STATE OF MINNESOTA
IN COURT OF APPEALS
A10-730

State of Minnesota,
Respondent,

vs.

David Stuart Hobbs,
Appellant.

Filed March 29, 2011
Affirmed
Crippen, Judge[*]

Houston County District Court
File No. 28-CR-09-1068

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

Jamie L. Hammell, Houston County Attorney, Suzanne M. Bublitz, Assistant County Attorney, Caledonia, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Larkin, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

CRIPPEN, Judge

Following jury convictions of attempted burglary and trespass offenses, resulting in a 30-month sentence, appellant David Hobbs argues that the district court erred by admitting *Spreigl* evidence and by responding to a jury question outside his presence. Additionally, appellant asserts that he was denied his Sixth Amendment right to a fair trial because he was required to wear a leg restraint during jury selection. Because there was no *Spreigl*-evidence error and any other error was harmless, we affirm.

FACTS

After midnight on October 21, 2009, a La Crescent woman called 911 to report that a man was trying to break into her neighbor's house. She described his movements and his appearance. A police officer responded to the scene and saw a man step out from behind a tree. The man's clothing was consistent with the reported description, and he was later identified as appellant.

In late November, appellant pleaded not guilty to charges of attempted first-degree burglary, in violation of Minn. Stat. §§ 609.582, subd. 1(a), 609.17, subd. 1 (2008); attempted second-degree burglary, in violation of Minn. Stat. §§ 609.582, subd. 2(a)(1), 609.17, subd. 1 (2008); and attempted trespass, in violation of Minn. Stat. §§ 609.605, subd. 1(b)(4), 609.17, subd. 1 (2008). Before trial, the state moved to admit evidence of five of appellant's prior convictions: first-degree burglary in 2004; attempted first-degree burglary in 2000; first-degree burglary in 1991; burglary in 1987; and burglary in 1972. Denying appellant's objection that this was character evidence, the district court admitted

the convictions from 2004, 2000, and 1991, but the court excluded the 1987 and 1972 convictions.

Before the state introduced the evidence of appellant's prior convictions, the district court instructed the jury not to use the prior convictions as character evidence. The court renewed this instruction before the jury began deliberating. Additionally, the court limited the state's use of the evidence at closing argument to show only an absence of mistake regarding appellant's presence in the neighborhood when the burglary occurred.

During jury deliberations, the district court received a question from the jury while the parties were on a break for lunch. Referring to the attempted burglary charges, the jury asked the following question: "Is the first degree attempt an occupied building whereas the second degree attempt is unoccupied?" Without convening court with the parties present, the court answered the question in the affirmative.

When the parties appeared, the district court informed the prosecutor, appellant, and appellant's attorney of the jury question and his answer. He then explained to the parties that the jury raised a second question: "Can the defendant be guilty of both first degree attempted burglary and second degree attempted burglary? If yes, since the building was occupied, wouldn't second degree attempt be inaccurate?" The court told the parties that it intended to answer the jury's question by stating that the defendant could be found guilty of both offenses if the elements of both have been proven—in other words, that guilty verdicts on both first- and second-degree burglary would not be inconsistent. Neither the prosecutor nor appellant objected to this proposed answer.

The jury returned a verdict of guilty on all three counts.

D E C I S I O N

1. *Spreigl* Evidence

Appellant argues that the district court erred by admitting evidence of his prior burglary and attempted-burglary convictions at trial. The admission of prior bad acts evidence, *Spreigl* evidence in Minnesota, lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996). To prevail, an appellant must show error and the prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Evidence of other crimes or bad acts is not admissible to prove the defendant's character for the purpose of showing that he acted in conformity with that character; however, such evidence may be admitted to show absence of mistake, intent, motive, common plan or scheme, or identity. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998); Minn. R. Evid. 404(b). *Spreigl* evidence is admissible only if notice is given, the evidence is both clear and relevant, and the probative value of the evidence is not outweighed by its potential for unfair prejudice. *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006). In addition, the state must clearly indicate what the evidence is being offered to prove. *Id.*

Appellant challenges the relevancy and argues the prejudice of the evidence, but he first argues that the state's reasons for offering the *Spreigl* evidence were too vague and generalized. When introducing *Spreigl* evidence, the state must "'specify the exception to the general exclusionary rule under which it is admissible.'" *State v.*

Babcock, 685 N.W.2d 36, 40 (Minn. App. 2004) (quoting *State v. Billstrom*, 276 Minn. 174, 178, 149 N.W.2d 281, 284 (Minn. 1967)). Here, the state explained to the district court that it intended to introduce appellant's prior convictions to show that appellant's presence near the burglarized property was not a mistake. The state satisfied its burden with respect to this condition, despite its earlier failure to present detail that would permit use of the evidence to prove a common scheme or plan.

In determining the relevance and materiality of *Spreigl* evidence, "the trial court should consider the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place, or modus operandi." *State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984). Appellant objects to the state's characterization of the prior convictions as a "string of burglaries" or a "pattern," arguing that this language is merely a veil for character evidence. But in *DeBaere*, the supreme court affirmed the admission of *Spreigl* evidence because the prior convictions "showed a pattern of similar aggressive sexual behavior" and were therefore "highly relevant." *Id.* In addition, the district court here admitted only the convictions that were close enough in time to the charged offense to be relevant—the 2004, 2000, and 1991 convictions.

Spreigl evidence is inadmissible if its probative value is "outweighed by its potential for unfair prejudice." Minn. R. Evid. 404(b). "[U]nfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

The *Spreigl* evidence in this case was admitted and argued for the limited purpose of showing an absence of mistake. Appellant's counsel explained in his opening statement that appellant was in the neighborhood at the time of the attempted burglary because he was walking to a nearby gas station. The state introduced evidence that appellant was staying with a friend in La Crescent but that he was usually in the Twin Cities; the state demonstrated in its closing argument that appellant had to travel out of his way to walk from his friend's residence through the neighborhood where the burglary occurred to the gas station. The state also introduced evidence that when appellant was arrested he had no money on his person, a fact which calls into question his assertion that he was traveling to a gas station. On this disputed question of fact, the evidence of appellant's prior convictions had probative value to demonstrate absence of mistake. The convictions tend to show that his presence in the neighborhood where the burglary occurred was not merely by coincidence or accident.

In addition, the district court read cautionary instructions to the jury before the prior convictions were introduced and before jury deliberations. The court stressed that the jury must not use the prior convictions to prove appellant's character or to engage in "unjust double punishment" by convicting the defendant based on his past convictions. These instructions "lessened the probability of undue weight being given by the jury to the evidence." *Kennedy*, 585 N.W.2d at 392.

Because the evidence was sufficiently probative and was given with proper cautionary instructions, we conclude that the district court did not abuse its discretion by admitting the *Spreigl* evidence.

2. Jury Instruction

Appellant next argues that the district court erred by responding to the first of the jury's questions out of appellant's presence. He argues that the jury improperly convicted him of first-degree burglary as a result of the district court's inaccurate answer on the difference between first- and second-degree burglary; he notes that the answer wrongfully suggested that appellant could not be convicted of second-degree burglary for entering an occupied building.

The Sixth Amendment Confrontation Clause grants a criminal defendant the right to be present at all stages of trial. U.S. Const. amend. VI; Minn. Const. art. I § 6. A district court's consideration of and response to a deliberating jury's question is a stage of trial. *State v. Sessions*, 621 N.W.2d 751, 755 (Minn. 2001). Thus, the district court may not respond to a jury question in the defendant's absence without obtaining a waiver from the defendant. *Id.*

Despite the rights that are implicated by answering a question outside the presence of the defendant, a new trial is not warranted if the error was harmless. *Id.* An error is harmless beyond a reasonable doubt if the verdict was "surely unattributable" to the error. *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997). The district court's erroneous exclusion of a defendant from its exchange with the jury has been held to be harmless because the evidence of the offense was strong and because of the overall content of the judge's instructions. *See Sessions*, 621 N.W.2d at 756-57 (citing authority for standards on weight of evidence and impact of instructions).

The evidence in this record strongly established all elements of first-degree burglary. *See* Minn. Stat. § 609.582, subd. 1 (criminalizing as burglary in the first degree the entry of "a building without consent and with intent to commit a crime . . . [if] the building is a dwelling and another person, not an accomplice, is present in it"). Minutes after a man was seen engaging in suspicious behavior, appellant was apprehended near the site. Appellant's description was consistent with the original witness's report. Appellant does not have a permanent address in La Crescent, and he was in a residential neighborhood far from commercial activity and the place where he was staying. Based on this evidence, the jury could reasonably have concluded that appellant attempted to commit first-degree burglary.

