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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0708

State of Minnesota,
Respondent,

vs.

Carl Augustus Brown,
Appellant.

Filed May 5, 2014
Affirmed
Peterson, Judge

Stearns County District Court
File No. 73-CR-12-2338

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

Matthew A. Staehling, City Attorney, Kirsten A. Lucken, Assistant City Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lynn Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Stauber, Judge.

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

PETERSON, Judge

In this appeal from a conviction of fifth-degree assault, appellant argues that (1) the evidence was insufficient to support his conviction, (2) he received ineffective assistance of counsel, and (3) the verdict was the result of racial bias. We affirm.

FACTS

Appellant Carl Brown and J.R. were acquaintances who lived in the same apartment complex in St. Cloud. In a common room at the complex, there were two televisions available for use by all of the residents. There was an unwritten rule that if a person watching television left the common room for only a short time, that person retained control of the television. But a person who was gone for ten or 15 minutes lost control of the television.

Following an incident in the common room on March 1, 2012, respondent State of Minnesota cited appellant for fifth-degree assault—harm, in violation of Minn. Stat. § 609.224, subd. 1(2) (2012). Appellant requested a jury trial. On the day of trial, respondent amended the citation to include one count of fifth-degree assault—fear, in violation of Minn. Stat. § 609.224, subd. 1(1), and one count of disorderly conduct—brawling or fighting, in violation of Minn. Stat. § 609.72, subd. 1(1) (2012). J.R., appellant, and a police officer testified at trial. The jury found appellant not guilty of fifth-degree assault—fear, and guilty of disorderly conduct and fifth-degree assault—harm. The district court dismissed the count of disorderly conduct as a lesser included offense and imposed sentence for the assault conviction. This appeal followed.

J.R.'s Testimony

J.R. testified that during the afternoon and early evening on March 1, he spent some time in the common room, where appellant and C.K., another resident, were both watching TV. When J.R. left, C.K. and appellant remained in the room watching television, but when J.R. returned around 8:00 p.m., C.K. was the only person in the room, and he had both televisions tuned to the same channel. J.R. had a short conversation with C.K., and C.K. did not mention that he was reserving a television for anyone. When J.R. asked C.K. if he wanted the same station on both televisions, C.K. gave J.R. the remote control and told him to "[g]o for whatever channel."

J.R. sat down in the chair closest to a television and was about to switch the channel when appellant entered the room, dropped some things on a nearby table, and "made a beeline" toward J.R. Appellant was standing "nose to nose" with J.R. as J.R. sat in the chair with the remote control in his right hand, and appellant began screaming at J.R. that he knew that appellant had been watching that television. Appellant took a few steps back, and J.R. stood up. J.R. told appellant that he understood that, because appellant had been gone from the room for so long, appellant had forfeited his right to control the television. J.R. sat back down in the chair, still holding the remote control, and appellant grabbed the remote control from J.R.'s hand. J.R. grabbed the remote, and appellant hit J.R. in his neck and face and cut his lip.

At some point, J.R. stood up, and he no longer had the remote. While J.R. and appellant were both standing, appellant threw several punches at J.R., and one hit his head and caused a bump. J.R. tried to swing back at appellant, but he did not hit him.

The fight ended when C.K. yelled, "That's enough!" Both J.R. and appellant paused, and appellant pointed his finger at J.R. J.R. unsuccessfully attempted to bite off the tip of appellant's finger. The two then walked away from each other. Appellant sat down on a couch, and J.R. called the police. While he waited downstairs for the police to arrive, J.R. called the apartment manager. When the police arrived, J.R. gave a statement and told them that appellant gave him a bump on his head and injured his pinky finger. During the next several days, J.R. discovered that he had a sore arm and a large bruise on his buttocks as a result of the fight.

Appellant's counsel questioned J.R. about the number of times he met with a representative from the prosecutor's office before testifying. When counsel suggested that the prosecution had coached J.R. to use certain words, like "towering over," J.R. stated that those words were his own and explained that the difference between the language of his testimony and his prior statement was due in part to a slight concussion he received in the fight. J.R. also admitted that he did not mention to police the conversation he had with C.K. that he testified about at trial.

