STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1559
A19-1560

State of Minnesota,
Respondent,

vs.

Robert Brady Malone,
Appellant.

Filed August 31, 2020
Affirmed
Reilly, Judge

Beltrami County District Court
File Nos. 04-CR-19-139, 04-CR-18-1920

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

David L. Hanson, Beltrami County Attorney, Bemidji, Minnesota (for respondent)

Rodd A. Tschida, Minneapolis, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Johnson, Judge; and Reilly, Judge.

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

REILLY, Judge

This is a consolidated appeal from final judgment of conviction for violating a domestic abuse no contact order (DANCO) and from an order revoking probation for a disorderly conduct conviction. Appellant challenges his conviction for violating the

DANCO, arguing the district court erred by denying his motion to dismiss that charge on due-process grounds, the evidence he violated the DANCO was insufficient to proceed to trial, the district court judge was disqualified from presiding over the proceedings due to violations of the Code of Judicial Conduct, and there was insufficient evidence to sustain his conviction. Appellant also challenges the revocation of his probation because it was based on the DANCO violation. We affirm.

FACTS

In June 2018, respondent State of Minnesota charged appellant Robert Brady Malone with misdemeanor domestic assault in violation of Minn. Stat. § 609.2242, subd. 1(2) (2016), for an incident involving his wife. The district court issued a pretrial DANCO prohibiting contact between appellant and his wife.[1] Appellant pleaded guilty to an amended charge of misdemeanor disorderly conduct in July 2018.

The district court sentenced appellant on August 27, 2018. At the sentencing hearing, appellant requested that the district court dismiss the DANCO. The district court denied appellant's request, citing concerns about information contained in the domestic violence inventory and presentence investigation report (PSI). The district court sentenced appellant to 90 days in jail, stayed for one year, and placed appellant on probation. The district court ordered the department of corrections to supervise appellant and imposed

[1] "A domestic abuse no contact order may be issued as a pretrial order before final disposition of the underlying criminal case or as a postconviction probationary order." Minn. Stat. § 629.75, subd. 1(b) (2018). Here, the district court issued a pretrial DANCO at the time appellant was charged with misdemeanor domestic assault. The district court subsequently issued a probationary DANCO after sentencing appellant on the amended charge of disorderly conduct.

conditions of probation. The district court also stated that it would "require that [appellant] . . . comply with the conditions of a probationary domestic abuse no-contact order." The district court set a review hearing for September and concluded the hearing.

Because the probationary DANCO listed the wrong address for appellant's wife, the court issued an amended DANCO prohibiting contact between appellant and his wife on August 31, 2018. On September 4, 2018, court administration filed a "Notice of Filing" with respect to the amended DANCO. The notice included a "cc" designation, listing appellant and his attorney. The notice further indicated that "[a] true and correct copy of this notice has been served upon the parties pursuant to Minnesota Rules of Criminal Procedure, Rule 33.03."

In September 2018, appellant signed a probation agreement, which stated that he would "[c]omply with Domestic Abuse No Contact Order (DANCO)" and other conditions "as set forth by the Court in my sentence."

On January 13, 2019, a law enforcement officer conducted a traffic stop and found appellant in the same vehicle with his wife. The respondent charged appellant with violation of a DANCO pursuant to Minn. Stat. § 629.75, subd. 2(b) (2018). Due to the new charge, appellant's probation officer filed a probation violation report alleging that appellant failed to remain law abiding and violated the DANCO.

Appellant pleaded not guilty to the DANCO violation charge and requested a jury trial. In February 2019, appellant filed a motion to dismiss, arguing that there "exists insufficient evidence of awareness by [appellant] of an actual non-sentencing DANCO as

required by the elements of the offense charged."[2] (emphasis omitted). Appellant also argued that the case should be dismissed because "the possible attempt to issue a statutory (non-sentencing DANCO) during a sentencing hearing violated [appellant's] due process rights as applied to him."

