STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1284

State of Minnesota,
Respondent,

vs.

Maksud Mahbub,
Appellant.

Filed September 9, 2013
Affirmed
Worke, Judge

Ramsey County District Court
File Nos. 62-CR-10-3372, 62-CR-10-3373, 62-CR-10-3374, 62-CR-10-3375

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Tina Liebling, Rochester, Minnesota; and

Stephen L. Richards, Chicago, Illinois (for appellant)

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

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

WORKE, Judge

Appellant seeks reversal of four criminal-sexual-conduct convictions, claiming erroneous admission of evidence, prosecutorial misconduct, erroneous response to a jury

question during deliberations, and ineffective assistance of counsel. He also asserts erroneous denial of his request for a postconviction evidentiary hearing. We affirm.

FACTS

Appellant Maksud Mahbub agreed to a joint trial on five criminal complaints alleging criminal sexual conduct involving separate victims.[1] The jury heard the following testimony.

A.H.

A.H. testified that on the evening of January 6, 2008, she visited the Twin Cities to go bar-hopping with others via a rental bus. A.H. drank "[m]ostly beer" and had consumed "[a]bout six drinks or so" by midnight. When A.H. was accidentally left behind at a bar, appellant approached her, told her that he worked with her friend, and enticed her to go with him to his townhouse by stating that the after-bar party was at his house.

Appellant drove A.H. to his townhouse, but when they arrived, no one else was there. Appellant told A.H. that the others would be coming soon. Feeling apprehensive, A.H. went upstairs to get away from appellant, sat down on a bed, and passed out. When A.H. awoke, appellant was "touching [her] breasts and [her] genital area" over her clothes. A.H. yelled at appellant, asked him what he thought he was doing, and insisted that he return her to her friends. Her purse, phone, money and identification were

[1] In exchange for joinder of the five complaints, the state agreed not to refer to several uncharged incidents at trial.

missing, and appellant did not call a cab for A.H. until she made numerous requests for him to do so.

During cross-examination, A.H. admitted that her written statement merely described appellant "grabbing and rubbing" her body, but on redirect A.H. clarified that her statement was very general and that she described the incident in more detail when she was interviewed by law enforcement. A.H. did not report the assault until the Ramsey County Sheriff's Department contacted her in March 2010.

Appellant testified that he invited A.H. to an after-bar party at his townhouse but denied that he assaulted her, and he stated that he called her a cab for her immediately when she realized that there was no party and wanted to leave.

C.F.

C.F. testified that on July 3, 2009, she and some friends went downtown Minneapolis. She drank "[a]t least four shots, probably four beers, and two or three mixed drinks" during the evening. Around 1:00 a.m., C.F. stayed at a bar to finish her drink while her friends went to another bar. At 1:45 a.m., C.F. phoned her friends, but they did not answer. She started walking toward an ATM to get money for a cab. In reply to her question about the location of the nearest ATM, appellant told her to follow him, but instead he took her to a parking garage and forced her into his car.

Appellant took C.F. to his townhouse. While C.F. was talking to a friend on her phone, appellant took her phone away and removed the battery. Appellant refused to let her leave and took her upstairs. C.F. sat down on a bed and "must have passed out"; when she next awoke, her pants were unbuttoned and unzipped, and appellant had his

hands up her shirt, touching her breasts. C.F. told appellant to stop, ran downstairs and tried to leave, but the door was locked. C.F. screamed and yelled at appellant, threatened to call police, and struck him until he called a cab for her. During her testimony, C.F. identified a cell-phone battery found at appellant's townhouse that looked like the one that had been taken from her phone.

During cross-examination, C.F. admitted that she did not tell police that she had been sexually assaulted. But on redirect, C.F. stated that she was not advised by police of specific definitions of sexual assault or criminal sexual conduct and that to her, sexual touching meant "hav[ing] sex." She did not report the assault until the Ramsey County Sheriff's Department contacted her in March 2010.

Appellant testified that when he saw C.F. she was looking for a ride home. He told her he could not give her a ride home but that she could come to his house if she wanted to, and she agreed. When they arrived at his house, she immediately wanted to leave, so he gave her his phone and she called her boyfriend. He denied touching her sexually.

T.O.

