STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1083

State of Minnesota,
Respondent,

vs.

Thomas Dwayne Brown,
Appellant.

Filed June 16, 2014
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Dakota County District Court
File No. 19HACR124110

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

James C. Backstrom, Dakota County Attorney, Jessica A. Bierwerth, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Kirk, Judge; and Reyes, Judge.

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

REYES, Judge

In this direct appeal from his conviction, appellant argues in relevant part that (1) the district court failed to instruct the jury that the state had to prove beyond a

reasonable doubt that he "knowingly violate[d]" a domestic-abuse no-contact order (DANCO); (2) a police officer's testimony, recounting the complainant's out-of-court statement that appellant struck her, was inadmissible hearsay and was the only evidence used to convict him of felony domestic assault, infliction of bodily harm; (3) he is entitled to a new trial because defense counsel conceded during closing argument that appellant gave false information to police; and (4) the district court erred by sentencing him on all four counts because they arose from a single behavioral incident. We affirm in part, reverse in part, and remand.

FACTS

This case arises from an incident involving appellant Thomas Dwayne Brown and his girlfriend, E.G., on the night of November 29, 2012. Brown and E.G. were staying at a hotel in Eagan, and both had been drinking alcohol. E.G. was heavily intoxicated and later could not remember many details from the evening. The couple got into an argument, and hotel staff called the police to have Brown removed. When police arrived "an hour or two" later, Brown gave them a false name. Officers interviewed Brown and E.G. separately. Each of them acknowledged their argument but denied a physical confrontation. Police asked Brown to leave the hotel, and he complied.

The officers returned to their squad car, where they ran a computer search for Brown and discovered that he had given a false name and was subject to a DANCO protecting E.G. The officers went back to the hotel room to find that Brown had returned to the room. They arrested him for providing false information and violating the DANCO. Police then conducted a second interview with E.G. This time, E.G. told

police that Brown had threatened to burn her face with a cigarette, that she slapped him, and that he struck her in response. Brown was charged with two counts of felony domestic assault (intent to cause fear and infliction of bodily harm), felony violation of the DANCO, and misdemeanor providing false information to police.

At Brown's jury trial, the state offered the testimony of E.G. and one of the police officers. E.G. could not recall many details about the evening, stating that she was "black[] out" drunk during the evening and could not remember if Brown had struck her. E.G. did testify that Brown threatened to burn her face with a cigarette and that Brown was not supposed to be in contact with her because of the DANCO, of which both she and Brown were aware. The officer testified that E.G. told police that Brown had threatened and struck her. The officer also testified that Brown made unsolicited statements to police acknowledging that he had given false information to them and that he knew of the existence of the DANCO. Brown did not testify. The jury found him guilty on all four counts, and the district court sentenced Brown to 60 months on count I (felony domestic assault, intent to cause fear), a concurrent term of a year and a day on count II (felony domestic assault, infliction of bodily harm), a concurrent term of a year and a day on count III (felony violation of DANCO), and a concurrent term of 90 days on count IV (misdemeanor giving false information to police). This appeal followed.

D E C I S I O N

I. Erroneous jury instruction

Brown argues that he is entitled to a new trial because the district court failed to instruct the jury that the state had to prove beyond a reasonable doubt that Brown

"knowingly violate[d]" the DANCO. *See* Minn. Stat. § 629.75, subd. 2(d) (2012) (providing that a person is guilty of a felony if he "knowingly violates" the order).[1] Brown contends that he thought the contact with E.G. was permissible because E.G. had spent the previous three weeks with him and that this was an issue of fact that should have been submitted to the jury. We disagree.

Using the language of 10 *Minnesota Practice*, CRIMJIG 13.54 (Supp. 2009), the district court instructed the jury as follows:

> The statutes of Minnesota provide that whoever violates a domestic abuse no contact order granted pursuant to the domestic abuse act or similar law of another state and knows of the existence of the order is guilty of a crime.
>
> . . . The elements of a violation of a domestic abuse no contact order are, first, there was an existing court domestic abuse no contact order.
>
> Second, the defendant violated a term or condition of the order when he had in-person contact with [E.G.].
>
> Third, the defendant knew of the existence of the order.
>
> Fourth, the defendant's act took place on or about November 29th, 2012, in Dakota County.

Brown did not object to the district court's instructions to the jury. An unobjected-to, erroneous jury instruction is subject to plain-error analysis. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Under plain-error analysis, Brown must establish (1) an error; (2) that is plain; and (3) that affects his substantial rights. *State v. Griller*,

[1] In 2013, the legislature amended Minn. Stat. § 629.75, subd. 2(d), removing the "knowingly violates" mens rea element.

583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "[F]ailure to properly instruct the jury on all elements of the offense charged is plain error." *State v. Vance*, 734 N.W.2d 650, 658 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). An error affects a defendant's substantial rights if the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741. If the first three prongs of the plain-error standard are satisfied, we then assess whether reversal is required to ensure "the fairness, integrity, or public reputation of judicial proceedings." *State v. Scruggs*, 822 N.W.2d 631, 642 (Minn. 2012) (quotation omitted).

In December 2013, the Minnesota Supreme Court issued *State v. Watkins*, which addresses the omission of the "knowingly violates" mens rea element in the district court's instructions to the jury on a felony DANCO charge. 840 N.W.2d 21 (Minn. 2013). The court held that the omission does not affect a party's substantial rights as a matter of law and specified three factors for consideration in determining the effect of the error, namely "whether: (1) the defendant contested the omitted element and submitted evidence to support a contrary finding, (2) the [s]tate submitted overwhelming evidence to prove that element, and (3) the jury's verdict nonetheless encompassed a finding on that element." *Id*. at 28-29. In *Watkins*, while the defendant knew of the DANCO, he testified that he did not knowingly violate it because the DANCO referred to a person with a different last name and birth date than his girlfriend, so he thought the DANCO did not apply to her. *Id.* at 29. The supreme court expressed its skepticism of this claim,

but because credibility determinations are the function of the fact-finder, it remanded for a new trial, concluding that omission of the mens rea element affected the defendant's substantial rights and that a new trial was required to ensure fairness. *Id.* at 30-31.

Under *Watkins*, the district court's omission of the mens rea element in its instructions to the jury in this case is an error that is plain. *State v. Watkins*, 820 N.W.2d 264, 268 (Minn. App. 2012), *aff'd*, 840 N.W.2d 21 (Minn. 2013). But based on an examination of the record and considering the supreme court's *Watkins* factors, the district court's omission did not affect Brown's substantial rights. 840 N.W.2d at 29.

The phrase "knowingly violates" requires that Brown "perceive[d] directly that the contact violated the DANCO statute." *Id.* Here, the evidence is conclusive that Brown had contact with E.G. when he knew that the DANCO prohibited such contact. Brown made unsolicited statements to police, "[a]t one point . . . telling the story of how he had met [E.G.], and through that story . . . stat[ing] that he was aware of the no contact order." These statements demonstrate that Brown was not only aware of the DANCO, but also that he perceived that his contact with E.G. was the very conduct prohibited by the order. As a result, the jury's verdict is not attributable to the omission of the mens rea element from the jury instructions.

II. Hearsay

Brown challenges his conviction on count II of felony domestic assault, infliction of bodily harm under Minn. Stat. § 609.2242, subd. 4 (2012), arguing that the district court erred when it admitted the police officer's testimony recounting E.G.'s statement that Brown struck her. Brown did not object at trial, but argues on appeal that this statement was hearsay that does not fall under any exception permitting its admission. Where a defendant fails to object to the admission of evidence, our review is under the plain-error standard. *Griller*, 583 N.W.2d at 740.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is inadmissible unless it falls within an exception to the hearsay rule. Minn. R. Evid. 802. The only evidence offered by the state to prove that Brown struck E.G. was the police officer's testimony that, during the second interview with E.G. when the officers had returned to the hotel room, she told them that Brown "struck her very forcefully with an open hand and then [she] demonstrated it on a desk how forceful the strike was." However, E.G. did not testify that Brown struck her and could not remember telling police that he had. The state does not dispute that the police officer's testimony recounting E.G.'s statement was hearsay. Instead, the state argues that the officer's testimony recounting E.G.'s statement was admissible as a recorded recollection, statement against interest, or under the residual hearsay exception. None of these exceptions applies.

