STATE OF MINNESOTA
IN COURT OF APPEALS
A11-601

State of Minnesota,
Respondent,

vs.

Thurmon Kubek Edwards,
Appellant.

Filed March 26, 2012
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CR0924868

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Stauber, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

STAUBER, Judge

Appellant challenges his conviction of aiding and abetting third-degree assault, arguing that the district court abused its discretion by denying his pre-sentencing request to withdraw his guilty plea and that the district court erred by imposing restitution when the record contained no factual basis for the award. Because his arguments are either unavailing or not properly before us on appeal, we affirm.

FACTS

On May 16, 2009, appellant Thurmon Kubek Edwards was at his apartment along with Jarbbar Jones and A.W.[1] Jones refused to allow A.W. to leave the apartment, hit A.W. with the butt of a gun, threw boiling water and bleach on him, and kicked and hit him. As a result of the attack, A.W. suffered a permanent mark in the middle of his head from being hit by the firearm, as well as several burns and lacerations from the bleach and boiling water. At Jones's request, appellant handed Jones items such as duct tape and water during the assault.

On May 19, appellant was charged by complaint with one count of aiding and abetting third-degree assault in violation of Minn. Stat. § 609.223, subd. 1 (2008). The complaint was later amended to include one count of aiding and abetting first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2008); two counts of aiding and

[1] The district court granted the state's joinder motion for trial with regard to Jones and appellant on April 15, 2010. No challenge to this order is made on appeal, and Jones is not a party to the appeal.

abetting second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2008); and one count of false imprisonment in violation of Minn. Stat. § 609.225, subd. 2 (2008).

While not entirely clear from the record furnished to this court, it appears that a number of plea offers were made by the state—appellant later indicated that he recalled there initially being seven offers—all of which had been rejected by appellant. On at least one occasion, appellant had seemingly expressed an interest in pleading guilty, but later changed his mind and decided not to plead guilty.

During the jury-selection process, the state indicated on the record that appellant had spoken with a third-person "about the facts of the case in the presence of several jurors who were in the hallway." The state argued that appellant's behavior "creates a problem" and argued that appellant "be taken into custody for that behavior as well as the voir dire of every juror who may have heard [appellant's comments] to figure out if the jury pool is tainted or not." Appellant's trial counsel argued that taking appellant into custody would not be appropriate, as "any type of statements . . . were harmless in their context, only exalting [appellant's] innocence." He further indicated that the parties had "come to a resolution that we agreed before lunch" that appellant would plead guilty in return "for stayed time and 24 months hanging over his head."

The state indicated that the agreement to which defense counsel was referring was no longer on the table as "no additional jail time is unacceptable." The state indicated that the offer on the table was for a stay of execution on an upward departure "with some workhouse time, . . . a cap of 180 days." The district court gave appellant an opportunity to consult with trial counsel regarding the new proposed plea agreement. Following a

recess, the district court indicated that the state's offer was that appellant must plead guilty to third-degree assault, with the agreement calling for a stay of execution of a 24-month sentence and a cap of 180 days' additional incarceration. After appellant waived his rights to a trial on both his guilt and any *Blakely* issues, the district court accepted the plea.

The day after entering the plea, appellant allegedly indicated that "he had concerns about entering his plea and wanted to have a public defender." A public defender was appointed, and on August 18, appellant moved to withdraw his guilty plea, accompanying his motion with a letter brief. The parties appeared before the district court on September 2 and agreed to rely on the transcript from the plea hearing along with appellant's previously introduced mental-health records. The district court denied appellant's motion on October 15, and the matter was set for sentencing.

On December 2, 2010, appellant was sentenced to the negotiated 24-month sentence, stayed for three years, plus 180 days' in jail with credit for time served. The district court also ordered appellant, along with Jones, to be jointly and severally liable to pay restitution in the amount of $1,275.09. No objection was made to the restitution award or the amount thereof. This appeal follows.

D E C I S I O N

I.

