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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0284**

State of Minnesota,
Respondent,

vs.

Darsche Chaudaun Wharry,
Appellant.

**Filed March 4, 2019
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-17-11954

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Darsche Chaudaun Wharry was charged with second-degree assault and threats of violence following an incident in which he pointed a shotgun at his brother.

Following a jury trial, he was acquitted of assault but convicted of making threats of violence. In this direct appeal, Wharry argues that his conduct did not constitute a threat, that the evidence was insufficient to prove beyond a reasonable doubt that he intended to cause fear, and that parts of a police officer's testimony were erroneously admitted, requiring reversal. We affirm.

FACTS

In 2017, Wharry was living in a house with his mother, L.M., and his half-brother, S.M. In May of that year, S.M. and L.M. had gone out to dinner to celebrate an early Mother's Day. When S.M. and L.M. returned from dinner, Wharry got into an argument with them.

S.M. left the room and went upstairs to his room. Shortly thereafter, he came back downstairs to talk to his mother. While standing on the stairs, S.M. felt as if someone was standing behind him and turned around to see Wharry pointing a shotgun at his head. Wharry imitated the noise of a gun, saying "boom" or "pow." S.M. told Wharry to "knock it off" and said that he was calling the police. Wharry told S.M. to "go ahead." During this brief conversation, according to S.M., Wharry "pulled [the gun] back away and was just waving the gun around as if there was a little intimidation going on." S.M. then hurried back up to his room, closed the door, and called 911. During that call, S.M. told the dispatcher that Wharry had threatened him with the gun. After S.M. went to his room, L.M. told Wharry to put down the gun, and he did so. Based on the 911 call, a number of officers arrived at the home. They instructed the three occupants to come outside, and they did. The police then interviewed S.M. and L.M. and arrested Wharry.

Wharry was charged with second-degree assault—fear. Just before trial the complaint was amended to include a charge of threats of violence.

At trial, there was some evidence suggesting that the shotgun may not have been in working order or that various members of the household may have believed it not to be. One officer testified that Wharry had told him the firing pin had been removed. S.M. testified that he had been told by both L.M. and his father that the gun did not work, but that he was not personally sure whether it did or not. L.M. testified that she did not know whether the gun worked but that she may have told police that it did not work. However, there was no conclusive evidence about whether the shotgun was actually functional.

The jury also heard the testimony of Officer Link, who said that S.M. had told him that S.M. “believed he would have died” and “thought that basically there was an imminent threat to him by having that shotgun pointed at him.” Officer Link was also asked whether S.M. had described any past violence by Wharry toward S.M. He responded that S.M. had “mentioned that [Wharry] had been violent toward previous girlfriends.” Defense counsel moved for a mistrial based on that statement, and the court denied the motion. Wharry’s attorney did not request a cautionary or curative instruction, stating that she believed the prejudice to Wharry from the statement could not be cured by such an instruction.

The jury found Wharry not guilty of second-degree assault and guilty of threats of violence. The district court convicted Wharry of threats of violence, stayed imposition of a sentence, and placed Wharry on probation for three years. Wharry appeals.

DECISION

I. Wharry's conduct was sufficient to constitute a threat to commit a future crime of violence.

Wharry argues that his actions did not constitute a threat within the meaning of Minn. Stat. § 609.713 (2016). He contends that, while pointing a gun could be frightening in the moment, it does not threaten future violence.

Whether conduct meets the statutory definition of a threat of violence is an issue of statutory interpretation that we review de novo. *State v. Olson*, 887 N.W.2d 692, 697 (Minn. App. 2016).

The seminal case construing Minn. Stat. § 609.713 is *State v. Schweppe*, in which the Minnesota Supreme Court defined “threat” as “a declaration of an intention to injure another . . . by some unlawful act.” 237 N.W.2d 609, 613 (Minn. 1975). In context, the communication must “have a reasonable tendency to create apprehension that its originator will act according to its tenor.” *Id.* (quotation omitted).

