**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-2189**

State of Minnesota,
Respondent,

vs.

Merlin John Sherer,
Appellant.

**Filed November 12, 2013**
**Affirmed**
**Kalitowski, Judge**

St. Louis County District Court
File No. 69DU-CR-11-4258

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

Mark Rubin, St. Louis County Attorney, Nathaniel T. Stumme, Assistant County Attorney, Kevin Pillsbury (certified student attorney), Duluth, Minnesota (for respondent)

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Kalitowski, Judge; and Chutich, Judge.

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

**KALITOWSKI**, Judge

Appellant Merlin John Sherer challenges his conviction of terroristic threats. Appellant argues that: (1) the prosecutor committed misconduct by improperly asking

appellant "were they lying" questions during cross-examination; (2) there is insufficient evidence to support his terroristic threats conviction; (3) the district court abused its discretion by granting the state's motion to amend its complaint after jeopardy attached; and (4) appellant received ineffective assistance of counsel. We affirm.

## D E C I S I O N

### I.

Appellant argues that the prosecutor committed misconduct by asking appellant "were they lying" questions during cross-examination. This court "review[s] prosecutorial misconduct to determine whether the conduct, in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Milton*, 821 N.W.2d 789, 802 (Minn. 2012) (quotation omitted). If the defendant objected to the misconduct at trial, the supreme court has employed a two-tiered harmless-error test. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). "For cases involving claims of unusually serious prosecutorial misconduct," the conviction may be upheld if there is "certainty beyond a reasonable doubt that misconduct was harmless." *Id.* For cases involving less serious prosecutorial misconduct, an appellate court determines "whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* If the defendant did not object to the misconduct at trial, this court reviews the defendant's claim under a modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Appellant points to three instances where the prosecutor in effect asked appellant if an officer who had testified earlier was lying. Appellant immediately objected after the first "were they lying" question was asked, and was overruled by the district court.

Because appellant takes issue with all "were they lying" questions and objected to the first question, we will assume that he objected to all questions. *See State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (analyzing alleged instances of prosecutorial misconduct as if they had all been objected to, even though some had been and some had not); *State v. Sutherlin*, 396 N.W.2d 238, 241 (Minn. 1986) (concluding the "trial court presumably would have sustained objections to other questions . . . if defense counsel had objected."). We therefore review appellant's prosecutorial misconduct claim under the harmless-error test. *Yang*, 774 N.W.2d at 559.

The supreme court has long expressed its "concern with 'were they lying' questions, and stated that as a general rule, they are inappropriate." *State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005) (citing *State v. Pilot*, 595 N.W.2d 511, 517 (Minn. 1999)). Thus, we must conclude that the prosecutor erred by asking appellant these questions. Nevertheless, we conclude beyond a reasonable doubt that the prosecutor's error was harmless and that it did not play a substantial part in influencing the jury to convict.

Considering the misconduct in light of the whole trial, we conclude that the jury would have reached the same verdict even if the prosecutor had not asked appellant the three improper questions. These questions were a small part of the prosecutor's cross-examination. And before the prosecutor asked "were they lying" questions, the jury had heard appellant's version of events, which directly conflicted with the officer's testimony. Thus, we conclude that asking appellant whether an officer lied was a harmless error and did not play a substantial part in influencing the jury to convict.

Moreover, the evidence against appellant was strong. Appellant admitted he was verbally abusive to the arresting officers, and two officers credibly testified that appellant had made threats.

On this record, the limited nature of the prosecutorial misconduct as well as the evidence presented at trial leads us to conclude that the misconduct was harmless beyond a reasonable doubt and did not play a substantial part in influencing the jury to convict. Although the prosecutor erred by asking "were they lying" questions, this error does not warrant a new trial.

**II.**

Appellant argues that there is insufficient evidence to support the jury's verdict finding him guilty of terroristic threats. We disagree.

"When considering a claim of insufficient evidence, we conduct a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Hohenwald*, 815 N.W.2d 823, 832 (Minn. 2012) (quotation omitted). In conducting that review, we must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Minnesota law provides that a person is guilty of making terroristic threats if he "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 (2012). A "crime of violence" includes second-degree assault and first-degree burglary. Minn. Stat. § 609.1095, subd. 1(d) (2012). And a statement is threatening if 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) (quotations omitted).

Here, the state introduced evidence of appellant's threats: two officers testified that appellant threatened "You break my door down, I'll break your door down and karma's a b----"; "It might be 18 months when I expire, but I'll be there"; "I don't need your gun, I've got my own"; and "I'm going to f--- you for dinner." One officer testified that he was "very concerned" and thought appellant's threats were valid. And appellant testified that he was angry at the officers for arresting him and it was his hope to "emasculate" the officers with his words.

Under the applicable standard of review, we must assume the jury believed the officers' testimony and disbelieved any evidence to the contrary. *Moore*, 438 N.W.2d at 108. Based on the officers' testimony, the jury could reasonably find that appellant threatened to commit a crime of violence, specifically second-degree assault or first-degree burglary. *See State v. Jorgenson*, 758 N.W.2d 316, 321 (Minn. App. 2008), *review denied* (Minn. Feb. 7, 2009) (holding a threat to 'kick the sh--'" out of a person was sufficient to find appellant guilty of making a threat of assault in the second degree).

And because appellant admitted that it was his hope to "emasculate" the officers and an officer testified that he thought appellant's threats were valid, the jury could reasonably find that appellant acted with the purpose of terrorizing the officer. *See Schweppe*, 306 Minn. at 400, 237 N.W.2d at 614 (holding that there was sufficient evidence on the element of intent where defendant testified that he wanted to make the victim "paranoid" and that the victim's reaction was circumstantial evidence relevant to the element of intent).

Viewing the evidence in the light most favorable to the verdict, we conclude that sufficient evidence supports the jury's verdict that appellant committed the crime of terroristic threats.

**III.**

In his pro se brief, appellant argues that the district court abused its discretion and violated Minn. R. Crim. P. 17.05 by granting the state's motion to amend its complaint a day after jeopardy had attached. We disagree.

Allowing an amendment under Minn. R. Crim. P. 17.05 "is in the sound discretion of the [district court] judge." *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982). This court reviews the district court's decision to allow amendments to a criminal complaint for abuse of discretion. *Id.* The district court may permit a complaint to be amended any time before the verdict is reached "if no additional or different offense is charged and if the defendant's substantial rights are not prejudiced." Minn. R. Crim. P. 17.05. The purpose of rule 17.05 is "to protect against confusing the jury, violating due process

notions of timely notice, and adversely affecting the trial tactics of the defense." *State v. Guerra*, 562 N.W.2d 10, 13 (Minn. App. 1997) (citation omitted).

Here, the state filed a motion to amend its complaint four days before trial commenced. The record indicates that before voir dire, the district court informed potential jurors that appellant was charged with the offenses listed on the state's amended complaint. The record further indicates that defense counsel was aware that the state was seeking an amendment to the complaint. Moreover, defense counsel was prepared to address the state's amended charges and did so both in opening argument and examining witnesses. Because no additional or different charges were considered by the jury after jeopardy attached, and defense counsel's trial tactics were not affected by granting the state's motion, appellant's substantial rights were not prejudiced. Therefore, the district court did not abuse its discretion by granting the state's motion to amend its complaint.

**IV.**

Finally, appellant argues that he received ineffective assistance of counsel because defense counsel did not object to the state's motion to amend its complaint on the grounds that it violated Minn. R. Crim. P. 17.05. Because the district court did not err in granting the state's motion to amend its complaint, appellant's ineffective-assistance-of-counsel claim fails.

**Affirmed.**