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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0952

State of Minnesota,
Respondent,

vs.

Alex Cortez Benson,
Appellant.

Filed June 9, 2014
Affirmed
Reyes, Judge

Anoka County District Court
File No. 02CR127295

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

Anthony Palumbo, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Kirk, Judge; and Reyes, Judge.

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

REYES, Judge

On appeal from his conviction of terroristic threats and fifth-degree possession of a controlled substance, appellant Alex Cortez Benson argues that (1) there was

insufficient evidence to prove beyond a reasonable doubt that he had the requisite intent to cause terror and (2) there was insufficient evidence to prove that the substance recovered was actually marijuana. In a pro se supplemental brief, Benson also argues that he received ineffective assistance of counsel from both of his trial lawyers. We affirm.

FACTS

In the early hours of October 3, 2012, after arguing for several hours with his girlfriend, V.S., Benson called police to the residence that he shared with V.S., his niece, and his niece's children. When police arrived, they heard people arguing inside the apartment from an open window. The officers recognized the voices as belonging to Benson and V.S. based on previous dealings with these individuals. While they listened, V.S. expressed that she wanted to leave, but Benson would not allow her to do so and stated, "I am going to shoot you, b-tch," and mentioned pistol-whipping V.S. The officers also heard Benson state that he was going to smoke a joint.

Perceiving that there might be danger to those inside, the officers entered the apartment. When asked by police, Benson denied taking part in an argument or talking to anyone in the apartment and later told a detective that he was trying to break up an argument between two women. An officer found V.S. in a bedroom closet, and she appeared frightened. V.S. told the officer that she was hiding because she was very afraid of Benson, and he would not let her leave. She indicated that she believed Benson kept a handgun and marijuana in a black bag in the bedroom.

Police found two bags of marijuana in a black laptop case that also contained a checkbook, prescription bottles, and a bill, all with Benson's name on them. A forensic scientist for Tri-County Regional Forensic Laboratory examined the substance using a visual test and a color test and determined that it was indeed marijuana. Benson later admitted to a detective that the laptop bag was his but denied that the marijuana belonged to him. Police also found a gun, which turned out to be a toy, on the floor of the bedroom.

Benson was charged with terroristic threats under Minn. Stat. § 609.713, subd. 1 (2012); domestic assault under Minn. Stat. § 609.2242, subd. 1 (2012); and fifth-degree possession of a controlled substance under Minn. Stat. § 152.025, subd. 2(a)(1) (2012). Under the representation of his first attorney, Benson pleaded not guilty and waived his right to an omnibus hearing. Thereafter, his first attorney was removed as counsel, and a second attorney took over representation of Benson. Benson's second attorney refused the court's offer of a continuance, and a jury trial was held. Benson was found guilty of terroristic threats and fifth-degree possession of a controlled substance.

Benson moved for a new trial, based in part on his claim of ineffective legal counsel provided by his first attorney, which the district court denied. Benson was sentenced to 29 months on the terroristic-threats conviction and 24 months on the drug-possession conviction, to be served concurrently. This appeal followed.

D E C I S I O N

I. Intent to terrorize

Benson argues that the evidence is insufficient to support his conviction of making terroristic threats. He contends that the state did not prove beyond a reasonable doubt that he acted with the requisite intent when he stated that he was going to shoot V.S., claiming that he was only expressing transitory anger. We disagree.

In order for Benson to be convicted of making terroristic threats, the state must prove that Benson threatened V.S. with the intent to terrorize or that he recklessly disregarded the risk of causing such terror. Minn. Stat. § 609.713, subd. 1. "Terrorize" in this context "means to cause extreme fear by use of violence or threats." *State v. Smith*, 825 N.W.2d 131, 136 (Minn. App. 2012), *review denied* (Minn. Mar. 19, 2013) (quotation omitted). A "threat" is a "declaration of an intention to injure another or his property by some unlawful act" communicated either by actions or words. *Id.* at 135 (quotation omitted). Even if Benson did not act with the specific intent to terrorize, "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).

