STATE OF MINNESOTA
IN COURT OF APPEALS
A11-979

Vivian Dorothea Grover-Tsimi, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 9, 2012
Affirmed
Collins, Judge[*]

Scott County District Court
File No. 70-CR-08-5289

Vivian Dorothea Grover-Tsimi, New Prague, Minnesota (pro se appellant)

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Schellhas, 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

COLLINS, Judge

In this postconviction appeal challenging her 2009 conviction of disorderly conduct, pro se appellant Vivian Grover-Tsimi argues for a new trial based on ineffective assistance of counsel and newly discovered evidence. She also challenges her sentence. We affirm.

FACTS

Respondent State of Minnesota charged appellant with disorderly conduct. The complaint was supported by reports from four sheriff's deputies describing an incident involving appellant at the Scott County courthouse on February 21, 2008. Appellant had previously avoided service of documents in her marriage-dissolution case. When she arrived at the courthouse for a scheduled hearing, one of the deputies handed the documents to her. Appellant screamed at the deputy, threw the documents to the floor, and yelled "I'm not served." A court clerk was sufficiently alarmed by appellant's outburst and behavior as to summon emergency assistance. Appellant continued screaming as she went up the stairs to the second floor, yelling obscenities, including the word "f—king" multiple times. There were about 40 people in the second-floor hallway, and some appeared alarmed by appellant's behavior. When a deputy again tried to hand the documents to her, appellant ran, screaming, to the stairwell and up the stairs to the third floor, repeatedly yelling as she went, "I'm not served." There were people throughout the third-floor hallway and courtrooms. Appellant continued screaming as she entered and left one courtroom and then entered another. Finally, after refusing the

deputies' commands to calm down, appellant was arrested, and she then physically resisted the effort to restrain her. In a courtroom holding cell, a nurse evaluated appellant and her medications and found no need for medical attention. After a two-day jury trial in April 2009, appellant was convicted of disorderly conduct in violation of Minn. Stat. § 609.72, subd. 1(3) (2006). The district court placed appellant on six months' probation and imposed a fine of $85. Appellant timely filed a direct appeal but subsequently withdrew it.

In April 2011, appellant petitioned the district court for postconviction relief, seeking a new trial based on claims of ineffective assistance of counsel and newly discovered evidence. This appeal followed the district court's summary denial of the petition.

D E C I S I O N

We review the denial of a postconviction petition under an abuse-of-discretion standard. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). The postconviction court will not be reversed unless it "exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Reed v. State*, 793 N.W.2d 725, 732 (Minn. 2010).

I.

A two-part test applies to determine whether an appellant is entitled to a new trial on the ground of ineffective assistance of counsel. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). Appellant must affirmatively prove, first, that her counsel's representation "'fell below an objective standard of reasonableness'" and, second, "'that there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). We may address the *Strickland* prongs in either order and may dispose of a claim of ineffective assistance of counsel if one prong is determinative. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

Notwithstanding appellant's failure to properly reference the record and cite to supporting legal authority, we will address each claim of ineffective assistance of counsel in turn. *See State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006) ("If the brief does not contain an argument or citation to legal authority in support of the allegations raised, the allegation is deemed waived."), *review denied* (Minn. Jan. 24, 2007).

Probable Cause to Arrest

Appellant argues that her counsel was ineffective for failing to challenge probable cause for her arrest. We disagree. "Probable cause to arrest exists where the objective facts are such that under the circumstances a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *State v. Laducer*, 676 N.W.2d 693, 697 (Minn. App. 2004) (quotations omitted). Review of the criminal complaint incorporating the reports written by the deputies and summarized above shows the existence of the requisite probable cause supporting appellant's arrest for disorderly conduct. *See* Minn. Stat. § 609.72, subd. 1 (2006). Appellant was not prejudiced by the pretrial waiver of a probable-cause challenge, and on this contention ineffective assistance of counsel has not been established. *See Gates*, 398 N.W.2d at 562 (requiring appellant to show "actual" prejudice).

Motion to Dismiss

Appellant next argues that her counsel was ineffective for failing to seek dismissal of the "indictment" as vague or containing conflicting allegations. We disagree. The citation-form complaint charged appellant with disorderly conduct, erroneously cited as under Minn. Stat. § "609.72S2." But the district court cured the statutory-citation confusion prior to trial, noting that Minn. Stat. § 609.72, subd. 2, was repealed and concluding that the citation referred to Minn. Stat. § 609.72, subd. 1(2). Thus, appellant suffered no prejudice, even assuming that her counsel should have brought a pretrial motion to dismiss the complaint. *See id*.

