

NOT DESIGNATED FOR PUBLICATION

No. 104,119

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MATTHEW JAEGER,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; ROBERT. W. FAIRCHILD, judge. Opinion filed December 16, 2011. Affirmed.

Pedro L. Irigonegaray and *Elizabeth R. Herbert*, of Irigonegaray & Assoc., of Topeka, for appellant.

Andrew Bruch, assistant district attorney, *Nola F. Wright*, assistant attorney general, and *Derek Schmidt*, attorney general, for appellee.

Before ATCHESON, P.J., ARNOLD-BURGER and BRUNS, J.J.

BRUNS, J.: This is a direct appeal from Matthew Jaeger's convictions for kidnapping, aggravated battery, and criminal threat. Jaeger raises multiple issues on appeal, including lack of sufficient evidence to support the convictions, juror misconduct, and cumulative error. We find that there was sufficient evidence presented to the jury to support the convictions. We further find that the district court appropriately handled the evidentiary issues presented at trial and properly instructed the jury regarding the law.

Finally, we find that Jaeger received a fair trial and that the district court appropriately addressed the issue of juror misconduct. Thus, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Matthew Jaeger and Mary Francine Biggs, who were both students at the University of Kansas, had a relationship for various periods of time between August 2005 and October 2007. Although Biggs considered their relationship to be over, she continued to have contact with Jaeger.

Biggs and Jaeger spent time together on the afternoon of October 8, 2007. That evening, Biggs went to a friend's apartment for dinner while Jaeger went to All Stars with one of his friends, Evan Carroll. According to Carroll, he noticed that Jaeger became agitated and obsessed with his cell phone over the course of the evening. In the early morning hours of October 9, 2007, there were 26 calls and text messages sent from Jaeger's cell phone to Biggs' cell phone. Eventually, Biggs turned off her cell phone and ignored Jaeger's calls and text messages.

Biggs returned to her apartment around 11:45 p.m. Shortly thereafter, Dylan Jones, who had been casually dating Biggs for several weeks, came to visit Biggs at her apartment. Around midnight, Jaeger and Carroll left All Stars. Carroll drove Jaeger's car because Jaeger did not believe he should drive due to the amount of alcohol he had consumed. After the two visited a friend at a sorority house, Jaeger told Carroll to drive to Biggs' apartment. Upon arrival at the Biggs' apartment building, Jaeger jumped out of the car before Carroll could park.

Carroll saw Jaeger run up the stairs and break the front window of Biggs' apartment, which was on the second floor. After Carroll parked the car, he stood outside to smoke a cigarette while waiting for Jaeger to return.

In the apartment, Biggs and Jones were engaged in sexual intercourse when they heard a window breaking. Upon hearing the noise, Biggs got out of bed, closed the bedroom door, and turned on the light. Biggs told Jones he needed to leave because she thought her ex-boyfriend had broken into the apartment.

Jones quickly dressed and went out onto the balcony adjacent to Biggs' bedroom. While Jones climbed over the railing of the balcony, he saw Jaeger come into the bedroom. Jones described Jaeger as looking angry and enraged. As Jones was still hanging onto the balcony, Jaeger told him, "You're fucking dead." Jones then dropped from the balcony. As he did so, he heard a "flop up against the wall" and Biggs saying, "What the fuck, Matt."

Jaeger then went outside in an attempt to find Jones. Fearing that he would run into Jaeger on the ground, Jones climbed back onto Biggs' balcony, ran through the apartment, out the front door, and down the stairs. Jones hid for a short time while Jaeger looked for him. When he was hiding, Jones could hear Biggs pleading with Jaeger to stop. Jones then ran to a nearby residence where Biggs' brother lived.

Jones, who was barefoot and wearing only a shirt and pants, woke up Biggs' brother frantically telling him to call 911. Jones also told Biggs' brother that his sister was hurt and that "Matt is a psycho." Biggs' brother then called 911 to report what had occurred.

Upon seeing a male running between the apartment buildings, Carroll pulled Jaeger's car to the front of Biggs' building. Although Jaeger came to the car and started to get in, he abruptly ran back up the stairs and went inside Biggs' apartment. Carroll heard screaming and yelling coming from inside the apartment. But when the screaming and yelling stopped, Carroll grew nervous and decided to go inside Biggs' apartment.