In reviewing the sufficiency of the evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction," is sufficient to allow the jurors to reach a verdict of guilty. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that

"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). We "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

Intent to terrorize is generally proven using circumstantial evidence "by drawing inferences from the defendant's words and actions in light of the totality of the circumstances" and the victim's reaction to the threat. *Smith*, 825 N.W.2d at 136 (quotation omitted). We exercise a heightened scrutiny for convictions based on circumstantial evidence and apply a two-step analysis to determine whether the evidence was sufficient to support a conviction. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). First, we identify the circumstances proved, deferring to the jury's acceptance of these facts and assuming that the jury rejected all contrary facts. *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013). Second, we determine whether the circumstances identified as proved are consistent with any rational hypothesis other than guilt. *Id.* at 599. "We give no deference to the fact finder's choice between reasonable inferences." *Id.* (quotation omitted). To sustain a conviction, the circumstances proved 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." *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted).

Benson argues that the evidence is not sufficient to prove that he intended to terrorize V.S., insisting that his "threat to shoot [V.S.] was said in transitory anger,

meaning that he used words expressing anger but not with the intent to terrorize." He urges that the short nature of his threat and the fact that V.S. did not testify supports this conclusion. But circumstantial evidence is considered as a whole, not as isolated facts. *State v. Sterling*, 834 N.W.2d 162, 175 (Minn. 2013). Benson cites *State v. Jones* for the proposition that the terroristic-threats statute is not intended "to authorize grave sanctions against the kind of verbal threat which expresses *transitory* anger which lacks the intent to terrorize," but *Jones* ultimately rejected the transitory-anger argument. 451 N.W.2d 55, 63 (Minn. App. 1990) (quotation omitted), *review denied* (Minn. Feb. 21, 1990). Likewise, each case Benson cites in support of his transitory-anger argument rejected transitory anger as a reasonable inference from the circumstances proved.

In this case, the circumstances proved were that Benson and V.S. had been arguing for several hours, and Benson called the police. When they arrived, the officers listened to the argument to assess the level of danger posed to the officers. Benson prevented V.S. from leaving the bedroom and yelled, "I am going to shoot you, b-tch" and stated that he would pistol-whip her. Benson only exited the bedroom when police entered the apartment. Benson's actions caused V.S. to hide in the bedroom closet, appearing frightened and emotional. V.S. believed that Benson kept a handgun in a bag in the bedroom and stated that she was hiding because she was afraid of Benson, and he would not let her leave. These circumstances support the inference that Benson intended to terrorize V.S., or at least acted with reckless disregard that V.S. would be terrorized by his statement, and cannot support any other reasonable inference. Therefore, the evidence was sufficient to support the verdict.

II. Identification of recovered substance

Benson argues that, because the state did not present sufficient evidence to prove that the substance recovered from his bag was marijuana, his conviction for possession of a controlled substance must be vacated. We disagree.

In assessing the sufficiency of a drug identification, we view the evidence in the light most favorable to conviction, recognizing that the jury is in the best position to consider the evidence of a crime. *State v. Olhausen*, 681 N.W.2d 21, 25-26 (Minn. 2004). Proof of the actual identity of the substance is required, but the supreme court has "not prescribed minimum evidentiary requirements in [drug] identification cases, preferring to examine the sufficiency of the evidence on a case-by-case basis." *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979).

Benson contends that the visual inspection and color tests performed on the recovered substance were only presumptive tests, not confirmatory tests, so the substance was not definitely identified as marijuana. Benson relies on *State v. Knoch* for the proposition that "only a confirmatory test performed in a laboratory can positively identify controlled substances." 781 N.W.2d 170, 173-74 (Minn. App. 2010), *review denied* (Minn. June 29, 2010). But *Knoch* held that laboratory testing is *not* required to support probable cause. *Id.* at 179-80. There is no specific testing required to support a conviction, and we review the evidence on a case-by-case basis. *See Olhausen*, 681 N.W.2d at 26-29 (holding that the identity of a controlled substance can be proven without any confirmatory testing).

