STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1548

State of Minnesota,
Respondent,

vs.

Oji Konata Markham,
Appellant.

Filed September 11, 2017
Affirmed
Reyes, Judge

Dakota County District Court
File No. 19HA-CR-16-287

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

James C. Backstrom, Dakota County Attorney, Dain Olson, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Jesson, Judge.

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

REYES, Judge

On appeal from a judgment of conviction of first-degree burglary, appellant claims that (1) the district court committed plain error by allowing the state to amend the

complaint; (2) the prosecutor committed misconduct during closing argument when he misstated the law; (3) the evidence was insufficient to prove that appellant intended to cause O.H. to fear bodily harm or death; and (4) the late disclosure of the complainant's 911 call necessitates a new trial. Appellant also makes multiple pro se arguments. We affirm.

FACTS

In the early morning hours on January 22, 2016, O.H. and her male friend, S.D., were drinking alcohol at O.H.'s residence. O.H. and appellant Oji Konata Markham had been in a relationship but broke up earlier in the week. Appellant texted and called O.H. on January 22 to tell her that he was coming to her residence. O.H. requested that appellant not come over. When appellant arrived, he knocked on O.H.'s front door and bedroom window. O.H. then heard her front door break open and appellant's voice inside her residence. When O.H. saw her broken door, she was afraid and shocked. O.H. ran from the house and attempted to drive away, but her vehicle's tire was flat. O.H. called 911.

A Mendota Heights police officer responded to O.H.'s 911 call at approximately 3:00 a.m. and met O.H. and S.D. at the residence. The officer smelled alcohol on O.H. and S.D. but noted that they did not appear intoxicated. The officer observed that O.H. may have been crying because her mascara was running and she had a tissue in her hand. The officer did not notice any visible marks or physical injuries on O.H., but S.D. had an abrasion on his left cheek that he would not let the officer photograph.

Outside, the officer observed damage to the front door frame to O.H.'s residence. The officer also noticed that the driver's-side front tires of O.H.'s and S.D.'s vehicles were flat. Inside, the officer observed a displaced coffee table and broken clay pots.

O.H. told the officer that appellant had been at her residence when the damage occurred. O.H. stated that appellant pushed her to the ground and attempted to kick her, and appellant's actions caused her to get a bloody nose. While O.H. was speaking with the officer, appellant sent O.H. threatening text messages and called her multiple times.

At approximately 11:30 a.m. on January 22, appellant returned to O.H.'s residence with another individual and replaced the shattered door and flat tire. Later that night, O.H. called the responding officer and requested that any charges against appellant be dropped.

Respondent State of Minnesota filed a complaint charging appellant with one count of first-degree burglary with assault in violation of Minn. Stat. § 609.582, subd. 1(c) (2014). On the third day of the jury trial, after a discussion between the judge and the parties' attorneys, the district court allowed the state to amend the complaint to separate the original charge into two counts: burglary with assault-fear against O.H. and burglary with assault-harm against S.D. The district court noted that appellant could not be convicted of both counts pursuant to *State v. Beane*, 840 N.W.2d 848 (Minn. App. 2013), *review denied* (Minn. Mar. 18, 2014).

The jury found appellant guilty only of first-degree burglary with assault-fear against O.H. Subsequently, appellant filed multiple pro se motions. After a hearing, the district court granted appellant's motion to discharge his public defender but denied

appellant's other motions, including his motion for a new trial. The district court sentenced appellant to 111 months in prison. This appeal follows.

D E C I S I O N

I. The district court did not commit error by allowing the state to amend the complaint.

Appellant argues that the district court committed plain error by allowing the state to amend the original complaint to add an additional or different offense after the state rested its case, which substantially prejudiced his rights. We disagree.

Because appellant did not object at trial, this court reviews the district court's decision to allow the state to amend the complaint for plain error. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under this standard, appellant must show (1) error; (2) that is plain; and (3) that affects appellant's substantial rights. *Id.* An error is plain if it is clear or obvious in that it "contravenes caselaw . . . or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Plain error affects substantial rights if there is a reasonable likelihood that it had a substantial effect on the outcome of the case. *Griller*, 583 N.W.2d at 741. If appellant meets all three prongs, we determine whether to address the error to ensure fairness and integrity of the judicial proceedings. *Id.* at 740.

Under Minn. R. Crim. P. 17.05, a district court "may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if the defendant's substantial rights are not prejudiced." The supreme court has noted that the purpose of rule 17.05 "appear[s] to be to protect against confusing the jury, violating due process notions of timely notice, and adversely affecting

the trial tactics of the defense." *State v. Alexander*, 290 N.W.2d 745, 748 (Minn. 1980). When an amendment "merely restate[s] with particularity the original complaint," it does not allege an additional or different offense. *State v. Miller*, 352 N.W.2d 524, 526 (Minn. App. 1984).

