STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1256

State of Minnesota,
Respondent,

vs.

William Rodriguez Morseth,
Appellant.

Filed December 9, 2008
Affirmed
Halbrooks, Judge

Stearns County District Court
File No. K9-06-1377

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Janelle P. Kendall, Stearns County Attorney, Chad T. May, Assistant County Attorney, Administration Center, Room 448, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

HALBROOKS, Judge

In this appeal from his conviction of first-degree controlled-substance crime, appellant challenges the district court's (1) refusal to appoint substitute counsel or to permit him to represent himself, (2) admission of *Spreigl* evidence, and (3) admission of prior-conviction evidence for impeachment purposes. We affirm.

FACTS

Appellant William Rodriguez Morseth was arrested on March 17, 2006, and charged with three controlled-substance crimes: one count of first-degree sale in violation of Minn. Stat. § 152.021, subd. 1(1) (2004), and two counts of third-degree sale in violation of Minn. Stat. § 152.023, subd. 1(1) (2004). The counts were later severed, with the first-degree count to be tried first under a possession-with-intent-to-sell theory.

At the final settlement conference on December 21, 2006, appellant informed the district court that he was displeased with his appointed attorney. Appellant stated that his attorney was not "ample," which the attorney said was grounded in appellant's perceived lack of enthusiasm in his counsel. Appellant did not elaborate on the source of his displeasure, nor did he express that he wanted to discharge his attorney.

Before voir dire commenced on January 2, 2007, the district court heard motions relating to three categories of evidence: *Spreigl* evidence, specifically the two severed counts; post-arrest communications between appellant and his accomplice and her sister; and two prior convictions. The district court postponed a decision on whether it would admit the severed counts as *Spreigl* evidence. The state sought to remove from the post-

arrest communications—letters and a phone call—any mention of the identified *Spreigl* incidents by either redacting the references or presenting the communications in summary form. The post-arrest communications themselves were not included by the state in its pretrial *Spreigl* notice or by the defense in its motion in limine to exclude the proposed *Spreigl* evidence. At the hearing, neither side argued the communications as *Spreigl* evidence. The prior convictions that the state sought to use to impeach appellant if he testified were a 1994 conviction of giving false information to a police officer and a 2004 conviction of felon in possession of a firearm. Defense counsel did not object to the use of either conviction, stating, "We understand that that's probably within the realm of something they can do if he testifies, and he does intend to testify." The district court did not independently analyze the proposed impeachment evidence.

Appellant also restated his dissatisfaction with his attorney, based on what appellant perceived to be his attorney's negativity about the likelihood of an acquittal. Appellant said he would "like to fire" his attorney and either proceed pro se or obtain substitute counsel. Appellant also requested a "couple of weeks[']" continuance to "read a little bit about the law." The district court denied the request for a continuance and sought to confirm whether appellant was intelligently waiving his right to counsel. When asked if he understood "the dangers and disadvantages" of representing himself, appellant replied, "Absolutely not. Absolutely not." The district court reviewed, among other things, legal terms and procedures that a layperson might find unfamiliar and the process of a trial. When the district court asked appellant if he wished to retain his attorney, appellant responded, "I guess, yeah."

Trial then commenced. One of the state's witnesses was appellant's accomplice, who agreed to testify against him as part of her plea agreement. She testified that during the two weeks that she knew and dated appellant, before the arrest, she was afraid of him because he threatened her and her family. She also testified that appellant wrote her letters after the arrest, telling her that he loved her and asking her to "take the fall." Two of the letters were received as evidence. On cross-examination, appellant's attorney questioned the accomplice about being afraid of appellant, about having opportunities to leave him, and about her fear of the police. The accomplice's sister also testified for the state, saying that appellant called her house several times after the arrest to ask her to tell her sister to take responsibility for the controlled substances found in the car when she and appellant were arrested. A recording of one call was played for the jury. No *Spreigl* objection was made to the testimony concerning threatening statements or to admission of the letters and phone call.

