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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1319**

State of Minnesota,
Respondent,

vs.

Robert Michael Windell,
Appellant.

**Filed May 13, 2019
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-17-25996

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Halbrooks, Judge;
and Larkin, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of engaging in a pattern of stalking conduct, arguing that the district court's jury instruction regarding that offense constructively amended the criminal complaint in violation of Minn. R. Crim. P. 17.05. Appellant also challenges his conviction of felony domestic assault, arguing that the trial evidence was insufficient to sustain the conviction. Lastly, appellant challenges his sentence, arguing that the district court impermissibly considered a 2003 Illinois conviction in calculating his criminal-history score. We affirm appellant's conviction of felony domestic assault. But we reverse and remand appellant's stalking conviction, as well as his sentence.

FACTS

Respondent State of Minnesota charged appellant Robert Michael Windell with felony domestic assault, obstructing legal process, and fleeing a peace officer. Later, the state amended the complaint to include a charge of stalking—pattern of stalking conduct. The amended complaint alleged that on October 12, 2017, Windell was involved in a domestic dispute with V.H., the mother of two of his children, at V.H.'s home. V.H. contacted the police to have Windell removed from her home, and Windell agreed to leave. Because V.H. thought that Windell had taken the keys to her home, she barricaded the side door with a chest freezer, in case Windell returned. Around 3:00 a.m. on October 13, 2017, Windell returned to the residence, used keys to unlock the side door, and attempted to push the door open. Windell demanded that V.H. let him into the residence. V.H. told Windell to leave multiple times, but he remained on the doorstep and demanded that V.H. let him

in. V.H. was afraid that Windell would assault her and take his children if he entered the home, so she asked one of her children to call the police.

Officers responded to the scene and identified themselves to Windell. Windell began to walk away, and the officers instructed him to stop. Windell ran from the officers and physically resisted their attempts to detain him. Four police officers were eventually able to restrain Windell.

The amended complaint alleged that Windell “had assaulted [V.H.] in the past and HAD been arrested for domestic violence” and that Windell had previously been convicted of violating an order for protection (OFP) regarding V.H. on November 25, 2015, and January 25, 2016.

Prior to trial, the state moved to admit, as relationship evidence, incidents of domestic violence and criminal conduct by Windell against V.H. as follows: (1) violation of an OFP on January 5, 2016, (2) domestic assault on September 9, 2015, (3) domestic assault on September 7, 2015, (4) domestic assault on February 20, 2013, and (5) domestic assault on February 19, 2013. Windell objected, but the district court ruled that the “prior instances do come in under 634.20,” the relationship-evidence statute. However, the district court indicated that it would limit the evidence, stating that “[t]his case is about what happened on this occasion, and we don’t want . . . to go into the same detail on these other incidents” and that the prior incidents “should be dealt with succinctly, and not in any way that is unduly prejudicial.”

V.H. testified regarding the incidents that occurred on October 12 and October 13, 2017. V.H. also briefly testified regarding the January 2016 incident, the September 2015

incidents, and the February 2013 incidents. Windell did not cross-examine V.H. regarding the 2016, 2015, and 2013 incidents. The state offered video recordings of police interviews of V.H., which were admitted without objection. In those recordings, V.H. stated that Windell had assaulted her in April 2017.

The state proposed a jury instruction indicating that the jury could consider the following acts as proof of a pattern of stalking conduct: (1) domestic assault on October 13, 2017, (2) trespass on October 13, 2017, (3) trespass on October 12, 2017, (4) domestic assault on April 1, 2017, (5) violation of an OFP on January 5, 2016, (6) domestic assault on September 9, 2015, and (7) domestic assault on February 19, 2013. The district court agreed to the state's proposed instruction over Windell's objection.

The jury found Windell guilty of engaging in a pattern of stalking conduct, felony domestic assault, and fleeing a peace officer. The jury found Windell not guilty of obstructing legal process. The district court entered judgments of conviction on the stalking, felony-domestic-assault, and fleeing-a-peace-officer offenses, and sentenced Windell to a 43-month prison term for stalking. Windell appeals, challenging his convictions of stalking and felony domestic assault, as well as his sentence.

D E C I S I O N

I.

Windell contends that his stalking conviction must be reversed “[b]ecause the district court’s jury instruction on ‘pattern of stalking conduct’ amounted to a constructive amendment to the criminal complaint,” which “charged a different crime and prejudiced [his] substantial rights.”

