**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-0070**

State of Minnesota,
Respondent,

vs.

Scott A. Brevik,
Appellant.

**Filed March 31, 2009**
**Affirmed in part and reversed in part**
**Bjorkman, Judge**

Clay County District Court
File No. CR-07-312

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Brian J. Melton, Clay County Attorney, Clay County Courthouse, 807 North 11th Street, P.O. Box 280, Moorhead, MN 56561 (for respondent)

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

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Bjorkman, Judge.

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

**BJORKMAN**, Judge

Appellant challenges the sufficiency of the evidence underlying his convictions of assault and terroristic threats. Because the evidence is sufficient to support his assault conviction but insufficient to support his terroristic-threats conviction, we affirm in part and reverse in part.

## FACTS

On June 18, 2007, appellant Scott Brevik and his wife, A.B., got into a heated argument while discussing water damage in their basement. The verbal exchange culminated in Brevik pulling down his pants, jumping up and down, and screaming at A.B. to "Get out of my a--." Brevik then "stormed past" A.B. and out of the house.

A.B. concluded that Brevik was heading toward his van and followed him out of the house to retrieve her wallet from the van. She found Brevik sitting in the van, which was parked just in front of the garage. A.B. tapped on the window and asked Brevik to hand her the wallet. Brevik rolled down the passenger-side window, threw the wallet out, and began backing out of the driveway. A.B. crossed the driveway to retrieve the wallet from the yard and called Brevik a "jerk." Brevik, who had driven "[a]bout halfway down" the driveway, reversed course and "started charging up" the driveway. A.B. heard Brevik "ram[] the gas." Brevik drove the van up to the edge of the grass, approximately five feet from A.B. She "jumped back," and Brevik began backing down the driveway again.

Brevik had almost reached the sidewalk when A.B. took two steps toward the van and called him "a goddamn a--hole." A.B. walked toward the house where she had noticed their son, T.B. Brevik "charged" in A.B.'s direction again. Upon hearing the engine rev, A.B. felt "very much scared" for herself and her son, grabbed T.B. and pulled him inside the gate to their yard. Brevik stopped the van approximately two feet from where A.B. and T.B. had been standing. A.B. looked at Brevik's face and saw "[a]nger, hate, red, very upset." She was "extremely frightened" and asked Brevik whether he wanted her to call the police. Brevik backed down the driveway again, "flipped [A.B.] the bird," and drove off.

A.B. did not immediately call the police, instead deciding to wait and see how Brevik acted when he returned. Brevik came home that evening and went straight to the couple's bedroom and closed the door. When he refused to talk about what happened, A.B. called 911. The responding police officers found a "very distraught" A.B. in the front yard and arrested Brevik.

Brevik was charged with two counts of second-degree assault (one concerning A.B. and one concerning T.B.), in violation of Minn. Stat. § 609.222, subd. 1 (2006), and one count of child endangerment, in violation of Minn. Stat. § 609.378, subd. 1(b)(1) (2006). On the first day of trial, the state sought to add a count of terroristic threats under Minn. Stat. § 609.713, subd. 1 (2006). The district court granted the request over Brevik's objection and granted the state's later motion to dismiss the count of second-degree assault concerning T.B.

At trial, A.B. testified that she and Brevik argued often. She explained that the arguments were upsetting but generally nonviolent. A.B. testified that during an argument in the summer of 2006, Brevik "slammed" a door on her head. Because it happened as they were arguing, she did not believe his claim that he had not seen her.

The jury found Brevik guilty of all three charges. The district court sentenced Brevik to 21 months' imprisonment for the assault conviction and one year and one day for the terroristic-threats conviction but stayed imposition of the sentences and placed Brevik on probation. The district court also sentenced Brevik to 365 days in jail for the child-endangerment conviction. This appeal follows.

**D E C I S I O N**

Brevik challenges the sufficiency of the evidence underlying his convictions of second-degree assault and terroristic threats. In considering a claim of insufficient evidence, "our review on appeal is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). "We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for . . . the [requirement of] proof beyond a reasonable doubt, could reasonably conclude that [a] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

## I. Second-degree assault

Brevik argues that the evidence is insufficient to support his assault conviction because there is no evidence he intended to cause A.B. fear. "Assault is a specific intent crime." *State v. Edrozo*, 578 N.W.2d 719, 723 (Minn. 1998). A conviction of second-degree assault requires proof beyond a reasonable doubt that the defendant (1) acted "with intent to cause fear in another of immediate bodily harm or death," or intentionally inflicted or attempted to inflict bodily harm upon another, Minn. Stat. § 609.02, subd. 10 (2006), (2) with a dangerous weapon. Minn. Stat. § 609.222, subd. 1. The phrase "'with intent to' . . . means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(4) (2006).

