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STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1742

State of Minnesota,
Respondent,

vs.

Glen John Balster,
Appellant.

Filed January 15, 2008
Affirmed
Wright, Judge

Nobles County District Court
File No. K4-05-0546

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Gordon L. Moore, III, Nobles County Attorney, Prairie Justice Center, 1530 Airport Road, Suite 400, Worthington, MN 56187 (for respondent)

Considered and decided by Peterson, Presiding Judge; Willis, Judge; and Wright, Judge.

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

WRIGHT, Judge

Appellant challenges his conviction of terroristic threats, arguing that (1) the district court erred by refusing to instruct the jury on transitory anger, and (2) the prosecutor committed prejudicial misconduct during closing argument. In his pro se supplemental brief, appellant argues that he received ineffective assistance of counsel. We affirm.

FACTS

At approximately 1:35 p.m. on September 14, 2005, Det. Troy Appel observed appellant Glen Balster leave the home of a suspected drug dealer and get into a truck, which was parked in the driveway. When Balster drove away, Det. Appel followed. Lacking a sufficient factual basis to stop Balster for criminal activity, Det. Appel stopped him for speeding as a pretext for questioning Balster about suspected drug activity. As the district court found, during the traffic stop "[t]here was very little, if any, conversation concerning the speeding violation." Lacking probable cause to expand his search beyond that which was justified by the speeding violation, Det. Appel obtained Balster's consent to search the truck. During the search, Det. Appel discovered a syringe filled with "a cloudy fluid" that later tested positive for methamphetamine. Det. Appel also recovered a cigarette box containing marijuana from the truck. Det. Appel arrested Balster and took him to jail.

The following day, Det. Appel found methamphetamine with a street value of approximately $100 to $150 tucked below the marijuana in the cigarette box. Because

Balster was using his vehicle to transport a controlled substance with a value of at least $100, Det. Appel prepared a Notice of Seizure and Intent to Forfeit form to notify Balster of the police department's intent to administratively forfeit his truck.[1]

That same day, Balster sought medical assistance from a nurse. The form he submitted states: "I am closterphobhic [sic] and being ignored, my head hurts and I feel I am going to snap. No one is giving me any answers." Scott Weirsma, a jailer on duty, responded. After offering Balster some Tylenol, Weirsma told Balster that Balster had a court appearance the following morning. Balster replied that he did not know if he could put up with confinement for another night. When Weirsma asked Balster if he were having thoughts of harming himself or others, Balster replied "possibly." When asked again, Balster responded that "the others would be fine until he got out." Balster did not respond when asked to whom he was referring.

During a telephone call a few minutes later, Det. Appel advised Weirsma that he planned to visit Balster in jail in order to serve the forfeiture notice. Weirsma informed Det. Appel that Balster was behaving strangely.

Det. Appel arrived at the jail shortly thereafter. When Det. Appel met with Balster to serve the forfeiture notice, Det. Appel explained that methamphetamine had been discovered in the cigarette package recovered from Balster's truck, showed Balster a photograph of the drugs, and advised him that the police would be forfeiting his truck.

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[1] "[A]ll conveyance devices containing controlled substances with a retail value of $100 or more" are presumed subject to administrative forfeiture if possession or sale of the controlled substance would be a felony. Minn. Stat. § 609.5314, subd. 1(a)(2) (2004). An agency intending to forfeit seized property must notify the owner of its intent "within a reasonable time after [seizure occurs]." *Id.*, subd. 2 (2004).

According to Weirsma, who witnessed the meeting, Balster "became very angry, start[ed] swearing at Detective Appel and saying that he had been set up." When Det. Appel tried to hand him the forfeiture notice, Balster refused to accept it. As the meeting ended, Balster turned toward Det. Appel and stated: "You're a dead motherf**ker when I get out."

Balster was charged with terroristic threats, a violation of Minn. Stat. § 609.713, subd. 1 (2004), and fifth-degree possession of a controlled substance, a violation of Minn. Stat. § 152.025, subds. 2(1), 3(a) (2004).[2] At trial, Balster's theory of the case was that he had not actually threatened to kill Det. Appel. Rather, Balster lashed out after Det. Appel deliberately provoked Balster while he was particularly vulnerable. The state countered that Balster was blaming Det. Appel for Balster's failure to control his anger.[3]

The district court granted Balster's request to instruct the jury on entrapment. But it declined to instruct the jury that "the offense of terroristic threats does not include verbal threats expressing transitory anger which lacked the intent to terrorize," which Balster requested orally after the jury-charge conference. The district court reasoned that caselaw neither prohibits nor requires such an instruction. Balster would be free to argue transitory anger in his closing, but the district court declined to grant the request. The jury found Balster guilty, and this appeal followed.

