STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1651

State of Minnesota,
Respondent,

vs.

Shaunell Arrice Johnson,
Appellant.

Filed March 29, 2011
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CR-08-21027

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

KALITOWSKI, Judge

Appellant Shaunell Arrice Johnson challenges his convictions of second-degree unintentional murder and second-degree manslaughter, arguing that (1) his trial counsel

was ineffective; (2) the district court abused its discretion by excluding evidence as a sanction for a discovery violation; and (3) the prosecutor committed several instances of misconduct. Appellant also challenges the district court order denying without a hearing his petition for postconviction relief that raised the same claims. We affirm.

D E C I S I O N

I.

Appellant argues that he was denied effective assistance of counsel because his trial counsel (1) "failed to investigate and explain the affirmative defense of self-defense" and (2) failed to disclose certain letters to the state, resulting in the exclusion of the letters from evidence. We review appellant's ineffective-assistance claims de novo. *See Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004) (stating standard of review for ineffective-assistance claims). To assert a valid claim of ineffective assistance, appellant must show that his trial counsel's representation fell below an objective standard of reasonableness and that, but for the unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *See Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (discussing two-pronged test).

Self-defense

Appellant argues that "any reasonably competent defense attorney would have raised a claim of self-defense" in this case. But the decision regarding which defenses to raise is a matter of trial strategy, which is not to be reviewed for competence. *See, e.g.*, *Opsahl*, 677 N.W.2d at 421 (upholding postconviction court's summary denial of petition because courts are in no position to second-guess trial counsel's strategic decision to

focus on one defense over another); *State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (concluding that trial counsel's decision "not to focus" on defense of intoxication provided no basis for postconviction relief because it was a matter of trial strategy).

Here, the victim was fatally shot once in the chest. Law-enforcement officers, responding to a neighbor's 911 call, arrived at appellant's residence and found the victim's body on the living-room floor. Appellant's trial counsel argued to the jury that witness P.B. had shot the victim. This argument constitutes a matter of trial strategy. Z.S. and P.B. were the only two witnesses who testified to being present in the living room when the shooting occurred. Z.S. was legally blind and admitted that she did not see appellant shoot the victim, and P.B. had motive to shoot the victim. Neither P.B. nor appellant could be excluded as the source of DNA recovered from a T-shirt found wrapped around the gun used to shoot the victim, and no other forensic evidence linked appellant or P.B. to the gun. We conclude that appellant's trial counsel made a reasonable decision to assert the alternative-perpetrator theory over a theory of self-defense because it was consistent with the minimal forensic evidence and P.B.'s possible motive, and did not require appellant to admit to shooting the victim.

Letters

During cross-examination, P.B. denied any romantic involvement with appellant. She also denied telling a defense investigator that she was in love with appellant. But she admitted sending "some letters" to appellant after the shooting, which included what she described as her standard closing of "always love." Out of the presence of the jury, appellant's trial counsel requested permission to impeach P.B. with the letters. Because

appellant's trial counsel had failed to disclose the letters to the state, the district court instructed the jury to disregard the questions and answers related to the letters.

Appellant contends that his trial counsel unreasonably failed to disclose these letters, resulting in their exclusion from evidence. He also argues that his trial counsel's omission affected the result of the trial because the letters could have been used to impeach P.B. and to bolster the defense's theory that P.B. shot the victim out of jealousy.

We conclude that appellant has failed to show that, had his trial counsel properly disclosed the letters, a reasonable probability exists that the result of the trial would have been different. *See Anderson v. State*, 746 N.W.2d 901, 906 (Minn. App. 2008) (stating that this court may address either prong of the ineffective-assistance test in any order and resolve a claim without addressing both). P.B. was impeached at trial as to her relationship with appellant by (1) Z.S.'s testimony that P.B. and the victim engaged in a physical fight over appellant's affections on the day of the shooting and (2) a police sergeant's testimony that her interviews with Z.S. and P.B. indicated that P.B. and the victim were both romantically involved with appellant and that this was the source of their quarrel. And P.B. admitted to a violent altercation with the victim shortly before the shooting. Consequently, the evidence that appellant sought to introduce through the letters was largely cumulative. On this record, there is no reasonable probability that the letters would have affected the outcome of the trial.

