STATE OF MINNESOTA
IN COURT OF APPEALS
A11-115

State of Minnesota,
Respondent,

vs.

Danny Hamilton,
Appellant.

Filed January 3, 2012
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-10-17596

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and Collins, 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

BJORKMAN, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that (1) the prosecutor's misconduct, which produced a mistrial, bars appellant's reprosecution under the Double Jeopardy Clause; (2) respondent's peremptory strike of the only African American on the jury venire was racially motivated; (3) the district court erroneously excluded the facts underlying the complainant's prior prostitution conviction; and (4) the evidence was insufficient to sustain a conviction. We affirm.

FACTS

On April 17, 2010, around 2:35 a.m., appellant Danny Hamilton robbed and raped J.B. in an alley behind 2735 15th Avenue South in Minneapolis. Appellant was charged with first-degree criminal sexual conduct and first-degree aggravated robbery.

Prior to trial, appellant moved to introduce evidence of J.B.'s conviction of prostitution, the facts underlying her conviction, and her probationary requirement that she commit no prostitution-related offenses as evidence that she consensually performed oral sex on appellant. Respondent State of Minnesota conceded the admissibility of J.B.'s conviction and the fact that she was on probation for the offense when she encountered appellant. But the district court excluded the facts underlying the conviction, ruling that they were not sufficiently similar to the facts of this case to establish that J.B. had a common plan or scheme relevant to appellant's consent defense.

The first trial quickly ended in a mistrial based on the prosecutor's comment during opening statement: "The defendant's attorney had told me, and they represented

to the Court, that you will hear the defendant say what has happened between himself and [J.B.] was really just consensual sex, oral sex between a prostitute and her client. [J.B.] will adamantly deny that." The district court determined that the comment infringed upon appellant's right not to testify and warranted a mistrial but did not bar reprosecution because the prosecutor's misconduct was negligent rather than intentional.

During voir dire in the second trial, appellant challenged respondent's peremptory strike of the only African-American prospective juror. The district court denied appellant's *Batson* challenge, simultaneously finding that appellant established a prima facie case of racial discrimination, respondent articulated a race-neutral explanation for the strike, and appellant did not prove that the explanation was a pretext for discrimination.

Appellant testified at trial that J.B. offered to perform oral sex in exchange for cocaine. Appellant stated that when J.B. refused to continue giving him oral sex, appellant demanded that she return the cocaine and then slapped the crack pipe out of her hand, causing her nose to bleed. By contrast, J.B. testified that appellant violently demanded her money, told her she was going to die that night, forced his penis into her mouth, and later penetrated her anally and vaginally while beating and choking her. The nurse who subsequently examined J.B. testified that she observed a tear, redness, and swelling on J.B.'s anus, and scrapes, bruises, and dried blood on her upper body. After hearing all the evidence, the jury convicted appellant of both offenses. This appeal follows.

D E C I S I O N

I. The district court did not clearly err by granting a second trial after prosecutorial misconduct caused a mistrial.

The Double Jeopardy Clauses of the United States and Minnesota Constitutions bar the government from retrying a criminal defendant following a mistrial when the prosecutor's misconduct was intended to cause a mistrial. *State v. Fuller*, 374 N.W.2d 722, 727 (Minn. 1985) (citing *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S. Ct. 2083, 2089 (1982)). We review legal issues regarding double jeopardy de novo. *State v. Large*, 607 N.W.2d 774, 778 (Minn. 2000). But we review the district court's factual findings concerning whether double jeopardy bars retrial for clear error. *Fuller*, 374 N.W.2d at 726. Specifically, we give "considerable deference" to the district court's findings regarding the prosecutor's intent and motivation. *State v. Gaitan*, 536 N.W.2d 11, 16 (Minn. 1995) (quotation omitted).

Appellant contends that the district court clearly erred in finding that the prosecutor did not intend to provoke a mistrial. We disagree. The district court observed that the prosecutor had no motive to provoke a mistrial during opening statements, before the prosecutor would have any reason to believe that his case was going poorly. And the district court found that the manner of the prosecutor's delivery—including the fact that he was not looking at his notes when he made the improper statement—suggested that he simply misspoke. We defer to the district court's ability to observe and evaluate the circumstances of the prosecutor's conduct.

