STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1480

State of Minnesota,
Respondent,

vs.

Andrew Albert Comeaux,
Appellant.

Filed January 8, 2018
Affirmed
Halbrooks, Judge

Le Sueur County District Court
File No. 40-CR-15-479

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Brent Christian, Le Sueur County Attorney, Le Center, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

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

HALBROOKS, Judge

In this appeal from second-degree assault and gross-misdemeanor theft convictions and from the district court's order denying postconviction relief, appellant argues that

(1) his counsel was ineffective because he failed to move to suppress evidence of appellant's silence or object to it during trial and failed to request an accomplice-testimony jury instruction; (2) the district court plainly erred in not giving an accomplice-testimony instruction; and (3) the district court abused its discretion in excluding evidence of the victim's prior violent act. We affirm.

FACTS

Appellant Andrew Comeaux and J.O. spent a day and a half together, during which Comeaux smoked methamphetamine and J.O. drank alcohol. They then went with two friends, E.J. and C.P., to a warehouse rented by Comeaux for business purposes. Shortly thereafter, Comeaux struck J.O. repeatedly in the head with a mallet. The friends left as Comeaux continued to strike J.O. Comeaux then left the warehouse with J.O. and accompanied him to a hospital, where he was treated for head and finger injuries. J.O. initially informed his treating physician that he had been involved in a motor-vehicle accident, but when J.O.'s girlfriend arrived at the hospital, J.O. told her that Comeaux had hit him.

Police interviewed J.O., E.J., C.P., and the owner of the warehouse. The owner later gave Comeaux a ride to the jail because an investigator wanted to speak with Comeaux. In the lobby of the jail, the investigator told Comeaux that J.O. provided a recorded statement about the incident and that the investigator wanted to discuss the incident with him. Comeaux replied, "J.O. doesn't talk to cops," and gave no further statement. At some point in this sequence, the investigator arrested Comeaux.

A jury trial was held; Comeaux testified that he hit J.O. in self-defense. The jury found Comeaux guilty of two counts of assault in the second degree and one count of theft. Comeaux appealed, and we granted his motion to stay the direct appeal to allow him to pursue postconviction relief in the district court based on ineffective assistance of trial counsel. After the district court denied Comeaux's postconviction petition, we dissolved the stay and reinstated the appeal.

D E C I S I O N

I.

Comeaux argues the district court erred in denying his postconviction petition because he received ineffective assistance of counsel. We review a district court's denial of a petition for postconviction relief for an abuse of discretion. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). "We will not reverse an order unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015) (quotation omitted). We review a district court's findings of fact for clear error. *State v. Miller*, 573 N.W.2d 661, 670 (Minn. 1998). Ineffective-assistance-of-counsel claims allege a violation of a defendant's Sixth Amendment right to reasonably effective assistance of counsel. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). They present mixed questions of law and fact and are evaluated de novo. *Id.*

When evaluating claims of ineffective assistance of counsel, we employ the *Strickland* test, which has two prongs: deficiency of representation and prejudice to the defendant. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). The defendant must

prove that the attorney'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, 694, 104 S. Ct. 2052, 2068 (1984)) (citation omitted). A court may address the two prongs in any order and "may dispose of the claim on one prong without analyzing the other." *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

A. Use of Silence in Prosecutor's Case-in-Chief

Comeaux contends that his attorney improperly failed to suppress Comeaux's silence and his statement that "J.O. doesn't talk to cops" and failed to object to the officer's testimony. The crux of Comeaux's argument is that he was under arrest at the time and therefore should have been given a *Miranda* warning and the interrogation should have been recorded. As a result, Comeaux argues that the admission of the evidence and references in closing argument violated his Fifth Amendment rights. A statement made during a custodial interrogation is "generally inadmissible unless the suspect is first given a *Miranda* warning." *State v. Edrozo*, 578 N.W.2d 719, 724 (Minn. 1998). Generally, custodial interrogations must be electronically recorded. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

Here, the postconviction court found that Comeaux was not under arrest when he said "J.O. doesn't talk to cops" and then declined to give a statement. Comeaux argues

that the postconviction court's finding that he was not under arrest is clearly erroneous, citing an affidavit filed in support of a search-warrant application. We are not persuaded.

The evidence presented at trial is inconclusive as to the specific sequence of events in the lobby of the jail; the issue was not raised during trial to the district court; and Comeaux did not request an evidentiary hearing in his postconviction proceeding to clarify the sequence. On this record, we cannot conclude that the district court's finding that Comeaux was not under arrest is clearly erroneous.

