STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2346

State of Minnesota,
Respondent,

vs.

Roscoe M. Holmes,
Appellant.

Filed May 5, 2009
Reversed and remanded
Kalitowski, Judge

Hennepin County District Court
File No. CR-06-57000

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; 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, Theodora Gaïtas, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Schellhas, Judge.

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

KALITOWSKI, Judge

Appellant Roscoe M. Holmes challenges his conviction of obstructing legal process, arguing that (1) the district court abused its discretion by improperly admitting

prejudicial *Spreigl* evidence, and (2) the district court clearly erred by denying his *Batson* challenge to the peremptory strike of an African-American juror. Because appellant was prejudiced by the wrongfully admitted *Spreigl* evidence and the district court made inadequate findings in denying appellant's *Batson* challenge, we reverse and remand for a new trial.

D E C I S I O N

On August 18, 2006, appellant was in downtown Minneapolis around 2 a.m. waiting on the sidewalk at a valet station with his friend for the friend's car. While working an off-duty beat, Minneapolis police officers David Mathes and Roderic Weber were walking along the same sidewalk at this time, trying to move bar and club patrons down the sidewalks. Officer Mathes approached appellant and asked him if he was waiting for his valeted car. When appellant replied that he was waiting for his friend's car, the officer informed appellant that he had to move down the sidewalk. Appellant refused to move, insisting that he was waiting for his friend's car.

After appellant refused to leave, Officer Mathes grabbed appellant's arm to escort him from the area, and appellant pushed Officer Mathes. Officer Weber grabbed appellant from behind and appellant pushed Officer Weber's hands away. Officer Mathes then placed appellant under arrest but when he attempted to handcuff appellant, appellant shoved Officer Mathes and turned away. Both officers then shot TASERs at appellant's back and appellant ran from the officers. Appellant was eventually caught and restrained by additional police officers before being arrested. During the altercation,

appellant stated, "This is a lawsuit waiting to happen," and told people who were watching to videotape the incident with their cell phone cameras.

At trial, the prosecutor moved to admit *Spreigl* evidence regarding a July 27, 2006 incident involving appellant wherein appellant had an altercation with police after being pulled over for careless driving. In that altercation, appellant videotaped the interaction and mentioned that the police officer's conduct in pulling him over would help him "put some rims on" his car. The prosecutor explained that she wanted to admit the evidence of the July 27, 2006 incident to show a "pattern" of appellant "inciting trouble for the purpose of instituting a lawsuit sometime in the future." Over defense counsel's objections, the district court admitted the evidence, finding that it was not unduly prejudicial and that "it tends to show the pattern of conduct and a pattern of behavior."

I.

Appellant argues that the district court abused its discretion by admitting the July 27, 2006 traffic-stop evidence because it was improper character evidence. Appellant also contends that even if the evidence can be considered "other acts" evidence, it was an abuse of discretion for the district court to admit it because it was not probative of any relevant fact and was unfairly prejudicial.

Admission of Spreigl evidence

The admission of *Spreigl* evidence lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996). If the trial 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). It is the appellant's burden to show error and the prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Evidence of other crimes or bad acts, also referred to as *Spreigl* evidence, is not admissible to prove the character of a person in order to show that the person acted in conformity with that character in committing an offense. Minn. R. Evid. 404(b). *Spreigl* evidence is admissible, however, to prove factors such as motive, intent, identity, knowledge, preparation, or plan. Minn. R. Evid. 404(b). In deciding whether to admit the *Spreigl* evidence, we examine (1) whether the state gave notice that it intends to admit the evidence; (2) whether the state has clearly indicated what the evidence will be offered to prove; (3) whether there is clear and convincing evidence that the defendant participated in the prior offense; (4) whether the *Spreigl* evidence is relevant and material to the state's case; and (5) whether the probative value of the *Spreigl* evidence is outweighed by its potential prejudice to the defendant. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). Here, in moving to admit the traffic-stop evidence, the prosecutor stated her intent to use the evidence to show a "pattern." We conclude that the *Spreigl* evidence was wrongfully admitted for two reasons.

