STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1349

State of Minnesota,
Respondent,

vs.

Cornelius Berdell Green,
Appellant.

Filed August 20, 2018
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-CR-16-895

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Charles F. Clippert, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Cleary, Chief Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

KIRK, Judge

In this direct appeal, appellant asks this court to reverse and remand his convictions and concurrent sentences for two counts of aiding and abetting attempted second-degree

murder, arguing that the district court prejudicially erred in joining his trial with his codefendant-brother's trial and made several other errors at the trial. We affirm.

FACTS

Around 2:30 a.m. on January 9, 2016, law enforcement responded to reports that two men had been stabbed across the street from a club in downtown Minneapolis. The two men, A.S. and B.P., had gone out for drinks downtown and were walking to a nearby residence when an altercation occurred with another group of men who had also been out drinking. A.S. was found lying on the sidewalk with two stab wounds to the neck. A.S. does not remember what happened other than turning around, hearing yelling, and feeling warm on his face before everything went fuzzy.

B.P. received six stab wounds to his neck and face, including to his left eye, and was bleeding profusely when he flagged down a nearby police squad car. B.P. testified that he and A.S. were walking down the street and a couple of men were following them. Words were exchanged, a fight started, and then additional men came from across the street and attacked them. B.P. testified that two men held him down while a third punched and stabbed him and said that the attack stopped because the stabber cut his hand.

Two patrons were standing in front of the club and witnessed five men "jump" the two men across the street. At some point, the patrons heard someone yell, "Get in the car!" A security guard from the club was alerted to the situation and came outside as the group of attackers ran back across the street, got into a black Cadillac parked in front of the club, and drove away. One of the men threw a bloody knife onto the sidewalk. The security guard testified that the passenger who got in the backseat behind the driver threw it, but

one of the patrons testified that it was thrown from the driver's window. It is undisputed that Davon Matten drove the Cadillac from the scene.

One of the patrons stood by the knife until police arrived and secured it. A.S. and B.P. were taken by ambulance to the Hennepin County Medical Center (HCMC) with critical, potentially life-threatening injuries. The on-duty police deputy at HCMC heard reports of the stabbing and a description of the suspect Cadillac over the police radio. Shortly thereafter, the deputy observed two men walk into the HCMC emergency room.

Both men had blood on their clothing and one had his hand wrapped. The man with his hand wrapped told the deputy that he had fallen on the ice. The deputy then went outside and saw a vehicle matching the description of the suspect Cadillac. After confirming that it was the vehicle from the stabbing, the deputy followed the vehicle until it parked a half block away from the hospital. The deputy stopped four men as they exited the vehicle. The club security guard was brought to the scene and identified the four men as having been involved in the stabbing, including codefendants-accomplices Davon Matten and Nicholas Durham-Smith. The guard also later identified appellant Cornelius Berdell Green at HCMC.

Meanwhile, another officer at HCMC spoke with the man who had his hand wrapped. The man gave the officer a false name but was later identified as codefendant-brother Devon Larry Green by hospital staff. Appellant was the man with Devon. Devon was treated for a severe laceration to his finger and told hospital staff that he fell on a glass bottle.

Appellant, Devon, Matten, and Durham-Smith were each charged with two counts of aiding and abetting attempted second-degree murder. Appellant's and Devon's cases were joined for a jury trial. At the joint trial, A.S. and B.P. testified, as did Matten and Durham-Smith, hospital staff, law enforcement officers, and investigators. Surveillance video from outside the club and still photographs showing a time lapse of the surveillance video were admitted, published for the jury, and discussed with several witnesses. The jury found appellant and Devon guilty of both charges.

The district court convicted appellant and sentenced him to concurrent terms of 153 months on count 1 and 173 months on count 2. Appellant asks this court to reverse his convictions and sentences and remand for a new trial.

D E C I S I O N

I. The district court did not err in joining appellant's and Devon's cases for trial.

Appellant argues that the district court erred in joining his case with Devon's for trial and that the joinder caused him substantial prejudice. In reviewing joinder decisions, an appellate court makes "an independent inquiry into any substantial prejudice to defendants that may have resulted from their being joined for trial." *State v. Powers*, 654 N.W.2d 667, 674 (Minn. 2003) (quotation omitted).