In the back bedroom of the apartment, Carroll saw Biggs on the floor with Jaeger hunched over her. Carroll urged Jaeger to leave. Shortly thereafter, Carroll, Jaeger, and Biggs left the apartment and went down the stairs. When they reached Jaeger's car, Carroll got into the driver's seat while Jaeger and Biggs got into the back seat. Biggs told Carroll that she was injured and needed to go to the hospital.

Two of Biggs' neighbors, who live directly across the parking lot from Biggs' apartment, had been awakened by the sound of loud voices and glass breaking. One of the neighbors, Katelyn Hall, heard a female screaming and went out on the front balcony of her apartment building. She was joined on the balcony by Troy Gower. Hall called 911 to report what she was observing.

Hall told the dispatcher that she saw two men dragging a woman by her arms and her hair down the stairs of Biggs' apartment building. She also told the dispatcher that she saw one of the men force the woman into the back seat of a car and then get into the back seat with her. Hall also described the car. And she told the dispatcher that the car was "moving pretty fast," that it had failed to stop at a stop sign, and that it turned left onto Michigan Street as it left the apartment complex.

A few minutes later, police officers stopped Jaeger's car near the intersection of 6th Street and Florida Street, as it was travelling in the opposite direction of Lawrence Memorial Hospital. One of the officers had Carroll exit Jaeger's car and placed him in a patrol car. The other officer approached the two people in the back seat. The officer noticed that Biggs was wearing all black clothing, was not wearing shoes, and appeared to have been crying. He also saw that her hands were clasped tightly between her legs.

An officer asked Biggs a few questions while she was still in the back seat of Jaeger's car, but she did not answer. Instead, she looked at Jaeger, who answered on her

behalf. When an officer asked Jaeger where they were going, he told the officer that the three were on their way to The Wheel to get a pizza.

After learning Biggs' name, an officer ran a records search and discovered that Biggs had an outstanding warrant for failure to provide proof of insurance. Even after being told about the warrant, Biggs continued to refuse to exit the vehicle. One of the officers then heard Jaeger give Biggs permission to get out of the car.

As Biggs got out of the car, an officer noticed that her hands and the back seat of Jaeger's car were covered with blood. The officer also noticed that blood was dripping onto the pavement. Biggs, who was having difficulty walking and complaining of pain, motioned to the officer that the blood was coming from between her legs.

Biggs initially told the officers that she thought she had glass in her vagina. She also told the officers that Jaeger was crazy and that they did not understand what she was dealing with. After being placed in an ambulance, Biggs told the officers that Jaeger had broken into her apartment and had strangled her until she was unconscious. She also told the police that when she awoke, there was another altercation and Jaeger had dragged her from her apartment and forced her into his car.

One of the officers who was at the scene saw that Jaeger had blood on his hands and shorts. When Jaeger was asked about the blood, he told the officer, "I bite my fingernails." Jaeger was subsequently transported by the police to the Law Enforcement Center, and Biggs was taken by ambulance to the emergency room at Lawrence Memorial Hospital.

In the emergency room, Dr. Lisa Gard examined Biggs and found her to be in emotional distress and in severe pain. Dr. Gard observed a traumatic injury to Biggs' genitalia, including a hematoma that she believed required an immediate consultation

with an obstetrician and gynecologist. Dr. Gard later testified at trial that she had never seen such an extensive external injury to the female genitalia. Dr. Gard also testified that she had treated "straddle injuries" to female patients on multiple occasions. Based on this experience and her examination of Biggs, Dr. Gard rendered the opinion that Biggs' injury was not a straddle injury.

Dr. Kathy Gaumer, an obstetrician and gynecologist, also conducted a physical examination of Biggs' genitalia in the early morning hours of October 9, 2007. Dr. Gaumer observed extensive trauma, active bleeding, and a rapidly expanding hematoma. Biggs told Dr. Gaumer that her ex-boyfriend had broken into her apartment and had assaulted her. Biggs also told Dr. Gaumer that she had lost consciousness and noticed the injury in her genital area after she woke up.

Dr. Gaumer performed surgery to repair the hematoma and to stop the bleeding. In doing so, she discovered several lacerations that were approximately 1 inch in length. At trial, Dr. Gaumer rendered the opinion that the hematoma resulted from the application of significant blunt force and was not a straddle injury. Dr. Gaumer further testified that in her 18 years of medical practice, she had never seen such an extensive gynecological injury.

Biggs was hospitalized for 11 days. During her hospitalization, Biggs was given medication to control the pain, as well as medicine to control her anxiety. Ultimately, she was discharged from Lawrence Memorial Hospital on October 20, 2007. After her discharge from the hospital, however, Biggs continued to receive home health care services and continued to have a catheter in place.

Jaeger was eventually charged with one count each of aggravated kidnapping, aggravated battery, aggravated burglary, and criminal threat. An 11-day jury trial

commenced on July 27, 2008. At trial, 25 witnesses were called and hundreds of exhibits were admitted into evidence.

Jaeger's defense was that he broke into Biggs' apartment because he thought she was in distress. In addition, he claimed that Biggs had injured herself by falling onto the railing of her bed. In support of this defense, Jaeger called expert witnesses who rendered the opinion that Biggs had suffered a straddle injury. Furthermore, one of the expert witnesses rendered the opinion that Biggs was not choked, nor did she lose consciousness.

Jaeger also called a forensic scientist who rendered the opinion that the pattern of the blood stains did not show any signs that Biggs struggled or was forced into Jaeger's vehicle. Moreover, Jaeger called an expert witness to testify about the medication Biggs took in the hospital, which allegedly made her susceptible to suggestion from family members or law enforcement officers.

Following the close of evidence, the jury deliberated for approximately 4 days. On the third day of deliberation, one of the jury members gave a note to the bailiff that stated:

"I have concern that we have a juror that [openly] stated he had pursued an investigation on his own away from the courtroom. Quote 'a reenactment' with his girlfriend that he used as a basis to draw conclusions about the case.

"My concern is that this juror has [openly] stated he has made his verdict in this case on all counts. And quote, 'nothing we say is going to change his mind.'"

After informing the parties of the juror's note, the trial judge held a hearing in which the presiding juror confirmed that the note was accurate. The trial judge then brought in the juror, who admitted that he had experimented with his girlfriend to see how Biggs may have been injured. The juror also admitted that he had already made up

his mind before he engaged in the experiment. The trial judge determined that the juror should be dismissed, and defense counsel did not object to the juror's dismissal.

After the juror was dismissed, the trial judge called in the rest of the jurors to question them about what they had been told. The remaining jurors indicated that the dismissed juror had told them that he reenacted the bedroom scene with his girlfriend and that he based his decision at least partially on that reenactment. The remaining jurors agreed that nothing the dismissed juror told them would impact their decision. Although Jaeger moved for a mistrial, the trial judge denied the motion and replaced the dismissed juror with an alternate who had heard the evidence.

The following day the jury returned a verdict, finding Jaeger guilty of kidnapping, aggravated battery, and criminal threat. The jury was unable to reach a unanimous decision on the aggravated burglary charge, and the district court declared a mistrial on that count. Jaeger subsequently filed a motion for a new trial, which was denied. Thereafter, Jaeger was sentenced to 106 months in prison.

ISSUES PRESENTED AND ANALYSIS

On appeal, Jaeger presents seven issues: (1) whether there was sufficient evidence to support his convictions; (2) whether the district court abused its discretion by allowing the State to present cumulative evidence; (3) whether the district court abused its discretion by limiting defense counsel's cross-examination of Biggs; (4) whether the district court erred in admitting evidence of Jaeger's prior bad acts; (5) whether the district court erred in instructing the jury on kidnapping; (6) whether the district court abused its discretion in denying Jaeger's motion for a new trial based on juror misconduct; and (7) whether cumulative error denied Jaeger a fair trial. We will address these issues in the order they were presented.

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT JAEGER'S CONVICTIONS?

Standard of Review

The standard of review for Jaeger's challenge to the sufficiency of the evidence is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, we are convinced that a rational factfinder could have found Jaeger guilty beyond a reasonable doubt. See *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011). In determining whether there is sufficient evidence to support the convictions, we will not reweigh the evidence or the credibility of witnesses. See 291 Kan. at 710; *State v. Trautloff*, 289 Kan. 793, 801, 217 P.3d 15 (2009).

