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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1458**

State of Minnesota,
Respondent,

vs.

Marvin Victory Jones,
Appellant.

**Filed July 23, 2012
Affirmed
Rodenberg, Judge**

Ramsey County District Court
File No. 62CR108638

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, David E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Stauber, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Marvin Victory Jones appeals his convictions of terroristic threats and third-degree assault. He argues that the convictions must be reversed because (1) the prosecutor

committed reversible misconduct by misstating the law regarding self-defense during closing argument and (2) there was insufficient evidence to support the terroristic threats conviction because the circumstantial evidence of his intent was consistent with transitory anger. We affirm.

FACTS

On October 8, 2010, appellant was ambling around the parking lot of a St. Paul apartment complex while shouting and cursing at no one in particular. Witnesses observed him making “karate” or “Elvis kind of” gestures. He was yelling “Glory!” “Victory” and “I am who I am!” while raising his arms to the sky in a style described as being like a referee signaling a touchdown. Appellant was not a resident of the complex, and his purpose in being there was not apparent.

A female resident of the apartment complex drove into the parking lot with her fiancé and two children. As they were getting out of the vehicle, appellant approached. He pointed at the resident’s fiancé and said, “F*** you, man. F*** you, f*** your kids, and f*** your wife.” The manager of the apartment complex and her husband observed this confrontation and went to investigate. They asked appellant to leave the property several times. Appellant told the apartment manager, “I’ll kill you too, b****.” Appellant then punched her in the face, but she managed to lean back so that the blow did not fully connect. Appellant continued to threaten everyone, saying he would kill them and their families; he claimed to wield a “one-hand death hit.” The apartment manager testified that appellant threatened to kill her at least six times.

Meanwhile, the manager's husband attempted to protect his wife by placing himself between her and appellant. Appellant glared at him menacingly. After the husband had turned away for a moment, appellant punched him with a closed fist directly in the face, knocking his glasses off. The husband felt woozy and paused to recover his bearings. Blood was streaming from his nose and onto his shirt. Appellant struck the apartment manager again, hitting her in the arm and kicking her in the groin. Throughout the confrontation, appellant continued to make combative martial-arts movements.

The apartment manager's husband went to his nearby car and retrieved two pipes. He pushed appellant to the ground with his foot, but appellant rose and said, "Now it's my turn." As appellant started toward him, the husband held the pipes in front of himself and backed away, luring appellant away from the other bystanders.

By this time, the police arrived and observed appellant pursuing the manager's husband. Appellant did not comply with the police officers' repeated orders to stop, and the police had to twice use a Taser on appellant in order to subdue him. The apartment manager sustained some minor injuries, and her husband underwent reconstructive surgery for a broken nose and septal shift.

One witness, R.I., testified to a somewhat different version of events. He was sitting at a bus stop near the complex and observed the altercation. He testified that the apartment manager initiated the fight by pushing appellant. As appellant was walking away, the manager's husband bear-hugged him from behind and pushed him to the ground. Appellant punched the husband in order to break free, according to this witness. After a brief struggle, the husband ran to his car and grabbed a tire iron. He swung the

tire iron at appellant, but missed. Meanwhile, according to this witness, the apartment manager and female resident were also fighting each other.

R.I. admitted that when he called 911, he reported only that a female was being assaulted; he did not mention the tire iron, and he did not report an assault on any male. Until the trial, R.I. never revealed that the apartment manager and her husband were the aggressors or that they ever laid hands on appellant.

Appellant was charged with one count of third-degree assault and one count of terroristic threats. Appellant requested, and received, a jury instruction on self-defense. The instruction stated that a person may use reasonable force to defend against imminent bodily injury. During closing argument, in an attempt to dispel appellant's self-defense theory, the prosecutor asserted that appellant "did not have an actual or honest belief [that] he was in imminent danger of death or great bodily harm." After discussing the evidence, the prosecutor concluded, "[t]here's no existence of any reasonable grounds to believe that the defendant was in fear of his life during this altercation." Appellant did not object to this argument.

