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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1951

State of Minnesota,
Respondent,

vs.

Walter Duane Boyd,
Appellant.

Filed December 10, 2012
Affirmed
Rodenberg, Judge

Scott County District Court
File No. 70CR106079

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Rodenberg, Judge; and Harten, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RODENBERG, Judge

In this combined appeal from his conviction of felony terroristic threats and misdemeanor domestic assault and from the order denying his petition for postconviction relief, appellant argues (1) that the district court erred in excluding the testimony of complainant's ex-fiancé; (2) that adding a new felony charge to the complaint on the day of trial prejudiced appellant and was an abuse of discretion; (3) that the evidence at trial was insufficient to prove that appellant had the requisite intent to commit the crimes of terroristic threats or domestic assault (fear); and (4) that appellant is entitled to a new trial due to newly discovered evidence of the complainant's lack of credibility. We affirm.

FACTS

Appellant Walter Duane Boyd and P.L.G. began dating in August or September 2009. On March 5, 2010, P.L.G. went to appellant's apartment to collect her belongings and her dog and to end the relationship. Appellant answered the door, and a heated argument ensued. P.L.G. went to a bedroom in the apartment to collect some of her possessions, and appellant followed her. P.L.G. ferried items from appellant's apartment to her truck, making several trips. P.L.G. and appellant continued to argue throughout this process.

P.L.G. testified that while she was collecting her possessions from the bedroom closet, appellant approached her "with these horrible eyes and he said, If I'm going to jail, I'm going to f---ing kill you, and he proceeded to raise his right hand and punch me." When asked by the prosecutor whether she had threatened to call the police and have

appellant arrested prior to appellant making the threat, P.L.G. said that she had not. P.L.G. claimed that the next thing she remembered was waking up on the floor of the closet. She testified that appellant was not around and that she fled to her vehicle, found her cell phone, and called the police.

Appellant admitted at trial that both he and P.L.G. used vulgarities and heated language during this incident. However, he denied ever striking or threatening P.L.G. Appellant testified that while he was retrieving some of P.L.G.'s possessions from a closet "she came at me just swinging and hitting, and actually knocked me back into the clothes in the closet." He then threatened to call the police, and the situation deescalated to the point where the parties continued to argue but he was able to help her carry out her belongings.

Appellant claimed to have later observed P.L.G. sitting in her parked vehicle, repeatedly striking herself in the face with something that looked like a cell phone.

Appellant was arrested later that day based on P.L.G.'s allegation that he had struck her in the face. Appellant was cited with one count of Domestic Assault (Harm) pursuant to Minn. Stat. § 609.2242, subd. 1(2) (2010). A "judicial determination of probable cause to detain" form issued that day found that there was probable cause to detain appellant for terroristic threats and domestic assault.

The subsequent complaint, filed June 18, 2010, charged appellant with one count of third-degree assault (substantial bodily harm) pursuant to Minn. Stat. § 609.223, subd. 1 (2010). The complaint was amended on February 23, 2011, to add one count of

domestic assault (harm), pursuant to Minn. Stat. § 609.2242, subd. 1(2), and one count of domestic assault (fear), pursuant to Minn. Stat. § 609.2242, subd. 1(1) (2010).

When the matter came on for trial on April 19, 2011, the state moved to further amend the complaint, seeking to add a count of terroristic threats pursuant to Minn. Stat. § 609.713, subd. 1 (2010). The presiding district court judge continued the proceedings until the following day due to the proposed amendment. The trial actually commenced on April 20, 2011, before a different district court judge, after the state's motion to amend the complaint was granted.

At trial, appellant sought to introduce the testimony of V.S., an ex-fiancé of P.L.G. After a lengthy discussion and offer of proof, covering some 26 pages of the trial transcript, the district court excluded the testimony and evidence related to V.S. The district court determined that the evidence, which was based on largely undocumented allegations that led to "no charges" and "no police involvement," and involved an order for protection proceeding where both parties were unrepresented, was too "unreliable" and "untrustworthy" to be admitted.

Following the trial, the jury found appellant guilty of terroristic threats and of domestic assault (fear), but acquitted appellant of third-degree assault and of domestic assault (harm).

