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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1097**

State of Minnesota,
Respondent,

vs.

Douglas Frederick Gratz,
Appellant.

**Filed April 17, 2017
Affirmed
Johnson, Judge**

Watonwan County District Court
File No. 83-CR-16-47

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Stephen Lindee, Watonwan County Attorney, St. James, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A Watonwan County jury found Douglas Frederick Gratz guilty of stalking, making threats of violence, and obstructing legal process. He argues that the evidence is

insufficient to support his conviction of stalking, that the district court erred by not instructing the jury on the defense of voluntary intoxication, and that the prosecutor committed misconduct in closing argument. We affirm.

FACTS

On January 25, 2016, Gratz visited the offices of Watonwan County Human Services while visibly intoxicated. When he arrived in the lobby, he asked to speak with his financial-services worker, M.L. When informed that M.L. was not in her office, Gratz became agitated and verbally abusive. A few minutes later, when M.L. appeared behind the counter, Gratz pounded on the glass above the counter with a closed fist and asked whether the glass was bulletproof. He was combative and belligerent and accused M.L. of stealing his money. He said to her, among other things, “go f**k yourself.”

The receptionist called law enforcement. Gratz made additional vulgar statements and left the building. Two law-enforcement officers found him approximately five to ten minutes later. While they drove him to the law enforcement center, Gratz said several times that he would kill one of the officers.

Two days later, the state charged Gratz with five offenses: (1) felony stalking, in violation of Minn. Stat. § 609.749, subds. 2(1), 4(b) (2014), based on his conduct toward the employees of Watonwan County Human Services; (2) making a threat of violence, in violation of Minn. Stat. § 609.713, subd. 1 (Supp. 2015), based on his conduct toward the employees of Watonwan County Human Services; (3) making a threat of violence, in violation of Minn. Stat. § 609.713, subd. 1, based on his conduct toward a police officer in the squad car; (4) gross-misdemeanor assault in the fourth degree, in violation of Minn.

Stat. § 609.2231, subd. 1 (2014), based on his conduct toward a police officer while being arrested; and (5) gross-misdemeanor obstructing legal process, in violation of Minn. Stat. § 609.50, subd. 1(2) (2014), based on his conduct toward a police officer in the squad car. Before trial, the state voluntarily dismissed count 4.

The case was tried in one day in March 2016. The state called six witnesses: four employees of Watonwan County Human Services, who testified about Gratz's conduct and statements while in the lobby of their offices, and two law-enforcement officers, who testified about Gratz's conduct and statements while in the squad car. Gratz did not testify. The jury found Gratz guilty on all four counts. Gratz filed a post-trial motion for judgment of acquittal on counts 1 and 2, which the district court denied.

The district court imposed concurrent sentences of 45 months of imprisonment on count 1, 30 months of imprisonment on count 3, and 365 days of jail time on count 5. The district court did not impose a sentence on count 2. Gratz appeals.

D E C I S I O N

I. Sufficiency of the Evidence of Stalking

Gratz first argues that the evidence is insufficient to support his conviction on count 1, in which the state alleged that he engaged in stalking at the offices of Watonwan County Human Services.¹

¹Gratz also argues that the evidence is insufficient to support his conviction on count 2, in which the state alleged that he made threats of violence against employees of Watonwan County Human Services. But the district court did not impose a sentence on count 2. A defendant may pursue a direct appeal “from any adverse final judgment.” Minn. R. Crim. P. 28.02, subd. 2(1). “A final judgment within the meaning of these rules occurs when the district court enters a judgment of conviction and imposes or stays a sentence.”

Stalking is defined by statute to mean “engag[ing] in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim.” Minn. Stat. § 609.749, subd. 1 (2014). There are seven different ways a person may commit stalking. Minn. Stat. § 609.749, subd. 2 (2014). In this case, the state alleged that Gratz committed stalking by “directly or indirectly . . . manifest[ing] a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act.” Minn. Stat. § 609.749, subd. 2(1). The unlawful act that is the predicate offense must be unlawful for reasons that are independent of the stalking offense. *See State v. Pegelow*, 809 N.W.2d 245, 251 (Minn. App. 2012) (applying prior version of harassment and stalking statute, Minn. Stat. § 609.749, subs. 1-2(a) (2008)).

