STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1456

State of Minnesota,
Respondent,

vs.

Freddie James Prewitt,
Appellant.

Filed July 15, 2013
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CR-12-821

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Kirk, Judge.

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

ROSS, Judge

Freddie Prewitt had vaginal and anal sex with a woman who lay unconscious after she ingested heroin. The state charged Prewitt with third-degree criminal sexual conduct,

and he fired his public defender and repeatedly insisted on representing himself at trial. He now appeals from his conviction, arguing that the district court unconstitutionally failed to obtain a valid waiver of his right to counsel before allowing him to proceed pro se, that the prosecutor committed misconduct, and that the district court departed from its neutral role. Because the record shows that the district court adequately ensured that Prewitt's decision to proceed to trial without legal counsel was informed and voluntary notwithstanding its failure to conduct a specific on-the-record colloquy, because the prosecutor properly focused on the victim's credibility in her closing argument and not on Prewitt's exercise of his constitutional rights, and because the district court's improper questioning of a witness did not affect Prewitt's substantial rights, we affirm.

FACTS

In May 2011, Freddie James Prewitt accompanied A.E., her friend, and another man to an apartment where all four ingested heroin. A.E. eventually went into a bedroom and fell asleep. The next morning, A.E. felt pain in her genital area and her friend told her that Prewitt had gone into the bedroom after her and had refused to let anyone else inside. A.E. went to the hospital for a sexual-assault examination. The examining nurse swabbed A.E.'s vagina and rectum. DNA testing of the swabs revealed semen that matched Prewitt's DNA profile maintained on a BCA database. A police investigator interviewed Prewitt, who denied ever having any sexual contact with A.E. The investigator obtained a DNA sample from Prewitt, which matched the DNA obtained from A.E.'s sexual-assault examination.

The state charged Prewitt with third-degree criminal sexual conduct for having sex with a helpless victim in violation of Minnesota Statutes section 609.344(1)(d) (2010). At a pretrial proceeding, Prewitt complained about his assigned public defender, stating, "[H]er and I don't get along," and, "[S]he hangs up the phone in my face" and "cut[s] me off in conversations." Prewitt asserted his right to represent himself pro se. The district court observed that Prewitt's public defender "[has] been around here for a long time," and it vouched for her skill and professionalism. It stated that Prewitt had a right to represent himself, but it recommended against it. The district court warned him, "You got a bunch of cases. You got two felonies here, one is very serious." It highlighted the potential punishment: "It's a presumptive 153 months in prison." And it pointed out the critical DNA evidence against him.

Prewitt responded that he wanted to argue the DNA issue with the "[p]ower of a pro se litigant," and he attested to his own ability to conduct independent research about DNA evidence. He asked, "So can I request to represent myself as a pro se litigant?" The district court responded with more warnings: "[Y]ou have a right to represent yourself. I don't recommend it. . . . [T]his actually is a fairly complicated case." When Prewitt indicated that he intended to argue that the DNA evidence was contaminated, the district court warned him about the difficulties of making that argument. Prewitt again asked, "So you're giving me the right to be a pro se litigant, right?" The district court finally agreed, "I am." It nevertheless appointed his previously assigned public defender as advisory counsel to assist him with legal research.

The district court continued to warn Prewitt about the consequences of representing himself pro se at a later proceeding. It warned him that he would be held to the same standard as an attorney. Prewitt said he understood. It cautioned him further, saying that, by refusing a public defender, he would not be able to access law clerks, investigators, and experts available through the public defender's office. It highlighted the limitations on his ability to obtain investigators and experts from the court. And it emphasized the research burden Prewitt was facing and offered a continuance. Prewitt declined the court's recommendation for a continuance, and the court added that by declining the continuance, he would "proceed at [his] own peril." The district court further warned of the consequences of proceeding without legal representation, explaining, "[I]f you had a lawyer at your side, they might give you some advice as to whether or not you're waiving those issues by your decision to proceed to trial." The district court reminded Prewitt that the presumptive sentence was 153 months' incarceration. Prewitt would not relent, concluding, "I would rather proceed to trial."

