STATE OF MINNESOTA
IN COURT OF APPEALS
A11-94

State of Minnesota,
Respondent,

vs.

Michael Lloyd Daly,
Appellant.

Filed January 30, 2012
Affirmed
Halbrooks, Judge

Crow Wing County District Court
File No. 18-CR-10-2054

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

Donald F. Ryan, Crow Wing County Attorney, David F. Hermerding, Assistant County Attorney, Brainerd, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

HALBROOKS, Judge

A jury convicted appellant of second-degree assault and terroristic threats in connection with a May 2010 shooting. Appellant now challenges his conviction and

sentence, arguing the district court erred by admitting portions of testimony by the arresting police officer, failing to properly answer a question posed by the jury during deliberations, and imposing an upward durational departure at sentencing. Appellant also raises issues in a pro se supplemental brief. We affirm.

FACTS

Throughout the day of May 9, 2010, appellant Michael Lloyd Daly made repeated threatening phone calls to R.L., who was caring for R.W., a friend who had several health complications, at R.W.'s home in Merrifield. Appellant's former wife, K.D., was assisting R.L. Appellant believed that R.L. and K.D. were romantically involved. In addition to the phone calls, appellant drove back and forth in front of R.W.'s home several times that day, spinning his wheels in the driveway, and left threatening messages on the front door.

At about 9:00 p.m., R.L. called 911 to report the harassment; he also called his girlfriend, D.W., who went to R.W.'s home. After D.W. arrived, appellant's calls became more frequent and more threatening, and D.W. called 911. The dispatcher told her and R.L. to stop answering the phone and to let the answering machine pick up the calls. At about 9:50 p.m., appellant called R.L. from just outside R.W.'s home and left a message saying, "Your worst nightmare is outside the door, boy, come and get me."

D.W. immediately called 911 again, and R.L. picked up a handgun that belonged to R.W. and went to the front porch with D.W., still on the phone, following a half-step behind. When R.L. saw appellant outside the home, he informed him that the police were on the way and fired a shot away from appellant, intending to scare him. Instead,

appellant rushed at R.L., knocked him to the ground, got on top of him, and began punching his face and head, yelling, "You are going to die, you are going to die." D.W., who was still on the line with the 911 dispatcher (who heard and recorded the entire incident over the phone), attempted to get appellant off of R.L. by kicking him and pulling his hair. As R.L. lay on the ground on his stomach, with the gun in his hand underneath him, appellant continued hitting R.L.'s head and face and reaching under him to get the gun. Appellant got his hand under R.L., placed his hand over R.L.'s hand holding the gun, forced the weapon up so it was pointing to R.L.'s face, and put his finger over R.L.'s trigger finger while saying, "Pull the trigger, pull the trigger." The gun discharged, and R.L. was struck in the face. Appellant got up, brandishing the gun, and said to D.W., "You're next," before running away. He was arrested soon afterward. R.L. was airlifted to a hospital in the Twin Cities and required several reconstructive surgeries on his face.

A jury found appellant guilty of second-degree assault with a dangerous weapon and terroristic threats. The district court sentenced appellant to 36 months in prison on the assault charge—the mandatory minimum sentence when a firearm is used in the commission of the assault—and 15 months in prison on the terroristic-threats charge, to be served concurrently. The district court denied appellant's motion for a new trial. This appeal follows.

D E C I S I O N

I.

Appellant argues that he was denied a fair trial when the district court admitted, over his objection, testimony by the arresting police officer that he knew appellant "from previous contacts" and that appellant responded "lawyer" when the officer asked his name. We review a district court's evidentiary rulings for an abuse of discretion. *State v. Prtine*, 784 N.W.2d 303, 312 (Minn. 2010). "The [party alleging error] has the burden of proving both that the district court abused its discretion and that prejudice resulted." *Id.* (citing *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997)). "Reversal is warranted only when the error substantially influences the jury's decision." *Nunn*, 561 N.W.2d at 907.

A. Appellant's previous contacts with law enforcement

Appellant contends that because the issue of his identity was irrelevant to the state's case, the officer's reference to previous contacts between appellant and the officer was prejudicial in that it created an inference that he has a criminal history and a bad character. In support, he relies on *State v. Strommen*, where the supreme court held that admission of testimony elicited from the arresting officer that he knew the defendant from "prior contacts and incidents" constituted plain error. 648 N.W.2d 681, 687-88 (Minn. 2002). In *Strommen*, the prosecutor asked the arresting police officer whether he had ever had "any contact" with the defendant, and the officer said that he recognized Strommen before arresting him "[f]rom prior contacts." *Id.* at 684-85. The supreme court noted, "It appears that the purpose in asking the offending questions was to elicit a

response suggesting that [the defendant] was a person of bad character who had frequent contacts with the police." *Id.* at 688.