The jury found appellant guilty of both counts, and this appeal followed.

D E C I S I O N

I. Prosecutorial misconduct

Appellant first argues that his conviction must be reversed because the prosecutor misstated the law regarding self-defense during closing argument. Because appellant did not object to the prosecutor's closing argument at trial, plain-error review applies. *See State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006) (holding that unobjected-to

prosecutorial misconduct is reviewed under the plain-error standard). The plain-error standard has three prongs: (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is “clear or obvious” because it “contravenes case law, a rule, or a standard of conduct.” *Ramey*, 721 N.W.2d at 302 (quotations omitted). Once appellant establishes the first two prongs, the burden shifts to the state to establish that appellant’s substantial rights were not affected. *Id.* This burden is met if the state can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury’s verdict. *Id.*

Prosecutorial misconduct, if severe enough, may infringe on a defendant’s right to a fair trial. *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). Misconduct includes a prosecutor’s misstatement of the law. *See State v. Strommen*, 648 N.W.2d 681, 689–90 (Minn. 2002). When the misstatement occurs during closing argument, this court must consider the alleged error in the context of the argument as a whole, and we must avoid lending undue prominence to an isolated remark. *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008). Also relevant to our review is the pervasiveness of the misstatements and whether the defendant had an opportunity to rebut them. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). If the prosecutor’s statement of law conflicts with the jury instructions, any error may be cured through the district court’s instruction. *State v. Race*, 383 N.W.2d 656, 664–65 (Minn. 1986).

To determine whether the prosecutor misstated the law, we must first ascertain the law regarding self-defense. A defendant may claim self-defense when, *inter alia*, he reasonably believed that he was resisting an “offense against the person.” Minn. Stat.

§ 609.06, subd. 1(3) (2010). The defendant has the burden of production in establishing four elements of self-defense, including that he subjectively believed he was in “imminent danger of death or great bodily harm.” *State v. Basting*, 572 N.W.2d 281, 285–86 (Minn. 1997); *see also State v. McKissic*, 415 N.W.2d 341, 344 (Minn. App. 1987) (reciting elements of self-defense in second-degree assault case).

Appellant argues that he was not required to demonstrate an imminent fear of death or great bodily harm, but only that he feared an offense against the person. However, an offense against the person is necessarily one that poses a risk of bodily harm. *See State v. Soukup*, 656 N.W.2d 424, 429 (Minn. App. 2003) (holding that under the “offense against the person” prong, self-defense is applicable to a disorderly conduct charge only when the victim’s conduct posed a threat of bodily harm), *review denied* (Minn. Apr. 29, 2003). Viewing the prosecutor’s statement in the context of the closing argument as a whole, the prosecutor did not misstate the law. Thus, appellant has failed to establish plain error regarding the prosecutor’s statement that self-defense required imminent danger of death or great bodily harm.

Appellant also challenges the prosecutor’s statement to the effect that appellant failed to adduce any evidence that he “was in fear of his life during this altercation.” As noted above, a defendant claiming self-defense only needs to establish fear of death *or* great bodily harm. By suggesting that the defendant was required to establish a fear for his life, the prosecutor did misstate the law.

In context of the closing argument as a whole, however, we find no reasonable likelihood that the misstatement had a significant effect on the jury’s verdict. The

prosecutor's prior description of the elements of self-defense provided the jury with an accurate framework. The misstatement was thus a single, isolated error. *Cf. State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996) (noting that “[u]nartful statements inevitably occur in the midst of a heated and impassioned closing argument,” and prosecutors’ statements do not need to be perfect recitations of the law). The district court also correctly instructed the jury that self-defense is lawful if the defendant had reasonable grounds to believe that “bodily injury” was imminent. It further instructed the jury to disregard any of the attorneys’ arguments which differed from the law as provided by the court. Juries are presumed to follow such instructions. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). Finally, the prosecutor’s remarks were not pervasive, and appellant had an opportunity to counter them in closing argument.

