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**STATE OF MINNESOTA
IN COURT OF APPEALS
A05-2290**

State of Minnesota,
Respondent,

vs.

Derrick Lee Kohene,
Appellant.

**Filed January 15, 2008
Affirmed
Lansing, Judge**

Ramsey County District Court
File No. K3-05-920

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Derrick Lee Kohene, #214800, 970 Pickett Street North, Bayport, MN 55003-1490 (pro se appellant)

Considered and decided by Lansing, Presiding Judge; Minge, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LANSING, Judge

Derrick Kohene was convicted of second-degree intentional murder. On appeal, he challenges an in-court identification, the district court's decision to permit impeachment by prior conviction, a homicide investigator's testimony that Kohene was lying during an interview, and the sufficiency of the evidence. In addition, he argues that he was denied his right to effective assistance of counsel and that the prosecutor engaged in misconduct. Because we conclude that no reversible error occurred in the trial process, we affirm.

F A C T S

Jennadya Davis was shot five times on March 7, 2005, on the porch of his grandmother's home in east St. Paul. The shooting occurred shortly after a drug transaction in which Davis sold fake crack cocaine. Davis was taken to the hospital and died a few hours later.

Near the location of Davis's body, investigators discovered a cell phone linked to Derrick Kohene. The next day, Kohene was arrested at his mother's home. A homicide investigator interrogated Kohene for five hours. During the interview, Kohene told the investigator that he was at a friend's house at the time of the shooting. He also said that he might have lost his cell phone. A gunshot-residue test indicated that Kohene might have discharged a firearm, handled a discharged firearm, or been in close proximity to a discharged firearm.

A police officer interviewed Davis's brother, Dominick Davis, about what he saw on the night of the murder. Davis's brother had been standing on the porch moments before Davis was shot and saw a man speaking with Davis. Based on a photographic lineup, Davis's brother identified Kohene as the man who had been standing on the porch.

Kohene was charged with second-degree intentional murder for shooting Davis. At trial, a witness—Edward Dupree—described Kohene's actions on the day of the shooting. Dupree testified that he, Kohene, and another man pooled money to purchase crack cocaine from Davis. Kohene had met Davis while they were both incarcerated and knew that he had drugs for sale. After dividing the crack cocaine, Kohene went to downtown St. Paul. Kohene later called Dupree and told him that the crack cocaine was fake. Kohene returned to Dupree's house, made a phone call, and then left on foot. Dupree heard gunshots and Kohene returned to Dupree's house five to ten minutes later. Dupree later saw Kohene with a gun and heard Kohene say he had shot Davis.

The state introduced other evidence indicating that Kohene was the shooter. A witness testified that he saw Kohene with a gun on the day of the shooting. The state introduced the description of the shooter provided by Davis's brother and evidence of his identification of Kohene in the photographic line-up. The state also introduced the gunshot-residue test results and phone records and testimony indicating that Kohene used a cell phone registered under his sister's name to call Davis several times on the day of the shooting.

Kohene testified in his own defense. He claimed that Dupree had borrowed his cell phone and that it was Dupree who shot Davis.

The jury found Kohene guilty of second-degree intentional murder. Following conviction the district court sentenced Kohene to 406 months in prison. He now appeals his conviction.

DECISION

I

As a matter of due process, identification evidence must be excluded if the procedure used “was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). After viewing a photographic lineup, Davis’s brother identified Kohene as the man he saw talking to Davis just before the shooting. Although Kohene challenged this evidence, the district court ruled that the state could introduce the out-of-court identification. Davis’s brother subsequently received a photograph of Kohene that the police had given his mother. Because Davis’s brother had been in possession of the photograph, the district court concluded that his in-court identification of Kohene could be affected by the intervening suggestive circumstances. Accordingly, the district court ruled that Davis’s brother could not make an in-court identification of Kohene.

