STATE OF MINNESOTA
IN COURT OF APPEALS
A09-880

State of Minnesota,
Respondent,

vs.

Christopher John Ehrmantraut,
Appellant.

Filed May 25, 2010
Affirmed
Ross, Judge

Wadena County District Court
File No. 80-CR-08-758

Lori Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, St. Paul, Minnesota; and

Kyra L. Ladd, Wadena County Attorney, Wadena, Minnesota (for respondent)

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

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

ROSS, Judge

Christopher Ehrmantraut was charged with third-degree assault and convicted after a bench trial. He appeals, arguing that his jury-trial waiver was invalid because it

was based on his attorney's promise that the district court judge would not convict him; that the judge's knowledge of potentially negative information about him and her conduct during his trial violated his due process right to a trial before an impartial judge; that his attorney provided ineffective assistance of counsel by failing to assert an alternative defense; and that the evidence was insufficient to support his conviction. Because Ehrmantraut lacks factual support for his jury-waiver argument, because the judge's familiarity with Ehrmantraut did not establish bias and she conducted the trial in an appropriate manner, because the proffered alternative defense does not fit the facts, and because we defer to the district court's resolution of conflicting eyewitness testimony as to whether Ehrmantraut acted in self-defense, we affirm.

FACTS

This criminal assault case originates with the divorce of Jamie and Samantha Malone. During the divorce proceedings, the district court ordered Samantha Malone to not allow contact between her children and Christopher Ehrmantraut, with whom she had begun a relationship. Our record does not indicate the reason for the order.

Jamie Malone's father, Bruce Malone, was upset that Ehrmantraut continued to call on Samantha Malone. On May 23, 2008, Bruce Malone went to Ehrmantraut's home to confront him about being around his grandchildren. Ehrmantraut was not home. Malone then visited Ehrmantraut's parents' home. According to Ehrmantraut's father, John Ehrmantraut, Malone appeared at his house agitated and hostile and told him, "[Y]ou tell that son of a bitch [he] better stay away from my grandkids and . . . Samantha." John Ehrmantraut testified that Malone came to his home again days later, a

fact Malone denies. According to John Ehrmantraut, Malone barreled into his yard and warned, "I told you once before—Chris is around my grandkids again and around Samantha and I am going to kick his ass, and I'm going to kick anybody else's ass that stands in the way."

On June 16, 2008, Malone received a phone call that led him to believe that Christopher Ehrmantraut was at Samantha Malone's house. He contacted police and informed them that Ehrmantraut was at the house in violation of a court order. Bruce Malone and an officer went to the house. Malone parked on the street where he could observe the back door while the officer approached the front door. Malone saw Ehrmantraut flee out the back.

The assault happened later that evening, after Malone decided to go to Ehrmantraut's house and wait for him there. He parked on the road, and at about 11 p.m. a car carrying Ehrmantraut pulled into the driveway. Ehrmantraut was with his sister Jennifer Ehrmantraut and her friend Chris Nelson. Malone walked up to Ehrmantraut and confronted him about having been at Samantha Malone's house. The confrontation quickly became violent. Witness accounts differed substantially as to who started the fight. According to Malone, he told Ehrmantraut that he had videotaped him leaving Samantha's home, and Ehrmantraut then attacked him and broke his jaw without Malone striking a single blow. But according to Ehrmantraut, his sister, and Nelson, Malone was the physical aggressor.

The state charged Ehrmantraut with third-degree assault. He waived his right to a jury and agreed to a bench trial. The bench trial was held before Judge Robertson, the

same judge who had presided over the Malone divorce case and who had issued the order forbidding Samantha Malone from allowing her children to have contact with Ehrmantraut.

At two points during the trial, Judge Robertson made remarks reflecting her familiarity with the Malone divorce and the no-contact order. The first occurred during Bruce Malone's testimony after the prosecutor inquired about Jamie Malone's marital status. Bruce was unsure whether Jamie and Samantha's divorce was finalized, testifying, "They are divorced, as far as I know, unless the court is still doing it. I know they went through it. The Judge here should know if they are divorced." Judge Robertson responded, "I think they are divorced." The second occurred as the prosecutor was questioning Bruce Malone about his attempt to catch Ehrmantraut at Samantha Malone's house on the day of the assault. The judge stated,

> Let me just interrupt for a moment, because I understand there was—because I think I ended up having some hearings on the OFP in this matter. This is all preliminary, and I am wondering if it is necessary to go through all of this as a precedent to what happened out—

At that point she was interrupted by the prosecutor, who assured her that Malone's testimony was necessary to the state's case.

