STATE OF MINNESOTA
IN COURT OF APPEALS
A09-804

State of Minnesota,
Respondent,

vs.

Carlton Dwayne Fogan,
Appellant.

Filed August 3, 2010
Affirmed; motions granted
Johnson, Judge

Olmsted County District Court
File No. 55-CR-08-8042

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

JOHNSON, Judge

An Olmsted County jury found Carlton Dwayne Fogan guilty of three counts of aiding and abetting second-degree assault. The jury's verdict was based on evidence that Fogan engaged in a hostile confrontation with another man and then supplied a handgun to a person who fired the handgun at the other man and two of his relatives. On appeal, Fogan argues that the evidence is insufficient to support the convictions on two of the three counts and that the district court erred by admitting evidence concerning an alleged threat made to a witness. We conclude that the evidence is sufficient and that the district court did not commit plain error by not excluding the evidence concerning the alleged threat. Therefore, we affirm.

FACTS

On August 15, 2008, in the city of Rochester, two groups of people had a chaotic confrontation in a residential neighborhood that resulted in gunshots being fired. No one was injured. For his role in the melee, Fogan was convicted of three counts of aiding and abetting second-degree assault.

On the day of the incident, Fogan went to a restaurant for lunch. He was dissatisfied with the service he received from his waitress. After leaving the restaurant, Fogan called J.B., a cousin of the waitress, to express his dissatisfaction. Fogan and J.B. had a heated telephone conversation, which concluded when J.B. hung up on Fogan. J.B. refused to answer his telephone when Fogan made subsequent attempts to continue the conversation.

Fogan then went to J.B.'s home, where J.B. lived with several persons, including C.H., who is his mother, and C.M.H., who is his sister. C.H. and C.M.H. were not home at that time. In the presence of several witnesses, Fogan and J.B. argued. Fogan challenged J.B. to a boxing match; J.B. refused but suggested that Fogan box against his half-brother, who is larger than either J.B. or Fogan. When the half-brother arrived, Fogan left the residence.

As Fogan walked down the street away from J.B.'s residence, one disinterested witness heard him say aloud that he was "tired of dealing with them n----rs" and that he was going to "bring my 40." Another witness heard Fogan (who is an African American) say, "These n----rs got to be dealt with," "I'll burn the f--king house down," and "I need to get a 40 gun."

Fogan then went to the home of his girlfriend, who worked occasionally as a police officer and kept a 40-caliber service weapon in an unlocked utility closet in her garage. The girlfriend testified that she was upstairs but heard Fogan and other men arguing outside the home for a short time before they left in the girlfriend's red Cadillac.

Fogan arrived at the home of J.B., C.H., and C.M.H. shortly thereafter in the red Cadillac, with one passenger. C.H. and C.M.H. were now at home. C.H. testified that Fogan had a gun when he arrived. C.H. testified that Fogan's passenger, who later was determined to be Dwayne Caldwell, also had a gun. Fogan and Caldwell and C.H. and C.M.H. walked toward one another. Fogan referred to his experience at the restaurant earlier that day. C.M.H. testified that Fogan threatened to shoot J.B.

While Fogan and C.M.H. were arguing, Caldwell asked Fogan, "[S]hould I shoot this b--ch?" Fogan told him to "hold on." Caldwell asked Fogan more than once if he should shoot C.M.H. As he asked the question for the last time, J.B. arrived as a passenger in a car, at which time a number of shots were fired. C.H. and C.M.H. testified that they did not see who did the shooting. Both testified that they did not see a gun in Fogan's hand when the shots were being fired. Fogan then ran toward a nearby cemetery, where he hid. As he ran, he called 911, saying, "Someone's shooting at me."

Fogan's girlfriend's gun was found near the scene of the shooting, as were casings from bullets fired by the gun. Investigating officers tested DNA found on the gun, which excluded Fogan, Fogan's girlfriend, and another friend of Fogan's, but not Caldwell. Another gun found near the scene was tested in the same way, but DNA found on that gun did not match any available DNA sample.

In August 2008, the state charged Fogan with one count of second-degree assault of J.B., in violation of Minn. Stat. § 609.222, subd. 1 (2008). In November 2008, the state amended the complaint to charge Fogan with three counts of aiding and abetting second-degree assault of J.B., C.H., and C.M.H, respectively, in violation of Minn. Stat. §§ 609.222, subd. 1, .05, subd. 1 (2008). The case was tried to a jury over 11 days in November and December 2008. The jury found Fogan guilty of all three charges. In February 2009, the district court imposed executed prison sentences of 68 months on count 1, 36 months on count 2, and 36 months on count 3, to be served consecutively. Fogan appeals.

D E C I S I O N

I. Motions to Strike

We begin by addressing two motions to strike filed by Fogan. On May 12, 2010, two months after appellate briefing was completed, the state submitted a three-page letter, pursuant to Minn. R. Civ. App. P. 128.05, with citations to supplemental authorities relating to Fogan's "argument regarding alleged impeachment evidence on pages 3 and 4 of Appellant's Reply Brief." The state's letter provides citations to 13 cases, all of which were decided before the state submitted its responsive brief, with a lengthy parenthetical for each case containing a quotation from the case. On May 18, 2010, Fogan moved to strike the letter on the ground that it violates the rule providing that a submission of supplemental authorities "must state *without argument* the reasons for the supplemental citations." Minn. R. Civ. App. P. 128.05 (emphasis added).

On May 20, 2010, the state responded to Fogan's motion to strike by filing a memorandum in which it argued that the motion should be denied because the letter does not make argument. In its memorandum, the state asserted, "If, indeed, an argument were made . . . , it would be more like the following . . . ." The state's memorandum then contains three paragraphs of argument that are addressed to the issue raised in Fogan's reply brief. On May 25, 2010, Fogan moved to strike the state's May 20 memorandum.

The relevant rule provides:

> If pertinent and significant authorities come to a party's attention after the party's brief has been filed or after oral argument but before decision, a party may promptly advise the clerk of the appellate courts by letter, with a copy to all other parties, setting forth the citations. The letter must

> state without argument the reasons for the supplemental citations, referring either to the page of the brief or to the point argued orally. Any response must be made promptly and must be similarly limited.

Minn. R. Civ. App. P. 128.05. The advisory committee comment to the rule explains the limited purpose of a rule 128.05 letter:

> The rule contemplates a very short submission, simply providing the citation of the new authority and enough information so the court can determine what previously-made argument it relates to. The submission itself is not to contain argument . . . . A submission or reply that does not conform to the rule is subject to being stricken.

Minn. R. Civ. App. P. 128.05, 2000 advisory comm. cmt.

In support of his first motion, Fogan argues that the lengthy parentheticals in the state's rule 128.05 letter violate the rule because they constitute argument. We agree. A proper rule 128.05 letter would have been limited to the introductory paragraph, which refers to the part of appellant's reply brief to which the supplemental authorities related, and to the citations themselves. To include a lengthy parenthetical comment for each case is essentially to make an argument that the present case should be decided on the grounds reflected in the parenthetical comment. Furthermore, the state's letter is, under the circumstances, excessive in citing 13 cases. It appears that the state wished to use rule 128.05 as a substitute for a surreply brief, which is not permitted by our rules, absent leave of court. *See* Minn. R. Civ. App. P. 128.02, subd. 5. A party may not attempt to circumvent rule 128.02, subdivision 5, by submitting a rule 128.05 letter with argumentative material. *See Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 193 F.3d 966, 972

(8th Cir. 1999) (granting motion to strike argumentative submission of supplemental authority under prior version of Fed. R. App. P. 28(j)).

In support of his second motion, Fogan argues that the three paragraphs of hypothetical argument in the state's May 20 memorandum also violate rule 128.05. We again agree. The state's memorandum expressly states that the three paragraphs contain argument that would violate rule 128.05 if contained in a rule 128.05 letter. By submitting a memorandum containing argument not permitted by rule 128.05 in response to a motion to strike its rule 128.05 letter, the state appears to be attempting to circumvent rule 128.05 itself. The rule states, "Any response [to a rule 128.05 letter] must be made promptly and must be similarly limited," Minn. R. Civ. App. P. 128.05, and "[a] submission or reply that does not conform to the rule is subject to being stricken," Minn. R. Civ. App. P. 128.05, 2000 advisory comm. cmt. A party may not submit information in a memorandum concerning its own rule 128.05 letter that could not be included in the rule 128.05 letter itself. *See Esicorp, Inc.*, 193 F.3d at 972.

Therefore, we grant Fogan's motions to strike.

II. Sufficiency of the Evidence

Fogan's primary argument is that the evidence is insufficient to prove him guilty of count 2, aiding and abetting second-degree assault against C.H., and count 3, aiding and abetting second-degree assault against C.M.H. Fogan concedes that the evidence is sufficient to prove him guilty of count 1, aiding and abetting second-degree assault against J.B. But Fogan contends that the evidence is insufficient on counts 2 and 3 because the state failed to prove that he acted with the requisite intent with respect to

C.H. and C.M.H. He bases this argument on the fact that C.H. and C.M.H. were not present at their home when he and J.B. had their face-to-face altercation there and on his assertion that he otherwise had no hostility toward C.H. and C.M.H. Both parties assume in their arguments that the person whom Fogan aided and abetted is Caldwell.

When considering a claim of insufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jurors to reach the verdict that they did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). The reviewing court must "assume that the jury believed the State's witnesses and disbelieved contrary evidence." *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008) (quotation omitted), *cert. denied*, 129 S. Ct. 605 (2008). A reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Clark*, 755 N.W.2d 241, 256-57 (Minn. 2008).

The term "assault" is defined by statute as "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2008). A person is guilty of second-degree assault if he or she "assaults another with a dangerous weapon." Minn. Stat. § 609.222, subd. 1. The statutory provision concerning aiding and abetting states, in relevant part, "A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or

otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1. We are not concerned with subdivision 2 of section 609.05, which establishes an alternative basis for aiding-and-abetting liability, *see* Minn. Stat. § 609.05, subd. 2 (2008), because the state charged Fogan only with aiding and abetting pursuant to subdivision 1.

Aiding and abetting is a specific-intent crime. Minn. Stat. § 609.02, subd. 9 (2008); *see also* Minn. Stat. § 609.05, subd. 1; *State v. Charlton*, 338 N.W.2d 26, 30 (Minn. 1983). Assault also is a specific-intent crime, which means that the state must prove "that the defendant acted with the intent to produce a specific result." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007). Using these two principles in series, Fogan contends that the state was required to prove *both* that he specifically intended to aid and abet Caldwell in the commission of second-degree assault *and* that he "specifically intended to assault [C.H.] and [C.M.H.]," not merely that he intended to assault "someone."

One leading commentator has explained the general state of the law that is implicated by Fogan's argument:

> Considerable confusion exists as to what the accomplice's mental state must be in order to hold him accountable for an offense committed by another. . . . In part, this [confusion] may be attributable to some uncertainty as to whether the law should be concerned with the mental state relating to his own acts of assistance or encouragement, to his awareness of the principal's mental state, to the fault requirements for the substantive offense involved, or some combination of the above.

2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2(b), at 343-44 (2d ed. 2003) (footnote omitted). In Minnesota, however, the applicable caselaw is clear enough to

provide an answer to the question raised by Fogan's argument. In *State v. Souvannarath*, 545 N.W.2d 30 (Minn. 1996), the defendant was charged with aiding and abetting first-degree premeditated murder. *Id.* at 30. On appeal, Souvannarath argued that the district court erred by failing to instruct the jury that the state was required to prove that he specifically intended to aid another person in the commission of first-degree murder and "that he both premeditated and specifically intended the death of the victim." *Id.* at 33. The supreme court rejected this argument, calling it "fundamentally flawed." *Id.* The supreme court explained, "Section 609.05 requires only that the defendant 'intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.'" *Id.* (quoting Minn. Stat. § 609.05, subd. 1).

