STATE OF MINNESOTA
IN COURT OF APPEALS
A11-586

State of Minnesota,
Respondent,

vs.

Tyler Ben Drake,
Appellant.

Filed February 21, 2012
Affirmed
Larkin, Judge

Anoka County District Court
File No. 02-CR-10-6413

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

Anthony C. Palumbo, Anoka County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

LARKIN, Judge

Appellant challenges his domestic-assault convictions, arguing that he was deprived of his constitutional right to a fair trial and that the state improperly withheld exculpatory evidence. We affirm.

FACTS

A jury found appellant Tyler Ben Drake guilty of one count of felony domestic assault by strangulation and one count of misdemeanor domestic assault. The evidence at trial demonstrated that on the morning of August 10, 2010, police responded to a call of a domestic assault in progress at the border of Fridley and Columbia Heights. Witness J.B. testified that during her morning commute, she saw appellant with his hands around a woman's neck on the side of the road. The woman is appellant's sister, K.F. J.B. pulled over and approached appellant and K.F. J.B. saw appellant hit and punch K.F. She noticed that K.F. was choking, coughing, and appeared to have trouble breathing. J.B. testified that K.F. had a bump on her forehead and scratches on her neck and shoulders. A second witness, A.W., testified that he also saw the altercation between appellant and K.F. He saw appellant's hands on K.F.'s neck and saw appellant hit K.F. A.W. walked up to appellant and told appellant to "fight [him]" instead. A.W. testified that he saw fingerprints on both sides of K.F.'s neck, as well as bruising and red discoloration on both sides of her face.

Officers arrived at the scene and arrested appellant. Officer Christopher Knight testified that while appellant was being handcuffed, he made several statements, including:

> This is bullsh-t. I didn't do anything. My sister won't testify against me anyway. This doesn't matter because nothing is going to happen anyway. I intimidate everybody. I beat the sh-t out of everybody, and that's just who I am and that's what I do, so nobody will ever testify against me.

Officer Robert Stevens testified that K.F. had been drinking. He also testified that she had scratches on her neck and some bruising on her cheek and that she had difficulty talking. Officer Stevens attempted to take photographs of K.F., but K.F. did not cooperate.

At trial, K.F. testified for the defense. According to her testimony, she received her injuries during an earlier fight with her sister. She admitted that appellant pushed her and slapped her in the face, but she denied that appellant had choked her. K.F. also testified that she told officers at the scene that appellant did not choke her. On cross-examination, the prosecutor referred to appellant's statement to police that "he intimidates everyone," and asked K.F. if she was afraid of appellant or intimidated by him. K.F. stated that she was not afraid of appellant, but acknowledged that she did not want to get him in trouble.

The state called Officer Stevens as a rebuttal witness. He testified that K.F. told him that "she got into an argument with her brother, and her brother placed his hands around her neck and strangled her." Officer Stevens also referred to photographs of K.F. apparently taken by an officer from the Columbia Heights Police Department. Neither

the prosecutor nor defense counsel had seen these photographs. After learning of the photographs, defense counsel moved for dismissal. The district court reserved its ruling pending the state's production of the photographs, but the jury returned its guilty verdicts before the prosecutor obtained the photographs.

After the jury returned its verdicts, the district court held a hearing on appellant's motion to dismiss. The prosecutor acknowledged that the photographs should have been disclosed to the defense, but he argued that he had no knowledge of the photographs. Defense counsel argued that the photographs were exculpatory because they supported the defense theory, which was that "there was no strangulation, there was merely a misdemeanor domestic assault." Counsel also argued that the photographs discredited J.B.'s testimony describing the victim's injuries. The prosecutor countered that the photographs were consistent with the state's evidence at trial, that there was nothing exculpatory in the photographs, and that the state "would have liked to have had these photographs at trial." The district court denied the motion to dismiss, concluding that the photographs were not exculpatory and would not have caused the jury to reach a different outcome on the strangulation charge. The district court sentenced appellant to serve a 27-month prison term. This appeal follows.

D E C I S I O N

I.

