STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1513

State of Minnesota,
Respondent,

vs.

John Evans,
Appellant.

Filed August 17, 2020
Affirmed in part, reversed in part, and remanded
Jesson, Judge

Steele County District Court
File No. 74-CR-19-64

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Dan McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Jesson, Judge; and Schellhas, 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

JESSON, Judge

After being convicted of first-degree witness tampering based on a threatening phone call to his ex-wife, appellant John Evans challenges both his conviction and sentence. He argues that the state's evidence was insufficient to prove the charge and that his criminal-history score was incorrectly calculated. Because the state's evidence was sufficient to prove that Evans committed first-degree witness tampering, we affirm in part. But because the state failed to prove that his criminal-history score was correct, we reverse Evans's sentence and remand for resentencing.

FACTS

Appellant John Evans and A.E. married in 2013 and had one child together. About two years into their marriage, Evans began abusing A.E. A.E. described the abuse at trial, including an incident where Evans choked her while she was on the phone and then coerced her to hide from the police when they came to investigate. She also described how Evans slammed her head against a car window, graphically threatened to kill her, and punched, hit, and choked her regularly. Evans's abuse of A.E. led to at least two criminal convictions.[1]

In 2016, A.E. successfully moved to vacate an order for protection (OFP) against Evans because he promised to stop the abuse, and she wanted to work on their marriage.

[1] At trial, Evans stipulated to two 2017 Goodhue County convictions for threats of violence.

But the abuse continued, and the two separated.[2] A.E. was granted a new 50-year OFP against Evans, which was later amended to add A.E.'s children.

In August 2018, A.E. began a new job at a hotel in Owatonna, Minnesota. Due to this change, she filed a request to modify the OFP to include her updated home and work addresses. Shortly before the scheduled OFP-modification hearing, A.E. noticed Evans sitting in his tan Ford Explorer in the Target parking lot adjacent to the hotel where she worked. She recognized the Explorer as Evans's from the license plate number and distinctive damage to the keyless entry system.

A.E. called 911. An officer called her back and asked her questions about her report, but he was unable to respond immediately to the hotel. A.E. also called some friends, but they were out of town. She did not want to alert her sole coworker or any hotel guests, so she tried to stay out of sight and continue her work.

About 30 minutes after A.E. first saw Evans's Explorer, she received a series of phone calls from an unknown caller. When she answered the first call, she immediately recognized the caller's voice. It was Evans's. During the call, Evans told A.E. that, "if [she] showed up for court, [she] wouldn't live to regret it." Evans may have said, in the alternative, that A.E. "*would* live to regret it." A.E. did not understand the figure of speech but understood that "it was some kind of threat." She told him that she was going to go to court. In a second phone call, about a minute later, Evans told A.E. to not show up for

[2] At the time of trial, the couple's marital dissolution was pending. But at the sentencing hearing, counsel for Evans noted that their divorce had been finalized.

court or something would happen. A.E. received four more calls from an unknown caller that she did not answer. A.E. called 911 again.

Nearly an hour after Evans called her, police arrived. A.E. described the phone calls and what Evans told her. Police took photos of A.E.'s cell phone call log that showed the time and duration of the calls.

The state charged Evans with two criminal offenses: (1) violating an OFP and (2) first-degree witness tampering. During a two-day court trial, the state provided testimony from four witnesses. First, a police sergeant testified that he had served Evans with copies of the OFP and a subsequent modification, which were admitted into the record.

Next, A.E. testified.[3] She recounted her history with Evans and what happened the day Evans parked near the hotel and called her. Her testimony was consistent with the facts described earlier. The state admitted the recording of her first 911 call into evidence.

During her testimony, A.E. admitted that she was having trouble remembering whether Evans said she *would* or *would not* live to "regret it" when he called her. On cross-examination, defense counsel highlighted this inconsistency. A.E. agreed that she could not remember which version Evans said.

[3] In her testimony, A.E. acknowledged that she had a criminal record consisting of five felonies, including crimes of dishonesty. These crimes generally occurred from 2013-2017. A.E. was using methamphetamine during some of this period, which contributed to her criminal conduct. A.E. eventually served prison time and was released in early 2018. At the time of the trial, A.E. testified that she no longer uses methamphetamine.

Next, the officer who responded to A.E.'s call at the hotel testified. Consistent with the earlier facts, the officer described his phone conversation with A.E. (after her first 911 call) and what happened once he arrived at the hotel. The officer confirmed that A.E. initially told him that Evans said that if she showed up to court, she *would* live to regret it. And then later, he recalled that A.E. stated that Evans told her that if she showed up to court, she *would not* live to regret it. The officer recounted how A.E. told him that she could not remember exactly which version Evans had said.[4] After the trial concluded, the court issued a written order finding Evans guilty of both offenses.

