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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1660**

State of Minnesota,
Respondent,

vs.

Meron R. Samuel,
Appellant.

**Filed January 27, 2009
Affirmed
Lansing, Judge**

Dakota County District Court
File No. K1-05-3621

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

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

UNPUBLISHED OPINION

LANSING, Judge

A jury found Meron Samuel not guilty of charges of burglary and criminal sexual conduct, but guilty of false imprisonment, arising from an encounter in an apartment building during a late-night party. In this appeal from conviction, Samuel seeks reversal based on claims of discrimination in jury selection, discovery violations, infringement of his confrontation rights, evidentiary errors, interference with his right to a fair trial, and insufficiency of the evidence to support his conviction. Although the trial was contentious, we perceive no reversible error or abuse of discretion in the challenged rulings, and the evidence is sufficient to support the conviction of false imprisonment. We therefore affirm.

F A C T S

Meron Samuel was a guest at a party in a friend's apartment in Mendota Heights. BD, who lived in a nearby apartment on the same floor of the building, returned to her apartment late that night after a visit with her sister during which BD consumed a couple of alcoholic drinks. The party in the adjacent apartment continued beyond BD's return, and some of the guests ended up spending varying amounts of time in BD's apartment. Meron Samuel was in BD's apartment for several hours and, at different times, invited two other party guests—Simon Haile and Temesghen Tsehay— to join him. It was undisputed at trial that Samuel and Tsehay had sexual contact with BD, but the evidence was disputed on whether the sexual contact was consensual.

The first sexual contact with BD occurred while only Haile and Samuel were in BD's apartment. According to BD, the two men forced her to drink vodka, forcibly removed her pants, and restrained her by clutching her arms and hair. BD testified that Haile forced her to perform oral sex on him while Samuel helped restrain her and inserted a kitchen spoon in her vagina. Tsehaye then joined the others, and BD and Tsehaye ended up alone in BD's bedroom.

BD said that she had tried to isolate Tsehaye in her bedroom because she thought that he might help her, but he instead forced her to perform oral sex on him. Tsehaye testified that it was Haile who told her to perform oral sex on Tsehaye. BD and Tsehaye both testified that, while they were in her room, Haile and Samuel stood outside the bedroom door and looked in several times to see what was happening. By that time it was past 5:00 in the morning.

When Tsehaye left the bedroom to go to the bathroom, BD called 911 and told the dispatcher that people were in her apartment and they would not leave. Then BD hung up abruptly. The dispatcher called back and, because it appeared she could not speak freely, he asked questions that required only yes-or-no answers. Based on her responses, he concluded that BD "needed medical attention and that she needed the police." Within a short time, two Mendota Heights police officers arrived at BD's apartment. BD said, "Thank God!" and then ran into her bedroom. One of the officers followed her, and the other began questioning the three men. Based on the officer's questioning of the three men, they were arrested.

Samuel pleaded not guilty to the charges of criminal sexual conduct, burglary, and false imprisonment. At a jury trial that extended over several days, both Samuel and BD testified and provided varying accounts of BD's interaction with people at the party, the amount of alcohol consumed, and the nature of the sexual contact. Through the testimony of several witnesses and the presentation of physical evidence, the state and the defense sought to establish competing accounts of the events, and the defense also sought to establish fundamental flaws in the police investigation of the charges.

The defense also raised procedural and evidentiary challenges. Samuel raised a *Batson* challenge when the state tried to use two of three peremptory strikes to remove the two venirepersons who were members of a racial minority. He argued that the state violated discovery rules by failing to disclose evidence in advance of trial. And, in addition to other evidentiary challenges, he asserted that his constitutional right to confront witnesses was violated by references to Haile's comments to police. Haile, who was also charged with criminal conduct, invoked his right against self-incrimination and was unavailable for cross-examination.

The jury found Samuel guilty of false imprisonment, not guilty of burglary, and not guilty of criminal sexual conduct. Samuel appeals his conviction for false imprisonment.

DECISION

On appeal, Samuel seeks reversal based on six grounds: discrimination in the state's exercise of peremptory challenges in jury selection, discovery violations, infringement of his confrontation rights, evidentiary errors, interference with his right to a

fair trial, and insufficiency of the evidence to support his conviction. We address each ground.

