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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1639

State of Minnesota,
Respondent,

vs.

Byron Dean Brantley,
Appellant.

Filed November 18, 2013
Affirmed
Ross, Judge

Ramsey County District Court
File No. 62-CR-11-2710

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

John J. Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Hudson, Judge; and Ross, Judge.

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

ROSS, Judge

A jury found that Byron Brantley shot two men outside a St. Paul bar, killing one of them. It acquitted him of first-degree murder but convicted him of second-degree

murder and attempted second-degree murder. Brantley argues that the district court improperly prohibited him from presenting alternative-perpetrator evidence and improperly allowed the state first to elicit testimony that he used a racial epithet and then to refer to the epithet in its closing argument. He also asserts that the district court erred when it denied him a *Schwartz* hearing after a juror said she felt pressured by other jurors to reach her verdicts. We conclude that Brantley fails to show that he was prejudiced by the district court's prohibiting him from presenting alternative-perpetrator evidence, or that eliciting testimony of Brantley's racial epithet constituted prosecutorial misconduct, or that the court abused its discretion by denying a *Schwartz* hearing. We therefore affirm.

FACTS

A Ramsey County jury heard evidence depicting the following story of a fatal shooting in St. Paul. Sometime around midnight on April 12, 2011, Byron Brantley and three friends, Xavier Buckhanan, Leandrews Miller, and David Keys, went to Born's Bar. A bouncer frisked them at the door and found no weapons, but the group had stashed handguns in Miller's car. A fight soon erupted between Brantley and other patrons. Bouncers tossed Brantley and many others out of the bar.

Brantley was angry. He, Miller, and Keys walked to Miller's car. Miller and Keys got into the front seat, and Brantley, still upset, started back toward the bar. Buckhanan went to Miller's car and got in the back seat.

Trevell Glass had been with a friend, Derek Hines, when the fight broke out. They also went outside immediately afterward. Hines testified that he then heard someone say,

"Oh, we should go get a gun." He decided to get Glass's car to drive himself and Glass home. Glass stayed, talking to an acquaintance, Ryan Davis. Glass remarked, "[T]hat was some bullshit," referencing the bar fight. According to Davis, a man then "popped up out of nowhere," asked, "[W]hat you mean by that?" and shot Davis in the abdomen. Davis fled. Hines testified that the same man then shot Glass multiple times. Both Hines and Davis identified the man as having two tattoos on his face, one under each eye—marks distinctive to Brantley—and in court they identified Brantley as the shooter.

Buckhanan also testified that he saw Brantley shoot the two men. He said that he was seated in Miller's parked car down the block, and when he saw Brantley start shooting, he began shooting also, but from inside the car. According to Buckhanan, after Brantley shot Glass and Davis, Brantley returned to Miller's car, got in the back seat, and then Buckhanan, Miller, Keys, and Brantley drove away.

Police arrived. Glass was dead. Davis was taken to the hospital to undergo surgery. Witnesses described Miller's car, and Officer Benjamin Lego pulled it over. Brantley jumped out and ran away. He had what appeared to Officer Lego to be a bulge in his sweatshirt and was holding his stomach. Officer Lego stayed with the car and arrested Miller, Keys, and Buckhanan.

Another officer and his German Shepherd tracked Brantley and found him hiding between a garage and a retaining wall a few blocks away from the stopped car. The officers arrested Brantley, and the dog helped officers find three guns nearby. Forensic DNA and ballistic testing matched Brantley to the gun that fired the shots that struck Glass and Davis.

The state charged Brantley with first-degree murder, second-degree murder, and attempted second-degree murder. Buckhanan faced similar charges, but he pleaded guilty to attempted first-degree murder, possession of a firearm by an ineligible person, and attempted first-degree assault. In exchange, the state promised to prosecute Buckhanan only for the firearm and attempted assault charges if he cooperated with investigators and testified truthfully.

Buckhanan testified that when Brantley returned to the car after the shooting, Brantley exclaimed, "[Y]ou see that? They was getting tough, that I had to air'em out." The prosecutor later pressed Buckhanan to clarify the quote. He asked Buckhanan, "And you testified that when Brantley got in the car he said, 'you see that. I had to air them out. They was, they were getting tough.' Did [he] actually use the word niggas when he was talking?" Brantley immediately objected on relevance grounds, but the district court overruled the objection. Buckhanan answered, "Yes." The prosecutor then asked again, "Can you say to the best of your recollection what his saying was, what he said when he got into the car?" And again, Brantley objected and the district court overruled him. Buckhanan responded, "He said, 'you see that shit, man. I had to air them niggas out. They was getting tough.'" The prosecutor highlighted the statement in closing argument, saying, "And as a punctuation mark we have the defendant's words to the others in that white car as they drove away. 'You see that. Those guys was getting tough. I had to air those Ns out.'"

