STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1238

In the Matter of the Welfare of: D. L. W., Child

Filed January 23, 2012
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-JV-10-10965

David W. Merchant, Chief Appellate Public Defender, Susan Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant D.L.W.)

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent State of Minnesota)

Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's admission of evidence regarding posts on his Facebook profile at his trial on first- and second-degree assault charges. Appellant argues that the evidence was irrelevant and unfairly prejudicial, and that its admission

constituted reversible error necessitating a new trial. Because the district court did not abuse its discretion by admitting the evidence, we affirm.

FACTS

Appellant D.L.W. and B.P. have been acquaintances since junior high school. In the summer of 2010, B.P. gave appellant $200 worth of marijuana to sell. But before appellant could complete the sale, the police arrested him and confiscated the drugs. B.P. contacted appellant and demanded that he pay B.P. $200 for the marijuana. When appellant did not pay B.P., they exchanged threats on Facebook.

On October 29, 2010, appellant and B.P. were at a party at a Maple Grove home. B.P. confronted appellant, and B.P. and appellant argued. When appellant left the house, B.P. approached appellant and a physical fight ensued. At trial, B.P. testified that he was "hovering over" appellant during the fight and acknowledged that he gave appellant a "pretty good beating."

After the fight, B.P. realized that he was bleeding, lifted his shirt, and saw stab wounds to his stomach. B.P. was transported to a hospital and underwent surgery to treat seven stab wounds: one to the back of his left arm; one to the back of his neck, one to his chest; two to his stomach; and two to his back.

Approximately two hours after the fight, appellant was arrested while riding in his friend's car. A pocket knife was recovered from the vehicle's center console. DNA testing revealed blood and a predominant DNA profile matching that of B.P. on the knife. Respondent State of Minnesota filed a juvenile delinquency petition, alleging that appellant committed first- and second-degree assault. The state subsequently moved to

certify appellant for prosecution as an adult. The district court denied the state's motion and designated the proceeding as an extended jurisdiction juvenile prosecution (EJJ).[1]

Appellant notified the state that he intended to raise a self-defense claim at trial. He also moved the district court to exclude from evidence the following posts from his Facebook profile, which were posted around one hour after the fight:

> D--n, I love drunk fight. Owee. I feel like a country boy in a bar fight. Got to love my bois. Ha! round 2. Let's do it, p-ssy. I got two days and that's enough to cause a little raucous.
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> Dude, Alicabeth, sorry for fighting at ur crib. Liquor before beer. You're in the clear. Well, that's a understatement. Ha! F--k you. The streets can see what you can't see. [B.P.], you're a p-ssy b--ch who can't fight worth sh-t. You f--king cracker a-- b--ch. 4 on 8. D--n, that's sad. All your bois ended up on the ground. Ha! Get at me. You know where to find me. Ya'll make me laugh.
>
> [B.P.], you are the definition of a white b--ch. Come see me. 85th Place North. Let's get it, p-ssy.
>
> And just like last time, you won't get out of ur d--n car when my bois surround the car. Not a threat. Just a promise. You're guna get f--ked up. No lie. LOL.

At the initial hearing on appellant's motion to exclude the posts from evidence, the district court focused on whether the prosecution would be able to lay adequate

[1] "An EJJ prosecution is a blending of juvenile and adult criminal dispositions that extends jurisdiction over a young person to age twenty-one and permits the court to impose both a juvenile disposition and a criminal sentence." *State v. J.E.S.*, 763 N.W.2d 64, 67 (Minn. App. 2009) (quotation omitted). The disposition in an EJJ case imposes an adult sentence but stays that sentence "so long as the offender does not violate the provisions of the juvenile disposition and does not commit a new offense." *Id.* (quotation omitted).

foundation and authenticate the posts under Minn. R. Evid. 901. But the district court also stated that the posts were "highly probative," "relevant to putting the whole fight in context," and not "unfairly prejudicial." Later, at appellant's jury trial, the district court questioned the relevance of the posts and their potential prejudicial effect, saying, "I just don't think it's relevant. Or to the extent it's relevant at all under 403, it's . . . misleading, confusing, [and a] waste of time. It's more prejudicial than probative." But the next day, the district court indicated that it had reconsidered the admissibility of the posts and would allow the jury to consider them. The district court reasoned that "[o]n the issue of relevance . . . the standard is very low for admissibility." The district court also reasoned that the posts had "some probative value" because they tended to contradict appellant's statement to the police, in which he denied that he had fought back against B.P. The district court concluded that while the posts had some prejudicial effect, they were not unfairly prejudicial.

The prosecution introduced the Facebook posts into evidence and quoted them in closing argument to refute appellant's self-defense claim. The state argued that the Facebook posts

> were not the words of a young man who just took a beating, didn't fight back and lost a fight. Those were not the words of a scared young man who felt that he had no alternative other than to use self-defense and use a deadly weapon.
>
> Those are the words of a young man who was boastful, who was bragging about winning the fight. And since we know that [B.P.] was over [appellant] and [appellant] was on the ground while [B.P.] was punching him, the only way that [appellant] could have felt that he won that fight was because he fought dirty, and he stabbed [B.P.].