I

Peremptory challenges to the selection of jurors may not be used for racially discriminatory purposes. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). To analyze a claim of racial discrimination in the exercise of a peremptory strike, district courts apply a three-step inquiry. *State v. Dobbins*, 725 N.W.2d 492, 501 (Minn. 2006); *see also* Minn. R. Crim. P. 26.02, subd. 6(a)(3) (describing three-step inquiry). First, the objector must make a prima facie showing that the circumstances raise an inference of exclusion based on race. *Dobbins*, 725 N.W.2d at 501. The party that exercised the strike must then rebut this showing by providing a basis for the strike that is “facially valid and exhibits no discriminatory intent.” *Id.* The objector then has an opportunity to establish that the offered reason is a pretext for purposeful discrimination. *Id.*

On review, the existence of racial discrimination is a fact question that requires great deference to the district court’s determination. *Id.* We reverse a determination on racial discrimination in the exercise of peremptory challenges only if it is clearly erroneous. *State v. Gomez*, 721 N.W.2d 871, 884 (Minn. 2006).

The record indicates that two venirepersons, #12 and #22, were members of a racial minority. The state used two of three peremptory strikes to remove them. But the district court allowed #22 to remain in the venire and, based on the random order in which they were seated, #22 served as a jury alternate and heard the case. Because the

district court disallowed the strike, Samuel does not have a basis to assert a *Batson* challenge to the initial strike of #22.

Samuel's challenge to the removal of #12 is that the circumstances of this peremptory strike, particularly taking into account the fact that he and the alleged victim are of different races, established prima facie evidence that the strike was based on race. Proceeding under *Batson*, the state offered a race-neutral explanation of why it struck #12. The state pointed out that, in response to a question in his juror questionnaire, #12 wrote that he was brought up "not to judge." In his response to the subsequent question, #12 answered that he doubted he could be fair because it would be hard to tell who was lying and who was not. The state noted that jurors must "make judgments with respect to the evidence," and #12's comments raised doubts about his ability to fulfill the juror's role. In this way, his responses distinguished him from other venirepersons.

These facially valid reasons rebutted an inference that the peremptory strike was motivated by racial discrimination, and the burden shifted to Samuel to demonstrate that the proffered reason was pretextual. Samuel provided no argument on pretext and apparently acceded to the district court's concluding comment that #12 was "gone." Taking the district court's statement as a determination that the state's peremptory strike was not based on racial discrimination, we perceive no clear error which would warrant reversal.

II

During the course of the trial, Samuel made a series of objections based on allegations of discovery violations for failure to provide the defense with various

documents or evidence in advance of trial. “Whether a discovery violation occurred” is a question of law, which we review de novo. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). Generally, the prosecution’s violation of discovery rules will not result in a new trial unless the violation resulted in prejudice to the defendant. *Id.* We will not order a new trial to remedy a discovery violation unless the evidence was material exculpatory evidence, indicating a “reasonable probability” that the evidence’s disclosure would have affected the trial’s outcome. *State v. Clobes*, 422 N.W.2d 252, 255 (Minn. 1988).

Samuel’s list of alleged discovery violations is lengthy but not well grounded. A cluster of his claims is based on the prosecutor’s failure to provide him with a transcript and a recording of statements taken by police during their investigation. He contends that he did not have access to an interview with BD that disclosed her alcohol concentration on the night of the incident. No such interview occurred. Samuel also contends that he did not have access to the text of a follow-up interview with one of the guests at the party. But the record establishes that neither a recording nor transcript ever existed. The discovery rule that Samuel seeks to enforce, Minn. R. Crim. P. 9.01, subd. 1(2), only requires the state “to inspect and reproduce . . . recorded statements.” Consequently, Samuel’s claims have no basis.

The remaining allegations of violation of the discovery rules relate to expert testimony about the viability of BD’s fiancé’s sperm sample which was taken from BD’s underwear and information on BD’s weight and menstrual cycle that was included in a medical report. Samuel has provided no link between these purported discovery

violations and his conviction of false imprisonment. We, therefore, conclude that Samuel has shown no discovery violation that would provide a basis for reversal.

