STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1831

State of Minnesota,
Respondent,

vs.

Brian A. Blue,
Appellant.

Filed January 29, 2008
Affirmed
Stoneburner, Judge

Ramsey County District Court
File No. K506864

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

John M. Stuart, State Public Defender, Rochelle R. Winn, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant challenges his conviction of third-degree assault, arguing that (1) the district court committed plain error by admitting his interview with police that contained

inadmissible character evidence and by allowing the prosecutor to cross-examine him about other assaults and (2) he was denied effective assistance of counsel. We affirm.

FACTS

Appellant Brian A. Blue punched his long-time acquaintance Michael Orr, fracturing Orr's face. The incident occurred at the home of Sheryl Lang, but Lang was not present at the time of the incident. Todd Rogney was at Lang's home but did not see Blue hit Orr. Rogney heard a "crack," and then saw Orr fall to the floor, put his hand to his face and swear. After Blue punched him, Orr left in his truck. Rogney also left immediately, found Lang, and the two of them then returned to the house.

Orr claimed Blue sucker-punched him. Blue claimed that he punched Orr in self defense after Orr pulled a knife on Blue when Blue told Orr to leave because Lang did not want him around. Rogney testified that Blue told Lang and him that Blue hit Orr because Orr had made statements about Blue behind his back. Rogney also testified that Blue did not tell them that Orr had threatened him with a knife.

Orr reported the assault to the St. Paul Police three days later. Blue initially denied knowing anything about an assault. Lang and Rogney also initially denied knowing anything about an assault, but when St. Paul Police Sergeant Lemon advised Rogney that he was also under investigation for aiding and abetting Blue, Rogney admitted being present. Lang then told Lemon that when she spoke with Rogney after he left the house the night of the incident, Rogney said that Blue had just hit Orr with a very loud sucker-punch.

Lemon then interviewed Blue and confronted him with Rogney's and Lang's statements. During the interview, Blue consistently asserted self defense. Blue later wrote to Lang, asking her to tell the police that he had acted in self defense. Lang testified that she could not truthfully say Blue acted in self defense. Rogney also testified that Blue had asked him to say that he saw Orr pull a knife, but Rogney never actually saw Orr with a knife.

Respondent State of Minnesota charged Blue with third-degree assault and aggravated robbery, based on a theory that Blue, Lang, and Rogney lured Orr to Lang's home to rob him, and Blue then took Orr's knife. Prior to trial, the parties agreed that Blue could be impeached with four prior felony convictions and that Blue's unredacted recorded interview with Lemon would be admitted at trial. The interview contains Lemon's assertions that Rogney and Lang were afraid of Blue, Lemon's criticism of Blue's lifestyle, Lemon's statements that Blue was lying, and Lemon's remarks about Blue's propensity for violence. At trial, the prosecutor asked Blue if he had ever knocked someone down with a punch before. Blue responded that he had done so when he boxed in the eighth grade. Blue said he knew that a punch to a certain area of the face would be likely to knock a person out. Blue's attorney did not object to this line of questioning.

The jury convicted Blue of third-degree assault but acquitted him of the robbery charge. Blue was sentenced and this appeal followed.

D E C I S I O N

I. Admission of Blue's interview

Blue first argues that admission of the unredacted taped interview constituted plain error that denied him the right to a fair trial because the interview contained inadmissible character evidence and references to other bad acts. Unobjected-to evidence is reviewed under the plain error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citations omitted). "If those three prongs are met, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation and citation omitted).

Blue acknowledges that his attorney agreed to admission of the unredacted statement, but relies on case law stating that "assuming a proper objection, immaterial and irrelevant portions of an extrajudicial interrogation of a defendant should generally not be received in evidence." *State v. Hjerstrom*, 287 N.W.2d 625, 627 (Minn. 1979). On proper objection, it is likely that the district court would have held that portions of the interview referring to Blue's lifestyle and reputation were inadmissible. *See Rairdon v. State*, 557 N.W.2d 318, 324 (Minn. 1996) (holding that a reference to defendant as a "violent man" was inadmissible character evidence). But, in this case, the statement was not just admitted without objection; Blue's counsel stipulated to its admission. It is difficult to imagine how a district court can commit plain error by admitting evidence stipulated to by defense counsel. Blue's counsel may have had sound strategic reasons to

agree to admission of the entire statement, which demonstrated that, despite Lemon's aggressive interview style, Blue consistently asserted that he acted in self defense. Defense counsel cross-examined Lemon and contrasted the confrontational interview techniques Lemon used with Blue with the interview style he used with Lang and Rogney, implying that Lemon was trying to antagonize Blue.

Under the circumstances of this case, the language from *State v. Tovar*, 605 N.W.2d 717, 725 (Minn. 2000), is instructive. There the supreme court stated: "Trial counsel cannot have it both ways: failing to raise a specific objection at trial for its own reasons of trial strategy, then claiming the admission of such evidence as error on appeal." *Tovar*, 605 N.W.2d at 725. Because Blue's counsel, consistent with sound trial strategy, stipulated to the admission of the unredacted interview, Blue has failed to demonstrate that admission of the statement was error, let alone plain error. Furthermore, the district court's sua sponte redaction of Lemon's interview of Blue could have resulted in a claim that the district court prevented Blue from presenting a full defense.

Moreover, we have previously declined to find plain error when references to prior bad acts are brief, lacking in detail, contain only an imprecise suggestion of prior bad acts, and are not referred to again. *State v. Burdeau*, 641 N.W.2d 919, 926 (Minn. 2002). In this case, Lemon's references in the interview to Blue's prior bad acts were brief, were not detailed, and the prosecutor did not mention the statements about prior bad acts contained in the interview.

Blue also challenges Lemon's reference to Rogney's and Lang's fear of Blue. Statements about a witness's fear of retaliation from a defendant for testifying against

him are relevant to witness credibility or to explain inconsistencies in a witness's statements. *State v. McArthur*, 730 N.W.2d 44, 52 (Minn. 2007). Lemon referred to the witnesses' fear of Blue three times in the 45-page interview. Even if, on proper objection, these references should have been redacted, we decline to find plain error where defense counsel stipulated to their admission.

Ultimately, even if admission of the unredacted statement could be considered plain error, Blue has not shown that admission of the statement seriously affected the integrity of his trial. The prosecutor's closing argument did not refer to Lemon's comments about Blue's character, lifestyle, reputation, or prior bad acts. The state's case was focused on how Blue's version of events was undercut by the testimony of the other witnesses. Furthermore, the jury acquitted Blue of the charge of aggravated robbery, demonstrating that the jury was not swayed in determining Blue's guilt or innocence by references to his character or prior bad acts contained in the statement.

II. Prosecutor's questions about prior bad acts

On cross-examination, the prosecutor asked Blue if he had ever punched someone before. Blue said yes, explaining that he used to box and had been in arguments and that he knows that there is a place on the face where a hit is likely to knock a person out. The state argues that the purpose of the questioning was to explain to the jury how Blue, who is substantially smaller than Orr, could have knocked Orr down with one punch.

"[A]ppellate courts [] use the plain error doctrine when examining unobjected-to prosecutorial misconduct." *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Although he did not object to the prosecutor's questioning at trial, Blue now asserts that

admission of this testimony was plain error because it was inadmissible evidence of prior bad acts.

"The state may prove all relevant facts and circumstances which tend to establish any of the elements of the offense with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes." *State v. Drews*, 274 Minn. 426, 430, 144 N.W.2d 251, 254-55 (1966). But the state cannot use evidence of prior misconduct to establish a defendant's propensity for assaults. *State v. Langley*, 354 N.W.2d 389, 396 (Minn. 1984).

