STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1194

State of Minnesota,
Respondent,

vs.

Kanchan Jung Khadka,
Appellant.

Filed August 5, 2013
Affirmed
Cleary, Judge

Lyon County District Court
File No. 42-CR-11-1101

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Rick Maes, Lyon County Attorney, Tricia Zimmer, Assistant County Attorney, Marshall, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Cleary, Judge; and Smith, Judge.

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

CLEARY, Judge

Appellant challenges his conviction of first-degree burglary under Minn. Stat. § 609.582, subd. 1(a) (2010), arguing that the district court abused its discretion by

limiting his questioning of the victim; that he received ineffective assistance of counsel; and that the jury returned legally inconsistent verdicts. We affirm.

FACTS

In the early-morning hours of September 9, 2011, A.M., A.S., and V.D. were watching television at A.M. and V.D.'s apartment in the 500 block of Village Drive in Marshall. Someone knocked on the door of the apartment, V.D. answered, and a fight broke out inside the door. A.S. and A.M. ran toward V.D. and saw four men hitting him. By the time they arrived at the door, V.D. was on the ground and bleeding from the eye. The four men hitting V.D. were appellant Kanchan Khadka, G.T., T.T., and R.T. A.S. and A.M. pushed the men out of the apartment and then called 911 to report the incident. Following the 911 call, Marshall Police Department officers were dispatched to the apartment. When the officers arrived, A.S. led them to an apartment in the same complex where T.T. lived and where the four men were at the time. Appellant and R.T. were standing outside of the apartment smoking, and the officers arrested them. The officers also arrested G.T. and T.T., who were in an apartment upstairs.

In January 2012, appellant was charged with one count of first-degree burglary under Minn. Stat. § 609.582, subd. 1(a), one count of first-degree burglary under Minn. Stat. § 609.582, subd. 1(c) (2010), one count of first-degree assault under Minn. Stat. § 609.221, subd. 1 (2010), and one count of third-degree assault under Minn. Stat. § 609.223, subd. 1 (2010). A jury trial was scheduled for March 2012.

Prior to trial, appellant filed several motions in limine. He requested an order allowing his counsel to cross-examine V.D. "regarding a pending civil suit, including a

letter from [V.D.'s] civil attorney stating that financial settlement would improve [appellant's] position in the pending criminal case." He also requested an order allowing his counsel to introduce into evidence, through V.D. or V.D.'s counsel, M.G., "(1) the letter discussed . . . requesting a financial settlement and (2) a [voicemail message] from [M.G.] to [appellant's counsel] stating that [appellant's] charges could be possibly eliminated if he were to provide a financial settlement to [V.D.]"

The court issued an order allowing appellant to question V.D. to establish bias, but reserved ruling on whether appellant could question V.D. about the contents of the letter. The court also reserved ruling on appellant's motion to introduce the letter or the voicemail message into evidence. In its memorandum supporting the order, the court noted that the "correspondence from counsel to counsel, or communication from counsel to counsel does little to assist the jury in understanding the witness' bias" and observed that "[i]f witnesses establish that [V.D.] was the victim of a significant physical assault, the witness' bias would seem obvious." Finally, the court stated that "[b]oth the letter and voicemail [message] appear to add no specific information as to the practical issue of bias."

The court and counsel also had an off-the-record chambers discussion regarding the motions in limine on the morning that trial began. In response to an order from this court, the district court would later file a statement detailing that discussion. During the discussion, the court clarified proper areas of cross-examination of V.D. Areas that were identified as proper included whether a civil claim against appellant by V.D. existed, whether V.D. had retained counsel regarding that claim, and whether V.D. intended to

commence a civil lawsuit, if necessary, to pursue that claim. The court also noted in its statement that "[n]o ruling was made on whether or not [M.G.] could testify. It was clear that until [V.D.] had testified, a ruling on that point would be premature. Counsel were told that [M.G.'s] testimony was unlikely unless [V.D.] denies having a claim, having an attorney, or possible litigation." Finally, the court noted that appellant's attorney "understood that it was his responsibility to bring [the issue of M.G.'s testimony] before the [c]ourt if he felt, after [V.D.]'s testimony, that testimony by [M.G.] was needed in order to establish the issue of the bias."