Although the phrase "prior contacts" in *Strommen* is nearly identical to the "previous contacts" language used by the testifying officer here, other aspects of *Strommen* render it inapposite. Appellant does not argue, and there is no evidence, that the prosecutor's purpose in asking the question was to elicit a response referencing appellant's frequent contacts with the police. The officer's passing reference to "contacts" in the middle of a narrative response to an open-ended question about the events surrounding appellant's arrest cannot reasonably be characterized as an attempt to insinuate inadmissible character evidence. Moreover, the record shows that the contested testimony did not prejudice appellant. Neither party nor counsel made any reference to the statement after its initial utterance, and appellant does not demonstrate how, in light of the voluminous testimony and other evidence of guilt offered at trial, the jury might have found him not guilty of either charge but for the statement's admission.

B. Appellant's request for an attorney

Appellant challenges the admission of testimony that he answered "lawyer," thereby requesting counsel, when the arresting officer asked his name. "A defendant's choice to exercise his constitutional right to counsel may not be used against him at trial." *State v. Juarez*, 572 N.W.2d 286, 290 (Minn. 1997); *see also State v. Dobbins*, 725 N.W.2d 492, 509 (Minn. 2006) ("[T]he state generally may not refer to or elicit testimony about a defendant's . . . request for counsel."). This is the case because allowing the jury

to hear a request for counsel leaves the jury likely to infer that the defendant was concealing his guilt. *Juarez*, 572 N.W.2d at 291.

By saying "lawyer" when asked his name, appellant was unmistakably requesting counsel. We therefore conclude that the district court abused its discretion by admitting the challenged testimony. We review the admission of testimony violating *Miranda* to determine whether it was harmless beyond a reasonable doubt. *Id*. (considering whether erroneous admission of defendant's request for a lawyer was harmless beyond a reasonable doubt). "An error is harmless beyond a reasonable doubt if the guilty verdict actually rendered in the trial was surely unattributable to the error." *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005).

In determining whether a jury verdict was "surely unattributable" to an erroneous admission of evidence, we consider the "manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, . . . whether it was effectively countered by the defendant," and the strength of the evidence of guilt. *Id.* Here, we conclude that the erroneous admission of the statement was harmless.

The statement was brief (consisting of one word), and it was not referred to by the prosecutor in closing argument or in connection with the questioning of any other witnesses. The request was not persuasive evidence of his guilt under the circumstances, as it was an isolated statement made at the moment of his arrest and not in the course of an interview during which he made incriminating admissions. Finally, evidence of appellant's guilt was strong: the jury heard eyewitness testimony from R.L. and D.W. and listened to the recording of D.W.'s 911 call that began just as appellant arrived at

R.W.'s home and lasted through the shooting. On this record, we conclude that the verdict was surely unattributable to the testimony that appellant requested an attorney. The error is therefore not reversible.

II.

Appellant argues that the district court abused its discretion when, in response to a request from the jury during deliberations to clarify an instruction, it referred the jury to the instructions already given instead of providing additional instructions.

We review a district court's decision to give additional instructions in response to a question from a deliberating jury for an abuse of discretion. *State v. Laine*, 715 N.W.2d 425, 434 (Minn. 2006). In response to a jury's question on any point of law, the district court has discretion to give additional instructions, expand previous instructions, reread the instructions, or give no response. *State v. Anderson*, 789 N.W.2d 227, 240 (Minn. 2010); *see also* Minn. R. Crim. P. 26.03, subd. 20(3) (listing actions a court may take in response to a jury question).

During deliberations, the jury asked the district court: "According to the law, are fists considered dangerous weapons?" The district court responded, "You are referred to the jury instructions. The jury instructions are complete." The instruction concerning dangerous weapons stated that to find appellant guilty of second-degree assault, the jury must find, among other elements: "[Appellant] in assaulting [R.L.] used a dangerous weapon. A firearm, whether loaded or unloaded or even temporar[ily] inoperable is a dangerous weapon."

Appellant contends that because the instruction ambiguously defined a firearm as only one type of dangerous weapon, rather than defining dangerous weapons as firearms, it created the impression that an instrument other than a firearm could be a dangerous weapon. He further argues that because the jury's confusion about the instruction prompted it to ask the question in the first place, the district court's response could only further confuse the jury and encourage it to conclude that fists are dangerous weapons and convict appellant for using an instrumentality—his fists—that is not, as a matter of law, a dangerous weapon. Appellant concludes that the district court's failure to adequately clarify the instruction warrants reversal. *Cf. State v. Shannon*, 514 N.W.2d 790, 793 (Minn. 1994) (holding that when the jury is "obviously confused," it is prejudicial error for the district court to respond to a jury request for clarification by refusing to correct the confusion).

