STATE OF MINNESOTA
IN COURT OF APPEALS
A11-993

State of Minnesota,
Respondent,

vs.

Keith Earl Tellinghuisen,
Appellant.

Filed May 7, 2012
Affirmed in part, reversed in part, and remanded
Harten, Judge[*]

St. Louis County District Court
File No. 69DU-CR-10-3135

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

Mark S. Rubin, St. Louis County Attorney, Jessica J. Smith, Assistant County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Crippen, Judge;***** and Harten, Judge.

[*] Retired judges of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HARTEN, Judge

Appellant challenges his convictions of second-degree assault and terroristic threats, arguing that he was denied his right to a fair trial by the cumulative effect of four trial court errors and that the evidence was insufficient to support either conviction; he challenges his sentence on the ground that he was erroneously sentenced for two offenses arising out of the same behavioral incident. Because we see no trial court errors and sufficient evidence supports both of appellant's convictions, we affirm them. We agree with both parties that appellant's sentence violates Minn. Stat. § 609.035 (2010); accordingly, we reverse it and remand for resentencing.

FACTS

On 19 September 2010, a police officer who responded to a 911 call made from a gas station was informed that a couple sitting across the street in a park had been involved with making the call. The officer approached the couple, appellant Keith Tellinghuisen and S.B. Appellant explained the call to the officer by saying that he and S.B. were arguing about an incident the previous evening, when appellant had been drunk at S.B.'s apartment and she had called the police.

After appellant left, S.B. told the officer that, earlier that day, appellant had squirted lighter fluid in her hair and threatened to set her on fire and that she had since washed her hair. She took the officer to her apartment and showed him a bottle of lighter fluid, some tobacco on the floor, a book of matches, and a torn shirt that appellant ripped off her.

Appellant was initially charged with false imprisonment, terroristic threats, and two counts of misdemeanor domestic assault (intent to cause bodily harm or death and intent to cause fear of bodily harm or death). Appellant was later additionally charged with second-degree assault. The first trial ended in a mistrial.

In the second trial, the jury found appellant guilty of second-degree assault, terroristic threats, and misdemeanor domestic assault (intent to cause fear of bodily harm or death), and not guilty of false imprisonment and misdemeanor domestic assault (intent to cause bodily harm or death). He was sentenced to 54 months' imprisonment for second-degree assault and 27 months for terroristic threats, both sentences to be served concurrently.

Appellant challenges his convictions, arguing that the district court erred (1) in overruling his objection to being impeached with five prior offenses; (2) in denying his request to sanction the state because its witnesses violated a sequestration order; (3) in failing to strike a testimonial reference to his possession of Oxycontin; and (4) in failing to give the jury a cautionary instruction. Appellant claims that the cumulative effect of these errors deprived him of a fair trial. He also asserts that insufficient evidence supported the findings that the lighter fluid appellant used to assault S.B. was a dangerous weapon and that appellant was guilty of terroristic threats.

D E C I S I O N

1. Cumulative Errors

A. Violation of Sequestration Order

After being granted a new trial because of a witness's inappropriate testimony, appellant told the district court that he had been advised of a potential sequestration violation at the original trial by two of the state's witnesses. Specifically, two officers had a very brief conversation about the testimony one of them had given. Appellant asked to have their testimony excluded as a sanction.

The sanction for such a sequestration violation is a new trial, but appellant had already been granted a new trial as a sanction for inappropriate testimony. Appellant offers no support for his view that this fact entitles him to select a different sanction, namely the suppression of the testimony of the officers who violated the sequestration order. Moreover, "[p]rejudice resulting from violation of a sequestration order must be shown" to entitle a defendant to relief. *State v. Erdman*, 383 N.W.2d 331, 334 (Minn. App. 1986), *review denied* (Minn. Apr. 24, 1986). The district court found there had been no prejudice to appellant, and he does not show or allege any prejudice.

The district court did not abuse its discretion in denying appellant's request for the suppression of the officers' testimony.

B. Impeachment by Appellant's Prior Convictions

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines

> that the probative value of admitting this evidence outweighs its prejudicial effect . . . .

Minn. R. Evid. 609(a)(1). The district court ruled that evidence of appellant's five prior convictions of kidnapping, burglary, terroristic threats, and assault was admissible for impeachment purposes. In light of this ruling, appellant chose not to testify.

A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as are other evidentiary rulings, under a clear abuse of discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). Whether the probative value of the prior convictions outweighs their prejudicial effect is a matter within the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985). The district court's decision will not be reversed absent a clear abuse of discretion. *Id.* at 209. The fact that a district court's ruling to admit evidence of prior convictions may influence a defendant not to testify is not necessarily an infringement of the defendant's constitutional rights. *State v. Gassler*, 505 N.W.2d 62, 68 (Minn. 1993). "*[A]ny* felony conviction is probative of a witness's credibility, and the mere fact that a witness is a convicted felon holds impeachment value. *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011) (holding that the admission of a prior, unspecified felony conviction for impeachment purposes under Minn. R. 609(a) was not an abuse of discretion) (emphasis in original).

Courts consider five factors in determining admissibility: (1) the impeachment value of the prior crime; (2) the date of the prior conviction and the defendant's history since that time; (3) the similarity of the past crime with the charged crime, with greater similarity equating to a greater prejudicial effect; (4) the importance of the defendant's

testimony; and (5) the centrality of the defendant's credibility. *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978). The district court considered all five factors and concluded that "the impeachment value of the prior crime cuts in favor of admissibility." Appellant argues that his conviction for fifth-degree assault was for a misdemeanor, not a crime, and evidence of it should not have been admitted. But evidence of appellant's other crimes—kidnapping, terroristic threats, and first-degree burglary—were adequate for the district court to conclude that evidence of his prior convictions had impeachment value.[1]

"Evidence of a conviction under this rule is inadmissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." Minn. R. Evid. 609(b). Although appellant's prior crimes occurred in 1996, his sentence did not expire until 2008. This fact favored admission of the evidence.[2]

The district court concluded that the third factor weighed against admissibility: appellant's prior crimes were similar to those with which he was charged. The district court also observed that "[the importance of [appellant's] testimony is unclear, that's kind of cutting against admissibility [but the centrality [of] credibility, to me, [is] incredibly important . . . ." and that, therefore, the fourth and fifth factors (importance of testimony and centrality of credibility) canceled each other out. Finally, the district court noted

[1] The district court actually said, "I will allow the impeachment with the prior felony crimes," so evidence of the fifth-degree assault conviction would not have been admitted.
[2] Appellant was sentenced, incarcerated, released, violated the conditions of his release, re-incarcerated to serve out the sentence, and released with conditions.

that "the whole person picture needs to be presented to the jury" and overruled appellant's objection to the impeachment evidence. This decision was not erroneous.

C. Failure to Strike Reference to Drug Possession

S.B. testified that, when she and appellant were drinking at her apartment, he said that he had a prescription narcotic drug, showed her a pill bottle, and put the bottle back in his pocket. Appellant did not object to the testimony. He argues now that the district court, sua sponte, should have struck this evidence as irrelevant and prejudicial and that its admission was plain error. But plain error review requires (1) an error that (2) was plain, and (3) affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Here, there was no error, much less plain error. A person may legally possess a prescription narcotic drug; S.B. did not testify that appellant's possession or use of it was illegal, and the jury was free to infer that it was a prescribed medication. Appellant's argument that possessing the drug was a bad act for which the jury may have been motivated to punish him lacks credibility: even if the district court's failure to strike the prescription drug testimony had been error, it would not have affected appellant's substantial rights because it did not affect the outcome of the case. *See id.* at 741 (the requirement that the error affect substantial rights is satisfied if the error was prejudicial and affected the outcome of the case).

Appellant relies on *State v. Strommen*, 648 N.W.2d 681, 690 (Minn. App. 1984) (reversing and remanding for a new trial in part because of a witness's testimony about the defendant kicking in doors and killing someone), but this reliance is misplaced. The

Strommen testimony that the defendant admitted killing someone cannot be equated with S.B.'s testimony that appellant showed her a bottle of prescription narcotic pills.

Appellant has not shown error in the district court's failure to strike sua sponte S.B.'s testimony on appellant's possession of the drug.

D. Cautionary Instruction on Events of July 18

The fourth error appellant alleges is the district court's failure to give a cautionary instruction concerning S.B.'s testimony about the events on July 18, the night before the assault. At that time, appellant became intoxicated, bothered a neighbor, and passed out on S.B.'s bed, whereupon she called the police to take him to detox. The evidence was admitted because it was part of the incident for which appellant was on trial, was relevant to his motive, and indicated his state of mind. Again, the failure to give the instruction was not objected to at trial; again, appellant argues that it meets the plain-error standard. Appellant concedes that caselaw indicates that the district court's failure to give such an instruction sua sponte "is not automatically reversible error" but argues that it was error here. He repeats his argument that the jury might have convicted him on the basis of his prior bad acts on the evening of July 18. But his acts on July 18 had no similarity to the acts of July 19 with which he was charged; again, even if the failure to give a cautionary instruction had been error, it would not have affected any substantial right of appellant.

