STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0690

State of Minnesota,
Respondent,

vs.

Michael Deangelo Ball,
Appellant.

Filed April 3, 2017
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Hennepin County District Court
File No. 27-CR-15-22968

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

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

CONNOLLY, Judge

Appellant challenges his convictions, arguing that (1) the district court abused its discretion in denying his alternative motions for a mistrial or for striking a victim's in-court identification of appellant and in not granting a new trial based on inaccuracies in the victim's testimony and (2) the evidence was not sufficient for the jury to reasonably conclude that appellant was guilty. Because we see no abuse of discretion and sufficient evidence supports the jury's verdict, we affirm. However, because there was an error in the imposition of appellant's consecutive sentences, we reverse the sentence and remand for resentencing.

FACTS

Appellant Michael Ball was one of three assailants involved in the robbery and assault of E.A. and T.S. on August 16, 2015. Appellant fled, was caught by a police officer, arrested, and put in a squad car; then a medical situation occurred that resulted in his being transferred to an ambulance and taken to the hospital. The police reports of the incident stated that identification procedures of the two other assailants by both victims and by some witnesses were conducted at the scene, but, because appellant was transferred to an ambulance, only E.A. participated in appellant's identification procedure.

Appellant was charged with one count of aiding and abetting first-degree assault and two counts of aiding and abetting first-degree aggravated robbery. In December 2015, before the jury trial, the prosecutor and a staff member met with victim T.S. He told them that: (1) the police apprehended three suspects and asked the victims and witnesses to

participate in showup identification procedures for the other two suspects, but not for appellant; (2) T.S. saw the police bring appellant down the sidewalk and put him in an ambulance; and (3) T.S. definitely recognized appellant as one of the assailants. This information was provided to appellant's counsel.[1]

At the jury trial in January 2016, T.S. described the incident and identified appellant as one of the assailants whom he saw in the courtroom. T.S. also said, for the first time, that he had participated in a showup identification procedure of appellant while appellant was in the ambulance. Because this testimony was new to both parties and conflicted with the police reports and with what T.S. had told the prosecutor, appellant's counsel moved for a mistrial or to strike T.S.'s testimony identifying appellant.

The jury was then dismissed, and the district court questioned appellant's counsel.

> Q: [C]orrect me if I'm wrong, . . . [but] you are not suggesting that the State intentionally withheld any information from you.
> A: I am not. . . . [A]ssuming the showup did happen as [T.S.] said, it was just something that he neglected to mention.
> . . . .
> Q: And not only would he have neglected to mention it, the police would have neglected to mention it in their reports.
> . . . [I]t seems to me if the showup didn't happen, that actually would not prejudice but would benefit the defense because [T.S.] appears to recall an event that didn't occur.

After hearing that three of the officers involved all said the only showup of appellant was to E.A., the district court said:

> I think we should go forward. I think that [T.S.] is certainly subject to cross-examination about the accuracy of that report. I think there's reason to believe that [the showup] didn't occur

[1] Appellant was represented by different counsel at trial.

> based on the investigation . . . done so far. If it becomes clear that it did happen and that the police neglected to report it, I would reconsider the defense's motion [for a mistrial]. But at this time, the defense's motion is denied and we'll proceed with testimony.

Appellant's counsel argued that, if counsel had known T.S. identified appellant in the ambulance during a showup procedure instead of on the sidewalk without a showup procedure, counsel might have challenged the circumstances of that identification before trial to preclude T.S.'s in-court identification of appellant. Other witnesses and the police involved all testified that the only person to identify appellant at a showup procedure was E.A.

The district court denied the motions for a mistrial and to strike T.S.'s in-court identification of appellant. The jury found appellant guilty as charged. Appellant challenges the denial of the motions, the sufficiency of the evidence to support the jury's verdict, and his sentence.

