STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1857

State of Minnesota,
Respondent,

vs.

James Howard Stellman,
Appellant.

Filed December 12, 2011
Affirmed
Crippen, Judge[*]

Kandiyohi County District Court
File No. 34-CR-09-1046

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Jennifer Kurud Fischer, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Benson Merz Godes, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Schellhas, 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

CRIPPEN, Judge

Appellant challenges his convictions of first-degree aggravated robbery, terroristic threats, and theft, arguing that the district court erred by failing to instruct the jury on all the elements of terroristic threats, and by denying appellant's request for a voluntary-intoxication instruction as a defense to the charge of terroristic threats, and that the prosecutor committed prejudicial misconduct during closing argument by misstating the burden of proof and the law of voluntary intoxication. We affirm.

FACTS

Following the taking of narcotics from a pharmacy in Willmar, appellant James Howard Stellman was charged with first-degree aggravated robbery, a violation of Minn. Stat. § 609.245, subd. 1 (2008); terroristic threats, a violation of Minn. Stat. § 609.713, subd. 1 (2008); and theft, a violation of Minn. Stat. § 609.52, subds. 2(1), 3(2) (2008 & Supp. 2009).

At the jury trial that followed, appellant did not dispute that he was the person who robbed the pharmacy, but he argued that he was unable to form the requisite intent to commit the charged offenses because he was voluntarily intoxicated by narcotics. The district court denied appellant's request for a voluntary-intoxication jury instruction as to the terroristic-threats charge because it concluded this offense did not require a specific intent. The district court permitted the voluntary-intoxication jury instruction as to the robbery and theft charges. The jury found appellant guilty of all three charged offenses, and appellant was sentenced to 48 months' imprisonment.

D E C I S I O N

1.

Appellant contends that, because the state had the burden to prove that he threatened to commit a "crime of violence" as an element of terroristic threats, the district court erred by failing to instruct the jury on the definition or elements of the predicate "crime of violence."

Because appellant made no objections to this jury instruction at trial, we apply a plain-error analysis. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007) (reviewing appellant's challenge to unobjected-to jury instructions for plain error). Even if plain error occurs, we do not reverse unless it affects "substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). An error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case." *Griller*, 583 N.W.2d at 741. The defendant bears a heavy burden of persuasion on this factor. *Id.* Even if plain error occurs, affecting substantial rights, we must affirm unless the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Strommen*, 648 N.W.2d at 686 (alteration in original) (quotation omitted).

In the instant case, the district court's jury instructions did not identify the predicate crime of violence or its elements.[1] But appellant has not established that this

[1] "[J]ury instructions must define the crime charged and explain the elements of the offense to the jury." *Vance*, 734 N.W.2d at 656. The Criminal Jury Instruction Guide provides guideline model jury instructions, but they are not mandatory rules. *State v. Kelley*, 734 N.W.2d 689, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

omission, if erroneous, affected his substantial rights.[2] The uncontroverted evidence demonstrates that appellant told the pharmacist that if he called the police within ten minutes of appellant leaving the pharmacy, appellant would "have his brother hunt [the pharmacist] down and kill [him]." Both the prosecutor and defense counsel referred to this threat in their closing arguments. Thus, the record clearly and unambiguously establishes that homicide was the predicate crime of violence threatened.

Appellant argues that the state was relieved of its burden to prove an element of the terroristic-threats offense because the jury had no alternative but to determine that homicide constitutes a crime of violence. The terroristic-threats statute provides that "'crime of violence' has the meaning given 'violent crime' in section 609.1095, subdivision 1, paragraph (d)." Minn. Stat. § 609.713, subd. 1.

Appellant relies on *State v. Jorgenson*, in which the predicate crime of violence underlying the defendant's terroristic-threats charge was assault. 758 N.W.2d 316, 322 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009). In *Jorgenson*, we held that the district court committed plain error when it instructed the jury that "assault is a crime of violence" because, although the definition of "violent crime" includes first-, second-, and third-degree assault, it does not include domestic assault, fourth-, or fifth-degree assault.

The model jury instruction on the elements of a terroristic-threats offense suggests that the jury be instructed, in part, that the defendant threatened "to commit a crime of violence." 10 *Minnesota Practice*, CRIMJIG 13.107 (2006). The model jury instruction also suggests that the district court identify the predicate crime of violence. *Id.*

[2] Because appellant failed to establish that his substantial rights were affected by the terroristic-threats jury instruction, we need not address the remaining plain-error factors. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011) ("[I]f we find that any one of the [plain-error] requirements is not satisfied, we need not address any of the others.").

Id. at 323-24. But appellant was charged with threatening to commit homicide, and homicide of any degree is defined as a crime of violence.[3] Minn. Stat. § 609.1095, subd. 1(d). Because all degrees of homicide are crimes of violence as a matter of law, this question did not present a factual issue for the jury to decide or for the state to prove.

