STATE OF MINNESOTA
IN COURT OF APPEALS
A09-624

State of Minnesota,
Respondent,

vs.

Pierre Sacarl Smith,
Appellant.

Filed May 11, 2010
Affirmed
Minge, Judge

Dakota County District Court
File No. 19-KX-07-001032

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

James C. Backstrom, Dakota County Attorney, Lawrence F. Clark, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaitas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Bjorkman, Judge.

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

MINGE, Judge

Appellant challenges his jury trial conviction for being a felon in possession of a firearm, Minn. Stat. § 624.713, subd. 1(b) (2006), claiming that (1) circumstantial

evidence was insufficient to support a guilty verdict; (2) the district court plainly erred in admitting evidence implying that he had a violent history; and (3) he was denied effective assistance of counsel. We affirm.

FACTS

On the night of December 29, 2008, St. Paul police received a call from an anonymous resident reporting gunshots. The caller described the shooter as an African American man and identified the man's vehicle. The police determined that the vehicle's owner was Tara Fitzgerald of Eagan. The next day, Eagan police officers met with Fitzgerald, explained the situation, received her permission to search the vehicle, conducted a search, and discovered a .22-caliber pistol with an empty magazine clip and a single gardening glove near the gun.

After their search, the officers further questioned Fitzgerald. Fitzgerald denied involvement with the shooting and implicated appellant Pierre Smith, stating (1) she had never seen the gun before; (2) Smith was her boyfriend; (3) she had loaned the car to Smith the previous day; and (4) Smith had left her house alone around 5:00 p.m. and returned at 3:00 a.m. that morning. She also informed the officers that Smith was in her house and gave them permission to enter.

Before entering Fitzgerald's home, Eagan police ran a background check on Smith that indicated a violent history. The officers then entered and discovered Smith asleep in a bedroom. According to the officers, they informed Smith he was being arrested for a St. Paul shooting, to which he immediately replied that he was not out the previous day. After being advised of his *Miranda* rights, Smith said he used Fitzgerald's car the

previous night, but that he was in Minneapolis during that time. He did not provide any witnesses to corroborate this claimed location. The police took Smith's DNA sample and swabbed his hands for gunshot-residue testing. Smith then stated that he had fired a gun within the past week at a gun range.

The police submitted the DNA sample, gun, magazine clip, and glove to the Bureau of Criminal Apprehension (BCA) for analysis. The BCA was unable to find DNA on the gun or magazine clip. The BCA did not test the glove.

Dakota County charged Smith with one count of felon in possession of a pistol, Minn. Stat. § 624.713, subd. 1(b) and 2(b) (2006). The defense stipulated that Smith had been convicted of a felony. The only issue for the jury to decide was whether Smith had possessed a gun. At trial, the district court cautioned the prosecutor to refrain from making or eliciting comments relating to Smith's history of gang affiliation. But, during direct examination, one of the Eagan police officers was asked what precautions the officers took before entering Fitzgerald's home; and within her reply the witness stated, "we had information that we would want our guns out." Defense counsel did not object.

The jury found Smith guilty. He directly appeals the conviction.

D E C I S I O N

I.

The first issue we address is the sufficiency of the evidence. "Our review of a challenge to the sufficiency of evidence is limited to determining whether the evidence, viewed in the light most favorable to the conviction, supports the verdict." *State v. Smith*, 619 N.W.2d 766, 769 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). This

review assumes "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). In order to obtain a conviction for violation of section 624.713, subdivision 1(b), the state must establish either actual or constructive possession of a firearm. *Smith*, 619 N.W.2d at 770. In this case, the state did not argue that appellant had actual possession of the firearm, which would have required proof that he physically had a gun on his person.

> Constructive possession may be proven by showing that (a) the police found the item in a place under the defendant's exclusive control to which other people did not have access, or (b) that, if the police found the item in a place to which others had access, there is a strong probability, inferable from the evidence, that the defendant was consciously exercising dominion and control over the item at the time.

Id.