Threats need not be verbal or explicit to fall within the scope of section 609.713. In *State v. Murphy*, the defendant engaged in a “campaign of terror” against members of the criminal justice system. 545 N.W.2d 909, 912-14 (Minn. 1996). Among other things, he slashed tires, threw objects through windows, spray-painted houses with messages like “I’ll be back,” and left mutilated animals near their homes. *Id.* Even though this conduct was primarily nonverbal and did not specifically threaten any violence against the residents of those houses, the supreme court held that the acts were implicit threats to commit actual violence in the future. *Id.* at 915-16.

Wharry’s conduct similarly implied that he intended to commit violence in the future. The act of miming the use of a shotgun against S.M., coupled with his instruction to call the police, suggests that Wharry was willing to use the shotgun—or at least to engage in some violence of comparable severity—and that S.M. would need the assistance of the police in order to prevent the impending violence.

Both parties spent a significant proportion of their briefing discussing *State v. Brevik*, No. A08-0070, 2009 WL 817532 (Minn. App. Mar. 31, 2009), an unpublished decision of this court. Unpublished decisions are not precedential but may be persuasive. *Kruse v. Comm’r of Pub. Safety*, 906 N.W.2d 554, 559 (Minn. App. 2018). In *Brevik*, a husband twice drove a van at his wife in a manner that suggested that he was willing to hit her with it—he stopped only a few feet short of a collision each time. *Brevik*, 2009 WL 817532, at *1. He was charged with and convicted of both second-degree assault and terroristic threats.¹ *Id.* On appeal, this court held that his conduct was insufficient to constitute a threat because it could not reasonably be interpreted as threatening to commit a future crime of violence. *Id.* at *4.

Wharry argues that his own conduct should be interpreted in the same way because he did not say anything that would convey a future threat. But Wharry’s conduct was not the same as *Brevik*’s. Pointing a shotgun and saying “boom” indicates that the person with the shotgun is currently restraining himself but could fire the shotgun if he wanted to. It foreshadows future violence in a way that driving a car toward a person does not.

¹ “Terroristic Threats” was the former title of Minn. Stat. § 609.713, now titled “Threats of Violence.” See 2015 Minn. Laws Ch. 21, art. 1, § 109, subd. 10, at 234.

Because of the way it suggested future violence, Wharry's conduct had "a reasonable tendency to create apprehension" that Wharry would shoot S.M. *See Schweppe*, 237 N.W.2d at 613. Wharry's conduct constituted a threat within the meaning of Minn. Stat. § 609.713.

II. The circumstantial evidence was sufficient to prove that Wharry had the requisite intent.

Wharry argues that the state failed to prove beyond a reasonable doubt that he had the necessary intent to support a conviction under Minn. Stat. § 609.713 because the circumstantial evidence introduced by the state did not rule out the possibility that he was merely expressing transitory anger.

When considering a claim of insufficient evidence, appellate courts conduct "a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Hohenwald*, 815 N.W.2d 823, 832 (Minn. 2012) (quotation omitted). We will not disturb the verdict if the factfinder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *See Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

If, however, the state relied on circumstantial evidence to prove an element of the offense, an appellate court applies a heightened standard of review. *See State v. Al-Naseer*, 788 N.W.2d 469, 475 (Minn. 2010). Under this heightened scrutiny, "[c]ircumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so

directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

An appellate court applying this standard of review engages in a two-step process. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). First, the appellate court determines what circumstances were proved. *Id.* In doing so, the court examines the evidence in the light most favorable to the verdict and assumes that the jury credited the testimony of the state’s witnesses. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017); *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). Then, based on the circumstances proved, the court asks whether the circumstances permit an inference of guilt and whether any hypothesis inconsistent with the defendant’s guilt could reasonably be inferred from the circumstances. *State v. Bahtuoh*, 840 N.W.2d 804, 811 (Minn. 2013).

To convict Wharry of threats of violence, the state had to prove that Wharry acted either with a purpose to terrify another or with reckless disregard of causing such terror. See Minn. Stat. § 609.713, subd. 1. Because the state sought to prove this element circumstantially, the heightened standard applies. See *State v. Davis*, 656 N.W.2d 900, 905 (Minn. App. 2003) (observing that “[t]he intent element of a crime, because it involves a state of mind, is generally proved circumstantially”), review denied (Minn. May 20, 2003).

