STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2047

State of Minnesota,
Respondent,

vs.

Darryl Don Freeberg,
Appellant.

Filed December 11, 2017
Affirmed
Hooten, Judge

Stearns County District Court
File No. 73-CR-15-9356

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for appellant)

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

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

HOOTEN, Judge

Appellant challenges the district court's finding that he was absent without justification from trial and its decision to proceed with trial in his absence. Additionally,

appellant argues that the district court abused its sentencing discretion by ordering him to serve his year and a day sentence for violating a restraining order consecutive to his 60-month sentence for third-degree criminal sexual conduct. We affirm.

FACTS

Background

In the summer of 2014, appellant Darryl Don Freeberg, a 19-year-old man, began dating M.S., a 14-year-old girl. In April 2015, M.S.'s mother discovered Freeberg in M.S.'s bedroom closet and began arguing with him. After he left, Freeberg threw rocks at a basement window and broke it. M.S.'s mother called the police, but by the time an officer arrived, M.S. had run away with Freeberg. M.S. did not return home for three or four days. When she returned home, M.S.'s mother, on behalf of herself and M.S., obtained a harassment restraining order against Freeberg. A deputy served the restraining order on Freeberg in May 2015.

Freeberg continued to have contact with M.S. over that summer. When Freeberg first entered their lives, M.S. and her mother lived in Brooklyn Park. Then in August 2015, M.S.'s family lived in St. Paul for a couple of weeks before they moved to their new home in St. Cloud. The first night M.S. was in St. Paul, she ran away again with Freeberg. M.S. and Freeberg stayed with Freeberg's sister and then lived in the basement at the sister's apartment building. Freeberg had sex with M.S. during the time they lived at the sister's apartment. Also, during this period of time, Freeberg began to physically abuse M.S. On more than one occasion, Freeberg hit M.S., causing bruises all over her body. At least once, he threatened to kill her while he was beating her. On another occasion, Freeberg

attempted to suffocate M.S.

M.S. attempted to leave, but Freeberg stopped her. Eventually, M.S. was able to call her cousin, and the cousin picked M.S. up and took her to the cousin's house. Several days later, Freeberg showed up at the cousin's house and spent the night with M.S. Upon discovering Freeberg at the house the next morning, the cousin called M.S.'s mother, who then brought M.S. to the family's new home in St. Cloud.

Freeberg continued to contact M.S. through social media. In September, he showed up multiple times at M.S.'s house, and occasionally, without the knowledge and permission of M.S.'s mother, Freeberg slept in M.S.'s bedroom. In October, Freeberg sent M.S. threatening messages. He threatened to break things, choke M.S. in front of her little brother, and kill M.S. On October 9, M.S. and her mother reported Freeberg's behavior to the police. Then on October 13, Freeberg showed up at M.S.'s house and she let him in. Upon learning of this, M.S.'s mother called the police, who arrested Freeberg. Notwithstanding a domestic abuse no contact order that prohibited him from having contact with M.S., Freeberg continued to contact M.S. by telephone while he was in jail awaiting trial. Consistent with jail policy, Freeberg's telephone contacts with M.S. were recorded.

Trial

Twice before trial, Freeberg expressed a desire to discharge his counsel. At a settlement conference, Freeberg said he was concerned about how infrequently he had been meeting with his counsel and mentioned having disagreements about strategy. Initially, Freeberg stated that he had only met with his counsel once, but then said that he had seen her the day before each court appearance. After the district court informed Freeberg that

he had the right to represent himself, and explained what representing himself would involve,[1] Freeberg decided to keep his counsel.

On the first day of the pretrial hearing, defense counsel reported to the district court that Freeberg was unwilling to listen to recently disclosed recordings of his phone calls with M.S. from the jail, and that when she tried to play the calls so that they could discuss trial strategy, Freeberg turned off her phone and eventually left the room.[2] In response, Freeberg again raised his concern that he never sees his counsel. Freeberg would also not discuss with his counsel whether he wanted to stipulate to an element of the charges to avoid his previous convictions being presented to the jury. The district court gave Freeberg and counsel time to discuss the stipulation, ordered Freeberg to listen to the phone calls with his counsel that evening, and adjourned for the day. Freeberg refused to meet with his counsel and, when the district court reconvened the next day, Freeberg again raised his desire to discharge counsel. After a short discussion with the district court, Freeberg agreed he would keep his counsel.

