STATE OF MINNESOTA
IN COURT OF APPEALS
A10-421

State of Minnesota,
Respondent,

vs.

Miles David Edinburgh,
Appellant.

Filed June 27, 2011
Affirmed
Muehlberg, Judge[*]

Kandiyohi County District Court
File No. 34-CR-08-1539

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Jennifer Fischer, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Stauber, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

MUEHLBERG, Judge

On appeal from his conviction of second-degree intentional murder and second-degree felony murder, appellant Miles David Edinburgh argues that the district court abused its discretion when it ruled he opened the door to cross-examination about his character; allowed the state to inquire about a specific instance of conduct on cross-examination; and permitted the state to present rebuttal testimony on the specific instance of conduct. Appellant also claims that the district court's jury instructions constituted plain error requiring reversal of his conviction; that the district court erred in failing to instruct the jury on the revival of an aggressor's right of self-defense; that the district court denied appellant a fair trial by admitting excessive "spark-of-life" evidence; and that the district court committed error by failing to sequester the jury. We affirm.

FACTS

Appellant went with friends to a party hosted by four football players from Ridgewater College at an apartment on the night of July 19, 2008. The hosts of the party did not know appellant or his friends and asked them to leave. After they left, one of the young men hosting the party, W.R., saw appellant and his friends in the apartment's parking lot, standing around W.R.'s car. W.R. was concerned because his car's lock was broken and he kept his wallet, GPS, and money in the car. W.R., L.F., J.M., and the victim, A.M., went outside and once again asked appellant and his friends to leave. The two groups began arguing. L.F. then hit appellant and appellant ran away. A.M. ran after appellant. L.F. and J.M. followed. A.M. caught appellant and as the two began to

wrestle, appellant pulled out a knife and stabbed A.M. By the time L.F. reached A.M. a few seconds later, A.M. was down on one knee, bleeding and holding his ribs. Appellant ran away. Police arrived and found appellant hiding underneath a car parked in the driveway of a nearby residence. A.M. was taken to the hospital where he died of multiple stab wounds.

The Kandiyohi County Attorney's Office charged appellant with one count of intentional second-degree murder. This court affirmed the district court's order certifying appellant to be tried as an adult. *In re Welfare of M.D.E., Child*, No. A08-1924 (Minn. App. Apr. 21, 2009). Appellant entered a plea of not guilty, claiming self-defense. A jury found appellant guilty of second-degree intentional murder and second-degree felony murder. At the sentencing hearing, appellant moved the district court for a judgment of acquittal, a new trial, and a downward-durational departure. The district court denied his motions and sentenced him to 360 months in prison, with credit for 501 days served. This appeal followed.

D E C I S I O N

Appellant argues that the district court abused its discretion when it ruled appellant opened the door to cross-examination about his character; allowed the state to inquire about a specific instance of conduct in its cross-examination of appellant; and allowed the state to present rebuttal testimony on the specific instance of conduct. Appellant also claims that the district court's jury instructions constituted plain error requiring reversal of his conviction; and that the district court erred when it failed to instruct the jury on the revival of an aggressor's right of self-defense, that it denied appellant his right to a fair

trial when it allowed the state to introduce excessive "spark-of-life" evidence, and when it failed to sequester the jury overnight during deliberation.

I.

Appellant challenges the district court's ruling that he opened the door to character evidence. The admissibility of character evidence is governed by Minn. R. Evid. 404(a). It is well settled that the prosecution may not attack the character or reputation of the accused unless he first introduces evidence of good character. *State v. McCorvey*, 262 Minn. 361, 364, 114 N.W.2d 703, 705 (1962); *State v. Loebach*, 310 N.W.2d 58, 63 (Minn. 1981) ("No rule of criminal law is more thoroughly established than the rule that the character of the defendant cannot be attacked until he himself puts it in issue by offering evidence of his good character.") (quotation omitted).

On direct examination, appellant testified about his reaction when he learned of A.M.'s death, stating: "It broke my heart to know that I took the life of another human being because that's - - that's not who I am." The state questioned appellant on cross-examination about his proclivity to use racial epithets to instigate fights. Appellant objected, arguing the state was seeking to elicit impermissible character evidence. The district court ruled that appellant opened the door to character evidence when, on direct examination, he testified, "that's not who I am." The district court held appellant's statement "entitled [the state] to find out who he is."