The cases on which appellant relies do not support his claim. *See State v. Bauer*, 598 N.W.2d 352, 365 (Minn. 1999) (no plain error in failure to give limiting instruction in regard to relationship evidence); *State v. Williams*, 593 N.W.2d 227, 237 (Minn. 1999) (no error when district court failed to give limiting instruction because other factors

reduced the potential for unfair prejudice); *State v. Meldrum*, 724 N.W.2d 15, 21-22 (Minn. App. 2006) (no error when the defendant failed to object to the absence of a limiting instruction and other evidence presented at trial supported his conviction), *review denied* (Minn. Jan. 24, 2007).

"The constitutional right to a fair criminal trial does not guarantee a perfect trial." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992). Appellant may not have had a perfect trial, but none of the errors he alleges, individually or cumulatively, deprived him of his right to a fair trial.

2. Sufficiency of Evidence of Dangerous Weapon

Appellant was charged with second-degree assault for assault with a "dangerous weapon" under Minn. Stat. § 609.222 (2010). A dangerous weapon may be a flammable liquid, defined as "having a flash point below 100 degrees Fahrenheit and having a vapor pressure not exceeding 40 pounds per square inch (absolute) at 100 degrees Fahrenheit" or a combustible liquid, defined as "having a flash point at or above 100 degrees Fahrenheit." Minn. Stat. § 609.02, subd. 6 (2010). Appellant argues that the evidence was insufficient to show that the lighter fluid was a dangerous weapon because the jury was not instructed as to its flashpoint or vapor pressure.

In reviewing a claim of insufficient evidence, this court must assume "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). Circumstantial evidence must form "a complete chain . . . [that] leads so directly to the guilt of the defendant as to exclude, beyond a reasonable doubt, any reasonable inference other than guilt." *State v. Jones*,

516 N.W.2d 545, 549 (Minn. 1994). In assessing the inferences to be drawn from the "circumstances proved," the court examines whether there are "no other reasonable, rational inferences that are inconsistent with guilt." *State v. Stein*, 776 N.W.2d 709, 716 (Minn. 2010).

No evidence was presented to rebut the state's evidence that the lighter fluid with which appellant sprayed S.B. was a combustible liquid. The jury saw a photograph of the bottle labeled as lighter fluid and as a combustible liquid, and heard S.B.'s testimony that she and appellant had used the liquid from that bottle to barbecue, that her eye burned when the lighter fluid hit it, and that she could smell lighter fluid in her hair. The jury also heard a police officer testify that he opened the bottle and smelled the liquid to see if it was lighter fluid and it "smelled like what lighter fluid would smell like," that what he smelled was "pretty distinctly lighter fluid," and that the lighter fluid was "a very volatile substance."

Finally, we note that "detailed definitions of the elements to the crime need not be given in the jury instructions if the instructions do not mislead the jury or allow it to speculate over the meaning of the elements." *Peterson v. State*, 282 N.W.2d 878, 881 (Minn. 1979). Here, the jury was not required to speculate over lighter fluid being a dangerous weapon under the circumstances presented.

3. Sufficiency of Terroristic Threats Evidence

We will not disturb a 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).

One who "threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror" is guilty of terroristic threats. Minn. Stat. § 609.713, subd. 1 (2010). Threats may be physical acts or words; the critical question is "whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) (quotation omitted). After squirting S.B. with lighter fluid, appellant said, "[T]his time the cops come, you will be burning." When asked, "What did you think [appellant] meant by that?" S.B. answered, "That he was going to light my hair on fire." When asked, "How did that make you feel?" she answered, "Scared." She said that she could not leave her apartment because appellant "was walking around looking for a lighter," then "got a book of matches" and lit "a couple of them." Appellant's words that S.B. would be burning when the police arrived and his act in getting and lighting matches while she had lighter fluid in her hair would reasonably create apprehension in S.B. that appellant was going to set her hair on fire. *See id.*

Appellant relies on *Murphy* to argue that he did not threaten S.B. because his words and acts indicated that he planned to set her hair on fire at that moment, not at some future time. *See id.* at 916 ("The terroristic threat statute mandates that the threats must be to commit a *future* crime of violence which would terrorize a victim."). But appellant had already sprayed S.B. with lighter fluid when he spoke and lit the matches;

his statement that "this time" she would be burning when the police arrived was both a reference to her calling the police the previous night and a threat to light her hair if she called them again. Moreover, *Murphy* states that "[i]t is the future act threatened, as well as the underlying act constituting the threat, that the statute is designed to deter and punish." *Id*. Thus, the statute was designed to deter and punish both appellant's eventual setting of S.B.'s hair on fire and his words and act in spraying her with lighter fluid and lighting matches.

Appellant has not shown that the trial errors occurred or that they would not have prejudiced him if they had occurred. Sufficient evidence supported both his assault conviction and his terroristic threat conviction. We agree with the parties that appellant was improperly sentenced for two offenses that arose out of a single incident. We affirm the convictions, reverse the sentence, and remand for resentencing.

Affirmed in part, reversed in part, and remanded.