On the first day of trial, Freeberg again attempted to discharge his counsel, telling the district court, "I don't want her on my case no more. She can move over there with

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[1] After discussing with Freeberg that he had never represented himself at trial, the district court asked him:

> So do you want to be the first time that you try to do all of these things in a case where there are 19 charges against you, and you are looking at months and months of possible time in prison . . . if a jury convicts you? . . . Is that—is that how you want—that's kind of like taking batting practice in a World Series.

[2] At an earlier settlement conference, defense counsel had also reported Freeberg was unwilling to listen to the terms of the state's plea offer.

[the prosecutor]. That's where she belongs. She's not representing me anymore. I'm not going to do this today." He also denied that the trial was going to happen that day, denied that he would represent himself if he fired counsel, and demanded that he be returned to jail. The district court repeatedly informed Freeberg that the trial was going to happen that day, and he could either have his counsel represent him, or he could fire her and represent himself. Freeberg argued back, saying the trial was not going to happen, he was not going to represent himself, and his counsel was fired. The district court informed Freeberg that he had the right to be present at his trial, that he could waive that right, and that he would be removed if he was disruptive.

Each time the district court told Freeberg that the trial was going to happen and he would have to represent himself if he fired his counsel, Freeberg did not give a definitive answer on whether he still wanted to discharge counsel. Instead, he kept denying that the trial was going to happen. The record indicates that Freeberg denied trial was going to happen over 30 times, demanded he be returned to jail or said he would leave over 20 times, and denied he would represent himself over 10 times. Freeberg's counsel attempted to make a record about the consequences of firing her, and asked Freeberg if he still wanted to fire her, but he repeatedly said he did not know, and he was "not doing anything today." On five occasions, Freeberg told the district court that he would be disruptive; and after the last time he made a thinly-veiled threat, telling the district court, "Yo, take me back before

I snap on this mother."[3]

The district court advised Freeberg that it viewed his actions as a delay tactic. And when the district court attempted to bring the jury in, Freeberg yelled, "Take me back, bro. Take me back. Just take me back. Take me back right now." The district court ordered Freeberg removed and deemed his actions to constitute a waiver of his right to be present at trial. Then, because Freeberg was inconsistent and unclear with the district court about whether or not he wanted to discharge his counsel, the district court ruled that Freeberg did not knowingly and voluntarily discharge counsel, and ordered defense counsel to continue representing Freeberg. Finally, after arriving at 8:00 a.m. and waiting for over three hours, the jury was brought in and jury selection began.

As trial moved forward, the district court kept Freeberg informed about what was happening in his trial by directing the bailiff to update Freeberg, and to inquire whether Freeberg wished to participate in the trial. Over lunch on day one, a bailiff asked Freeberg if he wanted to return to court for the remainder of jury selection; Freeberg said no. Later that same day, the bailiff informed Freeberg that opening statements would begin soon and asked if he wanted to participate; Freeberg again declined. At the end of day one, the district court informed the attorneys that the next day Freeberg would be brought over to the courthouse in street clothing and given time to meet with his counsel. In weighing the options, Freeberg's defense counsel recommended that Freeberg be allowed to waive his

[3] Freeberg was examined under Rule 20 and found competent to stand trial because he was able to "rationally consult with counsel," "understand the proceedings," and "participate in the defense." Minn. R. Crim. P. 20.01, subd. 2.

right to be present rather than having Freeberg shackled to compel his attendance before the jury.

On the second day of trial, Freeberg again declined to attend, and told the bailiff that he would physically resist anyone forcing him to attend. Defense counsel also reported that Freeberg would not meet with her. Over the lunch break, a bailiff reported that Freeberg did not want to attend trial or meet with his counsel.

For day three of trial, Freeberg was brought into court outside the presence of the jury, and he again tried to fire his counsel. After a brief exchange with the district court, Freeberg said, "I am not waiving nothing. She's not representing me. She's fired once again, man. She's not representing me at all. She's not my attorney right now." He then began to walk toward the door, and the district court deemed Freeberg to have waived his right to attend trial by conduct. After getting the input of the prosecutor and defense counsel, the district court decided not to discharge Freeberg's counsel. Following the lunch break, Freeberg was again brought before the district court outside the presence of the jury. At that time, Freeberg apologized for his outburst on the first day of trial, waived his right to be present for the rest of that day's testimony, and expressed his desire to be present for the jury instruction conference and for the last day of trial. Freeberg was present at the jury instruction conference, and for all proceedings thereafter, which included his trial testimony before the jury.

Conviction and Sentencing

The jury found Freeberg guilty of a pattern of stalking conduct related to M.S., Minn. Stat. § 609.749, subd. 5(a) (2014). The pattern included guilty verdicts for: five

counts of violating a harassment restraining order, Minn. Stat. § 609.748, subd. 6(d) (2014); two counts of felony domestic assault, Minn. Stat. § 609.2242, subd. 4 (2014); one count of domestic assault by strangulation, Minn. Stat. § 609.2247, subd. 2 (2014); one count of threats of violence, Minn. Stat. § 609.713, subd. 1 (2014); and one count of third-degree criminal sexual conduct, Minn. Stat. § 609.344, subd. 1(b) (2014). The jury also found Freeberg guilty of two counts of violating a harassment restraining order related to M.S.'s mother, and another count of violating a harassment restraining order related to M.S.[4]

At the sentencing hearing, Freeberg argued for a downward dispositional departure based on his fetal alcohol spectrum disorder, ADHD, and bipolar reactive attachment disorder. The state responded by summarizing the effects that Freeberg's conduct had on M.S. and her mother: the repeated and knowing conduct by Freeberg over the entire summer, the continued phone calls to M.S. as his case approached trial, and the violent threats and use of violence against M.S. The state also argued that there were people there for Freeberg when he was growing up; that he did not just fall through the cracks. The district court denied the motion for a downward dispositional departure.

The district court sentenced Freeberg to 60 months for the third-degree criminal

[4] The first of the two harassment restraining order counts relating to M.S.'s mother was charged as part of a pattern of stalking conduct, but Freeberg was only found guilty of one act within the pattern and was thus acquitted of that pattern charge. The second of the harassment restraining order counts relating to M.S.'s mother was separately charged from the pattern, as was the final violation of a harassment restraining order charge related to M.S.

sexual conduct count;[5] 21 months for the first harassment restraining order violation related to M.S.'s mother, concurrent; 24 months for the non-pattern harassment restraining order violation related to M.S., concurrent; and 12 months and a day for the second harassment restraining order violation related to M.S.'s mother, consecutive to the criminal sexual conduct count. In total, Freeberg was sentenced to serve 72 months and a day.

D E C I S I O N

I. Absence From Trial

Our court reviews the decision to proceed with trial in the absence of the defendant for an abuse of discretion, and "will not disturb the [district] court's factual findings unless clearly erroneous." *State v. Cassidy*, 567 N.W.2d 707, 709–10 (Minn. 1997).

Criminal defendants have a Sixth Amendment right to be present in the courtroom because each defendant has the right to confront the witnesses or evidence against him. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058 (1970). The Fourteenth Amendment due process clause also gives each defendant the "right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 2667 (1987) (quotation omitted). In Minnesota, our Rules of Criminal Procedure provide even greater protection by requiring the defendant's presence at "every stage of the trial," from jury selection until sentencing. Minn. R. Crim. P. 26.03, subd. 1(1); *Cassidy*, 567 N.W.2d at 709.

[5] Freeberg could only be sentenced on one count within the pattern of stalking conduct. Minn. Stat. § 609.035, subd. 1 (2014); *State v. Jones*, 848 N.W.2d 528, 534 (Minn. 2014).

However, the defendant can waive the right to be present. *Cassidy*, 567 N.W.2d at 709. The rules allow the district court to proceed without the defendant if he is "absent without justification after the trial starts." Minn. R. Crim. P. 26.03, subd. 1(2)(1). This is because we do not allow defendants to "take advantage of their own willful choice to defeat the ends of justice." *State v. Worthy*, 583 N.W.2d 270, 277–78 (Minn. 1998); *see also Allen*, 397 U.S. at 343, 90 S. Ct. at 1061 ("[T]rial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."). But the right to be present cannot be "easily waived." *State v. Grey*, 256 N.W.2d 74, 76 (Minn. 1977). In order to proceed without the defendant, "it must be clear that the defendant himself is intentionally abandoning a known right." *Id.* (citation omitted). Whether a defendant has waived his right to be present is based "upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *State v. Richards*, 456 N.W.2d 260, 264 (Minn. 1990) (quotation omitted).

And, "[t]he defendant has the [heavy] burden to prove that his absence was involuntary. . . . [B]ecause [o]ur judicial system could not function if defendants were allowed to pick and choose when to show up for trial." *State v. Finnegan*, 784 N.W.2d 243, 247–48 (Minn. 2010) (quotation omitted). If the defendant is absent without justification, trial proceeds without the defendant. *Id.* at 248.