Here, the original complaint alleges that appellant committed burglary with assault, and the statement of probable cause establishes O.H. and S.D. as victims. The district court allowed the state to amend the complaint so that it contained two counts of burglary with assault. In the final jury instructions, the district court instructed the jury on assault-fear with reference to O.H. and assault-harm with reference to S.D.

There was no error because the amendment did not allege an additional or different charge. The language of the original complaint refers to assault generally, which includes "an act done with intent to cause fear in another of immediate bodily harm or death" and "the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. 609.02, subd. 10 (2014). Thus, the amendment simply "restated with particularity the original complaint" with reference to the two possible victims. *See Miller*, 352 N.W.2d at 526.

Moreover, the amendment did not prejudice appellant's substantial rights. Appellant likens his situation to *State v. Guerra*, 562 N.W.2d 10 (Minn. App. 1997), and *State v. Caswell*, 551 N.W.2d 252 (Minn. App. 1996). In *Guerra*, this court held that Guerra's substantial rights were prejudiced based on a lack of notice and opportunity to prepare a defense, confusion of the jury, and negative effects to Guerra's trial tactics. 562 N.W.2d at 14. Similarly, in *Caswell*, we held that allowing the complaint to be amended

substantially prejudiced the defendant's rights because she was "unprepared to defend against [the additional] charges." 551 N.W.2d at 255. Appellant's reliance on *Guerra* and *Caswell* is misguided. Here, the original complaint and statement of probable cause put appellant on notice that he should prepare to defend against assault. In addition, separating the original charge into two counts mitigated potential jury confusion because it clarified the original complaint, and ensured that the guilty verdict would reflect the jury's unanimous decision about who was the assault victim. Accordingly, appellant cannot establish that the amendment to the complaint was plain error affecting substantial rights, which ends our analysis. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011).

II. The state presented sufficient evidence to prove that appellant intended to cause O.H. to fear bodily harm or death.

Appellant argues that the evidence is insufficient to prove the assault element of burglary, specifically that he intended to cause O.H. to fear bodily harm or death because the evidence supports a reasonable and rational alternative hypothesis that appellant was expressing his frustration over his relationship with O.H. ending. We are not persuaded.

A person commits the offense of assault-fear through "an act done with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.02, subd. 10(1) (2014). Assault-fear is a specific-intent crime. *Id.* at 309. Specific intent may be proven by circumstantial evidence, *State v. Johnson*, 374 N.W.2d 285, 288 (Minn. App. 1985), "by drawing inferences from the defendant's words and actions in light of the totality of the circumstances." *State v. Smith*, 825 N.W.2d 131, 136 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Mar. 19, 2013). "[I]ntent may be inferred from

events occurring before and after the crime." *Davis v. State*, 595 N.W.2d 520, 526 (Minn. 1999).

This court's review of a challenge to the sufficiency of the evidence "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We apply a two-step analysis for the circumstantial-evidence standard. *State v. Al Naseer*, 788 N.W.2d 469, 473-74 (Minn. 2010). First we identify the circumstances the state proved. *Id.* at 473. Second we determine whether the circumstances proved are consistent with guilt and inconsistent with any other rational hypothesis. *Id.* at 474. "We will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *Id.* at 473 (quotation omitted).

Here, the circumstances proved at trial are as follows: appellant and O.H.'s relationship ended earlier in the week of January 22, 2016; O.H. did not want appellant to come to her house on January 22; appellant came to O.H.'s house anyway, knocking on the front door and O.H.'s bedroom window; appellant broke open the front door and forced his way into the house when O.H. did not respond; O.H. heard the front door being broken and appellant shouting inside her house; a coffee table was displaced and clay pots were broken; O.H. became afraid when she saw the broken door; O.H. ran outside to drive away, but her vehicle's tire was flat; O.H. called 911; O.H. was in shock after the incident. The responding officer observed that O.H. had been crying; appellant sent O.H. threatening text messages and called multiple times while O.H. spoke with the officer. Finally, in a

recorded call between appellant and O.H. on January 26, appellant told O.H. to tell the police that appellant was not at her house on January 22, O.H. was drinking heavily and broke her own door or did not know how it happened, and O.H. called appellant to fix the damage the next day.

The circumstances proved support a reasonable inference that appellant intended to cause O.H. to fear bodily harm or death. Further, the circumstances proved do not support a rational alternative hypothesis that appellant's actions were merely an expression of frustration over the loss of his relationship with O.H. It is not a reasonable inference that appellant needed to travel to O.H.'s house knowing she was there, break the door, and damage other property to express his frustration. Accordingly, there is no other rational hypothesis for appellant's actions other than appellant's intent to cause O.H. to fear bodily harm or death.

