STATE OF NEBRASKA, APPELLEE, V. HOWARD L. McBRIDE, APPELLANT.

804 N.W.2d 813

Filed October 25, 2011. No. A-10-1200.

1. **Lesser-Included Offenses.** Nebraska uses the statutory elements approach for determining what constitutes lesser-included offenses.
2. ____. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time having committed the lesser.
3. **Lesser-Included Offenses: Jury Instructions: Evidence.** Once it is determined that an offense is a lesser-included one, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense.
4. ____: ____: ____. A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
5. ____: ____: ____. Where the prosecution offers uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-included offense instruction.
6. **Motions for Mistrial: Motions to Strike: Proof: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
7. **Criminal Law: Juries: Verdicts: Lesser-Included Offenses.** With respect to inconsistent jury verdicts in criminal matters, the most that can be said is that the verdict shows that either in the acquittal or in the conviction the jurors did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. The defendant may not upset such a verdict, even where the verdict acquits on a predicate offense while convicting on a compound offense.
8. **Criminal Law: Verdicts: Appeal and Error.** The fact that inconsistency may be the result of lenity, coupled with the State's inability to invoke review of the acquittal verdict, suggests that inconsistent verdicts should not be reviewable.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

DeAnn C. Stover for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Howard L. McBride appeals his conviction of second degree assault. On appeal, McBride challenges the failure of the district court for Lancaster County to give a lesser-included offense instruction, the effectiveness of his counsel for failing to request such an instruction, the district court's failure to declare a mistrial after a witness volunteered a statement about prior assaultive behavior, the sufficiency of the evidence to support the conviction, and the jury's inconsistent verdicts in convicting him of second degree assault but acquitting him of use of a weapon in the commission of a felony. We find no merit to any of these assertions, and we affirm.

II. BACKGROUND

The events giving rise to this case occurred on or about November 6, 2009. On that date, there was an altercation between McBride and Eric Beckwith, during which Beckwith received injuries. Beckwith was treated at a hospital for a 4-inch laceration on his face and stab wounds to his legs. Medical evidence was adduced at trial indicating that the injuries were caused by a knife or similar sharp instrument. McBride was charged with second degree assault and use of a weapon in the commission of a felony.

At trial, Beckwith testified that he had been involved in a relationship with McBride's ex-wife, Merrie Whitaker, for more than 6 years. He testified that on November 6, 2009, he was in the process of getting a vehicle started to go to work when McBride approached him and started an altercation. Beckwith testified that McBride cut his face. Beckwith testified that McBride then chased him with a knife. Beckwith described the knife as having a black handle and a silver blade approximately 4 or 5 inches in length.

Beckwith testified that he fled from McBride and then began looking for a weapon to use so that he could "go and get this dude, you know." As he was running, he encountered Whitaker and got into her car. She began to take Beckwith to the hospital, but McBride approached the car at a stop sign. Beckwith testified that McBride approached the car, opened the passenger door with a knife in his hand, and began stabbing at Beckwith, striking him in both legs.

Whitaker testified generally in accord with Beckwith's testimony. She testified that she encountered Beckwith covered in blood, that Beckwith indicated that McBride had cut him, that she attempted to take Beckwith to the hospital, and that they encountered McBride. She testified that McBride ran up to the car, opened the door, and began stabbing Beckwith in the leg. She testified that she observed a knife in McBride's hand.

During Whitaker's testimony, she was asked when, before this event, had been the last time she had seen McBride. She responded, "Oh, I saw him when he got out of jail for that assault last summer." In a sidebar, McBride's counsel moved for a mistrial. The court, after noting that Whitaker appeared to have volunteered the information and that the State had not attempted to elicit it, denied the motion for mistrial, struck Whitaker's answer, and instructed the jury to disregard it.

McBride did not testify and presented no evidence. During opening statements, McBride's counsel suggested to the jury that there was no dispute that an altercation had occurred, but asserted that Beckwith might have been the aggressor and that McBride might have acted in self-defense. During closing arguments, McBride's counsel again argued that McBride had acted in self-defense.

The district court's instructions to the jury included instructions about the necessary elements of both second degree assault, requiring bodily injury caused by a dangerous instrument, and use of a weapon in the commission of a felony. No instruction was requested or given on any lesser-included offense of second degree assault, and no objections were tendered to the proposed instructions.

The jury returned a verdict of guilty on the second degree assault charge, but not guilty on the use of a weapon charge. The district court sentenced McBride to 4 to 6 years' imprisonment. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, McBride has assigned errors challenging the district court's failure to give a lesser-included offense instruction and the effectiveness of his counsel for failing to request such an instruction, the district court's failure to declare a mistrial, the sufficiency of the evidence to support the conviction, and the jury's inconsistent verdicts in convicting him of second degree assault but acquitting him of use of a weapon in the commission of a felony.