The district court did not abuse its discretion in determining that Freeberg was absent without justification. Freeberg repeatedly and unequivocally stated that he did not want to be present at trial after being advised by the district court that he was expected to

be there and had the right to be present. When the district court attempted to bring the jury in to begin jury selection, Freeberg began yelling, demanding that he be removed from the courtroom. Based on Freeberg's repeated denials that trial was going to begin that day, and his repeated statements that he did not want to be present, the district court did not err in finding that Freeberg's tactics were an attempt to delay trial, and did not abuse its discretion in deeming Freeberg's conduct a waiver of his right to be present at trial. *See Worthy*, 583 N.W.2d at 277 (holding district court did not abuse its discretion when defendants "stated unequivocally that they did not wish to stay in the courtroom during trial," and confirmed their refusal to be present on several occasions). The district court made repeated attempts to involve Freeberg in the trial, and once Freeberg expressed a desire to be present, he was brought into the courtroom.

Freeberg argues that his absence was justified because his counsel only met with him once before trial. But that is not true. On multiple occasions, Freeberg himself acknowledged to the district court that he met with his attorney before each court appearance. And when Freeberg's counsel wanted to meet with him to go over new evidence disclosed by the state, or to discuss the possibility of stipulating to certain elements to prevent his prior convictions being presented to the jury, Freeberg refused to meet with his counsel. Even after the district court ordered Freeberg to meet with his counsel and listen to new evidence turned over by the state, Freeberg still refused. All of this occurred before the first day of trial, and when Freeberg re-raised the same issue at the beginning of trial the district court did not err in finding Freeberg's tactics were an attempt to delay trial. *See id.* at 277–78 (affirming district court's finding that defendants' firing

of counsel and refusal to be present for trial were delay tactics, and holding district court did not abuse its discretion by conducting trial without defendants present); *cf. Finnegan*, 784 N.W.2d at 249–52 (upholding district court's ruling that defendant was voluntarily absent without justification when he took methamphetamine, overdosed, and as result was absent from second day of trial).

Finally, Freeberg argues that he could not be absent without justification under rule 26.03 because the rule only allows a defendant to be deemed absent without justification after trial starts, and his trial had not started. But this argument was rejected in *State v. Carse*, 778 N.W.2d 361 (Minn. App. 2010), *review denied* (Minn. Apr. 20, 2010). Rule 26.03 makes jury selection a part of trial, and *Carse* held—at least for the purpose of rule 26.03—that trial starts when the district court is prepared to begin voir dire and prospective jurors are waiting to be brought into the courtroom. Minn. R. Crim. P. 26.03, subd. 1(1); *Carse*, 778 N.W.2d at 369–70. Our holding in *Carse* was designed to prevent defendants from manufacturing a rule 26.03 violation by refusing to be present for jury selection, and then claiming any waiver was not valid because jury selection had not yet begun, when the only reason that jury selection had not begun was the defendant's own refusal to allow the jury to enter the courtroom. *Carse*, 778 N.W.2d at 369–70.

Freeberg repeatedly told the district court that he did not want to be present for trial, and attempted to prevent trial by being disruptive. The district court gave Freeberg every opportunity to be present, even as the trial progressed, but properly did not allow Freeberg to prevent the administration of justice. Accordingly, the district court did not abuse its

discretion in deeming that Freeberg's words and actions made him absent without justification, and conducting most of the trial without him.

II. Sentencing

The district court is afforded "great discretion in the imposition of sentences," and this court will not reverse a sentencing decision absent an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014) (quotation omitted). We rarely reverse the imposition of a sentence that is within the presumptive range. *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). And, appellate courts "will not disturb a district court's decision to impose permissive consecutive sentences absent a clear abuse of discretion." *State v. Yang*, 774 N.W.2d 539, 563 (Minn. 2009). The district court abuses its discretion if consecutive sentences exaggerate the defendant's criminality. *Carpenter v. State*, 674 N.W.2d 184, 189 (Minn. 2004). "In determining whether a consecutive sentence unfairly exaggerates a defendant's criminality, [courts] are guided by past sentences received by other offenders for similar offenses." *Id.*

