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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-815**

State of Minnesota,
Respondent,

vs.

Antonio Marcus Ard,
Appellant

**Filed April 9, 2012
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge**

St. Louis County District Court
File No. 69DUCR103449

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

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Duluth, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and
Ross, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant challenges his convictions of terroristic threats and felony domestic
assault, arguing (1) the circumstantial evidence of intent was insufficient; (2) the

prosecutor committed prejudicial misconduct by asking him “were they lying” questions; and (3) his 33-month sentence was based on a miscalculated criminal-history score. We affirm in part, reverse in part, and remand.

FACTS

Appellant Antonio Marcus Ard and M.G. had been living together until October 8, 2010. That evening, appellant came home drunk and got into a loud argument with M.G. Appellant “pinned” her against the hallway wall, prompting M.G.’s 11-year-old son to run to his room screaming and crying. M.G. insisted that appellant leave. She agreed to drive him to his truck, which was parked at a friend’s house.

While in the car, appellant and M.G. continued to argue heatedly. Appellant repeatedly screamed at M.G. that he was going to kill her. M.G. testified that she was frightened. She heard a click, a sound she recognized as a retractable blade extending from a utility knife or box cutter. She immediately stopped the car and ran for help. She attempted to flag down another vehicle, but appellant waved the utility blade and told the occupant of the other vehicle, “If you know what’s good for you, you’ll keep f***ing going.”

M.G. ran toward a nearby apartment building, where a number of bystanders were congregated. They let her into the secured front entrance of the building. Appellant kicked at the door with the extended razor blade in hand. He threatened several bystanders, asking, “You n*****s want to go next?” M.G. called 911, and when the police arrived, they found a retractable utility blade in appellant’s pocket.

Appellant testified to a different version of events. He claimed M.G. was the aggressor and that she physically assaulted him. Appellant testified that, as M.G. was punching him while in the car, he wrestled a utility blade out of her hands and placed it in his pocket. He denied ever threatening anyone or waving the utility blade around.

Appellant was charged with second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2010); felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2010); and terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2010). Following a bench trial, the district court found appellant guilty of felony domestic assault and terroristic threats. It acquitted appellant of second-degree assault, finding reasonable doubt on that charge. The court sentenced appellant to a 33-month term of imprisonment based on a criminal-history score of seven.

D E C I S I O N

I. Sufficiency of the evidence

Appellant argues that the circumstantial evidence of intent was insufficient to support his convictions of terroristic threats and domestic assault.

This court reviews sufficiency of the evidence by determining “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). This standard applies to bench trials as well as jury trials. *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

When a conviction is based entirely on circumstantial evidence, heightened scrutiny applies. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). The circumstances proved must be “inconsistent with any other rational hypothesis except that of guilt.” *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). 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.” *Id.* (quotation omitted). Proof of a person’s state of mind generally stands on circumstantial evidence. *State v. Anderson*, 379 N.W.2d 70, 78 (Minn. 1985).

A. Evidence supporting terroristic threats

A person commits the offense of terroristic threats when he or she “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.

Appellant argues that the circumstances proved are consistent with the theory that he spoke out of transitory anger and without any intent to terrorize. This court has recognized 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 terroristic threats without having a specific intent to terrorize. *See* Minn. Stat. § 609.713, subd. 1 (imposing criminal liability for acts done in “reckless disregard” of the

risk of causing terror). Only a general intent is required for the recklessness prong. *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009).

Here, the district court found appellant guilty under the recklessness prong of the statute. This prong requires proof of a deliberate disregard “of a known, substantial risk” that a threat would terrorize another. *Id.* A threat is a communication which, in context, has a “reasonable tendency to create apprehension that its originator will act according to its tenor.” *Schweppe*, 306 Minn. at 399, 237 N.W.2d at 613 (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.

Because the district court discredited appellant’s version of events, we examine only the state’s evidence. *See State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (noting that appellate courts must examine sufficiency in light of circumstances proved). The state here established that appellant had been arguing extensively with M.G. when he began screaming that he was going to kill her. He repeated those threats several times, getting “louder and louder,” and eventually wielding a utility blade in the confined space of the car. M.G. was so frightened that she stopped the car in the middle of the street and ran to flag down a nearby car for help. Appellant threatened the other driver while waving the blade around. He then ran after M.G., kicked at the apartment door with the utility blade still in hand, and told the bystanders that they would be next. Several witnesses testified that M.G. was upset and crying. In the 911 call played at trial, M.G. repeatedly urged the police to “please hurry.” The district court found that M.G. sounded

“very upset” in the phone call and expressed concern for her safety. M.G. testified that she believed appellant was about to kill her.

Viewed as a whole, these circumstances give rise to only one rational hypothesis: that appellant made threats in reckless disregard of causing terror. In context, the threats had a reasonable tendency to cause apprehension that he would follow through with them. Given his tone and actions, and M.G.’s reaction, appellant had to have known there was a substantial risk that his threats would terrorize M.G. We conclude that the evidence was sufficient to support the terroristic threats conviction.