III. The prosecutor did not commit misconduct during closing argument.

Appellant argues that the prosecutor committed misconduct at closing argument by misstating the law which affected appellant's substantial rights. We disagree.

We may review unobjected-to prosecutorial misconduct under a modified plain-error test. *Ramey*, 721 N.W.2d at 302. Under the modified-plain error test, appellant must establish an error that is plain. *Id.* If appellant meets his burden, the state must establish that the error did not affect appellant's substantial rights. *Id.* When reviewing alleged prosecutorial misconduct during closing argument, we look at the whole argument in context. *State v. McNeil*, 658 N.W.2d 228, 234 (Minn. App. 2003).

The relevant portions of the prosecutor's statement are as follows:

> Looking first at [O.H.], the term assault in that case, fear of -- *intent to cause fear means an act done with an intent to cause fear of immediate bodily harm or death*.
> . . . .
> [O.H.] was assaulted that night. The evidence supports she was in fear of immediate bodily harm or death, and [appellant] caused that. *Looking at the totality of those circumstances* in the middle of the night, somebody outside the house screaming and yelling, door gets broken open, property damage, you go outside and your car tire is slashed. *What other reason would someone do all that but to cause fear?* Those were not accidental. The amount of force used to break open that door was not an accident. Two tires on two different vehicles both being flattened, not an accident. Those were intentional acts.

(Emphasis added.)

Assault-fear is a specific-intent crime. *State v. Fleck*, 810 N.W.2d 303, 309 (Minn. 2012). Because there is no direct evidence of appellant's specific intent, the prosecutor used circumstantial evidence to support his argument. *See State v. Johnson*, 374 N.W.2d 285, 288 (Minn. App. 1985). When read in context, the prosecutor properly set out the definition of assault-fear. The prosecutor's statements about appellant's intentional acts are the prosecutor's presentation to the jury of the acts appellant committed to support the inference he had intent to cause O.H. to fear immediate bodily harm or death. The prosecutor's statements were not misconduct, and therefore there is no error.

IV. Appellant is not entitled to a new trial due to the late disclosure of O.H.'s 911 call.

Appellant argues that he is entitled to a new trial because O.H.'s 911 call was not made available to the parties until after the trial in violation of Minn. R. Crim. P. 9.01 and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). We disagree.

"Whether a discovery violation occurred is an issue of law which this court reviews de novo." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). The state is required to disclose statements that relate to the case, whether written, recorded, or oral. Minn. R. Crim. P. 9.01, subd. 1(2). The prosecutor's duty to disclose applies before and during trial. Minn. R. Crim. P. 9.03, subd. 2(c). However, a discovery violation only results in a new trial if there is a showing of prejudice to the defendant. *Palubicki*, 700 N.W.2d at 489. Any "misconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error." *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000).

To establish a *Brady* violation, appellant must show that the evidence was (1) favorable to appellant "because it would have been either exculpatory or impeaching; (2) . . . suppressed by the prosecution, intentionally or otherwise; and (3) . . . material." *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010). The state concedes that the first two prongs of the *Brady* test are satisfied; thus, the only issue is whether the 911 transcript was material. Like under the discovery-violation analysis, evidence is material if the absence of the evidence caused prejudice to appellant. *Id.*

Here, the transcript of the 911 call confirms that O.H. called 911 on January 22, 2016. O.H. stated that her "ex-boyfriend" broke the door to her car and damaged her tires. O.H. further reported that "he" pushed her to the ground and her mouth was bleeding at one point. The call disconnected before O.H. provided the name of the alleged assailant.

At trial, O.H. testified that her recollection of the events on January 22 were better that day than now. O.H. could not remember telling the police that appellant punched her in the face, "beat on her," or gave her a bloody nose. O.H. further testified that she did not

see how her door became broken or how her tire became flat. The responding officer testified that O.H. reported that appellant pushed her to the ground and attempted to kick her. O.H. told the officer that she had a bloody nose, but the officer did not observe any blood on O.H. The officer also testified that he observed a flat tire on O.H.'s vehicle.

Although the 911 call has impeachment value, O.H.'s credibility was already attacked at trial through the officer's testimony. A timely disclosure of the 911 call would not have resulted in a different verdict. Accordingly, appellant was not prejudiced by the late disclosure of the 911 call, and he is not entitled to a new trial under Minn. R. Crim. P. 9.01 or *Brady*.

V. Appellant's pro se arguments lack merit.

We construe appellant's pro se supplemental brief to make six arguments. Each argument is addressed below.

A. The district court did not abuse its discretion by admitting the January 26 recorded phone call between appellant and O.H.

