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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-617**

State of Minnesota,
Respondent,

vs.

Tyler Andrew Graf,
Appellant.

**Filed March 26, 2012
Reversed
Hudson, Judge**

Mille Lacs County District Court
File No. 48-CR-10-1297

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Janice S. Jude, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, Chang Lau, Certified Student Attorney, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant Tyler Graf challenges his conviction of terroristic threats, arguing that the circumstantial evidence is insufficient to prove beyond a reasonable doubt that he

made threats with purpose to, or in reckless disregard of, causing terror. Because we conclude that appellant's statements, taken in context, did not amount to threats, we reverse.

FACTS

The state charged appellant Tyler Graf with making terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2008), based on remarks he made while a resident at Mille Lacs Academy, a secure treatment facility. The remarks related to “killing” the attorney who had prosecuted him in a former juvenile case. At appellant's jury trial, a case manager testified that, while appellant was performing dish duty, she overheard him speak with three other residents about breaking into the prosecutor's home when she was alone and hitting her over the head with a blunt object, and that while doing so, he was “giggling and almost . . . joking around.” He did not mention the prosecutor by name. The case manager told appellant to stop the conversation, but he did not do so.

The case manager noted the incident on the shift sheet and spoke to the on-call supervisor, who indicated that a formal report was not necessary, but appellant's probation officer should be notified. The case manager noted that the situation appeared “ridiculous” and testified that she did not believe appellant was “seriously considering murdering someone,” but that she communicated the incident because of the serious content involved. She testified that, in a therapeutic setting, she was required to communicate comments relating to the safety of the patient or others, even if they do not appear serious.

Three other residents, A.T., J.H., and V.D., who were present during the conversation, also testified that appellant did not appear serious when he made the remarks. A.T. testified that appellant was laughing, and at the time A.T. thought it was funny. J.H. testified that appellant appeared to be joking, but he told appellant and A.T. to stop because of the subject. V.D. testified that appellant was both frowning and laughing as he spoke and that appellant had borrowed a book from V.D. with a title such as “Inside the Criminal Mind.”

Appellant testified on his own behalf and stated that he was being playful and acting serious as part of the joke. He stated that he got the idea of clubbing the prosecutor from reading a crime novel containing a fictional prosecutor. He testified that he had the conversation in sympathy with A.T., who had indicated that his stay at a juvenile detention center was mishandled, and he told A.T., “I’d club [A.T.’s prosecutor] if I were [A.T.]” He stated that he “got a laugh from it and so [he] just continued and it went from there.” He testified that he did not know the name of the prosecutor in his previous case and did not remember being upset with her. He did not think it accurate that the case manager told him to stop. He testified that he did not mean to scare anyone and did not realize that anyone was taking the conversation seriously until a few days later.

T.F., who prosecuted appellant as a juvenile in 2009, testified that she learned of the conversation from a coworker, who had been informed of it by A.T.’s probation officer. She testified that she was extremely frightened by the detail in appellant’s statements and that they prompted her to take safety precautions by removing her

personal information from the internet and installing a security system at home. She also testified that she did not believe that appellant was joking; after a defense objection, the district court instructed the jury to disregard T.F.'s opinion testimony.

During the state's opening statement, the prosecutor stated that "this case ultimately involves a prosecutor's worst nightmare" and is "literally the type of thing that prosecutors have nightmares about as they're doing their jobs." A sheriff's office investigator testified that he attempted to speak with appellant about the incident and was unable to do so. The defense moved for a mistrial, arguing that the state had improperly elicited testimony on appellant's exercise of his right to remain silent; and that T.F.'s testimony as to appellant's intent was inadmissible because it was speculative. The district court denied the motion, concluding that the admission of the investigator's testimony, although error, was harmless beyond a reasonable doubt, and T.F.'s opinion on intent was also harmless error.

The jury convicted appellant, and the district court sentenced him to the presumptive sentence of 21 months, stayed for five years, with conditions of probation. This appeal follows.

