STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1332

Stephanie Necole Luellen, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 25, 2013
Affirmed
Halbrooks, Judge

Dakota County District Court
File No. 19HA-CR-09-2346

David W. Merchant, Chief Appellate Public Defender, Michael Wallace Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

James C. Backstrom, Dakota County Attorney, Heather D. Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's denial of her petition for postconviction relief. She argues that (1) her conviction of first-degree aggravated robbery must be reversed because the amount of force used during the offense was no more than required for simple robbery; (2) she is entitled to a new trial because the prosecutor engaged in prejudicial misconduct by eliciting inadmissible witness testimony and failing to prepare state witnesses for trial; and (3) the district court erred in denying her request for a jury instruction on the lesser-included offenses of theft and assault. We affirm.

FACTS

P.S. has muscular dystrophy, cannot use his arms and legs, and requires a 24-hour personal-care attendant for help with basic tasks such as eating and bathing. P.S. hired appellant Stephanie Necole Luellen for sexual services. During the course of their business relationship, the two became friends. From time to time, Luellen would visit P.S., bring him food, and watch movies with him.

On April 6, 2009, Luellen unexpectedly arrived at P.S.'s apartment, and P.S. buzzed her in. When Luellen entered, P.S.'s personal-care attendant, J.B., went to another room to give Luellen and P.S. privacy. Luellen mentioned to P.S. that she has a friend who wanted to meet him, but P.S. said that he did not want any company. Luellen then left the room and went to the bathroom. Several minutes later, P.S. heard Luellen walk down the hallway and the sound of the apartment door being unlocked. A man entered the apartment and covered P.S.'s eyes, nose, and mouth with his hands. Luellen

asked P.S. where his money was located. When P.S. tried to answer, the man pushed down on P.S.'s nose and mouth, inhibiting P.S.'s ability to breathe. This caused P.S. pain and made him feel faint. Luellen again asked for P.S.'s money. When he tried to respond, the man twisted P.S.'s head to the side, causing P.S. pain. P.S. was unable to respond to Luellen. But because Luellen was familiar with the two places that P.S. kept his wallet, she eventually located it. According to P.S., Luellen took about $500 from the wallet and some marijuana that was nearby.

After Luellen and the man left the apartment, P.S. yelled to J.B., and J.B. called the police. Officer Mark Hetherington responded to the incident. Several days later, Detective Jeffrey Pfaff conducted a recorded telephone interview with Luellen in which she denied having been at P.S.'s apartment on April 6. Following this incident, P.S.'s medical condition worsened.

Luellen was charged by amended complaint with first-degree aggravated robbery. At trial, Officer Hetherington testified that when he responded to the incident P.S. appeared "very upset" and added that "it made [him] feel bad . . . that something like that would occur." After the audio recording of Detective Pfaff's telephone interview with Luellen was played for the jury, Detective Pfaff testified that he knew Luellen "was lying" during that conversation when she denied being at P.S.'s apartment on the day of the incident. On cross-examination, he opined that Luellen was "as guilty as the guy."

Luellen's trial defense was that she did not know that her accomplice, who she identified as her pimp, planned to steal from P.S. She testified that she went along with the robbery, and later lied to Detective Pfaff, out of fear of being hurt by her pimp. At

the end of trial, Luellen requested that the jury be instructed on assault and theft—lesser-included offenses of simple robbery. The district court denied the request. The jury found Luellen guilty of first-degree aggravated robbery and the lesser-included offense of simple robbery.

Luellen petitioned for postconviction relief, arguing that (1) the state did not prove that her accomplice inflicted bodily harm on P.S., (2) the prosecutor engaged in prejudicial misconduct by eliciting inadmissible testimony from Officer Hetherington and Detective Pfaff, and (3) the district court erred by refusing to instruct the jury on the elements of theft and assault. The postconviction court rejected each of Luellen's arguments and denied her petition for relief. This appeal follows.

D E C I S I O N

I.

In reviewing a postconviction court's decision to grant or deny relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). The decision of a postconviction court will not be reversed absent an abuse of discretion. *Perry v. State*, 595 N.W.2d 197, 200 (Minn. 1999).