At sentencing, the parties discussed Evans's criminal-history-score calculation. The state provided two sentencing worksheets, one for each count. The worksheet provided for the OFP violation (count one) indicated a criminal-history score of six. And the worksheet for the witness-tampering offense (count two) reflected a criminal-history score of seven, anticipating the felony conviction for the OFP violation (count one). But the sentencing court found that the OFP violation was a lesser-included offense and that the offenses occurred as part of the same course of conduct, so it would enter a conviction for only the

[4] The assistant jail administrator was the state's final witness. He described how inmates—like Evans—may make phone calls while in the jail. He further described how he located an audio recording of a phone call that Evans made to another woman while he was in jail. The state admitted an audio recording of the phone call and a photo of Evans using the jail phone.

During the phone call, Evans talked about A.E.'s allegations. Generally, he appeared to recount an alibi: he was with the call recipient and not in Owatonna at A.E.'s place of work when A.E. accused him of being there. But the caller disagreed and recalled that Evans was not with her until later that evening. Evans appeared to become frustrated and upset that the caller disagreed with him and cursed at her.

more serious charge—witness tampering. By doing that, the criminal-history score on the sentencing worksheet for the witness-tampering offense would be reduced to six.

The parties also disagreed about whether Evans's criminal-history score should include one-half point from a controlled-substance conviction. After reviewing the relevant records, the court found that the state met its burden and that the half point was properly included in Evans's criminal-history score.

Based on a criminal-history score of six, the state recommended a 48-month sentence, and defense counsel argued for a sentence at the low end of the range, 41 months. Agreeing with the state, the court sentenced Evans to 48 months in prison for first-degree witness tampering.[5] Evans appeals.

D E C I S I O N

I. Sufficient evidence supports Evans's first-degree witness tampering conviction.

First, according to Evans, the evidence the state presented was insufficient to prove that he committed first-degree witness tampering. He argues that his statements to A.E.—if she showed up to court, she would (or would not) live to regret it—are not necessarily threats of injury. First, we address the standards of review for challenges to evidence sufficiency and convictions based on circumstantial evidence. Then, we review the substantive offense at issue here and apply the law to the facts. Finally, we address Evans's arguments.

[5] The district court did not adjudicate Evans guilty of violating the OFP (count one). Nor did it impose a sentence on that count.

We turn first to our standards of review. In our review of the sufficiency of the evidence, we "carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the [fact-finder] to reasonably conclude that the defendant was guilty" of first-degree witness tampering. *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). The evidence is viewed in the light most favorable to the verdict. *Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004). And we assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Ultimately, the district court's "verdict will not be overturned if the fact-finder, upon application of the presumption of innocence and the [s]tate's burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty." *Griffin*, 887 N.W.2d at 263. While Evans's conviction was the result of a court trial and not a jury trial, the same standard of review applies. *See State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (noting that courts "use the same standard of review in bench trials and in jury trials in evaluating the sufficiency of the evidence").

Here, Evans challenges the state's proof of his intent. Intent may be shown through circumstantial evidence. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). Circumstantial evidence requires the fact-finder to make an inference about whether the facts in dispute existed. *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017). The parties agree that the circumstantial-evidence standard of review is appropriate here.

When reviewing the sufficiency of circumstantial evidence, we conduct a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). "The first step is to

identify the circumstances proved." *Id.* In the second step, this court "determine[s] whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 599 (quotations omitted).

To obtain a conviction of first-degree witness tampering, the state must prove that Evans "intentionally prevent[ed] or dissuade[ed] or intentionally attempt[ed] to prevent or dissuade by means of force or threats of injury to any person or property, a person who is or may become a witness from attending or testifying at any trial, proceeding, or inquiry authorized by law." Minn. Stat. § 609.498, subd. 1(a) (2018). Evans does not contest that A.E. was a potential witness at the upcoming OFP-modification hearing. His argument instead focuses on whether the state proved that he intentionally attempted to prevent A.E. from attending the hearing by using threats of injury. *See id.*

With the relevant statutory requirements for the offense in mind, we return to the circumstantial-evidence review framework. In this framework, "[t]he first step is to identify the circumstances proved." *Silvernail*, 831 N.W.2d at 598. At this stage, we defer to the fact-finder's "acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate."[6] *Id.* at 598-99 (quotations omitted).

[6] Even though we assume the fact-finder credited the circumstances proved by the state, the district court here made explicit credibility determinations. Several times in its written order, it found A.E.'s testimony credible despite her criminal history, which is also a part of the trial record. We generally give deference to a district court's credibility determinations. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992).