B. Evidence supporting felony domestic assault

Appellant also contends that the circumstantial evidence of intent was insufficient to support his conviction of domestic assault. Appellant again theorizes that the circumstantial evidence is consistent with transitory anger.

Domestic assault occurs if an offender “commits an act [against a family or household member] with intent to cause fear in another of immediate bodily harm or death.” Minn. Stat. § 609.2242, subd. 1(1) (2010).

The state’s evidence established that appellant became physically combative at the beginning of the argument when he pinned M.G. against the wall, prompting her son to run away screaming and crying. Later, while still in the vehicle and after repeatedly threatening to kill M.G., appellant extended the blade of the utility knife. The district court found this action was done “with the intent to cause [M.G.] fear of immediate bodily harm.” Although M.G. did not initially see the blade, she recognized the sound and immediately fled the vehicle. When she tried to flag down another car, appellant

waved the utility blade and threatened the other driver. He then chased after M.G. with the blade in hand. A bystander at the apartment building testified that he saw what appeared to be a box-cutter blade in appellant's hand.

These circumstances are rationally consistent only with the theory that appellant acted with intent to cause fear in another of immediate bodily harm or death. Appellant's theory that the circumstantial evidence would admit the possibility that he was merely expressing anger, without any further intent, is unreasonable in light of the evidence as a whole. *See State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995) (“[P]ossibilities of innocence do not require reversal . . . so long as the evidence taken as a whole makes such theories seem unreasonable.”). The circumstantial evidence of intent was sufficient to support the domestic assault conviction.

II. “Were they lying” questions

Appellant next argues that his convictions should be reversed because the prosecutor committed prejudicial misconduct by (1) asking a series of “were they lying” questions and (2) arguing in summation that the court would have to find all of the state's witnesses not credible in order to acquit.

Because appellant did not object at trial to any of these alleged errors, the plain-error standard applies. *See* Minn. R. Crim. P. 31 cmt. (“On appeal, the plain error doctrine applies to unobjected-to prosecutorial misconduct.”). Appellant has the burden of demonstrating that a plain error occurred. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). An error is plain if it was clear or obvious rather than hypothetical or debatable. *State v. Leutschaft*, 759 N.W.2d 414, 420 (Minn. App. 2009), *review denied*

(Minn. Mar. 17, 2009). A plain error is also one that contravenes case law, rules, or standards of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Once plain error is shown, the state must demonstrate there is no reasonable likelihood that the misconduct significantly affected the verdict. *Id.*

It is generally improper for prosecutors to ask “were they lying” questions at trial. *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). Such questions invade the province of the fact-finder to determine credibility and may unfairly imply that the fact-finder cannot acquit without finding that all of the state’s witnesses were not credible. *Id.* at 516. Such questions also tend to improperly distort the state’s burden of proof. *Leutschaft*, 759 N.W.2d at 421. However, because “were they lying” questions may have probative value in some circumstances, the supreme court has rejected a blanket prohibition of them. *Pilot*, 595 N.W.2d at 518. Such questions are permissible when the defense opens the door by holding the issue of credibility “in central focus.” *Id.* The central-focus standard is met if the defense “expressly or by unmistakable insinuation” accuses a witness of falsehood. *Leutschaft*, 759 N.W.2d at 423.

A. Questions concerning M.G.

During cross-examination, the prosecutor asked appellant if M.G. had been lying in key aspects of her testimony. Appellant’s theory at trial was that M.G. was the aggressor who physically attacked him and that she was falsely accusing him of trying to kill her. Defense counsel elicited a motive for M.G.’s alleged fabrication in cross-examination: M.G. admitted she was on probation for theft by false representation and was subject to a condition that she remain law-abiding. Appellant’s theory of the case

placed M.G.'s credibility in central focus by unmistakably insinuating that she was lying. Appellant therefore opened the door to the "were they lying" questions regarding M.G. As a result, there was no plain error with respect to that line of questioning.

B. Questioning concerning bystander witnesses

At trial, several bystanders testified that appellant threatened them and that he may have had a utility knife in hand. During cross-examination, the prosecutor asked appellant whether these witnesses had all been lying. On direct examination, appellant had flatly denied that he threatened the bystanders or waved the knife at them. Unlike his theory regarding M.G., appellant did not insinuate or accuse the bystanders of lying; he merely denied threatening anyone or waving the knife around. He therefore did not place the bystanders' credibility in central focus. *See State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005) (holding that flat denial is insufficient to place credibility in central focus). Accordingly, permitting the prosecutor to ask these questions constituted plain error.

C. Closing argument

In closing argument, the prosecutor stated: "According to [appellant], however, he's the only one in this entire matter that told the truth and everyone else is lying. In order for the court to find that that's true, the court would have to find that all of the other testimony was not credible." Appellant argues that the prosecutor committed misconduct by presenting the court with a false choice and skewing the state's burden of proof.

