STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1444

State of Minnesota,
Respondent,

vs.

Hollis John Larson,
Appellant.

Filed September 15, 2009
Reversed
Stoneburner, Judge

Goodhue County District Court
File No. 25CR0880

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

Stephen Betcher, Goodhue County Attorney, Goodhue County Justice Center, 454 West Sixth Street, Red Wing, MN 55066-2475 (for respondent)

Marie Wolf, Interim Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Stoneburner, 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

STONEBURNER, Judge

Appellant challenges his conviction of terroristic threats, arguing that the evidence is insufficient to support conviction. We agree and reverse.

FACTS

In December 2007, appellant Hollis John Larson was incarcerated with an anticipated release date of February 5, 2008. Larson has been incarcerated for much of his life. Wendy Goodman, Larson's sister, has, since the death of their mother in 2003, provided assistance and support to Larson.

Larson's requests for assistance became more frequent as his release date approached. Goodman, who had health and other problems at this time, was not always able to comply with Larson's requests as quickly as Larson thought that she should.

On December 16, 2007, Goodman's husband accidentally hung up on a telephone call from Larson to Goodman. Goodman knew that Larson would assume that the hang-up was intentional and be angry. She immediately wrote a letter of apology that she mailed the next day.

Larson, as Goodman predicted, assumed that the hang-up was intentional and was angry. He immediately wrote and mailed a letter to Goodman that stated:

> Wendy,
>
> If it was/is your intent to piss me off, you've done a very good job.
>
> Remember what I did when I was pissed at you when we lived in Willow Run?

> Send me $50, I know you're so very busy and sending me a money order is such a very difficult task for someone like you, but if you take a ½ hour out of one of your overwhelming days, you may be able to handle it.
>
> By the way, DON'T bother coming to pick me up on 2/5/08. It is obvious you want nothing to do with me so I will happily oblige. I will send someone to pick up my stuff A.S.A.P.
>
> Have a nice life.

Goodman received the letter on December 18. Her husband called the police who then met with Goodman. The police found Goodman crying, nervous, frustrated, and upset. She told the officer that she considered the letter to be a threat to kill her. Larson was charged with one count of terroristic threats based on the letter.

At Larson's court trial, Goodman testified that she believed that Larson's reference to "Willow Run" referred to an incident that occurred between 1975 and 1977 when Larson, whose date of birth is November 5, 1964, caught Goodman, who is about five years older than Larson, smoking marijuana and threatened to call their mother at work. According to Goodman, they had a non-physical argument. She then went into her mother's walk-in closet to return or take something, and Larson appeared at the closet door with a knife. Goodman, who agreed that she was probably under the influence of marijuana at the time, described the knife as a "carving" knife. She testified that she was at first frightened but then began to laugh. Larson also began to laugh. Goodman does not recall what happened to the knife. She testified "[w]e were children." Nonetheless, Goodman testified that she considered Larson's reference to this incident to be a threat on

her life. Goodman also testified that she read the letter to mean that Larson would not have any further contact with her.

Larson testified that he was angry about the hang-up and assumed it was Goodman's way of saying she did not want any further contact with him. He testified that he did not intend any threat and that his "Willow Run" reference was to a time when he ran away from home leaving a note that said "consider me dead." But he also testified that the reference was to the incident that Goodman admitted ended in laughter. Larson recalled the knife incident as involving a butter knife and did not think it occurred in connection with his having caught Goodman smoking marijuana. He did not recall what they were arguing about when he picked up a knife, but he recalled that Goodman ran to her bedroom and closed the door. Larson thought that their mother was home at the time of the "knife incident." Larson testified that the letter was intended to say that he would be out of Goodman's life.

The district court found that Larson made a statement in reckless disregard of the risk of causing Goodman fear and did cause her fear. Noting that it was most "confused" over whether the element of threatening directly or indirectly to commit a crime of violence had been proved, the district court found that there "had to be something significant" about an incident that both Larson and Goodman remembered so many years later. The district court credited Goodman's testimony about the knife incident, found that the reference was to the knife incident, and found that by this reference, Larson indirectly threatened to commit a crime of violence. The district court did not specify what crime was threatened. The district court also found that Larson was angry at the

time he wrote the letter, but did not address Larson's argument that the letter expressed transitory anger. The district court sentenced Larson to 29 months in prison. This appeal followed.