T.O. testified that on August 30, 2009, she and two friends went downtown Minneapolis. T.O. consumed "a great deal," including about ten drinks of tequila and beer. T.O. went to the downstairs bar area, and the next thing she remembered, she was "on some guy's couch. He was beside me and my pants were undone and he had his hand going down my pants on top of my underwear." She "freak[ed] out" and began yelling at him, and he told her that she had come to his house for a party, but nobody else

was there. She demanded her purse and cell phone and started throwing things; eventually, he went to the kitchen and pulled her purse and cell phone out of a drawer and returned them to her. She continued to yell at him until a cab arrived. T.O. identified appellant at trial. T.O. did not make a statement about the incident until the Ramsey County Sheriff's Department contacted her in March 2010.

Appellant testified that he found T.O. near a bar at about 3:30 a.m., that she seemed lost and was looking for a ride home, and that she "agreed to come home with me." After they kissed for a while, she wanted him to call a cab for, which he did. He denied touching her vagina.

J.H.

J.H. testified that on September 4, 2009, she and a friend went downtown Minneapolis. She drank two shots and two beers at one bar, had another drink at a different bar, and had two beers and two shots at a third bar. J.H. lost her friend around 11:30 p.m., so she contacted a co-worker for a ride home. The co-worker agreed to come from Cottage Grove to give J.H. a ride.

J.H. waited outside, but it was cold, so she went back inside. She could not remember anything after that; when she awoke, she was in appellant's car. She attempted to use her phone, but it would not work; appellant told her that she could use his phone when they got to his house. When they arrived at appellant's house, he would not give J.H. a phone, and she got upset and started ransacking his house for a phone. When J.H. started setting appellant's mail on fire and raising a commotion, he agreed to take her

home. They set out for her house, but ended up in a parking lot before returning to appellant's house.

Appellant took J.H. upstairs and she laid down because she did not feel well. When she next awoke, she was naked, and appellant was trying to climb on top of her. Although she kicked him off twice, he eventually penetrated her with his penis while holding her hands down. As this happened, her "body went numb," and she awoke with appellant lying next to her and the sun coming up. J.H. was upset and accused appellant of raping her. She left in a cab, taking a piece of appellant's mail with her because she did not know his name or the location of his townhouse and wanted to be able to provide that information to police.

On September 7, J.H. discovered that the battery was missing from her cell phone, and she found it in a zippered compartment of her purse; she realized that "something terrible had happened" and decided to contact police. The piece of mail that J.H. took from appellant's house and J.H.'s underwear, which was discovered at appellant's house, were received into evidence at trial.

Appellant testified that he took J.H. to his house when they could not find her house. He denied taking a battery from her cell phone or sexually assaulting her. He testified that J.H. slept in his bedroom, and he found her underwear there after she left.

The jury also heard testimony from K.A., who was the fifth complainant; the investigating officers; the nurse who examined J.H.; a communications manager for a cab company; a telephone company records custodian; a Bureau of Criminal Apprehension

chemist; a forensic toxicologist; J.H.'s co-worker; a neighbor of appellant's; and a private investigator.

The jury found appellant guilty of one third-degree and three fourth-degree criminal-sexual-conduct offenses, and acquitted appellant of the separate charge involving K.A. The district court imposed sentences of 24 months, 36 months, and 60 months on the fourth-degree offenses, and at appellant's request all were executed to run concurrently with the 120-month executed sentence on the third-degree offense. Appellant directly appealed, but this court stayed the appeal to permit appellant to seek postconviction relief. The district court denied appellant's postconviction petition and his request for an evidentiary hearing. This court then dissolved the stay of appeal.

D E C I S I O N

Admission of physical evidence

"[A district] court's admission of physical evidence will be upheld unless it constitutes an abuse of discretion." *State v. Zornes*, 831 N.W.2d 609, 634 (Minn. 2013); *State v. Hanks*, 817 N.W.2d 663, 667 (Minn. 2012) (stating "we will not lightly overturn a district court's evidentiary ruling"). In general, relevant evidence is admissible at trial. Minn. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. With regard to physical evidence, objects that are connected to the crime scene or the investigation are admissible, and "the fact that the objects are not directly tied to a defendant only affects the weight of the evidence." *Zornes*, 831 N.W.2d at 624; *State v. Olson*, 436 N.W.2d

817, 820 (Minn. App. 1989) ("The lack of an absolute connection between the object introduced into evidence and the alleged crime does not affect the admissibility of the challenged evidence, but only its weight."), *review denied* (Minn. Apr. 26, 1989).

