STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1129

State of Minnesota,
Respondent,

vs.

Jason Patrick Marino,
Appellant.

Filed September 16, 2008
Affirmed
Collins, Judge[*]

Washington County District Court
File No. K0-06-4241

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Paul C. Engh, 220 South Sixth Street, Suite 215, Minneapolis, MN 55402; and

Robert G. Malone, 101 East Fifth Street, Suite 800, St. Paul, MN 55101 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

COLLINS, Judge

Appellant challenges his convictions of misconduct of a public officer and fifth-degree assault, arguing that (1) the prosecutor committed misconduct, (2) the district court improperly denied his request for certain jury instructions, (3) the complaint was deficient and did not allow him to present a defense, and (4) the evidence was insufficient to support his convictions. We affirm.

FACTS

At an early-morning hour on April 28, 2006, while walking home from a friend's house, A.B. stopped to rest outside a convenience store in Maplewood. When asked by a convenience-store employee what he was doing, A.B. replied that he was taking a break because he was tired of walking. The employee suggested that A.B. go inside the store and ask if one of the two police officers there would give him a ride.

A.B. went in and asked the officers for a ride to Interstate 94, which was near his home on Mounds Boulevard in St. Paul. A.B. testified that one of the officers, appellant Jason Patrick Marino, who was in uniform and on duty, responded: "What do we look like, the f--king taxi service? Get the f--k out, right now." Marino apparently remembered A.B.'s first name from an earlier encounter, which led A.B. to believe that Marino had a "grudge" against him. A.B. stated that it was the officers' duty to "serve and protect," to which Marino replied: "Where the f--k does it say that? I should kick your ass right now." A.B. testified that Marino physically escorted him out of the store, pushed him roughly against a squad car, handcuffed him, and placed him in the squad.

A.B. testified that he was never told that he was under arrest, but that he believed that he was being arrested and taken to jail.

The officers provided a slightly different version of events, but offered testimony that was generally consistent with A.B.'s story. Officer Stanley Belde, who was in the store with Marino, testified that A.B was "swearing" and "demanded" a ride to Interstate 94. And Marino claimed that, as a result of A.B.'s behavior, he was initially going to take A.B. to jail for disorderly conduct, although Belde testified that Marino did not say anything to A.B. about being arrested for disorderly conduct. But Marino testified that as he drove away from the convenience store with A.B. secured in the back seat, he changed his mind and decided not to arrest A.B.

A.B. admitted telling Marino during the encounter that "you probably got an ugly wife, short d--k and [you are] bald, fat and bald." A.B. testified that he later apologized, but that Marino said that it was "too late." Marino then drove A.B. on a circuitous route in the opposite direction from the location where A.B. had requested to be driven, traveling on Interstate 694, Highway 36, and a dirt road. Marino testified that A.B. had requested to be dropped off with a "dude" in Stillwater, near Manning Avenue north of Highway 36. A.B. denied ever asking to be taken to a "dude" in Stillwater. Marino did not inform dispatch of the fact that he was transporting someone outside the city limits, ask for a case number, or note the transport in his log. Marino testified that he did not radio the transport in to dispatch because of "[l]aziness, basically."

A.B. stated that, during the ride to Stillwater, Marino threatened to "kick [his] ass," to "kick the sh-t out of [him]," and to "beat [him] with [his] bare hands." A.B.

testified that he was "really scared" and that he feared that he would be killed. Although handcuffed, A.B. was able to get his cell phone out of his pocket and called 911 from the back seat of the squad car. A.B. testified that he told the 911 dispatcher the names of the cross streets as they went by because he did not know where he was.

Eventually, Marino stopped the squad car near a cornfield on Manning Avenue in rural Stillwater, more than ten miles away from the convenience store where the incident began. Marino removed A.B. from the squad car, took A.B.'s cell phone, and threw it "as far as he could" into the cornfield, breaking the phone's antenna. A.B. testified that he begged Marino not to hit him. A.B. testified that Marino removed the handcuffs and "smack[ed] [him] up across the back of [the] head" with the handcuffs. Marino denied striking A.B. but testified that A.B. had a "big . . . sh-tty grin on his face" and admitted that he told A.B. to "get the f--k out of here." Marino then drove off, leaving A.B. at the side of the road, and returned to the convenience store in Maplewood.