The district court instructed the jury that, to return a guilty verdict, it must find that the state proved all three elements of terroristic threats beyond a reasonable doubt. Because jurors are presumed to follow a district court's instructions, *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998), we may presume that the jury found, beyond a reasonable doubt, that appellant threatened to conspire with his brother to kill the pharmacist, which is a crime of violence as a matter of law.

Because appellant has not established that the district court's terroristic-threats jury instruction affected his substantial rights, he is not entitled to relief on this ground.

2.

Appellant argues that the district court erroneously denied his request for a voluntary-intoxication jury instruction as a defense to the charge of terroristic threats. We review the district court's refusal to issue a requested jury instruction for abuse of discretion, focusing on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). If the refusal to give a requested jury instruction was error, the defendant is entitled to a new trial unless the error was harmless. *Id.* at 558-59.

[3] Although appellant threatened to have his brother kill the pharmacist, the definition of "crime of violence" also includes conspiracy to commit homicide. *See* Minn. Stat. §§ 609.1095, subd. 1(d) (defining "violent crime" to include conspiracy to commit violent crime), .175, subd. 2 (defining conspiracy to include conspiring with another to commit crime) (2008).

An error in jury instructions is harmless if it can be said beyond a reasonable doubt that the error had no significant impact on the verdict. *Id.*

Minnesota law provides that the fact of intoxication may be taken into consideration solely to determine the defendant's intent or state of mind "when a particular intent or other state of mind is a necessary element to constitute a particular crime." Minn. Stat. § 609.075 (2008). A defendant is entitled to a voluntary-intoxication jury instruction when the defendant is charged with a specific-intent offense, the evidence is sufficient to support a finding, by a preponderance of the evidence, that defendant was intoxicated, and the defendant testifies that this explains his conduct. *State v. Torres*, 632 N.W.2d 609, 616 (Minn. 2001). When determining whether the voluntary intoxication defense applies, the district court must analyze whether the charged offense has a specific intent or purpose as an essential element. *State v. Lindahl*, 309 N.W.2d 763, 766 (Minn. 1981). "Specific intent means that the defendant acted with the intent to produce a specific result, whereas *general intent* means only that the defendant intentionally engaged in prohibited conduct." *Vance*, 734 N.W.2d at 656.

Here, the district court concluded that the terroristic-threats charge constituted a general-intent offense and refused to give the voluntary-intoxication jury instruction for that charge. A person is guilty of making terroristic threats if he 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." Minn. Stat. § 609.713, subd. 1. The district court relied on *State v. Bjergum*, in which we held that the voluntary-intoxication jury instruction was not warranted "[b]ecause the reckless-disregard portion

of the terroristic-threats statute does not include specific intent as an element." 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009). But in *Bjergum*, the charge at issue only alleged that the defendant made threats involving "reckless disregard of the risk" of causing terror—a purposeful offense was stated in a separate count. *Id.* at 55. By contrast, the complaint in the instant case alleges that appellant alternatively made threats "with the purpose of terrorizing" or "in reckless disregard of the risk" of causing such terror, thus permitting a terroristic-threat conviction on a theory of appellant's design to terrorize. The district court's final jury instructions permitted the jury to consider both purposefulness and recklessness. Accordingly, our limited holding in *Bjergum* does not support the district court's conclusion that the terroristic-threat charge in this case constituted a general-intent offense.

Assuming, without deciding, that the district court's refusal to give the voluntary-intoxication jury instruction for terroristic threats was error, appellant is not entitled to a new trial if the error was harmless. When determining whether a district court's error in declining to give a jury instruction was harmless, we may draw inferences from the jury's verdict on other counts. *See, e.g.*, *State v. Merrill*, 274 N.W.2d 99, 105 (Minn. 1978) (observing that, when jury was given option of first- or second-degree murder, jury's verdict of guilty of first-degree murder "indicates that the jury believed the defendant not only had the requisite intent but also acted with premeditation and that the failure to submit instructions on the lesser offenses did not prejudice defendant on the issue of intent"); *City of Minneapolis v. Altimus*, 306 Minn. 462, 472-73, 238 N.W.2d 851, 858 (1976) (holding that defendant was prejudiced by lack of involuntary-intoxication jury

instruction because jury's acquittal of defendant on assault charge suggested that jury believed defendant's evidence that intoxication explained his behavior). In the case before us, the jury's rejection of the voluntary-intoxication defense as to appellant's intentional robbery and theft charges suggests that the lack of a voluntary-intoxication jury instruction as to the terroristic-threats charge did not have a significant effect on the jury's verdict.

In addition, we may consider on the question of harmlessness of an instructional error whether there was overwhelming evidence supporting the jury's verdict. *See State v. Larson*, 787 N.W.2d 592, 601-02 (Minn. 2010) (holding that any alleged error in jury instruction on intent was harmless because record contained overwhelming evidence of defendant's intent). Harmlessness is not satisfied by evidence presented at trial that was merely sufficient to support the jury's verdict; rather, the evidence must be "so *overwhelming* that we can say beyond a reasonable doubt that the instructional error was harmless." *State v. Koppi*, 798 N.W.2d 358, 365-66 (Minn. 2011).