Blue did not dispute that his punch knocked Orr down. Therefore, it was not essential to the state's case to establish that Blue knew he could hit Orr in a manner likely to cause him to lose consciousness, and the prosecutor's brief line of questioning to elicit prior bad acts constituted plain error. But we conclude that Blue has failed to establish prejudice as a result of this error. Blue did not dispute that he hit Orr and knocked him down, and Blue's knowledge obtained in the context of boxing or even prior arguments did not imply that he had a propensity to commit assault. The prosecutor did not refer to this testimony again in questioning or in closing argument. *See State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995) (noting that prosecutor's decision not to rely on improperly admitted other-crime evidence in closing argument partly supported a conclusion that any error was harmless); *see also State v. VanWagner*, 504 N.W.2d 746, 749 (Minn. 1993) (requiring examination of the error's impact within the context of the entire record).

III. Ineffective assistance of counsel

Blue argues that he was denied effective assistance of counsel because his attorney failed to object to admission of the unredacted statement to Lemon, failed to object to the prosecutor's "one-punch" questions, and failed to object to Lemon's testimony about his opinion of the truthfulness of witnesses. "Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) (citations omitted) (stating that postconviction evidentiary hearings provide "additional facts to explain the attorney's decisions," enabling this court to properly consider whether an attorney's performance was deficient). But if further development of the record is not required to assess the claim, this court may review the claim on direct appeal. *State v. Thomas*, 590 N.W.2d 755, 759 (Minn. 1999). We conclude that further development of the record in this case is unnecessary.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance "fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's error." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quotation omitted). This court considers the totality of the evidence in assessing whether the outcome would have been different. *Id.* We need not address both prongs if the defendant fails to demonstrate one of them. *Id.*

Courts presume "that a counsel's performance falls within the wide range of 'reasonable professional assistance.'" *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998)

(quoting *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986)). And appellate courts do not review matters of trial strategy for competency. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). As noted above, counsel's failure to object to the admission of Blue's unredacted statement goes to trial strategy, and therefore cannot support an argument of ineffective assistance of counsel.

Regarding Lemon's testimony about his opinion as to Lang's, Rogney's, and Blue's truthfulness, it is a well-accepted rule that a witness cannot vouch for or against the credibility of another witness. *See State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). But opinion testimony of an officer "merely offered as a nonexpert opinion or inference drawn from his observations" is admissible. *State v. Hudspeth*, 535 N.W.2d 292, 295 (Minn. 1995) (considering officer's testimony that he suspected someone threw something out of a getaway car that was under his observation). Here, Lemon testified that he is familiar with the clues that a person who may be lying gives off during an in-person interview that could be missed in a telephone interview. Therefore, it is arguable that Lemon was testifying about his opinion of credibility based on his experience in interviewing witnesses and his observations of these witnesses during their interviews.

It may also be proper to admit testimony on the truthfulness of another witness's testimony if a party "opens the door" to such testimony. *State v. Maurer*, 491 N.W.2d 661, 662 n.1 (Minn. 1992). On cross-examination, Blue's attorney elicited Lemon's opinion that Blue was lying, which fit with counsel's apparent trial strategy to portray Lemon as closed-minded in ignoring Blue's consistent assertion that he acted in self defense. But even if the failure to object to this testimony was not part of counsel's trial

strategy, we conclude that Blue has failed to show that an objection to the testimony would have resulted in a different verdict. The jury heard the entire interview between Lemon and Blue, and both Lemon's and Blue's trial testimony were consistent with the statements made in the interview. The jury had ample opportunity to form its own opinion of Blue's credibility, and it is unlikely that counsel's failure to object to portions of Lemon's testimony affected the verdict.

Blue also claims that counsel unreasonably failed to object to Lemon's hearsay testimony that Rogney said that he saw Blue hit Orr. But allowing this testimony could have been part of counsel's trial strategy to show that Lemon was not credible. Additionally, Blue does not dispute that he hit Orr; therefore Blue is not able to show that he was unduly prejudiced by counsel's failure to object to this testimony. Rogney testified that he did not actually see Blue hit Orr or what occurred immediately preceding Blue's act. We conclude that in this case the outcome of Blue's trial was not affected by counsel's failure to object to this testimony.

Because we have found that any plain errors in admission of evidence did not prejudice Blue and that Blue has failed to establish ineffective assistance of counsel, we decline to conclude that the cumulative effect of errors at trial deprived Blue of a fair trial.

Affirmed.