STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1934

State of Minnesota,
Respondent,

vs.

Maurice L. Anderson,
Appellant.

Filed March 31, 2009
Affirmed
Shumaker, Judge

Ramsey County District Court
File No. K8-06-2768

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

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

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

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

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

SHUMAKER, Judge

On appeal from his conviction of second-degree felony murder, two counts of first-degree assault, and two counts of second-degree assault, appellant argues that he is entitled to a new trial because (1) he was prejudiced when the district court granted the state's request to add the assault charges after the parties had rested and (2) the prosecutor committed misconduct during closing arguments. Appellant also raises several pro se arguments. We affirm.

FACTS

On July 14, 2006, appellant Maurice Lovell Anderson was at a St. Paul bar. While there, J.R. confronted him about a dispute at a dance club in 2005. Apparently, J.R. had been arrested as a result of the dance-club incident, and Anderson believed that J.R. blamed him for the arrest.

Anderson claims that while at the bar on July 14, J.R. approached him several times about the dance-club incident, and that as a result, Anderson feared that J.R. would kill him. As their confrontations progressed, Anderson fired two gunshots at J.R. Both bullets passed through J.R., killing him and injuring two bystanders, D.M. and R.S.

Initially, Anderson was charged with one count of second-degree intentional murder and two counts of second-degree assault. But shortly before trial, on May 11, 2007, the complaint was amended, and Anderson was charged with one count of second-degree intentional murder, two counts of attempted second-degree intentional murder, and one count of second-degree assault with a dangerous weapon.

During a jury trial in May 2007, the state offered evidence that J.R. and Anderson had exchanged words at the bar and that J.R. told Anderson he would fight him. But instead of fighting him, Anderson shot J.R. because he feared losing a fistfight. Anderson claimed that he acted in self-defense.

Anderson testified that J.R. had confronted him several times at the bar and that J.R. had a gun. However, no one else testified to seeing a gun, no gun was shown on the bar's surveillance tape, and no gun was found on J.R.'s body or elsewhere at the scene. And other witnesses testified that J.R. did not have a gun that night and generally did not carry one.

According to Anderson, he attempted to diffuse the situation, but J.R. persisted, telling him that he would show him "what we do to snitches." Anderson testified that he was certain he would be shot, and that when he saw J.R. reach for his gun, he pulled his own gun from his waist and fired twice, striking J.R. in the right thigh and abdomen. Those shots passed through his body, killing J.R. and injuring D.M. and R.S. After the shooting, Anderson fled the bar, allegedly pointing a gun at the bar's owner on his way out.

After both sides had rested, Anderson told the court that he did not wish to have the jury instructed on lesser-included offenses. The state, however, requested such instructions. The district court granted the state's request and instructed the jury on the four charged offenses and, as allegedly lesser-included offenses, five additional uncharged offenses, namely, one count of second-degree felony murder, two counts of

first-degree assault, and two counts of second-degree assault. The district court also instructed the jury on self-defense.

The jury acquitted Anderson of the four charged offenses, but found him guilty of second-degree felony murder, two counts of first-degree assault, and two counts of second-degree assault. The district court sentenced Anderson to consecutive sentences of 150 months for the murder conviction, 86 months for one first-degree assault conviction, and another 86 months for the other first-degree assault conviction. This appeal follows.

D E C I S I O N

I

Anderson first challenges his convictions of first- and second-degree assault, alleging that the late addition of the four assault counts was reversible error.

"The determination of what, if any, lesser offense to submit to the jury lies within the sound discretion of the trial court, but where the evidence warrants an instruction, the trial court must give it." *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986). Once jeopardy attaches, a district court cannot add new and different charges against a criminal defendant. Minn. R. Crim. P. 17.05; *State v. Gisege*, 561 N.W.2d 152, 157 (Minn. 1997). "A jury can, however, find the defendant guilty of any lesser-included offense, whether or not the lesser-included offense was part of the complaint or indictment." *Gisege*, 561 N.W.2d at 157 (emphasis omitted).

A lesser-included offense is defined by statute as:

> (1) A lesser degree of the same crime; or

> (2) An attempt to commit the crime charged; or
> (3) An attempt to commit a lesser degree of the same crime; or
> (4) A crime necessarily proved if the crime charged were proved; or
> (5) A petty misdemeanor necessarily proved if the misdemeanor charge were proved.

Minn. Stat. § 609.04, subd. 1 (2004).

Anderson argues that the district court erred by adding the assault counts, because assault is not a lesser-included offense of attempted second-degree murder. The state concedes this point. *See Gisege*, 561 N.W.2d at 156; *State v. Gayles*, 327 N.W.2d 1, 3 (Minn. 1982).

