STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1851

State of Minnesota,
Respondent,

vs.

Michael Christopher Barta,
Appellant.

Filed August 19, 2013
Affirmed
Connolly, Judge

Rice County District Court
File No. 66-CR-11-2484

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

G. Paul Beaumaster, Rice County Attorney, Terence Swihart, Assistant County Attorney, Faribault, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Cleary, Judge; and Huspeni, Judge.*

* Retired judge 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

CONNOLLY, Judge

On appeal from his conviction of felony domestic assault, appellant argues that the district court abused its discretion by (1) admitting the audio recording of a witness's statement to police as a recorded recollection, and (2) denying appellant's motion for a mistrial following a witness's testimony regarding evidence previously ruled to be inadmissible. Because the district court did not abuse its discretion in either decision, we affirm.

FACTS

Appellant Michael Barta and M.M. were involved in a relationship throughout the summer of 2011. On the evening of July 23, M.M. was drinking at a bar in Faribault with three friends: T.K., K.D., and J.J. Although not on good terms, M.M. texted appellant and invited him to join her at the bar. Shortly after appellant arrived at the bar, he and M.M. got into an argument. When M.M. stood up to walk away, appellant allegedly hit her in the back of the head. Appellant immediately left the bar. Shortly thereafter, M.M. went home and called the police.

Respondent State of Minnesota charged appellant with one count of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2010) and one count of fifth-degree assault in violation of Minn. Stat. § 609.224, subd. 2(b) (2010).

While the case was pending, M.M. contacted the Rice County Attorney's Office and recanted her assault allegation against appellant. After her recantation, appellant was charged with burglary for allegedly breaking into M.M.'s house. M.M. then contacted

the Rice County Attorney's Office to rescind her recantation. Prior to trial, appellant filed a motion in limine to preclude any testimony about other crimes allegedly committed by appellant. Appellant also requested that respondent be required to instruct its witnesses not to discuss evidence determined to be inadmissible. The district court granted both motions.

At trial, M.M. testified that she and appellant got into an argument at the bar and that, as she stood up to walk away, appellant "hit [her] in the back of the head." She also testified that she had never been hit in the head that hard before and that the assault caused her to become dizzy. On cross-examination, counsel for appellant questioned M.M. regarding her recantation and later rescission of that recantation. Specifically, counsel asked her whether she contacted the prosecutor on December 22 after breaking-up with appellant the week before Christmas. M.M. responded, "[t]hat was after the second—that is after he broke in my house." Appellant immediately moved for a mistrial, arguing that M.M.'s statement was an inadmissible reference to an alleged burglary committed by appellant. The district court denied appellant's motion for a mistrial but offered to give a curative instruction. After a brief recess, appellant declined the offer.

T.K. testified that she did not see the alleged assault but that she observed M.M. "crying and holding the back of her head" shortly after the incident. K.D. testified that she was intoxicated on the date of the incident and therefore unable to recall witnessing any physical contact between appellant and M.M. Respondent attempted to refresh K.D.'s recollection by playing an audio recording of her statement to the police on the

night of the incident, but hearing the recording did not refresh her recollection. She could not even recall talking to the police officer on the date of the incident. Over appellant's hearsay objection, the court allowed the audio recording of the statement to be played for the jury as a recorded recollection under Minn. R. Evid. 803(5). In the recorded statement, K.D. told the police officer that she saw appellant "backhand" M.M., that M.M.'s "drink went over the bar," and that she then chased appellant out of the bar.

A bartender testified that she was turned away and did not witness the alleged assault. The bartender testified, however, that M.M.'s drink hit her in the back of her legs and that appellant then "took off," with a couple people, including K.D., going after him. The police officer, who interviewed M.M. at her house after the alleged assault and then T.K., K.D., and the bartender at the bar, testified that K.D. seemed to provide a coherent account of what happened. His conversation with her "seemed to flow much better than most of the other conversations" with other witnesses. Finally, J.J. testified that he was looking in the direction of appellant and M.M. at the time of the incident and that he did not see appellant hit M.M.

