STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1531

State of Minnesota,
Respondent,

vs.

Sulaiman Mada Songa,
Appellant.

Filed September 4, 2012
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CR-10-19512

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Hooten, Judge.

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

ROSS, Judge

A jury found Sulaiman Songa guilty of aiding and abetting robbery after a trial during which a witness mentioned that Songa had "legal issues" and was on probation.

The district court had offered to give the jury a curative instruction rather than to declare a mistrial, but Songa declined. Songa appeals. Because the witness's objectionable statements were of a passing nature and the evidence of Songa's guilt was overwhelming, the district court did not abuse its discretion by refusing to declare a mistrial.

FACTS

Jacques Lafrenier's supposed friend and former roommate Sulaiman Songa contacted him in March 2010 and offered to sell him video and gaming equipment for $400. Lafrenier cashed a student loan check for $3,644. He placed $400 in his front right pocket and the rest in a bank envelope in his left pocket. He traveled from Duluth to Minneapolis to meet with Songa to examine the equipment.

After Lafrenier arrived in Minneapolis, he waited at a prearranged location for Songa. A sport utility vehicle pulled up with Songa in the backseat and another man, who identified himself as "Smurf," driving. Lafrenier got into the car assuming they were headed to see the equipment. After about 45 minutes, Smurf stopped the car, reached his left hand over the seat, and pointed a gun at Lafrenier's face.

Smurf told Songa to empty Lafrenier's pockets. Lafrenier resisted, but Smurf hit him several times in the head with the pistol, cutting his face. Songa took all of Lafrenier's money. Smurf told Lafrenier to get out and "[s]tart running or [Smurf] [was] going to shoot [him]." Lafrenier ran away. He eventually came upon a stranger, whose phone he borrowed to summon the police.

Officer David Campbell met Lafrenier. Lafrenier told Officer Campbell that he had been robbed by his former roommate. The officer noticed that Lafrenier had a cut

above his eye. The next day, police found Songa and discovered $2,845 in cash on his person. Lafrenier identified Songa from a photo line-up. Police verified Lafrenier's story that he was a college student and that he had cashed his student loan check.

Police learned that Songa had told Alena Howell of Eastside Neighborhood Services that he had been given $3,000 or $3,500 so he could move to New York. Howell recalled that only a week earlier, Songa had complained about not having any money.

The state charged Songa with aiding and abetting first-degree aggravated robbery in violation of Minnesota Statutes sections 609.245, subdivision 1, and 609.05 (2010). Before trial, Songa moved the district court to bar any evidence that he was on probation for another offense. Songa was specifically concerned about Howell's testimony because he was attending Howell's educational group as a condition of probation. The district court prohibited the state from eliciting testimony referencing Songa's probation or testimony that he was ordered to participate in her group.

During a three-day trial, the jury heard Howell testify that when she was having a conversation with Songa, "[h]e was agitated because there were some legal issues that he needed to resolve. And he did disclose that he did not have any money." During cross-examination, Songa's attorney sought to discredit Howell's testimony as inconsistent with a discharge report that she had prepared detailing her conversation with Songa. The state then addressed this impeachment attempt by demonstrating that Howell had not intended the report for testimonial purposes, asking Howell whether she had written the report "for use in court?" Howell responded, "Absolutely not. This discharge report was sent to—at the time, Probation, and that was it."

Songa's attorney then moved for a mistrial on the basis of Howell's testimony. He argued that Howell testified about prior bad acts and "interject[ed] unfair prejudice into [the] trial, and that would deprive [Songa] of a fair trial." The district court denied Songa's motion for a mistrial because it concluded that Howell's comments had been inadvertent because she was "stumbling for the word, where she sent the report to." The district court offered to give an instruction to the jury to disregard Howell's statements, but Songa's attorney declined because he thought it would highlight Howell's testimony.

The jury found Songa guilty of aiding and abetting first-degree aggravated robbery. The district court sentenced Songa to 48 months in prison and ordered him to pay restitution.

Songa appeals.

D E C I S I O N

Songa argues that the district court committed reversible error by denying his motion for a mistrial. We review the denial of a motion for a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). We see no abuse of discretion here.

Songa contends that Howell's testimony was impermissible evidence of his bad character. *See* Minn. R. Evid. 404(b) ("Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith."); *see also State ex rel. Black v. Tahash*, 280 Minn. 155, 157, 158 N.W.2d 504, 506 (1968) (holding that "evidence of a defendant's prior criminal activity is inadmissible in a criminal prosecution"). We need not address whether Howell's

statements were inadmissible character evidence because the state does not contest the assertion and we need not decide the issue to resolve this appeal.

