STATE OF MINNESOTA
IN COURT OF APPEALS
A11-493

State of Minnesota,
Respondent,

vs.

Larry Joseph Thompson, Jr.,
Appellant.

Filed April 9, 2012
Affirmed
Peterson, Judge

Ramsey County District Court
File No. 62-CR-09-13865

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

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

PETERSON, Judge

In this appeal from a conviction of possession of a firearm by an ineligible person, appellant argues that (1) the evidence was insufficient to convict him, and (2) the district

court committed reversible error by (a) allowing the state to introduce evidence that appellant committed a burglary with a gun two days before the charged possession offense and (b) accepting appellant's stipulation to an element of the offense without first securing appellant's waiver of his right to a jury trial on that element. We affirm.

FACTS

Following a shooting in a St. Paul residential neighborhood, appellant Larry Thompson, Jr. was charged with one count of second-degree felony murder, a violation of Minn. Stat. § 609.19, subd. 2(1) (2008). The state alleged that appellant and two codefendants, Robert Sherman and Michael Sherman, murdered the victim while committing a second-degree assault. The complaint was later amended to add a charge of possession of a firearm by an ineligible person, a violation of Minn. Stat. § 624.713, subd. 1(2) (2008).

Michael Sherman pleaded guilty to first-degree manslaughter. Appellant and Robert Sherman were tried jointly, and both were charged with felony murder and possession of a firearm by an ineligible person. Appellant was acquitted of the murder charge and convicted of the possession charge.

A person who lived with the victim testified at trial that, two days before the shooting, appellant and D.N. entered the victim's apartment and stole the victim's binoculars, money, and house keys. During the burglary, appellant pointed a gun at three different people in the apartment, and D.N. held a knife to the victim's neck. About five minutes after D.N. and appellant left the apartment, Robert and Michael Sherman came to the apartment, and they were told to leave. On the day of the shooting, the victim was

high on methamphetamine and angry about the burglary, and, while armed with a .40-caliber pistol, went to confront people about the burglary.

The shooting occurred in a vacant lot at dusk. There were several eyewitnesses. They included (1) T.J., a neighbor across the street, and his nine-year-old son, who viewed the incident from their bedroom window; (2) C.L., a neighbor across the street, and her adult son; (3) P.F., who drove the victim to the scene; and (4) A.B., who was walking his dogs along the street where the shooting occurred.

T.J. and his son testified that appellant was wearing a white t-shirt at the time of the shooting. T.J. testified that, following the shooting, "there appeared to be an exchange" between appellant and a woman who was present at the scene. T.J. assisted appellant with a gunshot wound in appellant's back shoulder area. He saw appellant "walking around in circles." While assisting appellant with his gunshot wound, T.J., who had some familiarity with firearms, smelled gunshot residue on appellant's person. Following the shooting, appellant sat down on the front porch. T.J. never saw a gun in appellant's hands.

T.J.'s son saw appellant and another man in the vacant lot. Appellant was in the back of the vacant lot by the fence and did not have a gun. Appellant was running away and got shot, fell down, and tried to get up.

C.L. saw a "[s]kinny white male" standing in the middle of the vacant lot shoot a gun three or four times. After the skinny white male shot, a "young girl" came out and was walking back and forth with him, "helping him" and "holding his back." The skinny white male had been shot, and there was blood on his shirt. C.L. did not identify

appellant as being the skinny white male she described, and did not recall what the man wore. After the shooting, the skinny white male sat down on the front stairway.

C.L.'s son saw a "[t]all, skinny bald-headed" man "wearing a white shirt" standing by a fence shoot a gun three to five times, exchanging fire with another person behind the fence. After the shooting stopped, the skinny guy was "walking back and forth, back and forth" and had blood on his back. The skinny guy sat down on the front steps, and a woman sat behind him, putting pressure on the wound.

A.B. saw two people run out of the house next to the vacant lot, a "heavier, light-skinned guy" and a "real skinny, kind of darker complexion" one. The skinny guy ran toward the back of the house. A.B. then heard shots coming from the skinny guy's general vicinity, including the first shot. Following the shooting, the person who fired the first shot sat on the stairs.

