STATE OF MINNESOTA
IN COURT OF APPEALS
A09-363

In the Matter of the Welfare of:
S. A. M., a/k/a S. NMN W., a/k/a S. M.-W.,
Child.

Filed January 26, 2010
Affirmed
Ross, Judge

Goodhue County District Court
File No. 25-JV-08-541

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Stephen N. Betcher, Goodhue County Attorney, Elizabeth M.S. Breza, Assistant County Attorney, Red Wing, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

ROSS, Judge

Brock Blue was asleep in his car when he was awakened by two people who approached on either side. S.A.M., then 16 years old, pointed what appeared to be a gun at Blue and demanded money. Blue emptied his pockets and the robbers fled.

In this appeal from a delinquency adjudication for first-degree aggravated robbery, S.A.M. challenges the sufficiency of the evidence, argues that the district court plainly erred by admitting into evidence the out-of-court statements of two witnesses, and argues that he received ineffective assistance of counsel. We choose not to review whether admitting the challenged evidence was plain error because S.A.M. requested that the evidence be admitted. We reject S.A.M.'s ineffective-assistance-of-counsel claim because the challenged matters of trial strategy do not support the claim. And because sufficient evidence supports the delinquency adjudication, we affirm.

FACTS

Shortly after midnight on September 22, 2008, Sergeant Gordon Rohr of the Red Wing Police Department responded to a suspicious-vehicle report. Sergeant Rohr arrived to find Brock Blue, apparently intoxicated. Blue stated that he had been robbed while sitting in his car. He reported that one of the robbers pointed a gun at his head and told Blue he was being robbed. Blue gave them money.

Blue's description of the robbers was at first not precise. He initially described the robbers as two black males. He later added that the robber with the gun was a black male with a red short-sleeved shirt, a red baseball hat, and facial hair. The clothing description

came after a neighbor who was standing nearby told police that she had seen someone with a red hat and dark shirt bent down by Blue's window.

Sergeant Rohr noticed a vehicle stopped in the street half a block away. Several young men left a house and walked to it. The sergeant saw that one of the individuals, later identified as S.A.M., matched the description of one of the robbers. Sergeant Rohr recognized two other individuals, B.H. and F.R. Sergeant Rohr spoke with each youth individually. S.A.M. stated that he had been in D.T.'s house with B.H. and F.R. He also stated that he knew nothing about what had happened down the street and had not been there. Sergeant Rohr pat-searched S.A.M. for weapons and found none.

Red Wing Investigator Jerry Rosenow spoke with Blue the next day after Blue sobered and was better able to describe the robbery. Blue summarized the event and added detail about where the robbers were positioned. Rosenow also recorded interviews with F.R. and D.T. F.R. indicated that S.A.M. had told some drunk guy sleeping in a car to give him all his money. F.R. also stated that S.A.M. was using a toy gun. D.T. stated that he had not heard B.H. or S.A.M. say anything about a robbery.

F.R. and D.T. testified at trial. Their testimony did not implicate S.A.M. in the robbery. During a lunch break, the prosecutor was approached by D.T.'s father, Joshua Big Eagle. Big Eagle stated that he had overheard a conversation between F.R. and D.T. in the courthouse hallway after they had testified. The conversation indicated that they had either been threatened or intimidated by S.A.M., that this had affected their testimony, and that they did not testify fully about their knowledge of what happened during the robbery. The prosecutor sought to introduce the testimony of Big Eagle as well as D.T. and F.R.'s previously recorded statements to Investigator Rosenow.

S.A.M.'s counsel objected to the introduction of Big Eagle's testimony and volunteered instead that playing recordings of D.T. and F.R.'s prior statements was the "perfect remedy" to S.A.M.'s alleged intimidation. The district court allowed the prior statements to be played under the parties' stipulation and prohibited Big Eagle from testifying about threats made by S.A.M. Big Eagle testified that he had overheard D.T. and F.R. say that S.A.M "did it" but that they weren't going to "dry snitch" on him.

The district court found S.A.M. guilty of first-degree aggravated robbery. It acknowledged some testimonial discrepancies and that the victim had been very intoxicated, but it was convinced of S.A.M.'s guilt. The district court explained that neither Big Eagle's nor F.R.'s testimony was essential to its finding. It adjudicated S.A.M. to be delinquent, and this appeal follows.

