STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0047

State of Minnesota,
Respondent,

vs.

Larry Cregg,
Appellant.

Filed January 11, 2021
Affirmed
Reyes, Judge

Hennepin County District Court
File No. 27-CR-19-14378

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Erik Nilsson, Minneapolis City Attorney, Zenaida Chico, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant argues on direct appeal that (1) insufficient evidence supports his domestic-assault-fear conviction because he intended a contingent threat; (2) insufficient evidence supports his disorderly conduct conviction because his threats did not constitute fighting words; and (3) he is entitled to a new trial because the prosecutor committed misconduct by misstating witness testimony. We affirm.

FACTS

The following facts are based on the evidence and testimony presented at trial. Appellant owns and lives in a house where his son, L.C., and L.C.'s girlfriend, L.P., rent a room. After a prior rent dispute, appellant secured a temporary order for protection (OFP) against L.C. and L.P., who left the house. L.C. and L.P. lived in their vehicle while the OFP was in place. By June 19, 2019, however, the district court had dismissed the OFP, and L.C. and L.P. returned to appellant's house.

Appellant, apparently not understanding that the district court dismissed the OFP, called the police to have L.C. and L.P. removed from the house. Two police officers arrived and told appellant that the OFP had been dismissed and that they lacked authority to remove L.C. and L.P. from the property. Before leaving, the officers advised appellant to use the formal eviction process to remove L.C. and L.P.

Minutes after the officers left, appellant "busted" into L.C. and L.P.'s room, threw some of their belongings to the floor, and shoved L.C. "almost . . . across the room." Appellant threatened to have L.C. killed if they did not remove their belongings and vacate

the room. L.C. tried to record appellant with his cell phone, but appellant knocked the phone away. As appellant left the room, he said to L.C., "I'm gonna go get somebody right now to come kill you." L.C. and L.P. felt threatened by appellant's behavior and words, so L.C. called 911.

The same two officers returned to appellant's house approximately five minutes after they had left. Appellant then made statements to the officers leading them to believe that he might forcibly remove or harm L.C. The officers arrested appellant.

Respondent State of Minnesota charged appellant with misdemeanor domestic assault-fear and disorderly conduct. A jury found him guilty of both charges. The district court entered judgments of conviction of both charges and sentenced appellant to 90 days in jail on the domestic-assault-fear conviction. It did not impose a sentence for the disorderly conduct conviction. This appeal follows.

DECISION

I. Sufficient evidence supports appellant's conviction of misdemeanor domestic assault-fear.

Appellant argues that the state presented insufficient evidence to prove that he intended to cause fear of immediate harm because the evidence supported the rational-alternative hypothesis that appellant intended only contingent or future harm. We disagree.

Misdemeanor domestic assault-fear occurs when one commits an act against a family or household member[1] "with intent to cause fear in another of immediate bodily

[1] Neither party disputes that L.C. is appellant's son, meeting the requirement of a family or household member.

harm or death." Minn. Stat. § 609.2242, subd. 1(1) (2018). Assault-fear is a specific-intent crime. *State v. Fleck*, 810 N.W.2d 303, 309 (Minn. 2012). The state generally proves intent circumstantially "from the defendant's words and actions in light of the totality of the circumstances." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). In contrast, direct evidence is evidence "based on personal knowledge or observation" that "if true, proves a fact without inference." *Id.* (quotation omitted).

We apply a heightened standard of review, involving a two-step process, to a conviction based on circumstantial evidence. *Id.* at 598-601. First, we identify the circumstances proved, which are the subset of facts supporting the jury's verdict. *Id.* at 600. We "assume that the jury believed the State's witnesses and disbelieved contrary evidence." *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008) (quotation omitted). Second, we determine whether the circumstances proved are consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt. *Harris*, 895 N.W.2d at 601. We do not defer to the jury's choice between reasonable inferences. *Id.* "[A] possibilit[y] of innocence does not require reversal . . . so long as the evidence taken as a whole makes [] theories [of innocence] seem unreasonable." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

A. Circumstances proved

The circumstances proved include the following. Appellant called the police to remove L.C. and L.P. from his house. The OFP against L.C. and L.P. had been dismissed,

so when the officers arrived, they told appellant they could not remove L.C. and L.P. Appellant appeared agitated and angry, talked loudly, and told the officers that he would throw L.C. and L.P. out. Before leaving, the officers told appellant to go through the formal eviction process to remove L.C. and L.P. from the house.

After the officers left, appellant "busted" into L.C. and L.P.'s room. He grabbed and threw some of their belongings to the floor. L.C. tried to block appellant from entering the room, but appellant shoved him. Appellant told L.C. that he would "get somebody right now to come kill you." Both L.C. and L.P. felt threatened, alarmed, and afraid, so L.C. called 911 to report these events. The officers returned just minutes after they had left. Appellant continued to make threats and behave aggressively, and the officers arrested him. L.C. provided internally consistent testimony about these events: his testimony at trial matched his statements to the 911 dispatcher as well as his statements to the officers on the date of the incident.

