STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1008

State of Minnesota,
Respondent,

vs.

Lance Daniel Dewuske,
Appellant.

Filed June 21, 2021
Affirmed in part, reversed in part, and remanded
Ross, Judge

Chisago County District Court
File No. 13-CR-19-595

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

Janet Reiter, Chisago County Attorney, David M. Classen, Assistant County Attorney, Center City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Ross, Judge; and Rodenberg, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

ROSS, Judge

Lance Dewuske appeals from his judgments of conviction of and sentence for harassment and stalking, contending that his convictions were based on improperly admitted evidence about a Facebook friend request directed at the victim, that they rest on insufficient evidence, that they punish speech protected by the First Amendment, and that they violate his right not to be convicted and sentenced for lesser-included offenses. Dewuske raises additional but undeveloped arguments in a separate, supplemental brief. For the following reasons, we are persuaded only by his challenge based on lesser-included offenses, and we affirm in part, reverse in part, and remand.

FACTS

Lance Dewuske met K.H. in January 2019 when Dewuske began patronizing a Taylors Falls bar where K.H. worked. Dewuske became infatuated with K.H., but the attraction was not mutual. He left K.H. signs of his affection at the bar—a large tip, gifts, and a love letter. K.H. never reciprocated. Things came to a head the day Dewuske left a letter addressed to K.H. and her daughter, professing his love and announcing that he was "[t]hinking about [her] in his bed." Dewuske followed up by leaving voice messages on K.H.'s phone. K.H.'s boyfriend finally answered and told him to stop. But he did not stop.

K.H. reported Dewuske's conduct to a Chisago County sheriff's deputy. The deputy told Dewuske not to contact K.H., and Dewuske said that he would stop. But he did not. About two weeks later K.H. reported to the deputy that Dewuske continued to repeatedly telephone her number.

The district court issued a harassment restraining order (HRO) on March 25, 2019, and an amended order on May 1, prohibiting Dewuske from contacting K.H. or being within one-half mile of her home or within one block of her employment at the bar.

Dewuske continued to contact K.H. through various means. She received a Facebook friend request on May 19, 2019, from an account under the name, "Lance Dewuske." About a month and a half later, she saw Dewuske wave at her from a balcony across the street from her workplace. K.H. reported the encounter to a deputy, the deputy asked Dewuske if he had waved at K.H., and Dewuske told the deputy that he could "wave[] . . . at whoever he pleases."

The state charged Dewuske with one count of felony pattern of stalking, one count of gross misdemeanor stalking, and three counts of misdemeanor HRO violation. Minn. Stat. §§ 609.748, subd. 6(b), 609.749, subds. 2(2), 5(a) (2018). A jury found him guilty as charged. The district court entered judgments of conviction and sentenced Dewuske for all five offenses.

Dewuske appeals.

DECISION

Dewuske contends his convictions must be reversed because they were based on insufficient evidence and erroneously admitted evidence, violate the First Amendment in the manner the district court instructed the jury, and violate a statute prohibiting conviction and sentence for lesser-included offenses. Only his last argument prevails.

I

Dewuske argues that the district court abused its discretion by admitting two screenshots of the Facebook friend request as evidence that he violated the HRO. We review a district court's evidentiary rulings for an abuse of discretion. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). If the district court erroneously admitted evidence after an objection, we will reverse only if the error harmed the defense. *State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011). That is, we will correct an error that does not involve a constitutional right only if the defendant establishes that there is a "reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id.* (quotation omitted). We do not believe the district court improperly admitted the screenshots.

Dewuske specifically argues that the state failed to prove that he, rather than someone else, sent the friend request. But authorship was not assumed, it was debated and the subject of a factual dispute at trial. The prosecutor did not present the evidence to show, or argue to the jury that the evidence itself proved, that Dewuske sent the request. The screenshots instead corroborated K.H.'s testimony that she in fact received a friend request from an account bearing the name "Lance Dewuske." The question of whether Dewuske himself sent the request was a factual issue for the jury to determine in the context of deciding whether Dewuske committed a misdemeanor HRO violation. Dewuske's counsel argued the issue in precisely that context in his closing remarks to the jury, urging, "This information about the Facebook messages, she specifically even testified that she didn't know if it was him, she didn't check the email, didn't have a photograph, we don't have any information that this Facebook request . . . even occurred from Mr. Dewuske." The

fact that the question of authorship was an issue for the jury to decide might have been more clearly presented by a jury instruction expressly limiting the jury to use it in that fashion rather than rely on it as proof that Dewuske authored the request. But Dewuske asked for no limiting instruction and does not argue on appeal that failing to so instruct the jury was error. We see no abuse of discretion.