The judge also volunteered information to help establish the date of Bruce Malone's May 23 visit to Ehrmantraut's home. Malone could not recall the exact date but stated that it occurred on a morning before a hearing in his son's divorce case: "[I]f you ever look back on your records you'd find out it's Jamie's—it was one of the hearings, so it was that morning, just before it . . . ." The transcript indicates that a short

time later Judge Robertson stated, "Just so counsel know, the court administrator looked up and said there was a motion in the Malone file on May 23rd of '08."

Ehrmantraut relied on a self-defense theory at trial. Judge Robertson found Ehrmantraut guilty of third-degree assault. She did not credit Ehrmantraut's and his eyewitnesses' testimony that Malone had been the aggressor, citing their "strikingly inconsistent" testimony and Ehrmantraut's initial false denial to police that anyone else had been with him at the scene. The judge further reasoned that even if Malone had been the aggressor, Ehrmantraut's force could not be justified as self-defense because he made no effort to retreat. She suggested that Ehrmantraut had an opportunity to retreat after the fight began when Nelson pulled Malone off of him. In her written findings, Judge Robertson once again demonstrated her familiarity with the Malone divorce by describing the no-contact order as a temporary order, a detail that neither party had presented during the criminal trial.

Judge Robertson was lenient in sentencing and in ordering restitution. Noting that Ehrmantraut's presumptive sentence was a year and a day, she stayed imposition of his sentence and placed him on probation. Although the presentence investigator had recommended a fine of $1,500, Judge Robertson fined Ehrmantraut only $500. And she discounted thirty-five percent of Malone's costs because she concluded that he had initiated the verbal confrontation that precipitated the assault.

Ehrmantraut appeals, challenging his jury-trial waiver's validity, Judge Robertson's impartiality, his counsel's effectiveness, and the sufficiency of the evidence supporting the court's finding that he was the aggressor.

D E C I S I O N

I

Ehrmantraut first argues that he is entitled to a new trial because his jury-trial waiver was not knowing or voluntary and therefore was invalid. A criminal defendant has a federal and state constitutional right to a jury trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469 (1970) (describing waiver of federally protected constitutional rights); *see also State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991) (noting requirement that waiver of Minnesota constitutional right to trial by jury must be "knowing, intelligent and voluntary").

A defendant's waiver of his right to have a jury determine his guilt is knowing, intelligent, and voluntary if it meets the requirements of Minnesota Rule of Criminal Procedure 26.01, subdivision 1(2)(a). *State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006). The rule provides,

> The defendant, with the approval of the court may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

Minn. R. Crim. P. 26.01, subd. 1(2)(a).

The waiver dialogue between the court and Ehrmantraut satisfies the technical components of this rule. But Ehrmantraut argues that his waiver was nonetheless invalid

because it was based, in part, on his attorney's misleading "promise" that Judge Robertson would not convict him. Ehrmantraut contends that his attorney's "promise" of acquittal clouded his understanding of the consequences of the waiver and rendered it involuntary. The argument fails because its factual premise—that Ehrmantraut's attorney *promised* him acquittal if his case was tried to the court—lacks support in the record. At sentencing, Ehrmantraut's attorney offered tepid support for the claim. He informed the court that Ehrmantraut had waived his jury-trial right based on the attorney's assessment of Ehrmantraut's chances in a bench trial:

> I found out . . . that we weren't going to be able to have our speedy trial as we had requested, and because of that, because of the stress, my client was suicidal, financial stress on the family, we decided to waive the jury. The reason we waived the jury—that my client waived his right to a jury trial, was I felt that not only would there not be a conviction before 12 members of this community, but even the court couldn't possibly, in these circumstances, convict my client.

This statement, and the attorney's characterization of it as an assurance of acquittal, is the only evidence suggesting that Ehrmantraut's attorney promised acquittal. Even if the attorney's unsworn assertion were evidence, it would not help Ehrmantraut. It does not recite any statement constituting a promise. We have no factual basis to conclude that he promised Ehrmantraut anything. Based on the statement, the attorney's so-called promise of acquittal appears to be merely an optimistic assessment of the strength of Ehrmantraut's case. The described assessment was not unreasonable in light of Malone's provocative conduct known to the attorney from witness accounts. We have

no basis to consider Ehrmantraut's claim that a promise of acquittal invalidates his jury-trial waiver.

