STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2452

State of Minnesota,
Respondent,

vs.

Anthony Jerome Anderson,
Appellant.

Filed May 20, 2008
Affirmed
Lansing, Judge

Washington County District Court
File No. K3-05-4725

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

Doug H. Johnson, Washington County Attorney, Washington County Government Center, 14949 – 62nd Street North, Stillwater, MN 55082-0006 (for respondent)

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

Considered and decided by Ross, Presiding Judge; Lansing, Judge; and Johnson, Judge.

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

LANSING, Judge

A jury found Anthony Anderson guilty of second-degree assault of a security guard at a nightclub. In this appeal from conviction, Anderson contends that he received ineffective assistance of counsel and that the evidence was insufficient to sustain his conviction. Because the record does not support Anderson's claim that his lawyer's representation fell below an objective standard of reasonableness that affected the outcome of the trial and because the evidence is sufficient to sustain his conviction, we affirm.

F A C T S

Anthony Anderson was involved in a scuffle on the dance floor of a nightclub in June 2005. When it was over, the head of security separated Anderson and the man who started the scuffle. Anderson was directed to the nightclub's patio, and the other man was told to leave the premises. After Anderson waited on the patio for about five minutes, he was also told to leave the nightclub. The witnesses testified to varying accounts of what happened next. Three security guards testified for the state.

The first security guard, the head of security, testified that he was standing outside the nightclub as Anderson was leaving. When Anderson walked by, the guard noticed that he was holding a shirt in his right hand. A second security guard said something indiscernible to Anderson, and Anderson asked whether he was talking to him. Anderson then flicked the shirt off, exposing a knife in his hand. Anderson raised the knife up toward the second security guard, who grabbed Anderson's arm. Anderson grasped the

second security guard and "threw" him over his back. Other security guards then took Anderson to the ground, and the knife fell from his hand. The first security guard described Anderson as a regular customer at the nightclub but said that he had been "kind of on probation" because of "previous incidents." He testified that he did not think that Anderson intended to stab the second security guard but that he used the knife to scare him.

The second security guard testified that he saw Anderson walking toward him with something wrapped around his right hand. Anderson looked at him and asked, "You got a problem with me?" Then Anderson dropped the shirt, and the second security guard saw that he was holding a knife. Anderson raised the knife above his head and asked him, "Do you want me to stick you with this?" The second security guard said that he was intimidated by the knife and grabbed Anderson's right wrist with both hands. During the ensuing struggle Anderson tried to stab the guard with the knife and was holding it only an inch away from the guard's stomach before it fell from Anderson's hand. After the knife fell to the ground, Anderson, who was significantly larger than the second security guard, threw him over his back. The other security guards then took Anderson to the ground to subdue him.

A third security guard, who had been standing on the patio as Anderson left, saw Anderson walking toward the second security guard with a shirt in his hand. When the shirt came off, he saw a knife in Anderson's hand. The third guard observed Anderson raising the knife up and "jumping to bring it down." He said that it looked like Anderson was attempting to stick the knife into the second security guard.

Anderson called as a defense witness an employee of the sports bar adjacent to the nightclub. The sports-bar employee had been on the patio talking with Anderson. She testified that a person handed Anderson his shirt and told him to leave. As Anderson walked from the patio, a security guard said something to Anderson that the sports-bar employee believed was intended to provoke Anderson. Then she saw the security guard and Anderson push each other and start to fight. She did not see a knife but heard one of the security guards yell that Anderson had a knife.

Anderson testified that he was tackled by security guards as he left the nightclub. He said that he did not have a dispute with a security guard before he was tackled and that no one handed him a shirt. Anderson said that he was a culinary-school student and carried his favorite knife with him in his back pocket. When he was tackled by the security guards, the knife fell out of the pocket, but he had not drawn the knife or threatened anyone with it. He explained on direct examination that he was "on probation" at the nightclub because he had punched someone in response to a racial slur.

Anderson appeals his conviction on two grounds. First he contends that he received ineffective assistance of counsel. Second, he contends that the evidence is insufficient to sustain his second-degree assault conviction.

D E C I S I O N

I

To prevail on a claim of ineffective assistance of counsel, a defendant must affirmatively show that his lawyer's representation fell below an objective standard of reasonableness and that he was therefore prejudiced. *Zenanko v. State*, 688 N.W.2d 861,

865 (Minn. 2004). "[A]n attorney acts within the objective standard of reasonableness when he . . . exercise[es] 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).

Anderson makes three arguments in support of his claim that he received ineffective assistance of counsel. First, he argues that his attorney was ineffective because he did not object to improper *Spreigl* evidence; second, he argues that his attorney improperly called the sports-bar employee as a witness despite the fact that her testimony contradicted his testimony; and, third, he contends that his attorney failed to advise Anderson of his right not to testify at trial. We conclude that the first two claims of attorney error were strategic decisions that fall within the range of reasonable assistance, and the third claim, that his attorney failed to advise him of his right not to testify, lacks an adequate factual or legal basis.

Although the security guard's comment that Anderson had been on a "kind of probation" at the nightclub because of "previous incidents" does not suggest past criminal conduct, it does suggest bad conduct that triggers the protective *Spreigl* procedures. *See generally State v. Lynch*, 590 N.W.2d 75, 80-81 (Minn. 1999) (stating requirement for admitting evidence of defendant's other crimes or misconduct, referred to as *Spreigl* evidence). Because the security guard's statement was a peripheral comment not elicited by a direct question, defense counsel could not have reasonably objected before the witness made the statement. Consequently the attorney could have reasonably believed that, by objecting to the remark after the fact, he would only draw attention to the

testimony. The decision not to object falls within the category of reasonable strategic decisions. *See Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (stating that matters of trial strategy "lie within the discretion of trial counsel and will not be second-guessed by appellate courts").

We also conclude that the attorney's decision to call the sports-bar employee was a reasonable tactical decision. The employee testified that she saw someone hand Anderson a shirt on the patio, that she heard a security guard trying to provoke Anderson, that she saw that security guard and Anderson pushing each other and fighting, that she did not see a knife, and that she heard a security guard yell, "[h]e's got a knife." This testimony portrayed Anderson in a sympathetic light, as a subject of provocation, and suggested that Anderson did not threaten the security guard with the knife. It was also consistent with Anderson's testimony that the knife slipped out of his pocket. Although the sports-bar employee's testimony was not consistent with Anderson's statements that no one handed him a shirt and that he did not have a dispute with the security guards before they tackled him, the decision to call the sports-bar employee to testify was well within the range of reasonable assistance. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (stating that decisions on selection of witnesses is within discretion of trial counsel and will not be reviewed for competence).

Anderson's third argument is that his attorney failed to advise him of his right not to testify. Anderson's factual basis for this claim is that he testified and the record does not contain an affirmative waiver of his right not to testify. He has provided no affidavit or other evidence that he was not advised of this right or that he was unaware of his right

not to testify. He argues only that the record contains no express waiver of his right not to testify.

Anderson has provided no authority for his argument that the record must contain an express statement that his attorney advised him of his right not to testify and that he was waiving that right. Furthermore, references on the record suggest that Anderson was well aware of his right not to testify. At the sentencing hearing, the district court judge commented to Anderson about a previous discussion and the district court judge's early "questions about the wisdom of testifying." Anderson failed to provide the factual basis that would be necessary to meet any burden of proof on this issue. *See State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (stating that claimant bears burden of proof on ineffective-assistance-of-counsel claim and that "[a] strong presumption exists that counsel's performance fell within a wide range of reasonable assistance").

In addition to failing to show attorney error, Anderson has also failed to demonstrate a reasonable probability that the outcome of the trial would have been different if the defense attorney would have objected to the security guard's testimony about the previous incidents, had not called the sports-bar employee, or had advised Anderson on the record that he had a constitutional right not to testify. The jury likely relied heavily on the affirmative testimony of the three security guards, who provided detailed accounts of the incident that were factually consistent on the elements of second-degree assault. It is extremely unlikely that the absence of testimony by either or both of the defense witnesses or an objection to the reference to previous incidents would have changed the outcome of the trial.

Anderson has failed to make either of the showings required to establish ineffective assistance of counsel because he has not demonstrated that his lawyer's representation fell below an objective standard of reasonableness or that any of the challenged actions would have produced a reasonable probability that the outcome would have been different.

II

A challenge to the sufficiency of the evidence requires "a very thorough analysis of the record" to determine whether the evidence was sufficient to permit the verdict. *State v. Spann*, 574 N.W.2d 47, 54 (Minn. 1998). As a reviewing court, we must assume that the jury believed the testimony of the witnesses supporting the verdict and rejected any contrary evidence. *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007).

Anderson argues that the evidence does not support his conviction for second-degree assault because it fails to show that he used the knife to "cause fear in another of immediate bodily harm or death." *See* Minn. Stat. §§ 609.02, subd. 10 (defining assault as "(1) [a]n act done with intent to cause fear in another of immediate bodily harm or death; or (2) [t]he intentional infliction of or attempt to inflict bodily harm upon another"), .222, subd. 1 (2004) (providing that assault with dangerous weapon constitutes assault in second degree). We disagree and conclude that the evidence was sufficient.

The state presented evidence that Anderson approached the second security guard with a knife concealed in his hand; that Anderson then displayed his knife and asked the security guard, "Do you want me to stick you with this?"; that the security guard was intimidated when he saw the knife; that Anderson held the knife up and tried to bring it

down toward the security guard; that the knife came about an inch from the security guard's stomach; that Anderson eventually lost control of the knife; that Anderson threw the security guard over his back; and that Anderson desisted only when he was subdued by other security guards.

From this evidence, the jury could find beyond a reasonable doubt that Anderson was guilty of second-degree assault because he produced and wielded a knife in a manner that demonstrated an intent to cause fear of immediate bodily harm. Because intent is a state of mind, it is "generally proved circumstantially—by drawing inferences from the defendant's words and actions in light of the totality of the circumstances." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). Additionally, the testimony of the second and third security guards describing the manner in which Anderson held the knife and moved it toward the second security guard's stomach, was sufficient for the jury to conclude that Anderson attempted to inflict bodily harm with the knife. The evidence therefore satisfies not only the first definition of assault but also the second. *See* Minn. Stat. § 609.02, subd. 10 (giving second definition of assault as "[t]he intentional infliction of or attempt to inflict bodily harm upon another").

Affirmed.