STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1912

State of Minnesota,
Respondent,

vs.

Jeremy Michael Patterson,
Appellant.

Filed December 30, 2008
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. T2-06-611306

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Trevor S. Oliver, Little Canada City Attorney, Kelly & Lemmons, P.A., 200 Crossroads, 7300 Hudson Boulevard, St. Paul, MN 55128 (for respondent)

John E. Connelly, Faegre & Benson, L.L.P., 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402; and

Lawrence Hammerling, Chief Appellate Public Defender, Theodora K. Gaitas, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges his conviction of violation of an order for protection under Minn. Stat. § 518B.01, subd. 14 (2006), on the grounds that (1) the court erred by failing to instruct the jury that intent to violate the order is an element of the crime; (2) if there is no intent requirement for a violation of an order for protection, the statute is unconstitutional; and (3) appellant should be granted a new trial due to irregularities at trial. We disagree and affirm.

FACTS

On August 21, 2006, appellant Jeremy Michael Patterson's ex-fiancée, R.S., obtained an order for protection (OFP) preventing appellant from entering their trailer home from August 21, 2006 through August 31, 2006, so that R.S. could move her things from the residence. The OFP also provided:

> B. [Appellant] must not have any contact with [R.S.] or the child(ren) whether in person, with or through other persons, by telephone, letter, or in any other way.
>
> . . . .
>
> E. [Appellant] must not enter or call [R.S.'s] place of employment at [name and address omitted].
>
> [Appellant] must not enter the following additional address(es):
>
> Home [address omitted].
>
> Other [names and address omitted].

Appellant was served with the OFP while at the trailer home, the same day the OFP was issued, at 5:40 p.m. Under the supervision of the deputy sheriff who served him,

appellant left the home, locked the doors and windows, and took with him the only key to the home.

At approximately 8:00 p.m., on the same day the OFP was issued and served, R.S. went to the home with some of her family members, including her seven-year-old son whom she had with appellant. Because R.S. did not have a key to the home, she assisted her minor son in entering the home through a window to allow her to enter the home through the front door. While R.S. was in the home, appellant called the telephone in the home. R.S. answered the telephone and upon hearing her voice, appellant said something to the effect of "What are you doing there?"[1] R.S. informed appellant that he was violating the OFP by contacting her, and appellant disconnected the phone call. Appellant testified that he had no intention to contact R.S., assumed that she would not be in the home because it was locked and he had the only key, and only called the telephone at the trailer home to check for any voicemail messages from a legal aid lawyer whom he had contacted about moving ahead with child-custody proceedings involving his son.

On August 24, 2006, R.S. reported the telephone contact to the police, and appellant was charged with misdemeanor contempt under Minn. Stat. § 588.20, subd. 2(4) (2006) (willful disobedience to the lawful process or other mandate of a court). A jury trial was held on August 14 and 15, 2007.

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[1] Various versions of the facts have appellant saying: "What are you doing there?"; "Wow, you're there?"; "Oh, you're there?"; "What the f--- are you doing there—how the h--- did you get in the house?" The parties do not dispute the fact that the conversation ended almost immediately after it began, when appellant disconnected the call.

Prior to the commencement of trial, the parties stipulated that appellant was being charged with and tried for violation of an order for protection under Minn. Stat. § 518B.01, subd. 14, instead of Minn. Stat. § 588.20.[2] Notwithstanding the stipulation that the appellant would be charged under Minn. Stat. § 518B.01, subd. 14, however, the district court advised the jury that:

> A complaint has been filed with this court that alleges that the defendant, Jeremy Michael Patterson, committed the following crime. On August 21, 2006, Jeremy Michael Patterson placed a telephone call to [R.S.] in violation of an Order for Protection issued by the Ramsey County District Court. Minnesota Statute 588.20 states that it is a violation of law for a person to act in willful disobedience of a court order.

Appellant maintains that his trial counsel relied to his detriment on the district court's mistaken comments to the jury, when in his opening statement he said:

> Folks, Mr. Patterson didn't do anything wrong, he was just checking his voice mail. *And as the Court mentioned before, the violation [of] an order for protection requires willful disobedience.* Mr. Patterson didn't mean to do anything wrong, and he's being accused of doing something malicious.

(Emphasis added.) Then, in denying defense counsel's motion for judgment of acquittal, the district court said:

> The motion for judgment of acquittal is denied. A telephone call was placed, allegedly by Mr. Patterson, to a residence where [R.S.] was known to live, and in fact the location of that residence is specifically stated in the Order for Protection. *It's left for the jury to make a determination as to*

[2] The state did not amend the charges on the record until the close of trial, before final jury instructions were given.

