STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1753

State of Minnesota,
Respondent,

vs.

John Kevin Allensworth,
Appellant.

Filed September 9, 2013
Affirmed in part, reversed in part, and remanded
Worke, Judge

Polk County District Court
File No. 60-CR-10-982

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

Gregory A. Widseth, Polk County Attorney, Crookston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Chief Judge; and Toussaint, 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

WORKE, Judge

Appellant argues that the evidence was insufficient to sustain his conviction of engaging in a pattern of harassing conduct and that the district court erred by imposing sentences on this charge and on the eight misdemeanor convictions that show the pattern of harassing conduct. We affirm appellant's conviction, but reverse the misdemeanor sentences and remand to the district court for re-sentencing.

FACTS

Appellant John Kevin Allensworth and A.B. had been romantically involved for more than 14 years. In the last year of the relationship, A.B. stated that appellant "had become very controlling of me, obsessed with me. He was very manipulative, agitated most of the time, and I was miserable." A.B. informed appellant that she wanted no further contact with him; A.B. refused to talk on the telephone or in person with appellant and consistently told him that the relationship was over. A.B. became concerned because appellant "seemed not to take no for an answer."

On February 22, 2010, appellant went to A.B.'s workplace at a time when most of the staff was not there. Appellant hugged and kissed A.B., and A.B. told him to let go of her. Appellant responded by squeezing her tighter and asking, "Now what are you going to do about it?" A.B. said that she would have her co-worker call the police, and appellant released her. Shortly after this incident, appellant twice came to A.B.'s door and knocked. A.B. called the police, who spoke to appellant and instructed him not to contact A.B. On March 1, appellant again knocked on A.B.'s door; she contacted police,

who told her to apply for an order for protection (OFP). On March 2, 2010, A.B. applied for and received an emergency OFP, which prohibited appellant from contacting her by any means.

On March 16, 2010, appellant called A.B. on the telephone; she reported the incident to the police. While the police officer was taking the report, appellant called again. The officer spoke to appellant and reminded him that he was prohibited from contacting A.B. On March 24, 2010, A.B. returned to court because appellant was challenging the OFP. On that day, the parties agreed that the district court could issue a harassment restraining order (HRO), which prohibited appellant from contacting A.B. by any means, including through third parties.

On March 29, appellant called A.B.'s workplace and talked to an employee, asking her to tell A.B. to call him. On April 8, appellant called A.B. at her home. On April 10, appellant knocked on A.B.'s door, covering the peephole with his hand and identifying himself as "Hugh." A.B. recognized his voice and told him to go away. A.B. watched appellant waving at her through the peephole. On May 9, 2010, appellant called A.B. and identified himself as "Kevin." Later, appellant called a second time. After each of these incidents, A.B. contacted the police. Appellant was taken into custody and charged with one count of engaging in a pattern of harassing conduct[1], two counts of violating an OFP, and five counts of violating an HRO.

[1] In 2010, Minn. Stat. § 609.749, subd. 5, was amended to refer to a pattern of "stalking conduct," rather than a pattern of "harassing conduct." *See* 2010 Minn. Laws ch. 299, § 8. This amendment became effective on August 1, 2010. Appellant was charged in May 2010.

While appellant was in custody, on October 19, 2010, A.B. received a postcard from him, addressed to "Mr. and Mrs. John Allensworth," and referring to her as "dear wife." A.B. contacted the police. An additional charge of violation of an HRO was added. Before trial, appellant was civilly committed after a Rule 20 examination; he was ruled competent in June 2011, and trial followed in September 2011.

At trial on the nine charges, two police officers confirmed A.B.'s testimony and testified that they had both explained to appellant on more than one occasion that he could not contact A.B. Appellant did not testify and stipulated that he contacted A.B. five times while knowing that there was an active HRO prohibiting him from contacting A.B. Before trial, appellant dismissed his public defender and represented himself at trial, with the assistance of a standby attorney. Appellant called one witness, A.B.'s co-worker S.V., who testified that appellant called her and asked her to relay a message to A.B., which she refused to do. The jury found appellant guilty of all nine counts.

After his conviction, but before sentencing, appellant was once again civilly committed after a Rule 20 examination. In June 2012, criminal proceedings were reinstated, and appellant was sentenced to 17 months on the felony pattern-of-harassing-conduct charge; with credit for 586 days served, he had already completed this sentence. The district court also sentenced appellant to 90 days on each of the eight misdemeanor convictions, to be served concurrently. This appeal followed.

D E C I S I O N

Sufficiency of the evidence

Appellant challenges his conviction of engaging in a pattern of harassing conduct. *See* Minn. Stat. § 609.749, subd. 5 (2008). A person commits this offense by engaging in conduct that 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." *Id.* Appellant challenges the sufficiency of the evidence of only one element of this offense: whether he knew or had reason to know that his actions would terrorize the victim or cause her to fear bodily harm.