P.F. saw appellant run out of the house that was next door to the vacant lot. Appellant "appeared" to have a gun. Officer Ryan McAlpine testified that he spoke with P.F. immediately following the incident, and P.F. told him that appellant had begun shooting at the victim.[1] Sergeant Scott Payne interviewed P.F. over one month after the shooting. P.F. told Payne that he saw appellant with a gun in his hand.

Officer Christopher Hansen was the first officer to arrive on the scene. Upon his arrival, he saw people tending to two gentlemen who appeared to have been shot.

[1] The state asserts that P.F. "testified that appellant shot a gun," but does not cite to the transcript. The record does not support this assertion.

Hansen approached the two men to identify their injuries and call for medics. Hansen identified appellant as having been shot in the back.

D E C I S I O N

I.

When considering a claim of insufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jurors to reach the verdict that they did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "We will not disturb the verdict 'if the jury, 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 crime charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quoting *State v. McCullum*, 289 N.W.2d 89, 91 (Minn. 1979)) (other quotation omitted).

Direct evidence received at trial included the testimony of C.L., her son, and P.F. C.L. and her son testified that they saw a skinny white male wearing a white shirt shoot a gun several times. While they did not identify appellant at trial, their testimony included several facts that were consistent with other testimony and evidence indicating that the man they saw shooting the gun was appellant. This testimony included that, after the shooting, the skinny white male had blood on his back and repeatedly walked back and

forth while a young girl walked with him and held his back. The skinny white male then sat down on the front steps, and a woman sat behind him and put pressure on the wound.

A.B. testified that he saw an individual run out of the house and, soon after, A.B. heard gunshots from the direction where the individual ran. A.B. identified the individual depicted in exhibit ten as the individual he saw run out of the house, and Officer Hansen identified the individual in exhibit ten as appellant. P.F. testified that appellant ran out the back door and appeared to have a gun. T.J. testified that he is familiar with firearms and that, after the shooting, appellant smelled like gunshot residue. T.J. also testified that he saw appellant give something to a woman present at the scene.

Appellant argues that the evidence is insufficient because the firearm was never recovered and the results of a gunshot-residue test on appellant were inconclusive. Also, T.J.'s son unequivocally stated that appellant did not have a gun. But, in reviewing for sufficiency of the evidence, this court "will assume that the jury disbelieved any testimony in conflict with the result it reached." *State v. Daniels*, 361 N.W.2d 819, 826 (Minn. 1985). The presence of contrary evidence, or, in this case, inconclusive or absent evidence, does not render the jury's conclusion unreasonable. Based on the evidence received and the reasonable inferences to be drawn from it, the jury could reasonably conclude that the skinny white male who was seen shooting a gun several times and who was wounded during the shooting and sat on the front steps following the shooting was appellant. This evidence is sufficient to support the jury's finding that appellant possessed a firearm during the shooting.

II.

Appellant objected to the admission of testimony regarding the burglary at the victim's apartment two days before the shooting. The state did not give a *Spreigl*[2] notice regarding the testimony and, instead, argued that the evidence was admissible under the immediate-episode exception to the general character-evidence rule and that, to determine admissibility, the district court needed to evaluate only whether the probative value of the evidence was outweighed by its prejudicial effect. *See State v. Kendell*, 723 N.W.2d 597, 609 (Minn. 2006) (upholding denial of motion to sever offenses for trial when probative value of related offenses was not substantially outweighed by danger of unfair prejudice). The district court agreed, ruled that *Spreigl* did not apply, and concluded that the burglary evidence was admissible as "an explanation of how this came about."

We review a district court's evidentiary rulings for an abuse of discretion. *State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010). "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).

"Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). "The danger in admitting such evidence is that the jury may convict because of those other crimes or misconduct, not because the defendant's guilt of the charged crime is proved." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). "It may, however, be

[2] *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965).

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b).

"Immediate-episode evidence is a narrow exception to the general character evidence rule." *State v. Riddley*, 776 N.W.2d 419, 425 (Minn. 2009). Such evidence is admissible "where two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the res gestae."[3] *State v. Wofford*, 262 Minn. 112, 118, 114 N.W.2d 267, 271 (1962).

