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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-522

State of Minnesota,
Respondent,

vs.

Phillip Anthony Hall,
Appellant.

Filed March 19, 2012
Affirmed in part, reversed in part, and remanded
Randall, Judge[*]

Olmsted County District Court
File No. 55CR097993

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

James P. Spencer, Senior Assistant Olmsted County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Johnson, Chief Judge; and

Randall, Judge.

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

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

RANDALL, Judge

Following a court trial, appellant challenges his convictions of fourth-degree assault of a police officer and gross-misdemeanor obstruction of legal process, arguing that (1) the prosecutor committed prejudicial misconduct by eliciting testimony from the officers regarding appellant's intent and the district court abused its discretion by admitting the testimony, (2) that the district court erred by imposing a $75 fee on appellant without determining whether he had the financial ability to pay, and (3) the district court erred by failing to make any written findings of the essential facts as required by Minn. R. Crim. P. 26.01, subd. 2(b). Because the prosecutor's questions and the district court's admission of the testimony do not rise to the level of plain error, and findings regarding appellant's financial ability are not necessary for this fee, we affirm in part. However, because the district court did not make the findings required by Minn. R. Crim. P. 26.01, we reverse in part and remand to allow the district court to make the required findings.

FACTS

At approximately 3:00 a.m. on the morning of October 22, 2009, police were dispatched to C.P.'s residence in Rochester on complaints of two loud males in the apartment whom C.P. wanted removed. Officer Phillip Paschal (Paschal) and Officer Stephanie Bennett (Bennett), both of the Rochester Police Department, responded to the

call.[1] Upon arriving at the scene, Paschal noted that the men, one of whom was later identified as appellant Phillip Anthony Hall, appeared to be intoxicated. The men agreed to leave the apartment and go to the other man's hotel room.

After everyone left the apartment, the officers heard yelling and profanities coming from appellant's direction. Paschal drove to where appellant was and told him that if he did not calm down, he would be arrested for disorderly conduct. Appellant responded "f*cking arrest me then, b*tch." Appellant was told that he was under arrest and to put his hands behind his back. Instead, appellant moved away and a struggle ensued. At one point, appellant balled up his fist in an apparent attempt to strike the officer. Paschal forced appellant up against the squad car, at which point appellant twice tried to kick at the officers. The officers took appellant to the ground, where he continued to kick at the officers before a hobble strap was placed on him.[2]

Appellant continued to resist the officers' attempts to place him in the squad car, yelling profanities and threats. At one point, appellant attempted to head-butt one of the officers. Appellant was charged by complaint with one count of fourth-degree assault of a police officer in violation of Minn. Stat. § 609.2311, subd. 1 (2008), and one count of gross-misdemeanor obstruction of legal process in violation of Minn. Stat. § 609.50, subd. 1(1) (2008).

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[1] At the time of the incident, Officer Bennett's last name was Fogel, and she is identified that way in the relevant police reports. However the transcript and the briefs refer to her as Officer Bennett, her name at the time of the trial. For the purpose of consistency, we therefore refer to her as Officer Bennett.

[2] On appeal, appellant presents a different version of the events. But appellate courts view the evidence in the light most favorable to the verdict. *See State v. Heiges*, 806 N.W.2d 1, 17 (Minn. 2011) (discussing sufficiency-of-the-evidence claim).

Appellant waived his right to a jury trial and was found guilty on both counts after a court trial. At sentencing, a judgment of conviction was entered on the assault charge and the obstruction charge was dismissed. The district court stayed imposition of sentence for two years and placed appellant on probation. This appeal now follows.

D E C I S I O N

I.

Appellant argues that the prosecutor committed misconduct and that the district court abused its discretion when the prosecutor elicited and the court admitted statements from the two police officers that appellant's actions were intentional. The two challenged question-and-answer statements are:

> Q: Going back to the behavior that you described in the street, you've described some—an attempted punch, some attempted kicks, and an attempted headbutt, correct?
> A: Yes, ma'am.
> Q: Were any of those accidental on the part of [appellant]?
> A: No.
> Q: And how do you know that?
> A: Just the deliberate actions of making a fist, raising his arm, you know, in a quick motion towards me. You know, again kicking backward. You know, kicking towards where I was standing. You know, raising his leg off the ground, kicking back towards my direction. You know, also jerking his head forward, you know, very fast. There was—it was obvious in my mind that [appellant] was trying to do those things.
> ….
> Q: Were the—as you've described them, [appellant's] attempts to kick at the two of you, was that intentionally?
> A: It appeared to be. He kept yelling that he was a security guard, he was going to get us fired, making other comments, calling us names. Seemed more aggressive than anything else to us.