The district court conducted a hearing to address the pretrial motions on February 26, 2019, the morning appellant's jury trial was scheduled to begin. Appellant testified that he was aware that the district court had imposed a pretrial DANCO, but was not aware at the time of his sentencing that there was a difference between a pretrial and probationary DANCO. Appellant testified that at the sentencing hearing for the disorderly-conduct charge, his attorney requested that the district court dismiss the DANCO, which he understood to mean the pretrial DANCO. Appellant further testified that he recalled the district court saying there would be a DANCO, but that he did not know what the conditions of the DANCO would be. Appellant explained that when the district court said there would be a DANCO, he thought "it was a term of the sentencing" and that he was not aware that a violation of the DANCO could result in criminal charges. He also claimed that he had never been served with a copy of a written DANCO and that at the time of the incident on January 13, he did not "believe" he had seen a copy of the DANCO. During appellant's testimony, the district court, in response to an objection, stated that it was giving both parties "free rein," so it could "hear [appellant's] testimony and . . . judge his credibility."

[2] Appellant styled this motion simply as a "motion to dismiss." We construe this portion of appellant's motion as a motion to dismiss for probable cause. *See* Minn. R. Crim. P. 11.04, subd. 1(a) ("The court must determine whether probable cause exists to believe that an offense has been committed and that the defendant committed it.").

Following appellant's testimony, the district court indicated that it did not find appellant's testimony credible that he did not receive the probationary DANCO. The district court stated that it was "troubled" and that it believed appellant "ha[d] not told the truth on the stand." The district court explained that it found appellant's testimony untruthful based on the court procedures in the county. The district court stated:

> It is the procedure in Beltrami County District Court, as I assume it is elsewhere, that the sentencing domestic abuse no-contact order are not only e-filed on any attorney that might be representing the defendant, but they are also mailed separately to the defendant. And if you want, at some point, the clerk to testify to that regard, perhaps the [respondent] is going to need to do that. But that is always done.
>
> And for [appellant] to sit up here and say he never received it [strains] credulity, to say the least. There were two orders after sentencing, yes. And they were only correcting her address, the address of the protected person.
>
> . . . .
>
> So for [appellant] to stand up here—or sit up here and testify, under oath, that he did not receive those DANCOs, I quite honestly do not find the least bit credible. And I am really concerned.

Appellant suggested that "[p]erhaps the [respondent] should produce some discovery that something was mailed." The district court responded, "Well, should we have the clerk testify . . . to rebut what I think might have been perjured testimony . . . ? . . . And my clerk can testify what our procedures are . . . . And if you want to hear the clerk testify about that under oath, we'll call her up. But I am very concerned." Appellant argued that the district court judge did not "get to decide who the [respondent's] witnesses are." The district court responded: "No. But I can decide that [appellant] is not credible and deny

[the] motion to dismiss . . . . I just want to make a record here, but I don't find [appellant's] testimony the least bit credible." The district court also stated: "[w]e do have evidence that [appellant's] attorney opened up the e-filing of the post-sentencing DANCO." After hearing arguments from the parties about appellant's probable-cause and due-process challenges, the district court denied appellant's motions to dismiss.

After the pretrial hearing lunch break, appellant notified the district court that he would be filing a motion to remove the district court judge for bias. The district court inquired what the misconduct allegations entailed and appellant's counsel explained that he was concerned, in part, because it had come to his attention that the district court had "personally, contacted a potential witness in the case." The district court responded that he had "[a]bsolutely not" contacted a potential witness. He explained that the county attorney had informed him that he "might be calling a court clerk." He explained further that

> the county attorney was inquiring downstairs about a court clerk being available to testify. My court clerk, who is in the courtroom this morning and is here now, told me at lunch time that the State Court Administrator's office had advised [the] local court administrator that a court clerk would not be able to testify . . . . So to that extent, did I talk with my court clerk currently? Yes, about that. And that is what I was informed. But did I talk with a potential witness downstairs? Absolutely not.