At the conclusion of the first day's testimony, the district court ruled on the admissibility of the two third-degree sale counts as *Spreigl* evidence. The already-admitted letters, phone call, and threatening-statements testimony were not discussed. Before ruling, the district court evaluated each step required for admission of *Spreigl* evidence. Because the district court was concerned about the cumulative effect of admitting both incidents, it ruled that the state could use only the more recent sale, which had occurred the day before the arrest, as *Spreigl* evidence.

At the beginning of the second day of trial, appellant again notified the district court that he wished to fire his appointed attorney. He articulated specific dissatisfaction

with the way that his attorney cross-examined his accomplice. The district court denied appellant's request to discharge his attorney, but appellant persisted and stated that he did not believe his attorney would do an adequate job handling appellant's own testimony or the closing argument. The district court stated that appellant's disagreement with his attorney's style was not an exceptional circumstance warranting a continuance so that appellant could obtain substitute counsel and that the court would not allow appellant to fire his attorney. But the district court said it would grant appellant "leniency" regarding his testimony and allow him "to take more control of [his] case." The district court also granted appellant's request to make his own closing argument.

During his direct examination, appellant testified to his post-arrest communication with his accomplice and her sister. He stated that, in his initial letters, he said that he would take responsibility for the charges, but that after he learned about the sentencing guidelines from other inmates, the tenor of his letters changed to encouraging his accomplice to take responsibility. Appellant also testified that he had "been in trouble before" and had been incarcerated in other, unspecified states. On cross-examination, the state sought to impeach appellant with his prior convictions:

> Q. Mr. Morseth, is it true that you have a prior conviction for false info?
> A. Yes, I do.
> Q. You also have other prior felony convictions; is that correct?
> A. Yes, I do.

In its closing argument, the state mentioned the accomplice's testimony about appellant's pre-arrest threatening statements and the post-arrest letters and phone call. In

discussing the credibility of witnesses, the state pointed to the impeachment evidence it elicited on cross-examination: "You know that he has a false info conviction and other convictions."

During jury deliberations, the district court reconvened the attorneys and appellant to discuss a question from the jury. When the district court sought to make a record of who was present, appellant's counsel sought to clarify his role:

> THE COURT: Mr. Morseth is present with his attorney, Mr. Buttweiler.
> MR. BUTTWEILER: I'm sorry to interrupt the Court, but it's my understanding that I was dismissed as his attorney.
> THE COURT: No, you weren't dismissed. I said I wouldn't allow him to fire you at this time in the middle of the trial, but I did allow him to present his own closing.

Appellant was found guilty and sentenced to 146 months. This appeal follows.

D E C I S I O N

I.

Appellant first takes issue with his representation at trial. He argues that the district court erred by refusing to appoint substitute counsel or to allow him to represent himself. He also claims in a pro se supplemental brief that he was denied effective assistance of trial counsel.

A. Substitute counsel

Criminal defendants have a constitutional right to be represented by an attorney. *State v. Worthy*, 583 N.W.2d 270, 275 (Minn. 1998) (citing *Gideon v. Wainwright*, 372 U.S. 335, 343–45, 83 S. Ct. 792, 796–97 (1963)). But an indigent defendant's right to counsel is not "the unbridled right to be represented by the attorney of his choice." *Id.* at

278. Whether to appoint substitute counsel is within the discretion of the district court. *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006).

An indigent defendant's request to have substitute counsel appointed must be timely and reasonably made and will be granted "only if exceptional circumstances exist." *Worthy*, 583 N.W.2d at 278. A request for substitute counsel made on the day that trial is scheduled to start is not timely. *See id.* at 278–79. Exceptional circumstances are generally "those that affect a court-appointed attorney's ability or competence to represent the client." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). Exceptional circumstances do not include general dissatisfaction or disagreement with counsel's assessment of the case, *Worthy*, 583 N.W.2d at 279, or personal tension between the attorney and the client, *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

Here, appellant's first explicit request for substitute counsel was made the day of trial, more than nine months after he had been charged. His request was not timely. Additionally, appellant's situation did not satisfy the exceptional-circumstances requirement. His complaints about his attorney amounted to personal and stylistic disagreements and a differing assessment of the likelihood of acquittal, not concerns about his attorney's legal ability or competence.