Windell relies on Minn. R. Crim. P. 17.05, which provides: “The court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if the defendant’s substantial rights are not prejudiced.” The rule’s use of the phrase “may permit” indicates that the rule is generally applied prospectively and governs requests for amendments. Caselaw reflects the rule’s application in that context. *See State v. Caswell*, 551 N.W.2d 252, 254-55 (Minn. App. 1996) (applying rule 17.05 to state’s request to add charges to complaint during trial after witnesses were sworn); *State v. Manley*, 353 N.W.2d 649, 651-52 (Minn. App. 1984) (applying rule 17.05 to state’s request to add charge to complaint during trial after the close of evidence); *State v. Miller*, 352 N.W.2d 524, 525-26 (Minn. App. 1984) (applying rule 17.05 to state’s request to amend charge in complaint during trial at the close of the state’s case), *review denied* (Minn. Nov. 9, 1984).

But appellate courts have also applied rule 17.05 in the context of instructional error. More specifically, the rule has been applied when jury instructions varied from the charge set forth in the underlying complaint. For example, in *State v. DeVerney*, the indictment alleged that DeVerney aided and abetted others in committing first-degree murder while committing kidnapping, with intent to effect the death of the victim. 592 N.W.2d 837, 845 (Minn. 1999). The indictment cited Minn. Stat. § 609.05, subd. 1 (1998), which provided that “[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” *Id.* At the close of the state’s case, the state indicated that it would also seek an aiding-and-abetting instruction under Minn. Stat. § 609.05, subd. 2

(1998), which provided that “[a] person liable under subdivision 1 is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended.” *Id.* DeVerney objected, but the district court instructed the jury on both aiding-and-abetting theories. *Id.*

On appeal, DeVerney argued that the district court “improperly instructed the jury on a theory of vicarious liability which was not included in the indictment.” *Id.* The supreme court reasoned that although “the indictment was never formally amended pursuant to Rule 17.05,” it was appropriate to analyze the issue under that rule because “[DeVerney] argue[d] that the jury instruction resulted in an impermissible variance.” *Id.* at 845-46.

Similarly, in *State v. Guerra*, this court relied on rule 17.05 when assessing an assignment of instructional error in a case in which evidence was admitted for a limited purpose, and not as substantive proof of the charged offense, but the district court instructed the jury to consider the evidence as substantive proof of the charged offense. 562 N.W.2d 10, 12-13 (Minn. App. 1997). *Guerra* was charged with possession of a stolen firearm, occurring “on or about January 30, 1996.” *Id.* at 11. The complaint alleged that seven shotguns were stolen from a house on December 5, 1995, that seven handguns were stolen from a house on December 31, 1995, and that three of the seven shotguns were retrieved from Guerra’s apartment on January 30, 1996. *Id.* Statements on the record demonstrated that prior to trial, Guerra, his attorney, the charging prosecutor, the trial prosecutor, and the district court all believed that the charge of possession of a stolen firearm was based solely

on the possession of the shotguns found in Guerra's apartment in January 1996, and not on any of the handguns. *Id.*

Accordingly, the district court allowed "only enough testimony [regarding the handguns] to establish a foundation for why police were at Guerra's apartment when they discovered the shotguns." *Id.* at 12. But after the state rested its case, the district court reconsidered its approach and determined that the reference to "firearms" in the complaint was broad enough to include the handguns and that the phrase "on or about January 30, 1996" could include an offense that allegedly occurred in December 1995. *Id.* The district court therefore allowed the state to re-open its case and present testimony and evidence regarding Guerra's possession of the handguns that had been stolen in December 1995. *Id.* Guerra asked for a continuance after the district court's ruling, which the district court denied. *Id.* at 14. At the conclusion of the trial, the district court amended the jury instructions to include events that took place in December 1995 as substantive evidence of Guerra's guilt. *Id.* at 12.

