STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0664
A08-2187

State of Minnesota,
Respondent,

vs.

Xee Lor,
Appellant,

and

Xee Lor, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 29, 2009
Affirmed
Johnson, Judge

Anoka County District Court
File No. K8-05-7345

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Robert M.A. Johnson, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, 2100 Third Avenue, Suite 720, Anoka, MN 55303 (for respondent)

Bradford W. Colbert, Legal Assistance to Minnesota Prisoners, 875 Summit Avenue, Room 254, St. Paul, MN 55105 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Johnson, Judge.

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

JOHNSON, Judge

Xee Lor pleaded guilty to aiding and abetting second-degree murder, aiding and abetting second-degree assault, and aiding and abetting crimes committed for the benefit of a gang. On appeal, he argues that the district court erred by not allowing him to withdraw his guilty plea, by imposing sentences on his convictions in non-chronological order, and by ordering restitution that is not warranted by his convictions. We affirm.

FACTS

On the evening of February 3, 2005, there was an altercation between two groups of people at Jimmy's Billiards in Columbia Heights. One group consisted of nine members of a gang known as Menace of Destruction (MOD); the other group consisted of persons who were not members of MOD. Shots were fired, and two persons were killed. Other members of MOD have been tried and convicted of various offenses arising from the same incident. *See State v. Vang*, 774 N.W.2d 566 (Minn. 2009); *State v. Yang*, 774 N.W.2d 539 (Minn. 2009); *State v. Her*, No. A08-567, 2009 WL 1181918 (Minn. App. May 5, 2009), *review denied* (Minn. July 22, 2009).

On July 20, 2005, Lor was indicted on twelve counts, including two counts of aiding and abetting first-degree murder. The state later offered Lor a plea agreement in exchange for his testimony against other MOD members. On September 29, 2006, Lor entered an *Alford* plea of guilty to three offenses that were contained in a later-filed

complaint: aiding and abetting second-degree murder, aiding and abetting second-degree assault, and aiding and abetting crimes committed for the benefit of a gang. *See North Carolina v. Alford*, 400 U.S. 25, 38-39, 91 S. Ct. 160, 167-68 (1970); *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977). As part of the plea agreement, Lor agreed that the district court should sentence him on the conviction of aiding and abetting second-degree murder before the conviction of aiding and abetting second-degree assault, waived his right to have a jury trial on any sentencing issues, and agreed to be held jointly and severally liable for any restitution awarded by the district court.

Lor's sentencing was delayed so that he could testify in the trials of other MOD members. But after testifying in one such trial, Lor invoked his Fifth Amendment privilege against self-incrimination and refused to testify in future trials.

Prior to sentencing, Lor made multiple motions, both through counsel and *pro se*, to withdraw his guilty plea and discharge his attorneys. At a hearing in January 2008, Lor withdrew his *pro se* motion to discharge his attorneys, and the district court denied Lor's *pro se* motion to withdraw his guilty plea. The district court then proceeded to sentencing. The district court first imposed a sentence of 366 months of imprisonment on the conviction of aiding and abetting second-degree murder. The district court then imposed a consecutive sentence of 60 months of imprisonment on the conviction of aiding and abetting second-degree assault. The district court also imposed a consecutive sentence of 12 months of imprisonment on the conviction of aiding and abetting crimes committed for the benefit of a gang. Lor filed a notice of appeal from his convictions and

sentence. At Lor's request, this court stayed the appeal to allow Lor to petition for postconviction relief.

Lor filed a postconviction petition in October 2008. He alleged that his sentence was improper, that he received ineffective assistance of counsel, and that the district court improperly accepted his guilty plea. In March 2009, the district court granted Lor's petition in part and resentenced him according to a criminal-history score of zero, reducing his sentence on the conviction of aiding and abetting second-degree assault from 60 months to 36 months. But the district court denied Lor's petition to the extent that he sought to withdraw his guilty plea.

Meanwhile, in July 2008, the district court held a hearing on restitution. In October 2008, the district court issued an order requiring Lor to make restitution to the family of the murder victim and to the three assault victims in the total amount of $10,633.65.

Lor filed a second notice of appeal from the restitution order. This court subsequently reinstated the appeal that Lor had initiated following his conviction and original sentencing, and we consolidated the two appeals.

D E C I S I O N

Lor makes three arguments for reversal. First, he argues that the district court erred by denying his requests to withdraw his guilty plea. Second, he argues that the district court erred by imposing sentence on the conviction of aiding and abetting second-degree murder before imposing sentence on the conviction of aiding and abetting second-

degree assault. And third, he argues that the district court erred by ordering restitution "that went beyond the terms of the plea agreement."

