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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1335**

State of Minnesota,
Respondent,

vs.

Evan Aaron Bickford,
Appellant.

**Filed August 19, 2013
Affirmed
Worke, Judge**

Stearns County District Court
File No. 73-CR-11-8020

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Prokopec Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his conviction for fourth-degree assault, arguing that the evidence was insufficient to sustain the conviction and the district court erred by refusing

to instruct the jury on the elements of the underlying offense of disorderly conduct. Appellant also asserts that the district court abused its discretion by admitting a redacted videotape of the incident; ruling that appellant could be impeached with three prior felony convictions; and refusing to sentence appellant to probation, a downward dispositional departure from the Minnesota Sentencing Guidelines. We affirm.

FACTS

On September 7, 2011, Officer Ashley Capes of the Kimball Police Department was dispatched to investigate a complaint of threats made by appellant Evan Aaron Bickford. By the time Capes arrived, appellant had left the scene. Several hours later, on September 8, 2011, at about 12:17 a.m., Capes was sent to investigate another threats complaint. As she spoke with the complainant, Capes heard a loud rattling noise and a dog “barking very aggressively.” She instructed the complainant to remain inside and went around the house to the neighbor’s yard, where she saw appellant shaking a dog kennel. When he saw her, appellant started to run, but Capes ordered him to stop.

Appellant was initially cooperative, but when Stearns County Sheriff’s Deputy Dennis Heinen arrived, he started to yell and pull away. Heinen noted that appellant had been drinking and appeared intoxicated. Heinen decided to handcuff appellant as a safety measure. At this point, appellant became aggressive, but ultimately agreed to permit Heinen to handcuff him. Heinen placed appellant in his squad car to prevent him from running away. Capes decided to arrest appellant for disorderly conduct, but when they asked appellant to move from Heinen’s squad car to Capes’ squad car, he became upset

and said he would fight them. Heinen decided to transport appellant, with Capes as the arresting officer following in her squad car, to do the jail detention paperwork.

As Heinen started to drive, he heard a sound, like someone “[g]etting ready to make a big spit.” Then he “felt fluids on [his] face.” Heinen explained that there is a grate between the front and back seat of the squad car; there is a Plexiglas shield that can be closed to isolate the back seat, but he left it open so that he could “talk to the person in the back seat and make sure they are okay. Most times [he has] a conversation with them on the way to the jail so it makes the transport go easier.”

Heinen’s squad camera ran the whole time appellant was in the back of the squad; although the video portion of the camera was improperly activated, it made an audio recording of appellant’s conduct in the squad car. A redacted version of the videotape was played for the jury, with all references to appellant’s status of being on parole removed. Stearns County Sheriff’s Deputy Matthew Mayers also testified, largely confirming Capes’ and Heinen’s testimony. After the district court ruled that the state could impeach him with three prior felony convictions, appellant chose not to testify.

DECISION

Sufficiency of the evidence

When reviewing whether there is sufficient evidence to sustain a verdict, we determine “whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow a jury to reach a guilty verdict.” *State v. Hurd*, 819 N.W.2d 591, 598 (Minn. 2012) (quotation omitted). We assume that the jury weighed

the credibility of the witnesses, determined how much weight to give their testimony, and disbelieved conflicting evidence. *Id.*

Appellant was charged with fourth-degree assault under Minn. Stat. § 609.2231, subd. 1 (2010) (intentionally transferring bodily fluids onto a peace officer who was effecting a lawful arrest or executing any other duty imposed by law). Appellant argues that the evidence that Heinen was effecting a lawful arrest or executing any other duty imposed by law was insufficient. Appellant asserts that the state should have presented evidence to show that he was lawfully arrested for disorderly conduct.

The prohibitions of section 609.2231, subdivision 1, apply not only during a lawful arrest, but also whenever a peace officer is executing a duty imposed by law. A peace officer has many duties imposed by law. A “peace officer” is “charged with the prevention and detection of crime and the enforcement of the general criminal laws of the state and . . . has the full power of arrest.” Minn. Stat. § 626.84, subd. 1(c)(1) (2012). A peace officer may apply for and execute search warrants. Minn. Stat. §§ 626.04-18 (2012). A peace officer may, as directed, assist other peace officer agencies. Minn. Stat. § 626.76 (2012).

In fulfilling duties imposed by law, the police may engage in conduct that does not seem official but that does not make their duty to uphold the law any less. The supreme court concluded that an undercover officer investigating prostitution in a bar was performing official duties, despite the fact that he drank alcohol, wore casual clothing, and socialized with other patrons during the undercover work. *State v. Evans*, 756 N.W.2d 854, 879 (Minn. 2008). In an immunities case, the supreme court recited

entering a home and detaining suspects, shooting tires of a fleeing vehicle, handcuffing a suspect, and engaging in a high-speed chase as examples of official police duties involving the use of discretion. *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 664 (Minn. 1999).

