STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1743

State of Minnesota,
Respondent,

vs.

Jomar Haines,
Appellant.

Filed December 23, 2008
Affirmed in part, reversed in part, and remanded
Johnson, Judge

Dakota County District Court
File No. KX-06-2798

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Thomas E. Lockhart, Assistant County Attorney, Dakota County Judicial Center, 1560 West Highway 55, Hastings, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Marie Wolf, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

JOHNSON, Judge

A Dakota County jury found Jomar Haines guilty of felony domestic assault and making terroristic threats. The district court imposed concurrent sentences of 28 months on the domestic-assault conviction and 33 months on the terroristic-threats conviction. On appeal, Haines argues that the district court (1) misstated the law concerning the requirement that a jury's verdict be unanimous, (2) erroneously admitted three exhibits, and (3) erroneously determined his sentence. We conclude that the district court did not err with respect to the first or second issue but that the district court erred when applying the sentencing guidelines. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

Haines and A.H. began dating each other in early 2006. Shortly thereafter, Haines moved into A.H.'s residence in the city of Eagan. The evidence presented at trial indicates that, on June 27, 2006, they had a heated argument at the residence. According to A.H.'s testimony, Haines pushed her and grabbed her throat. Haines threw A.H. onto the bed and then got on top of her and choked her. A.H. managed to get away from Haines and called 911, but she quickly hung up because she feared Haines's reaction.

Soon thereafter, Haines left the residence, at which time A.H. called 911 again. Officer Todd Kirchgatter of the Eagan Police Department went to A.H.'s residence, but she did not open the door because she was afraid that Haines might retaliate against her for calling the police. At approximately the same time, Officer Patrick Hogan, who was

two to three blocks from A.H.'s residence, saw a man walking along a road who matched the description of Haines that A.H. had given to the police. Officer Hogan stopped the man, identified him as Haines, and notified Officer Kirchgatter, who went to Officer Hogan's location and talked with Haines. Haines admitted that he had argued with A.H. but denied that a physical altercation had taken place. After speaking with Haines, the officers saw him make a call from his cellular telephone. Immediately thereafter, Officer Kirchgatter received a call from dispatch to return to A.H.'s residence because Haines had just threatened A.H. by telephone. When Officer Kirchgatter spoke with A.H. at her residence, she told him that Haines had physically assaulted her that morning and that she had called 911 most recently because Haines had called her and threatened her.

In September 2006, the state charged Haines with fifth-degree felony assault in violation of Minn. Stat. § 609.224, subd. 1(2) (2004) and making terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2004). Before trial, the felony-assault charge was amended to a charge of felony domestic assault. Trial was held for two days in June 2007. The jury returned verdicts of guilty on both counts. In July 2007, the district court sentenced Haines to 28 months on the domestic-assault charge and 33 months on the terroristic-threats charge, with the sentences to run concurrently. Haines appeals.

D E C I S I O N

I. Statements Concerning Unanimity

Haines first argues that the district court made two misstatements to the jury concerning unanimous jury verdicts. The first statement was made during voir dire; the second was made when instructing the jury.

Defendants in criminal cases have a right to a unanimous verdict. *Andres v. United States*, 333 U.S. 740, 748, 68 S. Ct. 880, 884 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply"); Minn. R. Crim. P. 26.01, subd. 1(5). Two lines of cases provide guidance to district courts on this subject. The first line of cases requires that any verdict that is rendered be unanimous. *See State v. Hysell*, 449 N.W.2d 741, 744-45 (Minn. App. 1990) (approving jury instruction directing that verdict must be unanimous), *review denied* (Minn. Mar. 15, 1990); *State v. True*, 378 N.W.2d 45, 48 (Minn. App. 1985) (holding that comments regarding unanimous verdict "merely explained the jury's role"); *see also State v. Plantin*, 682 N.W.2d 653, 662 (Minn. App. 2004) (holding that defendant's right to unanimous verdict was not violated, despite absence of instruction concerning unanimous verdict, because jury was polled following verdict), *review denied* (Minn. Sept. 29, 2004).

The second line of cases ensures that a deadlocked jury is not pressured into returning a verdict if there is not unanimity. *See Jenkins v. United States*, 380 U.S. 445, 446, 85 S. Ct. 1059, 1060 (1965) (reversing conviction because of instruction to deadlocked jury that "You have got to reach a decision in this case"); *State v. Martin*, 297 Minn. 359, 372-73, 211 N.W.2d 765, 772-73 (1973) (reversing conviction because of instruction to deadlocked jury that case must be decided); *State v. Petrich*, 494 N.W.2d 298, 300 (Minn. App. 1992) (same), *review denied* (Minn. Feb. 23, 1993). The second line of cases addresses the risk that the district court might improperly "intrud[e] into the jury's deliberations and . . . coerc[e] a minority among a deadlocked jury to enter into a unanimous verdict." *State v. Fidel*, 451 N.W.2d 350, 355 (Minn. App. 1990), *review denied*

(Minn. Apr. 13, 1990). But a district court is not required to spell out to a jury that a deadlock is permissible. *State v. Peterson*, 530 N.W.2d 843, 846 (Minn. App. 1995).