The jury found appellant guilty as charged. The district court imposed a stayed, 74-month prison sentence on the first-degree assault offense and placed appellant on EJJ probation. This appeal follows.

D E C I S I O N

"Rulings concerning the admissibility of evidence under Minn. R. Evid. 403 are within the discretion of the district court, and will only be reversed for a clear abuse of that discretion." *State v. Schulz*, 691 N.W.2d 474, 477 (Minn. 2005). "On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *In re Welfare of D.D.R.*, 713 N.W.2d 891, 904 (Minn. App. 2006) (quotation omitted). "If there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted, then the error in admitting the evidence was prejudicial error." *Id.* (quotation omitted).

"Evidence which is not relevant is not admissible." Minn. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403.

Appellant argues that the evidence regarding his Facebook posts was inadmissible. Appellant describes the posts as "a statement that ha[d] little probative value and casts [him] in a very unfavorable light." Appellant also contends that the posts were unfairly prejudicial, "because [they] persuade[d] the jury to convict by 'illegitimate means.'"[2] The district court determined that the Facebook posts were relevant because they contradicted the description of the fight that appellant provided to the police. The district court explained:

> [A]t one point he said he wasn't involved in the fight at all. . . . [A]t one point he said he didn't fight back. . . . He said he was losing the fight. In fact [he] wasn't even fighting back. But in the Facebook entry he's basically—it certainly could be argued he's claiming he won the fight. And he also claims that he didn't know that the victim was stabbed. And yet he bragged about winning the fight. And to me arguably from his own statement [to the police], he admitted that he lost the fight or was losing the fight and wasn't fighting back.
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> [A]rguably the only reason he'd make an entry like that calling [B.P.] a p-ssy b--ch who can't fight worth sh-t . . . [is because] he knew he won the fight because he knew he had stabbed [B.P.]. Again, it goes to the weight. I'm not saying that's the truth, but it certainly is a reasonable inference for the state to argue.
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> [F]or all those reasons, I think it certainly has some probative value. And I'm going to allow it in.

On appeal, the state argues in support of the district court's reasoning. The state also contends that the posts were relevant to the jury's assessment of appellant's self-defense claim, arguing that the statements were "probative of whether [a]ppellant was an

[2] Appellant does not raise any arguments regarding authentication and identification under Minn. R. Evid. 901.

aggressor, honestly believed that he was in imminent danger of death or great bodily harm, and had reasonable grounds for [such] a belief." *See State v. Basting*, 572 N.W.2d 281, 285 (Minn. 1997) (explaining that self-defense requires that the defendant (1) not be the aggressor; (2) actually and honestly believe that he is in imminent danger of death or great bodily harm; (3) have reasonable grounds for that belief; and (4) have no reasonable possibility of retreating to avoid the danger).

Although appellant provided notice of a self-defense claim and the jury was instructed in accordance, in closing argument, appellant's attorney stated, "[Appellant] laid on the ground and took a beating. He never stabbed [B.P.]." The Facebook posts contradicted this claim of innocence, suggesting that appellant was an active participant in the fight and believed that he won the fight. The district court correctly reasoned that although the posts could have been "a lot of bragging," they also suggested "that [appellant] knew he won the fight because [appellant] knew he had stabbed the victim." Because the posts are reasonably interpreted as an admission that appellant stabbed B.P., they were relevant.

The posts were also relevant to appellant's self-defense claim. Around an hour after the fight, appellant created the posts, insinuating that he won the fight and that he was eager to fight B.P. again. Because this insinuation suggested that appellant was a willing participant in the fight, it was inconsistent with his self-defense claim, which was based on a contention that he had no choice but to use force to defend himself. *See id.* This inconsistency refuted appellant's self-defense claim.

Appellant also argues that the Facebook posts were unfairly prejudicial and therefore inadmissible. "Evidence that is probative, though it may arouse the passions of the jury, will still be admitted unless the tendency of the evidence to persuade by illegitimate means overwhelms its legitimate probative force." *Schulz*, 691 N.W.2d at 478-79. Appellant argues that the "only true purpose" of introducing the posts was, "to inflame the passions and prejudices of the jury." We disagree: the posts rebutted appellant's claims that he did not stab B.P. and that he acted in self-defense. Nor does appellant's use of vulgar language render the posts unfairly prejudicial. *See State v. Pearson*, 775 N.W.2d 155, 160-61 (Minn. 2009) (holding that a videotape of the defendant was not so unfairly prejudicial as to outweigh its probative value although the jury may have viewed the defendant in a negative light because of his language and demeanor on the videotape). Appellant's vernacular was not so prejudicial that it outweighed the probative value of his prompt description of the fight.

In conclusion, the record shows that the district court carefully and thoroughly considered both sides of the issue before deciding whether to admit the Facebook posts into evidence. Although the decision may have been a close and difficult one, the district court did not abuse its discretion by admitting the evidence. Because the admission was not in error, we affirm without addressing appellant's argument that the admission substantially affected the verdict and therefore requires reversal.

Affirmed.

Dated:

Judge Michelle A. Larkin