It is fundamental error for a defendant to be convicted of a crime with which he was not charged, and we, therefore, will reverse the conviction if the variance deprived the defendant "'of a substantial right, namely, the opportunity to prepare a defense to the charge against him.'" *Gisege*, 561 N.W.2d at 159 (quoting *State v. Dickson*, 309 Minn. 463, 467, 244 N.W.2d 738, 741 (1976)). "Ultimately, we must ask whether the erroneous charge denied the defendant the opportunity to prepare an adequate defense." *Id.* (quotation omitted).

Anderson has failed to show any way in which he was denied the opportunity to prepare his defense as a result of the added charges. He asserts that he would have "adjusted" or "fine tuned" his strategy, but does not explain how. Given that Anderson admitted to shooting J.R. but maintained he did so in self-defense, and since those bullets indisputably passed through J.R. and injured D.M. and R.S., it is unclear how he would have adjusted his strategy had he been formally charged with first- and second-degree

assault. It indisputably appears on this record that his defense to any and all charges of any nature would have remained the same, namely, self-defense.

At oral argument, Anderson suggested that he was prejudiced by the late addition of the assault charges because proof of the assault charges required that Anderson intended to harm the specific victims. Anderson seems to assert that had he known that the assault charges were going to be added, he could have presented evidence showing that he did not intend to harm R.S. and D.M.

Anderson's argument lacks merit. There was no contention at trial that Anderson intended to harm R.S. or D.M. Rather, it was undisputed that Anderson shot J.R. twice and that those bullets passed through him, injuring R.S. and D.M. Anderson is guilty of crimes against R.S. and D.M. under the doctrine of transferred intent, which Minnesota law recognizes. *State v. Ford*, 539 N.W.2d 214, 229 (Minn. 1995) (upholding attempted murder conviction using transferred intent when the intended victim died but the unintended victim did not); *State v. Sutherlin*, 396 N.W.2d 238, 240 (Minn. 1986) (applying transferred intent to affirm conviction of defendant who intended to shoot at a bar patron, but missed and killed a member of the band playing in the bar).

Transferred intent "is the principle that a defendant may be convicted if it is proved he intended to injure one person but actually harmed another." *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006) (quotation omitted). Thus, "where A aims at B with intent to injure B but, missing B, hits and injures C, A is guilty of battery of C." Wayne R. LaFave, *Substantive Criminal Law* § 6.4(d), at 474 (2d ed. 2003); *see also State v. Hough*, 585 N.W.2d 393, 395 n.1 (Minn. 1998) (stating that transferred intent is

frequently applied where an "accused intends to kill one person, but, because of bad aim, kills another"); *State v. Merrill*, 450 N.W.2d 318, 323 (Minn. 1990) ("Ordinarily, the doctrine of transferred intent applies when the intent being transferred is for the same type of harm."). "A's intent to harm B [is] transferred to C . . . so he is guilty of the crime against C . . . ." LaFave, *Substantive Criminal Law* § 6.4(d), at 474-75. And this court has previously applied the doctrine of transferred intent in an assault case. *State v. Livingston*, 420 N.W.2d 223, 229-30 (Minn. App. 1988) ("We conclude that the statutory definition of the intent required for assault is broad enough to account for the trial court's use of the transferred intent doctrine here."); *see also State v. Jankowitz*, 175 Minn. 409, 221 N.W. 533 (1928) (upholding an assault conviction where a defendant shot a woman in the leg but claimed he had only intended to shoot her husband). Furthermore, other courts have applied the doctrine of transferred intent in cases such as this, where A intends to harm B and harms both B and C. *See State v. Fennell*, 531 S.E.2d 512, 517 (S.C. 2000) ("hold[ing] that the doctrine of transferred intent may be used to convict a defendant of [assault and battery with intent to kill] when the defendant kills the intended victim and also injures an unintended victim"); *Ochoa v. State*, 981 P.2d 1201, 1205 (Nev. 1999) (applying transferred intent to all crimes where an unintended victim is harmed as a result of defendant's specific intent to harm an intended victim regardless of whether the intended victim is injured).

Although the assault counts were improperly added as lesser-included offenses, the late addition of those counts did not deprive Anderson of the opportunity to prepare an adequate defense. This is not a case in which the facts underlying the additional

offenses were different from the facts underlying the charged offenses. There were no new facts. Furthermore, importantly, there was no surprise because Anderson litigated the case as though the assault charges were lesser-included offenses. The late addition of the assault counts was not reversible error.

