STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1663

State of Minnesota,
Respondent,

vs.

Thorpe Thomas Bradley,
Appellant.

Filed October 20, 2009
Affirmed
Collins, Judge[*]

Wadena County District Court
File Nos. 80-K9-06-000557, 80-K5-06-000345

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Considered and decided by Chief Judge Toussaint, Presiding Judge; Stoneburner, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

Appellant challenges his conviction of second-degree unintentional murder while committing third-degree assault, arguing that the district court abused its discretion by instructing the jury on two causation standards and by admitting relationship evidence. Appellant also asserts he was denied his right to a fair trial because of prosecutorial misconduct and that he received ineffective assistance of counsel. We affirm.

FACTS

Appellant Thorpe Bradley was convicted of second-degree unintentional murder while committing third-degree assault in violation of Minn. Stat. § 609.19, subd. 2(1) (2006). Bradley had previously been involved with the victim's daughter and had two children with her. Bradley maintained an ongoing friendship with the victim's family, as did Bradley's father and sister. The families were close and spent a lot of time together doing "a lot of drinking."

The events giving rise to the victim's demise took place over the weekend of September 15-17, 2006. The two families began drinking together at the victim's home on Friday night and continued throughout most of Saturday. The group, which included Bradley, the victim and his wife, and Bradley's father and six-year-old son, ultimately drove in the victim's van to a river beach area. Later, the victim was sitting in the van with Bradley's father when Bradley approached the door and "smarted off" to the two men. Bradley claims that the victim hit him in the mouth, grabbed him, and tried to hit him again, so Bradley jabbed the victim one time on the cheek. Bradley's young son

testified that he saw the victim (his grandfather) attempt to back-hand Bradley through the window of the van, and that Bradley hit the victim once in the face and kicked him in the head, or tried to kick him but missed. A confidential informant who was later incarcerated with Bradley testified that Bradley admitted that he had punched and kicked the victim.

The victim acted normally after the incident, joking about the fight and continuing to drink. After making a few stops, including one at which the victim may have fallen, some of the group returned to the victim's home at about 10:00 p.m. Because no one could rouse the victim, they left him in the van, which was apparently not uncommon. The next morning, Bradley's sister called 911 after she discovered that the victim was unresponsive, his face was swollen and bruised, and there were fluids coming out of his mouth and nose. Bradley was arrested, and the victim died in the hospital the next day.

At trial, the jury heard testimony from two medical experts. The state's expert, Michael McGee, M.D., had performed the autopsy and described multiple bruises on the victim's check and three separate contusions on his scalp. Because of the large area of swelling on the left side of the face, Dr. McGee concluded that the victim was likely struck on that side of his face at least once and probably more. There was also hemorrhaging on the brain, and the brain had shifted from right to left. Dr. McGee testified that one punch to the left check could have accelerated or contributed to the victim's death and that the cause of death was "[m]ultiple traumatic injuries due to an assault."

The defense expert, Lindsey Thomas, M.D., agreed that there were multiple traumatic injuries, but disagreed that they were all necessarily caused by an assault. Rather, Dr. Thomas concluded that the facial injuries could have been caused by a single blow and that the chin injury could have resulted from being kicked or from falling. Dr. Thomas noted that the victim had a pre-existing condition that caused him to bleed easily, making it difficult to evaluate the significance of an injury.

Both experts found that the victim had liver disease, hepatitis C, and chronic alcoholism. They also agreed that there was evidence of a previously inflicted subdural hemorrhage.

A jury found Bradley guilty of second-degree unintentional murder while committing a third-degree assault, and he was sentenced to 216 months' imprisonment. This appeal followed.

D E C I S I O N

I.

A district court has "considerable latitude" in selecting language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explain the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

The district court's jury instruction on causation was as follows:

> Causation is established by proof that the defendant's conduct was a substantial factor in bringing about [the victim's] death, but it need not be the sole cause.

> The pre-existing medical condition of [the victim] at the time of the assault does not excuse the death if the assault accelerated or contributed to the death, even if the pre-existing medical condition may have made him more vulnerable to injury or death; even if [the victim] would have inevitably died from the pre-existing medical condition.