Appellant did not object to this testimony at trial. A defendant's failure to object to the admission of evidence "generally constitutes a waiver of the right to appeal on that basis." *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007). But we may review an error not brought to the district court's attention if the error affects a party's substantial rights. Minn. R. Crim. P. 31.02; *see also State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) ("[An appellate court] may review and correct an unobjected-to, alleged error only if: (1) there is error; (2) the error is plain; and (3) the error affects the defendant's substantial rights."). If these three prongs are met, we address the error only if it seriously affects the fairness and integrity of judicial proceedings. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Appellant argues that the testimony was inadmissible based on his assertion that it "speaks to the ultimate legal conclusion of intent." He claims that "the law is well-settled that ultimate conclusion testimony that embraces legal conclusions is inadmissible." This argument ignores the language of Minn. R. Evid. 704, which states that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The question is therefore whether the testimony was admissible despite speaking to the issue of intent.

Appellant's argument relies primarily on caselaw dealing with expert witnesses. There is nothing in the record to indicate that the police officers were testifying as anything other than lay witnesses. Lay witnesses may offer opinion testimony, but such testimony "is limited to those opinions or inferences which are (a) rationally based on the

perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Minn. R. Evid. 701.

"While it is improper to testify as to the subjective intention or knowledge of another, it is proper for the prosecutor to inquire of the complainant what was going through his mind when the actions occurred." *State v. Witucki*, 420 N.W.2d 217, 222 (Minn. App. 1988), *review denied* (Minn. April 15, 1988). Here, the officers testified that appellant's actions were not accidental and appeared to be intentional. Because the testimony went to the subjective intent of appellant, which we explicitly stated was impermissible in *Witucki*, the elicitation and admission of the testimony was plain error. The officer could testify as to his "state of mind," *but not to that of appellant*.

However, because the impermissible statements as to appellant's intent were offered in addition to a series of observations made by the officers that formed the basis for their opinion, we conclude that any harm done by the elicitation and admission of the testimony was mitigated to the point that a new trial is not mandated. We cannot find prejudice to appellant's substantial rights. *See State v. Reed*, 737 N.W.2d 572, 584 (Minn. 2007) (concluding that failure to give accomplice-testimony instruction was plain error, but defendant failed to carry burden on third prong of plain-error analysis "because the concerns underlying the accomplice corroboration instruction were largely mitigated at trial"). Given the weight of admissible testimony from which appellant's intent may be inferred, we conclude that the elicitation and admission of the officers' testimony that appellant's actions were not accidental and appeared to be intentional do not constitute reversible error.

II.

At appellant's first appearance, the district court found that he qualified for public-defender services and appointed a public defender to represent him in the proceedings. At sentencing, the district court required appellant to pay "$85 in fees and surcharges." The sentencing order itemizes the $85 as ten dollars for law-library fees and $75 for "Crim/Traffic Surcharge (once per case)."

The state suggests that the $75 fee is the surcharge required of "every person convicted of any felony, gross misdemeanor, misdemeanor, or petty misdemeanor offense" under Minn. Stat. § 357.021, subd. 6(a) (2010). We agree. The sentencing order itemized the fee using language that substantially resembles the language of the statute, which provides that a $75 fee is required to be imposed on any person convicted of a crime other than a parking violation and states that "[w]hen a defendant is convicted of more than one offense in a case, the surcharge shall be imposed only once in that case." Minn. Stat. § 357.021, subd. 6(a). No findings regarding the defendant's ability to pay are required, and in fact the district court is not allowed to waive the payment required under the section. *Id.*, subd. 6(c) (2010). Because the $75 fee is the surcharge required under Minn. Stat. § 357.021, subd. 6, and the section does not require any findings as to the defendant's ability to pay, the district court did not err by imposing the $75 fee.

