STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1668
A10-671

State of Minnesota,
Respondent,

vs.

Ronald McCord,
Appellant.

Filed March 8, 2011
Reversed and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CR-06-083414

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

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

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Hudson, Judge; and Ross, Judge.

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

ROSS, Judge

Ronald McCord appeals his second-degree murder conviction for the drive-by shooting of Lorenzo Cotto, citing numerous challenges arising from all stages of the prosecution. After reviewing the proceedings in light of the errors alleged, we hold that the district court acted outside of its discretion when it denied McCord's mistrial motion made after a state's witness spontaneously announced that McCord engaged in area robberies and that the shooting was related to those robberies. We reverse and remand for a new trial.

FACTS

Lorenzo Cotto and Cedric Day went to Sharing and Caring Hands in downtown Minneapolis for breakfast and other services. According to Day, Cotto briefly argued with appellant Ronald McCord and Starsha Wyatt.

Day and Cotto were later standing outside Sharing and Caring Hands for lunch. They were with another friend, Angelo Marcano, when they saw a green car approaching. They noticed that the car's rear passenger window was open. Day fled. Marcano dropped to the ground. A man in the backseat extended his arm from the open window and fired five shots at Cotto from a semiautomatic handgun. One of the bullets entered Cotto's chest, pierced his heart, and killed him. The car sped away.

Day told police that he recognized the shooter from the morning's argument but did not know his name. Police investigated and identified Wyatt and McCord and concluded that McCord was the shooter.

The state charged McCord with first- and second-degree murder. During the trial, Day, Marcano, and Wyatt testified that McCord was the shooter. As Marcano testified that he believed McCord was the shooter, he volunteered that he had recognized McCord in a line up because McCord had engaged in robberies in the area and that the shooting was related to those robberies. McCord objected to Marcano's testimony and moved the district court to declare a mistrial. The district court denied the motion but cautioned the jury to disregard Marcano's improper testimony. The jury convicted McCord of second-degree murder. McCord appeals.

D E C I S I O N

The only issue we must discuss is whether the district court erred by denying McCord's mistrial motion after Marcano blurted out why he recognized McCord. Marcano declared specifically that McCord previously had been "downtown robbing people" and that the dispute leading to the shooting was really about McCord's robberies.

We review the district court's denial of a defendant's mistrial motion for abuse of discretion. *State v. Spann*, 574 N.W.2d 47, 52 (Minn. 1998). When a state's witness spontaneously volunteers inadmissible testimony potentially prejudicing the defendant and the defendant moves for a mistrial, we generally will defer to the district court's judgment about whether to grant the motion because the trial judge is best positioned to gauge whether the unexpected interjection denied the defendant a fair trial. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). But if the record leads us to conclude that it is reasonably probable that the interjection prejudiced the defendant—that is, but for

the outburst, the outcome would have been different—we will hold that the district court abused its discretion by denying the motion. *Id.*

Marcano was Cotto's friend and the state's third witness. After the prosecutor asked him, "What did [the police] tell you before they showed you the line-up?," Marcano unresponsively testified that he remembered McCord because McCord "used to come downtown robbing people" and that "[t]hat's what all this was really about." McCord moved immediately for a mistrial. The district court denied the motion, determining that the following curative instruction would be sufficient:

> Ladies and gentlemen, just before we took a break, Mr. Marcano volunteered his idea as to what McCord may have done in the past and what his idea was as to what this matter was all about. You are instructed that Mr. Marcano has no firsthand knowledge, has no knowledge of those facts and that his statement was speculation, sheer speculation, and therefore you are ordered to disregard it.

When conducting our likelihood-of-prejudice analysis, we consider both the content of the outburst in the context of the case and the presumably mitigating effect of the district court's curative jury instructions. *See State v. Budreau*, 641 N.W.2d 919, 926 (Minn. 2002) (presuming that jurors follow curative instructions); *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003) (considering whether impermissible testimony substantially affected the jury's decision).

That McCord was known by an eyewitness for robbing people and that the shooting was related to the robberies was highly prejudicial to McCord's defense. The central issue at trial was the shooter's identity, and Marcano's testimony was

fundamental to that issue. The nature of the comments informs us that they clearly prejudiced McCord's defense. *See Manthey*, 711 N.W.2d at 506.

Concluding that the statement was significantly prejudicial, we turn to whether the district court's curative instruction sufficiently mitigated its damaging effect. The presumption that jurors follow curative jury instructions is not absolute. In some cases, the prejudicial remark may so impact the jury that it would be "taking too much for granted to say its effect can be removed by an instruction from the court." *State v. Huffstutler*, 269 Minn. 153, 156, 130 N.W.2d 347, 349 (1964) (quotation omitted); *State v. Reardon*, 245 Minn. 509, 513, 73 N.W.2d 192, 194–95 (1955); *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998); *see also State v. Caldwell*, 322 N.W.2d 574, 591 (Minn. 1982) ("The . . . assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction." (quotation omitted)).

