STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2087

State of Minnesota,
Respondent,

vs.

Tavares Greer,
Appellant.

Filed March 3, 2009
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-06-65094

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

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Following a jury trial, appellant was convicted of felony domestic assault by strangulation. Appellant argues that he was denied his right to a fair trial when the victim testified that appellant stated during the attack that he had "done this to people before." Because the admission of this statement did not constitute plain error, we affirm.

FACTS

Appellant Tavares Greer and the victim N.N. began dating in June 2006. At the end of July, appellant moved into N.N.'s apartment. On August 17, 2006, appellant and N.N. got into an argument. N.N. testified that appellant grabbed her around the neck from behind. Appellant pushed N.N. onto the bed while choking her, and she could not breathe, scream, or cry.

N.N. testified that:

> He was standing up in the bedroom. My door is right here (indicating) and I'm trying to walk out the door and when he jumped up, I'm trying to walk past him – actually I don't remember if it was in front or behind, but he ended up taking a hold of me so fast I didn't notice it and that's when the struggle began. I was trying to break him off of me. Eventually we ended up on the bed and he's on top of me and saying all kinds of crazy stuff that normal people don't say things like that. "I done this to people before. Who the f—k you think that you are dealing with," you know, just stuff that people don't say. Then I remember getting down on my knees. After I pushed him off of me when I was on the bed, eventually I ended up on my knees. While I'm on my knees trying to grab my phone that was on my bed, I remember trying to grab for it and he just swiped it away. He just took it real fast and eventually, you know, I'm on the floor, you know, my body started shaking; I peed on myself. That's

> when I started trembling. My body was shutting down. I didn't have any air for a minute and a half. It might have been more than that. I think he noticed when my body started to tremble he let me go and was talking, "Who do you think you are? Do something now. Do something now." Just being ignorant.

N.N. further testified that she reached for her cell phone to call the police, but appellant had taken it and they did not have a house phone. N.N. told appellant to leave, and he grabbed her around the throat again. This time she was able to scream, and appellant released her, admonishing her to be quiet. At that point, appellant left the apartment.

N.N. testified that she also left the apartment immediately and went to a friend's home. N.N.'s friend, C.F., testified that N.N. arrived at her apartment between 9:00 and 10:00 p.m. on the night of August 17. According to C.F., N.N. was shaken and crying. When C.F. asked what she was upset about, N.N. responded that she had been choked by appellant. C.F. suggested that N.N. call the police, and N.N. complied.

The police arrived approximately 20 minutes later. Minneapolis Police Officer James Carroll interviewed and observed N.N. Officer Carroll did not see any marks or swelling on N.N.'s neck. Officer Carroll asked if N.N. would like him to call an ambulance and she declined.

N.N. went to the emergency room the next day. N.N.'s vital signs were normal and she had very good oxygen saturation. N.N. was able to lie flat, which indicated that she did not have a substantial injury affecting her airway. N.N.'s treating physician testified that N.N.'s description of her physical symptoms at the time of strangulation—

loss of bladder control, breathing difficulties, soreness—were consistent with strangulation.

A police investigator interviewed N.N. by phone in mid-September. The same investigator interviewed C.F. in mid-October. C.F. told the investigator that on the night of the attack, she saw scars on N.N.'s neck and that N.N.'s neck was very swollen.

Appellant was found guilty of domestic assault by strangulation following a jury trial. This appeal follows.

D E C I S I O N

Appellant argues that he was denied his right to a fair trial when the alleged victim stated on direct examination that during the attack "[appellant] was saying all kinds of crazy stuff that normal people don't say like that 'I done this to people before. Who the f—k you think that you are dealing with[?]' you know, just stuff that people don't say." Appellant did not object to this testimony at trial.

Comments elicited from witnesses that suggest a defendant has a criminal record are inadmissible. *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974). But "unintended responses under unplanned circumstances ordinarily do not require a new trial." *State v. Hagen*, 361 N.W.2d 407, 413 (Minn. App. 1985), *review denied* (Minn. Apr. 18, 1985). The prosecutor in this case did not elicit the testimony, nor did he mention it thereafter. However, "even when the elicitation is unintentional, we will reverse if the evidence is prejudicial." *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978).

Where a defendant fails to object to the admission of evidence, our review is under the plain-error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740 (citing *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 1548-49 (1997))). "If those three prongs are met, we may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

Appellant argues that the admission of this statement was plain error because it was evidence of a prior bad act. Testimony of prior bad acts is generally inadmissible to show character under Minn. R. Evid. 404(b). "The danger in admitting such evidence is that the jury may convict because of those other crimes or misconduct, not because the defendant's guilt of the charged crime is proved." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). The statement at issue in this case does indicate that appellant had committed a similar crime in the past. Respondent contends that the use of the term "this" speaks of no "crime" or "wrong." This argument is unavailing. The statement "I done this to people before" indicates that appellant has committed a prior violent act. It does not reveal the exact type of violence but it can be reasonably inferred that the act was criminal. Therefore, admission of this statement into evidence appears to be an error.

However, the Minnesota Supreme Court has articulated that when a district court is not afforded a pre-trial opportunity to consider the admissibility of the testimony and the defendant fails to object to the testimony at trial, it is generally not plain error for the court to fail to intercede sua sponte. *See State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001) ("In the absence of an objection, we are hard pressed to see how the [district] court could be attuned to whether [the] testimony exceeded the scope of the *Spreigl* notice. Thus, there was no reason for the district court to intercede sua sponte, and, as a result the [district] court did not err in not striking [the] testimony.").[1] "Furthermore, while [district] courts are advised, even absent a request, to give a cautionary instruction upon the receipt of other-crimes evidence, failure to do so is not ordinarily reversible error." *Id.* Neither the district court nor the prosecutor appeared to know that N.N. was going to make this statement while testifying. Therefore, since no notice was provided to the district court, it was denied a pre-trial opportunity to decide on the statement's admissibility. And appellant made no objection to indicate the inadmissibility of the testimony. Based on the facts in this case, we will not "depart from the rule that a trial court's failure to sua sponte strike unnoticed *Spreigl* evidence or provide a cautionary instruction is not ordinarily plain error." *Id.*

Nonetheless, even assuming that error occurred, appellant's substantial rights were not prejudiced. N.N.'s statement was very brief and intermingled with a long dialogue such that the jury may not have even recognized its implications. *See Haglund*, 267

[1] Evidence of other crimes or bad acts is characterized as "*Spreigl* evidence." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

N.W.2d at 506 (stating that "the reference was of a passing nature and the import . . . may have been missed"). In fact, it is probable that appellant did not object to the statement at trial because he did not wish to draw attention to it.

Furthermore, the exclusion of this statement would not have altered the outcome of this case. If the district court erred in admitting evidence, the reviewing court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id.* N.N. testified in detail about the incident. Her friend C.F. testified that N.N. arrived at her apartment on the night of the incident shaken and crying, and C.F. noticed "scars" on N.N.'s neck. The police officer did not notice any marks that night, however, his interview with N.N. was admittedly brief. The doctor that examined N.N. the day after the incident testified that although her health appeared fine, the symptoms N.N. described were consistent with strangulation. Based on the substantial evidence in the record, there is no reasonable possibility that the verdict would have been more favorable to appellant had the statement been stricken.

Affirmed.