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[2] After a contested omnibus hearing, the district court granted Balster's motion to suppress evidence, concluding that Det. Appel had illegally expanded the scope of his search. As a result, the controlled-substance charge was dismissed.

[3] In support of its position, the state introduced various recorded telephone calls Balster made while in jail. During the second of these calls, made before Appel had served the forfeiture notice, Balster told his mother: "I'm f**kin' takin' heads off when I get out [of] here, too. . . . That f**kin' Troy Appel's got another thin[g] comin' to him."

D E C I S I O N

I.

Balster argues that the district court erred when it declined to instruct the jury on transitory anger, which was relevant to his theory of the case. We review a district court's denial of a defendant's requested jury instruction for an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). To warrant reversal, an appellant must demonstrate both that the district court's decision was erroneous and the error was prejudicial. *See State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) (explaining analytical framework). A district court has "considerable latitude" in selecting the particular language for jury instructions. *State v. Kycia*, 665 N.W.2d 539, 542 (Minn. App. 2003) (quotation omitted). At a minimum, the instructions must define the offense without materially misstating the law. *Kuhnau*, 622 N.W.2d at 556. We consider the jury instructions in their entirety to determine "whether they fairly and adequately explained the law of the case." *Id.* at 555-56.

A defendant is entitled to an instruction on the defendant's theory of the case if there is evidence to support it. *State v. Persitz*, 518 N.W.2d 843, 848 (Minn. 1994). But the district court may refuse to give the requested instruction "if it determines that the substance of that request is contained in the [district] court's charge." *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977). Balster requested an instruction that "the offense of terroristic threats does not include verbal threats expressing transitory anger which lacked the intent to terrorize." Balster argues that the district court did not have the discretion to refuse to give this instruction because his theory of the case was that he was merely

lashing out at Det. Appel rather than trying to terrorize him and because there was sufficient evidence to support this theory. Balster also argues that the standard instructions on terroristic threats are inadequate. We address each argument in turn.

A person who "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 making terroristic threats. Minn. Stat. § 609.713, subd. 1 (2004). The state must prove that the defendant (1) threatened to commit a crime of violence; and (2) made that threat with either (a) specific intent to cause extreme fear in another, or (b) reckless disregard of the risk that it would have that effect. *Id.*; *State v. Schweppe*, 306 Minn. 395, 399-400, 237 N.W.2d 609, 613-14 (1975) (discussing statutory elements).

The phrase "transitory anger" is not included in the language of section 609.713. Rather, this phrase is included in the commentary to the section of Model Penal Code, Tentative Draft No. 11 on which section 609.713 is modeled. *State v. Taylor*, 264 N.W.2d 157, 160 (Minn. 1978) (Sheran, C.J., dissenting). The terroristic-threats statute is designed to punish threats that are "more serious than would be covered by petty offenses like disorderly conduct or breach of the peace." *Id.* (quotation omitted). The statute is not intended to apply to "the kind of verbal threat which expresses transitory anger rather than [the] settled purpose to carry out the threat or to terrorize the other person." *Id.* (emphasis omitted) (quotation omitted).

We have held that the standard jury instruction on terroristic threats, which explains intent without referring to transitory anger, is sufficient. *State v. Dick*, 638

N.W.2d 486, 492-93 (Minn. App. 2002) (citing *State v. Lavastida*, 366 N.W.2d 677, 680 (Minn. App. 1985)), *review denied* (Minn. Apr. 16, 2002). A specific instruction on a transitory-anger theory is not required because its substance is already expressed in the instruction that "'[w]ith intent to terrorize' means to have the specific purpose or intention of causing extreme fear." 10 *Minnesota Practice*, CRIMJIG 13.107 (2006) (standard jury instruction on elements of terroristic threats); *Dick*, 638 N.W.2d at 492-93 (approving district court's reasoning that standard instruction on intent is sufficient); *cf. Ruud*, 259 N.W.2d at 578 (affirming refusal to give specific instruction on defendants' theory that they lacked intent to defraud because they relied on their accountants, which was already expressed in standard lack-of-intent instruction). Thus, as here, a defendant is free to urge the jury to find that the anger was expressed without the required intent to make the victim extremely fearful. *Dick*, 638 N.W.2d at 492-93 (citing *Lavastida*, 366 N.W.2d at 680).

