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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-0886, A11-0887, A12-0543**

State of Minnesota,
Respondent,

vs.

Rickey Lee Walker,
Appellant Rickey Lee Walker, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed February 25, 2013
Affirmed in part, reversed in part, and remanded.
Worke, Judge**

Ramsey County District Court
File No. 62-CR-10-8498

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

John J. Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Hudson, Judge; and Worke, Judge.

UNPUBLISHED OPINION

WORKE, Judge

In this consolidated appeal following two jury trials, appellant Rickey Lee Walker challenges his convictions of violating an order for protection (OFP), and of engaging in a pattern of stalking conduct. Because the district court improperly instructed the jury on the mens rea element of the felony OFP offense, we reverse that conviction and remand for a new trial. But because the evidence was sufficient and the district court did not abuse its discretion by permitting a witness to identify appellant on a security video, we affirm appellant's pattern-of-stalking-conduct conviction.

DECISION

Jury instruction

Appellant argues that the district court erred in instructing the jury on the elements of the OFP offense. We will review the district court's jury instructions despite a defendant's failure to object if the "instructions constitute plain error affecting substantial rights or an error of fundamental law." *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007), *overruled on other grounds*, *State v. Fleck*, 810 N.W.2d 303 (Minn. 2012); *State v. Gunderson*, 812 N.W.2d 156, 159 (Minn. App. 2012). Plain error is (1) error (2) that is plain and (3) affects a defendant's substantial rights. *Id.* If these three conditions are satisfied, a defendant's conviction will be reversed if "reversal is required to ensure fairness and the integrity of the judicial proceedings." *Id.*

Appellant was charged with a felony violation of an OFP, which required the state to show that appellant "knowingly violate[d]" the OFP. *See id.*, subd. 14 (d) (2010)

(felony violation); *cf.* Minn. Stat. § 518B.01, subd. 14(b) (2010) (misdemeanor violation). The district court instructed the jury that appellant must know of the existence of the OFP, the misdemeanor mens rea standard. *See* Minn. Stat. § 518B.01, subd. 14(b) (2010). The state concedes that the district court’s use of the improper standard was plain error, but argues that appellant failed to show either that the error affected his substantial rights or that reversal is required to ensure the fairness and integrity of the judicial process. *See Gunderson*, 812 N.W.2d at 159.

Plain error affects substantial rights if “there is a reasonable likelihood that the error had a significant effect on the jury’s verdict.” *State v. Young*, 710 N.W.2d 272, 280 (Minn. 2006) (quotation omitted). In *State v. Watkins*, 820 N.W.2d 264 (Minn. App. 2012), *review granted* (Minn. Nov. 20, 2012), a matter involving a felony violation of a domestic-abuse-no-contact order (DANCO), the district court instructed the jury in a similar fashion, stating that the defendant must know of the order rather than knowingly violate the DANCO, in order to be convicted of a felony. *Id.* at 266. This court, concluding that this was plain error, held that “as a matter of law, omission of an element of a charged offense from the jury instructions affects a party’s substantial rights.” *Id.* at 269.

In *Gunderson*, the district court instructed the jury in the same manner for felony violation of a harassment restraining order (HRO). 812 N.W.2d at 159. This court noted that the “omission of an element of a crime from the instructions to the jury has a significant effect on the verdict when the defendant submits evidence that tends to negate that element, and there is a reasonable likelihood that a properly instructed jury could

have accepted the defendant's version of events." *Id.* at 162 (quotation omitted). Here, appellant told the investigating officer that he thought the order was no longer in effect; arguably, this negates the element that he knowingly violated the OFP.

The state argues that the jury obviously disbelieved appellant's claim that he thought the OFP was no longer in effect and that therefore "the evidence at trial overwhelmingly proved appellant's violation of the terms of a valid OFP." But this argument applies the wrong standard: the question was not whether appellant knew of the order but whether he knowingly violated the order; presumably, the state was required to demonstrate that appellant knew that his conduct violated the order. Because of the erroneous instruction, it is not clear whether the jury determined that he knowingly violated the OFP, which could have significantly affected the verdict.

Finally, even a plainly erroneous instruction that impairs a defendant's substantial rights will not be reversed unless it affects the fairness and integrity of the judicial proceedings. *Id.* at 163. In *Gunderson*, this court stated that "the fairness and integrity of the judicial proceedings are called into question by . . . erroneous instructions and the verdict based on those instructions when the jury may not have considered a disputed element of the crime." 812 N.W.2d at 163 (quotation omitted). The jury here may not have considered the difference between knowing of the order and knowingly violating the order.

On this record, the district court's plainly erroneous instruction affected appellant's substantial rights, and the fairness and integrity of the judicial proceedings were compromised. We therefore reverse appellant's conviction for violation of an OFP

and remand the matter for further proceedings. Because of our decision, we do not address appellant's *Batson* challenge.

Sufficiency of the evidence: pattern of stalking conduct

Appellant contends that the evidence was insufficient to show one of the elements of the pattern-of-stalking-conduct charge: that he knew or had reason to know that the victim, G.W., would feel terrorized or fear bodily harm because of the stalking conduct. *See* Minn. Stat. § 609.749, subd. 5 (2010).

