STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1708

State of Minnesota,
Respondent,

vs.

Troy Ray Gibson,
Appellant.

Filed September 9, 2013
Affirmed
Worke, Judge

Becker County District Court
File No. 03-CR-11-2357

Lori Swanson, Attorney General, Robert A. Plesha, Assistant Attorney General, St. Paul, Minnesota; and

Michael D. Fritz, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Worke, Judge; and Smith, 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-criminal-sexual-conduct conviction, arguing that the district court erred by refusing to (1) grant a mistrial after a deliberating juror heard a radio report that appellant had "priors" and repeated the information to the jury; and (2) question the entire jury at the *Schwartz* hearing. We affirm.

D E C I S I O N

Mistrial denial

Appellant Troy Ray Gibson argues that he should have been granted a mistrial after the jury informed the district court that it had been exposed to potentially prejudicial information. The district court stated that appellant "waived his claim to a mistrial because he failed to bring a motion for mistrial when he became aware of the potential misconduct." This court reviews the denial of a motion for a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). "[A] mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different." *State v. Spann*, 574 N.W.2d 47, 53 (Minn. 1998).

During appellant's jury trial on a charge of first-degree criminal sexual conduct, the deliberating jury sent the district court a note that read: "[One] of our jurors had heard on the radio something about [appellant] having a prior[.] It was inadvertent [and] was mentioned to [the] jury!" The note was signed by the jury foreperson. The district court suggested reading a curative instruction, and appellant agreed to the curative instruction and to proceed with trial. Appellant's attorney stated that "th[e] curative instruction

would be appropriate at this point. It may give rise later, depending on what the verdict is, to further exploring to determine whether or not there is grounds for a new trial, but I don't see the harm in doing this at this point." The district court read the following curative instruction:

> [T]he court has received a note from your foreperson. And as a result, the [c]ourt will give you some additional instruction concerning your deliberations.
>
> The only information that you may consider in reaching your verdict is evidence that was admitted during the course of this trial. Anything that you may have heard or seen elsewhere must not be considered and shall play no part in your deliberation or verdict. Evidence received at trial has been determined to be admissible under our rules and has been subject to challenge through cross-examination. Information obtained outside of the courtroom has not gone through this process and therefore, may not properly be considered by you.

After the jury found appellant guilty of first-degree criminal sexual conduct, he moved for a mistrial.

This court has held that the failure to move for a mistrial as a trial tactic precluded a claim for error on appeal. *State v. Yant*, 376 N.W.2d 487, 490-91 (Minn. App. 1985), *review denied* (Minn. Jan. 17, 1986). In *Yant*, two jurors fell asleep during trial. *Id.* at 489-90. Although aware of the sleeping jurors, the defendant did not move for a mistrial. *Id.* Following his conviction, Yant appealed claiming error due to the sleeping jurors. *Id.* at 490. This court stated that the appellant could not gamble on a verdict in his favor, but then object when found guilty. *Id.* at 491; *see also State v. Collins*, 276 Minn. 459, 475, 150 N.W.2d 850, 861 (1967) (stating that "[i]f, having knowledge of the alleged

misconduct, defendant chooses nevertheless to proceed with the trial to completion, it must be held that he has waived the irregularity").

Appellant chose a curative instruction rather than moving for a mistrial after becoming aware of the alleged misconduct. His attorney pointedly stated that appellant intended to wait for a verdict before determining whether there is a basis for a mistrial. Similar to *Yant*, appellant's failure to move for a mistrial after learning of the alleged misconduct was a trial tactic, which precludes his claim of error on appeal. *See* 376 N.W.2d at 490-91.

"Under the invited error doctrine, a party cannot assert on appeal an error that he invited or that could have been prevented at the district court." *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). We may, however, correct an invited error if it meets the plain-error test. *See State v. Evans*, 756 N.W.2d 854, 867 (Minn. 2008) (stating that an exception to the "invited error doctrine" allows an appellate court to correct an error that satisfies the plain-error test). This court may review unobjected-to errors if: (1) there is error, (2) the error is plain, and (3) the error affects substantial rights. *Carridine*, 812 N.W.2d at 142. Appellant bears the burden of establishing these three factors; he bears a "heavy burden" to show that an error affected his substantial rights. *Id.* at 143; *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002); *see also State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998) (stating that whether an error affected substantial rights depends on whether the error was prejudicial and affected the outcome of the case). If appellant establishes the three factors, this court considers: "whether the error should be addressed to ensure

fairness and the integrity of the judicial proceedings." *Carridine*, 812 N.W.2d at 142 (quotation omitted).

Because appellant agreed to the curative instruction, the error here is that the instruction failed to remedy the potential prejudice of the extrajudicial information. The district court instructed the jury to consider only the evidence that was admitted during the trial and to disregard anything that was heard elsewhere. This is not a misstatement of the law. *See State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) ("An instruction is in error if it materially misstates the law."). Thus, appellant failed to show error, which is the first requirement of the plain-error test. Because appellant failed to meet the first prong of the plain-error test, we decline to consider the invited error.

***Schwartz* hearing**

Appellant also challenges the manner in which the district court conducted the *Schwartz* hearing, arguing that the district court should have examined more than just the jury foreperson. *See Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960) (establishing procedure in which district court may permit examination of jurors to assess potential misconduct). The district court's decision to grant or deny a *Schwartz* hearing to investigate claims of misconduct is reviewed for an abuse of discretion. *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998). "[T]he manner in which a Schwartz hearing is conducted rests within the sound discretion of the [district] court." *State v. Olkon*, 299 N.W.2d 89, 109 (Minn. 1980) (concluding that the district court did not abuse its discretion by calling only six of twelve jurors to investigate

alleged misconduct). Appellant bears the burden of demonstrating actual misconduct and prejudice at the *Schwartz* hearing. *State v. Kelley*, 517 N.W.2d 905, 910 (Minn. 1994).

The district court asked the foreperson to explain what the juror who heard the information about appellant did. The foreperson stated that the juror mentioned that during a break in deliberations, she went to her vehicle and heard something on the radio about appellant "and some priors. She didn't say what the priors were." The foreperson stated that only one juror heard the radio report. The foreperson stated that the juror mentioned multiple priors, but that she did not indicate the types of priors. The foreperson opined that a "prior" means "some kind of offense, could be anything from a speeding ticket to the trial that we were doing or something else." The district court asked if the juror indicated whether the "prior" was a charge or a conviction. The foreperson stated that he did not remember—only the word "prior" stuck in his mind.

The extent of the extrajudicial information was that appellant had priors, which only one juror heard and inadvertently repeated to the jury. The foreperson authored the note; thus, he had knowledge to testify regarding what prompted the writing of the note. Perhaps it would have been better practice for the district court to question the juror who heard the radio report, but based on the foreperson's testimony, there was no indication of misconduct; thus, it was unnecessary to examine that juror. Appellant did not demonstrate misconduct; therefore, the district court was within its discretion to conduct the *Schwartz* hearing in the elected manner.

Affirmed.