A conviction based entirely on circumstantial evidence, as is the case before us, is entitled to the same weight as one based on direct evidence.[1] *State v. Olhausen*, 681 N.W.2d 21, 26 (Minn. 2004). A reviewing court, however, more strictly scrutinizes a conviction based on circumstantial evidence. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). The evidence must form a complete chain that leads so directly to the defendant's guilt as to exclude all other inferences beyond a reasonable doubt. *Id*. A jury is in the best position to evaluate circumstantial evidence and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430. "[E]ven though verdicts based on circumstantial

[1] We acknowledge that an evenly divided supreme court recently decided *State v. Stein*, which addressed when circumstantial evidence can be the basis for a verdict. 776 N.W.2d 709 (Minn. 2010). Because *Stein* did not produce a majority opinion, we do not cite it as precedent here. Nevertheless, we believe our analysis is consistent with the opinions in *Stein*.

evidence may warrant stricter scrutiny, we still construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008).

Here, the evidence directly establishes that a gun was fired, that the shooter fled in Fitzgerald's car, that Fitzgerald's car was in the possession or control of Smith at the time of the shooting, and that an empty gun and single glove were in that vehicle the next morning. The description of the shooter, which matches Smith, along with Smith's incriminating reaction at his arrest, reinforces the inference that Smith possessed the gun. The only evidence that directly suggests Smith was not guilty is his statement that he was in Minneapolis the night of the shooting. However, based on the verdict, the jury clearly disbelieved this evidence. The remaining (arguably) exculpatory conditions—that others had access to the car on prior occasions and the car was unlocked—do not create a reasonably supported inference of innocence.[2] We conclude that the facts firmly and directly establish that Smith, not Fitzgerald or others, was the only one with possession of the gun on the night before his arrest and exclude other inferences beyond a reasonable doubt.

II.

The next issue is whether it was prejudicial error for the district court to not sua sponte exclude an officer's allusion to Smith's background. As the prosecutor was

[2] Smith also argues that the absence of inculpatory DNA evidence and failure to introduce any gun-residue test results suggest innocence. But because of the probable use of the glove and the apparent reasons for limited testing, those circumstances are not evidence but the understandable absence of evidence.

asking about the officers' arrest of Smith, the officer implied that a background check indicated that Smith was dangerous:

> [Prosecutor] What precautions did you use or what type of an entry—how would you describe the entry?
>
> [Officer] We went in with our guns out. The person that we were looking for had allegedly shot a house in St. Paul. They had recovered a gun, so there's a potential that he could have another gun. *We had also ran his information, so we had information that we would want our guns out* so we went in with our guns out, and we went up to the upstairs of the residence, because the lady that lived there had said there was a man in the upstairs. (Emphasis added).

Whether evidence is properly admitted is normally reviewed for an abuse of discretion. *State v. Pendleton*, 759 N.W.2d 900, 908 (Minn. 2009). But because Smith's counsel failed to object to the testimony or request a corrective instruction, the plain-error standard of review is used. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The plain-error standard provides that the appellate court will not reverse unless an appellant shows (1) error; (2) that was plain; (3) that affected substantial rights; and (4) that seriously upset the fairness and integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740 (citing *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 1549 (1997)).

In a criminal prosecution, evidence of prior criminal or violent activity is generally inadmissible. Minn. R. Evid. 404; *State v. Currie*, 267 Minn. 294, 301, 126 N.W.2d 389,

395 (1964). "What is thus inadmissible directly cannot be injected by indirection." *State ex rel. Black v. Tahash*, 280 Minn. 155, 157, 158 N.W.2d 504, 506 (1968). The prosecutor may not "deprive a defendant of a fair trial by means of insinuations and innuendoes which plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). Appellate courts will therefore "reverse more readily" if the prosecutor calculated to elicit or insinuate inadmissible character evidence in the face of a district court prohibition. *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978).