Bradley does not dispute the first sentence of the instruction, but he challenges the second sentence, arguing that the district court abused its discretion in selecting the language for the instruction by misstating the law, leading the jury to erroneously believe that causation could be established if Bradley's actions accelerated or contributed to the victim's death.

Bradley asserts that the instruction is improper because it is derived from the section of the opinion in *State v. Smith* addressing a sufficiency-of-the-evidence claim. *See* 264 Minn. 307, 320, 119 N.W.2d 838, 848 (1962). But in the case on which Bradley relies, *State v. Moore*, the supreme court's holding dealt narrowly with the need to apply the evidence in a particular case rather than relying on the fact that similar evidence had been found to be sufficient in a previous case. 699 N.W.2d 733, 737 (Minn. 2005). The supreme court's holding was not meant to broadly indicate that language from a sufficiency-of-the-evidence case could not be adopted as a rule of law.

The instruction that was given to the jury here is supported by Minnesota caselaw. *See Smith*, 264 Minn. at 320, 119 N.W.2d at 847 (stating that "one whose wrongful act hastens or accelerates the death of another or contributes to its cause, is guilty of homicide, though other causes co-operate" (quotation omitted)); *State v. Schaub*, 231 Minn. 512, 520, 44 N.W.2d 61, 65 (1950) (stating that "one whose wrongful act hastens

or accelerates the death of another, or contributes to its cause, is guilty of homicide, though other causes co-operate"); *State v. Torkelson*, 404 N.W.2d 352, 355 (Minn. App. 1987) (holding that "[t]he State must prove that [the defendant's] acts contributed to the death"), *review denied* (Minn. June 25, 1987); 9A *Minnesota Practice* § 49.13 ("A pre-existing physical condition or illness will sometimes be a cause of death, accelerated or aggravated by the defendant's action, which must ordinarily only be shown to be a causal factor."); c*f. State v. Olson*, 459 N.W.2d 711, 716 (Minn. App. 1990) (holding that the district court's instruction that if the "causal chain is not broken by the fact that a physical condition . . . may have made [the victim] more susceptible to injury" did not negate the foreseeability requirement of first-degree manslaughter), *review denied* (Minn. Oct. 25, 1990).

The instruction read as a whole informs the jury that it must find the defendant's actions to be a substantial factor in the victim's death. The jury was not instructed to find Bradley guilty merely if his conduct accelerated or contributed to the death. Rather, the jury was instructed that Bradley's acts are *not excused* by a pre-existing condition so long as his acts accelerated or contributed to the death of the victim.

Bradley further contends that the jury instruction also improperly "highlighted . . . the significance, or lack thereof, of [the victim's] pre-existing medical condition and essentially argued the state's position." Without objection by Bradley, the jury heard substantial testimony about the victim's pre-existing medical condition and how it may or may not have contributed to his death. Given the testimony on this issue, it was within the district court's discretion to instruct the jury about how it should deal with

causation when a pre-existing condition is involved. Moreover, the district court did not instruct the jury on the weight to be given the victim's pre-existing condition in its analysis of causation, nor did it remove the issue from the jury's consideration by stating conclusively that the pre-existing condition does not excuse Bradley from guilt. Instead, the instruction clarified that Bradley was not excused from liability if his conduct "accelerated or contributed to" the death of the victim. Because the instruction does not misstate the law, nor is it confusing with regard to what the jury must determine in order to find Bradley guilty, the district court did not err by giving this instruction.

II.

We review the district court's admission of similar conduct evidence under Minn. Stat. § 634.20 for an abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). Bradley has the burden to establish that the district court abused its discretion and that he was thereby unfairly prejudiced. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

> Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Minn. Stat. § 634.20 (2006). "'Similar conduct' includes, but is not limited to, evidence of domestic abuse, [or] violation of an order for protection." *Id.* "Evidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value." *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn.

1998). "When balancing the probative values against the potential prejudice, unfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

The state introduced evidence regarding two incidents as relationship evidence: (1) a 2001 event in which Bradley grabbed the victim's wife by the throat and the victim intervened by throwing Bradley to the ground and restraining him until police arrived and (2) a 2002 event in which Bradley assaulted the victim's daughter by choking her as she lay on the bathroom floor. The district court ruled that the evidence was relevant "on the issue of intent and motive and shows a strained relationship between [Bradley], the victim . . . and . . . the daughter of the victim."

