**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A06-2388**

State of Minnesota,
Respondent,

vs.

Shane T. Bramer,
Appellant.

**Filed April 22, 2008**
**Affirmed**
**Schellhas, Judge**

Waseca County District Court
File No. CR-06-48

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Paul Dressler, Waseca County Attorney, Waseca County Courthouse, 307 North State Street, Waseca, MN 56093 (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Schellhas, Judge.

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

**SCHELLHAS,** Judge

On appeal from his convictions of first-degree burglary, fifth-degree assault, and trespassing after trial by jury, appellant argues that (1) he received ineffective assistance of counsel because his counsel admitted elements of one of the crimes charged and (2) the prosecutor committed misconduct when he referred to appellant as a "vigilante." Because appellant acquiesced in his counsel's trial strategy and because we find no prosecutorial misconduct, we affirm.

## FACTS

In the early morning hours of June 11, 2006, appellant and a group of others went to W.H.'s apartment to confront him about the alleged sexual assault of one of appellant's neighbors. W.H. was asleep and was awakened by the sound of people entering his apartment. Appellant admitted that he entered the apartment without permission and testified that two other people beat W.H., that he hit W.H. only once, and that no knives were involved. Others testified that appellant hit W.H. multiple times.

After law enforcement was summoned to the scene, a sheriff saw appellant, learned that he had an outstanding warrant, and arrested him on the warrant. At the police station, W.H. identified appellant as one of the people who attacked him.

Appellant was charged with first-degree burglary and second-degree assault and was tried before a jury. During his opening statement, appellant's counsel stated that appellant would admit that he entered the apartment and that he hit W.H. Counsel told the jury that appellant acknowledged that what he did was wrong but that the conduct

amounted only to trespassing and fifth-degree assault, not first-degree burglary and second-degree assault.

In closing argument, the state argued that appellant became a "vigilante" when he went to the apartment. In his closing argument, appellant's counsel stated that there was vigilantism, admitted that appellant had entered the apartment and hit W.H., and asked that the jury show compassion and convict appellant of the offenses to which he admitted guilt: trespassing and fifth-degree assault. Appellant's counsel also depicted W.H. as a person guilty of serious wrongdoing and told the jury that those seeking justice needed "clean hands" and that W.H. did not have clean hands. In rebuttal, the state argued that even unsympathetic individuals are entitled to the protection of the laws and that the proper way to punish someone is through the justice system. The jury found appellant guilty of first-degree burglary, trespassing, and fifth-degree assault and acquitted him of second-degree assault. This appeal followed.

## D E C I S I O N

### I.

Appellant claims he received ineffective assistance of counsel during his trial. No decision was made by the district court on this issue and appellant asks this court to consider this claim in this direct appeal. Appellant bears the burden of proof in this claim. *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003).

A defendant who complains of ineffective assistance of counsel must first show that counsel made errors and then show that the errors affected the outcome of the

proceeding. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)).

To prove errors that amount to ineffective assistance of counsel, appellant must prove that "his counsel's performance was so deficient that it fell below an 'objective standard of reasonableness.'" *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (quoting *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064). "[I]n Minnesota, an attorney acts within the objective standard of reasonableness when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *Dukes*, 621 N.W.2d at 252 (quotations omitted).

Appellant argues that his counsel's performance fell below this standard because his counsel conceded that appellant was guilty of trespassing and fifth-degree assault, which inherently admitted guilt to the more serious burglary charge. "[A] criminal defense attorney cannot admit his client's guilt to the jury without first obtaining the client's consent to this strategy." *State v. Wiplinger*, 343 N.W.2d 858, 860 (Minn. 1984); *see also Dukes*, 621 N.W.2d at 252-54 (considering admission that undermined defendant's "mere presence" argument and conceded "most of the elements necessary to convict" the defendant of the more serious charges in the case). Appellant's counsel effectively admitted guilt to the first-degree burglary charge when he admitted appellant's guilt to two lesser-included offenses (trespass and fifth-degree assault), because trespass and assault are the elements of burglary. Generally, this amounts to

error under *Wiplinger* and *Dukes* unless appellant consented. No explicit consent is apparent from the record.

Even if appellant's counsel conceded guilt without appellant's explicit consent, "no error will be found if the [appellant] acquiesced in the strategy." *Dukes*, 621 N.W.2d at 254 (citing *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992)). Under *Dukes*, the inquiry is not simply whether counsel admitted guilt without the client's explicit consent but whether counsel did so and the client acquiesced in the strategy. *Id*.

In *Provost*, counsel admitted his client's conduct "from his opening statement through his closing argument" without objection by the defendant, and the Minnesota Supreme Court concluded that such a record demonstrated that the defendant acquiesced in the strategy. *Provost*, 490 N.W.2d at 97. Similarly, in this case, appellant's counsel admitted his client's conduct "from his opening statement through his closing argument." The transcript reveals use of the strategy at the beginning of the trial in counsel's opening statement, in the middle of the trial in discussions with the district court about jury instructions and at the end of the trial in closing argument.

As in *Provost*, appellant never objected to the admissions; in fact, appellant testified about his conduct. On cross-examination, appellant admitted entering the apartment without permission:

> PROSECUTOR: You went into [W.H.'s] apartment, isn't that true?
> DEFENDANT: Yes, I did.
> PROSECUTOR: And he did not give you permission to come into his apartment, did he?
> DEFENDANT: No, he did not.

The transcript also reveals that appellant admitted punching W.H.:

> DEFENSE COUNSEL: What did you do after he grabbed your jacket?
> DEFENDANT: I pushed his hand off me and punched him in the eye.
> DEFENSE COUNSEL: Did you have to do that?
> DEFENDANT: No, I did not have to do that.

