STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1159

State of Minnesota,
Respondent,

vs.

Miguel Angel Garcia,
Appellant.

Filed May 9, 2011
Affirmed in part, reversed in part, and remanded
Minge, Judge

Clay County District Court
File No. 14-CR-09-3276

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

Brian J. Melton, Clay County Attorney, Pamela Harris, Assistant County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Larkin, Judge.

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

MINGE, Judge

Appellant challenges his guilty plea to, conviction for, and sentencing on a charge of terroristic threats. Appellant claims that his guilty plea is invalid because he did not

admit to or describe facts sufficient to support the plea. Appellant further claims that terroristic threats is a lesser-included offense of the crime of felony domestic assault and that he should not have been convicted of both. Finally, appellant asserts that, even if both convictions are proper, they arose out of the same behavioral incident, and he should only be sentenced for one. Because we conclude that the record of the guilty-plea hearing is sufficient to support the guilty plea and that the crime of terroristic threats is not a lesser-included offense of felony domestic assault, acceptance of the guilty plea was not reversible error and appellant was properly convicted of both crimes. But because the convictions arose out of the same behavioral incident, we reverse the sentence, and remand for resentencing.

FACTS

In July 2009, C.Z. reported that appellant Miguel Angel Garcia, the father of her two children, pushed her multiple times, smashed a glass vase, knocked a phone from her hand while she called for help, and made various statements threatening that he would come back and hurt her. Garcia was charged with felony domestic assault, terroristic threats, and interference with an emergency call. On the day of trial, Garcia agreed to plead guilty on all charges. After questioning Garcia to establish a factual basis, the district court accepted his guilty plea on all three charges.[1]

At sentencing, the district court ruled that the terroristic threats and domestic assault arose from separate behavioral incidents because the two acts occurred at different

[1] The district court later determined that the offense of interference with an emergency call was a lesser-included offense of domestic assault and merged the two offenses.

times and for different purposes. Accordingly, it imposed a 21-month stayed sentence for the felony-domestic-assault charge and a 24-month prison sentence for the terroristic-threats charge. Garcia requested and the district court ordered execution of the 21-month stayed sentence, and he is serving both sentences concurrently.

Garcia appeals the guilty plea and conviction for terroristic threats, and the sentencing determination.

D E C I S I O N

I. BASIS FOR PLEA

The first issue is whether Garcia may withdraw his guilty plea on the charge of terroristic threats. After sentencing, a defendant may withdraw a guilty plea only if it is necessary to correct "a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists if a guilty plea is not valid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). "Assessing the validity of a plea presents a question of law that we review de novo." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

Garcia argues that the district court did not establish a sufficient factual basis to receive his guilty plea on the charge of terroristic threats. The prosecution must establish three elements to support a conviction of terroristic threats: (1) that the accused made threats; (2) to commit a crime of violence; and (3) with the purpose to terrorize another or in reckless disregard of the risk of terrorizing another. Minn. Stat. § 609.713, subd. 1 (2008); *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975). To be

accurate, a plea must be established on a proper factual basis. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). The district court typically satisfies the factual basis requirement by asking the defendant to express what happened in his own words. *Trott*, 338 N.W.2d at 251. The district court should be particularly wary of situations in which the factual basis is established by asking a defendant only leading questions. *Ecker*, 524 N.W.2d at 717. "Still, a defendant may not withdraw his plea simply because the court failed to elicit proper responses if the record contains sufficient evidence to support the conviction." *Raleigh*, 778 N.W.2d at 94.

Here, the prosecuting attorney, Garcia's defense attorney, and the district court questioned Garcia attempting to establish a sufficient factual basis for his guilty plea. Garcia initially denied making threats; instead, he reported telling C.Z. that he was cheating on her, didn't love her, and "stuff like that, hateful stuff." When asked specifically about threats, Garcia responded, "I can't remember. I would have to say if – probably told her something to the effect of you going to get what's coming to you . . . ." In response to leading questions about whether he made statements causing C.Z. to fear being hurt or terrorized, Garcia answered with "yes ma'm" or "yes sir."

Garcia argues that he did not admit to threatening future harm. Actions or words convey "a threat to injure, kill, or commit some other future crime" against another if they "would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *State v. Murphy*, 545 N.W.2d 909, 916 (Minn. 1996). Garcia admitted that, immediately after pushing her and smashing a vase, he threatened C.Z. by stating that she would get what's coming to her. Garcia's words and actions, when

combined, had a reasonable tendency to create apprehension that Garcia would follow through on his statement and bring future harm upon C.Z.

In addition, Garcia answered in the affirmative to a series of leading questions attempting to confirm that Garcia threatened C.Z. with intent to cause fear of future harm. Although it is preferable to have the accused describe the commission of the offense in his own words, the use of leading questions can be an appropriate method to elicit the necessary admissions when the accused fails to provide the necessary elements and sufficient evidence in the record exists to justify a finding of guilt. We conclude that the record contains an adequate basis for Garcia's guilty plea on the charge of terroristic threats.

