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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A07-0401

A08-1226

State of Minnesota,
Respondent,

vs.

Joseph M. Perez,
Appellant,

and

Joseph Michael Perez, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 7, 2009
Affirmed
Minge, Judge

Ramsey County District Court
File No. K1-05-2231

Deborah Ellis, 700 Saint Paul Building, Six West Fifth Street, St. Paul, MN 55102 (for appellant)

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges his convictions of aiding and abetting burglary and assault on a police officer, and denial of his petition for postconviction relief, arguing (1) his due-process rights were violated because the prosecutor asserted inconsistent theories of events in the trial of an accomplice; (2) there was insufficient evidence to support his burglary conviction; and (3) he should have been afforded an evidentiary hearing on his claim of ineffective assistance of counsel. We affirm.

FACTS

Shortly before 11:30 p.m. on June 5, 2005, St. Paul police officer Armando Abla-Reyes was at his home when he and his girlfriend heard someone in the kitchen. She saw a man in the backyard. Abla-Reyes saw another man leaving his house. He did not see the intruder from the front and could not describe him. Abla-Reyes ran outside. In the alley, he noticed a man holding something that could have been his girlfriend's purse and gave chase. The suspect ran and ducked out of sight.

After a few moments, Abla-Reyes saw a man with the same build, clothing, and cap as the intruder. The man was holding an item that appeared to be a purse. When Abla-Reyes identified himself as a police officer and attempted to detain him, a fight

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

ensued. The suspect knocked him down and choked him. As Abia-Reyes pushed back and momentarily freed himself, he was hit twice on the head and briefly lost consciousness. Because of the force with which he was hit and because the man with whom he was struggling had fallen back, Abia-Reyes concluded a second person was responsible for the blows to his head.

In the course of a police investigation of the incident, Abia-Reyes viewed photo lineups of potential suspects. He identified one Aaron Syring as the person he saw in the alley, chased, and fought. He also identified a photo of appellant Joseph Perez as someone that looked “familiar” to him but said that he was not the person with whom he struggled.¹ Police interviewed appellant’s father. The father told the investigator that, when appellant came to the father’s home on the night of the assault, appellant was frantic and agitated, stated that he had been in a fight with someone, used force to get away, feared he had killed the person, and was leaving town. The father testified that, when told that news reports indicated that the victim was a police officer, appellant was “in shock,” “scared to death,” and, in a matter of days, left for Texas with his girlfriend.

Appellant was eventually apprehended and charged with first-degree burglary, first-degree assault on a police officer, and third-degree assault, both as a principal assailant and as an accomplice.

At trial, appellant testified that he fought with Abia-Reyes and that the cap found by police was his. But he denied being involved in a burglary and claimed he was

¹ One officer reported that Abia-Reyes told him that appellant was familiar to him in relation to this specific case.

innocently proceeding down the alley when Abila-Reyes accosted him. He denied hearing anything that night about Abila-Reyes being a police officer. Also, he denied choking Abila-Reyes and hitting him with a metal object. Appellant explained that the reason Abila-Reyes thought he was struck by a metal object was because his head hit a fence after appellant knelt him in the face. Appellant admitted that he and Aaron Syring were close friends, but denied that he was with Syring that night.

After a jury trial, appellant was convicted of aiding and abetting on the first-degree burglary, assault, and assault-on-a-police-officer charges. In a separate, subsequent trial, Syring was acquitted. Appellant appeals his convictions.

D E C I S I O N

I.

