STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2317

State of Minnesota,
Respondent,

vs.

Timothy K. Ueland,
Appellant.

Filed April 22, 2008
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 06030438

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

HALBROOKS, Judge

Appellant Timothy Ueland challenges his conviction of terroristic threats on the grounds that he received ineffective assistance of counsel and the prosecutor improperly attacked his character during his closing argument. Appellant asserts that both errors resulted in prejudice denying his right to a fair trial and asks this court to reverse his conviction. We affirm.

FACTS

Appellant has a history of credit-card fraud, identity theft, and forgery, some of which he perpetrated with Kathleen Schildgen. In October 2005, appellant and Schildgen were arrested while attempting to use a stolen credit card at a department store. Following her arrest, Schildgen waived her *Miranda* rights and told a detective that she had received the stolen credit card from appellant. Appellant and Schildgen were both subsequently charged with credit-card fraud.

The prosecutor negotiated a deal with Schildgen in which she pleaded guilty and agreed to testify against appellant in exchange for a reduced prison term of one year and one day instead of 21 months. Schildgen entered her guilty plea on May 3, 2006, and gave a statement to police regarding appellant's involvement in the credit-card fraud and theft. Schildgen was allowed to remain out of custody until her sentencing hearing. After leaving the plea hearing, Schildgen took a bus to Sully's Bar in Northeast Minneapolis to celebrate.

There were varying accounts at trial concerning what happened at Sully's Bar. Schildgen testified and acknowledged that she and appellant had "worked" together for six years, committing ID theft and forgery. In exchange, she received heroin from appellant. On the day of this incident, Schildgen stated that she encountered appellant as she was walking into the bar. Appellant grabbed Schildgen by the arm and said, "Hey, Kat, I want to talk to you." When Schildgen refused to respond, appellant grabbed her by the neck to turn her around, saying "Come here, b-tch. If you testify against me, b-tch, I'm going to put a hit out on you." Schildgen testified at trial that she was afraid of appellant and in fear for her life. According to Schildgen, appellant's eyes looked "very evil," and she believed that appellant was going to have her killed.

Schildgen testified that after seeing appellant, she immediately left the bar. Although appellant continued to yell at Schildgen, he did not follow her. Schildgen went to her brother's house and called her attorney. When she was unable to reach her attorney, she left a message. Schildgen's attorney returned her call the next day and advised her to speak with the police about appellant's threats. Schildgen contacted the police, who first interviewed her on the phone and then sent a detective to her brother's house to take her statement. Appellant was subsequently arrested and charged with terroristic threats and first-degree aggravated witness tampering. The state later amended the charges to include first-degree witness tampering.

Appellant's attorney's theory of defense at trial was that Schildgen was not credible because she was motivated to lie about appellant in order to cover up her own

violation of a "no-use" condition of her probation.[1] In support of this theory, appellant called Martin Black, a friend of Schildgen and appellant. Black testified that Schildgen called him after the contact with appellant at Sully's Bar. According to Black, Schildgen was concerned that appellant was going to call Schildgen's probation officer and report that he had seen Schildgen in a bar. Black said that Schildgen appeared to be concerned but not afraid, and she indicated that she was going to try to "beat [appellant] to the punch and get ahold [sic] of her PO first before [appellant] had a chance to call her."

Appellant also called Kathleen Fraser as a trial witness. Fraser, who was with appellant at Sully's, testified that she did not witness any altercation in the foyer. She confirmed that Schildgen was there briefly but stated that appellant told Fraser that he did not want any problems with Schildgen. According to Fraser, appellant also told her that Schildgen looked terrible and that he had asked Schildgen if her probation officer knew that she was "using" again.

A videotape recording of the bar area at Sully's was also admitted into evidence. While it did not show the foyer area, there was nothing on the tape to indicate that any altercation was going on off-camera.

In response to this defense theory, the state called Schildgen. Schildgen denied that the conversation that Black related ever occurred. The state also called David Cohoes, Schildgen's attorney, who testified that Schildgen was not on probation or

[1] Appellant's attorney based his defense theory, in part, on a belief that Schildgen was subject to a "no-use" condition that prohibited her from using drugs or alcohol. According to appellant's attorney, this "no-use" condition was imposed as a result of a prior controlled-substance conviction.

subject to a no-use condition when she went to Sully's. Cohoes also stated that Schildgen called him, concerned about appellant's threats, and that he had instructed her to call the police.

The jury found appellant guilty of terroristic threats and not guilty of both witness-tampering charges. This appeal follows.

