STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1944

State of Minnesota,
Respondent,

vs.

Larry R. Propotnik,
Appellant.

Filed February 19, 2008
Affirmed
Halbrooks, Judge

Isanti County District Court
File No. CR-05-257

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

Jeffrey Edblad, Isanti County Attorney, Isanti County Government Center, 555 18th Avenue Southwest, Cambridge, MN 55008 (for respondents)

John M. Stuart, State Public Defender, Sharon E. Jacks, 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

HALBROOKS, Judge

Appellant was convicted of three counts of first-degree assault against a peace officer and one count of carrying a handgun without a permit. On appeal, he challenges the first-degree assault convictions, contending that the district court abused its discretion by admitting *Spreigl* evidence and speculative testimony. We affirm.

FACTS

Appellant Larry Propotnik lives just outside the city limits of Braham in Isanti County. Over several years, appellant had continuing problems with items being stolen from his property. As a result, he had several contacts with Braham Police Chief Robert Knowles. During these contacts, appellant voiced a vehement dislike for law enforcement, stating that he considers police officers "f--king Nazi pigs" and that he would like to see some officers killed. Appellant was not arrested for these threats, but Chief Knowles did pass them along to officers of the Isanti County Sheriff's Office. In June 2005, appellant voiced similar sentiments to Braham city employee Daniel Eklund while Eklund was grading a dirt road near appellant's property. Appellant told Eklund that there were warrants out for appellant's arrest and that he was ordering guns through the mail to have a shootout with the authorities if they ever attempted to take him into custody.

Approximately one month after he talked to Eklund, appellant drove to the Braham city maintenance building to retrieve his lost dog. While there, appellant conversed with city employee George Rowe and informed Rowe that he had purchased

an SKS rifle and 1000 rounds of ammunition to have a shootout with the police. When appellant asked Rowe if he could pay the fine for his dog with his credit card, Rowe told appellant he did not think so but that appellant could go to the city office and ask about his payment options. Appellant told Rowe that he did not want to go to the city office because he had warrants out for his arrest, so Rowe agreed to inquire on his behalf. While at the city office, Rowe told an unknown person that appellant was at the maintenance building. This person in turn relayed appellant's location to law enforcement, who wanted to pick him up on the outstanding warrants. In the interim, Rowe returned to the city maintenance building and agreed to assist appellant in loading appellant's dog into his truck. While doing this, Rowe saw a handgun sticking out of a seat-cover pocket.

Deputy Walter Nelson of the Isanti County Sheriff's Office was the first person to respond. When appellant saw Deputy Nelson, he got into the cab of his truck and placed both his hands on the steering wheel. Almost immediately thereafter, Sergeant William Guenther and Sheriff Michael Ammend arrived. With guns drawn, both Officer Nelson and Sheriff Ammend ordered appellant out of the truck. When appellant did not comply, Sheriff Ammend initiated a conversation with appellant in a further attempt to convince him to get out of his vehicle. At the same time, Sgt. Guenther approached the driver's door of the truck. When appellant realized Sgt. Guenther's proximity, he made a quick movement with his right hand towards the center of the vehicle and downward—the general location of the handgun in the seat-cover pocket. In response, Sgt. Guenther opened the driver's door and fired his Taser at appellant, incapacitating him.

A subsequent search of appellant and his vehicle revealed a loaded handgun in the seat cover of the truck; a second loaded handgun in appellant's pants pocket; credit cards bearing the name of Russ Kohn, an alias that appellant used; and an order form for survivalist equipment, such as barbed wire, smoke grenades, and books entitled "ID Master" and "How to Disappear in America." A later database check revealed that appellant did not have a permit to carry a handgun.

Appellant was charged with three counts of first-degree assault against a peace officer in violation of Minn. Stat. § 609.221, subd. 2(a) (2004), and one count of carrying a handgun without a permit in violation of Minn. Stat. § 624.714, subd. 1a (2004). He was convicted by a jury of all four counts. This appeal of his assault convictions follows.