Another county attorney, D.F., who was not the prosecutor in appellant's case,[3] was present in court after the lunch break and explained that he had informed appellant's counsel that

[3] Prosecutor R.T. tried appellant's case while prosecutor D.F. assisted R.T. in preparing for trial.

he "had a conversation with [the court administrator K.L.] during the lunch hour. And [he] believed that [K.L.] indicated that she had contact over the phone with [the district court judge]." The district court responded, "[s]he did not; she did not." The district court then indicated that the prosecutor assigned to appellant's case had emailed him, and copied appellant's attorney, in order to inform the district court that he "did not know the name of a clerk" and that "is what [he] wanted to establish." The district court later clarified that the county attorney's email indicated that he was "still trying to figure out who to call [for trial]." The county attorney also clarified that "the purpose of the e-mail to the Court was to inform the Court of any particular name for the purpose of providing a jury instruction." The district court explained that there was some communication between N.S., a court operations associate who the judge referred to as his "court clerk," and the other clerks about who might be available to testify. The district court denied being involved in "procuring witnesses" for the respondent. He explained that "[the county attorney] was e-mailing us that he was still looking at what clerk might testify. And [N.S.] was just informing him that there was a possibility of a directive from State Court Administration that no clerk would be allowed to testify."

Later the same day, appellant filed a notice to remove the district court judge "for interest or bias of judge" pursuant to Minn. R. Crim. P. 26.03, subd. 14(3). Appellant alleged numerous violations of the Code of Judicial Conduct, occurring at several hearings, including the proceedings that occurred the morning of trial. Appellant alleged that the district court judge violated the code of conduct when he investigated facts outside the record at the pretrial hearing, assisted the respondent in procuring a witness to testify

against appellant at trial, and acted with bias toward appellant at prior proceedings. To support these allegations, appellant submitted various exhibits, including an email exchange between N.S. and the district court. The exchange appears to have occurred during the pretrial hearing on February 26.

> Court: Do you mail the DANCO's directly to the defendant, or to their attorney?
> N.S.: I'm just checking with [another clerk] on that. I think she filed them. She's going to check [the Electronic Filing System] to make sure they were served on [appellant's attorney]. Would have been mailed paper copy to the [defendant].
> Court: that's what I want to know. Would the document be mailed directly to the defendant?
> N.S.: Yes.
> Court: 100
> N.S.: E-served on his attorney.
> Court: 100% sure? mailed to him directly?
> N.S.: yes. We mail the sentencing order and DANCO to the Defendant. Always.

Another exhibit shows that N.S. emailed another court clerk, K.S., about the sentencing order and DANCO, inquiring whether the DANCO had been sent to appellant's attorney. K.S. responded that "he got it and DID open it" on "August 31st at 8:24 a.m." N.S. then said: "FYI- Clerks may be testifying about this. :)" N.S. subsequently sent the district court an email saying that the system showed that appellant's attorney received and opened the DANCO. N.S. also again noted that a paper copy would have been mailed to appellant. There is no evidence that the judge was aware of this email exchange or directed it.

There were also communications between N.S. and K.L., the court administrator, on the day of the pretrial hearing. N.S. sent an email to K.L. indicating that one of the

issues the defense raised was that appellant had not seen a copy of the DANCO that was issued after his sentencing. N.S. wrote, "It sounds like the [respondent] may want myself or another Court Clerk to testify as to what our procedures are here in Beltrami County." N.S. explained that the orders "in question were served thru [the Electronic Filing System] on the attorneys and a paper copy would be mailed to the Defendant." K.L. responded that clerk K could testify but that she was the one who greeted the jury and asked N.S. to ask the judge if that would be a conflict. N.S. responded that it would be a conflict, and it would also be a conflict for her to testify. N.S. asked, "How about [clerk D]? . . . Do you want to call her?" K.L. responded that clerk J would do it. Following this exchange, N.S. sent a message to the district court judge indicating that clerk J would be testifying as to the procedures.

Another exhibit includes email messages between N.S. and K.L., which occurred on the same day.

> N.S.: Judge wants you to call [prosecutor D.F.] and give him a heads up on this. They may want to discuss this over the lunch break.
> K.L.: [prosecutor D.F.]?
> N.S.: He's wondering if we are subpoena'd? Would someone have to then? Yes – [prosecutor D.F.].
> K.L.: I was never aware of a subpoena.
> N.S.: [prosecutor R.T.] is the Attorney in here – but [prosecutor D.F.] was working on getting a Clerk to testify – that's why the Judge said to give him a heads up.
> . . . .
> K.L.: Ok. Let me know what happens. He told me they would subpoena our most senior clerk which according to him was [clerk D].
> . . . .
> K.L.: When we get the subpena [sic] i need it sentto [sic] me ASAP.

