STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1253

State of Minnesota,
Respondent,

vs.

Jeffrey Michael Schwartz,
Appellant.

Filed May 23, 2011
Affirmed
Harten, Judge*

Ramsey County District Court
File No. 62-CR-09-15239

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

John J. Choi, Ramsey County Attorney, Dawn R. Bakst, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora K. Gaitas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Schellhas, Judge; and Harten, 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

HARTEN, Judge

Appellant challenges the denial of his motion for a mistrial and his conviction on the ground that two segments of an officer's testimony were unfairly prejudicial. Because we see no abuse of discretion in either the admission of the evidence or the denial of the mistrial motion, we affirm.

FACTS

On 1 September 2009, an incident occurred that resulted in appellant Jeffrey Schwartz stipulating to prior convictions and being charged with one count of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2008). Appellant and his girlfriend, J.K., were having an argument. J.K. called her mother, P.K., to ask P.K. to come and pick her up. When P.K. arrived, she saw appellant assaulting J.K. Sometime after P.K. and J.K. arrived at P.K.'s home, P.K. called the police. An officer came to her house to interview her and J.K.

This appeal is based on two parts of the officer's trial testimony. First, the officer testified that J.K. told him she wanted to end her relationship with appellant "due to previous acts of aggression and assault." J.K. testified that she did not discuss any relationship issues with the officer, other than saying her dispute with appellant was about money. The district court instructed the jury that the officer's testimony about J.K.'s statements to him prior to trial was admitted only for the light it could cast on the truth of J.K.'s trial testimony, not as evidence of facts.

Second, when the prosecutor asked the officer how he was able to locate addresses at which appellant might be found, the officer answered, "[p]revious police contacts and reports." The district court overruled appellant's objection to this answer. After the jury began deliberations, appellant moved for a mistrial based on the officer's answer. The district court observed that, "[p]referably, that kind of information doesn't come into a trial," but concluded, "I don't think that this one question and this one answer is so serious and prejudicial that it affects [appellant's] right to a fair trial." The motion was denied. The jury found appellant guilty; he was sentenced to serve 24 months' incarceration.

Appellant argues that the district court abused its discretion by denying his motion for a mistrial based on the "previous police contacts and reports" language and by admitting into evidence that language and the "previous acts of aggression and assault" language.

D E C I S I O N

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). An error is prejudicial only if there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). 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). "A

mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would [have been] different if the event that prompted the motion had not occurred." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotation omitted).

Appellant relies on *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002). *Strommen* reversed a defendant's conviction of attempted robbery because of two items in witnesses' testimony. *Id.* at 687-88. First, when an accomplice was asked if the defendant had spoken of any prior crimes, the accomplice testified that the defendant had said he "killed somebody." *Id.* at 684. Second, when the arresting officer was asked how he knew the defendant, the officer testified that he recognized the defendant "[f]rom . . . prior contacts and incidents." *Id.* at 685. Neither the accomplice's testimony nor the arresting officer's testimony was contradicted. *See id.* at 684-85.

The supreme court concluded that the accomplice's testimony that the defendant claimed to have killed somebody "was highly prejudicial and should have been excluded . . . . because it portrayed [the defendant] as a person of bad character and the jury may have been motivated to punish [the defendant] for his other bad acts." *Id.* at 687. Here, the officer testified only that appellant's girlfriend said in an interview that she wanted to end her relationship with appellant "due to previous acts of aggression and assault." That testimony was contradicted by the girlfriend herself, who said she told the officer only that she and appellant were arguing about money and that she did not tell the officer anything about their relationship. Previous acts of aggression and assault, like having killed someone, are obviously "bad acts" and indicate "bad character," but there is a significant difference of degree between the two. Moreover, there was little chance that

the officer's testimony here motivated the jury to punish appellant for the unspecified "previous acts of aggression and assault" when the alleged victim's testimony denied saying that those acts were committed.

The supreme court also concluded in *Strommen* that the prosecutor's purpose in asking the arresting officer how he knew the defendant "was to [elicit] a response suggesting that [the defendant] was a person of bad character who had frequent contacts with the police." *Id.* at 688. Here, the question was how the officer knew other addresses at which appellant might be found, and the prosecutor may have expected the answer to be something on the order of a computer search, not a reference to appellant's previous contact with the police. We agree with the district court's observation that "[p]referably, that kind of information doesn't come into a trial" but, like the district court, we "don't think that this one question and this one answer [were] so serious and prejudicial that [they] affect[ed appellant's] right to a fair trial." *See Manthey*, 711 N.W.2d at 506 (mistrial motion should not be granted unless it is reasonably probable that, absent the event that prompted motion, trial would have had different outcome).

While we acknowledge the similarity between the testimony of the *Strommen* officer that he recognized the defendant because of his previous contact with the police and the testimony of the officer here that he knew of possible addresses for appellant because of his previous contact with the police, we note that the inclusion of neither testimony would have been independently sufficient for a mistrial. *See Strommen*, 648 N.W.2d at 688 (officer's "testimony . . . reinforced the prejudicial impact of the inadmissible testimony from [the accomplice]").

The *Strommen* accomplice's testimony that she had heard the defendant say he killed someone was far more prejudicial than the officer's testimony that appellant's girlfriend said she wanted to break off their relationship because of his prior aggressive acts. The accomplice's testimony alone may well have been a sufficient basis to reverse the defendant's conviction; here, neither of the two remarks to which appellant objects would, taken alone, provide a basis for reversal, and even taken together, they do not approach the level of prejudice that resulted from a jury hearing from an accomplice that a defendant had said he "killed somebody." *See id.*

Affirmed.