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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-812**

State of Minnesota,  
Respondent,

vs.

Marcus Rollins,  
Appellant.

**Filed June 4, 2012  
Reversed and remanded  
Stauber, Judge**

Dakota County District Court  
File No. 19HACR10963

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

James C. Backstrom, Dakota County Attorney, Jessica A Bierwerth, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

Claire Violet Jenny Joseph, Special Assistant Public Defender, Briggs and Morgan, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Connolly, Judge; and  
Randall, Judge.\*

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**STAUBER**, Judge

Appellant challenges his conviction on one count of second-degree assault and on three counts of terroristic threats, arguing that terroristic threats is not a lesser-included offense of second-degree assault; that the district court abused its discretion by informing the jury that the court was adding the four terroristic-threats charges; and that the evidence was insufficient to support the second-degree assault conviction. Because terroristic threats is not a lesser-included offense of second-degree assault, we reverse appellant's convictions on those charges. And, because the district court's instruction to the jury that it had added the four terroristic-threats charges violated appellant's right to a fair trial, we also reverse appellant's second-degree-assault conviction and remand for a new trial on that charge.

### FACTS

At approximately 2:23 a.m. on March 13, 2010, police officers responded to a gas station in Burnsville on a report that gun shots had been fired. After arriving at the scene, the officers spoke with witnesses and victims and reviewed surveillance video. The victims reported that they were riding in a red Dodge Durango. The Durango pulled up to a gas pump and the front end of the Durango collided with the front end of a Toyota, which was parked at the pump after fueling and belonged to appellant Marcus Rollins.

Appellant, who was standing at the trunk of his Toyota at the time of the impact, sustained an injury. He then allegedly came around the passenger side of his vehicle with a gun drawn and pointed at the Durango. The Durango allegedly drove forward, hit

appellant's vehicle a second time, and then attempted to steer past appellant's vehicle. At this point, appellant allegedly began shooting at the Durango from the other side of his own vehicle, firing four rounds from his weapon.

The driver of the Durango fled the scene on foot and has not been located. The three female passengers exited the Durango and ran into the gas station, where they were directed to a back room. An employee at the gas station then locked the station until the police arrived. When police arrived, they located appellant in the gas station parking lot, still in possession of the firearm. Officers found three bullet holes in the Durango, two bullets inside the vehicle, and four shell casings at the scene.

Appellant was charged by complaint with four counts of second-degree assault in violation of Minn. Stat. §§ 609.22, subd. 1, .11, .101 (2008); one count for each occupant of the Durango. Near the close of trial, the district court sua sponte "determined that terroristic threats is a lesser included offense of assault in the second degree" and told counsel that it would instruct the jury accordingly, over the objection of both defense counsel and the state. The jury returned a guilty verdict on the second-degree assault charge in regard to the driver of the Durango, not-guilty verdicts on the second-degree-assault charges in regard to the three passengers of the Durango, and guilty verdicts on all four counts of terroristic threats.

Appellant moved for a new trial on the second-degree assault conviction, arguing that the evidence was insufficient to support the conviction, and for vacation of the terroristic-threats convictions arguing that terroristic threats is not a lesser-included offense of second-degree assault. The state opposed the motion, and the district court

denied the motion in its entirety. At sentencing, the district court imposed a stayed 36-month sentence, ordered appellant to serve one year in jail, and placed him on probation for 15 years on the second-degree assault conviction. The district court dismissed the terroristic-threats conviction with regard to the driver of the Durango and did not impose a sentence on the remaining terroristic-threats convictions. This appeal follows.

## DECISION

### I.

Appellant argues that the district court erred by sua sponte adding four charges of terroristic threats after concluding that terroristic threats “is a lesser included offense of assault in the second degree” and instructing the jury accordingly. District courts are generally allowed “considerable latitude” in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). But an instruction is erroneous “if it materially misstates the law.” *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). “Typically, the failure of an indictment or complaint to include the crime with which the defendant was convicted is an error of fundamental law.” *State v. Gisege*, 561 N.W.2d 152, 158 (Minn. 1997).

