STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1641

State of Minnesota,
Respondent,

vs.

Michael Cordale Henderson,
Appellant.

Filed November 4, 2013
Affirmed
Hudson, Judge

Nicollet County District Court
File No. 52-CR-11-188

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

Michelle M. Zehnder Fischer, Nicollet County Attorney, James P. Dunn, Chief Deputy County Attorney, St. Peter, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Hudson, Judge; and Worke, Judge.

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

HUDSON, Judge

Appellant argues that the evidence is insufficient to support his convictions of second-degree assault and making terroristic threats, and that the district court plainly

erred in instructing the jury on self-defense. Appellant asks this court to vacate the terroristic-threats conviction because it arose out of the same behavioral incident as the assault conviction. Appellant also raises a number of issues in his pro se brief. We affirm because (1) the evidence is sufficient to support the convictions; (2) the district court's self-defense instruction was not plainly erroneous; (3) the district court's treatment of appellant's convictions did not violate Minn. Stat. § 609.04 (2012); and (4) appellant's pro se issues lack merit.

FACTS

On March 31, 2010, appellant Michael Cordale Henderson was confined at the Minnesota Security Hospital in St. Peter, after being civilly committed as mentally ill and dangerous (MID) in September 2009. On that date, J.M.R., a security counselor on appellant's unit, observed appellant carrying a box of sanitary wipes into his room. Sanitary wipes are among the items classified as "contraband" at the state hospital. J.M.R. had previously warned appellant about taking the wipes into his room. J.M.R. went to appellant's room to retrieve the wipes. He knocked, flipped open a curtain over the window to make sure appellant was clothed, opened the door, and told appellant that he was there to retrieve the wipes. Appellant began yelling, calling J.M.R. derogatory names and accusing him of sexually harassing him, and slammed the steel door as hard as he could. The loud noise attracted other security personnel. J.M.R. opened the door again and told appellant that he was not in trouble and that he merely had to hand over the wipes; he told appellant to go to a designated area where they could discuss the problem. J.M.R. spoke in a calm voice, according to other security personnel.

Security counselors D.T. and T.M. joined J.M.R. outside the door to appellant's room. Appellant screamed at J.M.R. to "come in here and get [the wipes] and see what happens," and slammed the door again and locked it. J.M.R. told appellant that he had keys to the room and that he could not permit the wipes to be left in appellant's room. As J.M.R. unlocked and opened the door, appellant came to the door. Appellant was still very angry; he bent down and pulled something out of his socks. Appellant held the object in his fist with the point sticking out of his fist and yelled at J.M.R., "I'm going to kill you, m-----r f----r." He swung his fist in a downward movement at D.T., who stepped back to avoid being hit, and then turned toward J.M.R., who began backing down the hallway. Appellant swung his fist from high over his head downward at J.M.R. As appellant swung, J.M.R. kicked him in the midsection, and then stepped close in to keep appellant from stabbing him with whatever was in appellant's fist. Finally, D.T. put appellant in a four-figure body hold with T.M.'s assistance, and all four men collapsed to the ground, with J.M.R. on the bottom. J.M.R. felt a couple of blows to his back while on the ground. Security counselor T.R. joined the group and helped to restrain appellant. After appellant was restrained, J.M.R. found a bent ballpoint pen on the floor that had a sharpened tip.

J.M.R. had two slight puncture wounds in his back in the area of his shoulder blades and also suffered a torn medial collateral ligament in his knee. J.M.R. opined that the injuries from the altered pen were less serious than they could have been because appellant struck him in the shoulder blade, rather than in an area of soft tissue. During the incident, J.M.R. believed that appellant "was trying to kill me."

Appellant was charged with one count of second-degree assault and one count of making terroristic threats. He represented himself and did not testify at trial. Appellant examined the state's witnesses, asking questions about whether J.M.R. had harassed him and made sexual overtures toward him. J.M.R. testified that appellant had made those allegations but that he had not harassed appellant in any way.

A jury found appellant guilty of both charged offenses. The district court entered convictions on both charges but sentenced appellant to 36 months in prison only on the second-degree assault conviction.

D E C I S I O N

We review a claim of insufficient evidence to determine whether the evidence, viewed in a light most favorable to the verdict, is sufficient to permit the jurors to convict the defendant. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). We assume that the jury believed the testimony supporting the verdict and rejected contrary testimony. *Id.* We will not overturn the verdict if it is evident that the jury properly considered the presumption of innocence and the state's burden of proving guilt beyond a reasonable doubt and could reasonably conclude that the defendant was guilty of the charged offense. *Id.*

I

A person who assaults another with a dangerous weapon is guilty of second-degree assault. Minn. Stat. § 609.222, subd. 1 (2008). An "assault" is defined as "an act done with intent to cause fear in another of immediate bodily harm or death" or "the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat.