Defendants may be tried jointly if they are alleged to have participated in the same behavioral incident constituting the charged offenses. Minn. Stat. § 631.035, subd. 1 (2016); *State v. Profit*, 591 N.W.2d 451, 458 (Minn. 1999). A district court may order a joint trial after separately considering: "(1) the nature of the offense charged; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice."

Minn. R. Crim. P. 17.03, subd. 2. This rule neither favors nor disfavors joinder. *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002).

A. Nature of the offense charged

Appellant contends that there was not substantial evidence in the record that he worked in close concert with Devon and that the record indicates he was "merely present." Appellant maintains that Matten's and Durham-Smith's testimony was the only evidence against him and that more evidence showed that Devon and Matten acted together.

The nature of the offense favors joinder where codefendants are charged with the same crimes, a majority of evidence is admissible against both, and the evidence shows that they worked in close concert. *See State v. Jackson*, 773 N.W.2d 111, 118-19 (Minn. 2009). Here, appellant and Devon were charged with the same crimes, for the same incident, occurring at the same time and place, and the allegations against each brother were largely the same. While some of the evidence pointed more directly to Devon's role as the stabber, the majority of the evidence was inculpatory against both, and the state was not required to prove who the stabber was to find appellant guilty of aiding and abetting attempted second-degree murder.

The record also shows that the brothers' roles were distinguishable from those of the other alleged attackers and that evidence against them was largely the same. Durham-Smith and Matten both testified that the fight started between the Greens and A.S. and B.P. But this was not the only inculpatory evidence against appellant, as he argues. Other testimony at trial indicated, and the surveillance video shows, that several men exited the Cadillac and ran across the street to join the fight but that the Green brothers were not

among them, allowing the inference that they were already across the street. The brothers were also dropped off at HCMC together by the others after the stabbings, and investigators found DNA-profile evidence linking each brother to one or both victims. This factor favors joinder.

B. Impact on the victim

Appellate courts consider "the impact on both the victim of the crime as well as the trauma to the eyewitnesses who would be compelled to testify at multiple trials." *State v. Johnson*, 811 N.W.2d 136, 143 (Minn. App. 2012) (quoting *State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005)). Appellant acknowledges that testimony is always difficult for a victim and that the impact here was no greater than any other trial. Appellant does not dispute that this factor is neutral.

C. Potential prejudice to appellant

Appellant argues that he was significantly prejudiced by the joinder because his defense was antagonistic to Devon's as the evidence linking Devon to the crime was much stronger. But the brothers did not present inconsistent or antagonistic defenses. Both argued that they were not guilty and that a third-party perpetrator, Matten, was the stabber.

Appellant also contends that joinder led the jury to believe that he was involved in the stabbings simply because his brother was and that he was forced to distance himself from Devon. First, "[g]eneral concern . . . that familial bonds will work against [a defendant] is not adequate to demonstrate the existence of inconsistent or antagonistic defenses." *Powers*, 654 N.W.2d at 675. Second, to the extent that there was evidence inculpating only appellant or only Devon, "[w]e have . . . recognized the ability of juries

in joint trials to separate evidence that inculpates only one defendant from evidence that inculpates both." *State v. Hathaway*, 379 N.W.2d 498, 502 (Minn. 1985).

Here, the jury heard that the stabber cut his finger and that Devon was treated for a cut finger at HCMC after the stabbings—evidence inculpating Devon. The jury also heard that the club security guard identified appellant and four other men as having been involved in the stabbings but did not identify Devon—evidence inculpating appellant. There is no indication that the jury was unable to separate the evidence inculpating Devon only from the evidence inculpating appellant only. Further, the state only had to prove that appellant aided and abetted the stabbings, not who stabbed A.S. and B.P. Put differently, even if the jury found that Devon or Matten was the stabber, it would not have proved that appellant was innocent.

