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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1477

State of Minnesota,
Respondent,

vs.

Wilmer Govani Montoya Ulloa,
Appellant.

Filed July 31, 2017
Affirmed
Connolly, Judge

Watonwan County District Court
File No. 83-CR-16-3

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Stephen J. Lindee, Watonwan County Attorney, St. James, Minnesota (for respondent)

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

Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

On appeal from his convictions of second-degree assault with a dangerous weapon and threats of violence, appellant argues that (1) the admission of a surveillance video and a still image of events that occurred without proper foundation and authentication was plain error that was prejudicial; (2) the evidence presented was insufficient to support the conviction of threats of violence; and (3) his sentence for threats of violence should be vacated because he cannot be sentenced for both the assault and the threats of violence, when the victim was the same in both offenses. Because the evidence admitted was not plain error, there was sufficient evidence of threats of violence, and there were multiple victims, we affirm.

FACTS

On December 30, 2015, appellant Wilmer Govani Montoya Ulloa met with his wife, victim A.P., at A.P.'s aunt's house to discuss their potential divorce. The next day, appellant returned to the victim's aunt's house to pick up a couple friends who needed a ride to the laundromat. Appellant saw A.P. with his cousin, victim F.C., with whom A.P. was in a relationship. Appellant pushed A.P. and began yelling at F.C. A fight ensued between appellant and F.C.

After the fight, appellant went outside and called A.P. A.P. refused to take the call, and appellant left. A.P. then went with F.C. and four others to the laundromat. While at the laundromat, A.P.'s brother came in and told her that appellant was outside and wanted to talk to her. When A.P. refused because she thought appellant was "already really angry,"

appellant entered the laundromat and began chasing F.C. with a knife. A.P. attempted to get between the two men. While chasing F.C., appellant said "[F.C. and A.P.] are not going to have a happy New Year together," "[F.C. and A.P. are not] going to make it into the next [new year]," and that "[appellant] was going to kill [them]." A.P. had never seen appellant that furious. A.P.'s brother confirmed that appellant was mad and not playing a game with anybody. A.P.'s brother told appellant to stop, and they left the laundromat together.

Appellant was arrested and charged with: one count felony second-degree assault with a dangerous weapon against A.P.; one count felony second-degree assault against F.C. with a dangerous weapon; one count felony threats of violence; one count gross-misdemeanor reckless handling or use of a dangerous weapon; and one count misdemeanor domestic assault against A.P. Before trial, respondent dismissed charges of second-degree assault against A.P. and the reckless handling or use of a dangerous weapon.

At trial, the jury heard the audio of the call to police dispatch, watched appellant's interrogation by police, observed a screenshot from a security video obtained from the laundromat, and watched the full security video from the laundromat. The screenshot and the video were objected to as cumulative evidence, and the district court denied the objections.

The jury found appellant guilty of second-degree assault with a dangerous weapon against F.C. and threats of violence against A.P. and F.C. and returned a verdict of not guilty on the domestic-assault charge. Appellant was sentenced to 24 months in prison for

the second-degree-assault charge and 15 months in prison for the threats-of-violence charge to be served concurrently.

D E C I S I O N

I. The admission of the surveillance video and still image did not constitute plain error affecting substantial rights.

An evidentiary objection made at trial must state the specific ground of objection. *State v. Mosley*, 853 N.W.2d 789, 797 n.2 (Minn. 2014) (citing Minn. R. Evid. 103(a)(1)). When the ground for the objection at trial is not the same as that raised on appeal, we review the claim for plain error. *Id.* "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citations omitted). The third prong is satisfied if there is a "reasonable likelihood that the error had a significant effect on the jury's verdict." *See State v. Vance*, 734 N.W.2d 650, 660 n.8 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). "If those three prongs are met, we may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Strommen*, 648 N.W.2d at 686 (quoting *State v. Crowsbreast III*, 629 N.W.2d 433, 437 (Minn. 2001)).

Appellant argues that the video from the laundromat and the still image that shows appellant holding a knife lacked foundation and authentication and should not have been admitted. At trial, appellant's counsel objected to this evidence as cumulative evidence. The district court denied the objection. Because appellant did not make the specific

objection he now appeals, we consider the admission of the evidence under the plain-error standard.

Authentication of evidence in a criminal trial is governed by Minn. R. Evid. 901 and Minn. R. Evid. 1101(a). *In re Welfare of S.A.M.*, 570 N.W.2d 162, 164 (Minn. App. 1997). The evidentiary requirement for authentication is met if the evidence is "sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). The conventional method for authenticating photos[1] is the "pictorial witness theory" because the photograph is thought to be a pictorial representation of what the witness observed. *S.A.M.*, 570 N.W.2d at 164. It has been established in Minnesota that the admission of a videotape can be authenticated by a witness who observed the events depicted on the tape. *Id.* In *S.A.M.* none of the witnesses who testified at the trial observed the alleged assault and therefore the videotape could not be authenticated by a "witness with knowledge." *Id.* at 165.