A.B. testified that he found his phone after searching the cornfield with his cigarette lighter and called his girlfriend and mother, who testified that he was "completely hysterical. . . . crying and hyperventilating." A bystander picked up A.B., and a Washington County deputy sheriff, who had been dispatched in response to A.B.'s 911 call, found A.B. at the corner of Highway 36 and Manning Avenue. When the deputy sheriff attempted to talk with A.B., A.B. would "stay a step away from [him]" as a result of the shock and fear of being assaulted.

Marino was charged with kidnapping, in violation of Minn. Stat. § 609.25, subds. 1(4), 2(1) (2006); false imprisonment, in violation of Minn. Stat. § 609.255, subd. 2

(2006); terroristic threats, in violation of Minn. Stat. § 609.713, subd. 1 (2006); misconduct of a public officer or employee, in violation of Minn. Stat. § 609.43 (2), (3) (2006); and fifth-degree assault, in violation of Minn. Stat. § 609.224, subd. 1(1)(2) (2006). Following a trial, a jury found Marino guilty of misconduct of a public officer and fifth-degree assault and acquitted him on the remaining charges. The district court placed Marino on probation. This appeal followed.

D E C I S I O N

I. Did the prosecutor commit misconduct by (1) eliciting vouching testimony; (2) asking the jury to send a "message" with its verdict; and (3) calling Marino a "boy"?

Marino contends first that the prosecutor committed misconduct and that the cumulative effect of that misconduct entitles him to a reversal of his convictions or a new trial. At trial, Marino did not object to the statements that he now contends were misconduct.[1] In reviewing a claim of prosecutorial misconduct that was not objected to at trial, appellate courts apply the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Under that standard, an appellant must establish that an error occurred and that the error was plain. *Id.* at 302. If he does so, the burden shifts to the state to establish that the misconduct did not prejudice the appellant's substantial rights by showing that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Id.* But even if the state fails to meet its burden, an appellate court

[1] Although Marino objected to one of the statements, the basis for the objection was that the answer "[c]alls for an expert opinion." We, therefore, construe this portion of the vouching argument as unobjected to. And it is undisputed that Marino did not object to any of the other alleged misconduct that he challenges on appeal.

will not grant a new trial unless doing so is necessary "to ensure fairness and integrity of the judicial process." *State v. Reed*, 737 N.W.2d 572, 584 (Minn. 2007). We analyze Marino's prosecutorial-misconduct arguments in turn.

A. Prosecutorial misconduct

1. Vouching

Because "the credibility of a witness is for the jury to decide," one witness cannot vouch for or against the credibility of another witness. *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995); *see also State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005) ("Bolstering a witness's credibility exceeds the proper bounds of aiding the jury to reach conclusions about matters not within its experience."). Improper vouching occurs when a witness testifies that another witness is telling the truth or that the witness believed the other witness. *See State v. Ferguson*, 581 N.W.2d 824, 836 (Minn. 1998). For example, it is improper for a police officer to testify that "I had no doubt whatsoever that I was taking a truthful statement." *Koskela*, 536 N.W.2d at 630; *see also State v. Ellert*, 301 N.W.2d 320, 323 (Minn. 1981) (holding that it was error to admit the testimony of police officer that it was his opinion that the defendant had lied to him).

Marino contends that the state elicited improper vouching testimony on two occasions. The first involved the testimony of A.B.'s mother, E.B.:

> [THE PROSECUTOR:] What did you observe about your son once he returned to your home?
> [E.B.:] Well, I just ran out to the car, and when I came out he was . . . crying, and he was really shaking and trembling. He's 6'2'', it's hard to hug him. He was just thankful to be home.
> [THE PROSECUTOR:] Did it appear that he was scared?

> [E.B.:] Yes, very much so.
> [THE PROSECUTOR:] Is your son the type of kid that could pull off an act like that?
> . . . .
> [Marino objected, arguing that the answer called for expert opinion, and the district court overruled the objection.]
> . . . .
> [THE PROSECUTOR:] Is your son able to pull off an act like that?
> [E.B.:] Well, if you're saying, could he have planned every minute of what happened, no.
> . . . .
> [Marino objected, citing no basis for the objection. The district court instructed the jury to disregard the answer but then told the prosecutor that she "may ask the question again."]
> . . . .
> [THE PROSECUTOR:] Your son's emotional response, Ms. Burke, would your son be able to -- was he able to fabricate that emotional response?
> [E.B.:] No.

