STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2052

State of Minnesota,
Respondent,

vs.

Gerald Duane Skolte,
Appellant.

Filed January 11, 2021
Affirmed
Bjorkman, Judge

Otter Tail County District Court
File No. 56-CR-15-2672

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges his conviction of attempted murder, asserting that (1) the district court abused its discretion by declining to instruct the jury on self-defense, (2) the

prosecutor committed misconduct during closing argument by arguing appellant did not act in self-defense, (3) erroneous admission of testimony regarding his previous incarceration and prior status as a felon require a new trial, and (4) the district court abused its discretion by admitting surveillance recordings and a revolver appellant disclosed during an unlawful police interrogation. We affirm.

FACTS

On September 4, 2015, appellant Gerald Skolte shot M.M. in the back with a black-powder revolver. The two men had known each other for some time. M.M. and his wife H.H. had intermittently lived in a trailer on Skolte's land since the spring of 2014. Skolte had not asked them to sign a formal lease agreement until August 2015, when he persuaded H.H. to do so. But M.M. was not present at the time, and later refused to sign the lease, sparking a feud with Skolte.

The brewing conflict escalated when M.M. reported to local police that Skolte had "a firearm that he was prohibited from having as he was a felon" and was growing marijuana on his property. The responding officer found the black-powder revolver but, under then-existing law, Skolte was allowed to possess the revolver because it was not considered a firearm. The officer confiscated ten marijuana plants.

Skolte was upset about law enforcement's visit to his property, and focused his ire upon M.M. He called H.H.'s sister, telling her that he believed M.M. had turned him in and stating that "he was going to kill them both." In late August, another trial witness overheard Skolte tell M.M. during an argument that he was "going to kill [M.M.]."

In the early morning on September 4, M.M. awoke to find Skolte had placed an eviction notice on M.M.'s trailer. M.M. immediately went to Skolte's trailer, got his attention, and the two conversed through the open trailer door. M.M. said he would not leave unless he received an eviction notice from a sheriff. M.M. then turned to walk away. Skolte approached the open door and told M.M. to "leave right now." Skolte then stepped out of the trailer with his revolver in hand. M.M. responded, "'Gerald . . . Seriously? You're going to pull a gun on me now, dude?'" M.M. then "flicked him off" and said "f-you." When he turned around to leave, Skolte shot him in the right side of his back.

Video recordings from multiple surveillance cameras located on Skolte's property are consistent with M.M.'s account of the shooting. They show M.M. stopping an unidentified distance away from the trailer with his right side facing the door. A black revolver appears through the open door pointed in M.M.'s direction. M.M. flinches and briefly covers his head, then gestures to the door with his right arm. While M.M.'s arm is outstretched, the gun fires and he collapses to the ground. Skolte then approaches M.M. and points the revolver at him once again. M.M. rises to his feet and, with an armed Skolte in close pursuit, walks off the property to an adjacent road.[1] According to M.M., Skolte's final words were, "You know, [M.M.], I have a good notion to put you in your grave."

H.H., awakened by the gunshot, saw Skolte following M.M. with the revolver and called the police. She later accompanied M.M. to the hospital. While M.M. was being

[1] Later surveillance footage shows Skolte carrying a white container from his trailer to an outbuilding. Police located the container during the warranted search of the property. The container held loads of black powder.

treated, and before Skolte was interrogated by the police, H.H. informed the police that Skolte had a "security camera system" at the property.

Skolte later surrendered to the responding officers and was taken into custody. During his interrogation, he confirmed that he had a surveillance system and told the police where he hid the revolver. Based in large part on Skolte's custodial statements, the police obtained a warrant to search his property. During the search, the police recovered the surveillance recordings and the revolver.

Prior to trial, the district court suppressed Skolte's statements to the police at the interrogation because they were obtained in violation of his right to counsel. But the district court did not prohibit the state from offering the revolver and the surveillance recordings at trial. The state also offered a letter Skolte wrote to his father from jail into evidence at trial, in which he stated, "If I hadn't shot him I probably would have beat him to death or crippled him for life," "my anger changed to hate and finally to rage," and "[t]he stuff [M.M.] did when he moved back in July just pushed my buttons and triggered me off."

At trial, defense counsel told the jury in his opening statement that the ultimate issue in the case was whether Skolte was "defending himself." Defense counsel cross-examined several of the state's witnesses regarding M.M.'s relationship with Skolte and M.M.'s actions on the day he was shot, apparently in an attempt to show Skolte feared bodily harm when M.M. approached his trailer. At the close of the state's case, defense counsel requested a jury instruction on self-defense. The district court indicated that the evidence did not support such an instruction, but noted that its ruling could change if additional

evidence were presented. But the defense rested without calling any witnesses or providing additional evidence.