We add that the attorney's account of what he told his client would not have provided an inducement for Ehrmantraut to choose a bench trial over a jury trial. Ehrmantraut's attorney stated, "The reason . . . that my client waived his right to a jury trial, was I felt that *not only would there not be a conviction before 12 members of this community*, but *even the court* couldn't possibly, in these circumstances, convict my client." This suggests that the attorney told Ehrmantraut that a judge would be *less* likely than a jury to acquit, but that the defense case was strong enough to prevail "even" in the less favorable circumstance of trial before a judge. Ehrmantraut's assertion that he waived a jury trial based on his attorney's advice that his chances would be better with a bench trial is belied by the only support that he offers.

II

Ehrmantraut next argues that Judge Robertson's involvement with the Malone divorce and her conduct during his criminal trial deprived him of his right to trial before an impartial judge. Due process includes a fair trial before an impartial judge who has no actual bias against the defendant or interest in the outcome of the case. *Bracy v. Gramley*, 520 U.S. 899, 904−05, 117 S. Ct. 1793, 1797 (1997); *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). If a defendant has been deprived of a fair trial before an impartial judge, the remedy is reversal and a new trial. *State v. Dorsey*, 701 N.W.2d 238, 253 (Minn. 2005).

In at least three circumstances, judicial proceedings may violate a defendant's due process right to a fair trial before an impartial judge: When the judge is actually biased against the defendant (*see Bracy*, 520 U.S. at 905, 117 S. Ct. at 1797); when the judge has an interest in the outcome or a good reason to harbor personal animus against the defendant (*see Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2259−62 (2009)); and when a judge conducting a bench trial disregards her role as an impartial factfinder by independently investigating material facts and presenting them at trial (*see Dorsey*, 701 N.W.2d at 250). Ehrmantraut attempts to establish a due process violation under the last two theories. Neither attempt is persuasive, but the serious nature of the allegation warrants a detailed discussion.

Intolerable Risk of Bias

The circumstances that Ehrmantraut claims created an intolerable risk of bias are these: Judge Robertson presided over the Malone divorce trial and gained collateral knowledge about Ehrmantraut; the judge ultimately ordered Samantha Malone to keep her children from Ehrmantraut, indicating that the information she learned about Ehrmantraut was disparaging; then, while conducting Ehrmantraut's criminal trial, the judge demonstrated consciousness of facts learned in the earlier proceeding.

Circumstances create a significant risk of actual bias if, "under a realistic appraisal of psychological tendencies and human weakness, [a judge's interest in the outcome] poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 129 S. Ct. at 2263 (quotation omitted).

The circumstances in this case do not suggest any significant risk of bias. The record does not indicate that Judge Robertson had an interest in the outcome of Ehrmantraut's trial or any history of conflict with Ehrmantraut. The judge's purported "use" of information known to her by virtue of having presided over the Malone divorce adds nothing to the bias analysis. Ehrmantraut's argument implies that a judge who has actual knowledge of unfavorable facts about the defendant or who has ruled against the defendant in another case should decide sua sponte to recuse herself. This suggestion is contradicted by caselaw and ignores practical reality. "Our judicial system presumes that judges are capable of setting aside collateral knowledge they possess and are able to approach every aspect of each case with a neutral and objective disposition." *Dorsey*, 701 N.W.2d at 247 (quotation omitted). For the many judicial districts that have fewer judges than repeat offenders, Ehrmantraut's suggested rule against presiding over cases involving familiar parties would be impossible. And the well-founded confidence we put in our district court judges to remain objective renders Ehrmantraut's rule unnecessary.

These circumstances do not overcome the presumption of judicial objectivity. Judge Robertson demonstrated her neutrality during the trial, undercutting Ehrmantraut's insinuation of bias. One of the judge's actions that Ehrmantraut decries as suggesting bias actually appears to have been an effort to limit prejudicial evidence against Ehrmantraut. When Bruce Malone was recounting his attempt to catch Ehrmantraut at Samantha Malone's house on the day of the assault, the judge stopped him and questioned whether the testimony was necessary to the state's case. She allowed Malone to continue only after she learned that Ehrmantraut had no objection to the testimony.