We will not reverse the district court's evidentiary rulings absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant must establish not only an abuse of discretion but also that he was prejudiced because of the district

court's ruling. *Id.* When evaluating whether an error in admitting evidence was prejudicial, the reviewing court determines "whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, the error is prejudicial. *Id.*

Appellant argues he did not offer affirmative evidence of his good character and at most, his statement, "that's not who I am," constitutes a general denial. Citing *State v. Sharich*, appellant asserts that a general denial that he did a particular kind of act is insufficient to put his character into issue. 297 Minn. 19, 23, 209 N.W.2d 907, 911 (1973). In *Sharich*, the supreme court held that the defendant's "mere denial that she was a prostitute or had prostituted herself on this occasion did not put her character into issue." *Id.* Other cases appellant references also support this proposition. *See State v. Flowers*, 262 Minn. 164, 167-68, 114 N.W.2d 78, 80-1 (1962) (holding that defendant's general denial on cross-examination that he ever kicked or struck anyone was insufficient to put his character into issue); *State v. Stockton*, 181 Minn. 566, 569, 233 N.W. 307, 308 (1930) (stating defendant did not put his general character into issue when he testified on cross-examination he had never robbed anyone); *State v. Sobocinski*, 395 N.W.2d 128, 129-30 (Minn. App. 1986) (holding that defendant's testimony as to group practices and prior farm-sale conduct did not place his character in issue, so the prosecution could not introduce evidence as to defendant's character for peacefulness).

As the state asserts, these cases are distinguishable from the instant case, which is more analogous to *State v. Willis*, 559 N.W.2d 693 (Minn. 1997). The supreme court in *Willis* found that "[w]hen defense counsel specifically asks whether a criminal act is out of character for an accused, defense counsel opens the door to the introduction of character evidence," and concluded the district court did not abuse its discretion "when it permitted the state to engage in limited questioning to rebut the same." *Willis*, 559 N.W.2d at 699.

The testimony of the defendants in *Sharich*, *Flowers*, and *Stockton* all included denials of particular acts—Sharich denied she was a prostitute; Flowers denied he had ever kicked or struck anyone; and Stockton testified he had never robbed anyone. Appellant's testimony did not deny a particular act, such as "I have never stabbed anyone." Instead, similar to testimony in *Willis*, appellant made a general assertion that the charged criminal act was out of character for him—that he is not someone who takes another person's life. Appellant's direct-examination testimony was calculated to lead the jury to conclude the conduct he was accused of is out of character for him and that he is not a violent, cold-hearted killer. Because appellant put his character in issue on direct examination, the district court did not abuse its discretion when it ruled his testimony opened the door to the state's inquiries regarding his character.

Specific-instance evidence

Next, appellant argues that the district court abused its discretion by allowing the state to inquire into his use of racial epithets to instigate fights. Appellant claims that the state's inquiry was substantively and procedurally improper under Minn. R. Evid. 608.

Ordinarily, evidence of a defendant's other crimes or prior bad acts is not admissible to show behavior consistent with the defendant's character. *State v. DeWald*, 464 N.W.2d 500, 502-03 (Minn. 1991); *State v. Spreigl*, 272 Minn. 488, 491, 139 N.W.2d 167, 169 (1965). However, prior misconduct, other than conviction of a crime, may be admissible for the purpose of attacking a witness's credibility if the prior misconduct is probative of untruthfulness. Minn. R. Evid. 608(b).

The state argues that rule 608 is inapplicable because its inquiry into specific instances of conduct was not for the purpose of attacking appellant's credibility. The specific instances of conduct, according to the state, were brought out on cross-examination to rebut a character trait offered by appellant and are therefore governed by rule 405, which deals with methods of proving character. "[T]he prosecutor may show specific instances of conduct in rebuttal of the character trait an accused brings out." *State v. Leutschaft*, 759 N.W.2d 414, 424 (Minn. App. 2009) (citing Minn. R. Evid. 405(b)), *review denied* (Minn. Mar. 17, 2009). But a specific instance of conduct brought out on cross-examination to rebut a character trait offered by a defendant must be relevant to that character trait. *Id.* To be relevant, the specific instance must make the trait more likely to exist than if there were no such evidence. *See* Minn. R. Evid. 401.