Double Jeopardy

After clarifying the original charge, the district court allowed the amendment of the complaint to add a second count of disorderly conduct in violation of Minn. Stat. § 609.72, subd. 1(3). Appellant argues that her counsel was ineffective for acquiescing in the amendment because the prohibition against double jeopardy was thus violated. We disagree. The double-jeopardy prohibition protects criminal defendants from "a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *State v. Humes*, 581 N.W.2d 317, 320 (Minn. 1998). Here, appellant was convicted only of violating Minn. Stat. § 609.72, subd. 1(3), and the district court dismissed the original count charged under Minn. Stat. § 609.72, subd. 1(2). Appellant was not subjected to a second prosecution, nor was she made to suffer more than a single punishment.

Appellant also contends that counsel's failure to investigate a "like-kind proceeding," in which she was purportedly charged with and acquitted of disorderly conduct in 2003, led to another violation of the prohibition against double jeopardy. We disagree. There is no relationship between the 2003 charge and the current offense; it simply was not the "same offense." *See id.* Appellant's counsel was not ineffective for failing to raise a patently meritless claim. *See Schleicher*, 718 N.W.2d at 449 (holding that counsel's failure to raise meritless claims does not constitute deficient performance).

Speedy Trial

Appellant argues that her counsel was ineffective for failing to move for dismissal based on a violation of her right to a speedy trial. We disagree. By rule, trial must commence within 60 days from the date of the defendant's speedy-trial demand, absent good cause shown. *State v. DeRosier*, 695 N.W.2d 97, 108-09 (Minn. 2005); (Minn. R. Crim. P. 6.06, 11.09). Appellant made her speedy-trial demand on February 19, 2009. Her trial commenced on April 8, 2009, well within the 60 days allowed under the rule.

The right to a speedy trial is also guaranteed by the Minnesota and United States Constitutions. *DeRosier*, 695 N.W.2d at 108. To determine if a violation occurred, we weigh the following factors: "(1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his or her right to a speedy trial, and (4) whether the delay prejudiced the defendant." *Id.* at 109. On balance, appellant has failed to establish that she received ineffective assistance due to her counsel's failure to move for dismissal of the complaint on either speedy-trial ground. Appellant did not demand a speedy trial until February 2009. Previous to that, delays were caused by the unavailability of

witnesses and, primarily, appellant's own decision to pursue an interlocutory, discretionary appeal to this court. Moreover, appellant has not alleged any prejudice attributable to delay. *See Gates*, 398 N.W.2d at 562 (requiring appellant to show "actual" prejudice).

Other Pretrial Concerns

Appellant makes other general assertions regarding her counsel's performance during the pretrial stage. She contends that her counsel failed to file unspecified pretrial motions, did not conduct a proper investigation, only interviewed her once, and refused to interview other witnesses. These are all matters of trial strategy which we need not review. *Schleicher*, 718 N.W.2d at 447. But even if her counsel was deficient, appellant has not established prejudice because she did not allege what, if any, additional evidence counsel would have discovered or how such evidence would have changed the outcome of her case. *See Gates*, 398 N.W.2d at 563 (holding that prejudice may not be based on speculation); *Reed*, 793 N.W.2d at 735 (finding no prejudice when petitioner failed to explain how more consultation would have affected the outcome of the case).

Jury Selection

Appellant argues that her counsel was ineffective because the jury of six caucasian members did not represent a fair cross-section of the community and violated her Sixth Amendment rights. *See* U.S. Const. amend VI (providing the right to a speedy and public trial by an impartial jury). We disagree. "To make a prima facie case that the jury does not represent a fair cross section of the community, a defendant must show that the allegedly excluded group is distinctive, that the group was not fairly represented in the

jury venire, and that the underrepresentation resulted from systematic exclusion of the group in question." *State v. Tomassoni*, 778 N.W.2d 327, 336 (Minn. 2010) (quotations omitted). Appellant has made no showing that non-caucasian jurors were not fairly represented in the jury venire, or that any underrepresentation resulted from systematic exclusion. Appellant thus failed to establish that her counsel was ineffective for failing to object to the composition of the jury panel.

Appellant also contends that her counsel was ineffective for failing to challenge jurors who had ties to law enforcement. We disagree. To succeed on a claim of juror bias, an appellant must show, in part, that the challenged juror was subject to a challenge for cause. *State v. Stufflebean*, 329 N.W.2d 314, 317 (Minn. 1983). A juror's mere acquaintanceship ties to law enforcement, alone, do not subject that juror to a challenge for cause. In such case, only a prospective juror related to "the person on whose complaint the prosecution was instituted" is subject to a challenge for cause. Minn. R. Crim. P. 26.02, subd. 5(1)5. Appellant has not alleged that any of the jurors were related to any of the sheriff's deputies upon whose reports the prosecution was instituted. Therefore, because appellant has not shown that any of the jurors were subject to a challenge for cause due to their alleged ties to law enforcement, she cannot demonstrate that her counsel's representation fell below an objective standard of reasonableness on this contention.

