STATE OF MINNESOTA
IN COURT OF APPEALS
A10-202

State of Minnesota,
Respondent,

vs.

Corry Eugene Burt,
Appellant.

Filed December 7, 2010
Affirmed
Minge, Judge

Winona County District Court
File No. 85-CR-08-1253

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

Charles E. MacLean, Winona County Attorney, Winona, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender; Theodora Gaitas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Minge, Judge; and Crippen, 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

MINGE, Judge

Appellant challenges his conviction of terroristic threats, arguing that (1) the prosecutor committed prejudicial misconduct by eliciting testimony regarding appellant's character for violence and commenting during closing argument on appellant's character for dishonesty and (2) the evidence is insufficient to support his conviction. Because we conclude that the prosecutor did not commit prejudicial misconduct and that the evidence is sufficient to support appellant's conviction, we affirm.

FACTS

In February 2008, appellant Corry Eugene Burt entered the NAPA Auto Parts store in Winona with a list of car parts he needed to fix his flood-damaged car. Appellant told R.N., the employee working the counter, that he was a wounded Vietnam veteran, and that the Veterans Administration (VA) was going to pay for the parts. Although skeptical, R.N. assisted appellant in finding the parts that he needed.

Following appellant's initial visit, the VA contacted R.N. and confirmed that it would pay for the parts through a veterans-assistance fund. R.N. submitted an invoice to the VA totaling about $1,380. After NAPA received a check from the VA, appellant picked up the parts.

About a week or two later, appellant returned to the NAPA store. Appellant told R.N. that he no longer needed the parts and wanted to return them for a cash refund. R.N. refused to refund the money to appellant, but stated that he would refund the money to the VA. When asked at trial if he explained to appellant why he would not give him a

cash refund, R.N. replied, "I really didn't need to explain it to him. He knew what he was doing, and he knew that I knew what he was doing, and I explained that to him. I said I knew what was in the works from the very start, and I wasn't going to allow that to happen." Appellant then became upset, called R.N. a "bastard," and said, "I'll get you for this," and "you got no right." R.N. testified that appellant spoke in a loud, agitated voice while standing only three or four feet away. R.N. told appellant that it would be best if he left the store, and appellant left, walking to a car parked in the lot.

After a few minutes, appellant angrily entered the store again and demanded that R.N. give him a cash refund. When R.N. refused, appellant said, "Well, I'll get you sons a bitches. I'll get you mother f-----s. I'll come back and kill every last f-----g one of you." R.N. asked appellant to leave the store. When R.N. walked out from behind the counter to escort appellant out, appellant left on his own.

R.N. reported the incident to the owner of the store later that day. The next day, the owner reported the incident to the Winona Police Department. Following a police investigation, appellant was charged with one count of terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2006). After a two-day trial, the jury found appellant guilty. The district court stayed imposition of a jail sentence but ordered 90 days electronic home monitoring, five years' probation, and other conditions.

This appeal followed.

D E C I S I O N

I.

The first issue is whether the prosecutor committed prejudicial misconduct by eliciting improper character testimony and by making comments during closing argument regarding appellant's plan to scam the VA.

Because appellant failed to object to the alleged prosecutorial misconduct at trial, we apply the modified plain-error test set forth in *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). Under this test, the defendant must show that the alleged misconduct constitutes error that was plain. *Ramey*, 721 N.W.2d at 302. Error is plain if it is clear or obvious, or if it contravenes caselaw, a rule, or a standard of conduct. *Id*. If the defendant shows plain error, the burden then shifts to the state to show 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).

Eliciting character testimony

Appellant argues that the state plainly erred by eliciting inadmissible, prejudicial testimony regarding "additional information" that appellant was dangerous. Appellant bases his claim on the following testimony:

> [PROSECUTOR]: You said at the first—when he first uttered these words, you took it as an angry guy who's kind of acting out, but you sort of blew it off. Is that how you felt at that time?
> [R.N.]: Basically.
> [PROSECUTOR]: Did a time ever arise where you felt maybe blowing it off wasn't the right reaction, without asking—without wanting to know why? Did there ever come a time when you realized that this was a—was a risk?

