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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0985**

State of Minnesota,
Respondent,

vs.

Jeremiah Jerome Johnson,
Appellant.

**Filed May 21, 2018
Affirmed
Schellhas, Judge**

Carlton County District Court
File No. 09-CR-14-1163

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

Thomas Pertler, Carlton County Attorney, Alexander W. Saumer, Assistant County Attorney, Carlton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Reyes, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his conviction of felony fourth-degree assault, arguing that the district court plainly erred by allowing testimony that appellant resided in a unit at the Minnesota Sex Offender Program for clients with significant behavioral issues. Appellant raised several additional issues in a pro se supplemental brief. We affirm.

FACTS

Appellant Jeremiah Johnson is a client at the Minnesota Sex Offender Program (MSOP) in Moose Lake, where he resided in the Omega unit. The Omega unit is a “behavioral therapy unit” to which clients are assigned if they have had “significant behavioral issues.” The Omega unit is secured by a door with a window. This door “has a half door on the top” that “swings towards staff away from the unit allowing the rest of the door to remain secure to provide a physical barrier” between the clients and MSOP staff.

On March 31, 2014, M.D., a security counselor at MSOP, observed Johnson place a plastic garbage bag over his mailbox, and then stand on a plastic property bin and tie a string around the sprinkler-system head. M.D. and N.L., another MSOP employee, opened the top part of the security door to the Omega unit and told Johnson to “stop tampering with the sprinkler system.” When Johnson refused to stop, N.L. contacted the A-Team for assistance. A-Team members respond to “incidents of adverse behaviors” and are “trained in the use of force” and chemical irritants, when responding to emergencies.

Several A-Team members responded to N.L.’s request for assistance, including A.H. Speaking through the open part of the security door, A.H. repeatedly instructed

Johnson to stop tampering with the sprinkler system or he would deploy a chemical agent. Johnson responded by “rapidly” approaching the security door and hitting the window with “both hands,” “causing [it] to swing back and strike” A.H. on the head. As a result, A.H. suffered a concussion, bruising, and a cut on his eyebrow.

Respondent State of Minnesota charged Johnson with fourth-degree assault under Minn. Stat. § 609.2231, subd. 3a(b)(1) (2012). A.H. testified at trial that Johnson appeared “angry” and “frustrated” as he tampered with the sprinkler system. A.H.’s supervisor, J.G., testified that as Johnson hit the door, he said: “that will teach you, you bitch.” The court allowed witnesses to testify that the Omega unit houses individuals who have behavioral issues. In addition to testimony from MSOP employees, the district court admitted into evidence videos that included A.H.’s body-camera video of the incident.

A jury found Johnson guilty of the charged offense. Johnson then moved to challenge the constitutionality of the penalty aspect of section 609.2231, subdivision 3a (2012). The district court denied the motion and sentenced Johnson to 13 months in prison and five years of conditional release. This appeal follows.

D E C I S I O N

Admission of testimony about MSOP’s Omega unit

Johnson argues that the district court erred by allowing “multiple workers at MSOP to testify that he was housed in the Omega unit; a housing unit for MSOP clients with significant behavior problems.” But Johnson concedes that he did not object to this testimony at trial. When a defendant does not object to the admission of evidence, this court reviews the district court’s admission of the evidence for plain error. *See State v.*

Griller, 583 N.W.2d 736, 740 (Minn. 1998) (discussing plain-error test). An appellant must show (1) an error, (2) that is plain, and (3) that affects the appellant’s substantial rights. *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). If all three prongs of the plain-error test are satisfied, we must consider “whether reversal is required to ensure the fairness and integrity of the judicial process.” *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016). But if we conclude that any of the requirements of the plain-error test are not satisfied, we need not consider the others. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

Relevant evidence is generally admissible and includes “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. Evidence that is not relevant is not admissible. *Id.*, 402. “Evidence is relevant and has probative value when it, in some degree, advances the inquiry.” *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). “A fact is relevant if, when taken alone or in connection with other facts, it warrants a jury in drawing a logical inference assisting, even though remotely, the determination of the issue in question.” *State v. Holmes*, 758 N.W.2d 326, 329 (Minn. App. 2008), *aff’d*, 778 N.W.2d 336 (Minn. 2010).

But relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Minn. R. Evid. 403. “The rule favors admission of relevant evidence, as the probative value of the evidence must be ‘substantially’ outweighed by prejudice” *Schulz*, 691 N.W.2d at 478 (quoting Minn. R. Evid. 403). Under rule 403, unfair 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.” *Id.*

Rule 404 of the Minnesota Rules of Evidence concerns character evidence. Under rule 404(a), evidence of a person’s character or a trait of character is generally “not admissible for the purpose of proving action in conformity therewith.” Minn. R. Evid. 404(a). Nor may evidence of another crime, wrong, or bad act be admitted to prove character “in order to show action in conformity therewith.” *Id.*, 404(b).

