STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2258

State of Minnesota,
Respondent,

vs.

Jesse James Forrey,
Appellant.

Filed October 26, 2010
Affirmed
Klaphake, Judge

Ramsey County District Court
File No. 62-CR-08-10147

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Melissa V. Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

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

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

KLAPHAKE, Judge

Appellant Jesse James Forrey challenges the sufficiency of the evidence to support his conviction for first-degree criminal damage to property, Minn. Stat. § 609.595, subd.

1(3) (2008), for throwing a rock through a bank window during the Republican National Convention on September 1, 2008. In his pro se brief, appellant also claims that his trial was unfair because the state failed to inform him of evidence of backpacks worn by him and his accomplice at the time of the crime, thus constituting a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and that his counsel was ineffective. We affirm because we conclude that (1) the evidence was sufficient when two eyewitnesses identified appellant as the person who committed the crime; (2) the prosecution's failure to inform the defense of the backpack evidence was not a *Brady* violation because the evidence was inculpatory rather than exculpatory, and although the infraction constituted a discovery violation, it was harmless because it did not prejudice appellant; and (3) the decision of appellant's counsel not to object to admission of the backpack evidence was strategic and within her discretion, did not prejudice appellant, and did not amount to ineffective assistance of counsel.

D E C I S I O N

Sufficiency of Evidence

On review of a sufficiency-of-evidence claim, this court conducts "a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Yang*, 774 N.W.2d 539, 560 (Minn. 2009) (quotation omitted); *State v. Pendleton*, 706 N.W.2d 500, 511 (Minn. 2005). This court must presume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009).

The first-degree criminal damage to property offense of which appellant was convicted required him to "intentionally cause[] damage to physical property of another without the latter's consent," and that the value of the damage was $1,000 or more. Minn. Stat. § 609.595, subd. 1(3). Appellant attacks inconsistencies in the testimony of two eyewitnesses to the crime. Brian Nelson was working across the street from the First National Bank Building in St. Paul on September 1, 2008, and observed appellant and his accomplice Dustin Matchett Morales throw rocks through a bank window. Scott Olson was riding his bike up to the First National Bank building just as appellant threw a rock at the bank window. Appellant claims that inconsistencies in Nelson's and Olson's trial testimony mandate a reversal of his conviction. The alleged testimonial inconsistencies included that: (1) Olson misidentified Morales as the offender who had red, curly hair;[1] (2) Nelson described the men as wearing sweatshirts with hoods while Olson said they were wearing long-sleeved shirts; (3) Nelson placed the offenders in the street, while Olson said that they were on the sidewalk; and (4) Olson placed the incident as occurring after 3:00 p.m., while Nelson said it occurred about noon.

Other evidence strongly supports a guilty verdict, however. Nelson testified that he clearly saw the faces of appellant and Morales, and he described in detail how he saw them each throw a rock at the bank window and break glass. Nelson further testified that the crime occurred "right in front of me. There was nothing [else] to draw my attention. I was just looking." Although Nelson initially incorrectly testified that Morales, rather than appellant, had red hair, when shown a photo of Morales, Nelson agreed that Morales

[1] Appellant is 6'2" tall and has red, curly hair. Morales is 5'2" tall and has dark hair.

had dark hair but that he was the man who was with appellant on September 1st. Further, Olson twice testified that he was "100 percent" certain that he saw appellant throw a rock at the bank window and that Morales was with appellant when he threw the rock.

"We have long recognized that the credibility of a witness is an issue for the jury, as the jury is in the best position to make such a determination." *State v. Thao*, 649 N.W.2d 414, 421 (Minn. 2002). Further, "[t]he jury is free to accept part and reject part of a witness's testimony." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006). Although there were some discrepancies in the witnesses' identifications of appellant, they each expressed with certainty that they saw appellant throwing a rock through the bank window, which was the essential element in question in this case. For these reasons, we reject appellant's sufficiency-of-the-evidence argument.

State's Failure to Disclose Evidence

In his pro se brief, appellant claims that the state improperly failed to disclose the existence of two backpacks that contained incriminating evidence.[2] The backpacks were worn by appellant and Morales at the time of the crime. Under Minn. R. Civ. P. 9.01, subd. 1, 1(3)(d), the prosecution has a duty to "allow access at any reasonable time to all matters within the prosecutor's possession or control that relate to the case," including "tangible objects." The state failed to disclose the backpacks to appellant before trial as required by the rule. Appellant characterizes the disclosure error as a violation of *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97, which makes it a due-process violation for the

[2] The backpacks included clothing that matched the descriptions provided by Nelson and Olson, as well as maps, gas masks, and other equipment, such as protective eyewear, anti-chemical agents, gloves and hats, and bandanas soaked in apple cider vinegar.

prosecution to fail to disclose material evidence favorable to the accused before trial. *See Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 1948 (1999) ("[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued"); *see also* Minn. R. Crim. P. 9.01, subd. 1(6) (codifying *Brady* in criminal rules).

The evidence at issue here is not a *Brady* violation because it is not exculpatory—the evidence was inculpatory and provided circumstantial evidence of appellant's guilt. A non-*Brady* violation of a discovery rule generally does not mandate a new trial without "a showing of prejudice to the defendant." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005).

The extent of any prejudice to appellant from the state's nondisclosure of the backpacks was minimal. The state obtained the backpacks from appellant and Morales, and appellant presumably knew of their existence; appellant acknowledged at trial that he was aware of the items contained in his backpack. Second, two eyewitnesses observed appellant throw a rock through the bank window, and the evidence contained in the backpacks, at most, provided redundant circumstantial evidence of the eyewitnesses' testimony. In light of the eyewitnesses' testimony and appellant's and Morales's admissions that they were at the scene of the crime and that Morales committed a similar crime, there was little prejudice to appellant because of the state's failure to disclose the evidence of the backpacks to appellant. Finally, we also note that this issue was not raised to the district court. *See State v. Finnegan*, 784 N.W.2d 243, 248 n.3 (Minn. 2010)

(stating that issues not raised to district court are generally waived on appeal); *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (same).

Effective Assistance of Counsel

Appellant also claims in his pro se brief that he was denied effective assistance of counsel. A claim of ineffective assistance of counsel requires proof that (1) counsel's performance was deficient such that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) the defendant was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (adopting *Strickland* analysis). The decision not to object at trial is "part of an attorney's trial strategy," however, and such decisions do not constitute ineffective assistance of counsel. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009).

Here, appellant's counsel may have decided not to object to admission of the backpack evidence because she may not have wanted to draw the jury's attention to it, as it was incriminating. Further, even if defense counsel's representation was unreasonable, appellant cannot demonstrate prejudice, which is required to prevail on an ineffective-assistance-of-counsel claim. *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001); *State v. Smith*, 367 N.W.2d 497, 502 (Minn. 1985). For these reasons, we reject appellant's ineffective-assistance-of-counsel argument.

Affirmed.