At sentencing, the district court initially ordered appellant to pay restitution to P.L.G. in the amount of $3,238.81. Appellant contested the amount of restitution. After a hearing on the issue, the district court amended the restitution order, awarding P.L.G. only the mileage and lost wages associated with her testimony at trial. The district court

noted in the memorandum accompanying the amended restitution order that its decision was based on P.L.G.'s lack of credibility on the restitution issues. Ultimately, appellant was only ordered to pay P.L.G. $309.60 in restitution.

Appellant filed a notice of appeal with this court. Appellant also brought a petition for postconviction relief. This court stayed appellant's appeal pending resolution of the petition for postconviction relief. When the postconviction court denied appellant's petition, this court dissolved the stay of appeal. We now address both appellant's direct appeal and the denial of his petition for postconviction relief.

D E C I S I O N

Appellant challenges the exclusion of the testimony of P.L.G.'s ex-fiancé, the district court's decision to permit the state to amend the complaint on the day of trial, the sufficiency of the evidence demonstrating his intent to terrorize or instill fear in P.L.G., and the district court's denial of his petition for postconviction relief based in part on the district court's own finding at the restitution hearing that P.L.G. was not credible.

I.

Appellant argues that the district court denied him his constitutional right to present a complete defense by excluding the testimony of P.L.G.'s ex-fiancé V.S.

The Minnesota and federal constitutions accord "[e]very criminal defendant . . . a right to be treated with fundamental fairness and to be 'afforded a meaningful opportunity to present a complete defense.'" *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984)), *review denied* (Minn. Oct. 19, 1993). However, because evidentiary

rulings are reviewed for an abuse of discretion and, "[i]f exclusion of evidence did violate defendant's right to present a defense, the appellate court will not reverse the decision if the error is found to be harmless beyond a reasonable doubt." *Id.*

A defendant's right to present a complete defense is not absolute, and the district court may limit the scope of the defendant's arguments in order to "ensure that the defendant does not confuse the jury with misleading inferences." *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009).

A. Minn. R. Evid. 403 and Minn. R. Evid. 608

In sustaining the state's objection to the proposed testimony of V.S., the district court relied upon rules 403 and 608 of the Minnesota Rules of Evidence.

Under Minn. R. Evid. 403, the district court may exclude relevant evidence where its probative value is substantially outweighed by the risk that it could confuse the issues or mislead the jury.

The district court provided appellant the opportunity to make a lengthy offer of proof as to the facts to which V.S. would testify. The proffered evidence indicated that V.S. would allege that P.L.G. had abused him, that he had denied abusing her, that each had made multiple requests for orders for protection, and that V.S. would provide evidence concerning P.L.G.'s "habits," and P.L.G.'s alleged abuse of her own child many years earlier. The offer of proof included reference to a number of disputes between V.S. and P.L.G. culminating in their acrimonious breakup. The proffered evidence concerning the contentious end of P.L.G.'s prior relationship with V.S. was of very limited probative

value and could have easily confused or misled the jury.[1] The district court did not abuse its discretion by excluding V.S.'s testimony under Rule 403.

Under Minn. R. Evidence 608(a), evidence tending to establish a witness' character for truthfulness or untruthfulness may only be introduced through reputation or opinion. Under Minn. R. Evidence 608(b), specific acts tending to establish a witness' character for truthfulness or untruthfulness may only be proved by cross-examination and may not be proved by extrinsic evidence. *See also State v. Sharich*, 297 Minn. 19, 24, 209 N.W.2d 907, 911 (1973) ("[A]n examining attorney who inquires into collateral matters on cross-examination, including those matters relating to the witness' credibility, is bound by the answers he receives. The cross-examiner is not permitted [to introduce evidence of] collateral matters to prove facts contradicting the answers, even if they are false.")

Appellant's trial counsel did not seek admission of V.S.'s opinion regarding P.L.G.'s reputation for untruthfulness. Rather, appellant sought to prove that she lied through the testimony of V.S. regarding prior reports about V.S. which he claimed were false. Specifically, appellant's offer of proof consisted not of evidence of P.L.G.'s character, but of her retaliatory behavior during a prior romantic relationship. V.S.'s testimony would have been extrinsic evidence. V.S. did not have any knowledge of the facts involved in the present case, and his testimony would have been limited to events

[1] Some of the evidence in appellant's offer of proof was likely not even relevant under Minn. R. Evid. 401. Determining which evidence may have had some limited relevance and which had none is not necessary here.

that had occurred several years prior. The district court did not abuse its discretion in excluding the evidence under Rule 608(b).

