STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1444

State of Minnesota,
Respondent,

vs.

Micheal Anthony Sparks,
Appellant.

Filed August 12, 2019
Affirmed; motion granted
Reyes, Judge

Hennepin County District Court
File No. 27-CR-18-5815

Keith Ellison, Minnesota Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Minneapolis, Minnesota; and

Scott A. Hersey, Special Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

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

REYES, Judge

On appeal from his convictions of and sentences for five counts of felony domestic-abuse-no-contact order (DANCO) violations, appellant argues that the district court abused

its discretion by (1) failing to take further action after he complained about his court-appointed attorney's representation; (2) allowing the state to introduce, as relationship evidence, 911 and *Scales* recordings from a previously dismissed domestic-assault case to prove his identity; (3) denying his motion for a mistrial after the district court made a statement suggesting that his court-appointed attorney worked for the public defender's office; and (4) imposing an excessive total aggregate sentence of 87 months and four days. We affirm.

FACTS

In early December 2017, A.G. called 911 to report that appellant Micheal Sparks was "acting like he[ ] [was] gonna kill [her]." Officers went to A.G.'s residence and arrested appellant. They brought appellant to the police department and took a recorded *Scales* statement from him.[1] The state charged appellant with felony domestic assault, and the district court issued a DANCO prohibiting appellant from contacting A.G. The state later dismissed appellant's felony domestic-assault charge.

In January 2018, with the DANCO still in effect, Hennepin County Sherriff's Department officers reviewed five jail calls originating from the Hennepin County Public Safety Facility, made with appellant's individual PIN, to A.G's phone number. Officers recognized the male voice on the calls as appellant's and the female voice as A.G.'s One of the calls was made with another inmate's PIN, but the male and female voices sounded

[1] All custodial interrogations, including ones seeking any information about rights, any waiver of those rights, and all questioning, must be electronically recorded where feasible and must be recorded when questioning occurs in a place of detention. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

similar to the other completed calls. Based on appellant's prior convictions of four DANCO-violation offenses in the last five years, the state charged appellant with five counts of felony DANCO-violation offenses, under Minn. Stat. § 629.75, subd. 2(d)(1) (2016)—one count for each answered phone call.

Following a trial, a jury found appellant guilty of all five counts. The district court sentenced appellant to prison for a total aggregate term of 87 months and four days. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by declining to take further action when appellant complained about his court-appointed attorney's representation.

Appellant argues that the district court abused its discretion by failing to inquire into the nature of his complaints regarding his court-appointed attorney and alleged requests for a different attorney. Appellant also encourages this court to adopt a per se rule requiring the appointment of new counsel when, like here, the court-appointed attorney is alleged to be unprepared for trial and the defendant has no opportunity to bring the matter to the district court's attention before the first day of trial. We disagree and decline appellant's invitation.

We review a district court's decision to grant or deny a request for substitute counsel for an abuse of discretion. *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006). Both the United States Constitution and the Minnesota Constitution guarantee a criminal defendant the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. A criminal defendant does not have the "unbridled" right to choose his or her counsel and

must generally accept the court's appointed counsel. *State v. Fagerstrom*, 176 N.W.2d 261, 264 (Minn. 1970). Nor does a defendant have a right to a "meaningful relationship" with appointed counsel. *Morris v. Slappy*, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983).

If a defendant "voices serious allegations of inadequate representation," then the district court should conduct a "searching inquiry" to determine whether the situation warrants appointing substitute counsel. *State v. Munt*, 831 N.W.2d 569, 586 (Minn. 2013) (quotation omitted). A district court will grant a request for substitution of counsel only if "exceptional circumstances exist *and the demand is timely*." *Id.* (emphasis added) (quotation omitted). Exceptional circumstances are those that affect a court-appointed attorney's ability or competence to provide representation. *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). General dissatisfaction with appointed counsel does not rise to the level of exceptional circumstances. *Munt*, 831 N .W.2d at 586.

On the first day of the trial, outside of the presence of the jury, appellant made the following statements to the district court:

> THE DEFENDANT: Um -- yeah. I just I wanted to be on record that -- um – it's kind of hard to get a fair shot in this trial. First time I even spoke to my counsel was yesterday morning, less than 24 hours later I'm in front of jury. Okay. So I want that to be on record as part of my appeal.
>
> THE COURT: Okay. It will be so noted.

The district court took no further action on appellant's complaint. On the second day of the trial, outside the presence of the jury, appellant addressed the district court:

> THE DEFENDANT: What happens if I fire [my court-appointed attorney]? I'm not entitled to another lawyer?

> THE COURT: No. Then you try --then you –
>
> THE DEFENDANT: Then I sit here and cross-examine these people myself?
>
> THE COURT: Yes. If you choose to, yes.