Because appellant's request was not timely made and did not arise under exceptional circumstances, the district court did not abuse its discretion by refusing to appoint substitute counsel.

B. Self-representation

The right to represent oneself as a criminal defendant is a corollary to the right to have an attorney. *Worthy*, 583 N.W.2d at 279. The right is unqualified only until trial begins, which is when voir dire commences. *State v. Christian*, 657 N.W.2d 186, 191–93 (Minn. 2003). After voir dire has begun, the district court has discretion and must balance the defendant's interests against potential disruption and delay. *Id.* at 193; *see also State v. Richards*, 552 N.W.2d 197, 205 (Minn. 1996) (stating that the district court must prevent the use of self-representation to delay trial). We review a district court's denial of a defendant's request to represent himself for clear error. *Christian*, 657 N.W.2d at 190.

Appellant's first explicit statement that he wished to proceed pro se occurred on the first morning of trial. Because voir dire had not begun, appellant's right was then unqualified. But after the district court engaged in the inquiry and advice required by the Minnesota Rules of Criminal Procedure, appellant changed his mind and elected to proceed with counsel.

Before accepting a waiver of the right to counsel, the district court "shall advise the defendant" of six categories of information:

> the nature of the charges, the statutory offenses included within the charges, the range of allowable punishments, that there may be defenses, that there may be mitigating circumstances, and all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

Minn. R. Crim. P. 5.02, subd. 1(4). The process seeks to ensure that a defendant's waiver of the right to counsel is "voluntary and intelligent." *Id.*

Appellant does not suggest the district court failed to advise him of the first five categories, but instead focuses on the somewhat sweeping language of the sixth category. He argues that the advice given by the district court was not the advice mandated by the rules, but was instead "a parade of horribles" focused only on the disadvantages of proceeding without counsel. But the standard set forth in rule 5.02 is not an exhaustive explication of every conceivable consequence; rather, the rule requires the district court to ensure that a defendant has a "broad understanding of the consequences." Appellant was aware of the advantages of representing himself, such as having an advocate with a more obvious zeal for his cause, because they were the stated reasons he sought to discharge his attorney. The district court was not forcing appellant's hand; it was properly ensuring that appellant saw the larger picture of self-representation.

On the second morning of trial, appellant's right to represent himself was subject to the district court's discretion in light of potential disruption and delay. With the trial nearly complete, the district court reiterated its concerns about delay. In light of the potential for delay, the district court did not abuse its discretion in denying appellant's request to proceed pro se.

Because appellant did not exercise his right to self-representation when it was unqualified and because the district court acted within its discretion in denying appellant's mid-trial request to represent himself, the district court did not commit clear error.

C. Ineffective assistance

We review ineffective-assistance-of-counsel claims de novo. *State v. Edwards*, 736 N.W.2d 334, 338 (Minn. App. 2007), *review denied* (Minn. Sept. 26, 2007). We generally prefer ineffective-assistance claims be raised in a postconviction petition to the district court, rather than on direct appeal. *Voorhees v. State*, 627 N.W.2d 642, 649 (Minn. 2001). But where, as here, the record is sufficient to resolve the claim on direct appeal, we will do so. *See id.* A defendant claiming ineffective assistance of counsel "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). In Minnesota, there is a strong presumption that trial attorneys act within the objective standard of reasonableness. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). Appellate courts "do not review for competency matters of trial strategy." *Id.*

But this traditional two-pronged inquiry is unnecessary in three circumstances: (1) the complete denial of counsel at a critical stage, (2) the utter failure of counsel to engage in "meaningful adversarial testing" of the state's case, or (3) "when counsel is called on to render assistance under circumstances when competent counsel could very likely not do so." *Edwards*, 736 N.W.2d at 338 (quoting *United States v. Cronic*, 466 U.S. 648, 659–62, 104 S. Ct. 2039, 2047–48 (1984)).

In his pro se supplemental brief, appellant asks us to second-guess his trial attorney's decision not to object to the state's attempt to impeach appellant. Consistent with precedent, we decline to do so. *See Doppler*, 590 N.W.2d at 633. Additionally, appellant does not attempt to meet his burden that, but for his attorney's failure to object at trial, the jury would have reached a different result. Appellant therefore has not shown that his trial counsel was ineffective.