The trial transcript suggests that, during his testimony, Davis’s brother made two gestures indicating that Kohene was the man he saw with his brother before the shooting. For example, the transcript relates one of Davis’s brother’s responses as follows: “my

brother and him (indicating) was sittin' out on the porch.” On appeal, Kohene argues that these “indicating” actions violated the district court’s exclusion of the in-court identification and denied him his due-process protections against misidentification.

Kohene, however, did not object to any gesture made by Davis’s brother. In general, the failure to object to the admission of evidence constitutes a waiver of the issue on appeal. *State v. Quick*, 659 N.W.2d 701, 717 (Minn. 2003). In the absence of an objection, we may review only (1) error, (2) that is plain, and (3) affects the defendant’s substantial rights. *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007). An error is plain only if it is clear or obvious under current law. *State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). An error affects the defendant’s substantial rights only if the error was prejudicial and affected the outcome of the case. *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). If the three prongs of the plain-error standard are met, we will reverse if necessary to “ensure fairness and the integrity of the judicial proceedings.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

The record does not support Kohene’s claim that the actions by Davis’s brother constituted plain error. This was not a formal in-court identification. The prosecutor did not ask Davis’s brother if the man he saw on the night of the murder was in the courtroom. *See State v. Guptill*, 481 A.2d 772, 774-75 (Me. 1984) (describing formal in-court identifications). Instead, the transcript indicates that Davis’s brother simply gestured toward Kohene. Even if this gesture amounted to error, the error was not plain. The record provides scant indication of the type or obviousness of the gesture. It is not

demonstrated that the jury would have observed the gesture or attached significance to it. The record is too undeveloped for this court to conclude that an error occurred or that the error was clear or obvious. Therefore, we cannot conclude that any plain error occurred.

Furthermore, even if plain error could be established, Kohene would be unable to show that it was prejudicial. The out-of-court identification by Davis's brother *was* admitted into evidence and Kohene does not challenge this decision. Under the circumstances, excluding the in-court identification would have provided little benefit to Kohene. Even if the gesture could be construed as an impermissible in-court identification, we discern no basis for concluding that it added any emphasis to the identification testimony already in the record. Thus, we would be unable to conclude that the alleged error affected the outcome of the case. We therefore conclude that Kohene is not entitled to a new trial based on any gesture made by Davis's brother in the course of his testimony.

II

A witness can be impeached by prior conviction even if the crime did not involve dishonesty. Minn. R. Evid. 609(a). If the conviction was not for a crime involving dishonesty or false statement, the probative value of admitting the evidence must outweigh its prejudicial effect. *Id.* In determining whether the probative value outweighs the prejudicial effect, the district court must consider:

(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Ihnot, 575 N.W.2d 581, 586 (Minn. 1998) (quotation omitted). We review a district court's decision to permit impeachment by prior conviction under an abuse-of-discretion standard. *See id.* (applying abuse-of-discretion standard when reviewing district court's decision to allow use of conviction for impeachment under Minn. R. Evid. 609(a)).

The district court ruled that Kohene could be impeached with two convictions for third-degree controlled substance crime involving the sale of cocaine. Although these convictions did not involve dishonesty or false statement, the district court concluded that the probative value of the evidence outweighed its prejudicial effect. The court reasoned:

While they are different than the crime charged in this case, I think they provide for the jury, if the Defendant testifies, a view of the whole person and the whole situation. I balance the importance of the Defendant's testimony with the credibility issues and the other factors and find that it's not significantly detrimental or a deterrent.

I think the credibility issue is central in this case. And having looked at . . . those factors, the rule of evidence and balancing all of those, I think the probative value [outweighs] any prejudicial effect.

At least three of the relevant factors support the district court's conclusion that the probative value of the evidence outweighs its prejudicial effect. First, Kohene's convictions had impeachment value because the jury could legitimately infer that a person who has sold drugs in the past is more likely to lie or misrepresent facts when testifying. *See State v. Pendleton*, 725 N.W.2d 717, 728 (Minn. 2007) (noting that allowing use of prior crimes for impeachment assists the jury by permitting it to see defendant's whole person). Some appellate opinions have suggested that drug *possession* has little impeachment value. *See, e.g., State v. Owens*, 373 N.W.2d 313, 316-17 (Minn.