D E C I S I O N

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the factfinder to reach the verdict he did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). In reviewing a sufficiency of the evidence claim, an appellate court "must take the view of the evidence most favorable to the state and assume the [factfinder] believed the state's witnesses and disbelieved any contradictory evidence." *State v. Jones*, 451 N.W.2d 55, 63 (Minn. App. 1990) (citing *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978)), *review denied* (Minn. Feb. 21, 1990). "If the [factfinder], giving due regard to the presumption of innocence and to the state's burden of proving . . . guilt beyond a reasonable doubt, could reasonably have found the defendant guilty, that verdict will not be reversed." *Id.* (quoting *Merrill*, 274 N.W.2d at 111).

Minn. Stat. § 609.713, subd. 1 (2006), provides, in relevant part, that "[w]hoever 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 . . . may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both." As used in this subdivision, "crime of violence" has the meaning given "violent crime" in section 609.1095, subdivision 1, paragraph (d). Larson

argues that the district court erred by convicting him without specifying the predicate crime of violence that he allegedly threatened.

Larson relies on *State v. Jorgenson*, 758 N.W.2d 316, 325 (Minn. App. 2008) (stating that "[t]o convict a defendant on a charge of felony terroristic threats, a [factfinder] must find that the defendant threatened a specific predicate crime of violence, as listed in Minn. Stat. § 609.1095"). In this case, the state did not identify the specific crime of violence that Larson allegedly threatened, nor did the district court make oral or written findings regarding the specific crime of violence threatened.

Larson argues that, even presuming that his letter referenced the childhood incident involving a knife, that incident ended in laughter, and there is no evidence that it involved a threat to commit a crime of violence. Larson also points out that his letter clearly stated his intent to have nothing more to do with Goodman, and Goodman testified that she interpreted the letter to mean "[t]hat would probably be the last I would hear from him."

"A threat is a declaration of an intention to injure another or his property by some unlawful act. . . . [T]he question of whether 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) (quotations and citations omitted). In *Jorgenson*, we reversed a conviction of terroristic threats based on the district court's failure to instruct the jury that in order to convict on such a charge, the jury must find that the defendant made threats to commit a crime of assault in the first, second, or third

degree. 758 N.W.2d at 326. In this case, the district court expressed its confusion over the element of whether or not appellant threatened a crime of violence but focused its analysis on which childhood incident Larson was referring to and whether reference to that incident risked causing Goodman fear. The district court did not analyze whether the childhood sibling encounter that did not involve any physical contact and that ended in laughter constituted a crime of violence such that a reference to that incident could *reasonably* tend to create apprehension in Goodman that Larson was threatening to kill her.

Larson also argues that the reference to a childhood incident could not constitute a threat to commit a future crime of violence against Goodman. *See State v. Murphy*, 545 N.W.2d 909, 916 (Minn. 1996) (stating that "[t]he terroristic threats statute mandates that the threats must be to commit a *future* crime of violence which would terrorize a victim"). The state argues that because Larson was in prison when he sent the letter, any threat was necessarily a future threat, and Goodman was aware of Larson's impending release. But these facts do not create a threat where none exists. On this record, we conclude that the reference in the letter is insufficient to support a conviction of terroristic threats.

Additionally, we find merit in Larson's claim that the letter expressed transitory anger: an argument not addressed by the district court despite the finding that Larson acted in anger. "[I]t is not the purpose of the statute 'to authorize grave sanctions against the kind of [threat] which expresses transitory anger.'" *Jones*, 451 N.W.2d at 63 (quoting 10 U.L.A. Model Penal Code, § 211.3 (Tent. Draft 1960) § 211-3 cmts.). Goodman fully

expected Larson to react to the hang-up with anger, and he did, writing and mailing the letter immediately, before he received Goodman's letter of apology and explanation. Under these circumstances, Larson's letter appears to be an expression of transitory anger that does not warrant the grave sanctions that flow from a conviction of terroristic threats.

Because we are reversing for the reasons stated above, we do not reach the additional issues raised in Larson's pro se supplemental brief.

Reversed.