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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1538

State of Minnesota,
Respondent,

vs.

Robert Gaye,
Appellant.

Filed August 1, 2011
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-06-30449

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Melissa Sheridan, Assistant State Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of second-degree criminal sexual conduct, arguing that (1) the district court abused its discretion when it denied his advisory

counsel's request for a continuance and (2) he was denied assistance of counsel. We affirm.

FACTS

Appellant Robert Gaye was charged in May 2006 with one count of criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2004). The complaint alleged that appellant had sexually abused his then nine-year old daughter, H.G. After H.G. reported the abuse, appellant fled the district court's jurisdiction for nearly two years. He was eventually apprehended, and a jury trial was held in July 2009. When the jury was unable to reach a unanimous verdict, a mistrial was declared. A second trial was scheduled for December 2009. In October 2009, appellant was charged by amended complaint with two counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct.

In August 2009, appellant sent a letter to the district court requesting that his appointed public defenders be dismissed and that he be permitted to represent himself. The district court granted appellant's request to proceed pro se but also appointed his public defenders as advisory counsel. At a December 2009 pretrial hearing, appellant informed the district court that he was "suffering from a psychological disorder." The district court ordered appellant's advisory counsel to assume representation for purposes of the hearing and ordered a full competency evaluation. The competency evaluator concluded that appellant was competent to stand trial, which was set for May 17, 2010.

On the day that appellant's trial was scheduled to begin, appellant "fired" his public defenders and requested to proceed pro se. After appellant waived his right to a

court-appointed attorney, the district court appointed one of appellant's public defenders as advisory counsel, explaining to appellant that

> [a]dvisory counsel will be physically present in the courtroom during all proceedings in the case. Advisory counsel will respond to requests for advice from you. Advisory counsel will not initiate such and the support staff of the public defender, investigators, secretaries, law clerks, and legal service advisors will not be available to you.

The district court warned appellant that "[a]dvisory counsel will not be prepared to try the case on your trial date unless ordered to be prepared to do so by the Court," and that "if you are removed from the courtroom because of behavioral issues your standby counsel will be appointed to proceed from there although not necessarily prepared." Later, the district court again emphasized to appellant that "if your behavior becomes disruptive to the extent that I have to remove you, you may lose your right to proceed pro se and [your public defender] would take over as standby counsel at that point."

The district court accepted appellant's waiver and found that it was "necessary because of the seriousness of the charges to appoint [the public defender] to represent [appellant] in a standby counsel capacity." Appellant's public defender provided appellant with the contents of his file.

Trial commenced the following day. Appellant periodically asked advisory counsel for assistance during witness examinations. The district court also ordered advisory counsel to cross-examine H.G.—using appellant's questions—to prevent appellant from directly questioning his alleged victim. Throughout the trial, the district court noted appellant's disruptive behavior and warned appellant that if it continued, the

district court would revoke his right to self-representation and appoint advisory counsel to proceed.

Toward the end of the fifth day of trial, the district court revoked appellant's right to proceed pro se, finding that appellant had continuously violated court rules, been held in contempt of court, exhibited irrational behavior, and lost his temper. The district court found that appellant's behavior had "deteriorated to such a level that the Court does not feel it can adequately control the proceedings as directed by the rules." The district court reappointed appellant's public defender to represent him throughout the remainder of trial.

Following his reappointment, appellant's counsel expressed concerns about his ability to provide effective assistance without additional preparation. The district court granted him until the next day to prepare for trial.

The next morning, counsel renewed his motion for a continuance, arguing that he was not prepared to argue the theory of defense that appellant advocated during his self-representation. He reiterated that he had not had enough time to prepare for the case, given its scientific complexity, and that he had lost the chance to effectively cross-examine many of the state's witnesses who had already testified. He also asserted that appellant's performance while representing himself had essentially made the case "unwinnable."

Appellant's counsel then informed the district court that he could not "in good conscience nor in compliance with my ethical obligations pretend to conduct a proper examination of any witness. To do so would only work against my client's interests."

Therefore, counsel stated that he intended to not call witnesses, not question witnesses, and not give a closing argument. The district court ordered counsel to comply with the appointment or pay a sanction of $1,000 for each day that he opted not to proceed. Counsel nonetheless refused to cross-examine Madison Gbieor, who had already been subject to direct examination and cross-examination by appellant. And during the redirect of Gbieor, counsel made no objections and refused to recross-examine him. During the state's direct examination of Margaret Carney, the nurse at Midwest Children's Resource Center who examined the victim, counsel made no objections and conducted no cross-examination.

Following the presentation of these two witnesses, the jury was excused, and the district court heard from the chief public defender and attorneys from the state's appellate division. Appellant's counsel agreed to represent appellant but requested a five-day continuance to prepare. The district court granted appellant's counsel's request but refused to suspend the state's presentation of its case during that time. The district court also refused to allow appellant's counsel to recall Gbieor and Carney for cross-examination, but the state later agreed to allow Carney to re-testify so appellant's counsel could conduct a cross-examination. Thereafter, appellant's counsel participated fully in the trial.

