STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0200

State of Minnesota,
Respondent,

vs.

Deirdre Elise Evavold,
Appellant.

Filed October 16, 2017
Affirmed
Connolly, Judge

Dakota County District Court
File No. 19HA-CR-15-4227

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

James C. Backstrom, Dakota County Attorney, Kathryn M. Keena, Assistant County Attorney, Hastings, Minnesota (for respondent)

Deirdre Elise Evavold, St. Cloud, Minnesota (pro se appellant)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

CONNOLLY, Judge

Pro se appellant was convicted of six counts of deprivation of parental/custodial rights. She now argues that (1) the district court erred in not instructing the jury on the affirmative defense under Minn. Stat. § 609.26, subd. 2(1) (2012); (2) law enforcement and the prosecution committed misconduct by tampering with the testimony of a witness; (3) the prosecution committed misconduct by not providing appellant with all of the discovery; and (4) she was deprived of her right to a fair trial due to judicial bias. We affirm.

FACTS

Sandra Grazzini-Rucki and David Rucki were married and share five children including the two children involved in this case: S.R. and G.R. Temporary custody of all the children was given to the children's paternal aunt on April 19, 2013, by a court order. Later that day, S.R. and G.R. were taken by their mother to appellant Deirdre Elise Evavold's home in St. Cloud. After several days, both S.R. and G.R. were taken by the appellant and their mother to the residence of Doug and Gina Dahlen, where they stayed for over two years before law enforcement agents discovered them.

Pro se appellant was charged with six counts of deprivation of parental/custodial rights. During several pretrial hearings, appellant complained of not having all of the discovery she was entitled to receive and asserted that the prosecution was engaged in an illegal scheme of charging her money to reproduce and send discovery. While the district court informed appellant several times throughout the pretrial hearings that she had other

options to obtain discovery without incurring costs, she chose not to utilize any of these options. Appellant, while being present for her jury trial, did not provide an opening statement, cross-examine any witnesses, or provide any direct testimony from any witnesses. The jury found appellant guilty of all six counts of deprivation of parental/custodial rights.

D E C I S I O N

I. Did the district court err by not instructing the jury on the affirmative defense provided in Minn. Stat. § 609.26, subd. 2(1)?

Appellant argues that she was wrongfully charged and convicted of six counts of depriving another of custodial or parental rights under Minn. Stat. § 609.26 because there is substantial evidence supporting the Minn. Stat. § 609.26, subd. 2(1) affirmative defense.[1] Because appellant not only failed to provide notice to the prosecution of her intent to raise any affirmative defenses but also unequivocally stated she was not raising the affirmative defense, appellant's argument fails.

Individuals charged under Minn. Stat. § 609.26 have the option to assert the affirmative defense contained in the statute. *See* Minn. Stat. § 609.26, subd. 2(1) ("It is an affirmative defense if a person charged under subdivision 1 proves that: (1) the person reasonably believed the action taken was necessary to protect the child from physical or

[1] To the extent that appellant is also arguing there was insufficient evidence to convict her under Minn. Stat. § 609.26, we disagree. The record, reveals that the evidence (including law enforcement testimony, the victim's testimony, emails sent and received by appellant, among other evidence), when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach the verdict it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

sexual assault or substantial emotional harm."). However, having the ability to assert an affirmative defense and asserting an affirmative defense are not the same thing. Appellant, while having the right to assert her affirmative defense, failed to provide any notice to the prosecution of her intent to raise any affirmative defenses, as required by Minn. R. Crim. P. 9.02(5). Even if the rules did not require appellant to provide affirmative notice, her argument still fails because she definitively told the district court "no" when asked whether she intended to assert the affirmative defense during her trial.

The district court did not instruct the jury on the affirmative defense. Appellant argues that failing to assert the affirmative defense is not dispositive as to whether the affirmative defense can absolve her of criminal liability. We disagree. Regardless of whether the evidence was or was not sufficient for the affirmative defense, a party who fails to notify the prosecution of her potential affirmative defense, fails to raise that defense even after being presented with a host of opportunities, and declines to submit any evidence or develop the record through direct- or cross-examination in support of that defense is not entitled to a jury instruction on it. *See State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000) (While it is true that district courts have the responsibility to ensure all essential instructions are given, that responsibility does not require the court to instruct the jury, sua sponte, on affirmative defenses when they are not requested, raised, or argued).