Appellant also argues that he suffered prejudice because he only received three peremptory strikes during jury selection as opposed to the five he requested. Under Minnesota criminal procedure, a defendant receives five peremptory challenges and the state receives three. Minn. R. Crim. P. 26.02, subd. 6. If there is more than one defendant, the court may increase each defendant's challenges and increase the state's correspondingly. *Id.* However, "[w]here more than one defendant is being tried jointly, peremptory challenges belong to a side, and not an individual defendant." *Jackson*, 773 N.W.2d at 120.

Here, the district court allowed each defendant three strikes or a total of six for the defense, and allowed the state four strikes. Thus, each side had one more strike than was required. There is no evidence of how appellant used his strikes at trial, and appellant fails

to argue how he would have used two additional strikes. He also fails to show that Devon's three strikes did not sufficiently address the two strikes he argues that he was denied. Accordingly, appellant has failed to show evidence of prejudice. This factor favors joinder.

D. Interests of justice

Finally, appellant argues that the interests of justice were not served because the district court only joined the Green brothers' trials and not the other two codefendants-accomplices' trials, meaning that three trials were still held. A district court may consider judicial economy and the length of separate trials in deciding to join cases. *Id.* at 119. Here, the allegations against each brother were largely the same, and if the matters had been tried separately, the evidence and testimony presented would have been the same or very nearly the same.

Granting a joint trial favored judicial efficiency and economy. The state saved resources by not having to try two cases, and the witnesses and victims had to testify at one fewer trial. At the same time, two additional trials were still necessary for the two codefendants-accomplices who were not joined. Although this slightly weakens the benefit to judicial economy, overall the interests of justice were served by holding one trial instead of two for the Green brothers. This factor favors joinder.

Our inquiry into the factors favoring joinder shows that appellant and Devon jointly participated in a single behavioral incident, that appellant was not substantially prejudiced by the joinder, and that the district court did not err in granting joinder.

II. The reverse-*Spreigl* evidence against Matten was relevant, but any error in excluding it was harmless.

Appellant argues that the district court erred by excluding reverse-*Spreigl* evidence that codefendant-accomplice Matten was charged with terroristic threats and domestic assault for a February 2017 incident with his girlfriend involving a knife because the evidence was relevant and tended to inculpate Matten as the stabber in this case. Appellant argues that there is a reasonable probability that the jury would have acquitted him if it had heard this reverse-*Spreigl* evidence against Matten.

The right to present a complete defense includes the right to present evidence showing that an alternative perpetrator committed the crime with which the defendant is charged. *State v. Blom*, 682 N.W.2d 578, 621 (Minn. 2004). A criminal defendant may "present evidence of other crimes, wrongs, or bad acts committed by the alleged alternative perpetrator in order to cast reasonable doubt upon the identification of the defendant as the person who committed the charged crime." *State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004).

To introduce "reverse-*Spreigl*" evidence, the proponent must first establish a connection from the alternative perpetrator "to the commission of the crime with which the defendant is charged." *Id.* Here, there was evidence that Matten was at the scene and involved in the assault and stabbings of A.S. and B.P., that he drove the Cadillac from the scene, and that a DNA profile matching A.S. was found on his clothing.

Having met this threshold requirement, the proponent must then establish: "(1) clear and convincing evidence that the alleged alternative perpetrator participated in the reverse-*Spreigl* incident; (2) that the reverse-*Spreigl* incident is relevant and material to defendant's

case; and (3) that the probative value of the evidence outweighs its potential for unfair prejudice." *Id.* at 16-17 (footnote omitted). We review the district court's analysis of these factors for an abuse of discretion. *State v. Ashby*, 567 N.W.2d 21, 25 (Minn. 1997). If the district court erred, we then determine whether the error was harmless. *State v. Vance*, 714 N.W.2d 428, 437 (Minn. 2006). An error is harmless if the verdict is "surely unattributable to the error." *Id.*

First, the state does not dispute that there was clear and convincing evidence of Matten's participation in the reverse-*Spreigl* incident. Second, to show that a reverse-*Spreigl* incident is "relevant and material," it "must be similar to the charged offense either in time, location, or modus operandi." *State v. Johnson*, 568 N.W.2d 426, 434 (Minn. 1997) (footnote omitted). "Absolute similarity . . . is not required [but t]he greater the similarity between the [reverse-]*Spreigl* incident and the crime charged, . . . the greater the likelihood that [it] is relevant." *Id.* (citation omitted).

