STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1908

State of Minnesota,
Respondent,

vs.

Jermain Edwards Schroeder,
Appellant.

Filed September 17, 2012
Affirmed
Worke, Judge

Pipestone County District Court
File No. 59-CR-11-77

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

James E. O'Neill, Pipestone County Attorney, Pipestone, Minnesota (for respondent)

Melissa V. Sheridan, Special Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

WORKE, Judge

Appellant challenges his third-degree-assault conviction, arguing that he is entitled to a new trial because: (1) the district court refused to give a self-defense instruction, (2) the district court admitted irrelevant and prejudicial evidence, (3) the prosecutor inappropriately instructed the jury on the law, and (4) the district court failed to define "assault" for purposes of the charged offense. We affirm.

D E C I S I O N

Self-defense jury instruction

Appellant Jermain Edwards Schroeder first argues that the district court abused its discretion by refusing to instruct the jury on self-defense. "The refusal to give a requested jury instruction lies within the discretion of the district court" and will not be reversed absent an abuse of that discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). To merit a new trial, a defendant must show that he was entitled to the jury instruction and that the district court's failure to give the instruction was not harmless. *State v. Pendleton*, 567 N.W.2d 265, 270 (Minn. 1997). A defendant is entitled to an instruction on his theory of the case if there is evidence to support it. *State v. Coleman*, 373 N.W.2d 777, 781 (Minn. 1985). But "[i]f the defense was not prejudiced by a refusal to issue an instruction, there is no reversible error." *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005).

The defendant "has the burden of going forward with evidence to support a claim of self-defense." *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). Once the

defendant has met that burden, "the state has the burden of disproving one or more of the[] elements beyond a reasonable doubt." *Id.* The elements of self-defense are (1) the absence of aggression or provocation on the part of the defendant, (2) the defendant's honest belief that he was in imminent danger of death or great bodily harm, (3) reasonable grounds for that belief, and (4) the absence of a reasonable possibility to retreat. *Id.* at 285. Additionally, the degree of force used to defend must not exceed that which would appear necessary to a reasonable person acting under similar circumstances. *Id.* at 286.

Appellant was charged with third-degree assault for hitting W.M. in the face. The district court denied appellant's requested self-defense jury instruction, stating that reasonable grounds did not support it. We must first determine whether appellant produced evidence sufficient to support his self-defense claim. *See State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006) (stating that this court first considers whether appellant produced sufficient evidence to support his claim).

A.T. testified that she and appellant have a seven-year-old son. Although A.T. has sole custody, she allowed her son to stay overnight at appellant's on February 12, 2011. Around midnight, A.T. heard that appellant had been seen at a pub. A.T. and her boyfriend, W.M., went to appellant's apartment. A.T.'s son answered the door, and appellant emerged from a back room. A.T. asked appellant why he had left their son alone. Appellant denied leaving him alone, and he and A.T. began arguing. A.T. heard appellant say that he was going to "crooked" W.M.'s nose, heard a noise, and next saw W.M. on the ground, unconscious. A.T. testified that W.M. did not threaten appellant

and that appellant was the aggressor. W.M. testified that just before he was struck, he attempted to calm appellant and A.T., and in response appellant threatened to "crooked" W.M.'s nose. W.M. testified that he did not threaten or touch appellant.

The evidence shows that W.M. attempted to stop A.T. and appellant's argument. The only evidence to support appellant's claim that W.M. was the aggressor is his statement to Sergeant Deputy Derek Wellnitz, who arrived at the scene and found W.M. lying unconscious in the apartment doorway. Appellant stated:

> Me and [A.T.] started talking back and forth. . . . [W]e started raising our voices at each other and [W.M.] stepped in front of [A.T.], pushing her back with his right hand and putting his left hand up in my face and said whoa, whoa, whoa, whoa, whoa and touched my nose with his hand.
> . . . .
>
> At which time I struck him in the face one time.

Appellant argues that W.M.'s touching appellant's nose gave appellant a "reasonable basis to fear present bodily injury." But this evidence fails to show that W.M. was the aggressor because he merely attempted to deescalate an argument between appellant and A.T.

Even if W.M.'s attempt to diffuse the argument demonstrated some aggression, appellant fails to show that he had an honest belief that he was in imminent danger of bodily harm. Appellant further fails to show that the degree of force he used was reasonable. Even according to appellant, W.M. merely touched his nose. Appellant responded excessively by striking W.M. in the face with enough force to render him unconscious. *See Basting*, 572 N.W.2d at 286 (stating that the degree of force used in

defense must not exceed the force used by a reasonable person acting under similar circumstances). Appellant fails to show that he was entitled to a self-defense instruction; therefore, the district court did not abuse its discretion in refusing to give the jury the instruction.