Our review of a sufficiency-of-the-evidence claim is limited to “ascertaining whether under the evidence contained in the record the jury could reasonably find the accused guilty of the offense charged.” *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009). We view the evidence in the light most favorable to the verdict. *Id.* If a verdict is based in part on circumstantial evidence, a heightened-scrutiny standard applies, which requires the reviewing court to consider whether the “reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt.” *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted). In doing so, deference is given to the factfinder's credibility determinations. *Id.* The heightened scrutiny involves a two-step process: first, the reviewing court identifies the circumstances proved, deferring to the jury's determination of the facts. Second, the reviewing court independently examines the reasonable inferences that can be drawn from the proved circumstances, without deference to the jury. *Id.* at 473-74. If the reasonable inferences lead to a conclusion other than guilt, a reasonable doubt as to guilt arises. *Id.* at 474. The circumstantial-evidence standard applies here because there is no

direct evidence of whether appellant knew or had reason to know that his actions would terrorize G.W.

Based on the jury's verdict, the following are the circumstances proved: (1) G.W. had a two-year OFP against appellant; (2) appellant knew about the OFP because the investigating officer and appellant's probation officer both explained the prohibited conduct and the duration of the OFP after appellant violated the OFP by attempting to contact G.W. by telephone; (3) despite these warnings, appellant violated the OFP on two occasions by entering G.W.'s workplace; (4) after each of appellant's attempts to contact G.W., she promptly notified police of the OFP violation; (5) appellant was told by two of G.W.'s co-workers that she did not want contact with him; (6) the OFP was granted because of appellant's violent actions toward G.W., including slapping her on multiple occasions and beating her until she needed medical care; (7) appellant threatened G.W. and told her that he would cause her to lose her job; (8) appellant told G.W. that he would get his friends to hurt her; (9) G.W. was isolated and had no support from family members; and (10) G.W. repeatedly told co-workers that she was frightened of appellant.

In *Franks*, the defendant was charged with engaging in a pattern of harassing conduct. 765 N.W.2d at 72. This offense has an element similar to the pattern-of-stalking-conduct offense: the defendant must know or have reason to know that his conduct would terrorize the victim or cause the victim to fear bodily harm. *Id.* at 74-75. The *Franks* court did not require the state to demonstrate an express threat, and concluded that a defendant's words and acts should be viewed "in the context of the

defendant's relationship with the victim, including evidence of past crimes against the victim." *Id.* at 75.

Here, appellant threatened to cause G.W. to lose her job and to ask his friends to harm her, and he appeared at her jobsite on two occasions, after receiving direct warnings not to do so. After appellant's earlier contact by telephone, G.W. immediately called police, and the investigating officer met with appellant; this informed appellant that his contact was not welcome. Appellant was repeatedly warned by G.W.'s co-workers, as well as the police and his probation officer, that G.W. wanted no contact with him. In the context of their relationship, the only conclusion to draw from these reasonable inferences is that appellant deliberately continued to violate the OFP because he knew that his actions would terrorize G.W. or cause her to fear bodily harm. On the record before us, there is sufficient evidence to sustain appellant's conviction of engaging in a pattern of stalking conduct.

Identification evidence

Appellant argues that the district court abused its discretion by permitting G.W.'s manager, L.F-H., to identify appellant as the person depicted on the security videotape taken at G.W.'s workplace. *See State v. Flemino*, 721 N.W.2d 326, 328 (Minn. App. 2006) (stating that district court's evidentiary decisions are reviewed for an abuse of discretion). Because appellant did not object to admission of the evidence, we review for plain error. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002).

Appellant contends that L.F-H.'s identification of appellant was improper lay-witness opinion testimony. *See Minn. R. Evid. 701* (stating that lay witness's testimony

is limited to opinions or inferences that are (1) rationally based on the witness's perception, and (2) helpful to a clear understanding of the witness's testimony). Appellant cites a number of cases in which error was found when police officers offered identification testimony about individuals seen in surveillance videos, although the officers were previously not acquainted with the defendant.

But L.F-H. did not offer opinion testimony about whether the individual in the video was appellant. L.F-H. spoke with appellant and served him his food order. At trial, L.F-H. personally identified appellant as the person she spoke with and served. When the jury watched the security video, L.F-H. pointed out who the various people in the security video were, including appellant. This is not opinion testimony; this is direct identification evidence.

Identification evidence that is unreliable may be rejected. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999). Generally, the district court must determine if, in the totality of the circumstances, there is an adequate reliable basis for a witness's identification. *Id.* Here, L.F-H. had an adequate opportunity, under well-lighted conditions, to examine appellant, speak with him, and serve him food. There was no error, much less plain error, in permitting this witness to identify appellant at trial.

Because there was sufficient evidence to sustain the conviction, and because the district court did not abuse its discretion by permitting L.F-H. to identify people in the security video, we affirm appellant's conviction of engaging in a pattern of stalking conduct.

Affirmed in part, reversed in part, and remanded.