B. Admissibility under *Goldenstein*

Appellant relies on *Goldenstein*, a case involving allegations of sexual abuse of minor children, in support of his contention that the district court improperly excluded the proffered testimony of V.S., and that the error is of constitutional dimension. *See generally* 505 N.W.2d at 332, 340. In *Goldenstein*, this court adopted "the rule of law established in several foreign jurisdictions whereby evidence of prior false accusations is admissible both to attack the credibility of the complainant and as substantive evidence tending to prove that the instant offense did not occur." *Id.* at 340. However, this court has also clarified that, before such evidence may be admitted, "the trial court must first make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists." *Id.* As with our prior analysis, we review the district court's action in this context for an abuse of discretion. *Id.*

After considering the lengthy offer of proof and arguments from both parties concerning the same, the district court determined that the evidence was untrustworthy and uncertain.[2] The proffered evidence consisted of V.S.'s own assertion that P.L.G. had fabricated allegations against him, and not of any investigation of those allegations. Nor was the district court persuaded that an order for protection issued in a proceeding

[2] As already noted, the offer of proof addressed numerous issues that were unrelated to whether P.L.G. had made prior false accusations.

involving P.L.G. and V.S., where neither was represented by counsel, was sufficiently reliable evidence that P.L.G. had previously made false accusations of domestic abuse.

The district court's threshold determination that V.S.'s testimony did not establish a reasonable probability of falsity of a prior accusation by P.L.G. is well supported. Analyzed under *Goldenstein*, the district court did not abuse its discretion by excluding V.S.'s testimony.[3]

C. Admissibility under Minn. Stat. § 634.20

Appellant also argues that the testimony of V.S. should have been admitted under Minn. Stat. § 634.20 (2010). This provision permits the introduction of "[e]vidence of similar conduct *by the accused* against the victim of domestic abuse, or against other family or household members" in cases involving domestic violence. *Id.* (emphasis added). However, appellant, not P.L.G., was the accused in this case. Minn. Stat. § 634.20, by its plain language, does not apply to V.S.'s testimony. Similarly, the cases cited by appellant that interpret Minn. Stat. § 634.20 are inapposite. *See*, *e.g.*, *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010) (discussing the admissibility of evidence of how *the accused* treats family and household members), *review denied* (Minn. Nov. 16, 2010).

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[3] Our review of our unpublished cases indicates that *Goldenstein* has generally only been applied in cases involving criminal sexual conduct, and is largely viewed as an exception to the rape shield statute. While appellant makes a persuasive argument that evidence of prior false allegations should be easier to introduce where the defendant does not need to overcome the rape shield statute, the trial judge made the "threshold determination" that a reasonable probability of falsity of the prior accusations *did not* exist.

II.

Appellant argues that the district court abused its discretion by allowing the state to amend the complaint, adding a count of terroristic threats, prior to voir dire but on the day of trial.

Under Minn. R. Crim. P. 3.04, subd. 2, the district court may continue pre-trial proceedings to permit the prosecutor to file a new complaint. Under Minn. R. Crim. P. 17.05, "[t]he court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if the defendant's substantial rights are not prejudiced."

Rule 3.04, subd. 2, controls motions to amend the complaint brought prior to commencement of trial. *State v. Doeden*, 309 Minn. 544, 546, 245 N.W.2d 233, 234 (1976). Rule 17.05 controls motions to amend the complaint brought after the commencement of trial. *Id.* For the purposes of these rules, trial commences when the jury is sworn. *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990). Therefore, because the amendment to the complaint in this case occurred prior to voir dire, the district court's decision granting the amendment is analyzed under Minn. R. Crim. P. 3.04, subd. 2.

In *Nelson v. State*, 407 N.W.2d 729, 730 (Minn. App. 1987), *review denied* (Minn. Aug. 12, 1987), the appellant was charged with criminal sexual conduct in the first, third, and fourth degree. Immediately prior to the commencement of trial, the state sought to amend the complaint, adding one count of kidnapping. *Id.* This court held that the amendment was permitted under Minn. R. Crim. P. 3.04, subd. 2, and that appellant was not prejudiced by the addition of the kidnapping charge because it "arose from the same

conduct as the other three offenses for which appellant had been previously charged." *Id.* at 731.

