STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1302

State of Minnesota,
Respondent,

vs.

Derek John Blomme,
Appellant.

Filed August 31, 2010
Affirmed
Peterson, Judge

Lyon County District Court
File No. 42-CR-08-1028

Lori Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, St. Paul, Minnesota; and

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia M. Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Lansing, Judge; and Peterson, Judge.

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

PETERSON, Judge

In this appeal from a conviction of terroristic threats, appellant argues that (1) the evidence was insufficient to support the conviction because the state failed to prove that

appellant threatened to commit a "crime of violence," intended to terrorize the complainants, or actually terrorized them; and (2) because appellant acted to prevent a trespass on his home or injury to himself or others, the district court committed plain error when instructing the jury on self-defense by instructing the jury that appellant had a duty to retreat. We affirm.

FACTS

Shortly after 12:30 a.m., Marshall police officers responded to a call about a fight at a bar. About 45 minutes later, R.S. called 911 to report a fight involving four men with baseball bats and knives going on in the parking lot outside his apartment. Marshall Police Officer Jason Buysse was the first officer to arrive at the scene of the second fight. When Buysse arrived, appellant Derek John Blomme, O.D., C.S., and J.O. were standing in the middle of the street. Buysse saw a bat lying on the ground behind C.S. but did not see any other weapons. A second bat was later found across the street. While Buysse was at the scene, there was no physical altercation, but a "moderately heated" verbal exchange occurred. Buysse spoke to and arrested C.S., who indicated that he was upset about what had happened earlier at the bar.

When Officer Ryan Koenen arrived, he spoke with appellant and O.D. Koenen removed a kitchen knife, like a steak knife, from O.D.'s pocket. Another officer patted down appellant but found no weapons. The next day, a neighbor called to report that she had found a knife next to her vehicle, and Koenen went and got the knife from the neighbor. The second knife was also like a kitchen knife, but bigger than the first knife, more like a chopping knife.

Appellant was charged with one count each of second- and fifth-degree assault and aiding and abetting those offenses and one count of terroristic threats. The charges were tried to a jury.

R.S. testified that just before C.S. and J.O. arrived in a car, appellant and O.D. were outside talking. Although R.S. could not make out their words, their tone was angry. C.S. and J.O. got out of the car holding bats, and appellant and O.D. approached them. The parking lot was illuminated by a security light, and R.S. could see appellant and O.D. holding knives behind their backs. An angry verbal exchange ensued, and appellant and O.D. brought their knives around and held them out as they approached C.S. and J.O. R.S. testified that the four men began "circling each other in crouched positions like they were going to attack each other" and that while the circling was occurring, appellant was making a jabbing motion but not "physically puncturing another person" with his knife.

J.O. and C.S., who were both at the bar when the fight occurred and who both pleaded guilty to terroristic threats, testified for the state at trial. C.S. testified that he knew some of the people involved in the fight and was upset. C.S. and J.O. went to look for appellant at the apartment complex where C.S. thought appellant lived. J.O. testified that he thought there would be a fight, but he did not know that weapons would be involved. J.O.'s testimony indicates that he and C.S. grabbed the bats because they saw the knives. J.O. testified that no one swung anything and that they were just arguing. At trial, C.S. did not remember seeing knives. But in a statement to police given the

morning of the incident, C.S. reported that he and J.O. grabbed the bats because they saw the knives.

The jury found appellant guilty of terroristic threats and not guilty of the assault charges.

D E C I S I O N

I.

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 jurors to reach the verdict that they reached. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Accordingly, 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 that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A person is guilty 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 (2008). "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). A threat may be communicated by words or acts, but it "must be to commit a *future* crime of

violence." *State v. Murphy*, 545 N.W.2d 909, 916 (Minn. 1996). "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." *Id.*

Second-degree assault with a dangerous weapon is a crime of violence. *See* Minn. Stat. § 609.1095, subd. 1(d) (2008) (defining "violent crime" to include violation of Minn. Stat. § 609.222). "Assault" is defined as "an act done with intent to cause fear in another of immediate bodily harm or death" or "the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2008).

