STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1099

State of Minnesota,
Respondent,

vs.

Steven James Sondrol,
Appellant.

Filed April 13, 2010
Affirmed
Klaphake, Judge

Benton County District Court
File No. 05-CR-08-1807

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Robert M. Raupp, Benton County Attorney, Foley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

KLAPHAKE, Judge

Steven James Sondrol appeals from his conviction for terroristic threats, Minn. Stat. § 609.713, subd. 1 (2006), arguing that the district court plainly erred in instructing

the jury and by permitting evidence of bad character that was not properly presented in accordance with Minn. R. Evid. 404(b). Because any error in the district court's jury instruction did not affect appellant's substantial rights, and because admission of the bad character evidence was part of the immediate episode for which appellant was tried and therefore not inadmissible under rule 404(b), we affirm.

D E C I S I O N

Jury Instruction

Appellant argues that the district court erred in instructing the jury on terroristic threats by including assault as a crime of violence without stating that the assault in question must be first-, second-, or third-degree assault. In order to convict a person of terroristic threats, the state must show that the offender threatened, either directly or indirectly, to commit a crime of violence against a person. Minn. Stat. § 609.713, subd. 1. "Crime of violence" is defined to include, among other things, all degrees of homicide and manslaughter, and first-, second-, and third-degree assault. Minn. Stat. § 609.1095, subd. 1(d) (2006). It does not include fifth-degree assault, the other crime with which appellant was charged.

Because appellant did not object at trial, we review the district court's instruction for plain error. A defendant forfeits his right to appeal if he fails to object to a jury instruction before the district court instructs the jury, unless the defendant can show that the instruction "constitute[s] plain error affecting substantial rights or an error of fundamental law." *State v. Vance*, 734 N.W.2d 650, 654-55 (Minn. 2007). "Plain error"

is (1) error (2) that is plain and (3) affects substantial rights. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001).

An instruction is erroneous if it materially misstates the law. *Vance*, 734 N.W.2d at 656. An error is plain if it is "clear or obvious" or if it "contravenes case law, a rule, or a standard of conduct." *Id.* at 658 (quotations omitted). If an instruction "eliminates a required element of the crime, the error is not harmless beyond a reasonable doubt." *State v. Jorgenson*, 758 N.W.2d 316, 325 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009). An error affects substantial rights if it prejudiced the defendant and significantly affected the outcome of the case. *Vance*, 734 N.W.2d at 659. If all three of these elements are shown, the reviewing court must then consider whether reversal is necessary in order to ensure fairness and the integrity of the judicial proceedings. *Id.* at 662. The defendant bears the burden of demonstrating prejudice. *Id.* at 659.

The state has conceded that the first two prongs of the plain error test are met: the district court erred, and the error was plain, based on *Jorgenson*, 758 N.W.2d at 323-24. The state asserts, however, that appellant failed to establish that he was prejudiced by the court's erroneous instruction.

In *Jorgenson*, the district court instructed the jury that "assault is a crime of violence" and gave no further definition of assault. 758 N.W.2d at 320. Jorgenson was also charged with misdemeanor domestic assault, Minn. Stat. § 609.2242, subd. 1(2) (2006), which is not defined as a crime of violence by Minn. Stat. § 609.1095, subd. 1(d). The jury found Jorgenson guilty of both offenses. *Id.* We concluded that Jorgenson had been prejudiced, because the jury could have determined that he was guilty of no more

than misdemeanor domestic assault, but that this was sufficient to support the terroristic threats conviction as a crime of violence, based on the faulty instruction. *Id.* at 325. *See also Vance*, 734 N.W.2d at 661 (concluding that omission of instruction on specific intent affected defendant's substantial rights).

Here, the district court did not omit the definition of "assault," but added to it, by instructing the jury that a threat to kill is a crime of violence, as is a threat to assault. Although appellant was also charged with two counts of fifth-degree assault, the jury acquitted him of both assault charges, which suggests that the jury did not focus on the assault charges as proof of a crime of violence. Further, despite the jury instruction, both the prosecutor and defense counsel focused on appellant's statement that he would kill the victim; neither mentioned appellant's statement threatening to assault the victim. Unlike *Jorgenson* and *Vance*, there is a strong indication that the jury here was not misled by the instruction, because it rejected the assault charges.

