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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1541**

State of Minnesota,
Respondent,

vs.

Lee Thomas Charette,
Appellant.

**Filed September 3, 2013
Affirmed in part, reversed in part, and remanded
Smith, Judge**

Hennepin County District Court
File No. 27-CR-11-28468

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Peterson, Judge; and Chutich,
Judge.

UNPUBLISHED OPINION

We affirm appellant's convictions of two counts of first-degree aggravated robbery and one count of attempted aggravated robbery because the procedure for determining appellant's competency was sufficient to support the conclusion that

appellant was competent to stand trial, appellant's constitutional right to a speedy trial was not violated, the district court did not abuse its discretion in its evidentiary rulings, and the prosecutor did not commit prosecutorial misconduct. We reverse appellant's sentence and remand the issue to the district court to ensure that appellant is sentenced in the chronological order of his offenses, as required by the Minnesota Sentencing Guidelines.

FACTS

Appellant Lee Charette was charged with two counts of first-degree aggravated robbery and one count of attempted aggravated robbery on September 12, 2011. Minn. Stat. §§ 609.245, subd. 1, .17 (2010). On September 11, 2011, three college students attended a party in the Dinkytown area of Minneapolis. After leaving the party, they proceeded toward a footbridge. As they were crossing the footbridge, a man confronted them by pointing a firearm¹ at them and demanding money. After taking their money, the man struck one of the students with the weapon. That student then grabbed the man and a fight ensued between the three students and the man. During the melee, the students gained possession of the weapon and disposed of it in a garbage can as they fled the scene. Minneapolis police responded to an emergency call and found Charette bleeding, prompting them to initially believe that he was the victim.

Charette demanded a speedy trial on November 21, 2011, seeking a trial date of January 21, 2012. Because both counsel had scheduling conflicts, they agreed to a trial

¹ The firearm was later determined to be an air pistol.

date of January 30, 2012, if the trial would begin on that date. Defense counsel also requested a rule 20.01 evaluation on November 21, but the request was denied. The January 30, 2012 date was continued for good cause by the district court because the prosecutor was participating in another trial.

At a February 2, 2012 hearing, defense counsel explained that Charette had made false representations about defense counsel, at times did not appear to have the ability to comprehend defense counsel's explanations, and occasionally was in denial about his whereabouts. Charette opposed a rule 20.01 evaluation, stating that he would refuse to comply with such an assessment. The district court ordered an expedited rule 20.01 evaluation, and the parties agreed to return on February 16, 2012.

Psychologist Andrea Lynn Lovett performed the evaluation. She determined that Charette "is currently experiencing substantial symptoms of mental illness, including auditory hallucinations, paranoid delusions, depressed mood, and suicidal ideation and intent." Lovett detailed a number of beliefs that Charette discussed, including that his deceased brother appeared and spoke to him, that voices urged him to end his life, that the FBI tailed him in vehicles, and that the FBI implanted a GPS device in his wrist, which transmitted agents' voices. Lovett noted additional considerations, such as Charette's learning disability and various traumatic brain injuries, including sustaining a gunshot wound to his head. Lovett opined that, although Charette demonstrated a factual understanding of some aspects of his pending criminal proceedings, he discounted evidence unfavorable to his case and exhibited paranoid beliefs about the justice system and defense counsel. Finally, Lovett observed that Charette was not malingering, noting

that his symptoms and attitudes were not consistent with those who feign illness. She concluded that Charette's "mental status deficits currently interfere with his ability to understand legal proceedings against him, adequately assist his attorney, and testify in his defense."

On February 23, 2012, the district court determined that Charette was not competent to proceed to trial based on Lovett's report. The district court referred Charette to mental-health court, but on March 12, 2012, the mental-health court dismissed the petition and remanded to criminal court. The mental-health court's decision was based on information provided by the court-appointed examiner, who did not support civil commitment. The evaluator noted that Charette admitted "fabricating symptoms to influence his court proceeding."

At a March 14, 2012 hearing before the district court, Charette's competency was questioned. The prosecutor noted that the commitment evaluation "didn't necessarily in great detail address the issue that I think [Lovett] talked about along the lines of concerns as to whether or not [Charette] could participate in his defense." The prosecutor also noted his concern regarding whether Charette understood the nature of the evidence against him.

Defense counsel indicated that Charette knew his location, was able to identify people, and "knows what's going on more or less." Defense counsel also stated, "I think he understands the trial process. I think he can assist in his own defense more or less." When asked directly if he believed Charette was competent, defense counsel responded, "I would not contest a finding of competence."

