

Filed in District Court
State of Minnesota

FEB 03 2023

STATE OF MINNESOTA
COUNTY OF [REDACTED]

IN DISTRICT COURT
[REDACTED] JUDICIAL DISTRICT

STATE OF MINNESOTA,

Court File No. [REDACTED]

Plaintiff,

vs.

ORDER AND
MEMORANDUM

[REDACTED]

Defendant.

The above-entitled matter came on for hearing before the undersigned Judge of District Court on November 30, 2022, at the [REDACTED] County Courthouse, [REDACTED], Minnesota. The State of Minnesota was represented by [REDACTED], [REDACTED] County Attorney, [REDACTED], Minnesota. Defendant, [REDACTED], was personally present and represented by his attorney, Bruce Ringstrom, P.O. Box 853, Moorhead, Minnesota.

On February 10, 2022, Defendant was charged by Complaint with one count of gross misdemeanor Harassment, in violation of Minn. Stat. § 609.749, subd. 2(b)(3). This matter is before the Court on Defendant's motion to dismiss for lack of probable cause, filed November 29, 2022. The State filed a *Florence* packet on December 13, 2022. Counsel submitted written arguments, and the matter was taken under advisement on January 6, 2023.

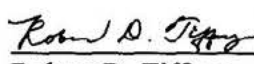
Based upon all the files, records and proceedings herein, the Court makes the following:

ORDER

1. Defendant's motion to dismiss for lack of probable cause is **GRANTED**.
2. The attached Memorandum of the Court is incorporated by reference herein.

IT IS SO ORDERED.

BY THE COURT:

 Tiffany, Robert
 Robert D. Tiffany Feb 3 2023 1:20 PM
 Judge of District Court

MEMORANDUM

A probable cause motion requires the court to determine “whether probable cause exists to believe that an offense has been committed and that the defendant committed it.” Minn. R. Crim. P. 11.04(a). Probable cause is less than proof beyond a reasonable doubt and requires only that the evidence “brings the charge against the [defendant] within reasonable probability.” *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976). The issue is not whether there was probable cause to support the original arrest, but rather whether “it is fair and reasonable . . . to require the defendant to stand trial” on the offense charged. *Florence*, 239 N.W.2d at 902; Minn. R. Crim. P. 11, comm. cmt.

The Court should deny the motion if the record, including reliable hearsay, “would preclude the granting of a motion for a directed verdict or acquittal if proved at trial.” *Florence*, 239 N.W.2d at 903. “A motion for judgment of acquittal is properly denied where the evidence, viewed in the light most favorable to the state, is sufficient to sustain a conviction.” *State v. Simion*, 745 N.W.2d 830, 841 (Minn. 2008). “In other words, if the facts . . . present a fact question for the jury’s determination on each element of the crime charged, the charge will not be dismissed for lack of probable cause.” *State v. Lopez*, 778 N.W.2d 700, 704 (Minn. 2010) (internal citations omitted).

I. SUMMARY OF FACTS IN THE RECORD

On July 22, 2022, Investigator [REDACTED] received a report of a possible crime from a student at [REDACTED] High School, in [REDACTED], Minnesota, [REDACTED] County. Investigator [REDACTED] met with J.B. who was a senior at the school. J.B. informed the investigator that she was a teacher’s assistant for [REDACTED], Defendant, who taught physical education and health at the school. J.B. said that in February 2021, Defendant began to get “touchy” with her, and this

behavior lasted until June 2021 when she reported the information to the school. J.B. indicated Defendant would reach over and “twiddle” her fingers. Defendant would stand close to J.B. so their legs would touch, touch J.B.’s stomach with his while she was on the bench press and, once grabbed J.B. around the waist and pulled her back towards him. At one point, J.B. said Defendant prevented her from leaving a room and tried to physically push her back into the room.

J.B. reported that Defendant made comments to her that made her uncomfortable, including that she should come to his apartment once she graduates and come to his cabin. Defendant told J.B. the bed at his apartment was comfortable, and that a real graduation present for J.B. was at his apartment. Defendant said he had a girlfriend in high school who was a gymnast. J.B. responded that she was a gymnast, and Defendant said that he must have a thing for gymnasts. Defendant texted J.B. and said he learned his niece had a doll with the same name as J.B. Defendant told J.B. he had driven past her home and asked if J.B. could see him on her Ring doorbell camera.

J.B. informed Investigator [REDACTED] that she did not initially report Defendant because she feared retaliation, but his behavior caused her to become depressed and have an emotional breakdown.

II. PROBABLE CAUSE ANALYSIS

Defendant is charged with one count of gross misdemeanor Harassment, in violation of Minn. Stat. § 609.749, subd. 2(b)(3). Under this statute, the State must prove the following elements at trial¹:

- 1) the defendant committed harassment.
- 2) the defendant acted with the intent to kill, injure, harass, or intimidate the alleged victim.

¹ See also CRIMJIG 13.58.1 Harassment – Elements (NEW), 10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 13.58.1 (6th ed.). The State would also be required to prove the crime happened in [REDACTED] County, however, that element is not disputed by the parties.

- 3) the defendant caused or would reasonably be expected to cause substantial emotional distress to the alleged victim.

Defendant argues that the State cannot prove any of these three elements. After reviewing the totality of the record, the Court concludes that the State's evidence presents a fact question for the jury on the second and third elements. But the State has not provided sufficient evidence to sustain a conviction on the first element of the offense.