Appellant claims that if he opened the door to character evidence with his statement "that's not who I am," the trait he placed at issue was whether or not he would kill someone, and that the district court should have excluded the state's specific-instance evidence as irrelevant to the character trait at issue. He claims that to be relevant, the specific instances the state brought out should have been incidents where appellant killed

someone or attempted to kill someone. Instead, the state offered evidence of his propensity for using racial epithets to instigate fights—a trait that appellant argues he did not place in issue.

Rule 405(b) allows proof of specific instances of misconduct by a defendant when his character is "an essential element of a charge, claim, or defense." "Character is in issue within the meaning of this rule only when character traits are of significance as an element of the crime, claim, or defense." *State v. Fader*, 358 N.W.2d 42, 46 (Minn. 1984) (emphasis omitted).

The state claims that it interpreted appellant's testimony as an assertion that he was not a violent or aggressive person, thus the evidence it offered that appellant instigated fights and fought in the past was relevant to the character traits he put in issue. This contention has merit since on cross-examination, the state clarified that when appellant stated "that's not who I am," he meant the entire confrontation between himself and the victim was not typical of him.

> PROSECUTOR: And, sir, you said, "That's not who I am," right?
> APPELLANT: Regarding to what?
> PROSECUTOR: This whole situation, it's not who you are.
> APPELLANT: No [it's not who I am].

Because appellant made a broad statement about his character, the state was given greater latitude to question his character on cross-examination. Appellant's instigation of fights in the past could be relevant to the character trait he put at issue with his testimony. The state's claim that appellant waived this issue on appeal because he did not object to the state's line of questioning at the district court is meritless. Appellant objected twice

to the state's inquiry into specific instances on cross-examination, adequately preserving the issue for appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that in general, an appellate court will not consider matters not argued to and considered by the district court). Since the scope of cross-examination is left largely to the district court's discretion and there is no clear abuse of that discretion here, the district court's decision should not be reversed. *See State v. Parker*, 585 N.W.2d 398, 406 (Minn. 1998).

Rebuttal testimony

Appellant argues that the district court abused its discretion by allowing the state to present rebuttal testimony of a prior specific instance of conduct. Evidence of specific instances of misconduct by the defendant may be admitted "to contradict the testimony of the defendant or a defense witness." *Fader*, 358 N.W.2d at 46; *State v. Becker*, 351 N.W.2d 923, 927 (Minn. 1984) (holding that defendant's denial that she had sex with any of her children was properly impeached by testimony of son not involved in charged offense about another instance of sexual misconduct by defendant).

Appellant also argues that presenting a rebuttal witness was improper because he admitted using a racial epithet during the confrontation with A.M. and his friends. But the state presented a rebuttal witness to contradict appellant's testimony that he had not used racial epithets to start fights in the past. The state elicited the following testimony during cross-examination:

> PROSECUTOR: Okay. And you've used [n-gger or n-gga] to get in the face of other people, right, to start other fights? Yes or no.
> APPELLANT: No.
> ….

> PROSECUTOR: And, sir, just to clarify, am I right that - - are you claiming that you[’ve] never use[d] that word to start a fight before?
> APPELLANT: I’ve never used that word to start a fight before.

Rebuttal evidence is evidence that "explains, contradicts, or refutes the defendant's evidence." *State v. Swanson*, 498 N.W.2d 435, 440 (Minn. 1993). To rebut appellant's claim, the state presented testimony from the assistant principal at his high school. He testified that appellant had used the word "n-gger," or a variation of the word, to incite a fight with another student at school. The witness's testimony tended to rebut appellant's claim to the contrary. "[T]he determination of what constitutes proper rebuttal evidence rests almost wholly in the discretion of the trial court." *State v. Eling*, 355 N.W.2d 286, 291 (Minn. 1984). Thus, it was within the district court's considerable discretion to allow the assistant principal's testimony as rebuttal evidence.