Judge Robertson also ruled in Ehrmantraut's favor on two evidentiary issues, sustaining a hearsay objection and refusing to allow the prosecutor to impeach Ehrmantraut with evidence of his conviction for issuing dishonored checks. Finally, the judge was lenient at the sentencing phase of trial, significantly limiting Ehrmantraut's jail time, fine, and restitution obligation. On this record, we do not know what, if any, negative information was available to the judge about Ehrmantraut. But whatever it was, we can see that the judge set aside any unfavorable knowledge and conducted a fair trial.

Judicial Participation in Presenting Evidence

Ehrmantraut argues that Judge Robertson impermissibly injected herself into the trial as a participant, compromising her role as impartial arbiter of the facts. A bench-trial judge who independently investigates and reports a fact that undermines the credibility of a key defense witness may deprive the defendant of his right to an impartial judge and factfinder. *Dorsey*, 701 N.W.2d at 250. Assuming that *Dorsey* sets the standard for judicial conduct in bench trials, we conclude that Judge Robertson's actions were innocuous by comparison to those of the judge in *Dorsey*.

In *Dorsey*, the defendant was charged with possession of marijuana, and the state sought an enhanced sentence because Dorsey also possessed a handgun. *Id.* at 241. Dorsey's defense was that the handgun, which police found in a couch, did not belong to him. *Id.* at 242. His first witness testified that she had sold Dorsey's wife the used couch shortly before police found the gun. *Id.* She testified that the couch had belonged to her deceased boyfriend LaTerrance Paige and that the gun could have been his. *Id.*

During the witness's testimony, the trial judge indicated that she was familiar with LaTerrance Paige from his appearances in drug court and believed that Paige had died. *Id.* at 243. But the judge stated that she believed that Paige had died *after* police found the gun in Dorsey's couch. *Id.* This fact, if true, would have seriously undermined the witness's credibility because it suggested that she had lied about the date of Paige's death to provide an innocent explanation of why the gun was in Dorsey's couch. The judge required the witness to spell Paige's last name and then had her law clerk check Paige's records. *Id.* The judge later revealed to counsel that her clerk had confirmed that Paige died more than one year after the handgun was found. *Id.*

The supreme court concluded that the district court judge's conduct deprived Dorsey of an impartial judge and factfinder. *Id.* at 253. It found the judge's conduct troublesome in three respects. By relying on facts not in evidence to conclude that the witness's statements about the date of Paige's death were false, the judge disregarded her duty to rest her factual determinations solely on the record evidence. *Id.* at 250. By independently investigating the date of Paige's death, she also violated her duty not to seek evidence outside what the parties had presented at trial. *Id.* And finally, by announcing the results of her investigation, the judge impermissibly infected the proceedings with a material fact favorable to the state that the state had not yet introduced. *Id.* at 251.

Ehrmantraut likens this case to *Dorsey* and contends that Judge Robertson compromised her role as impartial factfinder by "participating" in his trial. It is true that Judge Robertson supplemented the record on three occasions, stating that the Malone

divorce was final, providing the date that Bruce Malone first went to Ehrmantraut's house, and indicating that the no-contact order was temporary. But Judge Robertson's providing these nonprejudicial peripheral facts is not active participation in gathering and presenting material evidence prejudicial to the defense. Ehrmantraut acknowledged that the facts the judge contributed here were not significant and conceded at oral argument that their introduction had no effect on the trial. The district court judge's conduct at trial does not hint at partiality, did not affect the outcome, and does not call for reversal.

III

Ehrmantraut argues that his conviction is invalid because his attorney provided ineffective assistance by failing to assert the best defense to the assault charge. 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, 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).

Ehrmantraut argues that there was a reasonable probability that, had his attorney asserted property-defense instead of self-defense, he would have been acquitted. The argument fails. Both defenses require that the force used be reasonable relative to the

threat posed. *See* Minn. Stat. § 609.06, subd. 1(3) (2006) (defense of self); *id.*, subd. 1(4) (2006) (defense of property); *State v. Glowacki* 630 N.W.2d 392, 399 (Minn. 2001) (observing that section 609.06 requires "that the defendant reasonably believed that force was necessary and that the defendant used only the level of force reasonably necessary to prevent the harm feared"). The district court found that Bruce Malone was not physically threatening to Ehrmantraut and that Ehrmantraut did not limit his force to the force reasonably needed to stop Malone. This finding would defeat a property-defense theory just as certainly as it defeated the self-defense theory. Because the same requirement of reasonableness applies to both defenses, we conclude that the finding of unreasonable force eliminates any chance that the court would have found the same response to be warranted as a defense of property.

