STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0065

Elwin Louis Klimek, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 3, 2019
Affirmed
Slieter, Judge

St. Louis County District Court
File No. 69VI-CR-16-1008

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

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

Mark S. Rubin, St. Louis County Attorney, Karl G. Sundquist, Assistant County Attorney, Virginia, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Halbrooks, Judge; and Reyes, Judge.

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

SLIETER, Judge

Appellant Elwin Louis Klimek challenges the postconviction court's order denying relief, arguing that (1) his statement does not constitute a threat of violence as a matter of

law, (2) the evidence is insufficient to support his threats-of-violence conviction, and (3) the district court abused its discretion in instructing the jury. Because appellant's statement constitutes a threat of violence, there is sufficient circumstantial evidence to support the jury's guilty verdict of a threat of violence, and the district court did not abuse its discretion in its jury instructions, we affirm.

FACTS

The state charged appellant with threats of violence, in violation of Minn. Stat. § 609.713, subd. 1 (2014), and stalking, in violation of Minn. Stat. § 609.749, subd. 2(1) (2014). The case was tried to a jury, and the following evidence was presented at trial.

In 2013, appellant and his siblings initiated conservatorship proceedings for their mother, M.K. A.C., an attorney, was appointed to represent M.K. in the conservatorship proceedings. The district court appointed a conservator, and, due to the complexity of M.K.'s estate, A.C. continued to represent M.K. during the conservatorship. The district court also appointed an attorney for the conservator.

During A.C.'s representation of M.K., she had some contact with appellant about his mother's assets. Until 2016, their interactions were unproblematic—in the spring of 2016, however, appellant suspected that the conservator and appellant's siblings were embezzling money from his parents. Appellant had several conversations with A.C., expressing concern about the conservator and questioning whether the conservator was properly protecting his mother's assets. Appellant asked A.C. to work with the conservator's attorney to "deal with it," and A.C. purportedly told appellant that a meeting with that attorney was scheduled. Appellant learned from the conservator's attorney that

no meeting was scheduled; appellant therefore thought A.C. may be colluding with the conservator to embezzle money. Angered, appellant called A.C.'s law firm on July 11, 2016, and left a message:

> This is for [A.C.] from [appellant], [M.K.'s] oldest son. How is that phone call to the vulnerable abuse – abuse hotline too expensive to pursue the antiques that [A.] has? What the f-ck kind of lawyer are you? You lied to me and revealed yourself. One lie, always a liar. Nasty b-tch. You look pretty nice, but I'll bet you're a bum f-ck. You'll find out when you're in prison. Those lesbian bull d-kes will let me know.

After receiving the message, A.C. requested that the probate judge remove her from representing M.K. Although A.C. considered seeking a harassment restraining order, she felt that the best plan was simply to remove herself from the situation.

On July 14, 2016, appellant left another voicemail on A.C.'s work line:

> Hey, [A.C.], it's [appellant]. I was wondering how is it too expensive to call the vulnerable abuse hotline to turn [A.] and [B.] in for stealing all that stuff from my parents? They were vulnerable adults, you know. Didn't cost nothing for me to do it. You need to get right with God because the end of time for you is coming real f-ckin' soon. I don't like being lied to, b-tch.

The message made A.C. feel "afraid," specifically appellant's statement that "the end of time was coming for me real soon." A.C. interpreted "end of time" to mean appellant would kill her. A.C. was relieved that her husband and three family members were heading out of town and "weren't anywhere near our home." One of her children was working, and A.C. immediately told that child to stay at work and not go anywhere near the family home. After receiving the second message, A.C. then obtained a harassment restraining order. She also upgraded the security system in her home.

The jury convicted appellant of both counts. The state subsequently dismissed the stalking charge, and the district court sentenced appellant on the threats-of-violence count to a 366-day stayed sentence, and three years' probation. In May 2017, appellant's probation was revoked, and his sentence was executed.

Appellant filed a petition for postconviction relief asserting that his statement did not constitute a threat as a matter of law, there was insufficient evidence to support his conviction, and the district court gave erroneous jury instructions. The postconviction court denied the petition. This appeal follows.

D E C I S I O N

"We review the denial of a petition for postconviction relief for an abuse of discretion." *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). "We review legal issues de novo, but on factual issues our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Id.* (quotation omitted). "We will not reverse an order unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Id.* (quotation omitted).

