STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0217

State of Minnesota,
Respondent,

vs.

Kevin Lawrence Johnson,
Appellant.

Filed March 24, 2009
Affirmed
Stauber, Judge

Dakota County District Court
File No. 19K207001929

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Susan Andrews, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

STAUBER, Judge

Appellant Kevin Lawrence Johnson challenges his conviction of terroristic threats claiming that one of the district court's factual findings is clearly erroneous and without it the evidence is insufficient to support his conviction. Johnson also contends that he could not be convicted of terroristic threats because he was acquitted of being a felon in possession of a handgun. We affirm.

FACTS

Johnson was charged with second-degree assault, felon in possession of a handgun, terroristic threats, and third-degree criminal damage to property after police responded to a domestic disturbance at the home of R.W., a woman Johnson had recently dated. Johnson waived his right to a jury trial, and a bench trial was held in September 2007.

At trial, R.W. testified that she met Johnson in March 2007 after their paths crossed in a parking lot. R.W. gave Johnson her phone number and over the next few months they had several phone conversations, but did not meet in person. Eventually, R.W. agreed to a date with Johnson. On a Friday in early June 2007, they met and played cards with R.W.'s friends, and Johnson stayed the night at R.W.'s house. The following day, they ran errands together and attended R.W.'s daughter's baseball game before returning to R.W.'s house. Johnson again stayed the night. On Sunday they brought R.W.'s children to Grand Old Days, an annual celebration in Saint Paul. According to R.W., they began to mingle with other festival-goers and she eventually lost track of

Johnson. R.W. later found him in the bedroom of a stranger's home on Grand Avenue with crack cocaine in his possession. R.W. pleaded with Johnson to leave the home, but Johnson closed the door and proceeded to use the drugs. R.W. entered the room several minutes later and found him with "a towel over himself, masturbating, . . . sweating and acting . . . irrational." Disgusted by Johnson's actions and afraid that he might harm her, R.W. decided to leave. As R.W. exited the room, Johnson lunged at the door in an attempt to confine her in the room. R.W. managed to escape, and she and her children left the festival without him.

Two days later, Johnson stopped by R.W.'s home to retrieve some personal belongings, including CDs and a name badge for work. R.W. refused to allow him into the home without a police escort because she considered him "dangerous and inappropriate" after the incident at Grand Old Days. She also noticed that he was carrying two screwdrivers in his right hand, conceivably as weapons. R.W. agreed to retrieve the CDs from her car parked in the driveway if Johnson would stay "far enough away" from her. Johnson complied with R.W.'s request, and she was able to retrieve the CDs and place them on the hood of her car before running back into the home and locking the door. Johnson again approached the home and asked for his badge. After searching unsuccessfully in her home, R.W. promised to mail it to him if she found it. R.W. then informed Johnson that he was no longer welcome at her home and threatened to obtain a restraining order if he ever returned.

According to R.W., Johnson became agitated and confronted her about what had transpired at Grand Old Days. Johnson told her that she could not "treat [him] like this,"

and if he could not have her "nobody else will." R.W. claimed that Johnson then lifted his shirt to reveal a handgun tucked into the waistband of his pants and said, "I will kill you and your kids." R.W. took this to mean that he would kill her "sooner or later." R.W. immediately closed the blinds, told her daughter T.W. to hide, and ran upstairs to call the police. Johnson left before the police arrived, and R.W. discovered that all of the tires on her car had been slashed, and the license plates were missing. Police later found a bag containing the missing license plates in a room Johnson rented at a sober house. Consistent with R.W.'s testimony, T.W. testified that she heard her mother and Johnson speaking in raised voices at the front door and noticed that her mother was upset and seemed frightened.

In contrast, Johnson acknowledged that he stopped by R.W.'s home to retrieve his belongings, but claimed that he immediately left the premises without incident after R.W. refused to return his belongings without a police order. He also denied possessing any weapons, damaging her property, or threatening her.