D E C I S I O N

I

S.A.M. contends that the evidence was insufficient to support the district court's delinquency adjudication. We review claims of insufficiency of evidence by carefully analyzing the record and determining whether the evidence, viewed in the light most favorable to the verdict, supports the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989); *see also In re Welfare of T.N.Y.*, 632 N.W.2d 765, 768 (Minn. App. 2001) (reviewing sufficiency of evidence to support delinquency adjudication). We apply this standard to bench trials and jury trials alike. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). This court assumes that the factfinder believed the evidence supporting the verdict and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

S.A.M. specifically contends that the state failed to prove beyond a reasonable doubt one of the elements of first-degree aggravated robbery—that he actually took property from Blue. *See* Minn. Stat. §§ 609.24–.245 (2008) (listing robbery elements). The evidence supports a finding that S.A.M. took property from Blue. Blue testified to the theft, and "a conviction can rest upon the testimony of a single credible witness." *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997). The district court accepted Blue's testimony as credible despite Blue's intoxication: "The consistent details . . . were there from the moment the victim described what was happening. He was robbed. He offered some money. I find that to be very credible, even in his drunken state." Judging the credibility of a witness and the weight to assign to his testimony is a job for the factfinder, *Johnson*, 568 N.W.2d at 435, and appellate courts give great deference to a factfinder's credibility determination, *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992).

We recognize that Blue's testimony had inconsistencies, and he could not definitively state how much money was taken. And Blue's trial testimony differed from the statements he gave to the police on other topics, including how much he had to drink, how long he was in the car, and how old the primary robber appeared to be. But minor conflicts in evidence do not necessarily render testimony false, especially "when the testimony goes to the particulars of a traumatic and extremely stressful incident." *State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983). Instead, we consider inconsistencies in the light most favorable to the adjudication. *In re Welfare of S.A.M.*, 570 N.W.2d 162, 167 (Minn. App. 1997).

The district court observed that even "drunks" might clearly recall occurrences. Blue recalled specific details such as the robber's scruffy facial hair and hat with a flat brim. The district court also considered but rejected the possibility that Blue fabricated the robbery story to avoid a drunk-driving charge. Deferring to the district court's better position to weigh Blue's intoxication and inconsistencies, we hold that the evidence viewed in the light most favorable to the verdict supports the finding that S.A.M. took property from him.

II

S.A.M. argues that he is at least entitled to a new trial because the district court erred by admitting F.R. and D.T.'s prior out-of-court statements made to a police officer. S.A.M.'s counsel agreed to the admission of this evidence at trial. The failure to object to the admission of evidence generally constitutes a waiver of the right to appeal on that issue. *State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994). But appellate courts may in their discretion review the admission of the evidence under the plain-error test, which asks whether there was error, whether the error was plain, and whether the error affected the defendant's substantial rights. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (plain-error test); *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (applying plain-error test when appellant did not object to admission of hearsay evidence at trial).

Due to the circumstances, we choose to exercise that discretion by not determining whether it was plain error to admit F.R. and D.T.'s recorded interviews with Investigator Rosenow. This is not a case in which defense counsel merely *failed to object* to the admission of evidence; S.A.M.'s counsel *actively advocated* for its admission. To avoid the introduction of evidence that S.A.M. had intimidated two child witnesses, S.A.M.'s

counsel took steps to protect her client from Big Eagle's anticipated testimony about it. She argued that the "perfect remedy" was to admit the previous statements of F.R. and D.T., which would allow the substance of the evidence without tainting S.A.M. This strategy was apparently successful because the district court did not allow Big Eagle to testify about any threats made by S.A.M. On appeal, S.A.M. argues that the district court plainly erred by granting him the very remedy that he requested. So S.A.M. helped to create at trial the alleged error that he decries on appeal. Honoring this tactic by reviewing for plain error would be tantamount to acquitting "the proverbial child who murders his parents and pleads for mercy because he is orphaned." *Henderson v. United States*, 360 F.2d 514, 519 (D.C. Cir. 1966).

III

S.A.M. also demands a new trial on an alternative ground. He argues that his counsel's failure to object to the admission of the out-of-court statements was ineffective assistance. S.A.M.'s insubstantial argument on this point appears only in a footnote, stating generally that his counsel's failure to object to inadmissible evidence constitutes unreasonable representation that prejudiced the outcome of the case.

The United States and Minnesota constitutions guarantee criminal defendants the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). To establish a claim of ineffective assistance of counsel that violated constitutional rights, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the result of the

trial would have been different. *Id.* at 687–88, 694, 104 S. Ct. at 2064, 2068; *Hathaway v. State*, 741 N.W.2d 875, 879 (Minn. 2007). There is a strong presumption that counsel's performance fell within a range of acceptable professional conduct. *State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000). And appellate courts do not review matters of trial strategy for competency. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007).

As explained, S.A.M.'s counsel did not merely fail to object to the allegedly inadmissible evidence, she requested that it be admitted. "What evidence to present to the jury . . . and whether to object are part of an attorney's trial strategy which lie within the proper discretion of trial counsel and will generally not be reviewed later for competence." *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). We will not second-guess defense counsel's trial strategy.

Affirmed.