I. Requests to Withdraw Guilty Plea

Lor first argues that the district court erred by denying his requests to withdraw his guilty plea. There are two circumstances in which the Minnesota Rules of Criminal Procedure allow withdrawal of a guilty plea. First, after entry of the guilty plea and before sentence, a defendant may be allowed to withdraw his guilty plea "if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2. Second, "either before or after sentence, upon timely motion, a defendant has a right to withdraw his guilty plea at any time if the defendant can establish at the hearing on the motion to withdraw or at the postconviction hearing 'that withdrawal is necessary to correct a manifest injustice.'" *Butala v. State*, 664 N.W.2d 333, 339 (Minn. 2003) (quoting Minn. R. Crim. P. 15.05, subd. 1). "Manifest injustice occurs if a guilty plea is not accurate, voluntary, and intelligent." *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). We apply an abuse-of-discretion standard of review, both to the district court's pre-sentencing ruling and to its ruling on the postconviction petition. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

Lor has identified two potential bases for withdrawal of his plea. First, he contends that his guilty plea was involuntary because his attorneys applied undue pressure on him to plead guilty. Second, he contends that his guilty plea was not intelligent because he did not understand that he had a right to a jury at sentencing, as provided by *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and because the plea agreement required him to waive that right.

A. Voluntariness of Guilty Plea

To be valid, a guilty plea "must be accurate, voluntary, and intelligent." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). "The voluntariness requirement insures that a guilty plea is not entered because of any improper pressures or inducements." *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005) (quotation omitted).

As stated above, Lor argues that his guilty plea was not voluntary because his attorneys applied undue pressure on him to plead guilty. Lor presented this argument to the district court both in the *pro se* motion that he filed before sentencing and in his postconviction petition. The district court denied his first motion at the beginning of Lor's sentencing hearing on the ground that Lor did not carry his burden of providing the court with a fair and just reason to withdraw his plea. The district court again rejected the argument in its written order denying Lor's postconviction petition. Accordingly, we apply both the fair-and-just standard of rule 15.05, subdivision 2, and the manifest-injustice standard of rule 15.05, subdivision 1. If Lor could prove that his guilty plea was not voluntary, he would satisfy both the manifest-injustice standard and the fair-and-just standard. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007); *Perkins*, 559 N.W.2d at 688.

Lor alleges that his "attorneys told him that, despite his claim of innocence, he had no chance at trial," and that, as a result, he believed that "they would not be able to properly represent him at trial." The transcript of the plea hearing, however, shows that Lor repeatedly stated that he was making a voluntary decision. In response to questioning by the district court, Lor confirmed that he was making the decision to plead

guilty "freely and voluntarily" and that it was a "knowing and voluntary decision." Lor also unequivocally stated that no one, including his attorneys, had made any promises or threats to induce him to plead guilty. In addition, an exchange between the district court and Lor at a December 21, 2007, hearing indicates that Lor simply had a change of heart between his plea and his pre-sentencing motion:

> THE COURT: Mr. Lor, when I last saw you, you told me when I had my conversation with you on the record, that that was your own free will. That was not your attorneys making you do anything. That was what you wanted to do. You told me that when you pled guilty in October of 2006 it was of your own free will. You were under oath at that time when you pled guilty. You kept telling me it was your own free will, nobody had made any promises, nobody had made any threats to you to get you to do something you didn't want to do. And now you're telling me that was -- you were not telling me the truth, or just that you've had a change of heart?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: You've had a change of heart?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Well that's not enough grounds to fire your lawyer. It's also not enough grounds to change your plea or withdraw your plea.

Consistent with this colloquy, the district court concluded that Lor did not carry his burden of providing the court with a fair and just reason to withdraw his plea. A district court does not abuse its discretion by rejecting a criminal defendant's claim that his guilty plea was a result of improper pressure by his attorneys when the record from the plea hearing shows that the defendant was making his own decision. *Ecker*, 524

N.W.2d at 719. In this case, the district court did not abuse its discretion by concluding that Lor did not provide the court with a fair and just reason to withdraw his plea.

When Lor sought plea withdrawal for the second time in postconviction proceedings, the district court concluded that Lor had "not established that any of his asserted reasons create a manifest injustice such that this Court must allow him to withdraw his plea." Specifically, the district court found that Lor had not presented any evidence showing that his guilty plea was involuntary because his attorneys "substituted their will for [Lor's] will." The record supports the postconviction court's finding that Lor was not improperly pressured by his attorneys at the time of the plea. Lor clearly stated during the plea hearing that his guilty plea was "freely and voluntarily" made and that it was not a result of threats or promises by his attorneys. In addition, at the December 21, 2007, hearing, Lor admitted that his decision to plead guilty was a product of his own free will, not improper pressure by his attorneys, and that he was actually requesting to withdraw his guilty plea because of a change of heart. The affidavit that Lor submitted in support of his postconviction petition states, in a conclusory fashion, that he "didn't really understand" the concept of sentencing departures and "didn't understand that I had the right to a jury trial on the issue of whether I possessed a firearm." But, under well-established caselaw, Lor's affidavit cannot overcome the conflicting statements he made during his plea hearing and in the subsequent hearing. *See Ecker*, 524 N.W.2d at 719. Thus, the postconviction court's finding that Lor failed to establish that there was a manifest injustice requiring withdrawal of his guilty plea is not clearly erroneous.

