STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0180

State of Minnesota,
Respondent,

vs.

Terry Lynn Neitzel,
Appellant.

Filed January 13, 2020
Affirmed
Slieter, Judge

Pine County District Court
File No. 58-CR-17-991

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Reese Frederickson, Pine County Attorney, Pine City, Minnesota (for respondent)

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

Considered and decided by Reilly, Presiding Judge; Bratvold, Judge; and Slieter, Judge.

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

SLIETER, Judge

In this direct appeal from judgment of conviction for threats of violence and fifth-degree assault, appellant Terry Lynn Neitzel argues: (1) the evidence was not sufficient to

support his conviction for threats of violence because his actions did not threaten a future crime of violence; (2) the district court committed reversible error when it failed to inquire of appellant following his equivocal statement about his dissatisfaction with court-appointed counsel; and (3) the district court plainly erred in giving the jury a no-adverse-inference instruction without obtaining appellant's personal consent. Because appellant threatened to kill the victim, his statement constitutes a threat of violence. Because appellant failed to request that the district court allow him to proceed *pro se* or request to be appointed substitute counsel, the district court did not err in failing to inquire into appellant's statement about counsel. Finally, although the district court failed to obtain appellant's personal consent to the no-adverse-inference instruction, appellant's substantial rights were not affected by the error. We therefore affirm.

FACTS

The state charged appellant with threats of violence, in violation of Minn. Stat. § 609.713, subd. 1 (2016), and fifth-degree assault, in violation of Minn. Stat. § 609.224, subd. 1 (2016). The case proceeded to a jury trial.

The morning of trial, appellant complained about his court-appointed counsel. Appellant wanted his attorney to request a change of venue and join the charges with an unrelated misdemeanor citation. Appellant's counsel refused both requests as lacking a legal basis. Appellant told the district court:

> Since they brought this on me I've been trying to move it out of this county. They just refused to do it. I want to know why, why can't I have it moved out of this county. I have a right to a fair trial, don't I? This ain't going to a fair trial. Not in this county there ain't. Everybody is related. The jury is all related.

> My first question is going to be who are all related and you saw [sic] a bunch of hand go up in the air, that fast. I know this county better than you think I do. I know how the people work. He works for the State. He don't work for me. I want to move the trial. I want this stuff dropped so I—if he can't do the paperwork to have it moved out of the county then I don't need him. I don't need him on me. He leaves. My rights have been violated.

The district court responded to the request by stating that "there is no legal basis to remove this trial from Pine County. We're going to proceed with trial today."

The following facts were elicited during the course of trial. Appellant and victim J.A. lived in the same apartment complex in Pine City and knew each other for about ten years. On September 18, 2017, J.A. knocked on appellant's door to deliver some paperwork to him, which appellant had asked her to obtain. Appellant "started screaming and carrying on and hitting something." J.A. testified that appellant then "opened up the door with, I don't know, a bat or stick or something and he swung it at me and it hit the door frame." J.A. further testified that, while swinging the object, appellant said "he was f-cking sleeping and leave him the f-ck alone and he's going to f-cking kill me and all this stuff and just wild and swinging that whatever around." J.A. dropped the paperwork, left, and called the police.

At some point after the state rested, appellant's counsel questioned appellant on the record about his right to testify and appellant waived this right and did not testify. Appellant's counsel requested the no-adverse-inference instruction; the district court agreed to provide the instruction but did not question appellant personally about the no-adverse-inference instruction.

The jury convicted appellant of both charges. The district court stayed imposition of sentence on the threats-of-violence charge and placed appellant on probation for five years. The district court did not impose a sentence on the assault charge. This appeal follows.

D E C I S I O N

I. Appellant's conduct constituted a threat of violence, in violation of Minn. Stat. § 609.713 (2016).

Appellant argues that his conduct did not constitute a threat of violence, in violation of Minn. Stat. § 609.713, sub. 1, because he did not threaten to commit a future crime of violence. "Whether a defendant's conduct is prohibited by the statute he is charged under is an issue of statutory interpretation that this court reviews de novo." *State v. Smith*, 825 N.W.2d 131, 136 (Minn. App. 2012), *review denied* (Minn. Mar. 19, 2013).

A person is guilty of threats of violence when that person (1) "threatens, directly or indirectly, to commit any crime of violence" (2) "with the purpose to terrorize another or . . . in a reckless disregard of the risk of causing such terror or inconvenience." Minn. Stat. § 609.713, subd. 1. Although the statute does not define "threat," the supreme court has interpreted threat to mean "a declaration of an intention to injure another or his property by some unlawful act." *State v. Schweppe*, 237 N.W.2d 609, 613 (Minn. 1975). "Whether a given statement is a threat turns on whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Id.* (quotation omitted).

"[T]he threats must be to commit a *future* crime of violence, which would terrorize a victim." *State v. Murphy*, 545 N.W.2d 909, 916 (Minn. 1996). "It is the future act threatened, as well as the underlying act constituting the threat, that the statute is designed to deter and punish." *Id.* There is, however, no "specific amount of time that must pass before a threat of immediate violence becomes a threat of future violence." *Smith*, 825 N.W.2d at 136.

Appellant argues that, though he threatened to kill J.A., his threat was to commit an *immediate* act of violence, not—as the statute requires—a threat to commit a *future* act of violence. Put another way, appellant claims that "he was declaring that he was committing a crime in the present time." His words "were explaining what he was trying to do in the moment."