First, the recorded-recollection exception is wholly inapplicable. A memorandum or record of a past recollection is admissible as an exception to hearsay if (1) the witness at one time had personal knowledge about the matter recorded; (2) the witness lacks sufficient present recollection to testify fully and accurately about the matter; (3) the recorded statement was "made or adopted by the witness when the matter was fresh in the witness' memory"; and (4) the statement correctly reflects that knowledge. Minn. R. Evid. 803(5). Before admitting the recorded statement, the district court must determine whether these preconditions are satisfied. Minn. R. Evid. 104(a). Here, however, no recorded recollection was ever read into evidence. Moreover, even if the report had been offered, the exception does not apply because the report was not made or adopted by E.G., and it was not introduced to supplement her testimony.

Second, the officer's testimony regarding E.G.'s statement is inadmissible under the statement-against-interests hearsay exception. Minn. R. Evid. 804(b)(3). The admissibility of "declarations against penal interest" in a criminal trial requires three steps: (1) the court must determine that the declarant is unavailable to testify at trial; (2) the court must determine that the statement, at the time of its making, so tends "to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true"; and (3) the court must scrutinize the statements to avoid violating the defendant's right to confrontation. *State v. Tovar*, 605 N.W.2d 717, 723 (Minn. 2000) (quotation omitted) (alteration in original). Here, even if the district court had determined that E.G. was

unavailable, her statement that Brown struck her does not subject her to civil or criminal liability in any way and only serves to characterize Brown as the aggressor.

Finally, the officer's testimony recounting E.G.'s statement is inadmissible under the residual hearsay exception. The residual hearsay exception provides that a "statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness" is admissible if:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Minn. R. Evid. 807. A "totality of the circumstances test" must be used to determine whether the out-of-court statements have equivalent circumstantial guarantees of trustworthiness. *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006) (quotation omitted). When considering whether statements fall under rule 807, the court must consider "those circumstances actually surrounding the making of the statements." *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990), *cert. denied*, 498 U.S. 1033, 111 S. Ct. 693 (1991). Relevant factors for determining admissibility under this rule are:

> whether the statement was given voluntarily, under oath, and subject to cross-examination and penalty of perjury; the declarant's relationship to the parties; the declarant's motivation to make the statement; the declarant's personal knowledge; whether the declarant ever recanted the statement; the existence of corroborating evidence; and the character of the declarant for truthfulness and honesty.

State v. Davis, 820 N.W.2d 525, 537 (Minn. 2012) (citing *State v. Keeton*, 589 N.W.2d 85, 90 (Minn. 1998)); *see State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985) (holding that hearsay statement had circumstantial guarantees of trustworthiness because (1) admission did not violate defendant's right to confrontation; (2) it was undisputed that the declarant made the statement, and the statement was recorded; (3) the statement was against the declarant's penal interest; and (4) the statement was consistent with other evidence introduced by the state).

Here, the officer's testimony about E.G.'s statement does not satisfy the reliability requirements of rule 807. E.G.'s statement was not given voluntarily but rather in response to questioning by a police officer who stated that he "needed to know the truth of the situation" and "didn't know who the aggressor was." E.G.'s statement was not given under oath or subject to cross-examination. Although E.G. was Brown's girlfriend, she had a tumultuous relationship with him, was protected by a DANCO prohibiting him from contacting her, and had a heated argument with him on the night in question. E.G. was heavily intoxicated and could not recall the evening's events or their chronology at trial; she could not remember if Brown had struck her or that she had told police that he had. There is no corroborating evidence such as a visible injury or other account that Brown struck E.G. And there is no evidence bearing on E.G.'s character for truthfulness and honesty that makes the statement inherently trustworthy. As a result, E.G.'s statement to police that Brown struck her is unreliable and inadmissible under the residual hearsay exception.

We conclude that, under the circumstances, the district court's admission of E.G.'s hearsay statement to police was error that is plain, and this error affected Brown's substantial rights. *Griller*, 583 N.W.2d at 741. Here, the only evidence that the state offered to prove that Brown struck E.G. was the police officer's testimony recounting E.G.'s statement. The only logical inference is that the jury relied on this clearly inadmissible statement to convict Brown of felony domestic assault, infliction of bodily harm. The error was prejudicial, and in order to preserve the fairness, integrity, and public reputation of judicial proceedings, we reverse Brown's conviction on count II. *Scruggs*, 822 N.W.2d at 642. "On remand, if there is another trial and [Brown] is convicted, the district court must not impose separate sentences for convictions arising out of a single behavioral incident." *State v. Thompson*, 617 N.W.2d 609, 614 (Minn. App. 2000).