II. LESSER-INCLUDED OFFENSE

The second issue is whether terroristic threats is a lesser-included offense of felony domestic assault. A court cannot convict a defendant of a crime and a lesser-included offense on the basis of the same conduct. Minn. Stat. § 609.04, subd. 1 (2008). A lesser-included offense is "[a] crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(4). A crime is "necessarily proved" in a greater offense if it is impossible to commit the greater offense without committing the lesser offense. *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). To determine if an offense is a lesser-included offense, "a court examines the elements of the offense instead of the facts of the particular case." *Id.*

A terroristic threat occurs when a person threatens to commit a crime of violence with the purpose to terrorize another or in reckless disregard for the risk of causing such

terror. Minn. Stat. § 609.713, subd. 1. A domestic assault occurs when a person either commits an act against a family household member with intent to cause fear of immediate bodily harm or death, or intentionally inflicts or attempts to inflict bodily harm upon a family household member. Minn. Stat. § 609.2242, subd. 1 (2008). One can commit a domestic assault by striking a family member without warning. In such a case, there is no threat to commit a crime of violence or purpose to cause fear in or terrorize another person. Because, based on the elements of the two crimes, one can commit a domestic assault without making a terroristic threat, we conclude terroristic threats is not a lesser-included offense of domestic assault.

III. SAME BEHAVIORAL INCIDENT/SEPARATE SENTENCES

The third issue is whether, based on the record in this case, separate sentences can be imposed for the convictions of domestic assault and terroristic threats. The threshold question that must be addressed is whether the district court erred in determining that these crimes were not committed as part of a single behavioral act. To make the same-behavioral-incident determination, the district court is to consider "factors of time and place . . . [and w]hether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011). The district court's decision whether multiple offenses were committed as part of a single behavioral incident so as to preclude multiple sentences entails factual determinations that will not be reversed unless clearly erroneous. *State v. O'Meara*, 755 N.W.2d 29, 37 (Minn. App. 2008). A factual determination is clearly erroneous if it is unsupported by the record. *Id.* When the facts are not in dispute, the decision whether multiple offenses

are part of a single behavioral incident presents a question of law that is reviewed de novo. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

There is no question that the offenses here occurred in the same place. Two crimes share a unity of time when little or no significant time has passed between the two charged acts. *See State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000). A court cannot give significant weight to the time factor if the record does not indicate how much time passed between the two crimes. *Id.* at 843. The state has the burden of proving that a defendant committed the offenses "at substantially different times or places or that there was an interruption during the commission of the crimes." *State v. Johnson*, 653 N.W.2d 646, 652 (Minn. App. 2002).

Here, the district court made a factual determination that the domestic assault ended when Garcia forcefully removed C.Z.'s phone and that the terroristic threats occurred as Garcia left the apartment. Garcia admits to yelling at C.Z. throughout the incident. Neither the record nor the district court's findings address how much time passed between the domestic assault and the terroristic threats. Although it is apparent that the threats occurred after the assault, the record suggests that the time between the two crimes was minimal. Also, the terroristic quality of Garcia's statements are in part based on the violent context of the events that immediately preceded his statements. On this record, we conclude that the district court clearly erred when it relied on the time factor in determining the two crimes were separate.

The third aspect of the same-behavioral-incident test is whether the two offenses have the same purpose or objective. Here, the district court found that Garcia's purpose

in making the terroristic threats was "to deter her or to frighten her from contacting the police," and that the domestic assault had the purpose of injuring C.Z. or "caus[ing] her fear of bodily injury." Although these appear to be two separate purposes, they are considered to arise from a single behavioral incident if the defendant "substantially contemporaneously committed the second offense in order to avoid apprehension for the first offense." *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991). On appeal, the state argues that Garcia could not have made the terroristic threats to avoid apprehension because C.Z. had already called the police. However, unless clearly erroneous, we are bound by the district court's finding that Garcia made the threats to avoid apprehension. *See O'Meara*, 755 N.W.2d at 37. Because avoiding apprehension would include Garcia's trying to discourage C.Z. from incriminating him when talking to the police after they arrived, the district court's finding is still significant. Based on the district court's finding and this record, we conclude that Garcia's conduct in committing terroristic threats and domestic assault arose from the same behavioral incident.

The parties appear to disagree on how the same-behavioral-incident conclusion affects this proceeding. Garcia argues that he cannot receive multiple convictions based upon a single behavioral incident. This is partially correct. As a general rule, under Minn. Stat. § 609.04, subd. 1, "if a defendant commits one act which violates two different criminal statutes, one of which is included in the other, the defendant may be convicted of only one of the two crimes." *State v. Koonsman*, 281 N.W.2d 487, 489 (Minn. 1979). But as already determined, the crime of terroristic threats is not a lesser-included offense of domestic assault.

The state argues that a conclusion that the two offenses arose out of the same behavioral incident affects the calculation of Garcia's criminal-history score for purposes of sentencing. This is incorrect. The rule is that when a single behavioral incident results in the violation of multiple criminal statutes, the offender may be convicted of multiple offenses but punished and sentenced for only one of the offenses. Minn. Stat. § 609.035, subd. 1 (2008); *see also Tura v. State*, 353 N.W.2d 518, 523 (Minn. 1984) (concluding that when three convictions arose from same behavioral incident, district court should have sentenced defendant for only one offense). This is Garcia's situation. Therefore, Garcia erroneously received two separate sentences: a 21-month stayed sentence on the domestic-assault conviction and a 24-month prison sentence on the terroristic-threats conviction.

We reverse the sentencing decision and remand to the district court to impose a sentence on only one of the convictions, with no increase in criminal-history score. *See State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009). Also, because Garcia requested execution of the stayed sentence so as to serve it concurrently with the prison sentence, on remand, Garcia should be given the opportunity to withdraw his request for execution of his 21-month stayed sentence.

Affirmed in part, reversed in part, and remanded

Dated: