STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0225

State of Minnesota,
Respondent,

vs.

Bradley J. Poppenhagen,
Appellant.

Filed April 14, 2009
Affirmed
Klaphake, Judge

St. Louis County District Court
File No. CR-06-743

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

Melanie Sue Ford, St. Louis County Attorney, 100 North Fifth Avenue West, Suite 501, Duluth, MN 55802-1298 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie Lee Carlson, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

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

KLAPHAKE, Judge

Appellant Bradley J. Poppenhagen was convicted by a jury of false imprisonment, Minn. Stat. § 609.255, subd. 2 (2006), felony harassment/stalking, Minn. Stat. § 609.749, subds. 2(2), 3(a)(2) (2006), and impersonating a police officer, Minn. Stat. § 609.475 (2006), and was sentenced on the false imprisonment conviction to a year and a day in prison, stayed. Appellant challenges his conviction, arguing that (1) he was denied a fair trial because of prosecutorial misconduct; (2) the identification procedure was impermissibly suggestive; and (3) the evidence was insufficient to sustain his conviction for false imprisonment.

Because the prosecutor did not commit reversible misconduct, the identification procedure was not impermissibly suggestive, and the evidence was sufficient to sustain the jury's verdict, we affirm.

D E C I S I O N

I. Prosecutorial Misconduct

Appellant argues that the prosecutor committed misconduct by asking improper questions on voir dire, ignoring the court's instructions on the use of *Spreigl* evidence, and offering expert testimony on the issue of appellant's guilt. Defense counsel did not object to the voir dire questions or the expert testimony but did object to use of the *Spreigl*-like testimony.

A defendant must first establish that the prosecutor's conduct was improper. *State v. Wren*, 738 N.W.2d 378, 390 (Minn. 2007). When a defendant fails to object,

prosecutorial misconduct is reviewed under a modified plain error standard. *Id.* at 389. Under this standard, the defendant must show plain error; error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* at 393 (quotation omitted). If the defendant successfully establishes plain error, the burden shifts to the state to prove that the error did not affect the defendant's substantial rights. *Id.*

If the defendant objects to improper prosecutorial conduct, this court analyzes the incidents for harmless error, to determine if the error was harmless beyond a reasonable doubt and if the verdict was surely unattributable to the misconduct. *Id.* at 394. We consider several factors, including how the evidence was presented, the emphasis given to the evidence, whether the evidence was highly persuasive or circumstantial, whether the defendant countered it, and the overall strength of the evidence. *Id.*

Voir Dire

The purpose of voir dire is to discover "bases for challenge for cause and [to gain] knowledge to enable an informed exercise of peremptory challenges." Minn. R. Crim. P. 26.02, subd. 4(1). The comment to this rule indicates that the court "has the right and the duty to assure that the inquiries by the parties during voir dire examination are 'reasonable.' The court may therefore restrict or prohibit questions that are repetitious, irrelevant, or otherwise improper." *Id.* at cmt. Appellant argues that the prosecutor's questions improperly sought to educate or predispose jurors to conviction and refers to the Minnesota Supreme Court's Jury Task Force Report, December 20, 2001, which includes recommendations limiting the use of voir dire to educate, influence, or

predispose jurors to support an attorney's argument. Those recommendations, however, are not a part of the current rule and may be assumed to be advisory only.

Most of the cases discussing the allowable extent of voir dire view it from the defendant's perspective; a defendant has a constitutional right to an impartial jury, which includes the right to a voir dire adequate to identify unqualified jurors. *State v. Greer*, 635 N.W.2d 82, 87 (Minn. 2001); U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6. But rule 26.02, subd. 4(1), indicates that the prosecution must also be able to identify unqualified jurors ("[E]ither party may make a reasonable inquiry of a prospective juror or jurors in reference to their qualifications to sit as jurors in the case").

In *State v. Bolstad*, 686 N.W.2d 531, 542-43 (Minn. 2004), the supreme court considered the issue of whether the state's voir dire questions were improper. Although the supreme court was "troubled" by the state's questions and opined that "blunt questioning could inflame the passions of the jurors," the court concluded that the questions were not "unduly prejudicial." *Id.* at 543.

