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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1046

State of Minnesota,
Respondent,

vs.

Holyfield Ikeyan James,
Appellant.

Filed June 23, 2014
Reversed and remanded
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-12-41236

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

Susan L. Segal, Minneapolis City Attorney, Jennifer Saunders, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Tim M. Phillips, Law Office of Joshua R. Williams, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Klaphake, 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

HALBROOKS, Judge

Appellant Holyfield Ikeyan James was tab-charged with one count of misdemeanor theft, in violation of Minn. Stat. § 609.52, subd. 2(a)(1) (2102), based on an incident that occurred at a grocery store in Minneapolis. Before the jury trial started, and over appellant's objection, the state tab-charged a count of disorderly conduct, in violation of Minneapolis, Minn., Code of Ordinances § 385.90 (2013). The jury acquitted appellant of theft but found him guilty of disorderly conduct. Appellant files this appeal from the judgment of conviction asserting that his conviction must be reversed due to (1) error in the jury instructions and (2) insufficient evidence. We agree that there was error in the jury instructions and reverse and remand for a new trial.

FACTS

According to trial testimony, on December 15, 2012, at approximately 8:45 p.m., J.V., a meat cutter at the grocery store, was moving packages of chicken specials from a display area by the main entrance to the meat department in the back of the store. J.V. testified that appellant asked him what he was doing with the chicken, and J.V. responded that he was taking the daily special to its regular case. Appellant asked if he was going to throw the chicken away, and J.V. replied that he was not. J.V. recalled that appellant wanted to know if he could have two packages and speculated this was because J.V. had said it was the best deal of the week. J.V. remembered telling appellant, "Sure, here's the best ones," meaning the best sellers, and handed appellant two packages of the chicken special. But J.V. could not recall if appellant asked if he could have them for free. J.V.

maintained that he did not tell appellant that the chicken was free. He stated that the chicken was not expired, that he did not have authority to give food away, and that the store does not give expired food to customers. J.V. agreed that there may have been a misunderstanding with appellant about the chicken. A surveillance video of the encounter between J.V. and appellant was admitted as a trial exhibit and is consistent with J.V.'s testimony.

After his encounter with appellant, J.V. continued putting the chicken specials in a cart and moved the chicken to the meat case in the back of the store. While there, J.V. heard a loud commotion in the front of the store. He went to the front of the store, saw a police officer, thought everything was under control, and continued what he was doing. In response to the prosecutor's leading questions, J.V. agreed that it was appellant who was doing the yelling and that it disturbed his "peace and quiet."

Another store employee, K.E., who was working as a supervisor at the time of the incident, testified that he saw appellant walk past the cash registers with some items, exit the first set of doors, and stand in the vestibule. According to K.E., appellant was talking loudly as he was leaving the store, and he was "disturbing the, like, the peace in the store, like, basically everyone was looking toward what he was saying and doing." Appellant re-entered the store, talking loudly. K.E. testified that he did not understand what was going on and could not recall what appellant was saying. K.E. only knew that appellant was loud and that the loudness was disruptive and disturbed his "peace and enjoyment." K.E. contacted Sergeant Follano, the police officer who was doing security work for the

store. Two other surveillance videos that were received as a trial exhibit show appellant walking past the cash registers and exiting the first set of doors.

Sergeant Follano testified that he approached appellant, who was "initially cordial." After Follano asked appellant for a receipt and identification, "he became more animated and started shouting across the store." In response to defense counsel's questions, Follano testified that appellant was shouting "something to the effect of 'I'm being set up. The chicken's expired. That guy over there told me that I could have it for free,'" and appellant pointed to J.V. Follano testified that several cashiers looked in their direction and "appeared to be alarmed by the evolving circumstances." A surveillance video shows several people glancing in their direction but not looking particularly alarmed.

Appellant testified at trial. According to appellant, he asked J.V. if the chicken was expired and if he could have some. J.V. said, "Yeah," so he took three packages, thanked J.V., and started to leave the store. As appellant was walking by the cashiers, he said, "Hey guys, see [J.V.] give me some stuff." Appellant testified that the supervisor "gave some weird attitude and that grabbed my attention." Appellant tried to explain that J.V. gave him the chicken and pointed to the back of the store where J.V. was working. Appellant testified he never fully exited the store because he was waiting for J.V. to verify his story. As appellant was going back inside the store, Sergeant Follano arrived. Appellant was under the impression that Sergeant Follano was only paying attention to K.E. and not listening to appellant's explanation. Appellant asked them to "bring the butcher," but they ignored him. So he said it louder. Appellant denied intending to steal

the chicken and denied that he was attempting to disturb the peace and quiet of the store. This appeal follows the jury's verdict of guilty of disorderly conduct.

D E C I S I O N

At trial, appellant requested a "fighting words" jury instruction, arguing that the alleged disorderly conduct was based on the shouting of words and is, therefore, protected under the First Amendment to the U.S. Constitution. Appellant explained that the purpose of the instruction is to advise the jury that "if words are introduced, even if there is other conduct introduced," the jury is instructed that it cannot convict the defendant on words unless they are "fighting words." Because the evidence in the record was that the disorderly conduct charge was based on the loud and disruptive manner of speech and not on the content of appellant's comments, the district court denied the requested jury instruction and instructed the jury consistent with the language of the ordinance.

