STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1518

State of Minnesota,
Respondent,

vs.

James Waltz,
Appellant.

Filed February 12, 2008
Affirmed
Crippen, Judge[*]

Koochiching County District Court
File No. KX-04-597

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Philip Miller, Koochiching County Attorney, Koochiching County Courthouse, 715 Fourth Street, International Falls, MN 56649 (for respondent)

John M. Stuart, State Public Defender, Renee J. Bergeron, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Halbrooks, Judge; and Crippen, 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

CRIPPEN, Judge

Appellant James Waltz challenges his conviction for attempted first-degree murder on the premise that the district court wrongfully prevented him from introducing the prior-recorded statement of a key defense witness and further erred in admitting the state's evidence of appellant's prior bad acts. We affirm.

FACTS

The district court sentenced appellant to 184 months in prison after a jury found him guilty of attempted first-degree murder. There was undisputed evidence that appellant shot Ricky Davis, a 30-year-old African-American male, outside the Viking Bar in International Falls early in the morning hours of November 11, 2004.

The state presented evidence that the shooting occurred as a result of appellant's racial animus toward African Americans. Davis testified that when he arrived at the bar, he noticed appellant staring at him. Davis greeted appellant and appellant responded by using a racially derogatory term several times. Other witnesses in the bar testified that they heard appellant making racially derogatory remarks concerning Davis and his other African-American friends throughout the evening.

Davis testified that as the bar closed, he and his friends left by the rear exit of the bar; Davis stated that appellant then approached him, pointed a gun at his stomach, and told Davis that he was going to kill him. Davis testified that he raised his hands above his shoulders, turned his back to appellant, and said, "if you're going to shoot me, shoot me in my back." Davis testified that, when he turned back around, appellant shot him in

the abdomen at close range. Davis further stated that he ran away seeking help, and when friends came to his assistance, appellant ran after him shouting racial slurs and demanding that Davis's friends let him die.

Appellant's counsel characterized the shooting as accidental. The defense tried to introduce the prior recorded statement of Vanessa Rogers, who was intermittently involved in a rocky relationship with Davis. The couple has two small children, but at the time of the shooting, they were not together. By the time of the trial, the couple had reconciled.

In a telephone conversation with a defense investigator nine months after the incident, Rogers stated that about two weeks after the shooting, Davis called her and told her that appellant had been friendly with him and his friends at the bar. Appellant used the "'n' word," but he did so in an attempt to be friends with Davis and "hang" with the pool players. According to Rogers, Davis confronted appellant about using the term, and appellant then offered to buy Davis a drink, an offer Davis accepted. Rogers further stated that Davis told her he approached appellant in the alleyway behind the Viking to "goof around with him" about calling Davis the "'n' word." Davis pretended to punch appellant, but did not hit him. Appellant then pulled a gun on Davis. Rogers stated that Davis told her he was unafraid of the gun, but that he got mad. Davis allegedly told Rogers that "I was going to take the gun away . . . and when I went to take the gun away from [appellant] and put my hands on the gun he shot me in the stomach."

The defense made a pretrial motion for a protective order to bar the state from revealing Rogers's statement to Davis, in order to protect her from any potential

intimidation or harassment from Davis. Prior to the hearing on the motion, the prosecution discussed Rogers's statement with Davis. Davis and Rogers subsequently reconciled. Rogers was subpoenaed and present at appellant's trial, but when she took the stand, she was unwilling to corroborate her earlier statement. Out of the presence of the jury, Rogers was again questioned by the defense, but she called the credibility of her prior statement into doubt.

Appellant moved to have Rogers's earlier statement presented to the jury or read into the record. The district court denied the motion. Furthermore, over appellant's objection, the court allowed the state to present evidence of racially threatening remarks appellant made prior to this incident.

D E C I S I O N

1. Statement of Vanessa Rogers

Hearsay Determination

Appellant asserts that the district court erred in barring the defense from reading Roger's prior recorded statement into evidence. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Appellant contends that Rogers's statement was relevant, admissible, and critical to his defense. "Relevant evidence" is evidence having any tendency to make the existence of any material fact more probable or less probable than it would be without the

evidence. Minn. R. Evid. 401. To the extent that Rogers's statement supported appellant's claim that the shooting was accidental, rather than premeditated, the evidence was relevant.

Although relevant evidence is usually admissible, Minn. R. Evid. 402, hearsay evidence generally is not admissible, even if probative, Minn. R. Evid. 802. Hearsay is a statement, other than one made by a declarant while testifying at trial, offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c). Rogers's statement was made outside of court and was offered to prove that Davis, not appellant, was the initial aggressor outside the Viking Bar.

Because Rogers's statement relayed an earlier conversation she claimed to have had with Davis, the statement included not one, but two levels of hearsay. Hearsay within hearsay must be excluded unless each part of the combined statement conforms with an exception to the hearsay rules. Minn. R. Evid. 805.

Appellant contends that Rogers's statement fell within the hearsay exception in Minn. R. Evid. 807 (2006), the "catch-all" exception to the hearsay rule,[1] which allows statements to be admitted for substantive purposes if, along with other requirements, it has adequate guarantees of trustworthiness. The proper analysis under the rule is to examine the "totality of the circumstances . . . looking to all relevant factors bearing on trustworthiness to determine whether the extrajudicial statement has circumstantial

[1] Minn. R. Evid. 803(24), which governs the residual hearsay exception at the time of appellant's trial, was replaced by Minn. R. Evid. 807, effective September 1, 2006.

guarantees of trustworthiness equivalent to other Rule [807] hearsay exceptions." *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006) (quotations omitted).

After the state objected to evidence of Rogers's prior statement, the judge excused the jury, and the defense examined Rogers regarding the statement. Rogers indicated that she had many challenges in her life when she made the prior recorded statement and she did not care about Davis at the time. Rogers stated that "when I gave this statement what I feel like I did is I kind of ran what I said to Ricky together with what maybe he said to me." Rogers did not remember Davis telling her that he tried to take the gun from appellant. Instead, she said that she suggested he should have taken the gun away, but Davis laughed at her and said "you don't just take a gun away." After this exchange, the defense argued that the statement was admissible as impeachment of Davis's earlier testimony or as impeachment of Rogers's testimony as a prior inconsistent statement.

After hearing Rogers's testimony recanting her earlier statement, the district court concluded that the hearsay lacked any circumstantial guarantees of trustworthiness and therefore could not be admitted as substantive evidence under the former rule, Minn. R. Evid. 803(24). We conclude that the district court did not abuse its discretion in determining that the statement was inadmissible under our rules of evidence.[2] The prior

[2] The district court also conducted a careful examination of whether Rogers's prior-recorded statement could be admitted to impeach her inconsistent statements at trial under *State v. Thames*, 599 N.W.2d 122, 125 (Minn. 1999) (allowing the state to impeach its own witness where there was no suggestion that the state was attempting to expose the jury to hearsay under the guise of impeachment or that the prosecutor knew its witness would testify inconsistently), and *State v. Dexter*, 269 N.W.2d 721, 721 (Minn. 1978) (discussing the "surprise and affirmative damage" and "probative-value-versus-unfair-prejudice" approaches to analyzing whether prior inconsistent statements may be used for

statement was hearsay within hearsay, and Rogers directly recanted the statement at trial. Appellant failed to provide the district court with the circumstantial guarantees of trustworthiness necessary to admit the statement for substantive purposes, and there was no error in the district court's ultimate determination.

Appellant's Constitutional Right to a Fair Trial

Appellant also raises a constitutional argument that he was denied a fair trial due to alleged prosecutorial misconduct. Under both the Fourteenth Amendment of the United States Constitution and article I, section 7 of the Minnesota Constitution, "every criminal defendant has the right to be treated with fundamental fairness and 'afforded a meaningful opportunity to present a complete defense.'" *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984)).