On appeal, Guerra argued that the district court constructively amended the complaint in violation of rule 17.05. *Id.* at 11-12. This court held that "the district court's decision to allow the [state] to re-open its case to present additional evidence and to change the date in the jury instruction constituted a constructive amendment" and that rule 17.05 applied. *Id.* at 13. Next, we considered whether the constructive amendment charged a different offense. *Id.* We explained that "[a] different offense is charged if an amendment affects an essential element of the charged offense." *Id.* (quotation omitted). We noted that "[t]he amended offense . . . was the same category of offense as that originally

charged—possession of a stolen firearm,” but that “the object of the offense, the date, and the alleged facts underlying each offense were all different.” *Id.* We concluded that because the “state’s proof that Guerra possessed the handguns was different from proof of possession of the shotguns” and the “knowledge that the guns were stolen and the time and place of possession also differ[ed],” the constructive amendment charged a different offense in violation of rule 17.05. *Id.*

This court also concluded that the constructive amendment violated rule 17.05’s independent proscription against amendments that prejudice a defendant’s substantial rights. *Id.* We reasoned that Guerra did not have notice that the references to the handguns in the complaint would be transformed into a separate charge and that “[t]he jury was obviously confused by the change” because it had asked the district court, during its deliberations, whether Guerra had been charged with possession of the handguns or the shotguns. *Id.* at 13-14. We also reasoned that Guerra’s defense was based on the shotguns, that a claim based on the handguns “require[d] a substantially different defense,” and that Guerra did not have an opportunity to develop a defense to the possession of the handguns because his request for a continuance after the court’s ruling was denied. *Id.* at 14. We stated that “[t]he lack of notice and an opportunity to prepare a defense, the confusion of the jury, and the adverse effect on [Guerra’s] trial tactics all demonstrate that the midtrial amendment to the complaint prejudiced Guerra’s substantial rights.” *Id.* We therefore reversed Guerra’s conviction. *Id.*

We now turn to the circumstances in this case. The relevant charging statute provides:

A person who engages in a pattern of stalking conduct with respect to a single victim or one or more members of a single household 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) (2016). “[A] ‘pattern of stalking conduct’ means two or more acts within a five-year period that violate or attempt to violate the provisions of” several listed criminal statutes, including statutes prohibiting domestic assault, violations of domestic-abuse OFPs, and certain trespass offenses. *Id.*, subd. 5(b) (2016).

Windell argues that, like the circumstances in *Guerra*, the jury instructions in this case affected an essential element of the charged offense—pattern of stalking conduct—and added an additional or different offense in violation of rule 17.05. Specifically, Windell argues that “by allowing the state to use facts and evidence different than those contained in the complaint to prove that [he] was guilty of stalking, the district court’s instruction amount[ed] to a constructive amendment.” He further argues that “the amendment charged a different crime because the evidence that the state used to prove the ‘pattern of stalking conduct’ element as contained in the criminal complaint differed from the evidence it used to prove the element as set out in the jury instructions.”

Although the amended complaint generally alleged that Windell had “assaulted” V.H. in the past, it did not specifically mention the domestic assaults that allegedly occurred on April 1, 2017, September 9, 2015, and February 19, 2013,¹ as a basis for

¹ We do not include the January 5, 2016 OFP violation that was mentioned in the district court’s instruction in our analysis for the reasons that follow. The complaint refers to Windell’s violation of an OFP on January 25, 2016. However, the complaint also provides

criminal liability. Yet, the jury was instructed to consider those offenses for that purpose. Moreover, the district court had ruled that the evidence regarding the alleged offenses on September 9, 2015, and February 19, 2013, would be allowed as relationship evidence, that is, for the purpose of establishing the nature of the relationship between Windell and V.H. See Minn. Stat. § 634.20 (2016) (stating that “[e]vidence of domestic conduct by the accused against the victim of domestic conduct . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice”); *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004) (stating that relationship evidence “illuminate[s] the history of the relationship” between the accused and the alleged victim, “that is, [it] put[s] the crime charged in the context of the relationship between the two”). Consistent with that purpose, the district court stated that “[t]his case is about what happened on this occasion, and we don’t want . . . to go into the same detail on these other incidents” and that those incidents “should be dealt with succinctly, and not in any way that is unduly prejudicial.” Nonetheless, the district court instructed the jury to rely on the September 2015 and February 2013 incidents as substantive proof of the charged offense.

