

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1780**

In the Matter of the Welfare of: E. E. M., Child.

**Filed July 3, 2023
Reversed
Larkin, Judge**

Carver County District Court
File No. 10-JV-22-10

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant E. M. M.)

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

Mark Metz, Carver County Attorney, Martha E. Mattheis, Assistant County Attorney, Chaska, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant-child challenges the district court's order finding him guilty of making a threat of violence. Because the offense was partially proved with circumstantial evidence and the circumstances proved are consistent with a reasonable hypothesis other than guilt, we reverse.

FACTS

While riding on a school bus with other children, eleven-year-old appellant E.E.M. said that he was going to shoot up the school, claimed that he had a gun in his backpack, asked ten-year-old witness M.K. if he wanted to see the gun, and then said that he was just kidding. M.K. did not hear E.E.M. say that he was just kidding. When M.K. got off the school bus, he immediately reported E.E.M.'s behavior to an adult.

Respondent State of Minnesota filed a juvenile delinquency petition alleging that E.E.M. had committed the felony offense of making a threat of violence. The parties agreed to a stipulated-evidence trial. The district court, sitting as the juvenile court division, found E.E.M. guilty as charged, continued the matter without an adjudication of delinquency, and placed E.E.M. on probation for 180 days. The stay was conditioned on E.E.M. completing 48 hours of community service, participating in a diagnostic assessment, following its recommendations, and writing letters of apology.

E.E.M. appeals.

DECISION

E.E.M. contends that the evidence was insufficient to support the district court's determination that he was guilty of making a threat of violence. Traditionally, when evaluating the sufficiency of evidence to sustain a finding of guilt, this court reviews the record to determine whether the evidence, when viewed in a light most favorable to the verdict, was sufficient to allow the factfinder to find the accused guilty of the charged offense. *State v. Robertson*, 884 N.W.2d 864, 871 (Minn. 2016). “[W]e 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 was guilty of the charged offense.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012).

If the state relied on circumstantial evidence to prove an element of the offense, this court applies a heightened standard of review. *See State v. Harris*, 895 N.W.2d 592, 601-03 (Minn. 2017); *State v. Al-Naseer*, 788 N.W.2d 469, 471 (Minn. 2010) (stating that “heightened scrutiny applies to any disputed element of the conviction that is based on circumstantial evidence” (syllabus by the court)). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Harris*, 895 N.W.2d at 599 (quotation omitted). Direct evidence, in contrast, is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* (quotation omitted).

We review the sufficiency of circumstantial evidence by conducting a two-step analysis. *State v. German*, 929 N.W.2d 466, 472 (Minn. App. 2019). First, we identify the circumstances proved by the state. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). Second, we “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt.” *Id.* (quotation omitted).

The state charged E.E.M. with making a threat of violence under Minn. Stat. § 609.713, subd. 1 (2020), which provides that the offense occurs if a person “threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror.” A person is guilty of that offense if:

(1) through words or actions, [he] communicates an intention to injure another or their property; (2) the threat is to commit a statutorily defined crime of violence; (3) in context, those words or conduct create a reasonable apprehension that [he] will follow through with or act on the threat; and (4) [he] makes the violent threat in conscious disregard of a substantial and unjustifiable risk that [his] words or conduct will cause extreme fear.

State v. Mrozinski, 971 N.W.2d 233, 240 (Minn. 2022).

E.E.M. admits that he said that he was going to shoot up the school and that M.K. heard the statement. Thus, he does not dispute that the state proved the first two elements of the offense. Instead, he disputes the state’s proof of the third and fourth elements. Specifically, he argues that his words did not create a reasonable apprehension that he would act on the threat and that he did not make the threat in conscious disregard of a substantial and unjustifiable risk that his words or conduct would cause extreme fear. We address each argument in turn.

Reasonable Apprehension that E.E.M. Would Act on the Threat

“A communication is threatening when, considered in context, it creates reasonable apprehension that the defendant will carry through with or act on the threat.” *Id.* at 239. Courts must view communications “in their context” to “avoid[] sweeping in those communications that may be threatening on their face but that a listener could easily understand as a joke or crude political commentary.” *Id.* at 245.