A. Improper inducement of guilty plea

"A defendant does not have an absolute right to withdraw a valid guilty plea." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). A district court may grant a

defendant's motion to withdraw a guilty plea before sentencing if the defendant establishes that "it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2; *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

The supreme court has stated that although the fair-and-just standard "is less demanding than the manifest injustice standard, it does not allow a defendant to withdraw a guilty plea for simply any reason." *Theis*, 742 N.W.2d at 646 (quotation omitted). The defendant bears the burden of demonstrating that it is fair and just to withdraw a plea. *Kim*, 434 N.W.2d at 266 (Minn. 1989). In assessing whether it is fair and just to allow the withdrawal of a plea, the district court "must give due consideration to the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea." Minn. R. Crim. P. 15.05, subd. 2.[2] The decision to allow a plea withdrawal before sentencing "is left to the sound discretion of the [district] court, and it will be reversed only in the rare case in which the appellate court can fairly conclude that the [district] court abused its discretion." *State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991) (quotation omitted).

In order to be valid, a guilty plea must be "accurate, voluntary, and intelligent." *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). The voluntariness requirement ensures that the plea is not made in response to improper inducements or pressures.

[2] The district court found that the state would not suffer serious prejudice if appellant were allowed to withdraw his guilty plea. This finding is not challenged on appeal but is not dispositive of the issue. *See State v. Raleigh*, 778 N.W.2d 90, 98 (Minn. 2010) (affirming district court's denial of motion to withdraw guilty plea despite finding that the state would suffer no prejudice if plea were withdrawn).

Alanis v. State, 583 N.W.2d 573, 577 (Minn. 1998). If a guilty plea is not accurate, voluntary, and intelligent, a defendant should be allowed to withdraw the plea. *Perkins*, 559 N.W.2d at 688 (addressing more stringent manifest-injustice standard).

Here, appellant argues that it is fair and just to allow him to withdraw his guilty plea because "his decision to enter the plea was induced by his [trial] counsel's admonition that 'if he wanted to stay out of custody he should take the deal.'" While there is nothing in the transcript from the plea hearing indicating that such a statement was made, appellant's argument is based on his assertion that appellant interpreted his trial counsel's alleged statement "as an additional threat to induce his plea of guilty."

However, such an argument is belied by the record. At the plea hearing, appellant confirmed that he had gone through the petition with his attorney, that the document had been explained to him, and that he had signed the document. Appellant further confirmed on the record that the "developments that have occurred"—presumably the state's request that he be taken into custody—were in no way affecting his decision to plead guilty and that "[n]obody's made any threats, promises, or other inducements in order to get [him] to plead guilty other than [the proposed plea bargain]." Before the district court accepted the plea, trial defense counsel, the state, and the district court thoroughly laid a foundation and questioned appellant regarding his waiver of his right to a trial and a *Blakely* waiver.

Based on this record, it cannot be said that the district court's denial of appellant's motion to withdraw his guilty plea amounted to one of the "rare cases" where the district court abused its discretion. Appellant's argument on the issue is therefore unavailing.

B. Mental-health issues

The issue of appellant's mental health was fully briefed, argued, and considered by the district court. However, on appeal, the only reference to any mental-health argument is in the remedy section of appellant's brief:

> Because the record below is sufficient for this Court to conclude that the plea was thus not voluntarily entered [due to improper inducement], it conclude [sic] as well that these circumstances, *as well as those of appellant's mental health concerns*, provided a substantially fair and just basis to have permitted appellant to withdraw his guilty plea prior to sentencing.

(Emphasis added.).

Because appellant's brief presents no argument regarding his alleged mental-health issues and how they relate to his guilty plea, appellant has waived the argument and we do not address it further. *See State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (stating an assignment of error in a brief based on a "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection), *aff'd on other grounds*, 728 N.W.2d 243 (Minn. 2007); *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).[3]

[3] We also note that we have in the past remanded a case for resentencing at which a defendant was entitled to withdraw his guilty plea when the district court imposed restitution as a condition of probation, even though the plea agreement did not include restitution as a condition. *State v. Noreen*, 354 N.W.2d 77, 78–79 (Minn. App. 1984). Here, the following plea agreement is handwritten on the petition to plead guilty: "P.G. to A[3], time served, follow recs., sty of imp 3 yrs." The petition goes on to inform appellant that "if the Court does not approve the agreement stated . . . above, [he has] the right to withdraw his plea of guilty and have a trial." Noticeably absent from the petition and the

II.