Freeberg argues that imposing a consecutive sentence for one of his harassment restraining order violations, resulting in a 72 months and a day sentence, unfairly exaggerated his criminality. But consecutive sentences for these offenses were permissive within the guidelines, making the district court's sentence presumptively within its discretion. Minn. Sent. Guidelines 2.F.2.a(1)(i)(a) (Supp. 2015) (permitting a consecutive sentence if both offenses are listed in Section 6); *id.* at 6 (Supp. 2015) (listing both Freeberg's harassment restraining order violation, Minn. Stat. § 609.748, subd. 6(d), and his third-degree criminal sexual conduct violation, Minn. Stat. § 609.344, subd. 1, in

section 6). Moreover, the district court could have sentenced Freeberg to almost the exact same sentence by imposing a top of the box, 72-month sentence, for the criminal sexual conduct count, and sentencing the harassment restraining order count concurrently. *See* Minn. Sent. Guidelines 4.B (Supp. 2015) (showing presumptive sentence of 60 months and range of 51–72 months for sex offense of severity D with criminal history score of 2). The fact that the district court could have imposed almost the exact same sentence through different avenues weighs strongly against the argument that Freeberg's sentences exaggerate his criminality.

And, Freeberg cites no relevant cases which support his argument. He cites *State v. Goulette*, 442 N.W.2d 793, 794 (Minn. 1989), but that case involved a single robbery incident where the defendant was charged with one count of aggravated robbery for each victim, and the district court imposed consecutive sentences for each count at the maximum length within the guidelines. Even then, while the supreme court concluded that the total sentence unfairly exaggerated the criminality of the defendant's conduct, the reduction still imposed a longer sentence than if it had imposed three of the five sentences consecutively. *Id.* at 795; *cf. State v. Norris*, 428 N.W.2d 61, 70–71 (Minn. 1988) (holding that five 60-month sentences for assault running consecutive with each other and with life imprisonment sentence for first-degree murder, exaggerated criminality, but only reducing three of five assault sentences to run concurrently).

Freeberg does not cite any Minnesota cases which discuss a defendant's sentences for criminal sexual conduct and a harassment restraining order violation. However, in the rare cases in which an opinion has modified a consecutive sentence for exaggerating the

criminality of the conduct involved, the district court had imposed *more* than two sentences consecutively, and the reduction still imposed *at least* two of the sentences consecutively. *See State v. Poole*, 499 N.W.2d 31, 36 (Minn. 1993) (affirming appellate court's decision reducing defendant's six consecutive sentences for criminal sexual conduct to three consecutive sentences); *see also Norris*, 428 N.W.2d at 71 (imposing two of five assault sentences consecutive with each other and with life imprisonment sentence for first-degree murder); *cf. Goulette*, 442 N.W.2d at 795 (reducing total sentence for unfairly exaggerating defendant's criminality, but imposing longer sentence through upward departure than length of three consecutive sentences).

Finally, evidence of Freeberg's fetal alcohol syndrome and his past life experiences are not enough to show that the district court abused its sentencing discretion. Freeberg presented both of those arguments to the district court in asking for a downward dispositional departure and as a reason the district court should have imposed concurrent sentences. We conclude that, based upon this record, the district court did not abuse its discretion in denying Freeberg's request for a downward dispositional departure on these grounds.

For mental illness to mitigate against imposing consecutive sentences, "a defendant's impairment must be 'extreme' to the point that it deprives the defendant of control over his actions." *State v. McLaughlin*, 725 N.W.2d 703, 716 (Minn. 2007). But the record contains no evidence that Freeberg's fetal alcohol syndrome is severe enough to

deprive him of control over his actions.[6] *See State v. Fardan*, 773 N.W.2d 303, 322–23 (Minn. 2009) (determining defendant's fetal alcohol syndrome did not constitute mitigating factor in sentencing). And, Freeberg's past life experiences, which included abuse against him, also do not show that the district court abused its sentencing discretion because any mistreatment of Freeberg was not perpetrated by the victims of his crimes. *See State v. Hennum*, 441 N.W.2d 793, 801 (Minn. 1989) (emphasizing that appellate court's "reduction of district court's sentence" is rarely appropriate, and reducing defendant's sentence only because *victim* had physically and mentally abused defendant throughout their relationship).

The evidence supports the district court's findings, and the district court did not abuse its discretion in imposing a consecutive sentence for one of Freeberg's harassment restraining order violations.

Affirmed.

[6] Freeberg also does not explain why his bipolar reactive disorder, attachment disorder, or ADHD resulted in extreme mental impairment.