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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0714**

State of Minnesota,
Respondent,

vs.

Jaime Tirado Hernandez,
Appellant.

**Filed July 15, 2008
Affirmed
Lansing, Judge**

Hennepin County District Court
File No. 04036221

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Considered and decided by Lansing, Presiding Judge; Stoneburner, Judge; and Worke, Judge.

UNPUBLISHED OPINION

LANSING, Judge

After a jury trial, Jaime Tirado Hernandez was convicted of second-degree murder and second-degree assault for the benefit of a gang. On appeal, Hernandez disputes the admissibility of identification evidence, an inculpatory letter, two prior convictions, and a number of out-of-court statements. In addition, Hernandez argues that the prosecutor committed misconduct by providing a personal opinion about witness credibility in closing argument and that the district court improperly calculated his sentence. We conclude that the district court properly ruled on the evidentiary questions, that no prosecutorial misconduct occurred, and that the sentence was properly calculated. Accordingly, we affirm.

F A C T S

Ruben Santillo-Garcia was shot in the back near east Lake Street in Minneapolis in April 2003 and died four days later. During the shooting, a stray bullet hit a bystander, who had to be hospitalized and treated for a broken femur. At the time he was shot, Santillo-Garcia was reportedly attempting to end his involvement in the Surenos 13 gang.

Initially, the investigation into the shooting stalled. But almost a year after the shooting, a police officer located an individual who matched the description of a person at the scene of the shooting. When the officers interviewed the individual, he identified Jaime Hernandez as the shooter. Two witnesses to the shooting were then shown photo lineups and identified Hernandez as the shooter.

As a result, Hernandez was indicted for first-degree murder committed for the benefit of a gang and second-degree assault committed for the benefit of a gang. The jury found Hernandez guilty of second-degree murder committed for the benefit of a gang and second-degree assault committed for the benefit of a gang. The district court sentenced Hernandez to the presumptive sentence of 328 months for the murder conviction and imposed a consecutive, 48-month sentence for the assault conviction. Hernandez now appeals.

DECISION

I

The Due Process Clause requires that identification evidence must be excluded if the procedure used was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). Minnesota courts analyze this standard using a two-part test. The first part of the inquiry asks whether the procedure was unnecessarily suggestive. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999). If so, the second part asks whether the identification was reliable under the totality of the circumstances. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995).

Witnesses to the shooting identified Jaime Hernandez in a photo array. The police officers used two, six-person photo arrays. The pictures were selected by a computer program based on Hernandez’s physical description. Hernandez argues that the identification procedure was unnecessarily suggestive because the police officer failed to comply with Hennepin County guidelines for identification procedures, which required

the officer to use a sequential lineup of photographs and to place the suspect's photograph in a position other than first.

The relevant question, however, is not whether the identification procedure complied with Hennepin County guidelines. Instead, the question is whether the identification procedure used was unnecessarily suggestive. An identification procedure can violate the preferred method that is provided in the county's guidelines without being unnecessarily suggestive. *See State v. Mems*, 708 N.W.2d 526, 530-32 (Minn. 2006) (approving use of procedure similar to procedure in this case). We can find no basis on which we could conclude that the particular procedure used in the photo lineup was unnecessarily suggestive.

When a photo-identification procedure is not unnecessarily suggestive, we do not address part two of the inquiry because we need not consider whether the identification evidence was reliable under the totality of the circumstances. *Taylor*, 594 N.W.2d at 161.

Hernandez also argues that the identification evidence should have been excluded—despite the lack of a due-process violation—under Minn. R. Evid. 403. This rule requires the exclusion of evidence when the probative value of the evidence is substantially outweighed by the potential for unfair prejudice. Because the Due Process Clause and Minn. R. Evid. 403 serve the parallel purpose of limiting unreliable evidence, we see no basis for creating additional criteria for identification evidence under Rule 403.

II

The district court admitted two letters that Hernandez wrote while in prison. Hernandez argues that the letters should have been excluded because the letters were

unduly prejudicial and because they were found in an illegal search. We reject Hernandez's arguments for three reasons.

First, Hernandez failed to properly raise his objections. In general, the failure to properly raise an evidentiary issue at trial constitutes a waiver of the issue on appeal. *State v. Quick*, 659 N.W.2d 701, 717 (Minn. 2003). During the trial, Hernandez did not argue that the letters were unduly prejudicial. Instead, he made objections based on foundation. In addition, he failed to raise his illegal-search claim in a pretrial motion. See Minn. R. Crim. P. 10.03 (requiring known defenses to be raised in pretrial motion). Thus, Hernandez's arguments are waived.

Second, even if Hernandez had not waived his arguments, the district court did not abuse its discretion when it concluded that the letters were not unduly prejudicial. Under Minn. R. Evid. 403, evidence must be excluded if the probative value of the evidence is substantially outweighed by the potential for unfair prejudice. We review the district court's decisions under Rule 403 for an abuse of discretion. *State v. Schulz*, 691 N.W.2d 474, 477 (Minn. 2005). The district court could have reasonably concluded that both of the letters were highly probative of Hernandez's guilt. One letter appears to contain an admission of guilt. In the other letter, Hernandez appears to be requesting that witnesses refuse to testify against him. Hernandez argues that these letters were unduly prejudicial because they contained vulgar language, expressed suicidal thoughts, and revealed that he was having an affair with a married woman. In light of the highly probative value of these letters, however, the district court did not abuse its discretion when it admitted the letters.

Third, the letters were not found in an illegal search. Because prisoners are aware that their nonprivileged mail may be searched, Hernandez did not have a reasonable expectation of privacy in the letter and no unreasonable search occurred. *State v. Cuypers*, 481 N.W.2d 553, 556-57 (Minn. 1992).

III

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). An out-of-court statement is not hearsay if it is offered for some other purpose, such as to prove knowledge or notice. Minn. R. Evid. 801 cmt. As a result, police officers may be permitted to testify that they received a tip if that event explains or describes the progress of their investigation. *See State v. Litzau*, 650 N.W.2d 177, 183 n.4 (Minn. 2002) (permitting factual testimony about contacts with informants and events leading up to arrest). But nonhearsay evidence can be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403. Testimony about the contents of the tip may therefore be inadmissible because the testimony has little nonhearsay value. *See Litzau*, 650 N.W.2d at 183 (citing Minn. R. Evid. 403); *State v. Williams*, 525 N.W.2d 538, 544-45 (Minn. 1994) (holding that testimony about contents of tip was hearsay).

Hernandez challenges the district court’s decision on two hearsay issues. The first issue involves a police officer’s testimony about the contents of a tip. The second issue involves the exclusion of testimony about a tip the officer received that someone other

than Hernandez made threats against Santillo-Garcia. We conclude, however, that the district court properly ruled on both issues.

On the first issue, Hernandez argues that the officer should not have been allowed to testify that he received information from the gang strike force that Hernandez's street name was "Timer." We assume that Hernandez is correct that the evidence was inadmissible under *Litzau* because the testimony addressed the contents of the tip. But the district court did not allow the testimony—Hernandez's objection to this testimony was *sustained*. Although the record confirms that the objection was sustained, Hernandez did not ask that the court strike the officer's testimony. Other evidence, however, established that Hernandez's street name was "Timer." Thus, under the circumstances, the district court was not required to sua sponte strike the testimony. By sustaining the objection, the district court properly ruled on the hearsay issue.

Hernandez challenges another aspect of the police officer's testimony about the tip. He argues that the district court should have prevented the officer from testifying that he first learned about Hernandez when he was reading a police report. But because the purpose of this testimony was to explain the course of the investigation, the testimony was not hearsay. *See Litzau*, 650 N.W.2d at 183 n.4 (noting that police officers can testify about events leading up to arrest).

On the second issue, the district court correctly excluded evidence that another person had made threats against the victim. Hernandez wanted a police officer to testify that Santillo-Garcia's sister told the officer that someone told her that a different person was planning to kill Santillo-Garcia. Hernandez argued that statement was admissible for

nonhearsay purposes because it demonstrated the officer's failure to properly investigate the crime. But the real purpose of the testimony would have been to establish that a person other than Hernandez had made plans to kill Santillo-Garcia. *See id.* at 183 (holding that contents of tip included inadmissible hearsay). Thus, because the statement had no genuine nonhearsay purpose, the district court properly refused to admit testimony about the threat against the victim.

IV

Hernandez argues that the district court should not have admitted evidence of his prior conviction for spraying gang graffiti and his conviction for assault after the murder. Hernandez argues the evidence was inadmissible. We conclude, however, that the evidence was admissible for two reasons.

The first reason is that the graffiti conviction was probative evidence that the Sureños 13 was a criminal gang. To establish that Hernandez committed a crime for a benefit of a gang, the state was required to prove that a criminal gang existed and that the crime was committed for the benefit of the gang. Minn. Stat. § 609.229, subds. 1, 2 (2002); *State v. Mahkuk*, 736 N.W.2d 675, 687 n.3 (Minn. 2007). Because the graffiti conviction helped to establish that the Sureños 13 was a criminal gang, it was admissible despite the fact that it was evidence of a separate crime. *See State v. Wofford*, 262 Minn. 112, 118, 114 N.W.2d 267, 271 (1962) (“[W]here two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the *res gestae*, it is admissible.”).

The second reason the convictions were admissible was for the purpose of proving motive, identity, and modus operandi. A district court's decision to admit evidence of the commission of other crimes is reviewed for an abuse of discretion. *State v. Washington*, 693 N.W.2d 195, 200 (Minn. 2005). Evidence of other crimes, referred to as *Spreigl* evidence, may be admitted to establish "motive, intent, absence of mistake, identity, or a common scheme or plan." *State v. Asfeld*, 662 N.W.2d 534, 542 (Minn. 2003). It is inadmissible "to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). The evidence must be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403.

Hernandez's prior assault was committed to promote the Surenos 13's control of Powderhorn Park. The evidence of the conviction was probative of the fact that Hernandez used a similar modus operandi when he committed that crime and the crime against Santillo-Garcia and that the crimes had a similar motive. Thus, the conviction also helped to establish Hernandez's identity. The graffiti conviction similarly helped to establish that Hernandez's gang membership provided a motive for shooting Santillo-Garcia. Because the graffiti conviction was not a major offense and because the jury had already been informed of Hernandez's role in the assault, the danger of prejudice from the admission of the prior convictions was low. Therefore, the district court did not abuse its discretion when it admitted the *Spreigl* evidence.

Finally, Hernandez was not entitled to the particular jury instruction that he requested on *Spreigl* evidence. Hernandez requested the jury instruction, used in the

federal district courts in the Eighth Circuit, which identifies the specific purpose of the evidence. But the district court used the standard Minnesota instruction instead. When *Spreigl* evidence is admitted for multiple purposes, the supreme court has previously held that the same instruction given by the district court is proper. *Ture v. State*, 681 N.W.2d 9, 18-19 (Minn. 2004). Because the record indicates—contrary to Hernandez’s claim—that the *Spreigl* evidence was admitted for multiple purposes, we see no basis for concluding that the district court improperly instructed the jury.

V

The overarching problem presented by prosecutorial misconduct is that it may deny the defendant’s right to a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). To protect the right to a fair trial, we do not allow prosecutors to make arguments that rely on the prestige and credibility of their office. As a result, prosecutors cannot give their own opinions about the credibility of a witness. *State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006). Similarly, a prosecutor cannot personally endorse the credibility of a witness. *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995). In determining whether the prosecutor committed misconduct, we look at the closing argument “as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence.” *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (quotation omitted).

Hernandez argues that the prosecutor committed misconduct by commenting on the credibility of witnesses. In closing argument, the prosecutor stated that one witness “talked to you honestly,” that another witness’s testimony was “forthright” and had “the

ring of truth,” and that a third witness “decided to tell the truth.” Hernandez did not object to these statements.

Although the prosecutor made comments about witness credibility, the prosecutor did not base these arguments on personal opinion. When viewed in context, the prosecutor’s statements are supported by factual arguments based on the record. The prosecutor supported the statements with details of the testimony, the witnesses’ motives for testifying, and the demeanor of the witnesses. Although prosecutors cannot give personal opinions about witness credibility, prosecutors are permitted to *argue* that witnesses were credible. *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991). Therefore, the prosecutor’s argument was proper.

VI

The district court imposed consecutive sentences for second-degree murder for the benefit of a gang and second-degree assault for the benefit of a gang. *See* Minn. Sent. Guidelines II.F (permitting consecutive sentencing for certain offenses). In calculating Hernandez’s consecutive sentence for second-degree assault for the benefit of the gang, the district court started with the mandatory minimum sentence for second-degree assault—thirty-six months. *See* Minn. Stat. § 609.11, subds. 5, 9 (2002) (providing mandatory minimum of thirty-six months for second-degree assault when firearm is used). Hernandez does not dispute that the mandatory minimum applied to him. The district court then added twelve months because the assault was for the benefit of a gang. *See* Minn. Sent. Guidelines II.G (enhancing sentence for most benefit-of-gang offenses by twelve months).

Hernandez argues that this procedure was inconsistent with the sentencing guidelines provision on consecutive sentencing of crimes committed for the benefit of a gang. In general, the length of a permissive consecutive sentence is based on “a zero criminal-history score, or the mandatory minimum for the offense, whichever is greater.” Minn. Sent. Guidelines II.F. But a more specific provision applies to crimes committed for the benefit of a gang:

[W]here there is a sentence for an offense committed for the benefit of a gang, the presumptive duration for the underlying crime with the highest severity level if sentenced consecutively, would include additional months as outlined in Section II.G and using the respective criminal history score appropriate for consecutive sentencing.

Id. Hernandez argues that under this provision the district court could not use the mandatory minimum sentence. Instead, he argues, the district court needed to calculate the consecutive sentence starting with the presumptive sentence for second-degree assault with a criminal-history score of zero, which would be twenty-one months.

But the language of the guidelines does not preclude using the mandatory minimum sentence when a crime for the benefit of a gang is sentenced consecutively. Instead, the guidelines simply instruct district courts to calculate the consecutive sentence using Section II.G with a criminal-history score of zero. Section II.G, however, takes into account the possibility of mandatory minimum sentences. *See* Minn. Sent. Guidelines II.G (calculating sentence with criminal-history score or mandatory minimum, whichever is greater). Therefore, because the permissive consecutive sentence for a crime committed for the benefit of a gang “would include additional months as outlined

in Section II.G,” the permissive consecutive sentence can be calculated by adding twelve months to the mandatory minimum sentence.

Affirmed.