Additionally, we note that even if the district court erred in any of its evidentiary rulings raised by appellant, the errors were not prejudicial. The inquiry into specific instances of conduct and a rebuttal witness for the same both involved appellant's use of racial epithets to instigate fights. Both parties make much of the distinction, or lack thereof, between the word "n-gga" and "n-gger" without ever explaining the significance of the alleged distinction. At trial, the state argued that appellant called L.F. a "n-gger," which instigated the fight that ensued. Appellant insisted he used the word "n-gga." The state claims it makes no difference which variation of the word appellant used, that both are offensive and that the use of either could have served as the catalyst for the fight that

eventually led to A.M.'s death. This is important because the state asserts appellant was the aggressor of the fight, while appellant claims he acted in self-defense.

But testimony from appellant and other witnesses makes clear that appellant's use of the word in addressing L.F. did not offend L.F. L.F. testified: "No, I didn't get upset at [appellant's use of the term 'n-gga'] because obviously he's black." L.F. explained it was appellant's attitude and refusal to leave the premises that led to the altercation. For this reason, appellant's use of a racial epithet when speaking to L.F. that night is irrelevant because it was not what prompted the fight that ultimately caused A.M.'s death.

II.

Next, appellant argues that the district court's instructions to the jury were improper. District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "[W]hen instructing on self-defense, courts must use analytic precision." *State v. Hare*, 575 N.W.2d 828, 833 (Minn. 1998).

The state argues that appellant is barred from raising this claim on appeal because the district court provided the jury with the instruction that appellant requested. "The invited error doctrine prevents a party from asserting an error on appeal that he invited or could have prevented in the court below." *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). Appellant recognizes his claim would usually be barred under the invited-error

doctrine but asserts the district court committed plain error. The invited-error doctrine does not apply to plain errors. *See State v. Goodloe*, 718 N.W.2d 413, 424 (Minn. 2006) (citing *State v. Gisege*, 561 N.W.2d 152, 158 n.5 (Minn. 1997)).[1]

Appellant argues that the district court committed plain error when it used language contained in CRIMJIG 7.05 rather than CRIMJIG 7.06 in its instructions to the jury. The district court's instructions were consistent with CRIMJIG 7.05, which sets forth the law governing intentional use of deadly force pursuant to Minn. Stat. § 609.065 (2010). Appellant contends that this is an appropriate instruction when a defendant claims he *intentionally* took a life in self-defense, citing *State v. Marquardt*, 496 N.W.2d 806 (Minn. 1993). The problem, according to appellant, is that he denied intending to kill A.M., so the district court's use of CRIMJIG 7.05 was not proper. He notes that the supreme court has "repeatedly cautioned" district courts not to use CRIMJIG 7.05 in cases where the defendant asserts self-defense and claims the resulting death was unintentional. *See Hare*, 575 N.W.2d at 833. When the resulting death is unintentional, appellant asserts CRIMJIG 7.06 is proper, as it requires the jury to consider whether the defendant used reasonable force to resist an offense against the person.

In *Marquardt*, the supreme court held that the language in CRIMJIG 7.05 that "the killing must have been done in the belief that it was necessary to avert death or great bodily harm" improperly implies that the defendant must believe it necessary to kill in

[1] The state claims that the supreme court in *Goelz* and *Goodloe* erroneously concluded *Gisege* held that plain error is an exception to the invited-error doctrine and that the plain-error exception is not established law. This contention is unpersuasive. Moreover, it is not this court's role to review supreme court decisions. *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998).

order for the killing to be justified and is therefore "inappropriate if the defendant claims, e.g., that he intentionally stabbed the victim in self-defense but without intending to kill the victim." 496 N.W.2d at 806. The example given in *Marquardt* describes the exact facts of the instant case, supporting appellant's assertion that CRIMJIG 7.05 was inappropriate in this case.

The state argues that the problematic language cited in *Marquardt* and later in *Hare* and other cases, that "the killing must have been done in the belief that it was necessary to avert death or great bodily harm," was not used in this case so the district court did not err. The final jury instructions instead stated "In order for [appellant's] actions to be lawful . . . ." The state's argument is unpersuasive because its reading of *Hare* is inaccurate. While "the killing" language was used in *Marquardt*, the district court in *Hare* read the words "defendant's action" and not "the killing." *Hare*, 575 N.W.2d at 831 n.3. Yet the supreme court still held that the district court erred in using CRIMJIG 7.05—even when the problematic language referenced in *Marquardt* was replaced. *Id*. at 833. Here, the district court used the same replacement language as the court in *Hare*, thus, use of CRIMJIG 7.05 must be considered error.

