STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1690

State of Minnesota,
Respondent,

vs.

Luis Alexandre Nolasco-Salguero,
Appellant.

Filed August 31, 2010
Affirmed
Minge, Judge

Hennepin County District Court
File No. 27-CR-09-8436

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Minge, Judge.

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

MINGE, Judge

On appeal from his conviction of first-degree aggravated robbery, appellant argues that the district court abused its discretion by (1) admitting credit-card records that

appellant claims are hearsay; (2) admitting, without a *Spreigl* notice, irrelevant evidence of appellant's bad acts; (3) concluding that there was no prosecutorial misconduct during closing arguments; and (4) refusing to instruct the jury that the circumstantial evidence must be consistent with guilt and inconsistent with any other rational conclusion. We affirm.

FACTS

This appeal arises from a conviction of aggravated robbery. On September 8, 2008, at about 8:30 p.m., Jose Ortega, the victim, was sitting in his parked car when appellant Luis Alexandre Nolasco-Salguero and Jose Escobar approached. Appellant opened the passenger-side door and asked Ortega a question. After Ortega replied, appellant began punching him in the face.

Ortega testified that at appellant's direction, a third man appeared on the driver's side of Ortega's car and pulled Ortega out of the car; that appellant, Escobar, and the third man repeatedly hit and kicked Ortega; that the third man took Ortega's wallet from his back pocket; that appellant and Escobar drove off in a red Chrysler Sebring; and that the third man stole Ortega's car.

Appellant admitted the assault, testifying that he acted alone and that the fight began by his punching Ortega in the car.[1] Escobar testified that appellant alone beat up

[1] Although collateral to the issue at trial, there was complicated testimony about a fight that broke out involving appellant a couple of weeks before the assault on Ortega. Appellant repeatedly testified that his September 8 assault of Ortega was in retaliation for a previous assault by Ortega and his brothers on appellant at a restaurant that included breaking a bottle on appellant's head. Although Ortega's brother admitted that a prior fight occurred, Ortega and his brother both testified that Ortega was not present.

Ortega. Appellant and Escobar denied that any third person was involved in the assault or that they took part in the theft of Ortega's car or wallet.

After his assailants left, Ortega promptly reported the crime. Ortega described one of his assailants as wearing a blue jacket and blue jeans, another as wearing a gray sweatshirt and blue jeans, and the third as wearing a blue and gray jacket and gray pants. Ortega identified appellant as one of his assailants.

By checking his credit-card accounts online later that night, Ortega learned that credit cards in his stolen wallet had been used that night at several businesses, including a gas station in Fridley. Ortega denied making those charges.

Ortega provided the police with the numbers of his credit cards that were stolen. Police gave these credit-card numbers to the gas station's division security manager. The security manager testified that by using this number, he accessed the company's security system and learned that Ortega's credit card was used at a Fridley gas station at 9:09 p.m. on September 8; that the records enabled him to identify which pump the card was used at; and that the security video showed a red car pull up to that pump and an individual wearing blue jeans and blue coat get out and purchase gas using Ortega's credit card. Video-camera pictures received into evidence confirmed the testimony.

The jury found appellant guilty of not only the admitted assault, but also aggravated robbery. The district court sentenced him to 48 months in prison. This appeal of the aggravated-robbery conviction follows.

D E C I S I O N

I.

Because appellant admitted that he beat up Ortega and the defense conceded that Ortega was robbed, the issues on appeal are limited to whether appellant had participated in the robbery.

The first issue is whether the district court abused its discretion by admitting into evidence a credit-card bill and by allowing Ortega to testify about what he learned from checking his credit-card records. We review a district court's evidentiary rulings for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). To overturn a conviction based on admission of evidence, an appellant must show that the admission was erroneous and prejudicial. *Id*.; *cf. State v. Shoen*, 598 N.W.2d 370, 377-78 n.2 (Minn. 1999) (discussing conflicting lines of cases on when state and when defendant should have burden of establishing harmlessness and "waiting for another day to resolve any discord in our prior case law"). It is unnecessary to determine if the district court erred if an alleged error would have been harmless. *E.g.*, *State v. Hall*, 764 N.W.2d 837, 844 (Minn. 2009); *State v. Aligah*, 434 N.W.2d 460, 460 (Minn. 1989). Admitting inadmissible evidence that is cumulative of other admissible evidence is harmless. *State v Ahmed*, 708 N.W.2d 574, 582-83 (Minn. App. 2006).

