STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1847

State of Minnesota,
Respondent,

vs.

Cain Lee Wiskow,
Appellant.

Filed October 6, 2009
Affirmed
Stauber, Judge

Olmsted County District Court
File No. 55CR08435

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

Mark A. Ostrem, Olmsted County Attorney, Eric M. Woodford, Lead Attorney, Criminal Division, 151 Southeast Fourth Street, Rochester, MN 55904 (for respondent)

Marie Wolf, Interim Chief Public Defender, Rachel F. Bond, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from his convictions of fleeing a peace officer and giving a false name to police, appellant argues that the district court abused its discretion by allowing

testimony about the contents of a document found in his vehicle that he alleges was used to establish his identity as the driver of the vehicle. Appellant also contends that the district court committed plain error by (1) allowing testimony that police recognized appellant from prior contacts and that a warrant existed for appellant's arrest and (2) providing the jury with a "reasonable doubt" instruction that was confusing and repetitive. We affirm.

FACTS

At approximately 1:00 a.m. on October 13, 2007, Rochester police received a report of a road-rage incident involving a male Caucasian suspect with a shaved head and goatee driving a white Lincoln vehicle. Shortly thereafter, Officer John Swenson observed a person matching the description of the suspect driving a white Lincoln in southeast Rochester. Officer Swenson stopped the vehicle and asked the suspect for his driver's license and proof of insurance. The suspect told Officer Swenson that he did not have his driver's license with him and was unable to provide proof of insurance because he had just purchased the vehicle. Officer Swenson believed that the suspect looked familiar, but could not remember his name. When asked for his name, the driver paused for "an uncomfortable amount of time" before stating, "Michael Lee Jones." Officer Swenson ran the name through the state database to confirm the suspect's identity, but could not find a match. Officer Swenson returned to the vehicle and asked the suspect to spell his name. The suspect stated that his last name was spelled "J-O-N-H-S." Officer Swenson returned to his vehicle to run the new spelling through the database. Again, Officer Swenson was unable to find a match.

Officer Angela Timmerman reported to the scene to assist Officer Swenson. Officer Timmerman also recognized the suspect, but similarly could not remember his name. Officer Timmerman asked the suspect if he had anything in his possession that would help verify his identity. The suspect searched the center console of the vehicle and examined a document before inserting it back into the console. Officer Swenson noticed that the document looked "official" and believed that it might provide some information about the suspect's identity. Officer Swenson asked the suspect to show him the document, and the suspect complied. Officer Swenson determined that the document was a sales receipt for the white Lincoln that contained the name of appellant Cain Wiskow as the purchaser of the vehicle. Upon seeing the name, the officers immediately recognized the suspect as appellant. Officer Timmerman located appellant's driver's license photograph in the state database and confirmed that appellant was the driver. By that time, Sergeant Paul Wilson had arrived at the scene to assist with the investigatory stop. Sergeant Wilson also observed that the driver looked like appellant.

After the officers recognized appellant, he became nervous and fidgety. Officer Swenson asked appellant to turn off the vehicle. Appellant refused to comply and instead drove away at a high rate of speed. The officers gave chase, but were unable to locate the vehicle. Officer Swenson and Sergeant Wilson later reviewed appellant's booking photo from a prior arrest and confirmed that appellant was the driver of the vehicle.

Appellant was charged with one count of fleeing a peace officer in violation of Minn. Stat. § 609.487, subd. 3 (2006), and one count of providing a false name to a peace

officer in violation of Minn. Stat. § 609.506, subd. 1 (2006). After a jury trial, appellant was convicted of both charges. This appeal followed.

D E C I S I O N

I.

Appellant contends that the district court abused its discretion in making certain evidentiary rulings. "Evidentiary rulings generally rest within the district court's discretion and will not be reversed absent a clear abuse of that discretion." *State v. Palubicki*, 700 N.W.2d 476, 485 (Minn. 2005). On appeal, the appellant must demonstrate that the district court abused its discretion and appellant was thereby prejudiced. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

a. Testimony concerning the contents of the sales receipt

Appellant challenges the admission of Officer Swenson's and Officer Timmerman's testimony concerning the contents of the sales receipt found in the vehicle, claiming that the testimony violated Minn. R. Evid. 1002 because the state failed to offer the receipt as evidence. Commonly known as the "best evidence" rule, Minn. R. Evid. 1002 provides that in order "[t]o prove the content of a writing, . . . the original writing . . . is required, except as otherwise provided in [the rules of evidence] or by Legislative Act." But "[i]f a party is attempting to prove a different consequential fact there is no general requirement that he do so with the best available evidence." *Id.* 1997 comm. cmt.

Here, the testimony was not offered to prove the contents of the receipt, but to explain what triggered the officers' memories of appellant's identity and caused them to

search for appellant in the state database. Because the testimony was offered for a different consequential fact, the officers' testimony do not violate the best evidence rule.