First, the prosecutor failed to clearly indicate the reason for the introduction of the traffic-stop evidence. Rule 404(b) allows *Spreigl* evidence to be admitted for purposes of "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). "Pattern" is not a listed admissible purpose. And although "the list of acceptable purposes" in Minn. R. Evid. 404(b) is "not

meant to be exclusive," the prosecutor must clearly indicate the reason for introduction of evidence. Minn. R. Evid. 404(b) 1989 comm. cmt.; *see also Ness*, 707 N.W.2d at 686 (stating that a factor in admitting *Spreigl* evidence is whether the state has clearly indicated "what the evidence will be offered to prove"). The prosecutor's decision to introduce the traffic-stop evidence as indicative of a "pattern" without further elaboration about what this "pattern" would show leaves the defendant without the requisite "clear indication" of what the evidence will be offered to prove, as required by *Ness*. Importantly, defense counsel objected to the admission of the *Spreigl* evidence on these exact grounds, asserting that she did not know of any proper purpose for which this evidence could be admitted. When defense counsel asked for further clarification, the prosecutor responded "pattern."

Second, evidence of the "pattern" here failed to satisfy the requirements specified in *Ness*. The Minnesota Supreme Court has previously approved the admission of *Spreigl* evidence for the purpose of proving a "common scheme or plan," and it appears that the prosecution relied on this purpose to demonstrate a "pattern" of behavior. *See State v. Kennedy*, 585 N.W.2d 385, 391 (Minn. 1998) (stating that *Spreigl* evidence "can be used to show a link between the bad act and the charged offense in order to establish a modus operandi" for a common scheme or plan); *State v. Wermerskirchen*, 497 N.W.2d 235, 241 (Minn. 1993) (stating "our cases do not preclude the use of other-crime evidence to establish common scheme or plan, *i.e.*, to establish that the act occurred" and the evidence conveyed "to the mind, according to the ordinary logical instincts, a clear indication of . . . a design or a *pattern of behavior*") (emphasis added) (quotation and

citation omitted). And this court has similarly determined that when "the purpose for which the *Spreigl* evidence was being offered is . . . that 'it completes a pattern of behavior' . . . the state [must have been] alluding to the 'common scheme or plan' provision of rule 404(b)." *State v. Montgomery*, 707 N.W.2d 392, 397 (Minn. App. 2005).

In *Ness*, the supreme court noted that the use of *Spreigl* evidence to show a common scheme or plan poses a particular risk for unfair prejudice. 707 N.W.2d at 687. Thus, the *Ness* court emphasized that to satisfy the "common scheme or plan" purpose, the *Spreigl* evidence must have a "marked similarity in modus operandi to the charged offense." *Id.* at 688. And if the admissibility of *Spreigl* evidence presents a close call, it should not be admitted. *Id.* at 685.

We conclude that the evidence of the prior traffic stop, during which appellant was cited for careless driving, does not have a "marked similarity" to appellant's subsequent charged offense of obstructing legal process. There are significant differences in modus operandi between the traffic-stop incident and the charged offense. First, they are completely different offenses—one is careless driving, and the other is obstructing legal process. Second, in the July 2006 incident, appellant was pulled over for driving carelessly and the ensuing incident occurred near appellant's car. In contrast, in August 2006, appellant was standing on the street when the police confronted him. Third, the confrontations with the police were not "markedly similar." In both incidents, appellant argued with the police, but in July 2006, appellant videotaped the incident and was verbally aggressive toward the police almost immediately. In August 2006, appellant did

not verbally address the officers in any significant way before the incident turned physical, except to inform them that he was waiting with a friend and did not intend to leave. Moreover, in July 2006, appellant videotaped the officers with a handheld camcorder after his vehicle was pulled over. In August 2006, appellant asked people watching the incident to tape his altercation with the police on their cell phones. Finally, the prosecutor alleged that in both incidents, appellant threatened to bring lawsuits against the police for their actions. But only in August 2006 did appellant explicitly reference a lawsuit.

