STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2035

State of Minnesota,
Respondent,

vs.

Charles Antonio Gayles,
Appellant.

Filed January 5, 2010
Affirmed
Worke, Judge

Olmsted County District Court
File No. 55-CR-06-6034

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, 151 SE Fourth Street, Rochester, MN 55904 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

WORKE, Judge

Appellant challenges his theft conviction, arguing that (1) the prosecutor committed misconduct, (2) the district court abused its discretion by improperly admitting *Spreigl* evidence, and (3) the evidence is insufficient to support his conviction. In a pro se brief, appellant additionally claims that he should receive a new trial, arguing that the prosecutor systematically eliminated potential jurors of ethnic background from the jury, and that he was prejudiced when a testifying officer left the courtroom with admitted evidence. We affirm.

D E C I S I O N

Prosecutorial Misconduct

Appellant Charles Antonio Gayles first argues that the prosecutor committed misconduct during rebuttal closing argument. A reviewing court will reverse a conviction on the basis of prosecutorial misconduct "when 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). "If the state has engaged in misconduct, the defendant will not be granted a new trial if the misconduct is harmless beyond a reasonable doubt. We will find an error to be harmless beyond a reasonable doubt only if the verdict rendered was surely unattributable to the error." *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006) (quotations and citations omitted).

Appellant argues that the prosecutor impermissibly placed the burden on appellant to prove whether he has tattoos—a characteristic noted by the victim in identifying his offender. Appellant claims that the state could have proved that appellant has tattoos during its case-in-chief and declined to do so. Thus, telling the jury that appellant failed to prove an absence of tattoos during rebuttal closing argument was prejudicial misconduct.

The state bears the burden of proving each element of an offense beyond a reasonable doubt, and a prosecutor is prohibited from shifting the burden to a defendant to prove his innocence. *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985). But a prosecutor is free "to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *State v. Outlaw*, 748 N.W.2d 349, 358 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. July 15, 2008). A prosecutor may argue that a defense has no merit but may not denigrate or belittle the defense itself. *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993); *see also State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000) (concluding that a prosecutor arguing that a defense theory is implausible by highlighting certain evidence did not constitute prosecutorial misconduct); *State v. Romine*, 757 N.W.2d 884, 893 (Minn. App. 2008) (allowing a prosecutor to refute a defendant's defense with evidence produced by the state), *review denied* (Minn. Feb. 17, 2009).

Here, appellant was charged with theft in violation of Minn. Stat. § 609.52, subd. 2(1) (2008) for allegedly wrestling a cell phone out of the hands of a victim and telling

the victim that he would only return the phone if the victim paid him. Appellant relied heavily in his closing argument on the fact that the victim initially told the police that the perpetrator had tattoos on his neck, only to testify during trial that he believed that the tattoos were somewhere on the person's upper body and maybe not necessarily on the person's neck. The defense theory advanced during closing argument was mistaken identity—appellant's lack of a tattoo on his neck created a reasonable doubt as to whether he committed the crime. The state's rebuttal directly attacked the validity of this theory. The prosecutor asserted that the victim's reliance on the offender's face in identifying appellant in the photo lineup and in the courtroom was more important than the victim's recollection of where the offender had tattoos. Moreover, the prosecutor explicitly reiterated that appellant had no burden of proof before attacking the plausibility of appellant's theory, and the court articulated the appropriate burden of proof in giving jury instructions. Accordingly, the record does not support appellant's contention that the prosecutor shifted the burden of proof; therefore, the prosecutor did not commit reversible misconduct.

Spreigl Evidence

Appellant next argues that the district court erroneously admitted evidence of a prior conviction. Evidence of other crimes or acts, or *Spreigl* evidence, is inadmissible to prove the defendant's character or to show that the defendant acted in conformity with that character during the commission of the charged offense. Minn. R. Evid. 404(b); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). Such evidence may, however, be admissible to prove motive, intent, knowledge, common scheme or plan, or absence of

mistake or accident. *Kennedy*, 585 N.W.2d at 389. The admission of *Spreigl* evidence lies within the district court's sound discretion and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996). If the district court erred in admitting evidence, 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, then the error is prejudicial. *Id.* To prevail, appellant must therefore show error and prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Five requirements must be met before *Spreigl* evidence is admitted: (1) notice provided by the state, (2) an offer of proof, (3) clear and convincing proof that the defendant participated in the prior act, (4) the evidence is relevant and material to the state's case, and (5) its probative value must outweigh any potential for unfair prejudice. Minn. R. Evid. 404(b); *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). Only the fourth and fifth factors are implicated in this case.

