STATE OF MINNESOTA
IN COURT OF APPEALS
A11-505

State of Minnesota,
Respondent,

vs.

Michael Eugene Whitson,
Appellant.

Filed March 12, 2012
Affirmed
Schellhas, Judge

Kandiyohi County District Court
File No. 34-CR-10-676

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

Jennifer K. Fischer, Kandiyohi County Attorney, Stephen Wentzell, Assistant County Attorney, Willmar, Minnesota (for respondent)

John E. Mack, Mack & Daby P.A., New London, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Bjorkman, 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 terroristic threats, arguing that (1) the evidence is insufficient to support his conviction, (2) the jury's verdicts are inconsistent because the jury convicted him of terroristic threats but acquitted him of second-degree

assault with a dangerous weapon, and (3) the district court improperly sentenced him to five years' probation. We affirm.

FACTS

In January 2010, T.H. rented appellant Michael Whitson's home while Whitson wintered in Florida. That month, T.H.'s girlfriend, T.C., moved in with T.H. In May, T.H.'s daughter, A.H.; grandson, D.H.; and daughter's fiancé, C.W., also moved into the home. In June, Whitson returned to his home and resided with his tenants, although C.W. moved out at Whitson's request.

On the evening of August 19, C.W. stayed overnight at Whitson's home. On the morning of August 20, the tenants entered the kitchen and found Whitson seated at the kitchen table with a gun on the table. A.H. testified that Whitson said, "This isn't a f------ motel room," and that he then reached for his gun and said, "I ought to shoot you all." According to A.H., Whitson "put his hand on the gun, and . . . started to lift it" and, as he raised the gun, he pointed it directly at A.H. and D.H.

C.W. testified that when he entered the kitchen, Whitson said, "What the f--- is this? This is no hotel. I'm going to shoot all of you." C.W. said that Whitson picked up the gun and "was bringing it around" towards them, and at that point C.W. left the kitchen and exited the house.

T.C. testified that when she entered the kitchen, Whitson said, "What the F is this?" T.C.'s back was to Whitson and she was reaching for a cup of coffee when she heard A.H. say that Whitson had a gun. As T.C. turned towards Whitson, she saw that

"the gun was on the table, [Whitson] was reaching for it, and he yelled, 'I should shoot you all.'"

Respondent State of Minnesota charged Whitson with second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2010), alleging that Whitson assaulted A.H., C.W., T.C., and D.H. by threatening to shoot them with a handgun, and with terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2010), alleging that Whitson threatened to commit a crime of violence by threatening to shoot A.H., C.W., T.C., and D.H. while reaching toward a handgun.

A jury found Whitson guilty of terroristic threats but acquitted him of second-degree assault. The district court stayed imposition of Whitson's sentence, imposed an intermediate sanction of 100 days in jail with credit for 100 days already served, placed him on five years' supervised probation, and fined him $1,500.

This appeal follows.

D E C I S I O N

Sufficiency of the Evidence

> In assessing the sufficiency of the evidence, [an appellate court] view[s] the evidence in a light most favorable to the verdict to determine 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 of the offense of which he was convicted.

State v. Hanson, 800 N.W.2d 618, 621 (Minn. 2011) (quotations omitted). The reviewing court "must assume the jury believed the state's witnesses and disbelieved any evidence

to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted).

Here, the jury convicted Whitson of felony terroristic threats. The critical elements of the offense are (1) the defendant made threats (2) to commit a crime of violence (3) with the purpose to terrorize another or in reckless disregard of the risk of terrorizing another. Minn. Stat. § 609.713, subd. 1; *see State v. Schweppe*, 306 Minn. 395, 399–400, 237 N.W.2d 609, 613–14 (1975) (affirming conviction of felony terroristic threats when district court instructed jury of these critical elements of charged offense). As to the first element, "whether a given statement is a threat turns on whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Schweppe*, 306 Minn. at 399, 237 N.W.2d at 613 (quotations omitted). As to the second element, "[t]o convict a defendant on a charge of felony terroristic threats, a jury must find that the defendant threatened a specific predicate crime of violence, as listed in Minn. Stat. § 609.1095. And the jury must be informed of the elements of that essential predicate offense." *State v. Jorgenson*, 758 N.W.2d 316, 325 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009). Second-degree assault is a specific predicate crime of violence. Minn. Stat. §§ 609.713, subd. 1, .1095, subd. 1(d) (2010) (listing Minn. Stat. § 609.222—second-degree assault—as a violent crime). Second-degree assault is "an act done with intent to cause fear in another of immediate bodily harm or death" with "a dangerous weapon." Minn. Stat. §§ 609.02, subd. 10(1), .222, subd. 1 (2010).