IV. ANALYSIS

1. Lesser-Included Offense Instruction

McBride first asserts that the jury should have been instructed on third degree assault as a lesser-included offense to the charge of second degree assault. He asserts that the district court erred in not so instructing the jury and that his counsel was ineffective for failing to request such an instruction. We find that the evidence adduced at trial did not provide a rational basis for a lesser-included offense instruction to be given, and we find no merit to McBride's assertions.

[1-4] Nebraska uses the statutory elements approach for determining what constitutes lesser-included offenses. *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time having committed the lesser. *Id.* Once it is determined that an offense is a lesser-included one, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense. *Id.* Consequently, a court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater

offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *Id.*

Neb. Rev. Stat. § 28-309 (Supp. 2009) defines second degree assault and provides in pertinent part: "(1) A person commits the offense of assault in the second degree if he or she: (a) Intentionally or knowingly causes bodily injury to another person *with a dangerous instrument*." (Emphasis supplied.) Neb. Rev. Stat. § 28-310 (Reissue 2008) defines third degree assault and provides in pertinent part: "(1) A person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person[.]"

In the present case, witnesses called by the State testified that McBride used a knife to inflict injuries to Beckwith. Beckwith testified that McBride slashed his face and stabbed his legs with a knife, and he described the knife. Whitaker testified that she observed a knife in McBride's hand and that McBride stabbed Beckwith in the leg. The emergency room physician who treated Beckwith's injuries testified that they were caused by a knife or similar sharp instrument. The State also provided photographs of the injuries. McBride presented no evidence at trial to dispute that a knife was used to inflict the injuries to Beckwith. Indeed, although he presented no evidence, McBride's argument to the jury was that Beckwith might have been the aggressor and McBride's actions might have been justified as self-defense.

[5] Where the prosecution offers uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-included offense instruction. See *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). *State v. Al-Zubaidy* is remarkably similar to the present case on this issue. In *State v. Al-Zubaidy*, the defendant was charged with and convicted of second degree assault arising from an incident wherein two victims were allegedly stabbed with a knife. The prosecution presented witnesses

who testified that a knife was used to inflict the injuries, and the defendant offered no evidence to dispute that a knife was used. Nonetheless, the defendant asserted in a postconviction proceeding that a lesser-included offense instruction should have been given and that his appellate counsel had been ineffective for not raising the issue on direct appeal. The Nebraska Supreme Court held that the defendant was not entitled to a lesser-included offense instruction, because all of the evidence adduced at trial indicated that a dangerous instrument, a knife, had been used to inflict the injuries. The court also held that counsel's failure to raise the issue did not amount to ineffective assistance of counsel.

In the present case, the State offered uncontroverted evidence that a dangerous instrument, a knife, was used to inflict the injuries suffered by Beckwith. McBride was not entitled to a lesser-included offense instruction on third degree assault, and his counsel was not ineffective for failing to request such an unwarranted instruction.

2. Motion for Mistrial

McBride next asserts that the district court erred in denying his motion for mistrial based on a statement volunteered by a witness during her testimony. The district court struck the statement, admonished the jury to disregard it, and denied the motion for mistrial. We find no abuse of discretion.

[6] The decision whether to grant a motion for mistrial is within the trial court's discretion and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. *Id.* The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. *Id.*

In the present case, the State asked Whitaker when, before the date of the events in this case, she had last seen McBride. In response, she indicated that she had last seen McBride "when he got out of jail for that assault last summer." At a

sidebar, during which McBride's counsel moved for a mistrial, the court noted that the statement appeared to have been volunteered and not intentionally elicited by the State. McBride's counsel acknowledged, "I know." After the sidebar, the court ordered the answer stricken and admonished the jury to disregard it. The court denied the motion for mistrial. On the record presented, McBride has not demonstrated that this statement actually prejudiced him—rather than creating only the possibility of prejudice. We find no abuse of discretion and no merit to this assignment of error.

3. Sufficiency of Evidence

McBride next asserts that the evidence adduced at trial was insufficient to sustain his conviction for second degree assault. This assignment of error is meritless.

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *Id.*

As noted above, a conviction for second degree assault can be sustained if the defendant intentionally or knowingly caused bodily injury to another person with a dangerous instrument. See § 28-309. Also as noted above, the State presented evidence, in this case about the injuries sustained by Beckwith, that McBride inflicted the injuries and that he did so with a knife. A rational trier of fact hearing the evidence presented by the State could have found that McBride attacked Beckwith with a knife and slashed his face and that McBride moments later again attacked Beckwith with a knife and stabbed his legs. The State adduced evidence that Beckwith required treatment at a hospital, including stitches and plastic surgery. McBride's assertion that this evidence was insufficient is meritless.

