STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1282

State of Minnesota,
Respondent,

vs.

Xang Yang,
Appellant.

Filed August 22, 2011
Affirmed as modified
Worke, Judge

Ramsey County District Court
File No. 62-CR-09-11285

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Mark D. Nyvold, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Johnson, Chief Judge; and Worke, Judge.

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

WORKE, Judge

Appellant argues that the district court (1) abused its discretion in declining his requested jury instruction, and (2) erred by staying his sentence in excess of the statutory maximum. We conclude that the district court did not abuse its discretion in giving jury

instructions and affirm appellant's conviction. But because we conclude that the district court erred in sentencing, we affirm as modified.

D E C I S I O N

Jury Instructions

Appellant Xang Yang was convicted of terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2008) after he threatened to kill his ex-girlfriend. Appellant challenges the district court's refusal to give his requested "reckless" jury instruction. "The refusal to give a requested jury instruction lies within the discretion of the district court" and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). If a district court errs by refusing to give an instruction, this court reviews whether the error was harmless or whether, beyond a reasonable doubt, the error significantly impacted the verdict. *State v. Shoop*, 441 N.W.2d 475, 481 (Minn. 1989).

The standard jury instruction given for a terroristic-threats charge defines the elements of the offense as: (1) the defendant threatened to commit a crime of violence, and (2) the defendant made the threat with the intent to terrorize another or in reckless disregard of causing such terror. 10 *Minnesota Practice*, CRIMJIG 13.107 (2006). The district court provided the jury with the standard definitions of "to terrorize" and "with intent to terrorize." The district court further defined "reckless disregard of the risk of causing such terror," as meaning that appellant, "even [without] having the specific purpose of terrorizing another, recklessly risk[ed] the danger that the statements would be taken as threats by another and that they would cause extreme fear." Alternatively,

appellant requested that the district court give the "reckless" instruction under CRIMJIG 7.10, which provides:

> 'Recklessly' means that the defendant acted in conscious disregard of a substantial and unjustifiable risk that [the specified fact exists] [the specified fact will result from (his) [] conduct] This means the defendant (consciously) (intentionally) committed an act: 1) that created a risk[;] 2) the risk was substantial; 3) there was no adequate reason for taking the risk; 4) the defendant was aware of the risk; and 5) the defendant disregarded it.

10 *Minnesota Practice,* CRIMJIG 7.10 (Supp. 2010).

Appellant argues that the district court abused its discretion by failing to give the longer "reckless" jury instruction because the instruction better enables the jury to understand the second element of the terroristic-threats charge. Appellant contends that the district court declined to give the "reckless" jury instruction out of the misguided notion that the definition came from the supreme court's decision in *State v. Engle*, a dangerous-weapons case, with the district court reasoning that the instruction was not necessary because appellant's crime did not involve a firearm. *See* 743 N.W.2d 592 (Minn. 2008). Finally, appellant asserts that district courts almost uniformly define knowingly, intentionally, and recklessly for juries, and the district court should have followed suit here.

Appellant's argument is unconvincing. The comments to CRIMJIG 7.10 state that "[t]he definition of 'recklessly' is based upon the decision in *State v. Engle*, . . . involving the reckless discharge of a firearm within a municipality. . . . The [c]ommittee relied upon *Engle* . . . in formulating the list." CRIMJIG 7.10 cmt. The list provided in

CRIMJIG 7.10 refers largely to an "act," such as discharging a weapon in *Engle*, and there was no such act in this case. *See* CRIMJIG 7.10; *Engle*, 743 N.W.2d at 596. Accordingly, the district court did not abuse its discretion in declining appellant's request to give this instruction.

Sentence

Appellant also challenges the five-year stay of his sentence. We review a dispositional departure in sentencing, including a stay of execution, for an abuse of discretion. *See, e.g., State v. Dokken*, 487 N.W.2d 914, 917 (Minn. App. 1992), *review denied* (Minn. Sept. 30, 1992). Under Minn. Stat. § 609.135, subd. 2(c) (2008), "If [a] conviction is for a gross misdemeanor not specified in paragraph (b), [a] stay shall be for not more than two years." Appellant correctly asserts that terroristic threats is not a gross misdemeanor listed under Minn. Stat. § 609.135, subd. 2(b) (2008); thus, the district court abused its discretion by exceeding the two-year maximum for staying a sentence for a gross-misdemeanor conviction. *See State v. Mortland*, 399 N.W.2d 92, 94 n.1 (Minn. 1987) (stating that a sentence may not exceed the statutory maximum provided by the legislature in defining the offense). The state concedes this argument. Accordingly, we modify the stay of appellant's sentence to the two-year maximum allowable under Minn. Stat. § 609.135, subd. 2(c). *See State v. Pugh*, 753 N.W.2d 308, 311 (Minn. App. 2008) (stating that a reviewing court may correct an impermissible sentence at any time), *review denied* (Minn. Sept. 23, 2008).

Affirmed as modified.