II

Anderson next claims that he is entitled to a new trial because the prosecutor committed plain error during closing argument. Although he claims error on appeal, Anderson did not object to the prosecutor's closing argument during the trial or seek a curative instruction. He has therefore waived his right to appellate review of the prosecutor's argument. *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997). But we may exercise our discretion to review prosecutorial misconduct to which no objection was made if it amounts to plain error. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006).

The plain-error analysis asks whether (1) the prosecutor's argument was error; (2) the error was plain; and (3) it affected the defendant's substantial rights. *Id.* at 298. If the defendant demonstrates that a prosecutor's conduct constitutes plain error, the burden shifts to the state to show that the misconduct did not affect the defendant's substantial rights. *Id.* at 302. Error is plain if it is clear or obvious. *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). And clear or obvious error is shown if the alleged "error contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. We will reverse a conviction for prosecutorial misconduct only if the error, when "viewed in light of the entire record, is of such a serious and prejudicial nature that appellant's

constitutional right to a fair trial was impaired." *State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007) (quotation omitted).

Anderson focuses his argument on one brief portion of the prosecutor's summation, in which the prosecutor discussed the presumption of innocence, saying:

> First, the presumption of innocence. When this trial began, the defendant was cloaked in the presumption of innocence. That presumption stays with him unless and until the state has met its burden of proof. So at the very moment in this trial when you felt that the state had proven these crimes beyond a reasonable doubt, that presumption was overcome.

Anderson contends that these statements constitute reversible error, because they suggest that he lost the presumption of innocence.

"The presumption of innocence is a basic component of the fundamental right to a fair trial." *State v. Bowles*, 530 N.W.2d 521, 529 (Minn. 1995). And it is improper for a prosecutor to misstate the presumption of innocence in a criminal case. *Ramey*, 721 N.W.2d at 300. Such improper statements have been held to include statements that constitutional rights are meant to protect the innocent but not to shield the guilty, *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993), or that the presumption of innocence is a shield for the innocent but not a cloak for the guilty, and that when the state has proven its case "the presumption of innocence falls like a cloak, it drops, it disappears," *State v. Jensen*, 308 Minn. 377, 379, 242 N.W.2d 109, 111 (1976).

Anderson seems to suggest that the comments here are similar to those from *State v. Bohlsen*, where the prosecutor argued that the defendant "no longer enjoy[ed] th[e] presumption of innocence . . . when . . . the jury [was] satisfied that the State . . . proved

its case beyond a reasonable doubt." 526 N.W.2d 49, 50 n.1 (Minn. 1994). The supreme court found no prejudice to the defendant, but noted that the argument leading up to this statement "mock[ed]" the presumption of innocence by assuming the defendant's guilt while saying he is presumed innocent and cautioned prosecutors that similar, future arguments risk reversal. *Id.* at 50.

But here, the prosecutor's comments do not "mock" the presumption of innocence or assume Anderson's guilt. Rather, when read in context, the statements seem to be in accord with Minnesota's standard jury instruction on the presumption of innocence. That jury instruction provides that a "defendant is presumed innocent . . . [and that t]his presumption remains with the defendant *unless and until* the defendant has been proven guilty beyond a reasonable doubt." 10 *Minnesota Practice*, CRIMJIG 3.02 (2008) (emphasis added). In *State v. Young*, the Minnesota Supreme Court held that a prosecutor's remarks did not misstate the law when they were analogous to the language in this jury instruction. 710 N.W.2d 272, 281 (Minn. 2006).

Anderson also contends that the use of the word "cloaked" constitutes prosecutorial misconduct because the word "implies that [Anderson's] guilt was disguised at the start of trial by the presumption of innocence," because a cloak is typically associated with concealment or disguise. He cites no caselaw supporting this claim, and though novel, this argument, focusing on a single word, does not demonstrate plain error.

Next, Anderson asserts that the prosecutor's statement encouraged the jurors to make up their minds as individuals instead of reaching their decision as a group and that

the prosecutor's use of the word "felt" encouraged the jurors to decide the issue of guilt or innocence on the basis of their feelings. These arguments lack merit. The former contention requires a strained reading of a solitary sentence of the prosecutor's summation. On review, we look at the closing as a whole and do not focus on a particular phrase or give it undue influence. *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000). The latter argument fails to account for the fact that the word "felt" is often used as a synonym for the word "thought," and that the prosecutor specifically advised the jurors "not to be swayed by sympathies, by prejudices, [or] by passions," to use their "judgment," and "to clearly, rationally examine the evidence."