1985) (concluding that admission of cocaine possession charge was proper but noting that it may have little impeachment value). But in this case, Kohene’s convictions involved the *sale* of cocaine—an act involving intentional behavior, a greater degree of culpability, and thus greater impeachment value. Second, the convictions were relatively recent. Both convictions were from 2002 and were therefore probative of Kohene’s truthfulness at trial. Third, credibility was central to the case. Kohene alleged that one of the witnesses against him committed the crime, and the state’s case heavily relied on the credibility of witnesses who saw Kohene before and after the crime.

We recognize that two other factors may weigh against admitting the convictions. Kohene’s testimony was important because he had no apparent way of introducing his theory of the case without testifying. Kohene’s story that Dupree was the killer could not be easily introduced through cross-examination or closing argument. *Cf. State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (noting that need for testimony was reduced when defendant’s version could be presented through other witnesses). Second, Kohene’s convictions were arguably similar to the crime Kohene was accused of committing. Although the elements of murder and the sale of cocaine are distinct, the murder—as committed—involved significant factual similarities to his previous convictions. *See State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (comparing “alleged offense and the crime underlying a past conviction”). Because both the current charge and Kohene’s previous convictions involved drugs, introducing the convictions created some risk that the jury would use the convictions as evidence that Kohene was the shooter.

Nonetheless, we cannot conclude that the district court abused its discretion when it admitted Kohene's convictions for impeachment purposes. The need to assess Kohene's credibility was great and the danger of misuse—although present in this case—was relatively low. In similar situations, Minnesota courts have permitted impeachment evidence to be introduced. *See Gassler*, 505 N.W.2d at 67 (upholding admission of prior attempted-murder conviction in murder trial when defendant's credibility was main issue despite similarity of prior conviction with charged crime). Thus, Kohene is not entitled to a new trial based on the district court's decision to admit his prior convictions for impeachment purposes.

III

We next consider Kohene's challenge to the testimony of the homicide investigator. A non-expert witness can offer opinion testimony if it is (1) "rationally based" on the witness's perceptions and (2) helpful to the jury. Minn. R. Evid. 701. Evidence must be excluded if the probative value of the evidence is substantially outweighed by the potential for unfair prejudice. Minn. R. Evid. 403. We review the district court's evidentiary rulings for an abuse of discretion. *Francis v. State*, 729 N.W.2d 584, 591 (Minn. 2007). When the defendant fails to object to the introduction of evidence, we may review only (1) error, (2) that is plain, and (3) affects the defendant's substantial rights. *Martinez*, 725 N.W.2d at 738.

The homicide investigator testified about his five-hour interview with Kohene. In the course of describing the interview, the investigator made several references to his belief that Kohene was not truthful during the interview. In his testimony the investigator

described his state of mind during the interview: “I’m thinking maybe I should start talking about some of the lies that [Kohene] was telling me and kind of digging into those a little bit.” At other points during his testimony, the officer expressed his opinion that Kohene was lying. For example, he stated that “I knew he was lying” and that Kohene “still wouldn’t be honest with me about it.”

Kohene argues that the homicide investigator’s testimony was an improper and prejudicial comment on his credibility. Because Kohene failed to object to this evidence, we will reverse only if it constitutes plain error. *Id.*

For four reasons we conclude that the homicide investigator’s testimony did not result in plain error. First, the investigator’s opinion testimony was helpful to the jury. By giving his opinion that Kohene was lying, the investigator explained why the interview continued for five hours and explained the investigator’s conduct during the interview. Second, the investigator’s opinion was presumably based on his observations about Kohene’s demeanor, the consistency of Kohene’s story, and other perceptions. Thus, the testimony was arguably proper opinion testimony under rule 701.