Whitson argues that the state's witnesses "testified inconsistently" and were "contradictory." He emphasizes that the witnesses differed on what he said—"I ought to shoot you all," "I should shoot you all," and "I'm going to shoot you all"—and on what he was doing with the gun. He also argues that "any actions accompanying the words must make the threat unambiguous," and he claims that his actions "could have been interpreted two ways by a reasonable person" because he was reaching for his coffee cup, which was in the general direction of his gun. Whitson's arguments are unpersuasive.

This court must assume that the jury believed the state's witnesses, A.H., C.W., and T.C., and disbelieved contradictory evidence. *See Caldwell*, 803 N.W.2d at 384 (requiring reviewing courts to assume jury believed state's witnesses and disbelieved contrary evidence). Viewing the evidence in the light most favorable to the verdict, we conclude that sufficient evidence supports the jury's verdict.

In his reply brief, Whitson argues that the statement, "I ought to shoot you all," is not a terroristic threat because it is a statement of future intent. But Whitson failed to raise this issue in his initial brief, and issues raised for the first time in an appellant's reply brief, if not in response to issues raised in respondent's brief, are deemed waived and stricken. *State v. Vang*, 774 N.W.2d 539, 558 (Minn. 2009). Moreover, Whitson's argument is without merit. The Minnesota Supreme Court has said, "The terroristic threats statute mandates that the threats must be to commit a *future* crime of violence which would terrorize a victim. It is the future act threatened, as well as the underlying act constituting the threat, that the statute is designed to deter and punish." *State v. Murphy*, 545 N.W.2d 909, 916 (Minn. 1996) (emphasis in original).

Inconsistent Verdicts

Whitson argues that the jury's verdicts were inconsistent because the jury convicted him of terroristic threats but acquitted him of second-degree assault. This court reviews de novo whether a jury's verdicts are legally inconsistent. *State v. Leake*, 699 N.W.2d 312, 325 (Minn. 2005).

> The general rule is that a defendant who is found guilty of one count of a two count indictment or complaint is not entitled to a new trial or a dismissal simply because the jury found him not guilty of the other count, even if the guilty and not guilty verdicts may be said to be logically inconsistent.

Id. (quoting *State v. Juelfs*, 270 N.W.2d 873, 873–74 (Minn. 1978)). "Nothing in the constitution requires consistent verdicts." *Id.*

But Whitson relies on the Minnesota Supreme Court's language in *State v. Moore* that a verdict is legally inconsistent when "a necessary element of each offense . . . was subject to conflicting findings." 438 N.W.2d 101, 108 (Minn. 1989). Whitson argues that the verdicts are inconsistent because "[o]ne of the elements of the charge of terroristic threats was that Mr. Whitson threatened to shoot various members of the [H.] family. And that was the only operative element of the charge of second degree assault, as well." But in *Leake*, the supreme court clarified *Moore*'s necessary-element language, noting that courts apply the *Moore* rule when the jury returns multiple guilty verdicts. *Leake*, 699 N.W.2d at 325–26. And the supreme court reiterated the *Juelfs* rule, "which states that a defendant is not entitled to a new trial if the verdicts returned are logically inconsistent." *Id.* The *Juelfs* rule has been consistently applied "when a defendant is convicted of one offense and acquitted of another." *Id.* Similar to the defendant in *Leake*,

Whitson was convicted of one offense and acquitted of another. We therefore conclude that the jury's verdicts are only logically inconsistent and that Whitson is not entitled to a new trial.

Sentencing

In his brief, Whitson argues that even though the jury convicted him of a felony, his conviction should be deemed a gross misdemeanor pursuant to Minn. Stat. § 609.13, subd. 1 (2010), because the 100-day jail sentence is "within the limits provided by law for a . . . gross misdemeanor." At oral argument, Whitson's counsel conceded this issue, and we therefore deem this issue waived and do not address it.

Affirmed.