If we were to assume arguendo that the fee is a public-defender copayment, the district court nonetheless did not err by imposing the fee. A defendant who has been provided with the services of a public defender must pay $75 for such services, unless

that copayment is waived by the district court. Minn. Stat. § 611.17(c) (2010); *see also* Minn. Stat. § 645.44, subd. 16 (2010) ("'Shall is mandatory."). Appellant's argument is based on language in Minn. Stat. § 611.20, subd. 2 (2010), which allows the district court to assess a copayment if the court determines that the defendant has the ability to pay. We recently held that any copayment ordered under Minn. Stat. § 611.20 is in *addition to*—as opposed to *replacement of*—the mandatory $75 copayment under Minn. Stat. § 611.17. *State v. Craig*, 807 N.W.2d 453, 472(Minn. App. 2011), *review granted on other grounds* (Minn. Feb. 14, 2012). Section 611.17 does not require specific findings regarding the defendant's financial circumstances when imposing the $75 copayment.

Minn. Stat. § 611.20, the "PD statute," requires the financial ability component. Because the district court did not order partial payment under Minn. Stat. § 611.20, subdivision 2, it was not required to make specific findings with respect to appellant's financial circumstances. *See id.* at 472 (rejecting similar argument).

III.

Appellant argues—and the state concedes—that the district court's failure to supplement the record with written findings violated Minn. R. Crim. P. 26.01, and a remand is required. In relevant part, the rule requires the district court, in a case tried without a jury, to make findings in writing of the essential facts "within 7 days after making its general finding in felony and gross misdemeanor cases." Minn. R. Crim. P. 26.01, subd. 2(b).

It is undisputed the district court did not make the written findings of essential facts as required by the rule. At the end of the trial, the district court stated on the record:

> I have reviewed the elements of these charged offenses, as well as the definitions of the crimes as are contained in the statutes. . . .
>
> Having reviewed all of the elements of these offenses, as well as the definitions of each offense, I find that the State has proved their cases beyond a reasonable doubt, so I do find that [appellant] is guilty of both of these crimes.

These statements likely satisfy the rule's requirement that the district court make a general finding of guilty or not guilty. *See* Minn. R. Crim. P. 26.01, subd. 2(a).

But the statements do not satisfy the requirement that the district court make *written findings* of the essential facts. While the record may contain sufficient evidence to support the convictions, a remand is nonetheless required to allow the district court to make the required findings. *See State v. Taylor*, 427 N.W.2d 1, 5 (Minn. App. 1988) (remanding for written findings, noting that "[a]ny other interpretation of the rule would appear to render the rule meaningless" and declining to "abrogate the trial court's function by substituting our own written findings"), *review denied* (Minn. Sept. 28, 1988). We remand the case to the district court for the purpose of making findings of the essential facts required by Minn. R. Crim. P. 26.01, subd. 2(b).

IV.

Appellant's supplemental pro se brief raises a number of issues to this court. First, appellant asserts that he was denied effective assistance of counsel. In order to succeed on an ineffective-assistance-of-counsel claim, appellant 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) (quotations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). There is a strong presumption that "counsel's performance fell within a wide range of reasonable assistance." *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003) (quotation omitted).

While the supplemental pro se brief asserts a number of deficiencies, appellant presents no argument that the result of the trial would have been different but for any of the alleged errors by trial counsel. His claim therefore fails the second prong of the test adopted by the U.S. Supreme Court in *Strickland v. Washington*¸ 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984). Moreover, a number of the alleged errors are regarding what evidence to present to the court. "What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). Appellant's argument that he was denied effective assistance of counsel is without merit.

Appellant challenges his convictions based on alleged inconsistencies in the record. First, it is not entirely clear that the evidence is, in fact, inconsistent. Finally, appellate courts defer to the trier of fact on issues of credibility and will not reverse absent clear error. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992); *see also State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980) (stating existence of inconsistencies in the state's evidence may not require reversal of a jury's guilty verdict).

Appellant also claims that he was unable to hear the district court during the pretrial conference at which he waived his right to a jury trial, stating that if he had heard the judge he would not have waived that right. However, this statement is negated by the record. At the beginning of the pretrial conference, appellant's counsel told the district court that appellant was having difficulty hearing. After at first stating that he could not hear the district court, appellant confirmed that he was able to hear the court. The district court informed appellant that hearing-impaired equipment was available. At no point, other than the first brief instance, did appellant indicate that he could not hear the proceedings, and appellant did not request use of the hearing-impaired equipment at the pretrial conference.

The remainder of appellant's arguments are that he had been previously arrested for assault, that he is in compliance with his probation, that the condition of his probation that he be medicated violates the Due Process Clause, that preparation of the PSI violated his medical privacy, and that he has a delinquent debt. These arguments fail the requirement of relevancy. Further, no argument on any of these issues was raised to the district court. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). We decline to address them further.

Affirmed in part, reversed in part, and remanded.