STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1031

State of Minnesota,
Respondent,

vs.

Bruce Renault Fry,
Appellant.

Filed July 20, 2020
Affirmed
Bratvold, Judge

Hennepin County District Court
File No. 27-CR-18-18074

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

In this appeal from a final judgment of conviction for second-degree intentional murder, appellant asks this court to reverse and remand for a new trial because (1) the

district court erroneously denied his request for a jury instruction on the lesser-included offense of second-degree assault; (2) appellant was deprived of his right to effective assistance of counsel; (3) the district court erroneously denied appellant's request for an alternative public defender; and (4) the district court abused its discretion when it imposed a 480-month sentence.

We conclude that the district court did not abuse its discretion when it denied appellant's request for a lesser-included-offense instruction. We also determine that appellant's attorneys did not provide ineffective assistance and the district court did not abuse its discretion when it denied appellant's request for different court-appointed attorneys or when it imposed a 480-month sentence based on an aggravating factor. Thus, we affirm.

FACTS

On January 29, 2019, a jury found appellant Bruce Renault Fry guilty of second-degree intentional murder and the lesser-included offense of second-degree unintentional murder. These facts summarize, in a light favorable to the jury's verdict, the evidence received during Fry's trial.

Fry and K.H. had recently ended a roughly two-month romantic relationship. On July 13, 2018, K.H. told her two younger brothers, D.H. and S.H., that Fry had "hit" and "push[ed]" her. D.H. and S.H. became "upset" and wanted to "confront [Fry]." The three siblings were at S.H.'s home, a short walk from Fry's apartment building. The two brothers went to Fry's apartment at about 7 p.m. and were gone for "about ten minutes," according to K.H.

Fry's three-story apartment building has an unlocked exterior front door that opens into a vestibule with a locked glass door that opens into a hallway. Fry "buzzed" the brothers in at the same time a resident opened the hallway door with a key. D.H. and S.H. went upstairs to Fry's apartment, knocked on the door, and yelled, "Open the door. We told you not to hit our sister." S.H. "was banging on it, pounding on it," but Fry did not open the door. They yelled, "We gonna beat you—we're gonna whoop your a-s" and, "You're a little b-tch. Come outside." D.H. testified that he intended to "fist fight" and "was trying to break [Fry's] jaw."

After roughly 40 seconds, D.H. and S.H. decided that Fry was "not gonna come out" and that he was "scared." D.H. testified that, while he and S.H. were knocking, he could hear Fry say that he thought he had buzzed in his friend and told them to go away before he called 911. They left, walked back to S.H.'s apartment, and D.H. went to his own home.

"Pretty late" that evening, Fry's neighbor was outside the back of the apartment building, smoking a cigarette, when he "noticed a guy come around" and "start yelling up at the building." The individual, later identified as S.H., "seemed aggravated." For two minutes, S.H. yelled, "Come on out, you know, let's fight, I'll show you what I can do," shouted "cuss words and name calling," and stated he "wanted to fight." The neighbor watched S.H. go around to the front of the building.

Fry then came outside and asked his neighbor, "Was there anybody outside yelling?" The neighbor responded, "Yeah." Fry asked how many people were there, and the neighbor stated, "One." Fry went inside, and the neighbor continued to smoke for a few more minutes. The neighbor testified that Fry "came out the back—the back door," "ran

past" the neighbor "away from the building," and said, "Hey bro, don't say nothing. Don't say nothing." The neighbor saw that Fry "had something with him" that looked like "some sort of container." The neighbor testified that he did not know what Fry was talking about until he "went back in and saw the victim laying on the floor." The neighbor also testified that the person on the floor was wearing the same clothing as the person who had been yelling at the building.

Security cameras captured most of the fight between Fry and S.H. The apartment building has ten cameras, which record video of the vestibule, part of the hallway beyond the glass door, part of the parking lot, the rear door, and the rear stairwell. The videos do not include audio. The jury watched the videos depicting the fight and what followed, and a homicide detective described the video as it played to the jury. Based on the video time stamps, the fight lasted roughly five minutes from when S.H. approached the apartment building until Fry ran away from the apartment building.

