STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1894

State of Minnesota,
Respondent,

vs.

John Melvin Karnes,
Appellant.

Filed August 21, 2017
Affirmed
Smith, Tracy M., Judge

Mower County District Court
File No. 50-CR-16-1314

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

David Hoversten, Austin City Attorney, Michelle M. King, Assistant City Attorney, Baudler, Maus, Forman & King, LLP, Austin, Minnesota (for respondent)

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

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

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

SMITH, TRACY M., Judge

Appellant challenges his disorderly conduct conviction, arguing that (1) he was convicted based on constitutionally protected speech and expressive conduct in violation of his First Amendment rights, (2) the district court plainly erred by failing to instruct the

jury that it could not convict based on expressive conduct that is inextricably linked with speech, and (3) the district court violated his right to counsel when it stated that he did not have a right to counsel after he asserted his right to self-representation. We affirm.

FACTS

On June 21, 2016, P.C.D. was walking along Fourth Street SW in Austin, Minnesota, with his children, J.C. and A.C. They began to cross the intersection at Second Avenue SW. While they were in the intersection, they saw a vehicle that had been stopped at a stop sign on Second Avenue accelerate toward them and then brake suddenly, narrowly avoiding hitting them. The pedestrians moved out of the intersection and attempted to take a picture of the vehicle's license plate with their phones.

The driver, appellant John Karnes, pulled over and exited his vehicle. Karnes testified that he pulled over intending to apologize and explain that he had not seen the pedestrians when he left the stop sign. J.C. testified that, as soon as Karnes pulled over, Karnes appeared "furious" and asked why they took a picture of his car.

P.C.D. testified that Karnes said he was trying to hit them with his vehicle "because we're Mexicans and we shouldn't be here." P.C.D. also testified that Karnes said he was going to contact Immigration and Customs Enforcement (ICE) and said he wanted the police to arrest the pedestrians for being in the United States illegally. Karnes testified that he did mention ICE and suggest that the pedestrians were undocumented immigrants. Karnes testified that he made those comments about immigration only because he was upset, believing that P.C.D. might sue him for his driving conduct.

According to the testimony of P.C.D. and J.C., throughout the June 21 encounter, Karnes was shouting, screaming, jumping up and down, pacing, getting in P.C.D.'s face, putting up his fist, and making hand gestures indicating that he was going to hit P.C.D. D.W., a witness who lives near the intersection, was inside his house and heard Karnes yelling. D.W. testified that he looked outside and saw Karnes "pacing back and forth" and acting "pretty excitable," so he decided to go outside because he "didn't want [P.C.D.] to get assaulted in front of his two kids."

Karnes and J.C. both called the police. Karnes was charged with misdemeanor fifth-degree assault.

A public defender was appointed, but Karnes later requested to waive counsel and represent himself. At an August 31 hearing, the district court found Karnes's waiver of counsel knowing and voluntary and dismissed the public defender's office from the matter. Later in the same hearing, the state moved to amend the complaint to add misdemeanor charges of disorderly conduct and careless driving. The district court allowed the addition of those charges.

At a September 14 hearing on Karnes's motion to dismiss for lack of probable cause, the district court noted that it would "probably" appoint standby counsel to answer questions Karnes might have during the trial.[1] The district court explained that standby counsel would not try the case and that Karnes would still represent himself.

[1] A court may appoint standby counsel, also called advisory counsel, to assist a defendant who waives the right to counsel. *See* Minn. R. Crim. P. 5.04, subd. 2.

But at the pretrial hearing on September 16, the district court said it likely would not be able to find standby counsel available on such short notice. Karnes expressed concern, stating that he thought "if [he] didn't have an attorney present at court that day, at least [he would] have an attorney to assist [him] with filing of different things." The district court responded, "No, you've waived counsel and fired your public defender, so you don't have a right to an attorney. I generally appoint standby counsel to answer any questions during trial because I think it's really complicated." Karnes replied, "[T]hat's what I mean." Karnes explained that he was interested in "consult[ing] with an attorney" about "different rules and different things like that." Karnes stated that he believed he could try the case himself without being represented by an attorney.