The challenged evidence is the credit-card bill and Ortega's testimony that he learned his credit cards were used on September 8 by checking his online records. The challenged evidence does not indicate who made the purchases. And the credit-card bill

does not indicate that the purchases were made after the robbery; it only indicates that they were made on the day of the robbery.

Regardless, the admission of the testimony and credit-card records was not prejudicial. The unobjected-to testimony of the security manager was that at 9:09 p.m. on September 8, Ortega's credit card was used at the Fridley gas station. This was about a half an hour after the assault. The security manager determined at which pump the card was used. He testified that he watched the security video for that timeframe, saw a red car pull up to that pump, saw an individual wearing blue jeans and blue coat get out of the car and purchase gas at that pump using Ortega's credit card, and then saw the red car leave. Pictures from these video cameras received into evidence showed a red car at that pump and an individual wearing blue standing at the pump. Appellant admitted that he was driving with Escobar in a red car on September 8 and Ortega identified one of his assailants as wearing a blue coat and blue jeans. Testimony of the security manager, the video images, and Ortega's description of appellant connected appellant with the robbery. It duplicated the challenged credit-card bill testimony and documents by Ortega.

We further note that in its closing argument the prosecution relied more heavily on the testimony of the security manager and on the pictures than on the challenged evidence from Ortega. Moreover, unlike the challenged evidence, which did not indicate who made the purchases and thus could not refute the defense's theory that appellant and Escobar had no connection to Ortega's property, the video pictures and the security manager's testimony provided identification evidence.

In sum, because the challenged evidence merely duplicates the unchallenged evidence, there was not a reasonable probability that this challenged evidence significantly affected the verdict, and any error in admitting the challenged evidence is harmless. Accordingly, we need not determine whether admitting the challenged evidence was error, and we conclude that appellant is not entitled to a new trial based on this issue. [2]

II.

The next issue is whether the district court committed reversible error by admitting evidence of an order for protection (OFP) prohibiting appellant from having contact with the mother of appellant's baby. Appellant argues that the district court erred in ruling that the defense opened the door to this evidence. Appellant asserts that this evidence was bad-acts (*Spreigl*) evidence that was inadmissible because the state did not follow the procedures for admitting such evidence, and that the admission of this evidence prejudiced appellant. Appellant also argues that the prosecutor committed misconduct by intentionally eliciting this inadmissible bad-acts evidence. We review a district court's evidentiary rulings for an abuse of discretion. *Amos*, 658 N.W.2d at 203. To overturn a conviction based on the admission of evidence, an appellant must show that the admission was erroneous and prejudicial. *Id.*

To decide this issue, we must first determine whether the challenged evidence is bad-acts evidence. Evidence of a defendant's past crimes, wrongs, or bad acts may not

[2] Because we do not need to address whether admitting the challenged evidence was error, we do not address the parties' dispute about whether the challenged evidence was admissible under the rules of evidence.

be admitted to prove the defendant's character for committing crimes. Minn. R. Evid. 404(b); *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009). Evidence of an OFP falls within this rule because an OFP is issued upon a showing that a person committed physical harm, bodily injury, or assault; or manifests a present intention to inflict fear of imminent physical harm, bodily injury, or assault on a family member. Minn. Stat. § 518B.01 (2008); *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009). The state does not argue that evidence of an OFP against appellant is not evidence of a bad act; rather, the state contends that appellant opened the door, allowing this otherwise inadmissible evidence to be admitted.

