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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0592**

Steven James Hayes, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 22, 2019
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

St. Louis County District Court
File No. 69DU-CR-11-3112

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

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

Mark S. Rubin, St. Louis County Attorney, Jessica G. Foschi, Assistant County Attorney, Virginia, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Steven James Hayes was convicted of second-degree assault with a dangerous weapon and terroristic threats in connection with an incident involving a BB

gun. The district court had instructed the jury that a BB gun is a firearm and that a firearm is a dangerous weapon. Following Hayes's convictions, the supreme court decided, in *State v. Haywood*, 886 N.W.2d 485, 486 (Minn. 2016), that a BB gun is not a firearm for purposes of Minn. Stat. § 609.165 (2014). Hayes petitioned for postconviction relief, seeking, among other things, a new trial on the second-degree-assault and terroristic-threats charges on the ground that the jury instruction regarding a dangerous weapon was erroneous. The postconviction court denied a new trial, and Hayes appealed.

Because the error in the jury instructions deprived Hayes of the right to have the jury determine every element of second-degree assault with a dangerous weapon, we reverse that conviction and remand for a new trial. As to the terroristic-threats convictions, because the error did not direct the verdict on an element of the crime and was not prejudicial, we affirm those convictions.

FACTS

In September 2011, Hayes was charged with multiple offenses, including second-degree assault and terroristic threats, based on a domestic-abuse incident involving his estranged wife and others present during the incident. According to the complaint, Hayes called his estranged wife and threatened to beat her; arrived at her apartment and assaulted her, including by striking her with a BB gun; and showed his BB gun to, and threatened to kill, other persons who were at the apartment. The case was tried to a jury.

In instructing the jury on the second element of second-degree assault with a dangerous weapon, the district court stated that "Minnesota law defines a BB or pellet gun as a firearm" and that "[a] firearm . . . is a dangerous weapon." The court's instruction on

second-degree assault was then incorporated into the terroristic-threats instruction. The court instructed that the first element of terroristic threats is that “the defendant threatened, directly or indirectly, to commit a crime of violence.” The court went on to explain that “Second Degree Assault is a crime of violence.” On December 15, 2011, the jury found Hayes guilty of all charges. Relevant here, the district court convicted Hayes of one count of second-degree assault with a dangerous weapon and one count of terroristic threats against his estranged wife, and two counts of terroristic threats against two other persons present during the attack.

In October 2016, when Hayes was serving his sentence in prison, the Minnesota Supreme Court held that, “[u]nder Minn. Stat. § 609.165 (2014), the plain meaning of the word ‘firearm’ does not include an air-powered BB gun.” *Haywood*, 886 N.W.2d at 486 (syllabus). Hayes pursued postconviction relief. The postconviction court granted relief on a number of Hayes’s claims¹ but denied his claim that, because the jury instructions that a BB gun is a firearm were erroneous, he was entitled to a new trial on the second-degree-assault and terroristic-threats convictions.

This appeal follows.

D E C I S I O N

We “review the denial of a petition for postconviction relief for an abuse of discretion.” *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). We “will not reverse an

¹ For example, the postconviction court vacated Hayes’s conviction for being a felon in possession of a firearm based on *Haywood*.

order unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Id.* (quotation omitted).

Defense counsel, the state, and the postconviction court all analyzed this case under the framework of plain error. Plain error is the standard applied to an unobjected-to error. See Minn. R. Crim. P. 31.02 (“Plain error affecting substantial rights can be considered by the court on motion for new trial, post-trial motion, or on appeal even if it was not brought to the trial court’s attention.”). The plain-error standard requires the defendant to show: (1) error; (2) that was plain; and (3) that affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three prongs are met, the appellate court then assesses (4) whether it should address the error to ensure the fairness and integrity of the judicial proceedings. *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010).

“An error is plain if it . . . violates or contradicts case law, a rule, or an applicable standard of conduct.” *Id.* The postconviction court determined, and the parties agree, that the jury instruction was plainly erroneous in light of *Haywood*.² The points of contention are the third and fourth prongs. The third prong—whether substantial rights were

² “It is a well-established rule that any claims not argued by the parties are deemed waived unless prejudicial errors are obvious from the record.” *Barnes v. State*, 768 N.W.2d 359, 363 n.2 (Minn. 2009); see also *State v. Porte*, 832 N.W.2d 303, 312-14 (Minn. App. 2013) (declining to decide whether a trial error was harmless because the state failed to raise the issue). Because the state does not “take issue with the first two prongs of the plain error test,” we decline to review sua sponte the postconviction court’s decision that *Haywood* renders the BB-gun instruction plainly erroneous. It is not obvious whether *Haywood* applies retroactively to Hayes’s final convictions for second-degree assault and terroristic threats; we express no opinion on the issue.

affected—requires the court to consider if the error was prejudicial. *Id.* “An error in instructing the jury is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury’s verdict.” *State v. Huber*, 877 N.W.2d 519, 525 (Minn. 2016) (quotation omitted).

We begin with the second-degree-assault conviction.

I. The postconviction court abused its discretion in denying Hayes a new trial on his second-degree-assault conviction.

Hayes asserts that the erroneous jury instruction that a BB gun is a firearm, and thus a dangerous weapon, for purposes of the second-degree-assault charge is reversible plain error.

The state argues that, while erroneous, the instruction was not prejudicial under the third prong of the plain-error standard. Under the criminal code, “dangerous weapon” includes not only a firearm but also “any device designed as a weapon and capable of producing death or great bodily harm” and any “other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.” Minn. Stat. § 609.02, subd. 6 (2010). The state asserts that the BB gun was indisputably a dangerous weapon because (1) BB guns are “inherently capable of causing great bodily harm when used as a weapon” and (2) there was evidence that Hayes had used the BB gun in a manner likely to cause great bodily harm by striking his estranged wife with it. Thus, the state reasons, had the jury been properly instructed about the meanings of “dangerous weapon,” it still, in all likelihood, would have found Hayes guilty.

Hayes's argument has a different slant. He relies on *State v. Moore*, 699 N.W.2d 733 (Minn. 2005). In *Moore*, the defendant was found guilty of first-degree assault, an element of which was infliction of "great bodily harm." *Id.* at 735. "Great bodily harm" was statutorily defined as "a permanent or protracted loss or impairment of the function of any bodily member or organ." *Id.* at 736-37. The issue on appeal was whether the district court made a reversible error when it instructed the jury that "the loss of a tooth is a permanent loss of the function of a bodily member." *Id.* at 736. The supreme court concluded that the jury instruction was erroneous. *Id.* at 737. And, more importantly, the court rejected the state's argument that the error was harmless, holding that "harmless error analysis is not applicable." *Id.* at 737-38. The court did not consider whether the jury, based on the evidence in the record, would have found the loss of a tooth to be great bodily harm in the absence of the erroneous instruction. *Id.* That was because, by giving that instruction, the district court effectively directed a verdict on the element of great bodily harm, depriving "the defendant of the right to have the jury determine . . . every element of the charged offense." *Id.*

We conclude that *Moore* controls. Hayes was convicted of second-degree assault, and use of a "dangerous weapon" was an element of that crime. Minn. Stat. § 609.222 (2010). In instructing on that element, the district court stated, "Second, the defendant, in assaulting [the victim], used a dangerous weapon. A firearm, whether loaded or unloaded or even temporarily inoperable, is a dangerous weapon. Minnesota law defines a BB or pellet gun as a firearm." Just as the jurors in *Moore* could not help but find that the loss of a tooth was a permanent loss of the function of a bodily member and, thus, great bodily

harm, here, the jury could not help but find that a BB gun was a firearm and, thus, a dangerous weapon. Under *Moore*, the district court deprived Hayes “of the right to have the jury determine . . . every element of the charged offense.” 699 N.W.2d at 738.

We disagree with the state that the two alternative definitions of dangerous weapon change the analysis. Under either definition, a jury question was presented—namely, whether the BB gun was designed as a weapon and capable of producing death or great bodily harm or whether, in the manner in which it was used, the BB gun was calculated or likely to produce death or great bodily harm. See Minn. Stat. § 609.02, subd. 6. The erroneous instruction deprived Hayes of his right to have the jury answer that question.

Under the plain-error standard, even when the first three prongs are satisfied, we will reverse only if it is necessary to ensure the fairness and integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740. We conclude that this fourth prong is satisfied because Hayes did not have an opportunity to present his account to the jury that the BB gun was not a dangerous weapon. See *State v. Baird*, 654 N.W.2d 105, 114 (Minn. 2002) (“Fairness [under the plain-error standard] requires that [the defendant] be given an opportunity to present his account of the facts to a jury under the proper instructions.”) Allowing Hayes’s second-degree-assault conviction to stand, when the jury was directed to find an element of the offense, would undermine “the public’s confidence in the fairness and integrity of judicial proceedings.” See *State v. Little*, 851 N.W.2d 878, 886 (Minn. 2014) (describing the fourth prong as a question of whether the conviction will adversely affect the public perception of the proceedings).