Despite the district court's error, however, appellant is not entitled to a new trial unless there was plain error. "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights. 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." *State v. Strommen*, 648 N.W.2d 681, 686

(Minn. 2002) (citations omitted). Appellant fails to show, and the record fails to support, that the improper jury instruction prejudiced him.[2]

Appellant contends that by using CRIMJIG 7.05, his right to self-defense was conditioned on whether he reasonably believed he faced death or great bodily harm. The proper instruction, according to appellant, would have used language from CRIMJIG 7.06—whether under the totality of the circumstances appellant's use of force was necessary to resist an offense being committed or which he reasonably believed was being committed against his person. Appellant claims that had the court given the jury this instruction, the jury would have returned a different verdict. However, if the court had given an instruction more similar to CRIMJIG 7.06, it also would have had to instruct the jury about the degree of force appellant used. *See* CRIMJIG 7.06 ("The kind and degree of force a person may lawfully use in self-defense is limited by what a reasonable person in the same situation would believe to be necessary. Any use of force beyond that is regarded by the law as excessive."). In order for appellant to have used the amount of force he did, he would have needed to reasonably believe he faced *at least* great bodily harm. *See State v. Soukup*, 656 N.W.2d 424, 429 (Minn. App. 2003) (enumerating a nonexclusive list of factors relevant to the determination of whether the level of force used was reasonable, including: "age and size of victim and defendant;

[2] In arguing that his rights were significantly affected, appellant cites to the state's closing argument and contends comments made therein about self-defense were misleading. But this argument does not address the jury instructions, read by the court and given to the jury for its deliberations. If appellant believed the state's closing argument prejudiced him then he could have argued as much on appeal. He did not.

victim's reputation for violence; previous threats and/or altercations between victim and defendant; defendant's aggression, if any; victim's provocation, if any"). A.M. was not armed with a weapon. Appellant possessed a knife with a 3-1/2-inch blade. He used it to inflict two distinct stab wounds—the fatal stab wound to the chest was 4-3/4 inches deep and the second stab wound, to the upper abdomen, was 3-1/4 inches deep—in addition to one incised wound. According to the police report, appellant told the arresting officer that "he was going to get jumped and that was why he poked [A.M.]." The arresting officer confirmed at trial that appellant said he "poked at a person because [appellant] was going to get jumped." Because the jury found that appellant did not reasonably believe he was in danger of death or great bodily harm (such a finding was necessary to convict him of second-degree murder) the error did not affect appellant's substantial rights.

Appellant also argues the district court abused its discretion by failing to instruct the jury on revival of an aggressor's right of self-defense, CRIMJIG 7.07. Appellant concedes that he did not request the instruction at trial, nor did he object to its omission. Failure to object to instructions given generally results in forfeiture of the issue on appeal. *State v. Earl,* 702 N.W.2d 711, 720 (Minn. 2005). However, this court has discretion to consider a district court's failure to give a jury instruction if the failure constitutes plain error affecting substantial rights. *See* Minn. R. Crim. P. 31.02; *State v. Crowsbreast,* 629 N.W.2d 433, 437 (Minn. 2001).

The district court provided the jury with the self-defense instruction that appellant requested. Moreover, the jury instructions did not prohibit the jury from acquitting him

even if they found he was the aggressor. Therefore, the issue is waived, and the district court did not commit plain error by failing to instruct the jury on revival of an aggressor's right of self-defense.

III.

Appellant argues he was denied a fair trial due to the district court's admission of excessive "spark-of-life" evidence. The decision to admit evidence is reviewed for an abuse of discretion. *Amos*, 658 N.W.2d at 203. "In a prosecution for a homicide the state is entitled to briefly provide the jurors with a minimal amount of information identifying the victim so that the jury knows that the victim was not a number but a distinct person." *State v. Hodgson,* 512 N.W.2d 95, 97 (Minn. 1994). The state therefore may present evidence that the victim was more than "just bones and sinews covered with flesh"; rather, the victim was "imbued with the spark of life." *State v. Graham*, 371 N.W.2d 204, 207 (Minn. 1985). But "the State may not use spark-of-life evidence in an attempt to get the jury to decide the case on the basis of passion or prejudice." *State v. Evans*, 756 N.W.2d 854, 877 (Minn. 2008).