Balster, however, argues that *Dick* and *Lavastida* "do not adequately consider . . . that if an instruction on transitory anger is not given, the standard . . . instructions unfairly emphasize the prosecution side of terroristic threats cases" and that the jury needed an instruction on transitory anger "to make an adequate assessment of [Balster]'s intent." Specifically, he argues that a transitory-anger instruction was necessary to balance out instructions that the state need not prove either "that [Balster] had the actual intention of carrying out the threat" or "that [Det. Appel] actually experienced extreme fear."

The proper application of a statute that criminalizes a specific type of communication is necessarily context-dependent. *Schweppe*, 306 Minn. at 399, 237

N.W.2d at 613. For example, although the statement "I'm going to kill you" is a threat to commit homicide, the context in which it is uttered determines whether the speaker intends the literal meaning or a harmless expression of anger, frustration, or annoyance. *See, e.g.*, 12 Angry Men (Orion-Nova Productions/United Artists 1957) ("This phrase, how many times have all of us used it? Probably thousands. 'I could kill you for that, darling.' 'Junior, you do that once more and I'm gonna kill you.' 'Get in there, Rocky, and kill him!' We say it every day. That doesn't mean we're going to kill anyone."), *available at* http://www.imdb.com/title/tt0050083/quotes. Transitory anger is not always probative of a defendant's intent. At times, it may be probative of whether, in context, a given statement is a "threat[ ] . . . to commit any crime of violence" within the meaning of Minn. Stat. § 609.713, subd. 1. The state was not required to prove that Balster actually intended to follow through with his threat to harm Det. Appel, but rather that, taken in context, the threat tends to "create apprehension" that he will. *Schweppe*, 306 Minn. at 399, 237 N.W.2d at 613 (quotation omitted). Similarly, the state need not prove that Det. Appel actually experienced extreme fear. Although the actual effect a threat has on the victim is circumstantial evidence of the defendant's intent, it is not an element of the offense. *Id.* at 401, 237 N.W.2d at 614.

Balster's defense theory was that he merely lashed out after Det. Appel deliberately provoked him while he was in a particularly vulnerable state. Balster's transitory-anger theory encompasses the *context* in which he told Det. Appel that he was "a dead motherf**ker." Balster argues that the jury instructions unfairly minimized "the fact that the words [he] spoke seemed to have more relation to his distress than to what he

actually intended to do." The jurors could not decide the case fairly, he argues, because the instructions did not explain that the jury was "required to acquit [Balster] if they concluded his anger was transitory."[4]

Such an instruction, however, would misstate the law. Although the jury may acquit if it finds that the defendant's statement was the product of transitory anger, it is not required to do so. Even if transitory anger negates specific intent, the mens rea element of the statute is stated in the alternative. A terroristic threat also can be made in reckless disregard of its potential to create terror. Minn. Stat. § 609.713, subd. 1. Even brief anger can cause a person to say something with "[c]onscious indifference to the consequences" of the extreme fear that the threat may cause in another. *Cf.* Black's Law Dictionary 1276 (7th ed. 1999) (defining "reckless disregard"). The defendant's lack of subjective intent to terrorize is no defense if the defendant recklessly disregarded that, given the context, the threat to commit a crime of violence could cause extreme fear or terror. *See* CRIMJIG 13.107 (instructing on reckless terroristic threats).

Balster has not established that using the standard jury instruction was an abuse of the district court's broad discretion. Accordingly, the district court did not err by declining to give Balster's requested instruction.

[4] The transcript reflects that Balster only orally requested "an instruction *consistent with* . . . case law indicat[ing] . . . that the offense of terroristic threats does not include verbal threats expressing transitory anger which lacked the intent to terrorize." (Emphasis added.)

II.

Balster argues for the first time on appeal that the prosecutor's closing argument and rebuttal constituted prejudicial misconduct depriving him of a fair trial. A defendant who fails to object at trial generally waives the right to appellate review of a prosecutor's final argument. *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997). We have the discretion to review unobjected-to prosecutorial misconduct if plain error is established. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006).[5] The plain-error standard is met if (1) the prosecutor's unobjected-to argument was error, (2) the error was plain, and (3) it affected the defendant's substantial rights. *Ramey*, 721 N.W.2d at 299 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).