The district court found, and the record supports, that while riding on a school bus, E.E.M. said, “I’m going to shoot up the school.”¹ Ten-year-old M.K. was seated across from E.E.M. and heard him make the statement. The district court further found that E.E.M. “simultaneously or contemporaneously” declared, “I have a gun. Do you want to see it?” and motioned toward his backpack. M.K. thought E.E.M. was talking to him and responded, “No.” E.E.M. then said, “I’m just kidding.”² M.K. did not hear E.E.M. say that he was just kidding, and E.E.M. acknowledged that the other children on the bus may not have heard him say it.

E.E.M. admitted to an investigating deputy that he made the statements reported by M.K. He explained that he was trying to be funny. Upon questioning by the deputy, E.E.M. agreed that he could see people thought he was serious. E.E.M. “teared up” during his interview with the deputy “when talking about the seriousness of what was said.” Officers confirmed that E.E.M. did not have a gun in his backpack and did not have access to any weapons. A gun was never found.

E.E.M. argues that the evidence was insufficient to show that his words were anything more than “an ill-advised joke” and that M.K. did not know the full context of E.E.M.’s statement. E.E.M. points to M.K.’s admission that he was not listening to E.E.M.’s conversation until E.E.M. said he was going to “shoot up the school.” E.E.M.

¹ The district court’s order finding E.E.M. guilty incorporates a memorandum setting forth the factual determinations and reasoning on which the district court relied.

² The district court’s memorandum alternatively describes this statement as “I’m just kidding” and “I was only joking.”

also argues that his follow-up statement that he had a gun did not establish a threatening context because he did not “brandish a weapon” or make additional threatening remarks.

Even though M.K. did not hear the conversation leading up to E.E.M.’s statement that he was going to shoot up the school, it was reasonable for M.K. to be apprehensive after he heard E.E.M. make the threatening statement, without laughing or joking, and then double down on the threat by claiming that he had a gun in his backpack and gesturing toward the backpack. Because possession of a gun is not an element of the offense, it does not matter that E.E.M. did not actually have a gun in his backpack. *See* Minn. Stat. § 609.713, subd. 1. Nor were additional threats required. *See id.* And E.E.M.’s contemporaneous statement that he was kidding did not change the threatening context because M.K. did not hear it and E.E.M. admitted that he did not think the other students heard it.

In sum, the context of E.E.M.’s statement that he was going to shoot up the school—including his claim that he had a gun in his backpack and his physical gesture emphasizing that claim—was sufficient to create a reasonable apprehension that E.E.M. would follow through with or act on his threat.

Conscious Disregard of the Risk

A person acts in “reckless disregard” of a risk if he is “aware of a substantial and unjustifiable risk that [his] words or actions will cause terror in another” and acts “in conscious disregard of that risk.” *Mrozinski*, 971 N.W.2d at 240. “Recklessness requires deliberate action in disregard of a known, substantial risk.” *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *rev. denied* (Minn. Nov. 17, 2009).

“A state of mind generally is proved circumstantially, by inference from words and acts of the actor both before and after the incident.” *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000). “Knowledge . . . usually must be inferred from the evidence.” *State v. Mattson*, 359 N.W.2d 616, 617 (Minn. 1984). E.E.M. did not admit that he consciously disregarded a substantial and unjustifiable risk that his words or conduct would cause extreme fear, and there is no record evidence directly proving that element of the offense. Instead, E.E.M.’s state of mind was proved circumstantially. We therefore apply the heightened circumstantial-evidence standard of review.

In this case, the district court’s factual findings establish the following circumstances. E.E.M. said he was going to shoot up the school, and M.K. heard him make that statement. E.E.M. “simultaneously or contemporaneously” told M.K., “I have a gun. Do you want to see?” and made a motion toward his backpack. E.E.M. then said, “I’m just kidding,” but acknowledges that the other children on the bus may not have heard him. M.K. did not hear E.E.M. say, “I’m just kidding.” M.K. believed E.E.M. was serious when he made the statement, and M.K. was scared. M.K. noted that E.E.M. was not laughing or joking when he made the comments. M.K. reported that no one else on the bus said anything about what E.E.M. had said.

In sum, E.E.M. stated that he was going to shoot up the school. E.E.M. reinforced that threat by claiming that he had a gun in his backpack, gesturing to his backpack, and offering to show the alleged gun to M.K. E.E.M. then said, “I’m just kidding.” Those circumstances are consistent with guilt.

E.E.M. contends that the circumstances are also consistent with a rational hypothesis other than guilt. Specifically, E.E.M. argues that the evidence supports a reasonable inference that when he said he was going to shoot up the school and claimed to have a gun in his backpack, he was only joking and not aware that the statement created a substantial and unjustifiable risk that his words or conduct would cause extreme fear. E.E.M. asserts that such an inference is supported by his contemporaneous statement that he was “just kidding.”