Here, the district court found that the reverse-*Spreigl* incident between Matten and his girlfriend in a residence where Matten grabbed a nearby kitchen knife to threaten her after he had been drinking was a domestic incident and not sufficiently similar to a street fight involving strangers where someone brought a knife. We disagree. This is a stabbing case. Appellant's defense was that someone else stabbed A.S. and B.P. and that he was merely present. Allegations that Matten was involved in another altercation where he assaulted and threatened someone with a knife after a night of drinking are relevant to identifying Matten as an alternative perpetrator.

After finding that the evidence was not relevant, the district court indicated that the probative versus prejudicial value of the evidence was less concerning. But even if we assume, without deciding, that the evidence was more probative than prejudicial, and that the district court abused its discretion in excluding the reverse-*Spreigl* evidence, the error was harmless.

In this case, appellant was charged with aiding and abetting attempted second-degree murder. To find appellant guilty, the state had to prove that appellant, or someone he aided and abetted, stabbed A.S. and B.P. intending to kill them, or with reckless disregard for that risk. The state did not argue that appellant was the stabber, only that appellant aided and abetted the stabbings. Regardless of whether Devon, Matten, or some other member of the group actually stabbed A.S. and B.P., the issue for the jury was the same, did appellant aid and abet the stabbings. And the state presented a strong case that appellant aided and abetted attempted second-degree murder.

Furthermore, to the extent it was relevant, appellant was still able to present his defense and argue that Matten stabbed the victims. The jury heard that Matten faced the same charges as appellant, and during Matten's testimony, the defense implied that, and asked if, Matten stabbed the victims. Both sides encouraged the jury to scrutinize Matten's testimony and his role in the assault and stabbings. On this record, we conclude that the exclusion of the reverse-*Spreigl* evidence, even if erroneous, was harmless and did not impact the jury's verdicts.

III. The prosecutor did not recklessly elicit false testimony from a codefendant-accomplice.

Appellant argues that the prosecutor improperly elicited the testimony of codefendant-accomplice Durham-Smith knowing that it was false or with reckless disregard that it was false. In relevant part, Durham-Smith testified that the Greens initially engaged in the altercation with A.S. and B.P., with appellant fighting one man, and Devon fighting the other, and that the others joined in after the fight started. Durham-Smith testified that he tried to stop the fight and that he pulled appellant off of one of the victims.

Appellant contends that Durham-Smith's testimony was not credible because he portrayed himself as the person who broke up the fight and not as an active participant. Appellant argues that the state knew Durham-Smith's testimony was false but elicited it anyway. He points to a letter memorandum that the prosecutor sent in response to appellant's posttrial motion for acquittal in which appellant argued that the state failed to disclose a proffer discussion with Durham-Smith.

In the letter, the prosecutor indicated that "at no point did the state indicate that [the jury] should take what the [accomplices] testified to at face value . . . in fact, just the opposite" is true. The prosecutor indicated that the state had interviewed Durham-Smith and offered to dismiss the charges against him if he testified in the other codefendants' cases. However, the prosecutor explained that no deal was ever reached because "[t]he state never believed [Durham-Smith]."

A prosecutor is an officer of the court, charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions. *State v.*

Ramey, 721 N.W.2d 294, 300 (Minn. 2006). "Generally, a prosecutor's acts may constitute misconduct if they have the effect of materially undermining the fairness of a trial." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Where, as here, the defendant fails to object to alleged prosecutorial misconduct at trial, we review it under a modified plain-error standard. *Ramey*, 721 N.W.2d at 302. If the defendant shows error that is plain, then under the third or "prejudice" prong, the state bears the burden of proving that there is no reasonable likelihood that the absence of the alleged misconduct would have had a significant effect on the jury's verdicts. *Id.*

Here, there is no evidence that the prosecutor recklessly elicited false testimony from Durham-Smith. Instead, the prosecutor acknowledged the gaps in Durham-Smith's testimony, as well as Matten's testimony, and encouraged the jury to consider them, and appellant also had an opportunity to thoroughly cross-examine Durham-Smith and Matten. The prosecutor's actions did not amount to misconduct, but even if they did, the state met its burden under the third prong. The record shows that the state's case against appellant was strong, with or without the codefendants-accomplices' testimony. There is no reasonable likelihood that the prosecutor's actions significantly impacted the verdicts.