B. Intelligence of Guilty Plea

Lor also argues that his guilty plea was not intelligently entered because he did not understand that he had a right to a jury at sentencing, as provided by *Blakely*, and because the plea agreement required him to waive that right. Lor presented this argument to the district court in his postconviction petition. The district court rejected the argument in its written order denying Lor's postconviction petition. In reviewing a postconviction court's denial of relief, issues of law are reviewed *de novo*, and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). The validity of a *Blakely* waiver presents a question of law, which this court reviews *de novo*. *State v. Dettman*, 719 N.W.2d 644, 648-49 (Minn. 2006); *State v. Hagen*, 690 N.W.2d 155, 157 (Minn. App. 2004).

"To be intelligently made, a guilty plea must be entered after a defendant has been informed of and understands the charges and direct consequences of a plea." *State v. Byron*, 683 N.W.2d 317, 322 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). "The purpose of the requirement that the plea be intelligent is to insure that the defendant understands the charges, understands the rights he is waiving by pleading guilty, and understands the consequences of his plea." *State v. Farnsworth*, 738 N.W.2d 364, 372 (Minn. 2007) (quotation omitted). If a defendant had a full opportunity to consult with counsel before entering a plea, the court "may safely presume that counsel informed him adequately concerning the nature and elements of the offense." *State v. Russell*, 306 Minn. 274, 275, 236 N.W.2d 612, 613 (1975). The fact that a guilty plea is counseled

"justifies the conclusion that counsel presumably advised defendant of his other rights." *State v. Simon*, 339 N.W.2d 907, 907 (Minn. 1983).

Lor contends that the invalidity of his guilty plea is established by the invalidity of his waiver of his *Blakely* rights. "[A] defendant's waiver of the right to a jury determination of aggravating sentencing factors must be made knowingly, voluntarily, and intelligently." *State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006). A waiver is knowing, voluntary, and intelligent, if (1) the defendant is informed of *Blakely* and of his "right to a jury trial on sentencing enhancement factors," (2) the defendant is asked on the record if he has "any questions about the *Blakely* issue" and answers in the negative, and (3) the defendant is asked if he understands he has a right to a jury trial on the aggravating sentencing factors and that he is waiving that right, and he responds in the affirmative. *Id.*

The district court record reveals that Lor's waiver of his right to a jury at sentencing was knowing, voluntary, and intelligent. At the plea hearing, the terms of the plea agreement were reviewed, and the prosecutor expressly stated that Lor would "be specifically waiving the right to have a sentencing jury determine the enhancement of the gun." Lor affirmatively acknowledged that he heard and understood these terms. The district court also informed Lor that "under the terms of this plea agreement, . . . you're giving up your right to have a jury determine whether or not your sentence should be enhanced or made longer." The district court confirmed that Lor did not have any questions and that he understood his rights under *Blakely*. In response to questioning by his attorney and the district court, Lor acknowledged that he understood that he had a

right to a jury trial on sentencing enhancement issues and that he was waiving that right. Lor's affidavit does not attempt to explain the inconsistent statements he previously made to the district court. Thus, the record establishes that Lor was informed of his right to a jury trial on sentencing enhancement factors when he waived that right as part of his plea of guilty.

Lor urges us to conclude that his *Blakely* waiver is invalid because the district court did not ask him the eleven questions prescribed by Minn. R. Crim. P. 15.01, subd. 2 (2006). But that part of rule 15.01 was not yet in effect on the date Lor pleaded guilty. Thus, noncompliance with the version of rule 15.01, subdivision 2, that became effective October 1, 2006, does not establish that Lor's *Blakely* waiver was defective. The version of the rule applicable to Lor's guilty plea provides that the right to a jury trial may be waived by a defendant, "orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(b). Lor in effect received a bench trial on the sentence enhancement, and his waiver was consistent with this rule. Such a waiver "meets the knowing, voluntary, and intelligent requirement." *Thompson*, 720 N.W.2d at 827 (applying rule 26.01, subdivision 1(2)(a), at sentencing).

Thus, the district court did not clearly err in its factual findings and did not abuse its discretion by denying Lor's requests to withdraw his guilty plea.

