STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1898

State of Minnesota,
Respondent,

vs.

Charles E. Thomas,
Appellant.

Filed July 22, 2008
Affirmed
Peterson, Judge

Anoka County District Court
File No. K5-05-6315

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

Robert M.A. Johnson, Anoka County Attorney, Kristin C. Larson, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Peterson, 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

PETERSON, Judge

In this appeal from convictions of burglary and armed robbery, appellant argues that he is entitled to a new trial because the district court (1) admitted an out-of-court statement as nonhearsay evidence, (2) failed to repeat preliminary instructions during its final charge to the jury, (3) denied his request for surrebuttal closing argument, and (4) failed to sequester the jury during deliberations. We affirm.

FACTS

Shortly after 1:00 a.m. on August 30, 2004, two masked gunmen entered the bar area of Sharx nightclub in Fridley. The nightclub had just closed, and members of the staff were cleaning and socializing. The gunmen ordered everyone to the floor and told them to take off their jewelry and empty their pockets. At about 1:26 a.m., Fridley police were dispatched to Sharx in response to a 911 hang-up call. Two officers entered and found two men wearing sweatshirts with hoods pulled over their heads. One of the men was holding a handgun. The man appeared to put the handgun on the floor, and both men began running. The officers chased the men and, because it was dark inside the nightclub, followed them primarily by sound. One officer caught up to a man that he believed to be one of the robbers. The man was identified as Chevalier McConnell and arrested. While securing McConnell, one of the officers briefly saw the other suspect and made eye contact with him. The second suspect ran, and the officer heard what sounded like a door being kicked open.

On the basis of recorded phone conversations with McConnell, pawn shop records, and a statement to investigators, appellant Charles E. Thomas was charged in connection with the incident at Sharx. He was found guilty by a jury and convicted of five counts of armed robbery and one count of burglary. This appeal followed.

D E C I S I O N

I.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). A statement offered to show something other than the truth of the matter asserted is not hearsay. *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004). Out-of-court statements offered not for their truth, but to give context to responses by the defendant, are not hearsay. *State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000).

While McConnell was in custody, he made several telephone calls to appellant. At trial, the state sought to introduce part of one of those conversations in which McConnell said, "They didn't find no gun on me or nothing," and appellant responded, "Yeah, they found it?" Appellant conceded that his statement was admissible as a statement of a party opponent, but he argued that McConnell's statement was inadmissible hearsay. The state argued: "We are clearly not offering this to prove that they didn't find a gun on McConnell. That's undisputed. Everybody's testified to that. It's the inference that can be drawn from [appellant's] response that we are interested in." The district court ruled that McConnell's statement was not hearsay because it was not offered to prove the truth of the matter asserted, and the parties agreed on the wording of

a cautionary instruction. We review the district court's evidentiary rulings for abuse of discretion. *Tovar*, 605 N.W.2d at 722.

The matter asserted in McConnell's statement is that the police did not find a gun on McConnell. This fact is undisputed. There is no testimony or suggestion that the police found a gun on McConnell when they arrested him, though one of the arresting officers testified that she patted him down to check for weapons. Furthermore, the fact that the police did not find a gun on McConnell was not helpful to the state's case, which rested on the theory that McConnell was one of the armed robbers. Thus, the apparent reason for the state to offer McConnell's statement was to give context to appellant's statement. Because McConnell's statement was not offered to prove the truth of the matter asserted, the district court did not abuse its discretion when it determined that the statement was not hearsay.

II.

Appellant argues that the district court failed to adequately instruct the jury. But appellant did not object to the jury instructions at trial.

> Generally speaking, an appellate court will not consider an alleged error in jury instructions unless the instructions have been objected to at trial. In the absence of an objection, the appellate court may review jury instructions if the instructions contain plain error affecting substantial rights or an error of fundamental law. Under this test, the challenging party must show: 1) error, 2) that is plain, and 3) that affects substantial rights. If all three prongs are satisfied, the court determines whether the error must be addressed to ensure the fairness and integrity of the judicial proceedings.

