STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0363

State of Minnesota,
Respondent,

vs.

Randy Scott Bennett, Jr.,
Appellant.

Filed February 18, 2020
Affirmed
Bratvold, Judge

Stearns County District Court
File No. 73-CR-17-10891

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

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

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

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

Appellant appeals from his judgments of conviction for first-degree criminal sexual conduct, threats of violence, and domestic assault by strangulation. Appellant argues that

he is entitled to reversal and remand for a new trial on all three judgments because the district court did not rule on the admissibility of his prior convictions for impeachment purposes before he waived his right to testify. Appellant did not object during his jury trial, so we review this issue for plain error and determine no error occurred. Alternatively, if any error occurred, appellant's substantial rights were not affected. Thus, we affirm.

FACTS

Appellant Randy Scott Bennett Jr. and C.K. knew each other in high school, but had little contact until November 2017, when they began communicating through social media. C.K. planned to enter residential treatment for alcoholism on November 29, 2017, and needed a place to stay before her admission. C.K. testified that she had "exhausted pretty much all [her] options with friends and family as far as a place to stay" because she was "living a party lifestyle" and was "drinking heavily." C.K. accepted Bennett's offer to stay with him in St. Cloud.

C.K. stayed at Bennett's apartment from Friday, November 24 until Wednesday, November 29. C.K. testified that, during this stay, Bennett sexually assaulted her twice, and that the first assault occurred on Saturday evening. When Bennett returned from work on Saturday evening, the two were drinking vodka and talking while on top of Bennett's bed. C.K. testified that "things got to be kind of uncomfortable" because Bennett began touching her and "pull[ing] [her] closer to him." C.K. testified that she said, "No, don't. Stop." C.K. testified that she tried to get off the bed, but Bennett "forced [her]" to perform oral sex and "vaginally assaulted" her with "his fingers first and then with his penis." C.K. testified that she slept on the couch.

Bennett worked on Sunday and C.K. again slept on the couch. On Monday, Bennett's intensive-supervised-release agent briefly visited Bennett at his apartment. The agent asked C.K. for her name and identification, but they did not interact more. C.K. again slept on the couch Monday evening.

On Tuesday evening, after Bennett returned from work, C.K. testified that he began to get "handsy" again, that she "tried to push him off of [her]," and that they "began arguing pretty severely." C.K. told Bennett to "stop touching [her]" and that she was "not interested." Bennett picked up C.K., fully clothed, and tossed her from "a couple of feet up" into an "ice cold bathtub." C.K. took off her wet clothes and ran to the apartment door. Bennett picked her up again and threw her "into the bathtub." C.K. got out of the bathtub and ran to Bennett's landline to call the police, but Bennett had "knocked" the phone off the hook. C.K. ran towards the door again, but Bennett picked her up and threw her in the bathtub for a third time.

When C.K. got out of the bathtub, Bennett pushed her to the ground. C.K. testified that she was "[c]rying" and "screaming," and lying on her back when Bennett "put his hands around [her] throat" and "choked" her. C.K. testified that she could not breathe and later "woke[] up" on Bennett's bed. C.K. testified that Bennett told her "F you, I'll kill you, the river [is] right there, I just gotta throw you out the window."

C.K. testified that Bennett then forced her to perform oral sex on him and he vaginally penetrated her with his penis. C.K. also testified that she slept in Bennett's bed that night because "if he doesn't get what he wants, it's not gonna work out well for me" and she "was trying to just make it till the next morning" when she would leave for

residential treatment. The next morning, C.K. drove to her father's house, where her father telephoned the police and she reported the assaults. C.K. underwent a sexual-assault examination that day.

The state charged Bennett by complaint, which it later amended, and included four counts: first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(i) (2016), sexual penetration or sexual contact through force or coercion that causes personal injury to the victim on or about November 25-26, 2017 (count one); a second charge under the same statute for an offense committed on or about November 28, 2017 (count two); threats of violence under Minn. Stat. § 609.713, subd. 1 (2016), threatens a crime of violence on or about November 28, 2017 (count three); and domestic assault by strangulation under Minn. Stat. § 609.2247, subd. 2 (2016), on or about November 28, 2017 (count four).

Bennett pleaded not guilty, and proceeded to trial. The state presented six witnesses, who testified to the facts summarized above: C.K., a forensic nurse, Bennett's neighbor, two police officers, and a police investigator. The district court received into evidence nine photos related to C.K.'s injuries taken during C.K.'s sexual-assault examination, a recorded phone call placed by C.K. to Bennett with the investigator present, and the investigator's recorded interview of Bennett. In his police interview, Bennett said the sex was consensual, he never tried to choke C.K., and he never threatened C.K. The defense presented two witnesses: Bennett's intensive-supervised-release agent and the apartment caretaker.

The jury convicted Bennett of counts two, three, and four—first-degree criminal sexual conduct (November 28), threats of violence, and domestic assault—and acquitted

Bennett of count one, first-degree criminal sexual conduct (November 25-26). The district court entered convictions on three counts and imposed a guidelines sentence of 306 months' imprisonment on count two and concurrent sentences of 30 months each on counts three and four. This appeal follows.

D E C I S I O N

Bennett argues that the waiver of his right to testify is invalid because the district court did not rule on the admissibility of prior convictions as impeachment evidence before he waived his right to testify. We begin our analysis by reviewing the relevant facts, and then turn to Bennett's arguments.

Relevant facts

Before trial, the state moved to offer evidence of Bennett's two prior convictions (aggravated robbery and burglary) for impeachment purposes under Minnesota Rule of Evidence 609(a). At the start of the jury trial, the district court told counsel it was ready to address in limine motions. Defense counsel replied, "Your Honor, I guess if we just roll through them one at a time. Looks like number [one], impeachment obviously, we ask that you just reserve on that to see if Mr. Bennett actually decides to testify or not." The district court reserved its ruling on the impeachment evidence.

Just before the state rested, the district court discussed Bennett's right to testify in his own defense or to remain silent.

> THE COURT: All right, are we ready for the jury?
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> DEFENSE COUNSEL: Your Honor, just—before we bring them in, I've spoken several times with Mr. Bennett about his right to—not to testify whether he wants to or not, he still

> hasn't made a final determination, so I think this is more of a housekeeping request than anything else. I only expect three witnesses at this point to be brought in now. . . .
>
> THE COURT: Okay.
>
> DEFENSE COUNSEL: So when those three are done, I'd ask then that's the point at which you set the afternoon break so then I can discuss with Mr. Bennett, you know at that point he'll have heard all the other evidence and he can make that final determination.

After the state rested and the defense had presented two witnesses, the district court asked defense counsel to inquire about Bennett's decision.

> THE COURT: Counsel do you want to discuss on the record with your client his choice with respect to the right to remain silent instruction?
>
> DEFENSE COUNSEL: I can.
>
> THE COURT: You can do that now.
>
> DEFENSE COUNSEL: Mr. Bennett one of the things you and I have talked about multiple times prior to this trial as well as a couple times during the trial is you have the right to testify if you choose to, but if you choose not to, no one can use your silence against you, do you recall those conversations?
>
> BENNETT: Yes.
>
> DEFENSE COUNSEL: And you just indicated to me a moment ago that you do not want to testify. As part of your rights then to, we can ask [the trial judge] to include in her jury instructions a cautionary instruction to the jury reminding them that under the Constitution of both the State of Minnesota as well as the [United States] [y]ou have a [c]onstitutional right not to testify, would you like her to have that instruction included as part of her instructions to the jury?
>
> BENNETT: I suppose it wouldn't hurt.

> DEFENSE COUNSEL: Okay, so I think that's affirmative, Your Honor.

At no time during his trial did Bennett ask the district court to rule on the state's motion to allow impeachment evidence. Before closing arguments, the district court asked the parties about the impeachment jury instruction, and defense counsel agreed to "eliminate that entire instruction."

Analysis

Bennett argues that the district court failed to obtain a knowing, voluntary, and intelligent waiver of his right to testify because the district court did not "inform [Bennett] as to whether he might be impeached." The state argues that Bennett's waiver was knowing and voluntary and that the district court did not err by failing to sua sponte rule on the admissibility of impeachment evidence before it asked about Bennett's decision to testify or remain silent. We review a defendant's waiver of the constitutional right to testify under a mixed standard of review; a district court's factual findings are reviewed for clear error and its legal and constitutional determinations are reviewed de novo. *State v. Berkovitz*, 705 N.W.2d 399, 405 (Minn. 2005) ("[F]actual findings will be affirmed unless clearly erroneous."); *State v. Sewell*, 595 N.W.2d 207, 211 (Minn. App. 1999) ("We review constitutional issues de novo."), *review denied* (Minn. Aug. 25, 1999).

A defendant has a constitutional and statutory right to testify in his own defense. U.S. Const. amend. XIV, § 1; Minn. Const. art. 1 § 7; Minn. Stat. § 611.11 (2018) ("The defendant in the trial of an indictment, complaint, or other criminal proceeding shall, at the defendant's own request and not otherwise, be allowed to testify."); *see also Rock v.*

Arkansas, 483 U.S. 44, 49, 107 S. Ct. 2704, 2708 (1987) (holding that "a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense"). The United States and Minnesota Constitutions also afford a defendant the right against self-incrimination, which includes the right to remain silent. U.S. Const. amend. V; Minn. Const. art. 1, § 7; *see also Rock*, 483 U.S. at 52, 107 S. Ct. at 2709 ("The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony.").

A defendant must personally waive the right to testify, and the waiver "must be made voluntarily and knowingly." *Berkovitz*, 705 N.W.2d at 404-05. "Without anything in the record suggesting otherwise," an appellate court "must presume that the decision not to testify was made by [the] defendant voluntarily and intelligently." *State v. Smith*, 299 N.W.2d 504, 506 (Minn. 1980). The Minnesota Supreme Court has declined to require district courts "to perform an on-the-record colloquy with every criminal defendant who does not testify." *State v. Walen*, 563 N.W.2d 742, 751-52 (Minn. 1997).[1] "On appeal, the defendant has the burden to prove that his or her waiver was invalid." *State v. Bahtuoh*, 840 N.W.2d 804, 815 (Minn. 2013).

[1] *Walen* added, however, that "placement on the record of a defendant's waiver of his right to testify often will save both the court and defense counsel considerable time at any postconviction proceeding." *Id.* at 751-52; *see also Andersen v. State*, 830 N.W.2d 1, 11-12 (Minn. 2013) (stating that the detailed colloquy showed appellant "plainly entered a valid waiver of his right to testify on the record").

Bennett's argument focuses on the district court's failure to rule on the state's request to impeach him with prior convictions. *See* Minn. R. Evid. 609(a).[2] The state properly gave notice that they intended to impeach Bennett. *See State v. Tscheu*, 758 N.W.2d 849, 862 (Minn. 2008) (stating the "appropriate procedure" for admitting rule 609(a) evidence is for the prosecutor to request a hearing outside the jury's presence and "*preferably* before trial"). In deciding whether to allow impeachment by prior convictions, a district court must apply five factors. *See State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006).[3] Here, the district court never discussed the five factors or ruled on the admissibility of Bennett's prior convictions because Bennett chose not to testify. Bennett contends this created error because he waived his right to testify without knowing the district court's decision on the state's impeachment evidence.

Bennett did not object to the alleged error at trial, so we review for plain error, which requires the appellant to show (1) an error, (2) the error was plain, and (3) that it affected his substantial rights. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three elements are met, this court then considers "whether it should address the error to

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[2] Minnesota Rule of Evidence 609(a) states, "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment."

[3] The five *Jones* factors include: "(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 similarly, 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).

ensure fairness and the integrity of the judicial proceedings." *Id.* An error is plain if it is "clear or obvious," meaning the error "contravenes case law, a rule, or a standard of conduct." *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010).

Bennett argues the district court should have ruled on the admissibility of his prior convictions before he decided to waive his right to testify. The state argues that Bennett's waiver was valid because he "acknowledged understanding his right to testify," "consulted with counsel," and waived his right on the record. The state also argues that Bennett does not establish error because no legal authority requires that a district court "rule on an impeachment motion before a defendant can waive his right to testify."

We conclude that the district court did not plainly err for three reasons. First, the record establishes Bennett's waiver was knowing and voluntary. Bennett spoke with his attorney about his right to testify more than once before he waived his right to testify. Bennett's counsel stated that Bennett wanted to wait until he had "heard all the other evidence" before he made "that final determination" to testify or not. And Bennett identifies no point in the record that even hints that his decision to testify hinged on the district court's impeachment ruling. Bennett personally waived his right to testify on the record in response to questions by his counsel. Bennett also asked for a cautionary jury instruction about his right to remain silent. While the district court did not expressly find that Bennett's waiver was knowing and voluntary, the district court implicitly made this finding by giving the requested instruction.

Second, Bennett never asked the district court to rule on the state's motion to use his prior convictions for impeachment. In fact, on the first day of trial, Bennett asked the

district court to reserve its ruling "to see if Mr. Bennett actually decides to testify or not." The district court abided by Bennett's request and neither Bennett nor his counsel revisited the issue.

Third, Minnesota law does not support Bennett's claim that the district court plainly erred. Bennett bears the burden of showing that the district court's failure to rule on the admissibility of impeachment evidence before he waived his right to testify "contravenes case law, a rule, or a standard of conduct." *Sontoya*, 788 N.W.2d at 872. While the Minnesota Supreme Court has not decided the precise issue raised by Bennett, it has commented that "a defendant is entitled to have the district court make a determination of the Rule 609(a) issue outside the presence of the jury before the accused decides whether to testify." *Tscheu*, 758 N.W.2d at 862 (Minn. 2008) (quotation omitted). But *Tscheu* was reviewing a district court's decision to *allow* rule 609(a) impeachment and describing best practices for providing notice and a hearing. *Id. Tscheu* did not consider or decide whether a district court must sua sponte rule on impeachment evidence *before* a defendant waives the right to testify. Thus, no caselaw establishes the error that Bennett claims.[4]

Bennett argues that "[i]t is standard practice for district courts" to decide the admissibility of impeachment evidence and "then inform a defendant whether he stands to

[4] Bennett cites *Burns v. State*, which determined that appellant's waiver of her right to testify was valid and, in its analysis, stated that her counsel had informed her she would be impeached if she testified. 621 N.W.2d 55, 61 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001). But *Burns* did not consider or decide whether a district court must sua sponte rule on impeachment by prior conviction before a defendant may voluntarily waive the right to testify.

be impeached with prior convictions."[5] But Bennett does not claim that it is standard practice for a court to make this ruling sua sponte before a defendant waives the right to testify. Minnesota law does not require an on-the-record colloquy before a defendant waives the right to testify. *See Walen*, 563 N.W.2d at 751-52. And "[w]ithout anything in the record suggesting otherwise," an appellate court will assume that a defendant's decision not to testify was voluntary and intelligent. *See Smith*, 299 N.W.2d at 506. Given this legal framework, we read appellant's brief as articulating a new rule of law. As such, Bennett fails to establish plain error and we decline to adopt a new rule of law. *See State v. Fitzpatrick*, 690 N.W.2d 387, 392 (Minn. App. 2004) (stating that "[t]he extension of existing law is the task of the supreme court or the legislature, not of this court").

Even assuming that the district court committed plain error, Bennett bears the "heavy burden of persuasion" that the error was prejudicial. *Sontoya*, 788 N.W.2d at 872 (quotation omitted). "Plain error is prejudicial when there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *Id.*

Bennett argues "it was quite prejudicial for [him] not to testify" because it was "his word against" C.K.'s, "whose behavior was largely counter-indicative of non-consensual sexual conduct," and "he still needed to clarify his intentions toward [C.K.]." We are not persuaded. The jury acquitted Bennett of one first-degree criminal-sexual-conduct charge

[5] In his brief to this court, Bennett cites no caselaw to support his claim of "standard practice" and instead relies on law review articles challenging the validity of rule 609(a) because of the prejudicial effect of impeaching a defendant with prior convictions on the defendant's right to testify. This underscores our view that Bennett is seeking a new rule of law.

so it rejected C.K.'s testimony that Bennett sexually assaulted her twice. And the jury heard Bennett's version of events through his recorded interview with the investigator and the recorded phone call between Bennett and C.K. Bennett also offered testimony from his intensive-supervised-release agent, from which we determine that the jury was aware that Bennett had a criminal history. For these reasons, we conclude that Bennett fails to show that he was prejudiced by the alleged error.

Because we conclude that the district court did not err, much less plainly err, and because, if any error occurred, it did not affect Bennett's substantial rights, we do not address the final step of plain-error review.

Affirmed.