The district court's response was inaccurate insofar as the occupancy of a building is not relevant to the determination of whether a defendant committed second-degree burglary. *See* Minn. Stat. § 609.582, subd. 2 (defining the crime of second-degree burglary). But the court properly responded to the jury's second question by referring the jury back to the elements of first- and second-degree burglary contained in the jury instructions and advising the jury that conviction on the second-degree offense would not conflict with guilt on attempted first degree burglary. The district court read these and other instructions to the jury and provided the jury with a copy of the instructions for their deliberation.

Erroneous communication with the jury off the record and without appellant's presence, knowledge, or consent, was harmless beyond a reasonable doubt.

3. Fair Trial

In his pro se brief, appellant argues that he was denied the right to a fair trial because he was required to wear a leg restraint at the beginning of trial. The record demonstrates that during voir dire, his counsel asked appellant to stand up and then posed a question to a potential juror: "What do you think when you see [appellant]?" The potential juror answered, "I see [appellant] is disabled. He has a significant limp." Following voir dire, and while the jury was out of the courtroom, the prosecutor informed the court that appellant was wearing a leg restraint which appeared to cause him discomfort and to walk with a hobble. The prosecutor requested that the restraint be removed. Appellant's counsel did not ask for a curative instruction or make any other objection to the use of the leg restraint during voir dire. *See State v. Hogetvedt*, 488 N.W.2d 487, 490 (Minn. App. 1992) (remanding for a new jury trial because the defendant's leg restraint was visible to the jury); Minn. R. Crim. P. 26.03, subd. 2(c) ("Whenever physical restraint of a defendant or witness occurs in the presence of jurors trying the case, the judge shall on request of the defendant instruct those jurors that such restraint is not to be considered in assessing the proof and determining guilt."). The leg restraint was removed for the remainder of the trial.

A defendant may be restrained in court only if such restraint is reasonably necessary to maintain order or security. Minn. R. Crim. P. 26.03, subd. 2(c). "The use of restraints in the presence of a jury is inherently prejudicial because it risks impermissibly influencing the jury's judgment and denying defendant a fair trial." *Hogetvedt*, 488

N.W.2d at 489 (citing *Holbrook v. Flynn*, 475 U.S. 560, 568-69-7, 106 S. Ct. 1340, 1345-46 (1986)).

Despite the potentially wrongful use of restraints, any error of the kind during trial is harmless if the jury was not aware of the restraint. *State v. Jones*, 678 N.W.2d 1, 21 (Minn. 2004); *State v. Scott*, 323 N.W.2d 790, 792 (Minn. 1982) (holding that defendant was not prejudiced by wearing a leg restraint because the jury was not aware of it). In *State v. Shoen*, the supreme court explained that a harmless-error analysis is impossible to conduct in cases where the record fails to demonstrate clearly whether the jury realized that the defendant wore a leg restraint. 578 N.W.2d 708, 715-16 (Minn. 1998). In that case, the supreme court remanded to the district court to conduct a *Schwartz* hearing for the purpose of asking the jurors whether they noticed the restraint and whether they believed it was a security device rather than a medical device. *Id.* at 716. At that point, the district court could determine whether the error in requiring the use of the leg restraint was harmless. *Id.* (quoting *Juarez*, 572 N.W.2d at 292).

Schoen demonstrates that the mandate for remand rests on a combination of severe circumstances that are not evident in this case. In *Schoen*, the leg restraint was worn throughout the jury trial and may have been visible to the jury in any one of four ways: the restraint caused the defendant to limp; it needed to be adjusted each time the defendant wanted to bend his knees; the bottom of the restraint was visible below the defendant's pant leg; and the jury could hear a chain rattle on the restraint. *Id.* at 712. Further, the defendant made two objections to the use of the restraint, both of which were denied by the trial court. *Id.* at 711-12. By contrast, nothing in the record of this case

suggests that the jury was aware of the leg restraint. The potential juror's sole comment about appellant being disabled does not indicate that this juror or any others connected the perceived disability to the use of a leg restraint. Moreover, the restraint was removed immediately upon the request of the prosecutor and was not worn for the rest of the trial. Thus, appellant's right to a fair trial was not affected by the fact that he wore a leg restraint during voir dire.

Appellant's pro se brief also asserts numerous violations of his constitutional rights under the Fourth, Fifth, and Sixth Amendments and challenges the sufficiency of the evidence supporting his conviction. We have carefully reviewed each of these arguments in light of the evidence in the record, and none of the assertions has merit.

Affirmed.