Appellant claims that the introduction of police testimony that he had previous contacts with the police combined with the introduction of statements that he made at the time of his arrest denied him his constitutional right to a fair trial. We review

constitutional issues raising due-process concerns de novo. *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

Prior Police Contacts

During Officer James Mork's testimony, the following exchange occurred:

> PROSECUTOR: Eventually then, was the defendant handcuffed?
> WITNESS: Yes, he was.
> PROSECUTOR: What was your involvement after that point?
> WITNESS: At that point Columbia Heights officers arrived on scene. They recognized him from past contacts so—
> DEFENSE: Objection, Your Honor.
> COURT: Sustained.

Following the objection, the district court conducted an off-the-record bench conference. Later, the district court made a record of the conference, explaining that while the district court offered to provide a curative instruction to the jury, defense counsel declined the instruction because he did not want to further emphasize the comment. No other reference to past contacts between appellant and the police occurred during trial.

Evidence from which a jury could infer that a defendant has a criminal record is generally inadmissible. *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974). But "[t]he constitutional right to a fair criminal trial does not guarantee a perfect trial." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992). "Where, as here, a reference to a defendant's prior record is of a passing nature, or the evidence of guilt is overwhelming, a new trial is not warranted because it is extremely unlikely that the evidence in question played a significant role in persuading the jury to convict." *Id.*

(quotation omitted). For the reasons that follow, we conclude that the single reference to appellant's prior police contacts is not reversible error.

First, the officer's comment was vague. Officer Mork did not expressly refer to prior criminal acts or incarceration; he only referred to "contacts," which could describe any number of interactions between appellant and police. *Compare id.* ("[T]he challenged phrase [of 'from a past incident'] was only a passing remark that could have described many types of interactions between [the defendant] and police."), *with State v. Hjerstrom*, 287 N.W.2d 625, 628 (Minn. 1979) (holding that it was error for the district court to allow testimony referring to the defendant's time in Stillwater prison).

Second, the reference to "past contacts" was made in passing. It constituted brief testimony during a day-long trial. And the passing nature of the comment is further illustrated by defense counsel's declination of a curative instruction to the jury. *See State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978) (noting "that such an instruction might have emphasized [an objectionable] portion of [a] statement [because] the statement was of a passing nature, the import of which might have been missed by the jury"). Because the reference was vague and made in passing, it is unlikely that the comment played a significant role in the jury's verdict.

Third, the evidence of appellant's guilt is substantial. *See Clark*, 486 N.W.2d at 170. Although K.F. testified that appellant did not strangle her, she acknowledged that appellant slapped her and pushed her down and that she did not want appellant to get in trouble. And two eyewitnesses contradicted K.F.'s testimony that she was not strangled. These witnesses testified that they observed the assault, saw appellant's hands on K.F.'s

neck, and observed that K.F. had redness on her neck after the assault. One of the eyewitnesses further testified that K.F. was "choking" and had trouble breathing. Moreover, Officer Stevens testified that K.F. had scratches on her neck and a "gravelly" voice, which indicated to him that K.F.'s throat had been constricted. Officer Stevens also testified that K.F. told him that appellant had choked her. In sum, although K.F. testified that appellant did not strangle her, the evidence of strangulation is nonetheless substantial. Thus, it is extremely unlikely that the evidence of appellant's prior police contacts prompted the jury to convict where it otherwise would not have, and a new trial is not warranted. *See Hjerstrom*, 287 N.W.2d at 628 (concluding that while admission of evidence regarding the defendant's past prison stay was a serious error, a new trial was not warranted when the evidence of the defendant's guilt was "overwhelming").

Appellant's Arrest Statements

Appellant objects to the jury's receipt of the following italicized portion of his statements to police:

> This is bullsh-t. I didn't do anything. My sister won't testify against me anyway. This doesn't matter because nothing is going to happen anyway. *I intimidate everybody. I beat the sh-t out of everybody, and that's just who I am and that's what I do, so nobody will ever testify against me.*

Although appellant moved unsuccessfully to suppress his statement under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), he did not otherwise object to this evidence at trial. We therefore apply the plain-error standard of review. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected

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 affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted).

Appellant argues that the admission of the italicized portion of his statement was in error because it was irrelevant and more prejudicial than probative. "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 . . . ." Minn. R. Evid. 403.

Appellant also argues that his statement was inadmissible under Minn. R. Evid. 404(b), which provides:

> 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. It may, however, be 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).

