STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1369

State of Minnesota,
Respondent,

vs.

Jared R. Stevensen,
Appellant.

Filed August 4, 2009
Affirmed in part and reversed in part
Shumaker, Judge

Watonwan County District Court
File No. 83-CR-07-243

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Lamar Piper, Watonwan County Attorney, Watonwan County Courthouse, 710 Second Avenue South, P.O. Box 518, St. James, MN 56081 (for respondent)

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

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

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

SHUMAKER, Judge

In this appeal, we are asked to decide whether there was sufficient evidence for a jury to conclude beyond a reasonable doubt that appellant used a broken beer bottle as a dangerous weapon while assaulting a person and whether there was sufficient evidence to find that he threatened violence to support a conviction of terroristic threats. Appellant also alleges several instances of prosecutorial misconduct, to which he did not object at trial but which he claims affected his substantial rights, thus entitling him to a new trial. We affirm in part and reverse in part and order the vacation of the conviction of assault in the fifth degree.

FACTS

Following work on March 21, 2007, M.R. and co-workers went to Blackbeard's Rhum Tavern and Eatery in Madelia for dinner. He and one co-worker stayed after dinner to have drinks. Also present in the tavern were twin sisters Ch.F. and Cr.F., sitting at a table, and Stevensen, seated at the bar.

Around midnight, M.R. bought drinks for the twin sisters, and then he and his co-worker joined them at their table. M.R. became aware at one point that Stevensen was yelling something at them, but he could not understand him because of the loud music. He also learned that Ch. F. was Stevensen's former girlfriend.

When M.R. failed to acknowledge him, Stevensen shouted again, asking, "Are you guys fighters?" Stevensen then left his seat at the bar and came toward the table. As he did so, he broke an empty beer bottle over the back of a chair and yelled, "Come on, let's

go. I'll take you both on. Come on, let's go." Stevensen held the bottle by the neck, and, according to M.R., within striking distance. M.R. feared that Stevensen would cut his throat. Cr.F. called the police, and, before an officer arrived, the bartender approached Stevensen and took away the bottle. The responding police officer arrested Stevensen. Stevensen was charged with second-degree assault with a dangerous weapon, fifth-degree assault, and terroristic threats. A jury found him guilty of all charges.

After the jury returned its verdicts of guilty, the district court entered judgment on each conviction but imposed sentence only on the conviction of assault in the second degree. On appeal, Stevensen contends that the evidence was not sufficient to support the conviction of assault with a dangerous weapon, that the district court erred in sentencing, and that the prosecutor committed misconduct that affected the outcome of the trial.

D E C I S I O N

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) (alteration in original). This court must assume the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Second-degree assault

Stevensen argues that his conviction of second-degree assault must be reversed because the state failed to prove beyond a reasonable doubt that he used the broken beer bottle as a dangerous weapon. 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 (2006). "'Dangerous weapon' means [a] . . . device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm . . . ." Minn. Stat. § 609.02, subd. 6 (2006). "'Great bodily harm' means 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 (2006).

Stevensen concedes that he assaulted M.R. but contends that the evidence was insufficient to prove that he did so with a dangerous weapon. He contends that he was merely holding the broken bottle and that the evidence does not show that he intended to use it in a manner that would cause fear of death or bodily harm, as required to support the second-degree-assault conviction.

Under the statutory definition, the broken beer bottle was not per se a dangerous weapon but rather would have that characteristic only if Stevensen used it or intended to use it as such. Minn. Stat. § 609.02, subd. 6. An essential component of that use or

intent is the calculation or likelihood that the instrumentality would cause death or great bodily harm. *Id.* It cannot reasonably be disputed that a broken beer bottle has the capability of causing death or great bodily harm if used to cut another's body, particularly a vital portion of the body such as a major artery, vein, or a vulnerable and accessible organ, such as an eye.