Appellant's arguments on this issue are not without logic or merit. There was testimony that appellant used both his fists and a gun in assaulting R.L. And the jury's question obviously evinces some confusion about the definition of "dangerous weapon." The instruction in question is not unequivocal; it could be read to mean that firearms are only one kind of dangerous weapon among several.

But "the [district] court's charge to the jury must be read as a whole, and if, when so read, it correctly states the law in language that can be understood by the jury, there is no reversible error." *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998). When considered in light of the whole record, the instruction correctly and clearly stated that only a firearm could be considered a dangerous weapon. First, the trial record

unambiguously reflects that the "substantial harm" of the second-degree assault charge was the harm done to R.L.'s face by the gunshot, and there was testimony and documentary evidence concerning the injuries sustained specifically as a result of the bullet fired into R.L.'s face. Even if some jurors were unclear early in deliberations as to whether fists could be considered dangerous weapons, the fact that appellant was convicted of second-degree assault and that the substantial injury was a gunshot wound to his face, demonstrates that the jurors concluded that appellant used a firearm in committing the assault; he obviously could not have caused a gunshot wound with his fists. Second, while it is true, as appellant argues, that there was some testimony about his beating R.L. with his fists, the record is clear that the state's theory of the assault charge depended entirely on appellant's use of a firearm to harm R.L. And there is no mention of fists or other dangerous weapons in the instructions.

We therefore conclude that, because the instruction correctly stated the law in language that could be—and was—understood by the jury, the district court acted within its discretion when it answered the jury question by instructing the jury to refer to the instructions. *See State v. Harwell*, 515 N.W.2d 105, 109 (Minn. App. 1994) (observing that the district court's answer to a jury question—referring the jury to the instructions—was not an abuse of discretion because the original instructions provided sufficient guidance to enable the jury to resolve its concerns and reach a verdict), *review denied* (Minn. June 15, 1994).

III.

Appellant argues that the district court violated his right to a jury trial, contending that his Sixth Amendment rights under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), were violated when the district court imposed a mandatory-minimum 36-month sentence, under Minn. Stat. § 609.11, subd. 5 (2010), without a jury finding that a firearm was used in the commission of the assault. Whether a *Blakely* error occurred is a legal question, which appellate courts review de novo. *State v. Dettman*, 719 N.W.2d 644, 648-49 (Minn. 2006).

The jury was instructed that, to find appellant guilty of second-degree assault, it must find, among other things, that "[appellant] in assaulting [R.L.] used a dangerous weapon. A firearm, whether loaded or unloaded or even temporar[ily] inoperable is a dangerous weapon." But the jury was not specifically asked or instructed to find whether a "firearm" was used to commit the assault, and the verdict form said "Assault in the Second Degree with a Dangerous Weapon," without using the term "firearm."

Appellant is correct that without a jury finding that he used a firearm in the assault, there was a *Blakely* violation. *See State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005). But *Blakely* errors are subject to a harmless-error analysis. *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006). A *Blakely* error is harmless beyond a reasonable doubt if the reviewing court can "say with certainty that a jury would have found the aggravating factors used to enhance [the] sentence had those factors been submitted to a jury in compliance with *Blakely*." *Dettman*, 719 N.W.2d at 655.

Appellant argues that the error was not harmless because it increased his sentence. But the evidence that the handgun R.L. picked up as he exited R.W.'s home was the instrumentality of the harm caused by appellant's assault was overwhelming and unchallenged. It is indisputable that the jury concluded that appellant used a firearm. The substantial harm to appellant's victim (a gunshot wound) could only have been caused by a firearm, and the firearm was the focus of a great deal of testimony about the events surrounding the assault. We conclude that the district court's *Blakely* error was harmless because there was no evidence that any weapon other than the firearm was used to commit the assault.

IV.

In his pro se supplemental brief appellant argues that he is entitled to either dismissal of the charges against him or a new trial because (1) the instruction on the terroristic-threats charge was confusing and violated his right to separate verdicts, (2) the jury pool was tainted by pretrial publicity (which portrayed him as a "violent attacker"), and (3) the state did not meet its burden on the assault charge because R.L. assaulted him first and he was only acting in self-defense.

Appellant did not challenge the instruction, move for a change of venue, or challenge the verdict before the district court, and has therefore waived his right to raise these issues on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that the appellate court generally will not decide issues that were raised for the first time on appeal). Although we often review for plain error regardless of whether appellant

objected at trial, *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998), there is no obvious prejudicial error concerning any of the issues appellant raises.

Affirmed.