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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1744

State of Minnesota,
Respondent,

vs.

Kirt Jerome Wildhirt, Jr.,
Appellant.

Filed October 11, 2011
Affirmed
Connolly, Judge

Stearns County District Court
File No. 73-CR-10-2041

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Minge, Judge.

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

CONNOLLY, Judge

Appellant, having waived his right to a jury trial, was found guilty by the district court of terroristic threats and domestic assault–strangulation. He challenges his convictions on the ground of insufficient supporting evidence. Because the evidence was sufficient, we affirm.

FACTS

Appellant Kirt Wildhirt and T.L. began a romantic relationship in November 2009. They lived together and had identical cell phones, but T.L.'s phone was programmed to call 911 unless a code was pressed.

In March 2010, they returned home after an evening of drinking and began an argument, in the course of which appellant inadvertently put T.L.'s phone into his pocket. Neither party was aware that T.L.'s phone then called 911 or that their altercation was being recorded. On the recording, T.L. is heard saying "I can't breathe," "You just choked me and you tried to kill me. You won't let me breathe," and "Listen, you tried to kill me." This call lasted about seven minutes and was immediately followed by a similar, shorter call.

Police officers were alerted to the approximate location of the phone and went to the area. One officer heard a female screaming "You tried to kill me" from inside a residence. The officers knocked at the door of the residence and, because no one responded, broke in and entered. They saw appellant, who was wearing jeans, and T.L.,

who was in a short robe. T.L. told the officers they were having a fight; appellant told the officers they had been having foreplay for rough sex.

The officer who took appellant outside to separate him from T.L. noticed that appellant had cuts and scratches, a bleeding cut on his hand, and blood on his jeans. Appellant explained that he and T.L. had been having rough sex.

Another officer remained in the apartment with T.L., who had blood smeared on her arms and legs and in her hair; the apartment also had blood in various places. T.L. said she and appellant had been fighting so they could have make-up sex afterwards. She refused to allow her photograph to be taken or to make a statement, and she told the officer to leave after he asked her about the 911 call and the blood in the apartment.

T.L. also refused to explain the marks on her body to the officer who visited her later that morning and again that afternoon. But she did say that she had not made the 911 call and, when she listened to a tape of the call, said she could not understand it. Two months later, this officer spoke to T.L. again. T.L. said what had happened on March 10 was bad and had gone too far.

Appellant was charged with and convicted of domestic assault–strangulation and terroristic threats. The district court noted that, at trial, "T.L. was reluctant to testify . . . [;] she stated that she loves [appellant;] and [she] asked the Court if she could give [appellant] a hug." The district court also noted that both appellant and T.L. have reasons to conceal what really occurred: appellant was on parole, T.L. wants to be with him, and he has promised to marry her. Appellant was sentenced to 33 months in prison. He challenges his conviction on the ground of insufficient evidence.

D E C I S I O N

In determining whether the evidence is sufficient to sustain a conviction after a bench trial, this court applies the same standard of review as is used for a jury trial. *State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008). This court does not disturb a jury's verdict if the jury, acting with due regard for the presumption of innocence and the requirement of roof beyond a reasonable doubt, could reasonably have concluded that the defendant was guilty of the charged offenses. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Recordings, like other evidence, are reviewed to determine whether a district court's finding is clearly erroneous. *See State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010) (district court's findings are clearly erroneous only if, after reviewing evidence, this court has the definite and firm conviction that a mistake occurred); *State v. Lemieux*, 726 N.W.2d 783, 787 (Minn. 2007) (this court will accept the district court's findings of fact unless those findings are clearly erroneous).[1] This court views evidence in the light most favorable to the verdict and assumes the factfinder believed the state's witnesses and disbelieved contrary evidence. *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010). The stricter scrutiny appropriate for circumstantial evidence cases does not require a reviewing court to independently consider all the evidence and all the inferences that

[1] Appellant relies on *State v. Chavarria-Cruz*, 784 N.W.2d 355, 364-65 (Minn. 2010), to argue that recordings are reviewed de novo. But, in that case, a recording was reviewed de novo not to determine what a defendant and a victim had said but rather what a reasonable officer, as opposed to the officer involved, would have heard from the recording. *Id.* at 362-63. Because this case concerns what T.L. and appellant said, not what a police officer would have heard, *Chavarria-Cruz* is not on point.

