STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0157

State of Minnesota,
Respondent,

vs.

Raciel Zalva Zaldivar-Proenza,
Appellant.

Filed January 21, 2020
Affirmed
Smith, Tracy M., Judge

Swift County District Court
File No. 76-CR-18-249

Keith Ellison, Attorney General, Peter D. Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Danielle Olson, Swift County Attorney, Benson, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Hooten, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

Appellant Raciel Zalva Zaldivar-Proenza appeals his conviction for fourth-degree criminal sexual conduct. He argues that the district court (1) denied his right to counsel by

not providing him an attorney at his first-appearance hearing, which included a discovery request by the state to examine him for scratches, and (2) abused its discretion by not permitting his brother to testify on his behalf at trial. We affirm.

FACTS

Based on the testimony at trial, L.P.S. spent the night at her friend A.R.E.B.'s house on May 18, 2018. They slept in the same bed in A.R.E.B.'s bedroom. Zaldivar-Proenza did not live at the house but, according to A.R.E.B., had access to it because Zaldivar-Proenza was a friend of hers and took care of her house when she was away.

In the early morning of May 19, Zaldivar-Proenza came up to A.R.E.B.'s bedroom to make sure that everything was okay because a side door to the house was open. A.R.E.B. said everything was fine and asked him to leave. A.R.E.B. then fell back asleep.

Shortly thereafter, L.P.S. awoke to find her pants and underwear partially pulled down and Zaldivar-Proenza touching her buttocks. L.P.S. thought Zaldivar-Proenza was going to touch her vagina, but she "threw him off" before he did so. L.P.S. then scratched Zaldivar-Proenza on the arm and yelled at him to leave. Although L.P.S. and A.R.E.B. were sleeping in the same bed, A.R.E.B. did not wake up during this interaction.

Zaldivar-Proenza left, according to L.P.S., but then returned and yelled insults at her and A.R.E.B. A.R.E.B. woke up at this point and asked L.P.S. what was happening. L.P.S. told A.R.E.B. that Zaldivar-Proenza had touched her. L.P.S. told A.R.E.B. that she had scratched A.R.E.B. and that her fingernail was broken. L.P.S. called law enforcement, and Zaldivar-Proenza left.

The state charged Zaldivar-Proenza with fourth- and fifth-degree criminal sexual conduct.[1] On May 21, at his first-appearance hearing under Minn. R. Crim. P. 5, Zaldivar-Proenza appeared without counsel. The district court informed Zaldivar-Proenza that he qualified for a public defender and that a public defender would be at the next hearing—the second-appearance hearing under Minn. R. Crim. P. 8. The district court then addressed the state's discovery request under Minn. R. Crim. P. 9.02, subd. 2, for a physical examination of Zaldivar-Proenza. The state sought to observe and photograph any scratches on Zaldivar-Proenza's person. The district court granted the request.

A public defender was appointed, and the case proceeded to a jury trial. At trial, before Zaldivar-Proenza decided to testify, his counsel informed the district court that Zaldivar-Proenza wished to call his brother to testify that he and Zaldivar-Proenza spent the morning of the incident loading and unloading wire fencing. The purpose of the testimony was to suggest an alternative explanation for the scratches on Zaldivar-Proenza's arms. The district court excluded the testimony because, while the brother could testify that he and Zaldivar-Proenza had been working on fencing that morning, he could not testify that he saw Zaldivar-Proenza get scratched by the fencing. With no evidence actually linking the fencing to the scratches, the district court excluded the brother's testimony.

The jury found Zaldivar-Proenza guilty of both charges. The district court entered a conviction on the fourth-degree count, sentenced Zaldivar-Proenza to 78 months'

[1] The state also charged Zaldivar-Proenza with burglary, but later dismissed that charge.

imprisonment, and required him to register as a predatory offender for the remainder of his lifetime.[2]

This appeal follows.

D E C I S I O N

I. The district court did not deny Zaldivar-Proenza's right to counsel.

Zaldivar-Proenza claims that his right to counsel was denied when the district court considered the state's request to examine him for scratches without his appointed attorney present. When the underlying facts are undisputed, whether a defendant's right to counsel was violated is reviewed de novo. *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 712 (Minn. App. 2008).

Both the United States and Minnesota Constitutions guarantee a right of legal representation to a criminal defendant. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. Although the right to counsel granted by the federal constitution and the right granted by the state constitution are not identical, the same framework is used to determine whether a given proceeding triggers attachment of the right. *See Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991) (using a federal analytical framework to conclude that the Minnesota Constitution grants a limited right to a motorist to consult an attorney before deciding to submit to chemical testing for blood alcohol); *State v. Maddox*, 825 N.W.2d 140, 144 (Minn. App. 2013) (using federal case law to describe when both the federal and

[2] Zaldivar-Proenza has a previous sex offense conviction that allows for a lifetime conditional-release term for the current offense under Minn. Stat. § 609.3455, subd. 7 (2016).

state right to counsel apply). The right attaches when the state initiates formal judicial proceedings against the accused, *State v. Willis*, 559 N.W.2d 693, 697 (Minn. 1997), and thereafter applies to any "critical stage" of the proceedings. *Maddox*, 825 N.W.2d at 144.

Critical stages are "proceedings between an individual and agents of the State . . . that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary." *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 212 n.16, 128 S. Ct. 2578, 2591 n.16 (2008) (quotations and citations omitted). "A characteristic of a critical stage is that 'certain legal rights may be lost if not exercised at this stage.'" *Maddox*, 825 N.W.2d at 144 (quoting *Mempa v. Rhay*, 389 U.S. 128, 135, 88 S. Ct. 254, 257 (1967)). The attachment of the right to counsel at a judicial hearing does not necessarily imply that that judicial hearing is a critical stage of the proceedings. *Rothgery*, 554 U.S. at 212, 128 S. Ct. 2578, 2591-92.

At issue in this case is the state's request to examine Zaldivar-Proenza for scratches consistent with those that L.P.S. said she had given to her assailant. Under the Minnesota Rules of Criminal Procedure, a prosecutor may, "with notice to the defense and a showing that one or more of the discovery procedures . . . will materially aid in determining whether the defendant committed the offense charged," move the district court to order a defendant to "[s]ubmit to reasonable physical or medical inspection." Minn. R. Crim. P. 9.02, subd. 2(1)(h).

Zaldivar-Proenza argues that the hearing on the state's discovery request was a critical stage of the proceedings and thus he was entitled to counsel. Based on this argument, he claims that the district court should not have allowed the photographs of the

scratches on his arms into evidence. He argues that he was prejudiced by the photographs, as they bolstered the credibility of L.P.S. in the eyes of the jury, and thus he should receive a new trial.

In the abstract, the handling of a discovery request might generally be viewed as a critical stage of proceedings. It may involve a confrontation between the two parties governed by rules of criminal procedure, during which counsel could provide important advice and guidance on both how best to comply with the request and how to challenge the request. But, in *Gilbert v. California*, the United States Supreme Court held that a discovery matter is not a critical stage when "there is minimal risk that the absence of counsel might derogate from [a defendant's] right to a fair trial." 388 U.S. 263, 267, 87 S. Ct. 1951, 1953 (1967) (holding that taking handwriting exemplars without counsel present did not violate the party's right to counsel because it was not a critical stage of criminal proceedings).

As the state argues, this case is analogous to *Gilbert*. Zaldivar-Proenza has not shown that he lost any legal right by not having an attorney present at the discovery-hearing portion of his initial appearance. He describes hypothetical challenges a lawyer might have raised in opposition to the request, but any challenges to the discovery request that he wished had been raised remained available to him on a later motion to suppress evidence. And Zaldivar-Proenza does not argue that the discovery request was otherwise invalid or that the examination that took place was unreasonable.

It is not merely hypothetical that Zaldivar-Proenza could have later challenged the district court's granting of the state's discovery request; in fact, Zaldivar-Proenza did just that in a suppression motion soon after he was appointed counsel. He argued that he was

not provided sufficient notice of the request and that his counsel was never given a chance to object. The district court determined that the state had complied with the requirements of rule 9.02. The district court did not indicate that Zaldivar-Proenza had somehow forfeited his right to raise those arguments by not making them at the initial appearance hearing. Instead, the district court permitted counsel to advocate for him on the basis of his legal rights under rule 9.02, even though that advocacy was ultimately unsuccessful. As in *Gilbert*, there was a minimal risk that the lack of counsel at the original discovery hearing would result in Zaldivar-Proenza receiving an unfair trial.

Zaldivar-Proenza also claims that he lost his right to prevent the state from intruding on his body. But the state had the authority to move the district court to order the physical examination, so long as the state complied with the discovery rule and acted within constitutional limits. Because Zaldivar-Proenza does not assert specific grounds to show that the motion or the examination was invalid, he has not shown that the examination in this case resulted in the loss of a legal right.

Zaldivar-Proenza argues that *Coleman v. Alabama*, where the Supreme Court held that a preliminary hearing in Alabama was a critical stage of the proceedings, demands a different result. 399 U.S. 1, 9-10, 90 S. Ct. 1999, 2003 (1970). But the proceeding in that case was distinct from the proceeding here. The Alabama preliminary hearing at issue in *Coleman* included a judicial assessment of the sufficiency of the state's evidence to warrant submitting the case to a grand jury and involved the direct- and cross-examinations of witnesses. *Id.* at 8-10, 90 S. Ct. at 2002-03. Counsel at such a hearing would have had the opportunity to "fashion a vital impeachment tool" for trial through effective examination.

Id. at 9, 90 S. Ct. at 2003 (noting how a skillful cross-examination can develop useful impeachment tools or preserve favorable testimony from a witness who might be unavailable later). The hearing in this case did not involve the same type of opportunity to develop impeachment tools through witness testimony. And Zaldivar-Proenza does not identify any arguments he could have raised at the preliminary hearing that he could not have subsequently made in a later motion with the assistance of counsel.

In sum, we conclude that, in this narrow set of circumstances, where there was minimal risk that the absence of counsel would result in an unfair trial, the discovery hearing on an otherwise-valid discovery request to noninvasively photograph scratches was not a critical stage of the proceedings. Zaldivar-Proenza's constitutional right to counsel was thus not denied.

II. The district court did not abuse its discretion when it excluded the trial testimony of Zaldivar-Proenza's brother.

Zaldivar-Proenza also asserts that the district court abused its discretion by preventing his brother from testifying at trial about an alternative explanation for why Zaldivar-Proenza had scratches on his arm. He argues that this was a denial of his right to present a complete defense.

"Under the due process clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the Minnesota Constitution, every criminal defendant has the right to be . . . afforded a meaningful opportunity to present a complete defense." *In re Source Code Evidentiary Hearings in Implied Consent Matters*, 816 N.W.2d 525, 540 (Minn. 2012) (quotation omitted). The right to present a complete defense

"includes the right to call and examine witnesses." *State v. Munt*, 831 N.W.2d 569, 585 (Minn. 2013). This right yields to the evidentiary rules, however, unless the rules "serve no legitimate purpose" or are "disproportionate to the ends that they are asserted to promote." *State v. Pass*, 832 N.W.2d 836, 841-42 (Minn. 2013).

Appellate courts review the decision to exclude evidence for a clear abuse of discretion. *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015). The district court abuses its discretion when its ruling "is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). If the district court did abuse its discretion in an evidentiary matter, an appellant must also show prejudice from the error in order to obtain reversal. *Bustos*, 861 N.W.2d at 666.

Here, the district court determined that the brother's testimony would be irrelevant and call for jury speculation. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Minn. R. Evid. 401. Even if the evidence is relevant, however, the district court may exclude it if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Minn. R. Evid. 403.

As the state points out, Zaldivar-Proenza does not argue on appeal that the rules of evidence in question here serve no legitimate purpose or are disproportionate to the ends they promote. So the question is whether the district court abused its discretion in applying the rules of evidence.

Zaldivar-Proenza's counsel told the district court that Zaldivar-Proenza's brother was going to testify that he and Zaldivar-Proenza had worked on fencing in mid- to late morning the day of the incident, but counsel conceded that "no one could testify as to if the scratches got there because of working with the fencing."

As to relevance, the fact of consequence is whether Zaldivar-Proenza was scratched while working on fencing. Zaldivar-Proenza's brother, however, did not have any personal knowledge as to that fact. *See* Minn. R. Evid. 602 (requiring sufficient evidence that a witness has personal knowledge of a matter before they can testify to that matter). While, with hindsight, the brother's proposed testimony could appear relevant as a partial corroboration of Zaldivar-Proenza's later trial testimony that he was scratched while working on the fencing, the district court did not know, when it excluded the brother's testimony, whether Zaldivar-Proenza was going to testify. At the time the district court ruled on the proffered testimony from Zaldivar-Proenza's brother, nothing in the record indicated that Zaldivar-Proenza had gotten scratched while working on wire fencing. Zaldivar-Proenza did not ask the district court to revisit its decision after he testified. Thus, the question before the district court was whether the brother's testimony that Zaldivar-Proenza worked on fencing on May 19, 2018, with no other evidence connecting the fencing to his scratches, was relevant. It was within the district court's discretion to determine it was not. *See* Minn. R. Evid. 401.

And the district court was within its discretion to exclude the evidence, even if it was relevant, because of its potential for misleading the jury into speculation. *See* Minn. R. Evid. 403. As the district court concluded, the brother's testimony that Zaldivar-Proenza

was working with wire fencing, standing alone, would have invited the jury to speculate that Zaldivar-Proenza's scratches were caused by the fencing. A district court acts within its discretion when it excludes evidence that invites speculation with no further offer of proof. *State v. Wilson*, 900 N.W.2d 373, 386 (Minn. 2017). Zaldivar-Proenza did not explain to the district court how his own testimony would provide context for his brother's. Given the low probative value of the brother's proffered testimony, and the fact that the testimony would have invited the jury to speculate outside of the scope of the facts before them, the district court acted within its discretion when it excluded the testimony as speculative.

Thus, the district court did not abuse its discretion when it excluded Zaldivar-Proenza's brother's testimony as irrelevant and speculative.

III. Zaldivar-Proenza's pro se arguments are not sufficiently meritorious to warrant a new trial.

In a pro se supplemental brief, Zaldivar-Proenza raises two arguments in addition to those raised by his counsel. He argues (1) that law enforcement violated his *Miranda* rights and (2) that his rights were violated when his family members were not permitted on the jury. These violations, he claims, require a new trial.

Zaldivar-Proenza's *Miranda* argument appears to be based on an argument that he raised at the district court. Zaldivar-Proenza argued to the district court that law enforcement improperly obtained statements from him when he was arrested. The statements in question were all made to two deputies who were not called to testify at the trial. Zaldivar-Proenza does not point out any references in the trial transcript to his

statements made during his arrest. "The custodial interrogation of an individual requires that the individual be advised of his or her *Miranda* rights before any questioning occurs." *Sullivan v. State*, 585 N.W.2d 782, 784 (Minn. 1998). The remedy for statements taken in violation of *Miranda* is suppression. *See id.* ("Failure to advise an individual of his or her [*Miranda*] rights makes any statement made by the individual inadmissible at trial."). Because none of Zaldivar-Proenza's statements during the arrest came in as evidence at trial, even assuming Zaldivar-Proenza's *Miranda* rights were violated, he was not prejudiced by the violation.

With respect to the jury complaint, Zaldivar-Proenza appears to be arguing that some of his family members were improperly excluded from the jury. He does not, however, provide a record of voir dire. "An appellate court may not base its decision on matters outside the record on appeal." *State v. Taylor*, 650 N.W.2d 190, 204 n.12 (Minn. 2002). Zaldivar-Proenza also does not provide any legal authorities to support his position. Appellate courts decline to reach issues that are inadequately briefed. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). With no provided legal authorities and an insufficient record, we decline to address the argument.

Affirmed.