II

Dewuske next argues that the state presented insufficient evidence for the jury to find that he had the requisite *mens rea* for felony pattern of stalking. We carefully review the record to determine if the evidence, considered in the light favorable to the guilty verdict and giving due regard to the state's reasonable-doubt burden of proof, allowed the jury reasonably to find the defendant guilty. *State v. Gruber*, 864 N.W.2d 628, 636 (Minn. App. 2015). Someone who "engages in a pattern of stalking conduct with respect to a single victim . . . which the actor knows or has reason to know would cause the victim under the circumstances to feel terrorized or to fear bodily harm and which does cause this reaction on the part of the victim is guilty of a felony." Minn. Stat. § 609.749, subd. 5(a) (2018). The term "feel terrorized" means to "feel extreme fear." *State v. Franks*, 765 N.W.2d 68, 74 (Minn. 2009).

Dewuske acknowledges that K.H.'s testimony that she was very afraid and feared for her physical safety satisfies the requirement that Dewuske's conduct actually caused her to feel terrorized or fear bodily harm. He also recognizes that a defendant's mental state is ordinarily inferred from circumstantial evidence rather than proved by direct evidence. *See State v. Mattson*, 359 N.W.2d 616, 617 (Minn. 1984). But he contends that the

circumstantial evidence is insufficient to prove that he knew or had reason to know that his conduct would result in K.H.'s fear. The record defeats his argument.

The evidence supports the jury's inference, beyond a reasonable doubt, that Dewuske knew or should have known that his contact would cause K.H. to feel terrorized. Evaluating whether circumstantial evidence is sufficient, we first identify the circumstances proved, and then we determine whether the reasonable inferences drawn from those circumstances are consistent only with guilt, without deferring to the jury's inferences. *State v. Silvernail*, 831 N.W.2d 594, 598–99 (Minn. 2013). The circumstances proved point only to Dewuske's guilty mind. Dewuske knew that K.H. had responded to his repeated, unreciprocated romantic or sexual overtures by reporting his conduct to law enforcement. A reasonable person would know that fear precipitated the report. A deputy then told Dewuske not to contact K.H. again. A reasonable person would know that continued contact after a stern police warning would result in fear that is even more intensified than the fear that led to the initial report. Dewuske continued to contact K.H. repeatedly anyway. Dewuske knew that K.H. applied for and obtained an HRO based expressly on her having been "frightened" by Dewuske's repeated contact, which she saw as "threatening behavior." He knew that this included, among other things, the fact that he "sent [her] letters, mentioned [her] daughter in the letters, and indicated that he thought about [her] in bed." A reasonable person would know that continued contact with K.H. after being directed by police and then ordered by the court not to contact her would put her in even greater fear than she was already experiencing from the contact that occurred before those prohibitions. And Dewuske's *mens rea* is not derived purely from

circumstantial evidence; during one of his (more than 50) telephone calls to the Chisago County dispatcher center, Dewuske revealed *expressly* that he knew K.H. was in fear, saying to the dispatcher that K.H. is "only scared because [law enforcement] put that in her mind."

We apply these circumstances proved to Dewuske's conviction of felony pattern of stalking based on the three HRO violations. *See* Minn. Stat. § 609.749, subd. 5(b)(7) (2018). By the first time Dewuske engaged in any of the three HRO-violating contacts that supported that conviction, he knew all of the facts just summarized. Considering everything he knew alongside his continued violating behavior, any reasonable jury would *necessarily* conclude that Dewuske knew or should have known that his continued contact would cause K.H. to feel terrorized or fear bodily harm. The circumstances proved point only to guilt and therefore support the verdict.

III

The state correctly agrees with Dewuske's contention that the gross misdemeanor stalking and three misdemeanor HRO violations are lesser-included offenses of the felony pattern-of-stalking offense. The district court may convict a defendant "of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2018). The proof of the felony necessarily proves the underlying offenses. *Id.*, subd. 1(4). We therefore affirm only the felony conviction but reverse and remand for the district court to amend Dewuske's conviction and sentence accordingly.

Because we reverse the gross misdemeanor conviction on the included-offense ground, we do not consider Dewuske's argument challenging the district court decision

denying his request for a specific-intent jury instruction for that offense. Dewuske argues that the district court should have given a specific-intent jury instruction because the statute's allegedly negligence *mens rea* element imposes a facially overbroad restriction of his First Amendment rights. We decline to reach the argument, without prejudice to his opportunity to raise it again, if it becomes relevant. Dewuske also raises contentions in a supplemental brief—questioning his attorney's conduct, the prosecutor's conduct, and the truthfulness of trial testimony—but these lack legal arguments or any identified factual support in the record. We do not address them.

Affirmed in part, reversed in part, and remanded.