STATE OF MINNESOTA
IN COURT OF APPEALS
A09-773

State of Minnesota,
Respondent,

vs.

Richard Louis Kmett,
Appellant.

Filed March 30, 2010
Affirmed
Worke, Judge

St. Louis County District Court
File No. 69VI-CR-08-1331

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

Melanie Ford, St. Louis County Attorney, Michelle M. Anderson, Assistant County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Wright, Judge; and Larkin, Judge.

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

WORKE, Judge

Appellant challenges the sufficiency of the evidence supporting his second-degree assault and terroristic-threats convictions. We affirm.

D E C I S I O N

Appellant Richard Louis Kmett challenges the sufficiency of the evidence supporting his convictions. When reviewing such a challenge, we must determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow a jury to reach a guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The jury is in the best position to weigh credibility and thus determines which witnesses to believe and how much weight to give to their testimony. *State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002). We assume that the jury disbelieved any evidence contrary to the verdict. *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992). The question is whether the facts in the record, and the legitimate inferences drawn from them, would permit the jury, giving due regard to the presumption of innocence, to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the charged offense. *State v. Crow*, 730 N.W.2d 272, 280 (Minn. 2007); *State v. Ulvinen*, 313 N.W.2d 425, 428 (Minn. 1981).

Second-Degree Assault

Appellant first argues that the evidence is insufficient to support his second-degree assault conviction. Under Minn. Stat. § 609.222, subd. 1 (2006), "[w]hoever assaults another with a dangerous weapon" is guilty of second-degree assault. Assault is defined as "an act done with intent to cause fear in another of immediate bodily harm or death[.]" Minn. Stat. § 609.02, subd. 10(1) (2006). "'With intent to' . . . means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." *Id.*, subd. 9(4) (2006). "Intent may be proved by

circumstantial evidence, including drawing inferences from the defendant's conduct, the character of the assault, and the events occurring before and after the crime." *In re Welfare of T.N.Y.*, 632 N.W.2d 765, 769 (Minn. App. 2001) (citing *Davis v. State*, 595 N.W.2d 520, 525-26 (Minn. 1999)). "The intent of the actor, as contrasted with the effect upon the victim, becomes the focal point for inquiry." *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998) (quotation omitted). Furthermore, "[t]he crime is in the act done with intent to cause fear, not in whether the intended result is achieved." *Id.*

Here, L.K., a power-company employee, went to appellant's residence to collect appellant's past-due bill or disconnect his service. When L.K. arrived, he explained to appellant who he was and why he was there. L.K. was driving a vehicle marked "Lake Country Power," and was wearing clothing identifying him as an employee. Appellant told L.K. that he was not going to pay the bill. L.K. replied that he was going to disconnect the service. Appellant said, "No, you're not going to disconnect me." L.K. and appellant had two more similar exchanges before appellant accused L.K. of trespassing. Appellant then walked into his home and emerged holding a shotgun. Appellant stood on his porch and looked directly at L.K. with a "blank stare." L.K. left and called the police.

When officers arrived, they were unable to locate appellant. They left and returned later that day intending to take appellant into custody for making terroristic threats. As the officers approached appellant's residence, they noticed a bag in the back of a pickup truck, which was packed as if someone was preparing to leave. Appellant then exited his residence holding a shotgun. Officers followed appellant into a wooded

area, identified themselves as officers, and ordered appellant to stop and drop his weapon. Appellant failed to comply and the officers continued yelling at him to drop his weapon. Appellant eventually threw the gun to the ground. The gun was loaded with one round in the firing chamber and two in the magazine tube.

Appellant argues that the evidence is insufficient to show intent to cause fear of immediate bodily harm, relying on *T.N.Y.*, 632 N.W.2d 765. In *T.N.Y.*, police executed a search warrant for the appellant's home. 632 N.W.2d at 767. At the time of execution, only children were in the home who were fearful because their home had been shot at previously. *Id.* When officers entered, the 13-year-old appellant ran into a room. *Id.* The appellant then emerged pointing a gun in the direction of the officers. *Id.* An officer testified that the appellant was not "sighting the weapon, did not point the gun in a threatening way directly at the officers, or indicate by his voice or manner that he was going to shoot." *Id.* at 767-68. Officers yelled at the appellant to drop the gun, and he eventually complied. *Id.* at 768.