However, the district court has the discretion to deny such motions as well. In *State v. Baxter*, 686 N.W.2d 846, 849–50, 852 (Minn. App. 2004), the district court denied as untimely the state's motion to amend the complaint on the day of trial from one count of third-degree criminal sexual conduct to three counts of first-degree criminal sexual conduct. This court held that Minn. R. Crim. P. 3.04, subd. 2, accords the district court substantial discretion in determining whether to permit an amendment to the complaint, and noted that "[w]hile some courts have allowed amendments to complaints up to the point of jury selection, this does not negate the fact that a district court retains broad discretion over how a case proceeds once it is filed." *Id.* at 852. *Baxter* went on to hold that the district court in that case did not abuse its discretion by denying the motion to amend the complaint. *Id.* at 853.

In this case, the district court determined that appellant would not be prejudiced by the amendment to the complaint because P.L.G. had made a statement to police at the time of the arrest alleging that appellant had threatened her life, and because a judicial determination of probable cause to detain, made shortly after appellant's arrest, found that there was probable cause to detain appellant on suspicion of domestic assault and terroristic threats. The district court noted that appellant had received both of these documents during discovery. Accordingly, the district court reasoned that appellant would not be prejudiced by the amendment and by the evidence supporting the terroristic threats charge. As in *Nelson*, the late-added charge "arose from the same conduct" as the

other charges. 407 N.W.2d at 731. The district court also continued the trial until the following day, and appellant's counsel did not request a further continuance.

Under *Baxter*, the district court had the discretion to permit the state to amend the complaint immediately prior to the commencement of trial. The district court exercised that discretion under circumstances and for reasons analogous to those which this court upheld in *Nelson*, where the new charge arose from the same facts as the existing charges. The district court did not abuse its discretion by permitting the state to amend the complaint to add a count of terroristic threats.

III.

Appellant argues that the circumstantial evidence of intent was insufficient to support his convictions of terroristic threats and domestic assault.

This court reviews sufficiency of the evidence by determining "whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt . . . ." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted). This court assumes that the "jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

When a conviction is based entirely on circumstantial evidence, heightened scrutiny applies. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). The circumstances proved must be "inconsistent with any other rational hypothesis except that of guilt." *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). The circumstantial 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.* (quotation omitted). Proof of a person's state of mind generally stands on circumstantial evidence. *State v. Anderson*, 379 N.W.2d 70, 78 (Minn. 1985).

A person commits the offense of terroristic threats when he or she "threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror . . . ." Minn. Stat. § 609.713, subd. 1.

The jury convicted appellant of terroristic threats and domestic assault (fear), but acquitted him of third-degree assault and domestic assault (harm). Accordingly, the circumstances proved and accepted by the jury are that appellant approached P.L.G. during a heated argument "with these horrible eyes and he said, If I'm going to jail, I'm going to f---ing kill you." However, the jury did not find proof beyond a reasonable doubt that appellant struck P.L.G.

Appellant argues that the circumstances proved are consistent with the theory that his statement was an expression of frustration and gallows humor and that he did not have a specific intent to terrorize P.L.G. A person can commit terroristic threats without having a specific intent to terrorize. *See* Minn. Stat. § 609.713, subd. 1 (imposing criminal liability for acts done in "reckless disregard" of the risk of causing terror). Only a general intent is required for the recklessness prong of the statute. *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009).

Here, appellant was charged under the recklessness prong of the terroristic threats statute. This prong requires proof of a deliberate disregard "of a known, substantial risk"

that a threat would terrorize another. *Id.* A threat is a communication which, in context, has a "reasonable tendency to create apprehension that its originator will act according to its tenor." *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975) (quotation omitted). The victim's reaction to the threat is circumstantial evidence of the defendant's intent. *Id.* at 401, 237 N.W.2d at 614.

A general intent crime requires only proof that the appellant intended to do the prohibited act, but does not require proof that appellant "meant to violate the law or cause a particular result." *State v. Fleck*, 810 N.W.2d 303, 309 (Minn. 2012). However, the act itself must be "volitional" and not, for example, the result of a reflexive movement or other nonvolitional act, such as accidentally falling on someone after tripping. *Id.* at 309, 312.

