STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1889

State of Minnesota,
Respondent,

vs.

Jossiye Marvin DuBray,
Appellant.

Filed October 15, 2013
Affirmed
Kalitowski, Judge

Mille Lacs County District Court
File No. 48-CR-12-544

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Janice S. Jude, Mille Lacs County Attorney, Mille Lacs, Minnesota (for respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Chutich, Judge; and Harten, Judge.*

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

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

KALITOWSKI, Judge

Appellant Jossiye Marvin DuBray challenges his convictions of terroristic threats and stalking. Appellant argues (1) there is insufficient evidence to support the verdicts; (2) the district court erred by failing to instruct the jury on all elements of the crime of stalking; (3) the terroristic threats conviction must be vacated because it is based on the same conduct as the stalking conviction; and (4) the district court abused its discretion by imposing as conditions of probation that appellant avoid all use or possession of alcohol and submit to random testing. We affirm.

D E C I S I O N

I.

Appellant argues that there is insufficient evidence to support the jury's verdicts finding him guilty of terroristic threats and stalking. We disagree.

"When considering a claim of insufficient evidence, we conduct a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Hohenwald*, 815 N.W.2d 823, 832 (Minn. 2012) (quotation omitted). In conducting that review, we 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). We 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).

A conviction based on circumstantial evidence receives "heightened scrutiny" on appellate review. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). But when the state introduced direct evidence on each element of an offense, we do not apply the heightened standard. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013).

Terroristic threats

"Whoever 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 the crime of terroristic threats. Minn. Stat. § 609.713, subd. 1 (2012). "Crime of violence" means any "violent crime," as defined in Minn. Stat. § 609.1095, subd. 1(d) (2012). *Id.* Third-degree assault is a violent crime. Minn. Stat. § 609.1095, subd. 1(d). We have previously held that "[a] threat to 'kick the sh-t out of a person, throw someone down the stairs, and/or hit someone" constitutes a threat to commit third-degree assault. *State v. Jorgenson*, 758 N.W.2d 316, 322 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009).

Appellant argues the state presented only circumstantial evidence on the crime-of-violence element and, therefore, the heightened standard of review is appropriate here. We disagree.

Direct evidence is "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Bernhardt*, 684 N.W.2d at 477 n.11 (quotation omitted). Here, the state introduced direct evidence of

appellant's threat: L.D. testified that during her phone call with appellant, appellant threatened to "beat the sh-t out of" her. We therefore decline to apply the heightened standard of review.

Under the applicable standard of review, we assume the jury believed L.D.'s testimony and disbelieved any evidence to the contrary. *Moore*, 438 N.W.2d at 108. Therefore, the jury could reasonably find that appellant threatened to commit a crime of violence. *See Jorgenson*, 758 N.W.2d at 322 (holding "[a] threat to 'kick the sh-t out of a person" could be viewed as a threat to commit third-degree assault). Viewing the evidence in the light most favorable to the verdict, we conclude that sufficient evidence supports the jury's verdict that appellant committed the crime of terroristic threats.

Stalking

"'Stalking' means to engage in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim regardless of the relationship between the actor and victim." Minn. Stat. § 609.749, subd. 1 (2012). A person who stalks another by "directly or indirectly, or through third parties, manifest[ing] a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act" is guilty of the crime of stalking. *Id.*, subd. 2(1) (2012).

We interpreted the stalking statute in *State v. Pegelow*, 809 N.W.2d 245, 251 (Minn. App. 2012),[1] and we held that to convict a defendant of stalking under subdivision

[1] Although we analyzed the prior version of the statute in *Pegelow*, our interpretation is applicable here as the relevant sections have not changed.

