STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1795

State of Minnesota,
Respondent,

vs.

Von Forest Thompson,
Appellant.

Filed August 22, 2011
Affirmed
Klaphake, Judge

Kanabec County District Court
File No. 33-CR-08-588

Lori Swanson, Attorney General, James B. Early, Kimberly Ross Parker, Assistant Attorneys General, St. Paul, Minnesota; and

Amy R. Brosnahan, Kanabec County Attorney, Mora, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Klaphake, Judge; and Stoneburner, Judge.

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

KLAPHAKE, Judge

Appellant Von Forest Thompson challenges his conviction of and sentence for felony theft by swindle, Minn. Stat. § 609.52, subd. 2(4) (2006), arguing that (1) the

district court erred by depriving him of counsel during a critical stage of the trial; (2) the evidence was insufficient to support his conviction; (3) the district court erred by sentencing him on the more serious charge of theft by swindle, rather than on the less serious charge of temporary theft; and (4) the sentencing jury's findings did not support an upward durational departure.

Having thoroughly reviewed the record, we conclude that (1) the district court did not abuse its discretion by determining that appellant forfeited his right to counsel at the *Spreigl* hearing through his own dilatory conduct; (2) the evidence is sufficient to sustain the jury's verdict; (3) the district court properly sentenced appellant on the most serious of the convictions arising out of a single behavioral incident; and (4) the sentencing jury's findings provided sufficient reason for the district court to impose a sentence that constituted an upward durational departure. We therefore affirm.

D E C I S I O N

Right to Counsel

Appellant argues that he was denied his right to counsel at a critical stage of the proceedings, the hearing on the state's *Spreigl* motion, thereby depriving him of his right to a fair trial. The district court concluded that appellant forfeited his right to representation at the *Spreigl* hearing through dilatory conduct.

We review the district court's forfeiture-of-counsel determination for an abuse of discretion. *State v. Lehman*, 749 N.W.2d 76, 82 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008); *see also State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006) (stating that district court's decision on request for substitute counsel is reviewed for an abuse of

discretion). A defendant is constitutionally guaranteed the right to representation by counsel at any critical stage of a criminal proceeding. *Iowa v. Tovar*, 541 U.S. 77, 80-81, 124 S. Ct. 1379, 1383 (2004); U.S. Const. amend. VI; Minn. Const., art. I, § 6. But the right to counsel can be "relinquished in three ways: (1) waiver, (2) waiver by conduct, and (3) forfeiture." *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). A defendant may make a knowing waiver of counsel after being informed of his rights; likewise, when a defendant waives counsel by misconduct, he must first be informed that his misconduct will result in a waiver of counsel, and the district court must provide information about the rights being waived before determining that there has been a waiver of counsel by conduct. *Id.* at 504-05.

But a defendant may also forfeit his right to counsel by engaging in extremely dilatory conduct or other types of extreme behavior, and the district court may determine that there has been a forfeiture of the right to counsel without engaging in a waiver colloquy. *Id.* at 505.

In *Jones*, almost a year passed between the defendant's first appearance and the jury trial. The defendant made eight appearances without counsel and during seven of those appearances was warned that he must retain counsel. He was denied public defender representation three times. *Id.* at 506. The district court ruled that the defendant had forfeited his right to trial counsel; on appeal, the supreme court affirmed, noting that "[t]he rationale behind applying the forfeiture doctrine is that courts must be able to preserve their ability to conduct trials." *Id.* at 505-06; *see also Wilkerson v. Klem*, 412 F.3d 449, 454 (3rd Cir. 2005) (concluding that "a criminal defendant who has been duly

notified of the date of his trial, who has been advised to obtain counsel in sufficient time to be ready for trial, and who appears on the scheduled date without counsel and with no reasonable excuse for his failure to have counsel present, forfeits his Sixth Amendment right to counsel.").

