STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1848

State of Minnesota,
Respondent,

vs.

Jeffrey Brian Alphonse Stein,
Appellant.

Filed February 5, 2008
Affirmed
Dietzen, Judge

Hennepin County District Court
File No. 05033842

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Shane C. Perry, Perry, Perry & Perry, Parkdale 1, Suite 270, 5401 Gamble Drive, Minneapolis, MN 55416 (for appellant)

Considered and decided by Dietzen, Presiding Judge; Lansing, Judge; and Ross, Judge.

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

DIETZEN, Judge

Appellant challenges his conviction of first-degree burglary, arguing that the district court erred (1) in denying his motion to suppress evidence; (2) in its various evidentiary rulings; (3) in finding that the evidence was sufficient to support his conviction; and (4) in concluding that the prosecutor did not engage in misconduct during closing argument. We affirm.

FACTS

On a June morning in 2005, law enforcement responded to a series of three burglaries in Mound, Minnesota. The burglaries were all reported within a 75-minute timespan and the locations of the crimes were relatively close to one another. Each of the female victims indicated that a young, white male entered through an unlocked door, choked the victim in her bed, and then quickly fled after a minor scuffle. While struggling with the burglar, the third victim, D.B., grabbed hold of his shirt and pulled it off him as he fled. D.B. gave the shirt, a black Dickies tee-shirt, to the police.

While searching the area, a K-9 unit detected a track leading northeast from D.B.'s home to the southeast shore of Lake Langdon. Police then received a report of a suspicious person, a white male who was soaking wet, running to the north of Lake Langdon. Two other witnesses reported similar sightings near Sunnybrook Circle and Sunnyfield Road in Minnetrista.

While conducting a grid search of the area near Lake Langdon, police spoke to J.B., who lived within a few blocks of the three victims. J.B. told a detective that he

hosted a small party at his house the previous evening and that appellant Jeffrey Brian Alphonse Stein attended the party. Because the detective knew that appellant lived on Sunnyfield Road and that the assailant was last seen in that area, the detective contacted appellant later that morning at his place of work. After the detective noticed that appellant had numerous scratches all over his body, appellant was taken to the police station for questioning and provided a buccal swab for DNA testing.

Appellant was later arrested and charged with three counts of first-degree burglary, Minn. Stat. § 609.582, subd. 1 (2004). Before trial, appellant moved to suppress the evidence regarding the scratches on his body and the DNA test results. The district court denied his motion.

At trial, appellant's brother testified that on the way to J.B.'s party that evening appellant made a transaction at an ATM. Surveillance photographs from the ATM indicated that appellant was wearing a black tee-shirt. J.B. testified that appellant and a friend, J.K., attended the party and that appellant was wearing a black Dickies tee-shirt. J.K. testified that appellant was wearing a black shirt and that he left the party with appellant around 3:30 a.m. and dropped appellant off at a street corner a few blocks from the party.

The state introduced the results of DNA tests performed on the black Dickies tee-shirt left at D.B.'s home and the DNA sample provided by appellant. The results indicated that the predominant DNA profile found on the shirt matched the sample provided by appellant.

Following trial, the jury convicted appellant on count three, the burglary of D.B.'s home, but deadlocked on the first two counts. This appeal follows.

D E C I S I O N

I.

Appellant contends that the district court erred in denying his motion to suppress evidence regarding the scratches on his body and the DNA test results, arguing that his arrest was not supported by probable cause. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution prohibit unreasonable searches and seizures. But not every encounter between a police officer and a citizen is a seizure. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993). "A person generally is not seized merely because a police officer approaches him in a public place . . . and begins to ask questions." *Harris*, 590 N.W.2d at 98. And even if a person is seized, evidence should be suppressed only if the seizure was unreasonable. *Id.* at 99. A brief seizure for investigative purposes is not unreasonable if the officer has a particularized and objective basis for suspecting that the seized person has been involved in criminal activity. *Id.* (citing *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981)).

Appellant argues that he was unreasonably seized when two detectives questioned him at his workplace. The district court concluded that an investigative seizure of

appellant was supported by a reasonable, articulable suspicion of criminal activity. We agree. At the time, the detectives knew that appellant had been at a party near the burglaries until after one a.m., that his physical description matched the description of the burglar, and that the trail from the third burglary ended in the immediate area of appellant's home. These facts were sufficient to support a brief investigative detention; the seizure was not unreasonable and thus does not require suppression.

Appellant next argues that the DNA sample he provided to police should be suppressed because his arrest was not supported by probable cause. We disagree. "Probable cause exists where the facts would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person under consideration is guilty of a crime." *State v. Carlson*, 267 N.W.2d 170, 173 (Minn. 1978). The analysis depends on the individual facts and circumstances of the case and should not be "unduly technical." *Id.* at 173-74. When the detectives questioned appellant at his workplace they noticed numerous scratches covering his body, which were consistent with the reports that the burglar had fled, shirtless, through a wooded area. This information, coupled with the facts supporting the investigative detention, was adequate to support a finding of probable cause.

II.

Appellant argues that the district court erred in several evidentiary rulings. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the 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) (citations omitted).

A. *Hearsay Objections*

Appellant challenges a police officer's testimony that one of the victims told him the burglar had square sideburns. The district court admitted this testimony as a prior consistent statement under Minn. R. Evid. 801(d)(1)(B). For a prior consistent statement to be admissible, the witness' credibility must have been challenged. *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997). Here, the victim's credibility regarding her description of the burglar was attacked on cross-examination. Thus, the district court did not abuse its discretion.

Appellant next argues that the district court erred in allowing a deputy sheriff to testify that D.B. told him her attacker was six feet tall. The state concedes that it was error to admit the statement, but argues that the error was harmless. We agree.

Any error in admitting hearsay evidence is harmless if the evidence would have been admissible under the residual exception in Minn. R. Evid. 803(24). *State v. Robinson*, 718 N.W.2d 400, 410 (Minn. 2006). It is undisputed that D.B. made the statement shortly after the burglary, and, therefore, the statement had sufficient indicia of trustworthiness. Further, the witness was subject to cross-examination at trial. On this record, admission of the statement was harmless.

Appellant also challenges a police officer's testimony that appellant's brother told the officer that appellant was not home around 6:00 a.m., arguing that this statement was not inconsistent with the brother's testimony and, therefore, it was not admissible. Minn.

R. Evid. 801(d)(1)(A). Essentially, the state concedes that the statement was not admissible, but argues that it was not prejudicial. We agree.

The admission of evidence is prejudicial if "there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). Here, the brother's testimony at trial conveyed the same substance as the hearsay statement. Thus, we see no prejudice.

B. *Foundation Objections*

Appellant argues that the district court erred in admitting evidence that was not properly authenticated. "The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901. The proponent need not negate all possibility of tampering—if it is reasonably probable that tampering did not occur, then "contrary speculation . . . does not affect [the evidence's] admissibility." *State v. Hager*, 325 N.W.2d 43, 44 (Minn. 1982).

Appellant first challenges the admission of the photographs taken by the ATM machine. Surveillance images may be authenticated "by testimony describing the reliability of the process or system that created the [image]." *In re Welfare of S.A.M.*, 570 N.W.2d 162, 166 (Minn. App. 1997). Here, a records custodian from the bank testified that the system provides accurate and reliable images. We see no abuse of discretion.

Second, appellant contends that the district court erred in admitting the tee-shirt on the ground that the state was unable to prove the chain of custody. We disagree.

Although there was a conflict as to whether the tee-shirt was stored in a plastic or paper bag, the district court's conclusion that it was properly authenticated is supported by the record.

Appellant challenges the admission of the DNA evidence, arguing that three officers indicated that they "sealed" the buccal swabs but only one officer could have done so. Respondent suggests that each officer used the word "seal" in a different context. On this record, we see no abuse of discretion. Appellant also challenges the state's expert testimony regarding the random-match probability of the DNA evidence. But the supreme court has rejected a similar argument, holding that random-match-probability calculations using the BCA database are admissible. *State v. Roman Nose*, 667 N.W.2d 386, 397 (Minn. 2003).