Appellant does not cite to *Zornes*, but he argues that various items found at his home, including three pairs of women's underwear, a bra, three cell-phone batteries of various types, a memory stick adapter, seven cell phones, and other innocuous items, were erroneously admitted into evidence at trial because they were not probative and were prejudicial. All of these items were found at appellant's residence, were part of the state's criminal investigation, and were relevant to corroborate the victims' versions of the assaults. Moreover, because each victim identified appellant, gave a compelling and detailed account of her sexual assault, and the accounts of the assaults were very similar to each other, any error in admission of this evidence was harmless. *See State v. Smith*, 825 N.W.2d 131, 138 (Minn. App. 2009) (concluding that erroneous admission of evidence that defendant was carrying a box-cutter at the time of his arrest on an unrelated charge was harmless beyond a reasonable doubt), *review denied* (Minn. Mar. 19, 2013).

Appellant also asserts that some of the items constituted evidence of appellant's other bad acts that were improperly admitted at trial without notice. *See* Minn. R. Evid. 404(b) (codifying *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (Minn. 1965)). But the questionable items were facially innocuous and did not demonstrate any bad act on the part of appellant. *See Ture v. State*, 681 N.W.2d 9, 16-17 (Minn. 2004) (ruling that evidence of defendant's collecting information on various women, unrelated to female murder victim, was not *Spreigl* evidence because "there is nothing per se wrong with

collecting information on women"); *see also Spreigl*, 272 Minn. at 497, 139 N.W.2d at 173 (stating that bad acts or "[o]ffenses which are part of the immediate episode for which [a] defendant is being tried" are not *Spreigl* evidence). Thus, the items were not *Spreigl* evidence.

Prosecutorial misconduct

Appellant alleges three instances of prosecutorial misconduct, and all three occurred without objection. This court reviews unobjected-to claims of prosecutorial misconduct under a modified plain-error test. *See State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011) (applying plain-error analysis to unobjected-to claim of alleged prosecutorial misconduct). For prosecutorial-misconduct claims, appellate courts "use[] a modified substantial-rights test that places the burden of persuasion on the state to demonstrate that the alleged misconduct did not affect the defendant's substantial rights." *Smith*, 825 N.W.2d at 139. An appellate court will "reverse only if the misconduct, when considered in the light of the whole trial, impaired the defendant's right to a fair trial." *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006).

First, appellant argues that the prosecutor committed misconduct by eliciting testimony from Larry Mattson, appellant's neighbor. Mattson testified that he and appellant went to Minneapolis bars together on two occasions, and Mattson observed appellant following intoxicated women and offering them rides. The prosecutor argued during closing that appellant "was a man with a plan. He was on a mission. You heard about this mission from everyone, from his neighbor all the way to every single woman that he encountered."

Appellant cannot satisfy the plain-error test. "In general it is misconduct for a prosecutor to knowingly offer inadmissible evidence for the purpose of bringing it to the jury's attention." *State v. Smallwood*, 594 N.W.2d 144, 150 (Minn. 1999). Here, appellant mischaracterizes some of Mattson's testimony as *Spreigl* evidence, but it was not evidence of a crime or bad act, and appellant did not show that it was inadmissible under any other legal theory. *See, e.g.*, Minn. R. Evid. 406 (permitting admission of "[e]vidence of the habit of a person . . . [as] relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice").[2] Under these circumstances, the prosecutor's reference to this evidence in closing was not plain error. We also conclude that any prosecutorial misconduct in referring to this evidence did not affect appellant's substantial rights in light of the strikingly similar and consistent testimony from the victims.

Next, appellant argues that the prosecutor committed misconduct by distorting the state's burden of proof. At closing, the prosecutor made the following statement about the burden of proof:

> [Y]ou must consider now that you've heard all the evidence whether or not the State has proved this case beyond a reasonable doubt. Reasonable doubt is based on reason, common sense. It's not capricious doubt. It's not beyond all doubt. It is doubt based upon reason. The kind of information that you use to conduct important affairs. Not

[2] Appellant argues that the evidence was impermissible character evidence, but character evidence is defined as a "generalized description of one's disposition, or of one's disposition in respect to a generalized trait," which is different from the definition of habit, which is "one's regular response to a repeated specific situation." Minn. R. Evid. 406, 1989 comm. cmt. (quoting Charles T. McCormick, *McCormick on Evidence* § 195, at 462 (Edward W. Cleary, et al. eds., 2d ed. 1972)).

