STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0575

State of Minnesota,
Respondent,

vs.

David Isaiah Grady,
Appellant.

Filed June 10, 2008
Affirmed
Crippen, Judge*

Hennepin County District Court
File No. 06-01-5968

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

Michael O. Freeman, Hennepin County Attorney, Jean E. Burdorf, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Eric L. Newmark, Birrell & Newmark, Ltd., 333 South Seventh Street, Suite 2270, Minneapolis, MN 55402 (for appellant)

Considered and decided by Toussaint, Chief Judge; Connolly, Judge; and Crippen, 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

CRIPPEN, Judge

Appellant David Grady claims entitlement to a new trial following his conviction as an accomplice after the fact to first-degree murder. He contends that the district court erroneously conducted an in camera hearing before denying his discovery motion and that the prosecutor committed misconduct during her closing argument. Because appellant has failed to establish that he was denied access to relevant evidence and because the only questionable argument the prosecutor made during summation was not prejudicial, we affirm.

FACTS

In March 2006, appellant was charged by indictment with first-degree murder, second-degree murder, and as being an accomplice after the fact to an unknown shooter for the murder of Shedrick Turner. The murder occurred on February 10, 2006, at approximately 1:30 p.m. in front of Digital City Records, a business owned and operated by appellant, located on West Broadway Avenue in Minneapolis. Officers responding to the dispatch entered Digital City shortly after they arrived on the scene and found appellant and three other men inside. The officers discovered a computer with a surveillance video at Digital City, which permitted investigators to review the surveillance taken on February 10.

At trial, a Minneapolis police homicide investigator narrated the surveillance compilation. The compilation begins with Shedrick Turner and three friends inside Digital City. Shortly after the compilation begins, a fight breaks out between two of the

men inside the store, who punch and hit Shedrick Turner's friend, Terrell Bias. Appellant keeps Shedrick Turner's other friends at bay with a pistol, and Shedrick Turner and his friends retreat from the store. Another of appellant's companions then walks out the front door carrying Shedrick Turner's jacket, which he throws into the street. After he comes back inside, appellant unlocks the door to let a customer out, and then re-locks the door. A third companion then unlocks the door to admit the person who later shoots Shedrick Turner.

Shedrick Turner re-enters the store approximately 20 minutes later through the front door, joined by friends and family. One of appellant's companions raises his gun and points it at Bias. The shooter takes that gun from appellant's companion, puts a round in the chamber, and points the gun at Shedrick Turner. Shedrick Turner runs out of the store, with the shooter behind him. The surveillance video shows appellant going to the back of the store after Shedrick Turner and the shooter leave the store.

Moments later, the shooter enters the store, hands appellant the murder weapon, and puts on his jacket. Appellant gives the weapon back to the shooter after the shooter has his jacket on. Appellant reaches into his pocket and gives the shooter another item as he gestures toward the front door. The shooter puts on a hat that appellant hands him, which he was not wearing when he first entered the store, and goes out the back door. Appellant watches the shooter as the shooter leaves the back door of the store. Shortly thereafter, police officers arrive at Digital City.

Turner's brother testified at trial that when he accompanied the victim to Digital City, it was to try to resolve the earlier physical altercation. He admitted that he thought

there might be a fight. He testified that his brother asked the men inside the store if they wanted to take the fight outside. The men inside the store responded by drawing guns. This witness saw a man, whom he identified as the person who killed his brother, come from the back of the store. The shooter spoke with one of the men in the store near the CDs, then took a gun from one of appellant's companions. The shooter chambered a cartridge, cocked the gun, and pointed it toward the door. Then appellant said something like, "Go on and shoot them" to the shooter. The Turners and the others with them backed out of the store, but the shooter followed them. The brother heard two shots as he ran out of the store. He turned and saw Shedrick Turner lying face down on the sidewalk.

In an interview with police, appellant claimed that he did not see anyone go out of the back door after the shooting. He told police that he did not see the shooter and did not know who he was. Appellant denied that anyone he was associated with followed Shedrick Turner out of the store.

After other charges were dropped, the jury convicted appellant of being an accomplice after the fact to first-degree murder, defined as aiding another person he knew or had reason to know had committed a criminal act, by destroying or concealing evidence of that crime, providing false or misleading information about that crime, or obstructing the investigation and prosecution of that crime. Minn. Stat. § 609.495, subd. 3 (2006). The court sentenced appellant to 86 months' imprisonment.

D E C I S I O N

1. Discovery

Before trial, appellant moved for discovery of any information that the police department or the state had in its possession relating to the identity of the alleged shooter. Because this request was for information related to an ongoing police investigation, the court decided to hold an in camera interview with Sergeant Folkens. The court allowed the prosecutor to be present at that interview, but not defense counsel, contending that defense counsel's presence could create an ethical dilemma, depending on what information was disclosed. No record was made of the interview.

