

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0223**

State of Minnesota,
Respondent,

vs.

Daniel Josphe Kriesel,
Appellant.

**Filed February 1, 2021
Affirmed in part, reversed in part, and remanded
Worke, Judge**

St. Louis County District Court
File No. 69DU-CR-19-2530

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Nathaniel T. Stumme, Assistant County Attorney, Duluth, Minnesota (for respondent)

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Considered and decided by Bratvold, Presiding Judge; Worke, Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his assault and domestic-assault convictions, arguing that the district court failed to strike a biased juror and erroneously admitted the victim's out-of-

court statements. Appellant also challenges the sufficiency of the evidence supporting his first-degree-assault and domestic-assault convictions and presents several pro se arguments. We affirm in part, reverse in part, and remand.

FACTS

The state charged appellant Daniel Josphe Kriesel with first- and third-degree assault and felony domestic assault.

The case proceeded to a jury trial. On the second day of trial, the state informed the district court that the victim was not going to testify. The district court ruled that two officers' body-camera videos that contained the victim's statements identifying Kriesel as the assailant were admissible.

The first responding officer testified that he received a dispatch on July 15, 2019, to a disturbance. When he arrived at the home, he heard yelling and requested backup. As he was waiting for backup, "a woman covered in blood burst out of the front door and ran out onto the porch." The officer testified,

She was covered in blood. I could see visible injuries, um, in between her eyes, . . . just above the bridge of her nose. I could see her . . . forehead was laid open. Um, she looked like she had puncture wounds about her torso. . . . Um, it just looked horrible, . . . just injuries all about her.

A man then exited the front door of the house, and officers arrested him. Roughly one minute after the officers placed handcuffs on the man, the first officer asked the victim if the man was Kriesel; she replied that it was. Roughly 30 seconds after that, the officer told the victim that her hand looked broken, to which she replied, "He stabbed me." The victim was sobbing and saying "ow" throughout the entire encounter. The prosecutor

asked the first officer if there was anything in his report “that would indicate that anyone, besides . . . Kriesel . . . was being accused of the assault,” and the officer answered, “No.”

An investigator who analyzed the scene testified that he took pictures throughout the house and collected blood samples. He also found “a piece of human tissue” that he later identified as “[a] piece of [the victim’s] ear.” The state published several of the investigator’s pictures to the jury.

A second officer testified that she accompanied the victim to the hospital inside the ambulance. The victim’s identification of Kriesel as the assailant from inside the ambulance was presented to the jury in the officer’s body-camera video.

The jury found Kriesel guilty as charged. The district court entered judgments of convictions on all three counts and sentenced Kriesel to 158 months in prison for his first-degree assault conviction. This appeal followed.

DECISION

Juror bias

Kriesel first argues that the district court abused its discretion by denying his motion to strike a biased juror.

Criminal defendants are constitutionally guaranteed the right to an impartial jury. *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015). “The bias of a single juror violates the defendant’s right to a fair trial.” *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007). A party may move to strike a juror for cause when it “satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the challenging

party.” Minn. R. Crim. P. 26.02, subd. 5(1)(1). It is the moving party’s burden to establish bias. *State v. Munt*, 831 N.W.2d 569, 577 (Minn. 2013).

“We give great deference to a district court’s findings of fact regarding juror bias . . . and review a district court’s decision to seat a juror for abuse of discretion.” *Fraga*, 864 N.W.2d at 623 (quotation omitted). Reviewing whether a district court erred in not striking a juror involves a two-step process. *Id.* The first step is to view the juror’s voir dire answers in context to determine whether the juror expressed actual bias. *Id.* The next step is to determine if the juror was rehabilitated. *Id.*

Kriesel argues that a juror, J.B., expressed actual bias because she made it clear that “she has an emotional response to viewing graphic evidence and that emotional response would undermine her ability to presume . . . Kriesel innocent or be fair to him.” To establish bias, Kriesel must show that J.B. “exhibited strong and deep impressions that would prevent her from lay[ing] aside [her] impression or opinion and render[ing] a verdict based on the evidence presented in court.” *See Munt*, 831 N.W.2d at 577 (quotation omitted).

Kriesel cites three portions in J.B.’s voir dire testimony where he argues that she expressed bias. First, when the prosecutor asked J.B. if she could set aside her emotions and still presume Kriesel’s innocence, she responded, “That’s a tough one. Um, . . . I maybe could. . . . I don’t know. I can’t give you a –.” Next, when J.B. was asked if the graphic nature of the evidence would make her jump to conclusions, she responded “That’s the tough part. I – I can’t say for sure.” Finally, when J.B. was asked whether she could

hold off on making a final judgment until the end of trial, she responded, “I would try really hard.”

