STATE OF MINNESOTA
IN COURT OF APPEALS
A09-159

State of Minnesota,
Respondent,

vs.

Sammie Lee Burch,
Appellant.

Filed February 2, 2010
Affirmed
Ross, Judge

Ramsey County District Court
File No. 62-CR-08-3710

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

Susan Gaertner, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Ross, Judge.

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

ROSS, Judge

Sammie Lee Burch attacked his pregnant girlfriend in her St. Paul home and now appeals from his convictions of felony domestic assault and domestic assault by strangulation. Burch argues that he is entitled to a new trial for two reasons: the prosecutor committed prejudicial misconduct when she elicited inadmissible hearsay and misstated the evidence, and he received ineffective assistance of counsel when his counsel failed to object. Alternatively, Burch argues for resentencing because the district court erroneously sentenced him for domestic assault by strangulation instead of for the more serious offense of felony domestic assault. Because we find that the alleged prosecutorial misconduct did not impair Burch's right to a fair trial, that Burch was not prejudiced by his counsel's alleged errors, and that Burch's sentence appropriately fell within the presumptive range for either offense, we affirm.

FACTS

St. Paul police officer Theresa Timp went to S.R.'s apartment after a neighbor reported a disturbance. S.D., the tenant in the upstairs unit, had called after he heard swearing and things breaking, and after S.R. ran upstairs distressed and out of breath. Officer Timp arrived to find the entry door broken into pieces and S.R. coughing, crying, and speaking in a hoarse voice. Officer Timp also observed scratches on S.R.'s neck, and S.R. gave a detailed account indicating that her boyfriend, Burch, had threatened, attacked, and choked her.

Paramedics took S.R. to the hospital, where she was examined by Dr. Christopher Dillon. S.R. told Dr. Dillon that she had been choked with two hands by her ex-boyfriend, and she complained of neck pain. Dr. Dillon observed abrasions on both sides of her neck. The state charged Burch with felony domestic assault and domestic assault by strangulation.

S.R. was pregnant with Burch's child during the assault and due to deliver the baby three days after the trial. S.R.'s testimony at trial was not as forthcoming as her initial reports of the attack to police and Dr. Dillon. She responded by stating that she did not remember to most questions from the prosecutor. S.R. remembered that her door was kicked in but claimed not to know who did it, and she remembered going home from the hospital. She testified that she did not remember what she said to the police or that she sought an order for protection against Burch, even after the prosecutor showed her the written request for the order in her own handwriting. Despite S.R.'s resistance, the jury found Burch guilty of felony domestic assault and domestic assault by strangulation. S.R. later appeared at the sentencing hearing urging that Burch not be sentenced to prison. The district court sentenced Burch to 30 months' imprisonment on the domestic assault by strangulation conviction. This appeal follows.

D E C I S I O N

I

Burch claims for the first time that prosecutorial misconduct deprived him of a fair trial. He asserts that during the redirect examination of Dr. Dillon, the prosecutor deliberately elicited inadmissible hearsay testimony about a social worker's notes in

S.R.'s examination report. He also challenges a portion of the prosecutor's closing argument, claiming that she misstated evidence about S.R.'s hospital visit.

Burch failed to object to these things at trial, but we have discretion to review claims of unobjected-to prosecutorial misconduct under a modified plain-error test. *State v. Jones*, 772 N.W.2d 496, 506 (Minn. 2009). That test requires Burch to show that there was error that was plain. *Id.* The burden then shifts to the state to show that his substantial rights were not affected. *Id.* If a plain error affected Burch's substantial rights, we must determine "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Burch's substantial rights were not affected, and that resolves the claim.