Once jeopardy attaches, a district court may not add new and different charges against a criminal defendant. Minn. R. Crim. P. 17.05; *Gisege*, 561 N.W.2d at 157. “A jury can, however, find the defendant guilty of any lesser-included offense, whether or not the lesser-included offense was part of the complaint or indictment.” *Gisege*, 561 N.W.2d at 157 (emphasis omitted). The legislature defines a lesser-included offense as:

- (1) A lesser degree of the same crime; or
- (2) An attempt to commit the crime charged; or
- (3) An attempt to commit a lesser degree of the same crime;  
or
- (4) A crime necessarily proved if the crime charged were proved; or
- (5) A petty misdemeanor necessarily proved if the misdemeanor charge were proved.

Minn. Stat. § 609.04, subd. 1 (2008). Appellant argues that terroristic threats is not a lesser-included offense of second-degree assault, and the state concedes this point. We agree. The district court therefore erred by instructing the jury that terroristic threats is a lesser-included offense of second-degree assault.

But whether the offense is a lesser included is only the first part of our analysis. When such fundamental error occurs, an appellate court will examine the merits of a defendant's claim under the doctrine of reversible error, and will reverse the conviction only if the variance deprived appellant "of a substantial right, namely, the opportunity to prepare a defense to the charge against him." *Gisege*, 561 N.W.2d at 159 (quotation omitted). "Ultimately, [the reviewing court] must ask whether the erroneous charge denied the defendant the opportunity to prepare an adequate defense." *Id.* Such preparation includes deciding whether to waive the constitutional right to a trial by jury and whether to testify in one's own defense. *Cf. State v. Caswell*, 551 N.W.2d 252, 255–56 (Minn. App. 1996) (including right to a jury trial among defense's potential trial tactics).

Here, the terroristic-threats charges were added after the state had rested its case. When the district court added the charges, appellant was testifying on cross-examination

in the midst of the defense's case. The addition of the terroristic-threats charges resulted in appellant facing additional charges after jeopardy had attached, and he was therefore deprived of the constitutional right to receive timely notice of the charged offenses. *See* U.S. Const. amend. VI; Minn. Const. art. I, § 6. And without timely notice, appellant was precluded from knowingly and intelligently waiving his right to a jury trial and his right not to testify. *See* U.S. Const. amends. V, XIV § 1; *Schneckloth v. Bustamonte*, 412 U.S. 218, 238, 93 S. Ct. 2041, 2053 (1973). Such adverse effects establish that the addition of the terroristic-threats charges prejudiced appellant's substantial rights and amount to reversible error. We therefore reverse appellant's three terroristic-threats convictions.

## II.

Appellant argues that the evidence is insufficient to support his conviction of second-degree assault with regard to the driver of the Durango. When considering a claim of insufficient evidence, an appellate 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 sustain the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). A reviewing court 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). The reviewing court will not disturb the verdict if the fact-finder, 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).

Appellant's argument is based on his assertion that the evidence must be insufficient on his second-degree-assault conviction because he was acquitted on the second-degree-assault charges with regard to the passengers of the Durango and there is no evidence in the record that appellant acted differently toward the driver. But this argument is belied by Minnesota caselaw. "The general rule is that a defendant who is found guilty of one count of a two count indictment or complaint is not entitled to a new trial or a dismissal simply because the jury found him not guilty of the other count[.]" *State v. Leake*, 699 N.W.2d 312, 325 (Minn. 2005) (quotation omitted). This is true even in situations where the guilty and not-guilty verdicts may be said to be logically inconsistent, as "[n]othing in the constitution requires consistent verdicts." *Id.*

Here, the jury's guilty verdict as to second-degree assault against the driver of the Durango may well be logically inconsistent with its not-guilty verdicts as to second-degree assault against the three passengers of the Durango. But logically inconsistent verdicts do not entitle a defendant to a new trial. *See id.* at 326 (reiterating rule articulated in *State v. Juelfs*, 270 N.W.2d 873, 873-74 (Minn. 1978)). Therefore, the fact that appellant was convicted of one count of second-degree assault and acquitted on the other three counts of second-degree assault does not render the evidence insufficient to support the conviction. *See also State v. Perkins*, 353 N.W.2d 557, 561 (Minn. 1984) (noting that jury in a criminal case has the power of lenity, "that is, the power to bring in

a verdict of not guilty despite the law and the facts”). Appellant’s argument regarding the inconsistency of the verdicts is therefore without merit.<sup>1</sup>

### III.

Appellant also argues that the district court’s use of the first person when instructing the jury regarding the terroristic-threats charges was erroneous as it showed partiality on the part of the district court. The state counters that appellant, by not objecting to the instruction, has waived the issue on appeal.

