STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1639

State of Minnesota,
Respondent,

vs.

Douglas G. Ibberson,
Appellant.

Filed May 19, 2009
Affirmed
Kalitowski, Judge

Brown County District Court
File No. K3-03-173

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

James R. Olson, Brown County Attorney, 519 Center Street, P.O. Box 428, New Ulm, MN 56073 (for respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Toussaint, Chief Judge; and Hudson, Judge.

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

KALITOWSKI, Judge

Appellant contends the district court erred by admitting hearsay and opinion testimony at his sentencing trial. We affirm.

D E C I S I O N

In 2003, appellant Douglas G. Ibberson was convicted by a jury of first-degree test refusal, fleeing a police officer, and driving after cancellation. He was sentenced to 36 months in prison, an upward dispositional departure, based on the district court's finding that he is unamenable to probation. This court affirmed on appeal, *State v. Ibberson*, A04-180, 2004 WL 2340119 (Minn. App. Oct. 19, 2004). On December 13, 2005, the supreme court reversed our decision and remanded for resentencing based on *State v. Allen*, 706 N.W.2d 40 (Minn. 2005), which holds that *Blakely* applies to dispositional departures.

On remand, the district court held a sentencing trial at which testimony was taken from two probation officers on the issue of amenability to probation. Based on the jury's finding that appellant is not amenable to treatment, the district court resentenced him to 36 months in prison. This court again affirmed, concluding that (1) the rules of evidence do not apply to sentencing proceedings; (2) the prosecutor did not commit reversible misconduct; and (3) the district court's instructions on "amenability to probation" were not erroneous. *State v. Ibberson*, A06-1639, 2008 WL 68857 (Minn. App. Jan. 8, 2008). The supreme court granted appellant's petition for further review on the sole issue of whether the rules of evidence apply to sentencing jury trials and stayed all proceedings

pending final disposition of *State v. Rodriguez*, A06-974, *review granted* (Minn. Nov. 21, 2007). On October 21, 2008, the stay was vacated and the matter was remanded to this court for reconsideration in light of *Rodriguez*, 754 N.W.2d 672 (Minn. 2008), which held that the rules of evidence apply to jury sentencing trials.

The "erroneous admission of evidence that does not have constitutional implications is harmless if there is no reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Rodriguez*, 754 N.W.2d at 684 (quotations omitted). But when, as here, no objections are raised to the admission of evidence or when the objections that were made at trial are different than the ones made on appeal, a defendant is deemed to have waived those objections. *See State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007); *State v. Blom*, 682 N.W.2d 578, 617 (Minn. 2004). An appellate court may nevertheless choose to review evidentiary issues under the plain error standard, even though a timely objection was not raised at trial. *Martinez*, 725 N.W.2d at 738.

Appellant argues that the district court plainly erred in allowing introduction of hearsay evidence and in allowing evidence to come before the jury in the guise of expert testimony. "[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id*.

Hearsay testimony

Appellant argues that the jury was allowed to consider inadmissible hearsay when the county probation officer who had supervised him between 1990 and 2003, was allowed to testify about his past behavior and when she appeared to be repeating hearsay material culled from the probation files that she brought to the sentencing trial.

Appellant made no hearsay objection to the officer's testimony. In addition, it is unclear whether the majority of the officer's testimony included any inadmissible hearsay. The officer had supervised appellant during his probationary periods since 1990. She had custody of his probation records and likely authored most of the entries. She had first-hand knowledge of appellant, based on her many conversations with him and her opportunity to observe his demeanor. And she had first-hand knowledge of appellant's long history of probation violations. Thus, the officer's testimony was based on her personal observations and knowledge, and it is questionable whether hearsay was involved.

Appellant argues that he specifically objected to the admission of the officer's statements regarding threats he had made to law enforcement during treatment in 2003, which were relayed to the officer by the treatment program director. But the record shows that appellant did not object to these statements on hearsay grounds. Rather, he objected on the ground that the threats involved another, prior offense and were therefore "irrelevant" to the issue of probation on the current offense. Appellant argues that these statements "unfairly diverted" the jury from the issue of amenability and "would likely focus" the jury's attention on this prior misconduct.

We conclude that even if the officer's reference to what a program director had told her was inadmissible hearsay and constituted plain error, the officer's reference to appellant's threats to law enforcement was brief and a very minor part of her testimony. Therefore, appellant's substantial rights were not adversely affected by admission of this testimony.

Expert or opinion testimony

An expert witness may testify in the form of an opinion and opinion testimony is not inadmissible merely because it embraces the ultimate issue to be decided by the jury. Minn. R. Evid. 702, 704. But an expert's opinion must be helpful to the jury and should not comprise opinions that the jury could readily form without expert help. *State v. Saldana*, 324 N.W.2d 227, 230-31 (Minn. 1982).

Appellant argues that over his objection, the district court allowed the county probation officer to speculate and give her opinion as to appellant's motives and character. He asserts that the officer's speculation that appellant would not comply with any future conditions of probation was not a matter of fact, but was merely a personal opinion about appellant's future behavior. Appellant further asserts that the officer was allowed to testify that appellant would not abstain from substance abuse if placed on probation, which was not a fact but was an unprovable prediction.

Appellant also argues that the other probation officer who testified was allowed to perform a character assassination of him based on her own personal views. The officer was employed by the Department of Corrections (DOC) and had prepared the presentence investigation report. In particular, the DOC officer told the jury that

appellant is a "very bitter man" who is "resentful of authority figures, in general," who "[b]lames anybody and everybody else for anything that he does," and who "[t]akes absolutely no responsibility [and] easily rationalize[s] breaking the law."

Appellant did object to the testimony of the county probation officer regarding whether she believed that appellant could refrain from consuming alcohol if released on probation. But appellant's objection was not specific and was overruled by the district court after the prosecutor referred to Minn. R. Evid. 704, which allows a witness to testify to an opinion on the ultimate issue. And appellant raised no objections to the testimony by the DOC probation officer, which he now characterizes as a "character assassination." Thus, as with appellant's hearsay issue, appellant's claim that the district court erred in admitting expert or opinion testimony was not adequately preserved for appeal. *See State v. Dana*, 422 N.W.2d 246, 250 (Minn. 1988); *State v. Wellman*, 341 N.W.2d 561, 564 (Minn. 1983).

Moreover, under the plain error standard of review, admission of the probation officers' opinions was not error. Both officers had extensive training and experience supervising offenders on probation. And both were personally familiar and directly involved with appellant and his case. The county officer's opinion was not speculative, but was based on her long experience supervising appellant during his probationary periods. The officer directly observed appellant's words and behavior, in which he claimed and demonstrated that he would not abstain from using alcohol and that he would continue to drive whether he has a license or not. Therefore, the officer's opinion

regarding appellant and his ability to comply with probationary conditions was not based on speculation.

And while the DOC officer's characterization of appellant may have been somewhat inflammatory, her opinion was based not only on her review of appellant's records, but on her personal experience and dealings with appellant. Indeed, based on her conversations with appellant, the DOC officer testified that appellant made it clear that he would continue to drive without a license, that he has no alcohol problem, that he blames others for his troubles, and that he refuses to take responsibility for his actions. Thus, we conclude that the DOC officer's description of appellant as "bitter" and "resentful" was not prejudicial, given the overwhelming and undisputed evidence of appellant's history of repeated violations of probationary conditions.

Affirmed.