STATE OF MINNESOTA
IN COURT OF APPEALS
A09-609

State of Minnesota,
Respondent,

vs.

Joseph Denny Nezperce,
Appellant.

Filed March 16, 2010
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CR0814090

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Marie Wolf, Interim Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Stauber, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of second-degree assault, arguing that prosecutorial misconduct should have resulted in a mistrial and that the district court erred in instructing the jury. We affirm.

FACTS

Appellant Joseph Denny Nezperce was involved in a fight with Ronald King after an exchange of words between Nezperce, King, and King's companions, Kenneth Auginush and Samuel Little Cloud, in a South Minneapolis convenience store. Some of the fight was caught on the store's video surveillance camera, but the testimony at trial conflicted about who initiated the verbal confrontation. There was testimony that although Nezperce threw the first punch, King landed the first punch. The fistfight ended when King knocked Nezperce to the ground, and King and his companions ran away. Nezperce chased them and caught up to Little Cloud. Little Cloud felt a "punch" in his back but later realized that he had been stabbed. Little Cloud told police officers that Nezperce stabbed him in the back.

At a pretrial hearing, the defense attempted to exclude from evidence at trial any reference to a spontaneous statement Nezperce allegedly made at the time of arrest that he had been "jumped and didn't stab anybody." The district court held that the prosecutor could elicit testimony from the arresting officer about the alleged statement.

At trial, the prosecutor elicited testimony from the arresting officer that Nezperce volunteered a statement that he had been jumped and did not stab anyone. The

prosecutor also tried to introduce evidence that the officer had included the statement in his police report. But the district court sustained a hearsay objection to the contents of the report. After the objection was sustained, the prosecutor asked, referring to the statement in the report, "You put quotations around it?" Counsel for Nezperce again objected, and an unreported bench conference took place. Back on the record, the prosecutor again referred to the statement in the report, and asked the officer if that was "word for word what the defendant . . .," at which point the defense counsel again objected. The district court sustained the objection, stating, "I'm sustaining the objection to what he has in his report." After another bench conference, the prosecutor elicited the officer's testimony that Nezperce's statement was not made in response to any questions.

Anticipating that counsel for Nezperce would challenge the officer's credibility about whether Nezperce made such a statement, the prosecutor asked the officer, "You understand that you are about to be accused of lying?" The district court sustained an objection, ordered the officer's affirmative response stricken from the record, and told the jury to disregard the prosecutor's statement "as to what he anticipates will happen on cross-examination."

Defense counsel moved for a mistrial, arguing that the prosecutor had committed prejudicial misconduct by repeatedly attempting to present inadmissible hearsay and by making an improper and "inflammatory" statement in anticipation of cross-examination. The district court denied the motion.

Nezperce requested an instruction on self-defense. The state opposed the request, arguing that Nezperce was not entitled to a self-defense instruction because he had failed

to show absence of a reasonable means of retreat and because the charged assault occurred after the fight with King, as Nezperce was pursuing King and his companions. The district court gave a self-defense instruction but, over Nezperce's objection, also instructed the jury on the revival of an aggressor's right to self-defense after declining to carry on an assault he initiated. The jury found Nezperce guilty of second-degree assault. The district court sentenced him to 21 months in prison, and this appeal followed.

D E C I S I O N

I. The district court did not err in denying Nezperce's motion for mistrial.

A. The prosecutor's attempt to introduce hearsay was not prosecutorial misconduct, or, if misconduct, was harmless beyond a reasonable doubt.

We review the denial of a motion for a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). Nezperce argues that the prosecutor's repeated attempts to admit "hearsay"[1] from the police report and the improper attempt to vouch for the officer's testimony before he was impeached entitles Nezperce to a mistrial. We disagree.

In reviewing claims of prosecutorial misconduct, the first question we address is whether misconduct occurred. *State v. Wren*, 738 N.W.2d 378, 390 (Minn. 2007). A prosecutor's "attempting to elicit or actually eliciting clearly inadmissible evidence may constitute misconduct." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007).

[1] The state has not challenged the characterization of Nezperce's alleged at-the-scene statement as hearsay or the district court's ruling excluding evidence that the alleged statement was noted in the officer's report.

The district court ruled before trial that the prosecutor could elicit testimony from the officer that Nezperce made a spontaneous statement at the time of his arrest. The district court sustained Nezperce's objections to the prosecutor's attempts to establish that the officer had included this statement in his police report. Although the prosecutor's several attempts to introduce such evidence without arguing to the district court the basis of admissibility were futile, the prosecutor did not commit misconduct. Additionally, district courts are in the best position to monitor the conduct of prosecutors and assess the impact, if any, of alleged misconduct. *See State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006) (stating that "the district court is in a[] unique position to determine what actions constitute prosecutorial misconduct").

Even if the state engaged in misconduct by asking the same question after objection, a new trial will not be granted if the verdict rendered was surely unattributable to the error. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). Considerable evidence in the record supports the verdict in this case. The victim testified that Nezperce stabbed him in the back. King corroborated the victim's account. The jury saw video footage of the fight from which it could infer that Nezperce chased King and his companions as they fled the scene of the fight. Here, the district court correctly stated that the trial was not going to pivot on what the officer did or did not include in his police report. Any prosecutorial misconduct was therefore harmless beyond a reasonable doubt.

B. The prosecutor's improper question did not entitle Nezperce to a mistrial.

Nezperce argues that the prosecutor improperly attempted to vouch for the police officer's credibility when he asked him if he realized that he was going to be accused of lying. Nezperce argues that because this was a "close case" the officer's credibility was improperly bolstered. We conclude that any prosecutorial misconduct in asking this question was cured by the district court's prompt action in sustaining Nezperce's objection, striking the question from the record, and instructing the jury to disregard the prosecutor's attempt to anticipate what would occur in cross-examination. *See State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005) (stating that prosecutorial error may be cured by the court's instructions); *see also State v. Ferguson*, 581 N.W.2d 824, 833 (Minn. 1998) (observing that appellate courts assume that jurors follow the district court's instructions). As anticipated, cross-examination of the arresting officer was directed at establishing that the officer lied about Nezperce having made the spontaneous statement. Nezperce's sister, who was present at the time of arrest, testified that he did not make any statement at that time. The prosecutor's question was untimely but not inaccurate. Any error was promptly addressed and cured by the district court, and any prejudice evaporated when the officer's veracity was, in fact, challenged on cross-examination.

II. The jury instructions did not constitute reversible error.

We review the district court's decision to give a particular jury instruction for an abuse of discretion. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). "[J]ury

instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). An error in jury instructions is harmless if it can be said beyond a reasonable doubt that the error had no significant impact on the verdict. *State v. Olson*, 482 N.W.2d 212, 216 (Minn. 1992).

Nezperce argues that this was a "three against one" situation in which he was entitled to defend himself and that there is no evidence in the record that he was the aggressor and, therefore, no support for the district court's decision to instruct the jury on revival of an aggressor's right to self-defense. But the record demonstrates that the evidence about who started the fight was conflicting. And Little Cloud testified that he and Auginush watched but did not participate in the fight between Nezperce and King. Because the jury could have concluded from the evidence that Nezperce was the initial aggressor, the district court did not abuse its discretion in instructing the jury about the revival of an aggressor's right to self-defense.

Affirmed.