STATE OF MINNESOTA
IN COURT OF APPEALS
A10-0933

State of Minnesota,
Respondent,

vs.

Elsie Maria Mayard,
Appellant.

Filed August 20, 2012
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-CR-09-17644

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

Sara R. Grewing, Saint Paul City Attorney, Yamy Vang, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Conor E. Tobin, Bennerotte & Associates, P.A., Eagan, Minnesota (for appellant)

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

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

CONNOLLY, Judge

Appellant argues that (1) the district court clearly erred in finding that she had waived her right to counsel and a public defender and in finding probable cause for the

charge of obstruction of legal process; (2) the district court abused its discretion by denying her motion for a change of venue and in its evidentiary rulings; (3) the complaint failed to clearly set forth the charge; (4) the jury instructions were plainly erroneous and prejudicial; (5) the evidence was insufficient to support her conviction; and (6) she was prejudiced by cumulative error. We affirm.

FACTS

On November 27, 2009, appellant Elsie Maria Mayard was stopped by Saint Paul Police Officer Anthony Tallarico for driving without her vehicle headlights on. Appellant reacted to the traffic stop "hysterically," first exiting her vehicle to scream at Officer Tallarico, then locking herself in the vehicle. Appellant called 911 from her vehicle and screamed to the dispatcher that the police were going to kill her. Other officers were called to the scene, and after several failed attempts to convince appellant to unlock the door to her vehicle, officers were forced to break the passenger window to prevent her from ramming into police squad cars. Officers removed appellant from the vehicle, which she resisted by flailing her arms, screaming, and spitting at the officers.

Appellant was charged with obstruction of legal process in violation of Minn. Stat. § 609.50, subd. 1 (2008). At her first appearance, the district court advised appellant to retain counsel, informed her of the availability of public-defense services, and warned her of the difficulty of self-representation. Despite these warnings, appellant stated at the pretrial hearing that she would represent herself, and the district court then appointed standby counsel. Appellant's three-day trial began on May 19, 2010, and the jury found appellant guilty of obstruction of legal process. The district court issued a stayed

sentence of 90-days jail time, placed her on probation, and imposed a $50 fine as well as $81 in court fees. This appeal follows.

D E C I S I O N

I. Right to Counsel

Appellant argues that she was denied her right to counsel. The right to counsel is a constitutional right. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The district court must advise defendants of their right to counsel, and the court must appoint a public defender if a defendant is financially unable to obtain counsel. Minn. R. Crim. P. 5.04, subd. 1(1). Defendants who appear *pro se* must waive the right to counsel in writing or on the record; the waiver must be knowing, intelligent, and voluntary. Minn. R. Crim. P. 5.04, subd. 1(3); *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). Defendants may also relinquish the right to counsel through their conduct or by forfeiture. *Jones*, 772 N.W.2d at 505. Waiver by conduct occurs if a defendant "engages in dilatory tactics after he has been warned that he will lose his right to counsel." *Id.* A defendant who engages in "extremely dilatory conduct" may be said to have forfeited the right to counsel. *Id.* (quotation omitted). An appellate court will overturn a district court's finding of valid waiver only if the district court's finding is clearly erroneous. *Id.* at 504.

Appellant was notified of her right to an attorney and advised to obtain counsel at each stage of the court proceedings. The district court repeatedly warned appellant of the ramifications of self-representation.[1] Despite these warnings, appellant appeared at the

[1] At her first appearance, the district court advised appellant, "[Your defense is] going to require some skillful legal work. And a way to enhance that is to have a lawyer

May 17 pretrial hearing without counsel and said she would be representing herself. The district court again advised appellant of her right to counsel, and she provided no explanation as to why she did not have an attorney. The district court thereafter determined that appellant had knowingly, voluntarily, and intelligently waived her right to counsel.

Despite this determination, on the second day of trial, appellant requested a two-month continuance to retain counsel. The district court denied the request, stating:

> [T]he [appellant], at every stage of this case, has adamantly refused counsel, has adamantly maintained that she wishes to represent herself. . . . Now that trial has started, the [appellant] suddenly requested a continuance to obtain a different attorney . . . . I'm going to deny that motion. You requested to try this case pro se. . . . In fact, I view what you're doing as a delay tactic.

Furthermore, notwithstanding the district court's finding that appellant waived her right to counsel, appellant was appointed standby counsel at the pretrial hearing on May 17, and prior to the presentation of evidence, she retained her standby counsel as trial counsel. Therefore, we conclude that the district court did not err in finding that appellant had waived her right, and she is not entitled to a new trial.

---

representing you. . . . Have you tried to hire a lawyer? Can you afford a lawyer?" To which appellant responded, "I will hire an attorney." Later during first appearance, the district court again emphasized the need for legal representation: "Unless [your case is] presented properly with legal support your chances of success go down significantly. Do you understand that?" Appellant indicated that she understood. The district court further advised, "I strongly urge you to get an attorney."

II. Right to a Public Defender

Appellant further argues that she was denied her right to a public defender. The right to representation by a public defender is a statutory right, not a constitutional right. Minn. Stat. § 611.14 (2008). Defendants must be notified of the services of the public defender, but a defendant is only entitled to a public defender if she requests a public defender and shows that she is financially eligible. Minn. Stat. §§ 611.15, .16 (2008).

Here, appellant was informed on multiple occasions of her right to a public defender, but she did not apply for one. At her first appearance, the district court advised appellant, "If you want to get an attorney, today is the day. You might qualify for public defense services. . . . [W]hen you come back, you might talk to someone from [Criminal Defense Services] or the public defender." The district court also provided appellant with a brochure for Criminal Defense Services. But at no time did appellant request a public defender. Instead, she indicated that she would either represent herself or hire an attorney. The law only requires that a defendant be notified of the services of the public defender; it does not require that the court conduct further inquiry with a defendant who has not applied for a public defender. *See* Minn. Stat. § 611.16 (stating that certain eligible people may request a public defender). Since she was duly notified of her right to a public defender but did not request one, appellant cannot claim that she was denied the right to a public defender.

III. Probable Cause

Appellant contends that the district court erred in finding probable cause for the charge of obstructing legal process. As a mixed question of fact and law, this court

reviews determinations of probable cause de novo but reviews the district court's findings under the clearly erroneous standard. *State v. Lee*, 585 N.W.2d 378, 382-83 (Minn. 1998). The test for probable cause is whether the evidence to be considered brings the charge against the individual within a "reasonable probability." *State v. Florence*, 306 Minn. 442, 458, 239 N.W.2d 892, 902 (1976).

The district court conducted a *Florence* hearing and found: (1) Officer Tallarico was a peace officer; (2) Officer Tallarico gave various orders to appellant; (3) appellant did not follow those orders, which constituted a physical obstruction; and (4) appellant's resisting the officers when they tried to restrain her constituted physical obstruction. These findings are not clearly erroneous and sufficiently establish the reasonable probability of the charge. *See* Minn. Stat. § 609.50, subd. 1(2) (providing that anyone who intentionally "obstructs, resists, or interferes with a peace officer while the officer is engaged in the performance of official duties" is guilty of obstructing legal process).

IV. Change of Venue

Appellant argues that the district court abused its discretion by denying her motion for change of venue. If the court is satisfied that a fair and impartial trial cannot be had in the county in which the case is pending, the district court may transfer the case to another county. Minn. R. Crim. P. 24.03, subd. 1. The district court may exercise broad discretion when deciding motions for change of venue, and appellate courts will sustain such decisions absent a clear abuse of discretion and showing of actual prejudice. *State v. Chambers*, 589 N.W.2d 466, 473 (Minn. 1999).

Appellant claims that the district court did not examine the merits of her motion for change of venue when she mistakenly moved for removal to federal court instead of change of venue to another county. The record, however, belies this assertion: the district court addressed both issues and found appellant's claims of impartiality to be without merit. At trial, appellant requested removal to federal court, alleging a conspiracy against her involving Saint Paul police.[2] Her motion was denied. *See* 18 U.S.C. § 3231 (2006) (providing that federal courts have jurisdiction in all offenses against federal law). The district court also stated that it found no reason to change venue to another district court and that appellant's motion was without basis. Addressing appellant's allegation that the Ramsey County District Court could not be impartial, the district court judge stated, "I never heard of you before. . . . I'm not part of any conspiracy against you." The district court found no evidence to support appellant's claims that she would be unable to procure a fair trial in Ramsey County, and it did not abuse its discretion by denying appellant's motion for change of venue.

V. Admission and Exclusion of Evidence

The decision whether to admit or exclude evidence lies within the broad discretion of the district court, and absent clear abuse of discretion, the district court's evidentiary ruling will not be disturbed. *State v. Edwards*, 380 N.W.2d 503, 509 (Minn. App. 1986).

Appellant claims that the district court abused its discretion by excluding evidence regarding her past encounters with Saint Paul police. The record also belies this

[2] Appellant actually moved for "change of venue" to federal court, which is not possible, but the district court treated the motion as a motion for removal and explained that it could not remove her case to federal court unless it involved a federal crime.

assertion: appellant's conspiratorial allegations about prior police conduct fail to satisfy the basic standards of evidence, amounting to little more than argumentative assertions, which she attempts to support with broad claims of fundamental fairness. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.") (quotation omitted). The district court found little truth in the evidence that appellant offered at trial; its holding that the evidence violated the rules of evidence was not an abuse of discretion and will not be disturbed.

Appellant further argues that the recording of the 911 call should not have been admitted because the state failed to timely disclose, the evidence was irrelevant, and the evidence was more prejudicial than probative. Although there was some delay in delivering the 911-call recording to appellant, the district court rejected her claim that she had been prejudiced by the delay and instead granted her extra time to review the recording before proceeding. The district court also held that the evidence was relevant because it recorded appellant's interaction with police and the 911 dispatcher at the time of the offense, and the district court struck certain language from the transcript, including an officer's reference to the "psycho ward," to ensure that it was not more prejudicial than probative. *See* Minn. R. Evid. 403 (providing that the district court may exclude relevant evidence that is more prejudicial than probative). In all of the evidentiary rulings, the district court did not abuse its discretion.