IV. Any error in failing to give an accomplice-corroboration instruction to the jury did not affect appellant's substantial rights.

Appellant argues that the district court committed plain error affecting his substantial rights when it failed to instruct the jury to consider the reliability of Matten's and Durham-Smith's testimony and that the jury should have been instructed on the inherent unreliability of accomplice testimony. Appellant did not request the instruction

before the codefendants-accomplices testified or during final jury instructions, and no objection was made at trial.

Where, as here, a defendant fails to request, or object to the absence of, a jury instruction, our review is under the plain-error standard. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). Appellant must show (1) error, (2) that is plain, and (3) that affected his substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "If those three prongs are met, we may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (alteration in original) (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

District courts "have a duty to instruct juries on accomplice testimony in any criminal case in which it is reasonable to consider any witness against the defendant to be an accomplice." *Id.* at 689. It is undisputed that Matten and Durham-Smith were charged as codefendants and were accomplices here. *See State v. Henderson*, 620 N.W.2d 688, 701 (Minn. 2001) (defining accomplice as someone who "could have been indicted and convicted for the crime with which the accused is charged"). The state concedes that the lack of an accomplice-corroboration instruction was plain error but argues that it did not affect appellant's substantial rights.

For appellant to establish that his substantial rights were affected, he must show "that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted); *Reed*, 737 N.W.2d at 583-84. Appellant maintains that the error affected his substantial rights because without the accomplice testimony there was minimal

evidence linking him to the stabbings. Appellant argues that he provided his real name to hospital staff, unlike Devon, and that no other witnesses saw the fight start or were able to identify appellant's role in the fight or stabbings other than the accomplices.

Again, to find appellant guilty of aiding and abetting attempted murder, the state had to prove that appellant, or someone he aided and abetted, stabbed A.S. and B.P. intending to kill them, or with reckless disregard for that risk. The record shows that the state met this burden. Although the accomplices testified about how the fight allegedly started and the roles that each of the four codefendants played, attempting to shift the blame to appellant and Devon, the state was not required to prove who started the fight or who stabbed the victim. And contrary to appellant's argument, there was sufficient evidence proving his participation in the stabbings.

In addition to the codefendants-accomplices' testimony, A.S., B.P., the club patrons, and the club security guard all testified about how the fight and stabbings occurred. Appellant's involvement was also corroborated by the surveillance video and still photographs of the incident. Further, the club security guard identified appellant at HCMC as having been involved in the stabbings, and a DNA profile matching A.S.'s blood was found on appellant's clothing from that night.

Although the district court did not give the accomplice-corroboration instruction, the court did instruct the jury on how to examine witness credibility. *See State v. Jackson*, 726 N.W.2d 454, 461 (Minn. 2007) (noting that general instructions on credibility alert the jury to conflicting motivations for witnesses' testimony).

The jury learned that DNA profiles matching A.S. and B.P. were found on Durham-Smith's clothing from that night, that Durham-Smith and Matten were facing the same charges as appellant, and that there was a pending no contact order between them. The jury heard their testimony attempting to minimize their roles in the stabbings and attempting to shift blame to appellant and Devon and was able to weigh the reasonableness and reliability of their statements. The jury was not given the misconception that the accomplices' testimony should be taken at face value. Matten and Durham-Smith were vigorously cross-examined, and counsel for appellant and Devon, as well as the prosecutor, questioned the accuracy and reliability of their testimony during closing argument.

On this record, any error in failing to give the accomplice-corroboration instruction sua sponte was mitigated at trial. Given the other strong evidence against appellant, appellant has not established that the jury's verdicts were substantially affected as a result. *See Reed*, 737 N.W.2d at 584-85 (finding failure to give accomplice-corroboration instruction did not affect appellant's substantial rights where accomplice's testimony sufficiently corroborated by weight of other trial testimony).

Affirmed.