference instruction to the jury.

After the state rested, Fredin waived his right to testify and the district court asked whether Fredin requested a no-inference jury instruction.

[1] Fredin's opening brief raised two issues: sufficiency of the evidence to support his stalking-by-mail conviction and the district court's error in giving the no-inference instruction. Because the district court vacated Fredin's conviction for stalking by mail, we do not consider the first issue in this appeal.

> THE COURT: I also want to put on the record that the defendant wishes to insert the JIGS surrounding his right not to testify. [Fredin's attorney], if you could put that on the record?
>
> [FREDIN'S ATTORNEY]: Thank you, Your Honor. Our understanding is that we have the option to either include that instruction or not, and I would like that jury instruction included, titled "Defendant's Right Not to Testify."

The district court circulated a no-inference instruction to both parties in the court's proposed jury instructions. The district court ultimately read the no-inference instruction to the jury before closing arguments and Fredin made no objection.

Because Fredin did not object to the no-inference instruction during trial, we review this issue for plain error, which has three requirements: the appellant must prove (1) an error, (2) the error was plain, and (3) the error affected his substantial rights. *State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002). If appellant satisfies all three requirements, we consider whether a new trial is necessary "to ensure the fairness and integrity of judicial proceedings." *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006).

We begin by considering whether the district court erred. The district court read the no-inference instruction to the jury:

> The State must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant, Mr. Fredin, has no obligation to prove innocence. The defendant has the right not to testify. This right is guaranteed by both the federal and state constitutions. You should not draw any inference from the fact that Mr. Fredin has not testified in this case.

See 10 *Minnesota Practice*, CRIMJIG 3.17 (2018).

This instruction is grounded on a criminal defendant's right to not testify at trial. U.S. Const. amend. V; Minn. Const. art. 1, § 7; *see also State v. Borg*, 806 N.W.2d 535, 542 (Minn. 2011). Whether to give the no-inference instruction is a defendant's prerogative. "If the defendant chooses not to testify, the trial court may instruct the jury not to draw any adverse inference from the fact that the defendant has not testified *only if* the defendant requests the court to do so." *Gomez*, 721 N.W.2d at 880 (emphasis in original); *see* Minn. Stat. § 611.11 (2018). If the defense requests the instruction, "the trial court or defense counsel should make a record of the defendant's clear consent and insistence that the instruction be given." *McCollum v. State*, 640 N.W.2d 610, 617 (Minn. 2002). It is error for a district court to give a no-inference instruction without a defendant's consent. *Darris*, 648 N.W.2d at 240.

Shortly after Fredin personally waived his right to testify on the record in response to questions from his attorney, the district court said that it "want[ed] to put on the record that the defendant wishe[d] to insert the JIGS surrounding his right not to testify." Fredin's attorney said they chose "the option" to have the no-inference instruction. Neither the district court nor Fredin's attorney made a record of Fredin's express consent to the no-inference instruction. By failing to make a record of Fredin's personal consent to read the instruction to the jury, the district court erred. *See Gomez*, 721 N.W.2d at 881 (concluding that district court plainly erred by giving no-inference instruction without a record of defendant's personal consent).

The second element of the plain-error test requires the error to be "plain." *Id.* at 880-81. An error is "plain" if it is "clear" or "obvious" to the court at the time of appeal.

State v. Ihle, 640 N.W.2d 910, 917 (Minn. 2002) (quotations omitted). A district court's erroneous reading of a no-inference instruction is usually considered plain error unless the record establishes that the defendant agreed with his or her attorney's request for the instruction. *Compare Gomez*, 721 N.W.2d at 881 (concluding that district court committed plain error by giving no-inference instruction because the record did not establish defendant's consent), *with State v. Clifton*, 701 N.W.2d 793, 798 (Minn. 2005) ("Our independent review of the record satisfies us that [defendant] and his attorney agreed to the instruction.").

The record contains no explicit statements by Fredin consenting to the no-inference instruction. Still, we conclude that Fredin's implicit consent to the no-inference instruction is evident for several reasons. First, the district court asked about Fredin's position on the no-inference instruction shortly after he personally waived his right to testify and the district court stated that it "want[ed] to put on the record that *the defendant* wishes to insert the JIGS surrounding his right not to testify." (Emphasis added.) Fredin's attorney then said, "*Our* understanding is that *we* have the option to either include that jury instruction or not, and I would like that jury instruction included." (Emphasis added.) The record shows that, after this exchange, the district court gave Fredin a copy of the proposed jury instructions, including the no-inference instruction. Fredin did not object at any point before or after the no-inference instruction was given. Based on this record, we conclude that Fredin and his attorney discussed the no-inference instruction, Fredin understood that he had the option to have the instruction read to the jury, and Fredin chose to have the instruction read to the jury. We conclude that the district court did not plainly err by reading

the no-inference instruction without first making a record of Fredin's explicit personal consent.