Like the handgun evidence in *Guerra*, evidence regarding Windell’s prior domestic offenses was admitted for a limited purpose, and not as substantive proof of the charged offenses. It was not until after the close of evidence that the district court indicated that

a case number for that offense, and the district court’s records indicate that the offense occurred on January 5, 2016. Thus, it appears that the January 25 reference in the complaint may be a typographical error. If so, the alleged January 5, 2016 OFP violation contained in the jury instruction arguably is noticed in the criminal complaint. Because the parties did not address this issue, and because inclusion of the alleged January 5, 2016 OFP violation in our analysis would not impact our decision, we do not include it.

the evidence would in fact be used as substantive proof of guilt. Although the jury instruction presented the same category of offense as that charged in the complaint—engaging in a pattern of stalking conduct—the offenses allegedly constituting the pattern under the jury instruction were different than those described in the complaint. Instead of requiring Windell to defend against a pattern consisting of incidents that occurred on October 12 and 13, 2017, as well as violations of orders for protection that occurred on January 25, 2016,² and November 25, 2015—as alleged in the complaint—the jury instruction required Windell to defend against a pattern based on three additional offenses that allegedly occurred in 2017, 2015, and 2013.

The state argues that Windell’s “entire argument below (and on appeal) rests upon a contention that he lacked notice that his prior acts of abuse against V.H. within the past five years could be used against him” and that the “face of the complaint—with the statute cited and prior acts noted—dooms [his] entire notice-based argument.” In overruling Windell’s objection to the state’s proposed jury instruction, the district court similarly reasoned: “I’m going to let it stand as it is because the definition of the crime involved a five-year period, and so it’s pretty clear that anything within five years could be used.” We are not persuaded by that reasoning because the issue here is not that Windell did not know that his prior acts of abuse against V.H. *could* be used to prove a pattern. The issue is that he was not informed which acts *would* be used until after the close of evidence.

² Again, the January 25, 2016 offense date may be incorrect.

The state also argues that because the district court instructed the jury “exactly as the [stalking] statute provided” and “explained the elements of the crime, completely consistent with the law, the [district] court did not abuse its discretion in instructing the jury on pattern of stalking.” *See State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014) (stating that jury instructions must “accurately state the law in a manner that can be understood by the jury”); *State v. Koppi*, 798 N.W.2d 358, 361 (Minn. 2011) (“[Appellate courts] review a district court’s decision to give a requested jury instruction for an abuse of discretion.”). But the issue that Windell raised in district court, and again on appeal, is not that the district court inaccurately instructed the jury regarding the law, it is that the jury instruction impermissibly varied from the offense charged in the complaint. This court analyzes such an issue under rule 17.05. *See DeVerney*, 592 N.W.2d at 845-46 (applying rule 17.05 because defendant argued that jury instruction resulted in an impermissible variance from the indictment).

Based on the similarity of the circumstances of this case and those in *Guerra*, we conclude that the district court’s instruction that the jury could consider the alleged offenses from April 2017, September 2015, and February 2013, as proof of a pattern of stalking conduct, resulted in Windell being charged with an additional or different offense in violation of rule 17.05.

We next consider whether Windell’s substantial rights were prejudiced. Windell argues that they were because he “was not given adequate notice of the complaint amendment,” “he was not given the opportunity to defend against the different charge,” and he “did not ask V.H. a single question in cross-examination regarding the incidents

that allegedly occurred between February 2013 and January of 2016, but focused his examination entirely on the incidents occurring on October 12 and October 13.” Windell also argues that if he had known that the limited relationship evidence would actually be used to prove a pattern of stalking conduct, he might have cross-examined V.H. regarding those incidents, called witnesses, or even testified in his own defense.

Windell’s arguments raise concerns similar to those that led this court to conclude that Guerra’s substantial rights had been prejudiced. *See Guerra*, 562 N.W.2d at 14 (“The lack of notice and an opportunity to prepare a defense, the confusion of the jury, and the adverse effect on [Guerra’s] trial tactics all demonstrate that the midtrial amendment to the complaint prejudiced Guerra’s substantial rights.”). The record supports Windell’s argument that his defense was based on representations by the state and the district court that the evidence regarding the September 2015 and February 2013 domestic assaults would be used only to show the nature of the parties’ relationship and not as substantive evidence of guilt. Expanding the use of that evidence to include substantive proof of the stalking charge after the close of evidence prejudiced Windell’s substantial rights in violation of rule 17.05.