Appellant makes numerous arguments asserting that admission of the recorded call between O.H. and himself was improper. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

First, appellant argues that the recorded call was admitted into evidence without the proper foundation or authentication. The evidentiary requirement of authentication is met if there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). Here, the state laid the foundation for the

recorded call outside the presence of the jury to prevent the jury from hearing that the call occurred while appellant was in custody. An officer for the electronic crimes task force testified to the accuracy of the recorded call. With the jury present, the officer testified that he identified the male voice in the recording as appellant and that the phone number called belonged to O.H. Accordingly, the state laid a sufficient foundation, authenticated the recorded call, and identified the individuals in the recording.

Next, appellant asserts that the recorded call was inadmissible hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(b). A statement is not hearsay if it "is offered against a party and is . . . the party's own statement." Minn. R. Evid. 801(d)(2). Because the recorded call was offered against appellant and is his own statement, it is not hearsay.

Appellant further asserts that the recorded call violates his constitutional right to confrontation. Because the recorded call is not hearsay, the confrontation issue does not arise. *State v. Tovar*, 605 N.W.2d 717, 725 (Minn. 2000).

Finally, appellant argues that the recorded call revealed that he had a public defender and that the error in admitting the call was not harmless. First, in the recorded call appellant refers to his "lawyer" not to a public defender. Second, because there was no error in admitting the recorded call, we decline to address appellant's harmless-error claim. Based on the foregoing, the district court did not abuse its discretion in admitting the recorded call.

B. The district court did not abuse its discretion in instructing the jury on first-degree burglary and assault-fear.

Appellant first argues that the district court erred by omitting "intent" from the jury instructions on burglary. Specifically, appellant asserts that the district court should have included "with intent to commit a crime" in the instructions. Appellant's argument is based on an improper reading of the burglary statute.

We review a district court's jury instructions for an abuse of discretion. *State v. Koppi*, 798 N.W.2d 358, 361 (Minn. 2011). "Whoever enters a building without consent and with intent to commit a crime, *or enters a building without consent and commits a crime while in the building*, either directly or as an accomplice, commits burglary in the first degree." Minn. Stat. § 609.582, subd. 1 (2014) (emphasis added). The district court provided the jury with the following instruction for burglary: "Under Minnesota law whoever *enters a building without the consent of the person in lawful possession and commits a crime while in the building*, and the person assaults another within the building or on the building's appurtenant property, is guilty of a crime." (Emphasis added.) Accordingly, the district court did not improperly omit the element of intent from the jury instructions because it instructed the jury in accordance with the second clause of the burglary statute.

Appellant also argues that the district court improperly included "on the building's appurtenant property" in the definition of burglary. This argument lacks merit. The phrase "on the building's appurtenant property" is included in the burglary statute. Minn. Stat.

§ 609.582, subd. 1(c). Thus, the district court did not abuse its discretion in formulating its jury instructions.

C. The prosecutor did not commit misconduct.

Appellant argues that the prosecutor committed misconduct by eliciting testimony indicating that appellant was in custody. Appellant points to instances at trial when the prosecutor questioned the officer from the electronic crimes task force as support for his argument. A review of the record shows that at no point did the officer's responses to the prosecutor indicate or imply that appellant was in custody. Appellant's claim fails.

Appellant further asserts that the prosecutor committed misconduct by allowing the responding officer and the electronic-crimes-task-force officer to refresh their recollection with written reports during trial. Appellant's claim is misguided. Minnesota Rule of Evidence 612 allows a testifying witness to use a writing to refresh his recollection. Nothing in the record indicates that the prosecutor committed misconduct in allowing the officers to do so.

D. The state did not introduce improper character evidence.

Appellant argues that the recorded call between O.H. and appellant was improper character evidence admitted to "prove appellant's guilt by establishing his character as a bully or controlling." "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Minn. R. Evid. 404.

The recorded call shows that appellant attempted to direct O.H. on what to say to police after the events on January 22. The state presented the recorded call as a prior

statement made by appellant. The recorded call does not establish that appellant has any character or trait that is consistent with his propensity to commit first-degree burglary with assault-fear.

E. The state did not fail to disclose evidence of O.H.'s prior convictions.

Appellant asserts that the state failed to disclose O.H.'s prior convictions for crimes of dishonesty in violation of *Brady*. Appellant's claim lacks merit. First, the state claims that "a records search of the court and BCA criminal records check . . . revealed no such convictions," and appellant presents no evidence of such crimes. Second, even if the state failed to disclose O.H.'s convictions, the outcome of trial would not have been different absent the error because O.H. was impeached through testimony at trial.

F. Appellant did not receive ineffective assistance of counsel.

Appellant asserts that he received ineffective assistance of counsel because his trial attorney did not check O.H.'s criminal record prior to trial. There is no record of whether or not appellant's trial attorney researched O.H.'s criminal records prior to trial. Further, additional impeachment evidence against O.H. would not have affected the outcome of the trial. Accordingly, appellant's claim is without merit.

Affirmed.