Appellant points to the prosecutor's misconduct in a 2004 opening statement as evidence that he makes a practice of intentionally "throwing cases" when he is dissatisfied with the jury composition. We are not persuaded. First, the 2004 incident occurred more than five years prior to the instant misconduct, and appellant points to no other examples in the intervening years. Second, the circumstances of the 2004 misconduct are very different from those present in this case. In the former, the prosecutor made unverifiable *Spreigl* allegations, used an exhibit without the court's permission, and said that defense counsel would "play all sorts of games." Here, the prosecutor stated that the defendant would testify in a certain way. We discern no pattern of intentionally provoking mistrials from these two isolated and very different opening statements.

We also reject appellant's argument that the prosecutor's reference to the defendant's testimony was so clearly improper that intent to provoke a mistrial must be inferred. Admittedly, a criminal defendant's right not to testify—and the prosecutor's corresponding duty not to allude to the defendant's likely testimony—is fundamental. *See State v. DeRosier*, 695 N.W.2d 97, 107 (Minn. 2005) (stating that a prosecutor "may not directly or indirectly comment on a defendant's failure to testify"). But the obviousness of the error alone does not defeat the district court's factual determination that the prosecutor's misconduct was inadvertent.

Finally, appellant urges us to adopt Oregon's double-jeopardy standard, which prohibits retrial when the prosecutor knew his conduct was improper and was indifferent to the resulting mistrial. *See State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983). We

decline to do so. First, appellant failed to raise this argument to the district court. Second, "it is not the role of *this* court to make a dramatic change in the interpretation of the Minnesota Constitution when the supreme court has not done so." *State v. Rodriguez*, 738 N.W.2d 422, 431-32 (Minn. App. 2007), *aff'd*, 754 N.W.2d 672 (Minn. Aug. 21, 2008). Accordingly, we reject appellant's invitation to adopt the Oregon standard.

II. The district court did not err by finding that respondent's peremptory strike of the only African American on the jury venire was not racially motivated.

The Equal Protection Clause of the Fourteenth Amendment prohibits the state from striking a prospective juror because of his or her race. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). Under *Batson*, courts use a three-step analysis to determine whether racial discrimination motivated the state's peremptory strike. Minn. R. Crim. P. 26.02, subd. 6a(3); *State v. Matthews*, 779 N.W.2d 543, 554 (Minn. 2010). When "the district court err[s] in applying *Batson*, we will examine the record [to determine whether the strike violated *Batson*] without deferring to the district court's *analysis*." *State v. Pendleton*, 725 N.W.2d 717, 726 (Minn. 2007) (emphasis added). But we defer to the district court's *findings of fact* and review them for clear error. *State v. Taylor*, 650 N.W.2d 190, 202-03 (Minn. 2002).

A. The district court did not properly apply the *Batson* analysis.

Under *Batson*, a party objecting to a peremptory strike must make a prima facie case of racial discrimination. *State v. Martin*, 773 N.W.2d 89, 101 (Minn. 2009). If the objecting party makes this showing, the burden then shifts to the party exercising the strike to offer a race-neutral explanation. *Id.* The objecting party then has the burden of

proving that the race-neutral explanation is a pretext for discrimination. *Id.* The district court must follow these three steps in order, deciding after each step whether the party has met its burden. *See Pendleton*, 725 N.W.2d at 725 (holding that the district court improperly applied *Batson* because it failed to determine whether the objecting party stated a prima facie case before considering whether the opposing party offered a race-neutral explanation).

Appellant argues that the district court did not properly follow the *Batson* analysis. We agree for two reasons. First, the district court did not comply with *Batson*'s requirement that the three steps be decided in sequential order, instead ruling on the *Batson* challenge at the end of the parties' arguments. Second, the district court erred by simultaneously considering whether there was a race-neutral explanation and whether the explanation was a pretext for discrimination. Since the district court erred in its analysis, we independently review the record to determine whether respondent's peremptory strike was racially motivated.

