STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0226

State of Minnesota,
Respondent,

vs.

Michael E. Stratenberger,
Appellant.

Filed May 12, 2009
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge

Crow Wing County District Court
File No. K8-06-002371

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Donald F. Ryan, Crow Wing County Attorney, 213 Laurel Street, Suite 31, Brainerd, MN 56401 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Steven P. Russett, 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 Michael E. Stratenberger was convicted by a jury of two counts of attempted first-degree murder, two counts of first-degree assault, and one count of first-degree burglary. Appellant challenges his convictions of attempted first-degree murder, arguing that it was reversible error for the district court to instruct the jury on transferred intent. Appellant also argues that the district court abused its discretion in denying his request for a mistrial and raises additional claims in his pro se brief. We affirm the burglary and assault convictions. But because the district court erred in instructing the jury on transferred intent and we cannot conclude that the erroneous instruction was harmless beyond a reasonable doubt, we reverse appellant's convictions of attempted first-degree murder and remand for a new trial on the two attempted first-degree murder charges.

D E C I S I O N

Appellant began a relationship with C.V. in the summer of 2005 that continued until the summer of 2006 when C.V. ended the relationship. After the relationship ended, the two continued to have contact in person and by telephone. In July 2006, appellant told friends that he could not envision C.V. with anyone else, and called and stopped by C.V.'s home several times. In August 2006, C.V. began dating G.L. On August 26, 2006, the day prior to the incident, appellant visited C.V.'s home but C.V. and G.L. were at G.L.'s lake property. Appellant later returned when C.V. and G.L. were having dinner

at C.V.'s home and spoke with C.V. outside for about 15 minutes. C.V. described appellant as acting like a "trapped cat"—"pacing and freaked out."

Around 9:00 p.m. that evening, appellant telephoned his friend's wife, A.H. Appellant told A.H. that he could not live without C.V., could not handle seeing her with someone else, and made comments about doing something to C.V. Appellant called W.H., A.H.'s husband, who suggested that he and appellant have some drinks to get appellant's mind off of the situation with C.V. Appellant drove to St. Cloud, arriving around 10:30 or 11:00 p.m., and the two went out to a few bars. W.H. testified that appellant made threatening statements about C.V. and her new boyfriend. The two stayed out late at the bars and returned to W.H.'s mother's house around 4:00 a.m.

Meanwhile, at C.V.'s house, C.V. and G.L. went to sleep around midnight. At approximately 5:00 a.m., C.V. awoke and discovered appellant standing beside her bed. C.V. asked appellant what he was doing and told him to leave. Appellant did not respond and began striking C.V. in the chest. G.L. awoke to see appellant straddling C.V. and hitting her in the chest. G.L. began wrestling with appellant, and C.V. got out of the bed and fled to the kitchen to call 911. There, she noticed that she had blood all over her shirt and grabbed a knife for protection.

Meanwhile, the two men struggled. At one point G.L. had appellant by the throat, pinned against the wall. G.L. testified that appellant began punching him in the back and shoulders and yelled several times into his ear, "You're going to die . . . ." As the two continued their struggle, G.L. discovered that appellant had a knife, and at some point

G.L. pushed appellant away from him and appellant left the bedroom. C.V.'s daughter testified that she awoke from the fighting and saw appellant leaving the residence.

Police found C.V. and G.L. both bleeding profusely and having trouble breathing. Both received treatment for multiple stab wounds and collapsed lungs. Police found a bent, bloody knife along the edge of C.V.'s driveway. Later that morning, a deputy sheriff arrested appellant after following him to a wooded area near a residence north of Merrifield, Minnesota.

Appellant's trial began nearly a year after the date of the incident. At trial appellant pursued the defenses of a reduced culpability and heat of passion. Near the close of appellant's jury trial, the district court sua sponte included an instruction regarding transferred intent. Appellant objected to the instruction. In denying appellant's objection, the district court stated that it was including the instruction because it "feels that the facts of this case are such that the jury could conclude that [appellant] went into the house with the intent to kill [C.V.], and I'm simply indicating by including that that if that was his intent, then that does transfer to [G.L.]." The transferred intent instruction given to the jury by the district court stated:

> The Statutes of Minnesota define the crimes of murder in the first degree as follows:
>
> Whoever, with premeditation and with the intent to effect the death of the person causes the death of a human being is guilty of murder in the first degree.
>
> *If the defendant acted with premeditation and with the intent to cause the death of a person, other than the person killed, the element of premeditation and intent to kill is satisfied, even though the defendant did not intend to kill the person who was killed.*

(Emphasis added.) The jury found appellant guilty of two counts of attempted first-degree murder, two counts of first-degree assault, and first-degree burglary.

I.

Appellant argues that the district court's transferred intent instruction constitutes reversible error because it relieved the state of its burden to prove that appellant intended and premeditated the deaths of both victims. We agree.

