STATE OF MINNESOTA
IN COURT OF APPEALS
A11-674

State of Minnesota,
Respondent,

vs.

Andrue Thomas Grabow,
Appellant.

Filed March 19, 2012
Affirmed
Crippen, Judge[*]

Lyon County District Court
File No. 42-CR-10-871

Lori Swanson, Attorney General, Michael E. Everson, Assistant Attorney General, St. Paul, Minnesota; and

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

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

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Crippen, 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

CRIPPEN, Judge

Appellant challenges his convictions of domestic assault (fear), criminal damage to property, two counts of driving while impaired (DWI), arguing that the district court erred by ordering a $75 co-payment and a $25 public-defender fee, denying him a speedy trial, admitting and instructing on appellant's prior petty offense, and imposing multiple sentences for domestic assault (fear) and criminal damage to property. We affirm.

FACTS

On July 20, 2010, appellant Andrue Thomas Grabow was asked to leave public park property due to his intoxication and belligerence. Appellant called his former girlfriend, N.G., to pick him up, and she drove him to a hotel in Marshall. But appellant insisted that N.G. drive him back to the park to retrieve his car, yelling at her and damaging the interior of her car. While N.G. drove appellant to the park, appellant bit N.G.'s thumb, though appellant and N.G. disagree on whether the bite was intentional. When they arrived at the park, appellant retrieved his car, and appellant and N.G. drove their cars to the Walmart in Marshall. They then had another argument, and N.G. drove to the local police station to report what she had experienced. Appellant was arrested at the Walmart site after officers located him and recovered evidence of the driving violation.

The jury acquitted appellant of domestic assault (bodily harm) but found him guilty of the remaining charges.

D E C I S I O N

1. Co-payment and Public-Defender Fee

For the first time on appeal, appellant challenges the district court's order requiring him to pay a $75 co-payment and a $25 public-defender fee. Although we generally do not consider matters not raised to the district court, *State v. Cunningham*, 663 N.W.2d 7, 10 (Minn. App. 2003), we do so here in the interests of justice. *See* Minn. R. Crim. P. 28.02, subd. 11. In doing so, we review the district court's order for an abuse of discretion. *See Cunningham*, 663 N.W.2d at 13.

Co-payment

Appellant argues that the district court abused its discretion by ordering a $75 co-payment because his public-defender application demonstrated his inability to pay it. "Upon disposition of the case, an individual who has received public defender services shall pay to the court a $75 co-payment for representation provided by a public defender, unless the co-payment is, or has been, waived by the court." Minn. Stat. § 611.17(c) (2010). The co-payment is mandatory regardless of the defendant's financial circumstances unless it is waived due to the defendant's indigence or inability to pay without suffering manifest hardship. *Cunningham*, 663 N.W.2d at 11. If the defendant does not request a waiver, the district court may order a co-payment without making any specific findings regarding the defendant's financial circumstances.[1] *See State v. Craig*,

[1] Appellant claims the opposite, citing *State v. Moore*, A10-492, 2011 WL 691636, at *3 (Minn. App. Mar. 1, 2011), and *State v. Wallace*, A04-1846, 2005 WL 3370857, at *3-4 (Minn. App. Dec. 13, 2005). But although *Moore* and *Wallace* refer to co-pays/co-

807 N.W.2d 453 (Minn. App. 2011), *review granted* (Minn. Feb. 14, 2011) (granting review only on unrelated issue). Since appellant did not request a waiver, the district court did not abuse its discretion by ordering a co-payment without addressing appellant's ability to pay.

Appellant also contends that the district court erred procedurally by imposing the co-payment at the initiation of the case rather than at the disposition of the case. Although a defendant need not *pay* a co-payment prior to the disposition of the case, the district court may *impose* a co-payment at any time. *See* Minn. Stat. § 611.17(c). Thus, the timing of the district court's order was not an abuse of discretion.

Public-Defender Fee

Appellant argues that the district court should not have ordered a public-defender fee without first establishing appellant's ability to pay and the value of the public defender's work. If, after appointing a public defender, the court determines that the defendant has the ability to pay part of the costs, it must order the defendant to pay a public-defender fee. Minn. Stat. § 611.20, subd. 2; Minn. R. Crim. P. 5.04, subd. 5. Before imposing such a fee, the district court must make specific findings regarding the defendant's ability to pay, *Craig*, 2011 WL 6015031, at *15, and must ensure that the fee and the co-payment, combined, do not exceed the value of the public defender's work, *Cunningham*, 663 N.W.2d at 13.

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payments, both interpret Minn. Stat. § 611.20 (2010)—which governs what the parties call "public defender fees"—not Minn. Stat. § 611.17(c)—which governs co-payments.

The record suggests that the district court determined appellant's ability to pay a $25 fee based on the Fifth Judicial District's fee schedule.[2] That schedule dictates that appellant—based on his number of dependents and unemployment compensation income—is able to pay a nominal public-defender fee of $25. The district court's reliance on this fee schedule was not an abuse of discretion. The $25 fee did not exceed the value of the work that the public defender eventually devoted to appellant's two-day trial. Appellant is not entitled to relief on this ground.

