STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1415

State of Minnesota,
Respondent,

vs.

Mitchell Thomas Ellis,
Appellant.

Filed August 28, 2017
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-16-862

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

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

BJORKMAN, Judge

Appellant challenges his conviction of second-degree assault, arguing the district court erred by (1) not requiring the state to file a written amended complaint, (2) determining he could be impeached with evidence of prior felony convictions, (3) giving an adverse-inference instruction, (4) not permitting the jury to listen to a 911 call during deliberations, (5) denying his motion for a downward durational departure, and (6) convicting him on two counts. We affirm.

FACTS

On January 9, 2016, C.S. called 911 to report that her upstairs neighbor, appellant Mitchell Thomas Ellis, brandished a large knife at her. She reported Ellis "just pulled a knife out," was acting "crazy," and "look[ed] like the devil." When responding Minneapolis police officer Garrett Parten arrived at Ellis's apartment, the door was open and he saw Ellis standing inside. He observed a large knife within Ellis's reach. Officer Parten arrested Ellis and collected the knife as evidence.

On January 11, Sergeant David Hansen interviewed C.S. She told Sergeant Hansen that on January 9 she and Ellis were having "a beer or two" outside their duplex. Ellis went upstairs to his apartment and then "just flipped out." C.S. told Sergeant Hansen she went upstairs to tell him to quiet down. When Ellis answered the door, he was holding a knife and said, "this isn't about you but I will kill you too." Sergeant Hansen later interviewed Ellis. He confirmed he and C.S. were drinking together and that he later became upset and was "throwing things around" and yelling. But he denied threatening C.S. with a knife.

He explained that he had been handling the knife earlier that day to fix a Conair hair clipper because he did not want to use a screwdriver.

Respondent State of Minnesota charged Ellis with making threats of violence. On February 8, the district court held an omnibus hearing. The state indicated that if the matter proceeded to trial it would amend the complaint to add a charge of second-degree assault. On May 9, the district court held a pretrial hearing, during which the state moved to add a second-degree-assault charge. The district court granted the motion, and also determined Ellis could be impeached with evidence of his five prior felony convictions should he choose to testify at trial.

On May 9-11, the district court held a jury trial. Ellis did not testify. The jury found him guilty on both charges. Ellis moved for a downward durational departure. The district court denied the motion and sentenced Ellis to 51 months in prison on the assault offense. Ellis appeals.

D E C I S I O N

I. The district court did not abuse its discretion by permitting the state to amend the complaint immediately before trial.

The state may move to amend a complaint at any time before the commencement of trial. Minn. R. Crim. P. 3.04. A district court has discretion to permit amendment to include additional offenses before trial provided it allows continuances where needed. *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990). Where, as here, defense counsel did not object to the state's motion to amend the complaint, we review the issue for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under a plain-error analysis, we must

determine if there is error, that is plain, and affected appellant's substantial rights. *Id.* The appellant bears the heavy burden of establishing he was prejudiced by the error. *Id.* at 741. Ellis makes four plain-error arguments, none of which we find persuasive.

First, Ellis argues that the district court plainly erred because the initial complaint did not contain probable cause to support the second-degree-assault charge. Second-degree assault occurs when an individual uses a dangerous weapon and acts with the intent of causing another fear of immediate bodily harm or death. Minn. Stat. §§ 609.02, subd. 10, .222, subd. 1 (2014). The complaint indicates that police officers responded to reports of an assault and C.S. then reported that Ellis "threatened her with a knife" and while holding the large knife "said he was going to kill her." Because this provides probable cause that Ellis committed second-degree assault, we discern no error by the district court by permitting the state to amend the complaint.

Second, Ellis asserts that the state was required to file a new written complaint that included the assault charge. We disagree. Ellis cites Minn. R. Crim. P. 3.04, subd. 2, which provides that "[p]re-trial proceedings may be continued to permit a new complaint to be filed . . . if the prosecutor promptly moves for a continuance" and that "[i]f the proceedings are continued, the new complaint must be filed and process promptly issued." But the district court did not continue the proceedings after granting the state's motion. Accordingly, Minn. R. Crim. P. 3.04 does not support Ellis's assertion that the state was required to file a written amended complaint.

Third, Ellis argues that he was prejudiced by the late amendment. In *Nelson v. State*, 407 N.W.2d 729, 731 (Minn. App. 1987), *review denied* (Minn. Aug. 12, 1987), we held

that a defendant is not prejudiced by amendment of a complaint on the day of trial if the new charge "arose from the same conduct" as the other offense. *See State v. Mickelson*, 378 N.W.2d 17, 19-20 (Minn. App. 1985) (determining district court did not abuse its discretion by amending complaint on first day of trial and then proceeding without a continuance), *review denied* (Minn. Jan. 23, 1986). That is the situation here. The second-degree-assault charge plainly arose from the same conduct alleged in the original complaint. And defense counsel did not seek a continuance or object. Rather, counsel indicated that, depending on the evidence, he may request that the jury be instructed on the lesser-included offense of attempted second-degree assault.