D E C I S I O N

I.

Appellant first claims that the district court abused its discretion by admitting *Spreigl* evidence in the form of the credit cards in the name of his alias and the survival-gear order form. *Spreigl* evidence is generally not admissible to prove a defendant's bad character and action in conformity therewith. Minn. R. Evid. 404(a). But *Spreigl* evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). We "review[] the district court's decision to admit *Spreigl* evidence for an abuse of discretion." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006).

Initially, we question the premise of appellant's argument that the two challenged exhibits are actually *Spreigl* evidence. The order form and credit cards were found on appellant's person when he was arrested. Bad acts or "[o]ffenses which are part of the immediate episode for which [a] defendant is being tried" do not constitute *Spreigl* evidence. *State v. Spreigl*, 272 Minn. 488, 497, 139 N.W.2d 167, 173 (1965). Because both the credit cards and order form were found contemporaneously with the conduct with which appellant was charged and convicted, they fall within this exception. The items are not *Spreigl* evidence of appellant's past misdeeds any more than is the loaded handgun also found on his person after his arrest (which appellant does not take issue with on appeal). Moreover, the possession of the credit cards and the order form are not inherently wrong or bad acts. This further undercuts the premise of appellant's argument that these items are properly characterized as prior-bad-act evidence. *See Ture v. State*, 681 N.W.2d 9, 16-17 (Minn. 2004) (explaining that the admission of an exhibit in the form of a notebook cataloging personal information on numerous women, such as their license plates, addresses, and phone numbers, was not *Spreigl* evidence because "there is nothing per se wrong with collecting information on women").

Even assuming *arguendo* that these challenged exhibits were *Spreigl* evidence, we conclude that their admission was not reversible error. *See Ness*, 707 N.W.2d at 686 (setting out the various prerequisites and steps to be taken before admitting *Spreigl* evidence). "When the district court has erroneously admitted other-acts evidence, this court must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Ness*, 707 N.W.2d at 691. Factors

used to determine whether there is a reasonable possibility that the *Spreigl* evidence significantly affected the jury's verdict include (1) whether or not there was overwhelming evidence of guilt, (2) the strength of any defense evidence, (3) the presence or absence of a cautionary instruction, (4) whether the state referred to the evidence in opening or closing arguments, (5) whether or not other other-act evidence was properly admitted, and (6) the manner in which the evidence was introduced. *State v. Clark*, 738 N.W.2d 316, 347 (Minn. 2007); *State v. Bolte*, 530 N.W.2d 191, 198-99 (Minn. 1995).

While the prosecution never indicated what the two exhibits were meant to prove, they were presumably offered to show appellant's preparation to shoot it out with the police, which in turn provides circumstantial evidence both that he was reaching for the gun in the truck and that his intent in reaching for that gun was to harm the officers. But there was overwhelming evidence of these facts aside from the two challenged exhibits.

Deputy Nelson, Sgt. Guenther, and Sheriff Ammend all testified, with varying degrees of specificity, that appellant was reaching toward the area in the truck where the handgun was later found. Sgt. Guenther had the best view and testified that he could see appellant's arm and hand, could see where it was reaching, and that it was reaching in the direction of the gun. In addition, several witnesses testified that appellant made numerous prior statements about his desire to have a shootout with authorities and that he had purchased, or was planning to purchase, guns and ammunition for a shootout. The admissibility of this testimony is not challenged on appeal. *See State v. Vanhouse*, 634 N.W.2d 715, 721 (Minn. App. 2001) (basing, in part, the conclusion that the challenged

Spreigl evidence did not affect the verdict on the fact that the evidence was "essentially cumulative of . . . more damaging *Spreigl* evidence which is not challenged" on appeal), *review denied* (Minn. Dec. 11, 2001). Given the substantiality of this other evidence, we conclude that there is not a reasonable possibility that the two challenged exhibits significantly affected the jury's verdict.

II.

