Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-216

MAY TERM, 2021

State of Vermont v. Jean McGinness*	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1179-9-17 Rdcr
		Trial Judge: David R. Fenster

In the above-entitled cause, the Clerk will enter:

Defendant appeals her conviction of aggravated assault with a deadly weapon. She also challenges three conditions of probation imposed by the court. We remand for the trial court to strike the conditions, but otherwise affirm.

Defendant was charged with aggravated assault with a deadly weapon based on an incident that took place in September 2017. At trial, complainant testified that on the day in question, complainant and her brother went to collect rent from defendant, who was renting an apartment from complainant's brother. When they arrived, defendant was standing outside her apartment door next to the railing at the top of the stairs. Complainant testified that defendant began making verbal threats against complainant's daughter. An argument ensued. Defendant then grabbed a large knife that was just inside the doorway, leaned over the railing, and put the knife to complainant's throat, saying that she was going to slice complainant's throat. Complainant ran down the stairs, and defendant threw the knife after her. The knife struck the back of complainant's foot. Complainant ran to a neighbor's apartment and asked her to call the police.

Defendant testified that on the day in question, she answered the door and gave complainant's brother her rent. She then told him to tell his niece—complainant's daughter—to stop banging on the ceiling and turning off the cable because it was included in the rent. Complainant told defendant to "shut the F up" about her daughter. Complainant then came into defendant's apartment, pushed defendant against the door and threatened to kill defendant. Defendant grabbed her knife and pushed complainant back out. Complainant ran down the stairs and defendant threw the knife down the stairs. She stated that she threw the knife "[j]ust to get it out of my hand and go in and call the cops." She denied that she threw it at complainant or that it struck complainant. On cross-examination, she conceded that neither complainant nor her brother had any kind of weapon. Both complainant and her brother testified on rebuttal that neither of them entered defendant's apartment.

The jury found defendant guilty of aggravated assault. The court imposed a sentence of four months to four years, all suspended but four months to be served on home confinement. It also imposed special conditions of probation regarding drug and alcohol use.

On appeal, defendant first argues that her conviction must be reversed because the court added misleading and confusing language to the jury instruction on the element of threatening. The court instructed the jury as follows:

> The third essential element is that [defendant] threatened to use the deadly weapon on another person. To threaten another person means to communicate by words or deeds an intent to inflict imminent bodily injury upon another person. The threat may be explicit. For example, it may be a direct verbal threat. The threat may also be implicit, consisting of words or conduct which a reasonable person would understand to be a threat. Whether the threat was explicit or implicit, the State must have proven that [defendant] communicated an intent to inflict imminent bodily injury upon [complainant]. The State need not prove that [complainant] was actually placed in fear.
>
> The last essential element is that [defendant] intended to threaten [complainant]. The State must have proven that [defendant] intended to place [complainant] in fear of imminent bodily injury and that [defendant] did not act inadvertently because of mistake or by accident. In other words, the State must have proven that [defendant] acted with a conscious objective of putting [complainant] in fear of imminent bodily injury. The intent with which a person does an act may be shown by the way in which he or she expresses it to others or by his or her conduct. In determining [defendant's] intent, you should consider all of the surrounding facts and circumstances established by the evidence. The State need not prove that [defendant] actually intended to carry out her threat.

Because defendant did not object to the jury instructions at trial, we review for plain error only. See State v. Myers, 2011 VT 43, ¶ 17, 190 Vt. 29 ("[A]bsent a specific objection—after the judge reads the charge but before the jury retires—we review any appealed instructions for plain error."). Plain-error analysis involves the following four factors: "(1) there must be an error; (2) the error must be obvious; (3) the error must affect substantial rights and result in prejudice to the defendant; and (4) we must correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." State v. Herrick, 2011 VT 94, ¶ 18, 190 Vt. 292. "In reviewing possible error in a jury instruction, we look at the instructions in light of the record evidence as a whole and determine if any error would result in a miscarriage of justice." State v. Rounds, 2011 VT 39, ¶ 31, 189 Vt. 447 (quotations omitted).

Defendant objects that it was misleading and confusing for the court to tell the jury what the State did not have to prove, i.e., that complainant was actually placed in fear or that defendant actually intended to carry out her threat. We see no error. Both instructions are correct statements of the law.

"A person is guilty of aggravated assault if the person . . . is armed with a deadly weapon and threatens to use the deadly weapon on another person." 13 V.S.A. § 1024(a)(5). Aggravated assault is a specific-intent crime, meaning that the State must prove that the defendant intended to threaten the victim. State v. Bourn, 2012 VT 71, ¶ 11, 192 Vt. 270. However, as we explained in State v. Cahill, a "jury d[oes] not have to find that [the] defendant actually intended to harm the [victim], but only that he intended to threaten him." 2013 VT 69, ¶ 17, 194 Vt. 335. Furthermore,

the effect of the defendant's communication or conduct is properly measured "according to the perception of a reasonable person, rather than the subjective fearlessness of the [victim]." Id. ¶ 18. In other words, the State does not have to prove that the victim was actually placed in fear by the defendant's threat. See State v. Gagne, 2016 VT 68, ¶ 23, 202 Vt. 255 (explaining that "whether conduct amounts to a threat is generally discerned from the perspective of a reasonable person under similar circumstances," rather than whether victim subjectively felt afraid).

The trial court properly incorporated these principles into its instructions. The instructions were neither misleading nor confusing; rather, they helpfully clarified the State's burden of proof for the jury. We disagree with defendant's argument that by noting what the State did not have to prove, the judge appeared to be improperly commenting on the evidence. Crimes are often defined with reference to what the State does not have to prove, and we have previously upheld jury instructions containing such explanations. See, e.g., State v. Perley, 2015 VT 102, ¶ 22, 200 Vt. 84 (approving instruction for refusal of evidentiary blood alcohol test stating that "[t]he State need not prove that [defendant] was actually under the influence" (alteration in original)). Accordingly, we see no "error [that] would result in a miscarriage of justice." Rounds, 2011 VT 39, ¶ 31.

Defendant also challenges the court's imposition of probation conditions 2, 7, and the last part of condition 14, which relate to alcohol and substance abuse. The State has stipulated that the matter should be remanded for the trial court to strike these conditions. Accordingly, we need not address defendant's arguments concerning these conditions.

Remanded for the trial court to strike conditions 2 and 7 and the last part of condition 14; otherwise, affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Beth Robinson, Associate Justice

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William D. Cohen, Associate Justice