STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0485

State of Minnesota,
Respondent,

vs.

Reginald Tensley,
Appellant.

Filed May 12, 2009
Affirmed
Minge, Judge

Goodhue County District Court
File No. CR-07-1766

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Stephen Betcher, Goodhue County Attorney, Courthouse, 454 West Sixth Street, Red Wing, MN 55066 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Stauber, Presiding Judge; Minge, Judge; and Connolly, Judge.

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

MINGE, Judge

Appellant Reginald Tensley challenges his convictions of two counts of felony harassment pursuant to Minn. Stat. § 609.749, subd. 2(4)–2(5) (2006),[1] alleging: (1) the district court abused its discretion in admitting a hearsay statement that appellant was dangerous and had previously assaulted a girlfriend; (2) the convictions were not supported by sufficient evidence; and (3) the district court erred by not explicitly considering evidence that the victim suffered from post-traumatic-stress disorder (PTSD). We affirm.

D E C I S I O N

I.

The first issue is whether the district court abused its discretion in admitting, over a hearsay objection, an out-of-court statement that appellant was dangerous and had previously assaulted a girlfriend. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Appellant was tried without a jury. A review of the record shows that the challenged testimony was elicited immediately after the victim explained that, by May

[1] These were felonies under Minn. Stat. § 609.749, subd. 4(b) (2006) because appellant had two or more previous qualified domestic-violence-related offenses within ten years.

13, 2007, she had become "definitely scared" of appellant. The victim testified that on the evening of May 12, she told a neighbor about her contacts with appellant, his wanting her to be his girlfriend, and his numerous, insistent phone calls to her. The victim continued to say that this same neighbor told her that appellant had previously assaulted a girlfriend and warned her that he was dangerous and to stay away from him. The victim further testified that, as a result of that conversation with the neighbor, "everything started to click [in my mind] and I vowed I would never talk to him again." The neighbor was not a witness at the trial.

A. Hearsay

"Hearsay is evidence of a declarant's out-of-court statement to prove the truth of what is asserted in the statement." *State v. Litzau*, 650 N.W.2d 177, 182-83 (Minn. 2002) (quotations and citations omitted); *see also* Minn. R. Evid. 801(c). However, an out-of-court statement is *not hearsay* if it is admitted to show the probable state of mind and good-faith subsequent conduct of the person *who heard it*. *Litzau*, 650 N.W.2d at 182 n.3.

The neighbor's statement would be hearsay only if it was offered to prove the truth of the story recounted by the neighbor; namely, that appellant actually was dangerous and did injure a former girlfriend. It would *not* be hearsay if it were offered to prove the victim's state of mind. Here, appellant was charged with felony harassment. One of the elements of the crime is conduct by the accused that:

> (1) the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated; and

(2) causes this reaction on the part of the victim.

Minn. Stat. § 609.749, subd. 1 (2006). Thus, the victim's state of mind is relevant. For this reason, the victim's familiarity with or knowledge of the "actor" conduct and background is directly relevant to establishing the crime.

From the trial record, it is clear that the prosecutor was attempting to establish that appellant's repeated calls to the victim over a period of several days caused the victim to be apprehensive of appellant and that the victim became more fearful of appellant after she heard the neighbor's story. The record reflects that the prosecutor conveyed this purpose to the district court, that the testimony had this purpose and that the district court allowed the testimony on that premise. We recognize that, if this case had been tried to a jury, there would have been an increased potential for misusing the evidence. However, this was a bench trial, and the district court's on-the-record ruling on the hearsay objection recognized that the statement was not admitted for the truth of the matter asserted or under any hearsay exception.

Because the objected-to statement was offered to prove an element of the offense, the victim's fear, and not offered to prove the truth of the matter asserted, we conclude that it was not an abuse of discretion for the district court to allow the statement as a nonhearsay statement.

B. Character Evidence

Appellant argues that, in addition to being improper hearsay, the neighbor's statement constituted improper character evidence under the rules of evidence. Minn. R. Evid. 404(b). This objection was not made at trial. Generally, we will not consider

matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *see also* Minn. R. Evid. 103(a)(1) (requiring a party to state its specific grounds of objection). Nonetheless, we may review the claim under the plain-error standard of review. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To reverse the district court under *Griller*'s three-prong test, there must be: (1) error; (2) that is plain; and (3) the error must affect appellant's substantial rights. *Id.* If these prongs are met, we must determine whether this court "should address the error to ensure fairness and the integrity of the judicial proceedings." *Id*. The improper admission of evidence of prior bad acts is less prejudicial if the trial is to the court rather than a jury. *See Irwin v. State*, 400 N.W.2d 783, 786 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987).

Rule 404 prohibits evidence of a person's character, trait of character, or prior "crime, wrong, or act" to prove that the person acted in conformity therewith. Minn. R. Evid. 404(a), (b). The rule does not prohibit introducing evidence for other, legitimate purposes. Whether the evidence was inadmissible because of rule 404 depends on whether the evidence was effectively and prejudicially introduced to establish appellant's character. *See State v. Roman Nose*, 667 N.W.2d 386, 404 (Minn. 2003) (holding that a prosecutor's argument that a picture on defendant's wall portraying a human body was evidence of defendant's personality and values was improper character evidence); *Litzau*, 650 N.W.2d at 185 (holding testimony that drug dealers commonly took steps to avoid forfeiting a new car, hid drugs in obscure places like the air cleaner, and consented to searches was akin to character evidence and was erroneously admitted). In *Roman Nose*,

the supreme court observed that the evidence in question did not *become* character evidence until the prosecutor used it in his closing argument to raise the jurors' suspicions about the defendant's morality and personality. 667 N.W.2d at 404.