Appellant next contends that the district court improperly admitted speculative testimony from Sheriff Ammend concerning what appellant was reaching for just before Sgt. Guenther used the Taser to subdue him. The admission of the sheriff's testimony is an evidentiary issue, which we review for an abuse of discretion. *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004).

A lay witness's testimony must be based on his or her personal knowledge. Minn. R. Evid. 602. Any opinions or inferences a lay witness gives must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Minn. R. Evid. 701.

Sheriff Ammend testified that he could see where appellant's arm was reaching when he removed his right hand from the steering wheel. When questioning Sheriff Ammend about appellant's motion, the prosecutor initially attempted to elicit testimony from him regarding what he believed appellant was reaching for in the truck. But each time this occurred, defense counsel's objection was sustained. Later, outside the presence of the jury, the district court heard brief arguments on the desired testimony and then ruled as follows:

> [Appellant] reaches in an area, I'm not satisfied foundationally that where he was reaching was in the same area where the gun is, and I think you're allowed to question and ask the officer or the sheriff to testify as to that.
>
> Was he reaching *in the area* where the gun was located? [Sheriff Ammend's] certainly entitled to testify to that. That's what the court sees. That's how far the court sees the sheriff can go in expressing an opinion to that area. . . . Was he reaching *for the gun*, that's speculative, but was he reaching *in the area* where the gun was found, that he can testify to.

(Emphasis added.)

The following exchange subsequently occurred on direct testimony:

> [Prosecutor]: And based on your personal observations do you have an opinion as to whether or not the [appellant] was reaching towards that pocket where that loaded semiautomatic weapon was located?
>
> . . . .
>
> [Sheriff Ammend]: I have no doubt that he was reaching for that pocket where that handgun was located at.

The district court's carefully tailored ruling correctly limited Sheriff Ammend's testimony to his observations, as opposed to his speculation. The sheriff never specifically stated that appellant was reaching for the handgun as the ruling prohibits. Deputy Nelson and Sgt. Guenther also corroborated Sheriff Ammend's testimony concerning the area of the truck for which appellant was reaching. Sgt. Guenther stated that he had a clear view of appellant's right arm from his vantage point at the driver's side of the truck. And appellant does not challenge the testimony of either of these

officers on appeal. We conclude the district court properly exercised its discretion in admitting Sheriff Ammend's testimony.

III.

Appellant raises more than a dozen issues in his pro se supplementary brief. Appellant contends that law enforcement violated his *Miranda* rights in two ways and that the district court abused its discretion by refusing to suppress statements he made during a custodial interrogation. Before the questioning at issue, the interrogating police officer read appellant his *Miranda* rights and then the following exchange occurred:

> [Officer]: . . . having these rights in mind do you wish to talk to me at this time?
> [Appellant]: My gut instinct says not to . . .
> [Officer]: Ok --
> [Appellant]: but ah --
> [Officer]: Well like I said there Larry, you can -- there's questions you don't -- you can stop at any time, you can stop now -- you can --
> [Appellant]: I'll, I'll try but like I said I'm in so much pain I don't know if I'm coming or going.

Appellant claims that the officer failed to respect his invocation of his right to remain silent.

"[A]n unambiguous and unequivocal invocation of the right to remain silent is required to implicate *Miranda's* protections." *State v. Day*, 619 N.W.2d 745, 749 (Minn. 2000). "If the invocation of the right [to remain silent] is ambiguous or equivocal, the interrogating officers are not required to confine their questioning to clarifying questions" meant to determine whether the defendant desired to invoke his or her right to remain silent. *Day*, 619 N.W.2d at 749. An appellate court reviews "the factual issue of whether

a suspect unequivocally and unambiguously invoked the right to remain silent for clear error." *State v. Ganpat*, 732 N.W.2d 232, 239 (Minn. 2007). Based on this record, we conclude that the district court properly determined that appellant's statements did not constitute an unambiguous and unequivocal invocation of his right to remain silent.