On the day of trial, the district court again warned Prewitt about the consequences of representing himself. It opined, "I'm not sure you're capable of representing yourself, but . . . that's what you want to do. You're entitled to that." Prewitt demanded that his advisory counsel also be dismissed. The district court inquired and confirmed, "So you don't want an advisory counsel at all?" "So you intend to represent yourself?" "With the help of no lawyer; is that correct?"

Prewitt was confident. "Yes, sir. I feel like that I'm capable of being able to represent myself until its entirety." Even when the district court acceded to Prewitt's

insistence, it gave a final warning: "So now you're on your own, Mr. Prewitt." And Prewitt indicated that he understood. The district court summarized, "I don't think you're prepared to go to trial," and it confirmed that he was declining a court-appointed DNA expert and an investigator. Even the prosecutor offered to consent to a continuance so Prewitt could obtain additional help, but Prewitt declined and demanded, "Go to trial today."

The district court and the prosecutor were not alone in cautioning Prewitt. An outside source, the Legal Rights Center, wrote to Prewitt responding to his inquiry about obtaining their services. In the response, the center advised Prewitt that the public defender had the time and experience to represent him, and it exclaimed, "**DO NOT FIRE YOUR PUBLIC DEFENDER OR YOU RISK FACING A TRIAL WITHOUT ANY LEGAL SUPPORT!**"

Just before jury selection began, the district court instructed Prewitt on the elements of the offense he was charged with. It also re-elicited Prewitt's rejection of a plea agreement that would have resulted in a reduced sentence. And it confirmed that Prewitt wanted to proceed immediately to trial, again cautioning that "you're stuck with whatever you're stuck with" by proceeding without a continuance or counsel. Prewitt affirmed, "We can proceed with the trial."

Prewitt submitted several pretrial motions, including that he be allowed to inquire about A.E.'s history of prostituting herself for drugs, which the district court granted. It denied his motion to present evidence of A.E.'s previous report that she had been raped by two men.

During the trial, Prewitt engaged abrasively with the district court. He tried to raise the issue of A.E.'s previous rape report, disregarding the district court's pretrial ruling. Prewitt accused the district court of allowing a double standard favoring the prosecutor, to which the court explained, "Whatever I allow the prosecutor to do, I allow the prosecutor to do. Whatever I allow you to do, I allow you to do." The district court warned Prewitt that it would hold him in contempt if he refused to comply with its rulings. It tried to offer guidance on how to ask questions properly and how to admit exhibits into evidence. The district court also encouraged the jury to be understanding towards Prewitt's efforts because "he's in a unique position."

Prewitt did not seem to believe that the district court was helping him. He complained that the judge was "disrespecting" him because he wasn't an attorney. He accused the court of giving the prosecutor preferential treatment. He alleged that the district court conspired to "assassinate [his] character because [he was] a pro se litigant." He drew a rebuke and a contempt-of-court warning from the district court when he implied that the judge had coached a witness. And when he bemoaned, "Why don't you just put a rope around my neck and go ahead and hang me?" the district court commented on its limited trial-management authority, declining, "We don't do that in the State of Minnesota."

Prewitt testified in his own defense. He admitted to having had sexual contact with A.E., but he asserted that it had occurred on some other day, not on the day of the assault. During cross-examination, the prosecutor impeached Prewitt's testimony using prior

criminal convictions and by drawing upon his acknowledgment that he had told police investigators that he had *never* had sexual contact with A.E. at any time.

The prosecutor focused her closing argument heavily on A.E.'s and Prewitt's relative credibility. She cautioned, "[I]f I give you the law any differently than His Honor does, you ignore me and you follow him." She advised jurors, "You are the sole judges of whether testimony is credible." Then she highlighted A.E.'s candor about her own misbehavior, including her drug use. And she urged the jury to believe A.E. based on her demeanor on the stand and on her willingness to report the sexual assault even knowing that she would be subjected to "cross-examin[ation] by the individual that she believed had raped her" and "to submit to questioning by her rapist."

The jury found Prewitt guilty as charged and the district court sentenced him to the presumptive guidelines sentence of 153 months in prison.

Prewitt appeals from his conviction.

D E C I S I O N

I

Prewitt argues that the district court erred by allowing him to proceed pro se without a written waiver of his right to counsel or an oral colloquy on the record outlining the advantages and disadvantages of representation by a lawyer. The argument is not convincing.

Although criminal defendants have a constitutional right to counsel, they also have a constitutional right to forgo counsel and represent themselves. *State v. Worthy*, 583 N.W.2d 270, 275 (Minn. 1998) (citing *Faretta v. California*, 422 U.S. 806, 819–20, 95

S. Ct. 2525 (1975)). Waiver of the right to counsel must be made knowingly, intelligently, and voluntarily. *State v. Rhoads*, 813 N.W.2d 880, 884 (Minn. 2012). The right to counsel may also be waived by conduct or forfeited, but these are reserved for situations where a defendant is dilatory in some fashion or abusive. *See State v. Jones*, 772 N.W.2d 496, 505–06 (Minn. 2009) (reserving waiver-by-conduct for "dilatory tactics" and forfeiture for "extremely dilatory conduct"); *see also id*. at 514 (Meyer, J., dissenting) (noting that "[f]orfeiture is generally reserved for defendants who have verbally or physically abused their attorneys"). The district court did not find that Prewitt was dilatory or abusive, and the record would not support such a finding.

So our question is whether Prewitt's express waiver of counsel was valid. "Whether a waiver of a constitutional right is valid depends upon the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." *Worthy*, 583 N.W.2d at 275–76. When the facts are undisputed, we review the validity of a waiver-of-counsel de novo. *Rhoads*, 813 N.W.2d at 885.

The Minnesota Rules of Criminal Procedure require that a waiver-of-counsel be made in writing unless the defendant refuses to sign the waiver. Minn. Stat. § 611.19 (2012); Minn. R. Crim. P. 5.04, subd. 1(4); *see also Jones*, 772 N.W.2d at 504. But the rule has exceptions. First, the lack of a written waiver does not in itself make a waiver-of-counsel invalid if there is a sufficient on-the-record oral waiver. *See, e.g.*, *Jones*, 772 N.W.2d at 504–05 (analyzing sufficiency of an oral waiver-of-counsel when no written waiver was made). And second, even "[a] district court's failure to conduct an on-the-

record inquiry regarding waiver . . . does not require reversal when the particular facts and circumstances of the case demonstrate a valid waiver." *Rhoads*, 813 N.W.2d at 889.

On this standard, we have no difficulty concluding that the district court's failure to secure a signed, written waiver or to conduct an on-the-record inquiry does not require reversal here, because the circumstances demonstrate a valid waiver. This case reminds us of *Worthy* and *Brodie*. (And the supreme court in *Rhoads* expressly reaffirmed the validity of *Worthy*. 813 N.W.2d at 885.) In *Worthy*, the supreme court rejected an invalid-waiver-of-counsel claim in circumstances similar to Prewitt's. The *Worthy* defendants "were in fact given counsel and then unequivocally fired their attorneys." 583 N.W.2d at 276. The *Worthy* court reaffirmed that the lack of an on-the-record oral waiver does not invalidate a defendant's waiver of counsel if the defendant fired his public defender and "knew that he did not have a right to a different public defender but would have to represent himself if he did not accept the services of the public defender." *Id.* (quoting *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995)). It also held that "[w]hen a defendant has consulted with an attorney prior to waiver, a [district] court could 'reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to [the] defendant in detail by counsel.'" *Id.* (quoting *Jones*, 266 N.W.2d 706, 712 (Minn. 1978)). Like the defendants in *Worthy* and *Brodie* and unlike the defendant in *Jones*, Prewitt unambiguously waived his right to counsel by firing his appointed public defender knowing that he would be required to represent himself.