The circumstances proved implicating Evans in witness tampering with A.E. are as follows. Evans and A.E. were married. Evans had a history of physically abusing A.E. While she was working at a hotel, A.E. saw Evans park in an adjacent lot. A.E. called the police to report Evans for violating the OFP. A short time later, Evans called A.E.'s cell phone at least twice. During the phone calls, Evans told A.E. that if she appeared in court, she would (or would not) live to regret it. A.E. did not understand the phrase, but she understood that it was a threat.

Next, we determine whether these proved circumstances "are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Silvernail*, 831 N.W.2d at 599 (quotations omitted). And "we do not review each circumstance proved in isolation," but review the circumstances as a whole. *State v. Hawes*, 801 N.W.2d 659, 669 (Minn. 2011). No deference is given "to the fact-finder's choice between reasonable inferences." *Id.*

We are satisfied that the only rational hypothesis based on the proved circumstances is that Evans intended his conduct to try to dissuade A.E. from appearing at the upcoming OFP hearing. His statement to her implied that she should not go to the hearing, or she would regret it. In reviewing the record, the history of abuse and the circumstances of Evans's conduct are particularly relevant. *See Davis*, 595 N.W.2d at 525-26 (noting that intent may be shown through conduct or the character of conduct, or inferred from events before and after the conduct). Evans's physical presence while parked near A.E.'s place of work was likely aimed at intimidating her, as Evans had done in previous domestic incidents. And his verbal ultimatum—that if she appeared in court, she would (or would

not) live to regret it—was an implicit threat to A.E.'s life or, at least, her safety. Thus, the state provided sufficient evidence for the fact-finder to conclude beyond a reasonable doubt that Evans was guilty of first-degree witness tampering.

Still, Evans argues that the evidence was insufficient to show that he intended his words to be a threat to A.E.'s physical safety. First, he suggests a variety of alternative hypotheses relating to what he could have meant by the statement that A.E. would live to regret it if she appeared in court.[7] In short, he suggests that he was implying something other than a threat of injury to A.E. For example, he posits that he could have been implying that he would disclose personal information about A.E. if she appeared in court, thus making her regret attending. Perhaps he meant that he would take legal action against A.E., stop paying her child support, or that by appearing in court, she "would further damage, perhaps irreparably, the pair's relationship." In essence, Evans argues that because the conclusion that he intended his words as a threat to A.E.'s physical safety is not the *only* conclusion here, his conviction cannot be upheld.

But Evans's argument misapplies the test, which seeks to identify alternative *rational* or *reasonable* hypotheses. Suggestions not supported by evidence in the record or rooted purely in speculation, like those Evans offers, are neither rational nor reasonable hypotheses. *See State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008) (requiring the defendant to "point to evidence in the record that is consistent with a rational theory other

[7] In his brief, Evans seemingly concedes that if his statement was that A.E. *would not* live to regret it, it was an implicit death threat. He focuses his arguments on the possibility that Evans said that A.E. *would* live to regret it and whether that phrase constituted a threat to her physical safety.

than guilt," and explaining that he may not rely on "mere conjecture"). There is no evidence in the record that Evans was intending to stop paying child support, release personal information, or sue A.E. And his suggestion that A.E. appearing in court to modify her addresses on the existing 50-year OFP would somehow "irreparably" damage their relationship is unlikely. The record shows that the parties had little or no existing relationship at the time of this incident. Because Evans's offered hypotheses are purely speculative and have no support in the record, they are not rational or reasonable alternative hypotheses that render the state's evidence insufficient. *See State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010) ("The [s]tate does not have the burden of removing all doubt, but of removing all reasonable doubt.").

Evans also contends that the plain meaning of the phrase "live to regret" does not necessarily imply a threat of physical harm. Relying on the dictionary definition, Evans suggests the idiom itself has an innocuous meaning about being "disappointed" or "feeling sorry" in the future. But context matters. And here, the context includes Evans's history of domestic incidents with A.E. *See State v. Franks*, 765 N.W.2d 68, 75 (Minn. 2009) (noting that "it is proper to view a defendant's words and acts in the context of the defendant's relationship with the victim, including evidence of past crimes against the victim," and doing so in a case involving domestic violence). Considering the context of this statement with the parties' relationship and history, Evans's statement is less innocent than he attempts to frame it here.[8]

[8] Evans also attempts to cast doubt on A.E.'s account by pointing out the inconsistencies in her testimony and statements to the police about what Evans said on the phone—whether

Finally, Evans asserts that he did not intend his statements to A.E. as threats of injury. Witness tampering is an offense that requires "specific intent." *State v. Collins*, 580 N.W.2d 36, 44 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). This means that the offense "requires an intent to cause a particular result." *State v. Wilson*, 830 N.W.2d 849, 853 (Minn. 2013) (quotations omitted); *see also* Minn. Stat. § 609.02, subd. 9(3) (2018) ("'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result."). Courts generally "infer that a person intends the natural and probable consequences of his actions." *Collins*, 580 N.W.2d at 44 (quotation omitted).