In this case, a forensic scientist testified that he examined the substance recovered from Benson's bag using a microscopic examination that revealed bear-claw hairs on the leaves that are unique to marijuana and sufficient to positively identify the substance as marijuana. He explained that it is standard procedure to perform two tests to identify a substance, so he also conducted a color test, which indicated the presence of THC, the active component in marijuana. Based on these two tests, the forensic scientist concluded that it was a scientific certainty that the substance recovered from Benson's bag was marijuana. Viewing the evidence in the light most favorable to conviction, this forensic testimony forms a sufficient basis for the jury to conclude, beyond a reasonable doubt, that the substance was marijuana.[1]

III. Ineffective assistance of counsel

In his pro se supplemental brief, Benson argues that he received ineffective assistance of counsel, alleging that the performance of both of his attorneys fell below objective standards of reasonableness. The state asserts that Benson did not raise the ineffective-assistance-of-counsel claim with respect to his second attorney in district court, so it should not be considered on appeal. However, a claim for ineffective assistance of counsel that can be decided based on the district court record may be brought on direct appeal. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004). We will not make decisions on matters outside the record or consider evidence that was not

[1] Benson also contends that his conviction was based on the nonscientific evidence of his statement that he wanted to smoke a joint and V.S.'s belief that Benson had marijuana, and he relies on *Vail* to argue that this evidence cannot support his conviction. 274 N.W.2d at 133. But the scientific evidence presented was adequate by itself to prove beyond a reasonable doubt that the substance was marijuana.

produced at or received by the district court.[2] *State v. Maidi*, 520 N.W.2d 414, 419-20 (Minn. App. 1994), *aff'd*, 537 N.W.2d 280 (Minn. 1995).

To establish a claim of ineffective assistance of counsel, Benson "must show both that: (1) his trial attorneys' performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that, but for his attorneys' errors, the outcome of the trial would have been different." *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)). "There is a strong presumption that counsel's performance fell within a wide range of reasonable assistance." *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003) (quotation omitted).

A. First attorney

The district court denied Benson's motion for a new trial where he argued that his first attorney provided ineffective legal counsel by advising him to waive the omnibus hearing and indicating that he would not get convicted based on the evidence in the case. "We review the denial of postconviction relief based on a claim of ineffective assistance of counsel de novo because such a claim involves a mixed question of law and fact." *Hawes*, 826 N.W.2d at 782.

Benson contends that his first attorney's assistance was ineffective because (1) she waived the omnibus hearing; (2) she promised he would win his case so he did not take a plea deal; (3) her departure from her office prevented V.S.'s recantation from being

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[2] Attached to Benson's pro se supplemental brief is a letter from his first attorney. Because this letter is not part of the district court record, it is not considered on appeal.

entered into evidence; and (4) she did not visit him in jail. We find no merit in this argument.

Benson's second attorney was offered a continuance by the court before trial, affording Benson another opportunity to request an omnibus hearing, and Benson was advised of the terms of the state's plea offer by both his second attorney and the court. Benson failed to establish that he would likely have taken a plea deal had his first attorney given him different advice. *See Leake v. State*, 737 N.W.2d 531, 540-41 (Minn. 2007) (stating that a defendant who rejected a plea deal on misleading advice of counsel must show that there is a reasonable likelihood that he would have accepted the plea bargain had he been properly advised). Additionally, there is no evidence in the record to support Benson's contention that his first attorney somehow prevented evidence from being presented at trial or that she did not visit him in jail. Benson's first attorney's performance did not fall below an objective standard of reasonableness. But even if it did, it had no effect on the outcome of the case because Benson was represented by new counsel at trial.

B. Second attorney

Benson contends that his second attorney's assistance was ineffective because (1) he did not ask for a continuance; (2) he did not request an omnibus hearing; (3) he did not ask Benson if there were witnesses who could testify on his behalf; and (4) he told the jury during closing argument that the laptop case belonged to Benson. The first three of these complaints relate to tactical trial decisions made by his second attorney, which we will not review. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) ("[T]rial tactics

should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight. Counsel must, after all, have the flexibility to represent a client to the fullest extent possible."). And, though Benson claims on appeal that he never admitted that the laptop bag belonged to him, the state presented substantial evidence as to his constructive possession of the bag by presenting evidence of at least three items in the bag with Benson's name on them. His second attorney's decision to not dispute this evidence was arguably a tactical decision, and there is no reasonable probability that the trial outcome would have been different had his second attorney not conceded this point.

Affirmed.