Here, the jury heard testimony from MSOP employees that the Omega unit in which Johnson was housed was a “behavioral therapy unit” where MSOP placed clients if they have had “significant behavioral issues.” Johnson argues that this testimony was irrelevant because the only issue at trial was whether he intended to assault A.H. Johnson argues further that even if this evidence had some minimal probative value, such value was substantially outweighed by the danger of unfair prejudice because it amounted to improper character evidence that implied that he “was a difficult and potentially dangerous person.”

We conclude that the testimony explaining the purpose of the Omega unit was relevant to provide context for the assault. In *State v. Garcia*, this court held that testimony from the victim’s sister regarding the defendant’s drinking and abusive behavior “provided a factual background for the jury’s understanding, and was limited to a brief summary” of the defendant’s and the victim’s sister’s relationship. 374 N.W.2d 477, 480 (Minn. App. 1985), *review denied* (Minn. Nov. 1, 1985). Similarly, the challenged testimony here provided background about the unit in which Johnson was housed, as well as a factual context for the videotape of the assault. The state did not offer the testimony to prove that

Johnson has a bad character or that he acted in conformity with the “behavioral issues” referenced in the challenged testimony. In fact, the district court admitted no evidence about Johnson’s behavioral issues that led to his assignment to the Omega unit. Johnson therefore fails to establish that the evidence constituted improper character evidence.

Moreover, Johnson fails to demonstrate that the evidence should have been excluded under Minn. R. Evid. 403. Although arguably prejudicial, we cannot conclude that the prejudicial impact of the challenged testimony *substantially* outweighs its probative value, or that the testimony attempted to persuade by illegitimate means. The jury knew that the assault occurred at MSOP. Consequently, testimony that Johnson was in an MSOP unit for individuals with “behavioral issues” would not be *substantially* more prejudicial than the fact that Johnson was a client at MSOP. We therefore conclude that Johnson has not established that the district court plainly erred by admitting the challenged testimony.

Even if Johnson could show plain error, he has not established that his substantial rights were prejudiced. An error affects substantial rights “if there is a reasonable likelihood that the error substantially affected the verdict.” *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). In determining whether the evidence significantly affected the verdict, appellate courts consider the following factors: (1) the manner in which the state presented the evidence; (2) whether the evidence was highly persuasive; (3) whether the state referenced the evidence in closing argument; and (4) whether the defense effectively countered the evidence. *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016).

As discussed above, the state presented the challenged testimony simply to provide context for MSOP employees' duties, as well as the location where the assault occurred. And the state did not reference the testimony in closing argument, or emphasize it in any way. Moreover, the evidence against Johnson was strong. The jury viewed multiple videos that showed Johnson violently pushing the upper part of the door, causing it to hit A.H. on the head. Multiple witnesses testified that Johnson appeared angry as he tampered with the sprinkler system, and the videos support this testimony, particularly the video from A.H.'s body camera that contains audio of the interaction between MSOP staff and Johnson. The video shows Johnson rapidly approaching the door and violently hitting it with both hands as MSOP staff tried to shut and lock the door. Because the evidence overwhelmingly supports the jury's determination that Johnson intended to assault A.H., we conclude that Johnson is not entitled to a new trial.

Pro se arguments

Johnson argues in a pro se supplemental brief that (A) the state lacked probable cause to charge him with assault; (B) he was selectively prosecuted; (C) he received ineffective assistance of counsel; and (D) Minn. Stat. § 609.2231, subd. 3a(b)(1), violates his right to equal protection.

Probable cause

Johnson argues that the state lacked probable cause to bring charges against him. But once a defendant has been found guilty beyond a reasonable doubt, a probable-cause challenge becomes irrelevant because the "standard for the sufficiency of evidence to support a conviction is much higher than probable cause." *State v. Holmberg*, 527 N.W.2d

100, 103 (Minn. App. 1995), *review denied* (Minn. Mar. 21, 1995). Once convicted, the lack-of-probable-cause argument is more accurately construed as a challenge to the sufficiency of the evidence. *See id.* (“If Holmberg could show on appeal that probable cause is lacking, he would necessarily prevail on a claim of insufficiency of the evidence.”). When reviewing sufficiency of the evidence claims, this court’s review is limited to “a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach their verdict.” *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted).