The district court ultimately found an available attorney and appointed standby counsel on September 21.

A jury trial was held from September 27 to 28. Karnes represented himself. The jury found Karnes guilty of disorderly conduct and not guilty of assault and careless driving.

Karnes appeals.

D E C I S I O N

I. The disorderly conduct conviction does not violate the First Amendment.

Karnes argues that the disorderly conduct conviction violates his First Amendment rights because the conviction is based on his protected political speech about immigration and on expressive conduct that was inextricably linked with that speech.

A person may be convicted of disorderly conduct if he or she "engages in offensive, obscene, abusive, boisterous, or noisy conduct," while "knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace." Minn. Stat. § 609.72, subd. 1(3) (2014). Alternatively, a person may be convicted of disorderly conduct based on "offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others." *Id.* If the disorderly conduct conviction is based solely on language, the language used must be "fighting words" not subject to First Amendment protection. *In re Welfare of S.L.J.*, 263 N.W.2d 412, 419 (Minn. 1978). Fighting words are "words which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *State v. Crawley*, 819 N.W.2d 94, 106 (Minn. 2012) (quotation omitted).

When reviewing whether a conviction of disorderly conduct violates the First Amendment, we view the evidence in the light most favorable to the verdict but independently determine, as a matter of law, whether the defendant's language under the circumstances falls outside of constitutional protection. *In re W.A.H.*, 642 N.W.2d 41, 47 (Minn. App. 2002).

Acts of yelling and screaming, without regard to their substantive content, are treated as conduct rather than language under the disorderly conduct statute. The disorderly conduct statute criminalizes *conduct* that is "boisterous" or "noisy," but does not mention boisterous or noisy *language*. Minn. Stat. § 609.72, subd. 1(3). In *T.L.S.*, this court concluded that there was probable cause to arrest the defendant for disorderly conduct where she was "shrieking" and shouting in a high school, without using fighting words. *In*

re Welfare of T.L.S., 713 N.W.2d 877, 881 (Minn. App. 2006). We rejected the defendant's First Amendment argument, reasoning that the arrest was for boisterous and noisy conduct, independent of the content of words shouted, and therefore it was immaterial whether the words were fighting words. *Id.* We noted that "the disorderly shouting of otherwise protected speech or engaging in other 'boisterous or noisy *conduct*' may trigger punishment under the statute without offending the First Amendment." *Id.* (quoting Minn. Stat. § 609.72, subd. 1(3)). In such a case, we reasoned, it is the "manner of delivery of speech" that triggers punishment, not the constitutionally protected content of the speech. *Id.*

The jury did not specify whether it based the guilty verdict on Karnes's conduct or his language. If the record supports the conviction based on offensive, obscene, abusive, boisterous, or noisy conduct, then we may affirm the conviction without considering whether Karnes's language constituted fighting words. *See id.* at 880 (noting that the *S.L.J.* ruling on fighting words narrows only the "language" portion of the disorderly conduct statute and does not restrict convictions based on conduct).

The record contains sufficient evidence to support the conviction based on Karnes's conduct alone. P.C.D. testified that Karnes was getting "right in [P.C.D.'s] face," gesturing with his hands to indicate that he was "going to beat [P.C.D.] up." Officer Samuel Schuweiler testified that, when he arrived on the scene, J.C. told him that Karnes was pounding his fist into his hand in an intimidating gesture. J.C. testified that Karnes was "putting up his fist" in P.C.D.'s face. P.C.D. testified that Karnes was "jumping and screaming." J.C. testified that Karnes was "moving back and forth" and "screaming," "had

his fist up" and "would come close up to [P.C.D.]." D.W. testified that Karnes was so loud, D.W. heard Karnes yelling from inside his house with the windows closed and felt that he should go outside in case Karnes was going to hit P.C.D. Officer Aaron Juenger testified that Karnes "was pretty excited" and needed to be calmed down when police arrived. In the squad video, Karnes is seen yelling, throwing his arms in the air, jumping, and pacing while he explains his position to the officers. Karnes testified that he "get[s] animated."