II. Did the prosecutor commit misconduct by tampering with a witness?

Appellant argues that prima facie evidence of witness tampering exists in violation of Minnesota's witness-tampering statute. *See* Minn. Stat § 609.498 (2016). In support of this claim, appellant asserts that S.R. told law enforcement that her father and aunt made

her recant and presumably implies that the prosecution coerced S.R. into changing her statement.

Because appellant never raised any witness-tampering issues involving S.R. with the district court during or before trial, this issue is not properly before this court. Criminal defendants forfeit their right to raise the issue of prosecutorial misconduct on appeal when they fail to object or seek a curative instruction. *State v. Torres*, 632 N.W.2d 609, 617-18 (Minn. 2001). Without a timely objection, relief will only be granted in extreme cases involving "unduly prejudicial" prosecutorial misconduct. *State v. Whittaker*, 568 N.W.2d 440, 450 (Minn. 1997). But we review unobjected-to prosecutorial misconduct under a modified plain-error test. *See State v. Ramsey*, 721 N.W.2d 294, 302 (Minn. 2006) ("before an appellate court reviews unobjected-to trial error, there must be (1) error, (2) that is plain, (3) affects substantial rights.").

Even if the issue were properly preserved for this court, appellant's claim would still fail. Appellant does not cite any evidence in the record that would tend to show that S.R. was coerced into giving false statements by anyone, including the prosecution.[2] In addition, S.R. testified at appellant's trial, and appellant had the opportunity to ask her these questions if she desired. She chose not to. Because appellant has not shown error, it is unnecessary to address the other prongs of the plain error test.

[2] Appellant does place in her addendum a copy of a retyped excerpt of a conversation between Officer Kelli Coughlin and S.R., but this transcript does not appear in the record and is not properly before the court. *See* Minn. R. Civ. App. P. 110 (stating documents filed in district court, the exhibits, and the transcript of the proceeding, if any, shall constitute the record on appeal).

III. Did the prosecutor commit misconduct by allegedly failing to provide all discovery to appellant?

Appellant asserts that the prosecution committed misconduct by not providing all the discovery that it was required to produce. We disagree. There are five pieces of discovery that appellant claims were not produced and that the prosecution was required to produce, namely:

> (1) Officer Kelli Coughlin's preliminary audio recorded statements of S.R. and G.R.;
> (2) Preliminary audio statements of David Rucki, Tammy Love, Rich Hakanson, Loralie Musolf, Kelli Coughlin, Jim Dronen, and Deputy U.S. Marshal Matthew Palmer (including corresponding audio and video with a report);
> (3) Stearns County evidence (i.e., surveillance of residence by David Rucki and private, criminal investigative data for Christian Fox);
> (4) Blu-ray disc which contained reports from the Minnesota Bureau of Criminal Apprehension;
> (5) Child Protective Services documents from 2015.

As a threshold matter, many of the pieces of evidence that appellant describes above were not properly preserved for the record. "[A] party seeking review has a duty to see that the appellate court is presented with a record which is sufficient to show the alleged errors and all matters necessary to consider the questions presented." *State v. Carlson*, 281 Minn. 564, 566, 161 N.W.2d 38, 40 (1968); *State v. Taylor*, 650 N.W.2d 190, 204 n.12 (Minn. 2002) ("On appeal, the appellant is responsible for providing the court with an adequate record"). In examining appellant's objections in the record, appellant only specifically names item No. 4 as a piece of evidence that she had not received.

"The state's obligations in discovery derive from the Minnesota Rules of Criminal Procedure and also from the constitutional guarantees of due process." *State v. Hunt*, 615 N.W.2d 294, 298 (Minn. 2000). Specifically, Minn. R. Crim. P. 9.01, subd. 1, requires the prosecuting attorney to allow the defense access at any reasonable time to all matters within the prosecutor's possession or control that relate to the case. Minn. R. Crim. P. 9.01, subd. 1.

The prosecution was unable to make a copy of the Blu-ray disc.[3] However, the prosecution complied with Minn. R. Crim. P. 9.01, subd. 1 by making the disc available for appellant's review in the Dakota County Attorney's facilities. Appellant's refusal to examine the evidence at the Dakota County Attorney's facilities was her choice, but this choice now precludes her from arguing that she did not receive access to this discovery.

Appellant's claim regarding the other four pieces of evidence, assuming these pieces of discovery were preserved in the record, also fails. We review unobjected-to trial error under the plain-error standard. *See Ramsey*, 721 N.W.2d at 302.