> [R.N.]: I had a couple people apprise me.
> [PROSECUTOR]: Just—just without saying what they said—
> [R.N.]: Yeah.
> [PROSECUTOR]: —did you become aware of things that made you take it seriously?
> [R.N.]: Well, they said maybe you should—
> [PROSECUTOR]: Just—okay—
> [R.N.]: —take it seriously.
> [PROSECUTOR]: —I don't want to know what they said.
> [R.N.]: Yes.
> [PROSECUTOR]: Based on what they said, did you take it—
> [R.N.]: Yes, it made me step back and—
> [PROSECUTOR]: —seriously? Were you involved in reporting it to the authorities, to law enforcement?
> [R.N.]: Yes.
> [PROSECUTOR]: Why did you report it to law enforcement?
> [R.N.]: When [the owner] requested that something be done; that he wanted it on the record, and hopefully somebody would visit [appellant] and ameliorate the situation, make—make things not go away, but make him aware of the precariousness on both our parts not to be involved in this scenario to the extent that it sounded like we were all going to be involved in this scenario.

In general, evidence of a person's character is not admissible to show that the person acted in conformity with that character on a particular occasion. Minn. R. Evid. 404(a). It is error for the prosecutor to elicit inadmissible character evidence, and "questions by a prosecutor calculated to elicit or insinuate inadmissible and highly prejudicial character evidence and which are asked in the face of a clear trial court prohibition are not tolerable." *State v. Swaney*, 787 N.W.2d 541, 560 (Minn. 2010) (quotation omitted); *see State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994) ("The state will not be permitted to deprive a defendant of a fair trial by means of insinuations and

innuendos which plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible." (quotations and modification omitted)).

Here, the prosecutor carefully avoided asking about or overtly suggesting that appellant had any criminal record. The questioning was not a calculated attempt to elicit inadmissible character evidence regarding appellant's character for dangerousness. Rather, faced with R.N.'s testimony that initially he did not take the threats seriously, the prosecutor simply wanted R.N. to explain why he changed his mind. *See Swaney*, 787 N.W.2d at 560 (providing that the evidence sought by the prosecutor was "more akin to basic background information about Swaney and the witnesses than inappropriate character evidence"). This testimony is relevant to show that R.N. ultimately perceived that appellant intended to make a threat. *See State v. Schweppe*, 306 Minn. 395, 401, 237 N.W.2d 609, 614 (1975) (providing that the victim's reaction to the threat was circumstantial evidence relevant to the element of intent). In sum, we conclude that the prosecutor did not plainly err by eliciting improper character evidence.

Even if the state erred by eliciting testimony insinuating that appellant was dangerous, the state has the opportunity to show that the error was not prejudicial. The questioning that is alleged to constitute misconduct is limited to less than two pages in a 147-page transcript. *See State v. Prtine*, 784 N.W.2d 303, 315-16 (Minn. 2010) (providing that the alleged misconduct was not prejudicial when it was brief and isolated in the transcript, the prosecutor didn't repeat it or dwell on it, and there was other evidence in the record to support a verdict of guilt). The prosecutor did not repeat the information or dwell on it; to the contrary, the prosecutor sought to limit the testimony by

instructing R.N., "I don't want to know what they said." Finally, as discussed below, there is substantial evidence in the record to support a verdict of guilt without the allegedly improper statements. *See id*. Thus, even if plain error, we conclude the elicited comment did not have a significant effect on the jury.

Closing argument

In closing argument, the prosecutor urged the jury to weigh the credibility of the witnesses against appellant's credibility. Appellant argues that the state committed misconduct by attacking appellant's character in the following statements:

> [Appellant], to a degree, couldn't even tell the truth when he was trying to work this deal out. Remember what he said? I'm a Vietnam-era vet. I'm a wounded Vietnam-era vet. He's not old enough to be that. That's false. He couldn't even tell the truth then. Or when he was working out this deal with the Veterans Administration, special one-time assistance funds available to veterans who need it. It was just a dodge for this guy. It was a way to go through the machinations, get the parts, bring them back, get the cash, and when that scam didn't work, he reacted. He blew, and uttered those threats.

"When assessing prosecutorial misconduct, the closing argument will be considered as a whole." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). While a prosecutor may point to facts that cast doubt on a defendant's credibility, he may not inject his personal opinion about a defendant's credibility. *State v. Duncan*, 608 N.W.2d 551, 555 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). "The prosecutor's argument need not be colorless, and it may include conclusions and inferences that are reasonably drawn from the facts in evidence." *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010) (quotation omitted); *see State v. Spreigl*, 272 Minn. 488, 497, 139 N.W.2d

167, 173 (1965) (providing that evidence of offenses or other actions that are part of the immediate episode for which a defendant is being tried is admissible); *Schweppe*, 306 Minn. at 402, 237 N.W.2d at 615 (providing that reference to character in closing argument was not improper because it was relevant to establish defendant's motive for making the alleged threats).