Appellant also claims his *Miranda* rights were violated when a police officer posed questions to him during the booking process at the county jail. The only statement appellant made during booking that was admitted at trial was that appellant sometimes uses the alias of Russ Kohn. But this information was obtained pursuant to a routine booking question, and such questions do not require *Miranda* warnings. *State v. Greenleaf*, 591 N.W.2d 488, 497 (Minn. 1999); *see also State v. Link*, 289 N.W.2d 102, 107 (Minn. 1979) (stating that "[b]iographical questions are not proscribed by *Miranda*").

At some unspecified point during trial, appellant's attorney noted that a juror was sleeping for brief moments and brought this to the attention of the court. Appellant now claims that the juror's sleeping prejudiced his right to a fair trial. In evaluating the impact of a sleeping juror on a defendant's right to a fair trial, the defendant "must show actual misconduct and that the misconduct resulted in prejudice." *State v. Yant*, 376 N.W.2d 487, 489 (Minn. App. 1985), *review denied* (Minn. Jan. 17, 1986). While a juror's sleeping is misconduct, appellant did not make a record of what evidence the sleeping juror might have missed or explain how the juror's nodding off prejudiced him. Thus, he has not met his burden under the second prong of the test.

Appellant claims that his original trial counsel, whom he discharged several months before trial, refused to return certain documents that were required to prepare for

his defense. But an examination of the record reveals that appellant's real quarrel with the attorney was over the return of a deed to his property that appellant had used to secure the attorney fees he agreed to pay the attorney for his services. Further, when the attorney was discharged at the pretrial hearing, he stated on the record that he had returned the entire defense file to appellant.

Appellant argues that the district court abused its discretion by admitting certain evidence during trial. Appellant first alleges that the prosecution's introduction of the credit cards bearing the name of his alias while failing to introduce credit cards bearing his real name was improper. But what information to present to a jury is a matter of trial tactics left to the discretion of counsel, *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999), and appellant cannot force the prosecution to enter evidence favorable to his defense. Appellant claims that the survivalist-gear order form and several pictures authorities took of his truck were forgeries. But a proper foundation was laid for each exhibit and judgments regarding the credibility and weight to be given to evidence are left to the jury. *State v. Clark*, 739 N.W.2d 412, 418 (Minn. 2007).

Appellant asserts that Deputy Nelson and Sgt. Guenther lied when they testified that he did not have a permit to carry a handgun. But appellant produced no evidence to contradict this testimony, and, regardless, the officers' testimony was sufficient to allow the jury to convict appellant of carrying a handgun without a permit. *See State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989) (in a sufficiency-of-the-evidence challenge, reviewing courts assume that the fact-finder believed the state's witnesses). Finally, appellant contends that the admission of his mug shot, which was introduced for

identification purposes, was an abuse of discretion. But appellant explains neither how introduction of this evidence was error nor how it improperly prejudiced him.

Appellant next asserts an ineffective-assistance-of-counsel claim. Appellant contends that his trial counsel's failure to challenge the allegedly phony photographs of his truck and failure to check whether or not he had actually ordered the survivalist gear listed on the order form constituted ineffective assistance. To support a claim of ineffective assistance of counsel, the burden of proof is on the petitioner to demonstrate that (1) his counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that the result of the trial would have been different but for counsel's errors. *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003). "There is a strong presumption that an attorney acted competently." *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001). Appellant's bare allegations do not meet his burden. There is no evidence that law enforcement faked the photograph of his truck. And the prosecutor never claimed, as appellant contends, that appellant actually ordered the survivalist gear; the prosecutor just highlighted to the jury that appellant had an order form for such gear in his possession when arrested.

Appellant's final two arguments concern purported posttrial deficiencies. He contends that the denial of his pro se motion regarding his sentencing violated his right to a fair trial. There is no support in the record for this assertion. Finally, he claims that the district court erred in sentencing him because it stated that his sentence was based, in part, on his planned purchase of the aforementioned survivalist books. In our review of

the transcript of the sentencing hearing, we find no such comment or merit to this argument.

Affirmed.