In *T.N.Y.*, we determined that the juvenile court focused on the incorrect standard in determining intent because it failed to consider the juvenile's conduct, the character of the alleged assault, or the events occurring before and after the crime. *Id.* at 769-70. We held that the evidence was insufficient to support the adjudication for delinquency of second-degree assault because the alleged assault involved a

> 13-year-old child facing three police officers protected by a large bunker and pointing their weapons at him[,] [he] did not point the gun directly at the officers nor did he make any threatening comments or motions that would indicate he

> intended to shoot the gun[,] [he] merely hesitated before dropping the gun and complying with the officers' directions.

Id. at 770. While appellant correctly points out that we considered that the juvenile in *T.N.Y.* did not point his gun at the officers, that was only one consideration in our analysis. In determining whether T.N.Y. had intent to cause fear of immediate bodily harm we also considered his age, the fact that he was facing three protected officers who had their weapons pointed at him, and that he did not make any threatening comments or motions. *Id.*

L.K. testified that appellant did not point his shotgun directly at L.K. He also testified that the conversation with appellant was not heated and that appellant never verbally threatened him. But L.K. testified that he was scared and felt threatened and that appellant was adamant that L.K. was not going to disconnect the service. Although appellant may not have pointed the gun directly at L.K., the shotgun was loaded and appellant assumed a stance and stared L.K. down. It can be inferred that appellant retrieved the gun from his home in an attempt to achieve a goal—to frighten L.K. into leaving without disconnecting the service. The evidence is sufficient to support appellant's second-degree assault conviction.

Terroristic Threats

Appellant also argues that the evidence was insufficient to support his terroristic-threats conviction. Under Minn. Stat. § 609.713, subd. 1 (2006) "[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" is guilty of

terroristic threats. "A threat is a declaration of an intention to injure another or his property by some unlawful act." *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975). Although not an essential element of the offense, a victim's reaction to the alleged threat is circumstantial evidence of intent. *State v. Marchand*, 410 N.W.2d 912, 915 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987).

The statute does not restrict the word "threatens" to just the spoken word. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996). The focus is whether the "communication in its context would have a reasonable tendency to create apprehension." *Id.* at 915 (quotation omitted). Thus, "[m]any physical acts considered in context communicate a terroristic threat." *Id.* (offering examples of physical acts to include such things as drawing a finger across one's throat or discharging a firearm over the telephone). And "[i]t is the future act threatened, as well as the underlying act constituting the threat, that the [terroristic-threats] statute is designed to deter and punish." *Id.* at 916. An example from *Murphy* was the defendant leaving parts of dead animals on the victims' property. *Id.* That act did not induce fear of "future acts of littering or cruelty to animals[,][but] convey[ed] a threat to injure, kill, or commit some other future crime against the person." *Id.*

The state showed that appellant threatened to commit a crime of violence. Even without considering appellant's words, "No, you're not going to disconnect me," and accusing L.K. of trespassing, appellant's stance on his porch, holding a shotgun, and staring down the victim constituted a threat. Further, the state showed that appellant intended to cause extreme fear in L.K. L.K. was experienced at his job, which required

him to collect past-due amounts or disconnect service daily. Although he encountered verbal confrontations with other customers who did not want service disconnected, he believed that appellant was going to use his shotgun. And appellant also made the threat with reckless disregard of the risk because he did the act in order to prevent L.K. from disconnecting the service. Appellant seemingly believed that he would retain his service by doing something drastic, like retrieve a shotgun.

Finally, appellant contends that the mere act of possessing a shotgun does not constitute a threat to commit an act of future violence. *See id.* ("It is the *future* act threatened, as well as the underlying act constituting the threat, that the [terroristic-threats] statute is designed to deter and punish." (emphasis added)). The circumstances show that appellant threatened a future crime of violence. The jury could have reasonably concluded that appellant sent the message to L.K. that L.K. should not come back and attempt to disconnect his service by standing on his porch with his loaded shotgun. The evidence supports the conclusion that appellant posed a threat to commit a future second-degree assault.

Affirmed.