"Intent" refers to an actor's purpose to do a particular act or to cause a specific result and to the actor's belief that a successful act will have a particular result. Minn. Stat. § 609.02, subds. 9(3), (4) (2006). "Intent may be proved by circumstantial evidence, including drawing inferences from the defendant's conduct, the character of the assault, and the events occurring before and after the crime." *In re Welfare of T.N.Y.*, 632 N.W.2d 765, 769 (Minn. App. 2001) (citing *Davis v. State*, 595 N.W.2d 520, 525-26 (Minn. 1999)). For the second-degree assault of which Stevensen was convicted, the focus must be on his intent to cause fear of bodily harm or death and not on the effect his conduct had on M.R. *Id.* (citation omitted).

Stevensen did not testify in his defense, and the testimony of the eyewitnesses was consistent in all material respects. That consistent testimony showed that M.R. was sitting at a table with the twin sisters when Stevensen began to yell at him and his co-worker. Stevensen then walked toward the table, breaking a beer bottle on the way. As he approached, he challenged M.R. and his companion to fight. The twin sisters testified that Stevensen was waving the broken bottle around while making threats, and M.R. indicated that Stevensen held the broken bottle with the sharp, jagged edges pointed upward and that he came within a few feet, or striking distance, of M.R.'s chest.

The reasonable, and compelling, inference to be drawn from the consistent testimony was that Stevensen, a likely jealous former boyfriend of a woman with whom M.R. was socializing, intended to provoke a fight and intended to cause M.R. to be afraid of getting seriously injured if the fight occurred. Stevensen's prior relationship with a woman sitting with M.R.; his shouted, hostile words of challenge; his uninvited approach to the table; and his act of breaking a bottle and holding it in an inferentially threatening manner are all circumstances from which a jury could find beyond a reasonable doubt that Stevensen used or intended to use the broken bottle as a dangerous weapon. *See State v. Moss*, 269 N.W.2d 732, 736 (Minn. 1978) (evidence supported inference that defendant intended to use scissors in his possession during a robbery if their use became necessary, thus making the scissors a dangerous weapon).

Terroristic threats

Stevensen also argues that the evidence was insufficient to support his terroristic-threats conviction because the state could not prove that he actually threatened to commit an act of violence. A person who "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 terroristic threats. Minn. Stat. § 609.713, subd. 1 (2006). To obtain a terroristic-threats conviction, the state must prove that a defendant (1) made threats (2) to commit a crime of violence (3) with the purpose to terrorize another or in reckless disregard of the risk of terrorizing another. *See State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975). "A threat is a declaration of an intention to injure another or his property by some unlawful act." *Id.* A threat may be

communicated by words or acts. *State v. Murphy*, 545 N.W.2d 909, 916 (Minn. 1996). Whether a defendant's statements constitute 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." *Schweppe*, 306 Minn. at 399, 237 N.W.2d at 613 (quotation omitted). Although not an essential element of the offense, a victim's reaction to the alleged threat is circumstantial evidence of intent. *State v. Marchand*, 410 N.W.2d 912, 915 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987).

Considering the full context of the evidence described above, the jury reasonably could have inferred that Stevensen intended to terrorize M.R. Stevensen's conviction is borne out of the implicit nature of his invitation to fight: to create the fear in M.R. that Stevensen would cut him with the broken bottle. The evidence supports the conviction of terroristic threats.

Prosecutorial misconduct

Stevensen alleges several instances of prosecutorial misconduct during the state's closing argument, to which he did not object. When a defendant fails to object to alleged instances of misconduct, we apply a "modified plain error test," *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007), by which the defendant must establish both that the misconduct constitutes error and that the error was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *Id.* If the defendant satisfies his burden, the state must then demonstrate that there is no "reasonable likelihood that the absence of the misconduct in

question would have had a significant effect on the verdict of the jury." *Id*. (quotation omitted). If the modified plain-error test is satisfied, this court "will correct the error only if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected." *State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006) (quotation omitted).