Under Minn. Stat. § 609.2231, subd. 3a(b), inflicting demonstrable bodily harm “against an employee or other individual who provides care or treatment at a secure treatment facility while the person is engaged in the performance of a duty imposed by law, policy, or rule” is a felony. Here, the record evidence is sufficient to sustain Johnson’s conviction. The evidence includes that A.H. is an employee at MSOP and video evidence offered by the state shows Johnson violently hitting the top part of the security door causing it to hit A.H. on the head. As addressed above, the state presented sufficient evidence that Johnson intended to assault A.H., who suffered a concussion as a result of Johnson’s conduct.

Although Johnson argues at length in his pro se brief that the state lacked probable cause to charge him because MSOP employees conducted the investigation, the record reflects that the state did not charge Johnson until the Moose Lake Police Department reviewed the investigative reports and concluded that probable cause existed to support a charge of fourth-degree assault. And MSOP’s report was not the basis for Johnson’s

conviction; rather, the trial evidence provided sufficient support for Johnson's conviction of fourth-degree assault.

Selective prosecution

Johnson argues that the state subjected him to "selective prosecution." But Johnson fails to articulate how or why the state selectively prosecuted him, and he does not cite any legal authority to support his position. Because Johnson fails to support his argument with citations to relevant facts or legal authority, he has forfeited this argument. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (considering arguments waived when they lack factual support in the record and contain no citation to relevant legal authority).

Ineffective assistance of trial counsel

This court reviews ineffective-assistance-of-counsel claims de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2070 (1984)). To prevail on such a claim, an appellant must "demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (citing *Strickland*, 466 U.S. at 687–88, 104 S. Ct. at 2064–65). Both prongs need not be analyzed if one is determinative. *Id.*

Johnson contends that he received ineffective assistance of trial counsel because his counsel failed to challenge the state's evidence, "never called defense witnesses," and "failed to provide the . . . jury with an alternative theory on the actions that took place leading to a jury trial." This court generally will not review an ineffective-assistance-of-

counsel claim that is based on trial strategy, which includes determining which witnesses to call, the extent of counsel's investigation, and the selection of evidence to present at trial. *Staunton v. State*, 784 N.W.2d 289, 302 (Minn. 2010). Accordingly, Johnson has not met his burden to demonstrate that his counsel's performance was deficient. Because the first *Strickland* prong is dispositive, Johnson's claim fails.

Equal protection

Johnson argues that the "sentencing aspect" of Minn. Stat. § 609.2231, subd. 3a, violates his right to equal protection under the United States and Minnesota Constitutions. The constitutionality of a statute presents a question of law that is subject to de novo review. *State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006). This court presumes that "Minnesota statutes are constitutional and will strike down a statute as unconstitutional only if absolutely necessary. To prevail, a party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that the statute violates a constitutional provision." *State v. Cox*, 798 N.W.2d 517, 519 (Minn. 2011) (citation omitted).

To establish that he has been denied equal protection of the laws, Johnson "must show that similarly situated persons have been treated differently." *Id.* at 521 (quotation omitted); see U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 2. Appellate courts "impose this threshold showing because the guaranty of equal protection does not require that the State treat persons who are differently situated as though they were the same." *Cox*, 798 N.W.2d at 519 (quotation omitted). The Minnesota Supreme Court has rejected equal-protection claims when a party cannot establish that he or she is similarly situated to those whom he or she contends are being treated differently. *Id.* "The focus . . . in determining

whether two groups are similarly situated is whether they are alike in all relevant respects.”
Id. at 522.

Minnesota law provides that a district court must sentence a person convicted under Minn. Stat. § 609.2231, subd. 3a(b), to prison for “not less than one year and one day,” and five years of conditional release. Minn. Stat. § 609.2231, subd. 3a(c), (d). Johnson contends that the statute violates his right to equal protection because it requires “a mandatory commit to prison and five years of conditional release only for those who commit fourth-degree assault while under civil commitment and residing in secure facilities.” To support his claim, Johnson compares his sentence to a person convicted of fourth-degree assault and incarcerated in a Minnesota correctional facility. Johnson contends that the prison inmate is similarly situated to the individual committed at MSOP because both have their freedoms restricted, but the prison inmate is treated differently because the inmate is not subject to the stricter sentencing requirements that a committed person is subjected to under section 609.2231, subdivision 3a.

Johnson’s argument is without merit. The groups Johnson compares are not similarly situated because the members of one group have been committed as sexually dangerous persons or sexual psychopathic personalities, and the members of the other groups have not. Johnson’s equal-protection claim therefore fails because he cannot demonstrate that similarly situated persons are treated differently under Minn. Stat. § 609.2231, subd. 3a.

Affirmed.