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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1073**

State of Minnesota,
Respondent,

vs.

John Willis Netherton,
Appellant.

**Filed July 24, 2017
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge***

Olmsted County District Court
File No. 55-CR-15-8571

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Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and
Kalitowski, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Following his convictions of ineligible person in possession of a firearm, two counts of terroristic threats, and one count of reckless discharge of a firearm, appellant John Willis Netherton argues that the district court erred by (1) failing to order an overnight recess during jury deliberations; (2) admitting inadmissible hearsay; and (3) imposing a sentence on his reckless discharge conviction because it was committed as part of the same behavioral incident as one of his terroristic threats convictions. We affirm in part, reverse in part, and remand to the district court to vacate the sentence for reckless discharge and amend the judgment of conviction accordingly.

DECISION

I.

At Netherton's trial, the jury began deliberations at approximately 11:00 a.m. and returned verdicts around 9:00 p.m. Netherton argues that the district court abused its discretion by permitting the jury to continue deliberations because the fatigued jury returned an ill-considered verdict. We disagree.

Generally, "the length of time a jury may be kept deliberating" falls to the discretion of the district court judge, "but abuse of that discretion requires reversal." *State v. Kelley*, 517 N.W.2d 905, 909 (Minn. 1994) (quotation omitted). A district court must not require or threaten to require a jury to continue deliberations for "an unreasonable length of time or for unreasonable intervals." *Id.* (quotation omitted). The supreme court has expressed concern "about permitting a jury, particularly in a criminal case, to deliberate late into the

night without a recess,” and stated as a general rule that district courts “should intervene at an appropriate time and order an overnight recess.” *State v. Sanders*, 376 N.W.2d 196, 204 (Minn. 1985).

In *Sanders*, the supreme court referenced the Standards Relating to Juror Use and Management, Standard 18(d) (1983), noting “[a] jury should not be required to deliberate after normal working hours unless the trial judge after consultation with counsel determines that evening or weekend deliberations would not impose an undue hardship upon the jurors and are required in the interests of justice.” *Id.* at 204 n.5 (quotation omitted). The paramount concern is “whether the extension beyond normal working hours will enhance the rational deliberative process which the jury is charged to perform.” *Id.* (quotation omitted). Relevant concerns are the preferences of the jurors and counsel, juror fatigue and the duration of the deliberations, the potential for the jury to be exposed to improper influences, the case’s complexity, and whether deliberations would interfere with jurors’ religious practices or beliefs. *Id.*

Here, at around 8:00 p.m., the district court consulted with the attorneys and Netherton about the possibility of releasing the jury for the night. Netherton raised concerns about negative media influencing the jurors if they were released. Ultimately, the district court proposed bringing the jury into the courtroom, giving them the option to continue deliberations, and then letting them decide in private how to proceed. Both attorneys and Netherton agreed to proceed in this fashion. The jury unanimously voted to continue deliberations. The court stated that it was inclined to let the jury continue deliberations for “at least another hour.” Netherton’s attorney stated that if the jury wanted

“to stay all night, that’s their business.” The jury returned its verdicts, about one-half hour after resuming deliberations.

Based on these facts, we cannot conclude that the district court abused its discretion. The district court consulted with all involved, all agreed to allow deliberations to continue, and the duration of the deliberations was neither inordinate nor unreasonable. *See Kelley*, 517 N.W.2d at 909.

II.

Netherton was charged with two counts of making terroristic threats, one count involving A.K., and the other involving K.C. Netherton argues that the district court committed prejudicial plain error by allowing inadmissible hearsay relating to his terroristic threats against A.K. Counsel for Netherton did not object to, and actually elicited, the challenged statements during cross-examination of a witness, T.K. The following exchange occurred:

Q: And you try to get [A.K.] to leave with you apparently.

A: Yes. Because she said she was scared to death.

Q: Okay.

A: And she looked scared to death because he said that he’d put a gun to her head and told him if she -- told her if she --

Q: Wait just a minute now.

A: Well, you asked so I’m telling you. You want to know why.

Q: Well I --

A: You know, I’m just telling you the truth.

Q: Okay. I’ll let you finish your answer.

A: Thanks.

Q: Okay.

A: He said he would shoot her if he got out of the car.

Q: Okay. So you’re telling the jury now that you saw her -- Mr. Netherton put a gun to [A.K.’s] head.

A: I didn’t say that to the jury, I said that’s what she told me.

Q: Oh. You didn’t witness that yourself.

A: No, I did not.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at trial . . . , offered in evidence to prove the truth of the matter asserted.” Minn. R. Evid. 801(c). Hearsay is generally not admissible, subject to certain exceptions. Minn. R. Evid. 802. “Objections to possibly inadmissible evidence must be made at the time such evidence is introduced.” *State v. Hamilton*, 268 N.W.2d 56, 63 (Minn. 1978). “Where an objection is not made, hearsay evidence will be admitted and has probative force.” *Id.* Minnesota courts have noted the importance of objecting to potential hearsay evidence at trial due to the “complexity and subtlety of the operation of the hearsay rule and its exceptions,” so that a “full discussion of admissibility [can] be conducted at trial.” *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). “Failure to object to the admission of evidence generally constitutes [forfeiture] of the right to appeal on that basis.” *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). However, in the absence of an objection, we may review admission of evidence for plain error. Minn. R. Crim. P. 31.02. The plain-error standard requires the defendant to show (1) error (2) that was plain and (3) that affected the defendant’s substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). “If all three conditions are satisfied, we proceed to determine whether it is necessary to address the error to ensure the fairness and integrity of the judicial proceedings.” *Manthey*, 711 N.W.2d at 504.