Disparaging Defense

Stevensen argues that the prosecutor denigrated his defense. A prosecutor may argue that a defense has no merit but may not denigrate or belittle the defense itself. *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). Stevensen argues that the following statement by the prosecutor was "denigrating" to his defense: "Ladies and Gentlemen of the Jury, to describe this behavior as only an invitation is just nonsense. It's gobbledygook. It's from another planet."

The prosecutor's comments here are similar to those made in *State v. Hoppe*, 641 N.W.2d 315, 321 (Minn. App. 2002), *review denied* (Minn. May 14, 2002), when the prosecutor called the defense "ridiculous." Although the prosecutor here used colorful language, it appears that he was attempting to refute the defense on the merits by suggesting its implausibility, given the evidence. He was arguing that it would be implausible to conclude that Stevensen's statements and conduct on March 22 amounted to nothing more than an "invitation to fight," as Stevensen contended. The prosecutor's comments do not rise to the level of plain error. *See State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000) (finding no prosecutorial misconduct where prosecutor argued that a defense theory is implausible by highlighting certain evidence introduced at trial); *State*

v. Romine, 757 N.W.2d 884, 893 (Minn. App. 2008) (allowing prosecutor to refute a defendant's defense with evidence produced by the state);

Discussion of Presumption of Innocence

Stevensen next argues that the prosecutor misstated the presumption of innocence. It is improper for a prosecutor to misstate the burden of proof or the presumption of innocence in a criminal case. *Ramey*, 721 N.W.2d at 300. Such improper statements have been held to include, for example, statements that constitutional rights are meant to protect the innocent but not to shield the guilty, *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993) (acknowledging that such a statement constitutes reversible error), or that the presumption of innocence is a shield for the innocent but not a cloak for the guilty, and that the presumption disappears when the state has proven its case, *State v. Jensen*, 308 Minn. 377, 379, 242 N.W.2d 109, 111 (1976).

During closing arguments, the prosecutor commented on the presumption of innocence. Stevensen challenges the following statements:

> When this trial started, Mr. Stevensen was presumed innocent. He had that shield but when witness after witness after witness after witness comes up and says he broke a beer bottle, it was jagged, he pointed it at him and he challenged him and he was waving it around – when that happens the presumption of innocence goes.

These comments were similar to the district court's final charge to the jury on the presumption of innocence. The prosecutor even referred to the instructions the jury would receive regarding the presumption of innocence and stated that the presumption of innocence "goes" when facts are presented that "create proof beyond a reasonable

doubt." The district court gave the standard instruction: "The defendant is presumed innocent of the charge made. This presumption remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt." 10 *Minnesota Practice*, CRIMJIG 3.02 (2006). The prosecutor did not misstate the law regarding the presumption of innocence.

Sentencing

Finally, Stevensen argues that two of his convictions must be reversed because the district court erred in entering judgment of conviction for three offenses that were included as one single act in violation of Minn. Stat. § 609.04 (2006). The state concedes that Stevensen's conviction of fifth-degree assault should be vacated. A defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04. Whether an offense is a lesser-included offense requires an examination of the elements of the offense instead of the facts of the particular case. *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). "An offense is necessarily included in a greater offense if it is impossible to commit the greater offense without committing the lesser offense." *Id.* A lesser degree of the same crime is considered an included offense." Minn. Stat. § 609.04, subd. 1(1). Although a conviction that is improper under section 609.04 must be vacated, the underlying finding of guilt remains intact. *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999).

Stevensen's commission of fifth-degree assault was included in his commission of second-degree assault because it was a lesser degree of the more serious crime. Thus,

Stevensen's conviction of fifth-degree assault violates section 609.04, and that conviction must be reversed and vacated.

Even though the offense of terroristic threats arose out of the same behavioral incident as the assault offenses, a conviction for that offense is not improper. Minn. Stat. § 609.035 (2006). The district court entered judgment of conviction on the terroristic threats count but imposed no sentence for that offense. The court did not err in doing so.

Affirmed in part and reversed in part.