Kidnapping

Jaeger was charged with aggravated kidnapping under K.S.A. 21-3421, but the jury eventually convicted Jaeger of the lesser included offense of kidnapping under K.S.A. 21-3420. "Kidnapping is the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . to inflict bodily injury or to terrorize the victim or another." K.S.A. 21-3420(c). The jury was also instructed that the taking or confining could have been done with the intent to facilitate flight or the commission of any crime. See K.S.A. 21-3420(b).

Jaeger contends that the evidence presented at trial was not sufficient to support a conviction for kidnapping. We disagree. Based on our review of the record in the light most favorable to the prosecution, we find that there is sufficient evidence upon which a reasonable jury could have found Jaeger guilty of kidnapping beyond a reasonable doubt.

Under K.S.A. 21-3420(b) and (c), kidnapping includes "the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . (b) to facilitate flight or the commission of any crime; [or] (c) to inflict bodily

injury or to terrorize the victim or another." In *State v. Buggs*, 219 Kan. 203, 216, 547 P.2d 720 (1976), the court held that in order to facilitate a crime, the movement must not be "slight, inconsequential, and merely incidental to the other crime," must not "be of the kind inherent in the nature of the other crime," and must have some independent significance from the crime that "makes the other crime substantially easier of commission or substantially lessens the risk of detection."

Although we will not repeat all of the evidence contained in the voluminous record that supports the kidnapping conviction, we will briefly summarize the evidence. In addition to Biggs' own testimony, Hall testified that she saw two men dragging a woman by her arms and hair down the stairs of Biggs' apartment. She further testified that the woman was screaming and that one of the men was shouting, "'Shut the fuck up.'" Once the three reached the car, Hall saw one of the men force or shove the woman into the back seat of the vehicle and then get into the back seat with her. In addition, Gower offered similar testimony at trial.

The eyewitness testimony cited above, if believed, constitutes sufficient evidence that Jaeger used force, threat, or deception to take and/or confine Biggs. Moreover, a police officer testified that after Jaeger's car was stopped, Biggs would not talk to him or get out of the vehicle. The officer testified that Biggs kept looking at Jaeger and only got out of the car after Jaeger gave her permission to do so.

There is also evidence in the record that could lead a reasonable jury to conclude that Jaeger's intention in the kidnapping was to facilitate flight. Gower testified that the car was "moving pretty fast" when it left the apartment complex and that it did not stop at a stop sign. There was also testimony that Jaeger told Carroll to "'[d]rive, drive. Go, go, go'" and did not tell him how to get to the hospital—which is located only a few blocks away from Biggs' apartment.

Furthermore, Carroll testified that only Biggs attempted to give him directions to Lawrence Memorial Hospital. In fact, at the time Jaeger's car was stopped by the police, it was headed away from the hospital. Moreover, Jaeger did not mention that Biggs needed medical assistance, but instead he told the police at the scene that the three were going to The Wheel to get pizza.

It is only in rare cases, where the testimony is so incredible that no reasonable factfinder could find guilt beyond a reasonable doubt, that a guilty verdict will be reversed. See *State v. Matlock*, 233 Kan. 1, 5-6, 660 P.2d 945 (1983); *State v. Naramore*, 25 Kan. App. 2d 302, 322, 965 P.2d 211, *rev. denied* 266 Kan. 1114 (1998). This is not one of those rare cases. Viewing the evidence in the light most favorable to the State, we conclude there was sufficient evidence on which the jury could rely to find Jaeger guilty of kidnapping.

Aggravated Battery

Jaeger also contends there was insufficient evidence to support his aggravated battery conviction. Aggravated battery is the intentional infliction of "great bodily harm to another person or disfigurement of another person." K.S.A. 21-3414(a)(1)(A). "In defining great bodily harm, the word 'great' distinguishes the bodily harm necessary for aggravated battery from slight, trivial, minor, or moderate harm, and as such it does not include mere bruises, which are likely to be sustained in simple battery." *State v. Kelly*, 262 Kan. 755, Syl. ¶ 2, 942 P.2d 579 (1997).

It is undisputed that Biggs suffered a significant injury, including substantial loss of blood. Although Jaeger's expert witnesses testified that Biggs' injury was "very compatible" with a straddle injury and that falling on the bed rail was the most probable cause of her injuries, both the emergency room physician and the obstetrician-gynecologist who treated Biggs rendered the opinion that she did not suffer a straddle

injury. Rather, Dr. Gaumer rendered the opinion that the hematoma resulted from the application of significant blunt force.