Thus, to find Fogan guilty of aiding and abetting Caldwell's commission of second-degree assault against C.H. and C.M.H., the state was required to prove two things: first, that Fogan "intentionally aid[ed], advise[d], hire[d], counsel[ed], or conspire[d] with or otherwise procure[d]" Caldwell to commit second-degree assault, *see* Minn. Stat. § 609.05, subd. 1, and, second, that Caldwell "intentionally inflicted or attempted to inflict bodily harm on another." *Vance*, 734 N.W.2d at 656 (quotation omitted); *see also* Minn. Stat. § 609.05, subd. 1; *Souvannarath*, 545 N.W.2d at 33. The state was *not* required to prove that Fogan specifically intended to assault C.H. and C.M.H. The state also was not required to prove that Fogan acted with the specific intent that C.H. and C.M.H. be assaulted by Caldwell. If the state introduced evidence that Caldwell had the specific intent to commit assault and that Fogan had the specific intent

to aid Caldwell's commission of an assault, the state's evidence is sufficient to support the conviction.

To reiterate, the evidence introduced at trial establishes that Fogan had two verbal altercations with J.B. As Fogan left J.B.'s residence after the second altercation, he angrily made statements reflecting an intent to cause harm to J.B. and others. Fogan and others then went to Fogan's girlfriend's home, where she possessed a handgun, which later was found at the scene of the shooting. Fogan and the other men left the girlfriend's home in her red Cadillac and arrived at C.H.'s home in that vehicle soon thereafter. Fogan then had a hostile confrontation with C.M.H., which prompted Caldwell to ask whether he should shoot C.M.H. while C.H. was nearby. Shortly thereafter, when J.B. arrived at the scene, shots were fired from the gun belonging to Fogan's girlfriend, and the forensic evidence indicates that Caldwell handled that gun, which was found at the scene along with spent casings.

This evidence is sufficient to prove, first, that Caldwell intentionally attempted to inflict bodily harm on another and, second, that Fogan intentionally aided and abetted Caldwell's assault. Contrary to Fogan's argument, it is irrelevant that C.H. and C.M.H. were not present when Fogan had an earlier altercation with J.B. Fogan may be convicted of aiding and abetting Caldwell's assault of C.H. and C.M.H. even though Fogan and Caldwell did not specifically contemplate assaults of C.H. and C.M.H. prior to the shooting.

Thus, the evidence is sufficient to support the convictions on counts 2 and 3 for aiding and abetting the second-degree assaults of C.H. and C.M.H.

III. Admission of Evidence of Threats

Fogan also argues that the district court erred by admitting evidence concerning C.M.H.'s statement to a police investigator that she had received threatening telephone calls from an unknown person prior to trial. The statement Fogan challenges came into evidence during the state's direct examination of Steven Thompson, an investigator with the Rochester Police Department. During that examination, the prosecutor played an audio recording of Thompson's pre-trial interview of C.M.H. At the end of the recording, Thompson said to C.M.H., "Okay, that's about all I, about all—actually you know what? I would like to talk to you just for a second. I'll go ahead and end this statement here at 1504." At trial, the prosecutor asked Thompson about the discussion he had with C.M.H. after he turned off the recorder. Thompson answered by stating:

> I was going to leave. [C.M.H.] had made a complaint to Victim Services that she was being threatened. She was receiving some phone calls saying don't come in and testify. That she wanted to make a complaint. She didn't know who did that, who was calling. It was calling from private numbers. But she had called Victim Services. Victim Services called for an officer. Actually, they called me. I had an officer sent out there, but she had to run to the store when the officer showed up. So then, I just decided on my own to take that complaint from her.

As a general rule, a district court has broad discretion when making rulings concerning the admissibility of evidence, and such rulings are subject to an abuse-of-discretion standard of review. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). In this case, however, Fogan did not object at trial to the evidence he now challenges on appeal. Consequently, we review the district court's admission of the challenged testimony for

plain error. *See* Minn. R. Crim. P. 31.02. Under the plain-error test, we may not grant appellate relief on an issue to which there was no objection unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

Fogan contends that the admission of Thompson's testimony concerning C.M.H.'s statement was plain error that affected his substantial rights. He relies on *State v. Harris*, 521 N.W.2d 348 (Minn. 1994), in which the prosecutor repeatedly referred to witnesses' participation in a witness-protection program, which "create[d] the inference that Harris was of bad character and had a propensity to commit crimes of violence." *Id*. at 352. The court noted that evidence of participation in a witness-protection program may be admissible for purposes of impeachment. *Id*. But the court cautioned that the evidence is "highly prejudicial" because the jury might infer that the defendant in some way caused the witness to be in protection. *Id*. The *Harris* court ultimately reversed the conviction and remanded for a new trial due to the cumulative effect of several evidentiary errors. *Id*. at 355.

The state contends that evidence of threats against a witness may be relevant to the credibility of a witness. In *State v. Mayhorn*, 720 N.W.2d 776 (Minn. 2006), the supreme court stated that evidence of threats by a defendant against a witness "may be relevant to show consciousness of guilt and to explain a witness's inconsistent statements." *Id.* at 783 (citation omitted). The supreme court has upheld the admission of such evidence in a number of cases in which the evidence was introduced to explain inconsistent statements by a witness or to show the defendant's "consciousness of guilt." *Id.*; *see also State v. Holt*, 772 N.W.2d 470, 481-82 (Minn. 2009) (affirming admission of evidence of threats to show "consciousness of guilt"), *cert. denied*, 130 S. Ct. 2073 (2010); *State v. McArthur*, 730 N.W.2d 44, 50-53 (Minn. 2007) (same); *State v. Vance*, 714 N.W.2d 428, 441-42 (Minn. 2006) (affirming admission of evidence of threats after witnesses' credibility attacked); *State v. Clifton*, 701 N.W.2d 793, 797 (Minn. 2005) (affirming admission of evidence of assault of witness for limited purpose of bolstering credibility).

The state's argument is not completely applicable because it does not appear that the state offered the challenged evidence in this case to show Fogan's "consciousness of guilt" or to explain inconsistent statements by C.M.H. *Mayhorn*, 720 N.W.2d at 783. Rather, it appears that Thompson's testimony was elicited for the relatively innocuous purpose of simply explaining what he discussed with C.M.H. after the recorded interview ended. Thompson's statement at the end of the recording naturally would raise a question in a reasonable juror's mind as to why Thompson chose to discuss something with C.M.H. without recording it. To present that portion of the recording to the jury without answering the question naturally raised would have been awkward.

Regardless of the state's actual purpose in eliciting the challenged testimony, the fact that the evidence has some relevance in certain circumstances justifies the district court's decision to refrain from excluding the evidence *sua sponte*. Fogan's failure to timely object to the evidence deprived the state of an opportunity to justify the evidence contemporaneously. The circumstances of this case are similar to the circumstances of *Vance*, where a sergeant testified, without objection, that he searched the jail cell of a co-conspirator after a witness was threatened and found an incriminating letter from Vance to the co-conspirator. 714 N.W.2d at 440-41. The supreme court held that it was not plain error for the district court to admit testimony about the threat because the testimony was "offered solely as foundation and context for the letter" and was "mentioned only in passing." *Id*. at 442. Likewise, the district court's admission of Thompson's testimony about threats to C.M.H. was not plain error.

Even if the admission of Thompson's testimony were plain error, Fogan also would be required to show that the error affected his substantial rights. *See Griller*, 583 N.W.2d at 740. To satisfy that burden, Fogan must show that "there is a reasonable likelihood that the absence of the [alleged] error would have had a significant effect on the jury's verdict." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation marks omitted). But Thompson referred to the alleged threats only in passing. He did not describe the threats in any detail. Importantly, he expressly stated that C.M.H. did not know who made the threats. Fogan did not cross-examine Thompson about the matter, and neither the prosecutor nor defense counsel mentioned the alleged threats in closing argument. In light of these circumstances, we believe that the brief, vague reference to

the alleged threats during the 11-day trial is unlikely to have caused the jury to convict Fogan rather than acquit him. Thus, Fogan cannot demonstrate that the admission of Thompson's testimony about the alleged threats affected his substantial rights. *See Griller*, 583 N.W.2d at 740.

Affirmed; motions granted.