STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0897

State of Minnesota,
Appellant,

vs.

Justin Lee Erickson,
Respondent.

Filed December 3, 2012
Reversed and remanded
Peterson, Judge

Polk County District Court
File No. 60-CR-12-208

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

Gregory A. Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for appellant)

Sharon E. Jacks, Minneapolis, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Peterson, Judge; and Worke, Judge.

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

PETERSON, Judge

In this pretrial appeal, the State of Minnesota argues that the district court erred as a matter of law when it dismissed the terroristic-threats charge against respondent for lack of probable cause. We reverse and remand.

FACTS

Respondent Justin Lee Erickson was very upset because his wife, S.E., was having an affair with K.G. Respondent sent K.G. a series of text messages over an approximately 17-hour period. The text-message content varied, but included the following:

> "U better take this serious b**** ur dead ─ Justin"
>
> "I got ur address to b**** see u later ─ Justin"
>
> "This is the m***** f***** who u f***** up my marriage now im goin to f*** up ur life that means ur dead m***** f***** ─ Justin"
>
> "I'm on my way ─ Justin"
>
> "I'm goin to beat ur face up so bad she will not even know how u are ─ Justin"
>
> "U to scared to tex[t] me back p**** ─ Justin"
>
> "U little b**** come fight me im with [S.E.'s] dad u little b**** I will f*** u up ─ Justin"

K.G., who was at work, initially told respondent to leave him alone and to "lose" K.G.'s phone number, or he would inform police.

K.G. also received threatening voice-mail messages from S.E.'s father, William Stanley Hunt, who was later charged with making terroristic threats. In these voice-mail messages, Hunt said that he would "make sure [K.G.] die[s] right away" and encouraged K.G. to come outside and fight, because Hunt intended to "have [K.G.'s private parts] hangin' on my wall one day soon." Hunt appeared outside K.G.'s home and called for K.G. to come out and fight.

K.G. became increasingly concerned and contacted the Polk County Sheriff's Department. K.G. provided a statement and gave a sheriff's deputy copies of the text messages and recordings of the voice-mail messages.

The deputy also took statements from respondent and Hunt. Respondent admitted sending the text messages and stated that he was very angry because of K.G.'s affair with respondent's wife. When asked if his text messages threatened K.G.'s life, respondent said he did not think that they did, although he acknowledged that "if he wants to take them as a threat – I guess yeah I suppose." Hunt was much more bellicose and readily admitted making threatening statements; he said, "I pray to God that I never run into [K.G.]," implying that he would hurt him.

Almost one month later, respondent was charged with making terroristic threats, in violation of Minn. Stat. § 609.713, subd. 1 (2010). At the omnibus hearing, respondent moved to dismiss the charge for lack of probable cause. The district court concluded that, when read in context, the text messages did not support a finding that the statements were threatening. The court stated that K.G. had interfered with respondent's marriage and committed the offense of adultery and that respondent was "lashing out in rightful ire at [K.G.], who had not only violated long-standing Minnesota law [on adultery], but had caused substantial heartache to [respondent] and his family." The district court determined that respondent was experiencing "transitory anger" and, therefore, the statements were not truly threatening. In a footnote, the court stated that it was "perplexed that [K.G.] was never charged" with adultery. Finally, the court noted that K.G. had not requested a restraining order, law enforcement did not immediately

apprehend respondent, and the prosecution did not file a complaint for more than three weeks. Based on these considerations, the district court concluded that respondent's statements were not threatening and granted the motion to dismiss the charge. This appeal followed.

D E C I S I O N

I.

The state may appeal from a pretrial order dismissing a complaint for lack of probable cause if the dismissal is based on a legal determination, such as statutory interpretation. *State v. Ciurleo*, 471 N.W.2d 119, 121 (Minn. App. 1991). We "will reverse a probable-cause pretrial dismissal 'only if the state demonstrates clearly and unequivocally that the district court erred in its judgment and, unless reversed, the error will have a critical impact on the outcome of the trial.'" *State v. Dunson*, 770 N.W.2d 546, 549 (Minn. App. 2009) (quoting *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001)), *review denied* (Minn. Oct. 20, 2009). When the district court dismisses a criminal complaint, the test of critical impact has been met. *State v. Dendy*, 598 N.W.2d 4, 6 (Minn. App. 1999), *review denied* (Minn. Sept, 28, 1999). "We review a dismissal that is based on a question of law de novo." *Dunson*, 770 N.W.2d at 549.

II.

The state argues that the district court erred in two ways: (1) by "concluding that 'transitory anger' is a defense to a Terroristic Threats charge . . . [that] can be decided by [the court] at the omnibus hearing"; and (2) by considering events that occurred after the charged behavior that were not a part of the record.