Here, the prosecutor's statements summarize appellant's actions that explain the immediate episode for which appellant was being tried. Evidence of appellant's alleged intent to scam the VA provides context for the terroristic-threats offense; it is relevant to appellant's intent and motive in making the threat. Moreover, the prosecutor's characterization of appellant's actions as an attempt to scam the VA is supported by the facts in evidence: R.N. testified that while the VA paid for the parts, appellant demanded a cash refund, attempting to prevent R.N. from refunding the money directly to the VA. And significantly, R.N. testified that he told appellant he "knew what [appellant] was doing" immediately before appellant's outburst.

Even if the statements in closing did improperly attack appellant's character for dishonesty, they did not affect appellant's substantial rights. The alleged misconduct is limited to about 11 lines in a 10-page closing argument. *See State v. Wren*, 738 N.W.2d 378, 392-93 (Minn. 2007) (providing that misconduct on 3 pages in an almost 70-page closing argument did not affect defendant's substantial rights). In conclusion, the state did not commit plain error by referencing appellant's alleged scam in closing argument.

II.

The next issue is whether the evidence is sufficient to support appellant's conviction for terroristic threats. Specifically, appellant argues that the evidence is insufficient to support the conviction for terroristic threats because his statements were the product of transitory anger.

In considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

The statute defines appellant's crime as follows: "Whoever threatens, directly or indirectly, to commit any crime of violence . . . in a reckless disregard of the risk of causing such terror" may be found guilty of terroristic threats. Minn. Stat. § 609.713, subd. 1 (2008). With regard to state of mind, the statute provides that the accused must make a threat "with purpose to terrorize another," or alternately, as the jury was instructed here, "in a reckless disregard of the risk of causing such terror." Minn. Stat. § 609.713, subd. 1. The reckless-disregard prong "means that the defendant, even though not having the specific purpose of terrorizing another, recklessly risks the danger that the

statements would be taken as threats by another and that they would cause extreme fear. It need not be proven that another actually experienced extreme fear." *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009) (emphasis omitted) (quoting 10 *Minnesota Practice*, CRIMJIG 13.107 (2006)).

A threat is "a declaration of an intention to injure another or his property by some unlawful act." *Schweppe*, 306 Minn. at 399, 237 N.W.2d at 614. We determine whether words are threatening or harmless by examining the context in which they are used. *Id.* Specifically, whether a statement is 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." *Id.* (quotation omitted). Specific intent is not required. The accused's intent is "a subjective state of mind usually established only by reasonable inference from surrounding circumstances." *Id.* at 401, 237 N.W.2d at 614.

Here, R.N. testified that appellant said, "I'll come back and kill every last f-----g one of you." A NAPA co-worker testified that he also heard appellant say, "I would kill you." The jury's determination that appellant made such statements in disregard of the substantial risk of terrorizing others is supported by the context of the threats: R.N. testified that appellant was visibly upset, spoke in a loud, agitated voice, and called R.N. a bastard after R.N. refused to give him a cash refund. R.N. stated that appellant, after being asked to leave, returned to the store and again angrily demanded a cash refund. Notably, R.N. testified that appellant's behavior ultimately caused him to be concerned for his own safety and that of potential customers. There is ample evidence for the jury

to conclude that the statements were not made in jest or in a flippant or non-threatening manner.

Transitory anger

Appellant argues that the evidence is insufficient to support the conviction for terroristic threats because his statements were the product of transitory anger. To warrant reversal based on the transitory-anger defense, we must determine that the evidence demonstrates that the accused's anger was short-lived and lacked the purpose of creating terror in the person at which it was directed. The transitory-anger defense was rejected when a prison inmate made various threats against prison staff. *State v. Jones*, 451 N.W.2d 55, 63 (Minn. App. 1990), *review denied* (Minn. Feb. 21, 1990). The *Jones* court relied on one witness's testimony that the inmate's tone of voice was "very threatening" and another witness testified that she was frightened by the threats. *Id.* at 63. In another case, we concluded that the accused did not act in the midst of transitory anger when the evidence showed that he shouted threats at a tow-company employee and he testified that the purpose of his outburst was to dissuade the tow company from towing his car in the future. *State v. Marchand*, 410 N.W.2d 912, 915 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987).

Here, appellant failed to argue transitory anger to the district court. As discussed above, the evidence is sufficient to support the jury's determination that appellant acted with the requisite reckless disregard of the risk of causing terror. Therefore, we reject appellant's argument that this court must reverse because he simply claims that he acted out of transitory anger.

We conclude that, construing the evidence in the light most favorable to the verdict, the evidence is sufficient to support appellant's conviction for terroristic threats.

Affirmed.

Dated: