STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1203

State of Minnesota,
Respondent,

vs.

Devin Kowin Simmons-Mead,
Appellant.

Filed June 8, 2010
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-08-58841

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

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

LARKIN, Judge

Appellant challenges his conviction of first-degree aggravated robbery, arguing that the district court erred by admitting testimony in violation of his constitutional right to confront his accuser and abused its discretion by denying his motion for a mistrial. We affirm.

FACTS

On November 13, 2008, Officer Mark Johnson of the Minneapolis Police Department saw a group of males assaulting a man. Officer Johnson immediately notified dispatch of the assault, but because he was in plain clothes and an unmarked squad car, he assessed the risk and decided not to intervene alone. Instead, he drove around the block, and returned to the scene of the assault. At that point, the assailants had fled. Officer Johnson approached the victim, identified himself, and displayed his badge. But the victim "shrugged" him off and would not talk to him. A marked squad car arrived, and Officer Johnson left in search of the assailants.

Minneapolis Police Officer Jamie Karshbaum and her partner were on duty, in uniform, in a fully-marked squad car at the time of the assault. Officer Karshbaum overheard a radio transmission from Officer Johnson regarding a robbery or assault in progress. Officer Karshbaum and her partner were only three or four blocks away from Officer Johnson's location, and they responded to the scene immediately. Upon arrival, Officer Karshbaum observed two Hispanic males on the west sidewalk. One of the men was waving his arms around in an apparent attempt to stop the officers. Officer Johnson

advised Officer Karshbaum over the radio that the victim had refused assistance and was not going to tell them what had happened.

Officer Karshbaum got out of the car and approached the man who had flagged her down. The man began speaking very rapidly in Spanish, and Officer Karshbaum, who is moderately proficient in Spanish, had a difficult time understanding him. Officer Karshbaum observed that the man was very excited. She also noticed a fresh mark on his face, which looked like a shoe print. His pants were torn. Officer Karshbaum identified the man as F.T. and inquired, in Spanish, if he needed to go to the hospital.

While Officer Karshbaum was interacting with F.T., Officer Johnson notified her that he had a suspect, identified as L.V., in custody. The officers transported L.V. to F.T.'s location and conducted a show-up identification. F.T. identified L.V. as one of the men who had attacked him. During a police interview, L.V. asserted that appellant Devin Kowin Simmons-Mead had committed the robbery. The state subsequently charged Simmons-Mead with first-degree aggravated robbery, and the case was tried to a jury.

L.V. testified at the trial. He stated that he was with Simmons-Mead at the time of the robbery. L.V. explained that F.T. approached him to buy drugs, and Simmons-Mead began to hit F.T. in the face. According to L.V., F.T. fell to the ground, and Simmons-Mead began to choke him and tried to take his wallet. When F.T. refused to give up his money, Simmons-Mead tore F.T.'s wallet out of his pants pocket.

Officers Johnson and Karshbaum also testified at trial. Officer Johnson testified that he witnessed several people kicking, and one individual straddling and punching, F.T. He identified Simmons-Mead as one of the individuals involved in the assault.

Officer Karshbaum testified that when she spoke to F.T., she was trying to determine whether he needed medical assistance and why he had flagged the officers down. She testified that F.T. told her that "someone came up, hit him in the face, he somehow fell down onto the ground, and that . . . there were approximately three people kicking him repeatedly in the head and stomach and ribs, and that he was holding onto his wallet because he didn't want them to take his money." He further stated that "one of the suspects took his wallet from his pocket and ripped his pants in the process." He also said that he had pain in his face and ribs. F.T. did not testify at trial.

Simmons-Mead was convicted as charged and sentenced to serve 98 months in prison. This appeal follows.

D E C I S I O N

I.

Simmons-Mead first claims that the admission of Officer Karshbaum's testimony regarding F.T.'s statements at the crime scene violated his right to confront his accusers. An appellate court reviews de novo whether the admission of evidence violates a defendant's rights under the Confrontation Clause. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

The Confrontation Clause guarantees a criminal defendant's right to confront the witnesses against him. U.S. Const. amend. VI; Minn. Const. art. I., § 6. The Supreme Court has held that the Confrontation Clause bars the admission of "testimonial statements" made by a declarant out of court, unless the declarant is unavailable to testify

at trial and the defendant has had a prior opportunity for cross-examination.[1] *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004). The Supreme Court later clarified the circumstances in which a statement taken by a police officer is testimonial:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74 (2006).

"The foregoing definition provides two indicia of testimonial statements: (1) they are made after an emergency has passed; and (2) they are made in the context of an interrogation conducted for the primary purpose of establishing or proving past events." *State v. Wright*, 726 N.W.2d 464, 474 (Minn. 2007). In the context of 911 calls, the supreme court has identified four factors indicating that the victim's statements were made to meet an ongoing emergency:

> (1) the victim described events as they actually happened and not past events; (2) any "reasonable listener" would conclude that the victim was facing an ongoing emergency; (3) the questions asked and answers given were necessary to resolve a present emergency, rather than only to learn what had happened in the past; and (4) there was a low level of formality in the interview because the victim's answers were frantic and her environment was not tranquil or safe.

State v. Warsame, 735 N.W.2d 684, 690 (Minn. 2007).

[1] It is undisputed that Simmons-Mead did not have a prior opportunity to cross-examine F.T.

In *Warsame*, a police officer encountered a woman walking in the middle of the street. *Id.* at 687. Before the officer could speak to the woman, she stated: "My boyfriend just beat me up." *Id.* The officer observed that the woman was upset, crying, and holding the left side of her head. *Id.* As the officer provided medical attention, the woman explained that she had argued with her boyfriend and that he hit her with a pan and began to choke her. *Id.* In determining whether the woman's statements were testimonial, the supreme court focused on the fact that the primary purpose of the police interrogation was to assess her medical condition. *Id.* at 693. The court stated "that questions addressing a victim's medical condition may qualify as an interrogation designed to meet an ongoing emergency." *Id.* The court went on to conclude that these initial statements made during the officer's medical assessment were nontestimonial. *Id.* at 696.

The reasoning of *Warsame* is applicable in this case.

> As first responders to emergencies, police are often required to assess a party's injuries and determine whether those injuries must be immediately addressed and whether the party requires additional assistance from paramedics or other health care professionals. In order to make that assessment, officers must inevitably learn the circumstances by which the party was injured, and if the circumstances of the questions and answers objectively indicate that gaining such information is the primary purpose of the interrogation, then the party's statements are nontestimonial. [The supreme court] acknowledge[s] that information about a victim's injury and its cause may be useful in a later prosecution, but for Confrontation Clause purposes, it is the primary purpose of the interrogation that is dispositive.

Id. at 693.

The circumstances surrounding the police encounter in this case support our conclusion that Officer Karshbaum's primary purpose in speaking with F.T. was to assess his medical condition and his need for treatment. As Officer Karshbaum approached the scene, she saw F.T. waving his arms to get her attention. He was very excited and spoke rapidly in Spanish. He had what appeared to be a shoe print on his face, and his pants were torn. Officer Karshbaum asked him what had happened in an attempt to determine whether he needed medical assistance. There was a low level of formality in the interview, and F.T.'s answers were frantic. F.T. explained what had happened and described the pain in his face and ribs. Officer Karshbuam did not ask questions regarding the identity of the suspects, nor did she take notes. Rather, as her trial testimony indicates, Officer Karshbaum questioned F.T. in order to assess the situation and his medical condition. Because this interrogation was an attempt to resolve an ongoing emergency, F.T.'s statements were nontestimonial, and the district court did not err by admitting them through Officer Karshbaum.

Simmons-Mead argues that this was not an emergency because the suspects had left the scene. But in *Warsame* the court noted that an ongoing emergency may exist even when the police are with the victim, particularly if a dangerous suspect remains at large. *Id.* at 694. When F.T. made his statements to Officer Karshbaum, the suspects had not been apprehended. Any information that F.T. could provide about these individuals, might help to "address an existing threat to [the victim's] safety and the safety of others." *Id.* at 694 (quotation omitted). Simmons-Mead also argues that any emergency ended when F.T. declined Officer Johnson's assistance. This argument, however, ignores the

obvious distinction between Officers Karshbaum and Johnson: Officer Karshbaum drove a marked squad car and wore a uniform, whereas Officer Johnson drove an unmarked car and wore plain clothes. F.T. had just been attacked and assaulted. The fact that he wished to avoid interaction with Officer Johnson can be explained by the fact that Officer Johnson's official status was not readily apparent. This is demonstrated by F.T.'s almost simultaneous attempt to obtain assistance from Officer Karshbaum, a uniformed officer in a marked police car. It was no less of an emergency because F.T. sought help from a uniformed police officer rather than accepting help from an unknown man wearing civilian clothes and driving a civilian vehicle.

II.

Simmons-Mead next claims that the district court abused its discretion by denying his motion for a mistrial after L.V. made a statement, in response to a question by the state, suggesting that Simmons-Mead had a criminal record. The denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003).

The record indicates that L.V. and Simmons-Mead met at the Minnesota Correctional Facility-Red Wing. In pre-trial proceedings, the district court ruled that no references could be made at trial regarding how L.V. and Simmons-Mead met. At trial, the following interaction occurred:

> PROSECUTION: [L.V.], I'm not asking you where you met [Simmons-Mead], but I'm asking you how you know him?
> L.V.: From around the neighborhood. I was also locked up with him before.
> PROSECUTION: You knew him from around the neighborhood?

L.V.: Yes.

Simmons-Mead did not object, but he subsequently moved for a mistrial. The district court denied that motion, finding that the violation was unintentional and fleeting. Defense counsel declined the district court's offer to provide a curative jury instruction.

Generally, evidence from which a jury could infer that a defendant has a criminal record is inadmissible. *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974). But "[t]he constitutional right to a fair criminal trial does not guarantee a perfect trial." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992). "Where, as here, a reference to a defendant's prior record is of a passing nature, or the evidence of guilt is overwhelming, a new trial is not warranted because it is extremely unlikely that the evidence in question played a significant role in persuading the jury to convict." *Id.* (quotation omitted).

We first note that L.V.'s comment was vague. He did not explain when, where, or for how long he had been "locked up" with Simmons-Mead. And L.V.'s vague reference to Simmons-Mead's previous incarceration was of a passing nature. The prosecutor did not highlight the comment. Instead, she immediately focused on the "neighborhood" connection. Furthermore, the district court found that the prosecutor did not intentionally elicit the statement. The prosecutor explained: "[I] in no way intended to violate the Court's order. I would not do that, and I did not do that . . . . I moved on. I didn't highlight it. I regret that it happened, but it did, and it was in no way intentional on my part . . . ."

We will not assume that the prosecutor's elicitation of the statement was intentional when the record does not support such an assumption. *See State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978) ("[W]e cannot assume that an elicitation of this sort was intentional when there is nothing on the record to support such an assumption, especially where the [district] court stated that it had no reason to believe it was intentional."). And we will not reverse based on an unintentional elicitation of inadmissible evidence unless the evidence is prejudicial. *See id*. ("Even when the elicitation is unintentional, [an appellate court] will reverse if the evidence is prejudicial."). Given the fleeting nature of the comment and the other evidence of guilt, including Officer Johnson's in-court identification of Simmons-Mead, it is unlikely that the jury found Simmons-Mead guilty based on the comment, and the district court did not abuse its discretion by denying Simmons-Mead's motion for a mistrial.

Simmons-Mead's prosecutorial-misconduct argument also fails. When assessing an allegation of prosecutorial misconduct, we must first determine whether the behavior was actually misconduct. *State v. Yang*, 627 N.W.2d 666, 678 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). "It is improper for a prosecutor to ask questions that are calculated to elicit or insinuate an inadmissible and highly prejudicial answer." *State v. Henderson*, 620 N.W.2d 688, 702 (Minn. 2001). In this case, the prosecutor did not commit misconduct because the elicitation of the inadmissible testimony was unintentional. *See id*. ("As there is no indication the prosecutor persisted in trying to elicit testimony the court had ruled inadmissible, the district court did not abuse its discretion in finding that there was no prosecutorial misconduct."). Furthermore,

Simmons-Mead declined a curative jury instruction that might have ameliorated the effect of the improper reference. *See State v. McDaniel*, 534 N.W.2d 290, 293 (Minn. App. 1995) ("Defense counsel's failure to object to the comments or seek a curative instruction has 'weighed heavily' in our previous decisions not to reverse, because the [district] court might have been able to ameliorate the effect of improper prosecutorial argument." (quotation omitted)), *review denied* (Minn. Sept. 20, 1995). Simmons-Mead's decision to decline a curative instruction is consistent with the fleeting nature of this statement, which may have gone unnoticed. The record does not support a finding of prosecutorial misconduct.

III.

Simmons-Mead also makes numerous claims in his pro se supplemental brief. He first contends that he received ineffective assistance of trial counsel. In order to show ineffective assistance of counsel "[t]he defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Contrary to Simmons-Mead's contentions, his attorney did challenge probable cause; a probable cause hearing was held and the district court found that probable cause existed. Simmons-Mead's other allegations focus on trial strategy. "Generally, [appellate courts] will not review ineffective assistance of counsel claims based on trial strategy." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008).

Simmons-Mead may disagree with his trial counsel's strategy, but he was effectively represented. We have reviewed Simmons-Mead's other pro se claims and determine them to be without merit. *See Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (rejecting pro se arguments without detailed consideration of each argument).

Affirmed.

Dated:

Judge Michelle A. Larkin