Karnes argues that the conviction cannot be based on his conduct because it was expressive conduct inextricably intertwined with his protected anti-immigrant speech. Karnes analogizes his case to *State v. Peter*, in which this court reversed disorderly conduct convictions where the defendants were charged with disorderly conduct for conducting an animal-rights protest outside of a fur and leather store. 798 N.W.2d 552, 553, 556 (Minn. App. 2011). In *Peter*, the defendants were arrested for walking back and forth in front of the store, holding signs, chanting, and yelling about the fur industry and animal rights. *Id.* at 553. This court concluded that the defendants' conduct, including the manner and delivery of their speech, was protected because it was "inextricably intertwined with" the protected content of their speech. *Id.* at 556. This court distinguished *Peter* from *T.L.S.*, reasoning that the shouting in *T.L.S.* was "non-expressive conduct unrelated to any substantive message." *Id.* In *Peter*, the acts of shouting and walking back and forth in front of the fur store were essential to the protest; the purpose of the conduct was to convey the anti-fur message in front of the store the defendants were criticizing. But in this case, Karnes's acts of yelling, pacing, jumping, getting in P.C.D.'s face, and making threatening

hand gestures were non-expressive conduct unrelated to conveying the anti-immigrant message that emerged a few times during the personal dispute.

Karnes also compares his case to *State v. Machholz*, in which the supreme court concluded that a harassment statute was unconstitutionally overbroad as applied to the defendant, who was charged with felony harassment for riding a horse through a crowd at a gay-pride event while uttering anti-gay statements. 574 N.W.2d 415, 421 (Minn. 1998). The supreme court concluded that, "[a]lthough in some instances it is possible to separate protected speech from unprotected conduct," in that case, the defendant's conduct of riding his horse through the crowd and knocking over a sign announcing the event was inextricably linked to his anti-gay message. *Id.*

The inquiry into whether conduct is sufficiently expressive to merit First Amendment protection looks at whether there was an intent to convey a particular message and whether, under the circumstances, the likelihood was great that the message would be understood by those who viewed it. *Id.* at 419-20. In determining that the conduct was inextricably intertwined with the speech in *Machholz*, the supreme court noted that it was "difficult to believe that [the defendant] would have been charged under this statute had he simply ridden through the crowd without saying a word." *Id.* at 421.

In contrast to *Machholz*, it is not difficult to believe that Karnes would have been charged with disorderly conduct for shouting loudly enough to be heard inside a neighboring house, getting in P.C.D.'s face, pacing, jumping up and down, and pounding his fist into his hand, even if he had not made remarks about immigrants or his suspicion that the pedestrians were in the country illegally. Unlike in *Peter* and *Machholz*, the

evidence in this case does not suggest that Karnes intended to convey a particular political message or engaged in conduct likely to be understood as standing for that message. Rather, after narrowly avoiding a car accident, Karnes thought he might be sued, became angry with the situation, and, while expressing that anger, made disparaging comments that happened to be related to a matter of public concern. Karnes himself explained the situation this way at trial. At trial, Karnes did not mention free-speech rights or an attempt to convey a message. Rather, he dismissed his behavior as getting "animated" because he thought P.C.D. was going to "take advantage" and sue him. On this record, we cannot conclude that Karnes was engaged in expressive conduct inextricably linked with speech warranting First Amendment protection under *Peter* or *Machholz*.

The record supports the disorderly conduct conviction based on Karnes's offensive, obscene, abusive, boisterous, or noisy conduct. *See* Minn. Stat. § 609.72, subd. 1(3). Because the conviction does not rely on language, we need not address whether Karnes's language constituted fighting words. *See T.L.S.*, 713 N.W.2d at 880. We conclude that the disorderly conduct conviction is not in violation of Karnes's First Amendment rights.

II. The district court did not plainly err by not instructing the jury that it could not convict based on expressive conduct inextricably intertwined with speech.

Karnes argues for the first time on appeal that the district court should have instructed the jury that a conviction of disorderly conduct "may not be based on expressive conduct that is inextricably intertwined with constitutionally expressive speech." We review an error that was not objected to at trial under the plain-error standard. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). Under the plain-error standard, the defendant must show "(1) error; (2) that was plain; and (3) that affected substantial rights."

Id. If those three elements are present, we may correct the error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted). An error is plain if it is "clear or obvious at the time of appeal." *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 330 (Minn. 2016) (quotation omitted). An error is clear or obvious "when it contravenes a rule, case law, or a standard of conduct, or when it disregards well-established and longstanding legal principles." *State v. Brown*, 792 N.W.2d 815, 823 (Minn. 2011).

District courts have "considerable latitude" in the selection of language for jury instructions. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). A jury instruction is erroneous if it materially misstates the law. *Id.*

Here, the district court's jury instruction on disorderly conduct stated, in relevant part:

> First, the Defendant engaged in offensive, obscene, abusive, boisterous, or noisy conduct, or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.
>
> If you find that the Defendant's conduct consisted only of offensive, obscene, or abusive language, you must also find that the words used were fighting words.
>
> "Fighting words" are words that constitute personally offensive epithets that when spoken to the ordinary person under the particular circumstances of the case, are as a matter of common knowledge inherently likely to provoke a violent reaction or incite an immediate breach of the peace by those to whom such words are addressed.

This instruction, drawn from 10 *Minnesota Practice*, CRIMJIG 13.121 (2014), does not convey any limitation on convictions based on expressive conduct linked with protected speech.

We need not decide whether the lack of instruction on expressive conduct was erroneous, because even if it was an error, it was not plain. First, we are not aware of any case requiring the instruction Karnes now requests. *See State v. Milton*, 821 N.W.2d 789, 807 (Minn. 2012) (concluding that omission of instruction was not plain error because no prior case had clearly required that instruction).

Furthermore, the facts of this case do not meaningfully resemble the facts of *Peter* or *Machholz*. In each of those cases, the defendants were engaged in deliberate protests involving conduct directed at conveying a particular message. *See Peter*, 798 N.W.2d at 556 (involving a planned animal-rights protest); *Machholz*, 574 N.W.2d at 420 (involving anti-gay protest at a gay-pride event). In contrast, here, Karnes explained at trial that his "animated" behavior and his comments about immigration were merely the results of his anger at the thought that P.C.D. might sue him. Karnes's conduct was neither intended to convey a particular message nor reasonably likely to convey that message to people who saw it. *See Machholz*, 574 N.W.2d at 419-20. On these facts, the lack of a jury instruction on expressive conduct does not contravene case law or established legal principles within the meaning of the plain-error standard. *Brown*, 792 N.W.2d at 823.

Finally, neither party presented argument about free-speech rights at trial,[2] and Karnes offered no evidence that he intended to convey a particular message through his

[2] The language on fighting words was included in the jury instruction without discussion. A comment to the jury-instruction guide states that the district court "must include" the fighting-words portion in all disorderly conduct cases where the defendant's conduct consists of words alone, and "should" include it if the defendant is accused of both physical acts and words. 10 *Minnesota Practice*, CRIMJIG 13.121 cmt.

conduct. Given the lack of case law requiring an instruction on expressive conduct, the lack of discussion about free speech at trial, and the dissimilarity of this case from the protest cases on which Karnes now relies, we conclude that the need for an instruction on expressive conduct, if any, is not clear or obvious in this case. *Id.* Therefore, the lack of such an instruction is not a plain error. *See id.*; *Strommen*, 648 N.W.2d at 686.

III. The district court did not violate Karnes's right to counsel.

Karnes argues that the district court violated his right to counsel when it stated at the September 16 pretrial hearing, "[Y]ou've waived counsel and fired your public defender, so you don't have a right to an attorney." Karnes asserts that he had a "qualified right" to an attorney at that time and that the district court should have engaged in a balancing test to determine whether Karnes should be permitted to relinquish his right to self-representation and reassert his right to counsel.