"A probable cause determination is designed to determine if it is fair and reasonable to require the defendant to stand trial." *In re C.M.A.*, 671 N.W.2d 597, 601 (Minn. App. 2003). "The test of probable cause is whether the evidence worthy of consideration brings the charge against the [defendant] within reasonable probability." *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) (quotation omitted). Probable cause is a lesser standard than proof beyond a reasonable doubt; probable cause exists if there is a reasonable probability that a defendant has committed a crime. *See State v. Knoch*, 781 N.W.2d 170, 177 (Minn. App. 2010), *review denied* (Minn. June 29, 2010); *State v. Flicek*, 657 N.W.2d 592, 596 (Minn. App. 2003). The usual standard is that probable cause exists if the state presents substantial admissible evidence that would justify denial of a motion for a directed verdict. *Koenig*, 666 N.W.2d at 372.

In applying this standard, the district court "must view the credibility of the evidence, and every inference which may fairly be drawn therefrom, in favor of the [non-moving] party"; if there is sufficient evidence to present a fact question to a jury, a directed verdict is not appropriate. *Trei*, 624 N.W.2d at 598 (quotation omitted). The district court must not "invade the province of the jury," whose duty it is to determine issues of credibility and to reconcile conflicting evidence. *Id.*; *see State v. Plummer*, 511 N.W.2d 36, 38 (Minn. App. 1994).

A person is guilty of the offense of 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; *see* 10 *Minnesota Practice*, CRIMJIG 13.106-07 (2006) (defining crime of terroristic threats

and identifying elements). A defendant must either have a specific intent or purpose to terrorize, *State v. Schweppe*, 306 Minn. 395, 400, 237 N.W.2d 609, 614 (1975), or must act in reckless disregard of the risk of terrorizing another. *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009). Intent is generally inferred from all the facts and circumstances and presents a jury question. *State v. Alladin*, 408 N.W.2d 642, 648 (Minn. App. 1987), *review denied* (Minn. Aug. 12, 1987).

Respondent sent K.G. a series of text messages with threatening content, including the repeated statement, "[You are] dead." K.G. admitted having an affair with respondent's wife, which established the context in which respondent made the statements. Also, the law-enforcement reports presented to the district court included an interview with respondent's father-in-law, in which he admitted that he intended to harm K.G., which provided additional context. Respondent admitted sending the text messages, and, when asked if he meant to threaten K.G.'s life, he replied, "No I guess I don't know if I – well I don't know if he wants to take them as a threat – I guess yeah I suppose. . . . I – yeah of course I didn't mean it that way but if he wants to take them that way I guess." Although K.G. received several text messages over a 17-hour period before contacting police, he was sufficiently disturbed to report the text messages. This evidence is sufficient to present a fact question to a jury regarding whether respondent sent the text messages intending to terrorize K.G. or in reckless disregard of the risk of causing terror.

Despite this evidence, the district court concluded that (1) in context, the statements were not threatening; (2) K.G. was not credible because he had not requested a

restraining order; and (3) the matter was not serious because the prosecutor waited about a month before issuing a complaint. Rather than viewing the evidence and every inference that may be drawn from it in favor of the state, the court erroneously weighed the evidence and determined credibility, which are duties of the jury.

The district court also concluded that respondent did not intend to threaten K.G., but merely acted out of "transitory anger," thus interpreting the terroristic threats statute to include a transitory-anger defense. Minnesota courts do not favor a transitory-anger defense, except insofar as transitory anger negates specific or general intent. *See, e.g.*, *State v. Dick*, 638 N.W.2d 486, 493 (Minn. App. 2002) (stating that jury instructions on specific and general intent was sufficient when defense counsel argued concept of transitory anger), *review denied* (Minn. Apr. 16, 2002). A transitory-anger defense is nothing more than a denial of intent, and the existence of intent is a fact question for the jury. *Alladin*, 408 N.W.2d at 648; *c.f. State v. Hegstrom*, 543 N.W.2d 698, 703 (Minn. App. 1996) (concluding that district court erred when it weighed facts and applied them to statute, thus invading province of the jury), *review denied* (Minn. Apr. 16, 1996); s*ee State v. Diedrich*, 410 N.W.2d 20, 23 (Minn. App. 1987) (holding that district court erred by dismissing complaint for lack of probable cause because court made finding of defense not applicable to charged offense).

Viewed in the light most favorable to the state, the evidence presented to the district court was sufficient to require respondent to stand trial for the offense of terroristic threats. The district court erred as a matter of law by weighing the evidence,

making credibility judgments, and interpreting the terroristic-threats statute to include a defense of transitory anger that is distinct from the factual question of intent.

Reversed and remanded.