Lastly, Anderson argues that the prosecutor's remark constitutes plain error because it suggests that a juror could make up his mind about his guilt or innocence, at any point during the trial. It is error to suggest that a juror may make a determination of guilt or innocence before the close of evidence. *See State v. Costello*, 646 N.W.2d 204, 210-11 (Minn. 2002) (noting, in the context of a discussion on juror questioning, that it is an important "tenet of our criminal justice system that adjudicators should postpone" making a final decision on guilt or innocence until both sides have presented their case); *10 Minnesota Practice*, CRIMJIG 1.02A (2008) ("You should keep an open mind about all the evidence until the end of the trial, until you have heard the final arguments of the attorneys, and until I have instructed you in the law."). Even if we were to conclude that Anderson had met his burden by showing that the prosecutor's remarks constituted plain error, reversal still is not warranted because the error did not affect Anderson's substantial rights. An error affects a defendant's substantial rights if the error was

prejudicial and affected the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

Here, the remark about which Anderson complains did not affect the outcome of the case. There is no reasonable likelihood that the jury would have acquitted Anderson on all charges absent that remark. The prosecutor's comments came at the close of evidence, and the jury was instructed before trial by the judge to "keep an open mind" and not to make a decision until hearing all of the evidence, the closing arguments, and the instructions on the application of the law. The district court properly instructed the jury on the presumption of innocence and also told the jury that the attorney's statements were not evidence and that the jurors should decide this case for themselves, but only after discussing the case with their fellow jurors. We presume, absent evidence to the contrary, that the jury followed those instructions. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002).

III

Finally, we address the arguments raised in Anderson's pro se supplemental brief. Anderson first contends that the state failed to prove the elements of first- or second-degree assault against D.M. or R.S. Essentially, he seems to argue that the state failed to prove that he intended to assault D.M. or R.S. Appellant's attorney raised a similar contention during oral argument, as noted above. Again, no such evidence is required under the doctrine of transferred intent, which provides that "a defendant may be convicted if it is proved he intended to injure one person but actually harmed another."

State v. Hall, 722 N.W.2d 472, 477 (Minn. 2006) (quotation omitted). Here, it is undisputed that Anderson shot at J.R. and injured D.M. and R.S. as a result.

Next, Anderson argues that he was improperly convicted of both first- and second-degree assault. *See* Minn. Stat. § 609.04, subd. 1 (providing that a person may be convicted of either the crime charged or an included offense, but not both). Although the jury returned a guilty verdict on both first- and second-degree assault, Anderson was only convicted and sentenced on the first-degree assault counts. *See Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) ("A guilty verdict alone is not a conviction."); *Pierson v. State*, 715 N.W.2d 923, 925 (Minn. 2006) ("[T]he 'conviction' prohibited by [Minn. Stat. § 609.04, subd. 1,] is not a guilty verdict, but is rather a formal adjudication of guilt." (quotation omitted)).

Anderson also raises an ineffective-assistance-of counsel claim, arguing that his trial counsel failed to challenge the prosecutor's request for the additional charges. Ineffective-assistance-of-counsel claims involve mixed questions of law and fact, and we review them de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). A party alleging 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 unprofessional 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)). An attorney's representation falls below an objective standard of reasonableness when the attorney does not exercise the customary skills and diligence

that a reasonably competent attorney could provide under the circumstances. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quotation omitted). Under the prejudice prong, "the defendant must show that counsel's errors 'actually' had an adverse effect in that but for the errors the result of the proceeding probably would have been different." *Gates*, 398 N.W.2d at 562. This court "need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Anderson seems to contend that his trial counsel should have objected to the additional assault charges on the basis that they were not lesser-included offenses. But here, the district court was aware that Anderson did not want the assault charges to be added, and the court instructed the jury on those charges anyway. Furthermore, as explained above, the addition of these counts did not constitute reversible error in this case. Therefore, Anderson's ineffective-assistance-of-counsel claim fails.

Finally, Anderson challenges his felony murder conviction. Felony murder is a lesser-included offense of second-degree intentional murder, and therefore, the addition of the felony murder count was not error. *State v. Lory*, 559 N.W.2d 425, 428-29 (Minn. App. 1997), *review denied* (Minn. Apr. 15, 1997). To the extent that Anderson appears to suggest that the state did not prove he intended to assault J.R., we note that Anderson admitted that he pointed the gun at J.R. and fired twice, saying, "he didn't go down to the

ground. He was still standing up. So I fired again real quick . . . ." This evidence is sufficient to allow the jury to conclude that Anderson intended to assault J.R.

Affirmed.