> N.S.: Ok – I'm not sure who will get it – front counter or in court here. But I'll get it to you as soon as I can. [prosecutor D.F.] doesn't have anything in his hands.

Appellant also submitted transcripts of other proceedings that occurred prior to the pretrial hearing to support his claims that the district court judge acted with bias at those hearings.

In June 2019, the assistant chief judge denied appellant's motion to disqualify the district court judge from presiding over the remaining proceedings.[4]

In August 2019, the district court presided over a jury trial on appellant's DANCO violation charge. At trial, the district court admitted into evidence a certified copy of the pretrial DANCO entered by the district court in June 2018; a certified copy of the probationary DANCO entered by the district court on August 31, 2018; a certified copy of the notice of filing of the amended probationary DANCO, dated September 4, 2018; and a copy of the sentencing transcript from August 27, 2018. A person read the relevant portions of the transcript aloud to the jury, including appellant's request at the hearing that the DANCO be dropped and the district court's statement that it was going to require appellant to "comply with the conditions of a Domestic Abuse No-Contact Order."

Testimony at the trial established the following. Appellant's probation officer testified that the topic of the DANCO came up on "multiple occasions" during her interactions with appellant. She explained that the first time the DANCO arose was right

[4] The district court judge assigned to the case was the chief judge. Accordingly, the assistant chief judge heard and determined appellant's motion to remove for cause. *See* Minn. R. Crim. P. 26.03, subd. 14(3) ("A request to disqualify a judge for cause must be heard and determined by the chief judge of the district or by the assistant chief judge if the chief judge is the subject of the request.").

after sentencing when she and appellant reviewed the probation agreement. The probation officer testified that appellant was "frustrated with the fact that there was a DANCO that had been issued by the Court." She also testified that a month or two later, she met with appellant and they again spoke about appellant's frustrations with the DANCO. The probation officer further testified that on January 9, prior to appellant's arrest for violation of the DANCO, she and appellant reviewed his amended probation agreement which included the DANCO.

A Minnesota State Trooper testified that on January 13, 2019, he conducted a traffic stop of a vehicle after the driver failed to stop at a stop sign. The trooper identified appellant as the driver of the vehicle and, after entering appellant's information into his computer, the trooper learned that there was an active order for protection[5] in place. The trooper then identified the passenger of the vehicle as the protected party, appellant's wife.

Appellant did not testify and the defense did not present any other witnesses or evidence. At the conclusion of the trial, the jury found appellant guilty of violating the domestic abuse no-contact order.

In September 2019, the district court reinstated appellant on probation and imposed a "15-day probationary jail consequence" with respect to the probation violation resulting from appellant's conviction. The district court sentenced appellant to 15 days in the Beltrami County Jail for the DANCO violation conviction to run consecutive to the jail term imposed for the probation violation. This appeal follows.

[5] The trooper mistakenly referred to the DANCO as an order for protection.

D E C I S I O N

I. The district court did not violate appellant's procedural due process rights.

Appellant appears to argue that he was deprived of adequate procedural due process protection because the district court did not issue the probationary DANCO in a separate proceeding as required by statute.

Pursuant to Minn. Stat. § 629.75, subd. 1(b) (2018),

> A domestic abuse no contact order may be issued as a pretrial order before final disposition of the underlying criminal case or as a postconviction probationary order. A domestic abuse no contact order is independent of any condition of pretrial release or probation imposed on the defendant. A domestic abuse no contact order may be issued in addition to a similar restriction imposed as a condition of pretrial release or probation.

The statute further provides that "[a] no contact order under this section shall be issued in a proceeding that is separate from but held immediately following a proceeding in which any pretrial release or sentencing issues are decided." *Id.*, subd. 1(c) (2018).

We review de novo whether the government has violated a person's procedural due process rights. *State v. Moua*, 874 N.W.2d 812, 815 (Minn. App. 2016) (citing *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012)), *review denied* (Minn. Apr. 19, 2016). "Fundamentally, procedural due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *State v. Rey*, 905 N.W.2d 490, 494 (Minn. 2018) (quoting *Sawh*, 823 N.W.2d at 632).