could be drawn; the reviewing court considers only the inferences that can be drawn from the circumstances proved and does not consider inferences from conflicting facts the jury has rejected. *Id.* at 715. The reviewing court does consider the reasonableness of both the factfinder's inferences and other inferences, including any "reasonable, rational inferences that are inconsistent with [the defendant's] guilt." *Id.* at 716. But the possibility of innocence does not require reversal if the evidence, taken as a whole, makes a theory of innocence unreasonable. *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

1. Domestic assault–strangulation

Because neither appellant nor T.L. knew that the incident was being recorded, the district court found that the recording is the best evidence of what occurred. On the recording, T.L. is heard saying "I can't breathe. You wouldn't let me breathe"; "Let go of me. I can't breathe"; "You just choked me and you tried to kill me. You wouldn't let me breathe"; "I'm spitting up blood, stop it. Stop it! Don't choke me anymore"; "You choked me"; "You wouldn't stop choking me"; and "I need air." Appellant argues that, because T.L. would not have been able to speak if she were being strangled, her recorded statements show that he was not strangling her. But T.L.'s statements are not a continuous, comprehensible narrative; the recording also includes sounds of struggle, coughing, gagging, screaming, and crying. The district court's inference from the recording that T.L. was being strangled was reasonable and consistent with a theory of appellant's guilt.

The district court also relied on the evidence of blood, mucus, frothy saliva, and vomit in the apartment. Appellant argues that these substances could have come from

him rather than from T.L. and that he, not T.L., was bleeding when the police arrived. The district court noted that appellant testified that T.L. tried to claw him in the face and he spat saliva into the toilet, but rejected that testimony. In light of the duty to assume the factfinder disbelieved evidence contrary to the verdict, appellant's unsupported assertion that the body fluids were his and not T.L.'s is not a basis for reversal.

Finally, the district court relied on "half moon" marks an officer saw on T.L.'s face. Appellant argues that, because the marks were on T.L.'s face rather than on her throat, they do not sustain a conviction for strangulation. But strangulation includes both applying pressure to the throat or neck and blocking the nose or mouth. Minn. Stat. § 609.2247, subd. 1(c) (2010). Thus, marks on T.L.'s face could support the inference that appellant attempted to strangle her.

The evidence of the recording, the bodily substances found in the apartment, and the marks on appellant's face, taken as a whole, make the theory that appellant is not guilty of domestic assault–strangulation unreasonable.

2. Terroristic threats

"Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror" is guilty of making a terroristic threat. Minn. Stat. § 609.713, subd. 1 (2008). To find appellant guilty of terroristic threats, the district court relied on the recorded evidence that appellant said, "You're gonna die now bitch." Appellant argues first that the recording does not clearly prove he said these words. But, while the words on the tape are difficult to hear, they can be heard. We are not convinced that any mistake

occurred and do not conclude that the district court's finding was clearly erroneous. *See Andersen*, 784 N.W.2d at 334 (district court's findings are clearly erroneous only if, after reviewing evidence, this court has the definite and firm conviction that a mistake occurred).

Appellant also argues that, even if he did say those words, they were not a terroristic threat because they referred to a crime of violence being committed at the time they were spoken, i.e., "now," not in the future. *See State v. Murphy*, 545 N.W.2d 909, 916 (Minn. 1996) ("The terroristic threat statute mandates that the threats must be to commit a *future* crime of violence which would terrorize a victim."). But appellant used the future tense, "You're gonna [you're going to] die", and adding "now" did not defeat the purpose of his words, which was "to terrorize another." *See* Minn. Stat. § 609.713, subd. 1. *Murphy* holds that acts, without words, can be terroristic threats because "limiting the reach of the statute to oral or written threats would lead to an absurd result." *Murphy*, 545 N.W.2d at 916. Concluding that a statement was not a threat because it included the word "now" would lead to a similarly absurd result.

Moreover, appellant takes the language from *Murphy* out of context.

> The terroristic threats statute mandates that the threats must be to commit a *future* crime of violence which would terrorize the victim. It is the future act threatened, as well as the underlying act constituting the threat, that the statute is designed to deter and punish. Based on this interpretation of the statute, Murphy's acts of terrorism clearly involved threats to commit future acts of physical violence.

Id. The recording shows that appellant, by his words and his conduct, was threatening to commit a future act of physical violence, *i.e.*, an act that would kill T.L.

We conclude that the evidence is sufficient to sustain both appellant's conviction of domestic assault–strangulation and his conviction of terroristic threats.

Affirmed.