Appellant also claims that the testimony regarding the receipt was inadmissible hearsay. We disagree. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). The testimony concerning the receipt was not offered to prove the truth of the matter asserted (i.e., that appellant was the purchaser of the vehicle). As noted above, the testimony was instead offered to explain what triggered the officers' memories and caused them to search for appellant in the state database. Thus, the testimony was not hearsay.

b. Officers' familiarity with appellant and mention of his outstanding warrant

Appellant also claims that the officers' testimony about their familiarity with him and the outstanding warrant for his arrest was irrelevant and unfairly prejudicial. Generally, only relevant evidence is admissible. Minn. R. Evid. 402. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. But otherwise relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice. Minn. R. Evid. 403.

Contrary to appellant's assertion in his brief, he did not timely object to the officers' testimony. Thus, appellant is only entitled to relief if he can establish that the district court's failure to strike this evidence sua sponte constituted plain error. Minn. R.

Crim. P. 31.02 (stating that appellate court may consider plain errors that affect substantial rights even if those errors were not raised before district court); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (same). The plain-error standard requires an appellant to show that (1) the district court committed an error; (2) the error was plain; and (3) the error affected the appellant's substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "An error is plain if it is clear or obvious." *State v. Jones*, 753 N.W.2d 677, 694 (Minn. 2008). Generally, this degree of error "is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "[A]n error affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

At trial, Officers Swenson and Timmerman testified that they recognized appellant from past dealings and remembered his name upon reviewing the sales receipt. Officer Swenson also testified that he reviewed a prior booking photo of appellant to confirm his identity, and Officer Timmerman testified that she found "a felony warrant for [a] dangerous weapon" when she entered appellant's name in the state database.

Appellant argues that this testimony was irrelevant because the state could have established the identity of the driver by offering the sales receipt for the vehicle. But appellant's entire defense was premised on the lack of evidence identifying him as the driver. Therefore, the officers' explanation for their familiarity with appellant was highly relevant to proving identity, and the testimony regarding the outstanding warrant also tended to establish both motive and intent for fleeing the scene and offering a false name.

See State v. Ness, 707 N.W.2d 676, 687 (Minn. 2006) (noting that the state is generally entitled to prove motive because it explains the reason for an act and offers some evidence of a defendant's state of mind); *see also* Minn. Stat. § 609.506, subd. 1 (2006) (requiring the state to prove that the defendant gave a false name with the intent to obstruct justice); Minn. Stat. § 609.487, subd. 3 (2006) (requiring the state to prove that the defendant intentionally fled police). The officers' testimony regarding the outstanding warrant and booking photo presented some risk that appellant would be unfairly convicted for his prior run-ins with police, but that risk did not substantially outweigh the probative value of the evidence in establishing his identity. Accordingly, the admission of this evidence did not constitute plain error.

Appellant further argues that *Strommen* prohibits a police officer from testifying about prior encounters with a defendant. In *Strommen*, the supreme court concluded that an officer's testimony regarding past contacts with a defendant charged with attempted robbery was irrelevant and highly prejudicial because the evidence was not offered to identify the defendant or prove any of the elements of the crime. *See* 648 N.W.2d at 687–88 (stating that the defendant's "identification does not appear to have been the intended purpose of the questions eliciting the officer's testimony regarding 'prior contacts and incidents'"). *Strommen* is easily distinguishable because, here, the evidence was offered to establish identity. Because the evidence was offered for a valid purpose, appellant is not entitled to relief under *Strommen*.

II.

Appellant further argues that the district court erred in instructing the jury on reasonable doubt. Appellant did not object to the instruction at trial. Therefore, the jury instruction may only be reviewed for plain error. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998).

"The reasonable doubt standard is the cornerstone of our criminal justice system." *State v. Smith*, 674 N.W.2d 398, 400 (Minn. 2004). It "provides concrete substance for the presumption of innocence" and "plays a vital role in the American scheme of criminal procedure." *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 1072 (1970). Therefore, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent [people] are being condemned." *Id.* at 364, 90 S. Ct. 1072–73. A constitutional defect in a jury instruction defining reasonable doubt requires automatic reversal of a conviction. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 2082 (1993). Courts "are always safe in using" the CRIMJIG instruction for reasonable doubt. *State v. Sap*, 408 N.W.2d 638, 641 (Minn. App. 1987). But it is unnecessary to use particular words to define the burden of proof, "as long as, taken as a whole, the concept of reasonable doubt is correctly conveyed to the jury." *Smith*, 674 N.W.2d at 400.

Here, the district court began by supplying the jury with the definition of reasonable doubt provided in CRIMJIG 3.03, which states:

> Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful

> or capricious doubt, nor does it mean beyond all possibility of doubt.

10 *Minnesota Practice*, CRIMJIG 3.03 (2006). The court went on to further define "reasonable doubt" and "proof beyond a reasonable doubt," stating:

> A reasonable doubt is a doubt based upon reason and common sense and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon. However, proof beyond a reasonable doubt does not mean proof beyond a possible doubt.

Appellant contends that the combination of the CRIMJIG language with the additional language chosen by the court is confusing and repetitive. We disagree. The instruction, as a whole, constitutes an accurate statement of law, and the additional definitions of "reasonable doubt" and "proof beyond a reasonable doubt" incorporated by the district court are identical to those used in federal courts. *See Eighth Circuit Manual of Model Jury Instructions, Criminal*, 3.11 (2009). Accordingly, appellant is not entitled to relief on this basis.

Affirmed.