Appellant emphasizes his testimony that he did not threaten L.C. and that he intended only to force L.C. to leave the house by the end of the day. But appellant's testimony conflicts with the jury's verdict, so it is not a circumstance proved. *Harris*, 895 N.W.2d at 600. Appellant also argues that no evidence corroborates L.C.'s testimony of appellant's threat to "get somebody right now to come kill" L.C. But we assume the jury believed the state's evidence, including L.C.'s consistent statements and testimony. *Hughes*, 749 N.W.2d at 312. Appellant also argues that the prosecutor's misstatement of witness testimony during closing argument impermissibly bolstered L.C.'s credibility. However, the jury could have reasonably believed L.C.'s testimony even without the

misstatement, and we do not reassess credibility on appeal. *See Harris*, 895 N.W.2d at 599-601. In sum, the circumstances proved support the inference that appellant intended to cause fear of immediate bodily harm or death.

B. Rational hypotheses drawn from the circumstances proved

Appellant argues that the circumstances proved support the alternative hypothesis that he intended only contingent harm if L.C. did not leave by the end of the day. But even if appellant initially meant only a contingent threat, he then "busted" into L.C. and L.P.'s room, threw property, shoved L.C., and threatened to "get somebody right now to come kill" L.C., supporting an inference that he subsequently intended to cause fear of immediate harm. Appellant's alternative hypothesis is not reasonable. *Taylor*, 650 N.W.2d at 206.

Appellant asserts that any threatened harm was not immediate, arguing that "immediate" means "without any contingency between." But appellant's aggressive behavior as he entered L.C. and L.P.'s room and his threat to get somebody "right now" showed that the possibility of bodily harm no longer depended on L.C. vacating the premises. Appellant also relies on the *Merriam-Webster Dictionary* definition of "immediate" as "accomplished without loss or interval of time" to argue that the threatened harm must come "without delay" in order to be immediate. *Merriam-Webster Dictionary* 620 (11th ed. 2014). But not all definitions of "immediate" require instantaneous action. *Merriam-Webster* also defines "immediate" as "near to or related to the present." *Id.* at 621. The common usage of "immediate" often anticipates some appreciable passage of time more than an instant. *See State v. Milliman*, 802 N.W.2d 776, 779 (Minn. App. 2011) (stating that we refer to common usage of words to identify plain meaning); *Great N. Ins.*

Co. v. Honeywell Int'l, 911 N.W.2d 510, 516 (Minn. 2018) (noting that we construe "words and phrases . . . according to . . . their common and approved usage"). Here, the threatened harm is immediate because it is near in time to the acts, including appellant's behavior and threat, causing fear of harm. The jury could reasonably infer that appellant intended to cause fear of immediate harm. We therefore conclude that sufficient evidence supports appellant's misdemeanor domestic assault-fear conviction.

II. Sufficient evidence supports appellant's conviction of disorderly conduct.

Appellant argues that, because his spoken threats did not constitute "fighting words," he did not engage in disorderly conduct. Appellant's argument is misguided.

A person is guilty of disorderly conduct if, (1) while in a public or private place and (2) knowing or having reasonable grounds to know the person's conduct will "alarm, anger or disturb others or provoke assault or breach of the peace," the person (3) "engages in offensive, obscene, abusive, boisterous, or noisy conduct *or* in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others." Minn. Stat. § 609.72, subd. 1(3) (2018) (emphasis added). Appellant correctly states that the content of his speech is not punishable as disorderly conduct unless it consists of "fighting words." *In re Welfare of S.L.J.*, 263 N.W.2d 412, 418-19 (Minn. App. 1978). But because the disorderly conduct statute is written in the disjunctive, *either* speech that consists of "fighting words" *or* conduct that is offensive, obscene, abusive, boisterous, or noisy may constitute disorderly conduct. *See State v. Loge*, 608 N.W.2d 152, 155 (Minn. 2000) (noting that "or" is generally disjunctive); *In re Welfare of T.L.S.*, 713 N.W.2d 877, 881 (Minn. App. 2006) (noting that manner of speaking, independent of content, may

trigger disorderly conduct statute); *cf. S.L.J.*, 263 N.W.2d at 419, n.6 (noting that conduct alone would have warranted disorderly conduct conviction in prior case).

Here, appellant "busted" into L.C. and L.P.'s room, threw their belongings, and pushed L.C. Both officers testified that appellant appeared agitated and angry and talked loudly. From this evidence, the jury could reasonably conclude that appellant's conduct was offensive, abusive, boisterous, and noisy. Because appellant does not challenge or address the other elements of the disorderly conduct conviction, we conclude that the state presented sufficient evidence to support the conviction.

III. The prosecutor's misstatement of witness testimony did not affect appellant's substantial rights.

Appellant argues that the prosecutor misstated witness testimony, constituting prosecutorial misconduct that entitles him to a new trial. We disagree.