As to the remedy for a violation of rule 17.05, “[i]f the improper addition of charges substantially prejudiced the defendant, a reviewing court must reverse the [district] court’s decision to grant the motion.” *Caswell*, 551 N.W.2d at 253; *see Guerra*, 562 N.W.2d at 14 (“Because Rule 17.05 prohibits the amendment, we reverse Guerra’s conviction.”). Because the jury instruction resulted in an additional or different offense and Windell’s

substantial rights were prejudiced, we reverse Windell's stalking conviction and remand for a new trial.

Because we reverse Windell's stalking conviction on other grounds, we do not address his argument that the "district court plainly erred by allowing the jury to consider both the alleged October 13, 2017, trespass and the alleged October 13, 2017, domestic assault to find the pattern of stalking conduct element because both alleged crimes derived from a single act" or that the district court committed plain error by admitting V.H.'s prior recorded statements to Officer Womble and Sergeant Rowe. However, we briefly address his argument that the district court "committed plain and fundamental error" by "fail[ing] to properly instruct the jury that the state needed to prove two of the alleged criminal acts beyond a reasonable doubt to sufficiently establish [he] committed a pattern of stalking conduct."

The relevant jury instruction was as follows:

The State must prove the pattern of stalking conduct beyond a reasonable doubt, *but it is not required to prove each separate criminal act beyond a reasonable doubt for this charge*. When more than two criminal acts are alleged, each juror must agree that more than one criminal act occurred. The jury does not have to be unanimous about which criminal acts occurred, but must be unanimous that more than one criminal act occurred. I'm sorry, I think that's mistaken. You must agree unanimously that two criminal acts occurred, at least two.

(Emphasis added.)

Windell argues that "by failing to affirmatively inform the [jury] that it must find at least two of the alleged criminal acts beyond a reasonable doubt, the district court's

instruction conveyed to the jury that the state need not prove *any* of the criminal acts beyond a reasonable doubt.”

We are not aware of precedent addressing the state’s burden of proof in the context of a pattern of stalking. But in the context of a pattern of domestic abuse, the supreme court has said that a pattern requires two predicate acts and that those two acts must be proved beyond a reasonable doubt. *State v. Johnson*, 773 N.W.2d 81, 86-87 (Minn. 2009). If the state alleges more than two predicate acts, the jury need not unanimously agree regarding which two acts were committed; but the jury must agree, beyond a reasonable doubt, that some combination of two acts was committed. *Id.* It is reasonable to believe that those same principles apply in the pattern-of-stalking context. Thus, we are concerned that the district court’s jury instruction that “[t]he State must prove the pattern of stalking conduct beyond a reasonable doubt, but it is not required to prove each separate criminal act beyond a reasonable doubt for this charge” could have misled the jury by suggesting that the state did not need to prove *any* of the acts beyond a reasonable doubt. If the state elects to retry the stalking charge on remand, the district court should keep this concern in mind.

II.

Windell contends that his conviction of felony domestic assault was not supported by sufficient evidence. Windell was convicted under Minn. Stat. § 609.2242, subd. 4 (2016), which provides, “Whoever violates the provisions of this section or [the fifth-degree-assault statute], within ten years of the first of any combination of two or more

previous qualified domestic violence-related offense convictions or adjudications of delinquency is guilty of a felony.”³ Minn. Stat. § 609.2242, subd. 1 (2016), provides,

Whoever does any of the following against a family or household member as defined in section 518B.01, subdivision 2, commits an assault and is guilty of a misdemeanor:

(1) commits an act with intent to cause fear in another of immediate bodily harm or death; or

(2) intentionally inflicts or attempts to inflict bodily harm upon another.

The parties agree that the domestic-assault charge in this case was based solely on the theory that Windell committed an act with intent to cause fear in V.H. of immediate bodily harm or death. Windell argues that the circumstantial evidence was insufficient to prove such intent.

In considering a claim of insufficient evidence, this court’s review is limited to a close analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court must assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This court 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

³ Windell stipulated that he had necessary predicate convictions.

An offense may be proved by direct or circumstantial evidence. 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. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Id.* (quotation omitted). Circumstantial evidence always requires an inferential step that is not required with direct evidence. *Id.*

Because intent is a state of mind, it is “generally proved circumstantially—by drawing inferences from the defendant’s words and actions in light of the totality of the circumstances.” *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). “[T]he jury may infer that a person intends the natural and probable consequences of his actions and a defendant’s statements as to his intentions are not binding on the jury if his acts demonstrated a contrary intent.” *Id.*

When the state relies on circumstantial evidence to prove an element of an offense, we apply a heightened standard of review. *See Harris*, 895 N.W.2d at 601-03 (applying circumstantial-evidence standard to individual element of criminal offense that was proved by circumstantial evidence). First, we 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. Next, we determine if the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. *Loving*, 891 N.W.2d at 643. We will reverse a conviction based on circumstantial evidence only if there is a reasonable

inference other than guilt. *Id.* We “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). “[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).