A. Statement During Voir Dire

During voir dire, the district court stated to the jury:

> I find it interesting that in jury trials you can take twelve persons from different walks of life and different economic stations, different cultural backgrounds, religious backgrounds, you can put twelve people together and invariably it will be a unanimous verdict. I can say that in twenty-four years as a Judge, and before that as a trial lawyer, I have only had two hung juries in that entire time. So, I think that it's amazing that you can take reasonable people and put them together and they come out with a reasonable unanimous decision. In this case, that is what it has to be, it has to be unanimous. There is no ten/one verdict or eleven/one verdict or what have you, it has to be a unanimous verdict one way or the other.

Haines did not object to this statement. Accordingly, we review Haines's argument for plain error. *See State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007).

Haines contends that the district court's statement suggested to the jurors that they were required to reach a unanimous verdict before they would be excused from service. The state responds by describing the statement as "informative commentary to the jury by the district court judge about his experience in the court system." The district court's statement that "it has to be a unanimous verdict one way or the other" is an accurate statement of the law. In addition, the district court's statement is similar to the statement in *True*, that a verdict "shouldn't be a verdict of six or seven or eight of you [but rather] must be a unanimous verdict," which this court reasoned "merely explained the jury's role." *True*, 378 N.W.2d at 48. Thus, the district court's statement does not violate the

first line of cases cited above concerning a criminal defendant's right to a unanimous verdict. *See Andres*, 333 U.S. at 748, 68 S. Ct. at 884; Minn. R. Crim. P. 26.01, subd. 1(5).

The second line of cases described above does not apply because the statement was not made to the jury while the jury was deadlocked or at any other crucial juncture in the trial when the jury was struggling to reach a verdict. *See*, *e.g.*, *Jenkins*, 380 U.S. at 446, 85 S. Ct. at 1060. In fact, the statement was made before the jury had been selected. Nonetheless, district courts should avoid making statements that might cause jurors to believe that a disagreement among them must be resolved because they are required to return a unanimous verdict regardless whether unanimity actually exists. *See State v. Vann*, 372 N.W.2d 750, 753 (Minn. App. 1985) (affirming conviction after finding that predeliberation comments, although questionable, were neither coercive nor prejudicial), *review denied* (Minn. Sept. 26, 1985). Thus, the district court's statement during voir dire was not erroneous.

B. Jury Instruction

After the submission of the evidence and closing arguments, the district court instructed the jury, in part, as follows:

> Each of you must decide the case for yourself but do so only after you have fully considered the views of your fellow jurors. Reexamine your own views and change your mind if you decide your original view was mistaken but do not change your mind just because other jurors disagree or simply because of pressure to return verdicts. Your verdicts must be unanimous.

Haines did not object to the instruction. Haines concedes that the plain-error test applies. *See Vance*, 734 N.W.2d at 655.

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

Haines contends that the district court's statement was coercive because it instructed the jury that it had to reach a unanimous verdict "one way or the other." He reasons that the district court's instruction was a "watered-down version" of the pattern jury instruction, which provides:

> In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous.
>
> You should discuss the case with one another, and deliberate with a view toward reaching agreement, if you can do so without violating your individual judgment. You should decide the case for yourself, but only after you have discussed the case with your fellow jurors and have carefully considered their views. You should not hesitate to reexamine your views and change your opinion if you become convinced they are erroneous, but you should not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict.

10 *Minnesota Practice*, CRIMJIG 3.04.

The differences between the pattern jury instruction and the district court's instruction are minor. The statement, "Your verdicts must be unanimous," appears at the end of the district court's instruction instead of the beginning. The language concerning jurors' personal views is worded slightly differently but communicates the same concept. The district court's instruction includes the basic substance of the pattern jury instruction, including the concept that a verdict must be unanimous. Thus, the district court's instruction was not erroneous.

II. Admissibility of Text Messages

Haines next argues that the state failed to establish a foundation for three exhibits that were admitted into evidence. The exhibits at issue consist of three photographs of the screen of A.H.'s cellular telephone when it was displaying information about Haines and text messages that he sent to her.