Appellant relies on *State v. Ness*, 834 N.W.2d 177 (Minn. 2013), to support his argument that he was deprived of adequate procedural due process protections because the

district court failed to issue the DANCO in a separate proceeding. But *Ness* involved a facial challenge to the constitutionality of the statute, which is not the issue raised by appellant. Ness argued that "on its face, Minn. Stat. § 629.75, subd. 1, violates the Due Process Clauses of the United States Constitution and the Minnesota Constitution because it fails to provide adequate notice and opportunity to be heard in all of its applications." *Id*. at 182. The supreme court rejected Ness's argument, explaining that he "cannot show that the statute is unconstitutional in all of its applications because, on its face, the statute requires that the domestic-abuse-no-contact-order hearing be held '*immediately following* a proceeding in which any pretrial release or sentencing issues are decided.'" *Id*. at 183 (citation omitted). The supreme court explained that the "immediately following" language in the statute, "ensures that a defendant will receive notice of the conditions to be imposed and an opportunity to challenge those conditions in a constitutionally sufficient proceeding immediately before the court imposes a domestic abuse no contact order." *Id*. The supreme court concluded that the statute affords defendants adequate notice and an opportunity to be heard, and thus does not violate procedural due process.

In this case, appellant appears to focus his argument on whether the district court's failure to issue the DANCO in a "separate proceeding," as required by statute, violated his constitutional right to due process. Puzzlingly, appellant relies on *State v. Brewer*, No. A15-0653, 2016 WL 1081183, at *1 (Minn. App. Mar. 21, 2016), *review denied* (Minn. May 31, 2016) to support his argument. But in that case, this court rejected Brewer's argument that his conviction for violating a DANCO must be reversed because the DANCO was not issued in a separate proceeding. *Id*. at *2. We reasoned that while Minn.

Stat. § 629.75 unambiguously states that a DANCO shall be issued in a separate proceeding, the statute does not state that a DANCO is invalid if it is not issued in a separate proceeding and provides no remedy for a violation of the separate-proceeding requirement. *Id*. We explained that where a statute "provides no consequences for a court's failure to comply with the requirement," the requirement is "essentially directory and not mandatory." *Id.* (citation omitted). Thus, we concluded that Brewer was not entitled to relief. *Id*. at *3. While our decision in *Brewer* is not precedential, we find its reasoning persuasive here and conclude that appellant is not entitled to relief based on the district court's violation of the separate-proceeding requirement in Minn. Stat. § 629.75. *See State v. Roy*, 761 N.W.2d 883, 888 (Minn. App. 2009) (noting that unpublished opinions of the court of appeals are not precedential but that they may be persuasive (citations omitted)).[6]

We are mindful that the district court here, like the *Brewer* court, did not hold a "separate proceeding" when issuing the DANCO as required by Minn. Stat. § 629.75, subd. 1(c) (2018). But whether the district court issued the DANCO in a separate proceeding does not determine whether appellant's due process rights were violated. Here, at the beginning of the sentencing hearing, appellant requested that the district court dismiss the DANCO. The district court denied appellant's request to dismiss the DANCO, citing

[6] Appellant also relies on *State v. Milner*, No. A12-2137, 2013 WL 6152174, at *1 (Minn. App. Nov. 25, 2013) to support his argument. But *Milner* addressed whether the DANCO statute violates (1) procedural due process—the same argument we noted the supreme court rejected in *Ness*; (2) the void-for-vagueness doctrine of the due process clause; (3) the separation of powers doctrine under the Minnesota Constitution; and (4) substantive due process and the First Amendment. *Id*. at *2. Appellant does not raise the same issues here. As such, we conclude that *Milner* is not helpful for our analysis in this case.

concerns about information contained in the domestic violence inventory and PSI. The district court sentenced appellant, placed him on probation and imposed certain probationary conditions. The district court ordered the department of corrections to supervise appellant. The district court stated that it was "also going to require that [appellant] . . . comply with the conditions of a probationary domestic abuse no-contact order."

The district court provided adequate notice to appellant that it was imposing a DANCO and afforded appellant an opportunity to be heard with respect to the DANCO at the sentencing hearing. *See State v. Ness*, 819 N.W.2d 219, 226 (Minn. App. 2012) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (citation omitted)), *aff'd*, 834 N.W.2d 177 (Minn. 2013). As such, we conclude that the district court did not violate appellant's due process rights.