Assuming, but not deciding, that the statements here were inadmissible hearsay, Netherton has failed to satisfy the third prong of the plain-error test, an effect on his substantial rights, which requires a showing of “prejudice that forms the basis for a reasonable likelihood the error substantially affected the verdict.” *Id.* T.K.’s brief and

disorganized statements, which were elicited by Netherton's counsel, were inconsistent with both the state's theory of the case and A.K.'s own testimony, as she never testified that Netherton put a gun to her head or threatened to kill her if she left the vehicle.

During opening statements, the state concentrated on Netherton's act of shooting through the floor of the vehicle, pointing the gun at A.K., and telling her to "calm down," which the state characterized as an "inferred" threat to kill A.K. if she did not calm down and "[t]errifying behavior" that would cause A.K. "to feel terrorized." Moreover, during closing arguments, the state did not reference the statements now being challenged.

There was sufficient credible evidence to support Netherton's conviction. A.K. testified that Netherton took the gun out, pointed it at her and K.C., and stopped in a driveway, where he fired the gun while both women were in the vehicle. He then drove off, pointed the gun at A.K., and told her "to calm down in the back seat." A.K.'s testimony was both consistent with the state's theory of the case and sufficient to justify the terroristic threats conviction. *See State v. Smith*, 825 N.W.2d 131, 135-36 (Minn. App. 2012) (concluding that conduct was sufficient to constitute a terroristic threat where individual waved a knife at his cousin and demanded money because the conduct constituted a threat of a future assault if the cousin did not comply with the demand for money), *review denied* (Minn. Mar. 19, 2013); *see also State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) (holding that physical acts alone may constitute terroristic threats). We cannot conclude that a reasonable likelihood exists that the admission of T.K.'s statements had a substantial effect on the jury's verdict.

III.

Netherton argues that the district court erred by imposing a sentence for his reckless discharge conviction because it was committed as part of the same behavioral incident as his terroristic threats against K.C. We agree.

Under Minn. Stat. § 609.035, subd. 1 (2016), multiple sentences are prohibited, with some exceptions, for two or more offenses committed as part of the same behavioral incident. *State v. Rivers*, 787 N.W.2d 206, 213 (Minn. App. 2010). When the underlying facts are undisputed, determining whether multiple offenses arose out of a single behavioral incident presents a legal question, which this court reviews de novo. *Id.*

Two different tests are used to determine whether crimes arise from a single behavioral incident. *State v. Bauer*, 792 N.W.2d 825, 827-28 (Minn. 2011). Both tests examine whether there was unity of time and place between the separate crimes. *State v. Johnson*, 273 Minn. 394, 404-05, 141 N.W.2d 517, 525 (1966). But the other area of relevant inquiry differs depending on whether the underlying crimes contain an intent element. When examining two intentional crimes, we look at whether there was “an effort to obtain a single criminal objective.” *Id.* at 404.

Netherton asserts that the crimes of terroristic threats, Minn. Stat. § 609.713, subd. 1 (2016), and reckless discharge of a firearm in a municipality offense, Minn. Stat. § 609.66, subd. 1a(a)(3) (2016), are intentional for purposes of the single-behavioral-incident test, an assertion that the state does not contest. We therefore examine whether there was an effort to obtain a single criminal objective in determining if Netherton’s actions were part of a single behavioral incident. *See State v. Rund*, 896 N.W.2d 527, 534 (Minn. 2017) (stating

“the terroristic-threats statute includes more than one mens rea: either the purpose of terrorizing or a reckless disregard of the risk of terrorizing”); *State v. Engle*, 743 N.W.2d 592, 596 (Minn. 2008) (stating that reckless discharge under Minn. Stat. § 609.66, subd. 1a(a)(3), includes a mental state requirement and “requires both intentional conduct and the creation of a risk”).

Here, the crimes were committed inside Netherton’s vehicle during a limited window of time. And Netherton had the single objective of terrorizing the two women in his vehicle. Further, the state concedes that the acts here were part of a single behavioral incident. See *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000) (discussing state’s burden to establish offenses were not committed as part of a single behavioral incident). We therefore conclude that the crimes were part of a single behavioral incident and the imposition of sentences for both crimes was improper.

As for sentencing, “section 609.035 contemplates that a defendant will be punished for the ‘most serious’ of the offenses arising out of a single behavioral incident.” *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006). And determining which offense is the most serious requires appellate courts to “compare the maximum potential sentence for each of multiple offenses.” *State v. St. John*, 847 N.W.2d 704, 708 (Minn. App. 2014) (quotation omitted). Here, the terroristic threats charge carries a higher maximum potential sentence. See Minn. Stat. §§ 609.713, subd. 1, 609.66, subds. 1a(a)(3), 1a(b)(2). Therefore, the sentence for the reckless discharge must be vacated, and the judgment of conviction must be amended accordingly.

Affirmed in part, reversed in part, and remanded.