STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1712

State of Minnesota,
Respondent,

vs.

Timothy John Tice,
Appellant.

Filed January 13, 2009
Affirmed as modified
Bjorkman, Judge

Polk County District Court
File No. 60-CR-06-6990

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

Gregory A. Widseth, Polk County Attorney, 816 Marin Avenue, Suite 125, Crookston, MN 56716 (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

On appeal from his convictions of two counts of second-degree assault and one count of terroristic threats, appellant argues (1) his trial attorney was ineffective because he repeatedly promised the jury during his opening statement that appellant would testify and he did not; (2) the district court erred by ruling appellant could be impeached with evidence of two prior felony convictions if he chose to testify; and (3) the district court erred by sentencing appellant for two counts involving the same victim because appellant's conduct was part of a single behavioral incident. Because there is not a sufficient record from which we could determine his trial counsel's effectiveness, and because the district court never clearly ruled that appellant could be impeached with evidence of prior convictions, we affirm. However, because appellant should not have been sentenced for the terroristic-threats conviction, we conclude that sentence should be vacated.

FACTS

Appellant Timothy J. Tice and his 18-year-old son, K.T., engaged in a physical confrontation over money that K.T. apparently owed to appellant. Appellant's ex-wife (also K.T.'s mom) tried to intervene during the altercation and was struck on the hand with a wooden spindle from a broken staircase railing that appellant was wielding. Appellant was subsequently charged with two counts of second-degree assault and one count of making terroristic threats.

During his opening statement, appellant's attorney repeatedly stated that appellant would testify. He told the jurors that they would hear appellant's side of the story—including why he was at the house that day, what he said to K.T., and how the fight started. Appellant's attorney concluded by saying: "[Y]ou're going to hear from . . . the prosecution first. But just remember, there's another side coming. There's another explanation coming. And so when you listen to it, keep an open mind. There's going to be a lot of explanation for how this all happened."

Both K.T. and appellant's ex-wife testified during the state's case-in-chief and the district court granted the state's request to treat K.T. as a hostile witness. K.T. testified that he started the fight by telling his father: "If you want to hit me, just go ahead and hit me." K.T. further testified that he pushed his father into the railing and swung at him, and he acknowledged that some of the statements he made to police after the fight were incorrect. He also stated that he did not think appellant meant it when he told K.T., "I'm going to kill you."

Appellant's ex-wife testified that the verbal dispute between appellant and K.T. escalated to physical violence. She stated that when she tried to intervene, "things were way, way out of control," and that appellant hit her in the hand with a railing spindle. She did not think appellant was trying to hit her but was instead trying to hit K.T. She also testified, on cross-examination, that she never saw appellant hit K.T. with the spindle, but that K.T. later told her appellant hit him with a "closet pole." She did not hear appellant threaten to kill K.T.

Four other witnesses testified for the state regarding their interactions with K.T., appellant, and appellant's ex-wife immediately after the altercation. A neighbor testified that she saw K.T. leave the house with blood on his face. K.T. told her "[m]y dad f--king hit me. He came to my house, he's been drinking again, and he said he was going to f--king kill me." Defense counsel waived cross-examination of this witness. The neighbor's husband testified that when he confronted appellant about the situation, appellant admitted he had hit K.T.

The responding police officer testified to the statements K.T. and appellant's ex-wife made to him at the scene. The officer stated that K.T. told him appellant swung the staircase spindle at him like a baseball bat, while saying, "I'm going to kill you." Defense counsel waived cross-examination of this officer. The second officer on the scene described how appellant's ex-wife stated that appellant had "assaulted" both K.T. and her.

After the state rested its case, the prosecutor announced the state's intent to impeach appellant with his prior felony convictions pursuant to Minn. R. Evid. 609(a) if he chose to testify.[1] Appellant's attorney responded: "Your Honor, I think that's *Spreig[]l* evidence here and I would object to that coming in." The district court replied: "It's not being offered as *Spreig[]l*, there's no *Spreig[]l* notice, and the Court would not allow the evidence in if it were offered for *Spreig[]l* purposes." Appellant's attorney then asked: "So if I understand this, it would be allowed in for impeachment purposes on

[1] The state indicated its intent to impeach appellant with his prior convictions in the rule 9 disclosures the state filed approximately four months before trial.

his credibility?" The court responded: "As prior felony convictions." Appellant's attorney then declared: "I'm not going to call my witness." Following a short recess, appellant confirmed he would not testify. The district court did not expressly rule on the prior conviction issue.

The jury found appellant guilty on all three counts. Prior to sentencing, appellant terminated his trial attorney's representation and filed, pro se, a "Motion to Declare Mistrial." The motion alleged ineffective assistance of counsel. Appellant subsequently retained new counsel and withdrew his motion. The district court sentenced appellant to a 33-month prison term for the second-degree assault conviction involving K.T., an 18-month prison term for the terroristic-threats conviction involving K.T., and a 39-month prison term for the second-degree assault conviction involving appellant's ex-wife. All of these sentences were to run concurrently. This appeal follows.

D E C I S I O N

I. Appellant did not meet his burden of showing ineffective assistance of counsel.

Appellant first argues his trial attorney provided ineffective assistance of counsel because he promised the jury during his opening statement that appellant would testify but declined to present appellant's testimony after the state moved to impeach him with evidence of prior convictions. A defendant asserting ineffective assistance of counsel "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different.'" *Gates v.*

State, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). There is a "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007); *see also Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (stating an attorney acts within an objective standard of reasonableness if the attorney exercises the customary skills and diligence of a reasonably competent attorney).

Appellant argues his trial counsel's performance was objectively unreasonable because counsel promised the jury 13 times in his opening statement that appellant would testify to his side of the story, even though counsel had notice that if appellant testified the state intended to impeach him with evidence of two prior felony convictions.

As a general rule, matters of trial strategy do not provide a basis for a claim of ineffective assistance of counsel. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). Trial strategy includes such decisions as what evidence to present to a jury, which witnesses to call, and other trial tactics. *Id.*

Appellant argues we should take guidance from *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002), because it is "[p]recisely on-point." In *Ouber*, the First Circuit considered an ineffective-assistance-of-counsel claim where defense counsel promised the jury four times during his opening statement that petitioner would testify. 293 F.3d at 22. This occurred in Ouber's third trial, following two mistrials. Ouber had testified in the two previous trials, but as the third trial unfolded, defense counsel rested without calling her as a witness. *Id.* at 23. The First Circuit concluded Ouber's counsel was

ineffective, stating: "There is simply no record support for the . . . finding that the attorney's conduct constituted a reasonable strategic choice. To the contrary, the only sensible conclusion that can be drawn from this record is that the attorney's performance was constitutionally deficient under *Strickland*—and severely so." *Id.* at 32.

The argument that this case presents "the precise confluence of errors by defense counsel as *Ouber* presented to the First Circuit" is not persuasive. *Ouber* does present the common scenario of defense counsel advising the jury that the defendant would testify and a subsequent decision to the contrary that raised questions about counsel's strategic choices and competence. But a critical distinction between *Ouber* and this case defeats appellant's argument.

Unlike the court in *Ouber*, we lack a developed factual record from which we can determine whether counsel effectively represented appellant at trial. The record in *Ouber* included "affidavits submitted by the petitioner and her trial attorney in support of the ineffectiveness of counsel claim." 293 F.3d at 23. Here, there is no record as to what advice counsel provided to appellant, whether appellant wanted to testify in the first place, or whether he disagreed with counsel's initial strategy. This is not a case where we can review the ineffective-assistance-of-counsel claim on direct appeal. K.T.'s testimony at trial, particularly the fact that the state was authorized to treat him as a hostile witness, suggests that the evidence may have been more favorable to the defense than expected and that counsel's after-the-fact decision not to call appellant was tactical. In short, in the absence of the kind of record that is developed in postconviction proceedings, we conclude that appellant has not met his burden of showing ineffective assistance of

counsel. Absent such evidence, appellant cannot overcome the presumption that his attorney was competent and effective.

Because we conclude appellant has not met his burden with respect to the first *Strickland* prong, we need not address the second. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006) ("A court may address the two prongs of the [*Strickland*] test in any order and may dispose of the claim on one prong without analyzing the other.").

II. The district court did not abuse its discretion by admitting evidence of prior convictions as impeachment evidence.

Appellant next argues the district court erred by ruling that the state could impeach him with evidence of his prior felony convictions for possession of cocaine and driving under the influence. Evidence of prior convictions that do not involve false statements or dishonesty may be admitted if the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a). Whether the probative value outweighs the prejudicial effect is a matter within the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985). We review a district court's decision to permit impeachment by prior conviction under an abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). This court will reverse evidentiary rulings if there has been a clear abuse of discretion by the district court. *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979).

Importantly, the record reflects that the district court never ruled on the state's motion because appellant indicated he would not testify. Because appellant's attorney declared that appellant would not testify, the district court never addressed the factors for

determining whether the prior conviction evidence would be allowed. *See State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978) (listing the factors). Appellant's attorney did not pursue the issue and did not object to the admissibility of the evidence for impeachment purposes. In short, there was nothing for the district court to decide. This court generally does not address issues not decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988).

Appellant's argument that the district court's claimed ruling on this evidentiary issue "chilled [his] exercise of his federal and state constitutional right to testify in his own defense" also fails. The supreme court has stated that "[t]he mere fact that a trial court would allow impeachment evidence if a defendant chooses to testify does not necessarily implicate his constitutional right to testify in his own defense." *State v. Gassler*, 505 N.W.2d 62, 68 (Minn. 1993).

III. The district court erred in sentencing appellant on two offenses that arose out of the same behavioral incident.

Lastly, appellant argues the district court erred by sentencing him on both the assault and terroristic-threats convictions relating to K.T. because appellant's conduct arose out of a single behavioral incident. Minnesota law provides that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2006). Thus, if a defendant commits multiple offenses against the same victim during a single behavioral incident, the defendant may be sentenced for only one offense. *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995).

On appeal, the state concedes that appellant's sentence for the terroristic-threats conviction should be vacated. We agree. It is evident from the record that both the assault and terroristic-threats convictions involving K.T. arose from a continuous and uninterrupted course of conduct and occurred at substantially the same time and place, thus arising out of a single behavioral incident. *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997); *Bookwalter*, 541 N.W.2d at 294-97. Appellant's terroristic-threats sentence is therefore vacated.

Affirmed as modified.