> hard affairs. Not stuff like, well, should I marry this person or should I – should I –should I take my – my – aging relative off life support. It's not that kind of doubt. It is reason such as when you get the information as to where you want to live, what school district do you want your kids to go to. Those types of things that you can get facts and make a decision based upon facts.

The district court had also accurately instructed the jury on the state's proper burden of proof:

> Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, and it does not mean beyond all possibility of doubt.

The prosecutor's statements referring to "important affairs" rather than "most important affairs," and proposing that "important" affairs were not "hard" affairs did alter the burden of proof, and the examples given to demonstrate the burden of proof could have been misleading. But the prosecutor made three other references to the proper burden of proof during closing argument, and the prosecutor's argument, as a whole, was not misleading. *See State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) (stating that court looks to "closing argument as a whole, rather than just selective phrases or remarks that may be . . . given undue prominence"). Further, during its closing, the defense challenged the weaknesses of the prosecutor's isolated incorrect reference and emphasized the proper burden of proof. On these facts, the prosecutor's statements did not constitute plain error because they were not sufficiently incorrect and did not deny appellant a fair trial. *See State v. Vue*, 797 N.W.2d 5, 14 (Minn. 2011) (holding that

prosecutor's alleged misstatement of the burden was not so "plain or obvious" as to constitute plain error, but reminding prosecutor to "adopt some definition which has already received the general approval of the authorities"). We take this occasion, once again, to caution prosecutors to adhere closely to the precise language on the proper burden of proof during their closing arguments. *See id.* at 14 (cautioning prosecutors not to misstate the burden of proof and reminding them to "adhere as closely as possible to the normal statement of the presumption of innocence").

Finally, appellant argues that the prosecutor should not have argued to the jury that the victims may have been drugged. The state offered no scientific evidence that the victims were drugged, but K.A. testified that she thought that she had been drugged, and other victims testified to experiencing sensations consistent with being drugged. During closing, the prosecutor referred to this evidence, and summarized it along with the conditions of other victims, which the prosecutor described as "[d]runk, intoxicated, drugged even." The prosecutor specifically denied accusing appellant of drugging his victims, stating, "I make this one point about [K.A.], there's been no – no allegation, not by [K.A.], and certainly not anything here, indicating that [appellant] was the one [who] drugged her." The prosecutor did not commit misconduct during her closing argument by referencing K.A.'s testimony about feeling drugged.

Jury questions during deliberations

Appellant next claims that the district court erred by refusing to answer the following questions from the jury during deliberations: (1) "Does being 'very drunk' mean by legal definition you are 'physically helpless[?]'" and (2) "Does being

'intoxicated' mean by legal definition you are 'physically helpless?'" The district court interpreted the questions to mean that the jury was "asking for the court to take some facts and apply [them] to the legal definition, and that's their job." The court called in the jury and told them that "deciding questions of fact is your exclusive responsibility." The court also reread to the jury the following legal definition of physically helpless: "A person is physically helpless if she is asleep or not conscious, unable to withhold consent or withdraw consent because of a physical condition, or unable to communicate non-consent, and the condition was known or reasonably should have been known to [appellant]."

The district court may "give additional instructions," "reread portions of the original instructions," or "tell the jury that the request deals with matters not in evidence or not related to the law of the case" in response to a question submitted by a jury during deliberations. Minn. R. Crim. P. 26.03, subd. 20(3)(a)-(d). The considerable latitude that the district court holds in selecting jury instructions applies to responses to jury questions during deliberations. *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009). Here, the district court properly instructed the jury on the law and applied its discretion to redirect the jury to its duty and the applicable law. The district court's response to the jury questions was not an abuse of discretion. *See State v. Laine*, 715 N.W.2d 425, 434 (Minn. 2006) (stating that district court applies discretion in responding to a jury question during deliberations). We reject appellant's argument that by not answering the jury's questions, the district court implied that the answers to the questions were "yes." By

giving neither a positive nor a negative answer to the questions, the district court did not suggest either a positive or a negative response to them by the jury.

Effect of cumulative errors

Appellant argues that the cumulative effect of trial errors had a "synergistic effect" that denied him a fair trial. "[I]n rare cases, . . . the cumulative effect of trial errors can deprive a defendant of his constitutional right to a fair trial when the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Davis*, 820 N.W.2d 525, 538 (Minn. 2012) (quotation omitted). Our review of the trial record demonstrates that appellant was not denied a fair trial because of the alleged cumulative effect of trial errors. To the contrary, the record shows that appellant received a fair trial; many of his asserted trial errors were not errors, and any errors were either harmless or not plain error. This case does not constitute the "rare" case that would merit reversal for the cumulative effect of trial errors.

