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State of Minnesota
9/20/2018 12:00 PM

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

MOHAMED MOHAMED NOOR,

Defendant.

STATE'S NOTICE OF MOTION AND MOTION FOR DISCOVERY FROM DEFENDANT AND MEMORANDUM ON ADOPTIVE ADMISSIONS

MNCIS No: 27-CR-18-6859

TO: THE HONORABLE KATHRYN QUAINTANCE, HENNEPIN COUNTY DISTRICT COURT; COUNSEL FOR DEFENDANT; AND DEFENDANT.

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 27, 2018, at 1:30, or a time thereafter as scheduled by the court, the State of Minnesota will move for the disclosure of the source(s) of information referenced in the defendant's motion concerning probable cause. If this motion is denied or the information not provided, the State will move for two statements to be stricken from the defendant's memoranda and not be considered by the court for its ruling on probable cause.

PLEASE TAKE NOTICE also that the State will, on a future date, move this court to rule that the statements at issue constitute admissions by the defendant and are therefore admissible in the State's case-in-chief.

ARGUMENT

On September 14, 2018, the court directed the parties in this case to submit materials to the court that were referenced in filed motions and memoranda regarding the issue of probable

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cause. Specifically, the court directed each party to submit materials to the court which contained information beyond that enumerated in the criminal complaint. On September 16th, the State received defense counsel's letter itemizing the materials they submitted to the court. The State has compared the defense's list of materials to the evidence referenced in the two defense briefs. There are two statements in the defense briefs that appear in neither the complaint nor in any supplemental materials submitted to the court:

1. "Officer Noor reacted to a dark alley in the middle of the night, a voice, a thump on the squad, a body appearing at the driver's side window, and the startled announcement of fear by Officer Harrity as he reached for his firearm." Defendant's Motion to Dismiss Based on Probable Cause, August 15, 2018, page 7.

2. "Officer Noor aimed and fired once at the specific person standing in the squad window." Defendant's Reply to State's Response to Defendant's Motion to Dismiss For Lack of Probable Cause, September 12, 2018, page 20.

The State has received no discovery from the defense that supports these assertions, nor did the law enforcement investigation in this case reveal any such evidence. These statements are not the result of reasonable inferences from other evidence.[1] What the defendant saw, heard, perceived, and reacted to, and why he did what he did are very much in dispute in this case. Because these statements relate specifically to the defendant's unique perception and experience, they could only have come from the defendant, who has given no prior statement about the events of July 15, 2017.

These above assertions by the defendant's attorneys are very important because they are the linchpins of the defendant's two primary arguments that the charges are not supported by probable cause. They argue the defendant was legitimately frightened and justifiably used force

[1] Further, to the extent one can infer anything about the defendant's state of mind or intentions on July 15, 2017, that inference should be weighed in the State's favor at this stage of the proceedings. *State v. Peck*, 773 N.W.2d 768, 782 n.1 (Minn. 2009).

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because of a dark alley, a thump, a voice, and Officer Harrity's startled announcement. These statements therefore contain the key "facts" upon which the defendant bases his claim that the defendant's use of force was reasonable under *Graham v. Connor*, 490 U.S. 386, 396 (1989).[2] Likewise, the defendant bases his argument that there is no probable cause for third degree murder on the "fact" that he shot at a specific person outside Officer Harrity's window. To the State's knowledge, the defendant has never said that, and based on the surrounding circumstances, it is not a fact that is readily inferable. As the State argued in its probable cause response, one would hope the defendant would not have shot Ms. Ruszczyk if he actually realized who she was—a barefoot, unarmed 911 caller in pajamas. Without an affirmative statement to the contrary from the defendant (which does not exist), it is a leap to say he aimed at a specific person.[3] This statement that he shot someone "specific" could only have come from him, and it is not present in the discovery materials. And because the claim that he fired at a particular person is the crux of his probable cause argument for third degree murder, it should be stricken for lack of support in the record.

If the defense does not agree to strike these statements from their pleadings (and not rely upon these claims in their probable cause arguments), then because these statements appear in the defense's public filings, the court should find them adoptive admissions of the defendant, which are admissible as statements of a party opponent. Under Minn. R. Evid 801(d)(2)(B), "a statement of which the party has manifested an adoption or belief in its truth" is not hearsay. This includes a "statement by a party's agent who is authorized to speak for the party[,] such as

[2] Again, the State does not concede that *Graham* is applicable and reserves the right to make future arguments regarding the "reasonable police officer" standard.
[3] Compare this to the statements of Officer Harrity, who, from a closer distance and with an unobstructed view, was only able to glimpse or identify the silhouette of a person, and certainly no one specific or in particular.

