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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1392**

State of Minnesota,
Respondent,

vs.

David Franklin Bentley,
Appellant.

**Filed June 25, 2018
Affirmed
Larkin, Judge**

Anoka County District Court
File No. 02-CR-16-7717

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

Anthony C. Palumbo, Anoka County Attorney, Robert I. Yount, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of violating a domestic-abuse-no-contact order (DANCO), arguing that the evidence was insufficient to sustain his conviction, the prosecutor engaged in misconduct, and the district court improperly limited his cross-examination of the state's witnesses. He also challenges his sentence, arguing that the district court erred by including a custody point in his criminal-history score. We affirm.

FACTS

Respondent State of Minnesota charged appellant David Franklin Bentley with a felony-level DANCO violation, alleging that in 2016, he left several text messages and a voicemail message for E.O., the mother of his child, in violation of an existing DANCO. The case was tried to a jury.

At trial, the state introduced a copy of the DANCO as an exhibit. A notation on the DANCO indicated that Bentley “was served a copy of this Order on this 16 day of August, 2016. By BS (initials).” The state called Coon Rapids Police Officer Cameron Gustafson, who testified that based on his approximately ten years of experience, he believed that an individual would typically be served a DANCO “right there in court.”

The jury found Bentley guilty of violating the DANCO, and the district court sentenced him to serve 33 months in prison. Bentley appeals.

DECISION

I.

Bentley contends that the evidence was insufficient to sustain his conviction. When considering a challenge to the sufficiency of the evidence to sustain a conviction resulting from a jury trial, this court conducts a careful “review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict.” *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010) (quotation omitted). This court will not disturb the jury’s verdict if, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, the jury could reasonably conclude that the defendant was proved guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

“[A] person who knows of the existence of a domestic abuse no contact order issued against the person and violates the order is guilty of a [crime].” Minn. Stat. § 629.75, subd. 2 (2016). The state must prove that the defendant “was aware that his behavior was prohibited by the order.” *State v. Watkins*, 820 N.W.2d 264, 268 (Minn. App. 2012), *aff’d on other grounds*, 840 N.W.2d 21 (Minn. 2013). Bentley’s sufficiency challenge is limited to an assertion that the evidence was insufficient to prove that he knew of the existence of the DANCO.

The state offered the DANCO and the testimony of Officer Gustafson to prove that Bentley knew of the DANCO’s existence. Because an inferential step was required for the jury to conclude that Bentley knew of the DANCO based on this evidence, we apply the

circumstantial-evidence standard of review.¹ See *State v. Al-Naseer*, 788 N.W.2d 469, 473-75 (Minn. 2010) (applying circumstantial-evidence standard to individual element of a criminal offense that was proved by circumstantial evidence).

A conviction based on circumstantial evidence will be affirmed if the circumstances proved are consistent with the hypothesis that the defendant is guilty and inconsistent with any rational hypothesis except that of guilt. *Id.* at 473. Under the circumstantial-evidence standard, we first determine the circumstances proved. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). When evaluating the circumstances proved, we “disregard evidence that is inconsistent with the jury’s verdict.” *Harris*, 895 N.W.2d at 601. “[E]ven though verdicts based on circumstantial evidence may warrant stricter scrutiny, [appellate courts] still construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the State’s witnesses and disbelieved the defense witnesses.” *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008). After identifying the circumstances proved, we determine whether they are consistent with guilt and inconsistent with any rational hypothesis other than guilt. *Loving*, 891 N.W.2d at 643. We will not reverse a conviction based on circumstantial evidence unless there is a reasonable inference other than guilt. *Id.*

¹ Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *State v. Hokanson*, 821 N.W.2d 340, 354 n.3 (Minn. 2012) (quotation omitted). Direct evidence is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007) (quotation omitted). Circumstantial evidence always requires an inferential step that is not required with direct evidence. *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017).

“[P]ossibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable.” *State v. Stein*, 776 N.W.2d 709, 719 (Minn. 2010) (quotation omitted). Appellate courts “will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). “[A] defendant is not relying on conjecture or speculation when the defendant . . . points to evidence in the record that is consistent with a rational theory other than guilt.” *Al-Naseer*, 788 N.W.2d at 480 (quotation omitted).