Thus, appellant's ineffective-assistance arguments are without merit.

II.

Appellant argues that the district court erred by excluding P.B.'s letters to appellant as a sanction for his trial counsel's failure to disclose the letters to the state. Appellant contends that the sanction prevented him from being able to present a complete defense. We disagree.

This court reviews a district court's imposition of discovery sanctions for a clear abuse of discretion. *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998). Due process requires that a criminal defendant "be afforded a meaningful opportunity to present a complete defense." *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003) (quotation omitted). But "in exercising this right, both the accused and the state must comply with procedural and evidentiary rules . . . ." *Id.* Here, it is undisputed that appellant's trial counsel failed to disclose the letters to the state. *See* Minn. R. Crim. P. 9.02 (obligating defendant to make disclosures in felony cases). If a party fails to comply with a discovery rule, the district court may "order the party to permit the discovery, grant a continuance, or enter any order it deems just in the circumstances." Minn. R. Crim. P. 9.03, subd. 8.

In exercising its discretion in this area, the district court "should take into account: (1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors." *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). The sanction of preclusion of evidence "should be used only as a last resort and then only if preclusion will not prejudice the defendant." *State v. Vaughn*, 361 N.W.2d 54, 59 (Minn. 1985).

Here, appellant did not request a continuance to rectify the prejudice to the state. Nor did appellant make an offer of proof at trial or to the postconviction court regarding the content of the letters. *See* Minn. R. Evid. 103(a)(2). We decline to speculate that the content of the letters might have been more damaging to P.B. than the evidence already before the jury that P.B. had physically harmed the victim on the day of the shooting because of a dispute over appellant's affections. And we again note that P.B.'s denials of a romantic relationship with appellant were contradicted by other evidence. We therefore conclude that the district court did not abuse its discretion by excluding P.B.'s letters from evidence as a discovery sanction.

III.

Appellant argues that the prosecutor committed several instances of misconduct. This court will reverse a conviction because of prosecutorial misconduct "only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). If the defendant did not object to the misconduct at trial, this court reviews the defendant's claim under a modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

> A plain error occurs when: (1) there was error; (2) that was plain; and (3) the error affected the defendant's substantial rights. Under this test, an unobjecting defendant bears the burden of demonstrating that the prosecutor's conduct constitutes an error that was plain. The burden then shifts to the [s]tate to demonstrate that the conduct did not affect the defendant's substantial rights. Finally, if all three prongs of the test are satisfied, the court determines whether to address the error to ensure fairness and integrity in judicial proceedings. An error is "plain" if it is clear or obvious.

> Typically, a plain error contravenes case law, a rule, or a standard of conduct.

State v. Cao, 788 N.W.2d 710, 715 (Minn. 2010) (citations omitted). We address each of appellant's prosecutorial-misconduct arguments in turn.

Suppressed evidence

Appellant argues that the prosecutor committed misconduct by stating that there was "no evidence" of a sexual relationship between appellant and P.B. We disagree.

In closing argument, the prosecutor stated:

> You have been asked to believe that it was not [appellant] but [P.B.] who committed this murder to eliminate a competitor for the affections of [appellant]. . . . The only evidence of a relationship between [P.B.] and [appellant] was her denial of it. She was asked directly if she was in a sexual relationship with [appellant] and she said no. Now, it's fair and certainly true that the evidence tells us that other people thought they were in a relationship. . . . [Z.S.] thought that they were in a relationship. [A police sergeant] said that she was under that impression too. But that's all we know. We know that that's what they thought. There's no evidence that there was an actual relationship between these people.

Appellant did not object to these statements at trial.

Appellant relies on this court's decision in *State v. Thompson*, 617 N.W.2d 609 (Minn. App. 2000), to support his argument that the prosecutor improperly stated that there was "no evidence" of a sexual relationship between appellant and P.B. Specifically, appellant contends that because the prosecutor "was fully aware" of the letters written by P.B., the prosecutor lied to the jury about the lack of evidence.

In *Thompson*, this court concluded that the defendant had been substantially prejudiced by the district court's evidentiary ruling that precluded her from testifying that

she had struck the victim in the face because he had been "having relations" with the defendant's 13-year-old daughter. 617 N.W.2d at 611, 613. This court held that the defendant had an "absolute right" to explain to the jury why she had physically assaulted the victim. *Id.* at 613. This court noted that the prosecutor had "compounded" the district court's error by stating in her opening and closing sentences that the defendant had "no good reason at all" to punch the victim. *Id.* This court also noted that the prosecutor's conduct, in moving to exclude the defendant's testimony, then arguing that the defendant had no reason to assault the victim, "bordered on unethical." *Id.*

Thompson is distinguishable from the facts here because appellant's right to explain his actions to the jury was not affected by the exclusion of the letters. And, as we have already concluded, the exclusion of the letters did not prejudice appellant. Here, the prosecutor accurately stated that P.B. had denied having a relationship with appellant, that two other witnesses testified that they believed P.B. *did* have a relationship with appellant, and that the jury heard no other evidence of this relationship. Appellant has failed to show error that was plain regarding the prosecutor's comments.

Shifting the burden of proof

Appellant next contends that the prosecutor "repeatedly and emphatically shifted the burden of proof to the defense" by using the phrases "no evidence" or "no testimony" in closing argument. At trial, appellant did not object to the three comments to which he now assigns error.

A prosecutor is not permitted to shift the burden of proof to the defendant by commenting on the defendant's failure to call witnesses or to present evidence. *State v.*

Caron, 300 Minn. 123, 127, 218 N.W.2d 197, 200 (1974). But it is not misconduct for a prosecutor to "remark . . . on the lack of evidence regarding the defense's theory." *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993). The three challenged statements here, viewed in context, did not shift the burden of proof. Rather, they highlighted the lack of evidence to support the defense's theory that P.B. was the shooter and emphasized that the evidence best supported the state's theory of the case. Appellant has failed to show error that was plain regarding the prosecutor's comments.

Referring to the law of self-defense

Finally, appellant argues that the prosecutor committed reversible misconduct by referring to the law of self-defense in closing argument. We disagree.

During closing argument, the prosecutor argued that although the evidence indicated that the victim had possibly been threatening appellant with a knife before she was shot, the affirmative defense of self-defense did not apply:

> Now, as you probably know from your common sense and just having been around that there are cases of self[-]defense. People do commit homicides because they are being threatened. This is not one of those cases. You have not been and you will not be instructed on the law of self defense. It does not apply in this case and consequently you should not consider it when you deliberate.

Appellant did not object to this comment on the applicability of self-defense. Before this comment, the district court had instructed the jury that it must follow and apply the rules of law as given by the district court and did not include an instruction on self-defense when it charged the jury.

The prosecutor's comment on the applicability of self-defense was not plain error. *See State v. Stephani*, 369 N.W.2d 540, 547 (Minn. App. 1985) (holding that where district court instructed the jury that it must follow and apply the law as given by the district court and did not instruct the jury on self-defense, prosecutor's comments that "there will be no instruction on self[-]defense" and that "[s]elf[-]defense is not part of the law of this case" were not "prejudicial error"), *review denied* (Minn. Aug. 20, 1985).

Thus, appellant's prosecutorial-misconduct arguments are without merit.

IV.

Appellant contends, based on the arguments addressed above, that the district court abused its discretion by denying his petition for postconviction relief without a hearing. A summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). Because we conclude that all of appellant's arguments are without merit, the district court did not abuse its discretion by denying appellant's petition for postconviction relief without a hearing. *See* Minn. Stat. § 590.04, subd. 1 (2010) (permitting a postconviction court to summarily deny a petition if "the files and records of the proceeding conclusively show that the petitioner is entitled to no relief").

Affirmed.