During her closing argument, the prosecutor told the jury they "may hear about self-defense" from defense counsel and that they "heard a little bit" about it during Skolte's opening statement. The prosecutor stated, "[W]e're not talking about self-defense here. This isn't that case." She argued that Skolte was "not threatened in any way" on the day he shot M.M. and that M.M.'s hands were clearly empty at the time he confronted Skolte from outside the trailer about the eviction. Defense counsel only objected to the prosecutor's assertion that Skolte "had a legal obligation to go in his house and call law enforcement" if he felt threatened. The district court sustained the objection and instructed the jury to "disregard the last statement regarding legal obligation."

The jury found Skolte guilty. He moved for a new trial based on the prosecutor's statements regarding self-defense at closing, which the district court denied. Skolte appeals.

DECISION

I. The district court did not abuse its discretion by declining to give a self-defense instruction.

The decision to instruct the jury on self-defense is within the province of the district court and will not be reversed absent an abuse of discretion. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). A district court abuses its discretion by declining to give a self-defense instruction when the evidence supports one. *Id.* The defendant seeking an instruction has the burden to produce prima facie evidence showing (1) the "absence of

aggression or provocation" by the defendant, (2) that defendant had an "actual and honest belief" he "was in imminent danger of death or great bodily harm," (3) "the existence of reasonable grounds for that belief," and (4) "the absence of a reasonable possibility of retreat." *Id.*

Skolte argues that he made the requisite showing because the surveillance recordings, when viewed in the light most favorable toward him, provided sufficient support for the instruction. We disagree. Our careful review of the entire record shows Skolte did not make a prima facie showing that he was not the aggressor or that he reasonably believed he was in imminent danger when he shot M.M.

The confrontation began with Skolte's posting of an eviction notice on M.M.'s door. M.M. testified that he went to tell Skolte he was not leaving, and that he did not make any rude gestures or swear until *after* Skolte stepped out of the trailer and pointed the revolver at him. The surveillance recordings are consistent with M.M.'s testimony. They show M.M. stood some distance away from Skolte's trailer and did not move his hands until Skolte's revolver was pointed in his direction; up until that point the interaction between the two men could be characterized as "mere conversation." *State v. Carridine*, 812 N.W.2d 130, 145 (Minn. 2012) (stating that conduct "a good deal greater than mere conversation" is required to establish provocation (quotation omitted)). Skolte's prior statements about harming M.M. and his conduct after shooting M.M. also belie Skolte's contention that he was not the aggressor—he marched the wounded M.M. off his property at gunpoint.

M.M.'s testimony and the surveillance recordings also defeat Skolte's argument that he reasonably believed M.M. would harm him. Skolte raised and pointed his revolver at M.M. *before* M.M. made any of the movements Skolte points to as evidence that he feared bodily harm. The surveillance recordings show M.M. flinching only *after* Skolte pulled out the revolver; M.M.'s right hand is clearly visible and empty. And M.M. did not move his hands down toward his waist—as Skolte contends—he moved his hands up to protect his head. Because Skolte did not present prima facie evidence that he was not the aggressor or that he reasonably believed M.M. would inflict bodily harm, we discern no abuse of discretion by the district court in declining to give a self-defense instruction.

II. The prosecutor did not commit prejudicial misconduct during closing argument.

The district court denied Skolte's motion for a new trial due to the prosecutor's references to self-defense and a duty to retreat during closing argument. We will not reverse a district court's decision regarding alleged prosecutorial misconduct unless "the misconduct, considered in the context of the trial as a whole, was so serious and prejudicial that the defendant's constitutional right to a fair trial was impaired." *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000). We are not persuaded that the prosecutor's challenged statements rise to this level.

Assuming without deciding that the prosecutor's statements were improper, the record demonstrates such error was harmless. The main issue at trial was Skolte's intent—whether the shooting was premeditated. In context, the prosecutor's statements sought to preempt any defense argument that Skolte acted on impulse because he feared M.M. would

harm him. The evidence supporting the jury's finding that Skolte acted with premeditation—his prior confrontations with M.M., his prior statements to others that he planned to harm M.M., the letter to his father describing his hatred for M.M., and the surveillance recordings—overwhelmed any error in discussing self-defense at closing. Moreover, the challenged comments were brief. Skolte also argues the prosecutor's statements regarding any legal obligation to retreat necessarily confused the jury on the legal standards to apply to the case. But the district court immediately instructed the jury to disregard that statement, which we presume the jury followed. *See State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016) (stating appellate courts "presume that the jury followed" a district court's instruction). Accordingly, any prosecutorial error did not prejudice Skolte's right to a fair trial.

III. Skolte is not entitled to a new trial based on brief testimony regarding his prior incarceration and status as a felon.

Skolte next challenges M.M.'s testimony that a prior event occurred "the last time [Skolte] went to prison" and a deputy's two references to Skolte's status as a felon. Skolte objected only to M.M.'s testimony. References to "prior crimes or prior imprisonment should generally not be admitted," but any error in doing so does not warrant a new trial unless the defendant "demonstrate[s] that he was prejudiced by the error." *State v. Hall*, 764 N.W.2d 837, 842-43 (Minn. 2009). Unobjected-to error in admitting evidence of prior crimes or imprisonment may be considered and may provide a basis for relief on appeal if the error was plain and affected the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under either standard of review, we need not decide

whether there was error if Skolte cannot demonstrate prejudice. *See State v. Sontoya*, 788 N.W.2d 868, 873 (Minn. 2010) (stating that if a defendant cannot prove an alleged error affected their substantial rights, a court applying the plain-error analysis "need not consider the other factors" (quotation omitted)); *Hall*, 764 N.W.2d at 843 (stating that "even if it was error" for the district court not to suppress disputed testimony, "a new trial is not warranted" under the harmless-error analysis unless the defendant establishes prejudice).