The day after the in camera interview, the court stated on the record that it had learned there was no information that currently existed that would be responsive to appellant's discovery motion. The information available to the police came from potential informants, and the court explained that potential informants do not have to be disclosed under Minn. R. Evid. 901 because they do not have sufficiently specific information about the crime scene or about the identity of the alleged shooter. The court also explained that to disclose the information available to the Minneapolis Police Department would compromise the department's ongoing investigation, would not lead to relevant evidence with respect to the accomplice-after-the-fact charges before the court, and would not tend to exonerate the defendant.

Appellant claims that he is entitled to a new trial because the district court improperly conducted the in camera examination. When a district court undertakes an in camera review, "[a] record shall be made of the proceedings." Minn. R. Crim. P. 9.03,

subd. 6. Appellant argues that the rule's record requirement mandates the district court make a contemporaneous record of the in camera proceedings and THAT the court's failure to do so here was a per se violation compelling reversal. Appellant also challenges the district court's exclusion of him and his counsel from the in camera review.

A district court has broad discretion in granting or denying discovery requests and its decision will not be reversed absent a clear abuse of discretion. *State v. Renneke*, 563 N.W.2d 335, 337 (Minn. App. 1997). "There is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846 (1977). Due process does require that criminal defendants have the right to put before a jury evidence that might influence the determination of guilt. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 1000 (1987).

When a defendant is seeking confidential information, the defendant must make a plausible showing that the confidential information that he seeks would be material and favorable to his defense. *Id.* at 58 n.15, 107 S. Ct. at 1002 n.15. The Minnesota Supreme Court has expressly held that a defendant must make some showing before in camera review is granted. *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987). And the court has noted that the review of confidential material is a discovery option only after certain prerequisites are met; here again, there must be a showing that the information sought would be material and favorable to the defense. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992).

As the state suggests, even if this court were to determine the district court erred in failing to make a record of the in camera proceedings in the absence of appellant and his attorney, there is no prejudice in these circumstances unless it is demonstrated that appellant is entitled to discovery of the information subject to the in camera review. The record made after the in camera review and the record we have before us on appeal do not permit us to reach the conclusion that appellant was entitled to the discovery that he sought—the information related to the identity of the shooter or the identity of potential informants.

The district court expressly stated that it did not believe that the information that the police department had from potential informants was relevant to appellant's defense. Nothing in the record shows that any issue appellant raises on appeal would be colored by any observation that the shooter might have made. He points to nothing in the record and made no offer of proof suggesting that the evidence of the shooter's identity or the identity of potential informants would be material and favorable to his defense.

The discovery that appellant sought had no bearing on the accusation against him. He was charged with aiding the shooter, who he knew or had reason to know had committed a criminal act, by destroying or concealing evidence of that crime, providing false or misleading information about that crime, or obstructing the investigation or prosecution of that crime. Minn. Stat. § 609.495, subd. 3 (2006). Whether or not appellant knew the shooter, there is nothing in the record to permit a conclusion that actual identification information would have been material. *See Hummel*, 483 N.W.2d at 72 (determining that the defendant was not entitled to in camera review because he did

not meet his burden to prove that the confidential material he sought could be related to his defense or even to his case).

The surveillance video showed appellant going to the rear of Digital City after the shooter followed the victim out of the store. We can infer from that fact that appellant knew the shooting occurred. When the shooter came back inside, appellant held the murder weapon for the shooter while the shooter put on his jacket and a hat that appellant gave him, which he had not entered the store with. Appellant then watched the shooter leave through the back door of Digital City. When appellant was interviewed by police, he told them that the shooter did not come back inside Digital City after the shooting and that he did not see anyone leave Digital City's back door after the shooting. The surveillance video admitted at trial demonstrated these statements to police were not true and that appellant was concealing evidence of the crime, providing false information, and obstructing the police investigation of the murder.

Moreover, although the district court's explanation of the evidence may not suffice as a substitute for a contemporaneous record of the in camera hearing, it serves to ratify the conclusion that the request for discovery was unjustified. The court explained that it interviewed Sergeant Folkens for 30-40 minutes and learned that there was currently no information that would be responsive to appellant's motion. The court stated, "There were no witnesses known to the Department, who would be able to say they were present at the scene, and who saw the alleged shooter, and were able to identify the shooter, based on an on-scene identification." The court explained that Minneapolis police knew nothing of the identity of the shooter until September 2006, when potential informants

talked to police. The district court ruled that because the individuals were only potential informants, they did not have to be disclosed under rule 9. The district court added that to disclose the information available to the department would compromise an ongoing investigation, would not lead to relevant evidence with respect to the counts against appellant, and would also not exonerate him.