In *Fraga*, the supreme court distinguished voir dire responses that expressed actual bias from statements that were probative of bias. 864 N.W.2d at 625. The supreme court noted that a juror expressed actual bias when he answered whether he could be impartial by stating, “Besides the fact I know about the case, I don’t, no. I think it would be hard.” *Id.* (emphasis omitted). The juror’s caveat indicated actual bias, while his equivocal statements like, “I think it would be hard” and his statements about his friends and family using the word “sickening” when discussing the case with him were “probative of bias.” *Id.*

J.B. stated several times that she could avoid forming an opinion too quickly or being swayed by violence. These statements, while equivocal, were stated without any caveat. Thus, Kriesel has shown statements that are probative of bias, but no statement that expressed actual bias.

Kriesel relies on *State v. Bergendahl*, a recent nonprecedential opinion from this court. No. A19-1450, 2020 WL 5626091 (Minn. App. Sept. 21, 2020). In *Bergendahl*, a juror, who has a daughter who was physically and emotionally abused by a boyfriend, was asked whether she could be impartial and set aside her bias in a criminal-sexual-conduct case, and the juror responded, “[t]here is part of me that says, I might not be able to, yes, that I’m not sure.” *Id.* at *1. The juror made several other equivocal statements. *Id.* In concluding that the district court erred in not granting the defendant’s motion to strike, this court stated, “As a whole, [the juror]’s answers to the questions asked of her were

equivocal, especially her last statement that she ‘honestly’ did not know whether she could be fair.” *Id.* at *3. But *Bergendahl* is distinguishable from this matter for two reasons. First, the facts in *Bergendahl* required this court to interpret the juror’s answers because the district court did not make findings of fact and misunderstood some of the jurors’ answers. *Id.* Second, the juror in *Bergendahl* made stronger statements, including that she “honestly” did not know whether she thought she could be fair. *Id.* at *1.

Kriesel bears the burden of showing that J.B. was biased, and he has not provided any caselaw that states equivocal statements alone demonstrate actual bias. Because we determine that J.B. did not express actual bias, we need not analyze whether she was rehabilitated.

First body-camera video

Kriesel next argues that the district court violated his rights under the Confrontation Clause by admitting the first body-camera video after finding that its contents were nontestimonial.

Whether the admission of evidence violates a defendant’s rights under the Confrontation Clause is a question of law that we review de novo. *State v. Wright*, 726 N.W.2d 464, 472 (Minn. 2007). The Confrontation Clause states, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” U.S. Const. amend VI. This clause has been interpreted to prohibit the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004).

“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose* of the interrogation is to enable police assistance to meet an ongoing emergency.” *Wright*, 726 N.W.2d at 472 (quotation omitted). Conversely, statements are testimonial “when the circumstances objectively indicate that there is no such ongoing emergency, and that the *primary purpose* of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* (quotation omitted).

Kriesel challenges two of the victim’s statements in the first officer’s body-camera video, arguing that they are testimonial because they were made after Kriesel was arrested and after the emergency was resolved. The first statement was made about one minute after Kriesel ran out of the house. The officer asked the victim whether the man was Kriesel, and she responded affirmatively. The next statement came roughly 30 seconds after:

VICTIM: Ow, ow, ow, ow, ow (crying).

[OFFICER]: Let me see your hand. Your hand looks broken, okay.

VICTIM: He stabbed me.

[OFFICER]: He stabbed you?

VICTIM: He stabbed me and (inaudible) in the head.

Both statements are nontestimonial because there was an ongoing emergency. The house and premises were not yet secured, and both statements took place less than two minutes after the officers handcuffed Kriesel. The district court did not violate Kriesel’s rights under the Confrontation Clause by admitting the first body-camera video.

Second body-camera video

Kriesel argues that the district court abused its discretion by admitting the second body-camera video because it was hearsay. While the district court determined that the video was admissible under several exceptions to the hearsay rule, it ruled that the video “comes in most strongly” under the excited-utterance exception.¹

Hearsay is an out-of-court statement offered for the truth of the matter asserted, and it is generally inadmissible at trial. Minn. R. Evid. 801(c), 802. However, there are exceptions that allow for the admissibility of out-of-court statements because of other indicia of reliability. Minn. R. Evid. 803, 804. “A determination that a statement meets the foundational requirements of a hearsay exception is reviewed for an abuse of discretion.” *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009). An appellant who claims that the district court erred has the burden of showing that the district court erred and the resulting prejudice. *Id.*

Minn. R. Evid. 803(2) states that “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” is an exception to the hearsay rule. An excited utterance must meet three requirements: (1) “there must be a startling event or condition,” (2) “the statement must relate to the startling event or condition,” and (3) “the declarant must be under a sufficient

¹ The district court also stated that it “comes in most strongly” under the then existing state of mind or physical condition exception. Minn. R. Evid. 803(3) allows for the admissibility of statements “of the declarant’s then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed.” But this rule only applies when “the state of mind is relevant to the issues in the lawsuit.” Minn. R. Evid. 803(3) cmt. This exception does not apply.

aura of excitement caused by the event or condition to insure the trustworthiness of the statement.” *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986). “The lapse of time between the startling event and the out-of-court statement is not always determinative.” *State v. Hogetvedt*, 623 N.W.2d 909, 913 (Minn. App. 2001), *review denied* (Minn. May 29, 2001).

The second body-camera video captured the victim’s statements made when she was in the ambulance and the ambulance was still at the crime scene. Kriesel challenges the following statement that the victim made approximately 90 seconds after the officer entered the ambulance:

EMT: So – how did you get those facial injuries here, [victim]?

VICTIM: [Kriesel].

EMT: But how?

VICTIM: He punched me.

EMT: Punched you?

VICTIM: And he started stabbing me.

EMT: Okay. Did he punch you with a fist or [with] something else?

VICTIM: He used his fist. He used his feet. He used this metal lamp or glass lamp and he used a (inaudible) to the house and then he used himself.

EMTs were placing initial bandages on the victim, and she was constantly yelling “ow.” The video does not show the second officer talking to or engaging with the victim during the statement.

This statement clearly meets the first two excited-utterance requirements: it arose from both a startling event and condition, and relates to that event and condition. The issue is whether the victim was “under a sufficient aura of excitement caused by the event or condition to insure the trustworthiness of the statement.” *See Daniels*, 380 N.W.2d at 782.

The district court admitted the statement because, “Clearly, at this time, [the victim] is still in a state of distress. She is sobbing, not speaking clearly, but, again, describing what she’d experienced.”

We agree with the district court. The victim suffered severe injuries, and her statement was made relatively close to the event. The victim also answered nonleading questions when she made the statement. Finally, the EMTs were applying the initial bandages when the victim volunteered Kriesel’s name, and the victim was clearly still in pain. The district court did not abuse its discretion by admitting the second body-camera video under the excited-utterance exception.

Medical records

Kriesel next argues that the district court erred by admitting the victim’s medical records for treatment after the incident under the medical-diagnosis exception.

A hearsay statement is admissible if it is “made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception of general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” Minn. R. Evid. 803(4). “[S]tatements explaining the cause of an injury are admissible under the medical diagnosis exception, [but] statements attributing fault, including statements identifying the accused perpetrator, are ordinarily not admissible.” *State v. Robinson*, 718 N.W.2d 400, 404 (Minn. 2006).

Kriesel argues that the district court abused its discretion by admitting the medical records because the exception requires a medical expert witness to introduce the evidence.

Kriesel relies on *Robinson* for this assertion. We disagree with his interpretation of *Robinson*. In *Robinson*, the supreme court was asked to broaden the medical-diagnosis exception to allow identifying information for victims of domestic abuse. *Id.* at 404-05. When the supreme court stated that there was no medical expert to testify, it was discussing the scope of the treatment required for victims of domestic abuse and whether the identity of the perpetrator would be helpful for the medical professional in these situations. *Id.* at 406. *Robinson* does not support the proposition that a medical professional is needed before any medical records can be admitted under the exception. Kriesel has not shown how the district court abused its discretion by admitting the victim's medical records under the medical-diagnosis exception.

Sufficiency of the evidence

Finally, Kriesel challenges the sufficiency of the evidence supporting his convictions for first-degree assault and domestic assault.

When reviewing a challenge to the sufficiency of the evidence, this court reviews the record “to determine whether the evidence, direct and circumstantial, viewed most favorably to support a finding of guilt is sufficient to permit the jury to reach that conclusion.” *Francis v. State*, 729 N.W.2d 584, 589 (Minn. 2007) (quotation omitted). Appellate courts will not overturn a verdict if a jury, “upon application of the presumption of innocence and the [s]tate’s burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). “We do not retry the facts; we assume the jury

believed the state's witnesses and disbelieved the defendant's witnesses." *State v. Thao*, 649 N.W.2d 414, 420 (Minn. 2002).