"Opening the door" is a doctrine based on fairness and common sense that applies when one party introduces evidence that allows the opposing party to respond with otherwise inadmissible evidence. *State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007); *State v. Robideau*, 783 N.W.2d 390, 400 (Minn. App. 2010). A party opens the door by either gaining an unfair advantage or by presenting the factfinder with a misleading or distorted representation of reality. *Bailey*, 732 N.W.2d at 622. The evidentiary remedy to a party opening the door should be carefully tailored to eliminate prejudice, assure fairness to both parties, and to not unnecessarily compromise the fact-finding process. 8 *Minnesota Practice* § 32.54 (3d. ed., Supp. 2009). For example, if the district court allows otherwise inadmissible evidence to be introduced because a party opened the door, this evidence should be responsive to the evidence that opened the door. *Id.*; *see Bailey*, 732 N.W.2d at 622-23 (holding that defendant's implication that inadmissible DNA-testing evidence might have excluded defendant as a suspect opened the door for the state

to admit this evidence to show that this evidence did not exclude defendant as a suspect); *State v. Haynes*, 725 N.W.2d 524, 531-32 (Minn. 2007) (holding that defendant's claim that he was unfamiliar with an area opened the door to testimony showing that the police had stopped him repeatedly in that area).

At trial, appellant repeatedly testified that Ortega and his brothers jumped him at a restaurant a couple of weeks before Ortega was robbed on September 8. He also testified that Ortega broke a bottle over his head during this incident. The state contends that this testimony by appellant opened the door to evidence that appellant precipitated the altercation when he attempted to speak to the mother of his child in violation of an OFP she had against appellant. Appellant counters that his testimony did not open the door to the OFP evidence because that evidence does not respond to appellant's testimony that he was attacked. We do not need to resolve this dispute if admitting the evidence was harmless error.

When a district court erroneously admits bad-acts evidence, a new trial is not warranted unless "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995) (quotation omitted). Here, appellant admits that he is guilty of assaulting Ortega. Although the OFP evidence may suggest that appellant has a violent character, the issue was not whether appellant was violent or assaulted Ortega or had any justification for that assault, but whether appellant participated in robbing Ortega.

The evidence of appellant's guilt of the robbery was strong. As discussed previously, the testimony of the security manager and the gas station video pictures

linked a car and person matching the description given by Ortega to one of Ortega's stolen credit cards. This testimony corroborated the testimony of Ortega that appellant and his accomplices took his wallet and car. Moreover, the defense's evidence was of dubious credibility. Appellant's trial testimony about his actions on September 8 were his third version of what happened. At first, in a police interview, appellant denied encountering Ortega. Later, in the same interview, he admitted fighting with Ortega but stated that Ortega was outside of Ortega's car and the fight began after Ortega approached him. But at trial, appellant admitted that he had walked up to Ortega's car and punched Ortega while Ortega was in the car. Moreover, the trial testimony given by appellant and by Escobar was inconsistent. Escobar testified that Ortega exited the car, pushed appellant, and started fighting. All of these factors support the conclusion that there was not a reasonable possibility that the previous fight and OFP testimony significantly affected the robbery verdict. Accordingly, we conclude that any error in admitting the evidence was harmless, and appellant is not entitled to a new trial on this ground.

Here, even if the prosecutor did commit misconduct, the error in admitting the evidence would be harmless for the reasons described above. *See State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003) (holding that for less serious prosecutorial misconduct, the harmless-error standard is "whether the misconduct likely played a substantial part in influencing the jury to convict").

III.

The next issue is whether the district court abused its discretion by concluding that the prosecutor did not misstate the burden of proof during closing arguments. Again, we do not reverse on this issue unless we find a serious and prejudicial abuse of discretion that impaired appellant's right to a fair trial. *Haynes*, 725 N.W.2d at 529. If we conclude that prosecutorial misconduct occurred and the defendant objected to that misconduct, we use a two-tiered harmless-error analysis. *State v. Jackson*, 773 N.W.2d 111, 121 (Minn. 2009). For serious prosecutorial misconduct, the test is whether the error was harmless beyond a reasonable doubt; for less serious misconduct, the test is whether the misconduct likely played a substantial part in influencing the jury to convict. *Id*. If the prosecutor did misstate or shift the burden of proof, that would be highly improper prosecutorial misconduct. *Id*. at 122.