IV

In his pro se brief, Ehrmantraut appears to challenge the sufficiency of the evidence supporting the district court's guilty verdict. Appellate courts "review criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions." *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999) (quotation omitted). We review the record in the light most favorable to the conviction. *State v. Cox*, 278 N.W.2d 62, 65 (Minn. 1979). A reviewing court assumes that the factfinder believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is particularly true when the case turns on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

The focal point of Ehrmantraut's criticism is the district court's restitution order, in which the court reduced Malone's restitution award in apparent acknowledgement of Malone's substantial role in causing the altercation. The court stated,

> In this case, [Malone] went to the yard of [Ehrmantraut's] home, uninvited and in an angry state of mind, thus initiating the heated verbal interaction which resulted in the assault. . . . For his own conduct in this matter, [Malone] in fairness should bear 35% of the costs he has incurred.

Ehrmantraut questions how the district court could acknowledge that Malone's role in the altercation was so substantial yet disregard Ehrmantraut's theory of self-defense.

Ehrmantraut's concern about the district court's restitution order is well taken. One reason for reducing the restitution award in this manner may be the reason Ehrmantraut suggests, which is that his conduct in responding to Malone was not wholly unreasonable. And we are sympathetic to the situation Ehrmantraut found himself in when, late at night, an angry, older man who had previously attempted to confront him and who had allegedly threatened to "kick his ass" appeared suddenly in his driveway and "initiat[ed] the heated verbal interaction." If Ehrmantraut and his eyewitnesses were believed, their testimony would provide ample evidence to establish the need for a reasonable response in self-defense, and the reduction of the restitution award suggests that the district court was influenced by this testimony.

And we disagree with the district court's suggestion that, even if Bruce Malone was the aggressor, Ehrmantraut had a duty to retreat after Malone physically attacked him. Although the law of self-defense includes a general requirement to retreat if

feasible, *Glowacki*, 630 N.W.2d at 399, once an aggressor has attacked a person, the attacked person's right to defend himself outweighs his duty to retreat. We have found no caselaw that requires a person to reevaluate retreat opportunities after he begins to use force in self-defense. Nor does the fact that a person may have landed a majority of the blows and done all of the damage preclude a finding of reasonable self-defense. If the circumstances here were as Ehrmantraut described them, reasonable self-defense could have included his throwing the first punch, breaking Malone's jaw, and suffering no injuries in the mix. The idea behind self-defense is that a person has the right to protect himself from an *imminent future* harm by delivering a reasonable amount of violence. Winning the fight—and even winning it convincingly and unscathed—is not inconsistent with effective, reasonable self-defense. At oral argument, Ehrmantraut's counsel argued persuasively that a broken jaw inflicted in self-defense does not necessarily indicate excessive force. We agree that a broken jaw could just as well indicate a justified and well placed blow on an attacker.

Despite some concern about the reasons supporting reduced restitution and our disagreement with some of the district court's discussion of self-defense, we are in no position to second-guess the district court's credibility assessments or to substitute our judgment on factual matters. This is a close appeal, but we accept the district court's determination that Ehrmantraut was the aggressor, a determination reached against a backdrop of sharply conflicting eyewitness testimony. The district court expressly stated that it did not find Ehrmantraut or his supporting witnesses credible, noting that their testimony was strikingly inconsistent and that Ehrmantraut's testimony was inconsistent

with his own statement to police. It also found that Ehrmantraut and his friends had been drinking for several hours before the assault. Ehrmantraut challenges this finding but it is supported by his own testimony, which acknowledges, "[W]e watched movies, and had a few more beers there." The district court had sufficient reason to disbelieve Ehrmantraut's and his witnesses's version of the events, in which Malone was the physical aggressor, and to credit Malone's testimony that Ehrmantraut unreasonably converted a mere verbal confrontation into a forceful attack. We therefore do not interpret the restitution adjustment necessarily to contradict the district court's fact finding, but as the district court's discretionary reduction to acknowledge that Malone unreasonably provoked the confrontation to which Ehrmantraut unreasonably responded.

Affirmed.