Because the state relied on circumstantial evidence to prove Windell’s intent, we apply a heightened standard of review. *See Harris*, 895 N.W.2d at 601-03.

The trial evidence established the following circumstances. Windell is the father of two of V.H.’s children, who were seven and eight years old in October 2017. V.H. does not have a custody agreement with Windell regarding their children. V.H. stopped living with Windell in 2014, around the time that she moved to her current residence. Windell has physically assaulted V.H. in the past. For example, he punched V.H. in the face multiple times in February 2013 and September 2015.

On October 12, 2017, V.H. allowed Windell into her home, but V.H. asked Windell to leave after he started to yell at her. Windell refused to leave and fell asleep in V.H.’s home. V.H. called 911 to have Windell removed. Windell left V.H.’s home after the police arrived and told him to leave. V.H. placed a chest freezer against the side door to her home to prevent Windell from getting inside if he returned. Windell returned approximately 15 to 20 minutes later and walked back and forth outside V.H.’s home. Windell told V.H., “B---h, let me in,” and said he wanted his kids. V.H. again told Windell to leave, and he did so.

At approximately 3:00 a.m. the next morning, Windell returned to V.H.'s home. He used keys to unlock the side door and pushed on the door repeatedly. Windell was not able to get inside because of the chest freezer that V.H. had placed against the door. Windell demanded that V.H. let him in and stated that he wanted his children. V.H. asked her daughter to call 911, and she did so. Police responded to the scene, and Windell began to walk away. The police directed Windell to stop, and he ran from them.

Windell argues that, "[c]onsidering the state's evidence as a whole, it cannot be concluded without unsubstantiated speculation that [he] intended to cause V.H. to be afraid of imminent bodily harm or death when he went to her residence on October 13." Windell argues that although "the evidence shows that [he] went to V.H.'s residence at an odd hour that morning," it "also shows that [he] did not exhibit physical violence towards V.H. on that day or the day before, [he] did not threaten V.H. with physical violence at the time of the incident, and [he] did not act in a physically aggressive manner during the altercation."

We are not persuaded. Windell refused to leave V.H.'s home on October 12, resulting in a police call to have him removed. Windell returned to V.H.'s home shortly after being removed by the police and told V.H., "B---h, let me in," and that he wanted his kids. Despite being on notice that V.H. did not want him at her home, Windell returned at 3:00 a.m. on October 13, unlocked the side door and pushed on it repeatedly, demanding that V.H. let him in and stating that he wanted his children. Windell's demand to take his children was threatening given the circumstances: Windell made the demand at 3:00 a.m., after V.H. had repeatedly told him to leave her home and enlisted police assistance in removing him; V.H. did not have a child-custody arrangement with Windell; Windell

repeatedly tried to push open a door to V.H.'s home that she had barricaded to keep him out; and Windell had a history of physically assaulting V.H. Under the circumstances, it was reasonable for the jury to conclude that Windell intended to cause fear in V.H. of immediate bodily harm and death. Thus, the circumstances proved are consistent with guilt.

Windell argues that the evidence also supports a rational hypothesis other than guilt, namely, that he "went to V.H.'s home to take his children from V.H." Windell argues that "[i]t is unclear" why the fact that he did not have a child-custody agreement or a legal right to take the children "is relevant as to whether [he] went to V.H.'s home to take the children or to commit fear assault." It is not unclear to this court. The lack of a child-custody agreement, coupled with the threatening circumstances described above, indicate that even if Windell went to V.H.'s home to take his children, it is not reasonable to conclude that Windell intended to do so peacefully.

In sum, the evidence taken as a whole makes Windell's proffered alternative hypothesis that he did not intend to cause V.H. to fear immediate bodily harm or death seem unreasonable. Because the circumstances proved are consistent with the jury's finding that Windell was guilty of felony domestic assault and inconsistent with any rational hypothesis other than guilt, we affirm Windell's conviction of felony domestic assault.