The district court next questioned Charette. Charette stated that he was “lying about the whole thing” regarding “hearing voices and GPS and all that. I lied about all of that. I don’t hear voices. I did sustain traumatic brain injuries in my life, but it doesn’t like—I don’t know. I don’t hear voices, and I don’t—that’s not true.” He agreed that he understood the offenses with which he had been charged, that he had been preparing for trial with defense counsel, that he understood the arguments and evidence to be introduced at trial, and that he felt prepared for trial. Charette also disputed the content of Lovett’s evaluation, asserting that she lied throughout her report.

The district court concluded that, based on the “new information . . . brought by conversations with counsel, all of the correspondence[,] . . . and my examination of Mr. Charette, I am going to find him competent today to proceed with trial.” At the March 14 hearing, the district court also observed that the reason for a delay in the trial proceeding was because of the rule 20.01 evaluation and because competency and commitment proceedings suspend speedy-trial requirements.

Following a jury trial, which began on April 9, 2012, Charette was found guilty of all three charged offenses. He was subsequently sentenced to consecutive sentences totaling 183 months.

DECISION

I.

Charette argues that the district court erred by finding him legally competent to proceed to criminal trial. The Fifth Amendment and the Fourteenth Amendment to the United States Constitution protect a criminal defendant from being tried and convicted

when the defendant is found incompetent. *State v. Camacho*, 561 N.W.2d 160, 171 (Minn. 1997). Whether the district court observed procedures adequate to protect a defendant's right not to be tried or convicted while incompetent is a different question than whether the defendant actually is competent. *State v. Bauer*, 310 Minn. 103, 108, 245 N.W.2d 848, 852 (1976). Instead, the narrow issue is whether the district court, in fulfilling its protective duty, should have conducted further inquiry. *Id.* Because the evidence relevant to Charette's mental condition is not disputed, we review the record to determine whether the district court gave "proper weight to the information suggesting incompetence" when it came to its conclusion that there was not sufficient doubt of Charette's competency so as to require further inquiry. *Bonga v. State*, 797 N.W.2d 712, 720 (Minn. 2011) (quotation omitted).

A defendant is determined to be incompetent when he or she lacks the ability to rationally consult with counsel, understand the proceedings, or participate in his or her defense. Minn. R. Crim. P. 20.01, subd. 2. When a district court determines that reasons exist to doubt the defendant's competency, it must order an examination of the defendant's mental condition. *Id.*, subd. 3. District courts consider a number of factors when determining whether further examination of a defendant's competency is required. *Bauer*, 310 Minn. at 116, 245 N.W.2d at 855. These factors include the defendant's demeanor at trial, his or her lack of rational behavior, and "any prior medical opinion on [his or her] competence to stand trial." *Id.* at 116, 245 N.W.2d at 855. If the greater weight of the evidence supports such a finding, the district court shall deem a defendant competent. *See* Minn. R. Crim. P. 20.01, subd. 5(f).

After the district court determined that Charette was incompetent to proceed to trial, it properly commenced a civil commitment proceeding. *See* Minn. R. Crim. P. 20.01, subd. 6(b)(1)-(2) (providing that a district court must institute a civil commitment proceeding when the district court finds a defendant incompetent due to mental illness or mental deficiency). When the mental health court dismissed the commitment petition, rule 20.01, subdivision 7, became applicable. Subdivision 7 provides that a hearing with notice to all parties may be held to determine if the defendant is competent to proceed to trial. The appropriate procedure was followed in this case. After the hearing, the district court found Charette competent.

We review the district court's findings to determine whether it gave "proper weight" to the evidence produced and whether this independent review of the evidence supports the inferences that the district court drew from the evidence. *In re Welfare of D.D.N.*, 582 N.W.2d 278, 281 (Minn. App. 1998). At the hearing, once defense counsel outlined his position on Charette's competency, including a statement that he would not contest competency, the district court questioned Charette. It was only after questioning Charette, exploring his ability to prepare his defense with his attorney, and his understanding of proceedings that the district court made its findings.

The district court concluded that, based on the "new information . . . brought by conversations with counsel, all of the correspondence[,] . . . and my examination of Mr. Charette, I am going to find him competent today to proceed with trial." We are mindful that the district court observed Charette firsthand and was in the best position to evaluate Charette's demeanor and comprehension. We are also mindful of the obligation of the

district court to be “vigilant in ensuring that the defendant is competent to stand trial and that, when a sufficient doubt of the defendant’s competence arises, [it] must observe procedures adequate to ensure the defendant’s competency.” *Bauer*, 310 Minn. at 114, 245 N.W. 2d at 854. The record supports the district court’s determination that Charette was competent to assist and participate in his defense. Therefore, the district court did not err when it found Charette competent to proceed to trial.

