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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1794

State of Minnesota,
Respondent,

vs.

James Ernest Piere,
Appellant.

Filed December 17, 2018
Affirmed
Reyes, Judge

Carver County District Court
File No. 10-CR-17-40

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

Mark Metz, Carver County Attorney, Kevin A. Hill, Assistant County Attorney, Chaska, Minnesota (for respondent)

Richard L. Swanson, Chaska, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, 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 threats of violence, appellant argues that (1) the state failed to prove venue beyond a reasonable doubt; (2) he was entitled to a transitory-

anger jury instruction; and (3) he was entitled to a downward durational departure on his sentence. We affirm.

FACTS

In January 2017, a deputy with the Carver County Sherriff's Office transported appellant James Piere from the Douglas County Jail in Alexandria, Minnesota, to the Carver County Jail in Chaska, Minnesota. During the transport, the deputy asked appellant a question about his son, which upset him. Appellant then threatened that if T., appellant's probation officer since 2015, came to his house, he would kill her and any law-enforcement officers who came with her. A few days prior to appellant's threat, T. and law enforcement had gone to appellant's home because he had failed to meet his probation requirements. Another deputy from the Carver County Sherriff's Office communicated the threat to T., and she stated that it caused her to be fearful for her life.

The state charged appellant with threats of violence pursuant to Minn. Stat. § 609.713, subd. 1 (2016) in Carver County. Under the Minnesota Rules of Criminal Procedure, an offense that occurs on a conveyance may be prosecuted in any county traveled through during the conveyance if there is doubt about where the offense was committed. Minn. R. Crim. P. 24.02, subd. 1.

During trial, the deputy testified that the drive from Douglas County to Carver County is about two hours and thirty minutes, and appellant's threat took place within the first hour of the trip, eastbound on I-94 between Alexandria and St. Cloud, Minnesota, and "probably near the St. Cloud exits." Defense counsel argued during closing arguments that

there was no doubt as to where the threat occurred because the deputy's testimony pinpoints Stearns County as the location, making Carver County an improper venue.

The jury returned a guilty verdict, and appellant moved for judgment of acquittal, arguing that the evidence was insufficient as a matter of law to prove venue. Prior to sentencing, appellant moved the district court for a downward durational departure from the presumptive sentence, arguing that his conduct was significantly less serious than that of typical threats of violence cases. The district court denied both motions. The district court sentenced appellant to 30 months in prison with the Commissioner of Corrections, a sentence within the presumptive guidelines. This appeal follows.

D E C I S I O N

I. The evidence is sufficient to prove the venue element of appellant's conviction.

Appellant argues that the evidence at trial was insufficient to establish doubt as to where the threat was made, so the special-venue rule does not apply, and the case should not have been prosecuted in Carver County. We disagree.

In considering a claim of insufficient evidence, 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 that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). A reviewing court must assume 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).

In order to convict appellant of threats of violence, the state had to prove that he threatened, directly or indirectly, to commit any crime of violence with the purpose of terrorizing another or causing such extreme fear in reckless disregard of the risk of causing terror. Minn. Stat. § 609.713, subd. 1. Because this offense occurred on a conveyance, the state had to establish that there was doubt as to the location where the threat was made for it to be properly prosecuted in Carver County. Minn. R. Crim. P. 24.02, subd. 1. The district court gave the following amended jury instruction relating to venue:

> "Third, the defendant's act took place on or about January 5, 2017, in Carver County. An act is considered to have occurred in Carver County if the offense occurs within the state on a conveyance and doubt exists as to which county the offense occurred in, and the conveyance traveled through Carver County in the course of the trip during which the offense was committed."

The only evidence relevant to whether or not doubt existed as to where appellant made his threat was the deputy's testimony.

Appellant argues that the deputy's testimony that the threat was made within the first hour of the trip from Douglas County to Carver County places him at an exact location in Stearns County based on the speed at which the deputy traveled. But the deputy testified that the threat was made within the first hour of the trip, not exactly one hour after leaving the Douglas County Jail. Within the first hour, while traveling eastbound on I-94 from Alexandria to St. Cloud, the deputy would have traveled through Douglas County, Todd County, and Stearns County. Further, the deputy's statements that the threat was made "probably" near the St. Cloud exits evinces uncertainty. Therefore, based on the deputy's

uncertainty as to the location of the threat, it was reasonable for the jury to conclude that doubt existed as to where the threat was made.

II. The district court did not abuse its discretion by denying appellant's request for a jury instruction on transitory anger.

Appellant argues that the district court erred by not granting his request to instruct the jury on transitory anger, asserting that this is "clearly a transitory anger case" because appellant's threat was a single statement made in a moment of anger and frustration. We are not persuaded.

We review a district court's denial of a defendant's requested jury instruction for an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). A district court has "considerable latitude" in selecting the language for jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011). Jury instructions must fairly and adequately describe the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). If no abuse of discretion is shown, there is no reversible error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

A defendant is entitled to a jury instruction on his or her theory of the case if there is evidence to support it. *State v. Persitz*, 518 N.W.2d 843, 848 (Minn. 1994). But this court has previously concluded that failing to include a transitory-anger instruction is not reversible error when the district court properly instructed the jury on the elements of terroristic threats, including the definition of intent and recklessness, and permitted the defendant's counsel to argue the transitory-anger defense. *State v. Dick*, 638 N.W.2d 486, 493 (Minn. App. 2002) (citing *State v. Lavastida*, 366 N.W.2d 677, 680 (Minn. App. 1985)

(holding jury instructions for terroristic threats were proper even though district court failed to instruct on transitory anger)), *review denied* (Minn. Apr. 16, 2002).