When reviewing claims of prosecutorial misconduct during closing argument, we consider the closing argument as a whole rather than focus on comments that may be taken out of context or given undue prominence. *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005). Because the closing argument is considered as a whole, we have held that comments by the prosecutor that "the defendant in [his] defense [has] to explain away [the state's] evidence" did not improperly shift the burden because the prosecutor also correctly stated that the prosecutor had the burden of proof. *State v. Tate*, 682 N.W.2d 169, 178-79 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

Comments by the prosecutor that the defendant's theory of the case lacks support are proper and do not shift or misstate the burden of proof. *State v. Gassler*, 505 N.W.2d

62, 69 (Minn. 1993). The prosecutor may comment on witness credibility. *State v. Van Keuren*, 759 N.W.2d 36, 43 (Minn. 2008). Moreover, the supreme court has consistently held that a prosecutor "may use all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom during closing argument." *Id*. (quotation omitted).

Here, at the beginning of the prosecutor's closing argument, the prosecutor stated that the state must prove all the elements of the crime beyond a reasonable doubt. Then, the prosecutor recited almost verbatim the district court's instructions on proof beyond a reasonable doubt. In fact, the prosecutor went into greater depth by comparing this standard to the degree of certainty necessary to make a decision about whether to have surgery. Appellant's counsel endorsed this analogy in his closing argument.

The remarks appellant complains of occurred at the end of the prosecutor's rebuttal. During his closing arguments, appellant's counsel attacked the credibility of Ortega's testimony that appellant and his accomplices had taken Ortega's property. To refute these arguments, much of the prosecutor's rebuttal focused on supporting Ortega's credibility. The prosecutor concluded his rebuttal by noting that Ortega's testimony was corroborated by several sources, whereas appellant's was not:

> If we want to talk about the credibility of Mr. Ortega, I would like to finish with this. There is an individual walking down the road, and he's got to make a decision in this case. He comes to a fork in the road, and there is a big mountain in the middle, and the sign says, "Only one way is the right way."

> He looks down the one fork, there is the defendant, Mr. Escobar. "Come on this way. You know, we just beat him. We didn't take the wallet. Follow us."
>
> You look the other way, there is Mr. Ortega; his girlfriend, Mr. Ortega's brother; the evidence from the gas station; the evidence of [the] Officer [], who tells you about what happened when the crime was first reported. They are all looking at you, saying, "Come this way."
>
> Which way would you go?

In the context of a rebuttal focused on credibility and following defense counsel's attack on the credibility of the victims, the remarks are properly seen as being about credibility, not burden of proof. Because of this credibility focus and because the prosecutor correctly described the burden of proof in his closing, we conclude the district court did not abuse its discretion in determining that the prosecutor did not misstate the burden of proof.

IV.

The final issue is whether the district court abused its discretion by refusing to instruct the jury that before it could find appellant guilty based upon circumstantial evidence alone, the circumstantial evidence had to be consistent with guilt and inconsistent with any other rational conclusion. The refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

Concerning direct and circumstantial evidence, the district court gave CRIMJIG 3.05:

> A fact may be proven by either direct or circumstantial evidence, or by both. The law does not prefer one form of evidence over the other.
>
> A fact is proven by direct evidence when, for example, it is proven by witnesses who testify to what they saw, heard, or experienced, or by physical evidence of the fact itself. A fact is proven by circumstantial evidence when its existence can be reasonably inferred from other facts proven in the case.

10 *Minnesota Practice*, CRIMJIG 3.05 (5th ed., Supp. 2009). In *State v. Turnipseed*, the supreme court rejected an argument that an instruction on circumstantial evidence must include the statement that all circumstances proved must be inconsistent with any other rational conclusion. 297 N.W.2d 308, 312-13 (Minn. 1980). The *Turnipseed* holding has been reaffirmed. *See, e.g.*, *State v. Gassler*, 505 N.W.2d 62, 68 (Minn. 1993); *State v. Hardy*, 303 N.W.2d 57, 58 (Minn. 1981). Accordingly, the district court did not abuse its discretion in refusing to give the jury instruction that appellant requested.[3]

Affirmed.

Dated:

[3] Appellant argues that there have been changes in the law concerning the standard of review for insufficient-evidence appeals where the conviction was based on circumstantial evidence alone. Even if we were to conclude that appellant's argument has some force, this is not the case to evaluate a circumstantial-evidence jury instruction. Here, with the direct evidence provided by the testimony of victim Ortega and the gas station video, the jury did not convict appellant based on circumstantial evidence alone, and thus, the instruction appellant requested is not a proper fit.