Here, the prosecutor's questions skirt the line between purely informational and probably instructional, but whether this is misconduct is less clear.[1] If this is misconduct, appellant did not object, and therefore it must be analyzed for plain error, that is, a violation of caselaw, rule, or standard of conduct. *Wren*, 738 N.W.2d at 393. Neither caselaw nor rule contains an unequivocal bar to this type of questioning. We therefore

[1] The prosecutor asked the panel questions about plainclothes police officers, typical police vehicles, why a person impersonating a police officer would be a threat to society, what the words "harassment," "stalking," and "restrained" meant, and where jury members stored collections, if they were collectors.

conclude that the district court did not commit plain error by failing to limit the state's voir dire.

Expert Testimony

Appellant further argues that various statements made by the investigating officer, State Trooper Carey, during his testimony were improper because it appears that Carey gave an expert opinion on the issue of appellant's guilt. Specifically, appellant identifies the following answers by Carey: (1) "[N]ormal every-day people" don't have radar detectors and they are just "another tool to impersonate a police officer"; (2) the "only people that should have handcuffs are licensed peace officers and possibly security people"; and (3) impersonating an officer is "an obvious danger to the public." The first two statements were made in response to the prosecutor's questions about why certain items were seized pursuant to the search warrant. The third answer was made in response to a question about why Carey was pursuing the investigation. On cross-examination, Carey admitted that there were other reasons to own radar detectors and handcuffs and that the items were not illegal per se. Defense counsel did not object to any of this testimony.

Police officers may offer testimony about subjects that fall within their area of expertise. *State v. Carillo*, 623 N.W.2d 922, 926 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). It is not clear here whether Carey was offering an expert opinion or an explanation of why certain items were included in the search warrant, which was based on allegations that appellant was impersonating a police officer. It is within the

knowledge of a police officer to identify items that are related to police work. The district court's decision to permit this testimony was not plain error.

Character Evidence

Appellant argues that the prosecutor persisted in asking witnesses about prior instances of bad behavior. Because appellant objected to this testimony, we review the allegations to determine if this conduct was harmless beyond a reasonable doubt and if the verdict was surely unattributable to the misconduct. *Wren*, 738 N.W.2d at 394.

The prior incidents were as follows: on February 27, 2006, the Eveleth police, in response to a call from a citizen concerned about whether appellant was impersonating a police officer, went to appellant's workplace and observed a radio, radar detector, and handcuffs in plain view in appellant's car. On March 1, the police searched appellant's car with appellant's consent. On March 7, after the March 4 incident that is the basis for the conviction, appellant was stopped and warned by police about the police radio.

In asking St. Louis County Sheriff Sergeant Rasch about the March 7 incident, which the court ruled was admissible, the prosecutor elicited the response that "[a]rea law enforcement had been alerted some days prior" about the police equipment. Rasch made no specific reference to which date or incident.

Likewise, the prosecutor asked Carey how he came to be involved in the case, and he responded that his involvement began on March 1. After a sustained objection, the trooper again responded in a similar fashion. The prosecutor rephrased the question a third time, and Carey responded that he had heard about another incident. Later, the prosecutor asked Carey why appellant's photo was included in the photo lineup and

whether certain items had been seized under the search warrant because they had earlier been found in appellant's car. In response, Carey noted that there had been police reports from February 27 about appellant and that these same reports indicated that handcuffs and radar equipment were in the car. Defense counsel objected, but the court overruled this objection.

A prosecutor may not continue to ask questions that the court has ruled improper or that seek to obtain evidence that was ruled inadmissible. *State v. Lee*, 645 N.W.2d 459, 469 (Minn. 2002). In this instance, the court had not ruled on the admissibility of testimony about the February 27 and March 1 incidents; the court deferred ruling until after the state's case and, ultimately, the state did not offer testimony from the officers involved in those incidents. The court placed no specific limit on Carey's testimony. Thus, none of the objected-to questioning was in direct opposition to the court's rulings.

A prosecutor is permitted to introduce evidence to provide context for an investigation. *State v. Griller*, 583 N.W.2d 736, 743 (Minn. 1998); *State v. Czech*, 343 N.W.2d 854, 856-57 (Minn. 1984). In both cases, the district court permitted the prosecutor to introduce evidence that referred to other bad acts by the defendant, in order to explain why police had focused on the particular defendant and to provide a context for their investigative activities. But "a police officer testifying in a criminal case may not, under the guise of explaining how [the] investigation focused on defendant, relate hearsay statements of others." *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002) (quotations omitted). Here, the officers' testimony provides an explanation for their actions.

