STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1618

State of Minnesota,
Respondent,

vs.

Christina Louise Sayers,
Appellant.

Filed December 30, 2008
Affirmed
Stauber, Judge

Ramsey County District Court
File No. K3064590

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, Ramsey County Government Center West, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Stauber, Judge; and

Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

STAUBER, Judge

Appellant challenges her convictions for aggravated robbery and assault, arguing that (1) the only eyewitness, her ex-boyfriend, made inadmissible allegations about her character during his trial testimony; (2) she received ineffective assistance of counsel at trial; (3) a neighbor's testimony was hearsay; and (4) her conviction rested solely on circumstantial evidence. Because the eyewitness's testimony was not inadmissible character evidence, review of trial counsel's effectiveness is outside the scope of the record, and the claims of hearsay and circumstantial evidence are not persuasive, we affirm.

FACTS

Around 7:30 p.m. on December 4, 2006, Officer Felicia Reilly, of the St. Paul Police Department, responded to a 911 call. J.R., calling from his neighbor's phone, told the 911 operator that he had been beaten and robbed in his apartment.

Earlier that evening, appellant Christina Sayers, J.R's ex-girlfriend, had appeared at his apartment and asked if she could spend the night. When J.R. told her she could not, she asked if she could leave her backpack inside while she ran to the store to buy cigarettes. While she was gone, J.R. went to the apartment of his neighbor, F.C., to borrow her cordless house phone. F.C. and J.R. shared a common wall between their apartments, and J.R. did not have a phone of his own. F.C. asked J.R. if she could borrow a cigarette. He told her that he did not have any but that appellant went to buy

some so he would give F.C. one when appellant returned. F.C. told him that when she heard appellant return she would come over and get a cigarette, and get back her phone.

About ten minutes later, F.C. heard a knock at J.R.'s door, followed shortly by a "boom, boom, boom, boom, boom, boom, boom." She heard a man's voice, which she did not recognize, followed by a woman's voice, which she recognized as that of the appellant. F.C. then noticed the light on her phone base was flashing, which meant it was ringing. When no one answered the phone and she did not hear anything else from J.R.'s apartment, she went to check on him and retrieve her phone. When J.R. opened the door she discovered him bleeding, his eyes swollen shut, and his house "tore up."

When Officer Reilly arrived on the scene she was met by F.C. F.C. told her that she had heard two people come up the stairs to J.R.'s apartment and recognized the female's voice as "Christina." F.C. said that she heard banging and bumping noises followed by silence. She told Officer Reilly that when she went to check on J.R. she found him injured.

Upon entering J.R.'s apartment, Officer Reilly found J.R. with head injuries, a deep gash above his right eye, eyes swollen shut with heavy bruising, and bleeding facial wounds. Officer Reilly observed blood on the bedroom floor and the living room rug. J.R. identified the two people who assaulted him as appellant and her brother. J.R. told Officer Reilly that they came to his apartment and knocked on the door. He opened the door slightly, but when he would not let them enter they forced their way inside and beat him. J.R. told Officer Reilly that appellant hit him several times in the head with a stick wrapped with tape that was wider than a broomstick. He also said that her brother struck

him in the head with his fists and kicked him, approximately 10 to 15 times. He told Officer Reilly that appellant took his pain medications and his wallet. Among the items in his wallet was a money order for his rent in the amount of $214.

Appellant pleaded not guilty and demanded a jury trial. The jury found her guilty of aiding and abetting first-degree aggravated robbery, Minn. Stat. §§ 609.245, subd.1, .05, subd.1 (2006), aiding and abetting second-degree assault, Minn. Stat. §§ 609.222, subd.1, .05, subd.1 (2006), and aiding and abetting third-degree assault, Minn. Stat. §§ 609.223, subd.1, .05, subd.1 (2006). Appellant was sentenced to 58 months in prison, the presumptive sentence for first-degree aggravated robbery.

D E C I S I O N

I. Inadmissible character evidence

Generally, evidence regarding a defendant's character is inadmissible unless the defendant puts her character at issue. Minn. R. Evid. 404(a)(1). Appellant's counsel did not object to J.R.'s statements during trial. Where counsel fails to object to an error at trial, this court applies the plain-error standard of review. Minn. R. Crim. P. 31.02; *see also State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (applying the plain-error standard to unobjected-to admission of testimony regarding other crimes). The plain-error standard requires that there be (1) error; (2) that is plain; and (3) the error must affect the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The third prong is satisfied if the error was prejudicial and affected the outcome of the case. *Id*. at 741. If all three prongs are satisfied, this court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial

proceedings. *Id*. at 740. An error is plain if it is clear or obvious under current law. *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997).

