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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0722**

State of Minnesota,
Respondent,

vs.

Adam John Barthel,
Appellant.

**Filed March 23, 2020
Affirmed
Smith, John, Judge***

McLeod County District Court
File No. 43-CR-18-1359

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

Michael K. Junge, McLeod County Attorney, Zachary Lyngaas, Assistant County Attorney, Glencoe, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Slieter, 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UNPUBLISHED OPINION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 Adam John Barthel's conviction for threats of violence because the district court did not err in instructing the jury on the elements of the offense and did not abuse its discretion by admitting a portion of the victim's recorded statement to law enforcement.

FACTS

Barthel and his longtime girlfriend, T.O., live together and have a son. The evening of August 19, 2018, Barthel came home drunk and threatened to kill himself and kick T.O. in the face. She went outside and called 911. She reported his statements to the dispatcher, saying repeatedly that she was scared of Barthel and "please hurry." She also expressed concern for their nearly 10-year-old son, who was still in the apartment with Barthel. While she was on the phone, Barthel came outside, apparently intending to drive. T.O. told him he should not drive while drunk, and he threw his keys on the ground and called her "a f-cking c-nt." The responding officer arrived within minutes, while T.O. was still on the 911 call.

The officer's body camera recorded as she followed T.O. up to the apartment to check on the child. The video shows T.O. telling the officer she was "so worked up," and the officer asked, "So what's going on?" T.O. became visibly upset and told the officer that Barthel had been drinking and got "angry and violent." He said that he was going to slice his throat and kick her face. He kept looking at her phone and said, "B-tch, I'm going to f-cking kill you if you f-cking call 911." He "came at" her with a raised fist. T.O. told

the officer that she was “terrified” of Barthel because he had assaulted her in the past. The officer asked T.O. if Barthel had hit her, and she said that he did not “physically assault” her but raised his fist and said, “I’ll do it.” After a time, the officer went to talk to the child.

Barthel was charged with threats of violence and domestic assault (fear). At trial, T.O. claimed that Barthel merely called her names and denied that he threatened her or that she was afraid. But she acknowledged that in April 2010 he had physically assaulted her because she refused to get in the car with him, resulting in a domestic-assault conviction. The state played a recording of T.O.’s 911 call and, over Barthel’s objection, a portion of her recorded statements to police. The jury found Barthel guilty, and the district court convicted him for threats of violence. This appeal follows.

D E C I S I O N

I. The district court did not err in instructing the jury on the elements of reckless threats of violence.

A district court has “considerable latitude in selecting jury instructions and the language of those instructions,” provided the instructions, as a whole, fairly and adequately explain the law. *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). The court must define the crime charged, explaining the elements of the offense “rather than simply read statutes.” *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). But it need not provide “detailed definitions of the elements to the crime . . . if the instructions do not mislead the jury or allow it to speculate over the meaning of the elements.” *State v. Davis*, 864 N.W.2d 171, 177 (Minn. 2015) (holding no error in failure to define “theft” or “steal”).

Generally, a defendant forfeits the right to contest jury instructions on appeal if he fails to object at trial. *State v. Bauer*, 932 N.W.2d 47, 52 (Minn. App. 2019). But we can review unobjected-to instructions for plain error. *Id.* The appellant must show (1) the instructions were in error, (2) the error was plain, and (3) the error affected his substantial rights. *Id.* “An error is plain if it is clear or obvious under current law.” *State v. Hollins*, 765 N.W.2d 125, 133 (Minn. App. 2009). If the appellant establishes plain error that affects substantial rights, we must assess whether to remedy the error “to ensure fairness and the integrity of the judicial proceedings.” *Bauer*, 932 N.W.2d at 52 (quotation omitted).

The crime of threats of violence requires proof that the defendant threatened to commit a crime of violence “with purpose to terrorize another” or “in a reckless disregard of the risk of causing such terror or inconvenience.” Minn. Stat. § 609.713, subd. 1 (2018). The state argued only that Barthel recklessly threatened violence, and the district court provided the jury the standard jury instruction for reckless threats of violence:

[T]he defendant made the threat in reckless disregard of the risk of causing such terror. “To terrorize” means to cause extreme fear by use of violence or threats.

“In reckless disregard of the risk of causing such terror” means that the defendant, even though not having the specific purpose of terrorizing another, recklessly risks the danger that the statements would be taken as threats by another, and that they would cause extreme fear. It need not be proven that another actually experienced extreme fear.

See 10 Minnesota Practice, CRIMJIG 13.107 (2015). The district court also instructed the jury to apply the given definition of defined words and phrases and the “common, ordinary meaning” of undefined words and phrases.

Barthel claims plain error in the district court's failure to instruct the jury on a definition of "reckless" or "recklessly." In support of his claim, he points to this court's statement that "[r]ecklessness requires deliberate action in disregard of a known, substantial risk." *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009). He argues that the instruction the district court gave permitted the jury to find him guilty not based not on the *Bjergum* standard but on mere negligence.

Bjergum does not require that the district court define recklessness for the jury. Rather, *Bjergum* requires that the jury determine whether the defendant engaged in deliberate action in disregard of a known, substantial risk. *Id.* The district court so instructed the jury, defining the risk that Barthel was alleged to have disregarded—the risk that his statements would be taken as threats by T.O. and cause her extreme fear. That instruction did not leave the jury to speculate as to the meaning of "reckless disregard of the risk of causing such terror." Accordingly, Barthel has not demonstrated plain error in the district court's jury instructions.

II. The district court did not abuse its discretion by admitting at trial a portion of T.O.'s recorded statement to law enforcement.

Evidentiary rulings "rest within the sound discretion of the district court." *State v. Guzman*, 892 N.W.2d 801, 812 (Minn. 2017). We will not reverse unless the appellant demonstrates both an abuse of discretion and resulting prejudice. *Id.*

The rules of evidence generally exclude as hearsay any statement made out of court and offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c), 802. But there are numerous exceptions to that rule, including one for excited utterances. Minn. R. Evid.

803(2). A statement is admissible as an excited utterance if (1) there was “a startling event or condition,” (2) the statement related to the startling event or condition, and (3) “the declarant [was] under a sufficient aura of excitement caused by the event or condition to insure the trustworthiness of the statement.” *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986) (quotation omitted). When determining whether a “sufficient aura of excitement” affected the declarant at the time of the statement in question, a court considers “all relevant factors including the length of time elapsed, the nature of the event, the physical condition of the declarant, and any possible motive to falsify.” *Id.* at 782-83.

In weighing the admissibility of the body-camera recording, the district court received extensive arguments from the parties, weighed preliminary testimony from T.O., and reviewed the recording. The court admitted, as an excited utterance, the portion of the recording from the officer’s arrival until the officer went to talk with the child. In explaining its ruling, the court emphasized T.O.’s “shaky” and “teary” demeanor and her “rapid” and “pressured” speech during that interlude, followed by “a marked change in demeanor” as she became “much calmer” when the officer went to talk to the child.

Barthel now argues that the district court abused its discretion by admitting the statements because “it based its ruling entirely on the single factor of [T.O.’s] physical demeanor while making the statements.” He contends the court failed to consider “other relevant factors,” such as her “motives to fabricate,” how much time had passed since the incident, and the fact that T.O.’s statements were responsive to police questioning rather than spontaneous. This argument is unavailing.

The district court did not make express findings on each of the factors Barthel highlights, but its explanation on the record reflects its reasoned determination that T.O. was “under a sufficient aura of excitement caused by that event or condition to ensure the trustworthiness of that statement.” The court expressly noted that “[a]s a time lapse between the startling event and subsequent statement increases, so does that possibility for reflection and conscious fabrication.” And it implicitly found no such motive by ruling as it did despite T.O.’s preliminary testimony that she was not truthful to police about Barthel threatening her and “exaggerate[ed] a little bit” to get him out of the house and keep him from harming himself. It also found that so little time had lapsed since the incident that T.O.’s statements were likely also admissible as non-hearsay present-sense impressions. And while the district court did not address the issue of responsive versus spontaneous statements, the court did note that the conversation was with an officer responding to a 911 call, essentially “describing the emergency.” The recording itself also confirms that T.O.’s specific statements about Barthel’s threats and her fear of him were volunteered after the officer asked, “So what’s going on?” On this record, the district court did not abuse its discretion by admitting a portion of T.O.’s recorded statement under the excited-utterance exception.

Affirmed.