Appellant asserts the amount of spark-of-life evidence admitted was excessive and prejudicial. The district court permitted the jury to review a photo of A.M. tutoring young children, photos and testimony about a tree-planting ceremony in honor of A.M., and testimony that A.M. tutored fourth-grade students. A.M.'s football coach also testified about how A.M. was the team captain, about his leadership qualities, and about retiring A.M.'s jersey after his death. Appellant also notes the additional details provided about A.M.'s life in the state's opening statement and closing argument, including that

A.M. was 21, that he was recruited from Florida to play football at Ridgewater College, that he had a tattoo of his mother on his wrist, and that he wanted to be a teacher.

In *Evans*, the state made a one-to-two page summary of the victim's life in its opening statement, had three witnesses testify about, among other things, the victim's life, and allowed two photos of the victim. In 1,900 pages of transcript, the testimony of these witnesses totaled approximately 13 pages, according to the supreme court. *Id.* The transcript of appellant's trial totaled approximately 800 pages. Testimony about A.M.'s life was offered by two witnesses in about seven-to-eight pages of transcript.

Evidence about A.M.'s football career and physical abilities, with which appellant now takes issue, does not constitute spark-of-life evidence. This evidence was an essential part of appellant's self-defense argument, because A.M. was physically bigger and faster than he was, and it clearly was not offered to obtain a verdict on the basis of passion or prejudice.

Similarly unpersuasive is appellant's challenge to testimony from A.M.'s friends, that they became distraught upon learning of his death. These individuals only testified at trial because they witnessed the incident. Naturally, appellant and the state both elicited testimony from the witnesses about the events that transpired that evening, which sometimes led to a witness describing his or her reaction to A.M.'s death.

The state presented a minimal amount of spark-of-life evidence identifying A.M., the victim; and some of the evidence with which appellant takes issue does not constitute spark-of-life evidence. Accordingly, the district court did not abuse its discretion in admitting spark-of-life evidence, and the amount of evidence was not excessive.

IV.

Finally, appellant contends that he is entitled to a new trial because the district court erred when it failed to sequester the jury overnight during deliberation. The issue of sequestration of the jury during a criminal trial is governed by Minn. R. Crim. P. 26.03, subd. 5, which provides: "With the consent of the defendant and the prosecution, the court may allow the jurors to separate over night during deliberation." Appellant advised the district court that he did not consent to allowing the jurors to separate overnight during deliberation.

Although it is error for the district court to allow the jury to separate during deliberations without the defendant's consent, a new trial will be ordered only upon a showing of prejudice by the defendant. *State v. Erickson*, 597 N.W.2d 897, 901 (Minn. 1999) (citing *State v. Sanders*, 376 N.W.2d 196, 204 (Minn. 1985)). In *Erickson*, the supreme court held that the defendant failed to show prejudice from the district court's error in allowing the jury, without the defendant's consent, to separate overnight during its deliberations because the defendant did not present evidence of pervasive publicity or other inappropriate outside influences on the jury. *Id.* at 902.

While there is no evidence of pervasive publicity in this case, one of the jurors was exposed to an outside influence. When the jurors returned to deliberate for a second day, the district court asked if any of the jurors had received any communication about the case through media or conversations, or whether they had been exposed to any outside influence. One juror admitted that his mother called to wish him a happy birthday, asked if he was still serving as a juror on a murder case, and said that she had a coworker who

was a juror on an embezzlement case who said "it was just really tough because you're second-guessing yourself." The juror stated he did not believe the conversation would influence him, and the parties agreed to allow the juror to continue deliberating.

At the sentencing hearing, when appellant raised the jury-sequestration issue again, his attorney conceded that no prejudice resulted from the separation of the jurors, stating: "I raise this issue notwithstanding real[] inability to establish that there was any prejudice that resulted . . . . "

Although the district court committed error when it allowed the jurors to separate overnight during deliberations despite appellant's express disapproval, there was no showing of prejudice by appellant. Accordingly, appellant is not entitled to a new trial or a reversal of his conviction.

Affirmed.