D E C I S I O N

Appellant challenges the sufficiency of the evidence to support his conviction. In reviewing a claim of insufficient evidence, this court will uphold a verdict if the jury could reasonably have found the defendant guilty, giving due regard to the presumption of innocence and the state's burden of proof beyond a reasonable doubt. *State v. Gatson*, 801 N.W.2d 134, 143 (Minn. 2011). We conduct a "painstaking analysis" of the record

to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). In cases that rely on circumstantial evidence, “the circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011) (quoting *State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010)). In examining sufficiency of the evidence in a case that relies on circumstantial evidence, the reviewing court identifies the circumstances proved, and then determines whether those circumstances are “consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt.” *Id.* at 669 (quoting *Andersen*, 784 N.W.2d at 329).

A person is guilty of making a terroristic threat if that person “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.” Minn. Stat. § 609.713, subd. 1 (2008). Appellant argues that his statements did not constitute threats. “A threat is a declaration of an intention to injure another or his property by some unlawful act. . . . [W]hether 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.” *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975) (quotation and citations omitted). This court has noted that “the statement, ‘I am going to kill you,’ is objectively a threat to commit homicide, but the context may establish something else. Although the context might convey an actual intent to kill, it

also may indicate anger, or frustration without an intent to kill, or even humor.” *State v. Bjergum*, 771 N.W.2d 53, 56 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009).

Appellant argues that his statements were made in a joking manner and that, taken in context, they did not reasonably tend to create apprehension that he would act on them. The state proved that appellant made remarks relating to killing T.F., including that he would go to her home and hit her with a blunt object. But we are also required to examine whether the circumstances surrounding those remarks are consistent only with the hypothesis that the statements actually conveyed an intent to kill T.F. *Hawes*, 801 N.W.2d at 669. On these facts, we conclude that they are not. The evidence shows that appellant made the statements openly while in a small group in a secure facility and in front of a professional staff member. Our standard of review precludes us from inferring that the jury believed appellant’s testimony that he was merely joking, and that he did not know the prosecutor’s name. But all of the persons present testified that they believed appellant was joking or laughing when he made the remarks, and none indicated a belief that he would actually attempt to kill T.F. Even the case manager testified that, although she had a professional obligation to report statements relating to the safety of others, appellant did not appear serious, and the situation appeared “ridiculous.”

Understandably, T.F. found nothing funny about appellant’s statements and was genuinely frightened. But we are compelled to conclude that the circumstances proved the alternative rational hypothesis that, in the context in which appellant’s statements were made, they amounted to an immature expression of frustration and misplaced humor, rather than an actual plan to kill T.F. *See Bjergum*, 771 N.W.2d at 56 (stating

that, in context, a statement that a person is “going to kill” another may instead indicate anger, frustration, or humor, without intent to kill). And because the statements did not have a reasonable tendency to create apprehension that appellant would act in conformity with them, they did not amount to threats within the meaning required for a conviction of terroristic threats. *Schweppe*, 306 Minn. at 399, 237 N.W.2d at 613. Therefore, the state failed to sustain its burden of proving beyond a reasonable doubt that appellant committed the offense of terroristic threats.

The state argues that it provided proof that appellant had a “purpose to terrorize” T.F., noting that her frightened reaction to the statements provided circumstantial evidence relevant to an intent to terrorize. Minn. Stat. § 609.713, subd. 1; *see Schweppe*, 306 Minn. at 401, 237 N.W.2d at 614 (noting that victim’s reaction provides circumstantial evidence relevant to defendant’s intent). And the state argues that, even if appellant lacked such a purpose, he acted with “reckless disregard of the risk of” terrorizing T.F. Minn. Stat. § 609.713, subd. 1. But because we have concluded that the state has failed to prove beyond a reasonable doubt the threshold requirement that appellant threatened T.F., we need not consider this argument. And because we reverse appellant’s conviction, we do not address his additional arguments based on errors occurring at trial.

Reversed.