STATE OF MINNESOTA
IN COURT OF APPEALS
A10-492

State of Minnesota,
Respondent,

vs.

DeJuan Moore,
Appellant.

Filed March 1, 2011
Affirmed in part and reversed in part
Connolly, Judge

St. Louis County District Court
File No. 69-DU-CR-09-4115

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

Mark S. Rubin, St. Louis County Attorney, James T. Nephew, Assistant County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving 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

CONNOLLY, Judge

Appellant challenges his conviction of felony terroristic threats and the imposition of a copayment for a public defender. Because the jury could reasonably have found that appellant made terroristic threats, we affirm his conviction; because the district court did not make the required findings as to appellant's ability to pay, we reverse the imposition of the copayment.

FACTS

Appellant DeJuan Moore and L.D. have a daughter, D.D., who was one at the time of trial. At the end of August 2009, L.D. and D.D. were living in an apartment in Duluth, and appellant was visiting them. On August 30, appellant told L.D. he no longer wanted a relationship with her and left the apartment. He returned at about 1:30 a.m. on August 31, 2009. Incidents that occurred after his return gave rise to appellant being charged with (1) second degree felony assault with a dangerous weapon, (2) felony domestic assault by strangulation, (3) felony domestic assault with intent to cause fear of immediate bodily harm or death, (4) felony domestic assault by intentional infliction of bodily harm or attempting to inflict bodily harm, and (5) felony terroristic threats.

Appellant's and L.D.'s testimony differed significantly as to what those incidents were. L.D. testified that appellant (1) pushed his way into the apartment, (2) grabbed two kitchen knives, (3) pushed L.D. on to the staircase, (4) punched her, (5) told her he would kill her, (6) slapped her face, (7) followed her upstairs, where she picked up D.D., (8) pushed her to the ground, (9) put his knee on her throat, and (10) grabbed her so that

she dropped D.D. When L.D. saw that the police had arrived, she told them that appellant had assaulted her with two knives, but did not mention that appellant slapped her or that she dropped D.D.

Appellant testified that (1) after L.D. opened the door for him, she went into the kitchen; (2) L.D. was holding two kitchen knives when he saw her in the kitchen; (3) L.D. pointed the knives and told appellant to leave; (4) they went upstairs and L.D. picked up D.D., while holding one of the knives; (5) L.D. screamed at appellant and swung the knife at him; (6) appellant told L.D. that, if she stabbed him, he would "beat [her] ass"; (7) L.D. told appellant that, if he ended the relationship, she would tell the police about him and have him arrested; (8) L.D. went downstairs and talked to the police; and (9) appellant waited upstairs for the police and went downstairs when told to do so.

Appellant was tried on all five counts; the jury found him not guilty of all charges except terroristic threats. The district court sentenced him to 24 months in prison and imposed a $75 public defender copayment. Appellant challenges his conviction and the copayment.[1]

D E C I S I O N

1. Terroristic threat conviction

This court will not disturb a jury's 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 the defendant was guilty of the charged offense. *Bernhardt v.*

[1] Respondent State of Minnesota does not take a position on the copayment.

State, 684 N.W.2d 465, 476-77 (Minn. 2004). This court must assume the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

The jury was instructed that:

> The elements of making a terroristic threat are, first, defendant threatened, directly or indirectly, to commit a crime of violence. You're instructed that Assault in the Second Degree, Assault with a dangerous weapon, is a crime of violence. . . . It need not be proven that the defendant had an actual intent of carrying out the threat.
>
> Second, defendant made the threat with intent to terrorize [L.D.] or in reckless disregard of the risk of causing such terror. To terrorize means to cause extreme fear. With intent to terrorize means to have a specific purpose or intention of causing extreme fear. In reckless disregard of the risk of causing such fear means that the defendant, even though not having the specific purpose of terrorizing another, recklessly risks the danger that the statements will be taken as threats by another and that they would cause extreme fear. It need not be proven that [L.D.] actually experienced extreme fear.

Based on L.D.'s testimony and on appellant's statement to an officer, the jury could reasonably have concluded that appellant was guilty of making terroristic threats. L.D. testified:

> PROSECUTOR: [H]ad he said anything else to you prior to this [i.e., going upstairs]?
> L.D.: Just, "B****, I'll kill you."
> PROSECUTOR: And did he say that just once, or more than once?
> L.D.: No, he kept repeating it. Every time he'd choke me and smack me, he would say, B****, I'm [sic] kill you, or B****, I'm going to kill you.

> PROSECUTOR: And when he was saying these things to you, did you believe it?
> L.D.: Yeah.
> PROSECUTOR: How did it make you feel?
> . . . .
> L.D.: I was scared.

The jury also heard a tape of appellant's statement to an officer.

> I went to the back room, and she came back with the baby and had one knife. She was holding the baby and had one knife. Instead of doing this, what she told me to, that's when I did threaten her, because she had the knife, and I told, I said, You stab me with that thing, I'm going to jump up and beat the s*** out of you. I'm going to beat your a**.

Appellant argues that his conviction should be reversed because he threatened L.D. with imminent harm, not harm at some point in the future. To support this argument, he relies on two cases that upheld terroristic threat convictions for threats of future harm. *See State v. Murphy*, 545 N.W.2d 909, 916 (Minn. 1996) (defendant admitted his acts "[were] undertaken with the understanding that he might come back again"); *State v. Jones*, 451 N.W.2d 55, 63 (Minn. App. 1990) (upholding terroristic threat conviction of defendant who threatened to harm correctional officers when he was released from custody in three months) *review denied* (Minn. Feb. 21, 1990). But neither case supports the proposition that there must be a time lapse between the making and the execution of a terroristic threat.

In any event, appellant did threaten future harm: L.D. testified that he said "I'll kill you" (future tense) while assaulting her, and appellant himself said he made his threat contingent on a future event, i.e., L.D. stabbing him with the knife.

Because the jury could reasonably have found that appellant made terroristic threats, there is no basis for reversal of his conviction.

2. Copayment

The district court, without making any findings as to appellant's financial circumstances, imposed on him a $75 copayment for a public defender. Both the legislature and the supreme court have clearly expressed their intent that a district court's discretion to impose copayments is contingent on findings of a defendant's ability to pay. *See* Minn. Stat. § 611.20, subd. 2 (2010) ("*If the court determines that the defendant is able to make partial payments [for counsel]*, the court shall direct partial payments to the state general fund.") (emphasis added); Minn. R. Crim. P. 5.04, subd. 5 ("*If the court, after finding the defendant eligible for district public defender services, determines that the defendant now has the ability to pay part of the costs*, it may require a defendant to make partial payments as provided in Minnesota Statutes, Section 611.20.") (emphasis added). The imposition of the copayment is reversed.

We have also reviewed the issues raised in appellant's pro se brief and find that they are without merit.

Affirmed in part and reversed in part.