C. *Exclusion of Expert Opinion*

Appellant argues that the district court erred in excluding his proposed expert opinion interpreting the DNA-test data. To be admissible, scientific evidence "must be shown to have foundational reliability." *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000); *see also* Minn. R. Evid. 702 (effective Sept. 1, 2006) ("The [expert] opinion must have foundational reliability"). In order to establish the foundational reliability of DNA evidence, the proponent must satisfy the two-step *Frye-Mack* analysis, which requires (1) that the technique used to produce the evidence is "generally accepted within the relevant scientific community"; and (2) that the specific evidence offered is scientifically reliable, i.e. that "the laboratory conducting the tests . . . complied with appropriate standards and controls." *State v. Bailey*, 732 N.W.2d 612, 616 n.2 (Minn.

2007) (quoting *State v. Roman Nose*, 649 N.W.2d 815, 818-19 (Minn. 2002)). The proponent of the evidence has the burden of establishing both steps. *McDonough v. Allina Health Sys.*, 685 N.W.2d 688, 694 (Minn. App. 2004). The district court concluded that appellant had failed to meet his burden under the second step of *Frye-Mack*.

Here, the state presented expert testimony establishing that the standards and controls used by the Hennepin County lab produced scientifically reliable DNA data at relative fluorescent unit (RFU) levels of 150 or higher.[1] When appellant offered an expert opinion that relied on test data at much lower RFU levels, the state objected and the district court excluded this opinion on the ground that the underlying data was not scientifically reliable. More importantly, appellant failed to establish that the standards and controls used by the Hennepin County lab produced scientifically reliable data at RFU levels below 150. On this record, we see no abuse of discretion.

III.

Appellant argues that the evidence is not sufficient to support his conviction and that the district court erred in denying his post-trial motion for acquittal. In considering a claim of insufficient evidence, we review the record to determine if the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach a guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). "[W]e draw reasonable inferences in favor of the state and assume that the jury credited the state's

[1] DNA testing produces a graph of peaks; the intensity of a peak is measured in terms of RFUs. *State v. Bailey*, 732 N.W.2d 612, 616 n.1 (Minn. 2007).

witnesses and rejected any contrary evidence." *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007). Likewise, the standard for ruling on a motion for judgment of acquittal is whether the evidence is sufficient to sustain a conviction of the offense. Minn. R. Crim. P. 26.03, subd. 17(1); *see also* 8 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 31.9 (3d ed. 2001) ("a judge considering a motion for acquittal . . . should apply the same criteria used . . . in judging sufficiency of the evidence").

Circumstantial evidence is entitled to the same weight as direct evidence, but it warrants a heightened level of scrutiny. *Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004). It must be "consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted) But theoretical possibilities of innocence do not require reversal "so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (quotation omitted). Minor inconsistencies in the state's case—or in a witness's testimony—are not sufficient to overturn a conviction. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). Inconsistent testimony is more a sign of human fallibility in perception than testimonial falsity, especially in cases involving a traumatic or stressful event. *State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983).

A. *Sufficiency of the Evidence*

Appellant argues that the circumstantial evidence identifying him as the burglar is also consistent with the hypothesis that J.K., J.B., or M.B. committed the crimes.

But appellant's argument ignores the standard set forth in *Bernhardt v. State*. Specifically, *Bernhardt* requires consideration of circumstantial evidence from two

perspectives—the evidence must be consistent with the hypothesis that the accused is guilty, and it must be inconsistent with any rational hypothesis except that of guilt. 684 N.W.2d at 477. Appellant's argument that someone else may be guilty fails to address the evidence from the second perspective. Here, appellant was in the area in question at the time of the burglaries; his clothing, including a black Dickies tee-shirt, and physical description matched the descriptions provided by the victims; the DNA taken from the black Dickies tee-shirt matched a sample provided by appellant; the trail established by the K-9 units and the suspicious-person sightings led from the scene of the third burglary to an area near appellant's home; appellant was not sleeping on the couch when his brother left for work; and detectives observed numerous scratches on appellant's chest and neck that same morning. This evidence, when viewed in its totality, is consistent with the hypothesis that appellant is guilty and is inconsistent with any rational hypothesis other than guilt. On this record, the evidence is sufficient to support appellant's conviction of count three.

B. ***Denial of Acquittal Motion***

Appellant argues that the district court erred in denying his motion to acquit on counts one and two. Because the jury deadlocked on these counts, there was no final judgment from which to appeal. *See* Minn. R. Crim. P. 28.02, subd. 2(2) (requiring a final judgment before appeal may be taken). Because appellant is now facing retrial on counts one and two, he may be effectively denied review of the district court's decision to deny his acquittal motion. We conclude that, in the interest of justice, we should review

the decision. *See* Minn. R. Crim. P. 28.02, subd. 11 (providing that we may review any matter in "the interests of justice").

A district court may deny a motion to acquit "if it determine[s] that the state's evidence, when viewed in the light most favorable to the state, was sufficient to sustain a conviction." *State v. Slaughter*, 691 N.W.2d 70, 75 (Minn. 2005). The only significant difference in the evidence between counts one and two on the one hand, and count three on the other hand, is that count three included the DNA evidence from the tee-shirt identifying appellant as the burglar. But identity can also be established through a similar modus operandi.[2] *See State v. Cogshell*, 538 N.W.2d 120, 123 (Minn. 1995) ("We have made it clear that we 'readily uphold' the admission of so-called 'signature' crimes to prove identity. . . . [Provided that] there must be some relation between the other crimes and the charged offense in terms of time, place or modus operandi.") (citations omitted).

Here, all three crimes occurred within a very short time and relatively small geographic area; the witnesses all provided generally consistent physical descriptions of the burglar; and the modus operandi of each crime was nearly identical. We conclude that the DNA evidence identifying appellant as the burglar on count three, coupled with the modus-operandi evidence, viewed in the light most favorable to the state, is sufficient to sustain a conviction of all three counts. Thus, the district court did not err in denying appellant's motion to acquit.

[2] Modus operandi is "[a] method of operating . . . esp. a pattern of criminal behavior so distinctive that investigators attribute it to the work of the same person." *Black's Law Dictionary* 1026 (8th ed. 2004).

IV.

Appellant argues that unobjected-to prosecutorial misconduct deprived him of a fair trial. *See State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006) (stating that the overarching concern "is that [prosecutorial] misconduct may deny the defendant's right to a fair trial"). We review unobjected-to misconduct for plain error. *Id.* at 299. The plain-error doctrine requires (1) error; (2) that is plain; (3) that affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If all three prongs are satisfied, the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings. *Id.* An error is plain if it is clear or obvious under current law. *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997); *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). If the nonobjecting defendant shows that plain error occurred, the burden "shift[s] to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Ramey*, 721 N.W.2d at 302.

Appellant's claims of plain-error misconduct are based on several statements in the prosecutor's closing argument. In such cases "[w]e look . . . at the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

First, appellant contends that the prosecutor commented on his decision not to testify and shifted the burden of proof. *See Chapman v. California*, 386 U.S. 18, 25-26, 87 S. Ct. 824, 829 (1967) (decision not to testify); *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985) (burden of proof). But appellant mischaracterizes the prosecutor's

argument. Here, the prosecutor argued that appellant's theory that someone else committed the crimes did not credibly explain why a black shirt containing appellant's DNA was found at the third crime scene. This argument, which pointed out that appellant's theory was inconsistent with the evidence, was not misconduct. *See State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986) (stating that prosecutor is allowed to argue that defense theory lacks evidentiary support).

Second, appellant argues that the prosecutor belittled his defense in violation of *State v. Williams*, 525 N.W.2d 538 (Minn. 1994). In *Williams*, the supreme court stated that a prosecutor is "fully free to specifically argue that there was no merit to the defense . . . in view of the evidence." *Id.* at 549. Here, the prosecutor argued that the defense theory lacked merit in light of the evidence as a whole. On this record, the argument was proper under *Williams*.

Finally, appellant claims that the prosecutor improperly impugned the defense's expert witness. It is improper for a prosecutor to misquote an expert or argue inferences not reasonably supported by the expert's testimony. *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995). But the prosecutor's argument was based on the witness's testimony. Thus, we see no misconduct.

Affirmed.