Here, the context in which the victim testified about the neighbor's statement is clear. The prosecutor had the burden of establishing the victim's state of mind and indicated that he was only attempting to meet that burden with the evidence in question. The trial was a bench trial, and the district court inquired about and clarified this limited purpose. There is no claim that the prosecutor improperly used the evidence in closing argument to implicate appellant's character and no indication that the district court misconstrued the testimony as character evidence. In our case, the likelihood that the victim's state of mind was influenced by the neighbor's comment on appellant's character does not negate the proper use. As detailed later in this opinion, appellant's direct contacts with the victim were so pervasive that the risk of prejudice from the admission of the neighbor's statement is insignificant. We conclude that the district court did not err under rule 404 by admitting the evidence.

II.

The second issue is whether the evidence at trial was sufficient to support appellant's two convictions of harassment. In evaluating a claim of insufficient evidence, "[t]he standard of review is the same for a bench trial as it is for a jury trial." *State v. Stevenson*, 637 N.W.2d 857, 862 (Minn. App. 2002), *aff'd on other grounds*, (Minn. Feb. 6, 2003). We review the record to determine whether the evidence, when viewed in the light most favorable to the verdict, is sufficient to allow the factfinder to reach the verdict

that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the factfinder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We will not disturb the verdict if the factfinder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that appellant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Section 609.749 criminalizes harassment in a multi-part definition. As previously set forth in this opinion, one subdivision of the statute provided that to "harass" means to engage in intentional conduct in a manner that:

> (1) the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated; and
>
> (2) causes this reaction on the part of the victim.

Minn. Stat. § 609.749, subd. 1. Another subdivision adds that a person must "harass" another by committing one of several acts, including:

> (4) repeatedly mak[ing] telephone calls, or induc[ing] a victim to make telephone calls to the actor, whether or not conversation ensues; [or]
>
> (5) mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring[.]

Id. at subd. 2(4)–(5). The district court found that appellant was guilty of harassment under both of these subdivisions.

Appellant's sole argument regarding the adequacy-of-the-evidence issue is that the state failed to prove that he knew or had reason to know that his calls would cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated. He does not deny making the phone calls to her or that his calls caused her to feel frightened, threatened, or intimidated. Rather, he argues that he had no reason to believe that his conduct would cause that result.

The record indicates that, over the course of approximately one week, appellant made 20 to 30 calls per day, and that these calls resulted in numerous unwanted conversations, hang-ups, and voicemails. Appellant used most of these calls to convey his wide-ranging emotional responses to the victim's expression that she was not romantically interested in him. Beginning May 11, 2007, she made several statements that either explicitly or impliedly indicated that she did not want appellant to call her anymore, and, on May 13, she directly told appellant that they could not be friends and that he was not to call her anymore. Despite these unambiguous statements, appellant continuously called her from May 14-18. During some conversations, appellant made statements that he should have known were harassing. For example, during one conversation around May 16, he demanded that the victim be his girlfriend. When she denied his accusations that she was playing games with him, the victim testified that he said something along the lines of: "You don't want to play with me, honey, because I killed somebody before." On another occasion, he threatened to have her followed and kidnapped if she refused to talk to him. The district court credited the victim's testimony about these calls.

Based on appellant's threatening statements to the victim after she told him not to call and the excessive number of phone calls within a short time—most of which were made after she told him to stop calling her, we conclude that appellant knew or had reason to know that his conduct would cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated. Consequently, we conclude that the evidence was sufficient to support the convictions.

III.

The third issue is whether the district court committed reversible error by "fail[ing] to take notice of" the victim's testimony that, at the time of the alleged harassment, she was suffering from PTSD. The district court did not mention the PTSD testimony in its findings of fact or conclusions of law. Appellant argues that this PTSD evidence is important because it suggests that his conduct was not the sole cause of the victim's anxiety and fear but that she reacted irrationally and that he had no reason to anticipate that reaction.

Appellant did not assert this PTSD-related defense at trial and did not move for a new trial on this ground. Instead, we are asked to weigh the potential significance of the victim's alleged irrational state of mind as a defense and reverse. Generally, issues not raised at trial are waived. *Roby*, 547 N.W.2d at 357. Regardless, we may review such an issue in the interest of justice.

We note that the prosecution was not required to prove that the victim was a reasonable, healthy, or normal person. The state needed to prove that the victim was frightened and that appellant knew or had reason to know that his actions "would cause

the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated." Minn. Stat. § 609.749, subd. 1. Here, the district court found both of these elements were proved. Thus, whether the victim's subjective fear was partially caused by certain vulnerabilities peculiar to her is not material. The district court was not required to identify or discuss this PTSD evidence in its findings of fact. Accordingly, we conclude that the district court did not err.

Because we find that the district court did not err in admitting the neighbor's statement, because there was sufficient evidence to support the convictions, and because the district court did not err in not addressing the victim's PTSD in its decision, we affirm.

Affirmed.

Dated: