STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0585

State of Minnesota,
Respondent,

vs.

Tyreese Eugene Roberson,
Appellant.

Filed March 7, 2022
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Dakota County District Court
File No. 19HA-CR-19-2172

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kathryn M. Keena, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Bryan, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his convictions for two counts of first-degree criminal sexual conduct, arguing that the district court violated his right to confrontation by allowing a state witness to testify remotely at the underlying jury trial. Appellant also argues that the

district court erred by entering judgments of conviction for both counts of first-degree criminal sexual conduct because the underlying offenses arose from the same behavioral incident. Because appellant's Confrontation Clause rights were not violated, we affirm in part. But because the district court erred by entering judgments of conviction for both counts of first-degree criminal sexual conduct, we reverse in part and remand with instructions for the district court to vacate the conviction on count one.

FACTS

Respondent State of Minnesota charged appellant Tyreese Eugene Roberson with two counts of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subds. 1(a), 1(c) (2018). The charges were tried to a jury in September and October 2020.[1]

The state moved the district court, in limine, to allow L.A., a Bureau of Criminal Apprehension forensic scientist, to testify using remote technology. As support, the state explained that "[L.A.] is immunocompromised and has been advised by her doctors not to go to public places" due to the COVID-19 pandemic. Roberson opposed the motion, arguing that remote, electronic testimony would violate his rights under the Confrontation Clause. *See* U.S. Const. amend. VI; Minn. Const. art. I, § 6. The district court heard arguments on the motion at a pretrial hearing and asked the state to submit additional medical information, as well as evidence that L.A. had been subpoenaed. The district court ultimately ruled that L.A. would be allowed to testify remotely.

[1] The trial initially began in August 2020, but it ended in a mistrial.

The jury heard testimony from 17 witnesses, including the 12-year-old victim, the victim's mother and other family members, the nurse who examined the victim, officers who responded to and investigated the crime, and L.A. The victim identified Roberson as the man who assaulted her. L.A. testified via two-way videoconferencing (Zoom) technology. She explained that she performed DNA and serology testing on a sexual assault evidence kit from the victim and a knife that was used in the assault. She testified that, based on her testing, Roberson's DNA could not be excluded from the DNA found on the knife handle and on the victim.

The jury found Roberson guilty of both counts of first-degree criminal sexual conduct. The district court entered a judgment of conviction for each count, but it sentenced Roberson for only the second count.

Roberson appeals, arguing that the district court erred by allowing L.A. to testify remotely and by entering judgment of conviction for each count of first-degree criminal sexual conduct.

DECISION

I.

Roberson contends that L.A.'s remote testimony violated his rights under the Confrontation Clause. *See* U.S. Const. amend. VI; Minn. Const. art. I, § 6. This clause, contained within the Sixth Amendment of the United States Constitution and echoed in the Minnesota Constitution, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "[W]e apply de novo review when determining whether the admission of evidence

violates a defendant's rights under the Confrontation Clause." *State v. Sutter*, 959 N.W.2d 760, 764 (Minn. 2021).

The Confrontation Clause "predominantly requires a face-to-face meeting." *State v. Tate*, __ N.W.2d __, __, 2022 WL 16575, at *1 (Minn. App. Jan. 3, 2022), *petition for rev. filed* (Minn. Jan. 20, 2022). However, the right to face-to-face confrontation is not absolute. In *Maryland v. Craig*, the United States Supreme Court held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial" so long as "denial of such confrontation is necessary to further an important public policy and . . . the reliability of the testimony is otherwise assured." 497 U.S. 836, 850 (1990). This court recently held, in *Tate*, that the two-part *Craig* test applies to live, remote, and two-way video testimony in criminal trials. *Tate*, 2022 WL 16575, at *3-6. We therefore apply the *Craig* test here.

Important Public Policy

Under *Craig*, we first consider whether denial of Roberson's right to confrontation was "necessary to further an important public policy." *Craig*, 497 U.S. at 850. Roberson argues that L.A.'s remote testimony was not necessary to further an important public policy because it "involved a single, individual witness's particular situation" as opposed to "a broad public policy goal."

The public policy exception to the Confrontation Clause is defined narrowly; it does not include, for example, "issues related to the convenience of the parties or added expense." *Tate*, 2022 WL 16575, at *6. In *Tate*, this court summarized the Governor's and Chief Justice's COVID-19-related orders from 2020 that were in effect during Tate's

November 2020 trial and concluded that "protecting public health when in the throes of a global pandemic . . . . easily qualifies as an important purpose." *Id.* at *8. This court reached that conclusion based on the "juncture of the pandemic in November 2020," suggesting that future changes in public-health conditions or state policy might impact the relative importance of that purpose. *Id.* Here, Roberson's trial occurred within two months of Tate's trial, from September 21 to October 2, 2020. As this court did in *Tate*, we conclude that given the circumstances at the time of Roberson's trial, protecting the public health was an important public policy.

In *Tate*, this court noted that under *Craig*, a finding of necessity must be "case-specific." *Id.* (quoting *Craig*, 497 U.S. at 855). We held that, to satisfy *Craig*, the state must "show that the testimony *of a particular witness* must be remote in order to serve an important public policy, rather than . . . rest[ing] on the general existence of the pandemic." *Id.* Here, the state submitted a letter from L.A.'s physician stating that she "has a history of Diffuse Large B Cell Lymphoma" and is currently a patient in a bone marrow transplant clinic. The physician stated that "[t]he disease itself, and the treatment for it has left her immunocompromised," and that "it is advised that she testify for this trial via video conferencing for her safety." The district court noted the physician's recommendation in making its decision. This record satisfies the case-specific necessity requirement.[2]

[2] Roberson argues that the district court erred by considering the necessity of L.A.'s testimony to the state's case. Because our review is de novo, the alleged error is immaterial, and we do not discuss it.

Roberson argues that the state had other options for presenting L.A.'s testimony regarding the DNA evidence such as deposition testimony, having another forensic scientist testify regarding L.A.'s work on this case, or continuing the trial until L.A. was able to testify in person. Those arguments do not change our view of the legal issue because as Roberson acknowledges in his brief, "the Supreme Court has not required a showing of less-restrictive alternatives in the confrontation analysis." *See Craig*, 497 U.S. at 860 ("[W]e decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure."). Regardless, the district court here considered and rejected a continuance, reasoning that "[i]t's unknown how long the pandemic will last, and it is uncertain when this witness would be able to testify." *Cf. Tate*, 2022 WL 16575, at *9 (holding that "the possibility of a continuance did not negate the state's showing of necessity" because "no definite end date of the pandemic was on the calendar").

In sum, we conclude that the state made a sufficient, case-specific showing that allowing L.A. to testify via remote technology was necessary to further the important public policy of protecting public health during the COVID-19 pandemic.

Reliability

Under *Craig*, we next consider whether "the reliability of the [remote] testimony is otherwise assured." *Craig*, 497 U.S. at 850. "To satisfy this prong, the witness must generally be under oath and understand the seriousness of his or her testimony, the witness must be subject to cross-examination, and the judge, jury, and defendant must be able to properly see and hear the testifying witness." *Tate*, 2022 WL 16575, at *10. Roberson

argues that the remote electronic testimony here was not reliable because it was not "equivalent" to live, in-person testimony.

The record in this case indicates that the district court was conscious of the need to ensure reliability and took steps to do so. First, when making its decision to allow L.A. to testify remotely, the district court discussed the importance of assuring reliability. It noted that L.A. would be sworn in, that the defense would be able to cross-examine her, and that the jury might be better able to observe her demeanor because the court "could order that [L.A.] not wear a mask." The district court also noted that L.A. is "an experienced witness" and that "[s]he has been in court many times and understands what it is to testify in the presence of an accused." And it noted that L.A. had prepared reports that were already available to the defense, reducing the likelihood of "any surprises or recantation."

The district court also addressed the need to prepare for the use of remote technology, stating:

> It's the Court's expectation that the Dakota County Attorney's Office will work directly with court administration to facilitate and ensure that the technology will be workable before calling the witness in the presence of the jury. The Court will administer an oath and ensure that all parties are able to see and hear the witness via the technology. If the Court senses that the technology is not working and that any of the issues . . . that I have addressed are going to be an issue, then the Court reserves the right to change its mind on that. But I can't observe the technology until the technology is in effect.

Finally, the district court discussed a prior successful experience with remote testimony in a similar case, noted that such technology "is used [not only] widely in the court system, but by all citizens," and stated that "[a]s a society, people have become more

familiar with remote technology, whether FaceTime, Zoom, or ITV, in both personal and professional applications." And the district court noted that it had allowed the defense "to voir dire potential [jurors] on their attitudes toward assessing remote testimony."

The record indicates that L.A.'s remote testimony went smoothly. Prior to the start of L.A.'s testimony, the district court administered an oath to L.A. The district court then asked Roberson, his attorney, the prosecutor, and each one of the jurors whether they could see and hear L.A. Each person indicated that they could. The district court told both the jury and L.A. to let the court know if they had "trouble hearing or seeing" at any point during the testimony, and then instructed the jury as follows:

> [T]estimony will now be presented to you by way of remote technology. The testimony of a witness who, for some reason, cannot be present to testify in person may be presented in this form. Such testimony is under oath and is entitled to neither more nor less consideration by you because it was presented remotely. You are to judge its believability and weight in the same manner as you would if the witness was present in court.

The record also indicates that the defense cross-examined L.A. Based on this record, it is clear that L.A. was under oath, that she was subject to cross-examination, and that the judge, jury, and defendant could properly see and hear her. *See Tate*, 2022 WL 16575, at *10. Thus, the reliability of L.A.'s remote testimony was assured.