Whether or not the evidence was admissible under rule 404(b) depends on the purpose of the evidence, and our review of the record shows that the evidence was not used for an improper purpose, i.e., to prove appellant's character "in order to show action in conformity therewith." *Id.* During Officer Knight's testimony, he described

appellant's aggressive behavior during his arrest and recounted appellant's statements to police. The prosecutor did not ask any follow-up questions regarding this testimony. The prosecutor next referenced the challenged evidence when he cross-examined K.F. and asked her if she was intimidated by or afraid of appellant. The prosecutor also referenced appellant's statement during closing argument, describing it as follows: "[T]he defendant was boasting he wasn't worried because his sister won't testify against him." The prosecutor later referred to appellant's statements when arguing K.F.'s credibility to the jury. In sum, the record shows that the prosecutor used the evidence to show that K.F. was biased in favor of appellant and to explain why her trial-testimony denial of strangulation was inconsistent with her on-the-scene accusation. This was not an improper purpose. *See State v. McArthur*, 730 N.W.2d 44, 52 (Minn. 2007) (explaining that "[e]vidence of witnesses' fears of testifying and of purported threats against witnesses both tend to be relevant to general witness credibility or to explain a witness's reluctance to testify or inconsistencies in a witness's story").

Moreover, the evidence was relevant because it tended to show that appellant assaulted his sister—but not because he had acted in conformity with his character. Instead, appellant's statement to police during his arrest suggested consciousness of guilt. *State v. Harris*, 521 N.W.2d 348, 353 (Minn. 1994) ("[E]vidence of threats to witnesses may be relevant in showing consciousness of guilt."). Appellant's statements that K.F. would not testify against him and that "nobody will ever testify against me" suggested that he had done something to testify about. Finally, the evidence was highly probative of K.F.'s credibility and appellant's consciousness of guilt, and the probative value was

not substantially outweighed by the danger of unfair prejudice. *See State v. Ness*, 707 N.W.2d 676, 690-91 (Minn. 2006) (explaining that the district court must consider "the probative value of the evidence on disputed issues in the case against its potential for unfair prejudice").

In sum, because appellant's arrest statement was relevant, was not used for an improper purpose in violation of rule 404(b), and did not cause unfair prejudice, appellant fails to satisfy the first prong of the plain-error test. We therefore conclude that a new trial is not warranted without addressing the remaining prongs of the test. And because appellant has established only one, nonreversible error, we conclude that he was not deprived of his right to a fair trial.

II.

Appellant contends that he is entitled to a new trial because the state failed to disclose material and exculpatory evidence, namely, photographs of K.F. that were taken immediately after the assault. "[T]he suppression by the State, whether intentional or not, of material evidence favorable to the defendant violates the constitutional guarantee of due process." *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963)); *see also* Minn. R. Crim. P. 9.01, subd. 1(2), (6) (requiring the state to disclose to the defense relevant written or recorded statements and information that tends to negate or reduce defendant's guilt). A constitutional violation does not occur unless the evidence is favorable to the accused, either because it is exculpatory or it is impeaching; the evidence was suppressed by the state, either willfully or inadvertently; and the accused was prejudiced as a result. *Pederson v. State*,

692 N.W.2d 452, 459 (Minn. 2005). We review this constitutional issue de novo. *Heath*, 685 N.W.2d at 55.

Appellant argues that the photographs are favorable because they tend to show that J.B.'s testimony about K.F.'s injuries was exaggerated. J.B. testified that K.F. "had a huge bump on her forehead," that she had "scratches on her neck and her shoulders," and she had "scratches on her cheek . . . [and] neck." But the photographs show that K.F. had a bump on her forehead, scratches on her forehead, redness on her cheek, redness above her eye, scratches on her arms, and a red mark on her neck. Thus, the photographs tend to corroborate J.B.'s testimony, as well as the testimony of the other state witnesses, and they are not exculpatory. Moreover, having viewed the photographs and reviewed the testimony of the state's witnesses, we conclude that the photographs have little, if any, impeachment value. In sum, the evidence was not favorable to appellant. And because the evidence was not favorable, appellant was not prejudiced by the state's nondisclosure. We therefore find no constitutional violation. *See Pederson*, 692 N.W.2d at 459.

Affirmed.

Dated:

Judge Michelle A. Larkin