After asserting the right to self-representation, a defendant does not have an absolute right to relinquish self-representation and reassert the right to counsel. *State v. Richards*, 552 N.W.2d 197, 206 (Minn. 1996). Rather, a court has discretion to deny a defendant's request to relinquish his right to self-representation and have an attorney take over based on the consideration of factors such as the progress of the trial, the readiness of standby counsel to proceed, the possible disruption of the proceedings, the reasonableness of the defendant's request, and any extraordinary circumstances. *See id.* at 206-07. We review a district court's denial of a defendant's request to relinquish his right to self-representation for an abuse of discretion. *Id.* at 206.

The district court did not abuse its discretion by not considering whether Karnes should be allowed to relinquish his right to self-representation because Karnes never asked to relinquish self-representation. The district court made the statement at issue while discussing the role of standby counsel. Karnes expressed concern when the district court said it might not appoint standby counsel, stating that he had expected that, even if he represented himself at trial, an attorney would be available before trial to assist him with matters such as filing. The district court responded, "No, you've waived counsel and fired your public defender, so you don't have a right to an attorney. I generally appoint standby counsel to answer any questions during trial because I think it's really complicated." Karnes responded, "[T]hat's what I mean." Karnes explained that he intended to represent himself, but that he wanted the opportunity to consult with an attorney before trial to "give [him] some pointers" on "what to expect." The district court explained that the role of standby counsel is to help a pro-se defendant with questions that arise during trial, not to help with pretrial filing or research. Karnes accepted this and reiterated that he was "acting pro se" and did not need an attorney to try the case.

Although the September 16 conversation reveals some confusion about the role of standby counsel, Karnes never relinquished his right to self-representation and never attempted to reassert his right to appointed counsel. Therefore, even if the district court's statement that Karnes had no right to counsel was not entirely accurate because, under certain circumstances, the district court may have had discretion to consider appointing counsel if Karnes had requested it, any error was harmless because Karnes never asked to be represented by counsel after he asserted his right to self-representation.

Karnes also argues that the district court should have sought a renewal of his waiver of counsel after the state amended the complaint to add two charges during the hearing on Karnes's request to represent himself. Generally, a defendant who has knowingly, intelligently, and voluntarily waived the right to counsel need not renew the waiver of counsel at subsequent proceedings in the same matter. *State v. Rhoads*, 813 N.W.2d 880, 887 (Minn. 2012). However, a "substantial change in circumstances" after the initial waiver of counsel might necessitate renewal of the waiver. *Id.* For example, a renewal of a waiver of counsel is required if, after the waiver, the state amends the charges in a way that doubles the maximum possible punishment. *Id.* at 888. Whether a district court was required to obtain a renewed waiver of counsel is a question of law that we review de novo. *See id.* at 887.

In this case, the additional charges did not double—or even increase—the possible punishment. Karnes was initially charged with misdemeanor fifth-degree assault, which carries a maximum penalty of 90 days in jail, a $1,000 fine, or both. *See* Minn. Stat. § 609.224, subd. 1(1) (2014) (defining misdemeanor fifth-degree assault); *see also* Minn. Stat. § 609.03(3) (2014) (setting the maximum penalty for a misdemeanor unless stated otherwise). The charges added later are both misdemeanors having the same maximum penalty as the first charge. Minn. Stat. §§ 609.72, subd. 1, 169.13, subd. 2 (2014) (defining the offenses as misdemeanors); *id.* § 609.03(3) (setting penalty for misdemeanors). Generally, if an offender is convicted of multiple current offenses, the sentences are to be served concurrently. *See* Minn. Sent. Guidelines 2.F (2015). Because the additional charges did not increase the maximum sentence, this case is not factually analogous to

Rhoads. 813 N.W.2d at 887. And the added charges did not otherwise "substantially change" the circumstances, because they arose out of the same incident and were based on the same facts that were alleged in the original complaint. *See id.* at 887-88. Therefore, a renewal of the waiver of counsel was not required.

Affirmed.