STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1039

State of Minnesota,
Respondent,

vs.

Anthony Marice Brown,
Appellant.

Filed June 15, 2010
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 27-CR-08-43449

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota 55487 (for respondent)

David Merchant, Interim Chief Appellate Public Defender, Gurdip Singh Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

KLAPHAKE, Judge

Appellant Anthony Marice Brown was convicted by a jury of first-degree assault, Minn. Stat. § 609.221, subd. 2 (2008) (use of deadly force against a peace officer), and sentenced to the presumptive term of 192 months. Appellant challenges the district court's decision to admit evidence of an earlier incident involving appellant and raises a number of issues in a pro se brief.

Because the evidence was relevant and material and its prejudicial effect did not outweigh its probative value, the district court did not abuse its discretion by admitting the evidence, and we affirm. We have thoroughly reviewed appellant's pro se issues and conclude that they are without merit or have been waived; on the record before us, we are unable to determine if appellant was deprived of his right to a fair trial because of ineffective assistance of counsel.

D E C I S I O N

Admission of Evidence

We review the district court's evidentiary rulings for an abuse of discretion. *State v. Riddley*, 776 N.W.2d 419, 424 (Minn. 2009). A defendant has the burden of showing that admission of disputed testimony was both erroneous and prejudicial. *Id.*

Appellant has framed the issue as involving the use of *Spreigl* or other-bad-acts evidence. The use of such evidence is governed by Minn. R. Evid. 404(b). Generally, evidence of "another crime, wrong, or act" is not admissible as character or propensity evidence, but may be admissible for other purposes. *Id.*; *State v. Ness*, 707 N.W.2d 676,

685 (Minn. 2006). The rule sets forth a non-exclusive list of permissible purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). But we agree with the district court that the evidence proffered here is not *Spreigl* evidence, but substantive evidence of the state's case in chief.

On August 28, 2009, Minneapolis police officers Toscano and Kutz were responding to a report of a fight with firearms. Arriving at the scene, the officers observed three men standing on the sidewalk and a fourth man hiding in the bushes. Although Kutz ordered this person to "come here," the man began to walk away. As Kutz pursued the man on foot, Toscano heard a loud bang and two gunshots.

Kutz testified that as he left the squad, the man raised his arm and Kutz heard a gunshot from this direction, leading him to believe he had been shot at, although Kutz did not see a gun. Kutz chased the man and shot at him two times before stopping him as he attempted to climb a fence. The man was identified as appellant. Kutz found four .45 caliber rounds in appellant's pants but no gun.

Police discovered a .45 caliber semi-automatic Ruger handgun beside the house along the pathway that appellant took toward the backyard and a discharged casing close beside it. No fingerprints or DNA evidence were recovered from the gun. The placement of the discharged casing was not consistent with where Kutz testified appellant was standing when he fired, but a ballistics expert testified that casings discharge in unpredictable ways and that it was possible the casing could have been caught in appellant's clothing and then dropped out as he ran.

Nine days before this incident, E.P. and his girlfriend were sitting in a car outside an apartment building in Minneapolis. Two men, one of whom had a handgun, came up to the car. E.P. rolled up the windows. One man placed his hands on the passenger window and pointed a handgun at E.P. E.P. tried to drive away, but he crashed into the apartment building. He and his girlfriend ran from the car; E.P. heard four gunshots. Coincidentally, E.P. flagged down Kutz a couple blocks away; he described the gunman as an older, heavy-set man about 40-50 years old.

After appellant's arrest on August 28, E.P. was shown a photo lineup. None of the photos were of 40-50 year old men, but E.P. identified appellant as the man holding the gun. E.P. did not see if appellant actually shot at him because he was running away when the shots were fired. Fingerprints on the passenger window matched appellant's fingerprints. Two of the three casings matched the Ruger handgun found on August 28.

On the date of the charged offense, no one saw the gun in appellant's hand, but witnesses stated that the sound of gunfire came from appellant's direction. There was no real question that appellant was the person Kutz saw hiding in the bushes and the person whom Kutz chased, shot at, and arrested; in that sense, appellant's identity was not in question. But because the charge here was first-degree assault involving deadly force against a peace officer, appellant had to be tied to a gun in order to prove the charged offense. The earlier incident places the .45 Ruger semi-automatic handgun found along the pathway on August 28 in the hands of appellant on August 19. The district court noted, "[T]he state is required to prove linkage of the gun to [appellant] as a way of their

attempting to prove the case." Based on this, the court concluded that the evidence was relevant and probative.