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an attorney." 11A Minn. Prac. Courtroom Handbook of Minn. R. Evid 801(d)(2) (internal punctuation omitted).

For the statement of another to be "adopted" by a criminal defendant, "the trial court must first determine that the asserted adoptive admission was manifested by conduct or statements which are unequivocal, positive, and definite in nature, clearly showing that in fact [the] defendant intended to adopt the hearsay statement as his own." *Village of New Hope v. Duplessie*, 231 N.W.2d 548, 552 (Minn. 1975); *see also State v. Shoop*, 441 N.W.2d 475, 482 (Minn. 1989) (applying *Duplessie* and holding defendant's head nod in response to a third party's statement constituted an adoptive admission); *State v. Roan*, 532 N.W.2d 563, 573 (Minn. 1995) (applying *Duplessie* and holding defendant's "gun to the head" gesture after being asked if he killed someone constituted an adoptive admission).

Minnesota law recognizes that the concept of adoptive admissions also applies to representations made by a defendant's attorney in court and in pleadings. In *State v. Pilcher*, the Minnesota Supreme Court held that the defendant adopted his attorney's admission of guilt. 472 N.W.2d, 327, 337 (Minn. 1991). The defendant was charged with three counts of first degree murder and his lawyer presented a voluntary intoxication defense, arguing the defendant committed the crime, but was too drunk to form the requisite intent for murder. *Id.* at 336. The jury rejected the defense and convicted the defendant. *Id.* On appeal, the defendant argued that his lawyer conceded his guilt without his consent. *Id.* at 337.[4] The court held that because the defendant was "present when the concessions were made and, by his own admission, understood

[4] Technically, the lawyer had not conceded *guilt*. Rather, the lawyer conceded that his client committed the *corpus delicti* of the crime (the killing of the victims) without having the *mens rea* (intent) to do so. If the jury agreed, that would mean his client was not guilty. It is much the same here—the defendant's attorneys are conceding the defendant killed Ms. Ruszczyk, but are claiming it was an intentional-though-justified homicide, and the defendant therefore lacked the lesser recklessness and gross negligence required for the charges of third degree murder and second degree manslaughter.

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but did not dispute the tactic," he "acquiesced to the conduct of defense counsel in impliedly admitting guilt." *Id.* In so holding, the court also noted that because of the strength of the evidence against the defendant, "concession of guilt [was] an understandable trial strategy." *Id.*

This case is similar to *Pilcher*. The defendant's attorneys argue that the third degree murder charge is not supported by probable cause because the defendant aimed and fired at a particular person. They say that the defendant's specific design upon Ms. Ruszczyk makes third degree murder unprovable. This is no different than an attorney conceding that their client killed someone, but asserting an involuntary intoxication defense as to the requisite intent, which is what happened in *Pilcher.* It is essentially an affirmative defense. And like the court noted in *Pilcher*, it is a strategic decision—here, based on the third degree murder case law holding there must be a lack of specific design. Going forward, if the defendant acquiesces to this strategy, the court should find that he has adopted the representations of his attorneys as fact, and the State should be able to introduce such evidence in its case-in-chief or use it as the basis for any amended charges.

Many courts recognize that an attorney's statements in pleadings can be deemed adopted by a criminal defendant, and that a defendant may be impeached with the statements contained in the pleadings. *See e.g.*, *People v. Byfield*, 790 N.Y.S.2d 434, 435 (N.Y. Sup. Ct. 2005); *McCarter v. Commonwealth*, 566 S.E.2d 868, 869-70 (Va. App. 2002); *People v. McCray*, 630 N.W.2d 633, 636-37 (Mich. App. 2001); *People v. Lowe*, 969 P.2d 746, 748 (Colo. App. 1998); *People v. Shuff*, 564 N.Y.S.2d 132, 133 (N.Y. Sup. Ct. 1990); *Commonwealth v. Bey*, 439 A.2d 1175, 1181(Penn. App. 1982); *People v. Nickopoulous*, 182 N.W.2d 83, (Mich. App. 1970). Without having to decide the issue, the Minnesota Court of Appeals recognized the concept in *State v. Myers*, 2006 WL 330032, *3 (Minn. Ct. App. Feb. 2006) (attached). There, the State

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impeached a defendant with his alibi notice and his attorney did not object. *Id.* The court of appeals held it was not ineffective assistance of counsel for the lawyer to not object to the impeachment, and noted that other states have reached the conclusion that such pleadings constitute a party admission. *Id.*

Here, if the defendant intends to claim, as he stated in his pleadings, that: his fear was based on a being in a dark alley, and/or a thump, and/or a voice he heard, and/or on Officer Harrity's startled announcements, these statements are admissions. The State should be able to introduce those statements into evidence to show their unreasonableness. Likewise, if the defendant intends to claim that he specifically aimed and fired at Ms. Ruszczyk—despite the fact that she was an unarmed 911 caller who posed no threat—the State should be able to introduce that statement into evidence, and may exercise the right permitted by the rules of criminal procedure to amend charges accordingly. For these reasons, the State requests the Court order disclosure of the source(s) of the statements and/or strike the statements at issue from the pleadings because they are unsupported by the record. The State also requests that the Court find the statements to be party admissions.

Respectfully submitted,

MICHAEL O. FREEMAN
Hennepin County Attorney

By: _____
AMY E. SWEASY (26104X)
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-5561

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By: Patrick Lofton

PATRICK R. LOFTON (0393237)
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-5561

Dated: September 20, 2018

2006 WL 330032
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Jeffrey MYERS, Appellant.

No. A04-179.
|
Feb. 14, 2006.

Hennepin County District Court, File No. 03026165.

Attorneys and Law Firms

Mike Hatch, Attorney General, St. Paul, MN; and Amy Klobuchar, Hennepin County Attorney, Jean E. Burdorf, Assistant County Attorney, Minneapolis, MN, for respondent.

John M. Stuart, State Public Defender, Davi E. Axelson, Assistant Public Defender, Minneapolis, MN, for appellant.

Considered and decided by HALBROOKS, Presiding Judge; KLAPHAKE, Judge; and CRIPPEN, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge.

*1 Appellant challenges his conviction of second-degree aggravated robbery, arguing that he was denied his right to effective assistance of counsel when his attorney failed to object to the prosecutor's conduct in calling a defense investigator as a witness, highlighting the investigator's errors, and arguing that appellant's alibi defense was fabricated. We affirm.

FACTS

At about 4:10 p.m. on April 3, 2003, a masked man robbed Johnson Meat Company in northeast Minneapolis. At the time of the robbery, Colin Benjamin was standing at the register, while his co-worker, Cornelia Britton, hid behind a counter about 15 feet away. Britton recognized the robber's voice and tried calling 911 while she was crouched behind the counter. Britton then followed the robber out the door. When the robber reached the end of the building, Britton saw him remove his mask and turn toward her. Britton recognized the robber as appellant Jeffrey Myers, whom she knew as a former Johnson Meat Company employee and as her sister-in-law's ex-boyfriend.

Soon thereafter, the police and the company vice-president arrived; the vice-president located a copy of appellant's driver's license photo in his employee file and showed it simultaneously to Britton and Benjamin. Britton identified appellant as the robber. Benjamin also identified appellant as the robber, although he stated that he was not positive about the identification.

The police awakened appellant sometime after 11:10 p.m. on April 15, asked him about his whereabouts on the day of the robbery, and subsequently arrested him. An officer later testified that appellant told him that he had been working at Volt Service Group that day, but the officer determined that appellant's last day at Volt was actually April 2, 2003, the day before the robbery.

Appellant was charged with second-degree aggravated robbery. Appellant presented an alibi defense at trial, claiming that he had interviewed for a job at Phoenix Direct (f/k/a/ Phoenix Document Services) in Burnsville on April 3, and that he had taken the 4:59 p .m. bus home from Phoenix that day. Appellant stated that he arrived at Phoenix at 10:00 a.m. and met with Angela McLain and then later met with Phoenix's Director of Operations, Ron Flaa, around 2:30 p.m. Flaa testified that he estimated that the interview ended around 3:45 and that appellant left Phoenix around 4:00 p.m. Flaa also testified that appellant told him that he was taking the bus home. McLain

testified that she had told an investigator that appellant left Phoenix around 4:00 p.m. that day and that appellant had taken the bus, a fact that she assumed because she saw appellant take a shortcut outside the building often taken by others who ride the bus.

Lisa Stark, a Legal Rights Center community worker who does client intake and assists attorneys with case preparation, assisted defense counsel with this case. Stark prepared the notice of defense, supplemental notice of defense witnesses, and reports detailing her conversations with Flaa and McLain. In her reports, Stark included an incorrect name and telephone number for Phoenix, although she testified that she had done so unintentionally and that she had called both the prosecutor's office and Sgt. Michael Ganley to correct the mistake.

*2 During trial, the state questioned Stark about the inaccuracies in her reports and about her reports' statement that Flaa told her that appellant left Phoenix at 4:15 p.m. on April 3. The state also called Sgt. Ganley and elicited testimony that Phoenix's name and phone number as provided by Stark were incorrect and that he had never received any follow-up, correcting information from Stark. Ganley further testified that Flaa told him that he had never spoken with Stark, although Stark testified that she had spoken with Flaa.