§ 609.02, subd. 10 (2008). A "dangerous weapon" is defined as "any device designed as a weapon and capable of producing death or great bodily harm." Minn. Stat. § 609.02, subd. 6 (2008). "Great bodily harm" is "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2008). Thus, the state was required to prove that appellant intended to cause J.M.R. to fear immediate bodily harm or death or attempted to harm him and that appellant had a device capable of causing death, disfigurement, or other serious bodily harm.

Dangerous weapons include such obvious instruments as firearms and knives, but otherwise innocent objects can be used in a manner that fits within the definition of dangerous weapons. For example, a hand or a foot can be a dangerous weapon, if used in "particularly brutal and prolonged attacks against vulnerable and sometimes defenseless victims." *State v. Basting*, 572 N.W.2d 281, 284 (Minn. 1997). *See also State v. Jorgenson*, 758 N.W.2d 316, 321–22 (Minn. App. 2008) (concluding hands and feet could be used as dangerous weapons, even when the victim does not suffer great bodily harm), *review denied* (Minn. Feb. 17, 2009). A pick-up truck can be a dangerous weapon. *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 706, 708 (Minn. App. 2008) (concluding that truck was a dangerous weapon when used to repeatedly ram another occupied vehicle).

The intent with which a defendant wields an object may indicate whether it is a dangerous weapon for purposes of the statute. For example, in *State v. Cepeda*, this court

concluded that a beer bottle thrown against the victim's head with sufficient force to break the bottle was a dangerous weapon. 588 N.W.2d 747, 749 (Minn. App. 1999). Similarly, this court rejected the conclusion that a three-inch folding knife was a dangerous weapon, when a child inadvertently brought the knife to school, placed it in his locker, and never intended to use it. *In re Welfare of P.W.F.*, 625 N.W.2d 152, 154 (Minn. App. 2001). This court acknowledged that such a knife could be used as a weapon, but the state failed to prove that the child's "small folding knife was designed as a weapon rather than for its many other uses." *Id.*

Here, witnesses testified that the ballpoint pen tip had been sharpened. Appellant concealed the pen in his sock, rushed at J.M.R., and shouted that he was going to kill him. Appellant held the pen in his fist with the point down, and swung his arm in a downward arc at both D.T. and J.M.R. Appellant wielded the pen with enough force to penetrate J.M.R.'s shirt and leave two puncture wounds in his skin. Although this did not cause great bodily harm, the statute does not require actual great bodily harm. In *State v. Davis*, this court noted that

> bodily injury is not an element of second-degree assault. To be convicted of second-degree assault, the defendant must have used a weapon or an instrumentality that is calculated or likely to produce death or great bodily harm. . . . [H]ands and feet can constitute dangerous weapons even if the victim does not suffer great bodily harm.

540 N.W.2d 88, 91 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. Jan. 31, 1996). Appellant argues that the state is relying on hypothetical theories, rather than facts, by asserting that J.M.R. could have been injured had appellant struck him in a

soft-tissue area rather than on his shoulder blade. But the statute requires only that the instrumentality be "capable" of producing great bodily harm. Minn. Stat. § 609.02, subd. 6.

Viewing the record in a light most favorable to the conviction, we conclude that the jury reasonably found appellant guilty beyond a reasonable doubt of second-degree assault.

II

Appellant argues that the evidence was not sufficient to sustain his conviction of making terroristic threats, Minn. Stat. § 609.713, subd. 1 (2008). A person is guilty of making terroristic threats if he directly or indirectly threatens "to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror." *Id*. Appellant raises several arguments: (1) he exhibited mere transitory anger; (2) a person committed as mentally ill and dangerous cannot be held to the same standard as another person; (3) J.M.R. provoked him; and (4) the state hospital had a "responsibility and obligation" to institute procedures that would control its patients' behavior and that, generally, the state hospital's procedures are poor.

The last allegation can be disposed of summarily. Appellant relies on materials that were not introduced at trial that discuss events that occurred two years after the date of offense. We will not consider matters outside of the appellate record. *See* Minn. R. Civ. App. P. 110.01 (stating that the appellate record consists of "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings").