Finally, Ellis argues that his counsel was ineffective for failing to object to addition of the second-degree-assault charge. To prevail on his ineffective-assistance-of-counsel claim, Ellis must demonstrate "(1) that his counsel's representation 'fell below an objective standard of reasonableness'; and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 703, 104 S. Ct. 2052, 2064, 2072 (1984)). As discussed above, we see no error—plain or otherwise—by the district court in permitting the amendment. Accordingly, Ellis has not shown that, but for the alleged ineffective representation, the result would have been different.

II. The district court did not abuse its discretion by permitting the state to impeach Ellis with evidence of his prior felony convictions.

A district court may admit evidence of a defendant's prior felony convictions for impeachment if "the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a)(1). In determining whether the probative value of a conviction outweighs its prejudicial effect, the district court must consider

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). We review a district court's ruling on the admissibility of a defendant's prior convictions for abuse of discretion. *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006).

Ellis argues that after determining each felony conviction could be admitted for impeachment purposes,[1] the district court should have then considered whether admitting all five prior felony convictions would be overly prejudicial. We are not persuaded. Contrary to Ellis's assertion, Minnesota law does not require district courts to conduct a

[1] Ellis does not argue that the district court failed to properly analyze the *Jones* factors on the record, but the state concedes the district court failed to do so. Our review of the record persuades us this error does not require reversal. In *Swanson*, the district court failed to analyze the *Jones* factors, but the supreme court determined that reversal was unnecessary because the factors plainly weighed in favor of admitting the prior convictions. 707 N.W.2d at 654-55. The same is true here. Ellis's prior convictions have impeachment value because they allow the jury to see the "whole person," the district court limited potential prejudice by ruling the nature of the offenses would not be admitted, and credibility was a central issue. On this record, the *Jones* factors plainly weigh in favor of admitting the prior convictions.

post-*Jones* prejudice analysis. Minnesota courts recognize that potential prejudice is part of the *Jones* framework. *See, e.g.*, *State v. Zornes*, 831 N.W.2d 609, 627 (Minn. 2013) (stating that *Jones* established "five factors relevant to determining if a prior conviction is more probative than prejudicial"). In *Swanson*, the defendant challenged the district court's admission of his five prior felony convictions for impeachment purposes. 707 N.W.2d at 653. In affirming the district court, our supreme court analyzed the *Jones* factors with respect to each of Swanson's five felony convictions; the court did not separately analyze whether admission of the convictions, in the aggregate, would be overly prejudicial. *Id.* at 654-56. Because Ellis points to no legal authority for the proposition that a district court must conduct a post-*Jones* analysis, and we have found none, we discern no abuse of discretion by the district court.

III. The district court committed harmless error by giving an adverse-inference instruction.

At the conclusion of the trial, the district court instructed the jury, "The defendant has the right not to testify. This right is guaranteed by the federal and state Constitutions. You should not draw any inference from the fact that the defendant has not testified in this case." The state concedes that the district court erred because Ellis requested that the instruction not be given. But this error does not require reversal unless Ellis demonstrates that "the facts of this case make the error prejudicial" and "me[ets] his heavy burden of showing that there is a reasonable likelihood that giving the instruction had a significant effect on the jury's verdict." *State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002).

Ellis contends that the instruction had a significant impact on the verdict because the evidence against him was not strong. This argument is unavailing. To support his argument, he highlights inconsistencies in C.S.'s statements and testimony, as well as other witnesses' testimony that is in conflict with C.S.'s. He also notes that the knife was never tested for DNA. But he does not explain how these facts demonstrate the adverse-inference jury instruction significantly impacted the jury. He merely offers the conclusory statement that "erroneously highlighting to the jury that [he] did not testify would certainly have affected the verdict." But it would have been plain to the jury that he did not testify. On this record, Ellis failed to meet the "heavy burden" of establishing the erroneous jury instruction likely had a significant impact on the jury's verdict.

IV. The district court did not commit plain error by not permitting the jury to listen to the 911 call during deliberations.

A district court has broad discretion to determine whether to grant a deliberating jury's request to review evidence, and will not be reversed absent an abuse of discretion. *State v. Everson*, 749 N.W.2d 340, 345 (Minn. 2008). During deliberations, the jury asked to review the transcript of C.S.'s 911 call. The district court denied the request. Ellis concedes that defense counsel did not object to the district court's ruling and therefore this issue is subject to plain-error review. Accordingly, we must determine if there was error, that was plain, and affected Ellis's substantial rights. *Griller*, 583 N.W.2d at 740.