The jury convicted appellant of one count of second-degree criminal sexual conduct, and acquitted him of the two counts of first-degree criminal sexual conduct. Appellant was sentenced to 36 months in prison with credit for 774 days of time served. As his time-served credit amounted to two-thirds of his executed sentence, appellant was

released upon completing predatory-offender registration and providing a DNA sample. This appeal follows.

D E C I S I O N

I.

Appellant contends that the district court erred by requiring advisory counsel to immediately assume representation after appellant's right to self-representation was revoked. Appellant is challenging the district court's denial of advisory counsel's motion for a continuance following his reappointment. A ruling on a request for a continuance is within the district court's discretion. *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987). "In evaluating a request for a continuance, the test is whether the denial of a continuance prejudices the outcome of the trial." *State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990).

If a defendant voluntarily and intelligently waives his right to counsel, the district court may appoint advisory counsel to assist him. Minn. R. Crim. P. 5.04, subd. 2. Rule 5.04 provides for the appointment of advisory counsel in two situations. Under subdivision 2(1), advisory counsel is appointed "because of concerns about fairness of the process." In that instance,

> [t]he court must advise the defendant and advisory counsel on the record that the defendant retains the right to decide when and how to use advisory counsel, and that decisions about the use of advisory counsel may affect a later request by the defendant to allow advisory counsel to assume full representation.

If advisory counsel is appointed as a safeguard pursuant to subdivision 2(1), "it would not be expected that counsel would be asked to take over the representation . . . and counsel should not be expected and need not be prepared to take over representation should this be requested." Minn. R. Crim. P. 5.04 cmt. But "[i]f this unexpected event occur[s] and a short recess of the proceeding would be sufficient to allow counsel to take over representation," the district court could so order. *Id.*

Alternately, subdivision 2(2) provides for the appointment of advisory counsel "because of concerns about delays in completing the trial, the potential disruption by the defendant, or the complexity or length of the trial." In these circumstances, the district court must then "advise the defendant and advisory counsel on the record that advisory counsel will assume full representation of the defendant if the defendant . . . becomes so disruptive during the proceedings that the defendant's conduct is determined to constitute a waiver of the right of self representation." Minn. R. Crim. P. 5.04, subd. 2(2). "[A]dvisory counsel must be expected to be prepared to take over as counsel in the middle of the trial so long as the interests of justice are served." Minn. R. Crim. P. 5.04 cmt.

Appellant argues that his advisory counsel was appointed pursuant to subdivision 2(1) and that counsel had no knowledge that he was to be prepared throughout trial to possibly assume representation. On this ground, appellant argues that the district court abused its discretion by denying his motion for a continuance. When appointing advisory counsel, the district court warned appellant on three separate occasions that if he became disruptive during the proceedings, his advisory counsel would be appointed to assume

representation. While these comments suggest that counsel was appointed pursuant to subdivision 2(2), the district court never expressly stated the specific subdivision it relied on during advisory counsel's appointment. Nevertheless, the rule is clear that in either case, the district court may order advisory counsel to immediately assume representation and at that time, it should consider whether a continuance is appropriate. The fact that advisory counsel may have been appointed pursuant to subdivision 2(1) has no bearing on whether the district court's refusal to grant a continuance was an abuse of discretion. We must instead examine the entirety of circumstances at the time of the motion to determine whether the district court abused its discretion. *See State v. Turnipseed*, 297 N.W.2d 308, 311 (Minn. 1980) ("The reviewing court must examine the circumstances before the [district] court at the time the motion [for continuance] was made to determine whether the [district] court's decision prejudiced defendant by materially affecting the outcome of the trial.").

At the time counsel was ordered to assume representation, he requested a continuance to prepare for trial. Although the motion was initially denied, the district court eventually granted counsel approximately four days to prepare his case. Any prejudice in initially denying counsel's requested continuance was mitigated by the fact that counsel had represented appellant during his first trial. Counsel was familiar with the facts of the case, understood the issues, and should have been prepared to respond to the state's presentation of its case. Additionally, counsel had the option to introduce testimony of unavailable witnesses by way of transcripts from the first trial. While appellant argues that certain witnesses were unavailable due to the time constraints, he

does not identify how this prejudiced his defense. Given the circumstances in this case and the fact that counsel had more or less represented appellant since his 2006 charges, we conclude that the district court did not abuse its discretion by initially denying counsel's motion for a continuance.

II.

Appellant argues that he was deprived of his constitutional right to assistance of counsel by his counsel's refusal to participate during the questioning of Gbieor and Carney. The constitutional right to be assisted, or represented, by counsel is separate from the related right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 2063 (1984). A defendant claiming ineffective assistance of counsel must demonstrate prejudice caused by counsel's specific errors. *See id.* at 687, 104 S. Ct. at 2064. But because the actual assistance of counsel is an essential component of a fair trial, the deprivation of assistance is a "structural defect[] in the constitution of the trial mechanism," triggering a presumption of prejudice and automatic reversal. *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 1265 (1991)). "Structural errors require automatic reversal because such errors call into question the very accuracy and reliability of the trial process." *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007) (quotation omitted). Appellant contends that his counsel's refusal to adequately question the two witnesses constituted a structural error warranting reversal without the demonstration of prejudice. We disagree.