Bradley contends that the probative value of this evidence was outweighed by its prejudicial effect, arguing that the evidence was not necessary to prove either the likelihood that the current incident took place or intent, which Bradley had admitted. But the jury heard testimony tending to minimize the seriousness of the assault and portray the incident as being part of what Bradley and the victim did for "fun," including Bradley's statements that he "did not put anything on the punch," the group was "having fun, laughing, cracking jokes . . . I mean there was no problem," "we were laughing about it and joking about it," "we do this all the time," and "we weren't even mad at each other." These statements go to Bradley's motive, tending to suggest that he meant only to continue having "fun," not to commit assault. The relationship evidence provides context to what happened here as it demonstrates that Bradley had previously been so

violent with members of the victim's family that it was necessary to summon law enforcement. The evidence, therefore, is probative and is of the type meant to be admitted under Minn. Stat. § 634.20.

The evidence was also not unfairly prejudicial. Although five witnesses described the 2001 event, the victim's wife and daughter had limited memory of the incident, and the officers' testimony was necessary to establish what had occurred and the injuries that resulted. The district court did not abuse its discretion by admitting this evidence.

III.

We will reverse a conviction if prosecutorial error, considered in light of the whole trial, impaired the defendant's fair-trial rights. *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). "If the state has engaged in misconduct, the defendant will not be granted a new trial if the misconduct is harmless beyond a reasonable doubt. We will find an error to be harmless beyond a reasonable doubt only if the verdict rendered was surely unattributable to the error." *Id.* (quotations and citations omitted).

If the defendant failed to object to the misconduct at trial, he forfeits the right to have the issue considered on appeal, but if the error is sufficient, this court may review." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). When the defendant fails to object, prosecutorial misconduct is reviewed under the plain-error standard announced in *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Plain error requires that there be (1) an error; (2) that is plain; and (3) that affects the defendant's substantial rights. *Id.* On the third, or "prejudice" prong, the state now bears the burden of proving that there is no reasonable likelihood that the absence of the misconduct would have a significant effect

on the jury's verdict. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Prosecutorial misconduct affects a defendant's substantial rights if there is a reasonable likelihood, after considering the strength of the evidence against the defendant and the pervasiveness of the improper suggestions, that the absence of misconduct would have had a significant effect on the jury's verdict. *State v. Davis*, 735 N.W.2d 674, 681-82 (Minn. 2007).

Denigrating the defense and misstating the evidence

Bradley argues that the prosecutor committed misconduct by making improper statements during closing argument, thereby depriving him of a fair trial. Specifically, Bradley contends that the prosecutor's references to Bradley's theory of the case as "casting a net of reasonable doubt" and characterizing his expert's testimony as a "non-opinion" constitute misconduct. When evaluating Bradley's contentions, we examine 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).

During closing argument, the prosecutor stated:

> In the defense opening statement [defense counsel] talked about Dr. Thomas. Talked about how she looked at the autopsy that was performed . . . she has an opinion about what took place. But then he begins to kind of cast what I call the net of reasonable doubt, that there's no way to know for sure, it's hard to know. And I think when you get to the non-opinion of Dr. Thomas . . . [s]he can't rule out a fall on this chin injury and she can't rule out a kick.

Although the prosecutor's statements draw attention to Dr. Thomas's inability to pinpoint a direct cause of the victim's death, it is unlikely that the jury would have

believed the prosecutor to be urging the wholesale disregard of Dr. Thomas's opinions during deliberations. Rather, viewed as a whole, the prosecutor's closing argument simply urged the jury to focus on Dr. Thomas's inability to eliminate alternative causes of the victim's injury. It was not improper for the prosecutor to challenge the plausibility of Bradley's defense. As such, Bradley has failed to establish prosecutorial misconduct on this point.

Appealing to jury's passions and prejudices

A prosecutor is not permitted to "appeal to the passions of the jury" during closing argument. *State v. Mayhorn*, 720 N.W.2d 776, 786-87 (Minn. 2006).

> But these restrictions do not preclude all arguments relating to the impact of the crime on the victim. For example, "[i]t is proper for a prosecutor to talk about what the victim suffers and to talk about accountability, in order to help persuade the jury not to return a verdict based on sympathy for the defendant."