III

We next address Samuel's claim that the admission of testimony referring to Haile's statements to police violated Samuel's constitutional right to confrontation. Under the federal and state constitutions, a criminal defendant has "the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; Minn. Const. art. I, § 6. The Confrontation Clause precludes the introduction of hearsay statements that are testimonial in nature when the declarant is unavailable and the defendant has not had a prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, (2004); *State v. Wright*, 726 N.W.2d 464, 472 (Minn. 2007). Although what makes a statement testimonial has not been conclusively established, "the critical determinative factor . . . is whether it was prepared for litigation." *State v. Caulfield*, 722 N.W.2d 304, 309 (Minn. 2006). Thus, statements are nontestimonial "when made . . . under circumstances objectively indicating that the primary purpose . . . is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273 (2006). Because of the constitutional implications, evidentiary rulings on alleged violations of the Confrontation Clause receive de novo review. *Wright*, 726 N.W.2d at 472.

The testimony at issue involves two witnesses—Officer Convery, who responded to the 911 call and spoke with the three men at BD's apartment, and the lead investigating officer who later worked on the case. Convery's testimony referred to

Haile's denials of knowledge and involvement, and the investigating officer referred to the three men's statements as inconsistent. It is undisputed that Haile, who invoked his right against self-incrimination, was unavailable for cross-examination. We, therefore, turn to an analysis of whether his statements were testimonial. This analysis principally turns on whether Convery's interaction with Haile at BD's apartment was an attempt to evaluate an ongoing emergency or an investigation of suspects in preparation for prosecution.

The officers who responded to BD's 911 call knew that the caller was injured, that unwanted persons were apparently still in her apartment, and that the caller felt unable to speak freely with the 911 operator. Convery, the first responding officer, waited outside the apartment for the second responder, Officer Meyer, to arrive. They heard sounds within the apartment, but, when they knocked on BD's door, the apartment became quiet. Upon entering, Meyer saw BD, who was partially naked, rush from the room after exclaiming, "Thank God!" They also saw three men sitting on a couch. Meyer followed BD into her bedroom but was unable to get the distraught BD to say what had happened. Convery remained with the three men, asking what was happening and why the police had been called. The three men said nothing and only looked at each other and shrugged. The two officers then conferred in the hallway, and Convery, who had only fleetingly seen BD when they entered the apartment, first learned that she was naked from the waist down. The officers returned to ask more questions, and Convery received more shrugs and denials when he asked the three men if any of them had sexual contact with BD.

Convery then separated Tsehaye from the other two, and Tsehaye admitted that BD had performed oral sex on him. Convery returned to Samuel and Haile, and asked them if Tsehaye had sex with BD. Both initially denied any sexual conduct, but Samuel then whispered to Convery that Haile and Tsehaye had sex with BD. Haile overheard this and shook his head “no.” Convery and Meyer reconferred and traded places so that Convery could question BD specifically about the possibility of sexual assault.

The relevant statements by Haile are essentially four denials: (1) general denial—with the others—of any knowledge of why the police had been called; (2) initial denial—with the others—about sexual contact with BD; (3) subsequent denial—following Convery’s individual questioning of Tsehaye—that sexual contact had occurred with BD; and (4) further denial after overhearing Samuel tell Convery about sexual contact with BD. The first three of these denials were elicited during Convery’s testimony at trial. Then, on redirect examination of the lead investigating officer, the state was allowed to elicit the fact that the three men’s responses to questioning at BD’s apartment at the time of the incident were “inconsistent.” The state also referred to the denials generally in closing argument.

We conclude that all but the first of Haile’s denials were testimonial. These denials occurred after Convery and Meyer’s first conference and, as a result of that exchange, Convery learned from Meyer that BD, partially naked, had fled the room after expressing relief at the police officer’s arrival. The officers had the general information from the 911 call, were able to infer from the call’s content and BD’s conduct on arrival

that she was the 911 caller, and also observed that three evasive and suspiciously silent men were in the room from which BD had fled.

Reasonably, Convery had been suspicious of the three men at the time of arrival and, after obtaining the additional information from Meyer, his questioning became more direct. Convery specifically asked the men if sexual contact had taken place. In response to the three men's demeanor and evasiveness, Convery separated Tsehay for individual questioning because Convery was suspicious of all three men's demeanor and evasiveness. This approach to questioning suggests that the men were being treated as suspects of a crime. Conversely, the officers' actions do not otherwise indicate that they were "meeting an ongoing emergency." The officers did not do a protective sweep of the apartment, and nothing suggested that anyone other than the people in BD's apartment were involved in the incident.