4. Inconsistent Verdicts

Finally, McBride challenges the inconsistent verdicts rendered by the jury in this case. The jury returned a verdict of guilty on the charge of second degree assault, which includes as an essential element the use of a dangerous instrument, but returned a verdict of not guilty on the charge of use of a deadly weapon in the commission of a felony. McBride asserts that the jury's not guilty verdict on the use charge demonstrates that the guilty verdict on the assault charge cannot be sustained. He also argues that the not guilty verdict on the use charge supports his argument, rejected above, that a lesser-included offense instruction was warranted. We disagree with these assertions.

McBride has cited us to no authority in Nebraska where either the Nebraska Supreme Court or this court has found an inconsistency between two verdicts in a criminal case, and we have found none. In the great majority of cases where an issue has been raised concerning allegedly inconsistent verdicts, the appellate court has concluded that the verdicts were actually not inconsistent and has explained why. Although a few decisions have included language which could be read to suggest that such a determination of inconsistency is possible, see, e.g., *State v. Tucker*, 278 Neb. 935, 774 N.W.2d 753 (2009), we have found no Nebraska opinion in which a judgment was reversed or a new trial ordered as a result of inconsistent verdicts. In one instance, the Nebraska Supreme Court could have found no inconsistency between the verdicts reached by a jury, but instead concluded that the evidence presented justified conviction under both counts of the information, that both offenses charged were clearly committed by the same person and at the same time, that it was unexplainable how the jury arrived at a verdict convicting on one count and acquitting on the other, that nonetheless the verdict was not void, and that the defendant could not base an assertion of reversible error on the acquittal of one offense because the jury's "error was in his favor." See *Weinecke v. State*, 34 Neb. 14, 24, 51 N.W. 307, 310 (1892).

[7,8] In *United States v. Powell*, 469 U.S. 57, 64-65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984), quoting *Dunn v. United*

States, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356 (1932), the U.S. Supreme Court noted that, with respect to inconsistent jury verdicts in criminal matters, "'[t]he most that can be said . . . is that the verdict shows that either in the acquittal or [in] the conviction the jur[ors] did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" The defendant may not upset such a verdict, even where the verdict acquits on a predicate offense while convicting on a compound offense. See *United States v. Powell, supra*. The fact that inconsistency may be the result of lenity, coupled with the State's inability to invoke review of the acquittal verdict, suggests that inconsistent verdicts should not be reviewable. *Id.*

The Michigan Court of Appeals has recognized that juries may reach inconsistent verdicts as a result of mistake, compromise, or leniency. *People v Goss*, 446 Mich. 587, 521 N.W.2d 312 (1994). Juries are not held to rules of logic, nor are they required to explain their decisions. *People v Vaughn*, 409 Mich. 463, 295 N.W.2d 354 (1980). The ability to convict or acquit another individual is a grave responsibility and an awesome power, and an element of this power is the jury's capacity for leniency. *Id.* Thus, whenever a defendant is charged with different crimes that have identical elements, the jury must make an independent evaluation of each element of each charge and may reach different conclusions concerning an identical element of two different offenses. *People v Goss, supra*.

The evidence in this case was overwhelming and uncontradicted, demonstrating that McBride used a knife to inflict injuries upon Beckwith. It is apparent from reviewing the record made at trial that McBride's defense strategy, as indicated by his counsel during opening statements and argued during closing arguments, was that the jury should have considered his actions to be justified self-defense, not that there was no weapon used. Indeed, the jury was instructed on self-defense as a defense to the charges brought against McBride. That the jury inexplicably returned a not guilty verdict on the charge that McBride used a weapon in committing the felony the jury convicted him for, second degree assault, does not support a

finding either that there was insufficient evidence to support the assault conviction or that an otherwise unjustified lesser-included offense instruction should have been given. We find no merit to McBride's assertions to the contrary.

V. CONCLUSION

We find no merit to McBride's assertions. The State adduced overwhelming and uncontroverted evidence that McBride assaulted Beckwith with a knife and inflicted bodily injuries. No lesser-included offense instruction was justified, counsel was not ineffective for failing to request an instruction, and the inconsistent jury verdicts do not demonstrate otherwise. The district court committed no abuse of discretion in denying McBride's motion for mistrial based on a statement volunteered by a witness, stricken from the record, and the subject of an admonishment to the jury. We affirm.

AFFIRMED.