Appellant argues that because defense counsel thought that he had been discharged before closing arguments, appellant lacked the benefit of counsel during that critical stage of the trial. But the most recent discussion concerning representation occurred before appellant testified, not before closing arguments. Defense counsel continued to function as appellant's counsel: conducting a direct examination of appellant and arguing objections. Shortly before closing arguments, defense counsel referred to appellant as "my client." The district court did not deny appellant counsel. Instead, the district court showed extraordinary regard for appellant's concern for his own defense and was flexible in its approach to typical practices.

Appellant's pro se challenge to his attorney's decision not to object to the impeachment evidence does not fall within the exception for counsel's failure to engage in meaningful adversarial testing of the state's case. Defense counsel argued against the admission of evidence before trial, questioned the state's witnesses at trial, and argued objections. It therefore cannot be said that the attorney failed to subject the state's case to meaningful adversarial testing.

As for the third exception, impossible circumstances, appellant argues that defense counsel was forced to remain on the case "in so badly crippled a form [that] he could not be effective." But the record does not support appellant's characterization. Nor does our research reveal any cases suggesting that it is impossible for a competent attorney to assist her client when it is the client who will give closing argument. In sum, while appellant and his appointed attorney may have disagreed, their disagreement did not amount to ineffective assistance of counsel.

II.

Appellant's second issue concerns the district court's admission of evidence of his other crimes or bad acts, also known as *Spreigl* evidence. He argues that the district court abused its discretion by admitting evidence of his unconvicted prior sale and his threatening statements to his accomplice and her family.

The admission of *Spreigl* evidence lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996). In determining whether to admit *Spreigl* evidence, a district court must follow a five-step process that focuses on (1) notice of intent to offer, (2) purpose of the offer, (3) clear and convincing evidence of the defendant's participation, (4) relevance and materiality, and (5) a balancing of the evidence's probative value against its potential prejudice. *State v. Ness*, 707 N.W.2d 676, 685–86 (Minn. 2006). Generally, failure to object to *Spreigl* evidence at trial waives the objection on appeal. *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005).

Appellant asserts, in his pro se supplemental brief, that the district court abused its discretion with regard to the fifth step when it considered the severed-counts evidence. Appellant contends that evidence that is "a little" prejudicial is too prejudicial. However, the test looks at both prejudice and probative value. As reflected in the district court's decision to limit the evidence to only the most recent sale, the required balancing was carefully conducted. The district court did not clearly abuse its discretion when it admitted evidence of the prior sale as *Spreigl* evidence.

Not all evidence of other bad acts is *Spreigl* evidence subject to the five-step analysis; the namesake case itself recognized exceptions, including where the evidence offered involves incidents that are "part of the immediate episode for which defendant is being tried." *State v. Spreigl*, 272 Minn. 488, 497, 139 N.W.2d 167, 173 (1965).

Appellant seeks to characterize his accomplice's testimony about feeling threatened by him and the post-arrest communications as *Spreigl* evidence. The record does not support this characterization. The evidence is instead properly considered as immediate-episode evidence, used by the state to describe the nature of the relationship between appellant and his accomplice before they were arrested and appellant's post-arrest efforts to evade accountability. We note that no one—not the district court, not the state, and not appellant—treated the accomplice's testimony, the letters, or the phone call as *Spreigl* evidence before or at trial. Even if we were to accept appellant's characterization, the failure to object at trial waived the issue on appeal.

III.

The final issue appellant raises is whether the district court properly permitted the state to impeach him with evidence of prior convictions. He argues that the district court abused its discretion by permitting the prosecutor to use a 12-year-old dishonesty conviction and a vague reference to prior felonies.

A district court's ruling on the impeachment of a witness by prior conviction is reviewed under a clear abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). Similarly, whether the probative value of the prior convictions outweighs their prejudicial effect is a matter within the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985).