Postconviction claims

By postconviction petition, appellant argued that his trial counsel was ineffective because he failed to request a *Franks* suppression motion during trial when it became apparent that a police investigator's affidavit supporting a search-warrant application contained many inaccuracies.[3] "[A] search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of

[3] Appellant had moved pretrial to suppress the cell phones and a computer that were seized by police, on the basis that they were seized without probable cause; the district court excluded evidence of the computer but declined to suppress the other evidence.

fact material to the findings of probable cause." *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (quotation omitted); *accord Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 2684 (1978). A misrepresentation is material if, when the misrepresentation is omitted from the search-warrant application, probable cause to issue the search warrant no longer exists. *State v. Mems*, 708 N.W.2d 526, 532 (Minn. 2006). Appellate review of a district court's denial of postconviction relief, "including denial of relief without an evidentiary hearing," is under the abuse-of-discretion standard. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013).

"To establish ineffective assistance of counsel, the petitioner must show both that: (1) his trial attorney's performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that, but for his attorney's errors, the outcome of the trial would have been different." *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013); *see Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). An appellate court "need not address both prongs if one is determinative." *Hawes*, 826 N.W.2d at 783.

Appellant cannot meet the second prong of the *Strickland* test. By agreeing to join five criminal complaints at trial in exchange for exclusion of any *Spreigl* evidence, appellant set the stage for allowing the jury to hear five different victims tell strikingly similar versions of how appellant picked them up at bars late at night, took them to his home when they were inebriated, disabled their phones, and sexually assaulted them when they were sleeping, passed out, or incapacitated. Even without any of the corroborative physical evidence obtained in the search warrant, there was little

probability that the outcome of the trial would have been different without admission of this evidence.

Further, with regard to the first *Strickland* prong, the attorney's decision was strategic and therefore did not fall below the objective standard of reasonable representation. *Nicks*, 831 N.W.2d at 516 (stating "contentions that 'relate to trial strategy,' and not to 'errors in professional performance,' do not fall within the scope of appellate review for effective assistance"). We also note that appellant's attorney moved pretrial to suppress this evidence for lack of probable cause and at trial made a strong credibility challenge to the investigator's testimony by highlighting all of the deficiencies and inaccuracies in the investigator's search warrant application. The attorney's performance was reasonable.

Appellant also argues that the district court abused its discretion by refusing to order an evidentiary hearing on his postconviction claim that his trial counsel was ineffective because he failed to adequately investigate whether A.H.'s ex-boyfriend was available to testify to corroborate her allegation of nonconsensual sexual contact. *See Davis v. State*, 784 N.W.2d 387, 390 (Minn. 2010). To obtain a postconviction hearing on an ineffective-assistance claim, the petitioner "is required to allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test announced in *Strickland*." *Id.* at 504. A postconviction petitioner is entitled to an evidentiary hearing "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2012).

Generally, "the extent of any investigation is a part of trial strategy and, thus, should not be readily second-guessed." *Nicks*, 831 N.W.2d at 506. But the supreme court recently remanded for an evidentiary hearing a postconviction case involving a claim of ineffective assistance of counsel when the petitioner claimed that counsel "failed to correctly read [a phone company's] response to the subpoena of [the victim's] cellphone records and order a forensic examination of [her] phone." *Id*. at 505, 508. The supreme court declined to follow the general rule because the evidence was "a central part of counsel's theory of the case" but counsel failed to take any action to investigate the phone records. *Id*. at 507.

Here, however, the evidence in question was peripheral to the main issues at trial, and A.H.'s then-boyfriend was not a key witness; thus, defense counsel's decision not to pursue further contact was not objectively unreasonable under the first *Strickland* prong. *See id*. at 506 (noting other ineffective-assistance cases upholding as trial strategy counsel's decisions not to hire an investigator, interview witnesses, call witnesses, and pursue alternate legal theories). Further the evidence, even if fully realized, might have affected A.H.'s credibility, but it would not have affected the outcome of the case under the second *Strickland* prong. The other victims gave, according to the postconviction court, "strikingly similar accounts of . . . victimization," and evidence of lesser import was unlikely to affect the trial outcome. The district court did not abuse its discretion by declining to hold an evidentiary hearing.

Affirmed.