In sum, the two-part *Craig* test is satisfied in this case, and we therefore discern no violation of Roberson's rights under the Confrontation Clause.

II.

Roberson contends that the district court erred by entering judgment of conviction for each count of first-degree criminal sexual conduct. He asserts that his conviction on

count one should therefore be vacated. The state concedes that this was an error and that Roberson's conviction on count one should be vacated. We agree.

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2018). Whether a conviction violates Minn. Stat. § 609.04 is a legal question that this court reviews de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). The Minnesota Supreme Court has interpreted Minn. Stat. § 609.04 to "bar[] 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, 758, 760 (Minn. 1985). This includes multiple convictions of first-degree criminal sexual conduct for the same incident. *State v. Beard*, 380 N.W.2d 537, 542 (Minn. App. 1986), *rev. denied* (Minn. Mar. 3, 1986); *see also State v. Bowser*, 307 N.W.2d 778, 779 (Minn. 1981).

As stated in *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984):

> [T]he proper procedure to be followed by the [district] court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence.

Here, the district court entered judgments of conviction on both counts of first-degree criminal sexual conduct: count one for Minn. Stat. § 609.342, subd. 1(c) (penetration; fear of great bodily harm) and count two for Minn. Stat. § 609.342, subd. 1(a)

(penetration; victim under 13). The state does not dispute that those convictions are for acts committed during a single behavioral incident. We therefore conclude that the multiple convictions in this case violate section 609.04. We reverse in part and remand with instructions to vacate the conviction on count one.

III.

Roberson submitted a pro se supplemental brief in this appeal. In addition to reiterating the Confrontation Clause and multiple-conviction arguments set forth in his primary brief, Roberson argues that the district court did not permit him to discharge the public defender's office, that his counsel was ineffective, that the district court judge was biased against him, that he was denied the right to compulsory process for obtaining witnesses in his favor, and that he was denied due process and equal protection of the law.

When considering pro se arguments made on appeal, several principles govern our review. Courts have a duty to reasonably accommodate pro se litigants, so long as there is no prejudice to the adverse party. *Kasson State Bank v. Haugen*, 410 N.W.2d 392, 395 (Minn. App. 1987). But "[a]lthough some accommodations may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules." *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). "When an appellant acts as attorney pro se, appellate courts are disposed to disregard defects in the brief, but that does not relieve appellants of the necessity of providing an adequate record and preserving it in a way that will permit review." *Thorp Loan & Thrift Co. v. Morse*, 451 N.W.2d 361, 363 (Minn. App. 1990), *rev. denied* (Minn. Apr. 13, 1990).

"Claims in a pro se supplemental brief that are unsupported by either arguments or citation to legal authority are forfeited." *State v. Montano*, 956 N.W.2d 643, 650 (Minn. 2021) (quotation omitted). "Such arguments will not [be] considered unless prejudicial error is obvious on mere inspection." *Id.* at 650-51. Further, a party must cite the record in support of factual assertions. *See* Minn. R. Civ. App. P. 128.02, subd. 1(c) (stating that "[e]ach statement of a material fact shall be accompanied by a reference to the record"). The record on appeal consists of "[t]he documents filed in the [district] court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. This court will not consider any factual assertions that are beyond the record. *See Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977) (stating that "[i]t is well settled that an appellate court may not base its decision on matters outside the record on appeal").

Having reviewed Roberson's pro se brief with those principles in mind, we conclude that with the exception of the issue addressed in section II of this opinion, his arguments are "based on mere assertion" and therefore forfeited. *See Brooks v. State*, 897 N.W.2d 811, 818 (Minn. App. 2017), *rev. denied* (Minn. Aug. 8, 2017). Although Roberson asserts various violations of his constitutional rights, he provides no citations to legal authority and no citations to the record.

For example, Roberson asserts that the district court judge was biased against him and "made multiple prejudice remarks towards [him]." He does not cite to remarks in the record as support. He points only to the district court's alleged failure to allow him to discharge the public defender's office. However, "[p]revious adverse rulings by themselves do not demonstrate judicial bias. Rather, the bias must be proved in light of

the record as a whole." *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008) (citation omitted).

When reviewing a claim of judicial bias, we consider "whether the trial judge considered arguments and motions made by both sides, ruled in favor of a complaining defendant on any issue, and took actions to minimize prejudice to the defendant." *Id.* Here, the record indicates that the district court scheduled a hearing to address Roberson's choice of counsel two weeks after he first expressed dissatisfaction with the public defender's office, "to make sure [he] had enough time to make a knowing decision." And the district court thoroughly questioned him on the issue. Roberson ultimately decided not to discharge the public defender's office at that time. The record also indicates that the district court considered Roberson's arguments on multiple motions and ruled in favor of him on an evidentiary motion in limine. This record does not show obvious prejudicial error in the form of judicial bias.

In sum, our careful review of the record reveals no obvious prejudicial error justifying relief, except for the error and relief granted in section II of this opinion.

Affirmed in part, reversed in part, and remanded.