The jury found appellant guilty as charged. This appeal follows.

D E C I S I O N

I.

Appellant first challenges the district court's admission of the audio recording of K.D.'s statement to police as a recorded recollection under Minn. R. Evid. 803(5).

"Evidentiary rulings rest within the sound discretion of the district court and we will not disturb those rulings on appeal absent a clear abuse of that discretion." *State v.*

Stone, 784 N.W.2d 367, 370 (Minn. 2010). "A [district] court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted). An evidentiary error will only result in reversal of a conviction where the error substantially influences the jury's decision. *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). A hearsay statement may be either oral or written, Minn. R. Evid. 801(a), and is generally inadmissible unless it falls within an exception to the hearsay rule. Minn. R. Evid. 802.

It is undisputed that the audio recording of K.D.'s statement to police is hearsay. But appellant argues that the district court abused its discretion by determining that the recorded statement fell within the recorded-recollection exception to the hearsay rule, Minn. R. Evid. 803(5). Rule 803(5) defines a "recorded recollection" as, "[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." Therefore, in order for the audio recording of K.D.'s statement to police to be admissible as a recorded recollection under rule 803(5), respondent was required to show that (1) the recorded statement constitutes a "memorandum or record"; (2) K.D. had "insufficient recollection to testify fully and accurately"; (3) the statement was "made or adopted by [K.D.] when the matter was fresh

in [her] memory"; and (4) the statement "reflect[s] [K.D.'s] knowledge correctly." *See Stone*, 784 N.W.2d at 370-71 & n.1 (quotations omitted). Only the fourth requirement is at issue in this case.

As a preliminary matter, it appears that the district court did not consider whether the recorded statement was shown to "reflect [K.D.'s] knowledge correctly." The district court reasoned that the fourth requirement had been met because there was no issue concerning the proper transcription of the statement. But the fourth requirement of rule 803(5) pertains to the accuracy and trustworthiness of the statement, not how accurately it was transcribed.

Appellant argues that K.D.'s recorded statement was not admissible under rule 803(5) because it was not shown to reflect her knowledge correctly. Specifically, appellant calls into question the accuracy of K.D.'s statement because, due to her intoxication, she did not even remember giving it to the police officer. And because she could not remember speaking to the police officer, she was unable to testify that her statement more accurately reflected what she perceived and experienced on the date of the incident. But rule 803(5) is silent as to how the fourth requirement should be established. *See* 11 Peter Thompson, *Minnesota Practice* § 803.05 (4th ed. 2012) (noting that while the most persuasive evidence would be a witness's direct statement that he or she remembers making the record and accurately recorded his or her knowledge at that time, reliability has been established in other ways).

Here, while K.D.'s intoxication casts some doubt on her ability to relate to law enforcement what she saw, K.D. acknowledged that it was her voice on the recording,

and her statement was given to the police officer shortly after the alleged assault. Additionally, the police officer testified that K.D. seemed to provide a coherent account of what happened and that his conversation with her "seemed to flow much better than most of the other conversations" with other witnesses. Moreover, K.D.'s statement is consistent with the trial testimonies of M.M., T.K., and the bartender. This is sufficient to establish reliability and trustworthiness under our standard of review.

In sum, the record reflects that K.D.'s recorded statement "reflected [her] knowledge correctly," and therefore, the district court did not abuse its discretion in admitting it as a recorded recollection under rule 803(5). Because the district court did not abuse its discretion in admitting K.D.'s statement, we need not address appellant's argument that admission of the statement substantially influenced the jury's decision.

II.

Appellant next challenges the district court's denial of his motion for a mistrial following M.M.'s statement on cross-examination that appellant "broke in [her] house."