Here, appellant was charged on October 20, 2008, and was represented by his first private counsel. He hired Charles Ramsay, who became counsel of record on November 3, 2008. An omnibus hearing was scheduled for December 1, 2008, but was continued at Ramsay's request to January 23, 2009. The state filed a speedy trial demand; the district court set a contested omnibus hearing for March 13, 2009, and trial for March 23, 2009. In February, Ramsay requested another continuance because of a trial conflict. The district court rescheduled the trial to June 8, 2009. On March 13, 2009, Ramsay asked to withdraw because he had not been paid, but by an order issued in April 2009, the court did not permit withdrawal. Ramsay failed to inform the court that he had a scheduling conflict with the new June trial date. A hearing on the state's *Spreigl* motion was set for May 15, 2009. On May 12, Ramsay requested a continuance of the *Spreigl* hearing. On May 18, 2009, the district court permitted Ramsay to withdraw and sanctioned him for his dilatory conduct. On the same date, the district court set a new trial date for October 12, 2009, and a motion hearing for July 30, 2009. The district court stated that the trial "will commence on that date with or without Defense Counsel. It is Defendant's obligation to make certain that he hires an attorney who is available and prepared to try the case." On July 23, 2009, appellant contacted the district court and stated that he would not have a new attorney until August 7, 2009, but hiring would be finalized on that

date. Appellant asked for a continuance of the July 30 *Spreigl* hearing, but the state objected because it had subpoenaed 20 witnesses. The district court granted a continuance to September 3, 2009, but permitted the state to submit documentary evidence supporting its *Spreigl* motion in lieu of testimony. Appellant was warned that there would be no further continuances and that he must give an attorney time to prepare for the hearing. Shortly after the July 30 hearing, the district court sent appellant a form to apply for a public defender. On September 1, 2009, appellant applied for a public defender. On September 3, the district court appointed the public defender and reluctantly continued the trial to January 11, 2010. But the district court also conducted the *Spreigl* hearing on September 3, 2009, based on the documents submitted by the state, concluding that appellant had forfeited his right to counsel. Trial was finally held on April 13-21, 2010, eighteen months after appellant's first appearance.

In addition to the delays, the district court considered other factors. The state had made a speedy trial demand because the victim was over 90 years old and in frail health. Further, although the offense occurred in Kanabec County, the only judge in the county recused; a Pine County judge was assigned to hear the trial, but the state was represented by the Anoka County Attorney's office, so the trial took place in Anoka County.[1] Each time the trial was rescheduled, the court calendars of Kanabec County, Pine County, and Anoka County had to be consulted.

Appellant's conduct in this case is similar to that in *Jones*, in which the defendant delayed hiring counsel for almost one year. 772 N.W.2d at 501. In *Jones*, the district

[1] Appellant had been the Kanabec County Sheriff at one time.

court concluded that the defendant forfeited his right to trial counsel. *Id.* at 506. Here, appellant was represented at trial, after being given sufficient continuances to permit his attorney to prepare for trial. And although appellant was not represented at the *Spreigl* hearing, the district court did not summarily grant the state's motions but carefully reviewed the proffered testimony; out of 18 proposed witnesses, the district court excluded testimony of nine and limited the testimony of four others.

On these facts, the district court's conclusion that appellant forfeited his right to counsel at the *Spreigl* hearing was not an abuse of discretion.

Sufficiency of the Evidence

Appellant contends that the evidence was insufficient to sustain the jury's verdict convicting him of theft by swindle of more than $35,000. Appellant argues that the evidence does not show that he obtained more than $35,000 from the victim, R.B.C., for investment purposes, but rather that R.B.C. made personal loans to appellant, which appellant failed to repay.