II.

Although the parties agree that Charette invoked his right to a speedy trial on November 21, 2011, his trial did not begin until April 9, 2012. He was in custody from September 2011 to April 2012, during the pendency of his criminal proceedings. We review a speedy-trial challenge de novo. *State v. Johnson*, 811 N.W.2d 136, 144 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012). In Minnesota, a criminal trial must start within 60 days of the defendant’s demand “unless the court finds good cause for a later trial date.” Minn. R. Crim. P. 11.09(b); *see also State v. DeRosier*, 695 N.W.2d 97, 108-09 (Minn. 2005). To determine whether a delay beyond the 60-day requirement deprived a defendant of his or her right to a speedy trial, we consider the following four factors: “(1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his or her right to a speedy trial, and (4) whether the delay prejudiced the defendant.” *DeRosier*, 695 N.W.2d at 109 (citing *Barker v. Wingo*, 407 U.S. 514, 530–33, 92 S. Ct. 2182, 2192–93 (1972)). None of these factors is either necessary or sufficient to constitute a speedy-trial violation; they are related, however, and are

considered with all of the relevant circumstances. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). We address each in turn.

A. *The length of the delay*

If a trial does not begin within 60 days of a defendant's speedy-trial demand, we presume that a constitutional violation has occurred. *Id.* at 315-16. The parties do not dispute that Charette's trial started more than 60 days after his speedy-trial demand, and therefore the delay was presumptively prejudicial. Although this factor weighs in favor of finding a violation of Charette's speedy-trial right, "the length of time does not, as an independent factor, provide strong support for finding a violation." *State v. Rhoads*, 802 N.W.2d 794, 806-07 (Minn. App. 2011), *rev'd on other grounds*, 813 N.W.2d 880 (Minn. 2012).

B. *The reason for the delay*

The state carries the burden of promptly bringing a case to trial. *State v. Hahn*, 799 N.W.2d 25, 30 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). There is no speedy-trial violation when the delay is for a good cause. *State v. Griffin*, 760 N.W.2d 336, 340 (Minn. App. 2009); *see also* Minn. R. Crim. P. 11.09(b). When the state deliberately attempts to delay the trial, the weight is heavily against the state, while negligent or administrative delays receive less weight. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. The Minnesota Supreme Court has held that "calendar congestion or other circumstances over which the prosecutor has no control are good cause for delays up to fourteen months where the defendants suffered no unfair prejudice." *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989).

The delay caused by a rule 20.01 evaluation is a relevant consideration as to whether a speedy-trial violation has occurred. *DeRosier*, 695 N.W.2d at 109. From February 2, 2013 until March 14, 2013, the proceedings were legitimately delayed to discern Charette's competency.

Delays resulted both from defense counsel's, as well as the state's, scheduling conflicts. Even so, Charette highlights that, after the district court determined that he was competent, the district court suggested April 2, 2012 as a trial date. The state responded, "I'm going to suggest the 9th or 16th to give me sufficient time to . . . subpoena witnesses, so forth and so on. I'm out of town the last weekend of the month." Charette correctly observes that there was no persuasive explanation as to why the state could not prepare its case before April 9th. *See State v. Brooke*, 381 N.W.2d 885, 888 (Minn. App. 1986) (noting that prosecutor's scheduling conflict is not a valid reason for delay). Nonetheless, the record contains nothing to support that the delay was intended to harm Charette's defense. Instead, most of the trial-scheduling delays were the result of a good-faith effort by the parties to determine whether Charette was legally competent. This factor weighs against Charette.

C. Whether Charette asserted his right to a speedy trial

Because the parties do not dispute that Charette repeatedly asserted his speedy-trial right, this factor weighs in favor of Charette.

D. Whether the delay prejudiced Charette

The right to a speedy trial protects three main interests: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and

(3) preventing the possibility that the defense will be impaired.” *Windish*, 590 N.W.2d at 318 (citing *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193). This last interest, impairment of the defense, is the most important. *Id.* “A defendant does not have to affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant’s case.” *Id.*

During his incarceration, Charette described his mood as anxious and depressed, attributing these conditions to his current legal situation. Even so, the record does not demonstrate in any way how the delay actually prejudiced Charette’s defense; nor does Charette identify any trial prejudice suffered. Thus, this factor weighs against Charette.

Two of the four speedy-trial factors favor Charette’s claim. But because there were legitimate reasons for the delays and because his defense was not prejudiced at trial, we conclude that his constitutional right to a speedy trial was not violated. *See State v. Jones*, 392 N.W.2d 224, 234-36 (Minn. 1986) (holding that no unfair prejudice was established when a defendant charged with first-degree murder experienced a seven-month delay even though three *Barker* factors weighed against the state). Consequently, because the factors in this case do not lead to the conclusion that there was a denial of Charette’s right to a speedy trial, Charette is not entitled to relief on this ground.

III.

Charette contends that the district court committed prejudicial error by allowing the state to impeach his trial testimony with his prior convictions. The district court determined that six of Charette’s prior convictions were eligible to impeach his credibility. Charette conceded that his conviction for providing a false name to police was admissible as a crime of dishonesty under Minn. R. Evid. 609(a)(2), but he contends

that the district court abused its discretion by admitting five other convictions for impeachment purposes.

“We will not reverse a district court’s ruling on the impeachment of a witness by prior conviction absent a clear abuse of discretion.” *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011) (quotation omitted). “We review a district court’s decision to admit evidence of a defendant’s prior convictions for an abuse of discretion.” *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009).

Evidence of a previous conviction is admissible if the crime was a felony punishable by “imprisonment in excess of one year” and it is determined “that the probative value of admitting this evidence outweighs its prejudicial effect.” Minn. R. Evid. 609(a)(1). In exercising discretion under rule 609(a), courts consider five factors, known as the *Jones* factors:

(1) [T]he 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 similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of [the] defendant’s testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). In reaching its decision, the district court weighed these factors on the record and concluded that all the factors favored admission. *See State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006) (“[A] district court should demonstrate on the record that it has considered and weighed the *Jones* factors.”).

In reviewing the *Jones* factors, we are persuaded that the district court did not abuse its discretion. Admitting evidence of prior convictions for impeachment purposes

permits the fact-finder to see “the whole person” in order to “judge better the truth of his testimony.” *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979). A defendant’s lack of trustworthiness may be demonstrated by “abiding and repeated contempt for laws which he is legally and morally bound to obey.” *Id.* Put differently, “any felony conviction is probative of a witness’s credibility, and the mere fact that a witness is a convicted felon holds impeachment value.” *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011).

First, admission of Charette’s five felony theft convictions, in addition to evidence of his conviction for giving a false name to police, better informed the jury of Charette’s whole person because it demonstrated the severity of his prior conduct and his consistent and repeated disregard for the laws of society. Second, Charette’s five felony convictions occurred between 2004 and 2009, rendering them presumptively not stale. *See State v. Williams*, 757 N.W.2d 504, 509 (Minn. App. 2008) (stating that because the convictions occurred within the past ten years, the second *Jones* factor “weigh[ed] in favor of admission”), *aff’d*, 771 N.W.2d 514 (Minn. 2009). Third, Charette was charged with first-degree robbery and attempted robbery, neither of which he had been convicted of in the past. The dissimilarity of the prior offenses from the charged conduct minimized the potential prejudicial effect of admitting the prior convictions. *See Ihnot*, 575 N.W.2d at 586. This is particularly true given the district court’s willingness to provide a limiting instruction, at Charette’s request. Finally, the fourth and fifth *Jones* factors are often combined, as an analysis of the importance and credibility of the defendant’s testimony often involves similar consideration. *See Swanson*, 707 N.W.2d at 655. The district

court noted that Charette's testimony, if he chose to testify, would be important in aiding the jury's resolution of a factual dispute. The fourth and fifth *Jones* factors favor admission of the past convictions due to the conflicting events described by Charette and the victims.

Because all five of the *Jones* factors favored admission of Charette's prior felony convictions, the district court did not abuse its discretion by admitting evidence of those convictions for impeachment purposes pursuant to Minn. R. Evid. 609(a)(1).

IV.

Charette next asserts that the district court erred by not admitting into evidence a photograph taken of him in the hospital following his altercation with the victims. This photograph depicts Charette in a hospital bed, wearing a neck brace, with various medical devices and wires attached to him. Although the district court admitted other photographs of Charette's injuries, it did not admit the hospital bed photograph because of "its overly prejudicial nature and the medical state, that . . . is not at issue in this case, being at the forefront of the picture."

A district court has broad discretion in determining whether to admit photographs into evidence and will not be reversed absent a clear abuse of discretion. *State v. Dame*, 670 N.W.2d 261, 264 (Minn. 2003). Photographs are admissible when they "accurately portray anything which it is competent for a witness to describe in words and are not rendered inadmissible merely because they incidentally tend to arouse passion or prejudice." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005) (quotation omitted). "When a photograph is not misleading and is properly illustrative, the rule is liberally

construed in favor of admission” *Id.* But relevant photographs may be excluded if their probative value is substantially outweighed by the danger of unfair prejudice. *State v. Stewart*, 514 N.W.2d 559, 565 (Minn. 1994); *see also* Minn. R. Evid. 403.