The first element requires that the State prove Defendant committed harassment. Harassment is defined in Minn. Stat. § 609.749, subd, 2(c)(1-8). The statute specifically enumerates acts that constitute harassment under the statute. The following enumerated acts of harassment are the only harassment definitions relevant to the facts of this case:

- 1) directly or indirectly, or through third parties, manifests a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act²

The State argues that the evidence shows Defendant intentionally violated J.B.'s right to be safe at school, her right to feel safe in her home, and her right to feel safe in the community. However, to prove harassment under subdivision 2(c)(1), the State must prove Defendant committed an unlawful act independent of the acts that constitute harassment. *See State v. Pegelow*, 809 N.W.2d 245, 248 (Minn. Ct. App. 2012). CRIMJIG 13.58.1 requires the Court to instruct the jury on the elements of the independent unlawful act because they must also be proven beyond a reasonable doubt to convict under this harassment definition. The State has not presented evidence of an additional unlawful act and failed to address this requirement in their memorandum. There is insufficient evidence of an independent unlawful act. Therefore, there is no fact question for the jury to determine.

² Minn. Stat. § 609.749, subd, 2(c)(1).

2) follows, monitors, or pursues another, whether in person or through any available technological or other means³

While the State's memorandum mentions this harassment definition, the State failed to argue how this applies to the facts of this case. Most likely, the State is referring to allegations that Defendant told J.B. that he drove past her house several times and saw her car in the driveway. J.B. also said Defendant would look over her shoulder while she was on her cell phone to see what she was doing. The issue for the Court is whether a reasonable jury could conclude these acts constitute following, monitoring, or pursuing.

Defendant provides two unpublished opinions from the Minnesota Court of Appeals to help determine this question. While not binding, these cases provide the Court with guidance on how the appellate court defines these terms. In *State v. Fordyce*, the defendant sought to withdraw his guilty plea for harassment based on following and monitoring the victim. No. A19-0648, 2020 WL 54280 (Minn. Ct. App. Jan. 6, 2020). He admitted to monitoring the victim by making sure she was absent from her home before going there to leave notes. *Id.* at *3. The defendant took videos of the victim where he narrated that he was watching whether she was home or not. *Id.* The Court of Appeals concluded that these acts reasonably constituted monitoring. In *State v. Mosdal*, the defendant challenged his conviction for harassment based on evidence that: (1) he ran near his home while the victim drove by him; (2) posted a public comment on his Facebook page; (3) brought cinnamon rolls to the victim's mother; (4) inquired about a rental property; and (5) drove behind the victim. No. A19-0805, 2020 WL 2517542, at *1 (Minn.

³ Minn. Stat. § 609.749, subd. 2(c)(2).

Ct. App. May 18, 2020). The Court of Appeals found that this evidence was insufficient to support following, monitoring, or pursuing under the statute.⁴

The Court concludes that Defendant's behavior, even if proven, could not constitute following, monitoring, or pursuing J.B. under the statute. While evidence shows Defendant drove past J.B.'s house and saw her car there, the record lacks evidence indicating his intention in driving there was to monitor J.B. For example, in *Fordyce*, the Court of Appeals noted Defendant's videos where he narrated his intention to determine whether the victim was home. Without this evidence of intent, the present case is more similar to *Mosdal* where the Court of Appeals found there was insufficient evidence to support the conviction.

Additionally, looking over J.B.'s shoulder at her phone is not sufficient evidence of following, monitoring, or pursuing, absent additional evidence of Defendant's intent. Therefore, the evidence offered by the State is insufficient to sustain a conviction under this definition of harassment.

3) returns to the property of another if the actor is without claim of right to the property or consent of one with authority to consent⁵

The State does not argue that this harassment definition applies, but it is addressed in Defendant's memorandum. The Court agrees with Defendant that the evidence cannot sustain a conviction under this definition. First, the case law indicates that this definition is to be used when a person returns to a property without permission that they have previously been to before.⁶ Additionally, there is no indication Defendant ever set foot on

⁴ Both *Fordyce* and *Mosdal* interpret the previous version of the statute, but they analyze language that is the same as the current statute.

⁵ Minn. Stat. § 609.749, subd. 2(c)(3).

⁶ Defendant cites *State v. Dougherty*, No. A05-858, 2006 WL 1806154 (Minn. Ct. App. July 3, 2006), where the defendant temporarily lived at his parents' house and repeatedly returned after he was kicked out; and *State v.*

J.B.'s property. There is not sufficient evidence to sustain a conviction under this definition of harassment.

Minn. Stat. § 609.749, subd, 2(c)(4-8) contains additional enumerated definitions of harassment. None of these definitions apply to this case. After reviewing the totality of the record, there is insufficient evidence to sustain a conviction under the first element of the charged offense, which requires that the state prove Defendant committed harassment under one of the enumerated harassment definitions listed in the statute. A reasonable jury could not find Defendant committed harassment under the statutory definitions. Therefore, it is not fair and reasonable to require Defendant to stand trial for the charged offense. Defendant's motion to dismiss for lack of probable cause must be granted.

 Tiffany, Robert
Feb 3 2023 1:20 PM

Haberman, A12-1269, 2013 WL 3490978 (Minn. Ct. App. July 15, 2013), where the defendant returned to the apartment he used to live in with his ex-girlfriend and broke in without permission.