We conclude that under *Ness*, the differences between the *Spreigl* incident and the charged offense do not support a finding of a "marked similarity in modus operandi" between the two incidents, and that the district court abused its discretion by admitting the *Spreigl* evidence.

Prejudice to appellant

When the district court errs in admitting evidence, this court must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *Post*, 512 N.W.2d at 102 n.2. In order to make this determination, a reviewing court must examine the entire trial record. *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995).

In *State v. Clark*, the supreme court examined certain relevant factors bearing on whether the wrongful admission of *Spreigl* evidence had a significant effect on the jury verdict. 738 N.W.2d 316, 347-48 (Minn. 2007). In *Clark*, the court determined that the defendant was not prejudiced by the wrongful admission of *Spreigl* evidence because

(1) the district court gave a cautionary jury instruction before the *Spreigl* evidence was admitted and before closing argument; (2) the introduction of *Spreigl* evidence to the jury was through an attorney's reading of a prior plea hearing transcript, and not through "compelling live testimony"; and (3) the state did not refer to the *Spreigl* evidence during its closing argument. *Id.* Here, in contrast to *Clark*, there were more than 70 pages of transcript related to this *Spreigl* evidence introduced by way of testimony from the ticketing officer, the passenger in appellant's car on the night of the *Spreigl* incident, and appellant. Additionally, the jury viewed the video that appellant filmed of the *Spreigl* incident. And the prosecutor referred to the evidence during closing argument, while showing a clip from appellant's video of the incident. We conclude that because of the extensive testimony regarding the *Spreigl* evidence at trial, and the prosecutor's reference to the evidence in closing argument, there is a reasonable possibility that the admission of the *Spreigl* evidence significantly affected the jury verdict. Thus, appellant is entitled to a new trial.

We reject respondent's argument that appellant is not entitled to relief because appellant presented the majority of the evidence concerning the incident including his video. The record indicates that the prosecutor introduced "live compelling testimony" of the *Spreigl* incident, and referred to the *Spreigl* evidence and testimony of the ticketing officer in closing argument. Once the evidence was introduced by the state through the testimony of the ticketing police officer, appellant had the right to present his side of the story.

II.

During jury selection, the prosecutor used peremptory strikes to remove two African-American jurors. The defendant objected to the prosecutor's use of a peremptory strike to remove one of these jurors, Juror B.C., and commenced a *Batson* challenge.

The prosecutor stated that her reason for using the peremptory strike against Juror B.C. was because "every time the jurors would file into the courtroom . . . [Juror B.C.] would give a knowing glance to the defendant and a nod or other knowing looks at the defendant." The prosecutor stated that Juror B.C. behaved differently from the other jurors, and noted that his conduct was "in contrast with the way that the rest of the jurors acted, which is that everyone generally maybe glanced at him, maybe glanced at all three of us, but didn't have meaningful eye contact." Further, the prosecutor stated, "[i]t seemed to me like [Juror B.C.] was planning on creating rapport with the defendant."

The district court denied the *Batson* challenge, finding that the prosecutor's "decision was race neutral based upon her observations that she articulated." The district court also stated that the prosecutor's other strikes were race-neutral and that she kept other African Americans on the jury and "maybe other people of minority races."

Appellant argues that (1) the district court's findings were deficient regarding its *Batson* analysis; (2) the prosecutor failed to articulate a legitimate race-neutral reason for the peremptory strike because it was not "clear and reasonably specific" and because the prosecutor's description of the glances Juror B.C. made toward appellant as "knowing" implied that the juror and appellant had some connection by virtue of their shared race; and (3) even if the prosecutor's reason was race-neutral, it was pretextual and thus, was

an illegitimate reason for the strike. We agree that the district court's findings were deficient.