We review a district court's denial of a motion for a mistrial for abuse of discretion. *State v. Spann*, 574 N.W.2d 47, 52 (Minn. 1998). "The [district court] is in the best position to determine whether an outburst creates sufficient prejudice to deny the defendant 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). When analyzing whether potentially prejudicial but inadvertent testimony has deprived a defendant of the

right to a fair trial, the relevant factors this court considers include: "the nature and source of the prejudicial matter, the number of jurors exposed to the influence, the weight of evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice." *State v. Hogetvedt*, 623 N.W.2d 909, 914 (Minn. App. 2001) (quoting *State v. Cox*, 322 N.W.2d 555, 559 (Minn. 1982)), *review denied* (Minn. May 29, 2001).

During cross-examination, M.M. was asked, "then on December 22, or, you know, shortly before Christmas, you again contacted . . . the County Attorney's Office. Is that right?" She responded, "[t]hat was after the second—that is after he broke in my house." Prior to trial, the district court precluded any testimony about past misconduct or other crimes as inadmissible *Spreigl* evidence. *See* Minn. R. Evid. 404(b). Therefore, M.M.'s statement was inadmissible. But the district court denied appellant's motion for a mistrial.

Appellant argues that a mistrial was warranted because M.M.'s statement was an "irrelevant and highly prejudicial reference to [an] alleged burglary by appellant." Specifically, appellant argues that M.M.'s statement likely impacted the jury's view of the evidence because it allowed the jury to conclude that, if appellant was capable of burglarizing M.M.'s home, he was certainly capable of committing assault. Appellant also contends that M.M. wanted appellant sent to prison and therefore mentioned the burglary as part of a calculated strategy designed to prejudice him in the eyes of the jury. We disagree.

M.M.'s statement did not suggest that appellant was charged with a crime. And, even though the statement was made by M.M., the alleged victim in this case, there is no evidence that it was intentional. When the judge reminded M.M. not to make any references to pending criminal matters after she made the statement, M.M. responded, "That is pretty much how I know my dates is from when things happened." Further, the statement was made in response to a question by appellant's attorney, not the prosecution. *See State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003) ("A reviewing court is much more likely to find prejudicial misconduct when the state intentionally elicits impermissible testimony."). And the statement was not stressed or expounded upon by the prosecutor. In sum, M.M.'s statement was a single, unintended response to a question on cross-examination that does not warrant a new trial. *See State v. Hagen*, 361 N.W.2d 407, 413 (Minn. App. 1985) (noting that unintended responses under unplanned circumstances ordinarily do not require a new trial), *review denied* (Minn. Apr. 18, 1985).

Moreover, despite appellant's argument that M.M.'s statement "tipped the scales toward conviction," there is sufficient evidence in the record to support the jury's verdict. M.M. testified that appellant hit her, K.D. told the police shortly after the incident that she saw appellant hit M.M., and the police officer testified that K.D. seemed to provide a coherent account of what happened. It is more likely that the jury based its decision on the testimony of these three witnesses as opposed to M.M.'s brief comment on cross-examination.

Finally, the district court's failure to give a curative instruction does not warrant a new trial. After considering the district court's offer to provide a curative instruction during a recess, counsel for appellant decided not to request one. *See Ture v. State*, 353 N.W.2d 518, 524 (Minn. 1984) (holding that new trial was not warranted where defendant declined to have district court give curative instruction because it would only highlight the testimony). As in *Ture*, it can be inferred that appellant declined a curative instruction for strategic reasons (e.g., to avoid drawing further attention to the statement). *See Manthey*, 711 N.W.2d at 506 (noting that a curative instruction can have the effect of drawing further attention to an allegedly prejudicial statement). Therefore, the absence of a curative instruction does not warrant a new trial.

After careful review of the evidence, we conclude that there is no reasonable possibility that M.M.'s comment affected the jury's verdict given the nature of the statement and the weight of evidence supporting conviction. Therefore, the district court did not abuse its discretion in denying the motion for a mistrial.

Affirmed.