When a defendant challenges the sufficiency of the evidence, we review the evidence to "determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted). This court defers to the jury's credibility determinations. *Id.* We view the evidence in the light most favorable to the verdict. *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001). "A defendant bears a heavy burden to overturn a jury verdict." *Id.*

To convict appellant of felony theft by swindle, the state had to prove that he intentionally obtained more than $35,000 from R.B.C. by means of a swindle, which would include "artifice, trick, device, or any other means." Minn. Stat. § 609.52, subd. 2(4). A "swindle" involves "cheating and defrauding of another by deliberate artifice" and "betrayal of confidence." *State v. Ruffin*, 280 Minn. 126, 130, 158 N.W.2d 202, 205 (1968). According to R.B.C.'s testimony, he wanted appellant "to be a success in his business, and so I was convinced by myself and him that I should help him in his business by loaning him some money I was not using at the time." R.B.C. understood this business to be "investing in selling and buying—doing something with airplanes that were falling off because of the . . . 2008 recession times caused airplanes to be cheaper on sale." R.B.C. testified that he had "some of [appellant's] handwriting on his computations as to how he was going to make a profit on aircraft transactions." The computations purportedly were related to the aircraft business. R.B.C. stated that he was interested because "I had a better interest rate, a very much better interest rate available from [appellant]." On cross-examination, R.B.C. stated that he suspected that appellant was broke because "he wanted to enter into what to me was a new business for him, and he needed all the money he [could] get to actively engage in the aircraft industry." Defense counsel suggested that these were loans, rather than investments, but R.B.C. stated, "That's right, they were loans for him to make whatever investments he had to be a good deal for both of us because of the bigger earnings I would get from loaning it." R.B.C. acknowledged that he thought of appellant as a friend, which was a partial motivation for making the loans. But he also described their "unfortunate . . . financial

dealings" and felt that appellant "flim-flam[med]" him. The first IOU appellant gave to R.B.C. described the $65,459.27 check as a "loan . . . in the form of an investment." One of the other IOUs for $5,000 mentions investment in aircraft. Although the other IOUs do not mention investment specifically, R.B.C. also provided notes showing appellant's computation of expected profit from various investments. Between January 2, 2008, and June 1, 2008, R.B.C. gave appellant more than $178,000.

Appellant met R.B.C. in the 1980s when R.B.C. piloted an airplane for the Kanabec sheriff's office. Knowing of R.B.C.'s interest in aircraft, appellant pitched investments specifically in that area, without any apparent intent to actually make such an investment. Although R.B.C. agreed that appellant was a friend and he felt obligated to help him, the tenor of these transactions was that R.B.C. was making investments that he thought would reward him financially and that he thought were based on investments in aircraft. Despite R.B.C.'s understanding that the money he loaned appellant was to be invested in the aircraft industry, appellant admitted that he used R.B.C.'s money to pay his own bills and to pay others from whom he had borrowed money.

Although appellant denied that R.B.C.'s loans were for investment purposes, the jury was free to accept R.B.C.'s version of the facts and reject appellant's testimony. *Vick*, 632 N.W.2d at 690. The evidence supports "a betrayal of confidence" or "cheating or defrauding by deliberate artifice." *Ruffin*, 280 Minn. at 130, 158 N.W.2d at 205.

On the record before us, there is sufficient evidence to permit the jury to conclude beyond a reasonable doubt that appellant was guilty of theft by swindle of more than $35,000.

Sentencing on Lesser Included Offense

Appellant argues that the district court erred by imposing a sentence on the more serious conviction of theft by swindle, a severity level VI offense, rather than on his conviction of temporary theft, a severity level III offense. *See* Minn. Sent. Guidelines V (2007). A person convicted of multiple offenses may only be sentenced on one conviction, if all of the offenses arose out of a single course of conduct. Minn. Stat. § 609.035, subd. 1 (2010).[2]

This section does not explicitly set forth which conviction out of multiple convictions the district court should choose for sentencing. But the supreme court has stated that "[S]ection 609.035 contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotations omitted).

Appellant relies on *State v. Auchampach*, 540 N.W.2d 808 (Minn. 1995) for the proposition that "consistent with legislative intent a defendant should be sentenced for the less serious offense when the only difference between the greater and lesser offenses is the presence of a mitigating fact." In *Auchampach*, the defendant was charged with three counts of first-degree murder. *Id.* at 812. At the close of trial, the district court agreed to instruct the jury on the lesser-included offense of first-degree manslaughter (heat of passion) but refused to instruct the jury that the absence of heat of passion was an

[2] Although appellant's actions occurred over a five-month period, he was charged with and convicted of single counts of theft by swindle, theft by false representation, and temporary theft.

element of premeditated first-degree murder. *Id.* at 814. The question before the court in *Auchampach* was who bore the burden to prove beyond a reasonable doubt that the crime did not occur during the heat of passion; the supreme court concluded that the state retained that burden. *Id.* at 818. Thus, *Auchampach* does not deal with the question of the appropriate sentence to be imposed when a defendant is convicted of multiple offenses out of a single behavioral incident.

