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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A18-0405

A18-0489

State of Minnesota,
Respondent,

vs.

Alan Jon Nagle,
Appellant.

Filed February 4, 2019

Affirmed

Florey, Judge

Winona County District Court
File Nos. 85-CR-16-2507; 85-CR-16-2508
85-CR-17-1543

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

Karin L. Sonneman, Winona County Attorney, Stephanie E. Nuttall, Assistant County Attorney, Winona, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Schellhas, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

FLOREY, Judge

In these consolidated direct appeals from convictions and sentences for second-degree assault, threatening violence with intent to terrorize, domestic assault, and violating an order for protection (OFP), appellant argues that his convictions must be reversed because he was denied his right to a fair trial and impartial judge. We affirm.

FACTS

On December 9, 2016, appellant pointed a muzzleloading rifle at his wife, K.N., in the presence of their two children. He was charged with one count of second-degree assault with a dangerous weapon and one count of threatening violence with intent to terrorize. One week after the rifle incident, appellant and K.N. got into an argument. During the dispute, in a struggle over K.N.'s car keys, K.N.'s finger was cut. Appellant was charged with one gross-misdemeanor count of domestic assault—fear, and one gross-misdemeanor count of domestic assault—harm.

In February 2017, K.N. obtained an OFP which prohibited appellant from contacting K.N., except by text message for the limited purpose of setting up parenting time with the children. In July 2017, while appellant's other charges were pending, he sent text messages to K.N. that were unrelated to parenting time, and he was charged with one gross-misdemeanor count of violating an OFP.

The state dismissed the charge of domestic assault—fear. Appellant waived his right to a jury trial, and the remaining charges were heard in a single court trial. Appellant waived his right to an attorney and represented himself. After the trial, the district court

found appellant guilty of all four charges. On the second-degree-assault conviction, appellant was sentenced to 36 months' imprisonment, and on the conviction of threatening violence with intent to terrorize, he was given a concurrent sentence of 15 months. On the domestic-assault conviction, he was sentenced to 180 days in jail, and he received a 180-day concurrent sentence for the OFP violation. This consolidated appeal followed.

DECISION

Appellant argues, for three reasons, that he was denied his right to a fair trial and impartial judge, and therefore a structural error occurred, entitling him to a new trial. He asserts that the district court inappropriately questioned witnesses, made a comment indicating actual bias, and erred by considering as evidence appellant's actions and statements made in his capacity as self-represented litigant.

"The Due Process Clause requires that a defendant receive a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *State v. Crow*, 730 N.W.2d 272, 282 (Minn. 2007) (quotation omitted). We presume that judges approach cases with a neutral and objective disposition. *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008). We consider the record as a whole when addressing judicial-bias claims. *State v. Morgan*, 296 N.W.2d 397, 404 (Minn. 1980).

There are two distinct avenues for a defendant to challenge a judge's impartiality on appeal. First, a defendant may assert that the judge should have recused himself or herself from the proceeding. See *State v. Schlien*, 774 N.W.2d 361, 365 (Minn. 2009). Even if there was no objection below or motion to remove the judge for cause, a judge's

failure to recuse may be reviewed for plain error. *Id.*; see also *State v. Finch*, 865 N.W.2d 696, 703 (Minn. 2015) (noting that the substantial right at issue is not the outcome of the case, but rather the right to a fair hearing before an impartial judge).

Second, regardless of whether or not the judge had an obligation to recuse, a defendant may assert that the judge's conduct deprived the defendant of the constitutionally derived right to a fair trial and impartial factfinder. See *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005). This type of constitutional claim is subject to de novo review. *Id.* Appellant relies upon this second avenue and asserts that the judicial partiality here resulted in a structural error.

Structural errors are “defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards” because “[t]he entire conduct of the trial from beginning to end is obviously affected.” *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 1265 (1991) (quotation omitted). The Supreme Court has recognized that it is structural error for a defendant to be tried before a partial judge. *Id.* Structural errors require automatic reversal. *State v. Dalbec*, 800 N.W.2d 624, 627 (Minn. 2011). We address in turn appellant's three stated grounds for reversal.

I. The district court's questioning of witnesses was neither erroneous nor indicative of partiality.

Appellant acknowledges that a district court may question witnesses to produce more exact testimony or elicit relevant testimony, but he argues that the district court exceeded that power in this case by acting as an advocate for the state.