2. Speedy Trial

Appellant was arrested on July 21, 2010, and requested a speedy trial on August 31. His trial was set for October 20-21 until the judge discovered that he was unavailable those days. The court proposed scheduling the trial for November 3-4 or November 17-18, but defense counsel was unavailable on those dates. The court scheduled trial for November 5, but the state later discovered that three of its witnesses were unavailable. Trial was therefore set for December 1-2. The district court rejected the speedy-trial objection that appellant made minutes before trial, and appellant renews his objection on appeal. We review the district court's speedy-trial determination de novo.[3] *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

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[2] Although the fee schedule is not part of the record, we consider it because it is "documentary, essentially uncontroverted, and is not offered in support of a reversal" and therefore may be considered on appeal. *See In re Risk Level Determination of C.M.*, 578 N.W.2d 391, 394 (Minn. App. 1998).

[3] Respondent asserts that an abuse-of-discretion standard applies to the district court's determination that there was good cause for a delay, citing *McIntosh v. Davis*, 441 N.W.2d 115, 119 (Minn. 1989). But *McIntosh* merely stated that "a writ of mandamus

Appellant claims that this court should reverse his convictions because he was denied his constitutional right to a speedy trial. In determining whether a defendant's speedy-trial right has been violated, Minnesota courts consider (1) the length of the delay, (2) the reason for the delay, (3) whether and when the defendant asserted his right to a speedy trial, and (4) the prejudice caused by the delay. *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972)). Here, the 133-day delay from appellant's arrest to his trial was relatively short; the delay was due to scheduling conflicts rather than prosecutorial delay tactics; appellant requested a speedy trial but never objected to rescheduling on speedy-trial grounds; and the only prejudice appellant asserts is the anxiety and stress that all defendants experience while awaiting trial. In these circumstances, there was no violation of appellant's right to a speedy trial. *See State v. Jones*, 392 N.W.2d 224, 234-36 (Minn. 1986) (holding that a seven-month delay due to calendar congestion did not violate defendant's right to a speedy trial where no unfair prejudice resulted).

3. Prior Petty Offense

Appellant challenges the district court's (1) admission of a petty-misdemeanor determination that occurred after he painted his graduation year on a shack outside his high school without permission, and (2) instruction that the jury could use the petty misdemeanor as impeachment evidence. Because appellant failed to raise these objections to the district court, the plain-error test applies. *See Montanaro v. State*, 802

[to compel a trial] is available only where the act or failure to act constitutes a clear abuse of discretion." 441 N.W.2d at 119. It did not address a constitutional speedy-trial right.

N.W.2d 726, 732 (Minn. 2011). In applying the plain-error test, we will reverse only when there was a plain error that affected the defendant's substantial rights and "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (alteration in original) (quotation omitted). If we find that any one of these requirements is not satisfied, we need not address the remaining requirements. *Id.*

We need not address whether the district court plainly erred by admitting evidence of the prior offense and giving an impeachment instruction because it is not reasonably likely that the alleged errors affected the jury verdicts. *See id.* (defining the second prong of the plain-error test). First, it is unlikely that the jury considered appellant's responsibility for a school prank in determining his guilt or his credibility. Second, the record shows compelling evidence supporting the verdicts. Regarding the counts of domestic assault (fear) and criminal damage to property, the state presented photos of N.G.'s damaged dashboard, ripped upholstery, broken window, smashed car radio, and detached rearview mirror; a receipt showing the $657.67 cost of repairing N.G.'s car; and N.G.'s testimony that appellant yelled at her, called her cruel names, and damaged her car with his flashlight and his hands, causing her to fear for her life. Regarding the DWI counts, the state presented testimony of three police officers that appellant appeared to be drunk throughout the night; testimony that appellant failed the field sobriety tests; and evidence that appellant's alcohol concentration was .10 within two hours after he had his keys in the ignition of his car. In light of this evidence of guilt, it is not reasonably likely that the alleged evidentiary errors affected the jury's verdict, and appellant is not entitled to relief on this ground.

4. Multiple Sentences

Appellant argues that his stayed sentence for criminal damage to property must be vacated because it is duplicative of his concurrent stayed sentence for domestic assault (fear). Generally, the decision whether multiple offenses were committed as part of a single behavioral incident entails factual determinations that this court reviews for clear error. *State v. O'Meara*, 755 N.W.2d 29, 37 (Minn. App. 2008).

Minnesota law precludes multiple sentences for conduct that is part of a single behavioral incident. Minn. Stat. § 609.035, subd. 1 (2008). Whether multiple offenses arose out of a single behavioral incident depends on whether the conduct occurred at the same time and place and whether the defendant had a single criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). The district court could have reasonably determined that the two offenses arose out of separate behavioral incidents because the domestic assault (fear) arguably included actions other than the damage to property and occurred over a much longer span of time than the damage to property. The district court did not clearly err by imposing multiple sentences.

Affirmed.