In *Strommen*, the supreme court reversed an attempted-robbery conviction because the district court admitted an accomplice's statements that the defendant had committed murder, as well as an arresting officer's testimony that he knew the defendant from previous incidents. 648 N.W.2d at 685-88. The officer's statements came in response to a series of direct questions by the prosecutor asking if the defendant "was known to the police because of past crimes." *Id*. at 684-85. The supreme court found the accomplice testimony "highly prejudicial" and the officer testimony also improper because it portrayed Strommen as a person of bad character. *Id*. at 687-88.

Here, the parties agree that the disputed testimony is inadmissible. The officer's statement suggested that the defendant had a violent background such that the officers wanted their "guns out." This testimony could not have served any permissible purpose (e.g., motive or intent). Smith did not put his character in question, and there was no attempt to submit the bad-acts evidence under Minn. R. Evid. 404(b).

Unlike in *Strommen*, however, the admitted testimony did not affect Smith's substantial rights. The officer's comment was within a multisentence response regarding the run-up to the arrest. Character references that are so fleeting and nonspecific do not tend to affect substantial rights or result in real prejudice. *State v. Atkinson*, 774 N.W.2d 584, 596 (Minn. 2009). The statement would not have carried the same weight as the clear and distinct statements made by the officer in *Strommen*. The statement's isolation in this case also reduces its effect. *See State v. McCurry*, 770 N.W.2d 553, 558 (Minn. App. 2009) (finding isolated reference to prior crime by witness is not reversible error), *review denied* (Minn. Oct. 28, 2009). There was no added testimony reinforcing the officer's off-hand comment as there was in *Strommen*. No other statements concerning Smith's character or history were admitted.

Moreover, the record does not reveal a prosecutorial intent to adduce any allusion to Smith's possible criminal history. The question to the officer was targeted at the circumstances of the entry and arrest, not Smith's prior crimes or history. This line of questioning was legitimate. The record does not overcome the assumption that the prosecutor's motives were proper. *See Haglund*, 267 N.W.2d at 506 (assuming that prosecutor did not anticipate witness's inadmissible comment).

Because the evidence of Smith's guilt is strong, we conclude that it is highly unlikely that the officer's inadmissible comment had any effect on the jury verdict.

III.

A third claim raised by Smith is that he was denied his Sixth Amendment right to effective assistance of counsel. He complains that his attorney failed to (1) object to the

officer's statement in the record indicating the need to have guns drawn in approaching his room; and (2) investigate persons with prior access to Fitzgerald's vehicle.

Ineffective-assistance-of-counsel claims present mixed questions of fact and law that we review de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). To successfully claim ineffective assistance of counsel, a criminal defendant must show that "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." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Trial-strategy decisions are not reviewed for competence. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

Smith bases his claim that his counsel failed to pursue witnesses only on bare averments in his supplemental brief. But "argumentative assertions . . . [without] factual support" cannot prove ineffective assistance of counsel. *McKenzie v. State*, 754 N.W.2d 366, 370 (Minn. 2008); *accord Gail v. State*, 732 N.W.2d 243, 249 (Minn. 2007). Even if there were support for Smith's allegations, the actions of counsel do not fall below objective standards of reasonableness. Decisions concerning investigation and witnesses generally concern strategy and are not reviewed for competence. *Voorhees*, 596 N.W.2d at 255. Moreover, the fact that others had access to Fitzgerald's vehicle on prior occasions would not be a strong defense because this case concerns possession of the car on the night of the shooting.

Smith's complaint that his counsel failed to object to the officer's allusion to Smith's reputation as being dangerous is evident from the record. But the failure to object may have been motivated by the desire to not draw the jury's attention to an oblique statement. For this reason we usually deem decisions to object as trial strategy not reviewed for competence. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). Even if Smith's counsel's failure to object was unreasonable, Smith must demonstrate prejudice to prevail on an ineffective assistance of counsel claim. *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001). As discussed above, we conclude the officer's statement did not substantially affect the verdict.

In sum, we conclude that Smith has failed to establish that his counsel's representation fell below an acceptable standard of reasonableness.

Affirmed.

Dated: