STATE OF MINNESOTA
IN COURT OF APPEALS
A10-21

State of Minnesota,
Respondent,

vs.

Daniel Thomas,
Appellant.

Filed December 28, 2010
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-08-34479

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, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Worke, Judge.

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

WORKE, Judge

Appellant challenges his first-degree-assault conviction, arguing that (1) the district court erred by finding that unlawfully seized evidence was admissible under the

inevitable-discovery doctrine; (2) it was reversible error for the jury to hear that appellant had previously been in prison; (3) it was plain error for the jury to hear that appellant "did this to someone else"; and (4) the evidence is insufficient to show that appellant inflicted great bodily harm. We affirm.

FACTS

On July 10, 2008, officers were dispatched to a report of an assault. The victim, N.B., reported that her ex-boyfriend, appellant Daniel Thomas, held her against her will, sexually assaulted her, and attacked her with a knife. N.B. had numerous lacerations to her body, including a "gaping slash to [her] forearm that was to the bone." N.B. reported that she was able to escape after convincing appellant that she would go with him to Chicago and he went to a bus station.

Officers discovered that someone matching appellant's description purchased a bus ticket under the name "Shawn Smith." The bus was traveling through Wisconsin, so officers called a bus station in Eau Claire, Wisconsin with instructions to stop the bus. A Minneapolis officer and a U.S. marshal drove to Wisconsin after instructing Wisconsin officers to remove appellant from the bus when it stopped.

Wisconsin officers were given appellant's physical description, told that he was using the name "Shawn Smith," and that he was wanted for sexual assault. An officer boarded the bus, approached appellant because he matched the physical description, and asked for identification. The officer noticed that appellant had blood on his left hand and had his fist clenched. The officer asked to see appellant's palm and observed a cut on his hand, which appellant stated occurred when he was cutting a tomato. Appellant told the

officer that he did not have identification and that his name was "Terrence." Appellant was asked to step off the bus and he repeated that his name was "Terry Taylor." Wisconsin officers arrested appellant for giving a false name to a police officer, a misdemeanor offense in Wisconsin. When the Minneapolis officer and U.S. marshal arrived in Eau Claire, the sheriff turned appellant over to the U.S. marshal for transport back to Minnesota. Appellant was charged with first-degree criminal sexual conduct, first-degree assault, and first-degree burglary.

At the time of his transport to Minnesota, appellant had a backpack in his possession. One month after appellant's transport, officers obtained two search warrants: one for a DNA sample and one for a search of appellant's backpack. Appellant moved to suppress evidence obtained as a result of what he alleged was an illegal search and transport, claiming that officers failed to follow proper procedure in transporting him from one jurisdiction to another. The evidence appellant sought to suppress included: items seized as a result of the transfer, including his backpack, statements he made, and DNA evidence.

Following a hearing, the district court ruled that there was probable cause to arrest appellant for actions that took place in Minnesota. The court granted appellant's motion to suppress the statements he made to the Wisconsin officer regarding his name and the source of the blood on his hand. But the court stated that it was "satisfied that under the doctrine of inevitable discovery that those bits of evidence that were secured—namely . . . the backpack and the clothes [appellant] was wearing when he was on the bus and arrested . . . would be admissible into evidence."

N.B. testified during appellant's jury trial. Appellant's attorney asked N.B. why she called a victim advocate when she testified earlier that she did not want appellant to be arrested. N.B. responded that she called the advocate because she thought the advocate could help her because the advocate told N.B. that appellant "did this to someone else." Appellant's attorney continued with cross-examination.

The officer who responded to the initial call testified that when she made contact with N.B., N.B. was "very upset, crying, very shaken up." The officer testified that N.B. explained to her what happened. The officer was then asked if N.B. told her anything else. The officer testified: "She said her ex-boyfriend stated that he would rather kill her than go back to prison." Appellant's attorney moved for a mistrial. The district court denied the motion, stating that it was the officer's recollection of the evidence and was not so prejudicial as to warrant a new trial. The jury found appellant not guilty of criminal sexual conduct and burglary, but guilty of first-degree assault. This appeal follows.