The supreme court has "repeatedly affirmed the admission of immediate-episode evidence when there is a close causal and temporal connection between the . . . bad act and the charged crime." *Riddley*, 776 N.W.2d at 425. Immediate-episode evidence may include evidence of an attempt to conceal a crime or an attempt to avoid apprehension for a crime. *See Kendell*, 723 N.W.2d at 608-09 (determining that murder committed in one apartment constituted immediate-episode evidence because it was committed to avoid apprehension for murders committed in apartment next door); *State v. Martin*, 293 Minn. 116, 128-29, 197 N.W.2d 219, 226-27 (1972) (determining in murder trial that district court properly admitted testimony regarding earlier robberies committed by defendant because murder was motivated by defendant's desire to conceal robberies); *see also Riddley*, 776 N.W.2d at 426-27 (finding that evidence of earlier robbery was not

[3] "Res gestae" means "[t]he events at issue, or other events contemporaneous with them." *Black's Law Dictionary* 1423 (9th ed. 2009).

admissible under immediate-episode exception when there was no indication that later murder was motivated by earlier robbery or committed to conceal earlier robbery).

The burglary evidence was neither necessary nor relevant to any of the elements of the offenses for which appellant was being tried. The district court stated in its instruction to the jury that the burglary evidence was offered to explain "what may have led to" the events at the shooting. But as appellant argues, "[t]he only relevance . . . for introduction of the burglary in the homicide case was to explain [the victim's] reason for confronting Robert Sherman." The state contends that the burglary was highly relevant because it "precipitated and motivated [the victim's] desire to find and confront appellant." But the immediate-episode exception does not allow the state to "complete the story of the [charged] crime by placing it in context" when there is no causal connection between the prior bad act and the charged crime. *Riddley*, 776 N.W.2d at 425 n.3 (quotation omitted).

All of the cases cited by the state are distinguishable in this respect. In *State v. Nunn*, the court concluded that the prior bad act was admissible as immediate-episode evidence because it was relevant to demonstrate the defendant's motive for the charged offense. 561 N.W.2d 902, 908 (Minn. 1997). The court in *Kendell*, also held that the prior bad act was admissible as immediate-episode evidence because it was relevant to the defendant's motive to commit the charged crimes and his identity. *Kendell*, 723 N.W.2d at 609. Similarly, the courts in both *State v. Leecy* and *Martin* concluded that evidence of the prior bad act was admissible as immediate-episode evidence because, in *Leecy*, the prior bad act was relevant to show intent relating to the charged offense, and,

in *Martin*, the prior bad act was relevant to show the defendant's motive for the charged offense. *State v. Leecy*, 294 N.W.2d 280, 282 (Minn. 1980); *Martin*, 293 Minn. at 128-29, 197 N.W. 2d at 226-27. Unlike all of these cases, instead of showing appellant's motive for participating in the shooting, the evidence of the burglary two days before the shooting shows why the victim confronted Robert Sherman. Therefore, we conclude that the district court abused its discretion in admitting the evidence under the immediate-episode exception.

Even though the district court abused its discretion in admitting testimony about the burglary, to obtain reversal, appellant must show that "there is a reasonable probability that the wrongfully admitted evidence significantly affected the verdict." *Ness*, 707 N.W.2d at 691. To determine whether the erroneous admission of evidence about appellant's possession of a gun during the burglary significantly affected the verdict, this court considers: (1) whether the state presented other evidence on the issue for which the evidence was admitted, (2) whether the district court instructed the jury to limit the use of the other-crime evidence and not to convict appellant based on that evidence, (3) whether the state dwelled on the evidence in closing argument, and (4) whether the evidence of guilt was overwhelming. *Riddley*, 776 N.W.2d at 428.

1. The district court noted in its instruction to the jury that the burglary evidence was admitted to explain "what may have led to" the events at the shooting. In addition to the evidence that appellant possessed a gun during the burglary, the state offered testimony of the burglary victims that described the burglary and the personal property that was taken during the burglary.