Here, the statute requires that a person convicted of first-degree witness tampering "intentionally" attempt to prevent, "by means of force or threats of injury," someone "who is or may become a witness from attending or testifying at" a hearing. Minn. Stat. § 609.498, subd. 1(a). Under a plain reading of the statute, the crux of the crime is that the actor intentionally tried to prevent someone from attending court—that is the particular intended result. The result is *not* a threat of injury, as Evans asserts. Moreover, A.E. perceived it as a threat, which is further evidence of Evans's intent. *See State v. Schweppe*, 237 N.W.2d 609, 614 (Minn. 1975) (concluding that a victim's reaction

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he said that she would or would not live to regret appearing at court. But the district court specifically found portions of her testimony credible, a determination to which we give deference. *See Dickerson*, 481 N.W.2d at 843. Moreover, "[i]nconsistencies in testimony and conflicts in evidence do not automatically render the testimony and evidence false and are not bases for reversal, especially when the victim is recounting a traumatic or stressful event." *In re Welfare of T.N.Y.*, 632 N.W.2d 765, 769 (Minn. App. 2001) (quotation omitted).

to a threat was circumstantial evidence relevant to the intent element of a terroristic-threats charge).

In sum, the state's evidence is sufficient to support Evans's conviction of first-degree witness tampering. The circumstances proved are solely consistent with guilt and do not point to any rational or reasonable alternative hypothesis inconsistent with guilt. Thus, the district court did not err by determining that the state met its burden of proof.

II. The district court erred by calculating Evans's criminal-history score.

Evans also contends that the district court erred with regard to his criminal-history score. Specifically, Evans argues that the state failed to prove that his 2017 convictions for threats of violence and witness tampering did not arise from a single behavioral incident. While the parties disputed several items in the sentencing worksheets, as described earlier, Evans's challenge to his criminal-history score in this appeal is one he did not raise to the district court. But he did not waive review of this issue because a sentence based on an incorrect score is an illegal sentence. *See State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). The state agrees—as do we—that remand is necessary to provide the state an opportunity to develop the record for the 2017 convictions.

Generally, district courts have wide discretion to impose sentences. *State v. Soto*, 855 N.W.2d 303, 307 (Minn. 2014). We will not reverse a court's sentence absent an abuse of its discretion. *Id.* at 307-08. The state bears the burden of proof at sentencing to demonstrate that a defendant's prior conviction should be included in his criminal-history score. *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018).

Evans contends that his two prior convictions in 2017 may derive from a single behavioral incident, which may mean that they both should not be included in his score. Determining "[w]hether the offenses were part of a single behavioral incident is a mixed question of law and fact," in which we review questions of legal application de novo and findings of fact for clear error. *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). When multiple sentences were imposed based on a single course of conduct, a sentencing court is to include only the weight from the most severe offense when calculating a defendant's criminal-history score. *See* Minn. Sent. Guidelines 2.B.1.d.(1) (2018); *see, e.g.*, *State v. Barthman*, 938 N.W.2d 257, 265-67 (Minn. 2020) (analyzing whether two offenses were part of the same behavioral incident).

Here, the record is unclear about whether the prior offenses were part of the same behavioral incident.[9] The district court accepted the sentencing worksheet provided by the state and sentenced Evans based on a criminal-history score of six. That score included one point for witness tampering and one point for terroristic threats, both offenses with the same disposition date, July 14, 2017. The only information about these offenses in the record indicates that they share an offense date and sentencing date. The record contains no other information relevant to this question. There exists a fair possibility that these two offenses arose out of the same incident and therefore should not both be included in Evans's score. Therefore, the state failed to meet its burden in this respect.

[9] Because Evans did not object to his score on this basis at sentencing, the state did not have an opportunity to meet its burden to prove the offenses were properly included in the criminal-history score.

Accordingly, we conclude that reversing Evans's sentence and remanding is necessary for the state to develop the record. *See State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008) (concluding that if the state's evidence is insufficient to carry its burden of proof as to the defendant's criminal-history score, the proper remedy was to remand the matter for an opportunity for the state "to further develop the sentencing record so that the district court can appropriately make its determination."), *review denied* (Minn. July 15, 2008); *see also State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017) (holding that when a defendant's sentence is based on an incorrect criminal-history score, the district court must resentence him). Remand is the request of the parties and is appropriate as a matter of law.

Affirmed in part, reversed in part, and remanded.