At oral argument, appellant contended that the identity of the shooter was relevant to intent. This contention was not raised at the district court and is arguably now waived. Moreover, there is nothing in the record to suggest that the course of action that was the basis for the aiding-after-the-fact charge was unintended, occurred under duress, or was accidental. Any such suggestion is mere conjecture and insufficient to prove that the discovery was material to appellant's defense. Appellant has failed to demonstrate that he was denied access to relevant and material evidence.

2. Argument

After both closing arguments were given, the prosecution gave a rebuttal. During the rebuttal argument, the prosecutor made several statements that appellant now claims belittled his defense and therefore denied him a fair trial. The district court sustained appellant's objection to a portion of the prosecutor's rebuttal. Appellant contends that he is entitled to a new trial because the prosecutor committed misconduct.

When determining whether prosecutorial misconduct occurred during closing argument, this court examines "the closing argument as a whole, rather than just 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). First, this court determines whether there

was misconduct and, if so, whether the misconduct impaired the defendant's right to a fair trial. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). Appellant cites two examples of prosecutorial misconduct during the rebuttal. The first was the prosecutor's statement, while arguing that appellant furnished police with false and misleading information, that he thus chose "[t]o let a murderer run loose. Run in the streets doing God knows what."

Appellant's attorney objected to these statements, and the judge sustained the objection. Prosecutorial misconduct that was objected to is reviewed under the harmless-error standard, and this court will not reverse if the misconduct was harmless beyond a reasonable doubt; "an error is harmless beyond a reasonable doubt only if the verdict rendered was surely unattributable to the error." *Mayhorn*, 720 N.W.2d at 785. We review this allegation of prosecutorial misconduct for harmless error because a prosecutor may not appeal to the passions of the jury. *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995).

Overwhelming evidence of guilt is a factor in determining whether the error complained of had no impact on the verdict. *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997). When it is unreasonable to assume that the jury could have returned any verdict other than guilty, the error was harmless. *State v. Thompson*, 578 N.W.2d 734, 743 (Minn. 1998). In light of the other evidence presented against appellant, we conclude that the verdict was surely unattributable to the prosecutor's error. Surveillance video showed appellant (1) handing the shooter something immediately after Shedrick Turner is murdered, (2) holding the murder weapon for the shooter as the shooter puts on

his jacket, (3) giving the shooter a hat, (4) putting his right hand on the shooter's back, and (5) watching the shooter leave Digital City. Moreover, additional video footage showed the shooter at the store on other occasions shortly before the day of the shooting, sometimes for long periods of time, and with freedom to use parts of the building not evidently open to customers. This evidence makes implausible appellant's claim that the verdict could be ascribed to the prosecutor's misconduct.

The second instance of prosecutorial misconduct that appellant complains of is that the prosecutor called the defense's argument "demeaning," "not fair," and "condescending." Even when considered in isolation, the prosecutor's statements appear to be an express response to a specific statement made by appellant's defense counsel during his summation; appellant's attorney suggested that appellant had not lied to the police because he did not know the full name of the shooter and that in north Minneapolis it is a "part of life" to not know a person's real name. Appellant's attorney said, "It may be foreign to each and every one of you. It may not be how you live your life in the suburbs, but in north Minneapolis he goes by Dreads, people who are close to him only know him as Dreads."

This argument was apparently intended to imply that appellant could not be guilty of obstructing the investigation of the crime because he did not know who the shooter was. The prosecutor alleged that this argument was baseless. A "prosecutor is free to specifically argue that there is no merit to a particular defense in view of the evidence or no merit to a particular argument." *See State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993).

There is a difference between arguing against the merits of a defense and belittling a defense in the abstract: the prosecutor may not state that a particular defense is in a category of defenses that lack merit or are offered in desperation. *See, e.g.*, *id.* (holding that comment by prosecutor that defense attorneys always try to draw attention away from their clients was improper). Prosecutorial comments that specifically attack the defense's main theory are not improper. *See, e.g.*, *State v. Simion*, 745 N.W.2d 830, 844 (Minn. 2008) (holding as proper a prosecutor's comment that the defendant attempted to distract the jury from the criminal issues at trial).

In this instance, the prosecutor was attacking the worthiness of belief of appellant's defense against the charge that he obstructed the police investigation and not attacking the defense in the abstract. Attacks on the specific merits of a defense are permissible. *State v. Griese*, 565 N.W.2d 419, 428 (Minn. 1997).

Because this instance is not misconduct, we do not reach the question of whether we 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). Here, the jury considered appellant's defense and rejected it as inconsistent with the evidence.

Affirmed.