Appellant argues that, because "the state's witnesses did not authenticate the video and still image[,] . . . the surveillance video and still image were not admissible under the 'pictorial witness theory.'" We disagree. The state produced four eyewitnesses to the incident who were present at the time of the assault and described it as seen on the video. The state acknowledges that the witnesses who personally observed the altercation did not specifically testify that the surveillance video was an accurate depiction of what they saw. Nonetheless, the state argues that four witnesses with personal knowledge testified that

[1] For the purposes of proving content, a videotape is classified as a photograph. Minn. R. Evid. 1001(2).

they were present and whose testimony, elicited before the video was shown, precisely describes the video footage and provides sufficient foundation. We agree.

Even if we were to conclude that the admission of the video and the still image was an error that was plain, we conclude there is not a "reasonable likelihood that the error had a significant effect on the jury's verdict." *Vance*, 734 N.W.2d 660. Four witnesses testified that appellant chased F.C. with a knife. A video of appellant being interrogated showed that appellant initially claimed that he was chasing F.C. with a flashlight, and then confessed that it was actually a knife. Based on the evidence in the record, there is not a reasonable likelihood that the admission of the evidence objected to in this appeal had a significant effect on the verdict.

Because appellant cannot meet his burden on prong three, we need not consider the remaining prongs. *See State v. Rossberg*, 851 N.W.2d 609, 618 (2014).

II. There is sufficient evidence in the record for a jury to conclude that appellant had the requisite intent to be convicted of threats of violence.

In considering a claim of insufficient evidence, this court's review is limited to 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 the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "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). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant argues that the evidence was insufficient to support a conviction for threats of violence against A.P. and F.C. because the state did not prove beyond a reasonable doubt that appellant had the requisite intent for the crime.

"Whoever 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 or inconvenience may be sentenced to imprisonment." Minn. Stat. § 609.713, subd. 1 (2016). "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). A.P. testified that appellant told her and F.C. that they would not make it to the new year and that appellant "was going to kill [them] both," while pursuing F.C. with a knife. Viewing the evidence in the light most favorable to the jury verdict, we conclude that this evidence is sufficient to show that appellant threatened to commit a crime of violence, killing F.C. and A.P. before the new year, in order to terrorize both F.C. and A.P. That the victims did not testify that they were actually afraid for their lives is irrelevant.

Appellant argues that his actions were plausibly transitory anger meaning that "he used words or actions expressing anger [because his cousin was dating his wife] but without an intent to terrorize." The statement "I am going to kill you" is "objectively a

threat to commit homicide, but the context may establish something else." *State v. Bjergum*, 771 N.W.2d 53, 56 (Minn. App. 2009). Considering the context, we conclude that appellant's actions were more than a verbal threat. Appellant ran after F.C. with a knife, "recklessly disregard[ing] the risk of terrorizing another." *Id.* at 57. Substantial evidence in the record indicates that this was not transitory anger.

We conclude that there is sufficient evidence in the record to conclude that appellant had the necessary intent to be convicted for threats of violence against F.C. and A.P.

III. Appellant can be convicted and sentenced of threats of violence because the threats of violence offense involved multiple victims, F.C. and A.P, and the second-degree-assault offense only involved F.C.

Appellant next argues that the threats-of-violence sentence must be vacated because it violates the prohibition against imposing multiple sentences arising from a single behavioral incident. "[I]f a person's conduct constitutes more than one offense . . . , the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2016). Generally, this means that a person cannot be sentenced for two or more crimes that were committed in the course of a single behavioral incident. *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

However, "[u]nder the multiple-victim exception, courts are not prevented from giving a defendant multiple sentences for multiple crimes arising out of a single behavioral incident if: (1) the crimes affect multiple victims; and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant's conduct." *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012) (quotation omitted).

Appellant argues that the district court erred by imposing two sentences for two offenses arising from the same behavioral incident in which the state identified the same person, F.C., as the victim. The state charged appellant with one count second-degree assault against F.C. and one count of threats of violence against both F.C. and A.P. The state does not dispute that the two counts arise from a single behavioral incident.

Appellant argues that under *State v. Wipper*, 512 N.W.2d 92, 95 (Minn. 1994), we should vacate the threats-of-violence sentence. In *Wipper*, the appellant was found guilty of first-degree murder and first-degree arson after he shot the victim twice in the head and then set the house on fire to conceal the crime. *Wipper*, 512 N.W.2d at 93-94. The district court judge determined that the victim's two brothers, co-owners of the property that was burned, were also victims of arson and therefore "it was not improper to punish defendant for both offenses even though the arson was committed by defendant . . . in an attempt to avoid apprehension for the murder." *Id.* at 95. The supreme court vacated the 68-month concurrent sentence for the arson conviction, noting that "[t]his . . . will have no effect on the amount of time defendant actually will serve in prison, since he remains subject to a term of life in prison." *Id.* The supreme court did not discuss its reasoning.

This case is distinguishable. Appellant did not act in an attempt to disguise another crime. Appellant threatened to kill both F.C. and A.P. and, while holding a knife, told them that they would not live to see the new year. These are threats of violence against two separate people with the intent to cause apprehension or fear, affecting each victim and the sentence does not unfairly exaggerate the criminality of appellant's conduct. Because there

were multiple victims, we conclude that the district court did not err in imposing a 15-month concurrent sentence for threats of violence.

Affirmed.