Since direct evidence of intent is almost never available, *State v. Bouwman*, 328 N.W.2d 703, 705 (Minn. 1982), a jury may infer intent "from the totality of circumstances." *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989). Intent is "generally proved circumstantially[] by drawing inferences from the defendant's words and actions." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). Events before and after the alleged offense may provide a basis for finding intent. *Davis v. State*, 595 N.W.2d 520, 526 (Minn. 1999). And "the effect of the assault on the victim is frequently introduced at trial as evidence of the defendant's intent, [although] it is not essential for a conviction." *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

We conclude that the evidence presented at trial was sufficient for the jury to reasonably conclude that Brevik intended to cause A.B. fear of immediate bodily harm or

death. Brevik drove at least half the length of the driveway toward A.B. not once, but twice, which suggests intentional behavior. *See State v. Alladin*, 408 N.W.2d 642, 648 (Minn. App. 1987) (deciding that defendant's "repeated attack upon [the victim]" suggested intent), *review denied* (Minn. Aug. 12, 1987). And each time, Brevik specifically directed the van at A.B. *See In re Welfare of T.N.Y.*, 632 N.W.2d 765, 770 (Minn. App. 2001) ("Pointing a weapon at . . . another person has been held to supply the requisite intent to cause fear."). Brevik's explanation that he drove back both times to speak with T.B. was contradicted by A.B.'s testimony that Brevik never rolled down his own window. We must "view[] the evidence in the light most favorable to the jury's verdict" and assume that the jury believed A.B.'s testimony. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Brevik's visible anger and A.B.'s fear also support the jury's finding that Brevik intended to cause A.B. fear of immediate bodily harm. *See Hough*, 585 N.W.2d at 396 (recognizing that effect on victim may be evidence of intent); *State v. Williams*, 337 N.W.2d 689, 691 (Minn. 1983) (finding "that defendant was angry with [victim]" evidence of intent). Further, A.B.'s testimony that the two commonly fought and that Brevik had previously injured her during an argument "puts the alleged criminal conduct . . . in context" and supports a finding that Brevik intended to cause A.B. fear. *State v. Henriksen*, 522 N.W.2d 928, 929 (Minn. 1994).

Because the record evidence amply supports the jury's finding that Brevik intended to cause A.B. fear of immediate bodily harm or death, we affirm the assault conviction.

## II. Terroristic threats

Brevik also argues that the evidence underlying his terroristic-threats conviction is insufficient because there is no evidence that he threatened to commit a future act of violence. "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). A threat may be communicated by words or acts, but it "must be to commit a *future* crime of violence." *State v. Murphy*, 545 N.W.2d 909, 916 (Minn. 1996). Whether a defendant's conduct constitutes a threat turns on whether the conduct, viewed in context, "would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Schweppe*, 306 Minn. at 399, 237 N.W.2d at 613 (quotation omitted).

There is no evidence that Brevik verbally threatened A.B. Brevik's conviction therefore depends on whether his act of driving the van toward A.B. constitutes a threat "to commit a *future* crime of violence." *Murphy*, 545 N.W.2d at 916. We conclude that it does not.

"It is the future act threatened, as well as the underlying act constituting the threat, that the [terroristic-threats] statute is designed to deter and punish." *Id.* Brevik's underlying act is being punished as assault. And as his assault conviction indicates, the "tenor" of Brevik's act of driving the van toward A.B. is one that causes fear of immediate harm. By contrast, the conduct in *Murphy* included not only repeated behavior suggesting violence, such as depositing dead animals and animal parts at victims' houses, but also messages that he would "be back" or that he knew where his

victim lived. *Id.* at 913-14. These acts "sent a clear message that [Murphy] was capable of coming back later and doing something more serious." *Id.* at 916 (quotation omitted). Brevik's acts did not convey such a message and the evidence of Brevik's conduct is insufficient to permit a reasonable inference as to what future "crime of violence" would be deterred by also convicting Brevik of terroristic threats. *Cf. State v Jorgenson*, 758 N.W.2d 316, 325 (Minn. App. 2008) (holding that jury instruction on terroristic threats must require jury to make finding that threat was to commit "a specific predicate crime of violence"), *review denied* (Minn. Feb. 17, 2009).

Assault and terroristic threats are separate offenses with discrete elements; the state's argument and the verdict conflate the two. There is nothing about Brevik's conduct that provides a basis for a jury to reasonably conclude that he threatened to commit a future crime against A.B. We therefore reverse Brevik's terroristic-threats conviction.[1]

**Affirmed in part and reversed in part.**

[1] Brevik also argues that the district court erred in imposing sentences on both the second-degree-assault and terroristic-threats convictions because they arose from a single behavioral incident. Because we are reversing Brevik's terroristic-threats conviction, we need not address this argument.