Even though we reverse Windell's conviction of stalking, we briefly address his argument that the district court erred by entering judgment of conviction on the felony domestic assault "because that crime is a lesser included offense of felony stalking."

“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2016). An “included offense” means any of the following:

- (1) [a] lesser degree of the same crime; or
- (2) [a]n attempt to commit the crime charged; or
- (3) [a]n attempt to commit a lesser degree of the same crime; or
- (4) [a] crime necessarily proved if the crime charged were proved; or
- (5) [a] petty misdemeanor necessarily proved if the misdemeanor charge were proved.

Id.

“To determine whether an offense is an included offense falling under this statute, a court examines the elements of the offense instead of the facts of the particular case.” *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). “An offense is necessarily included in a greater offense if it is impossible to commit the greater offense without committing the lesser offense.” *Id.* (quotation omitted). This court reviews whether an offense constitutes a lesser-included offense de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Again, “a ‘pattern of stalking conduct’ means two or more acts within a five-year period that violate or attempt to violate the provisions of” multiple listed statutes, including statutes prohibiting first-degree murder, terroristic threats, domestic assault, violation of domestic-abuse OFPs, certain trespass offenses, interference with an emergency call, obscene or harassing telephone calls, burglary, damage to property, and criminal sexual conduct. Minn. Stat. § 609.749, subd. 5(b).

Thus, under the stalking statute, felony domestic assault is one of many acts on which the state may rely to prove a pattern of stalking conduct. *See id.*, subd. 5(b)(5) (listing domestic assault under Minn. Stat. § 609.2242 (2016) as an act which can be part of a pattern of stalking conduct). But a person can engage in a pattern of stalking conduct without committing a felony domestic assault. Because it is possible to engage in a pattern of stalking conduct without committing felony domestic assault, felony domestic assault is not an included offense of engaging in a pattern of stalking conduct within the meaning of Minn. Stat. § 609.04.

III.

Windell contends that his sentence must be reduced because the district court erred by including a 2003 out-of-state conviction as a felony in his criminal-history score.

The sentencing guidelines “provide uniform standards for the inclusion and weighting of criminal history information that are intended to increase the fairness and equity in the consideration of criminal history.” *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001) (quotation omitted). Convictions from other jurisdictions must be considered in calculating a defendant’s criminal-history score under the guidelines. *Id.*; *see* Minn. Sent. Guidelines 2.B.5.a. (Supp. 2017); *see also* Minn. Sent. Guidelines cmt. 2.B.502 (Supp. 2017) (“The Commission concluded that convictions from other jurisdictions must, in fairness, be considered in the computation of an offender’s criminal history score.”). An out-of-state conviction may be counted as a felony in calculating a criminal-history score only if it would be defined as a felony in Minnesota “based on the elements of the prior

non-Minnesota offense” and “the offender received a sentence that in Minnesota would be a felony-level sentence.” Minn. Sent. Guidelines 2.B.5.b. (Supp. 2017).

“[T]he district court may not use out-of-state convictions to calculate a defendant’s criminal-history score unless the state lays foundation for the court to do so.” *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). The state has the burden of establishing the facts necessary to justify consideration of out-of-state convictions in determining a defendant’s criminal-history score. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). “The state must establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota.” *Maley*, 714 N.W.2d at 711 (citing *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983)). The supreme court has explained that if a certified copy of an out-of-state conviction “cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.” *Griffin*, 336 N.W.2d at 525 (emphasis omitted) (quoting Minn. R. Evid. 1005).

The district court “must make the final determination as to whether and how a prior non-Minnesota conviction should be counted” in a defendant’s criminal-history score. Minn. Sent. Guidelines 2.B.5.a. This court reviews the district court’s calculation of a defendant’s criminal-history score for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

After the jury returned its verdict in this case, the district court asked whether Windell wanted a presentence investigation (PSI) before sentencing. A PSI had been completed months earlier when Windell had entered a guilty plea, which he later withdrew.

Defense counsel noted the earlier PSI and stated that an updated PSI was not necessary. The prosecutor noted that the probation officer who completed the PSI had indicated that she was unable to confirm a 2003 Cook County, Illinois conviction and therefore had not included it in her criminal-record summary. The prosecutor stated that he would obtain records confirming that conviction.