“To successfully challenge a conviction based upon circumstantial evidence, a defendant must point to evidence in the record that is consistent with a rational theory other than guilt.” *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). A defendant “may not rely on mere conjecture or speculation.” *Al-Naseer*, 788 N.W.2d at 480; *see State v. Tschau*, 758 N.W.2d 849, 858 (Minn. 2008). A defendant is not relying on conjecture or speculation if he points to “evidence in the record that is consistent with a rational theory other than guilt.” *Al-Naseer*, 788 N.W.2d at 480 (quotation omitted).

The district court found as “fact” that E.E.M. said, “I’m just kidding.” But the district court’s finding of guilt implies that it did not believe him. Normally, we defer to the district court’s credibility determinations because the district court is in the best position to judge the credibility of witnesses. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). But in this case, the district court did not expressly reject E.E.M.’s claim that he was only joking, and we are concerned that the district court’s implied rejection of that claim was based on broad societal concerns, and not on E.E.M.’s actual state of mind.

The district court explained its decision as follows:

The environment that we exist in today with mass school shooting commonplace and at the forefront of our collective consciousness with school districts resorting to penitentiary-type security measures and public service messages aimed at students on how to stay alive when confronted with a shooter, and along with regular “active shooter drills” at school, *this Court finds that it is reckless disregard for a student to make a threat under the facts and circumstances of this case.*

(Emphasis added.) The district court further explained that “[g]iven the current climate we all unfortunately live in, . . . *under these particular circumstances, it [is] appropriate to find [E.E.M.] guilty beyond a reasonable doubt.*” (Emphasis added.)

We do not dispute the accuracy of the district court’s description of the current environment. But the state had to prove and the court had to find that E.E.M. *himself* was aware of the statutorily defined risk when he made the threat and that he consciously disregarded that risk. The state did not present evidence that E.E.M. was aware that mass school shootings are “commonplace and at the forefront of our collective consciousness,” that E.E.M. had been in a school setting with “penitentiary-type security measures,” that E.E.M. was aware of “public service messages aimed at students on how to stay alive when confronted with a shooter,” or that E.E.M. was aware of or had participated in “active shooter drills at school.”

The factfinder’s role “is limited to deciding dispassionately whether the state has met its burden in the case at hand of proving the defendant guilty beyond a reasonable doubt.” *State v. Salitros*, 499 N.W.2d 815, 819 (Minn. 1993). A finding of guilt may not be based on an urge to protect the public or send a message. *See State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000) (“It is improper for the prosecutor to make statements

urging the jury to protect society or to send a message with its verdict.”), *rev. denied* (Minn. May 16, 2000). Thus, extra-record factual assertions regarding the current school-shooting environment could not establish E.E.M.’s guilt absent a showing that eleven-year-old E.E.M. was aware of that environment. *See In re Welfare of S. W. T.*, 277 N.W.2d 507, 514 (Minn. 1979) (“[I]n juvenile delinquency proceedings, the question of culpable negligence must be decided with reference to the conduct and appreciation of risk reasonably to be expected from an ordinary and reasonably prudent juvenile of a similar age.”).

“[J]uveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law. The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child.” *In re Winship*, 397 U.S. 358, 365 (1970). In addition, we must keep in mind that E.E.M.’s behavior cannot be assessed in comparison to that of an adult or an older juvenile. *See S. W. T.*, 277 N.W.2d at 514. For all of these reasons, we conclude that there is a reasonable hypothesis other than guilt: E.E.M. said he was “just kidding” and did not know that there was a substantial and unjustifiable risk that his words and acts would cause extreme fear.

We do not reach this decision lightly. The district court’s description of the current environment is compelling. We can understand how recent, all-too-frequent school tragedies influenced the decisions in this case. We also understand the state’s legitimate public-safety concerns and the need to treat any statement that suggests the possibility of school violence seriously and with urgency. Most importantly, we are mindful of the

impact that E.E.M.'s conduct had on M.K., his family, and the school. We commend ten-year-old M.K. for having the courage to promptly report E.E.M.'s behavior to an adult. But in reviewing the district court's finding of guilt, we are bound by the relevant law. Having applied that law, we conclude that the record supports a reasonable hypothesis other than guilt. The evidence was therefore insufficient to sustain the finding of guilt, and we reverse.

Reversed.