The state presented testimony from the pharmacist and police establishing that appellant did not exhibit signs of intoxication or confusion at the time of the offense or shortly thereafter. The state also presented evidence that appellant wore a disguise, concealed his vehicle's license plate, parked in the pharmacy parking lot away from the window, lifted his shirt to display his gun to the pharmacist, listed the specific narcotics he wanted, asked the pharmacist for those drugs while telling the pharmacist to hurry, threatened the pharmacist, and made false statements to the pharmacist and the police. This evidence is consistent with the state's theory of the case—that appellant acted with a

consciousness of guilt and an intentional, thought-out plan. By contrast, the only evidence that appellant was intoxicated at the time of the offense is appellant's testimony that he consumed narcotics on the day of the offense and the testimony of his doctor and wife regarding his addiction to narcotics. The record establishes that there is overwhelming evidence supporting the jury's guilty verdict for the terroristic-threats charge.

In sum, any error in the district court's refusal to give the voluntary-intoxication jury instruction as to the terroristic-threats charge was harmless beyond a reasonable doubt, and appellant is not entitled to relief on this ground.

3.

Appellant argues that the prosecutor committed prejudicial misconduct during closing argument. Appellant did not object to this alleged misconduct at trial. We review an unobjected-to trial error under the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (citing *Griller*, 583 N.W.2d at 740). "An error is plain if it was clear or obvious," or "conduct the prosecutor should know is improper." *Id.* at 300, 302 (quotation omitted). The burden is on the nonobjecting appellant to show that an error occurred and that it was plain. *Id.* at 302. But in the context of prosecutorial misconduct, the state bears the burden of establishing "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).

When reviewing alleged prosecutorial misconduct or error in a closing argument, we must view the statement in the context of the argument as a whole. *State v. Powers*,

654 N.W.2d 667, 679 (Minn. 2003); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). For us to reverse a conviction for serious prosecutorial misconduct, the misconduct must be "inexcusable and so serious so as to deprive appellant of a fair trial." *State v. McNeil*, 658 N.W.2d 228, 236 (Minn. App. 2003). Misstatements of the state's burden of proof in criminal cases are highly improper. *State v. Jackson*, 773 N.W.2d 111, 122 (Minn. 2009). But if statements of counsel on the applicable law conflict with those instructions on the law given by the district court, the error can be "cured by proper instructions by the [district] court." *State v. Race*, 383 N.W.2d 656, 664-65 (Minn. 1986).

Appellant contends that the prosecutor misstated the burden of proof and the law of voluntary intoxication in her closing argument. Voluntary intoxication may be considered when determining whether the defendant was capable of forming the requisite intent or state of mind at the time of the charged offense. Minn. Stat. § 609.075. It is the defendant's burden to demonstrate by a preponderance of the evidence that intoxication precluded him from forming the requisite intent. *State v. Buchanan*, 431 N.W.2d 542, 549 (Minn. 1988). Here, during closing argument, the prosecutor explained that intoxication is significant only if it negates intent; the prosecutor then added that "[i]ntoxication has to be something that overwhelms intent"; repeating, the prosecutor added that this is intoxication that "overwhelms all of those things he did, that required consciousness, intent, deliberate action, planning, premeditation, purposeful action"; repeating again, the prosecutor said that intoxication must be something that "overwhelms that intent."

It is correct that the defendant's burden is not to prove merely that he was intoxicated, but also that he was intoxicated to the extent that he lost the capacity to form the requisite intent. *Id.*; *see also State v. Thunberg*, 492 N.W.2d 534, 539 (Minn. 1992) (observing that "defendant's blood alcohol content of .24 does not compel the conclusion that he could not form a specific intent"). But the prosecutor's use of the word "overwhelm" in this context is ambiguous and may distort the standard.

Assuming, without deciding, that these statements constituted error, reversal under the plain-error standard is improper if the state establishes that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Ramey*, 721 N.W.2d at 302. The state's closing argument and rebuttal comprise approximately 11 pages in the transcript and almost exclusively address evidence supporting appellant's intent. By contrast, the allegedly improper statements at issue comprise less than one page of the transcript. In addition, the prosecutor ended her closing argument by stating that the evidence establishes "beyond a reasonable doubt [that appellant] intended and committed" the charged offenses. The defendant's closing argument also correctly states the burdens of proof.

Moreover, jurors are presumed to follow a district court's instructions. *Miller*, 573 N.W.2d at 675. Here, prior to instructing the jury on the voluntary-intoxication defense, the district court instructed the jury that "the arguments or other remarks of an attorney are not evidence" and "[i]f an attorney's argument contains any statement of the law that differs from the law I give you, disregard the statement." And the district court correctly instructed the jury that the state had the burden to prove intent beyond a reasonable

doubt, and that the defendant had the burden to prove his voluntary-intoxication defense by a preponderance of the evidence.

Because the state has established that it is not reasonably likely that the purported misconduct had a significant effect on the jury's verdict, appellant is not entitled to relief on this ground.

Affirmed.