The first issue is whether appellant's right to due process was violated when the jury heard differing accounts of the roles of appellant and Syring in the two trials. Appellant uses the phrase "judicial estoppel" to describe the alleged due-process issue he raises. The doctrine of judicial estoppel is "intended to prevent a party from assuming inconsistent or contradictory positions during the course of a lawsuit" or from seeking to prevail twice on opposite theories and, in the criminal context, precludes the state from relying on "factually inconsistent theories and irreconcilable evidence to obtain murder convictions in separate trials for the same murder." *State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005). The doctrine generally has three conditions: (1) "the party presenting the allegedly inconsistent theories must have prevailed in its original position"; (2) "there must be a clear inconsistency between the original and subsequent position of the party";

and (3) there must not be any distinct or different issues of fact in the proceedings.” *Id.* In *Pendleton*, the doctrine had no application to the facts, and the court did not decide whether to recognize it. *Id.*

Appellant claims that, in prosecuting him and in prosecuting Syring, the state advanced different claims regarding the identity of who was in the house. In reviewing the record, we note that, in Syring’s trial, the prosecution only presented evidence that Syring was the person Abia-Reyes saw and chased in the alley and did not claim Syring was in the house. Appellant claims that, by comparison, in his case there was evidence presented that Syring was the person Abia-Reyes saw in his house. In support of this claimed inconsistency, appellant points out that, on cross-examination, Abia-Reyes was asked whether Syring was the person who he pursued “from [his] house” and with whom he had a conflict, and Abia-Reyes responded yes. Appellant also points out that one investigating officer testified that Abia-Reyes told him that Syring was the person he saw in the house, and two other officers implied that, according to Abia-Reyes, the person he chased was the person who was in his home.

A close examination of the record does not support the assertion that the prosecution in appellant’s trial attempted to establish who was in the house. Abia-Reyes testified that he *did not* recognize the person in the house because he did not see his face. Although Abia-Reyes indicated that he chased Syring “from” the house and fought him, Abia-Reyes may have meant that, when he chased Syring down the alley, he was chasing him away from the vicinity of his house. The record does not support appellant’s claim that, in his trial, the prosecution attempted to establish who was in the house.

Consequently, appellant does not show that respondent presented clearly inconsistent positions in the separate trials. Regardless, appellant does not explain how the possibly differing evidence of the roles played by Syring are fundamentally prejudicial to appellant. To be sure, Syring was acquitted. However, he had a separate alibi witness in his trial. Conviction of appellant for aiding and abetting first-degree burglary did not require that the prosecution prove who was in the house committing the burglary or base a conviction solely on the theory that Syring was the burglar.

Because appellant fails to meet an essential element of the doctrine of judicial estoppel, we do not further consider the status of that doctrine in Minnesota law or appellant's claim that he was denied due process.

II.

The second issue is whether there was sufficient evidence to sustain appellant's conviction of aiding and abetting first-degree burglary. In claims of insufficient evidence, our review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, [is] sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary," *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989), especially if resolution of the matter depends mainly on conflicting testimony, *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). "We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could

reasonably conclude that [the] defendant was proven guilty of the offense charged.” *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted). We examine the “facts in the record and the legitimate inferences that can be drawn from those facts” to determine if a jury could have reasonably found the defendant guilty. *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). “A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05, subd. 1 (2004).

The state presented evidence that (1) someone entered Abia-Reyes’s home without permission while Abia-Reyes and his girlfriend were there; (2) another person was in his backyard at this time; (3) there had been a purse stolen from a nearby house shortly before the entry into Abia-Reyes’s house; (4) Abia-Reyes ran outside, saw a person he believed to be Syring with a purse in his hand, and saw that person flee; (5) Abia-Reyes chased that person and fought with him; (6) someone hit Abia-Reyes in the head twice; (7) the stolen purse and appellant’s hat were left at the scene, both stained with Abia-Reyes’s blood; (8) appellant admitted fighting Abia-Reyes at the time in question and feared that he killed him; (9) Abia-Reyes identified appellant as someone who looked familiar from that night; and (10) appellant and Syring were good friends and spent time together regularly. On this evidence, a reasonable jury could have determined beyond a reasonable doubt that appellant was aiding and abetting the burglary by acting either as a lookout or as an accomplice when Syring or someone who was robbing houses in the

neighborhood was trying to get away from Abila-Reyes. We conclude that the evidence was sufficient to support the conviction of aiding and abetting a first-degree burglary.

III.