After some discussion, the district court asked appellant whether he intended to continue proceedings with his court-appointed attorney or if he wanted to represent himself, to which appellant said "Go ahead."

Appellant relies on *Clark*, 722 N.W.2d at 464, for guidance on "how a [district] court should proceed when a defendant makes complaints about his public defender." *Clark* does not advance appellant's case. Clark challenged the district court's denial of his request for substitute counsel after he alleged, among other things, that his public defender had failed to "represent[ ] his interests in [the] case." *Id.* at 463. The supreme court affirmed the district court's denial of Clark's request on three grounds: (1) Clark requested a speedy trial and there is a strong reluctance to continue matters after trial begins; (2) the record belied Clark's allegation that his public defender provided inadequate representation leading up to trial; and (3) Clark made an untimely request on the morning of trial and after jury selection had begun. *Id.* at 464-65.

Similar to *Clark*, appellant requested a speedy trial. Second, as in *Clark*, the record belies appellant's claims that he first spoke with his court-appointed attorney the morning before trial, and he could not raise his concern earlier. Appellant met with his attorney in preparation for a pretrial hearing to review the state's settlement offer and other evidence. They also appeared before the district court for a bail and omnibus hearing where appellant

addressed the district court but made no mention of his attorney's representation. Moreover, appellant acquiesced to his court-appointed attorney's continued representation, and such acquiescence is interpreted to be confirmation that further inquiry by the district court is unnecessary. *Munt*, 831 N.W.2d at 587.

Third, appellant concedes that, under *Clark*, his request for substitute counsel is untimely. And significantly, unlike in *Clark*, appellant never made a request for substitute counsel, but rather only inquired into what would happen if he were to discharge his attorney.

Appellant also relies on *State v. Paige*, 765 N.W.2d 134, 134 (Minn. App. 2009), for the proposition that the district court should have asked how appellant intended to proceed pro se. The defense counsel in *Paige* presented no arguments at the sentencing hearing and advised the district court that he was in a "difficult position" because the defendant was going to allege ineffective assistance of counsel. *Id.* at 137. In *Paige*, we concluded that counsel's comments combined with his failure to make arguments on Paige's behalf were sufficient to trigger the district court's duty to ascertain whether an impermissible conflict of interest existed that could materially limit defense counsel's representation of defendant. *Id.* at 141. *Paige* is inapposite. Unlike in *Paige*, appellant's court-appointed attorney provided adequate representation throughout trial. Further, appellant made an untimely request, and we made clear in *Paige* that our decision does "not absolve a criminal defendant of the responsibility to make a timely request." *Id.* at 139. We conclude that the district court did not abuse its discretion by not taking action on appellant's complaints about his attorney's representation.

II. The district court did not abuse its discretion by allowing the state to introduce the 911 and *Scales* recordings.

Appellant argues that the district court abused its discretion by allowing the state to introduce the 911 and *Scales* recordings as relationship evidence, under Minn. Stat. § 634.20, to identify appellant's and A.G.'s voices, when *Spreigl* evidence[2] governs the admissibility of prior bad-act evidence introduced to prove identity. Appellant's argument is misguided.

Evidentiary rulings will not be reversed absent a clear abuse of the district court's discretion. *State v. Robinson*, 604 N.W.2d 355, 363 (Minn. 2000). A district court abuses its discretion when it acts arbitrarily, without justification, or contrary to the law. *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). Appellant has the burden of proving that the district court abused its discretion and that he suffered prejudice as a result. *Miles v. State*, 840 N.W.2d 195, 204 (Minn. 2013).

The district court deemed the 911 and *Scales* recordings admissible for voice identification under other evidentiary rules, not as section 634.20 relationship evidence, as appellant argues. Because this factual error forms the basis for appellant's entire argument, his argument fails. Therefore, the district court did not abuse its discretion in allowing the state to introduce the 911 and *Scales* recordings.

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[2] The term "*Spreigl* evidence" refers to evidence which is inadmissible to prove a defendant's propensity to commit the charged offense, but may be admitted to establish motive, intent, absence of mistake or accident, identity, or common scheme or plan. *See generally State v. Spreigl*, 139 N.W.2d 167, 173 (Minn. 1965).

III. The district court did not abuse its discretion by denying appellant's motion for a mistrial after the district court made a statement during voir dire suggesting that appellant's counsel worked for the public defender's office.

Appellant argues that the district court's reference to his attorney being a public defender before the jury panel impacted his ability to receive a fair trial. We disagree.