B. The state's peremptory challenge was not racially motivated.

We first consider whether appellant made a prima facie case. A prima facie case of racial discrimination is established by showing that (a) one or more members of a racial group have been peremptorily excluded from the jury and (b) circumstances of the case raise an inference that the exclusion was based on race. *State v. White*, 684 N.W.2d 500, 505 (Minn. 2004). Respondent's strike of the only African-American prospective juror contributes to establishing an inference of discrimination. *See State v. Moore*, 438 N.W.2d 101, 107 (Minn. 1989) (upholding the district court's finding of a prima facie

case based on the state's strike of the only African American on the venire). It is undisputed that respondent struck the only African American on the jury panel. Neither party questioned the prospective juror in detail, giving the state no obvious reason to strike the prospective juror. The record also shows that respondent struck the only African American from the venire in the first trial. These circumstances raise an inference that the exclusion was based on race and thus establish a prima facie case of racial discrimination.

We next consider whether respondent articulated a race-neutral explanation for the strike. The proponent of a peremptory challenge must articulate a race-neutral explanation, though it need not be "persuasive or even plausible." *Martin*, 773 N.W.2d at 101. The court deems the offered reason to be neutral unless discriminatory intent is inherent in the explanation. *Id.* Here, the prosecutor explained that he struck the prospective juror because he worked at the Drake Hotel, a "flophouse" known for prostitution, and the state did not want jurors to be familiar with prostitution because prostitution is part of appellant's theory of the case. The prosecutor also noted that the Drake Hotel's staff routinely fail to cooperate when prosecutorial investigators attempt to serve people on the premises. Neither of these considerations—the prospective juror's likely familiarity with prostitution or reluctance to aid the police—is inherently related to race. On this record, we conclude that respondent met its burden of articulating a race-neutral explanation for its peremptory strike.

Finally, we determine whether appellant proved that respondent's explanation was a mere pretext for racial discrimination. *See Pendleton*, 725 N.W.2d at 726 (explaining

the pretext step of the *Batson* analysis). Appellant argued the prosecutor's failure to question the prospective juror about his employment at the Drake Hotel and his contact with prostitutes demonstrated pretext. We disagree. The district court found that it was reasonable not to broach these issues with the juror because doing so could provoke backlash. Because this finding was not clearly erroneous, we conclude that respondent's peremptory challenge was not racially motivated.

III. The district court did not abuse its discretion by excluding the facts underlying J.B.'s prostitution conviction, and their exclusion did not prejudice appellant.

In reviewing a district court's evidentiary rulings, we examine the record for abuse of discretion. *State v. Crims*, 540 N.W.2d 860, 864 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). We will reverse an evidentiary error only if there is a "reasonable possibility" that it prejudiced the appellant. *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003). But we will reverse a constitutional error unless it is harmless beyond a reasonable doubt. *Id.*

Appellant argues that the facts underlying J.B.'s prostitution conviction were admissible under the rape-shield laws. We disagree. When, as here, the defendant asserts consent as a defense, evidence of the victim's previous sexual conduct with a third party is inadmissible unless (1) the victim previously made fabricated allegations of sexual assault, (2) the evidence "tend[s] to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue," and (3) "the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature." Minn. Stat. § 609.347, subd. 3(a)(i) (2010); *see* Minn. R. Evid. 412(1)(A)(i)

(mandating the second and third elements); *see also* Minn. Stat. § 609.347, subd. 7 (2010) ("Rule 412 of the Rules of Evidence is superseded to the extent of its conflict with this section."). Because appellant presented no evidence that J.B. had previously fabricated allegations of sexual assault, evidence of the facts underlying her prostitution conviction was inadmissible under the rape-shield laws.[1]

Alternatively, appellant argues that exclusion of the facts underlying J.B.'s prostitution conviction violates his constitutional rights. A criminal defendant has a constitutional right to present a complete defense. *Crims*, 540 N.W.2d at 865. Consequently, defendants are sometimes entitled to present material, favorable evidence that the rape-shield laws would otherwise exclude. *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992). Although a victim's sexual history is generally irrelevant to the issue of consent, a defendant has a constitutional right to present this evidence if the past conduct "establishes a *pattern* of behavior *clearly similar* to the conduct at issue" and if the prejudicial effect of the evidence is not outweighed by its probative value. *Crims*, 540 N.W.2d at 866, 868 (emphasis added).