On a claim of insufficient evidence, we review the record in the light most favorable to the conviction to determine whether the evidence is sufficient to allow the jury to reach its verdict. *State v. Nelson*, 812 N.W.2d 184, 187 (Minn. App. 2012). We assume that the jury believed the state's witnesses and disbelieved contrary evidence. *Id.*

The determination of whether appellant knew or had reason to know that his actions terrorized A.B. or caused her to fear bodily harm is based on circumstantial evidence. When a verdict is based on circumstantial evidence, we apply a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, we identify the circumstances proved, deferring to the jury's acceptance and rejection of evidence, and construing the evidence in the light most favorable to the verdict. *Id.* at 598-99. Second, viewing the evidence as a whole, we determine whether the circumstances proved and any inferences drawn therefrom are consistent with any other reasonable hypothesis other

than guilt. *Id.* at 599. We do not defer to the jury's choice between reasonable inferences. *Id.*

A person is "terrorized" if he or she feels "extreme fear resulting from violence or threats." *State v. Franks*, 765 N.W.2d 68, 74 (Minn. 2009) (analyzing Minn. Stat. § 609.749, subd. 5(a)). The conduct need not amount to an express threat, but may be deemed threatening in context. *Id.* at 75. Additionally, "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." *Id.*

Here, the circumstances proved include the following: (1) A.B. consistently told appellant that she wanted no contact, both before and after she received an OFP and an HRO, and she never wavered from this position; (2) A.B. sought and obtained an emergency OFP and an HRO, alleging that she feared domestic abuse; (3) A.B. enforced every violation of the two orders by calling the police; (4) A.B. testified that she was frightened when appellant came to her workplace and squeezed her tightly; she was afraid of what would have happened if a co-worker had not been there; (5) appellant made a veiled threat during this incident: "Now what are you going to do about it?"; (6) appellant was informed by police on several occasions that he was prohibited from contacting A.B. by any means, but continued to do so, and he stipulated at trial that he knew about the orders and knew that he was prohibited from contacting A.B.; (7) appellant attempted on two occasions to contact A.B. by using a different name; and (8) while acknowledging that appellant had not been violent in the past, A.B. testified that she was frightened because appellant would not take no for an answer and because of the

way "this matter was progressing." The jury rejected appellant's position that he was trying to help A.B. or that he deserved a better explanation about why she terminated their relationship.

Appellant argues that A.B. testified that their relationship had never been violent and that she described it as "good" for most of the years that they dated. Appellant asserts that in the context of their non-violent and non-threatening relationship, the evidence is insufficient to show that he knew or should have known that his actions, which he described as "clearly annoying and concerning to A.B.," would terrorize her. Appellant relies on *Franks*, in which the defendant had physically abused and raped the victim, and had threatened to kill her. *Id.* The supreme court concluded that the letters the defendant sent to the victim, her family, and a friend should be viewed in the context of this background of domestic abuse. *Id.* Here, there is not the same background of violence or abusive behavior.

Although this matter presents a closer case than *Franks* because of the lack of underlying violence, the sheer number of contacts, particularly when A.B. consistently rejected contact and enforced the OFP and HRO, suggest that appellant intended to or knew that his actions would terrorize A.B. It is not reasonable to hypothesize that appellant was merely concerned about A.B. or wanted to talk with her, particularly when he mailed her a postcard while he was in jail after arrest for violating the orders. We acknowledge that this matter is complicated by appellant's severe mental illness, but he made no claim at trial and no claim on appeal that he is not guilty by virtue of being mentally ill. There is sufficient evidence to sustain the verdict.

Sentencing

Appellant argues that the district court erred by sentencing him on the felony pattern-of-harassing-conduct conviction and on the eight underlying misdemeanor convictions. The state concedes that if appellant's conviction for a pattern of harassing conduct is affirmed, the sentences for the underlying misdemeanor convictions should be vacated, because Minn. Stat. § 609.035, subd. 1 (2010) prohibits the imposition of multiple sentences for conduct arising out of a single behavioral incident. We agree.

A single behavioral incident is one in which there is a unity of time and place. *State v. Mullen*, 577 N.W.2d 505, 511 (Minn. 1998). But a single behavioral incident can also be defined by "a defendant's singleness of purpose, i.e., whether the defendant was motivated by a desire to obtain a single criminal objective." *State v. Johnson*, 653 N.W.2d 646, 651 (Minn. App. 2002) (quotation omitted). Here, the pattern offense requires proof of two or more acts of harassing conduct directed at a single victim within a five-year period. Minn. Stat. § 609.749, subd. 5. The underlying offenses are an element of the more serious pattern-of-harassing-conduct charge. Sentencing on these offenses would violate the purpose of section 609.035: "to protect a defendant convicted of multiple offenses against unfair exaggeration of the criminality of his conduct." *Mullen*, 577 N.W.2d at 511. We therefore reverse appellant's sentences on the eight misdemeanor convictions and remand this matter to the district court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.