Appellate courts give "considerable deference" to district court's findings on the issue of whether a peremptory challenge was motivated by prohibited discriminatory intent. *State v. Johnson*, 616 N.W.2d 720, 725 (Minn. 2000). Whether racial discrimination in the exercise of a peremptory challenge "has been proved is 'an essentially factual determination,' which typically 'will turn largely on an evaluation by the trial court of credibility.'" *State v. James*, 520 N.W.2d 399, 403-04 (Minn. 1994) (quoting *State v. McRae*, 494 N.W.2d 252, 254 (Minn. 1992)). The clearly erroneous standard of review applies to this factual determination. *Id.* at 404.

"Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 (1986). In *Batson*, the United States Supreme Court established a three-step process to determine whether a peremptory challenge discriminates on the basis of race. *Id.* at 96-98, 106 S. Ct. at 1723-24. First, the opponent of the strike must make out a prima facie case of racial discrimination, at which point the burden of production shifts to the proponent of the strike. *Id.* at 97, 106 S. Ct. at 1723. The proponent, in step two, must then come forward with a race-neutral explanation for the peremptory strike. *Id.* If a race-neutral explanation is tendered, the district court must then decide, in step three, whether the opponent of the strike has proved purposeful racial discrimination. *Id.* at 98, 106 S. Ct. at 1724.

"It is important for the court to announce on the record its analysis of each of the three steps of the Batson analysis." *State v. Reiners*, 664 N.W.2d 826, 832 (Minn. 2003). The district court must first determine "whether the prosecutor has articulated a facially race-neutral explanation for striking the juror in question." *State v. McRae*, 494 N.W.2d 252, 257 (Minn. 1992). Here, respondent concedes that the district court failed to determine whether the prosecutor offered a legitimate race-neutral reason under *Batson* at the time that the prosecutor offered the reason for the strike.

When a district court fails to analyze whether the prosecutor's reasons are facially race-neutral, the reviewing court need not defer to the step two findings made by the district court. *State v. Taylor*, 650 N.W.2d 190, 202 (Minn. 2002). Thus, we review de novo whether the reason offered by the prosecutor was legitimate and race-neutral. But here, de novo review is difficult because there is nothing on the record to review except the prosecutor's assertion and the district court's determination that the prosecutor was credible. And although the reasons given by the prosecutor may be race-neutral, they are not subject to verification upon review because the ultimate determination regarding the *Batson* challenge was based only on the district court's belief that the prosecutor was credible and not on the district court's observations of juror demeanor or analysis of the prosecutor's reasons. *See State v. Weatherspoon*, 514 N.W.2d 266, 269 (Minn. App. 1994), *review denied* (Minn. June 15, 1994) (concluding that "more subjective reasons for striking jurors, such as a juror's rapport with counsel, body language or tone of voice" are less subject to verification).

The district court, by its own admission, did not observe Juror B.C.'s demeanor, nor did it make any independent observations regarding whether the given reason for the strike was valid. Given the facts of this case, where a juror's demeanor that was observed only by the prosecutor was used as the basis for striking one of the few African-American jurors, the district court's lack of findings is particularly problematic.

We note that when egregious and repeated juror demeanor is the basis for a strike, the better practice would be to call the issue to the attention of the district court so that the district court can make independent observations of the alleged demeanor. Because that did not occur here, we are unable to conduct a meaningful de novo review of the record to determine whether the prosecutor's offered reasons for the peremptory strike were race-neutral.

But we need not determine whether the inadequate findings by the district court alone constitute reversible error. Coupled with our conclusion that there is a reasonable possibility that the wrongfully admitted *Spreigl* evidence significantly affected the jury verdict, the district court's failure to make sufficient findings regarding the *Batson* challenge leads to the conclusion that appellant is entitled to a new trial. *See State v. Erickson*, 597 N.W.2d 897, 904 (Minn. 1999) (holding that the cumulative effect of multiple errors should be assessed in order to ensure that the defendant received a fair trial); *State v. Ware*, 498 N.W.2d 454, 459 (Minn. 1993) (concluding that the "synergy" of errors warranted a new trial).

Reversed and remanded.