> *whether or not the intent of that alleged phone call was to make contact with [R.S.] in violation of the no contact order.*

(Emphasis added.) Immediately after the court's ruling, appellant testified, waiving his right to remain silent. After appellant testified and outside the presence of the jury, the district court said:

> [T]here's no facts upon which one could reasonably conclude that the call was made for the purpose of contacting [R.S.] and in violation of the Order for Protection.
>
> However, Mr. Patterson himself testified that once he realized that [R.S.] was the recipient of the call that it would have been the proper thing from him to simply hang up rather than say anything. He didn't hang up. Rather, he used that opportunity as a—as a—as an opportunity to make comment, however brief, to [R.S.]
>
> I believe that Mr. Patterson's testimony would support a jury determining that even though he did not have a reasonable expectation that [R.S.] might answer the telephone call, once she did answer and respond verbally then that constituted a violation of an Order for Protection.

After closing arguments, the district court denied appellant's request for "an explicit instruction regarding the issue of intent." The court gave final jury instructions on the elements of violation of an order for protection under Minn. Stat. § 518B.01, subd. 14, as follows:

> Now the elements of violation of an order for protection are: first, there was an existing court Order for Protection; second, the defendant violated a term or condition of the order; third, the defendant knew of the existence of the order; fourth, the defendant's act took place on August 21, 2006 in Ramsey County.

The court did not instruct the jury on whether a violation of an OFP requires intent. During its deliberations, the jury submitted a question to the court: "Is the *intention* of the defendant's action relevant to our decision of his guilt or innocence?" In response to the question, the court instructed the jurors to rely on the information already given to them and did not address the issue of intent. The jury found appellant guilty of violation of an order for protection under Minn. Stat. § 518B.01, subd. 14. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court erred in declining to instruct the jury that intent is an element of the crime of violating an OFP under Minn. Stat. § 518B.01, subd. 14, because, argues appellant, the violation of an OFP is at least a general-intent crime. In crafting jury instructions, the district court has significant discretion. *State v. Broulik*, 606 N.W.2d 64, 68 (Minn. 2000). A jury instruction is error if it materially misstates the law. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). Jury instructions must be viewed in their entirety to determine whether they fairly and adequately explain the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

Under Minnesota law, a "crime is a general intent crime if the only intent required is to do the act which is prohibited by the statute." *State v. Lindahl*, 309 N.W.2d 763, 766 (Minn. 1981). Minnesota Statutes, section 518B.01, subdivision 14(b), provides that "whenever an order for protection is granted . . . and the respondent or person to be restrained knows of the existence of the order, violation of the order for protection is a misdemeanor." The statute requires that the restrained person have knowledge of the

existence of the OFP but does not provide that a violation of an OFP occurs only when a restrained person intends to violate an OFP. The violation of an OFP is a general-intent crime, because the only intent required is to do the act which is prohibited by the OFP that is issued pursuant to the statute.

Appellant argues that because he did not intend to contact R.S., he cannot be guilty of a violation of an OFP. Appellant's argument is unpersuasive. Appellant does not deny that he knew of the existence of the OFP. A defendant who knows of the OFP is deemed to know the contents of the OFP, including the prohibited conduct. *See State v. Colvin*, 629 N.W.2d 135, 138 (Minn. App. 2001) ("The state is required to prove the existence and defendant's awareness, of the order for protection, in addition to a violation of the order."), *rev'd on other grounds*, 645 N.W.2d 449 (Minn. 2002).

Here, the OFP clearly prohibited "contact with [R.S.] or the child(ren) whether in person, with or through other persons, *by telephone*, letter or in any other way." (Emphasis added.) Not only did appellant telephone the home from which he was excluded, when R.S. answered the telephone, appellant did not hang up. Instead, with full knowledge that the OFP prohibited his telephone contact with R.S., appellant engaged in a verbal exchange with R.S., albeit brief.

Because appellant had telephone contact with R.S., knowing of the OFP, the district court determined that a jury could reasonably conclude that appellant violated the OFP. The court ruled that an instruction on intent was unnecessary and instructed the jury in accordance with the Criminal Jury Instruction Guide for violations of an OFP. *See* 10 *Minnesota Practice* CRIMJIG 13.54 (2006). Courts favor the use of CRIMJIG's

during trials. *State v. Smith*, 674 N.W.2d 398, 401 (Minn. 2004). We conclude that the district court did not materially misstate the law when it instructed the jury using CRIMJIG 13.54, which recites the applicable elements from Minn. Stat. § 518B.01, subd. 14(b). The district court did not err in declining to instruct the jury on intent.

We are not presented with a situation in which accidental contact is a defense and a jury instruction is necessary to avoid a wrongful conviction. *See State v. Orsello*, 554 N.W.2d 70 (Minn. 1996) (concluding that the stalking statute must require specific intent because otherwise the court must "admit the possibility that one might be guilty of accidental stalking"). In this case, unlike in *Orsello*, no dispute exists about whether appellant voluntarily and intentionally engaged in telephone contact with R.S. when he initiated the telephone call and did not hang up when he heard R.S.'s voice. However brief appellant's telephone contact with R.S. was, he engaged in conversation with her, knowing of the OFP, and that prohibited contact resulted in appellant's conviction.