Here, Heinen, a Stearns County deputy sheriff, was called to back up Capes, a Kimball city police officer. The arrest site was in Capes' jurisdiction; she was the primary arresting officer, and she ordinarily would issue the citation. Heinen testified that "[n]ormally the department in charge would do the transport." Because of appellant's combative attitude, Heinen agreed to transport appellant. This falls within the definition of executing a duty imposed by law: Heinen assisted another peace officer agency. *See* Minn. Stat. § 626.76, subd. 2. This is sufficient evidence to support the jury's guilty verdict.

As a separate matter, we conclude that appellant was lawfully under arrest. A warrantless arrest is lawful if it is supported by probable cause. *State v. Williams*, 794 N.W.2d 867, 871 (Minn. 2011). "Probable cause to arrest exists when a person of ordinary care and prudence, viewing the totality of circumstances objectively, would entertain an honest and strong suspicion that a *specific* individual has committed a crime." *Id.* (quotation omitted). It is a lesser standard than the proof required for a conviction. *Id.*

A person commits disorderly conduct when he "engages in offensive, obscene, abusive, boisterous, or noisy conduct . . . tending reasonably to arouse alarm, anger, or resentment in others." Minn. Stat. § 609.72, subd. 1(3) (2010). Although appellant

minimizes his conduct by describing it as rattling a dog kennel, the noise was loud enough to attract the attention of Capes, who was standing in the front yard of a neighboring house; it frightened or annoyed the dog in the kennel so that it barked in a markedly aggressive manner according to Capes; and this occurred after midnight in a residential area, while Capes was investigating threats made by appellant against the homeowner. In the totality of these circumstances, Capes had probable cause to make an arrest for disorderly conduct.

Jury instructions

Appellant argues that the district court erred by failing to instruct the jury on the elements of disorderly conduct so that the jury could determine if Heinen was effecting a lawful arrest. Because appellant did not object to the jury instructions, we review the district court's actions for plain error. *State v. Hokanson*, 821 N.W.2d 340, 356 (Minn. 2012). Under the plain-error test, an appellant must show that there was (1) error, (2) that was plain, in that it contravened caselaw, a rule, or a standard of conduct, and (3) that affected the appellant's substantial rights. *Id.* If this three-part test is met, the reviewing court considers "whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted). The appellant has the burden of proving the third element. *Id.*

When considering whether the district court erred, we recognize that the district court has considerable latitude in its choice of the language of the instruction and the reviewing court will not reverse if the jury instructions as a whole are a fair and correct statement of the applicable law. *Id.*

The district court here instructed the jury using the standard CRIMJIG 13.21 and 13.22, which describe the elements of fourth-degree assault. The court instructed the jury that the assault must occur while “effecting an arrest or executing any other duty imposed by law.” The district court previously noted that the officer must be effecting a “lawful arrest.” Thus, the jury was obligated to determine if the officer was making a lawful arrest.

Here, however, whether there was a lawful arrest is an element of the crime. Appellant argued that he should not have been arrested for disorderly conduct, so the issue of the lawfulness of the arrest was part of his defense theory. When a probable cause determination is an element of the crime, a jury must be instructed on probable cause. *See State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). A defendant is entitled to instruction on his theory of the case if there is enough evidence to support it. *State v. Wilson*, 830 N.W.2d 849, 855 (Minn. 2013). The district court erred by failing to instruct the jury about determining whether the arrest was lawful.

But the charged offense also includes transfer of fluids to an officer who is performing a duty imposed by law. Minn. Stat. § 609.2231, subd. 1. The instructions included this language as well and the evidence showed that Heinen was acting within the scope of his duties. *See* Minn. Stat. § 626.76 (assisting another peace officer). Thus, the instruction, considered as a whole, is not erroneous. *See State v. Kelley*, 734 N.W.2d 689, 691, 695 (Minn. App. 2007) (affirming fourth-degree assault conviction when defendant spat at police officer transporting him to the detoxification unit), *review denied* (Minn. Sep. 18, 2007).

Because appellant has not met the three-part test for plain error, we need not consider whether the error must be addressed in order to ensure the fairness and integrity of the judicial proceedings. *See Hokanson*, 821 N.W.2d at 356.

Admission of videotape

Appellant challenges the district court's admission of the entire redacted squad videotape. Appellant wanted to show only the portion of the videotape up until the spitting incident and exclude the rest of the videotape, in which he shouted and swore at Heinen and threatened Heinen's family. The prosecutor argued that appellant's conduct tended to prove that he intentionally spat at Heinen. The district court ruled before trial that the state could show the entire redacted videotape.

We review the district court's evidentiary rulings for an abuse of discretion and "will not lightly overturn a district court's evidentiary ruling." *State v. Hanks*, 817 N.W.2d 663, 667 (Minn. 2012) (quotation omitted). Generally, relevant evidence is admissible and irrelevant evidence is not. Minn. R. Evid. 402. Evidence is relevant when it "advances the inquiry" or "when taken alone or in connection [with] other facts, [it] warrants a jury in drawing a logical inference assisting, even though remotely, the determination of the issue in question." *State v. Swinger*, 800 N.W.2d 833, 839 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. Sep. 28, 2011). Relevant evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of prejudice, confusion, or waste of time. Minn. R. Evid. 403. "[U]nfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *Swinger*, 800 N.W.2d at 839 (quotation omitted).