"When the government does nothing to compel a person who is not in custody to speak or to remain silent . . . the voluntary decision to do one or the other raises no Fifth Amendment issue." *State v. Borg*, 806 N.W.2d 535, 543 (Minn. 2011). In *Borg*, the Minnesota Supreme Court held that during the state's case-in-chief in a criminal trial, the state may offer evidence of a defendant's failure to respond to a pre-arrest, pre-*Miranda* letter from police requesting an interview. *Id*. Applying *Borg* to Comeaux's case, the prosecutor's elicitation of evidence of pre-arrest silence in the state's case-in-chief did not violate Comeaux's Fifth Amendment right against self-incrimination. On this record, because the evidence was admissible, Comeaux's counsel's failure to move to suppress or exclude the evidence does not fall below an objective standard of reasonableness. Therefore, Comeaux has not shown his counsel was ineffective.

B. Use of Comeaux's Silence in Prosecutor's Closing Argument

We next address Comeaux's argument that his counsel was ineffective because he did not object when the prosecutor commented on his failure to previously claim self-defense. In closing, the prosecutor stated:

> Mr. Comeaux claims that this is self-defense. Ladies and Gentlemen of the Jury, this is the first time that that's ever been postulated. Mr. Comeaux had every chance to tell law enforcement when they were discussing matters with him this was self-defense. I was attacked. I was violently attacked as he told you today. He didn't say that to [the investigator]. His exact words were, didn't happen. He said it didn't happen. And he said [J.O.] doesn't talk to the cops. That's remarkably different than what Mr. Comeaux said here today.

Comeaux asserts that the prosecutor relied on Comeaux's silence as evidence of guilt. We disagree. The prosecutor highlighted Comeaux's failure to assert self-defense to police as a means of impeaching Comeaux's trial testimony that he acted in self-defense. As the district court correctly noted, the state has a right to impeach the credibility of a defendant when he testifies at trial. *See Jenkins v. Anderson*, 447 U.S. 231, 238-39, 100 S. Ct. 2124, 2129 (1980) (concluding "the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility"). And a prosecutor may argue that a witness was not credible during closing argument. *State v. Martin*, 773 N.W.2d 89, 106 (Minn. 2009). Therefore, the prosecutor's reference to Comeaux's pre-arrest, pre-*Miranda* silence in closing argument was not error. An attorney's "fail[ure] to make an objection that would not succeed is not professionally unreasonable." *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). Because the prosecutor did not err, Comeaux cannot demonstrate that his counsel acted unreasonably by failing to object to the prosecutor's closing argument.

C. Accomplice Jury Instruction

Comeaux argues that his counsel was ineffective because he failed to seek an accomplice-testimony jury instruction. Comeaux asserts that the jury could have

reasonably found that E.J. and C.P., who were present at the warehouse when Comeaux first struck J.O., were accomplices to the assault. A defendant may not be convicted based solely on testimony of an uncorroborated accomplice. *State v. Ford*, 539 N.W.2d 214, 225 (Minn. 1995). "The general test for determining 'whether a witness is an accomplice . . . is whether he could have been indicted and convicted for the crime with which the accused is charged.'" *State v. Lee*, 683 N.W.2d 309, 314 (Minn. 2004) (quoting *State v. Henderson*, 620 N.W.2d 688, 701 (Minn. 2001)). "If the facts of the case are undisputed and there is only one inference to be drawn as to whether the witness is an accomplice, the court should make the determination." *Id.* But the district court must give a jury instruction on accomplice testimony in any criminal case in which a witness against the defendant might reasonably be considered an accomplice. *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989).

The issue here therefore is whether "there is only one inference to be drawn as to whether the witness[es] [were] accomplice[s]." *Lee*, 683 N.W.2d at 314. The district court found:

> There is nothing in the record to show that [E.J. and C.P.] intentionally aided, advised, hired, counseled or conspired with [Comeaux] to commit the crime of assault. [E.J. and C.P.] were present because [J.O.] and [Comeaux] needed a ride due to their car troubles. [E.J. and C.P.] were present at the scene, however they quickly ran from the scene when they saw what was happening. [E.J. and C.P.] did not have a legal duty to protect and provide aid to [J.O.] . . . . There is no evidence that [E.J. and C.P.] did anything under Minn. Stat. 609.05 [(2016)] which would warrant charges and convictions.