State v. Baird, 654 N.W.2d 105, 113 (Minn. 2002) (citations omitted). An error is plain if it contravenes caselaw, a rule, or a standard of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

"Trial courts are permitted considerable freedom when determining how to instruct the jury as long as the jury instruction is not confusing or misleading on fundamental points of the law." *State v. Gutierrez*, 667 N.W.2d 426, 434 (Minn. 2003). A district court may give preliminary instructions "[a]fter the jury has been impaneled and sworn, and before the opening statements of counsel." Minn. R. Crim. P. 26.03, subd. 4; *see* Minn. R. Crim P. 26.03, subd. 11(b) (order of jury trial). "The court in its discretion shall instruct the jury either before or after the [closing] arguments are completed except, at the discretion of the court, preliminary instructions need not be repeated." *Id.*, subd. 18(4). Preliminary instructions "do not relieve the court of its obligation to fully inform the jurors of the applicable law at the close of the evidence." *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004.) "In charging the jury the court shall state all matters of law which are necessary for the jury's information in rendering a verdict and shall inform the jury that it is the exclusive judge of all questions of fact." Minn. R. Crim. P. 26.03, subd. 18(5). "Upon review, instructions are viewed in their entirety to determine whether they fairly and adequately explain the law of the case." *Peterson*, 673 N.W.2d at 486.

Adequate information on the topics of circumstantial evidence and the credibility of witnesses, given at the start of the trial, "need not be repeated in final instructions." *State v. Duemke*, 352 N.W.2d 427, 432 (Minn. App. 1984). However, a final charge

delivered orally that does not include instructions on the presumption of innocence and proof beyond a reasonable doubt obscures and dilutes the state's burden of proof and denies a defendant due process of law. *Peterson*, 673 N.W.2d at 487.

In its final charge, the district court orally instructed the jury on the presumption of innocence and the requirement of proof beyond a reasonable doubt. Appellant argues that the district court failed to orally instruct the jury on the duties of the judge and the jury, direct and circumstantial evidence, rulings on objections to evidence, notes the jurors may have taken, how to evaluate testimony and the credibility of witnesses, and the role of attorneys. The district court orally instructed the jury on these topics as part of its preliminary instructions, and appellant has not identified any error or omission in the preliminary instructions. Instead, appellant argues that the district court erred in failing to repeat its preliminary instructions in its final charge. The record shows that the district court provided each juror with a complete written copy of its instructions but did not reread the instructions that had been given at the start of the trial. The district court did point out ways in which the final instructions differed from the preliminary instructions and read through the changes and additions. At least twice, the district court stated that the jurors functioned as judges of the facts.

Appellant cites no caselaw, rule, or standard of conduct that requires the district court to reread preliminary instructions on the duties of the judge and the jury, direct and circumstantial evidence, rulings on objections to evidence, notes the jurors may have taken, how to evaluate testimony and the credibility of witnesses, or the role of

attorneys.[1] Because the district court has considerable discretion in instructing the jury, and because the rules of criminal procedure specifically provide that the district court may choose, in its discretion, not to repeat instructions given previously, appellant has not shown that the district court committed plain error. Appellant argues that the district court's decision not to reread the preliminary instructions could have left the jury confused about the applicable law and its duties, but cites no evidence that supports this argument. The record reveals that the jury sent several notes to the district court during deliberations seeking clarification and asking questions, but none of the notes has any apparent relationship to the preliminary instructions. Appellant never objected to the district court's method of instructing the jury and has not shown that it was plain error.

III.