II. Appellant is not entitled to a new trial based on his allegations of judicial bias.

Appellant argues that the district court judge should have been removed for cause from presiding over his jury trial and asks this court to remand to the district court for a new trial. "[A] party may seek to disqualify a judge at any point in the proceeding for cause." *State v. Finch*, 865 N.W.2d 696, 701 (Minn. 2015). "A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct." Minn. R

Crim. P. 26.03, subd. 14(3).[7] "[A] judge must disqualify herself from any proceeding in which the judge's impartiality might reasonably be questioned." *State v. Mouelle*, 922 N.W.2d 706, 713 (Minn. 2019) (quoting Minn. R. Jud. Conduct 2.11). We review de novo whether a judge has violated the Code of Judicial Conduct. *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005).

"Our judicial system presumes that judges are capable of setting aside collateral knowledge they possess and are able to approach every aspect of each case with a neutral and objective disposition." *Id.* at 247. This is true despite the fact that judges must consider pretrial motions challenging certain evidence that may "reflect adversely on the defendant," may involve "highly prejudicial evidence," or may even include evidence that is "incriminating." *Mouelle*, 922 N.W.2d at 713. When determining whether disqualification is required, "the relevant question is whether a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *Id.* (quotation omitted).

[7] Appellant argues that the district court judge violated various rules of the Minnesota Code of Judicial Conduct. Specifically, appellant contends that the district court judge violated rule 2.2, which requires a judge to "perform all duties of judicial office fairly and impartially"; rule 2.3(A), which requires that a judge "perform the duties of judicial office . . . without bias or prejudice"; rule 2.9 which prohibits ex parte communications except under certain circumstances; rule 2.11, which requires a judge to disqualify herself or himself "in any proceeding in which the judge's impartiality might reasonably be questioned"; and rule 2.12 under which a judge "shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under [the] Code."

a. Investigation of facts outside the record

First, appellant argues that because the district court improperly investigated facts outside the record during the pretrial hearing on February 26, 2019, he is entitled to a new trial. Specifically, appellant points to the conversation the district court had with N.S. regarding the court procedures for serving DANCOs and the fact that N.S. communicated to the district court that appellant's counsel had opened the DANCO. Appellant relies on *Dorsey*, 701 N.W.2d at 238, to support his argument. But *Dorsey* is distinguishable.

In *Dorsey*, the district court held a bench trial and Dorsey was convicted of the crimes charged. *Id*. at 241. At the trial, a defense witness testified to the date of death of another individual. *Id*. at 242-43. However, the judge had knowledge of the individual's approximate date of death, investigated the date of the individual's death, and used the information obtained through that investigation in determining the credibility of the witness. *Id*. at 250. The issue on appeal was whether the judge, who had "knowledge relevant to determining the outcome of Dorsey's case," deprived Dorsey of his right to a fair trial and impartial finder of fact when the judge "(1) openly questioned the veracity of a factual assertion made by Dorsey's key witness; (2) independently investigated the fact; and (3) revealed the results of her investigation in open court." *Id.* at 249. The supreme court concluded that the judge's actions "deprived Dorsey of an impartial judge and finder of fact," and explained that "the judge was not only the referee of the proceeding, she was also the finder of fact." *Id.* at 250. And, because the judge was the finder of fact in the bench trial, "her independent investigation of a fact testified to by a defense witness was impermissible." *Id*.

Here, even if we assume the district court impermissibly investigated a fact during the pretrial hearing, he did not act as the finder of fact at appellant's trial. Instead, the district court judge sat only as the referee of the trial proceedings, while the jury acted as the finder of fact. And, after hearing all of the evidence, the jury found appellant guilty beyond a reasonable doubt. Moreover, appellant does not allege that the district court (1) committed any ethical violations at the jury trial itself, (2) revealed any results of the alleged pretrial investigation to the jury, or (3) revealed to the jury its conclusion that appellant's testimony at the probable cause hearing was not credible. As such, we conclude that *Dorsey* is distinguishable under the particular facts and procedural history of this case.