We observe no error in the district court's decision to sentence appellant on the more serious conviction of theft by swindle.

Sentencing Departure

Appellant challenges the district court's decision to impose an upward double durational departure in sentencing, arguing that the sentencing jury's special verdict is improperly based on reasons for departure rather than facts and that to the extent the jury found facts, they do not support an upward departure. The district court concluded that the offense here was a major economic offense, an aggravating factor supporting departure under the sentencing guidelines.

We review whether the district court's reason for a sentencing departure is properly based on aggravating factors as a question of law; if there are aggravating factors, we review the district court's decision to depart for an abuse of discretion. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

The sentencing guidelines set forth a series of aggravating factors that the sentencing court can consider when departing from the presumptive sentence. Minn. Sent. Guidelines II.D.2.b. (2010). One aggravating factors is if the offense was a major

economic offense "identified as an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property." *Id.* at (4). The guidelines state:

> The presence of two or more of the circumstances listed below are aggravating factors with respect to the offense: (a) the offense involved multiple victims or multiple incidents per victim; (b) the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified by statute; (c) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; (d) the defendant used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships; or (e) the defendant has been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions.

Id.

In *State v. Rourke*, 773 N.W.2d 913, 920-21 (Minn. 2009), the supreme court sought to differentiate between the factual findings that a sentencing jury must make in order to support departure from a presumptive sentence, *see Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and the reasons for departure, which are based on the facts found by the jury but which are determined by the sentencing court. The supreme court held that commission of a crime with particular cruelty was a reason the district court could use for departure if it were based on facts found by a jury that supported that reason. *Id.* We applied similar reasoning in *Carse v. State*, 778 N.W.2d 361 (Minn. App. 2010), *review denied* (Minn. Apr. 20, 2010), further concluding that the supreme court's

reasoning applied not only to particular cruelty cases but also to particular vulnerability cases. *Id.* at 373.

Thus, a jury must find facts, such as that the victim was handcuffed and sprayed with a chemical, on which the district court can base its conclusion that the act was particularly cruel, which provides a reason for departure. *Rourke*, 773 N.W.2d at 922. But both of those aggravating factors, particular cruelty and particular vulnerability, require judicial knowledge representing the "collective, collegial experience [obtained from] reviewing a large number of criminal appeals." *Id.* at 920 (quotation omitted). A jury does not possess the collective knowledge that would permit it to determine if an offense is committed in a particularly cruel manner as compared to many other instances; it logically is limited to finding the underlying facts that suggest particular cruelty.

The aggravating factor of "major economic offense" differs from particular cruelty or vulnerability. The guidelines set forth a number of examples of aggravating circumstances that amount to factual determinations: for example, whether there were multiple victims or the amount involved was substantially greater than the statutory minimum loss. Minn. Sent. Guidelines II.D.2.b.(4). If two or more of those enumerated facts are present, the offense is a major economic offense.

On the special verdict form here, the jury was asked if R.B.C. was particularly vulnerable; under the reasoning of *Rourke*, this was improper. But the jury also found that there were multiple incidents involving R.B.C., the offense involved an actual monetary loss substantially greater than $35,000, and the offense occurred over a lengthy period of time. These are factual determinations within the province of the jury.

The major-economic-offense aggravating factor requires that two or more circumstances be present. Here, the jury found three: multiple incidents, lengthy time, and substantially greater economic loss than the minimum statutory requirement. This is sufficient to support the district court's decision to depart. Because the sentencing jury found sufficient facts and the district court based its decision on an appropriate reason, the decision to depart was not an abuse of discretion.

Affirmed.