When reviewing whether there is sufficient evidence to support a conviction, this court undertakes a “painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient” to support the

Id. “The record of a judgment of conviction must contain,” among other things, the “sentence.” Minn. R. Crim. P. 27.03, subd. 8. Accordingly, if a defendant is found guilty of an offense but the district court has neither imposed a sentence nor stayed imposition of a sentence, the defendant has not been convicted of that offense and, accordingly, does not have a right to pursue a direct appeal with respect to that offense. *See State v. Hoelzel*, 639 N.W.2d 605, 609-10 (Minn. 2002) (holding that verdict of guilt, without recorded judgment of conviction, is not final, appealable judgment); *State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (declining to address sufficiency-of-evidence argument with respect to counts on which defendant was found guilty but not formally adjudicated or sentenced). Thus, we will not consider Gratz’s sufficiency-of-the-evidence argument as it relates to count 2. If Gratz were to be sentenced on count 2 in the future, he would have an opportunity at that time to pursue a direct appeal from the adverse final judgment with respect to that offense. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). We “will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Ortega*, 813 N.W.2d at 100.

The parties agree that the conviction on count 1 rests on circumstantial evidence and that we should apply the standard of review that is appropriate for circumstantial evidence. When reviewing a conviction based on circumstantial evidence, this court applies a two-step analysis to determine the sufficiency of the evidence. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we “identify the circumstances proved.” *Id.* (citing *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). “In identifying the circumstances proved, we assume that the jury resolved any factual disputes in a manner that is consistent with the jury’s verdict.” *Id.* (citing *Andersen*, 784 N.W.2d at 329). Second, we “examine independently the reasonableness of the inferences that might be drawn from the circumstances proved” and “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotations omitted). We must consider the evidence as a whole and not examine each piece of evidence in isolation. *State v. Taylor*, 650 N.W.2d 190, 201 (Minn. 2002).

At the first step of the analysis, we must identify the circumstances the state proved that might be relevant to whether Gratz manifested a direct or indirect intent to injure M.L.

by the commission of an unlawful act. The following circumstances are relevant: Gratz pounded on the glass separating him from M.L. and asked whether the glass was bulletproof. Gratz accused M.L. of stealing his money. Gratz was combative, aggressive, and belligerent. Gratz told M.L. she “could go f**k [her]self.” The persons behind the glass testified that it was a “very serious” situation and that they felt “scared” and “concerned for [the] safety” of other persons in the area.

At the second step of the analysis, we “examine independently the reasonableness of the inferences that might be drawn from the circumstances proved” and “determine whether the circumstances proved are consistent with guilt.” *Moore*, 846 N.W.2d at 88 (quotations omitted). The state contends that the circumstances proved support an inference that Gratz manifested a purpose or intent to injure M.L. by committing an assault. The term “assault” is defined by statute to mean “(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another.” Minn. Stat. § 609.02, subd. 10 (2014). We agree with the state that a reasonable inference from the circumstances proved is that Gratz intended either to cause fear in others of immediate bodily harm or death or to inflict or attempt to inflict bodily harm on another.

We must also determine whether the circumstances proved are “inconsistent with any rational hypothesis except that of guilt” on the charge of stalking. *Moore*, 846 N.W.2d at 88 (quotation omitted). Gratz contends that the circumstances proved are consistent with a joke, a comment made solely due to intoxication, a comment made in a state of transitory anger, or a comment that was meant to assure the persons behind the glass that they were

safe. Each of these hypotheses is inconsistent with the circumstances proved, which includes the fact that the persons behind the glass were fearful. Their fear is inconsistent with a joke, a harmless drunken comment, or a comment that is meant to assure them of their safety. Accordingly, the circumstances proved are inconsistent with a rational hypothesis that Gratz is not guilty.

Thus, the evidence is sufficient to support Gratz's conviction of stalking.

II. Voluntary-Intoxication Instruction

Gratz next argues that the district court erred by denying his request for a jury instruction on the defense of voluntary intoxication with respect to the stalking charge.

A defendant must satisfy three requirements in order to be entitled to a jury instruction on voluntary intoxication: “(1) the defendant must be charged with a specific-intent crime; (2) there must be evidence sufficient to support a jury finding, by a preponderance of the evidence, that the defendant was intoxicated; and (3) the defendant must offer intoxication as an explanation for his actions.” *State v. Torres*, 632 N.W.2d 609, 616 (Minn. 2001); *see also State v. Wilson*, 830 N.W.2d 849, 854-57 (Minn. 2013). We apply an abuse-of-discretion standard of review to a district court's denial of a request for a voluntary-intoxication instruction. *Torres*, 632 N.W.2d at 616.