Through his testimony, appellant admitted conduct consistent with his attorney's opening statement. These admissions are further evidence of acquiescence in the strategy of admitting appellant's conduct and asking the jury to hold appellant liable only for lesser-included offenses. Because appellant never objected to his counsel's admissions and admitted the conduct during his testimony, he acquiesced in counsel's trial strategy. Because appellant acquiesced to his counsel's trial strategy in admitting his commission of lesser-included offenses, he has failed to show that his counsel made errors or that the errors affected the outcome of the proceeding. Therefore, we find no error.

**II.**

Appellant claims that several statements made by the prosecutor during his closing argument amount to prosecutorial misconduct. Because appellant did not object to these statements at trial, we apply a plain-error analysis. "[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (citations omitted). The defendant has the burden to demonstrate both that error occurred and that the error

was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "[W]hen the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden would then shift to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Id.* Employing the supreme court's formulation of the prejudice standard in the prosecutorial-misconduct context, "the state would need to show that there is no 'reasonable likelihood that the absence of the misconduct in question would have a significant effect on the verdict of the jury.'" *Id.* (quoting *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005)).

"An error is plain if it was clear or obvious." *Id.* (quotation omitted). "Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *Id.*

Appellant claims that the prosecutor's characterization of him as a "vigilante" was error because it was inflammatory, an improper attack on his character, and unfairly prejudicial. In support of his argument, appellant cites *State v. Buggs*, 581 N.W.2d 329, 342 (Minn. 1998) (finding prosecutorial misconduct where a prosecutor called defendant a "coward" but not ordering a new trial); *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997) (finding prosecutorial misconduct where defendant was called a "would-be punk"); and *State v. Merrill*, 428 N.W.2d 361, 372 (Minn. 1988) (finding prosecutorial misconduct where a prosecutor asked the jury to "pass a message" that "we don't approve of vigilante-type" justice). Appellant argues that these cases support his argument that the use of the term "vigilante" in this case was an attack on character, inflammatory, and unfairly prejudicial. But the supreme court did not find reversible error in the cases cited by appellant.

The state argues that in this case, according to the dictionary definition of "vigilante,"[1] the term accurately describes appellant's conduct because he took law enforcement into his own hands and that "vigilante" was used as a descriptive, not a disparaging term. The state further argues that appellant is not to be protected from descriptive or colorful terms used to describe his actions. *See State v. Torres*, 632 N.W.2d 609, 618 (Minn. 2001) (finding "butcher" and "slaughter" were apt descriptions of crime).

Prosecutors are given "considerable latitude" during final argument, and they "are not required to make a colorless argument." *Ives*, 568 N.W.2d at 714 n.1. The prosecutor's use of the term "vigilante" was descriptive and was not unfair, particularly in light of the "considerable latitude" given to prosecutors during final argument and the fact that they "are not required to make a colorless argument." And appellant's own counsel admitted, without objection by appellant, that there "was vigilantism" and that appellant "[took] matters into his own hands." Where the term "vigilante" was an accurate description and where appellant's counsel used a variation of the term, use of the term by the prosecution was not plain error.

Appellant also argues that it was error to compare the trial rights afforded to him with the rights not afforded to W.H. because the comparison called into question appellant's constitutional right to a trial. He also argues that the state's rebuttal argument improperly appealed to the passions and prejudices of the jury by encouraging a

[1] A vigilante is defined as "[o]ne who takes or advocates the taking of law enforcement into one's own hands." *The American Heritage College Dictionary* 1529 (4th ed. 2007).

conviction based on sympathy for W.H. We disagree. During the state's rebuttal, the prosecutor argued, in part:

> The defendant has had the advantage of those rules during this trial. . . . Those are the things that [W.H.] didn't get on June 11. He didn't have an attorney, he didn't have a trial, there was no judge, there was no jury. The defendant and his companions decided that [W.H.] was guilty and they punished him right then and there. They did not afford [W.H.] the same things that the defendant has been afforded. It's time now for justice.

Appellant takes the state's rebuttal argument out of context. A closing argument is to be viewed as a whole, rather than in "selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). Here, the prosecutor responded to the content of closing argument made by appellant's counsel, who argued that W.H. was not a sympathetic character because he had just committed a crime. Appellant's counsel argued, "if you want justice you come to court with clean hands, and [W.H.] does not have clean hands in this case." In response, the state argued:

> Now, there may be a temptation for people who sit where you are sitting to think he got what he deserved. . . . The problem with that argument is that we only have one set of laws in this country. We don't have a set of laws for people who always behave in a respectful manner and another set of laws for people who drink too much and act irresponsibly. We have one set of laws. Everyone is entitled to have their home protected from intruders, even if it's an apartment, even if it's not a very nice apartment. So, in spite of what the defendant has said about [W.H.], please remember that he is entitled to the same protection of law as any other citizen. . . . These are the rules of law. *The defendant has had the advantage of those rules during this trial. . . . Those are the things that* [*W.H.*] *didn't get on June 11. He didn't have an attorney, he*

> *didn't have a trial, there was no judge, there was no jury. The defendant and his companions decided that* [*W.H.*] *was guilty and they punished him right then and there. They did not afford* [*W.H.*] *the same things that the defendant has been afforded. It's time now for justice.*

(Emphasis added.) We do not agree that the state's rebuttal argument impermissibly questions appellant's constitutional right to a trial.

Because appellant has failed to demonstrate that the prosecutor's use of the term "vigilante" constitutes prosecutorial misconduct, or that the prosecutor's argument was otherwise improper, appellant has failed to show that these were plain error.

**Affirmed.**