At trial, L.P. testified that appellant "threatened that he's gonna call people to come and remove [L.C.] from his house," and that she felt this to be a "real threat." The prosecutor told the jury during closing arguments that L.P. said "she heard the defendant threaten *the life* of [L.C.]" and that L.P. "believed it to be a real threat on [L.C.'s] *life*." (Emphasis added).

Appellant did not object to the prosecutor's misstatement of testimony at trial. We review unobjected-to misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Appellant must first show that the prosecutor's misstatement constitutes (1) error (2) that is plain. *State v. Matthews*, 779 N.W.2d 543,

551 (Minn. 2010) (citing *Ramey*, 721 N.W.2d at 300). Then, the burden shifts to the state to prove (3) that the error did not affect appellant's substantial rights. *Id.*

A. The misstatement constitutes plain error.

The state concedes that the prosecutor misstated L.P.'s testimony, but disputes whether the misstatement constitutes *plain* error. "An error is plain if it [is] clear or obvious," such as when it "contraven[es] case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. A prosecutor "should not make a statement of fact . . . that the prosecutor does not reasonably believe to be true." A.B.A., *Crim. Just. Standards for the Prosecution Function* 3-1.4(b) (4th ed. 2017). Here, the prosecutor had no reasonable ground to believe that L.P. testified that appellant threatened L.C.'s life. The prosecutor's misstatement violated a standard of conduct, and therefore constitutes plain error.[2]

B. The error did not affect appellant's substantial rights.

The state must show that there is no reasonable likelihood that the misconduct significantly affected the jury's verdict. *Ramey*, 721 N.W.2d at 302. In determining whether the state has met its burden, we consider "(1) the strength of the evidence against [appellant]; (2) the pervasiveness of the erroneous conduct; and (3) whether [appellant] had

[2] Appellant characterizes the prosecutor's misstatement as "misconduct" and asserts that the misconduct was intentional. But "there is an important distinction . . . between prosecutorial misconduct and prosecutorial error." *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009). Misconduct "implies a deliberate violation of a rule or practice, or perhaps a grossly negligent transgression" while error "suggests merely a mistake . . . [or] misstep of a type all trial lawyers make from time to time." *Id.* While there is no evidence here that the prosecutor's actions were intentional, the standard of review for prosecutorial misconduct is "equally applicable to prosecutorial error," so for clarity and consistency we use the term "prosecutorial misconduct." *Id.*

an opportunity to rebut any improper remarks." *State v. Peltier*, 874 N.W.2d 792, 806-807 (Minn. 2016).

1. Strength of the evidence

If the state's evidence is strong, it can overcome the prejudice caused by misconduct. *See State v. Huber*, 877 N.W.2d 519, 527 (Minn. 2016) (analyzing plain error in jury instructions). Here, the record contains ample evidence supporting appellant's convictions. Both officers testified that appellant made threats, appeared agitated, and talked loudly. Both L.C. and L.P. testified that appellant "busted" into their room, threw their belongings, shoved L.C., and yelled threats. As discussed above, L.C. provided internally consistent testimony. Finally, while appellant is correct that L.P. and the officers did not corroborate L.C.'s testimony that appellant threatened to "get somebody right now to come kill" L.C., they corroborated L.C.'s other testimony about additional threats and appellant's aggressive behavior. We therefore conclude that strong evidence supports appellant's convictions.

2. Pervasiveness of the misconduct

Appellant makes no argument on this factor, but the state argues that the misconduct was not pervasive. We agree with the state.

In determining the pervasiveness of prosecutorial misconduct, courts look to factors such as whether the misconduct is isolated, short or long in duration, and counterbalanced by instruction from the district court. *See, e.g.*, *State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006) (noting several types of misconduct in single trial); *Matthews*, 779 N.W.2d at 552-53 (noting short duration of misconduct and district court's mitigating instructions).

Here, appellant alleges only one instance and type of prosecutorial misconduct: misstatement of testimony in closing argument. The prosecutor's misstatement consists of three lines of an eight-page closing argument. The prosecutor did not use inflammatory language or draw attention to the misstated testimony. When discussing evidence that corroborated L.C.'s testimony in closing argument, the prosecutor did not mention L.P's testimony. Further, the district court instructed the jury that statements of attorneys are not evidence and that they should weigh witness credibility based on their own experience, judgment, and common sense. As a result, we conclude that the misconduct was not pervasive.

3. Whether appellant had an opportunity to rebut the misconduct

Neither party addresses this factor on appeal. Appellant could have objected to or rebutted the misstatement in his closing argument, but he did neither. *See Peltier*, 874 N.W.2d at 806 (concluding that prosecutorial misconduct did not affect appellant's substantial rights in part because defendant had ample opportunity to rebut erroneous statements in closing arguments but failed to do so).

In sum, we conclude that there is no reasonable likelihood that the prosecutor's misstatement of witness testimony significantly affected the jury's verdict. We therefore affirm appellant's convictions of domestic assault-fear and disorderly conduct.

Affirmed.