STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1888

State of Minnesota,
Respondent,

vs.

Edward R. Bergren,
Appellant.

Filed February 12, 2008
Affirmed
Toussaint, Chief Judge

St. Louis County District Court
File No. K9-04-473

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Melanie S. Ford, St. Louis County Attorney, St. Louis County Courthouse, 100 North Fifth Avenue West, Suite 501, Duluth, MN 55802 (for respondent)

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

Considered and decided by Toussaint, Chief Judge; Crippen, Judge;[*] and Muehlberg, Judge.[**]

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

[**] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

TOUSSAINT, Chief Judge

Following a jury trial, appellant Edward Ross Bergren was convicted on charges of kidnapping, second-degree assault, false imprisonment, and terroristic threats, which arose from the kidnapping and assault of two men, who allegedly sold marijuana for appellant and owed him money. Because (1) the district court did not abuse its discretion in ruling that three of appellant's prior convictions could be used as impeachment evidence; (2) the testimony of two accomplices was sufficiently corroborated, as required by Minn. Stat. § 634.04 (2002); (3) the evidence of one victim's injuries was sufficient to prove kidnapping involving great bodily harm under Minn. Stat. § 609.25, subds. 1, 2(2) (2004); (4) the prosecutor did not commit misconduct by commenting on the credibility of the witnesses; (5) the district court's error in engaging in an ex parte communication with the jury during its deliberations was not prejudicial; and (6) the issues raised by appellant in his pro se supplemental brief are without merit, we affirm.

FACTS

On the morning of March 16, 2004, two men, N.W. and J.W., were approached by three men, L.L., J.D., and J.R. N.W. acknowledged that he owed L.L. money for drugs. The group went to a restaurant, where they discussed how N.W. could repay the money he owed. At around 11 a.m., N.W. and J.W. rode with the three men to a carwash, where they were approached by a fourth man wearing a baseball cap and a bandana "cowboy-style" over his face. The man asked N.W. and J.W. about "his" money. While N.W. and J.W. could not identify the man, J.D. and J.R. both testified at trial that the masked man

was appellant.

N.W.'s and J.W.'s eyes were then duct-taped shut so that they could not see where they were going. The two were driven to a home in a remote area of Duluth, where they were led to a basement and duct-taped to chairs. For the next several hours, the two men, particularly N.W., were threatened and assaulted. The victims were eventually released and walked several miles to the home of N.W.'s mother.

N.W. testified that he assumed someone named "Ross" was in charge that day because he heard his voice in the basement and because everyone appeared to be listening to him. J.W. testified that he remembered hearing the name "Hoss," "Voss," or "Ross," and that that person was not in the basement the entire time because the others would talk about him when he left.

Only two of appellant's accomplices, J.D. and J.R., testified at trial. Throughout their testimony, both accomplices repeatedly referred to appellant as "Ross" and both testified that appellant was not directly involved in the assaults. But J.D. testified that appellant used signals or whispered to others in the basement so as to hide his identity from the victims, although at one point he whispered in N.W.'s ear that "you're f****d." J.D. further described appellant as acting "high and mighty," like he was in control, and as leaving and reentering the basement several times.

Appellant did not testify in his own defense. But the defense did call two witnesses who knew appellant personally and who also referred to him as "Ross." Those witnesses both testified that they saw appellant with his daughter that day, sometime between 3 and 6 p.m.

The defense also called a sergeant in the Duluth Police Department who had arrested accomplice J.D. several weeks after the March 2004 incident. The sergeant testified that J.D. initially told police that someone named "Jason Anderson" from the Iron Range was the masked man. In a later interview, however, J.D. claimed that appellant was the masked man and that he was unwilling to initially turn appellant in because of loyalty and friendship.

The jury was informed that J.D. and J.R. had both received favorable treatment and had been offered a deal by the state in exchange for their testimony against appellant. And the victims, N.W. and J.W., were both impeached with prior convictions.

D E C I S I O N

I.