We afford district courts significant discretion in crafting jury instructions. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). We review jury instructions in their entirety to determine whether they fairly and adequately explain the law of the case, and an instruction is in error if it materially misstates the law. *Id.* at 555-56. An erroneous instruction merits a new trial if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict. *State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007) (quotations omitted).

Our first inquiry is whether the transferred intent instruction is erroneous. The doctrine of transferred intent "is the principle that a defendant may be convicted if it is proved he intended to injure one person but actually harmed another." *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006) (quotation omitted). It is usually applied in cases where a defendant premeditates and intends to kill one person but accidentally kills another. *See id.* at 477-78 (collecting cases and discussing transferred intent). In such cases, the intent for first-degree premeditated murder may be "transferred" to the unintended victim. *Id.*

In *State v. Hall*, the supreme court held that a transferred intent instruction was in error because there was no evidence that the defendant shot the victim intending to kill

anyone except the victim. *Id.* at 478. Likewise, here, there is no evidence that appellant premeditated and intended to murder C.V. but instead accidentally stabbed G.L., or vice versa. Thus, we conclude, and the state concedes, that because the evidence does not support a transferred intent instruction, the district court erred by giving the jury this instruction.

An erroneous jury instruction, however, does not require a new trial if the error was harmless. *Id.* at 477 (citing *Kuhnau*, 622 N.W.2d at 558). An erroneous jury instruction is harmless only if it can be determined beyond a reasonable doubt that the error had no significant impact on the verdict rendered. *Id.* "For an error to be harmless beyond a reasonable doubt, the verdict must be surely unattributable to the error." *State v. Vance*, 734 N.W.2d 650, 660 n.8 (Minn. 2007) (quotations omitted).

In examining whether the verdict here is surely unattributable to the erroneous transferred intent instruction, we are mindful of the Supreme Court's admonition in *Connecticut v. Johnson* that,

> [t]o allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made.

460 U.S. 73, 86, 103 S. Ct. 969, 977 (1983) (considering whether an erroneous instruction was harmless), *quoted in Vance*, 734 N.W.2d at 659 n.7. Consequently, our analysis extends beyond the inquiry of whether the evidence supports appellant's convictions. It must also encompass the "method by which decisions of guilt are to be made." *Johnson*, 460 U.S. at 86, 103 S. Ct. at 977.

In *Hall*, the Minnesota Supreme Court concluded that the erroneous transferred intent instruction was not harmless because it allowed the jury to find the defendant guilty of first-degree premeditated murder without finding that the defendant premeditated the actual murder committed, and thereby relieved the state of its burden of proving premeditation beyond a reasonable doubt. 722 N.W.2d at 478-79. The court stated that "although there was evidence that Hall premeditated [the] murder, we cannot conclude beyond a reasonable doubt that Hall would have been convicted of first-degree premeditated murder without the erroneous transferred intent instruction." *Id.* at 479 (emphasis omitted).

Here, the effect of the erroneous instruction was to permit the jury to convict appellant of the attempted first-degree murder of G.L. if it concluded appellant premeditated and intended the attempted first-degree murder of C.V., or conversely, to convict appellant of the attempted first-degree murder of C.V. if it concluded appellant premeditated and intended the attempted first-degree murder of G.L. Therefore, the erroneous instruction relieved the state of its burden to prove beyond a reasonable doubt that appellant premeditated and intended the deaths of both C.V. and G.L. The *Hall* court observed that it has been "consistently held that when an erroneous jury instruction eliminates a required element of the crime this type of error is not harmless beyond a reasonable doubt." *Id.* at 479.

Respondent argues that *Hall* permits consideration of the prosecutor's closing argument in determining whether the erroneous instruction had a significant impact on the verdict. *See Hall*, 722 N.W.2d at 478 (discussing the prosecutor's closing argument).

The record here indicates that the state did not request a transferred intent instruction, and that the prosecutor in this case, unlike the prosecutor in *Hall*, did not emphasize or discuss transferred intent as a theory upon which to convict appellant. But although the prosecutor here did not rely on the transferred intent instruction in closing argument, we must "assume that the jurors were intelligent and practical people who took the court at its word and were guided by the plain language of the instruction." *State v. Edwards*, 269 Minn. 343, 350, 130 N.W.2d 623, 627 (1964). Thus, we cannot disregard the effect of the erroneous jury instruction. And the prosecutor's decision not to argue transferred intent does not establish beyond a reasonable doubt that the erroneous instruction had no significant effect on the verdict.

We recognize that on this record, the jury could have found premeditation and intent with respect to both victims. But it is also possible that the jury found premeditation and intent with respect to one victim and applied the transferred intent instruction with respect to the other victim. Thus, absent the erroneous instruction, the jury may have convicted appellant of first-degree attempted murder with respect to one of the victims and convicted appellant of a lesser crime, with respect to the other victim. Based on these reasonable possibilities, we cannot say beyond a reasonable doubt that the verdict is surely unattributable to the error.