Officer Fischer's Testimony

Officer Trent Fischer of the St. Cloud Police Department responded to J.R.'s call. He testified that he met J.R. in the lobby, and J.R. sounded "pretty shook up, worked up" while he talked on the phone with the apartment manager. Fischer noticed a lump forming on the left side of J.R.'s forehead and a small cut on J.R.'s upper lip. Fischer took photographs of the lump on J.R.'s forehead, the cut on his lip, and his right pinky finger. The photographs were entered into evidence at trial.

Fischer spoke briefly with J.R., and then he and another officer spoke with appellant. Fischer perceived appellant's demeanor as "fairly calm," and he did not notice any physical signs of injury. Appellant told Fischer that he and C.K. had been watching a Timberwolves basketball game before he left briefly to get some study materials. When he returned, appellant thought J.R. had changed the channel and was watching wrestling. Appellant appeared upset and told police that J.R. "took a swing at him as he was sitting in front of him in a chair." Appellant also told police that he took the remote control out of J.R.'s hand, J.R. swung at him, and he swung back once at J.R. Fischer testified that J.R.'s injuries were not consistent with what appellant told him had happened.

Appellant's Testimony

Appellant testified that he first went into the common room on March 1 around 8:00 p.m., and C.K. was the only person there when he arrived. C.K. watched one television, and appellant watched the other. Appellant told C.K. that he needed to go to his room and would be back shortly. When appellant returned, he saw J.R. watching the television that appellant had been watching, and he told J.R. that he had been watching the television. When appellant asked C.K. whether appellant had been watching the television earlier, C.K. said, "Yes." J.R. was holding the remote control, and he responded that he had not seen anyone watching the television.

Appellant was upset that J.R. was not following the unwritten rule to return control of the television to a person who left for only a few minutes, and he went up behind J.R. and pulled the remote from his hand. J.R. then came at appellant, began throwing his fists, and hit him. Appellant tried to tell J.R. to relax, and, when that was

not successful, appellant fought back. J.R. then "[r]ealized that he didn't have the upper hand" against appellant and went to call police. Appellant did not follow J.R. and sat calmly while waiting for police to arrive.

Appellant admitted that grabbing the remote control from J.R. was an aggressive move but insisted that he took the remote when J.R. was not looking in order to gain control of the television. When the prosecutor asked appellant whether he told the police that he was hurt, appellant said that he did, but, after being shown a transcript of his statement to police, he admitted that he had agreed with an officer when the officer stated that he did not notice any injuries on appellant.

D E C I S I O N

I.

Appellant argues that the evidence presented at trial is insufficient to establish that he committed fifth-degree assault because the state did not prove that J.R. suffered bodily harm or that appellant intended to cause that harm. One who "intentionally inflicts or attempts to inflict bodily harm upon another" is guilty of fifth-degree assault. Minn. Stat. § 609.224, subd. 1(2) (2012). "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(3) (2012). "'Bodily harm' means physical pain or injury, illness, or any impairment of physical condition." *Id.*, subd. 7 (2012).

The state must prove beyond a reasonable doubt all of the essential elements of the crime with which the defendant is charged. *State v. Pratt*, 813 N.W.2d 868, 873 (Minn.

2012). In considering a claim that the evidence is insufficient to support a conviction, the reviewing court "determine[s] whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Fairbanks*, 842 N.W.2d 297, 306-07 (Minn. 2014) (quotation omitted). We must assume that "the jury believed the state's witnesses and disbelieved any contrary evidence," *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009), especially when the resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). "[D]etermining the credibility or reliability of a witness lies with the jury alone." *Buckingham*, 772 N.W.2d at 71. We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the offense charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant argues that J.R.'s testimony was inconsistent and therefore did not establish that appellant intended to harm J.R. Appellant contends that J.R.'s testimony differed from what he told police on the night of the incident and that J.R. used words like "towering" at trial to describe appellant's behavior, words that he had not used before.

J.R. testified that when he tried to take the remote control back from appellant, appellant hit him in his neck and face. He also testified that appellant hit him in the head while both of them were standing. Appellant testified that he grabbed the remote control from J.R.'s hand and did so in order to control the television that J.R. was watching. A

reasonable jury could find that, when appellant hit J.R. in his neck, face, and head, he did so in order to cause physical pain or injury or believed that the punches would cause physical pain or injury. The evidence was sufficient to establish the intent element of fifth-degree assault.

