STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0703

State of Minnesota,
Respondent,

vs.

John Stephen Woodward,
Appellant.

Filed June 30, 2014
Affirmed
Chutich, Judge

Rice County District Court
File No. 66-CR-10-2907

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

G. Paul Beaumaster, Rice County Attorney, Faribault, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

CHUTICH, Judge

Appellant John Woodward challenges his conviction of conspiracy to commit first-degree murder, asserting that (1) the district court erred by not instructing the jury to

unanimously decide which overt act he committed in furtherance of the conspiracy and (2) the prosecutor committed prejudicial misconduct by asking witnesses questions that called for a legal conclusion. He also raises several pro se arguments. Because the district court did not plainly err in instructing the jury on conspiracy, the prosecutor did not commit misconduct, and Woodward's pro se claims lack merit, we affirm.

FACTS

In 2007, a jury found appellant John Woodward guilty of aiding and abetting several controlled-substance crimes, and he was sentenced to 94 months' imprisonment. While incarcerated, Woodward met Thomas Jackson, a fellow prisoner who performed legal work for other inmates. Woodward told Jackson that the Dakota County Attorney had a personal vendetta against Woodward because Woodward was, at one point, the county attorney's neighbor. Jackson helped Woodward prepare and file an ethics complaint alleging that the county attorney misused state funds by prosecuting him.

After his ethics complaint was determined to be unfounded, Woodward became angry. He told Jackson that a confidential informant set him up and that he wished that the informant, the county attorney, and the district court judge who presided over his drug case were dead. Woodward expressed hope that he could find someone to kill the county attorney. When he learned that Jackson was about to be released from prison, Woodward suggested that Jackson could "do[] the three murders for him." Woodward was "adamant" that the county attorney be killed first. Jackson was frightened by his conversations with Woodward, but was reluctant to report them because he feared that his life would be in danger if he became known as a snitch.

On June 5, 2010, Jackson met with Woodward, and Woodward drew a map showing the county attorney's home, route to work, and locations of potential hiding places for a shooter. They also discussed a backup plan to kill the county attorney if a first attempt were to fail. Woodward showed Jackson where Jackson could dispose of the gun and explained areas where Jackson could get a cab to escape the scene. A prison surveillance camera captured the meeting, and the video was shown at trial.

During the June 5th meeting, Woodward agreed to pay Jackson $10,000 to murder the Dakota County Attorney. Woodward agreed to make the payments in three installments: an initial $2,500 payment and two subsequent payments of $3,750 to Jackson's two sisters, who lived in Maryland and West Virginia. Woodward told Jackson that he intended to have his wife send $2,500 to Woodward's attorney by telling his wife that the money was for legal fees and by telling his attorney that it was for the purchase of a truck. Woodward also agreed to send payments to Jackson's sisters after the county attorney was killed, using the name of a prison staff member. On June 23, Woodward's wife sent his attorney $2,500, and Woodward told Jackson that the initial transfer was complete.

On June 30, 2010, Jackson reported his conversations with Woodward to a prison official and also provided a copy of the map that Woodward drew on June 5. Jackson agreed to wear a recording device to record further conversations with Woodward. While wearing the recording device, Jackson met with Woodward again on July 30 and August 9, 2010. Woodward confirmed the details of his plan to pay Jackson to murder the county attorney. Woodward wavered on whether to go through with the plan and

expressed nervousness about the possibility that he would be caught and punished, but he ultimately confirmed that he wanted Jackson to go forward. Woodward confirmed details of the plan again in another recorded conversation.

A police detective and an agent from the Minnesota Bureau of Criminal Apprehension confronted Woodward with the map, and Woodward admitted that the map was related to discussions about killing the county attorney. He claimed that the plan was Jackson's idea, however, and he said that he did not believe that Jackson was serious. Woodward further stated that Jackson had been pressuring him and that Woodward pretended to cooperate with the plan so that Jackson would continue to help him with his legal claims. When Woodward was moved from Faribault to Oak Park Heights on August 10, 2010, officers of the correctional facility found a handwritten note in Woodward's cell with the names and addresses of Jackson's sisters.

The state charged Woodward with two counts of conspiracy to commit first-degree murder against the Dakota County Attorney and the district court judge who presided over his 2007 drug case, as well as conspiracy to commit first-degree assault against the confidential informant from the 2007 case. *See* Minn. Stat. §§ 609.185(a)(1), .175, subd. 2(2), .221, subd. 1, .175, subd. 2 (2008). During trial, Woodward testified that Jackson coerced and intimidated him, and he alleged entrapment. Jackson testified about his interactions and conversations with Woodward. The prison investigator and a police detective testified that the recorded conversations between Woodward and Jackson substantiated Jackson's account of his previous conversations with Woodward.