We are not persuaded. As noted, Minnesota courts have "never defined a specific amount of time that must pass before a threat of immediate violence becomes a threat of future violence." *Id.* *Smith* involved a defendant who waved a knife at the victim while demanding money. *Id.* Like appellant here, Smith argued that he was threatening immediate not future violence. *Id.* We disagreed, concluding that Smith's conduct constituted "a threat to assault [the victim] with the knife in the future if [the victim] did not comply with [Smith's] demand for money." *Id.* "Appellant's threat to assault [the victim] in the near future [was] not changed by the fact that appellant made the threat during an ongoing confrontation." *Id.*

Appellant's statement that he was "going to f-cking kill" J.A. can be reasonably construed as a threat to kill J.A. in the future. As in *Smith*, appellant's threat is not "changed

by the fact that appellant made the threat during an ongoing confrontation." *Id.* Nor is it required that a specific amount of time pass before an immediate threat becomes a threat of future violence. *Id.* Appellant's statement meets the definition of a threat of violence, in violation of Minn. Stat. § 609.713, subd. 1.

II. The district court did not err by failing to inquire of appellant following his equivocal statement about counsel.

The United States and Minnesota Constitutions guarantee a criminal defendant the right to the assistance of counsel for his defense. U.S. Const. amend VI; Minn. Const. art. I, § 6. If the defendant cannot employ counsel, the defendant is entitled to appointed counsel. *Gideon v. Wainwright*, 372 U.S. 335, 339-45, 83 S. Ct. 792, 793-97 (1963). But the right of an indigent defendant to court-appointed counsel is not an "unbridled right to be represented by counsel of [the defendant's] choosing." *State v. Fagerstrom*, 176 N.W.2d 261, 264 (Minn. 1970).

Appellant expressed frustration over his attorney's refusal to move for a change of venue and join an unrelated misdemeanor offense. On appeal, appellant asserts that the district court should have conducted an inquiry into appellant's statements because the district court should have explained appellant's option to proceed *pro se* or inquire whether appellant wanted substitute counsel.

Appellant cites no authority for this position, and we can find no law obligating a district court to inquire of a defendant following an equivocal statement of dissatisfaction about court-appointed counsel. Unlike cases in which a defendant requests to proceed *pro se*, *see State v. Christian*, 657 N.W.2d 186, 191 (Minn. 2003), or requests substitute

counsel, *see State v. Worthy*, 583 N.W.2d 270, 278-79 (Minn. 1998), appellant requested neither.

At oral argument, appellant asked this court to create a rule requiring that, after a defendant makes an equivocal statement about counsel, district court must question the defendant about proceeding *pro se* or whether the defendant desires appointment of substitute counsel. Because the creation of such a rule rests with the supreme court, we decline to do so. *See State v. Askerooth*, 631 N.W.2d 353, 362 (Minn. 2004) ("It is [the supreme court's] responsibility as Minnesota's highest court to independently safeguard for the people of Minnesota the protections embodied in our constitution."). We therefore conclude that the district court did not commit reversible error by declining to affirmatively question the appellant following his equivocal comment about his court-appointed attorney.

III. The district court's plain error did not affect appellant's substantial rights.

Appellant argues that the district court committed plain error by failing to obtain his personal consent before giving a jury instruction on appellant's right not to testify. A district court ordinarily should obtain a criminal defendant's permission before giving CRIMJIG 3.17, which instructs [the] jury not to draw any adverse inference from [the] defendant's decision not to testify in his [or her] own behalf." *State v. Thompson*, 430 N.W.2d 151, 151 (Minn. 1988). "A [district] court ordinarily should not give a no-adverse-inference instruction unless the defense requests it," and because the instruction "calls the defendant's silence to the jury's attention," the instruction "ordinarily should not be done without the defendant's personal consent." *McCollum v. State*, 640 N.W.2d 610,

616-17 (Minn. 2002); *see also State v. Clifton*, 701 N.W.2d 793, 798 (Minn. 2005) ("We have made clear that CRIMJIG 3.17 should not be given without the personal and clear consent of the defendant."). Generally, "a record should be made, either by defense counsel on his own or at the [district] court's insistence, regarding the defendant's preference in the matter." *Thompson*, 430 N.W.2d at 153.

Because appellant did not object to the instruction at trial, we review its admission for plain error. Minn. R. Crim. P. 31.02. Plain error requires the appellant to show (1) error, (2) that was plain, and (3) that affected the appellant's substantial rights. *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). An appellant's substantial rights are affected "if there is a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998) (footnote omitted) (quotation omitted).

"If all three requirements are met, [appellate courts] then determine whether relief is required to ensure fairness and the integrity of the judicial proceedings." *See State v. Fraga*, 898 N.W.2d 263, 277 (Minn. 2017). This fourth prong is satisfied only "in those circumstances in which a miscarriage of justice would otherwise result." *State v. Huber*, 877 N.W.2d 519, 528 (Minn. 2016) (quotation omitted). The plain error doctrine "authorizes appellate courts to correct only particularly egregious errors[]—in other words, those errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation and citations omitted).

Appellant's counsel asked for the no-adverse-inference instruction and the district court did not obtain appellant's personal consent. This is error that is plain.

The error, however, did not affect appellant's substantial rights. Although appellant argues that the state's evidence was weak because the state did not present the "shovel handle" and the officer saw no marks on the doorjamb, this is unpersuasive. The issue at trial was credibility, and the jury believed J.A. Appellant bears a "heavy burden" in showing his substantial rights were affected, and he has not met that burden. *Griller*, 583 N.W.2d at 741.

Affirmed.