The record supports this conclusion. J.O. testified that while he was being hit, "I moved forward and I kind of bumped into [E.J.]. Then he grabbed me and I don't know if he was grabbing to help . . . . I don't know if he [was] trying to help me out because I flew forward. And then after that . . . [C.P. and E.J.] actually ran out. So then it was just me and [Comeaux]. As he was swinging it." J.O. later clarified and said, "I assume he was helping me at the time. I didn't know. If I think about it, he ran off after that; I'm pretty sure he wasn't trying to be a part of the assault." E.J. testified that he tried to help J.O. at first, "but [Comeaux] kept swinging, so I just wanted to leave and not be involved." C.P. testified:

> As soon as Mr. Comeaux hit [J.O.] over the head with the mallet, I then turned around, went to run away, jumped in my truck, um. He was still hitting [J.O.] as I was walking out the garage. . . . Cause I was on felony parole for possession of a weapon. I didn't want to get into any kind of trouble, to be honest. He's got a mallet. What am I going to do? I'm not going to stop him. I'm not getting beat up. That was my main thing.

Comeaux's own testimony also undermines his argument that E.J. and C.P. could reasonably be considered accomplices. He testified that he believed that he was going to get beat up by "3 guys that were a lot bigger than me . . . . I hit [J.O.] again. And that's when E.J. had started to run off with C.P." But the evidence does not support Comeaux's claim that the friends intentionally aided, advised, hired, counseled or conspired with him to commit the crime of assault. Thus, the instruction was not warranted, and Comeaux has not shown that his attorney provided deficient representation by failing to request it. Because Comeaux has not demonstrated that he received deficient representation, we need

not analyze whether his counsel's acts prejudiced his case. *Schleicher*, 718 N.W.2d at 447. The district court did not abuse its discretion in denying Comeaux's petition for postconviction relief based on ineffective assistance of counsel.

In addition to arguing that his trial counsel was ineffective for not requesting an accomplice instruction, Comeaux also contends that the district court erred in failing to sua sponte give the instruction. Because Comeaux did not request the instruction, our review is for plain error. *See State v. Gail*, 713 N.W.2d 851, 863 n.9 (Minn. 2006) ("Generally, this court reviews the failure to provide a sua sponte jury instruction under a plain error standard of review."). For Comeaux to succeed on a plain-error analysis, there must be "(1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Gustafson*, 610 N.W.2d 314, 319 (Minn. 2000) (quotation omitted). If we determine that the plain-error prong is not satisfied, we need not consider the other prongs. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

We have already determined that an accomplice-testimony instruction was not warranted because, based on the undisputed facts, E.J. and C.P. could not reasonably have been considered accomplices. Therefore, the district court did not err in failing to sua sponte give the instruction, and we need not address the remainder of the plain-error analysis. *See id.*

II.

Comeaux argues that the district court violated his constitutional right to present his theory of self-defense because it excluded evidence that, ten years earlier, J.O. had assaulted a person with a baseball bat and videotaped the incident. Comeaux learned of

this alleged assault while he was in jail with J.O. in 2006 and sought to introduce it as evidence that he thought J.O. was turning on him, causing him to defend himself.

A criminal defendant has a constitutional right to "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984). That right encompasses, among other things, "the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923 (1967). In presenting a defense, however, the defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973).

When self-defense is asserted, evidence of a specific act is admissible to show that a defendant reasonably feared serious bodily harm, provided that the defendant proves that he knew of the specific act at the time of the alleged offense. *State v. Bland*, 337 N.W.2d 378, 382 (Minn. 1983). Evidence of specific acts of violence is admissible "where commonsense indicates that these acts could legitimately affect a defendant's apprehensions." *State v. Matthews*, 301 Minn. 133, 134, 221 N.W.2d 563, 564 (1974).

Like all evidence, specific-acts evidence offered to show that a defendant reasonably feared great bodily harm must also be relevant and more probative than prejudicial. *State v. Penkaty*, 708 N.W.2d 185, 203 (Minn. 2006) (citing Minn. R. Evid. 403). We have previously held that a district court properly refused to admit evidence that a victim terrorized the defendant six years before the incident, concluding that "an episode

occurring . . . more than six years before, would not legitimately affect [the defendant's] apprehension here." *State v. Rule*, 355 N.W.2d 496, 498 (Minn. App. 1984).

The same reasoning applies in this case. There is no evidence in the record demonstrating any disputes, arguments, or tension before Comeaux suddenly hit J.O. with a mallet. To the contrary, Comeaux had willingly spent more than 24 hours with J.O. before striking him. Because there is no evidence in the record that Comeaux was apprehensive around J.O. before suddenly hitting him, we conclude that Comeaux's knowledge of an incident that allegedly occurred ten years ago would not reasonably have put him in apprehension that J.O. would harm him. Therefore, the district court did not violate Comeaux's constitutional right to present a defense by excluding the evidence.

Affirmed.