The crime of simple robbery prohibits (1) the taking of personal property from the person or in the presence of another, (2) accompanied by the use or threatened use of force against that person, (3) to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property. Minn. Stat. § 609.24 (2008). First-degree aggravated robbery is a robbery committed by a person

who (1) is armed with a dangerous weapon or (2) inflicts bodily harm on another. Minn. Stat. § 609.245, subd. 1 (2008). Bodily harm is statutorily defined as "physical pain or injury, illness, or any impairment of physical condition." Minn. Stat. § 609.02, subd. 7 (2008).

Luellen seeks reversal of her conviction of first-degree aggravated robbery on the ground that the force that her accomplice used was no more than what was necessary to accomplish the taking of P.S.'s property. Luellen's argument is contradicted by the evidence. There was ample testimony to support a finding that Luellen's accomplice inflicted bodily harm on P.S. Furthermore, given P.S.'s extreme physical limitations and the fact that Luellen knew where P.S. kept his wallet, little force or threat of force was required to overcome P.S.'s resistance or to compel his acquiescence to the taking. While covering P.S.'s face was arguably necessary to overcome ability to scream for help, pushing on P.S.'s nose and mouth to the point of causing pain, faintness, and restriction of breath and twisting his neck was conduct in excess of what was required to locate and abscond with the wallet. As such, the conduct of Luellen and her accomplice meets the statutory definition of first-degree aggravated robbery.

II.

Luellen argues the prosecutor engaged in prejudicial misconduct by eliciting inadmissible testimony at trial and by improperly preparing the state's witnesses. We apply a plain-error analysis when examining alleged prosecutorial misconduct to which no objection was made at trial. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Under that test, there must be plain error that affects the defendant's substantial rights.

Id. Attempting to elicit or actually eliciting clearly inadmissible evidence may constitute prosecutorial misconduct. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). A prosecutor has a duty to prepare a witness before trial to avoid inadmissible or prejudicial statements. *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003).

Luellen asserts that the prosecutor engaged in misconduct when Officer Hetherington testified, in response to a question concerning P.S.'s condition following the robbery, that he felt bad "that something like that would occur." No objection to this testimony was made at trial. While we agree that this testimony was objectionable, we disagree that the prosecutor elicited it. The prosecutor's question concerning the victim's demeanor was in no way calculated, or anticipated, to evoke sympathy for the victim. We also disagree with Luellen's contention that this objectionable remark reveals the prosecutor's failure to sufficiently prepare Officer Hetherington for his testimony.

Luellen also argues that it was prejudicial misconduct for the prosecutor to elicit testimony about her credibility and for failing to prevent opinion testimony concerning her culpability. A witness cannot "vouch for or against the credibility of another witness." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). Likewise, a witness's opinion about the accused's guilt may deprive him of a fair trial. *See State v. Hogetvedt*, 623 N.W.2d 909, 915-16 (Minn. App. 2001), *review denied* (Minn. May 29, 2001).

Detective Pfaff testified on direct examination that he knew that Luellen "was lying" to him during their phone interview about whether she was at P.S.'s apartment on April 6. On cross-examination, he opined that she was "guilty." No objection to this testimony was made. Although Detective Pfaff's remarks were objectionable, there is no

evidence that they were caused by prosecutorial misconduct. As a result, there is no basis for us to conclude that the prosecutor either sought to elicit vouching testimony or failed to properly prepare Detective Pfaff for testifying at trial.

III.

Luellen also challenged the district court's refusal to instruct the jury on theft and fifth-degree assault, lesser-included offenses of simple robbery. Although we review the denial of a requested lesser-included-offense instruction under an abuse-of-discretion standard, where the evidence warrants such an instruction, the district court must give it. *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005). The evidence warrants a lesser-included-offense instruction when "1) the lesser offense is included in the charged offense; 2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and 3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *Id.* at 598. In making this determination, the district court must view the evidence in the light most favorable to the party requesting the instruction. *Id.*

At trial, Luellen conceded that a robbery occurred and that she participated in it. But she disputed her liability as an accomplice, arguing that she was pressured into aiding and abetting her pimp. Based on her defense theory, and viewing the evidence in the light most favorable to her, there are rational grounds for acquitting Luellen of simple robbery. But based on the defense theory, there is no rational basis for convicting her of theft or assault. According to Luellen, the only issue for resolution at trial was her liability as an accomplice. The evidence and her theory did not provide the jury with a

rational basis to acquit appellant of first-degree aggravated robbery and convict her of theft and assault. The district court therefore did not abuse its discretion in denying Luellen's request for a lesser-included instruction.

Affirmed.