2. The district court twice instructed the jury to disregard the burglary in evaluating appellant's guilt of the charged crimes. Before admitting the evidence, the court stated:

> [Y]ou are about to hear testimony alleging that [appellant] was involved in an incident on July 24, 2009. That evidence is submitted for the limited purpose of showing what may have led to the events on July 26, 2009. [Appellant] is not being tried and may not be convicted of any offense except the offenses charged based on the events that occurred on July 26, 2009. You should not consider this evidence as evidence of [appellant's] character or to conclude that he acted on July 26, 2009, in conformity to a character trait.

3. The second instruction, given at the close of evidence, was substantively the same. The prosecutor referred to the burglary during closing argument and described appellant as "brandish[ing] a firearm, pointing it about." But the prosecutor characterized appellant's actions as leading to and causing the angry reaction of the victim and, consequently, leading to the shooting two days later. The prosecutor did not dwell on the incident in a manner that communicated to the jury an improper connection between the charged offenses and appellant's possession of a gun during the burglary.

4. The evidence that appellant possessed a gun during the shooting was not overwhelming. But it was strong. Although the two witnesses who saw a skinny white male shooting a gun could not identify appellant as the skinny white male at trial, and, A.B., who testified that he heard gunshots coming from appellant's direction, did not identify appellant at trial, the eyewitness testimony provided a strong basis for concluding that the skinny white male who was seen shooting a gun was the man who ended up sitting on the front steps following the shooting. And there was overwhelming

evidence that appellant was wounded during the shooting and that appellant was the person sitting on the front steps following the shooting.

We also note that appellant's attorney referred to the burglary during his opening statement to support his argument that the victim instigated the shooting, and that appellant acted in self-defense. Thus, to some degree, the burglary evidence was essential to appellant's defense and trial strategy. *See State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) (invited-error doctrine precludes defendant from raising own trial strategy as basis for reversal).

Because appellant used the burglary as part of his trial strategy, the prosecutor did not dwell on the burglary in a manner that encouraged an improper connection between the burglary and the charged offenses, and the district court twice instructed the jury not to consider the burglary in evaluating appellant's guilt of the charged offenses, appellant has not shown that the improperly admitted evidence significantly affected the verdict.

III.

The United States and Minnesota constitutions guarantee a defendant in a criminal case the right to a jury trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *accord* Minn. R. Crim. P. 26.01, subd. 1(a). This right "includes the right to be tried on each and every element of the charged offense." *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004). This is true even if the evidence relating to these elements is uncontradicted. *State v. Carlson*, 268 N.W.2d 553, 560 (Minn. 1978). But a defendant may waive the right to a jury trial on an element of the charged offense by stipulating to that element. *Wright*, 679 N.W.2d at 191. The defendant must make the waiver

personally on the record in open court either orally or in writing. Minn. R. Crim. P. 26.01, subd. 1(2)(a).

It is error for the district court to accept a stipulation to an essential element of an offense in the absence of a defendant's personal waiver in compliance with Minn. R. Crim. P. 26.01, subd. 1(2)(a). *State v. Kuhlmann*, 806 N.W.2d 844, 850 (Minn. 2011). In the absence of an objection, this court reviews for plain error, which requires the appellant to establish that the error affected his substantial rights. *Id*. at 852. When a defendant stipulates to an element of the offense to prevent his criminal history from being placed before the jury, the error does not affect the defendant's substantial rights. *Id*. at 853.

The district court did not obtain a personal waiver in compliance with Minn. R. Crim. P. 26.01, subd. 1(2)(a), before accepting appellant's stipulation to the fact that he had prior qualifying convictions, which is an element of the firearm-possession offense under Minn. Stat. § 624.713, subd. 1(2). Thus, the district court erred.

But appellant agreed that he was "ineligible because of [his] prior record" and that one of the reasons he wanted to stipulate was "to prevent the State from introducing at least in their initial part of the case [his] prior felony record." Because appellant stipulated to the prior convictions to prevent evidence of his prior convictions from being placed before the jury, the failure to obtain appellant's personal waiver did not affect appellant's substantial rights and appellant is not entitled to reversal of his conviction.

Affirmed.