A prosecutor has "an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt." *Id.* at 300. The potential adverse effect on the defendant's right to a fair trial is the "overarching concern regarding prosecutorial misconduct . . . ." *Id.* Balster contends that the prosecutor's repeated references to his failure to take responsibility for his actions and the denigration of his entrapment defense were prejudicial misconduct. When evaluating his claim, we examine the closing argument "as a whole, rather than just selective phrases or remarks

[5] The state argues that *Ramey* is inapplicable because it had not been decided at the time of trial and the opinion is silent as to retroactive application. But *Ramey* did not establish a "new" rule of law. It resolved a conflict in existing law. *See Ramey*, 721 N.W.2d at 301 (acknowledging supreme court's use of different approaches to analyze unobjected-to prosecutorial misconduct, including plain error).

that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

A prosecutor's closing argument may not "ask[ ] the jury to teach the defendant a lesson." *State v. Gates*, 615 N.W.2d 331, 341 (Minn. 2000) (citing *State v. Montjoy*, 366 N.W.2d 103, 108-09 (Minn. 1985)). Although the prosecutor may ask the jury to hold the defendant accountable for his actions rather than acquit based on sympathy, the prosecutor may not "emphasize accountability to such an extent as to divert the jury's attention from its true role of deciding whether the state has met its burden of proving [the] defendant guilty beyond a reasonable doubt." *Montjoy*, 366 N.W.2d at 109.

Balster's theory of the case was that he was not responsible for what he said because Det. Appel and Wiersma had "induced" and "manipulated" him by placing him in "circumstance[s] . . . where he was likely to lash out in the only way he could." Although the district court declined to instruct the jury on transitory anger, it granted Balster's requested instruction on entrapment.

Viewed as a whole, the prosecutor's closing argument and rebuttal urged the jury to find that, because threatening Det. Appel's life was "not just blowing off steam," Balster must "live with the consequences" of the decision he made while he was angry. It was not improper for the state to challenge the plausibility of Balster's claim that Det. Appel and Weirsma "set [him] up to commit" this offense. The prosecutor's comments about Balster's refusal to accept responsibility for his actions respond directly to Balster's theory that others caused and, therefore, are responsible for his actions. As such, Balster

has failed to establish any error. Thus, his challenge does not meet the plain-error standard.

III.

In his pro se supplemental brief, Balster generally claims that he was treated unfairly. His only discernable legal argument for appellate relief is a claim of ineffective assistance of counsel. To prevail on such a claim, a defendant must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the outcome would have been different but for counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005). The defendant has the burden of proof and must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007); *see Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (noting that judicial review should be "highly deferential" to counsel's performance). If the defendant fails to meet the burden to prove either deficient performance or prejudice, we need not address the other. *Blanche*, 696 N.W.2d at 376; *see Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064 (noting that defendant must prove both prongs).

A claim of ineffective assistance of counsel can be reviewed on direct appeal only if the underlying facts are reflected in the record. *State v. Green*, 719 N.W.2d 664, 674 (Minn. 2006). For this reason, a claim ordinarily should be raised in a petition for postconviction relief rather than on direct appeal. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) (explaining that postconviction hearing may provide facts necessary to

evaluate reasonableness of attorney's actions). Here, Balster appeals directly from a judgment of conviction.

Balster first asserts that trial counsel "made [him] sound like [he] was all strung out on drugs and this wasn't the case at all." Our evaluation of the objective reasonableness of counsel's performance does not include challenges to counsel's trial strategy. *Blanche*, 696 N.W.2d at 376. It appears from the record that counsel's trial strategy was to negate the intent element by attempting to demonstrate that Balster's fragile mental state resulting from claustrophobia and recent drug use caused him to lash out. Balster does not explain why this was unreasonable, and the record does not reflect that it was. Therefore, we cannot conclude that counsel's representation in this regard fell below an objective standard of professional reasonableness.

Balster also claims that he "was not allowed to testify" because his counsel told him that "this was the best way." A defendant has a right to testify in his own defense. *State v. Ihnot*, 575 N.W.2d 581, 587 (Minn. 1998) (citing Due Process Clause and Minn. Stat. § 611.11 (1996)). Because this right is personal, the defendant, not counsel, must decide whether to exercise the right. *State v. Smith*, 299 N.W.2d 504, 506 (Minn. 1980). A defendant is entitled to a new trial if the defendant can prove that counsel refused to let the defendant testify. *Id.* (noting that denial of right to testify "can never be harmless error"). But Balster has not submitted any evidence to support the bare assertion set forth in his pro se supplemental brief. The record establishes only that he did not testify. Without any evidence suggesting otherwise, we must presume that Balster's decision not

to testify was voluntarily and intelligently made. Because Balster has not proved either deficient performance or prejudice, his claim of ineffective assistance of counsel fails.

Affirmed.