Both Biggs and Jones testified that Jaeger entered the apartment angry and enraged. And there were several witnesses who testified that they heard screaming and yelling. Moreover, Jones testified that Biggs was not injured before he left the apartment.

Biggs testified that Jaeger strangled her until she was unconscious. And there was testimony from Steve Crawford, who runs a martial arts school in Overland Park, that Jaeger had taken martial arts classes from him and had learned how to perform a choke hold that could cause a person to pass out within a few seconds. Biggs also testified that upon regaining consciousness, she noticed that she had been injured. In addition, Carroll testified that when he went into Biggs' apartment, she was lying on the floor of the bedroom with Jaeger hunched over her.

A conviction of even the gravest offense can be based entirely on circumstantial evidence and the inferences fairly deductible therefrom. *McCaslin*, 291 Kan. at 710. Here, there was sufficient circumstantial evidence in the record from which a reasonable jury could conclude that Jaeger intentionally caused great bodily harm to Biggs. Furthermore, it was up to the jury—not this court—to determine whether it found the testimony of Jaeger's expert witnesses to be credible. Thus, from a review of the record in the light most favorable to the State, we conclude that there was sufficient evidence presented to prove beyond a reasonable doubt that Jaeger committed aggravated battery.

Criminal Threat

Jaeger next contends there was insufficient evidence to support his criminal threat conviction. Criminal threat is defined as any threat to commit violence, communicated

with intent to terrorize another. K.S.A. 2009 Supp. 21-3419(a)(1). Here, the alleged threat was made to Jones.

At trial, Jones testified that once Biggs thought Jaeger was in the apartment, Jones got dressed quickly and climbed over the balcony adjacent to Biggs' bedroom. As Jones was lowering himself to the ground floor, he saw Jaeger. According to Jones, Jaeger told him, "You're fucking dead." Biggs similarly testified that when Jaeger saw Jones leaving from the balcony, he said, "You're fucking dead." Then after Jones ran back through Biggs' apartment and out the front door, Jones heard Jaeger yelling for him to show his face because he was "fucking dead."

Therefore, after reviewing the evidence presented in the light most favorable to the State, we conclude that there was sufficient evidence in the record upon which a reasonable jury could conclude that Jaeger was guilty beyond a reasonable doubt of making a criminal threat to Jones.

DID THE DISTRICT COURT ABUSE ITS DISCRETION BY ALLOWING CUMULATIVE PRESENTATION OF EVIDENCE AT TRIAL?

Jaeger argues that the district court erred in failing to exclude cumulative evidence presented at trial. He challenges the district court's decision to allow Biggs and Carroll to present live testimony and videotaped statements because the evidence was "basically consistent and therefore duplicative in nature."

Cumulative evidence is evidence that is unduly repetitious. See *State v. Green*, 274 Kan. 145, 147, 48 P.3d 1276 (2002). Although a trial judge has the discretion to admit or exclude evidence that is cumulative, such evidence is not objectionable in and of itself. See *State v. Hickles*, 261 Kan. 74, 88, 929 P.2d 141 (1996). Thus, a trial judge's ruling on cumulative evidence should not be reversed unless there has been an abuse of

discretion. See *State v. Miller*, 284 Kan. 682, 701, 163 P.3d 267 (2007); *State v. Reed*, 282 Kan. 272, 280, 144 P.3d 677 (2006).

Furthermore, a party must make a contemporaneous and specific objection to the admission of evidence in order to preserve the issue for appeal. See K.S.A. 60-404; *McCaslin*, 291 Kan. at 707. Here, it does not appear that Jaeger objected at trial to either Biggs' and Carroll's testimony being cumulative to each other or being cumulative to their videotaped statements. And although Jaeger objected to Biggs' videotaped testimony, his objection was on different grounds than those raised on appeal.

Prior to trial, Jaeger filed a motion to exclude from evidence the video of Biggs' statement recorded while she was still in the hospital. But Jaeger did not argue that the video should be excluded because it was cumulative to Biggs' live testimony. Jaeger simply argued the video was more prejudicial than probative. Furthermore, during Biggs' direct examination at trial, when the State offered into evidence the videotaped statement Biggs made to the police at the hospital, Jaeger did not object to its admission. Instead, Jaeger stated that he had objections to certain parts of the video.