The district court denied appellant's request for a transitory-anger instruction because the standard jury instruction on threats of violence was sufficient, based on *State v. Dick*. The district court instructed the jury on the elements of threats of violence, and it defined both intent and recklessness to the jury. And the district court allowed defense counsel to argue appellant's theory of transitory anger in his closing argument, which he did. We discern no abuse of discretion by the district court.

III. The district court did not abuse its discretion by denying appellant's motion for a downward durational departure.

Appellant argues that the district court abused its discretion by not granting his motion for a downward durational departure because (1) he lacked substantial capacity for judgment; (2) he was less culpable because he was in custody and unable to carry out the threat; and (3) he showed remorse. We are not persuaded.

This court reviews a district court's decision not to depart from the sentencing guidelines for an abuse of discretion. *See State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). A district court must sentence a defendant "within the applicable range unless there exist identifiable, substantial, and compelling circumstances to support a departure." Minn. Sent. Guidelines 2.D.1 (2016). Substantial and compelling circumstances supporting a durational departure are those that demonstrate that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the offense in question. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017).

"Although the [district] court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence." *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). We will not interfere with "the sentencing court's exercise of discretion, as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination." *Id.* at 81. We will reverse a district court's refusal to depart only in a "rare" case. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). To maintain uniformity and proportionality in sentencing, departures from the guidelines sentence are discouraged. *Rund*, 896 N.W.2d at 532.

Because appellant had six criminal-history points, the district court found that the presumptive sentence was between 26 and 36 months and sentenced him to 30 months. We will address each of appellant's arguments in turn.

A. State of mind

Appellant argues that a downward departure was required because he lacked substantial capacity for judgment when he made the threat because he suffers from major depressive disorder, anxiety disorder, post-traumatic-stress disorder, and attention-deficit disorder. We disagree.

A district court may depart from the sentencing guidelines when "[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed." Minn. Sent. Guidelines 2.D.3.a (3) (2016). In order for mental illness to constitute a mitigating factor in sentencing, impairment "must be 'extreme' to the point that it deprives the defendant of control over his actions." *State v.*

McLaughlin, 725 N.W.2d 703, 716 (Minn. 2007) (citing *State v. Wilson*, 539 N.W.2d 241, 247 (Minn. 1995)) (concluding McLaughlin's mental health appeared to be "insufficiently extreme" to be a mitigating factor when evidence lacking that McLaughlin frequently suffered delusions or engaged in wholly irrational behavior). In *State v. Martinson*, this court upheld a downward durational departure when the record provided ample evidence that Martinson suffered from paranoid schizophrenia at the time of the incident, his illness manifested itself in delusional paranoia, and caused Martinson to engage in "wholly irrational" behavior before, during, and after the incident. 671 N.W.2d 887, 891-92 (Minn. App. 2003)

This case is more analogous to *McLaughlin* than *Martinson*. We have carefully reviewed the presentence investigation and conclude that appellant's mental-health issues do not appear to be sufficiently extreme so as to constitute a mitigating factor.

Moreover, even if a mitigating factor is present, the district court is not obligated to impose a shorter sentence than a presumptive sentence. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). Appellant received a presumptive sentence, and even if he had established that he lacked substantial capacity for judgment, the district court would not have been obligated to depart from the guidelines.

B. Inability to immediately carry out the threat

Appellant argues that the context in which he made the threat is relevant, arguing that he was less culpable for the threat because he was in the back of a police car and unable to immediately carry out the threat. We disagree.

In *State v. Rund*, the supreme court analyzed whether threats made on social media required a downward departure because they may have been "more exaggerated or extravagant" and less likely to be carried out. 896 N.W.2d at 535. The supreme court concluded that, even if a threat was made in a context in which it was less likely to be carried out, this does not "support a categorical rule" that such threats were "somehow less serious than other threats." *Id*. Rather, an analysis of the totality of the circumstances surrounding the threat is required to determine if it was more or less serious than the typical offense. *Id.*

Here, the district court considered the context in which the threat was made in deciding not to depart from the guidelines and found that T. was "objectively terrified." The record supports the district court's determination. Appellant made the threat just a few days after T. and law enforcement went to appellant's home. Appellant's inability to immediately carry out his threat does not render it less serious than the typical offense. The district court considered the testimony and information before sentencing, and therefore, we will not interfere with its exercise of discretion in imposing a presumptive sentence.

C. Remorse

Lastly, appellant argues that his remorse required a downward durational departure. We are not persuaded.

While a defendant's remorse does not generally relate to a decision to reduce the length of a sentence, in some circumstances, a defendant's remorse can relate back and be considered as evidence of remediation, making the conduct significantly less serious than the typical conduct underlying the offense. *Rund*, 896 N.W.2d at 535. But showing that

remorse is relevant to a durational departure "will not be an easy task" because the defendant must show that "his demonstrated remorse is directly related to the criminal conduct at issue and made that conduct significantly less serious than the typical case." *Id.*

Here, appellant has not cited, nor does the record reflect, any examples of remorse that are directly related to the criminal conduct and that would make the conduct less serious than the typical case.

In sum, the record supports the district court's findings that substantial and compelling circumstances were not present. The district court carefully considered the testimony and information before sentencing appellant. Moreover, even if the district court had found substantial and compelling circumstances, it was not required to depart from the guidelines.

Affirmed.