D E C I S I O N

I.

Appellant argues that his attorney provided ineffective assistance of counsel that deprived him of his right to a fair trial because his theory of defense that Schildgen was motivated to lie was not supported by the evidence. An appellant claiming ineffective assistance of counsel must prove that his counsel's representation fell below an objective standard of reasonableness. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). If an appellant can show that his counsel's assistance was below such a standard, the appellant must then establish by a preponderance of the evidence that he has suffered actual prejudice. *Pierson v. State*, 637 N.W.2d 571, 579 (Minn. 2002). Regardless of any professional error, the prejudice must be so great that there is a reasonable probability that, but for the error, a different outcome would have been the result. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both [prongs] if the defendant makes an insufficient showing on one [prong]." *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069 (1984).

An attorney acts within an 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). A strong presumption exists that "a counsel's performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Appellant's ineffective-assistance argument centers on his counsel's opening statement, which included the following:

> Now, to the question, "Why did she lie about him like this?" She's already got her deal, right? One of the things you are going to hear about it is that she was really happy that day. Why was she happy? Because she didn't go to jail that day. She thought she was going to be taken into custody and going to prison that day, but she was allowed some time to turn herself in.
>
> Still . . ., why would she lie about this? I'll tell you why, because she thought she was on her way back to jail. When this happened, she was on probation. You are going [to] hear that she was on probation for a felony drug case. You are also going to hear that she had a no use condition. So she gives testimony, leaves the courthouse, hops on a bus, not to go home, to go have a drink, to celebrate the fact that she wasn't going to go to jail that day.
>
> If she thought for a minute that my client was going to turn her in to her probation officer for using, wouldn't she take the first swing? Wouldn't she do what she could to protect herself? Does she call the police? No, she doesn't call the police. There is a police station just a few blocks from where this happened. Does she run in to the police station in fear of her life? No. She goes home. She hops on the bus and goes home and makes a phone call, not to the police. She makes a phone call to somebody else before she makes a phone call to her lawyer.

> Over the course of years, she has lied and lied and manipulated and manipulated the system, and she's been in and out of jails and prisons her whole—for the past ten years. She did not want to go back to prison that day or back to jail.

In his closing argument, appellant's counsel made the following brief reference to Schildgen's post-plea conduct: "What does she do? She goes to get high or goes to the bar to get a drink to get drunk. Does she change her life around? No. She's still using substances. Should she be drinking or using anything? Absolutely not."

Appellant asserts that these statements amounted to an unfulfilled promise to produce evidence that Schildgen lied to avoid probation revocation and that his attorney should have known before trial that Schildgen had not been on probation or subject to a "no-use" condition when she went to Sully's. But appellant's counsel's primary theme was that Schildgen was not a credible witness. She was a heroin addict who had an extensive criminal history and who had been arrested and charged with credit-card fraud with appellant. By agreeing to testify against appellant, Schildgen had benefited by a reduction of her prison term of almost one-half. Black's testimony that Schildgen was going to "beat [appellant] to the punch and get ahold of her [probation officer] first" was consistent with appellant's theory that Schildgen had reason to lie. Although Schildgen's testimony that she was not on probation and Cohoe's testimony that he did not believe that Schildgen was then on probation or subject to a no-use condition contradicted Black, it cannot be said that appellant's counsel did not have a reasonable basis for the defense theory. The jury was free to make credibility determinations and assess the strength of

appellant's theory at trial. *See State v. Johnson*¸ 568 N.W.2d 426, 435 (Minn. 1997). At least with respect to the terroristic-threats charge, the jury chose to believe Schildgen.

Even if it can be argued that appellant's counsel made an error in trial strategy or preparation, the error was not so serious that appellant was denied his Sixth Amendment right to counsel. *See State v. Race*, 383 N.W.2d 656, 663 (Minn. 1986) (stating counsel's errors must be so serious that they deprive the defendant of a result that is reliable). Examining the trial in its entirety, we conclude that appellant has not shown by a preponderance of the evidence that he suffered actual prejudice as a result of the alleged ineffective assistance. *See State v. Ferraro*, 403 N.W.2d 845, 848 (Minn. App. 1987) ("A defendant must show counsel was incompetent and did not exercise the diligence and skills a reasonably competent attorney would perform . . . .").

II.

Appellant's second argument is that the prosecutor committed misconduct by attacking his character in his rebuttal closing argument. This argument is based on the prosecutor's following statements:

> This is a defendant that controls women. He is the one that calls the shots. He is the one that breaks into the cars and only steals female IDs, so he can send the women that he controls into stores to rip people off. Are you going to tell me that he was that intimidated by seeing one of these women that he controls through heroin and through stolen credit cards that he's going to leave the bar when they were up there to relax and have a beer? His history doesn't dictate that, that he's the one that is going to back down.
>
> Why does he leave? Maybe she's going to go call the cops, because her life just got threaten [sic] in front of that bar. He didn't even sit back down. Watch that video. He

> couldn't get out of there quick enough. And it's not part of his character from what we have heard. He's the controller—

Appellant's counsel objected to these statements and the district court sustained the objection.

When reviewing a claim of prosecutorial misconduct, this court first examines the challenged conduct to determine whether any misconduct occurred. *State v. Ford*, 539 N.W.2d 214, 228 (Minn. 1995). A prosecutor's closing argument should not be designed to incite prejudice against the defendant or inflame the passions of the jury. *State v. DeWald*, 463 N.W.2d 741, 744-45 (Minn. 1990). If the reviewing court finds misconduct, reversal of the guilty verdict will be granted only if the misconduct was so serious and prejudicial in light of the entire trial that it impaired the defendant's right to a fair trial. *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000).

When the misconduct is "unusually serious," an appellate court will reverse unless the error can be deemed harmless beyond a reasonable doubt. *Sanderson v. State*, 601 N.W.2d 219, 225 (Minn. App. 1999) (quotation omitted), *review granted* (Minn. Jan. 18, 2000), *and order granting review vacated* (Minn. Mar. 28, 2000). But when the misconduct is "less serious," an appellate court will reverse only if the alleged error had a "substantial influence upon the jury's decision to convict the defendant." *Id.* (quotation omitted). This court must consider the closing argument as a whole and reject efforts to take certain phrases or remarks out of context and accord them undue prominence. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

In response to appellant's argument that the prosecutor's rebuttal argument was misconduct, the state asserts that the prosecutor was entitled to present an argument to the jury that appellant had a history of controlling women that did not fit with appellant's version of the facts. We agree with the state that a prosecutor has the "right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980).

The evidence that arguably supports the prosecutor's comments regarding appellant's controlling behavior can only be found in the testimony of Fraser and Schildgen. Fraser testified that when appellant returned from the front of the bar, he said, "[L]et's go," and the two of them got up and left. Schildgen testified that while committing crimes with appellant, "he would let [her] get what [she] wanted," after appellant got what he wanted. Schildgen also testified that appellant would provide heroin in exchange for her help. The state argues that the prosecution's comments were "[f]or the most part," a "fair comment on the evidence."

While the references to appellant's character are limited, the prosecutor's statements do inject appellant's character into the trial. And the state by its own argument seems to concede that not all of the prosecutor's closing comments can be characterized as a proper inference based on the evidence at trial. To the limited extent that the prosecutor referenced appellant's character, the argument was improper. Minn. R. Evid. 404. Because the prosecutor's character attack was impermissible, we review the effect it may have had on the jury and its verdict. *DeWald*, 463 N.W.2d at 745.

As previously noted, the prosecutor's comments were objected to by appellant's counsel. The district court sustained appellant's counsel's objection and granted his motion to strike the improper statement and to instruct the jury that appellant's character was not at issue. The district court then instructed the jury: "That will be stricken. His character is not in evidence, members of the jury."

When the district court provides a cautionary instruction, the prejudice from improper prosecutorial statements is limited. *Id.* We assume that the jury followed the instructions given by the district court. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). Although this assumption is not absolute, the instruction given here by the district court properly limited any potential prejudicial effect. *See State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) (discussing the relevant factors to consider in determining whether a jury instruction is adequate: (1) the likelihood that the jury will disregard the instruction; (2) the probability that if the jury does disregard the instruction it will have a devastating effect on the case; and (3) the determinability of the facts before trial) (citing *Cruz v. New York*, 481 U.S. 186, 193, 107 S. Ct. 1714, 1719 (1987))).

In addition, the jury acquitted appellant on two of the three charges. The split verdict in this matter is a strong indication that the jury was not unduly inflamed by the prosecutor's argument. *See DeWald*, 463 N.W.2d at 745 (citing *State v. Glaze*, 452 N.W.2d 655, 662 (Minn. 1990)); *see also State v. Matthews*, 301 Minn. 133, 136, 221 N.W.2d 563, 565 (1974) (a jury's acquittal of defendant of first-degree murder while

finding him guilty of a lesser offense indicates that the jury was not prejudicially influenced by an improper closing argument).

Affirmed.