At the sentencing hearing, the state asked the district court to include a 2003 Cook County, Illinois conviction of manufacture or delivery of a controlled substance in the calculation of Windell's criminal-history score. The prosecutor explained,

We were able to obtain records from Cook County both a copy of the criminal complaint as well as what appears to be something similar to their register of action indicating that [Windell] was convicted of the statute as alleged in the complaint so we believe that point and a half that is indicated on the criminal record summary is appropriate and that the defendant's criminal history score is five.

I did consult with [the probation officer who completed the earlier PSI] and based on the records that were provided she did agree.

Neither the Cook County criminal complaint nor the equivalent of a register of action was received as evidence at the sentencing hearing. Thus, those documents are not part of the record on appeal.

Windell objected to the inclusion of the alleged 2003 Illinois conviction, arguing that the documentation provided by the state did not sufficiently substantiate the conviction. The district court stated that it was "going to rely on the probation officer in this matter whose job it is to calculate criminal history scores and tell us what the guideline sentence is." The district court included the 2003 Illinois conviction, determined Windell's

criminal-history score to be five, and sentenced Windell based on that criminal-history score.

Windell argues that the state failed to demonstrate that it had exercised reasonable diligence “to obtain a certified record or a certified copy before resorting to alternative forms of evidence to prove the out-of-state conviction.” (Emphasis omitted.) Windell also argues that the state did not “provide a satisfactory alternative to a certified record or a certified reproduction.”

The state counters that the record is sufficient to establish the existence of the 2003 Illinois conviction because the state relied on a copy of the underlying complaint and “something similar” to Cook County’s register of action and “consulted with probation who agreed that based upon Windell’s criminal record—including the Illinois conviction—his correct criminal history score was five points.”

In *State v. Jackson*, this court held that the unsworn testimony of a defendant’s probation officer regarding a prior out-of-state conviction was sufficient to establish that conviction for the purpose of the defendant’s criminal-history score. 358 N.W.2d 681, 682-83 (Minn. App. 1984). But *Jackson* is distinguishable. Here, the assigned probation officer was not present at the sentencing hearing and did not present any information to the district court regarding the circumstances of the Illinois conviction. And again, the Cook County documents on which the prosecutor relied are not of record on appeal. Thus, the evidence regarding Windell’s 2003 Illinois conviction consists of the prosecutor’s representations regarding a probation officer’s opinion and the contents of two documents that are not of record.

Assuming, without deciding, that the prosecutor's statements were adequate to prove the existence of the prior Illinois conviction, the statements do not tell us anything about the elements of the offense or the sentence. That information is necessary to determine whether the conviction was properly included in Windell's criminal-history score. *See* Minn. Sent. Guidelines 2.B.5.b. On this record, we cannot determine whether the district court correctly included the Illinois conviction in Windell's criminal-history score because the documents on which the district court relied are not of record. Thus, the state has not met its burden to show that inclusion of the alleged 2003 Illinois conviction in Windell's criminal history was appropriate. We therefore reverse and remand for resentencing.

Windell argues that, because he objected to the use of the alleged 2003 Illinois conviction at sentencing, the "state was therefore on notice that it would have to prove the conviction by a preponderance of the evidence and it failed to do so." Windell argues that, "[h]aving failed to meet that burden once, there is no reason the state should be given another opportunity to prove the Illinois conviction" and that this "Court should order upon remand that [he] be sentenced without it."

When a defendant does not object to the use of an out-of-state conviction in his criminal-history score at sentencing and then successfully challenges the use of that conviction on appeal, this court has allowed the state to develop the record on remand. *See, e.g., State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008) (allowing the state to further develop the record on remand because defendant did not object to the district court's determination that his out-of-state convictions were felonies), *review denied* (Minn.

July 15, 2008). We are not aware of precedent holding that the state is precluded from developing the record on remand if the defendant objected to the state's use of an out-of-state conviction at sentencing. *Cf. Maley*, 714 N.W.2d at 713-15 (noting defendant's objections to his criminal-history score, concluding that alleged out-of-state convictions were insufficiently documented, and reversing and remanding without indicating whether state could develop the record on remand). On remand, the district court shall make an initial determination regarding whether to allow the state to further develop the record. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (“[An appellate court] generally will not decide issues which were not raised before the district court . . .”).

In conclusion, we affirm Windell's conviction of felony domestic assault. But we reverse and remand Windell's conviction of stalking, as well as his sentence.

Affirmed in part, reversed in part, and remanded.