It is undisputed that Charette sustained injuries as a result of his altercation with the victims; and although the district court admitted other photographs illustrating Charette’s injuries, Charette chose not to rely on these admitted images. The disputed hospital bed photograph portrays what appears to be a dire medical situation when, in reality, Charette’s neck brace was a precaution. As a result, the hospital bed photograph is misleading. *See Schulz*, 691 N.W.2d 474, 478 (misleading photographs should be excluded). The district court’s determination that the hospital bed photograph was unfairly prejudicial was sound.

V.

Charette argues that the prosecutor committed prosecutorial misconduct by shifting the burden of proof to the defense during the state’s closing argument. It is undisputed that Charette did not object to the prosecutor’s closing argument at the district court level. “Arguments that shift the burden of proof to the defendant to prove his innocence are improper.” *State v. Carridine*, 812 N.W.2d 130, 148 (Minn. 2012). To determine whether the prosecutor improperly shifted the burden of proof, we review “the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence.” *Id.* (quoting *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993)).

In reviewing claims of unobjected-to prosecutorial misconduct, we apply a modified plain-error test. *Carridine*, 812 N.W.2d at 146 (citing *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). To satisfy this test, the defendant must establish that the misconduct amounted to error and that the error was plain. *Id.* An error is plain “if [it] contravenes case law, a rule, or a standard of conduct.” *Id.* (quotation omitted). If plain error is established, the state has the burden to show that it did not prejudice the defendant’s substantial rights. *Id.* This burden is satisfied when the state establishes that there is no reasonable likelihood that the misconduct had a significant effect on the jury’s verdict. *Ramey*, 721 N.W.2d at 302. “Finally, if all three prongs . . . are satisfied, the court determines whether to address the error to ensure fairness and integrity in judicial proceedings.” *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010).

The challenged portions of the prosecutor’s argument implored the jurors to believe Charette’s recollection of events. The prosecutor repeatedly stated that Charette “wants you—no strike that—he needs you to believe” various versions of events. These statements are almost identical to those recently examined by the Minnesota Supreme Court:

There is only one truth in this case. Either [defendant] had a gun or he did not have a gun. And the defendant wants you to believe he had a gun. Actually, I take that back. He needs you to believe he had a gun, not because it’s true, because it’s not. He needs you to believe it because if you don’t believe it, he’s guilty of [the charged offense]. And so, he needs you to believe it.

Carridine, 812 N.W.2d at 147-48. The supreme court concluded that the prosecutor’s comments did not shift the burden of proof. *Id.* at 148. Moreover, the supreme court

held that, even if it were to assume that the comments shifted the burden of proof to the defendant, the error did not affect that defendant's substantial rights under the plain-error test. *Id.*

Much like in *Carridine*, the prosecutor's statements to the jury here were in the context of comparing Charette's version of events with that of the victims'. The state was attempting to establish that either Charette or the victims were not being truthful because of the variance in their respective stories. Also, the district court adequately instructed the jurors on the presumption of innocence, the state's burden to prove the elements of the crime beyond a reasonable doubt, and that the arguments or remarks of the attorneys are not evidence. Consequently, the prosecutor's conduct was not prosecutorial misconduct and Charette's substantial rights were not affected by the conduct.

VI.

The parties agree that the district court sentenced Charette improperly. The Minnesota Sentencing Guidelines require a district court to sentence a defendant in the order in which his or her offenses occurred. Minn. Sent. Guidelines 2.F (2012). In Charette's case, the district court sentenced his offenses in the order in which they were charged. Therefore, we reverse the sentences and remand this case for resentencing. The district court must determine the chronological order that Charette's offenses occurred and sentence Charette in that order.

VII.

Finally, Charette raises a myriad of asserted errors in a supplemental pro se brief. However, many of Charette's arguments are not assertions of error but rather personal assertions on the facts of the case. An assignment of error based on mere assertion and unsupported by argument or authority is waived unless prejudicial error is obvious upon mere inspection. *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006), *aff'd*, 728 N.W.2d 243 (Minn. 2007). Because Charette's statements are no more than unsupported assertions, we deem them waived and offer no further analysis.

In sum, we affirm Charette's convictions but reverse his sentence. We remand Charette's case to the district court to resentence Charette in the chronological order in which his crimes were committed.

Affirmed in part, reversed in part, and remanded.