The district court found Johnson guilty of terroristic threats and third-degree criminal damage to property, but acquitted him of second-degree assault and felon in possession of a handgun. With respect to the terroristic threats charge, the district court found that Johnson committed the offense by stating: "Sooner or later, I'm going to kill you . . . and your kids." This appeal followed.

D E C I S I O N

Johnson contends that one of the district court's factual findings is clearly erroneous, and without it the evidence is insufficient to support his conviction of

terroristic threats. We review the district court's findings of fact for clear error. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). Factual findings are clearly erroneous if they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985).

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 did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "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 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. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). The same standard of review applies to bench trials. *State v. Fisler*, 374 N.W.2d 566, 569 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985).

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 (2006). Therefore, to obtain a terroristic-threats conviction, the state must prove that a defendant (1) made threats (2) to commit a crime of violence (3) with purpose to terrorize another or in reckless disregard of the risk of terrorizing another. *See State v. Schweppe*, 306

Minn. 395, 399, 237 N.W.2d 609, 613 (1975). Whether a statement is a threat depends 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.* (quotation omitted). It is not necessary that the defendant possess the immediate capability of carrying out the threat. *See State v. Marchand*, 410 N.W.2d 912, 915 (Minn. App. 1987) (finding defendant intended to cause fear in victim even though he did not have immediate means to carry out threat), *review denied* (Minn. Oct. 21, 1987). But it must be the defendant's "aim, objective, or intention" to cause extreme fear through the threat. *Schweppe*, 306 Minn. at 397, 237 N.W.2d at 614. Although not an essential element of the offense, a victim's reaction to the threat is circumstantial evidence of intent. *Marchand*, 410 N.W.2d at 915.

Johnson argues that the district court erroneously found that he told R.W., "[s]ooner or later, I'm going to kill you . . . and your kids." He claims that there is no evidence in the record that the phrase "sooner or later" was included as part of the threat. After a painstaking analysis of the record, we agree that the district court's finding deviates slightly from the threat R.W. alleged in her testimony. R.W. testified that Johnson said, "I will kill you and your kids," but did not include the phrase "sooner or later." It appears that this phrase derived from R.W.'s testimony that she believed Johnson would carry out his threat "sooner or later." Johnson contends that this inconsistency is significant because without the phrase "sooner or later" the threat did not involve a *future* crime of violence. *See State v. Murphy*, 545 N.W.2d 909, 916 (Minn. 1996) ("The terroristic threats statute mandates that the threats must be to commit a

future crime of violence which would terrorize a victim."). We disagree. Even without this phrase, the threat to kill R.W. and her children involved future crimes of violence because these acts had not been carried out, and Johnson made no immediate effort to carry them out. Because the material language of the finding is reasonably supported by the record, we conclude that the finding is not clearly erroneous.

Johnson also argues that there is insufficient evidence to convict him of terroristic threats because he was acquitted of being a felon in possession of a handgun. Johnson claims that without a finding that he possessed a gun, his threats were merely expressions of transitory anger that did not involve intent to terrorize. We disagree. The acquittal on this charge does not necessarily indicate that R.W. was unreasonable in her *perception* that Johnson possessed a weapon. Moreover, even without the handgun, there is sufficient evidence in the record to conclude that the context in which Johnson communicated the threat would cause a reasonable person to believe that he would harm R.W. and her children. The evidence, when viewed in a light most favorable to the verdict, suggests that Johnson (1) abused controlled substances, (2) was prone to irrational behavior, (3) had previously attempted to restrain R.W., (4) was angry at R.W. for leaving him at Grand Old Days, ending their relationship, and failing to retrieve all of his belongings, (5) was carrying two screwdrivers that could be used as weapons, and (6) damaged R.W.'s vehicle before leaving the premises. R.W.'s reaction to Johnson's arrival at her home also provides context to the legitimacy of the threat. R.W. was unwilling to allow Johnson into the home and ordered him to step away from the home before she would retrieve his CDs. R.W. also responded to the threat by immediately

shutting the blinds, telling T.W. to hide, and calling the police. Because evidence supports the district court's conclusion that Johnson committed the offense of terroristic threats, we affirm.

Affirmed.