Prior to trial, the defense moved for a protective order pursuant to Minn. R. Crim. P. 9.03, subd. 5, in order to prohibit the state from revealing to Davis the identity of certain state witnesses, including Rogers. Rogers was previously involved in an abusive

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impeachment purposes even where inadmissible substantively). Statements offered to impeach a witness, while inadmissible as substantive evidence, are not considered hearsay. *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004). Appellant does not brief this issue on appeal, and we therefore consider the matter waived. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (holding that an issue not properly briefed or raised on appeal is waived), *review denied* (Minn. Aug. 5, 1997). But we note the district court was aware that the use of hearsay under the guise of impeachment was inappropriate, and the court concluded that the parties were not surprised by Rogers's reluctance to testify at trial after she reconciled with Davis. The court also determined that impeaching Rogers's character for truthfulness held little probative value. Although we find it unnecessary to address an issue not raised in briefing to this court, we note that it is unlikely that we would find an abuse of discretion given the district court's thorough consideration of this issue.

and difficult relationship with Davis, and the defense was concerned that Davis would pose a threat to Rogers or attempt to manipulate her statement prior to trial. Before the hearing on the defense motion, the state questioned Davis about Rogers's description of events.

At the pretrial hearing, appellant's counsel objected to the state's disclosure of information to Davis while the motion for a protective order was pending. The defense stated that, if Rogers later became unavailable at trial due to her fear of Davis, appellant would ask permission to play Rogers's statement to the jury. The state apologized for any improper conduct but defended its prosecutorial need to ask Davis whether he gave the state a different story about the shooting than he gave Rogers.

The district court ultimately granted the motion for a protective order. The court expressed concern over the disclosure to Davis regarding Rogers's statement and stated that it would consider allowing the statement to be read to the jury if she became unavailable for trial as a result of the state's conduct. Rogers was available to testify at trial. But, as previously noted, Rogers and Davis reconciled and were living together with their two children before the trial began. There is no evidence in the record to indicate that the reunion between Rogers and Davis had anything to do with the state's pretrial disclosure. Even if appellant could show that the district court erred in failing to properly address the state's alleged misconduct, there is no evidence of prejudice. In addition, Rogers seriously weakened the credibility of her prior recorded statement during her colloquy with the court at trial. We decline under these circumstances to determine whether the district court erred by denying a proposed punitive action for

alleged misconduct of the prosecutor. There is insufficient evidence to support appellant's contention that he was denied a fair trial.

2. Prior Bad Acts

Appellant also contends that the district court erred by allowing two witnesses to testify that appellant had previously uttered racist remarks and stated a desire to kill a black person one day. Appellant contends that the statements did not meet the *Spreigl* requirements for admission of prior bad acts.

"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. But it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation [or] plan." Minn. R. Evid. 404(b). This type of evidence is characterized as *Spreigl* evidence and will only be admitted when (1) the state gives notice of its intent to admit the evidence; (2) the state indicates what the evidence will be offered to prove; (3) there is clear and convincing evidence that the defendant participated in the prior acts; (4) the evidence is relevant and material to the state's case; and (5) the probative value of the evidence is not outweighed by the potential for prejudice to the defendant. *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006). The admission of *Spreigl* evidence lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996).

Appellant challenges the testimony of two witnesses: Debra Carr, a woman who lived in the same building as appellant, and Larry Trott, who came in contact with appellant as a volunteer driver for Arrowhead Transit. Carr testified that, as she was

standing outside her apartment building waiting for a ride to work one morning in late 2004, an African-American co-worker called out across the street and asked for a ride. Appellant was standing nearby. Carr testified that appellant referred to her co-worker with a racial slur and stated that he wanted to shoot a black person someday and he would like to see them all dead. Carr further stated that appellant made numerous disparaging remarks about black people in passing during the time that she knew him and never referred to them without using a racial slur.

Trott stated that he drove appellant about three times in 2000 and 2001. Trott testified that appellant stated "he wished [African Americans] were all annihilated or . . . sent back." Trott further testified that appellant stated he would like to get rid of as many African Americans as he could.

