STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0659

State of Minnesota,
Respondent,

vs.

Kenwood Alan Lacey,
Appellant.

Filed May 19, 2014
Affirmed
Johnson, Judge

Beltrami County District Court
File No. 04-CR-12-2609

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

Timothy R. Faver, Beltrami County Attorney, Annie P. Claesson-Huseby, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Cleary, Chief Judge; and Rodenberg, Judge.

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

JOHNSON, Judge

A Beltrami County jury found Kenwood Alan Lacey guilty of making terroristic threats based on evidence that he talked about killing a person with whom he had a business relationship. On appeal, Lacey challenges the sufficiency of the evidence by arguing that his conduct is not prohibited by the statute criminalizing terroristic threats, and he also challenges one of the jury instructions. We conclude that Lacey's conduct is within the applicable statute and that the district court did not err by giving the challenged instruction. Therefore, we affirm.

FACTS

In 2012, Lacey was a customer of a credit union in the city of Bemidji for which C.R. was an employee. For various reasons, Lacey was unhappy about a loan he had received from the credit union a few years earlier.

On May 23, 2012, Lacey visited W.T., a former employee of the credit union, at W.T.'s workplace. Lacey began the conversation by informing W.T. of his difficulties with the loan and complaining that the credit union was forcing him into bankruptcy. Lacey expressed suspicions that C.R. wished to repossess Lacey's home so that C.R. could acquire it himself. Lacey asked W.T. for certain personal information about C.R., such as how to spell his last name and his home address.

As the conversation progressed, Lacey made several statements about C.R. that were violent in nature. According to W.T.'s trial testimony, Lacey said to W.T., "I should have just shot him in the head. That would have made things much easier a

couple years ago." Lacey also said, "If he got in an accident, . . . I would laugh," or, "[I]f I stood over him dying, I would laugh." Lacey said that he knew of a sinkhole where he could bury a body so that no one would find it. Lacey told W.T. that "it wouldn't be the first time [I] killed somebody." Lacey elaborated by saying that, while on a top-secret military mission, he had killed someone by shooting him between the eyes. Near the end of the conversation, Lacey said, "I guess I don't want his address, because if he were to wind up dead, I don't want to be a suspect; I don't want to be blamed for it."

After Lacey's visit, W.T. informed his supervisors of Lacey's statements. W.T. and his manager then visited C.R.'s office to inform him of Lacey's statements. C.R. contacted his supervisors, who contacted law enforcement. An investigator spoke to Lacey by telephone the next day. Lacey admitted to the investigator that he had made the statements reported by W.T. but denied that he intended to cause any harm to C.R.

In August 2012, the state charged Lacey with one count of making terroristic threats, in violation of Minn. Stat. § 609.713, subd. 1 (2010). The case was tried in one day in December 2012. The jury found Lacey guilty. The district court imposed a sentence of 60 days in jail. Lacey appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Lacey argues that the evidence is insufficient to support a conviction of making terroristic threats.

When considering a claim of insufficient evidence, this court conducts "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 a verdict of guilty. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). "[W]e 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 that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100. If an appellant challenges the evidence on the ground that his conduct is not prohibited by the applicable statute, the appellant's argument raises an issue of statutory interpretation, to which this court applies a *de novo* standard of review. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002); *State v. Smith*, 825 N.W.2d 131, 136 (Minn. App. 2012), *review denied* (Minn. Mar. 19, 2013).

The applicable statute provides, "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 making a terroristic threat. Minn. Stat. § 609.713, subd. 1. For purposes of this statute, a "threat" is "a declaration of an intention to injure another or his property by some unlawful act." *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975). "[T]he question of whether a given statement is a threat turns 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).

On appeal, Lacey does not dispute that he made the statements to which the state's witnesses testified, and he also does not dispute that his statements referred to crimes of violence. He argues that he did not commit the charged offense because he talked merely about *previous* incidents and his *previous* desire to harm C.R. Lacey contends that a statement referring to a crime of violence is not prohibited by section 609.713, subdivision 1, unless the statement refers to a *future* crime of violence. For this proposition, Lacey relies on *State v. Murphy*, 545 N.W.2d 909 (Minn. 1996), in which the supreme court stated that the offense of making terroristic threats requires evidence of a communication showing an intention "to commit a *future* crime of violence." *See id.* at 916.

We note that the issue for the supreme court in *Murphy* was whether the appellant committed the offense of making terroristic threats by non-verbal actions, such as leaving dead animals at victims' homes, planting fake bombs, and vandalizing vehicles. *See id.* at 912, 914. The supreme court in *Murphy* was not so concerned with the distinction between a previous crime of violence and a future crime of violence. *See id.* at 914-16. Nonetheless, other cases suggest that a terroristic threat must at least imply a future crime of violence. For example, in *Schweppe*, the supreme court sought to determine whether the appellant had made "a declaration of an intention to injure another or his property by some unlawful act." 306 Minn. at 399, 237 N.W.2d at 613. Lacey's argument is, in essence, that a person may not be found guilty of making a terroristic threat so long as he speaks about crimes of violence in the past tense. If Lacey's argument were adopted by this court or the supreme court, it would create a safe harbor for persons who deliberately

confine their statements to the past tense, even if they intend to convey a threat of a future crime of violence. Lacey's argument is inconsistent with the general rule that a statement is a terroristic threat if "in its context [it] would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Id.* (quotation omitted). That is the test we must apply in this appeal.