Nunn v. State, 753 N.W.2d 657, 662 (Minn. 2008) (quoting *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985)).

Bradley argues that the prosecutor improperly appealed to the jury's passions by stating, "[Bradley's son], with his head barely above the stand here. And it really takes a pretty big man to come in and look at your dad in the eye and tell the world that he did something wrong, and that you saw it." But the jurors knew the age of Bradley's son, and the comment on his height seems unlikely to have had much impact. Although noting how difficult it was for Bradley's young son to testify comes close to an improper appeal to passion, this was a very brief statement within the closing argument, and the

prosecutor quickly moved on to discuss the testimony. Based on the record, the hardship on Bradley's son was not over-emphasized and the prosecutor did not impermissibly appeal to the jury's passions.

The second closing-argument statement at issue was that "[a guilty verdict] is really the only verdict that's appropriate. It's the only verdict that's justice. It wasn't a fair fight that day. The evidence is that it was a pretty brutal beating." There is evidence in the record to support that the fight was not fair given the disparity in the two men's ages and the victim's health problems. There was also testimony from the state's expert that this was a "pretty brutal beating." Again, this was a very brief comment in the midst of a lengthy closing argument, and the prosecutor did not thereby emphasize accountability to such an extent that the jury would be distracted from its proper role. Taking the closing argument as a whole, the prosecutor's disputed statements did not constitute plain error compelling remedial action sua sponte by the district court.

Misstating the law, misleading the jury

Bradley also argues that the prosecutor misstated the law by referring to the "contributed to or accelerated" causation standard, misleading the jury. As discussed in section I, the "contributed to or accelerated" causation standard is supported by Minnesota caselaw; the prosecutor did not misstate the law by referring to this standard.

Bradley's pro se argument that the prosecutor improperly displayed steel-toed boots without introducing them into evidence also fails, as there is no indication of such a display in the record, nor is there testimony that Bradley kicked the victim with the steel-toed boots.

Vouching for witness's credibility

The prosecutor stated in closing argument, "I trust [Bradley's son] over [another witness] to that extent." Defense counsel objected, and following a bench conference the district court instructed the jury "to again be aware that the personal opinion of any of the attorneys or myself concerning credibility—what our opinions are about the testimony is irrelevant. You are to be the sole judge of the testimony in this case."

The state concedes that the prosecutor improperly vouched for Bradley's son's credibility. But the comment was made regarding the son's recollection concerning an issue about which there was little dispute and was not likely to have had an impact on the jury's ultimate verdict. Therefore, particularly given the immediate objection and the district court's cautionary instruction, the statement did not impair Bradley's fair-trial rights. *See State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007) (noting that jurors are assumed to follow district court's directive); *State v. Robinson*, 604 N.W.2d 355, 361 (Minn. 2000) (stating that cautionary instructions weigh against granting a mistrial).

IV.

Finally, Bradley raises a number of issues in his pro se brief that appear to assert he received ineffective assistance of counsel.

> The 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)). A claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo, particularly when, as here, it was not raised in the district court. *Cf. Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004) (applying de novo standard to postconviction review of ineffective-assistance-of-counsel claim).

Bradley fails to present evidence that his attorney's actions fell below the standard of reasonableness or that the results would have been different but for his attorney's unprofessional errors; nor is there evidence in the record that there was a basis for the arguments that Bradley urges us to consider or that such arguments would have been successful.

Bradley also contends that his trial was unfair because his attorney had a conflict of interest. This conflict was discovered during the trial when one of Bradley's attorneys realized that another client of his had a relationship with the state's confidential-informant witness. Bradley's attorneys initially moved for a mistrial, but before the district court ruled on the motion, the attorneys determined that the trial could continue if Bradley waived the conflict and the attorney ceased representation of the other client. Bradley was questioned on the record regarding his understanding of the conflict, that he had discussed the matter with another attorney who did not have a conflict, and that he was satisfied that his attorney had not taken any actions adverse to his interests. The district court found that Bradley's waiver was "free and knowing and intelligent." Moreover, Bradley had two trial attorneys, and there is no indication that the second

attorney would have been required to cease representation. Although the circumstances are problematic, we defer to the district court's determination that Bradley freely and knowingly waived the conflict of interest.

Affirmed.