The first two of the five *Ness* considerations are not at issue. But appellant argues that the testimony from Carr and Trott was insufficient to establish, by clear and convincing evidence, that he previously uttered racially derogatory and threatening remarks. Appellant states that Carr failed to identify the precise dates on which appellant made the remarks. He also notes that Trott recounted conversations with him that occurred three to four years before the shooting, and Trott acknowledged on the witness stand that he struggled with short-term memory problems.

The supreme court has held that the testimony of an eyewitness to a prior bad act is sufficient to satisfy the "clear and convincing" standard. *See State v. Moorman*, 505 N.W.2d 593, 601-02 (Minn. 1993) (finding clear and convincing evidence of participation in a [*Spreigl*] incident where the victim picked the defendant out of a police

lineup). Carr noted with reasonable particularity that appellant made his most threatening remarks while she waited for a ride to work one morning in September 2004. Furthermore, even though Trott recounted four-year-old conversations, the supreme court has upheld the admission of *Spreigl* evidence stretching back 7 to 19 years. *See State v. Wermerskirchen*, 497 N.W.2d 235, 242 n.3 (Minn. 1993) (discussing the relevance of the passage of time between a charged offense and a prior bad act). The district court did not err in finding clear and convincing evidence that appellant made the prior remarks, and we decline to find an abuse of discretion based on this record.

The fourth *Ness* factor requires examining whether the proffered evidence was relevant and material to the state's case. Appellant argues that the racially threatening remarks comprised improper character evidence and were therefore irrelevant to the state's case. But the state argued that appellant's long-held racist beliefs and his stated ambition to kill an African American explained his conduct on the night of the shooting and showed appellant's motive, intent, and premeditation to commit the crime charged. To prove attempted first-degree murder, the state had to show that appellant took a substantial step toward causing Davis's death with premeditation and intent to effect the murder. Minn. Stat. §§ 609.17, subd. 1, .185(a)(1) (2006). Appellant's prior statements were directly relevant to showing motive and intent, and the district court did not err in finding the testimony relevant to the state's case.

Finally, we must examine the question of whether the probative value of the evidence outweighed the potential for unfair prejudice to appellant. *See* Minn. R. Evid. 403. Certainly, the testimony of Trott and Carr revealed damaging and prejudicial

statements made by the appellant. But "'prejudice' does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Cermak,* 365 N.W.2d 243, 247 n.2 (Minn. 1985) (quoting 22 Charles Wright & Kenneth Graham, *Federal Practice and Procedure-Evidence* § 5215 (1st ed. 1978)).

The state asked the jury to consider appellant's prior statements as the explanation for his conduct and intent on the night of the shooting. This testimony damaged appellant's defense, but the state asserts that it needed to provide the jury with the plausible reason for appellant's actions, and the district court properly determined that the remarks were directly relevant to the state's burden under the charged offense. Appellant failed to show that this evidence was offered for illegitimate purposes, and the district court did not abuse its discretion in finding that the testimony of Carr and Trott satisfied the *Ness* considerations for admitting evidence of prior bad acts.[3]

Appellant argues that he was denied his constitutional right to a fair trial as a result of the district court's decision to admit the testimony of Carr and Trott. Because the court did not abuse its discretion in allowing Carr and Trott to testify, the court did not deny appellant's constitutional right to a fair trial by allowing the evidence.

[3] This decision is bolstered by the knowledge that the jury rejected the proposition that appellant's offense was racially motivated, which would call for an upward sentencing departure. Thus, even if the district court erred in admitting the testimony of Trott and Carr, the jury did not appear to give significant weight to the testimony with regard to sentencing.

We also note that appellant's argument that the prosecution committed misconduct by inflaming the passions of the jury and by repeatedly denigrating the defense counsel in closing argument is raised for the first time on appeal. This issue was not the subject of a defense objection, argument at trial, or briefing to this court, and we decline to consider it for the first time on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts will generally decline to examine matters not argued and considered in the court below); *Butcher*, 563 N.W.2d at 780 (noting that issues not briefed on appeal are waived).

Affirmed.