The video received into evidence shows that S.H. walked up to the front door of the apartment building at 10:43 p.m. At about the same time, Fry came down the rear stairwell; the homicide detective testified that the video shows "the glint of a knife in his right hand." Fry exited a back door to the parking lot, walked around the parking lot, and, 30 seconds later, reentered the apartment building through the back door.

The video also shows that, at about the same time, S.H. opened the apartment building's front door and entered the vestibule. S.H. pressed the buzzer, and Fry approached the vestibule from the hallway. With the glass hallway door between them, they appeared to argue with the door shut. Fry opened the hallway door, and they argued

in the vestibule. S.H. put his hand on Fry's chest and pushed him. Fry responded by making "three distinct stabbing motions," according to the homicide detective. S.H. fell onto the floor, just past the hallway door. Still on the floor, S.H. raised his hands. Fry then "comes [at S.H.] with an overhand swing with the knife," according to the detective. S.H. stood up and ran down the hallway, away from Fry, and Fry followed. The video does not record what happens next, although police later found S.H. collapsed on the hallway floor. Their fight lasted about one minute based upon the video time stamps.

The video shows that Fry next walked upstairs, returned downstairs, turned into the hallway where police later found S.H., and then walked back upstairs. Roughly two minutes later, at 10:52 p.m., Fry exited the apartment building through the back door with something in his hands. Fry then ran through the parking lot, away from the building.

Responding to a 911 call, police arrived at 10:54 p.m. and entered the apartment building through the front door, where an officer later testified that he saw blood droplets on the floor. Upon passing through the glass hallway door, the same officer testified that he saw more blood "almost like a trail" down the 50-foot hallway. Police found S.H. on the floor near a "pool" of blood, with more blood on the wall. They administered aid and took S.H. to the hospital.

Within a few days, police asked K.H. and D.H. to view the apartment-building video, and they identified Fry. Police arrested Fry on July 15. In a *Mirandized* statement, Fry admitted that he stabbed S.H. After obtaining a warrant, officers searched Fry's cell phone and found text messages sent between 11:00 p.m. and 1:00 a.m. on the night of the

stabbing that said "emergency" and "[p]lease pick up the phone." Fry also received a text message that listed names and phone numbers of three criminal law firms.

On July 18, the state charged Fry with one count of attempted second-degree murder with intent to effect the death of that person or another, without premeditation, while using a dangerous weapon under Minn. Stat. § 609.19, subd. 1(1) (2016). After S.H. died from the wounds he sustained in the assault, the state amended the complaint by removing the attempt allegation and updating the probable-cause statement.

Fry pleaded not guilty. A six-day jury trial began on January 22, 2019. The state presented testimony from S.H.'s mother, K.H., D.H., a 911 dispatcher, Fry's neighbor, four police officers, a police sergeant, a homicide detective, Fry's apartment-building manager, a forensic scientist in the crime-lab field-operations unit, a medical examiner, and a computer forensic examiner. Fry waived his right to testify and did not present any evidence.

The district court received 81 exhibits, including a map of the area around Fry's apartment building, photos used to identify Fry during the investigation, crime-scene photos, medical records, autopsy photos and records, and a cell-phone data report. The state offered into evidence and played for the jury: the 911 call, an officer's body-camera footage, and the apartment-building video. The witnesses testified to the facts summarized above.

The medical examiner testified that S.H. had six wounds: one "incised wound of the forehead"; two incised wounds on his face consistent with use of a knife; a chest wound; "a stab wound on the back of the right arm" that was likely "a defensive wound"; and a

wound on his pinky finger. The examiner testified that the wounds were consistent with the use of a knife. The medical examiner also testified that S.H.'s cause of death was the "stab wound" to his chest, and that the other wounds were too insignificant to have contributed to his death. The medical examiner testified that a toxicology report showed S.H.'s alcohol concentration was 0.20.

The jury found Fry guilty of both intentional second-degree murder and the lesser-included offense of unintentional second-degree felony murder under Minn. Stat. § 609.19, subd. 2(1) (2016). The district court granted the state's motion for an upward durational departure, and Fry waived a separate sentencing trial. At sentencing, the district court found one aggravating factor, stating that both Fry's current and prior convictions involved injury to a victim, which justified the upward departure. The district court imposed a 480-month prison sentence for the intentional second-degree murder conviction. Fry appeals.