"The district court has broad discretion in determining jury instructions, and we will not reverse where jury instructions 'overall fairly and correctly state the applicable law.'" *Stewart v. Koenig*, 783 N.W.2d 164, 166 (Minn. 2010) (quoting *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002)). "A defendant is entitled to a specific instruction if the trial evidence supports the instruction and the substance of the proposed instruction is not already contained in instructions chosen by the district court." *State v. Nelson*, 806 N.W.2d 558, 564 (Minn. App. 2011), *review denied* (Minn. Feb. 14, 2012). The refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d

43, 50 (Minn. 1996). In our analysis, "we review the jury instructions in their entirety to determine whether the instructions fairly and adequately explain the law of the case." *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quotation omitted). A jury instruction that materially misstates the law, however, is error. *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012).

Appellant was convicted of violating the Minneapolis disorderly conduct ordinance. The ordinance prohibits, in part, engaging in or preparing, attempting, offering or threatening to engage in, "any riot, fight, brawl, tumultuous conduct, act of violence, or any other conduct which disturbs the peace and quiet of another save for participating in a recognized athletic contest." Minneapolis, Minn., Code of Ordinances § 385.90.

Similarly, Minnesota's disorderly conduct statute prohibits engaging in, among other things, "offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others." Minn. Stat. § 609.72, subd. 1(3) (2012). The supreme court has held that this statute as written violates the First Amendment because it criminalizes vulgar, offensive, and insulting language. *See In re Welfare of S.L.J.*, 263 N.W.2d 412, 416-19 (Minn. 1978). But the supreme court upheld the constitutionality of the statute by "construing it narrowly to refer only to 'fighting words.'" *Id.* at 419 (holding words, "F--k you pigs," spoken by 14-year-old were vulgar but not "fighting words" when directed at police officers sitting in a squad car 15-30 feet away). This narrowed construction was applied

to the Minneapolis disorderly conduct ordinance at issue in this case in *State v. Lynch*, 392 N.W.2d 700, 704 (Minn. App. 1986) (construing the language of the city code "to refer only to 'fighting words'").

"Fighting words" have been defined as "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," words that inflict injury by their "very utterance," or words that tend to incite an immediate breach of the peace. *S.L.J.*, 263 N.W.2d at 418. The test of whether vulgar, offensive, and insulting words are "fighting words" depends on the facts and circumstances of the case. *See Lynch*, 392 N.W.2d at 704-05 (holding Lynch's denunciation of police as "motherf--king pigs" constituted "fighting words" because of "the additional factor" of the club-brandishing crowd drawn by the confrontation between Lynch and the police).

Appellant argues that the district court's jury instruction on the elements of disorderly conduct was inadequate because he "was accused of both physical acts *and* words," and the district court precluded him from presenting his theory of the case by not including a "fighting words" instruction. Appellant requested an instruction consistent with the bracketed portion of 10 *Minnesota Practice,* CRIMJIG 13.121 (2006), which provides:

> [If you find that the defendant's conduct consisted only of offensive, obscene, or abusive language, you must also find that the words used were "fighting words." "Fighting words" are words that constitute personally offensive epithets that, when spoken to the ordinary person, under the particular circumstances of the case, are, as a matter of common knowledge, inherently likely to provoke a violent reaction or

> incite an immediate breach of the peace by those to whom such words are addressed. The offense may be based upon the utterance of fighting words alone without resulting in actual violence. The focus is upon the nature of the words and the circumstances in which they were spoken, rather than upon the actual response.]

The state counters that appellant was not entitled to a "fighting words" jury instruction because "the evidence at trial did not support that instruction."

Although it appears that the state only questioned its witnesses about the volume of appellant's yelling and its effect on people in the store, our review of the record reflects that there was trial testimony conveying the substance of what appellant said. Under the facts of this case, appellant's words, "bring the butcher," and his conduct, loudly yelling, were a package that required the jury to consider if the words spoken constituted "fighting words." *See State v. Klimek*, 398 N.W.2d 41, 43 (Minn. 1986) (considering appellant's words and conduct, including the loud manner in which he expressed himself, as a package). We, therefore, hold that the district court erred in refusing to give a "fighting words" jury instruction.

"An error in instructing the jury is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury's verdict." *State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013) (quotation omitted).

> If, after an analysis of the record and a consideration of all relevant factors, we conclude that the erroneous omission of the instruction might have prompted the jury, which is presumed to be reasonable, to reach a harsher verdict than it might have otherwise reached, defendant must be awarded a new trial.

State v. Shoop, 441 N.W.2d 475, 481 (Minn. 1989).

After carefully reviewing the record, including the multiple surveillance videos, we are persuaded that the omission of an instruction that would have advised the jury that appellant's words had to be "fighting words" in order to support a charge of disorderly conduct was error. *See State v. Pendleton*, 567 N.W.2d 265, 270-71 (Minn. 1997) (reversing conviction when there was evidence to support defense theory, the instructions misstated the law, and the error was not harmless because the erroneous jury instruction eliminated the defense from the jury's consideration). Because we reverse and remand for a new trial due to an error in jury instructions, we do not reach appellant's additional claim of error.

Reversed and remanded.