Skolte argues that M.M.'s reference to his prior imprisonment is inadmissible per se and its presence alone is proof of prejudice. This argument is unavailing. As noted above, Skolte is not entitled to a new trial unless he can show he was prejudiced by the statement. *See Hall,* 764 N.W.2d at 843. Skolte does not attempt to make this showing. Given the strength of the state's evidence—including the surveillance recordings, prior animosity between the two men, and Skolte's prior statements to H.H.'s sister and another person regarding his intent to harm M.M.—we are not persuaded that one passing reference to prior imprisonment tipped the scales against him.

Skolte next asserts that the deputy's references to him being a felon affected his substantial rights by portraying him as a person previously determined to be "too dangerous to have a firearm" and as a person "capable, and who might try, to kill someone." Assuming without deciding that admission of the deputy's statements was plain error, Skolte must establish that they had a significant effect on the jury's verdict. *Sontoya*, 788 N.W.2d at 876. This he cannot do. The jury heard testimony and saw Skolte shoot a departing M.M. in the back. And, as stated above, the jury heard a variety of witnesses testify about the animosity between the men, and learned of Skolte's expressed intent to

harm M.M. This record does not persuade us that "the jury would have reached a different verdict had the wrongfully admitted testimony not come in." *State v. Jaros*, 932 N.W.2d 466, 472 (Minn. 2019).

IV. The district court did not err by denying Skolte's request to exclude the physical evidence he referenced in his police interrogation.

In a pretrial order, the district court suppressed Skolte's custodial statements, but did not suppress "evidence seized by authorities" after he made the statements. The district court declined to do so both because Skolte did not specifically identify any fruits of his unlawful interrogation and because Skolte made no argument that statements leading the police to any physical evidence were given involuntarily. Skolte now argues that the district court should have suppressed the surveillance recordings and the revolver. In the absence of district court findings, we may "independently review the facts and determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence." *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004).

When determining whether evidence identified during an unlawful interrogation should be excluded, we examine whether the evidence resulted from exploitation of the illegality or was obtained by means "sufficiently distinguishable to be purged of the primary taint." *See State v. Maldonado-Arreaga*, 772 N.W.2d 74, 80 (Minn. App. 2009) (quotation omitted). This analysis requires us to examine "the purpose and flagrancy of the misconduct, the presence of intervening circumstances, whether it is likely that the evidence would have been obtained in the absence of the illegality and the temporal

proximity of the illegality and the evidence alleged to be the fruit of the illegality." *Id.* (quotation omitted).

Skolte contends that the surveillance recordings and the revolver were seized as a direct result of the statements he made to police during his unlawful interrogation. The record belies this assertion. H.H. told officers that Skolte had security cameras on his property before the officers questioned Skolte. M.M. told the responding officers at the scene that Skolte shot him with a black-powder revolver. And the police were already aware that Skolte owned the revolver because an officer saw it one month earlier in Skolte's home. The record also does not indicate that police exploited Skolte's lack of counsel at the interrogation to ascertain the existence of either the surveillance recordings or the revolver. Accordingly, it is highly likely police could have obtained a search warrant even if Skolte had not told the interrogating officers that he had a security system and revolver.

The supreme court reached a similar conclusion in *State v. Seefeldt*, 292 N.W.2d 558, 560 (Minn. 1980). In *Seefeldt*, the defendant sought to suppress identification evidence obtained during a photo line-up following his unlawful arrest. While Seefeldt was at the station, an officer connected him to an assault. *Id.* That officer, who was familiar with Seefeldt and the circumstances of the crime, believed Seefeldt fit the perpetrator's description. *Id.* Despite the district court there concluding the arrest was made without probable cause, the supreme court later concluded identification evidence obtained after the arrest was admissible, reasoning that Seefeldt's identification as the perpetrator would have arisen independently of the unlawful arrest. *Id.* at 560.

Likewise, we are satisfied that the surveillance recordings and the revolver were discovered by means "sufficiently distinguishable to be purged of the primary taint." *Maldonado-Arreaga*, 772 N.W.2d at 80 (quotation omitted); *see also State v. Bale*, 267 N.W.2d 730, 731-33 (Minn. 1978) (applying the same factors as in *Maldonado-Arreaga* and concluding the circumstances between an arrest for a misdemeanor traffic offense and evidence seized after a physical assault on the arresting officer are so attenuated as to purge the evidence of any alleged taint). The district court thus did not err by admitting the surveillance recordings and the revolver at trial.

Affirmed.