Evidentiary ruling

Appellant next argues that the district court abused its discretion by admitting irrelevant and prejudicial evidence of his past conduct. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Under Minnesota law, evidence of other crimes or bad acts, commonly known as *Spreigl* evidence, is inadmissible to prove that a defendant acted in conformity therewith. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). But *Spreigl* evidence may be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. Minn. R. Evid. 404(b). A court is required to conduct an analysis prior to ruling on the admissibility of such evidence. *See id.* (stating that prior to the admission of evidence of other wrongs or acts the prosecutor must give notice of intent to admit the evidence and indicate what the evidence will be offered to prove, the defendant's involvement in the act must be proven by clear-and-convincing evidence, the evidence must be relevant and material to the case, and the probative value of the

evidence must not be outweighed by its potential for unfair prejudice). If the district court erroneously admits this evidence, we will reverse if the evidence significantly affected the verdict. *State v. Ness*, 707 N.W.2d 676, 691 (Minn. 2006).

W.M. testified that he went with A.T. to appellant's apartment, "because [the child] was left there alone and there's a past history of violence from [appellant] towards [A.T.]" The district court overruled appellant's objection. The district court did not conduct a *Spreigl* analysis. While this comment was spontaneous and most likely unintentionally elicited, the district court had ruled that evidence of appellant's past felonies were inadmissible. And it does not appear that this evidence would have been admissible had the district court conducted an analysis—there was no notice, no indication regarding what the evidence would prove, no clear-and-convincing evidence showing appellant's involvement, and no showing of relevance or materiality. Further, the statement was more prejudicial than probative.

While the district court erred in admitting this evidence, appellant fails to show prejudice. *See Amos*, 658 N.W.2d at 203 (requiring a showing of both an abuse of discretion and resulting prejudice). Appellant's conviction will stand if this error was harmless beyond a reasonable doubt. *See State v. King*, 622 N.W.2d 800, 809 (Minn. 2001). An error is harmless if "the verdict is surely unattributable to the error." *Id.* (quotation omitted).

Appellant argues that there is a reasonable possibility that evidence of a history of violence against A.T. significantly influenced the jury to convict him because it portrayed him as a violent person. But appellant admitted to striking W.M. after W.M. allegedly

touched appellant's nose, which alone supports appellant's conviction. Further, this was a brief comment and appellant's history of violence was not raised again. *See State v. Courtney*, 696 N.W.2d 73, 84 (Minn. 2005) (concluding that wrongfully introduced other-crimes evidence was not reasonably likely to have significantly affected the jury's verdict when the state did not dwell on that evidence). We cannot say that the wrongfully admitted evidence influenced the jury to convict appellant; therefore, any error was harmless.

Prosecutorial misconduct

Appellant also argues that the prosecutor committed misconduct in closing argument by inappropriately instructing the jury on the law. Appellant failed to object. We apply a modified plain-error analysis to review claims of unobjected-to misconduct. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). Under this approach, there must be (1) error; (2) that is plain; and (3) that affected substantial rights. *Id.* If appellant shows plain error, the state must then show that the error did not affect appellant's substantial rights, "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). If plain error is established, we will reverse only if the error seriously affected the integrity and fairness of the proceedings. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

A prosecutor engages in prejudicial misconduct by violating rules, laws, court orders, or this state's caselaw, or engaging in conduct that materially undermines the fairness of a trial. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). In evaluating

alleged prosecutorial misconduct during closing argument, we focus on the argument as a whole, rather than on "particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008) (quotation omitted). The prosecutor's argument does not need to be perfect, but only proper, as mistakes or inarticulate statements are inevitable. *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996). A conviction will be reversed "only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

The prosecutor stated in closing argument that

> you are going to be asked to determine whether or not being unconscious is substantial bodily harm. And the [c]ourt is going to instruct you, and I will quote and paraphrase that substantial bodily harm is the temporary but substantial loss or impairment of the function of any bodily member or organ. That's not easy to understand from a lay standpoint. I will quote you some law. . . . [T]he Minnesota Court of Appeals wanted to look at whether or not unconsciousness constituted substantial bodily harm. . . .
>
> And they . . . say unconscious means lacking awareness in the capacity for sensory perception or not conscious. The definition of conscious include[s] having an awareness of one's environment and in one's own existence, sensations and thoughts and mentally perceptive or alert. The brain is the primary center for receiving and interpreting sensory impulses. Thus, an individual who is rendered unconscious temporarily loses impulses. Although temporarily, this loss of impairment of sensory brain function is total and thus substantial. Therefore, the Court of Appeals . . . conclude[d] that temporary loss of consciousness . . . is substantial bodily harm for the purposes of the third degree assault statute.
>
> That is the Court of Appeals opinion. This is issued law. So, you are asked to determine was [] W.M. knocked unconscious. If you determine, as a whole, that yes, [] W.M.