Appellant challenges the district court's decision to admit three of his prior convictions as impeachment evidence: a January 2006 conviction for first-degree assault for his actions in pushing his girlfriend out of a moving vehicle; a July 2001 conviction for possession of ammunition by a felon; and one of three September 1998 convictions, to be chosen by the prosecutor, for receiving a stolen firearm, possession of a firearm by a felon, or fifth-degree possession of marijuana. Evidence of prior convictions is admissible only if the "court determines that the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a); *see State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978) (setting out factors to consider when determining whether probative value outweighs prejudicial effect). The decision whether to admit prior convictions as impeachment evidence is within the district court's discretion. *State*

v. Ihnot, 575 N.W.2d 581, 584 (Minn. 1998).

Appellant insists that it is "time for the Minnesota courts to reexamine the 'whole person' rationale" and to weigh the first factor in a defendant's favor "*at least some of the time*," particularly in this case when the prior convictions for assault, weapons, or drug possession are not directly relevant to his credibility. *See State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993); *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979). But the "whole person" rationale was recently utilized in *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006).

Appellant also argues that his prior assault, weapons, and drug-possession convictions were all too similar to the current charges of kidnapping, assault, and terroristic threats. But when, as here, the facts underlying the two crimes are substantially different, Minnesota courts have upheld the admission of similar crimes for impeachment purposes even when the crime is the same as the charged crime, particularly when any prejudice is reduced through the proper cautionary instruction. *See, e.g., State v. Vanhouse*, 634 N.W.2d 715, 720 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

Finally, appellant argues that the district court's ruling, particularly the decision to admit the first-degree assault conviction, caused him to abandon his right to testify. But appellant's apparent defense (that he was not involved in the crimes) was presented through defense witnesses who testified that they had seen appellant during at least part of the time that the crimes occurred. And defense counsel offered a defense theory to the jury when counsel cross-examined accomplice J.D. about his initial statement to police

that implicated someone else: a "Jason Anderson," who apparently was involved in a kidnapping and murder for a drug money debt a few months later on the Iron Range, and when the defense called as a witness the police sergeant who had taken J.D.'s initial statement. Thus, while appellant's credibility would have been central had he testified, the jury was presented with a plausible defense theory and evidence tending to show that appellant was somewhere else at the time and that someone else was the masked man at the carwash and in the basement. *See Swanson*, 707 N.W.2d at 655 ("If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions."); *Ihnot*, 575 N.W.2d at 587.

II.

"When reviewing the sufficiency of evidence to corroborate accomplice testimony, we view the evidence in the light most favorable to the state and all conflicts in the evidence are resolved in favor of the verdict." *Turnage v. State*, 708 N.W.2d 535, 543 (Minn. 2006) (quotation omitted). "A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense." Minn. Stat. § 634.04 (2004); *see also State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007).

Corroborating evidence need not establish a prima facie case of the defendant's guilt. *Jackson*, 726 N.W.2d at 460. It is sufficient if "it confirms the truth of the accomplice's testimony." *State v. McKenzie*, 532 N.W.2d 210, 223 (Minn. 1995). The evidence "must link or connect the defendant to the crime." *State v. Scruggs*, 421 N.W.2d 707, 713 (Minn. 1988); *State v. Adams*, 295 N.W.2d 527, 533 (Minn. 1980). But

the testimony of one accomplice cannot be corroborated merely by the testimony of another accomplice. *State v. Armstrong*, 257 Minn. 295, 307-08, 101 N.W.2d 398, 407 (1960).

Here, appellant's involvement in the crime was corroborated by the testimony of the two victims, who independently stated that their assailants used the name "Ross" or something similar, and by the repeated use throughout trial of that name to refer to appellant, by both defense and prosecution witnesses. Additional corroborating evidence tending to link appellant to the crime included testimony by J.D. on cross examination that appellant and L.L, who did not testify, were roommates; testimony by N.W. that he had dealt directly with L.L. and knew that he owed L.L. money, but that the masked man at the car wash and the person referred to as "Ross" in the basement appeared to be in charge of the drug operations. While slim, this evidence tends to connect appellant with the crime, which is all that is required of corroborative evidence.