Appellant asserts that the facts underlying J.B.'s prostitution conviction meet this standard.[2] We disagree for three reasons. First, a single incident of past prostitution does not establish a modus operandi. *See id.* at 868 (holding that evidence of the victim

[1] We also note that appellant did not provide notice of his intent to present evidence of J.B.'s prior sexual conduct at least three days before trial, as required by Minn. Stat. § 609.347, subd. 4(a) (2010).

[2] Specifically, appellant notes that they occurred within one year and one block of one another, each involved J.B. walking alone at night, and each involved J.B. performing consensual oral sex for minimal compensation.

prostituting herself for drugs, money, and services on four or five occasions did not compellingly establish a modus operandi). Second, J.B.'s prior act of exchanging oral sex for money is not clearly similar to J.B.'s claimed offer to perform oral sex on appellant in exchange for drugs. *See id.* (holding that evidence that the victim had previously bargained for drugs, drug money, and household repairs in exchange for sex was not clearly similar to defendant's theory that the victim offered the defendant sex to compensate him for having given her $20). Third, the evidence of J.B.'s injuries substantially limits the probative value of evidence of her prior prostitution. *See State v. Morris*, 606 N.W.2d 430, 437 (Minn. 2000) (excluding evidence of the victim's prior sexual conduct because significant evidence showed that the victim was injured on the night of the subject offense); *Friend*, 493 N.W.2d at 545 (same); *Crims*, 540 N.W.2d at 868 (excluding evidence of the victim's past prostitution in part because "the evidence of struggle preclude[d] an inference that the events . . . were simply another episode in [the victim's] history of prostitution" (footnote omitted)).

Moreover, the exclusion of the evidence is harmless beyond a reasonable doubt. The district court permitted appellant to introduce evidence that J.B. was convicted of prostitution, J.B. was on probation with a requirement that she not engage in prostitution at the time of the subject offense, and prostitution regularly occurs in the neighborhood where the subject offense occurred. The excluded evidence—that the prostitution offense occurred in the same neighborhood as the subject offense—adds little to appellant's consent defense. And J.B.'s testimony was corroborated by the medical evidence of injuries and a neighbor's report that she heard screaming at the time and location of the

subject offense. On this record, we conclude that exclusion of the evidence regarding the circumstances of J.B.'s prostitution offense did not violate appellant's constitutional rights and was, in any event, harmless.

IV. The evidence was sufficient to support appellant's conviction of criminal sexual conduct in the first degree.

Our review of a sufficiency-of-the-evidence claim is "limited to ascertaining whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009) (quotation omitted). We review the evidence in the light most favorable to the state and presume that the jury believed the state's witnesses and disbelieved any contrary evidence. *Id.* We defer entirely to the credibility determinations of the jury and will uphold the jury's verdict even if it is based solely on the testimony of one eyewitness. *Id.*

In his pro se brief, appellant argues that the evidence was insufficient to support his conviction of first-degree criminal sexual conduct. A person "is guilty of criminal sexual conduct in the first degree if . . . the actor causes personal injury to the complainant, and . . . uses force or coercion to accomplish sexual penetration," including "sexual intercourse, cunnilingus, fellatio, or anal intercourse." Minn. Stat. §§ 609.341, subd. 12(1), .342, subd. 1(e)(i) (2008). J.B. testified that appellant beat her, choked her, pushed his penis into her mouth, and penetrated her vaginally and anally. The nurse who examined J.B. corroborated this testimony, stating that J.B. had a tear, redness, and swelling on her anus, and scrapes, bruises, and dried blood on her upper body. The jury

was entitled to believe this testimony and accordingly find appellant guilty of first-degree criminal sexual conduct.

Appellant insists that this evidence is insufficient because (1) his semen was not found on J.B., (2) J.B. did not immediately tell the police that appellant had raped her, (3) one of respondent's witnesses heard a woman crying but not yelling "rape," and (4) J.B. was a prostitute on probation at the time of their encounter. We are not persuaded. None of these facts significantly detracts from the evidence that appellant forcibly penetrated J.B. Moreover, appellant admitted that he orally penetrated J.B., and the jury was entitled to believe J.B.'s testimony that he did so by injurious force. Based on our careful review of the record, we conclude that evidence amply supports the jury's verdict.

Affirmed.