> was assaulted; yes, he was knocked unconscious, you have the basis to say yes, [appellant] committed the crime of which he has been accused and the [s]tate . . . met its burden of proof.

It is the district court's responsibility to instruct the jury. *State v. Cao*, 788 N.W.2d 710, 716 (Minn. 2010). But a prosecutor "may reference the law during trial" as long as the prosecutor does not misstate the law. *Id.* The prosecutor stated that this court determined that temporary loss of consciousness is substantial bodily harm for the purposes of third-degree assault. This court has held that "[a]n individual who assaults another and causes temporary loss of consciousness has inflicted substantial bodily harm and is guilty of third-degree assault." *State v. Larkin*, 620 N.W.2d 335, 338 (Minn. App. 2001). Thus, the prosecutor did not misstate the law. The prosecutor further told the jury that the district court would give it instructions and that it would be up to the jury to determine whether appellant assaulted W.M. and whether W.M. was unconscious. Therefore, the prosecutor stated its burden of proving the elements of the offense and the jury's duty in determining whether that burden had been met. Appellant fails to show plain error in the prosecutor's closing argument.

Jury instructions

Appellant argues that the district court failed to define "assault," which was prejudicial error. Appellant failed to object; thus, we review for plain error. *See State v. Larson*, 787 N.W.2d 592, 600 (Minn. 2010). Appellant must show: "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "An error is plain if it was clear or obvious." *Id.* at 688 (quotation

omitted). "If [the] three prongs are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 686. (quotation omitted).

District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). The district court "must define the crime charged." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). But "detailed definitions of the elements to the crime need not be given in the jury instructions if the instructions do not mislead the jury or allow it to speculate over the meaning of the elements." *Peterson v. State*, 282 N.W.2d 878, 881 (Minn. 1979) (holding that the failure to instruct the jury on the definition of "great bodily harm" contained in Minn. Stat. § 609.02, subd. 8 (1978) was not erroneous or prejudicial). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

Appellant was charged with third-degree assault. "Whoever assaults another and inflicts substantial bodily harm" is guilty of third-degree assault. Minn. Stat. § 609.223, subd. 1 (2010). The district court instructed the jury:

> The elements of assault in the third degree are . . . first, that [appellant] assaulted [] W.M. Second, that [appellant] inflicted substantial bodily harm on [] W.M. Substantial bodily harm means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member. It is not necessary for the state to prove that [appellant] intended to

> inflict substantial bodily harm, but only that [appellant] intended to commit the assault.

The district court failed to define "assault." We must determine whether that failure constituted plain error. "Assault" is defined as "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2010). The supreme court has held that a district court's failure to define assault is error. *State v. Vance*, 734 N.W.2d 650, 657 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). In *Vance*, however, at issue was the defendant's intent. *See id.* Here, the issue is not intent but whether appellant had a good-faith belief that his act was justified.

In *Fleck*, the supreme court clarified that assault-harm, found in Minn. Stat. § 609.02, subd. 10(2) (prohibiting the intentional infliction of bodily harm) is a general-intent crime. 810 N.W.2d at 312. "When a statute simply prohibits a person from intentionally engaging in the prohibited conduct, the crime is considered a general-intent crime." *Id.* at 308. Thus, the jury had to find only that appellant "intended to do the physical act forbidden, without proof that he meant to or knew that he would violate the law or cause a particular result." *Id.* (quotation omitted). Appellant admitted that he struck W.M. in the face. The state had to prove only that appellant did the act, not that he intended to cause a particular result. Therefore, while the district court should have

instructed the jury on the definition of assault,[1] because the jury needed to find only that appellant intended to do the physical act without ascertaining his intent, appellant was not prejudiced by the district court's failure to define assault.

Pro se supplemental brief

Finally, appellant argues in his pro se supplemental brief that the evidence shows that he was entitled to use self-defense. But we have already concluded that appellant was not entitled to a self-defense jury instruction because the evidence failed to show that appellant was entitled to use self-defense.

We conclude that the district court did not abuse its discretion in refusing to instruct the jury on self-defense because the evidence did not support such defense. And the prosecutor did not commit misconduct by instructing the jury on the law, because he did not misstate the law. But the district court abused its discretion by admitting evidence of a prior bad act and by failing to instruct the jury on the definition of "assault." These errors, however, did not prejudice appellant; therefore, he is not entitled to a new trial.

Affirmed.

[1] This is especially true because the jury requested a dictionary, but the district court advised the jury to rely on its instructions.