Although the concept of transitory anger has been discussed in several opinions, there is no definitive statement of what constitutes transitory anger.[1] A person commits the offense of terroristic threats either by having the purpose to terrorize someone or by acting in reckless disregard of the risk of terrorizing someone. *State v. Smith*, 825 N.W.2d 131, 135 (Minn. App. 2012), *review denied* (Minn. Mar. 19, 2013); Minn. Stat. § 609.713. A defendant's state of mind as to whether he is threatening another can be ascertained by the surrounding circumstances or a victim's reaction to the threat. *Jones*, 451 N.W.2d at 63; *see also State v. Schweppe*, 306 Minn. 395, 401, 237 N.W.2d 609, 615 (1975); *State v. Marchand*, 410 N.W.2d 912, 915 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987). The concept of "transitory anger" tends to negate the sense of purpose or the reckless disregard of one's conduct. *Jones*, 451 N.W.2d at 63.

Here, the surrounding circumstances indicate that appellant exhibited more than transitory anger. Appellant shouted at J.M.R. and slammed his door more than once; witnesses agreed that J.M.R. did not provoke or threaten appellant. Appellant lunged at both J.M.R. and D.T. with a sharpened ballpoint pen, narrowly missing them at first, and screamed that he was going to kill J.M.R. J.M.R. testified that he believed appellant was trying to kill him. Appellant concealed the pen in his sock, which suggests that he

[1] The concept of transitory anger was briefly discussed in *State v. Jones*, 451 N.W.2d 55 (Minn. App. 1990), *review denied* (Minn. Feb. 21, 1990). This court referred to the "relevant section of the Model Penal Code [that] indicates that it is not the purpose of the [terroristic threats] statute to authorize grave sanctions against the kind of verbal threat [that] expresses transitory anger [and that] lacks the intent to terrorize." *Id.* at 63 (quotation omitted).

intended to use it as a weapon and that he had not randomly grabbed any available object. This conduct is not consistent with transitory anger.

Appellant next argues that he cannot be found guilty of terroristic threats because he was committed as MID, which means he is unable to control his behavior. A person is "mentally ill and dangerous to the public" if (1) he is mentally ill and (2) because of this, he "presents a clear danger to the safety of others," either because of an overt act or because there is a substantial likelihood that he will commit an act "capable of inflicting serious physical harm on another." Minn. Stat. § 253B.02, subd. 17 (2012). But although appellant is MID, the standard for excusing a person from responsibility for the commission of a crime is whether "the person was laboring under such a defect of reason [from being mentally ill or mentally deficient] as not to know the nature of the act, or that it was wrong." Minn. Stat. § 611.026 (2008).[2] Under Minnesota law, a person suffering from a mental illness will not be excused from criminal liability unless "that mental illness caused such a defect of reason that at the time of the incident defendant did not know the nature of his act or that it was wrong." *State v. Bott*, 310 Minn. 331, 334, 246 N.W.2d 48, 51 (1976). Even when it is not disputed that a defendant suffers from a mental illness, sufficient evidence must be presented to demonstrate that he does not understand the nature of his act or that the act was wrong. *State v. Odell*, 676 N.W.2d 646, 648–49 (Minn. 2004). Appellant presented no evidence

[2] This statute was amended by 2013 Minn. Laws ch. 59, art. 3, § 18, at 295, replacing the words "mentally ill or deficient" with "persons with a mental illness or cognitive impairment."

suggesting that he did not know the nature of his act or that it was wrong, and he did not indicate before trial that he intended to rely on an insanity defense.

Appellant also argues that J.M.R. provoked him by continuing to interact with appellant despite his belief that J.M.R. was harassing him. Appellant's contention that J.M.R. was harassing him and provoking him by prolonging the contact instead of asking another staff person to intervene was presented to the jury, which rejected this evidence.

The evidence is sufficient to sustain a terroristic-threats conviction and to negate the defense of transitory anger.

III

Appellant argues that the district court erred by instructing the jury that appellant had a duty to retreat before he could claim self-defense. Because appellant did not object to the instruction, we review under a plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

A person may use reasonable force when resisting "an offense against the person." Minn. Stat. § 609.06, subd. 1(3) (2008). The elements of self-defense are: "(1) an absence of aggression or provocation; (2) an actual and honest belief that imminent death or great bodily harm would result; (3) a reasonable basis . . . for this belief; and (4) an absence of reasonable means to retreat or otherwise avoid the physical conflict." *State v. Soukup*, 656 N.W.2d 424, 428 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003). Although in general a person has a duty to retreat or to avoid conflict, there is "no duty to retreat from one's own home when acting in self-defense in

the home." *State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001). Appellant claims that he was acting in self-defense in his "home," his room at the state hospital.