The second instance involved the testimony of a police officer who investigated the allegations:

> [THE PROSECUTOR:] What, then, did you find notable once you interviewed [A.B.] and compared that with all of the other interviews that you have done in the case?
> [SERGEANT ELLICKSON:] [A.B.'s] statements to [other officers, his girlfriend, and his mother] were consistent throughout. The only inconsistency that I found, that I made note of, was at the very end when [A.B.] said he was trying to get the squad number of Officer Marino's, he said he was going to log it into his phone. And at that point, he wouldn't have had his phone in his hand. He did later catch that he did not have the phone in his hand, so he seemed a little bit confused about that, but other than that, his statements to all of us were consistent throughout.

It appears that both responses had the effect of bolstering the credibility of A.B.'s testimony, and, therefore, were improper. *See Van Buren v. State*, 556 N.W.2d 548, 550-

52 (Minn. 1996) (holding that prosecutor committed misconduct by eliciting testimony about whether the victim's family members "believed" her allegations); *State v. Maurer*, 491 N.W.2d 661, 662 (Minn. 1992) (stating that the prosecutor committed misconduct by eliciting testimony from witnesses that they felt that the victim's allegations were "sincere"), *denial of habeas corpus rev'd by Maurer v. Dep't of Corr.*, 32 F.3d 1286 (8th Cir. 1994). But we conclude that these statements were not so egregious as to require sua sponte intervention by the district court and they were not, therefore, plain error.

2. Send a message with verdict

In criminal prosecutions, "the jury's role is not to enforce the law or teach defendants lessons or make statements to the public or to 'let the word go forth.'" *State v. Salitros*, 499 N.W.2d 815, 819 (Minn. 1993). Thus, misconduct occurs when, for example, a prosecutor urges the jury to protect society, *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000), or to hold the defendant "accountable," *Salitros*, 499 N.W.2d at 819-20.

Here, the prosecutor stated the following during closing argument:

> Marino acknowledges that the only place that [A.B.] ever asked to go to before being placed in that squad car was Highway 94. He didn't have the authority to do any of those things. Having a badge, carrying a gun, being on duty doesn't just let you teach young punk men a lesson. You're not allowed to do that, and you must send that message with your verdict.

It appears that the prosecutor was asking the jury to make Marino an example and to convict him on that basis. Appellate courts have roundly criticized this type of argument in the past. *See, e.g.*, *State v. Merrill*, 428 N.W.2d 361, 372-73 (Minn. 1988) (stating

that the prosecutor's request that the jury send a message of disapproval for "vigilante-type" justice and show murder victim's family that "the system works" is improper); *State v. Clark*, 296 N.W.2d 372, 377 (Minn. 1980) (holding that a prosecutor's argument appealing to the crime problem in general as opposed to individual guilt is improper); *Duncan*, 608 N.W.2d at 556 (holding that a prosecutor committed misconduct when he argued that the jury should send the message that "[i]t's time in this country that we start believing kids"); *State v. Peterson*, 530 N.W.2d 843, 848 (Minn. App. 1995) (finding misconduct when a prosecutor told the jury that sexual abuse was a "sad reality" in our society and that the jury should not "turn your back" on the victims); *State v. Eggert*, 358 N.W.2d 156, 162 (Minn. App. 1984) (holding that it is improper for a prosecutor to imply that "the jury should assist society in taking a stand on [an] issue"). In light of this caselaw, we conclude that this statement was not only improper, but also plain error.

3. Evocation of the "thin blue line" to protect their "boy"

Marino contends that the prosecutor improperly asked the jury to cross the "thin blue line" of officers protecting their own and wrongly described him as a "boy" to the jury. The prosecutor's complete statement was:

> Now, I expect that [Marino's counsel] is going to get up here and talk to you about credibility, credibility, credibility. He will put [A.B.] down the gutter, and talk about how great [Marino] is. He's going to say, look at all of these guys. It's the thin blue line I talked to you about in the opening statement. Look at all of these guys that came up here and said, Marino, he's a good cop. Think about [one of the officers who testified], he said, he takes pride in being an officer. Then I asked him, do officers who take pride in being an officer tell civilians to get the f--k out of here? What lengths will this department go to to see that their boy is taken

> care of? Whose [sic] interested in the stakes? Think about that.

We conclude that this statement was not misconduct. The prosecutor was arguing that the defense witnesses were not credible because they had a motive to lie, that is, to protect their fellow officer. *See State v. Dupay*, 405 N.W.2d 444, 450 (Minn. App. 1987) (noting that prosecutors are allowed to "vigorously argue that [the] defendant and his witnesses lack credibility" (quotation omitted)).