Clifton supports our analysis. There, as here, the defendant waived his right to testify and the district court read the no-inference instruction after the defendant's attorney requested it, but without first making a record of the defendant's express personal consent. 701 N.W.2d at 798. On appeal, the supreme court determined that the record showed the defendant and his attorney had discussed the instruction and did not object when given the opportunity to do so after the district court read the instruction. *Id.* The supreme court also determined that the district court did not plainly err by reading the no-inference instruction because the defendant and his attorney agreed to the instruction. *Id.* We reach the same conclusion in this case.

Even assuming the district court's error was plain, the third requirement of the plain-error test requires Fredin to show "there is a reasonable likelihood that the giving of the instruction would have had a significant effect on the jury's verdict." *Gomez*, 721 N.W.2d at 881-82 (quotation omitted). Unless the facts of the case suggest otherwise, we have held that "the giving of [the no-inference] jury instruction [is] harmless." *Darris*, 648 N.W.2d at 240.

Fredin argues that he has shown prejudicial error because the jury struggled to reach a verdict. We disagree. The jury's notes to the district court during deliberations show that it reached a verdict on the HRO-violation charge, which is the only issue on appeal, and asked a question only about the stalking-by-mail charge. We conclude that there is no

reasonable likelihood that the district court's reading of the no-inference jury instruction had a significant effect on the jury's verdict.

In sum, we conclude that the district court erred when it read the no-inference instruction without first obtaining Fredin's personal consent on the record, but he has no right to a new trial because the error was not plain and, even if it was, it did not affect his substantial rights.

II. Fredin forfeited his as-applied challenge to the constitutionality of the HRO-violation statute, Minn. Stat. § 609.748, subd. 6(b).

Fredin did not raise the constitutionality of Minn. Stat. § 609.748, subd. 6(b), during district court proceedings. Rather, Fredin's motion requesting a specific jury instruction stated that he was "not here challenging the HRO statute." "We ordinarily do not consider issues raised for the first time on appeal, even . . . the constitutionality of a statute." *State v. Williams*, 794 N.W.2d 867, 874 (Minn. 2011). We may do so "when the interests of justice require their consideration and when doing so would not work an unfair surprise on a party." *Id.*

Fredin does not argue that the interests of justice require us to consider his constitutional challenge. Even so, Fredin's explicit decision not to raise a constitutional challenge in district court weighs against our review of the issue. *See id.* at 874-75 (concluding the interests of justice did not require consideration of constitutional challenge raised for first time on appeal because the challenge could have been raised in district court).

Fredin's challenge to Minn. Stat. § 609.748, subd. 6(b), is also inadequately briefed. He does not articulate why the statute is unconstitutionally vague or overbroad. *See State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990) (requiring party challenging constitutionality of statute to prove constitutional defect beyond a reasonable doubt); *see also State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (noting that inadequately briefed issues are not properly before an appellate court), *review denied* (Minn. Aug. 5, 1997). Thus, we decline to review the constitutionality of Minn. Stat. § 609.748, subd. 6(b).

In the portion of his brief arguing the constitutionality of the HRO-violation statute, Fredin also argues that insufficient evidence supports his conviction for violating the HRO. When reviewing a challenge to the sufficiency of the evidence, we review the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). We will affirm if the jury reasonably could have found the defendant guilty of the crime charged. *State v. Vasko*, 889 N.W.2d 551, 558 (Minn. 2017). To uphold Fredin's conviction for violating the HRO, the state's evidence must establish beyond a reasonable doubt that he knew of the HRO and violated one of its provisions. Minn. Stat. § 609.748, subd. 6(b).

The record establishes that the HRO prohibited Fredin from having "direct or indirect contact" with G.M., Fredin knew of the HRO because it was served on him in February 2016, Fredin posted a message to G.M. in his profile on a dating website, and Fredin edited his message twice in response to G.M.'s requests to remove it. We conclude that the record evidence reasonably permitted the jury to find that Fredin violated the HRO

by having "direct or indirect contact" with G.M.; thus, sufficient evidence supports Fredin's conviction for violating the HRO.