Appellant argues that the evidence is insufficient to show that he intended to commit a future act of violence against J.O. and C.S. because, if it is sufficient, "every second-degree assault with a dangerous weapon would necessarily constitute a terroristic threat." We disagree. After the angry verbal exchange ensued, appellant and O.D. brought their knives around from behind their backs and held them out as they approached C.S. and J.O. The four men then began "circling each other in crouched positions like they were going to attack each other." While the circling was occurring, appellant was making a jabbing motion with his knife. Appellant testified that the confrontation lasted one to one and one-half minutes before police arrived, and J.O. testified that no one swung anything and that they were just arguing. Based on this evidence, the jury could have found a threat of a future, rather than an immediate, second-degree assault with a dangerous weapon. *See The American Heritage Dictionary of the English Language* 902 (3d ed. 1992) (defining immediate as "[o]ccurring at once; instant").

Appellant concedes that there was evidence that he made a jabbing motion but argues that there was "no evidence that appellant made a slashing or stabbing gesture or that he was close enough to [J.O.] and [C.S.] to injure them or cause them to feel extreme fear from the gesture." To "terrorize" means "to cause extreme fear by use of violence or threats." *Schweppe*, 306 Minn. at 400, 237 N.W.2d at 614. Whether a communication 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." *Id.* at 399, 237 N.W.2d at 613 (quotation omitted). Intent "is a subjective state of mind usually established only by reasonable inference from surrounding circumstances." *Id.* at 401, 237 N.W.2d at 614. "[T]he effect of a terroristic threat on the victim is not an essential element of the offense." *State v. Marchand*, 410 N.W.2d 912, 915 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987).

Even if a jabbing motion is less threatening than a slashing or stabbing gesture, an angry verbal exchange, which R.S. described as "full of rage," was going on, and the four men were "circling each other in crouched positions like they were going to attack each other." Shortly before C.S. and J.O. arrived, R.S.'s wife heard appellant or O.D. say "I'm going to f---ing kill them" in a very angry tone of voice. R.S. expected violence to occur, and R.S.'s wife testified that she was very nervous and afraid someone would get hurt. Appellant objects to the evidence of R.S.'s and his wife's emotions, but their emotional reactions are circumstantial evidence of appellant's intent. *See id.* (stating that victim's reaction to threat is circumstantial evidence of intent).

Appellant also argues that the evidence was insufficient to prove that he intended to terrorize C.S. and J.O. or actually terrorized them because appellant testified that he took a knife from the kitchen and went outside only after he saw C.S. and J.O. approaching with baseball bats. But this court must view the evidence in the light most favorable to the verdict. *Moore*, 438 N.W.2d at 108. R.S. testified that appellant and O.D. were already outside when C.S. and J.O. arrived and that he could see appellant and O.D. holding knives behind their backs. Also, there was evidence that C.S. and J.O. grabbed the bats only after seeing the knives. Viewing the evidence in the light most favorable to the verdict, the evidence was sufficient to prove that appellant intended to terrorize C.S. and J.O.

II.

Appellant did not object at trial to the jury instruction that he challenges on appeal. An appellate court has discretion to review a jury instruction despite the failure to object at trial if the instruction is plain error that affects substantial rights. *State v. Goodloe*, 718 N.W.2d 413, 420 (Minn. 2006). To establish plain error, a defendant must show: (1) error; (2) that is plain; and (3) that affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *see also State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (explaining burden of proof).

Appellant argues that because the incident "occurred just outside appellant's ground-level apartment, as a result of [J.O.] and [C.S.] approaching appellant's home while wielding baseball bats and following an earlier confrontation," the district court erred in instructing the jury that appellant had a duty to retreat. Minn. Stat. § 609.06,

subd. 1(3)-(4) (2008), authorizes the use of reasonable force to resist an offense against the person or by a person in lawful possession of real or personal property to resist "a trespass upon or other unlawful interference with such property." The supreme court has stated:

> We require reasonable retreat in self-defense outside the home because the law presumes that there is somewhere safer to go -- home. But self-defense in the home is based on the premise that the home is a place critical for the protection of the family. Requiring retreat from the home before acting in self-defense would require one to leave one's safest place. . . . [I]t is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack.

State v. Glowacki, 630 N.W.2d 392, 401 (Minn. 2001) (quotation and citations omitted).

Here, the confrontation occurred in a parking lot outside the apartment complex. Because appellant cites no authority extending the defense-of-dwelling exception to the duty to retreat beyond the home itself, appellant has failed to establish plain error.

Affirmed.