I. Appellant's statement constitutes a threat to commit a crime of violence.

Appellant argues that his voicemail did not constitute a threat within the meaning of Minn. Stat. § 609.713 (2014). "Whether a defendant's conduct is prohibited by the statute he is charged under is an issue of statutory interpretation that this court reviews de novo." *State v. Smith*, 825 N.W.2d 131, 136 (Minn. App. 2012), *review denied* (Minn. Mar. 19, 2013).

A person is guilty of threats of violence when that person (1) threatens, directly or indirectly, to commit any crime of violence, (2) with the purpose to terrorize another or in a reckless disregard of the risk of causing such terror. Minn. Stat. § 609.713, subd. 1. Although the statute does not define "threat," the supreme court has interpreted it to mean "a declaration of an intention to injure another or his property by some unlawful act." *State v. Schweppe*, 237 N.W.2d 609, 613 (Minn. 1975). Conduct constituting a threat does not need to amount to an express threat, and it may be communicated by actions or words. *State v. Murphy*, 545 N.W.2d 909, 912, 915-16 (Minn. 1996) (holding that slashing tires, throwing objects through windows, spray painting "I'll be back" on houses, and leaving mutilated animals near homes were implicit threats to commit future acts of violence). Whether a statement is a threat, therefore, "turns on whether the communication in its context" would reasonably "create apprehension that its originator will act according to its tenor." *Schweppe*, 237 N.W.2d at 613 (quotation omitted). The threat need not be intentional: "declaring the intent to injure by an unlawful act constitutes a terroristic threat when the person who utters the statement recklessly disregards the risk of terrorizing another." *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009).

Appellant left a message on A.C.'s voicemail: "You need to get right with God because the end of time for you is coming real f-ckin' soon. I don't like being lied to, b-tch." He argues that his message cannot be interpreted as an "indication that [he] would do anything to harm" A.C. and does not "indirectly or directly threaten to commit a future act of violence against [A.C.]."

This claim is unpersuasive. Appellant's statement that "the end of time is coming for you real f-ckin' soon" may, in the context, be properly interpreted as a threat to commit an act of violence. Coupled with "I don't like being lied to, b-tch," appellant's statement conveys a threat that appellant himself will harm A.C. in the future. Appellant's statement had a "reasonable tendency to create apprehension" that appellant will harm A.C., *Schweppe*, 237 N.W.2d at 613 (quotation omitted), and constituted a threat pursuant to Minn. Stat. § 609.713.

II. The state proved that appellant had the requisite intent.

Appellant next argues that even if his statement constituted a threat, the state failed to prove he had the requisite intent because the state's circumstantial evidence supports the inference that he was expressing transitory anger. To convict appellant, the state was required to prove that appellant threatened A.C. with a crime of violence with the purpose to terrorize A.C., or in reckless disregard of the risk of terrorizing her. *See* Minn. Stat. § 609.713, subd. 1. A defendant's "[i]ntent is a state of mind that is generally proved using circumstantial evidence by drawing inferences from the defendant's words and actions in light of the totality of the circumstances." *State v. Smith*, 825 N.W.2d 131, 137 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Mar. 17, 2013). The victim's reaction to a threat is circumstantial evidence of intent. *Schweppe*, 237 N.W.2d at 614.

Heightened scrutiny applies to convictions that are based on circumstantial evidence. *State v. Al–Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). "In circumstantial evidence cases, the circumstances proved must be consistent with guilt and inconsistent

with any rational hypothesis except that of guilt." *State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011) (quotation omitted).

When reviewing the sufficiency of the evidence for convictions based on circumstantial evidence, we conduct a two-step analysis. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). First, this court identifies the "circumstances proved." *Id.* In identifying the circumstances proved, this court defers to the fact-finder's "acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate." *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013).

Second, this court must "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with rational hypotheses other than guilt." *Al–Naseer*, 788 N.W.2d at 473-74 (quotation omitted). The "[c]ircumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Id.* at 473 (quotation omitted). Appellate courts give no deference to the fact-finder's choice between reasonable inferences. *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010).

The state proved these circumstances: (1) appellant and A.C. had some interaction during A.C.'s representation of M.K., (2) appellant believed that his family members might be working with the conservator to embezzle money from appellant's parents and A.C. was doing nothing about it, (3) appellant thought A.C. lied to him about several things involving the conservatorship, (4) appellant thought A.C. might be colluding with the conservator,

(5) appellant's statement scared A.C., (6) A.C. upgraded her home's security system, and (7) A.C. obtained a harassment restraining order against appellant.