Bentley argues that “the circumstances proved do not eliminate the inference that the order was issued on Aug. 16, but [he] was not served with the DANCO and did not know of its existence.” When determining the circumstances proved, we “defer, consistent with our standard of review, to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.” *Id.* at 473 (quotation omitted). We therefore treat the DANCO’s notation regarding service as establishing that the DANCO was in fact served on Bentley.

Bentley also argues that “no evidence” was provided to show that he knew of the DANCO. This argument ignores the notation on the face of the DANCO indicating that it was served on Bentley. It also ignores Officer Gustafson’s testimony that individuals are typically served with a copy of a DANCO in court. This evidence tends to show—albeit circumstantially—that Bentley knew about the DANCO.

In sum, service of the DANCO on Bentley is a circumstance proved. This circumstance is consistent with an inference that Bentley knew of the DANCO, which is consistent with guilt. Bentley does not point to any evidence in the record suggesting that

he did not know of the DANCO's existence despite having been served with the DANCO. Thus, he does not point to evidence in the record that is consistent with a rational theory other than guilt. Because Bentley's argument for reversal is based on mere conjecture, we do not disturb the jury's verdict.

II.

Bentley contends that the prosecutor engaged in misconduct during closing argument by misstating evidence and arguing facts not in evidence. Specifically, Bentley argues that the prosecutor incorrectly argued, over his objection, that he was taken to court, that he appeared in court, and that the DANCO was served on him.

“Prosecutors are allowed to argue all reasonable inferences from evidence in the record. It is unprofessional misconduct, however, for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.” *State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016) (quotation omitted). The DANCO that was admitted as evidence at trial, in conjunction with Officer Gustafson's testimony, supports a reasonable inference that Bentley was served the DANCO in court. Thus, the challenged argument did not constitute prosecutorial misconduct.

III.

Bentley contends that the district court abused its discretion by limiting his cross-examination and thereby preventing him from presenting a complete defense.

“[T]he district court possesses wide latitude to impose reasonable limits on cross-examination of a prosecution witness.” *State v. Tran*, 712 N.W.2d 540, 550 (Minn. 2006) (quotation omitted). “[T]he main purpose of cross-examination under the Confrontation

Clause is to allow the defendant an opportunity to reveal bias, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.” *Id.* at 551 (quotation omitted). The district court has the discretion to limit cross-examination to avoid “harassment, decision making on an improper basis, confusion of the issues, and cross-examination that is repetitive or only marginally relevant.” *State v. Lanz-Terry*, 535 N.W.2d 635, 639 (Minn. 1995). A district court’s decision to limit cross-examination is reviewed for an abuse of discretion. *Tran*, 712 N.W.2d at 550.

During cross-examination, Bentley’s attorney asked E.O. if she was the payee on Bentley’s disability checks. The state objected. Bentley’s attorney responded that the question went to E.O.’s “motivation and bias as far as calling the police on this matter altogether.” The district court clarified: “[Y]our theory is: Sure. He had contact with her in violation of that DANCO but her motivation to call the police on this particular time was financial. Is that what you are getting at?” Bentley’s attorney responded, “Yes.” The state argued that the question was improper because “[t]he fact that she is a payee . . . is completely irrelevant.” The district court stated: “If [Bentley] violated the law, there is no good reason for it. The fact that [E.O.] is a payee isn’t an exception under [the DANCO].”

Bentley argued that the line of questioning would assist the jury in evaluating the credibility of E.O. because she had a financial incentive for her actions. The district court ultimately sustained the state’s objection, interpreting the question as advancing a theory that Bentley “had a good reason [for violating the order], or he [had] relied on her not

objecting in the past.” The district court reasoned that the question was an inappropriate attempt at jury nullification.

Although a jury has “the power of lenity—that is, the power to bring in a verdict of not guilty despite the law and the facts,” the district court “may bar a defense attorney from arguing jury nullification.” *State v. Perkins*, 353 N.W.2d 557, 561-62 (Minn. 1984) (quotation omitted). And the district court “may limit the scope of a defendant’s arguments to ensure that the defendant does not confuse the jury with misleading inferences.” *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). Because Bentley’s cross-examination could have incorrectly suggested that contacting E.O. to obtain his disability payment was a valid excuse to violate the DANCO, it could have confused the jury with a misleading inference. Moreover, Bentley does not explain why E.O.’s payee status created financial bias. Under the circumstances, Bentley fails to establish that the district court abused its discretion by prohibiting cross-examination regarding E.O.’s status as Bentley’s payee.