II.

Appellant argues, for the first time, that if no proof of intent is required to establish a violation of an OFP under Minn. Stat. § 518B01, subd. 14, the statute is unconstitutionally overbroad and vague because it fails to give adequate notice of the conduct prohibited and punishes a broad range of apparently innocent conduct. Though raised for the first time on appeal, the state fully briefed this constitutional issue. Therefore, the state will not be prejudiced if we consider the constitutionality of Minn. Stat. § 518B.01. *See Woodhall v. State*, 738 N.W.2d 357, 363 n.6 (Minn. 2007) ("Because a statute's constitutionality is a purely legal issue and because the state briefed

the issue, we do not prejudice the state by considering the constitutionality of [the statute]."); *see also* Minn. R. Crim. P. 28.02, subd. 11 (stating that appellate courts "may review any other matter as the interests of justice may require"). "Evaluating a statute's constitutionality is a question of law." *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). Accordingly, the constitutionality of a statute is subject to de novo review. *Id.*

"The void-for-vagueness doctrine requires that 'a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983)). "A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). "[B]ecause the overbreadth doctrine has the potential to void an entire statute, it should be applied only as a last resort and only if the degree of overbreadth is substantial and the statute is not subject to a limiting construction." *Id.* (quotation omitted).

We have previously described the elements for a violation of an OFP pursuant to Minn. Stat. § 518B.01, subd. 14(b): (1) an order exists; (2) the defendant knows about the order; (3) the order was violated; and (4) it was violated around a certain date in the referenced county. *See Colvin*, 629 N.W.2d at 138 (stating elements (1) through (3)). The statute clearly provides that the violation of an OFP is the prohibited conduct, which

is not innocent or accidental conduct. And the OFP itself provides appellant sufficient notice about the particular conduct that is prohibited because that conduct is set forth in the OFP. We conclude that the statute is not unconstitutionally overbroad or vague because it defines the violation of an OFP with sufficient definiteness and is properly limited in scope.

III.

Appellant also argues that this court should remand this case to the district court for a new trial because there were irregularities in appellant's trial. An irregularity is defined as "an act or practice that varies from the normal conduct of an action." Black's Law Dictionary 848 (8th ed. 2004). Specifically, appellant argues that due to the district court's preliminary statements to the jury that referenced language in Minn. Stat. § 588.20, he was not prosecuted throughout the trial under Minn. Stat. § 518B.01 with consistent interpretations of the offense and its elements.

Appellant argues that he was prejudiced because defense counsel relied on the district court's erroneous instructions and statements. But appellant failed to object to the district court's preliminary statements to the jury or to any other complained-of statements by the court. Where a defendant fails to object to the admission of evidence, our review is under the plain-error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). We apply the same standard to the trial irregularities asserted by appellant. "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740 (citing

Johnson v. United States, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 1548-49 (1997))). "If those three prongs are met, we may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

But irregularities not affecting substantial rights do not warrant a new trial. *See State ex rel. Cobb v. Rigg*, 251 Minn. 208, 210, 87 N.W.2d 363, 365 (Minn. 1957) (stating that appellant's claim of irregularity did not result in error where county attorney read accusations in complaint to jury, instead of court as provided by Minn. Stat. § 610.31, because no matter who read accusations to jury, the purpose of the act was met: giving information of accusations to defendant). And the defendant bears the heavy burden of persuasion on the third prong of the plain-error test and must prove that the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741.

Here, both parties knew the actual statute under which appellant was being prosecuted even though the complaint listed the wrong statute. Moreover, before final jury instructions were given, the complaint was amended on the record to reflect the correct statute. And while the district court incorrectly stated the elements to be proved by the state during its preliminary statements to the jury, the court cured the potential prejudice to appellant when it properly gave the jury CRIMJIG 13.54 in its final instructions. Additionally, after hearing these final instructions, the jury heard from defense counsel who stated, "[t]he judge read to you certain instructions, and I've got them up here for you to look at. There's four elements." Defense counsel went on to list all four elements, read each element to the jury, and showed the jury a list of the four

elements. Even if there was plain error here, the appellant has failed to show that the error was prejudicial and affected the outcome of the case.

Finally, appellant also asserts that because of a statement made by the district court during trial, appellant waived his right to remain silent and testified. As noted above, the court stated, "It's left for the jury to make a determination as to whether or not the intent of that alleged phone call was to make contact with [R.S.] in violation of the no contact order." But we are not persuaded that this statement induced appellant's waiver and trial testimony. Appellant was fully aware of the elements of a violation of an OFP because defense counsel acknowledged during trial that appellant was "on notice of the specific violation" with which he was charged. Additionally, during his opening statement, long before the court's particular statement was made, defense counsel told the jury that appellant would be testifying at trial. Because appellant has failed to show that he was prejudiced or that his substantial rights were affected by the irregularities, we conclude that appellant is not entitled to a new trial.

Affirmed.