Concerning the discovery appellant describes in paragraph one, the prosecution states there were no preliminary audio interviews conducted on the girls at any time. While one police interview of S.R. eventually did take place, this interview was sent to appellant in late August.

[3] The Blu-ray disc contained emails from a search of the computer of an attorney involved with the original disappearance of S.R. and G.R. that was performed by the Minnesota Bureau of Criminal Apprehension.

Concerning the discovery raised in paragraph two, the prosecution notes in its brief that there were no interviews conducted of Rucki, Love, or Musolf. The prosecution also notes that the other individuals in paragraph two are all law enforcement officers who would not give "preliminary audio statements." Thus, beyond appellant's mere assertion, it appears that the discovery appellant is requesting in paragraph two does not exist. Further, appellant provides no factual support that recorded interviews of anyone in paragraph two exist, which is her responsibility on appeal. *See Carlson*, 281 Minn. 564 at 566, 161 N.W.2d at 40.

Concerning the discovery raised in paragraph three, appellant argues that under Minn. R. Crim. P. 9.01, subd. 2, the prosecution is required to aid her in retrieving "Stearns County evidence." Appellant overstates the state's discovery obligations in a criminal case. Typically, the state's discovery obligation only applies to evidence that is actually in the state's possession. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S. Ct. 989, 1001 (1987). "In contrast to the civil rules, the criminal rules allow only limited discovery[.]" *State v. Deal*, 740 N.W.2d 755, 763 (Minn. 2007). Under the criminal procedure rules, a prosecutor is required to disclose, without a court order, "all matters within the prosecutor's possession or control that relate to the case[.]" Minn. R. Crim. P. 9.01, subd. 1. However, a defendant may file a motion with the district court to order the prosecution to assist the defendant in obtaining access to matters in the possession of a governmental agency, but not in the prosecutor's control. Minn. R. Crim. P. 9.01, subd. 2(1). Simply put, rule 9 does not require the state to disclose items the state does not possess. *See State v. Schmid*, 487 N.W.2d 539, 543 (Minn. App. 1992). This is especially true if those records are not in the

control of the state, no motion has been made under Minn. R. Crim. P. 9.01, subd. 2(1), and there is no identifying information to inform the prosecution of what records are even being requested.

Concerning the discovery items raised in the fifth paragraph of appellant's brief, the child-protection records she requests also do not appear to be in the possession of the prosecution. If appellant, acting as her own attorney, believed those records to be of a pertinent nature to her defense, then her proper recourse would be to file a *Paradee* motion seeking in camera review of the relevant child-protection records under Minn. R. Crim. 9.03, subd. 6. *See State v. Paradee*, 403 N.W.2d 640 (Minn. 1987). Appellant's failure to do this does not equate to prosecutorial misconduct. Because she has not established error, it is not necessary to address the other prongs of the plain error test. *See State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

IV. Did the district court deprive the defendant of the right to a fair trial due to judicial bias and questionable impartiality?

For her last issue on appeal, appellant alleges that the district court failed to disclose its conflict of interest and was unfairly biased against her. The Minnesota Rules of Criminal Procedure mandate that a judge not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct. Minn. R. Crim. P. 26.30, subd. 14(3). Appellant alleges a violation of rule 2.11(A) of the Minn. Code of Judicial Conduct,[4] which states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]" Whether a judge has violated the

[4] Appellant cites this rule as Canon 3E in her brief.

Code of Judicial Conduct is a question of law, which we review de novo. *State v. Pratt*, 813 N.W.2d 868, 877 (Minn. 2012). However, because appellant did not object to the district court judge presiding over her bench trial, we review this new objection on appeal under the plain-error standard. *See State v. Schlienz*, 774 N.W.2d 361, 365 (Minn. 2009).

Here, appellant asserts that the district court judge was biased during this proceeding because she presided over a preliminary hearing that involved a disorderly conduct charge against one of the appellant's victims in 2009. Appellant also points out that while the 2009 case was set for trial, "the defense filed a motion to dismiss for lack of probable cause . . . that motion was granted without a hearing by [the district court] and the case was abruptly thrown out." Based on the district court's register of actions, appellant is mistaken. In reality, both parties filed memoranda in support of their respective positions, and the district court decided the motion to dismiss on the merits. We see no evidence of bias. Appellant has not established error and we need not consider the other prongs of the plain-error test. *See Brown*, 815 N.W.2d at 620.

Affirmed.