Also while Buckhanan was on the stand, Brantley's counsel asked him a number of questions implying an alternative-perpetrator defense. When Brantley's counsel asked

Buckhanan whether *he* had killed Glass, the state made a no-facts-in-evidence objection. The district court overruled the objection, and Buckhanan answered, "No." The attorneys and the district court then had a side-bar discussion. The district court told Brantley's counsel to end that line of questioning. Brantley's counsel then asked Buckhanan if he had "shot the gun that hit Mr. Davis." Buckhanan again responded, "No." Brantley's counsel concluded, "But to be clear, you did say under oath that you shot in the direction of these two men with intent to kill them; right?" Buckhanan answered, "Yes."

Outside the jury's presence, the prosecutor argued that the court should prohibit any alternative-perpetrator evidence because Brantley had given the state no notice of the defense. Brantley's counsel maintained that he was not asserting an alternative-perpetrator defense or presenting evidence of an alternative perpetrator; he was instead using the questions merely to foster reasonable doubt. He expressly "acknowledge[d] on the record that [Brantley was] not able to present witnesses or extrinsic evidence relating to an alternative perpetrator without prior notice." The district court then prohibited alternative-perpetrator evidence because Brantley failed to give notice to the state. Despite this ruling, Brantley's counsel argued in closing that Buckhanan was likely the actual shooter who landed his bullets. The state objected, and, after a side-bar discussion, Brantley's counsel resumed his argument implying that Buckhanan was the murderer.

After deliberating nine hours, the jury returned guilty verdicts on the second-degree murder and the attempted second-degree murder charges. It found Brantley not guilty of first-degree murder.

The day after the verdicts, one juror went to the trial judge's chambers to express concern about her decision. The juror later testified before the prosecutor, defense counsel, and Brantley. She said that she had second thoughts about Brantley's guilt. She explained that during jury deliberations, she felt "really pressured" when other jurors stated, "We have to agree" and began staring at her. She also said that other jurors told her, "We want to go home." But she testified that they never threatened her. After this testimony, the district court declined Brantley's request to hold a *Schwartz* hearing to inquire further into possible jury misconduct.

This appeal follows.

D E C I S I O N

Brantley appeals his convictions, contending that the district court erred by prohibiting him from pursuing an alternative-perpetrator defense, by injecting race into the case by allowing the prosecutor to elicit testimony that included the word "niggas" and then allowing the prosecutor to use that testimony during closing argument, and by not initiating a *Schwartz* hearing after the juror indicated she felt pressure from other jurors to arrive at a verdict. Brantley adds other arguments in a separate pro se brief.

I

Brantley argues that the district court denied him his constitutional right to present a complete defense by prohibiting him from introducing alternative-perpetrator evidence that Buckhanan was actually the person who fired the fatal shot. Criminal defendants have a constitutional right to present a complete defense, including an alternative-perpetrator defense. *State v. Nissalke*, 801 N.W.2d 82, 99 (Minn. 2011). The district court

instructed Brantley not to offer any evidence of an alternative perpetrator because he had given the state no notice. This instruction defeats the state's assertion that Brantley was able to fully present the defense.

But Brantley did not object to the district court's decision, conceding that he was barred from presenting the evidence due to his failure to provide notice. When a defendant does not object to the district court's evidentiary decision, we may exercise our discretion to consider the alleged error if the error is plain and affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *see State v. Jones*, 678 N.W.2d 1, 17 (Minn. 2004) (applying the plain error standard in an alternative-perpetrator case where neither party objected to the trial court's erroneous analysis of the admissibility of such evidence). Because criminal defendants have a constitutional right to present a complete defense, including alternative-perpetrator evidence, denying a defendant that right may affect his substantial rights, and we may review the alleged error. *Nissalke*, 801 N.W.2d at 99. But an error affects substantial rights only when "there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation omitted). We need not decide whether the district court plainly erred by prohibiting alternative-perpetrator evidence here because the overwhelming evidence of Brantley's guilt renders any alleged error nonprejudicial.

All trial evidence pointed only to Brantley as the person whose shots injured Davis and killed Glass. Three eyewitnesses, Buckhanan, Hines, and Davis, identified Brantley as the shooter. His peculiar facial tattoos (a numeral 5 under one eye and a 2 under the

other) make mistaken identification implausible. Buckhanan added that Brantley admitted to the shooting when he got into the car. Brantley fled from officers on foot, carrying and attempting to hide the guns from them as he also hid himself. The Bureau of Criminal Apprehension performed ballistic and DNA tests on both guns used in the shooting, and the tests strongly indicated that Brantley, but not Buckhanan, had handled the gun that killed Glass. Given the overwhelming evidence of his guilt, we cannot imagine how the alleged error prejudiced Brantley in the least.