D E C I S I O N

I. The district court did not abuse its discretion when it denied Fry's request for a jury instruction on second-degree assault as a lesser-included offense.

We review a district court's decision to deny a request for a lesser-included-offense instruction for an abuse of discretion. *State v. Chavez-Nelson*, 882 N.W.2d 579, 591 (Minn. 2016). A district court must instruct the jury on a lesser-included offense when "(1) the lesser offense is included in the charged offense; (2) the evidence provides a rational basis for acquitting the defendant of the charged offense; and (3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *Troxel v. State*,

875 N.W.2d 302, 310 (Minn. 2016); *accord State v. Zumberge*, 888 N.W.2d 688, 697 (Minn. 2017). The district court "views the evidence in the light most favorable to the party requesting" the lesser-included-offense instruction. *Troxel*, 875 N.W.2d at 310. If a district court erroneously denies a defendant's request to instruct the jury on a lesser-included offense, reversal is warranted only if the defendant was prejudiced by the omitted instruction. *Id.* "A defendant is prejudiced when the jury may have convicted the defendant of only the lesser offense had the lesser-included-offense instruction been given." *Zumberge*, 888 N.W.2d at 697 (quotation omitted).

In Fry's case, the district court instructed the jury on second-degree intentional murder without premeditation and second-degree unintentional felony murder. The district court also gave a justifiable-taking-of-life self-defense instruction, which stated: "the defendant is not guilty of intentional murder in the second degree for taking the life of [S.H.], even intentionally, if the defendant's action was taken in resisting or preventing an assault the defendant reasonably believed exposed him to death or great bodily harm."

After the state rested, it requested a jury instruction on a lesser-included offense of second-degree unintentional felony murder with second-degree assault as the predicate felony. In response, the defense requested that the district court instruct the jury separately on second-degree assault as a lesser-included offense.

The district court denied Fry's request, reasoning that

> Okay. Well, this—I think this is the—a good example of a single continuous transaction. This all takes place in a very short period of time, and I don't think it's realistic or proper to ask this jury, you know, did stabs one, two, and five cause death, or stabs two and four, or whatever. This is very much a

> single continuous transaction and a felony. And the homicide needs to be part of a single continuous transaction, and that's what we have here. There's no way—like I said, this entire stabbing, I didn't count the seconds, but the entire incident of stabbing was a matter of seconds. We can't parse this as finely as defense would like it to be parsed. I don't think it's appropriate here, and I don't think a reasonable jury could conclude that Mr. Fry assaulted the victim and that was not the cause of his death and, you know, self-defense applies to one and not stabs four and five.
>
> I do not think that's what these rules are set up for. And I think the case [*State v. Nielsen*, 467 N.W.2d 615 (Minn. 1991)] that [the state] cited is on point and does apply here . . . .

The district court granted the state's request.

On appeal, Fry argues the district court erred when it denied his request for a jury instruction on the lesser-included offense of second-degree assault because "the evidence presented at trial provided the jury with a rational basis to acquit Fry of the greater offenses and find him guilty of the lesser included offense of second degree assault." The state argues that the district court correctly determined that no rational basis supports acquitting Fry of second-degree unintentional felony murder and convicting him of second-degree assault.

Our analysis addresses the three elements for instructing on lesser-included offenses. First, we determine whether second-degree assault is "included" in the charged offense of second-degree unintentional felony murder. *Troxel*, 875 N.W.2d at 310. Fry argues that second-degree assault is a lesser offense of second-degree unintentional felony murder because "it is necessarily proved if the greater offense is proved." The elements of second-degree unintentional felony murder include that Fry caused S.H.'s death and, at the time of causing the death, Fry was committing or attempting the felony offense of

second-degree assault. *See* Minn. Stat. § 609.19, subd. 2(1). Second-degree assault under Minn. Stat. § 609.222, subd. 1 (2016), provides that an individual who "assaults another with a dangerous weapon" is guilty of the offense. Because second-degree unintentional murder while committing second-degree assault requires proof that Fry committed second-degree assault, the second-degree assault is "included" in the charged offense. *See Troxel*, 875 N.W.2d at 310.

Second, we determine whether the evidence provides a rational basis for acquitting Fry of second-degree unintentional felony murder. *See id.* Fry argues that the jury could have reasonably concluded that his first "strike," or "the fatal blow," was "a legitimate act of self-defense" and therefore acquitted him of second-degree unintentional murder. But even if Fry is correct, we must then consider, third, whether the evidence provides a rational basis for convicting Fry of second-degree assault. *See id.* We are not persuaded that Fry can succeed on the third element. As the district court concluded, Fry's conduct was a single continuous transaction of about a minute that caused S.H.'s death. It is not rational for the jury to parse out each strike as a separate assault unrelated to that homicide.

We find *State v. Nielsen* to be instructive. There, the appellant was convicted of first-degree felony murder after he killed a woman and sexually penetrated her either during the assault or after her death. 467 N.W.2d at 617-18. First-degree felony murder occurs when one "cause[s] the death of a human being while committing or attempting to commit criminal sexual conduct." *Id.* at 618. Appellant contended that he should have been acquitted of first-degree felony murder because the homicide and the assault were two separate transactions, so the felony-murder rule, which requires that "the felony and the

homicide are parts of a single continuous transaction," did not apply. *Id.* (quotation omitted). Appellant pointed to the lack of evidence proving when the assault occurred, and argued that he did not consider sexually assaulting the victim until after she was deceased. *Id.* The supreme court concluded that, even if the sexual assault "occurred after death, the jury could have believed that the assault was sexually motivated and that the [assault] and the homicide were one continuous transaction, making the crime first degree felony murder." *Id.*

Fry argues that we should distinguish *Nielsen* because it involved a sufficiency-of-the-evidence claim and did not concern a lesser-included-offense jury instruction. The state argues that *Nielsen* applies because it involved "a fatal assault that was over in a matter of seconds and was part of a single continuous transaction." We agree with the state. *Nielson* reasoned that the evidence was sufficient to support the jury's determination that the assault and the homicide, which occurred up to 30 minutes apart, were part of a continuous transaction under the felony-murder rule. *Id.* Here, Fry's assault and homicide lasted roughly one minute, and under *Nielsen*, Fry's conduct was part of a continuous transaction.

The supreme court has also rejected Fry's implicit argument that a murder can be separated from an underlying felony. In *State v. Harris*, the supreme court held that "[s]o long as the underlying felony and the killing are part of one continuous transaction, it is irrelevant whether the felony took place before, after, or during the killing." 589 N.W.2d 782, 792 (Minn. 1999). In *Bellcourt v. State*, the supreme court determined that "[i]n Minnesota, we ascribe to the res gestae theory that the felony-murder rule is applicable

where the felony and the killing [. . .] are parts of one continuous transaction." 390 N.W.2d 269, 274 (Minn. 1987) (quotation omitted). The state argues that this rationale applies here, because "[i]f the jury concluded that [Fry] committed the second-degree assault, it would have to conclude that he committed felony murder." We agree. The evidence did not provide a rational basis for the jury to acquit Fry of second-degree unintentional felony murder and convict him of second-degree assault. If the jury acquitted Fry of felony murder based on self-defense for the first strike, it could not then convict him of the predicate felony of second-degree assault. *See Troxel*, 875 N.W.2d at 310 (stating the evidence must provide a rational basis for convicting the defendant of the lesser-included offense to warrant the jury instruction). We conclude the district court did not abuse its discretion by denying Fry's request for a jury instruction on the lesser-included offense of second-degree assault.

Even if we were to conclude that the district court erred by denying Fry's request for a lesser-included-offense instruction, we would then need to determine whether Fry was prejudiced by the error. Fry argues that he was prejudiced because of the "huge difference" between his sentence and the sentence he would have received if convicted of the lesser-included offense. But this is the wrong analysis. In *Zumberge*, the supreme court held that prejudice occurs if the jury could have convicted the defendant of *only* the lesser offense had the instruction been given. 888 N.W.2d at 697.

We conclude that Fry was not prejudiced by the alleged error. The jury found Fry guilty of second-degree intentional murder and the lesser-included offense of second-degree unintentional felony murder, and rejected his self-defense argument.

Thus, having convicted Fry of the greater offense and the lesser-included offense, the jury could not have convicted Fry of *only* the second-degree assault. *See, e.g.*, *State v. Harris*, 713 N.W.2d 844, 851 (Minn. 2006) ("That the jury convicted Harris of the greater offense, despite the availability of the lesser offense, or "third option," indicates that Harris suffered no prejudice from the denial of the second-degree felony murder instruction.").

II. Fry was not deprived of his right to effective assistance of counsel.

We review ineffective-assistance-of-counsel claims de novo. *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016). A claim of ineffective assistance of trial counsel must satisfy the two-part test explained in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Under the *Strickland* test, Fry must show that "(1) his counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Id.*; *see Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). The objective standard of reasonableness is "representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014) (quotation omitted). "There is a strong presumption that counsel's performance was objectively reasonable." *Griffin v. State*, 883 N.W.2d 282, 287 (Minn. 2016) (quotation omitted).

Fry argues that his attorneys provided ineffective assistance for two reasons: they requested the wrong self-defense jury instruction and they did not request a jury instruction for the lesser-included offense of heat-of-passion manslaughter. We discuss each of Fry's points in turn.

First, Fry contends that his attorneys' performance fell below an objective standard of reasonableness because they requested the justifiable-taking-of-life self-defense instruction that was "more onerous" than the general self-defense instruction. Fry argues the justifiable-taking-of-life self-defense instruction was not appropriate because, under *State v. Pollard*, 900 N.W.2d 175 (Minn. App. 2017), it is error to give this instruction in a case in which the defendant argues he lacked the intent to kill, as Fry argued here. In *Pollard*, this court recognized that the supreme court "has repeatedly stated that it is error to provide the justifiable-taking-of-life instruction, instead of the general self-defense instruction, when the defendant asserts self-defense but claims that the death was not the intended result." 900 N.W.2d at 179. We agree with Fry that the justifiable-taking-of-life self-defense instruction was inappropriate. *See also State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012) ("We have stated that when a defendant asserts self-defense and claims that the resulting death was unintentional, it is inappropriate to give the justifiable-taking-of-life instruction.").

But Fry fails to establish the second part of *Strickland*—that a reasonable probability exists that his trial outcome would have been different but for his attorneys' error. *See Andersen*, 830 N.W.2d at 10 ("We need not address both the performance and prejudice prongs if one is dispositive."). The jury received the general self-defense instruction for second-degree unintentional felony murder and rejected it when it found Fry guilty of that offense. Because the jury rejected general self-defense for the lesser offense of second-degree unintentional felony murder, Fry cannot show that, had the jury been instructed on general self-defense for second-degree intentional murder, it would have

acquitted him of the greater offense after rejecting general self-defense on the lesser offense. We conclude that Fry has failed to show that his trial outcome would have been different but for his attorneys' alleged error.

Second, Fry argues that his attorneys failed to request an instruction on the lesser-included offense of first-degree heat-of-passion manslaughter. Fry's argument fails on the first part of the *Strickland* test because his attorneys' performance did not fall below an objective standard of reasonableness. As discussed above, a district court must give a lesser-included-offense instruction when the lesser offense is included in the charged offense and the evidence provides a rational basis for acquitting the defendant of the charged offense and convicting the defendant of the lesser-included offense. *Troxel*, 875 N.W.2d at 310. The supreme court has recognized that first-degree heat-of-passion manslaughter can be a lesser-included offense of second-degree intentional murder. *See State v. Johnson*, 719 N.W.2d 619, 625-26 (Minn. 2006). Therefore, the first *Troxel* element is met.

But Fry's argument fails on the second and third *Troxel* elements. The evidence did not provide the jury with a rational basis to convict him of first-degree manslaughter and acquit him of second-degree unintentional felony murder. First, the evidence presented does not establish either of the two elements of first-degree heat-of-passion manslaughter. Under Minn. Stat. § 609.20 (1) (2016), an individual is guilty if they "intentionally cause[] the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances."

Fry argues his "emotional state was consistent with a heat of passion." But record evidence shows that Fry acted in anger or out of fear, and this evidence cannot warrant the heat-of-passion instruction. *See Johnson*, 719 N.W.2d at 626 (reviewing denial of a heat-of-passion instruction, appellate courts "look for a heat of passion that clouds a defendant's reason and weakens his willpower" and "[a]nger alone is not enough") (quoting *State v. Carney*, 649 N.W.2d 455, 461 (Minn. 2002)). And the evidence shows that Fry was the aggressor and escalated the situation—conduct that does not support a heat-of-passion instruction. *See Stiles v. State*, 664 N.W.2d 315, 322 (Minn. 2003) (stating a heat-of-passion instruction is not warranted when a defendant was the aggressor). Without some evidence that would allow the jury to conclude that (a) Fry acted in the "heat of passion," *and* (b) Fry was *not* the aggressor when he opened the locked glass hallway door holding a knife, we conclude that Fry's attorneys acted with objective reasonableness by not requesting a lesser-included-offense instruction for heat-of-passion. Thus, Fry's second theory for ineffective assistance of counsel fails the first part of *Strickland*.

Even if we were to assume that Fry's attorneys' performance was not objectively reasonable, there is no reasonable probability that the trial outcome would have been different because the jury found Fry guilty of second-degree unintentional felony murder. *See Andersen*, 830 N.W.2d at 10. For the same reasons discussed above, we are not persuaded that the trial outcome would have been different if his attorneys had requested the lesser-included-offense jury instruction on first-degree heat-of-passion manslaughter. Because Fry's arguments fail to satisfy the *Strickland* test, we conclude that Fry's ineffective-assistance-of-counsel claim fails.

III. The district court did not abuse its discretion when it denied Fry's request for different court-appointed attorneys.

The Minnesota Constitution and the United States Constitution guarantee criminal defendants the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Defendants who cannot afford counsel are entitled to a court-appointed attorney. *Gideon v. Wainwright*, 372 U.S. 335, 339-45, 83 S. Ct. 792, 794-97 (1963).

When a defendant articulates concerns about his court-appointed attorneys' performance and requests substitute counsel, the district court must grant the request "'only if exceptional circumstances exist and the demand is timely and reasonably made.'" *State v. Munt*, 831 N.W.2d 569, 586 (Minn. 2013) (quoting *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998)). If a defendant "'voices serious allegations of inadequate representation,' a district court should conduct a 'searching inquiry' before determining whether the defendant's complaints warrant the appointment of substitute counsel." *Id.* (quoting *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006)). A defendant's "general dissatisfaction with appointed counsel does not amount to an exceptional circumstance." *Id.* (quotation omitted). We review a district court's decision to deny a defendant's request for substitute counsel for an abuse of discretion. *Clark*, 722 N.W.2d at 464.

At the second omnibus hearing, Fry and the district court discussed Fry's concerns about his court-appointed attorneys:

> THE COURT: Mr. Fry, you wanted to say something.
>
> FRY: Yeah. I wanted to stop this before we go any farther, right? I'm trying to get a change of counsel, right, because Mr. Soul . . . is that correct?

THE COURT: Mr. Sellers.

FRY: Mr. Sellers, he said he was go to come and see me and get an investigator—

THE COURT: Okay.

FRY: --to question all the things that I have right here on this piece of paper, but which no one came to talk with me. And he said he was going to come back to me a month after that, uh, prior. He said he come and do—look over the paperwork.

THE COURT: Okay.

FRY: Haven't come back. So I'm really—I really—I need a – a change of counsel.

. . . .

FRY: And being that I would like to have a change of counsel because Sellers honestly is not doing his job and I don't want him to represent me.

THE COURT: Well, hang on, Mr. Fry. Here's the deal. Like I said, I can't tell [the chief public defender] who to assign to what case and she has assigned Mr. Sellers, a very experience[d] attorney, and Mr. Widmalm-Delphonse, also lots of experience in representing clients such as yourself. That is her choice. I can't—I can't make her change that, okay. If you have complaints or concerns, you can feel free to call her, but I cannot change that for you and these are your lawyers. Unless you hire private counsel or somehow get some sort of substitution of counsel, these gentlemen are your attorneys on the case. You can represent yourself, but this is a charge of Murder in the Second Degree, a very serious felony with a presumptive commitment to the Commissioner of Corrections between 295 months and 415 months, so it would seem having counsel is prudent; but ultimately, sir, that is your choice. So these gentlemen are your attorneys unless they, um, are replaced by [the chief public defender] or unless you fire them and hire somebody new or choose to represent yourself.

On appeal, Fry argues that the district court erred when it failed to "make any inquiry into the nature of [his] complaints about his attorney." The state responds that Fry complained "early on in the case just as discovery was being completed," alleged "general dissatisfaction," and did not make "serious allegations of inadequate representation" that warranted a searching inquiry.

We agree with the state. Under *Munt*, the district court conducts a searching inquiry when a defendant makes serious allegations about his attorneys' performance. 831 N.W.2d at 586. Fry did not make "serious allegations of inadequate representation" that would trigger a searching inquiry. *See id.* (quotation omitted). Fry told the district court that "no one came to talk with [him]" about information he had related to his case and that his attorney "honestly is not doing his job." Neither of these are serious allegations about inadequate representation. Rather, these statements fall into the category of "general dissatisfaction" with counsel. *Id.* at 586-87.

Fry argues that, under *Clark*, the district court should have conducted a searching inquiry, including "a questioning of Fry and his attorneys," because, "without questioning, the court would have no idea about the specifics of Fry's complaints." But Fry overlooks that he must make serious allegations before the district court conducts a searching inquiry.

Fry next argues that this court's "analytical approach" is "akin to a Catch-22," in which a defendant may have a hearing only if he voices serious allegations, but the only way to voice serious allegations is to have a hearing. Fry argues that his case is like *State v. Paige*, in which this court reasoned that a district court should ask a defendant how he wishes to proceed when he wants to discharge his attorney, and that the district court erred

when it "took no action to clarify appellant's request to discharge counsel." 765 N.W.2d 134, 140 (Minn. App. 2009).[1] Fry argues that under *Paige*, the district court needed to "conduct the inquiry at a hearing where the parties could be present and have the ability to give further input." We disagree.

In *Paige*, the appellant sought new counsel because he was trying to withdraw his guilty plea based on the ineffective assistance of counsel, and his current attorney had a conflict of interest if he continued representation. *Id.* at 137-38. In contrast, Fry requested different court-appointed attorneys based on general dissatisfaction, which materially differs from the appellant's request in *Paige*. Because Fry did not make serious allegations about his attorneys' performance, we conclude that the district court did not abuse its discretion when it denied Fry's request for different court-appointed attorneys.

Fry also argues that the district court erred when it stated that it "had no authority to assign [Fry] a different public defender." This court has held that it is inaccurate for the district court to tell a defendant that "he could not have a different public defender under any circumstances." *State v. Lamar*, 474 N.W.2d 1, 3 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991). Here, the district court informed Fry that "these gentlemen are your attorneys unless they . . . are replaced by [the chief public defender] or unless you fire them and hire somebody new or choose to represent yourself," that the court could not make the chief public defender change who represents him, but that Fry could "address the Chief

[1] Fry also urges this court to follow its analysis in an unpublished decision. But our unpublished decisions are not precedential. *See* Minn. Stat. § 480A.08, subd. 3(b) (2018); *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 575 n.2 (Minn. 2009) (stating that "the unpublished Minnesota court of appeals decision does not constitute precedent").

Public Defender if [he] ha[s] attorney complaints at this time." Later, the district court stated that "[u]nless you hire private counsel or somehow get some sort of substitution of counsel, these gentlemen are your attorneys."

Here, the district court did not state that Fry could not have different attorneys under "any circumstances." And the district court stated that Fry could request substitute counsel. When its comments to Fry are read in context, the district court appears to have implicitly found that Fry's complaints were not serious allegations of inadequate representation. But the district court's statement implying that it lacked the authority to change or substitute Fry's counsel came close to misstating the law. *See Munt*, 831 N.W.2d at 586. Under all of the circumstances, we conclude that the district court did not abuse its discretion in denying Fry's request for different court-appointed attorneys.