The trial judge ruled that the video of Biggs' statement could be admitted, but defense counsel could object to portions of the video if an issue arose. At one point during the playing of the video, defense counsel objected, arguing that what was being played at that point was repetitive or cumulative. The trial judge determined that Biggs was repeating herself on the video somewhat, stating, "[S]he's repeating herself, but I think under the circumstances it's taken into context, it's okay."

Based on our review of the record, it does not appear that Jaeger preserved a cumulative evidence objection for appeal. Even if he had done so, we do not find that the trial judge abused his discretion by allowing Biggs and Carroll to testify in person as well as admitting their videotaped statements into evidence. We also note that both Biggs and

Carroll were subject to comprehensive cross-examination by Jaeger's counsel at trial. Thus, we conclude that Jaeger's right to a fair trial was not substantially prejudiced by the admission of this evidence.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN LIMITING JAEGER'S CROSS-EXAMINATION OF BIGGS?

Jaeger next contends that the district court erred in limiting his cross-examination of Biggs. Specifically, he argues that the district court improperly denied him the opportunity to question Biggs regarding an alleged attempt to extort money from someone with whom she had engaged in a sexual relationship before she met Jaeger. In sustaining an objection asserted by the State, the trial judge determined that while Biggs' faithfulness to Jaeger might be relevant, the alleged extortion was not relevant or material to the issues presented at trial.

The standards for reviewing rulings on the admissibility of evidence are set forth in *State v. Riojas*, 288 Kan. 379, 382-83, 204 P.3d 578 (2009). The scope of cross-examination is subject to reasonable control by the trial judge, and the decision to limit cross-examination is reviewed for abuse of discretion. Judicial discretion is abused when no reasonable person would adopt the district court's view. *State v. Corbett*, 281 Kan. 294, 308, 130 P.3d 1179 (2006). Abuse of discretion can also occur if the district court's decision was based on an error of law or fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

On appeal, Jaeger asserts that "[i]n refusing to allow the questioning [regarding the alleged extortion] to continue, the trial court prevented [him] from fully inquiring into Ms. Biggs' 'honesty or veracity or their opposites.'" See K.S.A. 60-420; K.S.A. 60-422. Jaeger further asserts that evidence regarding Biggs' alleged extortion of her former boss showed that she "was willing to hide the truth for a price."

K.S.A. 60-422(d) states that "evidence of specific instances of [a witness'] conduct relevant only as tending to prove a trait of his or her character, shall be inadmissible." "A witness's character traits for honesty and veracity can only be shown by opinion testimony or evidence of reputation, and not by specific instances of the witness's conduct." *Hagedorn v. Stormont-Vail Regional Med. Center*, 238 Kan. 691, Syl. ¶ 5, 715 P.2d 2 (1986); see also *State v. Aldrich*, 232 Kan. 783, 783-84, 658 P.2d 1027, *cert. denied* 464 U.S. 819 (1983) (a witness' character traits for honesty and veracity could not be shown by evidence that the witness had once sworn to a false affidavit).

Here, Jaeger attempted to introduce a specific instance of conduct—the alleged extortion—in an attempt to prove a trait of character—that Biggs will "hide the truth for a price." The evidence, therefore, was inadmissible under K.S.A. 60-422(d), and we conclude that the trial judge did not abuse his discretion in controlling Jaeger's cross-examination of Biggs by prohibiting questions regarding the alleged extortion.

DID THE DISTRICT COURT ERR IN ADMITTING EVIDENCE OF JAEGER'S PRIOR BAD ACTS?

Jaeger contends the district court erred in allowing the State to admit evidence that he had previously choked Biggs from behind. He argues that admitting the evidence was contrary to K.S.A. 2009 Supp. 60-455, which makes evidence that a person committed a crime or civil wrong on a specified occasion inadmissible to prove the person's disposition to commit crimes or civil wrongs. He recognizes, however, that prior crimes or civil wrongs may be admissible if "relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." K.S.A. 2009 Supp. 60-455(b).

For prior crimes or civil wrongs evidence to be admissible under the statute, the evidence must be relevant—*i.e.* probative and material—to prove one of the 60-455(b)

facts, which must be a disputed material fact, and the probative value of the evidence must outweigh its prejudicial effect. See *State v. Reid*, 286 Kan. 494, 503, 186 P.3d 713 (2008). We review whether evidence is probative under an abuse of discretion standard, and we make a de novo review of whether evidence is material. See *State v. Berriozabal*, 291 Kan. 568, 586, 243 P.3d 352 (2010). Moreover, whether the probative value of the evidence outweighs its potential for producing undue prejudice is reviewed for abuse of discretion. See *State v. Wells*, 289 Kan. 1219, 1227, 221 P.3d 561 (2009).

Jaeger argues that evidence of prior incidents of choking was introduced without a proper *foundation* being laid. But a review of the record reveals that Biggs had personal knowledge of the prior instances of choking and that she was able to recall these instances. Thus, Jaeger's argument goes to the weight to be given to the evidence of prior incidents of choking and not to the foundation for the admission of such evidence.

Biggs testified that Jaeger choked her until she was unconscious and that she discovered she had been injured when she regained consciousness. Moreover, Jaeger did not object at trial when Biggs testified that he strangled her "quite often." Because Jaeger did not make a contemporaneous and specific objection to the admission of this evidence, this issue was not preserved for appeal. See K.S.A. 60-404; *McCaslin*, 291 Kan. at 707.

Jaeger does not argue that a limiting instruction should have been given. And it is unclear whether the trial judge admitted this evidence of prior incidents of choking under K.S.A. 2009 Supp. 60-455(b). Nevertheless, the failure to give a limiting instruction is clearly erroneous "only if the reviewing court is firmly convinced there is a real possibility that the jury would have rendered a different verdict if the error had not occurred." *State v. Shirley*, 277 Kan. 659, 666, 89 P.3d 649 (2004) (quoting *State v. Davis*, 275 Kan. 107, 115, 61 P.3d 701 [2003]); see K.S.A. 22-3414(3).

Here, the evidence against Jaeger was overwhelming, including the testimony of Biggs, Carroll, the witnesses who saw Biggs being forced into Jaeger's car before it sped away from the apartment complex, and the physicians who treated Biggs for her injuries. In addition, the law enforcement officers who testified at trial offered convincing testimony, including the fact that Jaeger's car was headed away from Lawrence Memorial Hospital at the time it was stopped and that they found a terrified young woman bleeding profusely sitting next to Jaeger in the back seat. Moreover, when questioned by police at the scene, Jaeger gave the bizarre explanation that he had blood on him because he bites his fingernails and that the three were going out for pizza.

Accordingly, we are not convinced there was a real possibility that a different verdict would have been reached even if the evidence of prior incidents of choking had not been introduced or if a limiting instruction had been given. Furthermore, we conclude that any error on the part of the trial judge was harmless in light of the other compelling evidence of Jaeger's guilt.

DID THE DISTRICT COURT ERR IN INSTRUCTING THE JURY?

Jaeger contends the district court erred in instructing the jury on aggravated kidnapping and kidnapping by including the word "confined" in the jury instructions. Because Jaeger asserted an objection during the jury instruction conference, we must determine "if [the instruction] properly and fairly states the law as applied to the facts of the case and could not have reasonably misled the jury." *State v. Appleby*, 289 Kan. 1017, 1059, 221 P.3d 525 (2009). In making this determination, we must consider the jury instructions as a whole and not isolate any one instruction. 289 Kan. at 1059.

The jury instructions stated that to establish the kidnapping charge, the jury had to find the State proved that Jaeger "took or confined" Biggs by force or fear. Jaeger contends there was no physical or forensic evidence to show that Biggs was confined in

the back seat of his car. He also contends that the evidence merely shows that Carroll may have confined Biggs by driving her away from her apartment.

Regarding the issue of confinement, the district court found: "And later she told [a police officer] she was afraid of Mr. Jaeger and that's why she didn't speak and why she didn't move, and that she was confined in the car. There's evidence to support that. Objection's overruled." We agree with the trial judge that there was sufficient evidence in the record from which a reasonable jury could conclude that Jaeger confined Biggs to the back seat of his car.

As indicated above, Hall testified that Biggs was "shoved into a vehicle," and it is undisputed that Jaeger got into the back seat with her. There is evidence in the record that although Biggs was bleeding and needed to go to the hospital, Jaeger's car was headed away from Lawrence Memorial Hospital when it was stopped by the police. Likewise, there is evidence in the record that after the police stopped the car, Biggs would not speak to the police and Jaeger answered questions for her. The record also includes evidence that Jaeger gave Biggs permission to get out of the car and that Biggs told the police she did not initially speak because she was scared of Jaeger. We conclude, therefore, that the inclusion of the word confined in the kidnapping instruction was supported by the evidence presented at trial.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING JAEGER'S MOTION FOR A NEW TRIAL BASED ON JUROR MISCONDUCT?

It is undisputed that one of the jurors committed misconduct by conducting an experiment or reenactment with his girlfriend. Specifically, the juror and his girlfriend attempted to determine whether a person could fall onto a bed rail and suffer the type of injury that Biggs suffered to her genitalia. Jaeger argues that the trial judge erred in denying his motion for a new trial based on this misconduct.

A district court may grant a defendant's motion for a new trial if it is required in the interest of justice. K.S.A. 22-3501. On appeal, we review a district court's decision on a motion for a new trial under an abuse of discretion standard. See *State v. Mathis*, 281 Kan. 99, 103-04, 130 P.3d 14 (2006). "A trial court abuses its discretion when it denies a motion for a new trial based on juror misconduct if the defendant can show that (1) an act of the jury constituted misconduct and (2) the misconduct substantially prejudiced the defendant's right to a fair trial.' [Citations omitted.]" 281 Kan. at 104.

Jaeger argues that he is entitled to a new trial because the juror's misconduct deprived him of a dissenting voice in jury deliberations. In his motion for a new trial, defense counsel stated that he spoke with the dismissed juror after the trial was over. According to defense counsel, the juror stated that he had formed the opinion that Jaeger was not guilty. But there is no affidavit or testimony in the record to support this contention.

Rather, we find from a review of the record that the trial judge very carefully and deliberately avoided bringing out any information regarding the dismissed juror's position regarding Jaeger's guilt or innocence. As a result, neither the attorneys nor the trial judge knew if the dismissed juror would have voted to acquit or convict Jaeger. And when the presiding juror was initially questioned, she indicated that the rest of the jury members had not yet made their decisions.

Clearly, the trial judge was placed in a difficult position upon receiving a note from one of the jurors regarding the experiment conducted by another juror. Under the circumstances, it was appropriate for the trial judge to dismiss the offending juror, and Jaeger did not object to that ruling. Likewise, it was also appropriate for the trial judge to speak with the remaining jurors—in the presence of Jaeger and his attorneys—to determine whether they had been tainted by the misconduct of the dismissed juror. After

doing so, the trial judge determined that they had not been contaminated by the dismissed juror.

As such, it was only after being satisfied that the remaining jurors could fairly decide the case--based solely on the evidence presented at trial—that the trial judge replaced the dismissed juror with an alternate who had heard the evidence presented during the course of the trial. Thereafter, the remaining jurors and the alternate engaged in extensive deliberations before returning a verdict. Thus, we conclude that the misconduct of the dismissed juror did not substantially prejudice Jaeger's right to a fair trial and that the district court did not abuse its discretion in denying the motion for a new trial under the circumstances presented.

DID CUMULATIVE ERROR DENY JAEGER A FAIR TRIAL?

Jaeger argues he is entitled to a new trial because of cumulative trial errors. If individual errors are not sufficient to support reversal on their own, the cumulative effect of multiple errors may be great enough to require reversal. The test is "whether the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. No prejudicial error may be found upon this cumulative effect rule, however, if the evidence is overwhelming against the defendant." [Citation omitted.]" *State v. Edwards*, 291 Kan. 532, 553, 243 P.3d 683 (2010).

Because Jaeger failed to show any trial errors, he cannot show cumulative error. See *State v. Cofield*, 288 Kan. 367, 378, 203 P.3d 1261 (2009). Moreover, based on our review of the totality of the circumstances, we do not find that Jaeger was substantially prejudiced by any of his allegations of error. Finally, we conclude that the evidence in the record overwhelmingly supports the jury's verdict.

Affirmed.