First-degree assault

First, Kriesel argues that the state did not offer sufficient evidence to support his conviction for first-degree assault because it "failed to prove beyond a reasonable doubt that the [victim] had a serious permanent disfigurement."

A person who "assaults another and inflicts great bodily harm" is guilty of first-degree assault. Minn. Stat. § 609.221, subd. 1 (2018). "'Great bodily harm' means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss of impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2018).

The state asserted that the victim suffered serious permanent disfigurement because she was missing a piece of her ear. Kriesel argues that the state failed to show permanent disfigurement because it did not provide evidence about the victim's injuries at any point after the incident.

An investigator testified that he collected a piece of human ear that was "about an inch-and-a-half to 2-inches long and about a quarter of an inch wide." He also testified that this piece of ear was still in collection at the police department on the date of trial. The victim complained multiple times to the EMT that her ear hurt. The medical records indicate "bit . . . left ear" in the history of present illness, and that doctors used a skin graft from the victim's right thigh for her ear and face. The state also submitted several pictures

of the victim's injuries. This evidence—particularly the evidence of the piece of ear still in collection—is sufficient to permit the jury to find that the victim suffered permanent disfigurement.

Domestic assault

Kriesel also argues that the state provided insufficient evidence to support his domestic-assault conviction because there was no evidence that he was married to or lived with the victim.

A person who “intentionally inflicts or attempts to inflict bodily harm” against “a family or household member” is guilty of domestic assault. Minn. Stat. § 609.2242, subd. 1(2) (2018). Family and household members include spouses and people who live together. Minn. Stat. § 518B.01, subd. 2(b)(1), (4) (2018).

At trial, the only mention of Kriesel's marriage with the victim came from the prosecutor. The state argues that Kriesel's argument “overlooks the fact that . . . Kriesel's counsel acknowledged . . . Kriesel's relationship with [the victim] before trial began.” The state is referring to a comment that Kriesel's attorney made during a hearing on the state's motion to amend the complaint. He stated, “I don't think that there was really any dispute that . . . Kriesel and [the victim] are husband and wife.” But the parties did not stipulate on this element of the charge, and the jury was instructed that, in order to find Kriesel guilty of domestic assault, it had to find that the victim was a family or household member. Because the state provided no evidence for this element, we reverse Kriesel's conviction for felony domestic assault.

Lesser-included offense

The district court entered judgments of conviction for first-degree assault and the lesser-included offense of third-degree assault. “Minnesota law generally prohibits a person from being punished twice for conduct that is part of the same behavioral incident, with certain exceptions.” *State v. Holmes*, 778 N.W.2d 336, 339 (Minn. 2010). If a defendant is convicted of multiple crimes including a lesser degree of the same crime, the district court should adjudicate and impose a sentence on only one count. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

Although not raised by the parties, “it is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities.” *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (quotation omitted). The district court should have adjudicated only Kriesel’s conviction for first-degree assault because third-degree assault is a lesser-included offense, and the state alleged only one instance of assault. We, therefore, reverse and remand for correction of the warrant of commitment.

Pro se arguments

Kriesel makes three pro se arguments. First, he argues that his due-process rights were violated because two jurors showed bias. The first juror is J.B., which we analyzed earlier in this opinion. He argues that a second juror was biased because the juror’s daughter-in-law was the victim of domestic violence. Defense counsel did not move to strike this juror. Arguments that are not raised and considered by the district court are

forfeited on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Further, by simply inferring that “[i]t seems very unlikely any person could be impartial in such a situation,” Kriesel has not met his burden in establishing bias.

Kriesel next argues that the prosecutor committed impermissible burden shifting in his closing argument. But the most compelling portion of the transcript that Kriesel cites came from a discussion outside the presence of the jury. The other sections of the transcript do not show any impermissible burden shifting.

Finally, Kriesel argues that “great bodily harm” is unconstitutionally vague. But this court has concluded that the statute is not unconstitutionally vague. *See State v. Currie*, 400 N.W.2d 361, 365-66 (Minn. App. 1987), *review denied* (Minn. 1987). Kriesel’s pro se arguments are without merit.

Affirmed in part, reversed in part, and remanded.