"In determining the relevance and materiality of *Spreigl* evidence, the [district] court should consider the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place or modus operandi." *Kennedy*, 585 N.W.2d at 390 (quotation omitted). *Spreigl* evidence offered for the purpose of demonstrating a common scheme or plan "must have a marked similarity in modus operandi to the

charged offense." *Ness*, 707 N.W.2d at 688. "[I]f the prior crime is simply of the same generic type as the charged offense, it ordinarily should be excluded." *State v. Wright*, 719 N.W.2d 910, 917-18 (Minn. 2006). However, "absolute similarity between the charged offense and the *Spreigl* offense is not required to establish relevancy." *State v. Landin*, 472 N.W.2d 854, 860 (Minn. 1991). Our "review for abuse of discretion reflects the fact that the district court is best positioned to weigh th[e] factors" relevant to determining the relationship between the offenses. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005).

Appellant challenges the admission of his conviction for simple robbery committed in March 2004. The prior conviction involved appellant approaching a juvenile acquaintance at a gas station in Rochester and asking for a ride. When reaching his destination, appellant demanded all of the money the driver had on his person, took $160, and exited the vehicle. In admitting the prior conviction as evidence of modus operandi, the district court noted that appellant's prior conviction was similar to the current charge in several respects: both incidents involved appellant confronting young individuals in broad daylight and requesting a small favor which escalated into a demand for money and a theft. The district court further concluded that the probative value of the previous conviction as modus operandi evidence was not outweighed by the risk of unfair prejudice to appellant. The court limited the reading of the complaint and gave a limiting instruction to the jury as well.

Appellant essentially argues that the previous conviction and the present charge are only *generically* similar; the previous conviction involved the use of a weapon and

did not involve a cell phone, so the facts vary considerably. Appellant contends that this evidence was highly prejudicial, and the unfair prejudice could not have outweighed the probative value due to the differences in the crimes. While there are differences between the two offenses, the record does not support appellant's contention that the district court abused its discretion in admitting the prior conviction as relevant to modus operandi and as more probative than prejudicial.

Sufficiency of the Evidence

Appellant also argues that the evidence is insufficient to support the jury's verdict. On such a claim, our review is limited to an analysis of the record to determine whether the evidence, viewed in the light most favorable to the conviction, is sufficient to allow jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Here, appellant was charged with theft in violation of Minn. Stat. § 609.52, subd. 2(1). The elements of this crime are:

> First, the [property] alleged to have been taken . . . was the property of [a person other than the defendant].
>
> Second, the defendant intentionally took . . . the [property]. This means that the defendant took . . . the

> [property] on purpose, and that the defendant knew or believed that it was the property of another person.
>
> Third, the defendant knew or believed that [he] [] had no right to take the [property].
>
> Fourth, [the owner of the property] did not consent to the defendant[] taking it.
>
> Fifth, the defendant intended to deprive the owner permanently of the possession of the [property].

10 *Minnesota Practice*, CRIMJIG 16.02 (2006).

While the primary issue at trial was the identity of the perpetrator, appellant now concedes that the witness testimony identifying appellant was enough to support the jury's determination in this respect. Appellant instead challenges whether there was sufficient evidence to support the jury's conclusion on the fifth element of the charge, that appellant "intended to deprive the owner permanently of possession of the property." Appellant argues that uncontroverted testimony shows that the offender offered to return the cell phone to the victim if the victim gave him money.

This argument has little merit. The victim testified that appellant wrestled the phone away from him, told him that he would return it only if the victim gave him money, and then jumped into a car and drove away when the victim told him that he did not have any money. Additionally, the investigating officer testified that he interviewed the driver of the car appellant jumped into after taking the victim's phone, and the driver told the officer that appellant instructed him to drive fast because he just took someone's cell phone. As such, sufficient evidence exists to support the jury's conclusion that

appellant intended to permanently deprive the victim of the cell phone, and thus there is sufficient evidence to support appellant's conviction.

Appellant's Pro Se Arguments

Finally, appellant raises two additional arguments in his pro se supplemental brief: (1) the prosecution systematically eliminated the only person of ethnic background from the jury, and (2) the district court committed reversible error by allowing the investigating officer to leave the courtroom after testifying with evidence admitted by the court. The juror in question was eliminated by a peremptory challenge, and appellant failed to object to the exercise of the challenge in a timely manner. Objections to peremptory challenges are governed by Minn. R. Crim. P. 26.02, subd. 6(a)(2) (2008), which provides, "[a]ny party, or the court, may object to the exercise of a peremptory challenge on the ground of purposeful racial or gender discrimination at *any time before the jury is sworn to try the case*." (Emphasis added.) Here, appellant's counsel failed to object to the state's use of a peremptory challenge before the jury was sworn in, and thus the issue is not preserved for appeal.

Appellant's second pro se argument is that the district court committed reversible error by allowing the investigating officer to exit the courtroom with an evidentiary exhibit after testifying. Appellant does not deny that the evidence was promptly returned when the mistake was noticed, nor does appellant articulate how his substantive rights were impaired by the exhibit momentarily and inadvertently leaving the courtroom.

"Any error that does not affect substantial rights must be disregarded." Minn. R. Crim. P. 31.01. Accordingly, this argument also fails.

Affirmed.