II. Order of Sentencing

Lor next argues that the district court erred by sentencing him, pursuant to the terms of the plea agreement, on the conviction of aiding and abetting second-degree

murder before sentencing him on the conviction of aiding and abetting second-degree assault. Lor contends that he first should have been sentenced on the conviction of aiding and abetting second-degree assault because that offense was complete as soon as he pointed a gun while the offense of aiding and abetting second-degree murder was not complete until the gun was fired. His argument is based on the following provision of the sentencing guidelines: "When consecutive sentences are imposed, offenses are sentenced in the order in which they occurred." Minn. Sent. Guidelines II.F.

The state argues in response that Lor failed to raise this issue in the district court and, thus, has forfeited it. *See State v. Osborne*, 715 N.W.2d 436, 441 & n.3 (Minn. 2006); *State v. Lopez-Solis*, 589 N.W.2d 290, 293 n.3 (Minn. 1999). It is unclear, however, whether this issue may be forfeited. *See* Minn. Stat. § 244.09, subd. 5 (2004); *cf. State v. Misquadace*, 644 N.W.2d 65, 69-72 (Minn. 2002) (analyzing validity of upward durational departure from sentencing guidelines range). It is common for this court to review for plain error if an argument has not been properly preserved. *See* Minn. R. Crim. P. 31.02. The state also argues that Lor's argument is barred by the invited-error doctrine. But the invited-error doctrine is subject to an exception for plain error. *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). There is no caselaw precisely on point concerning whether Lor's argument is subject to review and, if so, the scope and standard of review. In light of *Goelz* and the plain-error rule, we find it appropriate to review Lor's argument for plain error.

Under the plain-error doctrine, an appellant must show (1) an error, (2) that the error was plain, and (3) that the error affected the appellant's substantial rights. *State v.*

Griller, 583 N.W.2d 736, 740 (Minn. 1998). An error is "plain" if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

The state responds to the merits of Lor's argument by contending that the district court did not impose sentences in non-chronological order because there is no evidence in the record indicating that the assault occurred before the murder. The district court record is not well developed on the issue of the timing of Lor's actions toward his various victims. At the plea hearing, Lor acknowledged that at least four named individuals were victims of the assault that he aided and abetted. But the record does not contain any evidence showing that those four persons were assaulted before the murder was committed. The fact that Lor was convicted not of committing murder and assault but of *aiding and abetting* murder and *aiding and abetting* assault complicates the factual inquiry because it implicates the conduct of other persons. In short, the record does not plainly show that the assaults were committed before the murder was committed. Thus, Lor has failed to convince us that the district court committed plain error by sentencing him on the conviction of aiding and abetting second-degree murder before sentencing him on the conviction of aiding and abetting second-degree assault.

III. Restitution

Lor last argues that the district court erred in its order concerning restitution. Lor does not challenge $5,800.00 in restitution that was attributed to the murder, but he does challenge $4,833.65 in restitution that was attributed to the assaults of three identified persons. Lor contends that the restitution "went beyond the terms of the plea agreement" because the complaint to which he pled guilty does not identify any victim of the offense of aiding and abetting second-degree assault. More specifically, Lor contends that the district court erred by ordering him to make restitution to three assault victims even though he was convicted of only one count of aiding and abetting second-degree assault. We apply an abuse-of-discretion standard of review to a district court's award of restitution. *State v. Tenerelli*, 598 N.W.2d 668, 672 (Minn. 1999).

Lor relies primarily on this court's decision in *State v. Chapman*, 362 N.W.2d 401 (Minn. App. 1985), *review denied* (Minn. May 1, 1985), in which this court held that the restitution ordered went beyond the terms of the plea agreement because it "includes amounts charged in the complaint, on counts dismissed pursuant to the plea, for which the plea itself does not provide a factual basis." *Id.* at 404. But we also have held that if a "victim's losses are directly caused by appellant's conduct for which he was convicted there is nothing improper in ordering restitution." *State v. Olson*, 381 N.W.2d 899, 901 (Minn. App. 1986).

At Lor's plea hearing, the prosecutor identified by name four assault victims who were injured by gunshot wounds. Lor confirmed that he fired his gun at a group that included those four persons. Lor also agreed with the prosecutor's statement that "with

respect to the second degree assault there's substantial evidence that [his] gun may have hit one of those four people." The district court awarded restitution to three of the four injured assault victims. Lor's admissions at the plea hearing provide a factual basis for the district court's decision to award restitution to the three injured assault victims. *See State v. Srey*, 400 N.W.2d 722, 723 (Minn. 1987) (affirming restitution order based on course of conduct that appellant did not deny).

Thus, the district court did not abuse its discretion by awarding restitution.

Affirmed.