In two other instances, the court sustained defense counsel's objections. First, Carey testified that he discovered firearms while executing the search warrant at appellant's home. The court sustained the objection and instructed the jury to disregard the testimony. Second, in her rebuttal to defense counsel's closing, the prosecutor stated, "Does it seem coincidental that [the victim] identified a man who just six days prior to the incident with her was the subject of a concerned citizen report?" Defense counsel promptly objected, and the court sustained the objection and instructed the jury to disregard the citizen report statement. The prosecutor was permitted to point out that the victim identified appellant just six days after police had searched his car.

Even if we assume that one or more of these actions were misconduct, as in *Wren*, the objectionable testimony was brief and not particularly persuasive, was countered by the defendant, and was overshadowed by other strong evidence against the defendant. 738 N.W.2d at 394-95. We conclude that the error was harmless beyond a reasonable doubt and that the verdict here was surely unattributable to any error.

II. Identification Evidence

Appellant challenges the district court's order permitting identification testimony based on a photo lineup, arguing that it was impermissibly suggestive. We review the district court's evidentiary determinations for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant has the burden of proving that the district court abused its discretion, thereby prejudicing appellant. *Id.*

An impermissibly suggestive pretrial identification procedure violates a defendant's due process rights. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995).

The court employs a two-part test to determine if pretrial identification evidence should be suppressed. First, the procedure must not be unnecessarily suggestive or unfairly single out the defendant in some way. *Id.* Second, even if the procedure is somewhat suggestive, the court must determine if, in the totality of the circumstances, the evidence is nevertheless reliable. *Id.*

In the case of a photo lineup, the photographs displayed must bear a reasonable physical similarity to the accused, but need not be "exact clones." *State v. Yang*, 627 N.W.2d 666, 674 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. July 24, 2001). The photo lineup need not be an exact execution of the witness's description. *State v. Roan*, 532 N.W.2d 563, 572 (Minn. 1995).

We have reviewed the photo lineup used by the police with the victim. The victim described the man who stopped her as having "glasses, a scruffy beard and mustache and I didn't get a good look at how long his hair was if it was long or short." The photo lineup includes six men of similar age and racial type, all of whom have facial hair. Two of them have glasses. Carey, who showed the photo lineup to the victim, did not tell her that a suspect's picture had been included. This was not an overly suggestive procedure. Because the identification procedure was not unnecessarily suggestive, we need not address the second part of the test.

III. Sufficiency of the Evidence

Appellant argues that there was insufficient evidence to support his conviction for false imprisonment. We review the sufficiency of the evidence to determine whether the

evidence, when viewed in the light most favorable to the conviction, is sufficient to permit the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

Minn. Stat. § 609.255, subd. 2 (2006), provides that anyone who knowingly lacks the authority to do so but nevertheless confines or restrains another is guilty of the felony of false imprisonment. The elements of this offense are (1) intentional confinement or restraint; (2) lack of authority to confine or restrain; and (3) lack of consent. 10 *Minnesota Practice*, CRIMJIG 15.04 (1990).

> To confine or restrain a person is to deprive a person of the freedom to go where the person pleases and is lawfully entitled to go, or to leave the place where the person is. The restraint or confinement may include the use of physical barriers, the use of physical force, or the threat of the immediate use of physical force if the person confined or restrained reasonably believes that the person making the threat has the ability to carry out the threat.

Id.; *see State v. Dokken*, 312 N.W.2d 106, 108 (1981) (approving CRIMJIG instruction).

Appellant argues that the victim was not confined or restrained in any way: he parked behind her so she was not blocked in by appellant's car and could have driven away at any time. The victim testified that she felt she had to stay, because appellant appeared to be a police officer and because he took her license, insurance information, and registration from her, all of which included her home address. While the statute mentions physical force or restraint, "restraint may be imposed by the assertion of legal authority, and if an arrest is made without proper legal authority, it is a false arrest, and so false imprisonment." *Lundeen v. Renteria*, 302 Minn. 142, 146, 224 N.W.2d 132, 135 (1974); *see also Johnson v. Morris*, 453 N.W.2d 31, 36 (Minn. 1990); *Perkins v. County*

of St. Louis, 397 N.W.2d 405, 408 (Minn. App. 1986), *review denied* (Minn. Jan. 16, 1987). Although these cases involve civil suits against police officers by persons arrested or detained, they set forth the principle that assertion of apparent legal authority acts as a restraint, as it did here. Viewing the evidence in the light most favorable to the conviction, there is sufficient evidence to sustain the conviction.

Affirmed.