During closing argument, the state highlighted the inaccuracies in Stark's reports and the inconsistencies between Stark's reports and other witnesses' testimony. The state argued that Stark had misrepresented certain things and that she had "tailor[ed] her summary to fit a time frame that would support the defendant's latest alibi."

The jury found appellant guilty of second-degree aggravated assault, and the district court sentenced appellant to 39 months in jail. Appellant filed a motion with this court to stay his appeal; we granted the motion, allowing appellant to seek postconviction relief. Appellant petitioned for postconviction relief, alleging ineffective assistance of counsel. The district court denied appellant's petition for postconviction relief. We granted appellant's motion to reinstate his appeal, and this appeal follows.

DECISION

Appellant alleges that he was denied effective assistance of counsel when his attorney failed to object to the prosecutor's trial conduct in calling Lisa Stark, highlighting her alleged errors, and arguing that appellant's alibi defense was fabricated. Because "ineffective assistance of counsel claims involve mixed questions of law and fact, our standard of review is de novo." *State v. Rhodes,* 657 N.W.2d 823, 842 (Minn.2003).

The Sixth Amendment guarantees appellant the right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). To prevail on a claim for ineffective assistance of counsel, appellant must show both that trial 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. Blanche,* 696 N.W.2d 351, 376 (Minn.2005). These two prongs must be shown by a preponderance of the evidence. *Dukes v. State,* 621 N.W.2d 246, 252 (Minn.2001).

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. There is a strong presumption that counsel's representation fell within a "wide range of reasonable professional assistance" and "that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 104 S.Ct. at 2065 (quotation omitted). And the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696, 104 S.Ct. at 2069.

*3 Appellant contends that his counsel was ineffective for failing to object to the admission of the alibi notice that Stark prepared and by failing to object to the state's remarks in closing argument concerning Stark's mistakes. A decision not to object to argument or evidence is generally a matter of trial strategy. *See Rhodes,* 657 N.W.2d at 844 (refusing to find ineffective assistance of counsel where counsel decided not to object to certain questioning and evidence in order to get a witness off the stand quickly). Here, defense counsel, instead of objecting to the evidence, chose to respond to the evidence in his opening statement, in his examination of Stark, and in his argument to the jury. At a minimum, such a tactic was consistent with the defense theme that the state's alibi rebuttal evidence was weak.

Appellant also argues that the state impermissibly focused, without defense counsel's objection, on Stark's mistakes-instead of appellant's guilt or innocence-and that Stark's mistakes are unconnected to appellant's alibi

defense. In addition, appellant argues that the alibi notice was improperly admitted in evidence. But the state contends that the alibi defense notice containing the admitted mistakes is a party admission, usable to impeach appellant's alibi defense. Courts in other states have reached that conclusion. *People v. McCray*, 630 N.W.2d 633, 636-37 (Mich.App.2001) (alibi notice proper evidence for impeachment because it is admission of party-opponent); *People v. Byfield*, 790 N.Y.S.2d 434, 435 (N.Y.App.Div.2005) (state properly allowed to cross-examine alibi witness regarding contents of alibi notice); *Commonwealth v. Bey*, 439 A.2d 1175, 1181 (Pa.Super.Ct.1982) (contents of alibi notice properly admitted to show alibi defense asserted at trial was "incomplete, inconsistent and incorrect"). Here, we have no record on this matter to review as the alibi notice was admitted without objection. And we note that a plain-error analysis would be duplicative "[b]ecause both the plain error and ineffective assistance of counsel tests require a showing of prejudice." *Rhodes*, 657 N.W.2d at 839 n. 7.

Looking at the trial in its entirety, we conclude that appellant has not met his burden to establish by a preponderance of the evidence that his counsel's performance fell below an objective standard of reasonableness. But even if appellant satisfied that burden, in order to prevail appellant must also demonstrate "that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Blanche*, 696 N.W.2d at 376. "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*, 466 U.S. at 694, 104 S.Ct. at 2068). Appellant has not met that burden.

Defense counsel responded ably to the allegedly questionable evidence and argument in his opening statement, in his examination of Stark, and in his statements to the jury. And the state presented the eyewitness testimony of two Johnson Meat Company employees, both of whom identified appellant as the individual who committed the robbery. Appellant raises several questions about alleged weaknesses in the witnesses' testimony, but the jury was in the proper position to evaluate that testimony and determine witness credibility. Appellant merely reargues the case, without demonstrating that the outcome would have been different but for the allegedly questionable evidence and argument. Appellant has not demonstrated by a preponderance of the evidence "that a reasonable probability exists that the outcome would have been different but for counsel's errors." *See Blanche*, 696 N.W.2d at 376.

***4 Affirmed.**

All Citations

Not Reported in N.W.2d, 2006 WL 330032

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