The record indicates the jury did not ask to have the 911 call played again; it asked to review the transcript of the call. The parties agreed the district court should not provide

the transcript because it was not admitted into evidence.[2] Although the district court further observed that it did not have a way to replay the evidence, any error in that analysis was harmless because the jury did not ask to hear the audio recording again. Based on the limited record on this issue, we discern no plain error.

V. The district court did not abuse its discretion by denying Ellis's motion for a downward durational departure.

"[A] sentencing court has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present." *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). The appropriateness of a durational departure turns on the nature of the offense, not the circumstances of the offender. *State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998), *review denied* (Minn. Mar. 19, 1998). A district court may grant a downward durational departure if the defendant's conduct is significantly "less serious than that typically involved in the commission of the crime in question." *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984). We review a district court's decision whether to depart from the presumptive sentence for an abuse of discretion. *Dillon v. State*, 781 N.W.2d 588, 594 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

Ellis argues that the district court abused its discretion by denying a downward durational departure because he suffers from severe untreated mental illness. He references various portions of the record, including C.S.'s statements to the 911 operator and trial testimony describing him as "crazy," defense counsel's indications that Ellis was agitated

[2] Minn. R. Crim. P. 26.03, subd. 20(1), provides: "The court must permit received exhibits . . . into the jury room."

during trial and was not always taking his medications, and notes in the presentence investigation report that both he and his mother suffer from mental illness. The state argues that even if we accept Ellis's contention that he suffers from a mental illness, the district court nonetheless did not abuse its discretion in imposing a presumptive sentence. We agree with the state.

Ellis cites *State v. Martinson* for the proposition that a significant mental impairment may justify a downward durational departure. 671 N.W.2d 887, 891-92 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004). But in *Martinson*, the district court granted the defendant's motion for a downward departure. *Id.* at 891. Accordingly, this court did not consider whether a departure was mandated; we decided the district court did not abuse its discretion by deciding to depart. *Id.* at 892. Indeed, the sentencing guidelines permit, but do not require, a district court to depart when substantial and compelling reasons are present. Minn. Sent. Guidelines 2.D.1 (2014). The presence of mitigating factors does not require the district court to order a durational departure. *Wells v. State*, 839 N.W.2d 775, 781 (Minn. App. 2013), *review denied* (Minn. Feb. 18, 2014). Based on our careful review of this record, we conclude that the district court did not abuse its discretion by imposing a presumptive sentence.

VI. The district court did not err by convicting Ellis of both second-degree assault and making threats of violence.[3]

Minn. Stat. § 609.04, subd. 1 (2014) provides:

> Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both. An included offense may be any of the following:
>
> . . . .
>
> (4) A crime necessarily proved if the crime charged were proved[.]

The statute also forbids "multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). Application of Minn. Stat. § 609.04 (2014) is a question of law, which we review de novo. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

The state argues that the district court did not err because making threats of violence is not necessarily included in a second-degree-assault offense. We agree. An offense is necessarily proven "if it is impossible to commit the greater offense without committing the lesser offense." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). When determining whether an offense is necessarily included in another, we consider the elements of the offenses, not the facts of the particular case. *State v. Roden*, 384 N.W.2d

[3] The record shows that the district court convicted Ellis of both offenses. At oral argument, Ellis asked this court to consider whether the district court also imposed sentences on both counts. A district court generally may not impose multiple sentences for crimes committed during a single behavioral incident. Minn. Stat. § 609.035, subd. 1 (2014). At sentencing, the district court pronounced a 51-month sentence on the second-degree-assault conviction, and then stated "[y]ou've also been found guilty of [making threats of violence] . . . [t]hat is a 27-months sentence; however, that will merge into the 51-month sentence; so you'll have one sentence, and not two." The sentencing order only imposes a sentence for the second-degree-assault conviction. Accordingly, the district court did not violate Minn. Stat. § 609.035, subd. 1.

456, 457 (Minn. 1986). An individual is guilty of second-degree assault if he "assaults another with a dangerous weapon." Minn. Stat. § 609.222 (2014). Assault is defined as "an act done with intent to cause fear in another of immediate bodily harm or death" or "the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10. An individual is guilty of making threats of violence when he "threatens, directly or indirectly, to commit any crime of violence with the purpose to terrorize another." Minn. Stat. § 609.713, subd. 1 (2014). Thus, a defendant may only be convicted of making threats of violence if he threatens to commit a crime of violence with the intent to terrorize. But a defendant may commit second-degree assault by intentionally assaulting another with a weapon without making any kind of threat. Because it is possible to commit second-degree assault without making threats of violence, the latter offense is not necessarily included in a second-degree-assault offense. Accordingly, the district court did not err by convicting Ellis of both offenses.[4]

Affirmed.

[4] Ellis raises several additional pro se arguments regarding witness credibility, the admission of the knife into evidence, and the jury instructions. After careful review of the record, we conclude these arguments lack merit.