The Minnesota Rules of Evidence permit district courts to question witnesses. Minn. R. Evid. 614(b). The comments to the rule note that questioning should be undertaken with caution, especially in a jury trial, and a specific objection must be made to preserve a challenge for appeal. Minn. R. Evid. 614 1977 comm. cmt.; *State v. Olisa*, 290 N.W.2d 439, 440 (Minn. 1980). Such questioning is generally proper when done to clarify testimony. See *Teachout v. Wilson*, 376 N.W.2d 460, 465 (Minn. App. 1985), review denied (Minn. Dec. 30, 1985).

Appellant points to brief exchanges between the district court and appellant's son and daughter, both of whom testified, in which the district court primarily inquired about whether the boy had ever pointed a gun at his sister. These exchanges were not indicative of bias. Appellant meandered in his questioning throughout the trial, but his general theory of the case was that his son had been hiding the muzzleloader at the home and had pointed the weapon at the daughter, and on December 9, appellant was simply trying to secure the weapon. The district court's questions were in line with appellant's own line of questioning, clarified the children's testimony, and expedited the process by eliciting pointed answers. Appellant also points to a brief exchange between the district court and appellant's adult daughter, C.N., in which the district court interrupted appellant's cross-examination to inquire whether C.N. was afraid of appellant and upset with appellant. These limited questions were relevant to the credibility of C.N.'s testimony and do not indicate bias.

Appellant points to an exchange between the district court and one of the investigating officers, in which the district court asked the officer whether there had been

any reports of appellant threatening to kill himself, and specifically, reports of appellant threatening suicide with a gun. The officer noted that there was an incident where appellant claimed an overdose, but the officer was unsure if this was a suicide attempt. Prior to the district court's questions, appellant effectively raised the issue by asking the officer, "Are you aware if [N.K.] has previously in reports said that I've pointed guns at my head before?" and "Have you been on other calls dealing with me and her?" and "Do you know of any reports that [appellant] pointed a gun at anyone else? Ever?" The district court's questions were in line with appellant's own questions, clarified the officer's testimony, and expedited the process.

Lastly, appellant points to several exchanges between himself and the district court. For example, appellant testified about the muzzleloader, stating that December 9 was "the first time [he had] seen that gun in [his] life," and he then testified about a 2013 incident when the son pointed a gun at another individual. The district court questioned appellant about the relevance of the 2013 incident. We discern no error.

Given that this was a court trial, and there was no danger of the appearance of partiality to a jury, the district court's questions and statements, which were centered on eliciting relevant and clarifying testimony and expediting the trial, do not establish error. Additionally, the questions were generally in line with appellant's own questions and theory of the case and do not demonstrate bias.

II. The district court’s comment, which occurred after the close of testimony, does not overcome the presumption of judicial impartiality.

Appellant next argues that the district court made a comment demonstrating actual bias. After the close of testimony, the following exchange occurred between the district court and the prosecutor:

THE COURT: When was the last time there was a claim of an incident between [appellant] and [K.N.] or the children, do you know?

PROSECUTOR: That I’m aware of? Other than the OFP violations, um, it would be the December 16. I’m not sure what the last of the reported OFP violations was.

THE COURT: How long [does] the OFP last? Have there been any incidents as far as you know since the OFP? I mean, since the OFP charge?

PROSECUTOR: Yes.

THE COURT: Okay. Of course there has. Um, . . . Well, let me go back to my question here. Here’s my— here’s something I want you to keep in mind, [appellant]. Not only am I hearing this case and going to decide the guilt phase, but in the event I do find you guilty, I’m going to have to decide what the sentence is going to be.

The offhand comment, “[o]f course there has,” was inappropriate. “To remain impartial, the judge should avoid the appearance of impropriety and should act to assure that parties have no reason to think their case is not being fairly judged.” *State v. Munt*, 831 N.W.2d 569, 580 (Minn. 2013) (quotation omitted). However, despite the comment, the presumption of impartiality has not been overcome. The comment occurred after the close of evidence during an informal exchange, and shortly after the comment, the judge indicated quite clearly that he had yet to make a guilt determination. The record as a whole indicates that the district court was impartial, fair, and reasonable in accommodating appellant’s defense. *Morgan*, 296 N.W.2d at 404.

III. The district court did not improperly consider appellant's pro-se conduct, and even if the district court did err, the error was not structural error.

Lastly, appellant argues that the district court erred by considering as evidence appellant's actions and statements while representing himself. He offers two examples. First, after appellant requested that the district court stop K.N. from "mak[ing] faces at [him]," the district court stated as follows:

[Appellant], what I will say is I have seen you very animated throughout this trial, and so I'm not—I think that faces between you and [K.N.] are going to be considered when we get to my deciding on the credibility of the witnesses. That includes your behavior throughout this whole thing. I'll just let you know that.