2(1), "the jury must determine that the defendant committed an act that is unlawful independent of section 609.749." We further explained that the state is "required to introduce some evidence from which the jury could reasonably find that [the defendant's] act was unlawful." *Id.* In *Pegelow*, the state failed to indicate if or how the act under scrutiny was unlawful and did not present any evidence from which the jury could conclude the act was unlawful; therefore, the jury was required to speculate as to what the law required. *Id.* We concluded that because "the jury's determination that [the defendant] committed an unlawful act necessarily was based on speculation, rather than evidence," there was insufficient evidence to sustain the stalking conviction, and we reversed. *Id.*

Appellant relies on *Pegelow* and argues there is insufficient evidence here to support the stalking conviction because the state did not identify an unlawful act to the jury. We disagree because the case here is different from *Pegelow*. Here, the district court instructed the jury on the crime of terroristic threats, and the state presented evidence from which the jury could find that appellant's threat was unlawful independent of the stalking statute. Therefore, unlike *Pegelow*, the jury here was not required to speculate as to how appellant's act was unlawful.

Appellant alternatively argues that if the unlawful act was committing the crime of terroristic threats, then there is insufficient evidence to sustain the stalking conviction because there is insufficient evidence that appellant made a terroristic threat. We disagree. As we determined above, the jury's terroristic threats verdict was supported by sufficient evidence.

We conclude that the jury's verdict finding appellant guilty of stalking is supported by sufficient evidence in the record.

II.

Appellant argues that the district court erred by failing to fully instruct the jury on the unlawful-act element of stalking. Appellant argues that "the particular unlawful act and its elements must be included in the [stalking] jury instructions."

Failure to preserve issue for appeal

As a threshold issue, appellant urges us to construe arguments he made to the district court as sufficient to preserve his jury instruction argument for appeal, and to therefore review the jury instructions for an abuse of discretion. *See State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996) (reviewing an objected-to jury instruction for an abuse of discretion). We decline to do so.

"An objection must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Aug. 31, 1993). Here, in a pretrial motion, appellant moved to dismiss the stalking charge on the ground that the state failed to produce evidence of an unlawful act independent of the stalking offense. And at trial, moving for a judgment of acquittal, appellant argued there was insufficient evidence of the terroristic threat and, therefore, the state did not prove the unlawful-act element of the stalking offense. But appellant's arguments to the district court did not raise an objection to the jury instructions and thus could not have alerted the district court to the argument regarding jury instructions that appellant now makes on appeal. *See id.* (holding that appellant failed to preserve an issue for appeal where the

objection below could not have alerted the district court to the detailed arguments subsequently raised on appeal).

Review for plain error

Failure to object to jury instructions before they are given to the jury generally is considered a waiver of the right to appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). But "a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law." *Id.* Plain error is established if (1) there is error, (2) that is plain, and (3) that affects the appellant's substantial rights. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). If all three prongs are met, we may correct the error if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Griller*, 583 N.W.2d 736, 742 (Minn. 1998).

A plain error affects substantial rights if it is prejudicial and affects the outcome of the case. *Id.* at 740. Plain error is prejudicial if there is a "reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Id.* at 741.

Appellant argues that the district court's instructions on stalking were plainly erroneous because they did not identify and instruct on a specific unlawful act. But we need not consider whether the district court's failure to identify and instruct on a particular unlawful act was plain error because we conclude that any alleged error did not affect appellant's substantial rights or have an effect on the jury's verdict.

The district court instructed the jury on the crimes of terroristic threats and stalking. Because the jury found appellant guilty of terroristic threats, the district court's failure to repeat the definition and elements of terroristic threats during the stalking instructions did not have an effect on the jury's verdict on the stalking charge. Thus, even if the district court erred by failing to identify and instruct on a specific unlawful act as part of the instructions on stalking, the error was not prejudicial to appellant.

III.

Appellant asserts that the district court erred by entering judgment of conviction for the terroristic threats charge because "a defendant cannot be convicted of multiple crimes based upon a single act." We disagree.

When a defendant is convicted of two crimes based on the same conduct, two Minnesota statutes are implicated: Minn. Stat. §§ 609.035 and 609.04 (2012). Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

Section 609.035

Under section 609.035, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Section 609.035 was properly applied here because appellant was sentenced only for the stalking conviction.

Appellant asserts that the warrant of commitment improperly reflects that appellant was sentenced on the terroristic threats charge. "Clerical mistakes in a judgment, order, or in the record arising from oversight or omission may be corrected by

the court at any time, or after notice if ordered by the court." Minn. R. Crim. P. 27.03, subd. 10. A document in the district court file indicates that the district court has corrected this clerical error in an amended warrant of commitment reflecting the district court's proper application of section 609.035.

Section 609.04

Section 609.04 provides that

> Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both. An included offense may be any of the following:
>
> (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.

Appellant cites *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984), where the supreme court applied section 609.04 and held that

> the proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed . . . .

We reject appellant's reliance on *LaTourelle*. First, *LaTourelle* applies section 609.04, which does not apply here: terroristic threats is not a lesser included offense of

stalking, and terroristic threats is not necessarily proved if stalking is proved. *Compare* Minn. Stat. § 609.713, subd. 1 (defining terroristic threats as "[threatening] . . . to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror), *with* Minn. Stat. § 609.749, subds. 1, 2(1) (making it a stalking crime "to engage in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction" when the actor "directly or indirectly . . . manifests a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act").

Second, appellant cites no authority to suggest that the court's instruction as it relates to section 609.04 should be applied to situations implicating section 609.035. On the contrary, caselaw indicates that *LaTourelle*'s instruction should not be applied when section 609.035 is applicable. *See State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002) (stating that section 609.035 "allows multiple convictions for different incidents (counts) arising out of a 'single behavioral incident,' but prohibits multiple sentences for conduct that is part of a single behavioral incident"); *see also Langdon v. State*, 375 N.W.2d 474, 476 n.1 (Minn. 1985) ("The issue of when multiple convictions based on a single act or behavioral incident are permitted is covered by Minn. Stat. § 609.04 . . . .").

We conclude that the district court did not err when it entered judgment of conviction for both the terroristic threats and stalking charges.

IV.

Finally, appellant argues that the district court abused its discretion by imposing as conditions of probation that appellant "[a]bstain from the use of and possession of all non-prescribed mood alterants and alcohol and submit to testing as requested" by law enforcement because there was no evidence that alcohol was involved in the underlying incident or that appellant had a serious drinking problem. We disagree.

We review a district court's sentencing decision for an abuse of discretion. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). A district court has "great discretion in the imposition of a sentence and appellate courts cannot substitute their judgment for that of the [district] court in the imposition of a sentence." *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989).

A district court may stay execution of a sentence and order probation "on the terms the court prescribes." Minn. Stat. § 609.135, subd. 1(2) (2012). "Generally, conditions of probation must be reasonably related to the purposes of sentencing and must not be unduly restrictive of the probationer's liberty or autonomy." *Friberg*, 435 N.W.2d at 515. Under the Minnesota Sentencing Guidelines, a district court should consider various penal objectives when imposing conditions of a stayed sentence, including deterrence, public safety, rehabilitation, and risk reduction. Minn. Sent. Guidelines 3.A.2 (2012). The relative importance of these objectives "may vary with both offense and offender characteristics." *Id.*

Here, the record contains evidence that appellant has experienced problems with alcohol use: at the time of sentencing, appellant was on probation and had a violation

pending for a prior DWI conviction. Additionally, the Department of Corrections (DOC) recommended in its presentencing report that appellant be prohibited from using or possessing alcohol and be required to submit to random testing. Although we would prefer that the district court make specific findings regarding its imposition of the alcohol-limiting conditions, based on the evidence in the record and the DOC's recommendation, we cannot say the district court abused its broad discretion when it imposed as conditions of probation that appellant abstain from the use and possession of alcohol and submit to random testing.

Affirmed.