STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0588

State of Minnesota,
Respondent,

vs.

Thanantos Lee Ashing,
Appellant.

Filed February 19, 2019
Affirmed
Rodenberg, Judge

Scott County District Court
File No. 70-CR-17-10357

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Reilly, Judge.

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

RODENBERG, Judge

Appellant Thanantos Lee Ashing appeals from his conviction for misdemeanor disorderly conduct. We affirm.

FACTS

Appellant was cited for disorderly conduct after tenants at an apartment complex heard him yelling from his girlfriend's apartment balcony in the early afternoon. A neighbor, A.T., heard someone "being loud and obnoxious." She opened her patio door and noticed a male on a balcony "yelling at random people," saying "f this place." A.T. was acquainted with appellant's girlfriend, and she recognized appellant as the person who was yelling.

According to A.T., appellant appeared "distraught, angry, and upset." A.T. described that, when appellant first came out to the balcony, he was yelling at people going to and from the building. His attention then turned toward the apartment's office building, and appellant began yelling the name of G.P., the apartment manager. A.T. testified that appellant yelled "f you" toward the office and called G.P. the "B word." A.T. was concerned with appellant's behavior because there were children outside and because appellant's yelling was making A.T.'s roommate "really anxious."

G.P., the building manager, went to see what was going on after receiving complaints about appellant's yelling. G.P. saw appellant on the balcony, could hear him yelling, but could not clearly understand what he was saying. G.P. decided to call police because appellant was not a lessee of the apartment and was disturbing other people.

Shakopee Police Officers Weiers and Chadderdon responded to G.P.'s call. Almost immediately upon arriving to the apartment building, Officer Chadderdon got out of his squad car and could hear appellant yelling from the northwest corner of the apartment building. Officer Chadderdon described that appellant was yelling "expletives or profane language from a third-story balcony." Officer Chadderdon heard appellant yell, "F--k you.

I'm going to beat your a--" in the officer's direction. Officer Chadderdon tried to speak with appellant, but appellant told the officer, "F--k off, go away."

Officer Weiers, arriving at the building in another squad car, also heard appellant yelling. The officers spoke with G.P. and A.T. and decided to attempt to speak with appellant. When they knocked on the door of the apartment within which appellant was located, they could hear dogs barking from inside the apartment. Appellant told the officers, "F--k off, go away, I'll send my dogs after you." At that point, other residents were becoming upset because appellant's yelling could be heard from the hallway.

The officers returned to their squad car and called M.L., appellant's girlfriend and the lessee of the apartment. M.L. identified appellant as the person inside her apartment and said that he was dog sitting her pit bulls while she was out of town. The officers then moved Officer Chadderdon's squad car out of sight, thinking this might de-escalate the situation. It did. Appellant quieted down and was no longer on the balcony. At that point, the officers decided to leave rather than risk agitating appellant again. A citation was mailed to appellant charging him with disorderly conduct under Minn. Stat. § 609.72, subd. 1(3) (2016).[1]

The disorderly-conduct charge was tried to a jury. At trial, the state requested that the district court include the fighting-words limitation from CRIMJIG 13.121 in its jury instructions. 10 *Minnesota Practice*, CRIMJIG 13.121 (Supp. 2018). The proposed instruction concerning fighting words would preclude conviction where the allegedly disorderly "conduct consisted only of offensive, obscene, or abusive language."

[1] Appellant was cited for disorderly conduct on June 5, 2017. We therefore cite to the 2016 version of the disorderly-conduct statute.

Appellant's trial counsel objected to this proposed instruction, arguing that appellant's yelling was not limited to language, but instead was conduct. The district court agreed, and instructed the jury on the elements of disorderly conduct as forth in CRIMJIG 13.121, without including the fighting-words limitation.

The jury found appellant guilty, and the district court sentenced appellant to 60 days in jail.

This appeal followed.

D E C I S I O N

I. The district court did not plainly err when it instructed the jury on the elements of disorderly conduct.

Appellant argues that the district court plainly erred by omitting the fighting-words limitation from the disorderly-conduct instructions because the allegations against him were based only on appellant's language. At trial, appellant's trial counsel objected to the proposed fighting-words instruction and argued that appellant's yelling constituted conduct.