We begin with the first step—identifying the circumstances proved. All of the testimony at trial was from the state’s witnesses. Thus, the testimony is presumed to be credited, so long as it is consistent with the verdict. See *Harris*, 895 N.W.2d at 600. The state’s two eyewitnesses, S.M. and L.M., testified to substantially the same events. S.M.

argued with Wharry, then went upstairs.² S.M. came back down the stairs when he heard a loud conversation between Wharry and L.M. Not long after S.M. descended, Wharry pointed the shotgun at S.M.'s head and imitated the sound of a gun firing. S.M. told Wharry to knock it off and said that he was calling the police; Wharry responded by telling S.M. to go ahead and call the police. Wharry pulled the gun back but continued to hold it, and S.M. ran back upstairs to call the police. Wharry then put the gun away. S.M. testified that he did not feel scared or nervous but did feel that he urgently needed to stop the situation. S.M. called 911 and told the dispatcher that he had been threatened. L.M. testified that she was afraid Wharry would hurt S.M. because "a gun can misfire."

We turn to the second step of the analysis. Wharry does not challenge that the circumstances proved permit an inference of guilt; rather, he argues only that they also are consistent with the reasonable inference that he acted in transitory anger and not with the purpose to terrorize or in reckless disregard of the danger that he would do so. Section 609.713 "is not meant to encompass verbal threats expressing transitory anger without intent to terrorize." *State v. Dick*, 638 N.W.2d 486, 492-93 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). But a person can commit a threats-of-violence offense

² L.M.'s testimony did not mention that S.M. argued with Wharry, stating only that she and Wharry had a conversation that was heated. It is not entirely clear which version is more favorable to the verdict. If S.M. and Wharry had been in an argument, that suggests that Wharry would have been angry, which could help provide some support for the anger aspect of his transitory anger argument. But that same fact also suggests that Wharry's anger was not transitory, which would negate that defense. Similarly, if S.M. and Wharry had not been in an argument, then the time frame for the incident is shorter, suggesting that Wharry's state of mind was transitory, but the absence of an argument leaves no basis for inferring that Wharry was angry at S.M. when he pointed the shotgun.

without having a specific intent to terrorize, and the general-intent requirement is satisfied when the perpetrator disregards a known, substantial risk that the threat will terrorize another. *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009).

Wharry relies on the facts that the incident was brief and unaccompanied by other threatening words or behavior, that he stopped pointing the gun when told to do so, that S.M. was calm during the 911 call, and that everyone involved had been told that the gun did not work. He argues that, together, these facts permit the reasonable inference that he was expressing transitory anger and lacked the necessary mens rea.

Wharry, however, fails to construe the evidence in the light most favorable to the verdict. *See Harris*, 895 N.W.2d at 600. S.M. testified to feeling an urgent need to put a stop to the situation. He was sufficiently concerned to call 911, and he told the dispatcher he had been threatened. When this evidence is interpreted in the light most favorable to the verdict, Wharry's conduct did cause S.M. to feel terrorized. Though that terror is not an element of threats of violence, it is "circumstantial evidence relevant to the element of intent." *Sykes v. State*, 578 N.W.2d 807, 811 (Minn. App. 1998), *review denied* (Minn. July 16, 1998); *see also State v. Jones*, 451 N.W.2d 55, 63 (Minn. App. 1990) (affirming sufficiency of circumstantial evidence based, in part, on the fact that the victim felt threatened), *review denied* (Minn. Feb. 21, 1990).

Wharry's argument that the brevity of the incident shows that he acted out of transitory anger also fails. When the evidence is viewed in the light most favorable to the verdict, the argument had been going on for some time before Wharry threatened S.M.—

the incident was not actually brief. And even if it was over quickly, the mere fact that an incident “did not continue for a long period of time” does not suffice to show that a threat was merely an expression of transitory anger. *State v. Smith*, 825 N.W.2d 131, 137 (Minn. App. 2012), *review denied* (Minn. Mar. 19, 2013).