IV. The district court did not abuse its discretion when it imposed a 480-month sentence.

The purpose of the Minnesota Sentencing Guidelines is to "promote uniformity, proportionality, rationality, and predictability in sentencing." *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011). The guidelines provide presumptive sentences for offenses. To promote proportionality and uniformity, "departures from the presumptive guidelines sentence are discouraged." *Id.* (quotation omitted). A district court may depart from a presumptive sentence when aggravating factors are present. This court reviews a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion. *Tucker*, 799 N.W.2d at 585-86. We determine whether the district court's

reasons for departure "are legally permissible and factually supported by the record." *State v. Weaver*, 796 N.W.2d 561, 567 (Minn. App. 2001), *review denied* (Minn. July 19, 2011).

Before sentencing, the state sought an upward departure on the aggravating factor that Fry had a prior conviction for an offense in which the victim was injured. After the jury found him guilty, Fry waived his right to a jury determination of aggravating factors. The district court also heard arguments and received a certified copy of an order of sentence and commitment showing Fry's prior first-degree murder conviction in Illinois as evidence of Fry's prior offense. The district court also conducted a sentencing hearing. With Fry's criminal-history score of two and the offense severity level of 11, the guidelines provided a presumptive commit of 346 months with a range of 295 months to 415 months. Minn. Sent. Guidelines 4.A (2016). The state argued for a 480-month sentence and the defense argued for a downward durational departure or a sentence within the guidelines. The district court imposed an upward durational sentence of 480 months with credit for 274 days served.

Fry contends that "given the facts of this case," the district court abused its discretion when it imposed a 480-month sentence. Fry argues that the district court erroneously relied solely on Minn. Stat. § 244.10, subd. 5a(a)(3) (2018), to justify the departure, and caselaw requires that a district court consider "the facts of the case" to justify its decision to depart.

Contrary to Fry's argument, our review of the record shows the district court provided detailed reasoning supporting its departure decision. It explained that the departure was warranted under Minn. Stat. § 244.10, subd. 5a(a)(3), based on Fry's

recidivism—this conviction came within four years after Fry completed a 28-year sentence for intentional murder. Minn. Stat. § 244.10, subd. 5a(a) (2018), provides a non-exhaustive list of aggravating factors that can justify an upward departure. The district court relied on the aggravating factor in subdivision 5a(a)(3), which permits upward departure if "the current conviction is for a criminal sexual conduct offense or an offense in which the victim was otherwise injured and there is a prior felony conviction for a criminal sexual conduct offense or an offense in which the victim was otherwise injured."

During the sentencing hearing, Fry conceded that he had a prior felony conviction in Illinois for intentional murder, his prior offense involved a victim who was injured, and the prior offense could be used as an aggravating factor under Minn. Stat. § 244.10, subd. 5a(a)(3). Thus, the district court appropriately relied on subdivision 5a(a)(3).

Still, Fry argues on appeal that, under *State v. Meyers*, 869 N.W.2d 893 (Minn. 2015), the supreme court held that subdivision 5a(a)(3) requires that a district court rely on specific facts to justify an upward departure. *Meyers* stated that "*[g]iven the facts of this case*, the applicability of the repeat offender aggravating factor, and our prior recognition that the departure ground itself justifies up to a double durational departure, we hold that the district court did not abuse its discretion by imposing a sentence of 240 months." 869 N.W.2d at 902 (emphasis added). But *Meyers* also stated that "the existence of the repeat offender aggravating factor is sufficient, by itself, to justify up to a double durational departure." *Id.* at 901. Thus, under *Meyers*, a district court may rely on Minn. Stat. § 244.10, subd. 5a(a)(3), to justify an upward departure.

Fry argues the facts of his case do not justify an upward departure because he was frightened, defended himself from a "dangerous intruder" at his residence, and his offense was not more serious than a typical second-degree murder offense. And Fry argues that the district court could have considered imperfect self-defense as a mitigating factor.

We are not convinced. The district court addressed the facts of Fry's case when it imposed the departure. At the sentencing hearing, the district court stated, "[F]rankly, Mr. Fry, I'm not detecting any remorse over the fact that we have a young man who's dead. I think you're sorry to be here, but I'm not detecting any remorse for the fact that another life was taken." The district court also noted that Fry is "an extreme danger to public safety at this point with two intentional murder convictions under your belt," that "[t]his is not a self-defense case," and that "[t]here are no mitigating factors." We conclude that the district court did not abuse its discretion when it imposed an upward departure.

Affirmed.