Second, while appellant was conducting cross-examination of K.N., the district court warned appellant against making admissions and stated that it would take into account appellant's statements when determining appellant's credibility. Specifically, the following exchange occurred:

APPELLANT: On December 5—okay. In reference to the text message, you said, "What did I do to be in contempt of court to you[?]" What is that in reference to? Excuse me, July 28.

K.N.: July 28 this year or the year—

APPELLANT: Correct. The 2017. The text message you sent me. Supposedly sent me.

K.N.: That had something to do—I honestly don't know because you said that something about me being in contempt of court, so I was asking you what—why I would be in contempt of court.

APPELLANT: Your Honor—

K.N.: Because it's ridiculous.

APPELLANT: —if you remember . . . I was forced to be under subpoena . . . and [our daughter] was also under subpoena and failed to come to court.

PROSECUTOR: Objection, Your Honor. He's testifying.

THE COURT: So are you admitting that these are your text messages?

APPELLANT: No, I'm not, Your Honor. I said—

THE COURT: Well, it sure sounds like it.

APPELLANT: I'm just reading off here—

THE COURT: It sure sounds like it. You got to be careful what you say and what you ask.

APPELLANT: I said supposedly.

THE COURT: Yeah, I don't care. If you're admitting that you know all about this, that's an important admission. You might want to be well-advised to be careful about making such admissions. Now, the question is what does that have to do with her testimony? I'm going to let you ask the question. But if you—but I'm also taking into consideration the statements you make and how they may apply to your own credibility, so let's keep that in mind. Okay?

Appellant argues that by considering his conduct while acting as self-represented litigant, the district court, in effect, considered facts not in evidence.

As to the first instance offered by appellant, in which the district court stated that it would consider appellant's and K.N.'s behavior at trial, the district court never stated that it would determine appellant's credibility based upon his behavior, but merely "the credibility of the witnesses." This implies that the district court was interested in the evaluation of the behavior of witnesses on the stand, and that appellant's conduct, which might affect a witness's behavior, would be taken into account in assessing that witness's credibility. The assessment of a witness's credibility is exclusively the province of the factfinder. *Francis v. State*, 729 N.W.2d 584, 589 (Minn. 2007). Moreover, not every judicial error requires reversal. *Dorsey*, 701 N.W.2d at 252. "In cases involving trial errors, we apply a harmless error test, which requires reversal unless the guilty verdict rendered is surely unattributable to the error." *Id.* (quotation omitted). Even if the judge

erred by considering appellant's conduct, such error was not indicative of bias and did not rise to the level of structural error. Appellant's conduct in the courtroom was never referenced in the district court's verdict order, and in a case where the direct evidence against appellant was quite strong and included eyewitness testimony from multiple witnesses, the verdicts are surely not attributable to the judge's consideration of appellant's conduct in the courtroom. *Cf. id.* at 253 (concluding that a structural error occurred "when the judge independently investigated a factual assertion made by a key defense witness and revealed the results of her investigation to counsel").

As to the second instance, when the district court stated that it would take into account appellant's admissions when determining appellant's credibility, we discern no error. Appellant was effectively testifying during cross-examination, or at a minimum, he was on the verge of testifying, and therefore it was permissible and practical for the district court to warn appellant that those admissions or statements could be damaging to his case and the credibility of any subsequent testimony from him.

IV. Appellant's pro se claims are unavailing.

Lastly, appellant filed a pro se supplemental brief, arguing that his right to self-representation was violated, and he is entitled to a new trial because of witness perjury. Appellant's other claims are unsupported by argument or legal authority and shall therefore not be considered. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008).

Appellant asserts that the district court violated his right to self-representation because the district court informed appellant that he would need to be represented. However, the state correctly observes that, although the district court initially denied

appellant's last-minute request to represent himself, the district court reversed its decision and allowed appellant to proceed as a self-represented litigant. The state also correctly notes that at the start of trial, the district court called a recess to allow appellant to go home and retrieve materials that appellant had prepared, such as questions and an opening statement. Appellant's argument that his right to self-representation was violated is unavailing.

Lastly, appellant claims that he should be granted a new trial because K.N. committed perjury by testifying that she did not pawn a gold necklace. A new trial may be granted because of perjured testimony when the testimony is false, without the testimony the factfinder might have reached a different conclusion, and "the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial." *State v. Nicks*, 831 N.W.2d 493, 511 (Minn. 2013) (quotation omitted). A new trial is not warranted because, even accepting that K.N. perjured herself, none of the challenged testimony related to elements of the case, and appellant was able to, and did, attack the veracity of K.N.'s testimony.

Affirmed.