Likewise, the prosecutor's use of the word "boy" to describe Marino is not misconduct on these facts. It is generally improper for a prosecutor to attack a defendant's character, unless the comment is carefully confined to, and justified by, the evidence, or to disparage the defendant personally. *See, e.g.*, *State v. Ives*, 568 N.W.2d 710, 713-14 (Minn. 1997) (holding that the prosecutor's description of the defendant as a "would-be punk" was improper); *State v. Scruggs*, 421 N.W.2d 707, 715-16 (Minn. 1988) (stating that the prosecutor's description of the defendant as a "one-eyed jack" was not improper when it involved a legitimate reference to the evidence); *State v. Holden*, 414 N.W.2d 516, 520 (Minn. App. 1987) (holding that prosecutor's comment comparing defendant and her family to "little bugs and critters" was "excessive" but not prejudicial misconduct), *review denied* (Minn. Jan. 15, 1988). But here, the prosecutor used the term "boy" not to disparage Marino's character, but to illustrate the close tie between him and the members of the police force who testified on his behalf.

B. Prejudice

Because the prosecutor committed misconduct amounting to plain error by asking the jury to send a message with its verdict, we consider next whether that misconduct prejudiced Marino's substantial rights. *Ramey*, 721 N.W.2d at 302. In determining whether a prosecutor's misconduct was prejudicial, this court examines the prosecutor's statements as a whole, rather than isolated excerpts. *See State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993).

We conclude that Marino was not prejudiced by the misconduct for several reasons. First, the jury was properly instructed on the elements of the offense and that the attorney's statements were not evidence. *See State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (stating that the district court's jury instructions "are also relevant in determining whether the jury was unduly influenced by the improper comments).

Second, the jury's split verdict supports the state's claim that the comments did not unduly influence the jury. The jury convicted Marino of misconduct of a public officer and fifth-degree assault, but acquitted him of kidnapping, false imprisonment, and terroristic threats. When a jury has convicted a defendant on some counts, but acquitted a defendant on others, we view the verdicts as an indication that the jury was not unduly influenced by the prosecutor's comments. *Id.*

Third, the statements were brief, comprising a few lines in nearly five-hundred pages of transcribed testimony and argument. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (finding that a prosecutor's improper personal opinion of the defendant did

not result in prejudice when it "was only two sentences in a closing argument that amounted to over 20 transcribed pages").

And finally, Marino did not object to any of the alleged instances of prosecutorial misconduct that he now argues deprived him of a fair trial. *See Washington*, 521 N.W.2d at 40 (noting that defense counsel's failure to object "weigh[s] heavily" against a reversal when determining whether improper statements were prejudicial (quotation omitted)).

II. Did the district court abuse its discretion by failing to give Marino's requested jury instructions?

Marino argues next that the district court abused its discretion by "refusing to instruct the jury as to [his] theories of defense." Specifically, Marino contends that the district court abused its discretion by refusing to instruct the jury on the concept of good faith and on the fact that a police officer may use reasonable force against another without that person's consent.

The refusal to give a requested jury instruction lies within the discretion of the district court and no error results if no abuse of discretion is shown. *State v. Blasus*, 445 N.W.2d 535, 542 (Minn. 1989). In reviewing a charge, the instructions must be viewed as a whole. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). It is an abuse of discretion for a district court to refuse to give the jury an instruction on the defendant's theory of the case if there is evidence to support it. *See Blasus*, 445 N.W.2d at 542 (stating that a party "is entitled" to such an instruction). But even if improper or inadequate, an instruction may not require a new trial if the error was harmless. *State v. Kuhnau*, 622 N.W.2d 552, 558 (Minn. 2001). "An error in jury instructions is not

harmless and a new trial should be granted if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *Id*. at 558-59.

A. Good-faith instruction

The first requested jury instruction was: "All of the crimes charged here require proof of an intent to commit a crime. If you find that Jason Marino was acting in good faith, then the State has failed to prove criminal intent and you must find the defendant not guilty." We conclude that the district court did not abuse its discretion by refusing to give this instruction.

First, the instruction is confusing. *See State v. Meldrum*, 724 N.W.2d 15, 20 (Minn. App. 2006) (stating that a district court need not give jury instructions that are confusing), *review denied* (Minn. Jan. 24, 2007). The term "good faith" is not defined in his instruction, and it is unclear how the jury is to evaluate whether Marino's actions were in good faith. And in his brief, it is unclear whether Marino contends that "good faith" is an affirmative defense to the offense of misconduct of a public officer or if the instruction merely restates the mens rea requirement for the offense. If it is the former, then Marino has cited no authority to support the proposition that good faith is an affirmative defense to this particular offense. If it is the latter, then the district court did not abuse its discretion by refusing to give the instruction because it properly instructed the jury on the mens rea component of the offense.