D E C I S I O N

Inevitable Discovery

Appellant first argues that the district court erred in admitting unlawfully obtained evidence, contending that the evidence was seized when he was transferred to Minnesota and officers failed to follow statutory-arrest and extradition laws. Appellant asserts that the evidence was prejudicial because the trial was based on the victim's credibility and the evidence bolstered her credibility. The district court ruled that under the inevitable-discovery doctrine, the DNA and backpack evidence was admissible. Whether the

district court erred by denying a pretrial motion to suppress evidence is a question of law that this court reviews de novo. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

Individuals have a constitutional right to be free from unreasonable searches and seizures. U.S. Const., amend. IV; Minn. Const., art. 1, § 10. Under the exclusionary rule, evidence obtained as the result of an unconstitutional search may not be introduced at trial. *State v. Martinez*, 579 N.W.2d 144, 148 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). However, "[t]he inevitable discovery doctrine permits the inclusion of evidence otherwise excluded under the exclusionary rule if the police would have inevitably discovered the evidence, absent their illegal search." *Id.* (quotation omitted).

The evidence would have inevitably been discovered because appellant was identified as the assailant and an individual who purchased a bus ticket. Police had probable cause to arrest appellant and had authority to conduct a search incident to that arrest. The evidence, which included appellant's identification cards and bus ticket, would have been retained by police even if appellant had not been illegally returned to Minnesota without extradition proceedings or appellant's consent following an arrest. Thus, the district court appropriately relied on the inevitable-discovery doctrine.

But even if the district court erred in admitting the evidence, it was harmless. The erroneous admission of evidence does not warrant reversal if the error was harmless. *See State v. Blasus*, 445 N.W.2d 535, 540-41 (Minn. 1989) (applying harmless-error analysis to the erroneous admission of evidence). When a district court has 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.* In completing a "harmless-error" analysis, the inquiry is not whether the jury could have convicted the defendant without the error, but rather, what effect the error had on the jury's verdict, "and more specifically, whether the jury's verdict is surely unattributable to the [error]." *State v. King*, 622 N.W.2d 800, 811 (Minn. 2001) (quotation omitted).

Appellant claims that the evidence was prejudicial because the items in his backpack supported N.B.'s story. But the jury did not find N.B. to be wholly credible because it found appellant not guilty of all charges except for the first-degree assault. Thus, appellant's argument is not supported by the record and the jury's verdict; the jury's verdict is surely unattributable to any possible error that the district court made in admitting the evidence.

Evidence of Appellant's Prior Incarceration

Appellant next argues that the district court abused its discretion in allowing an officer to testify that the victim reported that appellant stated that "he would rather kill [the victim] than go back to prison." Appellant contends that this statement was irrelevant and not probative and complains that the district court failed to take any corrective action, such as giving the jury a cautionary instruction. Appellant further asserts that this evidence impacted the jury's verdict because it could be the reason that the jury did not acquit him of all charges.

Appellant moved for a mistrial following this testimony. The denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). The district court is in the best position to determine whether a defendant has been denied a fair trial such that a mistrial should be granted. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). "A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *Id.* (quotation omitted).

Generally, evidence from which a jury could infer that a defendant has a criminal record is inadmissible. *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974). But when a reference to a defendant's prior criminal record "is of a 'passing nature,' or the evidence of guilt is 'overwhelming,' a new trial is not warranted because it is extremely unlikely 'that the evidence in question played a significant role in persuading the jury to convict.'" *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (quoting *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978)).

In *Haglund*, an officer testified that the defendant ate a note that stated that the defendant did not want to "get sent to St. Cloud again." 267 N.W.2d at 505. The supreme court concluded that reversal was not necessary because the prosecutor did not intentionally elicit the testimony and the defendant was not prejudiced because the reference was made in passing and the evidence of guilt was overwhelming. *Id.* at 506.

In *Manthey*, the defendant challenged two references to her custody status. 711 N.W.2d at 505. One statement was made by Manthey's daughter in response to the question, "So by your testimony for the last two years your mother had been answering

the phone?" she responded, "No. She's been in jail." *Id.* The second reference was information learned by a juror of Manthey's custody status. *Id.* at 506. The supreme court determined that "whatever prejudice was created was not so fundamental or egregious as to require a mistrial." *Id.*

Here, the reference was made in passing, was isolated, and did not reoccur. The officer merely repeated N.B.'s statement—there was no evidence that appellant had been in prison. And, because the jury acquitted appellant of all but one charge, it is unlikely that the statement played a significant role in persuading the jury to convict appellant. Therefore, the district court did not abuse its discretion in denying appellant's mistrial motion.