Gratz initially requested a voluntary-intoxication jury instruction at the outset of trial. The district court reserved ruling until the completion of the evidentiary phase of trial. At the instructions conference, Gratz renewed his request for the instruction. The district court denied the request on the ground that Gratz had not satisfied the third requirement because he had not “offered intoxication as an explanation for his actions.”

Gratz contends that the district court erred in its analysis of the third requirement. In response, the state argues that Gratz was not entitled to the instruction because he could not satisfy either the first or the third requirement. With respect to the first requirement, the state contends that stalking is not a specific-intent crime. The statute on which the state relies provides as follows:

No proof of specific intent required. In a prosecution under this section, the state is not required to prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated, or except as otherwise provided in subdivision 3, paragraph (a), clause (4), or paragraph (b), that the actor intended to cause any other result.

Minn. Stat. § 609.749, subd. 1a (2014). Because the exceptions in this paragraph are inapplicable, the state is correct that stalking is not a specific-intent crime.

At a glance, the quoted statute might appear to be in conflict with a case cited by Gratz. In *State v. Orsello*, 554 N.W.2d 70 (Minn. 1996), the supreme court stated “that Minn. Stat. § 609.749 (1993), which defines the crime of stalking, requires specific intent.” *Id.* at 76. But that statement in *Orsello* no longer is true because the legislature amended section 609.749 in 1997 by adding the statutory text that is quoted above. 1997 Minn. Laws ch. 96, § 7, at 700. Accordingly, stalking now is not a specific-intent crime, which means that Gratz did not satisfy the first requirement of the *Torres* test. In light of that conclusion, we need not consider whether Gratz satisfied the third requirement.

Thus, the district court did not err by denying Gratz’s request for a jury instruction on the defense of voluntary intoxication.

III. Prosecutorial Misconduct

Gratz last argues that the prosecutor committed misconduct by misstating the law in his closing argument. Gratz's argument is based on the following excerpt, which we have highlighted in the same manner in which Gratz highlighted it in his brief:

Now, I want to mention that in this threats of violence — and actually in the stalking instruction — there are It's kind of a subdivision where they talk about the elements to second degree assault, third degree assault, and second degree murder. That's essentially to help you understand what the crime of violence is that he's threatening. *None of those elements need to be proven as far as the, kind of the — or the underlying type of crime.* We are only talking about the threatening language, and *those are more of just a guideline for you to follow.* (Emphasis added.)

Gratz did not object to the prosecutor's alleged misstatement when it occurred. Accordingly, this court applies a modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail, Gratz first must establish that there is an error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If Gratz were to satisfy that burden, the state would need to show that the error did not affect Gratz's substantial rights, *i.e.*, that “there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *Id.* (quotations omitted). If we conclude that any requirement of the plain-error test is not satisfied, we need not consider the other requirements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012). We will reverse a conviction on the grounds of prosecutorial misconduct only if the misconduct, “when considered in light of the whole trial, impaired the defendant's right to a fair trial.” *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

Gratz contends that the prosecutor misstated the law because the state is required to prove all elements of an offense beyond a reasonable doubt, but the prosecutor characterized the jury instructions as mere guidelines. Gratz further contends that, with respect to the stalking charge in count 1, the state must prove that Gratz manifested an intention to commit the underlying act of second-degree assault and, with respect to the threat-of-violence charge in count 3, the state must prove that Gratz threatened to commit an act of violence. Gratz contends that the prosecutor's misstatement might have caused the jury to believe that the state did not need to prove the predicate offenses.

Gratz cannot establish that the prosecutor engaged in misconduct that rises to the level of plain error. The prosecutor organized his closing arguments by talking about the four charges in numerical order and the elements of each charge in numerical order. The excerpt quoted above is from the prosecutor's argument concerning the first element of count 2, which is the count for which there is no conviction. *See supra* at 4 n.1. The prosecutor did not make a similar statement with respect to either count 1 or count 3. Even so, the highlighted portion of the argument refers to the predicate offense, not the charged offense. The prosecutor did make a passing reference to the stalking charge in count 1, but the reference was very brief. When considered as a whole, the prosecutor's closing argument did not plainly misstate the law in a way that might cause a jury to misunderstand the elements of count 1 or count 3.

Thus, the prosecutor did not plainly commit misconduct in his closing argument.

Affirmed.