Burch complains that the prosecutor used the examination of Dr. Dillon to elicit the substance of a nontestifying social worker's conversation with S.R. Eliciting inadmissible testimony is "improper for prosecutors." *Ramey*, 721 N.W.2d at 300. The prosecutor asked Dr. Dillon to look at S.R.'s examination report and asked whether the social worker's notes indicated that S.R. had reported being choked by her boyfriend. The prosecutor also asked whether S.R. had indicated to the social worker that she was able to flee her boyfriend and that he had kicked her door down. Dr. Dillon answered the three questions affirmatively. Burch argues that this testimony violated his constitutional right to confront his accusers under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), and that it was inadmissible double hearsay under rules 801(c) and 805 of the Minnesota Rules of Evidence. Burch also contends that the prosecutor committed misconduct in her closing argument by referring to S.R.'s statements to the social worker

and by misstating evidence. Burch's primary allegation of misstated evidence is that the prosecutor made an unsupported argument that S.R. willingly sought medical treatment.

Even if the prosecutor's elicitation of testimony about the social worker's notes or her closing comments about S.R.'s trip to the hospital was misconduct that constituted plain error, a new trial is warranted only if the errors affected Burch's substantial rights. *See Ramey*, 721 N.W.2d at 299. The same analysis applies to Burch's *Crawford* claim. *See State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008) (applying plain-error analysis to a Confrontation Clause challenge not raised to the district court). The alleged errors did not prejudice Burch's substantial rights because "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *Ramey*, 721 N.W.2d at 302 (quotation omitted).

The jury found Burch guilty of domestic assault and domestic assault by strangulation on compelling, unchallenged evidence. Officer Timp testified that she found S.R. coughing, crying, and hoarse and that S.R. told her that Burch had attacked and twice choked her. She testified to seeing scratches on S.R.'s neck. S.R.'s neighbor testified that he heard a "tussle" downstairs before S.R. ran upstairs crying and requesting that he call police. He also testified that he saw Burch kick in S.R.'s door. Dr. Dillon testified to seeing abrasions on both sides of S.R.'s neck and that S.R. told him that she was choked twice by an "ex boyfriend."

Considering the clear and weighty evidence presented against Burch, there is no reasonable likelihood that the prosecutor's alleged misconduct had a significant effect on the verdict. Excluding the alleged misconduct would not have altered the outcome. The

social worker's challenged notes were merely cumulative evidence of Burch's attack, and the prosecutor's mentioning that S.R. voluntarily went to the hospital responded to one of Burch's defenses and constituted a brief part of the closing argument.

II

Burch argues that he received ineffective assistance of counsel. 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). Ineffective-assistance-of-counsel claims present mixed questions of fact and law and are reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). To establish a claim of ineffective assistance of counsel that violated constitutional rights, an appellant must show that his attorney's representation fell below an objective standard of reasonableness and that, but for the errors, the result of the trial probably would have been different. *Strickland*, 466 U.S. at 688, 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). A reviewing court may address the test's two prongs in any order and may dispose of the claim on one without analyzing the other. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006). We resolve the claim on the prejudice prong.

Burch argues that a competent attorney acting with reasonable skill would have objected to the prosecutor's elicitation of hearsay evidence and to the prosecutor's

alleged misstatement of the evidence during closing argument. We are not convinced. But even if Burch's counsel's failure to object to this alleged misconduct fell below an objective standard of reasonableness, it is clear that Burch was not prejudiced by the failure. As discussed, the prosecutor's alleged misconduct did not significantly influence the jury and could have had no bearing on the verdict.

III

Burch's final argument is that the district court erred by sentencing him for the domestic assault by strangulation conviction rather than the felony domestic assault conviction. A defendant whose conduct constitutes more than one offense may be punished for only one of them. Minn. Stat. § 609.035, subd. 1 (2008). "[S]ection 609.035 contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted). Burch argues that he must be sentenced for felony domestic assault as the most serious offense because it has a higher statutory maximum sentence. The argument fails.

Burch was convicted of two separate crimes for the same conduct; therefore the district court sentenced him for only one of the convictions. We must determine whether the district court sentenced Burch for the most serious offense. Determining which of multiple offenses to sentence for under section 609.035 is a question of law, which we review de novo. *See id.*

Although felony domestic assault has a higher *statutory maximum sentence*, *compare* Minn. Stat. § 609.2242, subd. 4 (2008) *with* § 609.2247, subd. 2 (2008), domestic assault by strangulation has a higher *presumptive sentence* because sentencing for the latter crime resulted in a higher criminal history score for Burch.[1] *See* Minn. Sent. Guidelines II.B.6 (2008) (limiting criminal history score when crime is a felony only because of prior nonfelony offenses). Burch's presumptive sentencing range for domestic assault by strangulation was 26 to 36 months, with a presumptive duration of 30 months. His presumptive sentencing range for felony domestic assault was 23 to 32 months, with a presumptive duration of 27 months. The district court sentenced Burch to 30 months' imprisonment for domestic assault by strangulation.

Burch would prefer to be sentenced for the felony domestic assault because the presumptive duration is three months shorter than the sentence he received. He relies on *State v. Franks*, 765 N.W.2d 68, 77–78 (Minn. 2009), and *Kebaso*, 713 N.W.2d at 322, for his assertion that the district court should have used the statutory maximum sentences to determine which conviction was the most serious offense.

[1] Burch argues in a footnote that the sentencing worksheet for the domestic assault by strangulation conviction reflects an incorrect criminal history score of seven. Burch included this worksheet, dated December 12, 2008, in the addendum to his brief. Burch relies on the wrong sentencing worksheet. The December 12 worksheet was later modified on December 19, 2008, the day of sentencing. The modified worksheet indicates a criminal history score of six, which Burch argues is the correct score. The presentencing investigator appeared at the sentencing hearing and clarified that he brought an amended worksheet that morning. The district court consulted the modified worksheet with the correct criminal history score of six before sentencing Burch.

His reliance on these cases is misplaced. Neither case clearly answers whether to look to severity-level rankings or statutory maximums to determine which of two crimes is more serious.

The *Kebaso* court noted, "[W]e have never explicitly outlined how appellate courts should determine which of multiple offenses is the most serious under section 609.035." 713 N.W.2d at 322. But it listed the following considerations as guidance: (1) the length of the sentences actually imposed by the district court, leaving the longest sentence in place; (2) the sentencing guidelines' severity-level rankings; and (3) the maximum potential sentence for each of multiple sentences. *Id.* The first consideration does not apply here because Burch did not receive multiple sentences. The second consideration is not helpful because the sentencing guidelines' severity-level rankings for each of Burch's crimes was the same. And the third consideration, the "maximum potential sentence," is ambiguous. *Id.* at 322 n.6. The maximum-potential-sentence consideration comes from *State v. Alt*, 529 N.W.2d 727, 730–31 (Minn. App. 1995), *review denied* (Minn. July 20, 1995). *Alt* did not specify whether a maximum potential sentence is determined by the presumptive guidelines sentence or the statutory maximum sentence. Depending on how one resolves the ambiguity in the maximum-potential-sentence approach, either of Burch's convictions could be the most serious offense: One offense had a higher presumptive guidelines sentence while the other had a higher statutory maximum sentence. The *Kebaso* court declined to resolve the ambiguity because it was not necessary to its determination. 713 N.W.2d at 322 n.6.

The *Franks* court recognized that in *Kebaso*, the court "implicitly approved the use of the sentencing guidelines' severity-level rankings as a method for determining which of multiple felony offenses is the most serious." 765 N.W.2d at 77–78 (quotation omitted). It added, "We also 'approved' an analysis of the statutory maximums for the crime as a way of assessing which was the more serious." *Id.* at 78. But in *Franks* the offense that the court determined to be the more severe had both a higher severity level and a higher statutory maximum, and the court did not state which method it used when it remanded for resentencing to the district court.

We have no occasion to resolve the ambiguity left by *Kebaso* and *Franks* because Burch's sentence of 30 months was squarely within the presumptive guidelines range for either of the convictions. Appellate courts "generally will not interfere with sentences that are within the presumptive sentence range." *State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982). Section 609.035 protects a defendant convicted of multiple offenses against the unfair exaggeration of the criminality of his conduct. *State v. Mullen*, 577 N.W.2d 505, 511 (Minn. 1998). Thirty months' imprisonment does not "unfairly exaggerate" Burch's criminal conduct when that sentence would have been fitting for either conviction. The district court therefore did not err by sentencing Burch based on its understanding that domestic assault by strangulation was the most serious offense.

Affirmed.