Despite the plain error in the district court's jury instruction, appellant has not demonstrated that he was prejudiced by the error, the essential third element in the appeal from error to which no objection was made. We therefore conclude that although the district court erred in its instruction, the error was harmless.

Evidence of Bad Acts

Appellant also argues that the district court erred by admitting testimony about other bad acts for which no notice was given under Minn. R. Evid. 404(b) (codifying the *Spreigl* rule). Rule 404(b) permits the use of evidence of other crimes or wrongful acts for a limited number of purposes, including proof of motive, opportunity, intent,

preparation, plan, knowledge, identity, or lack of mistake or accident. *Id.* In order to use such evidence, the prosecutor must give notice of intent to use the evidence and the purpose for which it is offered; the evidence must be supported by clear and convincing evidence; and the relevance of the evidence must outweigh its prejudicial effect. *Id.*

Here, the state gave no notice of intent to offer *Spreigl* evidence, but appellant did not object to any of that evidence. We therefore review this issue under the plain error standard. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002).

Appellant asserts that the district court erred by permitting the following testimony: (1) appellant treated his son poorly on the day of the offense; (2) appellant upset other people throughout the day at the party where the incident occurred; (3) appellant also threatened the victim's sister; and (4) appellant appeared to be trying to hide something in his truck just before the sheriff's deputies arrived.

While generally evidence of other bad acts is not admissible except as set forth in rule 404(b), evidence of offenses or other actions that are a "part of the immediate episode for which defendant is being tried" is admissible. *State v. Spreigl*, 272 Minn. 488, 497, 139 N.W.2d 167, 173 (1965); *see also State v. Townsend*, 546 N.W.2d 292, 296 (Minn. 1996) (affirming admission of testimony regarding a related assault that occurred about three hours prior to charged murder); *State v. Wofford*, 262 Minn. 112, 118, 114 N.W.2d 267, 271 (1962) (recognizing that state may prove all relevant facts of two or more offenses so linked together in time or circumstances so that "one cannot be fully shown without proving the other").

This is particularly true when the charged offense is terroristic threats, in which the context must be understood in order to explain the threatening nature of words or gestures. *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975) ("The test of whether words or phrases are harmless or threatening is the context in which they are used."); *see also State v. Franks*, 765 N.W.2d 68, 71 (Minn. 2009) (evaluating a pattern of harassing conduct, court noted that letters sent to the victim had to be viewed in context of preceding domestic abuse); *State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) (in case involving terroristic threats conviction, stating that communication must be viewed in context to determine whether it would "have a reasonable tendency to create apprehension that its originator will act according to its tenor") (quotation omitted).

Taken alone, the phrase "I am going to kill you," while troubling, may not be threatening, absent knowledge of the circumstances surrounding the statement. The evidence that appellant finds objectionable places this statement in a context that permitted the jury to determine whether appellant intended to terrorize the victim with his threats. This evidence shows that appellant was acting in a threatening manner toward his son and other partygoers and appeared to others to be out of control, rendering his threat to kill the victim more credible and more frightening. None of the incidents were separated by any significant amount of time. *See State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005) (in context of *Spreigl* evidence, noting that a greater gap in time between incidents lessens the relevance).

The first requirement of plain error is that the error be plain. *State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008). Here, it is not clear that admission of this testimony was plainly erroneous. Therefore, appellant has not met his burden of establishing plain error.

Ineffective Assistance of Counsel

Appellant suggests in the alternative that he was denied a fair trial because he received ineffective assistance from his trial attorney, who failed to object to the testimony set forth above. In order to show ineffective assistance of counsel, the defendant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2068 (1984)). In short, appellant must show (1) objective deficiency by counsel and (2) actual prejudice. *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004).

But "[a] claim of ineffective assistance of counsel may not rest on the failure of an attorney to make a motion that would have been denied if it had been made." *Id.* Here, because evidence of appellant's other acts testimony was admissible as immediate episode evidence, it is unlikely that appellant's trial counsel could have successfully objected to admission of the testimony appellant finds objectionable. As such, counsel's representation did not fall below an objective standard of reasonableness.

See Johnson, 673 N.W.2d at 148 (stating that reviewing court need not address both issues if one issue is dispositive of ineffective-assistance-of-counsel allegation).

Affirmed.