The district court must also balance the probative value of the evidence against its potential for unfair prejudice. Minn. R. Evid. 403; *State v. Haynes*, 725 N.W.2d 524, 531 (Minn. 2007). The probative value of the evidence must not be outweighed by the potential for unfair prejudice, but there is no requirement that the potential prejudice substantially outweigh the probative value. *See State v. Smith*, 749 N.W.2d 88, 95 (Minn. App. 2008) (discussing balancing in use of *Spreigl* evidence). While all evidence against a defendant is prejudicial in some way, the concern is unfair prejudice, which is "'the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.'" *Id.* (quoting *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 650 (1997)). But "'[t]he mere existence of the possibility of misuse is not enough to bar the evidence'" that would otherwise be admissible. *Smith*, 749 N.W.2d at 96 (discussing use of *Spreigl* evidence and quoting Thomas A. Mauet & Warren D. Wolfson, *Trial Evidence* § 5, at 103 (1997)).

Here, the charged offense and the earlier incident are separated by just nine days. No DNA evidence or fingerprints were recovered from the Ruger after the charged offense, but appellant was identified as the gunman in the earlier incident by handprints left on the victim's car window, and the state's expert identified these as appellant's handprints. The casings recovered from the earlier matter matched the Ruger found at the scene of the charged crime. In short, the evidence is probative because it ties appellant to the gun found at the scene of the charged offense. *See generally State*

v.Williams, 418 N.W.2d 163, 168-69 (Minn. 1988) (affirming admission of testimony linking defendant to possession of murder weapon).

Based on the record before us, we conclude that evidence about the August 19 incident was relevant and probative to the state's case in chief and that the probative value of the testimony outweighed its prejudicial effect. Therefore, the district court did not abuse its discretion by admitting this evidence.

Pro Se Issues

Appellant raises five issues in his pro se supplemental brief: (1) ineffective assistance of counsel; (2) lack of an evidentiary hearing to determine probable cause; (3) insufficient evidence; (4) prosecutorial misconduct by withholding evidence; and (5) a *Batson* challenge.

1. Ineffective Assistance of Counsel

Generally, to prevail on a claim of ineffective assistance of counsel, a defendant must prove that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's errors, the result of the trial would have been different. *State v. Martin*, 773 N.W.2d 889, 109 (Minn. 2009) (relying on *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987)). The matters appellant alleges in his pro se brief are usually considered to be trial tactics, such as determining which witnesses to call or whether to employ an expert witness. *Id.*

On this record, it is impossible to determine if appellant received ineffective assistance from his trial attorney. These matters are outside the trial record and more

properly should be addressed in a postconviction petition when additional facts can be pleaded. *See State v. Green*, 719 N.W.2d 664, 674 (Minn. 2006).

2. Probable Cause Challenge

The issue of probable cause was not raised below; we generally do not review issues not raised before the district court. *State v. Hannon*, 703 N.W.2d 498, 508 (Minn. 2005). The jury's verdict indicates that there was probable cause.

3. Insufficient Evidence

Appellant asserts the evidence was insufficient because neither his fingerprints nor his DNA were on the gun. The expert witnesses at trial explained why this would happen. This also bolsters the state's argument for use of the *Spreigl* evidence.

4. Prosecutorial Misconduct

Appellant argues that the prosecutor engaged in misconduct because test results taken to check for gunshot residue were not revealed. Nothing in the file reflects that tests were made or that results were obtained. Generally, if the issue of misconduct was not raised below, a defendant forfeits the right to have the matter considered on appeal, unless the error is unduly prejudicial. *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

5. Batson Challenge

Appellant's counsel raised a *Batson* challenge after the prosecutor struck the sole African-American juror. The court held a *Batson* hearing. This court will not reverse the district court's *Batson* decision unless clearly erroneous. *State v. McDonough*, 631 N.W.2d 373, 385 (Minn. 2001).

The *Batson* challenge involves a three-step process: first, the court considers whether there is a prima facie showing of racial discrimination; second, the state has the burden of demonstrating a racially neutral explanation for striking the juror; finally, the defendant must prove that the strike was purposefully discriminatory. *State v. White*, 684 N.W.2d 500, 504-05 (Minn. 2004). Here, the district court concluded that appellant made a prima facie showing of racial discrimination, because the stricken juror was the only African-American on the jury. But the district court accepted the prosecutor's explanation that she struck the juror because the juror stated that she would expect the state to offer certain forensic evidence, such as fingerprints, DNA, or trace evidence; other jurors acknowledged that such evidence might not be found, but this juror felt that forensic evidence was necessary. The district court's conclusion was not clearly erroneous.

Affirmed.