Third, it is not clear or obvious that the probative value of the testimony was substantially outweighed by the potential for unfair prejudice. Minnesota cases hold that “the credibility of a witness is for the jury to decide.” *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). On proper objection, the Minnesota Supreme Court has held that it is error to permit testimony that a witness was lying during an interview. *State v. Ellert*, 301 N.W.2d 320, 323 (Minn. 1981) (concluding that error was harmless); *see also Koskela*, 536 N.W.2d at 630 (concluding that it was harmless error to permit testimony

that police officer believed that confession was truthful). But it is not clear or obvious that every reference to the truthfulness of a witness during an interview will be unduly prejudicial. In this case, the investigator's need to summarize the interview and explain its length provided a legitimate reason for commenting on Kohene's statements.

Finally, the error did not affect Kohene's substantial rights. Much of the state's case was directed at proving that Kohene was lying during the interview and on the witness stand. A handful of incidental comments made by the investigator during the course of describing the interview did not affect the outcome of the case. Accordingly, Kohene is not entitled to a new trial based on the homicide investigator's testimony.

IV

In considering a claim of insufficient evidence, our review is generally "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Fields*, 679 N.W.2d 341, 348 (Minn. 2004) (quotation omitted). We assume the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). And we defer to the jury's credibility determinations. *See Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995) (stating that "judging the credibility of witnesses is the exclusive function of the jury").

A conviction based only on circumstantial evidence, however, is subject to a stricter standard and "warrants particular scrutiny." *State v. Bolstad*, 686 N.W.2d 531, 539 (Minn. 2004). When a conviction is based only on circumstantial evidence, the

evidence “must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004) (quotation omitted).

Kohene argues that the evidence was insufficient to establish that he was the person who shot the victim. He contends that the conviction was based only on circumstantial evidence and that the evidence is consistent with his theory that Dupree was the shooter.

We conclude, however, that the evidence is not purely circumstantial. Circumstantial evidence, unlike direct evidence, requires the fact-finder to draw inferences to find a particular fact. *See State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007) (defining direct and circumstantial evidence). The state introduced evidence that Kohene was seen on the porch with the victim immediately before the shooting and that Kohene said that he shot the victim. From these facts, the jury could conclude that Kohene was, in fact, the shooter. The inferences required are so slight that the evidence against Kohene is best characterized as direct evidence. Because the jury could have reasonably concluded beyond a reasonable doubt that Kohene was the shooter, we conclude that the evidence was sufficient to support his conviction.

Even if we accepted Kohene’s circumstantial-evidence characterization, the evidence was nonetheless consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis. First, the evidence showed that Kohene was on the porch with Davis shortly before the shooting. Davis’s brother identified Kohene as the man who was standing on the porch. Second, the evidence showed that

Kohene learned that Davis had sold him fake crack cocaine and that Kohene had been in communication with Davis during that day. Phone records indicated that Kohene telephoned Davis several times during the day of the shooting and that one of the calls was made shortly before police were summoned to the house where Davis was shot. Third, the evidence showed that Kohene had a gun on the day that Davis was shot. Witnesses saw Kohene with a gun on the day of the shooting. Fourth, the gunshot-residue tests suggested that Kohene had been in close proximity to a discharged firearm and may have fired a gun. Fifth, a witness testified that Kohene said that he shot the victim. Even if this evidence was only circumstantial, we find no basis for concluding that the evidence was insufficient to show that Kohene was the shooter.

Kohene's challenges to the evidence are not persuasive. First, he presents an alternative theory under which Dupree was the shooter. This theory is supported only by Kohene's testimony. Second, he challenges the reliability of the circumstantial evidence itself. Both of these arguments, however, are based on challenges to credibility determinations made by the jury. *See Dale*, 535 N.W.2d at 623 (providing that only factfinder may make credibility determinations). Although the circumstantial facts must be inconsistent with any rational hypothesis other than guilt, nothing in Minnesota caselaw permits appellate courts to reweigh the evidence and to second guess the jury's credibility determinations. In reaching its guilty verdict, the jury rejected Kohene's testimony and accepted the state's proof of the circumstantial facts that established that Kohene was the shooter. Accordingly, the evidence was sufficient to permit the jury to find Kohene guilty and to support Kohene's conviction of second-degree murder.