Haile's conduct in response to Convery's first question of whether they knew why police had been called was not testimonial because it occurred under circumstances objectively indicating that the primary purpose was to enable police assistance to meet an ongoing emergency. But in light of the unfolding developments and, after Convery's and Meyer's conference, the questions' primary purpose changed from meeting an emergency to pursuing the officers' suspicion that the three men had done something illegal.

Because Haile's last three denials of sexual contact were thus testimonial, allowing them into evidence violated Samuel's right to confrontation. The state argues that, even if Haile's denials were testimonial, the two witnesses' references to them did not violate Samuel's confrontation rights. In addressing Samuel's violation-of-

confrontation claims, the district court observed that any violation was negated because Samuel's trial conduct created a justification for admission of Haile's denials.

We recognize that violations of a defendant's right to confrontation can be waived. *See, e.g., State v. Worthy*, 583 N.W.2d 270, 277-78 (Minn. 1998) (holding that defendants who absent themselves from trial waive their rights to confrontation). We also recognize that the district court has discretion to allow a party to offer otherwise inadmissible evidence as rebuttal if the other party has introduced material necessitating the use of the evidence for purposes of rebuttal. *State v. Gutierrez*, 667 N.W.2d 426, 435 (Minn. 2003); *see also Thurman v. Pepsi-Cola Bottling Co.*, 289 N.W.2d 141, 144-45 (Minn. 1980) (applying doctrine of curative admissibility in civil context). Three conditions must be met for rebuttal evidence to be allowed under this doctrine: (1) the evidence being rebutted must have been itself inadmissible and prejudicial, (2) "the rebuttal evidence must be similarly inadmissible," and (3) "the rebuttal evidence must be limited to the same evidentiary fact as the original inadmissible evidence." *Thurman*, 289 N.W.2d at 144. Having determined that three instances of Haile's denial were inadmissible, we turn to whether the denials were necessary to address Samuel's impermissible evidence on that same issue.

This question is answered with reference to one of the principal elements of Samuel's defense, namely, his attempt to establish that investigating officers had not properly handled the case and had rushed to judgment about Samuel's guilt. At trial, Samuel's attorney asked officers extensively about their investigation and called witnesses to establish that the officers would have been less suspicious of the men if they

had investigated more thoroughly. In general, this defense is, of course, not improper. But the record demonstrates that one particular line of questioning relating to this defense was improper. The impermissible line of questioning occurred in the lead investigating officer's cross-examination. Samuel's attorney repeatedly sought to establish that the officer should not have believed BD's version of events. The district court cautioned Samuel that this was an unwise avenue of questioning and could open up other issues in addition to invading the province of the jury as the sole authority on BD's credibility. The evidence of Haile's denials directly relates to the same evidentiary issue, namely, the credibility of BD's account and the basis for the officers' suspicion of the men. As the district court said, if the jury heard that Haile "lied and said nothing happened" when questioned by officers, it tended to make BD's testimony more credible. It was within the district court's discretion to admit the reference to Haile's denials because Samuel had himself sought in an impermissible way to influence jurors' impression of BD's credibility. The Confrontation Clause violation is, thus, justified as a permissible rebuttal under the curative admissibility doctrine.

IV

Samuel challenges five other evidentiary rulings. We review claims of evidentiary error under an abuse-of-discretion standard. *Francis v. State*, 729 N.W.2d 584, 591 (Minn. 2007), *cert. denied*, 128 S. Ct. 151 (2007). To establish reversible error, the appellant must demonstrate not only that the district court abused its discretion, but also that it resulted in prejudice. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

First, Samuel asserts that the district court abused its discretion by allowing the state to play BD's recorded police interview for the jury. But Samuel waived this objection on the record by specifically agreeing that the jury could hear the recording. Furthermore, the recording was essentially consistent with BD's trial testimony and was therefore admissible under Minn. R. Evid. 801(d)(1)(B). The comment to rule 801(d)(1)(B) specifically endorses prior consistent statements as evidence of a prompt report of sexual assault. Samuel has not demonstrated any prejudice from any contents of the recording that were not prior consistent statements.