Appellant challenges three statements that J.R. made during his testimony: a statement about her being a "prostitute," a reference to "her behaviors," and a statement that "whenever she drinks, she [gets] mean." Appellant claims that the statements were inadmissible character evidence and the trial court's error in allowing the statements was plain. The first statement was made in response to a question about when J.R. saw appellant that evening. J.R. testified that she showed up at his apartment the evening of the incident looking for a place to stay:

> Q: And did you agree to have [appellant] come stay with you?
> A: No, I didn't.
> Q: Why not?
> A: We had a No-Contact Order. And we had, I had put her out. I ended the relationship, because she was a prostitute and I wasn't going along with that. I couldn't deal with that in our relationship.

The second statement was a continuation of the same line of questioning:

> Q: So, at any rate, she showed up at your apartment that night?
> A: Right.
> Q: Wanted a place to stay. And you told her what?
> A: I said, you know, basically that what I had said many times before, you know, is that it was over. And you know, because of her behaviors and the way we're, what we're going through. And there was no sense in it.

J.R. further testified that when appellant left her backpack in his apartment while she went to the store to buy cigarettes, he went to F.C.'s apartment to borrow her phone since he did not have one in his apartment:

> Q: Did you talk to your neighbor [F.C.] after the [appellant] left to get cigarettes?
> A: Yes, I did. And I went and got her phone.
> Q: Why did you do that?
> A: Because I didn't feel right. Something you know, she just, I smelled alcohol on her breath. And whenever she drinks, she got mean. And I just want the phone for, you know, in case of whatever.

This line of questioning was intended merely to establish why appellant was at J.R.'s apartment that evening, the nature of their relationship and why he was unwilling to let her stay. Since his testimony was given not to prove appellant's bad character but to help illuminate her relationship with him, it is not character evidence. *See State v. Diamond*, 308 Minn. 444, 448, 241 N.W.2d 95, 99 (1976). Even if the statements were prejudicial and inappropriate, it was not the responsibility of the trial court to strike this testimony sua sponte because to do so would call more attention to the statements. *See State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001) (concluding that absent an objection or advance opportunity to consider the admissibility of a witness's testimony, a trial court's failure to sua sponte strike the testimony or to provide a cautionary instruction did not constitute plain error). Because the three brief statements merely helped to establish the relationship between appellant and J.R., they were properly admitted by the district court.

II. Ineffective assistance of counsel

In her pro se supplemental brief, appellant argues that her attorney failed to object to the improper character testimony at trial and did not use the information she provided him with to aid her defense. The record is wholly inadequate for direct review of these assertions.

An appeal from conviction "is not the most appropriate way of raising an issue concerning the effectiveness of the trial counsel's representation because the reviewing court does not have the benefit of all the facts concerning why defense counsel did or did not do certain things." *State v. Hanson*, 366 N.W.2d 377, 379 (Minn. App. 1985). "This issue is more effectively presented in a postconviction proceeding under Minn. Stat. §§ 590.01-.06." *Id*. Appellant's claim that her attorney did not use information that would aid her defense is outside the scope of the record and thus not reviewable here.

Additionally, when alleging ineffective assistance of counsel

> [t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'

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, 2064, 2068 (1984)). Appellant has not presented any evidence that her trial counsel's representation fell below an objective standard of reasonableness.

III. Hearsay testimony

Appellant also argues in her pro se brief that since the next-door neighbor, F.C., was not an eyewitness to the altercation, her testimony should be excluded as hearsay. A hearsay argument is not applicable here, because F.C. was testifying from her own personal observation and was not testifying to an out-of-court statement by a declarant that was being used to prove the truth of the matter. Minn. R. Evid. 801. Minnesota Rule of Evidence 602 provides that a witness is competent to testify as long as there is sufficient evidence that the witness has personal knowledge of the matter. F.C. heard several loud noises indicating a scuffle through the wall of her apartment and testified as to her firsthand knowledge of the incident. Her testimony did not include any hearsay, and she was competent to testify. Her testimony is admissible.

IV. Circumstantial evidence

Appellant's final pro se argument is that she is entitled to a new trial because the prosecution provided no physical evidence on the essential elements of the offense and that her conviction rests on circumstantial evidence. Circumstantial evidence is "[e]vidence based on inference and not on personal knowledge or observation," or "[a]ll evidence that is not given by testimony." *Black's Law Dictionary*, 576 (7th ed. 1999). The state presented eyewitness testimony by the victim that appellant assaulted him, testimony of a neighbor who overheard the assault and placed appellant at the scene, testimony of an individual who purchased the victim's stolen money order from appellant, and testimony of a doctor who said that the victim's injury was consistent with

being struck by some sort of board or stick. The evidence presented was not circumstantial evidence.

Affirmed.