Moreover, the record reflects ample evidence in support of the conviction, thereby reducing the risk that the jury relied on any misstatements of law. In granting appellant’s request for a self-defense instruction, the district court recognized that the evidence in support of self-defense was “borderline.” Four eyewitnesses testified that appellant was the aggressor; they affirmed that neither the apartment manager nor her husband ever hit or physically attacked appellant.¹

¹ Although R.I. testified that appellant was *not* the aggressor, R.I.’s credibility was called into significant doubt. For example, he acknowledged that during the 911 call, he reported only that a woman was being assaulted; he did not report that appellant was a victim. Likewise, he never claimed that the apartment manager and her husband were the aggressors until trial. R.I. also denied seeing any blood, even though all the other witnesses (and photographs taken at the scene) established that the apartment manager’s husband was bleeding profusely.

The prosecutor's lone misstatement of the law, in context, was easily corrected by the trial court's thorough and appropriate jury instructions. Thus, the state has met its burden in showing that there was no reasonable likelihood that the misstatement had a significant effect on the verdict.

II. Transitory anger

Appellant argues that his terroristic threats conviction must be reversed because there was insufficient evidence of his intent. He argues that the evidence was consistent with another rational hypothesis—that he was expressing transitory anger rather than acting with the requisite intent to cause fear.

In reviewing sufficiency of the evidence, this court must determine “whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt.” *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted). We must assume that the “jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

A person’s state of mind is generally proven by circumstantial evidence. *State v. Anderson*, 379 N.W.2d 70, 78 (Minn. 1985). When a conviction is based on circumstantial evidence, heightened scrutiny applies. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). The circumstantial evidence must form a “complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). We must therefore determine whether

the circumstances proved by the state are inconsistent with any rational hypotheses other than guilt. *Id.*

A person commits the offense of terroristic threats when 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 (2010). A threat is a communication which, in context, has 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) (quotation omitted). The victim’s reaction to the threat is circumstantial evidence of the defendant’s intent. *Id.* at 401, 237 N.W.2d at 614.

This court has recognized in dictum that terroristic threats do not encompass “the kind of verbal threat which expresses *transitory anger*’ which lacks the intent to terrorize.” *State v. Jones*, 451 N.W.2d 55, 63 (Minn. App. 1990) (quoting Model Penal Code § 211.3 cmt. (Tentative Draft No. 11, 1960)), *review denied* (Minn. Feb. 21, 1990). However, a person can commit the offense of terroristic threats without having a specific intent to terrorize. The general intent requirement is satisfied when the perpetrator disregards a known, substantial risk that his threat will terrorize another. *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009).

Here, the state proved that appellant made numerous threats to kill the bystanders during the course of an extended assault on the apartment manager and her husband. Appellant was acting in a hostile manner when he first approached the female resident and her fiancé and cursed at them. When the apartment manager arrived, appellant told

her at least six times that he was going to kill her. He followed up on this threat by punching her in the face. After staring down her husband and sizing him up, appellant then punched the husband in the face, fracturing his nose. Appellant threatened the bystanders, saying he would kill them and their families. While making these threats, appellant continued to make combative movements. Several of the bystanders were frightened and upset; the apartment manager was shaken and crying. Her husband testified that he was frightened for his life. He described appellant as displaying a scary, intimidating look on his face, and opined that appellant was clearly not afraid of anyone. Even after the police arrived, appellant continued to pursue the manager's husband.

Viewed as a whole, this evidence gives rise to only one rational hypothesis: that appellant made threats with a purpose to terrorize, or in reckless disregard of the risk of causing terror. In context, appellant's threats had a reasonable tendency to cause apprehension that he would follow through with them. Given his tone, actions, and the victims' reactions, appellant must have realized the substantial risk that his threats would terrorize others. The evidence does not rationally support the theory that he was merely expressing transitory anger without any knowledge of that risk or without any purpose to terrorize. As a result, the evidence is sufficient to support the terroristic threats conviction.

Affirmed.