II

Brantley next argues that the state committed prosecutorial misconduct by eliciting testimony that Brantley had used the racial term, "niggas." Brantley claims that the testimony prejudicially injected race into a case where racial tension was never an issue (the shooters and the victims all being African Americans), and so he is entitled to a new trial. Brantley is correct that injecting racial considerations into a case when race is irrelevant is improper and may constitute prosecutorial misconduct. *See State v. Paul*, 716 N.W.2d 329, 339 (Minn. 2002). The prosecutor engages in misconduct when he references race and invites jurors to view a defendant differently from themselves. *State v. Ray*, 659 N.W.2d 736, 747 (Minn. 2003). Similarly, when the prosecutor refers to the defendant's racial background to imply that the jury should convict due to race, the conviction should be reversed. *State v. Jackson*, 773 N.W.2d 111, 124 (Minn. 2009).

But not every comment about race constitutes misconduct. *See Paul*, 716 N.W.2d at 340; *State v. Lindsey*, 755 N.W.2d 752, 758 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008). The state maintains that the witness's statement was such a nonoffending

comment here because the prosecutor elicited the term only to demonstrate Brantley's post-shooting, cold state of mind toward his victims, not to highlight his disparagement of (or even to identify) the race of any participant. The argument is persuasive; context and the now-common understanding of usage leads us to reject Brantley's implied contention that the prosecutor introduced the term "niggas" to inflame racial passions. Despite the well-known, racially hostile origins of the term in American parlance, modern popular culture—music, comedy, film—has exposed what might have been previously known only to the African American community: not all uses of the term are racist, or even racial. One linguistic researcher has concluded that "massive evidence" contradicts the notion "that nigger can mean only one thing." Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word* 135 (2003). He posited what is today widely perceived, which is that some "[b]lacks use the term with novel ease to refer to other blacks, even in the presence of those who are not African American," and that, what's more, now "the term both as an insult and as a sign of affection is being affixed to people of all sorts," white, black, and Latino. *Id.* at 137. Given its "complexity" and "ambiguity," *id.* at 138, the controversial word cannot be ascribed its quality outside of its context.

Brantley's suggestion that the term's use is racially inflammatory regardless of context is wrong. And its context in this case supports the state's argument. Nothing about the circumstances of Brantley's remark hints of Brantley's *racial* hostility; his use of the word in context implied instead his *general* hostility or dismissive attitude toward the two men shot. This state-of-mind evidence is relevant to the state's case both to help

establish Brantley as the shooter and to establish his chilly *mens rea* behind the shooting. These are of course both elements of the murder charge. *See* Minn. Stat. § 609.185(a)(1) (2010). Given Brantley's trial contention that he was not the murderer, his own words offered as evidence of his indifference toward the victims immediately after the shooting were highly probative of his guilt, and any undue prejudice toward him was at most slight by comparison.

III

Brantley also argues that the district court erred by denying him what is known as a *Schwartz* hearing after one juror revealed that she felt pressured by other jurors to convict him. *See Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960) (implementing a procedure for questioning jurors after their verdict to determine whether jury misconduct occurred). We will reverse a district court's decision not to hold a *Schwartz* hearing only if it abused its discretion by denying a request for the hearing. *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998). Like the district court, we perceive the short posttrial proceeding with the juror to be the court's preliminary inquiry to determine whether a *Schwartz* hearing was warranted. It was not itself a *Schwartz* hearing, contrary to an assertion now made by the state. We therefore turn to whether the district court erred by denying the requested *Schwartz* hearing.

To warrant a *Schwartz* hearing to explore possible jury improprieties, a "defendant must first present evidence that if unchallenged would warrant the conclusion that jury misconduct occurred." *State v. Jackson*, 615 N.W.2d 391, 396 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000). The district court should allow a juror to testify about

whether extraneous prejudicial information, threats, or violence influenced any juror. Minn. R. Evid. 606(b). "The trial court must distinguish between testimony about 'psychological' intimidation, coercion, and persuasion, which would be inadmissible, as opposed to express acts or threats of violence." *Id.* 1989 committee cmt. Having mere second thoughts also is not prima facie evidence of impropriety warranting a *Schwartz* hearing. *State v. Bauer*, 471 N.W.2d 363, 367 (Minn. App. 1991), *review denied* (Minn. July 24, 1991).

On that standard, we hold that no *Schwartz* hearing was required here. One juror approached the trial judge about her second thoughts. The record shows that she felt merely the psychological pressure of other jurors wanting to convict and go home. No one threatened her. That some jurors feel strongly for or against conviction and express their feelings to persuade their fellow jurors no doubt results in pressure toward a verdict. But we assume that this sort of pressure is the common experience of every juror who, at some point during deliberations, holds the minority position. Second thoughts about a verdict are also not unexpected. Second thoughts imply thoughtfulness, a quality necessary to serious deliberation over competing testimony and other conflicting evidence. The district court rightly recognized this, and it did not abuse its discretion by denying Brantley's request for a *Schwartz* hearing.

Brantley submits additional arguments in a pro se supplemental brief. We have carefully considered those arguments, and we conclude that they do not warrant further discussion or reversal.

Affirmed.