To prove that J.R. suffered bodily harm, the state relied on J.R.'s testimony and the photographs of J.R.'s injuries. Appellant points out that J.R.' trial testimony was not consistent with his statement to police because he testified about bruises on his arm and buttocks that he did not report to police. J.R. testified that he received a bump on his head and an injury to his pinky finger as a result of the fight with appellant, which is what he told police. He also testified that, during the days after the fight, he noticed that he had a sore arm and a large bruise on his buttocks that he did not have before the fight. J.R.'s testimony explained why he did not report the bruises on his arm and buttocks to police; the bruises had not developed when J.R. spoke to police.

The state entered into evidence photos that Officer Fischer had taken of the lump on J.R.'s forehead, the cut on J.R.'s lip, and the pinky finger of J.R.'s right hand. Each of these injuries fits within the definition of "bodily harm" under Minn. Stat. § 609.02, subd. 7.

In reaching its verdict, the jury weighed the conflicting testimony of J.R. and appellant. Under our standard of review, we must assume that the jury believed J.R. and did not believe appellant. The evidence was sufficient to support appellant's conviction of fifth-degree assault.

II.

In his pro se supplemental brief, appellant argues that he received ineffective assistance of counsel. Appellant alleges that his attorney "didn't have [his] best interest at heart," failed to communicate with him before and during trial, did not give an opening statement at trial, and did not offer C.K.'s testimony or a video recording of the incident that was supposed to have been made by a video camera in the building.

To prevail on an ineffective-assistance-of-counsel claim, an appellant must show that "counsel's performance 'fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors.'" *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quoting *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998)). If one prong of this test is dispositive, we need not address the other prong. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

An attorney's representation is reasonable when the attorney "exercise[es] the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Reed v. State*, 793 N.W.2d 725, 733 (Minn. 2010) (quoting *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993)). A strong presumption exists that counsel's performance was reasonable. *Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001).

Appellant contends that his attorney's representation was not reasonable because his attorney did not give an opening statement and did not offer as evidence C.K.'s testimony or a video recording of the events in the common room. An appellate court will generally not review counsel's trial strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). The decision to give an opening statement is part of counsel's trial

strategy. *See Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008) (holding that counsel's conduct in closing argument was trial strategy). The selection of evidence to present to the jury is also a matter of trial strategy. *Opsahl*, 677 N.W.2d at 421. Therefore, we will not review these matters other than to note that nothing in the record indicates that C.K. was available to testify at trial or that the incident in the common room was recorded. The prosecutor told the district court that the state was unable to locate C.K., and appellant presented no evidence that there was a recording device in the common room. Consequently, even if the decision to call C.K. as a witness or to offer a recording as evidence were not considered part of counsel's trial strategy, appellant has not shown that his attorney's conduct was not objectively reasonable.

Appellant also alleges that his attorney did not "have [appellant's] best interest at heart." But this bare allegation is not sufficient to present an ineffective-assistance-of-counsel claim for us to review. *See State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) ("An assignment of error . . . based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection."), *aff'd* 728 N.W.2d 243 (Minn. 2007).

Finally, appellant contends that his attorney failed to adequately communicate with him, noting that he did not learn that a pretrial hearing date had been changed until he attended court on the originally scheduled date for the hearing. Appellant appears to allege that his attorney deliberately did not mail to him, or misdirected, correspondence about the case. The only evidence before the court is appellant's unsubstantiated assertion. This is insufficient to demonstrate that counsel's assistance was ineffective.

See State v. Zernechel, 304 N.W.2d 365, 367 (Minn. 1981) ("Generally, an appeal from a judgment of conviction . . . is not the most appropriate way of raising an issue concerning the effectiveness of the trial counsel's representation, because we do not have the benefits of all the facts concerning why defense counsel did or did not do certain things.").

Because the record does not demonstrate that counsel's performance fell below an objective standard of reasonableness, we reject appellant's ineffective-assistance-of-counsel claim.

III.

Appellant also alleges in his pro se supplemental brief that he "was the only black person in the [court]room" and the jury verdict reflects that he was misjudged "because of [the color] of [his] skin." Appellant has provided only bald assertions that the jury was biased. Because appellant has not cited any evidence in the record to substantiate his claim of jury bias, makes no legal argument and cites no legal authority to support the claim, and prejudicial error is not obvious, we will not consider the claim. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519, 187 N.W.2d 133, 135 (1971) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.").

Affirmed.