Appellant's argument is disingenuous. *Glowacki* instructs that

> the lack of a duty to retreat does not abrogate the obligation to act reasonably when using force in self-defense. Therefore, in all situations in which a party claims self-defense, even absent a duty to retreat, the key inquiry will still be into the reasonableness of the use of force and the level of force under the specific circumstances of each case.

Id. In *State v. Carothers*, the supreme court stated, "Defense of dwelling and self-defense within the dwelling serve a defensive and not offensive purpose, and do not confer a license to kill or to inflict great bodily harm merely because the offense occurs within the home." 594 N.W.2d 897, 904 (Minn. 1999).

While it is not disputed that appellant resides in an assigned room, it is not clear that the same principles inherent in self-defense or defense of dwelling apply to his room at the security hospital. These self-defense principles arise out of the "castle doctrine," which permitted a person to prevent a forcible intrusion into his home. *State v. Hare*, 575 N.W.2d 828, 832 (Minn. 1998) (quotation omitted). As an inmate committed to the security hospital, appellant does not have the same rights of ownership or de facto ownership that a homeowner has; his right of movement in the hospital is limited and he is subject to various institutional rules that restrict his rights within the hospital. *See, e.g.*, Minn. Stat. § 253B.18 (2012) (setting forth procedures and conditions for people committed as MID).

And, while appellant may have a limited privacy interest in his own room, the assault here took place outside his room; appellant emerged from his room and attacked the security counselors in a common area at a time when they were not engaged in felonious or intrusive conduct. Appellant has not demonstrated that he was acting in self-defense, or acting with a defensive, rather than offensive, purpose, or acting reasonably under the circumstances, all principles of self-defense. The district court did not err by including the duty to retreat in its instruction.

IV

Appellant argues that the district court erred by entering convictions and sentences on both charges. According to the warrant of commitment, the district court entered convictions on both charges, but sentenced appellant only on the second-degree assault charge.

Minn. Stat. § 609.035, subd. 1 (2008) prohibits, with some exceptions not relevant here, imposition of multiple sentences for crimes committed during a single behavioral incident. Minn. Stat. § 609.04, subd. 1 (2008), states that a defendant may be "convicted of either the crime charged or an included offense, but not both." "An included offense" is a lesser degree of the same crime, an attempt to commit the charged crime or a lesser degree of the charged crime, a crime "necessarily proved if the crime charged were proved," or a "petty misdemeanor necessarily proved if the misdemeanor charge were proved." *Id.* Thus, section 609.035, subdivision 1, prohibits multiple sentences for a single behavioral incident, and section 609.04, subdivision 1, prohibits

multiple convictions for single act. *See State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012); *State v. Papadakis*, 643 N.W.2d 349, 357–58 (Minn. App. 2002).

The district court sentenced appellant on one conviction, for two charges that arise out of a single behavioral incident. This does not violate section 609.035, subdivision 1. Although appellant mentions section 609.04, subdivision 1, neither he nor the state discuss whether the charge of terroristic threats is an offense included in second-degree assault. "[W]hen considering whether multiple convictions are prohibited, the court compares the statutory elements of both crimes and determines whether the elements of the crimes are different." *State v. Holmes*, 778 N.W.2d 336, 340 (Minn. 2010). "An offense is necessarily included in a greater offense if it is impossible to commit the greater offense without committing the lesser offense." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006) (quotation omitted).

Second-degree assault requires (1) an act done to cause fear in another of immediate bodily harm or death; (2) a dangerous weapon; and (3) specific intent. Minn. Stat. § 609.222, subd. 1. The crime of terroristic threats requires a direct or indirect threat to commit a crime of violence in order to terrorize another; it does not require specific intent, but can be proved by showing a reckless disregard of the risk of causing terror. Minn. Stat. § 609.713, subd. 1. Although both offenses include a requirement that a defendant's action create terror or fear in the victim, proof of second-degree assault does not necessarily prove the crime of terroristic threats. *See* Minn. Stat. § 609.04, subd. 1. The crime of terroristic threats is not a lesser degree of second-degree

assault or an attempt to commit an assault. *See id.* We conclude, therefore, that the district court did not err by entering convictions on both charges.

V

We have fully considered appellant's pro se arguments and conclude that they are without merit. *See State v. Bartylla*, 755 N.W.2d 8, 22–23 (Minn. 2008) (stating that appellate court "will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority," particularly when "no prejudicial error is obvious on mere inspection").

Affirmed.