We review a district court's denial of a motion seeking a mistrial for an abuse of discretion. *State v. Spann*, 574 N.W.2d 47, 52 (Minn. 1998). The district court is in a better position than an appellate court to determine whether any prejudice warrants a mistrial. *State v. Reardon*, 73 N.W.2d 192, 195 n.6 (Minn. 1955). When the prejudice is insubstantial, we leave the granting of a new trial to the district court's discretion. *Id.*

The jury must not be informed that defense counsel is a public defender. *State v. Bonn*, 412 N.W.2d 28, 30 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987). But when the identification is inadvertent and the prejudicial impact is both speculative and minimal, the reference does not deny the accused a fair trial. *Id*.

During voir dire, one prospective juror informed the district court that she worked in the same office as appellant's defense counsel. The district court responded, "Okay. So you're an Assistant Hennepin County Public Def – defense attorney?" Appellant moved for a mistrial based on the district court's comment. The district court responded that he had said "Assistant Hennepin Defense Attorney," and appellant withdrew his motion. At the start of the second day of trial, the district court conceded that, upon review of the audio recording of the proceedings, he did make a reference to defense counsel being a public defender. Appellant moved for mistrial. The district court denied the motion, stating that

"I did catch myself before I actually spit out the whole phrase" and "[i]t was a fleeting comment on my part. I have no reason to believe that it prejudiced [appellant]."

Appellant contends that the error amounts to a violation of his constitutional right to a fair trial, which requires a higher standard of analysis showing that the asserted error did not contribute to the verdict beyond a reasonable doubt. *State v. Cox*, 322 N.W.2d 555, 558 (Minn. 1982). However, even under the higher standard, the alleged error did not prejudice appellant.

The district court did not complete the statement and did not repeat it for the remainder of the trial. *See id.* at 559 (stating that "the nature and source" of the comment is relevant to analysis); *see also State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (analyzing prosecutor's improper statement in context of entire closing argument). The district court uttered the statement during voir dire, before empaneling the jury. *See Cox*, 322 N.W.2d at 559 (analyzing "number of jurors exposed to the [statement]"). The state presented the jury with an overwhelming amount of evidence implicating appellant, including the jail-call recordings, the 911 and *Scales* recordings, and the law-enforcement witnesses. *See Bonn*, 412 N.W.2d at 30 (finding alleged misconduct harmless in light of overwhelming evidence implicating defendant). Appellant declined the district court's offer of a cautionary instruction. *See Washington*, 521 N.W.2d at 40 (noting that jury instructions are relevant in determining whether improper comments unduly influenced jury). Based on this record, we discern no abuse of discretion by the district court.

IV. The district court did not abuse its discretion by imposing a total aggregate sentence of 87 months and four days.

Appellant argues that, "considering the garden variety nature of the charged offenses," the district court's aggregate sentence of 87 months and four days is "unreasonable, excessive, inappropriate, and unjustifiably disparate." We disagree.

We review sentencing decisions for an abuse of discretion. *Vickla v. State*, 793 N.W.2d 265, 269 (Minn. 2011). Because appellant had four prior felony convictions for the same offense, the district court imposed consecutive sentences; specifically, 39 months for count one, and 12 months plus one day consecutively for each of the remaining four counts. The Sentencing Guidelines permit the imposition of consecutive sentences based on appellant's particular prior felony.[3] Minn. Sent. Guidelines 2.F.2b, 6B (2017).

At the sentencing hearing, the district court stated that appellant's phone calls played at trial were "chilling" and that it "totally underst[ood] why [A.G.] is concerned for her safety."[4] Based on the record and the fact that the district court imposed a sentence within

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[3] The state filed a motion to strike appellant's reply brief because it included sentencing data from the Sentencing Guidelines Commission. Appellant included the data to support his argument that felony DANCO violators on average receive lower aggregate sentences, and a low percentage of them receive consecutive sentences. Appellant did not present this data to the district court. *See* Minn. R. Crim. P. 28.02, subd. 8 (providing documents filed in district court constitute record on appeal). And while this court may consider documents that it could find through its own research, *State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2000), appellant raised this new information in his reply brief rather than his primary brief, and his reply brief must be confined to the new matter raised in respondent's brief. Minn. R. Civ. App. P. 128.02, subd. 4. We therefore grant the state's motion.

[4] The state also moved to strike appellant's pro se supplemental brief which, it argues, contains conversations appellant had with his attorney and information gleaned "after the fact about [A.G.]'s" motivation to testify at trial. "The record on appeal consists of the documents filed in the district court, the offered exhibits, and the transcript of the proceedings, if any." Minn. R. Crim. P. 28.02, subd. 8. "An appellate court may not base

the presumptive guidelines, the district court did not abuse its discretion by sentencing appellant to an aggregate total of 87 months and four days.

Affirmed; motion granted.

its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *State v. Roy*, 928 N.W.2d 341, 347 n.2 (Minn. 2019). Because appellant presents information and arguments for the first time in his supplemental brief that are outside the record on appeal, we grant the state's motion.