Finally, the fact that S.M. had been told that the gun did not work does not permit a reasonable inference that Wharry lacked the requisite mens rea. Because of the potentially life-threatening harm that can be caused by a functional gun, a person recklessly disregards the risk of causing terror by intentionally pointing a gun at someone who may believe that the gun works.³ Even though S.M. had been told that the gun did not work, S.M. was unsure about whether that was true or not. S.M. also believed that the gun may have been loaded. Moreover, the circumstances proved do not include anything allowing this court to infer what Wharry believed that S.M. believed about the gun. “[Appellate courts] will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.” *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). To conclude from these facts that Wharry was certain that S.M. believed the gun to be nonfunctional would be conjecture, not inference. Because the record contains no evidence allowing an inference about what Wharry believed that S.M. believed about whether the gun worked, we cannot infer that Wharry did not act in reckless disregard of the risk of causing terror. Because Wharry knew

³ Whether the gun was in fact loaded or functional is irrelevant because the issue is whether Wharry intended to terrorize S.M. or ignored the risk of doing so and not whether he could have actually followed through on his threat using that particular gun. *See State v. Rund*, 896 N.W.2d 527, 533 n.10 (Minn. 2017) (explaining that, in the typical offense of recklessly threatening a crime of violence, the offender is unlikely to intend to carry out the threat).

that pointing the gun posed a risk of terrorizing S.M. but did so anyway, his threats could not reasonably be characterized as arising from transitory anger.

III. The district court did not commit reversible error by admitting two out-of-court statements.

Wharry argues that the district court erred by admitting two out-of-court statements that Officer Link testified were made by S.M. The first was that S.M. had told Link that Wharry had engaged in domestic violence toward past girlfriends. The second was that S.M. had told Link that, when the shotgun was pointed at him, “[S.M.] actually believed that he would have died” and “thought basically there was an imminent threat to him.” Wharry argues that S.M.’s statements were inadmissible hearsay.

At trial, Wharry did not object to either of the statements on the grounds that it was hearsay. We review assertions of unobjected-to error for plain error. Minn. R. Crim. P. 31.02. On plain-error review, the defendant bears the burden to show: “(1) error; (2) that was plain; and (3) that affected substantial rights.” *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). “An error affects substantial rights if there is a reasonable likelihood that it substantially affected the verdict.” *State v. Fraga*, 898 N.W.2d 263, 277 (Minn. 2017). The third prong is “a heavy burden.” *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Even if the defendant satisfies the first three prongs, we will reverse only if the error “seriously affects the fairness and integrity of the judicial proceedings.” *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014).

Because of the “complexity and subtlety of the operation of the hearsay rule and its exceptions,” it is difficult to prove that certain testimony was plainly inadmissible hearsay.

State v. Manthey, 711 N.W.2d 498, 504 (Minn. 2006). Statements that would be hearsay if used for one purpose may not be hearsay if admitted for a slightly different purpose, and failure to object at trial prevents the district court from creating a record of its decision-making process. *See id.* Here, however, it seems that both statements were hearsay—they repeat S.M.’s out-of-court statements for the purpose of proving the substance of the statements. *See* Minn. R. Evid. 801. On appeal, the state argues that the statements fall within the residual exception to the rule against hearsay. *See* Minn. R. Evid. 807. But, because Wharry never objected at trial, the determinations necessary to rule on the applicability of that exception were never made. As a result, we cannot hold that the statements, although hearsay, were plainly inadmissible.