Appellant challenges the district court's award of $1,275.09 in restitution to be paid to the victim, arguing that there is "no factual basis whatsoever in the record to have supported the district court's order for restitution."

After a person is convicted of a crime, the victim "has the right to receive restitution as part of the disposition of [the] criminal charge." Minn. Stat. § 611A.04, subd. 1(a) (2010).

> The victim must produce information relating to the loss, including the items of loss, the dollar amount claimed, and the reasons justifying that amount. An offender who wishes to dispute the amount of restitution has the burden to produce evidence challenging the items requested, but the state has the burden to prove, by a preponderance of the evidence, the appropriateness of a certain type of restitution and the amount of loss sustained.

State v. Arends, 786 N.W.2d 885, 889 (Minn. App. 2010) (citations omitted); *review denied* (Minn. Oct. 27, 2010); *see* Minn. Stat. §§ 611A.04, subd. 1(a); .045, subd. 3 (2010). The Minnesota Crime Victims Reparations Board (CVRB) may also make requests for restitution. Minn. Stat. § 611A.04, subd. 1a. "A district court's order for restitution is reviewed under an abuse of discretion standard. But determining whether an item meets the statutory requirements for restitution is a question of law that is fully

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plea-hearing transcript is any contemplation of restitution. *Noreen* therefore seems to indicate that appellant would be entitled to withdraw his plea. But appellant did not raise this argument before the district court and does not assert it now on appeal. The argument is therefore waived, and we do not address it further. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating appellate court will generally not consider matters not argued to and considered by the district court); *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

reviewable by the appellate court." *State v. Nelson*, 796 N.W.2d 343, 346-47 (Minn. App. 2011).

Under the statute, the initial burden of production when challenging a restitution request rests with the offender. *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000).

> At the sentencing . . . the offender shall have the burden to produce evidence if the offender intends to challenge the amount of restitution or specific items of restitution or their dollar amounts. This burden of production must include a detailed sworn affidavit of the offender setting forth all challenges to the restitution or items of restitution, and specifying all reasons justifying dollar amounts of restitution which differ from the amounts requested by the victim or victims.

Minn. Stat. § 611A.045, subd. 3(a) (2010). "Once an offender raises a proper challenge to the restitution order, the prosecution bears the burden of proving the propriety of the restitution by a preponderance of the evidence." *Thole*, 614 N.W.2d at 235.

Here, appellant did not file an affidavit objecting to the restitution award at sentencing. *See Thole*, 614 N.W.2d at 235 ("[T]he affidavit is both the sole vehicle by which the offender can meet the burden of pleading, and an essential element of the offender's case required to meet the burden of production."). Nor did appellant request a hearing challenging the restitution award. *See* Minn. Stat. § 611A.045, subd. 3(b) (2010) ("An offender may challenge restitution, but must do so by requesting a hearing within 30 days of receiving written notification of the amount of restitution requested, or within 30 days of sentencing, whichever is later."); *but see State v. Gaiovnik*, 794 N.W.2d 643, 648 (Minn. 2011) (stating that 30-day deadline does not apply in the "narrow circumstances . . . where the only challenge is to the legal authority of the court to order

restitution and that challenge was raised in the district court"). Indeed, the first time appellant raised any challenge to the district court's restitution award was on appeal. *See Roby*, 547 N.W.2d at 357 (stating appellate court will generally not consider matters not argued to and considered by the district court).

This court has already rejected an offender's request "to create an exception that would permit an offender to circumvent his own failure to comply with mandatory procedural requirements." *Thole*, 614 N.W.2d at 236 (concluding Minn. Stat. § 611A.045 bars an offender from challenging a restitution award beyond the extent to which an affidavit was filed). Because appellant failed to comply with the plain language of the statute by not filing an affidavit challenging the restitution award, he is barred from challenging the award on appeal. *See id.* at 235–36 (noting that restitution award, especially in case involving a guilty plea, is not subject to plain-error analysis because it does not affect offender's ability to have a fair trial).

Affirmed.