Second, the district court adequately instructed the jury on the offenses. Because the district court adequately instructed the jury on the offenses—including describing the mental state required to support Marino's convictions—the district court did not abuse its

discretion by rejecting Marino's proposed instruction. *See Blasus*, 445 N.W.2d at 542 (stating that "the [district] court need not give the requested instruction if the substance of the request is contained in the court's charge").

Finally, Marino argued during closing argument that he was acting within his lawful authority during the incident and that he did not possess the "bad intent" to be guilty of the offenses as charged. When defense counsel argues the substance of the charge during closing argument, it is not an abuse of discretion for the district court to have refused to give the instruction. *Id*.

Because the proposed good-faith instruction is confusing, the district court properly instructed the jury on the elements of the offense, and because defense counsel argued that Marino did not have the requisite intent, the district court did not abuse its discretion by denying the proposed instruction.

B. Use-of-force instruction

The second proposed instruction was: "The law permits a peace officer to use reasonable force against another without that person's consent." But the district court did not abuse its discretion by refusing to give the jury this instruction because Marino's proposed language misstates the law. The instruction quotes, in part, Minn. Stat. § 609.06, subd. 1 (2006), which provides:

> [R]easonable force may be used upon or toward the person of another without the other's consent when the following circumstances exist or the actor reasonably believes them to exist:
>
> (1) when used by a public officer or one assisting a public officer under the public officer's direction:

> (a) in effecting a lawful arrest; or
> (b) in the execution of legal process; or
> (c) in enforcing an order of the court; or
> (d) in executing any other duty imposed upon the public officer by law . . . .

Unlike the language of the use-of-force statute, Marino's requested instruction suggests that a subjective standard, rather than an objective standard, is used to determine whether a public officer was permitted to use force. *See* Minn. Stat. § 609.06, subd. 1 (providing that force may be used when "the following circumstances exist or the actor *reasonably* believes them to exist" (emphasis added)). Because Marino's instruction is incomplete and misstates the law by giving the impression that only his subjective belief that force was necessary is required for an acquittal, the district court did not abuse its discretion by refusing to give the instruction. *See Kuhnau*, 622 N.W.2d at 556 (stating that it is error to give a jury instruction that materially misstates the law).

III. Did the complaint deprive Marino of his constitutional rights by denying his ability to present a defense?

Marino argues next that the complaint was indefinite.[2] Specifically, Marino claims that "[t]here has to be an articulation [in the complaint] of exactly why [he] violated [the statutes]."

The Sixth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment Due Process Clause, requires that a defendant "be informed of the nature and cause of the accusation." U.S. Const. amends. VI, XIV;

[2] In his brief, Marino labels this argument as a sufficiency-of-the-evidence issue. But we address it separately because Marino essentially asserts that the complaint was inadequate to inform him of the nature and cause of the accusation and to allow him to present a defense.

Faretta v. California, 422 U.S. 806, 818, 95 S. Ct. 2525 (1975). Under Minn. R. Crim. P. 17.06, subd. 2, a defendant may raise any issue concerning the adequacy of a complaint by moving for relief as provided in rule 10.01, which provides:

> Pleadings in criminal proceedings shall be by the indictment, complaint or tab charge and the pleas prescribed by these rules. Defenses, objections, issues, or requests which are capable of determination without trial on the merits shall be asserted or made before trial by a motion to dismiss or to grant appropriate relief.

"Ordinarily a defendant is deemed to have forfeited an issue as to the adequacy of a complaint unless the defendant either properly raised the issue in the [district] court or can show good cause for not having done so." *State v. Lehman*, 295 N.W.2d 264, 265 (Minn. 1980).

Because Marino did not challenge the adequacy of the complaint by way of a motion in the district court and because he has not even argued on appeal—much less established—that he has good cause for not having done so, he has waived this argument. *See State v. Stagg*, 342 N.W.2d 124, 126 (Minn. 1984) (refusing to consider a defendant's challenge to a "vague and confusing" complaint for the first time on appeal).