Trial

Appellant raises a number of claims of ineffective assistance of counsel based on counsel's performance at trial. These claims include failing to call expert or other

significant witnesses, failing to subpoena videotapes of the incident, failing to subpoena medical records, failing to object to the prosecutor's questions during his cross-examination of her, failing to object to the state's decision to call a particular witness, failing to make general objections, failing to develop the facts at trial, and making a poor closing argument. These claims essentially implicate trial strategy, which we need not review. *Schleicher*, 718 N.W.2d at 447. But having carefully reviewed the trial record, we are satisfied that appellant received adequate assistance of counsel at trial: her counsel effectively questioned and cross-examined witnesses, made appropriate objections, fully developed appellant's account of the incident, and argued appellant's theory to the jury in closing. That the jury rejected appellant's testimony and version of the events does not support a claim of ineffective assistance of counsel. And appellant failed to show how additional witnesses or evidence would have changed the result in her case. *See Gates*, 398 N.W.2d at 562 (requiring actual prejudice).

Affirmative Defense

Appellant contends that her counsel was ineffective for failing to offer additional evidence regarding her medical condition—supraventricular tachycardia, a heart condition—because the disorderly-conduct statute provides defendants with an affirmative defense if the disorderly conduct was caused by an epileptic seizure. *See* Minn. Stat. § 609.72, subd. 1. But this contention is unavailing because appellant does not have epilepsy.

Missing-Witness Jury Instruction

Appellant argues that her counsel was ineffective for failing to pursue a missing-witness jury instruction, based on the state's failure to call one of the four deputies as a witness. We disagree. If a party refuses to call a witness "who is apparently within the power of [the] party to produce, and who would more naturally favor that party," a "missing witness" instruction allows the jury to draw an inference that the witness's testimony would have been unfavorable to that party. *See Malik v. Johnson*, 300 Minn. 252, 261, 219 N.W.2d 631, 637 (1974) (quotations omitted). But, this subject was raised during trial. The district court granted the state's motion in limine, opposed by appellant's counsel, to preclude an adverse-inference argument to the jury. It follows that a request for a "missing witness" instruction would have met similar fate. Thus, even assuming that her counsel should have formalized a request for such an instruction, appellant was not prejudiced by the failure to do so. *See Gates*, 398 N.W.2d at 562 (requiring "actual" prejudice).

Appeal

Appellant argues that her counsel failed to advise her of her right to appeal and failed to perfect a timely appeal. But on this ground, appellant cannot establish prejudice because she in fact filed a timely appeal. *See id.*

Appellant goes on to argue that, by refusing to represent her on appeal, her counsel (a public defender) violated her constitutional right to counsel. We disagree. Misdemeanor offenders do not have a statutory right to a public defender on appeal. *State v. Randolph*, 800 N.W.2d 150, 156-57 (Minn. 2011). Therefore, appellant had no

right to public-defender representation on appeal. *See* Minn. Stat. § 609.72, subd. 1 (classifying disorderly conduct as a misdemeanor).

II.

Appellant next contends that new evidence establishes her actual innocence of the crime of conviction. She lists several bits of evidence but does not describe how any of it would prove her actual innocence. New evidence warrants a new trial where a postconviction petitioner establishes:

> (1) that the evidence was not known to [her] or [her] counsel at the time of trial, (2) that [her] failure to learn of it before trial was not due to lack of diligence, (3) that the evidence is material, and (4) that the evidence will probably produce either an acquittal at a retrial or a result more favorable to the petitioner.

Rhodes v. State, 735 N.W.2d 315, 318 (Minn. 2007) (quotations omitted). Appellant made no attempt to meet this burden. Moreover, the evidence she identifies was known to her at the time of trial and, therefore, is not "new." *See id.* Thus, appellant is not entitled to relief based on newly discovered evidence.

III.

Finally, appellant would have us consider the same arguments regarding sentencing that she raised in her aborted direct appeal. We decline to do so because appellant has waived such issues by failing to present them for consideration and decision by the district court in her petition for postconviction relief. *See Hirt v. State*, 309 Minn.

574, 575, 244 N.W.2d 162, 162 (1976) (refusing to consider issues not litigated before the postconviction court).

Affirmed.