III. Counsel's concession of guilt

During closing argument, defense counsel conceded Brown's guilt of giving false information to police, stating: "[r]egarding the offense of giving a false name to a peace officer. Yeah, he did that. You don't need to worry about that, so let's go on to the important stuff." Brown argues that this concession of guilt violated his Sixth Amendment right to effective assistance of counsel and that he is entitled to a new trial as a result.

This court reviews claims of ineffective assistance of counsel de novo, as a mixed question of law and fact. *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004). To succeed on a claim of ineffective assistance of counsel, a criminal defendant must show

that "'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.'" *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Generally, when counsel admits a defendant's guilt without the defendant's consent, counsel's performance is deficient and prejudice is presumed. *Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001). But when defense counsel uses the strategy of conceding the defendant's guilt throughout trial and the defendant fails to object, the defendant is deemed to have acquiesced to the concession. *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992). The supreme court has also held that "the defendant acquiesces when admitting guilt was an 'understandable' strategy, and the defendant was present at the time the concessions were made *and admits that he understood that his guilt was being conceded*, but did not object." *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003) (citing *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991)) (emphasis added).

Here, defense counsel pursued a perfectly understandable trial strategy to concede guilt of a misdemeanor charge of giving false information to police, which Brown offered no evidence to contest at trial, in order to challenge the more serious charges Brown faced. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (stating that matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts); *see Jorgensen*, 660 N.W.2d at 133 (holding that appellant acquiesced to counsel's concessions throughout trial that appellant intended to kill the victim in order to

convince the jury that the killing was without premeditation). Brown was present at the time of the concession and did not object.

But based on our review of the record before us, we cannot determine whether Brown admitted that he understood that his guilt was being conceded in his attorney's closing statement, and we do not reach the merits of his claim of ineffective assistance of counsel. Brown's remedy is to pursue his claim in a petition for postconviction relief. *See Roby v. State*, 531 N.W.2d 482, 484 n.1 (Minn. 1995) (noting that, although a reviewing court may consider such a claim when requested to do so, an ineffective-assistance-of-counsel claim should generally be raised in a postconviction motion, rather than on direct appeal, because the reviewing court does not "have the benefit of all the facts concerning why defense counsel did or did not do certain things." (quotation omitted)).

IV. Sentencing

Brown argues, and the state concedes, that the district court erred in sentencing Brown on all four counts because they arose from a single behavioral incident. *See State v. Bauer*, 776 N.W.2d 462, 477 (Minn. App. 2009) ("when multiple offenses arise from a single behavioral incident, the district court may sentence for only one offense"), *aff'd*, 792 N.W.2d 825 (Minn. 2011); Minn. Stat. § 609.035, subd. 1 (2012) (providing that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses").

The state requests that the controlling 60-month sentence for count I, felony domestic assault, intent to cause fear, Minn. Stat. § 609.2242, subd 4, remain imposed.[2] *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (providing that Minn. Stat. § 609.035 "contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses" (quotation omitted)). Accordingly, we vacate Brown's sentences and remand to the district court for a new sentencing order consistent with this opinion.

V. Pro Se Arguments

Finally, in a pro se supplemental brief, Brown assigns several errors to the conduct of the arresting officers, district court, his counsel, fairness of his trial, and the jury's credibility determinations. We appreciate that Brown does not have the legal training, analytical abilities, or communication skills necessary to construct sound legal arguments. And we recognize that courts have a duty to accommodate pro se litigants, so long as no prejudice results. *Kasson State Bank v. Haugen*, 410 N.W.2d 392, 395 (Minn. App. 1987). But "[a]lthough some accommodations may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules." *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). And "[a]n assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection." *State v. Wembley*, 712 N.W.2d 783, 795 (Minn.

[2] Brown does not appeal his conviction on count I.

App. 2006), *aff'd*, 728 N.W.2d 243 (Minn. 2007) (quotation omitted). Here, none of Brown's assignments of error is supported by relevant legal authority or discernible legal argument, and we have already addressed Brown's potential remedy for his claim of ineffective assistance of counsel. Because prejudicial error is not obvious even on careful review of Brown's pro se arguments, we deem these assertions waived.

Affirmed in part, reversed in part, and remanded.