It is true that in cases where an attorney is present but grossly ineffective, a reviewing court will presume the prejudice required for a claim of ineffective assistance

of counsel. *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 (1984). But prejudice is only presumed pursuant to *Cronic* if the record demonstrates that counsel completely failed to test the state's case. *Bell v. Cone*, 535 U.S. 685, 697, 122 S. Ct. 1843, 1851 (2002); *see also Chadwick v. Green*, 740 F.2d 897, 901 (11th Cir. 1984) ("[W]hen *Cronic* and [*Strickland*] are read in conjunction, it becomes evident that *Cronic*'s presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances . . . are so egregious that the defendant was in effect denied any meaningful assistance at all."). If counsel's assistance is not "antithetic to effective assistance," the presumption of prejudice does not apply and the defendant must prove ineffective assistance of counsel according to the test outlined in *Strickland*. *Scarpa v. Dubois*, 38 F.3d 1, 12 (1st Cir. 1994).

Appellant argues that his counsel's decision to remain silent during the questioning of the state's two witnesses was not strategic, but motivated by the district court's refusal to grant him adequate time to prepare, and therefore triggers the presumption of prejudice pursuant to *Cronic*.[1] *See Warner v. Ford*, 752 F.2d 622, 624-25 (11th Cir. 1985) (concluding that counsel's strategic decision to remain silent during the entire trial is properly analyzed as an ineffective-assistance claim pursuant to *Strickland*). But we conclude that even if appellant's counsel did not stay silent for strategic reasons,

[1] We note that in subsequent discussions with the district court, the chief public defender described counsel's decision as "a way of now trying to protect this client. And, strategically, the best way to protect him is we can't undue the damage he already did to himself, but it's to not ask any other questions."

his brief refusal to participate in the proceedings was not so antithetical to effective assistance that prejudice may be presumed in this case.

Appellant's counsel refused to participate during recross-examination of Gbieor and during the state's examination of Carney. But prior to his counsel's appointment, appellant himself cross-examined Gbieor at length, and his counsel was subsequently permitted to cross-examine Carney. Therefore, appellant's argument that he is entitled to the *Cronic* presumption of prejudice rests only on the fact that counsel did not make any objections during the state's redirect of Gbieor and during the state's direct examination of Carney. We cannot conclude that counsel's unwillingness to raise objections during this brief portion of the trial was so antithetical to effective assistance of counsel that appellant is entitled to a presumption of prejudice. *See State v. Edwards*, 736 N.W.2d 334, 338 (Minn. App. 2007) (stating that "as a practical matter, it is difficult to imagine situations that would trigger structural error analysis beyond the failure on the part of counsel to inform a defendant of certain basic rights, such as the right to trial by jury, to self-representation, or to an appeal as a matter of right" (quotation omitted)), *review denied* (Minn. Sept. 26, 2007).

Appellant relies heavily on *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001), to support his argument. In *Burdine*, the defendant's counsel slept through a substantial portion of the 12-hour trial. 262 F.3d at 349. The Fifth Circuit equated a sleeping attorney to no attorney at all, and held that counsel was presumptively ineffective. *Id.* But the court expressly limited its holding to the egregious facts before it, and we find its rationale to be inapposite here. *See id.*

Because no presumption of prejudice applies in this case, appellant must demonstrate prejudice caused by specific errors in his counsel's performance. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. While appellant did not argue ineffective assistance of counsel to the district court or in his brief to this court, we conclude that the record is sufficiently developed that we may adequately review an ineffective-assistance-of-counsel claim. *See* Minn. R. Crim. P. 28.02, subd. 11 (allowing for the appellate review of issues not raised below in the interests of justice).

To succeed on a claim of ineffective assistance of counsel, "[t]he defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068); *see also Sanchez-Diaz v. State*, 758 N.W.2d 843, 847-48 (Minn. 2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Gates*, 398 N.W.2d at 561 (quotation omitted). If one prong of the test is determinative of the appellant's claim, we need not address both prongs of the analysis. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

We conclude that appellant's claim of ineffective assistance of counsel fails for lack of prejudice. Appellant's claim is based on his counsel's unwillingness to participate in the recross-examination of Gbieor or to object during Carney's direct examination. But the record reflects that despite these failures, appellant had already engaged in cross-examination of Gbieor, and Carney was re-called, giving counsel the

opportunity to cross-examine her. Thus, there is no reasonable probability that, but for counsel's decision to remain silent during that brief portion of the trial, the outcome would have been any different. Because appellant is unable to demonstrate prejudice, his claim of ineffective assistance of counsel is without merit.

III.

Appellant also raises fourteen issues in his pro se supplemental brief. We have carefully reviewed these arguments and, based on the record, conclude that they are without merit.

Affirmed.