The district court's curative instruction in this case was well-stated and well-timed, but inadequate on these facts. Given the likelihood of substantial prejudice arising from jurors hearing that McCord had been engaging in robberies associated with the shooting, even the district court's careful instruction cannot satisfy our concern that the comment had already irreparably destroyed the jury's ability to fairly maintain the presumption of McCord's innocence. *Cf. Richardson v. Marsh*, 481 U.S. 200, 208, 107 S. Ct. 1702, 1708 (1987) ("[T]he only issue is, plain and simply, whether the jury can possibly be expected to forget [the evidence] in assessing the defendant's guilt."). We emphasize that this is a close decision and that our holding rests substantially on the quality of the state's case against McCord.

The evidence that McCord was the shooter was substantial but not overwhelming. No fingerprint evidence linked McCord to the shell casings found at the scene and police never located the gun. Day and Marcano were bystanders who identified McCord as the shooter, but the accuracy of their identification testimony was subject to question. Day mistakenly described the gun as a revolver while the state's forensics expert established that the fatal round had been fired from a semiautomatic, and Day fled immediately as he saw the assailant's car approaching. Marcano similarly had only an instant to have seen the shooter before dropping to the ground for cover. The two bystander descriptions eventually led police to Wyatt, but not to McCord, whom police focused on primarily because he was an acquaintance of Wyatt's and he generally fit the witness descriptions. And dissimilarities existed between McCord's physical characteristics and Day's description of the man whom he saw arguing with and later shooting at Cotto. McCord's attorney emphasized to the jury during his closing argument that Day described the man as shorter than McCord and he failed to describe the shooter as having a tattoo, which McCord had. And Wyatt, who was the only witness who knew McCord and who rode in the shooter's car, was pictured in photographs with an unidentified man who appeared to fit Day's description of the man with Wyatt arguing with Cotto earlier in the day. Although Wyatt's testimony put McCord in the backseat of the suspect car during the shooting, she qualifies as an accomplice whose testimony is inherently questionable. *Cf.* Minn. Stat. § 634.04 (2006) (requiring corroborating evidence for convictions based on accomplice testimony); *State v. Barrientos-Quintana*, 787 N.W.2d 603, 611–12 (Minn. 2010) (holding it was plain error for district court not to instruct jury on the requirement

of corroborating testimony when the state's drive-by shooting case relied on testimony from an accomplice-passenger in the car during the shooting). While the evidence was sufficient to sustain the jury's verdict, it lacked the force to overcome the unfair prejudice of Marcano's spontaneous interjection.

Our holding is also consistent with the reasoning in cases involving mistrial claims when the post-interjection curative instruction sufficiently protected the defendant's fair-trial right. In those cases, the interjections were less related to the disputed facts bearing on the defendant's guilt and therefore less apparently prejudicial. *See, e.g.*, *Manthey*, 711 N.W.2d at 505 (holding that a mistrial was not required when a witness unresponsively stated that the defendant had "been in jail"); *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003) (holding that a mistrial was not required when a police officer testified that his investigation did *not* indicate that the defendant had been convicted of violent crimes); *State v. Smallwood*, 594 N.W.2d 144, 149, 154 (Minn. 1999) (holding that a mistrial was not required when the prosecutor stated that "the defendant at one point in time even admitted that he wanted to plead guilty to this particular offense"); *State v. Forcier*, 420 N.W.2d 884, 885 (Minn. 1988) (holding that a mistrial was not required when a police officer stated that he did not believe the defendant); *State v. McCurry*, 770 N.W.2d 553, 556, 558–59 (Minn. App. 2009) (holding that a mistrial was not required when a witness in a burglary trial spontaneously testified that the defendant had previously been imprisoned for attempted sexual assault), *review denied* (Minn. Oct. 28, 2009); *McNeil*, 658 N.W.2d at 232–33 (holding that a mistrial was not required when the mother of an alleged rape victim testified that she believed her daughter). The outbursts

in those cases did not suggest that the defendant accused in a shooting was known to engage in recent violent crimes similar to and directly related to the offense charged.

By contrast, Marcano's outburst suggested that McCord's identification as the drive-by shooter was corroborated by his implicitly recent, related robberies in the same geographic area. The jury was essentially told that an eyewitness recognized McCord as a robber and that McCord engaged in the dispute and the shooting arising from his crimes as a robber. The district court's curative instruction attempted to redirect the jury away from the highly prejudicial assertion that McCord was an area robber. Although we have reasonable confidence in jurors and presume that they have followed curative instructions, the relative weakness of the state's case in the face of the weighty, prejudicial assertion here overcomes both this general presumption and our usual deference to the district court's choice between a curative instruction and a mistrial.

Because we have serious doubts on these facts that the jury could disregard Marcano's highly prejudicial comments related to the central issue of the trial, the district court's well-crafted instruction was not sufficient to assure a fair verdict. We therefore reverse McCord's conviction and remand the case for a new trial.

Reversed and remanded.