The district court granted a judgment of acquittal on the count of conspiracy to commit first-degree murder against the district court judge, but permitted the other two conspiracy counts to be determined by the jury. The jury acquitted Woodward on the count of conspiracy to commit first-degree assault against the confidential informant, but convicted Woodward of conspiracy to commit first-degree murder against the Dakota County Attorney. The district court sentenced Woodward to 192 months' imprisonment, consecutive to the prison term that he was already serving. This appeal followed.

D E C I S I O N

I. Jury Instructions

Woodward contends that the district court plainly erred by not instructing the jury that it must unanimously decide which overt act or acts that Woodward committed to carry out the conspiracy. Because each of the four overt acts alleged here were alternative means to prove the element "in furtherance of the conspiracy," we affirm Woodward's conviction. *See State v. Ayala-Leyva*, ___ N.W.2d ___, ___, 2014 WL 2013325, at *7 (Minn. App. May 19, 2014).

Minnesota law states that "[w]hoever conspires with another to commit a crime and in furtherance of the conspiracy one or more of the parties does some overt act in furtherance of such conspiracy" is guilty of the crime of conspiracy. Minn. Stat. § 609.175, subd. 2(2). The district court accordingly instructed the jury that "[t]he second element of count 1[conspiracy to commit murder] is that the defendant did one or more of the overt acts alleged and did so with the purpose of furthering the conspiracy."

The district court then listed four alleged overt acts, which included: 1) preparation and delivery to Jackson of a map concerning the county attorney's neighborhood; 2) providing specific information to Jackson about the county attorney's time and route of travel, and suggested locations for the attack and disposal of the weapon; 3) payment of $2,500 to Woodward's attorney; and, 4) Woodward's receipt of the addresses of Jackson's sisters. The district court gave a general unanimity instruction that "each juror must agree with [the] verdict. Your verdict on each charge must be unanimous."

Woodward did not object to the district court's jury instructions so our review is under the plain-error standard. *State v. Hayes*, 831 N.W.2d 546, 555 (Minn. 2013) (stating that unobjected-to jury instructions are reviewed for plain error). Plain error requires that the appellant show "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002).

Applying this standard and a recently issued decision of this court, *Ayala-Leyva*, 2014 WL 2013325, we conclude that the district court did not err, much less plainly err, when instructing the jury concerning overt acts. *Ayala-Leyva* involved a single ongoing conspiracy between Ayala-Leyva and multiple co-conspirators to distribute methamphetamine. *Id.* at *1. The state presented evidence of at least twenty overt acts that it alleged were committed in furtherance of the conspiracy by Ayala-Leyva or his co-conspirators. *Id.* at *5. Like Woodward here, Ayala-Leyva contended that the district court erred when it failed to instruct the jury that the overt acts "were themselves

elements of the conspiracy offense, and not alternative acts or means of establishing the overt-acts element of the offense." *Id.*

Citing with approval conspiracy cases from other jurisdictions, the *Ayala-Leyva* court stated that "a jury need not unanimously agree on which of many overt acts has been committed in furtherance of a conspiracy, because the element consists of '*an* overt act, not a *specific* overt act' committed in furtherance of the conspiracy." *Id.* (quoting *People v. Russo*, 25 P.3d 641, 647 (Cal. 2001)). This distinction means that a jury need not unanimously decide "which of several possible sets of underlying brute facts make up a particular element" or "which of several possible means the defendant used to commit an element of the crime." *Richardson v. United States*, 526 U.S. 813, 817, 119 S. Ct. 1707, 1710 (1999); *see also State v. Crowsbreast*, 629 N.W.2d 433, 439 (Minn. 2001) (holding that jurors were not required to unanimously agree which of several possible acts satisfied the "past pattern of domestic abuse" element in case involving first-degree domestic abuse homicide).

The district court properly instructed the jury that, to convict Woodward on conspiracy to commit first-degree murder, it must find that he "did one or more of the overt acts alleged and did so with the purpose of furthering the conspiracy" and that its verdict needed to be unanimous. *See* Minn. Stat. § 609.175, subd. 2(2); Minn. R. Crim. P. 26.01, subd. 1(5). Because each of the alleged four overt acts provided an alternative way to prove the element in furtherance of the crime of conspiracy, or a "brute fact" to support an element of the offense, we conclude that the district court's jury instructions

on conspiracy and unanimity were consistent with Minnesota law. *See Ayala-Leyva*, 2014 WL 2013325, at *7.

Even if we were to determine that the district court's instructions contained an error, the error was not plain. As stated in *Ayala-Leyva*, "Given the 'cloudy' or 'unsettled' state of the law, as recognized even in the unpublished cases cited by appellant,[1] the district court's decision regarding the wording of the jury instruction was not plain error." *Id.*

Finally, Woodward cannot show that the jury instructions prejudiced him. The jury convicted Woodward after being presented with Jackson's testimony, Jackson and Woodward's recorded conversations, the map Woodward created of the county attorney's neighborhood, a security video of Woodward creating the map, and documents supporting Woodward's payment plan to Jackson, including the addresses of Jackson's sisters and the $2,500 check to Woodward's attorney for "future legal work." With this strong documentary and physical evidence, Woodward cannot show that the district court's jury instructions affected the jury's verdict. *See Strommen*, 648 N.W.2d at 688.

[1] Similarly, Woodward cites two unprecedential cases to support his position. *See State v. Womack*, No. A06-2283, 2008 WL 1795584, at *6–7 (Minn. App. Apr. 22, 2008) (reversing a conspiracy conviction when the jury was not told it had to unanimously agree on which overt act was committed); *State v. Cobbins*, No. A05-1617, 2006 WL 3719462, at *2–3 (Minn. App. Dec. 19, 2006) (concluding that the failure to properly instruct the jury that it had to unanimously agree on an overt act was reversible error), *review denied* (Minn. Feb. 20, 2007). These cases are not persuasive because neither presents similar facts. The overt acts here involved only one murder plot with Woodward conspiring with one other person, Jackson. Woodward was the only person on trial for conspiracy and he was personally involved in each of the alleged four overt acts.

For these reasons, Woodward's claim fails the plain-error test, and we affirm his conviction.

II. Alleged Prosecutorial Misconduct

Woodward contends that "the state interfered with the jury's role by asking its witnesses to offer their opinion about . . . legal conclusions." Specifically, Woodward claims that the prosecutor improperly used witnesses to argue whether the co-conspirator testimony from Jackson was corroborated and whether Woodward completed the conspiracy before Jackson went to the police. For the reasons stated below, Woodward's claims lack merit.

In reviewing claims of unobjected-to prosecutorial misconduct, we apply a modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (citing *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). To meet this test, the appellant must establish that the misconduct amounted to error and that the error was plain. *Id.* An error is plain "if [it] contravenes case law, a rule, or a standard of conduct." *Id.* (quotation omitted). If plain error is established, the state has the burden to show that it did not prejudice the appellant's substantial rights. *Id.* This burden is satisfied if the state can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Ramey*, 721 N.W.2d at 302. "Finally, if all three prongs . . . are satisfied, the court determines whether to address the error to ensure fairness and integrity in judicial proceedings." *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010).

Police officers may testify to "subjects that fall within the ambit of their expertise in law enforcement[,]" *State v. Carillo*, 623 N.W.2d 922, 926 (Minn. App. 2001), *review*

denied (Minn. June 19, 2001), but may not testify to "legal conclusions or terms of art." *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990). "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704.

A. Co-conspirator Testimony

A "conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Minn. Stat. § 634.04 (2008). The district court properly instructed the jury on the substance of this statute.

At trial, the prosecutor asked several questions of two police officers about whether Jackson's statements to them before wearing a recording device were "corroborated" by the later conversations between Jackson and Woodward on July 30 and August 9, 2010. Woodward did not object, and, generally, "a trial court's failure to sua sponte strike or instruct is not reversible error." *State v. Vick*, 632 N.W.2d 676, 687 (Minn. 2001).

In addition, instead of using the word "corroborated," the prosecutor could have asked whether Jackson's previous statements to the police were "confirmed by" or "consistent with" his later recorded conversations with Woodward. As the state correctly notes, none of the questions asked by the prosecutor to the police officers were about the legal sufficiency of Jackson's testimony at trial. The questions and testimony that Woodward now challenges helped to show factually why the police continued their

investigation into the conspiracy. The evidence also was relevant to refute Woodward's entrapment defense and to assess Jackson's credibility. Because the prosecutor's questions did not call for a legal conclusion of whether Jackson's testimony at trial was corroborated by other evidence, we conclude that the prosecutor did not commit misconduct.

B. Testimony Concerning Completion of the Conspiracy, Entrapment, and Withdrawal

To raise an entrapment defense, a defendant must show "by a fair preponderance of the evidence . . . that the government induced the commission of the crime." *State v. Vaughn*, 361 N.W.2d 54, 57 (Minn. 1985). To establish inducement, "the evidence must show that the state did something more than merely solicit the commission of a crime." *State v. Olkon*, 299 N.W.2d 89, 107 (Minn. 1980) (affirming district court's dismissal of entrapment defense when "state merely provided defendant with the opportunity to commit the crime"). For a withdrawal defense to be effective, a defendant must show that the withdrawal occurred *before* an overt act to carry out the conspiracy was committed. *See State v. Liljedahl*, 327 N.W.2d 27, 30 (Minn. 1982) (withdrawal from a conspiracy after an overt act has been committed may shield the defendant from criminal liability for the offense that was the object of the conspiracy but not from liability for the crime of conspiracy).

Because Jackson became a state agent after agreeing to wear a recording device, both parties agree that the state had to prove that Woodward committed the criminal offense of conspiracy to commit murder in the first degree *before* Jackson's recorded

conversation with Woodward on July 30. At trial, the prosecutor asked two police officers several questions about whether, based on Jackson's statements to them and the recorded conversations between Jackson and Woodward, Woodward and Jackson's "plan" was completed before Jackson and Woodward's first recorded conversation on July 30. The witnesses responded affirmatively.

Notably, the prosecutor never asked the police officers whether the crime of conspiracy was completed before July 30. The crime of conspiracy requires an agreement to commit a criminal act *and* an overt act in furtherance of the agreement. *See* Minn. Stat. § 609.175, subd. 2. Because the prosecutor only asked the police officers about whether Woodward and Jackson had a plan to murder the Dakota County Attorney before July 30, the prosecutor did not elicit testimony on "when the conspiracy was complete," as Woodward alleges. Even assuming that it was improper for the prosecutor to elicit this testimony, however, Woodward does not cite any relevant statutory authority or case law to support his contention that this error was plain error.

The prosecutor also asked an officer whether Jackson's statements and the recorded conversations showed that Woodward tried to withdraw from the conspiracy. Woodward objected, and the district court sustained his objection. As a result, the officer did not answer these questions, and no testimony was elicited that could have affected the outcome of the trial. Because Woodward has not shown that the prosecutor committed misconduct that amounted to plain error, we affirm Woodward's conviction.

III. Pro Se Arguments

A. Leg Restraints

Woodward contends that he was unfairly prejudiced by being shackled in the presence of the jury. Because no evidence suggests that the restraint placed on Woodward's leg was visible to the jury, we disagree.

"Requiring a criminal defendant to appear in shackles or restraints is an inherently prejudicial practice that is constitutionally permissible only when 'justified by an essential state interest specific to each trial.'" *State v. Shoen*, 578 N.W.2d 708, 713 (Minn. 1998) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568–69, 106 S. Ct. 1340, 1346 (1986)). Use of restraints carries a risk of prejudice only when they are visible to the jury. *See State v. Hogetvedt*, 488 N.W.2d 487, 489 (Minn. App. 1992) ("The use of restraints in the presence of a jury is inherently prejudicial because it risks impermissibly influencing the jury's judgment and denying defendant a fair trial.").

Woodward appeared at trial wearing a device attached to his leg that was designed to restrict his movements if he ran or made a sudden motion. The leg brace was concealed beneath his pant leg with only the bottom bracket potentially visible. The record shows that the district court and counsel took great care to ensure that the jury would not be aware of the security device and that Woodward would not be seen in custody by the jury. Because the device never activated to restrict Woodward's motion and was concealed from the jury, we conclude that Woodward was not prejudiced by having to wear the leg brace.

B. Ineffective Assistance of Counsel

Woodward alleges that his counsel was ineffective by failing to timely interview or investigate potential witnesses. We conclude that Woodward received effective assistance of counsel.

To prevail with an ineffective-assistance-of-counsel claim, a "defendant must affirmatively prove that his 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.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2068 (1984)).

Woodward cites his counsel's pretrial statements that counsel was planning to interview potential defense witnesses to claim that his attorney failed to conduct an adequate investigation of his case. But Woodward does not identify any specific witnesses that his counsel neglected to interview. Nor does Woodward explain how investigating unidentified witnesses would have altered the outcome of his trial. Because Woodward did not meet either element of the *Strickland* test, we reject his argument.

C. Prison Clothing

Woodward claims that he was unconstitutionally required to appear in front of the jury in prison clothing. This contention is without merit.

The Fourteenth Amendment bars the state from requiring a defendant "to stand trial before a jury while dressed in identifiable prison clothes[.]" *Estelle v. Williams*, 425 U.S. 501, 512, 96 S. Ct. 1691, 1697 (1976). No constitutional violation occurs, however,

if the defendant's clothes do "not bear any markings identifying them as jail clothes[.]" *State v. Hill*, 256 N.W.2d 279, 280 (Minn. 1977).

On the first day of jury selection, Woodward's counsel objected to the prison-issued clothing that Woodward was wearing, a grey t-shirt, pants bearing the size insignia "XL," and grey pull-on shoes with faded grey socks. The district court noted that no markings identified his clothes as jailhouse clothing. With the district court's permission, the prosecutor provided a grey suit coat and a sweater for Woodward to wear. Although Woodward said that "I wouldn't want any of [the jurors] to see me this way," and his counsel agreed, saying, "I'm not happy with this outfit," nothing in the record shows that Woodward's clothing was identifiable to the jury as prison garb. Moreover, Woodward only wore the objected-to clothing for the first day of jury selection and wore street clothes for the duration of the trial. We accordingly reject Woodward's claim.

Affirmed.