Second, we reject Samuel's claim that the district court abused its discretion when it cautioned Samuel's attorney on several lines of questioning on cross-examination. The record confirms that the cautionary admonitions were appropriate, and Samuel has not established any prejudice.

Third, Samuel asserts that the lead investigating officer's testimony improperly referred to other witness's credibility. Even accepting this claim as true, Samuel has not demonstrated prejudice from the officer's comment, and we conclude that any error was harmless. *See State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995) (concluding that it was harmless error when police officer testified he believed confession was truthful). The district court repeatedly reminded the jurors that they alone were to determine the witnesses' credibility.

Fourth, Samuel is incorrect in his claim that the district court prevented him from asking Convery about BD's reaction when the officer entered her room. The record

shows that Samuel did not propound the question that he now claims he was prevented from asking.

Fifth, and finally, reversible error cannot be predicated on allegedly prejudicial testimony by BD's fiancé. The testimony to which Samuel points was stricken from the record, and the jury was instructed to disregard it. None of Samuel's claimed errors show prejudicial abuse of discretion that warrants a new trial.

V

Samuel takes issue with the conduct of the trial and argues that the district court judge who presided over the trial improperly interfered with the proceedings and prejudiced his defense. Minn. R. Evid. 611(a) charges judges with discretion to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." We have thoroughly reviewed the record and the contentious exchanges that are confirmed in the transcript. We conclude that the identified instances of improper trial court conduct occurred at junctures in the proceedings at which the parties' zealotry threatened the truth-seeking purpose of the trial. The importance of protecting this fundamental purpose and the imposition of necessary restraint on the parties' zeal justified a proportional response to maintain "reasonable control." We perceive no unfair prejudice from the district court's conduct of the trial.

VI

The last challenge is to the sufficiency of the record to support a conviction of false imprisonment. Under Minn. Stat. § 609.255 (2008), it is a felony to confine or restrain a person without that person's consent when one knowingly lacks lawful

authority to do so. The state must show that the perpetrator possessed the specific intent “to restrict the [complainant’s] freedom of movement against [that person’s] will.” *State v. Dokken*, 312 N.W.2d 106, 108 (Minn. 1981). An individual is presumed to intend “the natural and probable consequences of his actions.” *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

A challenge to the sufficiency of the evidence requires a “thorough analysis of the record to determine whether the evidence . . . was sufficient to permit the jury to reach its verdict.” *State v. Spann*, 574 N.W.2d 47, 54 (Minn. 1998). The reviewing court does not retry the facts, but instead assumes the jury believed the witnesses’ testimony that supported the verdict and disbelieved the evidence that did not. *State v. Steinbuch*, 514 N.W.2d 793, 799 (Minn. 1994).

Restraint and lack of consent are established directly in several ways. BD described being physically hemmed in by Samuel and Haile in her kitchen and telling them that she wanted them to leave. She also described being trapped in her bedroom because Samuel and Haile were at the bedroom door. And the circumstances of her 911 call provide a basis for concluding that her freedom of movement was being restrained against her will. The jury could infer that Samuel intended to restrain BD in taking these actions. As for Samuel’s knowledge that he had no lawful authority, the evidence shows that BD was in her own apartment and otherwise acting lawfully. The jury was free to infer that Samuel knew he had no authority to imprison her.

Samuel’s insufficiency argument relies heavily on challenging the credibility of BD’s testimony. Credibility determinations on witness testimony are entrusted to the

jury and we defer to those determinations. *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992). Furthermore, the jury's determinations of not guilty on the burglary and criminal-sexual-conduct charges do not preclude a finding of guilt on the elements of false imprisonment. *See Aligah v. State*, 394 N.W.2d 201, 203-04 (Minn. App. 1986), *review denied* (Minn. Nov. 17, 1986) (holding false-imprisonment conviction not inconsistent with acquittal on criminal-sexual-conduct charge for same incident).

Samuel's second argument attempts to draw parallels between the facts of this case and the facts in *Dokken*, 312 N.W.2d at 107-08. Samuel's argument that temporary restraint may be insufficient is not persuasive because, unlike the facts in this case, the temporarily restrained person in *Dokken* testified that he felt free to leave at all times. *Id.* at 107. No similar testimony was presented in this case. The evidence was sufficient to sustain the conviction.

Affirmed.