Evidence that Appellant "Did This to Someone Else"

Appellant also argues that the district court committed plain error when it allowed the victim to testify that she was told that appellant "did this to someone else." Appellant did not object at trial, but now argues that this is evidence of a prior bad act under rule 404(b), or *Spreigl* evidence. "[W]e may review and correct an unobjected-to, alleged error only if: (1) there is error; (2) the error is plain; and (3) the error affects the defendant's substantial rights." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).

The state concedes that there was error here regarding reference to a past offense because if appellant had sought to strike the testimony the district court likely would have granted that request. The state argues, however, that the error was not plain because it was not clear or obvious. *See State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002). But the

error was plain error because "[u]sually [plain error] is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). This statement referenced a prior crime. Evidence of other crimes or bad acts is characterized as *Spreigl* evidence. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). Under Minn. R. Evid. 404(b), *Spreigl* evidence is only admissible for such limited purposes as proving "motive, intent, knowledge, identity, absence of mistake or accident, or a common scheme or plan." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). There is a five-step process in order to admit *Spreigl* evidence:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

Id. at 685-86. None of the steps for the admission of *Spreigl* evidence were satisfied. Because the evidence of a prior crime was admitted without a proper analysis, this was plain error.

However, this plain error did not affect appellant's substantial rights. A plain error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case." *Griller*, 583 N.W.2d at 741. The statement was brief and it did not affect the jury because the jury found appellant not guilty of all of the charges except for the assault. When the victim stated that she was told that appellant "did this to someone else," she did not clarify what "this" pertained to. The only possible way that this evidence could have affected the jury is if the jury believed that "this" referred to the assault with the knife

and did not refer to any of the other charges. But it is not likely that the jury believed that the victim was solely referring to the assault.

Further, even if the three prongs of the plain-error test are met—plain error affecting substantial rights—this court may correct the error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 742. As the state points out, it was appellant's attorney whose question elicited the statement. It is, therefore, not necessary to correct this error, even if it did affect appellant's substantial rights, because it did not affect the fairness or integrity of the proceedings.

Sufficiency of the Evidence

Finally, appellant argues that the evidence is insufficient to sustain his first-degree-assault conviction. Appellant claims that the scar on the victim's arm is not a serious permanent disfigurement constituting "great bodily harm." The state contends that the district court appropriately gave the issue to the jury and that the jury correctly found that the victim's three-inch scar that required two layers of stitches and staples was a serious permanent disfigurement.

When considering a claim of insufficient evidence, this court's review is limited to an analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach the verdict that it did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008). 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). This court 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 crime charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A conviction for first-degree assault requires that a person assault another and inflict great bodily harm. Minn. Stat. § 609.221, subd. 1 (2006). The term "great bodily harm" is "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2006).

This court has concluded that long, visible, and permanent scars constitute "serious permanent disfigurement" within the meaning of the statute. In *State v. McDaniel*, this court upheld a first-degree-assault conviction when the victim's injuries included a highly visible six-centimeter scar on the front of the victim's neck and a two-thirds-of-an-inch raised scar on the victim's chest. 534 N.W.2d 290, 293 (Minn. App. 1995), *review denied* (Minn. Sept. 20, 1995). In *State v. Currie*, we affirmed a first-degree-assault conviction when the victims' injuries included numerous scars on their backs from whippings with an extension cord, even though the injuries were not life-threatening, because the whippings caused bleeding and life-long scars. 400 N.W.2d 361, 365-66 (Minn. App. 1987), *review denied* (Minn. Apr. 17, 1987). And in *State v. Anderson*, we upheld a first-degree-assault conviction based, in part, on the victim's injuries that included a scar that ran the length of her upper body despite the victim's testimony that she was considering having the scar removed by plastic surgery. 370 N.W.2d 703, 706 (Minn. App. 1985), *review denied* (Minn. Sept. 19, 1985). *Compare*

State v. Gerald, 486 N.W.2d 799, 802 (Minn. App. 1992) (holding that two half-inch scars in and behind the victim's ear, although disfiguring, were not permanently disfiguring because they were "relatively small" and in areas that are "not particularly noticeable").

The evidence, including photos of the victim's injury, is sufficient to support the jury's finding of great bodily harm. The laceration to the victim's arm was between three and four centimeters deep. The wound bled profusely and required two layers of stitches and staples. The resulting scar is three inches long and raised; it is located on her arm and will always be visible and noticeable.

Affirmed.