At trial, V.D. testified and was cross-examined by appellant's counsel. On cross-examination, the following exchange took place:

> Q: Now, uh, you have hired a lawyer, right?
> A: In the civil case?
> Q: Uh, on the civil case, yes.
> A: Yes. Yeah.
> Q: Yeah. And that lawyer, uh, is seeking monetary damages against [appellant], is that right?
> A: We were thinking about a civil case – fighting a civil case, but we can't because I'm an international student.
> Q: Okay.
> A: I don't have that privilege or maybe you can say rights.
> Q: Okay. You, uh, went to an attorney though, right?
> A: Yes.
> Q: Okay. Do you know if that attorney contacted [appellant]?
> PROSECUTOR: Objection to relevance, Your Honor.
> THE COURT: Overruled at this point.
> A: Who did he contact?
> Q: Yes
> A: He contacted everyone – all the four of those people; four or three.
> Q: The civil – the civil attorney contacted [G.T.], right?
> A: Not [G.T.] because [G.T.] was already in jail. He was not out on bail.
> Q: Okay. [T.T.]?

A: Yes.
Q: And [R.T.]?
A: Actually, as far as I know. [R.T.'s] lawyer he didn't reply to my civil law – my civil lawyer at any time.
Q: [Appellant], though – your civil lawyer contacted [appellant] through me?
A: Yes.
Q: And you talked to your civil lawyer about that, right?
A: Not a lot. But when I came to know I could not file a civil lawsuit –
Q: Okay.
A: I just gave up. I was not; no because I decided to contact a civil lawyer because of all my hospital bills and initially my insurance company rejected the bills and I was, like, in bank trouble because I cannot pay $25,000 – $30,000 bills at any time of my life.

Appellant's counsel did not, at any time during V.D.'s testimony, renew his motion to cross-examine V.D. regarding the contents of the letter, nor did he renew his motion to introduce the letter or the voicemail message through V.D. or M.G.

The jury found appellant guilty of one count of first-degree burglary and found him not guilty on the remaining counts. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by limiting the areas on which he would question V.D. to establish bias. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W2d 201, 203 (Minn. 2003) (citation omitted). "Subject to the [district] court's right

to reasonably limit questioning, the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness by revealing to the jury the possible biases and ulterior motives of the witness being cross-examined." *State v. Pride*, 528 N.W.2d 862, 865 (Minn. 1995) (quotation omitted). "Whether the [district] court abused its discretion in restricting a defendant's attempted cross-examination that is aimed at showing bias turns on whether the jury has sufficient other information to make a discriminating appraisal of the witness's bias or motive to fabricate." *State v. Lanz-Terry*, 535 N.W.2d 635, 641 (Minn. 1995) (quotation omitted).

The court determined that appellant would be allowed to cross-examine V.D. about three topics: (1) whether a civil claim against appellant by V.D. existed; (2) whether V.D. had retained counsel with regard to the civil claim; and (3) whether V.D. intended to commence a lawsuit, if necessary, to pursue that claim. The court noted in its ruling on the motions in limine that the "correspondence from counsel to counsel, or communication from counsel to counsel does little to assist the jury in understanding the witness' bias." The court indicated that it was unlikely to allow M.G. to testify unless V.D. denied having a claim, having an attorney, or possible litigation. Appellant's attorney elicited testimony from V.D. that he had retained an attorney "[i]n the civil case," and that he had pursued the possibility of civil litigation against appellant. Although V.D. testified that he did not believe that he could file a civil claim because he was an international student, he did not deny pursuing the option. V.D.'s testimony demonstrates, beyond the inherent bias of a victim, V.D.'s specific bias or interest in the outcome of the criminal case as it related to the possible civil proceeding. Because the

jury had sufficient information to make a discriminating appraisal of V.D.'s bias or motive to fabricate, the court did not abuse its discretion by ruling that bias could be established through these three areas of inquiry.

II.

Appellant next argues that he was denied effective assistance of counsel because his trial counsel failed to renew the motion to call M.G. The United States and Minnesota Constitutions guarantee a defendant the right to reasonably effective assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *Schleicher v. State*, 718 N.W.2d 440, 445–47 (Minn. 2006). An ineffective-assistance-of-counsel claim involves mixed questions of law and fact and is reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

The reviewing court analyzes an ineffective-assistance-of-counsel claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Id.* An appellant "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*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068). "We need not address both the performance and prejudice prongs if one is determinative." *Patterson v. State*, 670 N.W.2d 439, 442 (Minn. 2003).