III.

Appellant argues that because the injuries received by N.W. do not meet the statutory definition of "great bodily harm," the evidence is insufficient to support his conviction for aiding and abetting kidnapping involving the infliction of great bodily harm under Minn. Stat. § 609.25, subds. 1, 2(2) (2004). But the jury was properly instructed that "great bodily harm" includes bodily injuries that create a high probability of death, cause serious permanent disfigurement, cause permanent loss or impairment of any bodily organ, or cause *other serious bodily harm*." *See* Minn. Stat. § 609.02, subd. 8 (2004). While appellant claims that the emergency room report establishes that N.W.'s

injuries were only minor and not permanent or serious, the evidence was undisputed that he sustained a variety of injuries to various parts of his body, including burns from a butane torch, cuts from a razor blade, repeated hits from a ball-peen hammer, and injuries to his toe and fingernails from a pliers. This evidence is more than sufficient to support finding that N.W. sustained "other serious bodily harm," and thus "great bodily harm."

IV.

Appellant argues that the prosecutor committed "plain error" in his closing argument by making the following statement:

> If you feel that all - - everything you heard was fabrication - - that the two victims, alleged victims, maybe that really didn't happen to them or Mr. Bergren wasn't there, and that this idea of Ross is being made up by them, and if you feel that [the two accomplices] made up the whole thing just to save a little time in prison, then you acquit, that's your responsibility.

Appellant claims that this statement improperly shifted the burden of proof to him. But, when these statements are considered in context, it is apparent that the prosecutor was merely commenting on the credibility of the state's witnesses, which he was entitled to do. *See Swanson*, 707 N.W.2d at 656. The prosecutor's statements were not inconsistent with the instructions that were given to the jury regarding the state's burden of proof and the presumption of innocence. We therefore conclude that the prosecutor did not materially misstate the law or commit plain error. *Cf. State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (finding plain error when jury instruction materially misstated law).

V.

During jury deliberations, the jury asked the district court the following question:

> We are wondering if it was the defense's job to argue and disprove

> evidence set forth in trial by the state, meaning disprove testimony, argue the testimony. If so, can we take the fact that the defense didn't argue facts testimony into our deliberations? Thank you.

The district court did not inform counsel of the question and merely answered: "Please consult the written jury instructions. Judge Munger."

The district court erred by engaging in this ex parte communication with the jury at this critical stage of trial, without notifying counsel or allowing counsel and appellant to be present. *See* Minn. R. Crim. P. 26.03, subd. 19(3); *State v. Sessions*, 621 N.W.2d 751, 755-56 (Minn. 2001). Nevertheless, a new trial is warranted only if appellant demonstrates that this error was prejudicial. *See Sessions*, 621 N.W.2d at 756. A reviewing court will consider the strength of the evidence and the substance of the judge's response in determining whether the error requires a new trial. *Id.*

Here, the judge's response was innocuous and did not favor either party. And, it is unlikely that the judge's response would have been much different had appellant been present. The jury was properly instructed and had those instructions with it in the jury room: the judge merely directed the jury to consult those written instructions. The error committed by the district court was not prejudicial and was harmless under the circumstances of this case.

VI.

Appellant raises two issues in a pro se supplemental brief. He challenges the district court's imposition of consecutive sentences, and he argues that the prosecutor engaged in misconduct and witness coercion by offering a plea deal to a witness if he testified only to what the state determined the facts to be. But consecutive sentencing is

permitted in this case because the offenses are "crimes against persons." *See State v. Senske*, 692 N.W.2d 743, 748-49 (Minn. App. 2005), *review denied* (Minn. May 17, 2005). In addition, appellant's right to a fair trial was not violated by accomplice J.R.'s testimony pursuant to his plea agreement, which required that he provide a factual basis at the time he pleads guilty and that he testify truthfully to enumerated facts set forth in the agreement. We therefore reject the claims made by appellant in his pro se supplemental brief.

Affirmed.