Appellant's statement in this case, even if it were to be reasonably understood as an expression of frustration or gallows humor, was volitional. That he angrily made a statement "with these horrible eyes," evincing what P.L.G. interpreted as an intention to kill her, presented a substantial risk of terrorizing P.L.G. Appellant made the statement in deliberate disregard of that risk. Therefore, there was sufficient evidence of intent to convict appellant of terroristic threats.

Appellant also contends that the circumstantial evidence of intent was insufficient to support his conviction of domestic assault (fear).

Domestic assault occurs if an offender "commits an act [against a family or household member] with intent to cause fear in another of immediate bodily harm or

death." Minn. Stat. § 609.2242, subd. 1(1) (2010). This is a specific intent crime. *Cf. Fleck*, 810 N.W.2d at 308–09 (stating that assault-fear is a specific intent crime).

The circumstances proved appear to us to be rationally consistent only with the theory that appellant acted with intent to cause P.L.G. to fear immediate bodily harm or death. Appellant freely admitted during his testimony that he was very angry during the argument, and repeatedly stated that his primary objective at the time was to have P.L.G. leave his home as quickly as possible. P.L.G.'s testimony, accepted by the jury, was that appellant's demeanor was angry and frightening. There is nothing in the record to suggest that the circumstances involved "gallows humor" or anything of the sort. In addition to his not having asserted this claim in any way through his trial testimony, appellant's theory on appeal is implausible given the surrounding circumstances. *See State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995) ("[P]ossibilities of innocence do not require reversal . . . so long as the evidence taken as a whole makes such theories seem unreasonable."). The circumstantial evidence of appellant's intent is sufficient to support the domestic assault conviction.

IV.

Appellant argues that the district court should have granted his petition for postconviction relief and ordered a new trial based on newly-discovered evidence. The new evidence to which appellant points is the district court's own determination at the restitution hearing that P.L.G. was not credible.

Review of a district court's decision to deny postconviction relief "is limited to a determination of whether there is sufficient evidence to sustain the postconviction court's

findings," and the postconviction court's decision will not be disturbed absent an abuse of discretion. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). However, the postconviction court's decision as to questions of law is reviewed de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

Where a new trial is sought during a postconviction proceeding on the basis of newly discovered evidence,

> [i]f the new evidence is doubtful in character, not so material as to make probable a different result on a new trial, or merely cumulative or impeaching, relief will be denied, nor will relief be granted, even though very material facts have been brought to light, if they could, by the exercise of proper diligence, have been discovered and presented on the first trial.

State v. Bergeson, 203 Minn. 88, 89, 279 N.W. 837, 838 (1938), *quoted in Martin v. State*, 295 N.W.2d 76, 78 (Minn. 1980) (emphasis omitted).

Here, the new "evidence" arose after the first trial and could not have been discovered prior to the trial, because the district court had no occasion to opine on P.L.G.'s credibility until the restitution hearing and subsequent order.

However, a judge's opinion as to the credibility of a witness is not relevant evidence, nor is it admissible during a jury trial. *See* Minn. Stat. § 631.06 (2010) ("[T]he court shall decide questions of law, except in cases of criminal defamation, and the jury shall decide questions of fact."); Minn. R. Crim. P. 26.03, subd. 19(6) ("The court must not comment on evidence or witness credibility, but may state the respective claims of the parties."); *cf.* Minn. Code Jud. Conduct 2.10(A) ("A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness

of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.")

Since appellant would not be permitted to introduce the evidence he claims entitles him to a new trial, the district court did not abuse its discretion in denying the petition for postconviction relief on this basis.

V.

The district court did not abuse its discretion by excluding V.S.'s testimony because the evidence was of limited probative value and could have easily confused or misled the jury. *See* Minn. R. Evid. 403. In addition, proof of P.L.G.'s character for truthfulness by extrinsic evidence is not permitted under Minn. R. Evid. 608(b). The district court did not abuse its discretion in permitting the state to add an additional count to the complaint on the day of trial where it continued proceedings until the following day and where the new charge arose from the same conduct as the other charges of the complaint. The evidence offered at trial was sufficient to prove appellant's intent to commit the crimes of terroristic threats and domestic assault (fear). The district court's assessment of P.L.G.'s credibility at the restitution hearing was not newly discovered evidence warranting a new trial.

Affirmed.