A. The false-statement conviction

Witnesses may be impeached with evidence that they have been convicted of crimes involving dishonesty or false statement. Minn. R. Evid. 609(a). But if the conviction is more than ten years old, the evidence is inadmissible unless the district court determines that the conviction's probative value substantially outweighs its prejudicial effect. Minn. R. Evid. 609(b). The proponent of the evidence must also give advance written notice of its intent to use the evidence, so that the adverse party may fairly contest its use. *Id.*

A defendant who fails to object to evidence generally waives the issue on appeal. *State v. Bauer*, 598 N.W.2d 352, 363 (Minn. 1999). But we may review admission of the dishonesty conviction for plain error, which involves considering four factors: (1) whether there was error, (2) that was plain, (3) that affected the defendant's

substantial rights, and (4) that should be addressed to ensure procedural fairness and integrity. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quoting *State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006)). An error affects substantial rights if it is reasonably likely that the error substantially affected the verdict. *State v. Smith*, 582 N.W.2d 894, 896 (Minn. 1998). A defendant bears a heavy burden of persuasion on the third factor. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998); *but see Ramey*, 721 N.W.2d at 300 (shifting the burden in cases of prosecutorial misconduct).

Here, appellant did not merely fail to object to the state's use of a 1994 false-statement conviction, he actually acquiesced. Even if we set aside the waiver and conduct plain-error analysis, appellant has not met his burden on the third factor of that analysis.[1] In light of all the evidence presented to the jury, we cannot say that the verdict was substantially affected by the admission of the false-statement conviction.

B. The felony convictions

Witnesses may be impeached with evidence that they have been convicted of felony crimes not involving dishonesty or false statement if the district court "determines that the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a). In making this determination, the district court is to consider five factors set forth in *State v. Jones*: "(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the

[1] By analyzing the third factor, we do not suggest that appellant has met his burden on any of the other factors.

past crime with the charged crime . . . , (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue." 271 N.W.2d 534, 537-38 (Minn. 1978).

A district court should make a record of its *Jones*-factor analysis, but if the district court fails to do so, an appellate court may review the factors itself to see if the error was harmless. *See State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). "[T]he error is harmless if the conviction could have been admitted after a proper application of the *Jones*-factor analysis." *State v. Vanhouse*, 634 N.W.2d 715, 719 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

Appellant contends that it was error for the district court to fail to conduct a *Jones* analysis. Appellant further argues that the prosecutor's multiple uses of the plural "felonies," when notice had been given regarding only one prior felony conviction, makes it impossible for this court to conduct its own *Jones* analysis. We agree with the first argument, but not the second. This court has access to the reports of appellant's criminal history that the district court would have relied on in making its *Jones* analysis, and we rely on them in conducting our own *Jones* analysis.

With regard to the first *Jones* factor, prior convictions may have impeachment value in helping the jury to see the defendant's "whole person" and to evaluate the defendant's truthfulness. *Swanson*, 707 N.W.2d at 655 (quoting *State v. Gassler*, 505 N.W.2d 62, 66-67 (Minn. 1993)). Appellant's prior felony convictions had similar impeachment value in helping the jury see his whole person. This factor weighs in favor of admission.

The dates and history of a defendant's convictions may "show a pattern of lawlessness," making them probative of truthfulness. *Id.* Appellant's felony convictions show a pattern of lawlessness. The second factor, then, also weighs in favor of admission.

The more similar a prior conviction is to the charged offense, the more likely the prior conviction will be more prejudicial than probative. *Id.* Other than the firearm conviction that the state gave notice of, all of appellant's prior felony convictions are for controlled-substance crimes. Specifically, they are crimes of possession or possession with intent to sell. The state's theory in this case was that appellant had possession with intent to sell. Because of the similarity between all but one of appellant's prior felony convictions and the alleged offense, the third *Jones* factor weighs against admission.

The fourth and fifth factors weigh in favor of admission if the defendant's credibility is central to the case, which is often true when the defendant's testimony is the only evidence of an asserted defense. *Id.* Here, appellant's defense was based on his assertion that the controlled substances were not his but instead belonged to his accomplice. Appellant's testimony, therefore, was important, and his credibility was central. The fourth and fifth factors also weigh in favor of admission.

Because the district court could have conducted the above *Jones*-factor analysis and still admitted the evidence, the error in not conducting the analysis was harmless.

Affirmed.