D E C I S I O N

1. Mistrial motion

The denial of a mistrial is reviewed for an abuse of discretion. *State v. Spann*, 574 N.W.2d 47, 52 (Minn. 1998) (mistrial based on prosecutorial misconduct in failing to provide discovery). A mistrial should be granted only if there is a reasonable probability, in light of the entirety of the trial, that the outcome would have been different if the incident giving rise to the motion for a mistrial had not occurred; the district court is in the best position to determine whether the incident was so prejudicial as to require a mistrial or

whether another remedy will suffice. *State v. Manthey*, 711 N.W.2d 498, 506-07 (Minn. 2006).

Despite appellant's counsel having said at trial that the State did not intentionally withhold information, appellant now argues that "[t]he State's failure to disclose T.S.'s show-up identification procedure of appellant was prejudicial" and that he is entitled to a new trial because, without T.S.'s erroneous testimony that he recognized appellant in a showup, the jury might not have found appellant guilty.

But the jury had at least four reasons other than T.S.'s testimony to find appellant guilty. First, the jury saw and heard a video of an officer telling E.A. to look in the ambulance and asking him, "[J]ust yes or no, is that one of the guys [who assaulted you]?" to which E.A. answered, "Yes." Second, the jury heard a witness to the incident, R.M., identify appellant in court as one of the assailants and as the man who was put into an ambulance. Third, the jury heard T.S. testify that a man wearing the clothes appellant was wearing at the time of the incident was the only man within one foot of T.S. during the incident and was the man standing by T.S.'s truck in a video of the incident. Fourth, the jurors heard one officer testify that he: (1) chased appellant on foot, (2) caught him, (3) was positive appellant was one of the three men whom E.A. had identified as assailants, (4) arrested appellant and put him in a squad car, (5) transferred appellant to an ambulance, (6) did one showup identification by taking E.A. to the back of the ambulance where appellant was lying on a cot, (7) saw E.A. identify appellant, (8) followed appellant to the hospital, and (9) eventually took appellant to jail.

Taken as a whole, all the evidence from victims, witnesses, and police officers that appellant was one of the assailants defeats appellant's argument that, if T.S.'s testimony that he saw appellant as part of a showup as well as during the assault had been disclosed to the defense before trial, the outcome of the trial might have been different.

2. Motion to strike

Appellant's counsel also asked the court for an alternative to the mistrial: "strik[ing] the testimony from [T.S.] identifying [appellant] at this time and prohibit[ing T.S.] from making any further identification in the court as a result of this."[2] Counsel for the state objected:

> [T.S.] was asked whether he could make an in-court identification based on this person, and he made the identification. And I said, "What do you remember [appellant] doing?" And he said, "Punching [me] in the face." You see in the video a man that's wearing exactly the same clothes as [appellant was wearing] punching [T.S.] in the face. There's an independent basis for you to feel very confident that that identification was truthful and accurate.

The district court responded:

> I think that the in-court identification would be something that I would tell the jury to disregard if I believed that it was tainted by an improper show-up. In this case it seems to me that there wasn't a showup, that the witness [T.S.] is certainly impeachable about whether that event happened. And that may affect the credibility of his identification of [appellant], but . . .

[2] Although at trial appellant's counsel asked to strike only T.S.'s in-court identification, he argues on appeal that he is entitled to a new trial because the trial court "did not strike T.S.'s testimony [concerning the showup] or give the jury a curative instruction." Because appellant did not ask to have the testimony about the showup stricken or to have a curative jury instruction given, those issues are not properly before us. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (this court does not generally consider matters not presented to and considered by the district court).

> there wasn't a constitutional violation that would lead to a suppression of the in-court identification, at least at this point.
>
> And again, if it becomes clear that there was a show-up, then I would need to examine whether that show-up infected the in-court identification. But at this point, . . . I have no reason to think that there was a show-up. And so . . . I can't make a finding that there was a show-up, that it was impermissible or that it infected the in-court identification. So I will not strike that identification testimony; however, [T.S.] is certainly subject to cross-examination about the reliability of his memory with regard to the events in general based on the testimony so far.