The state's witnesses testified about their understanding of Lacey's intentions based on his statements. W.T. testified that Lacey seemed "somewhat serious" when he made the statements, even though he was laughing at the same time. W.T. testified that Lacey's comments made him uncomfortable and worried because he knew C.R. had small children. W.T.'s subsequent actions show that he was sufficiently concerned that he decided to share the information so that others could take action. C.R. testified that he was "scared for [his] life" after W.T. informed him of Lacey's statements and that he also feared for the safety of his family and other employees of the credit union. C.R.'s response was informed in part by the fact that Lacey previously had used inappropriate language and made threats directly to C.R. On one occasion, C.R. had asked Lacey to leave the credit union office because of his behavior. After W.T.'s warning, C.R. obtained a harassment restraining order against Lacey. The credit union later hired security officers for each of its branch offices.

The question is whether Lacey's statements, "in context" had "a reasonable tendency to create apprehension" that he might have "act[ed] according to its tenor." *See id.* (quotation omitted). The violent nature of Lacey's statements is a strong reason why a person reasonably would have such an apprehension. In addition, the state's witnesses

testified about their subjective apprehension after hearing the statements. C.R.'s previous interactions with Lacey provided context, which reasonably increased C.R.'s apprehension. We believe that the state's witnesses' apprehension was not unreasonable. The fact that Lacey's statements were phrased in the past tense did not necessarily alleviate their apprehension.

Thus, the evidence is sufficient to allow a jury to conclude that Lacey engaged in the offense of making a terroristic threat.

II. Jury Instruction

Lacey also argues that the district court erred when instructing the jury on the requirement of a predicate crime of violence.

A district court must instruct the jury in a way that "fairly and adequately explain[s] the law of the case" and does not "materially misstate[] the applicable law." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). In a criminal case, the jury instructions "must define the crime charged and . . . explain the elements of the offense." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). A district court has "considerable latitude" in selecting language for jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). Accordingly, we apply an abuse-of-discretion standard of review to a district court's jury instructions. *Koppi*, 798 N.W.2d at 361.

Before trial, the district court and counsel discussed how the jury should be instructed concerning the crime of violence that is required by the statute criminalizing terroristic threats. Lacey's attorney requested that the district court refer generically to a threat of "a crime of violence." Later, at the instructions conference, the district court

decided to refer specifically to a threat of the crime of homicide. Lacey's attorney did not object. The district court gave the following instruction on the first element:

> Number one, that Mr. Lacey threatened, directly or indirectly, to commit a crime of violence. You are instructed that the Statutes of Minnesota provide that homicide is a crime of violence. It need not be proven that the Defendant had the actual intention of carrying out the threat.

On appeal, Lacey argues that the district court erred because it did not "instruct the jury on either the definition or the elements of" homicide. Lacey's appellate counsel concedes that Lacey's trial counsel did not preserve this particular argument. Accordingly, the plain-error rule applies. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Lacey relies primarily on *State v. Jorgenson*, 758 N.W.2d 316 (Minn. App. 2008), a terroristic-threats case in which this court concluded that a district court plainly erred by not instructing the jury on the definition and elements of the predicate crime of violence. *See id.* at 324. Despite its superficial similarities, *Jorgenson* nonetheless is distinguishable. In that case, the predicate crime of violence was assault. *Id.* at 321. The district court gave an instruction that referred generically to the crime of assault. *Id.* at 323. But not every type of assault is a crime of violence. By statute, first-, second-, and third-degree assault are crimes of violence, but fourth- and fifth-degree assault are not crimes of violence. *Id.* (citing Minn. Stat. § 609.1095, subd. 1(d) (2006)). For that reason, the jury instructions in *Jorgenson* needed to specify the elements of the required types of assault so that the jury would not convict the defendant of threatening fourth- or fifth-degree assault. *Id.* at 323-24. Thus, the district court erred by failing to specify

which type of assault was threatened. *Id.* at 324. In this case, however, the predicate crime of violence is homicide. By statute, every type of homicide is a crime of violence. Minn. Stat. § 609.1095, subd. 1(d) (2010). For that reason, a more detailed instruction stating the definition and elements of homicide was unnecessary. As is, the district court's jury instruction ensured that Lacey would not be convicted for threatening a crime that was not a crime of violence.

Thus, the district court did not err by not instructing the jury on the elements of homicide. Because the district court did not err, we need not analyze all requirements of the plain-error rule.

Affirmed.