Assuming the statements were inadmissible, Songa still must establish that the statements prejudiced his defense. The district court should deny a mistrial motion unless there is a reasonable probability that the outcome of the trial would be different had the event prompting the motion not occurred. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). When inadmissible statements are of a passing nature and the evidence of the defendant's guilt is overwhelming, the district court does not abuse its discretion by refusing to declare a mistrial. *See State v. Haglund*, 267 N.W.2d 503, 505–06 (Minn. 1978) (affirming conviction when purportedly inadmissible evidence was of a passing nature and admissible evidence of guilt was overwhelming); *State v. Farr*, 357 N.W.2d 163, 166 (Minn. App. 1984) (same). We must weigh the significance of the inadmissible statements against the weight of the admissible evidence of guilt.

The significance Howell's testimony that Songa had "legal issues" and that she sent her "discharge report" to "probation" was slight in the context of the overall evidence of Songa's guilt. Howell stated that Songa had "legal issues" in response to a question about a conversation about Songa's unfavorable financial circumstances the day before the robbery. She explained that she next spoke with Songa on a day soon after the robbery, when he disclosed that he had acquired $3,000 or $3,500. The focus of Howell's testimony was on Songa's financial condition before and after the robbery, not on the nature of the report. It was only in passing that Howell stated that Songa was "agitated" because he needed to resolve "some legal issues." Howell was not asked what those legal

issues were, and she did not elaborate or state that they were criminally oriented legal issues. Given the common relationship between *civil* legal issues and financial troubles, we are not persuaded by Songa's contention that Howell's reference emphasized to the jury some sort of *criminal* misbehavior.

Howell's mention of "probation" obviously regards criminal behavior, but it was never a subject of any testimonial emphasis. It was Songa's attorney who questioned Howell about a report that she had prepared recounting her conversation with Songa. He specifically asked her whether she knew if her report would be of interest to Sergeant McDonald. She responded "yes" but described the report as "a discharge from [the] program." On redirect examination, the state attempted to counter Songa's impeachment effort by allowing Howell to explain that she had not intended the report to be used in the context of the criminal action against Songa. She elaborated, "Absolutely not. This discharge report was sent to—at the time, Probation, and that was it. My report was not forwarded to any investigators, no." She did not testify that Songa was on probation for another crime, she did not elaborate on what she meant by "probation," and the state did not follow-up to inquire more about what she meant by "probation." In this context, we are convinced that the reference to "probation" was of a passing nature.

We are not persuaded otherwise by two cases relied upon by Songa—*State ex rel. Black v. Tahash* and *State v. Strommen*. In *Tahash*, a police officer testified that he had asked the defendant "when was the last time he saw [the alleged accomplice], and he stated that he had only seen him once since leaving Stillwater." 280 Minn. at 157, 158 N.W.2d at 505. The supreme court held that it had "no doubt that the officer's remark

constituted prejudicial error which provided grounds for a mistrial." *Id.* at 158, 158 N.W.2d at 506. But the court was not addressing the question we have today, which is whether a mistrial was required; it was considering whether the defense attorney had provided ineffective assistance by failing to ask for a mistrial. *See id*. And the court held that the attorney had not provided ineffective assistance. *Id*. In *Strommen*, one witness testified that the defendant had told her that he had killed someone, and the arresting police officer testified that he knew and was on a first name basis with the defendant from "prior contacts and incidents." 648 N.W.2d 681, 684–85 (Minn. 2002). On appeal, the supreme court remanded the case for a new trial because the comments were both irrelevant and prejudicial. *Id.* at 688–89. Unlike this case, where the statements are of a passing nature and did not disclose any details about the defendant's criminal history, the *Strommen* court specifically held that "the purpose in asking the offending questions was to illicit a response suggesting that Strommen was a person of bad character who had frequent contacts with the police." *See id*. at 688. And the court considered the statements in context with the case as a whole and concluded that they were "highly prejudicial" and "substantially affected the verdict." *Id*.

Here, by contrast, any prejudicial qualities in Howell's statements are offset not only by their passing nature but also by the overwhelming quality of the evidence of Songa's guilt on clearly admissible testimony. His former roommate, the victim, identified him as one of the robbers. A day after the robbery and several days after Songa complained of having no money, police found more than $2,800 in cash on him, consistent with the amount of cash stolen. Songa's statement to Sergeant McDonald that

the money came from job-income savings was unsupported by any financial or employment evidence, and it was flatly contradicted by his own statement to Howell that he had no money. His police statement was also inconsistent with his statement to Howell that someone had given him the money. The jury also learned that Officer Campbell had observed a cut over Lafrenier's eye, which was consistent with his story of being assaulted during the robbery, and that Sergeant McDonald had confirmed that Lafrenier had cashed a sizable check shortly before the robbery. Even without Howell's reference to probation, the trial evidence left no apparent room for the jury to reasonably doubt Songa's guilt.

The district court did not abuse its discretion by refusing to grant a mistrial.

Affirmed.