The state was required to prove that appellant intentionally spat on Heinen. Because this is a state of mind, it is proved by circumstantial evidence. *See State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000) (“A state of mind generally is proved circumstantially, by inference from the words and acts of the actor both before and after the incident”). Appellant argued that the first portion of the videotape should be shown, so that the jury could see that he was cooperative; but the videotape also showed appellant’s extreme anger at Heinen after the spitting incident. This tended to show that appellant acted deliberately or intentionally, and that the spitting incident was not an accident, providing “context for the incident.” *Id.* The district court’s decision to admit the entire redacted videotape was not an abuse of discretion.

Impeachment evidence

Appellant argues that the district court abused its discretion by permitting the state to use “sanitized” evidence of three of appellant’s prior convictions to impeach him if he decided to testify. Minn. R. Evid. 609(a) allows a witness’s credibility to be attacked by evidence of a conviction for a felony or a crime of dishonesty.

We review the district court’s impeachment ruling for an abuse of discretion. *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011). Although appellant provides a number of sources that cast doubt on the legitimacy of impeachment by prior convictions, it continues to be permissible under the law in Minnesota. In *Hill*, the supreme court once again affirmed the rationale that impeachment by prior convictions permits a jury to see the “whole person” and noted that “[I]ack of trustworthiness may be evinced by the [defendant’s] abiding and repeated contempt for laws which he is legally and morally

bound to obey.” *Id.* (quotations omitted). The supreme court approved the use of “sanitized” convictions, in which only the fact and date of conviction are disclosed to the jury. *Id.* at 652.

A district court considers the *Jones* factors in deciding whether a defendant may be impeached with a particular conviction. *See State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978). These factors include (1) the impeachment value of the prior crime; (2) the date of conviction and defendant’s subsequent history; (3) the similarity of the current crime to the past conviction; (4) the importance of the defendant’s testimony; and (5) the centrality of the credibility issue. *Id.* Here, the district court analyzed five of appellant’s felony convictions using the *Jones* factors and determined that the state could use three of them for impeachment, concluding that the remaining two convictions would merely be cumulative and thus irrelevant under Minn. R. Evid. 403.

The district court found that all three felony convictions would permit the jury to view the “whole person” and that all three convictions were recent, within 2-3 years. The district court further found that the three convictions, for felony domestic assault and terroristic threats, were similar to the charged crime, which would weigh against their use, but concluded that offering a “sanitized” version including only the fact of conviction and a date, would mitigate any prejudice. Finally, the district court weighed the last two factors against each other: appellant’s testimony was important because it was a “he-said he-said” situation, but the issue of appellant’s credibility was also more important.

The district court noted reasons both for and against admission of the convictions and engaged in a proper weighing of the merits; its decision was not an abuse of discretion. *See Hill*, 801 N.W.2d at 653 (concluding that a judge who “properly and carefully balanced the potential probative value and prejudicial effects of the proffered impeachment evidence” did not abuse its discretion).

Downward dispositional sentencing departure

Appellant argues that the district court abused its discretion by denying his motion for a downward dispositional sentencing departure. The district court imposed a 22-month sentence, the presumptive sentence for this charge under the Minnesota Sentencing Guidelines when an offender has a criminal history score of 7, as appellant has.

The Minnesota Sentencing Guidelines are intended to “establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the conviction and the extent of the offender’s criminal history.” Minn. Sent. Guidelines 1 (2012). Although the guidelines are advisory, “departures from the presumptive sentences established in the guidelines should be made only when substantial and compelling circumstances exist.” Minn. Sent. Guidelines 1.4 (2012). We review the district court’s decision on whether to depart from the sentencing guidelines for an abuse of discretion. *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011).

Appellant argues that the district court abused its discretion by failing to consider whether it should depart from the presumptive sentence. “If the district court has

discretion to depart from a presumptive sentence, it must exercise that discretion by deliberately considering circumstances for and against departure.” *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). But in order to make a downward dispositional departure, mitigating factors must be present: “[T]he judge shall pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids.” Minn. Sent. Guidelines 2.D (2012). The sentencing guidelines set forth a nonexclusive list of mitigating factors. Minn. Sent. Guidelines 2.D.2 (2012). *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982), sets forth other factors, including the defendant’s age, prior record, remorse, cooperation, attitude, and community support, used to determine whether a defendant is particularly amenable to treatment in a probationary setting. But appellant failed to identify any mitigating factors, other than admitting that he was an alcoholic and was going to AA, and that he attended church while in jail. These are not substantial and compelling factors that permit a district court to depart from the presumptive sentence. *See Pegel*, 795 N.W.2d at 253. “The district court must order the presumptive sentence provided in the sentencing guidelines unless substantial and compelling circumstances warrant a departure.” *Id.* (quotation omitted). The district court did not abuse its discretion by refusing to make a downward dispositional sentencing departure.

Affirmed.