"On the motion of the defendant, the court may permit the defendant to reply in surrebuttal if the court determines that the prosecutor has made in its rebuttal argument a misstatement of law or fact or a statement that is inflammatory or prejudicial." Minn. R. Crim. P. 26.03, subd. 11(k). Given the district court's broad discretion in managing trials and the permissive language of the rule, we review the denial of appellant's request for a surrebuttal argument for abuse of discretion. *See State v. Chambers*, 589 N.W.2d 466, 475 (Minn. 1999) (decision to require criminal defendant to wear restraints reviewed for

[1] Appellant cites *Massey v. State*, 508 S.E.2d 149, 151 (Ga. 1998), in which the Georgia Supreme Court reversed a conviction based in part on the district court's refusal to reread a preliminary instruction on circumstantial evidence as part of its final charge to the jury. *Massey* is not controlling authority and is distinguishable because in that case, defense counsel made a timely request for the instruction during trial. *Id.*

abuse of discretion); *State v. Parker*, 585 N.W.2d 398, 406 (Minn. 1998) (restrictions on scope of cross-examination reviewed for abuse of discretion)

After appellant's closing statement, the prosecutor delivered a brief rebuttal argument. Appellant requested an opportunity to give a surrebuttal, arguing that the prosecutor misstated the evidence. The district court concluded that "those are not misstatements of the evidence but differing conclusions or inferences that might legitimately be drawn" and denied the request for surrebuttal.

During closing argument, defense counsel argued:

> Let's talk about physical evidence found at the scene. There were no gloves, masks, bandanas, hats, found anywhere in the Sharx Nightclub. Now, don't fall for this argument from the State that police did an inadequate search of the club, that they didn't look in places they should have. Where did you hear any testimony during this trial that police didn't search the waste basket in the bathroom. There was no testimony about that at all. There was testimony that a number of law enforcement officers arrived, and a number of them, probably four or five, I believe you'll recall, all talked about conducting different searches in that club, so the police fanned out in that club and searched every area of it.

During rebuttal, the prosecutor argued:

> [Defense counsel] suggested that -- that the search by the police that night was, in fact, thorough. Well, you know what? Even [appellant], if you believe his testimony, the search was not thorough. [Appellant] testified that they went there to exchange weed for liquor. Where is the weed? They didn't find any. No matter whose story you believe, the search wasn't good.

Defense counsel argued that the prosecutor misstated the evidence because "[t]here was no testimony one way or the other about whether marijuana was found in the

nightclub. May have been, may have not have been. We don't know. No evidence about that." Appellant is correct that nobody testified whether marijuana was found in the nightclub. But the prosecutor's statement was made in response to the defense argument that police searched every area of the nightclub, which asked the jurors to infer that the police search was thorough and that because the search was thorough, the police found whatever physical evidence was in the nightclub. To counter this argument, the prosecutor referred to appellant's testimony about marijuana in the nightclub and asked the jury, "Where is the weed?" The prosecutor then answered his rhetorical question by stating, "They didn't find any." The district court did not abuse its discretion when it concluded that the prosecutor's answer to his own question was not a misstatement of the evidence, but an inference that might legitimately be drawn from testimony that described the search of the nightclub but did not state that marijuana was found. *See State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986) (indicating that prosecutor may comment on lack of evidence regarding defense theory).

The prosecutor also argued during rebuttal that the evidence showed that the robbers could not have exited Sharx through the kitchen door, which was appellant's theory. Appellant argued that there was no evidence or testimony supporting the prosecutor's argument. But a Sharx employee testified at trial that on the night of the robbery, he locked the door near the kitchen and placed the security bar over it, and the manager on duty that night testified that with the bar across the door, a person could not push the door open from inside the building and, instead, would have to lift the bar to exit. A photo of the door, taken by a crime-scene photographer after the robbery, shows

the metal bar in place. Based on the photo, the jury could reasonably infer that if a person had run out that door, the metal bar would no longer be in place. Again, the prosecutor was arguing a reasonable inference that the jury could draw from the evidence in the record.