III. The district court did not err by denying Fredin's requested jury instruction.

A district court has "considerable latitude" to select language for jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011). Jury instructions must, in their entirety, "fairly and adequately explain[] the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). We review a district court's decision to give or deny a requested jury instruction for an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

Fredin asked the district court to read an instruction for "a defense to the crime of stalking," as provided in the pattern jury instructions. *See* 10 *Minnesota Practice*, CRIMJIG 13.66 (2018). The district court refused the instruction, but, as explained above, the district court later vacated Fredin's stalking-by-mail conviction on remand from this court. Fredin's claim that the district court erred by denying his requested instruction is therefore moot. *See Obermoller v. Fed. Land Bank of St. Paul*, 409 N.W.2d 229, 230-31 (Minn. App. 1987) (defining an issue as moot when a determination of the issue "would make no difference in respect of the controversy on the merits" (quotation omitted)), *review denied* (Minn. Sept. 18, 1987); *see also State v. Fraga*, 864 N.W.2d 615, 626 (Minn. 2015) ("Fraga's third issue, that the district court erred in denying his motion for a change of venue, is now moot because the conviction is reversed."). Also, Fredin does not articulate how the district court's refusal to read an instruction for "a defense to the crime of stalking" affected the jury's verdict on the HRO-violation charge or otherwise caused him prejudice. Because Fredin's challenge to this jury instruction is moot and lacks any claim of

prejudicial error, we conclude that the district court did not err by denying Fredin's requested instruction.

IV. The district court did not abuse its discretion during sentencing.

Fredin's arguments about sentencing are not entirely clear, but we identify three alleged errors: (1) the judge was biased; (2) the district court imposed a one-year sentence for the stalking-by-mail conviction, and (3) the district court "removed" Fredin's attorney against his consent. We consider each argument in turn.

First, Fredin's claim of judicial bias rests on his constitutional right to a fair trial, which includes the right to an impartial judge. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). Because Fredin did not raise judicial bias in district court, we review for plain error. *See State v. Schlienz*, 774 N.W.2d 361, 365 (Minn. 2009) (applying plain-error standard of review where defendant raised judicial bias for first time on appeal). When reviewing judicial bias for plain error, we will not reverse unless the appellant shows actual bias. *See State v. Plantin*, 682 N.W.2d 653, 663 (Minn. App. 2004) ("After a defendant submits to trial before a judge without objecting to the judge on the basis of bias, we will reverse the defendant's conviction only if the defendant can show actual bias in the proceedings."), *review denied* (Minn. Sept. 29, 2004).

We presume that a judge has properly discharged her judicial duties. *McKenzie*, 583 N.W.2d at 747. The judge must be "fair to both sides" and "refrain from remarks which might injure either of the parties to the litigation." *State v. Schlienz*, 774 N.W.2d 361, 367 (Minn. 2009) (quotation omitted). "A judge shall disqualify himself or herself in any

proceeding in which the judge's impartiality might reasonably be questioned . . . ." Minn. Code. Jud. Conduct Rule 2.11(A).

Fredin argues that the district court judge was biased against him based on comments during the October 2018 sentencing hearing in which the district court accepted the jury's finding of guilt on both charges and imposed an executed sentence for the stalking-by-mail conviction. After a careful review of the sentencing transcript, we disagree. A judge's opinions formed "on the basis of facts introduced or events occurring in the course of . . . current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008) (quotation omitted). While the district judge's statements were harsh at times, her statements relied on evidence introduced at trial and Fredin's demeanor throughout the proceedings, including his statements during the sentencing hearing. We do not discern that the district judge's comments showed "a deep-seated favoritism or antagonism that would make fair judgment impossible." *See id.* (quotation omitted). Fredin has failed to show actual bias warranting reversal. *See Plantin*, 682 N.W.2d at 663.

Second, Fredin argues that the district court abused its discretion when it imposed an executed 365-day sentence for the stalking-by-mail conviction. But the district court later vacated Fredin's stalking-by-mail conviction, entered a conviction for the HRO-violation charge, and sentenced Fredin to 90 days in jail with credit for 90 days that he had already served. Fredin served no additional time for the HRO-violation conviction. Fredin's claim is therefore moot. *See State v. Eller*, 780 N.W.2d 375, 384 (Minn. App.

2010) (holding that even if district court erred during sentencing, the issue was moot because defendant had already served the full sentence), *review denied* (Minn. June 15, 2010).

Third, Fredin argues that the district court erred by improperly "removing" his attorney. The record does not support this argument. Fredin's trial attorney moved to withdraw as counsel after the trial had concluded and before the sentencing hearing because of "an irreconcilable breakdown in the attorney-client relationship." The district court granted the attorney's motion to withdraw. Fredin had time to obtain—and did obtain—new counsel for sentencing. Fredin does not articulate how this violated his rights or otherwise prejudiced him.

Affirmed.