STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1435, A08-1339

State of Minnesota,
Respondent,

vs.

Elmer Bishop,
Appellant,

and

Elmer Elwyn Bishop, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 23, 2009
Affirmed
Collins, Judge*
Concurring specially, Shumaker, Judge

Ramsey County District Court
File No. K5-06-1996

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

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

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

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

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

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

COLLINS, Judge

Appealing from his convictions of first- and second-degree assault, appellant argues that the district court erred by (1) refusing to instruct the jury on self-defense; (2) finding that the state did not wrongfully fail to disclose evidence of the victim's prior juvenile adjudication and adult criminal conviction; and (3) finding that appellant did not receive ineffective assistance of counsel. We affirm.

FACTS

At approximately 10:00 p.m. on May 20, 2006, D.B. and his fiancée went to an apartment building in St. Paul to visit a friend. They encountered a woman in the hallway, later identified as appellant Elmer Bishop's daughter, who asked them how they got into the building. They responded that they had entered as someone else was leaving. Bishop's daughter then returned to her apartment. According to D.B., as he and his fiancée were knocking on the friend's door, Bishop's daughter and an older woman returned to the hallway and began yelling at them to leave. When D.B. continued to knock on the friend's door, Bishop's daughter punched him in the face and a struggle ensued. D.B. heard someone say, "I'm going to kill him," and D.B. and his fiancée fled.

According to Bishop's daughter, as she was showing her boyfriend out of the apartment building, D.B. forced his way in, and as they were passing, he shoved her out of the way with his shoulder. Bishop's daughter locked the entrance door and returned to her apartment. D.B. was heard pounding and kicking his friend's apartment door and yelling for the friend to open the door. Bishop's daughter returned to the hallway and requested that D.B. leave. D.B. then punched her, and the two struggled. Bishop's daughter also testified that through their open apartment door her mother was heard telling a 911 operator that her daughter was being beaten. D.B. then fled.

According to Bishop, he had been sleeping and heard his wife yell that someone was breaking in. Bishop grabbed a knife, went into the hallway, and saw D.B. fleeing. Bishop followed D.B. out of the apartment building until they reached the street. After D.B. turned around and headed back toward the building, Bishop walked behind D.B. and stabbed him in the back. Bishop then returned to his apartment and had his wife call 911. He was arrested without incident.

But according to D.B., as he fled, he saw a man pursuing him with a knife. D.B. ran outside and toward his car, which was parked on the other side of the street. The man continued in pursuit, yelling that he was going to kill D.B. As D.B. was running from the man, he dropped his cell phone, and as he stooped to pick it up, the man stabbed him in the back.

Bishop was initially charged with second-degree assault. The state later amended the complaint to include first-degree assault.

In preparation for trial, Bishop's attorney made three separate requests for disclosure of D.B.'s criminal history. The prosecutor directed his office to obtain it, and a paralegal ran a search on the National Crime Information Center (NCIC) database, as was her normal practice. She found no record of D.B.'s convictions. The prosecutor had also asked D.B. about prior convictions, to which D.B. responded that he had been convicted of "traffic matters."

The day after jury selection began, Bishop's attorney asked the prosecutor if he had run a criminal records check on D.B. The prosecutor replied, "I believe I did. But the state at this time is stating to you that he has no prior felony convictions. There are traffic matters, but no . . . ." Bishop's attorney then asked, "And as a juvenile, there are no matters, either?" The prosecutor responded, "No." Following the trial, Bishop was found guilty on both charges.

Thereafter, Bishop's attorney entered D.B.'s name into the Trial Court Information System, (TCIS) database at Ramsey District Court, which is available to the public, and discovered that D.B. had a 2003 conviction for providing false information to police and a 2001 juvenile adjudication for possession of a dangerous weapon on school grounds.

After filing a notice of appeal, Bishop was granted a stay in order to petition for postconviction relief. Following a hearing on the petition, the district court denied relief. Bishop appealed the denial of postconviction relief and moved to reinstate the direct appeal. We granted reinstatement and consolidated the two appeals.

D E C I S I O N

I.

Bishop first contends that the district court abused its discretion by refusing to instruct the jury on self-defense. We review the district court's denial of a defendant's requested jury instruction for an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). "Defendants are entitled to an instruction on their theory of the case if there is evidence to support that theory. . . . An instruction need be given only if it is warranted by the facts and the relevant law." *State v. McCuiston*, 514 N.W.2d 802, 804 (Minn. App. 1994) (citation omitted), *review denied* (Minn. June 15, 1994).

> Self-defense requires a showing of 1) the absence of aggression or provocation on the part of the defendant; 2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm; 3) the existence of reasonable grounds for that belief; and 4) the absence of a reasonable possibility of retreat to avoid the danger.

State v. Vazquez, 644 N.W.2d 97, 99 (Minn. App. 2002) (quotation omitted). "The degree of force used in self-defense must not exceed that which appears to be necessary to a reasonable person under similar circumstances." *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). "The defendant . . . has the burden of going forward with evidence to support his claim of self-defense." *State v. Columbus*, 258 N.W.2d 122, 123 (Minn. 1977). The Minnesota Supreme Court has upheld a district court's refusal to give a requested self-defense instruction when the defendant was the aggressor and was found to have not in good faith withdrawn from the conflict. *See State v. Robinson*, 427 N.W.2d 217, 227-28 (Minn. 1988); *Bellcourt v. State*, 390 N.W.2d 269, 272-73 (Minn. 1986).

Bishop does not claim that he acted to defend himself. Rather, Bishop asserts that he was protecting his wife, his daughter, and his dwelling. Thus, the relevant self-defense jury instructions are those tailored for defense-of-others and defense-of-dwelling. We address each in turn.

Defense-of-others

Reasonable force may be used "by any person in resisting or aiding another to resist an offense against the person[.]" Minn. Stat. § 609.06, subd. 1(3) (2008).

Bishop must prove the absence of aggression or provocation. Although evidence was presented that D.B. made oral threats and assaulted Bishop's daughter, it is undisputed that Bishop continued to pursue D.B. after he fled from the apartment building. At that point, Bishop could have locked the entrance door or retreated with his family into their apartment, locked the door, and waited for police to respond to the 911 call. By pursuing D.B., Bishop exhibited aggression and provocation. Thus, we cannot find that Bishop has met his burden of proving the first element of self-defense.

Bishop also must prove the second element of self-defense, an actual and honest belief that his family was in imminent danger of death or great bodily harm. Imminent danger is defined as "[a]n immediate, real threat to one's safety that justifies the use of force in self-defense." *Black's Law Dictionary* 421 (8th ed. 2004). The district court found that there was no evidence to support Bishop's contention that he held such a belief when he stabbed D.B. in the back. Indeed, the evidence establishes that D.B. fled rather than engage Bishop or threaten Bishop's safety or that of his family.

Examination of the moments just prior to the stabbing further supports the conclusion that there was no basis for a reasonable jury to find for Bishop on a defense-of-others claim. Although Bishop testified that he acted because he was concerned that D.B. was returning to jeopardize his family or property, he did not testify that he stabbed D.B. because such harm was imminent based on D.B.'s threatening comments or actions. And though Bishop stated that D.B. had his hand in his pocket, he did not indicate that he was concerned that D.B. had a weapon. Rather, Bishop indicated that D.B. had merely reversed himself and was headed in the direction of the apartment building when Bishop approached D.B. from behind and stabbed him in the back. Thus, the record does not support that Bishop held an honest belief that his family was imminently endangered or that such a belief would have been reasonable under the circumstances.

Finally, Bishop also fails to prove the final element of a defense-of-others claim. A person claiming self-defense has a duty to retreat and to avoid danger if reasonably possible. *State v. Austin*, 332 N.W.2d 21, 24 (Minn. 1983); *see State v. Soukup*, 656 N.W.2d 424, 428-29 (Minn. App. 2003) (stating that principles of self-defense in homicide cases apply to assault cases as well, including duty to retreat or avoid physical conflict). The evidence demonstrates that Bishop did not attempt to retreat or to avoid the danger. Bishop had ample opportunity to retreat into the secure apartment building or to have avoided any danger or physical conflict by not leaving the building in the first place. There is also no indication in the record that D.B. was moving toward Bishop in such a way as to prevent Bishop from retreating to safety, but rather the evidence demonstrates that D.B. was walking away from Bishop when Bishop stabbed him.

Further, Bishop's family was either inside the locked apartment building or close enough to be able to easily retreat inside before D.B. could become an imminent threat. There is no evidence to support that Bishop took advantage of the reasonable opportunities to retreat or avoid the danger.

A thorough review of the record reveals that because there is no evidentiary basis for a reasonable jury to find for Bishop on this defense, the district court did not abuse its discretion by refusing to instruct the jury on defense-of-others.

Defense-of-dwelling

"There is no duty to retreat from one's own home when acting in self-defense in the home . . . [b]ut the lack of a duty to retreat does not abrogate the obligation to act reasonably when using force in self-defense." *State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001).

> When faced with a defense of dwelling claim, the jury must determine (1) whether the [threat of deadly force] was done to prevent the commission of a felony in the dwelling, (2) whether the defendant's judgment as to the gravity of the situation was reasonable under the circumstances, and (3) whether the defendant's election to defend his or her dwelling was such as a reasonable person would have made in light of the danger to be apprehended.

State v. Carothers, 594 N.W.2d 897, 904 (Minn. 1999). "[W]hether a defendant's use of force was reasonable is a fact question and, like all factual disputes, should be decided by the fact-finder. But when the evidence in the record is undisputed and leads a rational fact-finder to a single conclusion, the issue becomes a question of law." *Soukup*, 656

N.W.2d at 431 (citing *Jack Frost, Inc. v. Engineered Bldg. Components Co.*, 304 N.W.2d 346, 350 (Minn. 1981)).

The district court correctly noted that a defense-of-dwelling instruction is available only when a person is "resisting a trespass," *see Carothers*, 594 N.W.2d at 900. A person is guilty of trespass when he or she is "on the premises of another and . . . refuses to depart from the premises on demand of the lawful possessor[.]" Minn. Stat. § 609.605, subd. 1(b)(3) (2008). The district court found that D.B. was not on or near Bishop's premises at the time of the stabbing and that, regardless, Bishop used excessive force and had reasonable alternatives to using that force.

The district court found that the evidence did not support a defense-of-dwelling instruction because Bishop was not resisting a trespass at the time of the stabbing, a finding that is supported by the record. Bishop cites *State v. McCuiston*, 514 N.W.2d 802 (Minn. App. 1994), for his contention that stopping a trespass from occurring is equivalent to resisting a trespass. But *McCuiston* involved the shooting of a man who had followed the defendant home while threatening the defendant, pulled and kicked at the defendant's door as the defendant went to get a gun, and was making a move toward the defendant, who was standing in his doorway, when the man was shot. *Id.* at 803. Our holding that a defense-of-dwelling instruction was required when the victim was "about to force his way into [the defendant's] house" addresses circumstances in which there is a much more imminent threat of trespass than that presented here. Here, Bishop generally alleges that D.B. had turned around and was walking toward the building.

We cannot conclude that Bishop reasonably believed that his family and his dwelling were in any imminent danger or that stabbing D.B. was a reasonable response to the circumstances. Therefore, the district court did not abuse its discretion by refusing to instruct the jury on defense-of-dwelling.

II.

Bishop next argues that the prosecutor violated federal and state law by wrongfully failing to disclose evidence of D.B.'s prior conviction for providing false testimony to police and a juvenile adjudication for possession of a dangerous weapon on school grounds. "Whether a discovery violation occurred presents a question of law, which we review de novo." *State v. Colbert*, 716 N.W.2d 647, 654 (Minn. 2006).

The rules of criminal procedure provide:

> The prosecuting attorney shall disclose to defense counsel the names and addresses of the persons intended to be called as witnesses at the trial together with their prior record of convictions, if any, within the prosecuting attorney's actual knowledge.
>
> . . . .
>
> The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.

Minn. R. Crim. P. 9.01, subd. 1(1)(a), (c), (6). Beyond rule 9.01, "*Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197 (1963), requires the State to disclose all exculpatory evidence, including impeachment evidence." *State v. Miller*, 754 N.W.2d 686, 706 (Minn. 2008). To establish a *Brady* violation, a defendant must demonstrate

that (1) the evidence was favorable to the accused because it is either exculpatory or impeaching, (2) the evidence was willfully or inadvertently suppressed by the state, and (3) the suppression of the evidence prejudiced the defendant. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936 (1999)). To grant a new trial for a *Brady* violation, the district court must find that the evidence is "material." *Id.* at 460 (quoting *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985)). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quotation omitted).

Juvenile adjudication

Juvenile adjudications generally are not available to impeach credibility. *State v. Spann*, 574 N.W.2d 47, 52 (Minn. 1998). "Evidence of juvenile adjudications is not admissible under this rule unless permitted by statute or required by the state or federal constitution." Minn. R. Evid. 609(d). "When the defense seeks to use the prior adjudication for a particularized attack on credibility, such as bias, prejudice, or ulterior motive, the United States Supreme Court has held that a state's interest in protecting a juvenile offender may be subordinated to the defendant's constitutional right of confrontation." *Spann*, 574 N.W.2d at 52.

The district court correctly found that the state had no obligation to disclose D.B.'s juvenile adjudication to the defense because the adjudication did not demonstrate a motive to lie or suggest bias or a pattern of fabricating claims. Bishop's contemplated use of this evidence was to attack D.B.'s contention that his motive for entering the

apartment building was peaceful because the past adjudication demonstrates a "history of showing up at supposedly safe places, like his school, armed with dangerous weapons." But this is a generalized assertion that D.B.'s prior possession of a gun on school grounds is relevant to his honesty about peaceful motives at the apartment building. This is not the kind of particularized attack demonstrating a clear motive to falsely testify that is required under *Spann*.

Bishop's argument that the policy behind maintaining confidentiality of juvenile records no longer applies also is without merit. Bishop contends that the former policy was based on the need to spare the juvenile "some embarrassment," and because juvenile courts have diverted their focus from rehabilitation, delinquency-adjudication evidence may be used. According to Bishop, because the state's interest in rehabilitating D.B. as a juvenile has failed, there would be no "embarrassment" in impeaching him with prior adjudications. But the legislature has provided that juvenile adjudications may not "impose any of the civil disabilities imposed by conviction, nor shall any child be deemed a criminal by reason of this adjudication, nor shall this adjudication be deemed a conviction of crime[.]" Minn. Stat. § 260B.245, subd. 1(a) (2008). This reflects the state's continuing commitment to a policy that recognizes a difference between the effect of juvenile adjudications and adult convictions. Adopting Bishop's contentions here would be at odds with the public policy expressed by the legislature regarding the effect of juvenile court proceedings.

Because Bishop is not arguing for admissibility based on the kind of particularized attack required, and because public policy does not support admissibility, the district court did not err by denying Bishop's requested relief.

Adult conviction

Bishop contends that the postconviction court erred by finding that there was no wrongful failure to disclose D.B.'s prior conviction of a crime of dishonesty for impeachment purposes. The rules of criminal procedure provide for "court orders requiring the prosecution to make a reasonable effort to obtain the records . . . where the prosecution does not have the records but the defendant specifically requests them and it appears that the records will be material to the defense." *State v. Jackson*, 346 N.W.2d 634, 638 (Minn. 1984). The record supports the state's position that the prosecutor made such reasonable efforts by performing the NCIC records check. According to the paralegal who performed the search, the NCIC database is the most comprehensive database available to the Ramsey County Attorney's Office, and it was for that reason that it was the database typically used. The prosecutor reasonably relied on a report from that database when he informed the defense that D.B. had no record of convictions.

United States v. Perdomo, upon which Bishop primarily relies, is inapposite in that it is a case involving a crime committed in the Virgin Islands in which the prosecutor performed a NCIC search, but that database does not include Virgin Islands criminal records. 929 F.2d 967, 968-71. (3rd Cir. 1991). Here, however, the prosecutor performed a search of the database most likely to include the relevant records for the jurisdiction. Further, the TCIS system on which the records were later found by Bishop's

attorney is accessible to the public. "When information is readily available to the defendant, it is not *Brady* material, and the prosecution does not violate *Brady* by not discovering and disclosing the information." *United States v. Jones*, 34 F.3d 596, 600 (8th Cir. 1994). Thus, the district court did not err by finding that there was no wrongful failure to disclose the record of D.B.'s prior adult conviction.

III.

Bishop also argues that he received ineffective assistance of counsel, asserting that his attorney failed to check TCIS to determine D.B.'s criminal history prior to the trial. A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law, which we review de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). "The defendant 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, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

Bishop has not met his burden of demonstrating that his attorney's performance fell below an objective standard of reasonableness. Although he asserts that the failure to perform a TCIS search was unreasonable, Bishop presented no evidence at the postconviction hearing to support this contention. Bishop's contention that the prosecutor's testimony provided such evidence is not persuasive, as the prosecutor

testified that he often relied on TCIS as a public defender, but did not indicate that this is common practice for defense attorneys in general.

Bishop has also failed to meet his burden of demonstrating prejudice, as D.B.'s credibility was not important to Bishop's conviction. The evidence regarding Bishop pursuing D.B. across the street before stabbing him in the back is undisputed, and this evidence is sufficient to support Bishop's conviction. There is no reasonable probability, therefore, that admission of impeachment evidence attacking D.B.'s credibility would have changed the result in this case.

Affirmed.

SHUMAKER, Judge (concurring specially)

I concur in the opinion of the court. I write separately to note that, although there seems to be no absolute duty on the prosecution to search exhaustively for and to find and disclose a defendant's prior criminal record, it would be prudent for the prosecution to disclose at least three important things: (1) what search of what source the prosecution has actually made; (2) the date on which the search was made (or searches were made); and (3) the result of the search (or searches). Such disclosures would enable the defense to determine whether proper sources were consulted, whether the search has been adequate, and whether the search is current. Thus, any problems regarding the search could be addressed in the district court, ideally before trial. With this approach, the quest for a fair trial would be bolstered and, very likely, the need for an appeal on this issue would be obviated.