Our conclusion that appellant's allegations do not warrant a new trial is further supported by the supreme court's reasoning in *Mouelle*, 922 N.W.2d at 706. In that case, Mouelle's counsel had an ex parte conversation with the district court judge in chambers just before opening statements. *Id*. at 711. Mouelle's counsel "suggested to the district court that Mouelle might commit perjury." *Id*. at 712. Following a trial, at which Mouelle testified, the jury found Mouelle guilty of all charges. *Id*. On appeal, Mouelle asserted that "[c]ounsel's disclosure tainted the judge who was tasked with deciding evidentiary issues" and argued that structural error occurred because the judge, rather than recusing herself, presided over the jury trial after learning of Mouelle's potential perjury. *Id*. at 713. The supreme court determined that Mouelle failed to established that "the circumstances of [the] trial raised even the *appearance* of judicial partiality against him, much less actual bias" and that no structural error occurred. *Id*. at 712. The supreme court explained that "an objective, unbiased layperson with full knowledge of the facts and circumstances

would not question the district court's impartiality" given that counsel's concerns were never mentioned during the jury trial. *Id.* at 714. The supreme court also explained that "[c]ritically, the jury—the fact finder here—was never exposed to the concerns about Mouelle's testimony that Counsel raised during the ex parte conversation." *Id.* Similarly here, the jury was never exposed to the concerns about appellant's testimony noted by the district court at the pretrial hearing; and appellant did not testify at trial. Accordingly, we reject appellant's argument.

b. Assisted the respondent in obtaining witnesses

Second, appellant contends that he is entitled to a new trial because at the same pretrial hearing the district court impermissibly assisted the respondent in procuring a witness to testify against him. Appellant argues that the district court judge, after suggesting that the respondent may need someone to testify as to the court procedures regarding DANCOs, assisted the respondent in its search of a potential witness by contacting court administration and directing his court clerk to contact court administration. But these allegations are not supported by the record.

First, regarding appellant's allegations that the district court assisted the respondent when it suggested that the respondent call a court clerk to testify, the record shows the following. After appellant testified, the district court indicated that it did not find appellant's testimony credible based on the court procedures in the county. Appellant's attorney then responded, that "[p]erhaps the [respondent] should produce some discovery that something was mailed." The district court responded, "Well, should we have the clerk testify . . . to rebut what I think might have been perjured testimony . . . ? . . . And my clerk

can testify what our procedures are . . . . And if you want to hear the clerk testify about that under oath, we'll call her up. But I am very concerned." Based on this exchange, we are not persuaded that the district court acted inappropriately. The district court was merely further indicating to appellant its reasons for its credibility determination.

Second, with respect to appellant's allegation that the district court assisted the respondent in procuring a witness, the record does indicate that N.S. had communications with other court clerks about the possibility that one of them would be called to testify. But the district court repeatedly denied that it had contact with anyone in the court administration office. And there is no evidence in the record to support appellant's claim that the district court contacted court administration in an attempt to procure a witness for the respondent or that the district court directed N.S. to contact court administration in an effort to find an available witness. From our independent review of the record, it appears that the respondent's attorneys were attempting to procure a court clerk to be a witness at the trial and that the district court judge was attempting to learn the clerk's name for the purposes of telling the jury during voir dire the names of potential trial witnesses. As such, we reject appellant's claims as unsupported by the record.

c. Showed bias at prior hearings

Finally, appellant argues that the district court committed ethical violations at three different hearings, all of which occurred prior to the pretrial hearing on the DANCO violation charge.[8] Appellant complains that the district court judge committed ethical

[8] In addition to the rules of the Minnesota Code of Judicial Conduct cited earlier, appellant also contends that with respect to the prior hearings, the district court judge violated the

violations and failed to act impartially when he failed to provide a copy of the probation-violation report to appellant, warned appellant that his probation would be revoked if he continued to "show an intimidating attitude towards [his] female probation officer," discussed information contained in the police report for the incident resulting in the DANCO violation at a hearing, referred to the possible deportation of appellant's wife at a hearing, and indicated that he could not "condone" a "deliberate violation" of a DANCO. As noted previously, our judicial system "presumes that judges are capable of setting aside collateral knowledge they possess and are able to approach every aspect of each case with a neutral and objective disposition." *Dorsey*, 701 N.W.2d at 247. We are not persuaded that the district court did not approach this case with a "neutral and detached disposition." Further, we conclude that "a reasonable examiner, with full knowledge of the facts and circumstances" presented here would not question the judge's impartiality. *Mouelle*, 922 N.W.2d at 714.