Here, it appears that appellant's trial strategy was to keep the trial focus away from whether he was yelling "fighting words" and instead keep the focus on whether appellant's conduct violated the statute.[2] Typically, we do not review errors that were invited or that

[2] Appellant also maintains that his trial counsel's objection to the fighting-words instruction "arguably constitutes ineffective assistance of counsel." Because appellant cites no legal authority in support of his claim, this issue was not adequately briefed. We therefore decline to address this issue further. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that, because appellant's pro se supplemental brief contained no argument or citation to legal authority in support of the allegations, those arguments are waived). Moreover, any alleged error by appellant's trial counsel appears to have been trial strategy, for the reason noted. *See State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014)

could have been prevented. *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). "Despite these general rules, we will review an unobjected-to error, even if the error was invited by the defendant under the plain-error test." *Id.* "As a result, we will treat any errors committed by the district court or the parties as errors made during the course of a trial and apply the plain error framework." *Id.* To establish plain error, an appellant must show that a district court's jury instructions were (1) error; (2) that was plain; and (3) that the error affected appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

We first consider whether an error occurred at trial. *Id.* District courts have broad discretion when selecting language for jury instructions. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). When reviewing jury instructions for error, we review the instructions in their entirety to determine whether they fairly and adequately explain the law. *Id.* A jury instruction is erroneous if it materially misstates the law. *Id.* Jury instructions must define the crime charged and explain the elements of the offense. *Id.*

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). 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.* The First

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(stating that, generally, appellate courts do not review an ineffective-assistance-of-counsel claim based on an attorney's trial strategy).

Amendment prohibits a conviction of disorderly conduct for using offensive or obscene language unless that language involves "fighting words," which are not protected under the First Amendment. *In re Welfare of S.L.J.*, 263 N.W.2d 412, 418-19 (Minn. 1978). Fighting words are words that have a direct tendency to cause acts of violence by persons to whom, individually, the remark is addressed. *State v. Crawley*, 819 N.W.2d 94, 105 (Minn. 2012).

A defendant's offensive, boisterous, or noisy *conduct* is not speech, and therefore receives no First Amendment protection. *In re Welfare of T.L.S.*, 713 N.W.2d 877, 881 (Minn. App. 2006). A defendant's words are considered as a package in combination with conduct and physical movements, viewed in light of the surrounding circumstances. *In re Welfare of M.A.H.*, 572 N.W.2d 752, 757 (Minn. App. 1997); *see also State v. Klimek*, 398 N.W.2d 41, 43 (Minn. App. 1986) ("[W]e view appellant's words, coupled with his conduct and physical movements, and measure them as a package against the controlling statute."). "Conduct is disorderly in the ordinary sense when it is of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment." *State v. Zais*, 790 N.W.2d 853, 861 (Minn. App. 2010) (quotation omitted), *aff'd*, 805 N.W.2d 32 (Minn. 2011).

Here, the district court instructed the jury that the elements of disorderly conduct are "[f]irst, the defendant engaged in offensive, obscene, abusive boisterous or noisy conduct, or in an offensive, obscene, or abusive language tending reasonably to arouse[] alarm, anger or resentment in others," and second, that "the defendant knew or had reasonable grounds to know, that the conduct would or could tend to alarm, anger, disturb, provoke an assault by, or provoke a breach of the peace by others." As appellant requested, the district court did not include the fighting-words instruction. *See* CRIMJIG 13.121.

Appellant argues on appeal that, despite his attorney's protestations at trial, the district court should have included the fighting-words instruction because, without including that limiting instruction, the jury was permitted to convict appellant for his constitutionally protected speech.

The trial record demonstrates that both the state and appellant focused solely on whether appellant's yelling amounted to conduct that was disorderly. Appellant made no argument that his yelling was constitutionally protected, and the state made no argument that appellant used "fighting words." The focus at trial was on the disturbing volume and duration of appellant's yelling—it continued for more than two hours and could be heard by multiple other tenants inside the building.

The jury concluded, and the record supports, that appellant's conduct was disorderly—it was not just appellant's use of profanities that disturbed others. Instead, it was appellant's "manner of delivery of speech"; the disorderly nature of the speech did not depend on its content. *See T.L.S.*, 713 N.W.2d at 881. Because of how the case was tried, the district court did not err by omitting the fighting-words limitation provided in CRIMJIG 13.121.[3]

Because the district court did not err, it cannot have plainly erred.

Affirmed.

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[3] We also observe that, even if appellant had demonstrated error that was plain, he would not be entitled to appellate relief unless he also demonstrated that the district court's error affected appellant's substantial rights. *Griller*, 583 N.W.2d at 740. We are convinced that the outcome here would surely have been the same even if the jury had received the fighting-words instruction which appellant actively opposed at trial. Yelling for two hours so loudly that multiple tenants of the apartment building and the building manager were sufficiently disturbed that the police were called would have been regarded by the jury as disorderly conduct regardless of the specific words appellant was using.