After determining the circumstances proved, we next examine the reasonableness of all inferences that might be drawn from the circumstances. The circumstances proved clearly produce an inference that appellant intended to terrorize A.C. with a crime of violence. But appellant argues that there is also a rational hypothesis *inconsistent* with guilt: that he was "simply venting fleeting emotions" and "express[ing] transitory anger" about the handling of his mother's estate. Minn. Stat. § 609.713 "is not meant to encompass verbal threats expressing transitory anger without intent to terrorize." *State v. Dick*, 638 N.W.2d 486, 492-93 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002).

We do not agree that the circumstances permit a reasonable inference that appellant was merely expressing transitory anger. The record reflects no reasonable inference other than that appellant's statement was meant to terrorize A.C. Further, appellant's statement caused A.C. to feel terrorized, and a "victim's reaction to the threat is circumstantial evidence relevant to the element of intent." *Sykes v. State*, 578 N.W.2d 807, 811 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). Appellant's threats cannot be reasonably characterized as an expression of transitory anger.

III. The district court did not abuse its discretion in its jury instruction.

Appellant argues that the district court abused its discretion by failing to instruct the jury on the definition and elements of the crime of violence underlying the charge in the manner that he requested. A district court must instruct the jury in a way that "fairly and

adequately explain[s] the law of the case[]" and does not "materially misstate[] the applicable law." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). In a criminal case, the jury instructions "must define the crime charged and . . . explain the elements of the offense." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). A district court has "considerable latitude in selecting language for jury instructions." *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). Accordingly, we apply an abuse-of-discretion standard of review to a district court's jury instructions. *See Koppi*, 798 N.W.2d at 361. The jury instructions must be read as a whole, and if the instructions correctly state the law in language that can be understood by the jury, there is no reversible error. *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998).

To be guilty of threats of violence, appellant must have threatened to commit a specific crime of violence. In relevant part, the criminal jury instructions provide:

> The elements of making a terroristic threat are:
>
> First, the defendant threatened, directly or indirectly, to commit a crime of violence. [You are instructed that [HERE INSERT THE DEFINITION OF THE SPECIFIC CRIME OF VIOLENCE (e.g., Assault in the Second Degree)] is a crime of violence. The elements of [HERE INSERT NAME AND ELEMENTS OF THE CRIME OF VIOLENCE WHICH DEFENDANT THREATENED].] It need not be proven that the defendant had the actual intention of carrying out the threat.

10 *Minnesota Practice*, CRIMJIG 13.107 (2015) (footnote omitted). Minnesota Statute section 609.1095, subdivision 1(d) (2014), lists crimes that qualify as crimes of violence. *See* Minn. Stat. § 609.713, subd. 1 ("As used in this subdivision, 'crime of violence' has the meaning given 'violent crime' in section 609.1095, subdivision 1, paragraph (d)."). All

forms of murder qualify as violent crimes under this statute. *See* Minn. Stat. § 609.1095, subd. 1(d).

Appellant first argues that the district court abused its discretion by instructing the jury that the predicate crime was homicide. Appellant contends that the district court should have instructed the jury that the predicate crime was first-degree assault. This argument is unpersuasive—appellant's threat is fairly construed as a threat of homicide, and the district court did not abuse its discretion by instructing the jury as such.

Appellant next argues that the district court abused its discretion because it failed, in the first element, to instruct the jury on the definition and elements of the crime of homicide. Instead, the district court included in its instructions: "You are instructed that the statutes of Minnesota provide that homicide is a crime of violence."

Appellant relies on *State v. Jorgenson* to support his contention that this is an abuse of discretion. 758 N.W.2d 316 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009). In *Jorgenson*, this court held that simply informing the jury that "assault is a crime of violence" without informing the jury that not every assault is a crime of violence was plain error. *Id.* at 322 (quotation marks omitted). These facts are unlike those in *Jorgenson*.

The district court instructed that the predicate crime was homicide and, unlike assault, all homicide is a crime of violence in Minnesota. There was no risk that appellant might be convicted of threatening a crime that is not a crime of violence. A more detailed instruction defining homicide and its elements was thus unnecessary. The district court's instructions 'correctly state[d] the law in language that can be understood by the jury, [and]

there is no reversible error." *Peou*, 579 N.W.2d at 475. Because appellant is not entitled to relief, the postconviction court therefore did not abuse its discretion in denying appellant's petition for postconviction relief.

Affirmed.