"An attorney's performance is substandard when the attorney does not exercise 'the customary skills and diligence that a reasonably competent attorney would [exercise] under the circumstances.'" *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (*Leake I*) (alteration in original) (quoting *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999)). "Matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts." *Leake I*, 737 N.W.2d at 536. A defendant has the burden of proof to rebut the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007).

The Minnesota Supreme Court has repeatedly held that trial preparation, determining what objections to make, and determining how to cross-examine witnesses are matters of trial strategy that will not be second-guessed by a reviewing court. *See State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (holding that failure to vigorously cross-examine a witness and failure to object to vouching testimony were matters of trial strategy and were not to be reviewed for competency); *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) ("What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence."); *State v. Lahue*, 585 N.W.2d 785, 789–90 (Minn. 1998) (holding that "[p]articular deference is given to the decisions of counsel regarding trial strategy" and that "[w]hich witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of the trial counsel") (quotation omitted).

The district court indicated that it was unlikely to allow M.G. to testify unless V.D. denied having a claim, having an attorney, or possible litigation. Appellant claims that V.D. "denied that he, through his lawyer, had actively and repeatedly attempted to obtain a monetary settlement from appellant before his criminal trial." In actuality, V.D. admitted that he had retained counsel and was "thinking about a civil case" against appellant because he could not pay his medical bills. V.D. also admitted that his attorney had contacted attorneys representing T.T. and R.T., as well as appellant's counsel. V.D.'s testimony demonstrated his interest in the outcome of the criminal case. Because V.D.'s bias had already been established, it was a trial strategy not to renew the motion to call M.G. to testify, and we will not review this strategy for competency. Because appellant's ineffective-assistance-of-counsel argument fails on the first prong of the *Strickland* analysis, we need not address the second, prejudice prong. *Patterson*, 670 N.W.2d at 442.

III.

Finally, appellant argues that the jury returned legally inconsistent verdicts because it found him guilty of one count of first-degree burglary under Minn. Stat. § 609.582, subd. 1(a), and acquitted him of one count of first-degree burglary under Minn. Stat. § 609.582, subd. 1(c).

"The question of whether verdicts are legally inconsistent is a question of law," which is reviewed de novo. *State v. Leake*, 699 N.W.2d 312, 325 (Minn. 2005) (*Leake II*). "Verdicts are legally inconsistent when proof of the elements of one offense negates a necessary element of another offense." *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

Generally, a defendant who is found guilty of one count of a multi-count complaint "is not entitled to a new trial or dismissal simply because the jury found him not guilty of the other count, even if the guilty and not guilty verdicts may be said to be logically inconsistent." *State v. Newman*, 408 N.W.2d 894, 898 (Minn. App. 1987) (citing *State v. Juelfs*, 270 N.W.2d 873, 873–74 (Minn. 1987), *review denied* (Minn. Aug. 19, 1987)). "It is clear that the jury in a criminal case has the power of lenity—that is, the power to bring in a verdict of not guilty despite the law and the facts." *State v. Perkins*, 353 N.W.2d 557, 561 (Minn. 1984). "[T]he focus is not upon the inconsistency of the acquittals, but upon whether there is sufficient evidence to sustain the guilty verdict." *Nelson v. State*, 407 N.W.2d 729, 731 (Minn. App. 1987) (citing *United States v. Powell*, 469 U.S. 57, 67, 105 S. Ct. 471, 478 (1984)), *review denied* (Minn. Aug. 12, 1987).

While the verdicts here may be logically inconsistent, they are not legally inconsistent. Proof of the elements of first-degree burglary under § 609.582, subd. 1(a), does not negate proof of any of the elements of first-degree burglary under § 609.582, subd. 1(c). Generally, legally inconsistent verdicts occur when a jury returns multiple guilty verdicts on offenses with conflicting intent requirements. *See, e.g., State v. Moore*, 458 N.W.2d 90, 94 (Minn. 1990) ("We are unable to reconcile the jury's findings that the defendant caused the death of his wife with premeditation and intent and at the same time caused that death through negligence or reckless conduct."); *see also Leake II*, 699 N.W.2d at 326 (noting that "all of the cases in which this court has applied the [rule that jury verdicts finding a defendant guilty of both first- and second-degree murder are not legally inconsistent] have involved situations where the defendant alleged inconsistences

between multiple *guilty* verdicts"). There were not multiple guilty verdicts here; it appears the jury simply exercised lenity in acquitting appellant of the second burglary count.

Affirmed.