V

Kohene's pro se brief raises a claim of ineffective assistance of counsel. As a result of this claim, Kohene's initial appeal was stayed to give him an opportunity to file a petition for postconviction relief. After Kohene filed a petition for postconviction relief, the district court held an evidentiary hearing and then denied the petition. We provided Kohene an opportunity to supplement the record and to submit additional briefing based on the petition for postconviction relief. Because the record does not include a postconviction-relief argument, we review only the issues raised on direct appeal.

Kohene's direct appeal raises numerous ineffective-assistance-of-counsel arguments. He contends that he was denied effective assistance of counsel because his lawyer failed to object to the in-court identification, failed to interview witnesses before trial, had Kohene discuss his criminal history while testifying, failed to conduct an independent investigation of the crime scene, allowed the state "to present a false version of the events," failed to object to the homicide investigator's testimony that he believed Kohene was lying during an interview, and failed to obtain full and complete discovery of the prosecution's evidence.

A defendant has been denied effective assistance of counsel if the lawyer's representation fell below an objective standard of reasonableness and a reasonable probability exists that the outcome would have been different but for the lawyer's errors. *Zenanko v. State*, 688 N.W.2d 861, 865 (Minn. 2004). "[A]n attorney acts within the objective standard of reasonableness when he provides his client with the representation

of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances.” *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (quotation omitted). Issues of trial strategy will not be reviewed for competence. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

On this record we conclude that Kohene has failed to establish that he was denied effective assistance of counsel. Even if Kohene had provided a factual basis for his claims against his lawyer, the record provides no basis for determining that this conduct fell below an objective standard of reasonableness. Decisions about calling witnesses and conducting investigations involve questions of trial strategy. We will not review these decisions for competence. *Id.* Accordingly, we reject Kohene’s ineffective-assistance-of-counsel claim.

VI

Finally, we address Kohene’s claim of prosecutorial misconduct. The overarching concern on issues of prosecutorial misconduct is that it may deny the defendant’s right to a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). “[W]e reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant’s right to a fair trial.” *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). If the defendant objected to the prosecutorial misconduct, a new trial will not be granted when the misconduct was harmless beyond a reasonable doubt. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). Prosecutorial misconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error. *Id.* If the defendant failed

to object to the prosecutorial misconduct, a new trial will be granted if the misconduct was plain error. *Id.*

Kohene argues that the prosecutor committed misconduct by showing autopsy photographs to the jury and by failing to present evidence in his favor. Because Kohene did not object to this conduct, he must establish that the prosecutor's actions constituted plain error. Our review of the record fails to disclose any sort of error at all.

A prosecutor may not inflame the passions of the jury. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). Kohene claims that the prosecutor inflamed the passions of the jury by showing the jury autopsy photographs during closing arguments. The transcript, however, does not support Kohene's claim that the prosecutor displayed the photographs during closing arguments. In any case, merely showing photographs—including autopsy photographs—does not per se inflame the passions of the jury. *See State v. Morton*, 701 N.W.2d 225, 236-37 (Minn. 2005) (concluding that introduction of after-death photographs did not inflame passions of jury). Kohene has not argued that the photographs were inadmissible or provided any additional basis for concluding that the photographs inflamed the passions of the jury. Therefore, we have no reason to conclude that the prosecutor committed misconduct.

Kohene's argument that the prosecutor failed to present evidence in his favor similarly fails. Kohene argues that the prosecutor failed to introduce gunshot-residue test results favoring the defense. Kohene does not specify what test results were not introduced. At best, the record contains alternative explanations of the test results that might be less favorable to the state. In any case, Kohene has not pointed to any evidence

of misconduct. A prosecutor must disclose exculpatory or impeaching evidence to the defendant. *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000) (citing *Brady v. Maryland*, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 1197 (1963)). But the prosecutor is under no obligation to introduce or emphasize potentially exculpatory information at trial. Kohene has provided no basis for concluding that the prosecutor withheld exculpatory information. Therefore, we can find no basis for concluding that the prosecutor engaged in misconduct.

Affirmed.