IV. Was the evidence sufficient to sustain Marino's conviction of misconduct of a public officer?

Marino argues finally that the evidence was insufficient to support his convictions.[3] When considering a claim of insufficiency of the evidence, this court

[3] Marino argues in his brief that there was insufficient evidence to support his assault conviction because the complaint was deficient. As noted above, Marino has waived any challenge to the deficiency of the complaint. And consequently, he challenges only the sufficiency of the evidence as to the public-misconduct conviction.

reviews the record to determine if the evidence, viewed in the light most favorable to the conviction, permitted the fact-finder to find the defendant guilty. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). But this court will not retry the facts. *State v. Sheldon*, 391 N.W.2d 537, 539 (Minn. App. 1986). On review, we assume that the fact-finder credited the testimony of the state's witnesses and discredited any conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). An appellate court will not overturn a verdict if the jury, acting with due regard for the presumption of innocence and the necessity of proof beyond a reasonable doubt, could reasonably conclude that the defendant was proved guilty of the offenses charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Marino claims that his conduct, as a matter of law, did not involve misconduct of a public officer. The public-misconduct statute provides, in relevant part:

> A public officer or employee who does any of the following, for which no other sentence is specifically provided by law, may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both:
>
> . . . .
>
> (2) in the capacity of such officer or employee, does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in that capacity; or
>
> (3) under pretense or color of official authority intentionally and unlawfully injures another in the other's person, property, or rights . . . .

Minn. Stat. § 609.43 (2006). Specifically, he argues that he did not commit misconduct because (1) he "was permitted to arrest, cuff and place [A.B.] in the squad car"; (2) a

"criminal violation cannot be based on departmental guidelines"; and (3) the state did not prove that A.B. was injured.

Marino argues that the victim's "tantrum" qualified as disorderly conduct, and, therefore, as a matter of law, Marino could not have committed misconduct of a public officer. This argument is unpersuasive. Regardless of whether Marino was entitled to "arrest, cuff and place [A.B.] into the squad car," he was not entitled to threaten and physically assault A.B. A.B.'s testimony, which we must assume the jury believed, indicated that Marino threatened more than once to "kick [A.B.'s] ass" and hit A.B. in the head with a pair of handcuffs. And A.B. testified that, as a result of Marino's conduct, he thought he would be killed. Moreover, Marino was not entitled to throw A.B.'s cell phone into the cornfield, which resulted in damage to the phone, or to abandon A.B. late at night along the side of an unfamiliar rural road.

Marino cites *State v. Serstock* for the proposition that the evidence is insufficient because his conviction of misconduct of a public officer was based on departmental guidelines. 402 N.W.2d 514, 516-17 (Minn. 1987) (stating that a public-misconduct conviction may not rest on asserted violations of the Code of Professional Responsibility or a city's ethics code alone). But *Serstock* is distinguishable because Marino's conviction was based on conduct that went beyond mere violations of "departmental guidelines." As the jury found in this case, Marino assaulted A.B. Although the public-misconduct statute does not define the term "lawful authority," violating a criminal statute clearly exceeded Marino's "lawful authority." *See State v. Ford*, 397 N.W.2d 875, 880 (Minn. 1986) (holding that a schoolteacher violated the public-misconduct

statute after having sexual contact with a student because the Minnesota Statutes provide that such behavior is grounds for immediate discharge); *State v. Andersen*, 370 N.W.2d 653, 663 (Minn. App. 1985) (affirming conviction for misconduct of a public officer when mayor accused citizen of breaking the law, threatened citizen with legal action, and attempted to interfere with a police investigation). And as this court stated in *Andersen*: "Public employees, elected or non-elected, uniformed or non-uniformed, must not and cannot use their positions to intimidate, coerce, threaten, frighten or chill the rights of any individual citizen." 370 N.W.2d at 663. There is record evidence indicating that A.B. was afraid and thought that he would be killed.

Marino also argues that the state "did not prove [A.B.] was injured." But the state need not establish a physical injury to obtain a conviction under the public-misconduct statute. First, Marino was charged with violating Minn. Stat. § 609.43, subd. 1 (3), which requires that the official "intentionally and unlawfully injure[] another in the other's person, property, or *rights*." (Emphasis added.) Second, Marino was also charged with violating subd. 1 (2), which has no express injury requirement. *See* Minn. Stat. § 609.43, subd 1(2) (stating that it is a crime if a public official "does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in that capacity"). Because the statute does not require the state to prove that A.B. was physically injured to obtain a conviction, Marino's argument is without merit.

Affirmed.