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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1877**

State of Minnesota,
Respondent,

vs.

Terry Marcell Allen,
Appellant.

**Filed October 1, 2018
Affirmed
Smith, John, Judge***

Traverse County District Court
File Nos. 78-CR-16-106, 78-CR-17-43

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

Matthew P. Franzese, Traverse County Attorney, Wheaton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and Smith,
John, Judge.

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

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm appellant's conviction of terroristic threats because the prosecutor did not commit misconduct during closing arguments.

FACTS

Appellant Terry Marcell Allen and his housemate B.N. engaged in a verbal and physical altercation. During the altercation, Allen entered B.N.'s bedroom, where she was sitting on her bed. He hit the left side of her face with his fist. They continued yelling at each other, and B.N. activated the recorder on her cell phone. Allen then approached her again, and she said, "Would you wanna hit this side now?" Allen responded, "I might kill you." The statement made B.N. feel scared; she left the house and later reported the incident to the police. Allen was charged with domestic assault and terroristic threats. After a jury trial, he was convicted of both charges and sentenced to 16 months' imprisonment.

DECISION

When, as here, an appellant claims prosecutorial misconduct based on unobjected-to conduct, we apply a modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). The test requires that the appellant establish that the misconduct was error and that the error was plain. *Id.* at 302. Then the burden shifts to the state to show that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Id.* Finally, we determine "whether to address the error to ensure fairness and integrity in judicial proceedings." *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010).

A prosecutor commits misconduct by misstating the law or the state's burden to prove each element of the charged crime beyond a reasonable doubt. *State v. Strommen*, 648 N.W.2d 681, 690 (Minn. 2002). But in determining whether a prosecutor's argument misstates the law or burden of proof, we do not focus on isolated phrases; we consider the argument as a whole. See *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008). The prosecutor is afforded leeway to present "all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence in . . . closing argument." *State v. Nissalke*, 801 N.W.2d 82, 105 (Minn. 2011) (quotation omitted).

Allen contends that the prosecutor's closing argument misstated the state's burden of proving each element of terroristic threats by arguing that the state needed to prove only the "mere act" of Allen saying threatening words.¹ This argument is unavailing. The prosecutor used the phrase "mere act" three times in closing argument:

It does not need to be proven to you that the defendant actually intended to carry out the threat. Words matter. What the focus should be is the *mere act* of him saying the words. I might kill you after are you going to hit me in the other side of the face. . . . We don't need to prove that the defendant had the actual intent of carrying out the threat. The *mere act* of saying it is what's important. He said [in his testimony] it was a joke. I submit to you that's not a joke and he was not joking when he said that but it doesn't matter. The *mere act* of him saying it in the context of what was going on is what matters and that's the only thing you should be focused on.

(Emphases added.) Viewed in context of the entire argument, the phrase appropriately asserts that Allen's act of saying "I might kill you" establishes the first element of terroristic

¹ Allen does not challenge his domestic-assault conviction.

threats: threatening a crime of violence. *See* Minn. Stat. § 609.713, subd. 1 (2016). The prosecutor also used the phrase to accurately distinguish between proving that element and proving that Allen intended to follow through on the threat, which is not an element of terroristic threats. *See* 10 *Minnesota Practice*, CRIMJIG 13.107 (2015) (“It need not be proven that the defendant had the actual intention of carrying out the threat.”). And the prosecutor accompanied references to the “mere act” of Allen saying threatening words with references to the mens rea element of terroristic threats, urging the jury to find that Allen said the words with reckless disregard for their likely terrorizing effect. *See* Minn. Stat. § 609.713, subd. 1. The prosecutor did not misstate the law of terroristic threats or diminish the state’s burden of proving each element of that offense.

Allen also asserts that the prosecutor misstated the state’s burden of proof by invoking a biblical standard of judgment that “allows condemnation by one’s words alone.”² This argument is similarly unavailing. The prosecutor ended his argument with the following:

In closing I want to leave you with a quote from Matthew’s gospel, chapter twelve, verses thirty-six through thirty-seven. But I tell you that everyone will have to give account in the day of judgment for every empty word they have spoken. For by your words will you be acquitted and by your words will you be condemned. Today is the defendant’s day of judgment for what he did on May 19, 2016. By the defendant’s words you should find him guilty of terroristic threats and by

² Notably, while Allen suggests that he was prejudiced by the comments because of “inherent” prejudice in a prosecutor quoting religious authority, Allen disavows any claim of impropriety in the mere reference to or quotation of a religious text. *Cf. State v. Wangberg*, 136 N.W.2d 853, 855 (Minn. 1965) (holding prosecutor committed misconduct by invoking scripture as a basis for conviction).

the photographs find him guilty of domestic assault. The facts are clear but more importantly, the law is clear. Thank you.

Viewed in context, this reference to judgment “by your words” is not misleading; it simply reiterates the prosecutor’s earlier accurate statements that Allen’s “mere words” establish the threat element of the offense.

In sum, the prosecutor emphasized throughout his closing argument precisely what Allen urges on appeal: that a terroristic threat involves both an act (the threat) and a mens rea (either intent or reckless disregard). And the prosecutor’s argument, as a whole, accurately articulated the state’s burden to prove these elements. Accordingly, Allen’s plain-error claim of prosecutorial misconduct fails.

Affirmed.