"The requirement of authentication or identification as a condition precedent to admissibility [of an exhibit] is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). The evidence supplying the foundation may be the testimony of a witness with knowledge "that a matter is what it is claimed to be." Minn. R. Evid. 901(b)(1). The foundational evidence may include evidence of "[d]istinctive characteristics," such as "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Minn. R. Evid. 901(b)(4). To obtain the admission of an exhibit, the state need not negate "all possibility of tampering or substitution" but rather must show only that "it is reasonably probable that tampering or

substitution did not occur." *State v. Johnson*, 307 Minn. 501, 505, 239 N.W.2d 239, 242 (1976). "Contrary speculation may well affect the weight of the evidence accorded it by the factfinder but does not affect its admissibility." *Id.* "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Exhibit 1 shows the profile and telephone number of "Lil Joe" that was programmed into A.H.'s cellular telephone. A.H. testified that "Lil Joe" was Haines and that the telephone number associated with the profile for "Lil Joe" was Haines's telephone number.

Exhibit 2 shows a text message that was received by A.H.'s cellular telephone from "Lil Joe" in which he ridicules her and essentially admits that he choked her. A.H. testified that she recognized Haines's telephone number.

Exhibit 3 shows a text message that was received by A.H.'s cellular telephone from "Lil Joe" in which he ridicules her for contacting law enforcement. A.H. again testified that she recognized Haines's telephone number. She also testified that the text message in exhibit 3, as well as that in exhibit 2, was "[e]xactly how he would speak to me."

Following A.H.'s testimony concerning each of the three exhibits, the state offered the exhibits, Haines objected on grounds of lack of foundation, and the district court sustained the objections. At a later point in the trial, Officer Kirchgatter testified that

Haines had called him from the same cellular telephone number that was programmed into A.H.'s cellular telephone under the profile for "Lil Joe." The next witness, Detective Douglas Matteson of the Eagan Police Department, testified that A.H. came to his office on September 25, 2006, and showed him the text messages on her cellular telephone and told him that she had received the messages from Haines. Detective Matteson testified that he observed the text messages and then took photographs of each message, which became the trial exhibits. The state then re-offered the three exhibits, and the district court admitted them over Haines's objection.

The state laid a proper foundation for the admission of exhibit 1 with the testimony of two witnesses, A.H. and Officer Kirchgatter, that the telephone number shown on A.H.'s profile for "Lil Joe" had been Haines's cellular telephone number, and the testimony of Detective Matteson concerning the circumstances in which the photographs were taken. The state laid a proper foundation for the admission of exhibit 2 with the testimony of A.H. and the testimony of Detective Matteson that he observed and photographed the text message on September 24, 2006, when A.H. came to his office. Detective Matteson also testified that a cellular telephone will automatically identify the cellular telephone from which a text message is received if that telephone's number is programmed into the receiving telephone. Likewise, the state laid a proper foundation for the admission of exhibit 3 with testimony of the same nature. Thus, the district court did not abuse its discretion in admitting exhibits 1, 2, and 3.

III. Calculation of Sentence

Haines last argues that the 33-month sentence on his terroristic-threats conviction is three months longer than allowed by law. This court conducts a de novo review of the interpretation of the sentencing guidelines. *State v. Holmes*, 719 N.W.2d 904, 907 (Minn. 2006).

The information before the district court at sentencing was mistaken or confused in two respects. First, the district court likely considered an incorrect guidelines range. A conviction for terroristic threats is a level-four offense, which, with a criminal-history score of six or more, leads to a sentencing range of 26 to 36 months and a presumptive sentence of 30 months. Minn. Sent. Guidelines IV, V (2006). The state concedes, however, that it incorrectly advised the district court at the sentencing hearing that the presumptive sentencing range for the terroristic-threats offense was 29 to 39 months.

Second, the sentencing guidelines provide that an additional three months must be added to an offender's sentence if (1) a custody-status point is assigned and (2) "the criminal history points that accrue to the offender without the addition of the custody status point places the offender in the far right hand column of the Sentencing Guidelines Grid." Minn. Sent. Guidelines II.B.2. In this case, the district court apparently assigned a custody-status point to Haines because the district court added three months to the sentence. The state concedes, however, that a custody-status point should not have been assigned to Haines. It would have been error for the district court to add three months to Haines's sentence on the basis of a custody-status point.

Thus, the district court received incorrect information concerning the applicable sentencing range and erroneously assigned Haines a custody-status point. It is true that the sentencing worksheet showed the correct sentencing range, and it also is true that the district court was correctly informed that the presumptive sentence is 30 months. Nonetheless, the incorrect range information and the erroneous assignment of a custody-status point may have affected the district court's selection of the 33-month sentence. As a consequence, we reverse Haines's sentence for terroristic threats and remand to the district court for resentencing. We note that the district court also had the erroneous understanding that Haines's criminal-history score was seven, although it actually was eight. On remand, the district court shall not impose a sentence exceeding 33 months, which the state conceded at oral argument should be the upper limit of Haines's sentence. *See State v. Coe*, 411 N.W.2d 180, 182 (Minn. 1987) (remanding for resentencing and instructing district court to not exceed original sentence imposed).

Affirmed in part, reversed in part, and remanded.