Respondent also cites *State v. Noble*, where this court assumed that a transferred intent instruction was error and held that such error was harmless because of the "ample" evidence of intent. 669 N.W.2d 915, 919-20 (Minn. App. 2003), *review denied* (Minn. Dec. 23, 2003). But *Noble* is distinguishable. In *Noble*, the defendant denied shooting

the victims—a mother and her unborn child. *Id.* at 917. Here, appellant's defense centered on his reduced level of culpability. Thus, the transferred intent instruction went to the central focus of appellant's trial. *See Hall*, 722 N.W.2d at 479 (concluding that where the central focus of the trial was the element of premeditation, an erroneous transferred intent instruction was not harmless error); s*ee also Vance*, 734 N.W.2d at 660-61 (discussing cases that applied the harmless error test where the erroneous instruction went to the central focus of the trial and distinguishing cases where the erroneous instruction did not). Finally, we are guided by the supreme court's reasoning in *State v. Olson* that "[a]lthough defendant *probably* would have been convicted in any event, we cannot conclude *beyond a reasonable doubt* that he would have been convicted in any event." 482 N.W.2d 212, 216 (Minn. 1992) (emphasis in original); s*ee also Hall*, 722 N.W.2d at 479 (stating that although there was evidence of premeditation, the court could not conclude beyond a reasonable doubt that the defendant would have been convicted of first-degree premeditated murder without the erroneous transferred intent instruction).

Our concern for the method of conviction, and not simply whether the evidence suffices for conviction, compels us to reverse appellant's convictions for attempted first-degree murder. The erroneous instruction on transferred intent permitted the jury to convict appellant of two charges of attempted first-degree murder without necessarily finding premeditation and intent on both charges. Because premeditation and intent were the central focus of the trial, we cannot conclude that the error was harmless beyond a reasonable doubt. Therefore, we reverse appellant's convictions for attempted first-degree murder and remand for a new trial on those two charges.

II.

Appellant argues that the district court abused its discretion by denying his motion for a mistrial after a police investigator testified that appellant "declined to give a statement" after his arrest. This court reviews a district court's denial of a motion for a mistrial for abuse of discretion. *Mahkuk*, 736 N.W.2d at 689.

"[A] mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *Id.* (quotation omitted). Generally, the state may not refer to, or elicit, testimony of a defendant's post-arrest silence and/or request for counsel. *State v. McCullum*, 289 N.W.2d 89, 92 (Minn. 1979). The state has a duty to prepare its witnesses, prior to testifying, to avoid impermissible statements. *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003).

Here, the following exchange led to defense counsel's motion for a mistrial:

> Q. Okay. So what happened at the Law Enforcement Center?
>
> A. Upon arriving at the Law Enforcement Center I saw that [appellant] was in the rear of Deputy Fagerman's squad car.
>
> Sergeant Larson arrived shortly thereafter, at which time [appellant] was removed from the squad car and brought into our interview room.
>
> *At that point we attempted to interview [appellant] and he declined to give a statement at that point.*

(Emphasis added.) Defense counsel immediately objected to this testimony and the district court held a conference in chambers where defense counsel moved for a mistrial.

The district court denied the motion but indicated its willingness to issue a curative instruction. Defense counsel argued that no instruction would cure the violation and chose not to seek a corrective instruction. On the record before the jury, the district court sustained the objection. Neither party further referenced the objected-to testimony.

This court's analysis in *State v. Dunkel* is instructive. In *State v. Dunkel*, when asked about the criminal investigation, a deputy testified:

> I spoke briefly to Mr. Dunkel. I made an attempt to contact him for an interview. He was away. And when we were able to establish contact . . . I spoke to him only long enough for him to provide . . . his date of birth and those kinds of things for purposes of the investigation. *I did not – he declined an interview.*

466 N.W.2d 425, 427 (Minn. App. 1991) (emphasis in original). On review of the district court's denial of a motion for a mistrial, we stated that the use of the accused's silence was constitutionally prohibited. *Id.* at 428. But we concluded that the erroneously admitted statement was harmless beyond a reasonable doubt because: (1) the statement was innocuous, brief, and undramatic; (2) the prosecution did not elicit the statement; (3) the prosecution did not mention the statement at any point during the trial; and (4) the victim provided a very detailed account of the incident. *Id.* at 429.

Here, as in *Dunkel*, we conclude that the district court did not abuse its discretion in denying appellant's motion for a mistrial. The statement was brief and undramatic; the statement was not intentionally elicited; the statement was not mentioned at any point in the trial; and the victims provided detailed accounts of the incident. Moreover, the

district court sustained the objection to the testimony. On this record, we conclude that the district court did not abuse its discretion in denying appellant's motion for a mistrial.

III.

Finally, appellant raises a number of claims in his pro se brief. We have considered these claims and conclude that none merits reversal of appellant's convictions.

Affirmed in part, reversed in part, and remanded.