Prosecutorial misconduct includes misstating the state's burden of proof. *State v. Fields*, 730 N.W.2d 777, 786 (Minn. 2007). Prosecutors cannot make arguments that

shift the burden to the defendant to prove his innocence. *Finnegan v. State*, 764 N.W.2d 856, 864 (Minn. App. 2009), *aff'd*, 784 N.W.2d 243 (Minn. 2010).

Here, the prosecutor's remarks impermissibly shifted the state's burden of proof by implying that appellant had the burden to disprove the credibility of the state's witnesses. The remarks also presented a false choice that in order to acquit, the court had to find that all of the state's witnesses were not credible. Such a choice distorts the reasonable-doubt standard. The prosecutor went beyond merely remarking on the credibility of particular witnesses and instead implied a lesser burden of proof than proof beyond a reasonable doubt. This constituted plain error. *See Ramey*, 721 N.W.2d at 302 (noting that error is plain if it clearly contravenes case law).

D. Prejudice

Because appellant has shown plain error, the state must demonstrate there was no reasonable likelihood that the misconduct significantly affected the verdict or otherwise deprived appellant of his right to a fair trial. *See id.* at 302 (holding that once appellant shows plain error, burden shifts to state).

The prosecutor's improper remarks occurred at a bench trial, not a jury trial, and therefore had a diminished persuasive impact. The district court recited the proper burden of proof in its thorough findings. It applied the reasonable-doubt standard by acquitting appellant of second-degree assault, finding reasonable doubt that he used the utility knife in a manner likely to cause death or bodily harm. Similarly, the court made independent credibility findings based on its observation of all the witnesses. Its findings indisputably demonstrate that the court did not rely on an improper burden of proof, nor

follow the state's improper suggestion that it had to find all the state's witnesses not credible in order to acquit. The state has therefore met its burden in showing there was no reasonable likelihood that the misconduct significantly affected the verdict, and the errors were therefore harmless.

III. Criminal-history score

Finally, appellant argues that his 33-month sentence was based on a miscalculated criminal-history score of seven. Appellant did not object at the time of sentencing.

The state has the burden of establishing a defendant's criminal-history score. *Bolstad v. State*, 439 N.W.2d 50, 53 (Minn. App. 1989). Criminal defendants have an unwaivable right to appeal a criminal-history score regardless of whether the issue was raised below. *State v. Maurstad*, 733 N.W.2d 141, 146–47 (Minn. 2007). A sentence based on a miscalculated criminal-history score is unlawful and may be corrected at any time. *Id.* at 146; Minn. R. Crim. P. 27.03, subd. 9.

In determining whether appellant's prior offenses were properly weighted, we must interpret the sentencing guidelines. "Construction of the sentencing guidelines is a question of law that we review de novo." *Maurstad*, 733 N.W.2d at 148.

Under the guidelines, a defendant's presumptive felony sentence is calculated using (1) the severity level of the current offense and (2) the defendant's criminal-history score for prior convictions. Minn. Sent. Guidelines II (2010). A defendant's criminal-history score is calculated by assigning points to prior offenses based on their severity levels. *Id.* at II.B.1.a. The severity levels of prior offenses are determined by the guidelines in effect at the time the *current* offense was committed. *Id.* at II.B.1.

The severity levels of appellant's prior offenses are determined by the guidelines in effect on October 8, 2010, the date appellant committed the current offense. Under those guidelines, theft offenses over \$5,000 are deemed severity level III and assigned one point. *Id.* at II.B.a, V (2010). Theft offenses under \$5,000 are deemed severity level II and assigned a half point. *Id.*

Appellant's sentencing worksheet weighted the three theft offenses with one point each. The worksheet notes that one of the convictions was for theft over \$2,500, but the record does not contain any indication that the convictions were for theft over \$5,000. If the convictions were for theft under \$5,000, they would be assigned only a half point each. *See* Minn. Sent. Guidelines II.B.1.a. Appellant's criminal-history score would then be 5.5, which would round down to five for purposes of calculating appellant's sentence. *See id.* at II.B.1. His presumptive sentence would be 30 months instead of 33 months (taking into account the three custody points that appellant has not challenged). *See* Minn. Sent. Guidelines IV (Sentencing Guidelines Grid) (2010).

The state concedes that the record is not sufficiently developed regarding appellant's criminal-history score. Appellant contends that because the state failed to meet its burden of proof, he is entitled to a recalculated criminal-history score of five and the resulting presumptive sentence of 30 months. However, it is "the trial court's role to resolve any factual dispute bearing on the defendant's criminal history score." *Bolstad*, 439 N.W.2d at 53 (quotation omitted); *see also State v. Campa*, 390 N.W.2d 333, 336 (Minn. App. 1986) (rejecting appellant's argument that he was entitled to benefit of the doubt and remanding for factual findings where record regarding criminal-history score

was ambiguous), *review denied* (Minn. Aug. 27, 1986). Because the record is insufficiently developed and the trial court did not have the opportunity to consider appellant's contentions below, we reverse and remand for further factual findings.

Affirmed in part, reversed in part, and remanded.