The third issue is whether the district court abused its discretion when it denied without a hearing appellant's petition for postconviction relief for ineffective assistance of counsel. The merits of the petition and the need for a hearing are interrelated. Generally, we review the decision of a postconviction court for an abuse of discretion; however, legal issues are reviewed de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). A person convicted of a crime may petition the district court for postconviction relief. Minn. Stat. § 590.01, subd. 1 (2006). The petition must contain "a statement of the facts and the grounds upon which the petition is based and the relief desired." Minn. Stat. § 590.02, subd. 1(1) (2006). A petitioner bears the burden of alleging facts that, if proven by a preponderance of the evidence at a hearing, would warrant reopening the case. *Hummel v. State*, 617 N.W.2d 561, 564 (Minn. 2000). The allegations must be supported with more than mere argumentative assertions that lack factual support. *Id.* The postconviction court is not required to hold an evidentiary hearing "unless facts are alleged which, if proved, would entitle a petitioner to the requested relief." *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990); see Minn. Stat. § 590.04, subd. 1 (2006).

Appellant's claim is that his trial counsel should have called certain witnesses. Appellant's postconviction petition was denied without a hearing because the district court determined that appellant did not show that, if the desired witnesses had testified, their testimony could change the result in his case. Appellant asked the district court to

reconsider the issue and provided further claims about additional potential testimony to bolster his ineffective-assistance claim. However, because appellant appealed the case, the district court lost jurisdiction and never ruled on the motion for reconsideration.

Because the ineffective-assistance issue is resolvable on the present record, we address the denial of the petition by evaluating the merit of all of appellant's ineffective-assistance arguments. *See* Minn. R. Crim. P. 28.02, subd. 11 (stating that appellate courts may review matters as the interest of justice may require).

The right to effective assistance of counsel forms a part of the Sixth Amendment right to counsel. U.S. Const. amend. VI; *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

[Appellant] 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 results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'

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)). In making a determination, this court considers the totality of the evidence and is not required to "address both the performance and prejudice prongs if one is determinative." *Rhodes*, 657 N.W.2d at 842. A strong presumption exists "that a counsel's performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). In hindsight, reviewing courts do not review counsel's tactical decisions involving trial strategy. *State v. Miller*, 666 N.W.2d 703, 717 (Minn. 2003).

Appellant argues his trial attorney failed to conduct a complete investigation that could have further corroborated his testimony. Specifically, he claims his attorney failed to discover and present testimony of witnesses who might have placed him away from the scene of the crime.

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535 (2003). At the same time, decisions surrounding the presentation of evidence and the calling of witnesses are within the discretion of trial counsel. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999); *Jones*, 392 N.W.2d at 236. Expert opinion may be useful in determining whether defense counsel’s representation fell below an objective standard. *See, e.g., Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006) (“There are no affidavits from unaffiliated defense attorney experts to the effect that counsel’s representation of Bruestle fell below an objective standard of reasonableness.”).

Here, appellant admitted participating in the fight with Abila-Reyes and somehow causing his head injuries. Appellant’s trial counsel called two witnesses who confirmed appellant’s testimony about his activities earlier that evening. Appellant’s attorney had to work within this factual setting. Appellant claims additional witnesses should have been called about his whereabouts earlier in the evening. Having already admitted to the physical confrontation and based on the timeline of events, appellant’s attempt to contest being in the area at the time of the burglary appears to be a very marginal defense strategy. Abila-Reyes’s testimony connected the crimes in time and space, and the stolen

purse ties appellant not only to the assault, but also to the burglary. Under the facts alleged in the postconviction petition and even the motion for reconsideration, we conclude that the decision of appellant's attorney to not seek out or call additional alibi witnesses did not fall below an objective standard of reasonableness. The affidavit of appellant's appellate attorney did not provide an adequate basis to require a hearing on ineffective assistance of trial counsel on these matters. We conclude that the district court did not abuse its discretion in determining that a hearing on such matters would have been fruitless.

Because appellant's due-process rights were not violated, because there was sufficient evidence to support the burglary conviction, and because appellant has not shown sufficient evidence of ineffective assistance of counsel to warrant either a new trial or a postconviction evidentiary hearing, we affirm.

Affirmed.