Even if we agreed with appellant that this conduct constituted violations of the Code of Judicial Conduct, the only relief appellant requests is a new trial on the DANCO violation charge. As noted, appellant does not allege that the district court acted inappropriately or with bias at the jury trial. Appellant provides no legal authority, and we

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following rules: rule 1.2, which directs a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"; rule 2.5(A), which requires a judge to "perform judicial and administrative duties competently and diligently"; rule 2.6(A) which requires a judge to "accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law"; and rule 2.8(B), which requires a judge to be "patient, dignified, and courteous to litigants . . . and others with whom the judge deals in an official capacity."

are not aware of any, that would require this court to reverse a conviction following a jury trial based on alleged ethical violations occurring at various hearings prior to a jury trial. As such, we reject appellant's argument.

III. Appellant's probable cause challenge is irrelevant on appeal.

Appellant argues that the district court erred when it denied his pretrial motion to dismiss for lack of probable cause. But this court has held that a challenge to a probable cause determination is "irrelevant" on appeal from final judgment of conviction given that the "standard for the sufficiency of the evidence to support a conviction is much higher than probable cause." *State v. Holmberg*, 527 N.W.2d 100, 103 (Minn. App. 1995), *review denied* (Minn. Mar. 21, 1995). Because appellant was found guilty beyond a reasonable doubt by a jury, and we conclude, as detailed below, that the evidence was sufficient to support appellant's conviction, we decline to consider this argument.

IV. The evidence was sufficient to support appellant's conviction.

Appellant contends that the respondent's evidence at trial was not sufficient to sustain his conviction. Specifically, appellant argues that the evidence was insufficient to prove that he knew about the probationary DANCO. A person is guilty of violating a domestic abuse no-contact order if a person "knows of the existence of a domestic abuse no contact order issued against the person and violates the order." Minn. Stat. § 629.75, subd. 2(b).

When there is a challenge to the sufficiency of the evidence, appellate courts "carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the [factfinder] to reasonably conclude that the defendant

was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). On appeal, we review the evidence in the "light most favorable to the conviction." *State v. Carufel*, 783 N.W.2d 539, 546 (Minn. 2010) (citation omitted). And "[i]f 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 defendant was proven guilty of the offense charged, a reviewing court will not disturb its verdict." *State v. Norgaard*, 136 N.W.2d 628, 632 (Minn. 1965). When a conviction is based on circumstantial evidence, "the circumstances proved must be consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt." *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010).

Contrary to appellant's contention that the respondent relied solely on circumstantial evidence to prove that he knew of the existence of the DANCO, the respondent also presented direct evidence of appellant's knowledge of the DANCO. Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017). In contrast, direct evidence is "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Id.* While the copy of the DANCO filed with the court on August 31 and the subsequent notice of filing are circumstantial evidence since they require an inference to be made that appellant knew about the DANCO simply because they were filed with the court, the respondent also presented direct evidence of appellant's knowledge of the DANCO. Here, appellant's

probation officer testified about her discussions with appellant about the DANCO and the respondent offered into evidence the transcript of the sentencing hearing at which the district court issued the probationary DANCO. When viewing the direct evidence in a light most favorable to the conviction, it is sufficient to permit the jury to reach the verdict they did. When the circumstantial evidence is factored in and viewed together with the direct evidence, it is consistent only with the hypothesis that appellant knew about the DANCO and was therefore guilty of the crime charged. As such, we conclude the evidence is sufficient to sustain appellant's conviction.

V. We decline to reverse the revocation of appellant's probation.

Appellant argues that if his conviction for violating the DANCO is reversed, the probation violation must also be reversed because "it relied on the conviction." Appellant presents no alternative basis for relief with respect to the probation violation. Because we do not reverse appellant's conviction for violating the DANCO, we decline to reverse the revocation of appellant's probation.

Affirmed.