Even if we do not assume that, because of his prior interactions with his appointed public defender, Prewitt was informed of the consequences of defending himself without a lawyer, the record informs us that he knew everything that would have been covered in a standard oral colloquy. While "it [is] preferable for the trial court to [make] a more comprehensive examination into [a] defendant's desire to represent himself," a defendant's waiver of counsel is nevertheless valid "[when] it is clear from the record that [the] defendant understood the consequences of proceeding pro se." *State v. Krejci*, 458 N.W.2d 407, 413 (Minn. 1990). Specifically, a defendant must comprehend "the charges against him, the possible punishments, the defenses, mitigating circumstances, and any other facts relevant to an understanding of the consequences of the waiver." *Id.* at 412. The district court specifically outlined the elements of the offenses that Prewitt was charged with, and it twice told him the presumptive sentence. It discussed Prewitt's defense-strategy options, including the difficulties of challenging DNA evidence and the elements of a consent defense. And it repeatedly warned Prewitt about the dangers of proceeding pro se, emphasizing that he would be held to the same standards as an attorney and highlighting the difficulties of challenging certain evidence without expert legal and scientific assistance. Prewitt steadfastly demanded his right to defend himself in the face of the express and implied risks and consequences of proceeding without representation. We hold that his waiver of his right to counsel was valid.

II

Prewitt contends that the prosecutor committed misconduct during her closing argument. He never objected during trial to the comments he asks us to deem misconduct.

When a defendant alleging prosecutorial misconduct did not object during trial, we review only for plain error, determining whether the prosecutor erred, whether the error was plain, and whether it affected the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 299, 302 (Minn. 2006). Only if these three prerequisites are met do we decide whether to exercise our discretion to reverse in order "to ensure fairness and the integrity of the judicial proceedings." *Id.* at 302.

Prewitt asks us to ascribe error to particular references made by the prosecutor. To assess whether a prosecutor engaged in misconduct during a closing argument, we do not look at the prosecutor's words or phrases in isolation, but rather "we look [to] the closing argument as a whole." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). And an error is only plain error if it "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. Prewitt's argument focuses on the prosecutor's statements that A.E. had to face "her rapist" in trial. The argument implies that the prosecutor wanted the jury to feel that A.E. was being twice victimized because Prewitt had exercised his right to a trial, leading the jury to develop unfair sympathy toward A.E. as the alleged victim and inflamed passions against Prewitt as the accused.

Prewitt's argument on appeal mischaracterizes the prosecutor's closing argument to the jury. It is true that a prosecutor may not suggest that the jury should punish a defendant for exercising his trial rights. *State v. McNeill*, 658 N.W.2d 228, 235–36 (Minn. App. 2003). But this does not bar the prosecutor from explaining evidence or defending a witness's credibility. *Finnegan v. State*, 764 N.W.2d 856, 865–66 (Minn. App. 2009), *aff'd.* 784 N.W.2d 243 (Minn. 2010). The prosecutor here focused her

closing argument on A.E.'s credibility, discussing it in relation to each of several factors drawn verbatim from the jury instructions. Prewitt extracts sentence fragments to assert that "[t]he prosecutor also argued that 'rapist' Prewitt, by going to trial and cross-examining [A.E.], 'forced' her to 'submit' to questioning." The argument is distortion. It takes the prosecutor's words obviously out of context. The prosecutor made the challenged comments specifically in the context of defending A.E.'s credibility against Prewitt's express assertion that she had fabricated her rape account. She argued that the jury should deem A.E.'s account credible, pointing out that she had no "motive to fabricate" because she had "no upside to her [accusing Prewitt] other than to be forced to take the stand months after this happened . . . and submit to questioning by her rapist." Contrary to Prewitt's contention, the prosecutor did not suggest that the jury punish Prewitt for exercising his trial rights. We hold that the prosecutor's comments likely did not constitute error, and certainly not plain error.

III

Prewitt asserts that the district court departed from its constitutionally required impartiality by giving him legal advice, threatening to hold him in contempt, and questioning a witness. Only one of these three claims of error has some merit, but it does not lead us to reverse.

An impartial judge is a "basic protection" of the criminal justice system, and we review de novo whether a defendant was denied it. *State v. Dorsey*, 701 N.W.2d 238, 249, 253 (Minn. 2005). The trial-management challenges that tend to arise when a pro se defendant, who is understandably unfamiliar with courtroom procedure, requires the

district court to intervene to guide the defendant through the trial process. *See McKaskle v. Wiggins*, 465 U.S. 168, 177 n.7, 104 S. Ct. 944, 950 n.7 (1984) ("A *pro se* defendant must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses [and] from the prosecutor who faithfully exercises his duty to present evidence favorable to the defense.").

Prewitt argues that the district court directed him to present a consent defense and disparaged his plans to challenge DNA evidence. The critical inquiry is whether a pro se defendant "had a fair chance to present the case in his own way." *Holt v. State*, 772 N.W.2d 470, 479 (Minn. 2009) (quoting *McKaskle*, 465 U.S. at 177, 104 S. Ct. 944 (1984). The record indicates that, by the time the district court commented about Prewitt making a consent defense, Prewitt had already announced his intention to do so. And the court accurately advised Prewitt that challenging DNA evidence would be unnecessary and irrelevant if he was relying on a consent defense. The record does not show that the district court prevented Prewitt from presenting his case in his own way when it advised him of the elements of different defenses and the relevance or irrelevance of evidence. The district court certainly did not exhibit partiality by advising Prewitt in the manner now accused.

The district court also did not depart from its constitutionally required neutrality when it threatened to hold Prewitt in contempt. A pro se defendant must obey court rules and standards of decorum. "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with the relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46.

The district court directed Prewitt several times not to ignore its prior evidentiary rulings. Prewitt responded with apparent disrespect in open court in front of the jury. It is not only the district court's prerogative, but its duty, to maintain proper order. So after Prewitt's repeated contemptuous commentary questioning the legitimacy of the district court's decisions, the judge acted well within his discretion by rebuking Prewitt's behavior gently but plainly. At the same time, the district court urged jurors to be understanding toward Prewitt in his "unique position" as a pro se defendant. We see nothing in the record that suggests that the district court exhibited any unconstitutional bias against Prewitt.

We agree with Prewitt's argument, however, that the district court should not have questioned a witness. Prewitt contends that the district court showed bias and bolstered the state's case when it asked a sexual-assault examining nurse how swabs were labeled, and he asserts that by doing so the district court adopted the role of an advocate. Because Prewitt did not object to the district court's questions during trial, we review this complaint for plain error only. *See State v. Olisa*, 290 N.W.2d 439, 440 (Minn. 1980) (noting that challenges to district court's questioning of witnesses are waived by failure to object); *Ramey*, 721 N.W.2d at 299, 302 (outlining elements of plain-error review for waived objections).

A district court may question witnesses. Minn. R. Evid. 614(b). But doing so without appearing biased is difficult. So it must avoid asking about vital issues. *State v. Sandquist*, 146 Minn. 322, 324, 178 N.W.2d 883, 884 (1920). And it must avoid giving the jury the impression that one side should prevail. *See I.J. Bartlett Co. v. Ness*, 156

Minn. 407, 412, 195 N.W. 39, 41 (1923). Here the district court's questioning closed a loose end that the prosecutor's questioning had left open, effectively helping a witness for the state to clarify her testimony in a manner that ordinarily would be left for the prosecutor to do. Had the court not asked the question, the state may have left an opening for Prewitt to challenge the witness's testimony either during cross-examination or closing argument.

The caselaw previously cited demonstrates that the court crossed a line, at least slightly here, by seeming to assist the state. This is not the role of a neutral court. But we do not decide whether this slight assistance constitutes plain error. This is because it is clear that any error did not affect Prewitt's substantial rights. The DNA evidence against Prewitt was overwhelming, destroying any plausible defense that he did not have sex with A.E. And the state pointed out that Prewitt had materially changed his story, first asserting to police that he had never had sex with A.E. at any time, and then asserting to the jury that he had sex with A.E. but only on her consent. The overwhelming nature of the evidence supporting conviction renders implausible the notion that the district court's questioning on a DNA detail prejudiced Prewitt's substantial rights. Reversal therefore is not warranted.

IV

Prewitt raises a host of additional evidentiary issues and repeats his claims of bias and corruption in a supplemental pro se brief. We have carefully considered all his

contentions, and we conclude that none of them warrants detailed discussion or supports reversal.

Affirmed.