VI. Failure to Clearly Set Forth the Charge

Appellant argues that the district court failed to clearly set forth the charge in the complaint. The legal sufficiency of a complaint is a question of law to be reviewed de novo. *State v. Dunson*, 770 N.W.2d 546, 549 (Minn. App. 2009), *review denied* (Minn. Oct. 20, 2009). The complaint must contain the statement of the facts establishing probable cause and the statute allegedly violated. Minn. R. Crim. P. 2.01, subd. 1. Citation of the specific offenses charged must be given. Minn. R. Crim. P. 17.02, subd. 3. However, "a charging document imperfect in form is not fatally defective if it adequately apprises the defendant of the charge against him." *Dunson*, 770 N.W.2d at 552.

Appellant was charged with obstruction of legal process in violation of Minn. Stat. § 609.50, subd. 1. Even though the complaint failed to cite a specific subpart of the statute, the complaint clearly identified the statute and listed the facts establishing probable cause and the elements of the offense. *See* Minn. Stat. § 609.50, subd. 1 (providing five subparts). Therefore, appellant was adequately apprised of the charge against her.

VII. Jury Instructions

Appellant argues that the district court erred in its jury instructions by naming all four officers involved (rather than only naming Officer Tallarico, the only officer named on the complaint) and by failing to define "official duties." District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety

to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). At trial, both parties were presented with the proposed jury instructions, and appellant made no objections. Appellate-court review of unobjected-to error requires (1) error, (2) that is plain, (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Plain error is prejudicial if there is a "reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Id.* at 741 (quotation omitted).

Here, there is no indication that the substantial rights of appellant were affected. The district court did not change the element of the offense by adding the names of all four officers to the jury instructions, nor could this addition have had a significant effect on the jury verdict. Second, although the jury instructions did not explicitly define "official duties," the district court did include "official duties" in three elements of the offense. Leaving that term undefined did not change the element of the offense, nor could it have had any significant effect on the jury verdict. Furthermore, based on the plain language of the term "official duties," a reasonable jury could find that officers conducting a routine traffic stop, responding to calls for assistance, and responding to a 911 call were "engaged in the performance of official duties."

VIII. Sufficiency of the Evidence

Appellant claims that the evidence was insufficient to support her conviction. When assessing whether the evidence is sufficient to support a conviction, reviewing courts conduct "a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict,

were sufficient to allow the jury to reach its verdict." *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010) (quotation omitted). A guilty verdict will not be disturbed "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged." *Id.* (quotation omitted).

Appellant argues that the state failed to establish venue. Crimes must be prosecuted in the county in which they occur. Minn. Const. art. I, § 6. Proper venue may be proved by direct or circumstantial evidence, *State v. Bahri*, 514 N.W.2d 580, 582 (Minn. App. 1994), *review denied* (Minn. June 15, 1994), based on "all the reasonable inferences arising from the totality of the surrounding circumstances." *State v. Carignan*, 272 N.W.2d 748, 749 (Minn. 1978). Here, Officer Tallarico testified that he was on patrol on the west side of Saint Paul and that he stopped appellant's vehicle at Concord/Cesar Chavez Street and Robert Street. Officer Slagter testified that he photographed appellant's vehicle at the traffic-stop scene on Concord/Cesar Chavez Street between Robert Street and Congress Street. Officers Wong and Freiermuth testified that they responded to calls for assistance at Concord/Cesar Chavez Street and Robert Street. Furthermore, appellant identified her location as Concord Street to the 911 dispatcher. All of the streets identified at trial are well-known streets in Saint Paul. Therefore, based on the totality of the circumstances, it was reasonable for the jury to find that the crime occurred in Saint Paul, which is in Ramsey County.

Appellant further argues that the evidence is insufficient to support a conviction for obstruction of legal process. A defendant is guilty of obstruction of legal process

when the defendant intentionally "obstructs, resists, or interferes with a peace officer while the officer is engaged in the performance of official duties." Minn. Stat. § 609.50, subd. 1(2). The statute is "directed at words and acts that have the effect of physically obstructing or interfering with a police officer." *State v. Ihle*, 640 N.W.2d 910, 915 (Minn. 2002). Here, appellant's actions were directed at police and physically interfered with the performance of their official duties. Appellant's hysterical screaming at the officers and the 911 dispatcher prevented them from explaining why she had been stopped. She refused to comply with police instruction to roll down her windows or open her car doors, and she physically held down the locks in her car so that police could not enter using a "lock-out" device. When officers tried to arrest her, she resisted by pulling away, twisting her body, flailing and swinging her arms, and spitting at the officers. Based on reasonable inferences drawn from the record, a reasonable jury could conclude that appellant had obstructed legal process.

IX. Cumulative Error

Finally, appellant argues that she was prejudiced by cumulative error. "Cumulative error exists when the 'cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury.'" *State v. Hill*, 801 N.W.2d 646, 659 (Minn. 2011) (quotation omitted). Here, appellant has failed to adequately develop an argument for error as to *any* of her claims, let alone cumulative error.

Affirmed.