Even if both statements were plainly not admissible under any hearsay exception, Wharry has not shown that the errors affected his substantial rights. Wharry argues that S.M.’s statement that he “believed . . . he would have died” and that he thought that “there was an imminent threat to him” affected the outcome at trial because it was the strongest evidence that S.M. actually felt terrorized and thus the strongest circumstantial evidence of Wharry’s intent. However, intent is shown by inferences from all of the circumstances. *See Harris*, 895 N.W.2d at 600 (requiring an appellate court to view the circumstances proved “as a whole”). S.M.’s statement to Officer Link was just one circumstance. As discussed in section II, above, the evidence is sufficient to rule out an inference that Wharry lacked the requisite mens rea, even if S.M.’s statement to Officer Link is excluded. The remaining circumstances—S.M.’s feeling of urgency, his call to police, and his statement to the dispatcher that he had been threatened—made it unreasonable for a jury to conclude that

S.M. did not feel threatened by Wharry's conduct. Thus, the admission of S.M.'s out-of-court statement that he felt threatened did not affect Wharry's substantial rights.

Wharry also argues that Officer Link's testimony regarding S.M.'s statement that Wharry had engaged in domestic violence against a past girlfriend affected his substantial rights because it unfairly prejudiced the jury against him and made it more likely that the jury would believe that he intended to terrorize S.M. The entirety of Link's testimony about S.M.'s statement was: "[S.M.] mentioned that [Wharry] had been violent toward previous girlfriends." Inadmissible evidence of prior bad acts can be sufficiently prejudicial to affect substantial rights. *See Strommen*, 648 N.W.2d at 687-88. Inadmissible evidence is less likely to affect substantial rights if it is "not presented in a manner that [gives] it significant focus." *State v. Jackson*, 764 N.W.2d 612, 620 (Minn. App. 2009), *review denied* (Minn. July 22, 2009).

Officer Link's testimony was a single statement, no other witness gave comparable evidence, and the state did not draw the jury's attention to the testimony in its closing argument or even mention the testimony in any way. Thus, its manner of presentation did not give it "significant focus." *See id.* Additionally, though potentially prejudicial, Officer Link's testimony does not seem likely to have persuaded the jury that Wharry threatened S.M. In comparable situations, even clearly inadmissible character evidence—specifically, testimony that the defendant was "a violent person"—has been held not to affect a defendant's substantial rights. *See State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). Because of the brief and isolated nature of the statement, any error in the district court's response to the testimony did not affect Wharry's substantial rights.

In sum, Wharry has not shown that the district court committed reversible plain error by admitting testimony about S.M.’s two out-of-court statements.

IV. The district court did not abuse its discretion by refusing to declare a mistrial.

Finally, Wharry contends that the district court abused its discretion by not declaring a mistrial following Officer Link’s testimony regarding S.M.’s statement about Wharry’s past conduct toward a former girlfriend. Wharry argues that the evidence was irrelevant and prejudicial and thus not admissible and that a mistrial was required to remedy the prejudice. The state responds that the evidence was, in fact, admissible under Minn. Stat. § 634.20 (2018), which allows the admission of “[e]vidence of domestic conduct by the accused against . . . household members” unless prejudice from the evidence substantially outweighs the evidence’s probative value, and that there was therefore no basis for granting a mistrial.

Unlike his hearsay objections, Wharry raised this objection to the district court by moving for a mistrial. We review a district court’s refusal to grant a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). To justify a mistrial based on the admission of unfairly prejudicial evidence, there must be “a reasonable probability that the outcome of the trial would be different” without that evidence. *Manthey*, 711 N.W.2d 506.

We analyze this question first, without deciding whether the evidence was admissible. For the reasons we cite above in concluding that admission of the same testimony did not affect Wharry’s substantial rights under the plain-error test, we conclude that the testimony did not justify a mistrial. The challenged testimony was brief—a single

sentence out of two days of testimony; it was also isolated—there was no other evidence of Wharry’s conduct toward past girlfriends, and it was never mentioned again. *Cf. State v. Benton*, 858 N.W.2d 535, 538-39, 541-42 (Minn. 2015) (holding that more extensive relationship evidence did not significantly affect a verdict because the evidence was solicited from a single witness, the evidence was mentioned in the prosecutor’s closing argument “only once in passing,” and cautionary instructions were provided). Because there is no reasonable probability the outcome of the trial would be different without the testimony, the district court did not abuse its discretion in refusing to grant a mistrial.

Affirmed.