Appellant argues that nothing was done to correct T.S.'s false testimony, but he does not say what else could have been done. T.S. was cross-examined about his identification of appellant, and the police officers and other witnesses were also examined. The district court not only arranged for conflicting testimony from several sources to refute T.S.'s account of a showup; it also planned for appropriate actions depending on what that testimony would reveal. Appellant did not, at the time, seek either to strike the showup testimony or to have a curative jury instruction given.

Finally, appellant relies on *Ferguson v. State*, 645 N.W.2d 437 (Minn. 2002). But *Ferguson* is distinguishable. In that case, the defendant was arrested shortly after a murder, denied knowledge of it, and was released. *Ferguson*, 645 N.W.2d at 441. Afterwards, a third party informed police that, on the morning of the murder, the defendant had said he was going to shoot the victim and had later confessed to shooting the victim. *Id.* The defendant was re-arrested, the third party testified at his trial, and the defendant was convicted. *Id.* The third party later allegedly told a fourth party that the third party's testimony at the defendant's trial had been a lie. *Id.* The defendant then submitted a

petition for postconviction relief with a notarized statement from the fourth party confirming the third party's alleged recantation. *Id.* at 442. The defendant's petition was denied on the ground that, because "[the] court could not be reasonably well-satisfied that [the third party's] trial testimony was false based on [the fourth party's] statement alone," the defendant had not established, by a preponderance of the evidence, facts that would entitle him to a new trial. *Id.* at 445-46.

Ferguson applied the three-prong test for newly discovered evidence of falsified testimony set out in *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1982). First, the court is reasonably satisfied that the testimony of a material witness was false; second without the false testimony, the jury might have reached a different conclusion; and third, the petitioner either was taken by surprise at trial or did not know the testimony was false until after trial. *Ferguson*, 645 N.W.2d at 442. Unlike *Ferguson*, this case does not involve the post-conviction discovery of evidence of falsified testimony that was material to the conviction. Here, the testimony offered during trial was new to both parties; it conflicted not with the witness's prior testimony but with his pretrial statements to the prosecutor, and its significance to appellant's conviction was minimal. Appellant's reliance on *Ferguson* is misplaced.

3. Sufficiency of the evidence

Appellant argues that the evidence was not sufficient to establish that E.A. suffered the "great bodily harm" required for first-degree assault. "The question of whether a particular injury constitutes great bodily harm is a question for the jury" and "[w]hether [a victim's] injuries constituted great bodily harm [i]s a question within the knowledge and

experience of the jury." *State v. Moore*, 699 N.W.2d 733, 737, 740 (Minn. 2005) (quotation omitted).

The jury was instructed that, to find appellant guilty, it had to find that he inflicted great bodily harm on E.A. and that "'Great bodily harm' means bodily harm that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any [part of the body], or other serious bodily harm." The jury heard E.A. testify that he was beaten, his head was stomped into the street, he passed out several times, and he suffered a traumatic brain injury resulting in severe headaches, sensitivity to light, loss of balance, and memory loss, as well as a decrease in his ability to sleep, walk, exercise, eat, and perform his job. Jury determinations that lesser injuries constitute great bodily harm have been upheld. *See, e.g.*, *State v. Stafford*, 340 N.W.2d 669, 670 (Minn. 1983) (holding that a fractured nose constituted great bodily harm and that great bodily harm is "[a]rguably . . . inflicted if one knocks someone out briefly"). We see no basis to overturn the jury's verdict that great bodily harm was inflicted on E.A.

4. Sentence

The parties agree that the case should be remanded because appellant's consecutive sentences should have been calculated using a criminal-history score of zero. *See* Minn. Sent. Guidelines 2.F.2.a (2015); *State v. Holmes*, 719 N.W.2d 904, 908 (Minn. 2006) ("If a consecutive sentence is permissive . . . , a criminal history score of zero is assigned to

determine the duration of the sentence."). Because we agree that appellant's sentence was incorrectly calculated, we reverse and remand for resentencing.

Affirmed in part, reversed in part, and remanded.