Bentley also argues that the district court improperly limited his cross-examination of Officer Gustafson. The district court sustained an objection when Bentley asked the officer whether E.O. had told him that she had contacted Bentley. Afterward, the district court explained:

There [were] a few times where [the state] objected on the basis of [the earlier discussion about improper motivation]. I think, as I see [it,] the basis is relevance. I think that is the way to articulate it. . . . I would say relevance would be an identifiable issue for me.

Bentley argues that “if [the] jurors had learned of other contact between [him] and E.O. and that E.O. did not feel threatened by the voicemail, [they] would have acquitted

[him].” Neither the occurrence of other uncharged contact between Bentley and E.O. nor E.O.’s reaction to the voicemail underlying the charge was relevant. Neither is an element of the crime, and neither establishes a defense to the charge. Cross-examination regarding these topics could therefore confuse the jury with misleading inferences. The district court did not abuse its discretion by limiting cross-examination on these topics.

IV.

Bentley contends that we should reverse his sentence because the district court erroneously included a custody point in his criminal-history score. The district court’s determination of an offender’s criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

In 2014, Bentley was sentenced for a controlled-substance offense. The district court imposed a 19-month sentence, stayed execution of the sentence for three years, and ordered a three-year term of supervised probation, beginning on November 7, 2014, and ending on November 7, 2017. However, the district court discharged Bentley from probation on November 7, 2014. The district court included a custody point in Bentley’s criminal-history score, based on this controlled-substance sentence.

The applicable sentencing guidelines provision instructs: “Assign a custody point if the offender is discharged from probation but commits an offense within the initial period of probation pronounced by the court. **Do not** assign a point if the probation is revoked and the offender serves an executed sentence.” Minn. Sent. Guidelines 2.B.2.a.(4) (2016).

Bentley argues that because he was never actually placed on probation, he was not discharged early from probation and should not have received a custody point. The state counters:

The sentencing guidelines assign a custody point when the offender is . . . (1) discharged from probation, but (2) commits an offense within the initial *period of probation pronounced* by the court. This language clearly and unambiguously instructs sentencing courts to look at the probationary period as it was initially pronounced in sentencing, regardless of how much time was served before discharge. . . . [I]t is the initial probation sentence that determines the operative probationary period.

We interpret the sentencing guidelines *de novo* and apply rules of statutory construction when doing so. *State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012). If the language of a statute is plain and unambiguous, it is presumed to manifest legislative intent, and we must give it effect. *Id.* We do not discern ambiguity in the language of the applicable sentencing guidelines provision. We therefore apply it as written.

It is clear that the district court pronounced a three-year period of supervised probation for Bentley on November 7, 2014. The district court discharged Bentley from probation the same day. Under the plain language of the relevant guidelines provision, the district court here properly included a custody point in Bentley's criminal-history score because he committed the sentencing offense in 2016, which was within the initial three-year period of probation pronounced by the district court.

This court has consistently upheld the inclusion of a custody point when the defendant was placed on probation, discharged from probation early, and committed a new offense during the initial probationary period pronounced by the court. *See, e.g., State v.*

Wenneson, No. A10-0675, 2011 WL 1364245, at *10-11 (Minn. App. Apr. 12, 2011) (concluding that custody point was proper when sentencing offense was committed within the initial five-year probationary term despite discharge of probation one year after sentencing); *State v. Washington*, Nos. A08-0297, A08-1553, 2009 WL 2225211, at *1-2 (Minn. App. July 28, 2009) (concluding that custody point was proper when sentencing offense was committed within the initial five-year probationary period despite discharge of probation less than a year after sentencing).

Although these unpublished opinions are not precedential, they are persuasive. See Minn. Stat. § 480A.08, subd. 3(c) (“Unpublished opinions of the Court of Appeals are not precedential.”); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993) (“At best, [unpublished] opinions can be of persuasive value.”). Bentley does not provide, and we do not discern, a principled basis to treat the same-day early probation discharge in this case differently than we have treated early probation discharges in other cases. Under the plain language of the sentencing guidelines, commission of the sentencing offense within the initial period of probation pronounced by the district court results in inclusion of a custody point. The district court therefore did not err by including a custody point in Bentley’s criminal-history score.

Affirmed.