Finally, the prosecutor argued that appellant's trial testimony did not match the statements that he initially gave the investigating detective. Specifically, the prosecutor argued that appellant told the detective that he was at Sharx "to buy liquor and buy weed." The detective actually testified that "[appellant] said that he accompanied Mr. McConnell to Sharx so Mr. McConnell could get some liquor or weed." To the extent that the prosecutor's argument suggests that appellant told the detective that he would be the purchaser, it misstates the evidence. But appellant has not shown that the district court abused its discretion in denying his request for surrebuttal. The misstatement was minor and was made in the context of arguing that inconsistencies between appellant's initial statement to the detective and his trial testimony showed that his version of events had changed over time. Regardless of whether appellant initially said that he or McConnell would be the purchaser, the jury could determine whether appellant's trial testimony was consistent with his initial statement to the detective. Because the prosecutor's misstatement was minor when viewed in the context of the trial and closing arguments as a whole, appellant has not shown that the district court abused its discretion in denying his request for surrebuttal.

IV.

> During the period from the time the jurors are sworn until they retire for deliberation upon their verdict, the court, in its discretion, may either permit them and any alternate jurors to separate during recesses and adjournments or direct that they be continuously kept together during such period under the supervision of proper officers. With the consent of the defendant and the prosecution, the court, in its discretion, may allow the jurors to separate over night during deliberation.

Minn. R. Crim. P. 26.03, subd. 5(1). "[I]t is error for a trial court to allow the jury to separate during deliberations without the defendant's consent." *State v. Erickson*, 597 N.W.2d 897, 901 (Minn. 1999).

The jury was sent home on a Friday afternoon after the parties rested. The subject of sequestering the jury during deliberations did not come up until after the jury had been dismissed. The possibility of notifying the jurors by phone that they should return to court the following Monday prepared for possible sequestration was raised, but appellant objected to notifying them. When court reconvened on Monday, the district court explained the practical difficulties that would be involved in attempting to sequester the jury given the lack of prior notice to the jurors. The state consented to allowing the jury to separate, but appellant insisted on sequestration. The district court determined that it would not sequester the jury. The jury began deliberations at 12:20 p.m. and continued until about 6:30 p.m. Before allowing them to separate for the night, the district court reminded the jurors of how to conduct themselves and specifically told them not to talk about the case, do any independent research, intentionally visit any of the locations mentioned during trial, or read, watch, or listen to any reports about the trial. The jurors

returned to court the following morning, continued deliberations, and reached a verdict. At no time did appellant request voir dire.

Citing *State v. Holly*, 350 N.W.2d 387, 388-90 (Minn. App. 1984), appellant argues that allowing the jury to separate during deliberations is presumptively prejudicial. But a presumption of prejudice was explicitly rejected by the supreme court in *State v. Sanders*, when it held that "mere separation of the jury in violation of Minn. R. Crim. P. 26.03, subd. 5, without more, does not raise a presumption of prejudice." 376 N.W.2d 196, 206 (Minn. 1985). The court discussed *Holly* and explicitly overruled *State v. Georgian*, 124 Minn. 515, 145 N.W. 385 (1914), the case on which *Holly* was based. 376 N.W.2d at 204-06.

> [A] new trial will be ordered only upon a showing of prejudice by the appellant. Prejudice will be presumed upon a showing by the defendant of private communications or contact or other circumstances suggesting direct or indirect improper influence or jury tampering, such as pervasive, unfavorable publicity. Upon such a showing, the state then bears the burden of overcoming the presumption of prejudice.

Erickson, 597 N.W.2d at 901-02 (quotation and citations omitted). It is appropriate for a district court that has allowed a jury to separate to conduct voir dire before the jury resumes deliberations. *Sanders*, 376 N.W.2d at 206-07. However, failure to do so, particularly where voir dire was not requested by defense counsel and there is no reason to believe that it would have uncovered any improper influences, does not alone justify an inference of prejudice. *Id.*

Appellant has not alleged any private communications with the jury, improper influence, jury tampering, or pervasive publicity. Because appellant has failed to allege

or show any prejudice that resulted from the erroneous separation of the jury, he is not entitled to a new trial on this basis.

Affirmed.