A defendant’s failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver of the right to challenge the instructions on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). “[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three prongs are satisfied, we then assess whether we should address the error to ensure fairness and the integrity of the judicial proceedings. *Id.*

In contrast, “structural errors are defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards.” *State v. Dorsey*, 701 N.W.2d 238, 252 (Minn. 2005) (quotations omitted). Structural errors “necessarily render a trial

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<sup>1</sup> Appellant argues that his conviction is based on circumstantial evidence and therefore his insufficient-evidence argument must be analyzed under the two-part test set out in *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). But contrary to appellant’s assertion, the convictions are not based on circumstantial evidence. Appellant admitted to brandishing his firearm and shooting at the Durango and its occupants, but asserted that he did so in self-defense.

fundamentally unfair” and “deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.” *Neder v. United States*, 527 U.S. 1, 8–9, 119 S. Ct. 1827, 1833 (1999) (quotations omitted). These types of errors are not susceptible to harmless-error analysis because they “affect the framework within which the trial proceeds, and are not simply an error in the trial process itself.” *United States v. Gonzalez–Lopez*, 548 U.S. 140, 148, 126 S. Ct. 2557, 2564 (2006) (quotations omitted). “Structural errors require automatic reversal because such errors ‘call into question the very accuracy and reliability of the trial process,’” even if a party fails to make a timely objection. *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007) (quoting *State v. Osborne*, 715 N.W.2d 436, 448 n.8 (Minn. 2006)).<sup>2</sup>

The Supreme Court identified four classes of structural error in *Gonzalez-Lopez*: denial of right to counsel, denial of right to self-representation, denial of right to a public trial, and denial of right to jury trial with presumption-of-innocence instruction. 548 U.S. at 149, 126 S. Ct. at 2564. The Minnesota Supreme Court has identified denial of the

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<sup>2</sup> The state posits that defense counsel’s request, following a concern expressed by the state, that the district court “leave [the instruction] alone” because further comment “would simply be emphasizing the situation” further supports its argument that the issue has been waived on appeal and now is outside even plain- or structural-error review. But the state cites no authority—nor are we aware of any—indicating that defense counsel’s request that no curative instruction be given to an unobjected-to jury instruction may not be reviewed under the plain-error or structural-error standards. Indeed, holding otherwise would place defense counsel between a proverbial rock and a hard place, requiring counsel to request a special clarification that runs the risk of calling more attention to an erroneous—although unobjected-to—jury instruction.

right to an impartial fact-finder as an additional structural error. *Dorsey*, 701 N.W.2d at 253.

Here, after closing arguments, the district court told the jury “I’ve added four more [charges], and I will explain as we go along.” After instructing the jury on the elements of second-degree assault, the district court stated “before I read the law in self-defense, I added four other counts.” Under the theory advanced by appellant, the district court’s use of the first person when discussing the erroneous addition of the terroristic-threats charges constitutes error, as the district court “signaled to the jury that those charges were particularly appropriate.” We agree.

The supreme court has noted that a prosecutor’s use of the first-person pronoun “I” in closing argument may be “an improper interjection of personal opinion into the argument.” *Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004). We see no difference between a prosecutor using the first-person pronoun in closing argument and the district court using the same pronoun in discussing “additional” charges. Indeed, caselaw has recognized that the jurors may lend particular credence to the words of the district court, and as such the district court’s use of the first-person is even more damaging. *See Hansen v. St. Paul City Ry. Co.*, 231 Minn. 354, 361, 43 N.W.2d 260, 264–65 (1950).

The district court’s use of the first-person pronoun in saying “I’ve added four more [charges]” likely indicated to the jury that the district court believed that such charges were appropriate, thus invading the province of the jury. Appellant was therefore deprived of his right to be heard by an impartial fact-finder, and the case therefore is plagued by structural error.

We note that we vacated appellant's terroristic-threats convictions above. However, structural error falls within "a very limited class" of errors that are not subject to harmless-error review, but require automatic reversal. *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549 (1997). And we are not assured that the consequence of the district court's structural error was limited to the erroneous terroristic-threats convictions and did not taint the entire deliberative process. We therefore reverse appellant's second-degree-assault conviction as to the driver of the Durango and remand for a new trial on that charge.

**Reversed and remanded.**