In sum, the postconviction court abused its discretion in denying Hayes a new trial on the second-degree assault charge.

II. The postconviction court did not abuse its discretion in denying Hayes a new trial on his terroristic-threats convictions.

Although the parties do not distinguish the instructional error's effect on the second-degree-assault conviction and the terroristic-threats convictions, it is necessary to address the terroristic-threats convictions separately. As discussed above, the error with respect to second-degree assault directed a verdict on the use of a dangerous weapon and deprived Hayes of the right to have the jury decide every element of the offense. The effect of the error on the terroristic-threats convictions, however, was not so drastic.

The jury instructions explained that the first element of terroristic threats is that the defendant "threaten[ed], directly or indirectly, to commit any crime of violence," Minn. Stat. § 609.713, subd. 1 (2010), and then identified the "crime of violence" as second-degree assault. Thus, the jury question on the first element was whether the state proved, beyond a reasonable doubt, that Hayes had made threats to use a dangerous weapon.

Unlike in the context of the second-degree assault conviction, the district court did not remove this question from the jury by giving the BB-gun instruction. The erroneous instruction was, in essence, that a BB gun is a dangerous weapon. Even assuming that it is, that fact does not establish that threats to use a dangerous weapon were made. Threats are proved by apprehension of danger, not by the actual existence of it. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("[A threat is a] communication . . . [that] would have a reasonable tendency to create apprehension that its originator will act according to its

tenor.” (quotation omitted)); *State v. Smith*, 825 N.W.2d 131, 135 (Minn. App. 2012) (“A threat is a declaration of an intention to injure another or his property by some unlawful act.” (quotation omitted)). The jury was asked the question whether apprehension of a second-degree assault was created by Hayes, and they answered in the affirmative. We are not convinced that the jury’s answer was forced by the erroneous instruction because the instruction did not pose any logical impediment to deciding otherwise. Because the district court did not direct the jury to find an element of terroristic threats, *Moore* does not apply.

Moreover, our review of the record convinces us that the jurors would not have reached a different verdict on the terroristic-threats charge even if they had not been informed that a BB gun was a firearm. There was ample evidence that Hayes made direct and indirect threats to use a dangerous weapon to both his estranged wife and the two other persons present. First, in a phone call Hayes made to his wife on his way to her residence, Hayes threatened to beat her. That threat did not necessarily involve the BB gun as a dangerous weapon. “Depending on the circumstances of the assault, hands and feet may be dangerous weapons.” *State v. Davis*, 540 N.W.2d 88, 90 (Minn. App. 1995), *review denied* (Minn. Jan. 31, 1996). Second, the two other victims of threats testified that they believed Hayes was wielding a gun and that he threatened to shoot them. Third, the jury physically examined the BB gun during the trial, which would have allowed the jurors to assess whether one who was threatened with the BB gun would have perceived it to be a dangerous weapon. On this record, there is no reasonable likelihood that the BB-gun instruction had a significant effect on the jury’s verdict as to terroristic threats.

Because the BB-gun instruction did not prejudice Hayes as to the terroristic-threats convictions, we need not address the fourth prong of the plain-error analysis. We affirm the terroristic-threats convictions.

III. Pro se arguments

We briefly address the arguments made only in Hayes's pro se brief. First, Hayes asserts that the district court made an evidentiary error by allowing the jury to examine the BB gun while in deliberation. He argues that the BB gun exerted "extraneous influence" on the jury because it was erroneously characterized as a firearm. This argument lacks merit because it is not disputed that the BB gun was legitimately admitted into evidence and the BB gun remained relevant even if it was not a firearm. Also, Hayes did not make this argument to the postconviction court and thus forfeited the issue. *See Andersen v. State*, 913 N.W.2d 417, 428 n.11 (Minn. 2018) (citing *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996)) (holding that some of appellant's claims would not be considered on appeal because they were not raised before the postconviction court).

Second, Hayes argues that double jeopardy bars his conviction for fifth-degree assault as a lesser-included offense to second-degree assault. This argument lacks merit because the two convictions involve different victims. Also, he did not make this argument to the postconviction court, and it is forfeited. *See Andersen*, 913 N.W.2d at 428 n.11.

Third, Hayes argues that the appellate public defender provided ineffective assistance because she did not include his previous two claims in her brief to this court. This argument lacks merit because the two pro se claims lack merit.

Affirmed in part, reversed in part, and remanded.