STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1909

State of Minnesota,
Respondent,

vs.

Thanantos Lee Ashing,
Appellant.

Filed October 19, 2010
Affirmed in part, reversed in part, and remanded
Ross, Judge

Sherburne County District Court
File No. 71-CR-08-1211

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Elk River, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara Lynne Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Ross, Judge; and Johnson, Judge.

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

ROSS, Judge

Thanantos Ashing was convicted of making terroristic threats after posting a threatening classified advertisement on the internet site Craigslist. Ashing appeals,

arguing that the district court violated his right to counsel by denying his request to relinquish self-representation, that the court deprived him of a fair trial by appointing advisory counsel but limiting her role to replacing him if he became disruptive, that he was erroneously convicted of threatening a crime of violence when the more specific offense of brandishing a replica firearm applied to his conduct, and that the prosecutor committed misconduct by eliciting testimony that he was a pimp in violation of the court's pretrial ruling. Ashing also submits a pro se brief with several additional arguments.

Because Ashing's request to relinquish self-representation was untimely and unreasonable, because the district court properly limited his advisory counsel's role, because the testimony that Ashing was a pimp did not violate the district court's pretrial ruling, and because none of Ashing's pro se arguments calls for reversal, we affirm in part. But because brandishing a replica firearm is merely a subset of the more general offense of threatening a crime of violence and Ashing's conduct violated both laws, we reduce Ashing's threatening-a-crime-of-violence conviction to a conviction based on brandishing a replica firearm and remand for resentencing.

FACTS

Investigator Kevin Grams of the Sherburne County Sheriff's Office assisted with a prostitution sting operation on May 6, 2008. Undercover officers responded to a classified advertisement posted on the Minneapolis erotic services section of craigslist.org. They arranged for the advertised prostitute to meet them in Elk River. D.S. arrived in a car driven by Thanantos Ashing and both were arrested. Police arrested

D.S. for prostitution and Ashing for driving with a cancelled license. Ashing asked for a "break" and complained about being arrested for a "petty driving offense." Investigator Grams took Ashing to the Sherburne County Jail. On the way, Ashing stated that he had "done prison time in Oak Park Heights" and had "gotten away with murder." Ashing was released on May 8.

At 5:36 p.m. that day, Investigator Grams's mother received a voicemail message from a male caller. The caller stated, "Yeah, this is Thanantos Ashing. Are you any relation to Kevin Grams? Kevin Grams owes me about $1,000 right now. So, ah, somebody needs to pay that money to me." The phone's caller identification feature indicated that the caller's phone number was Ashing's. Investigator Grams requested increased police presence in his mother's neighborhood.

On May 15, the Sherburne County Sheriff's Office was contacted about another advertisement in the Minneapolis erotic services section of Craigslist. This one was titled "sherburne county running stings" and stated, "they have nothing better to do to generate revenue in hicksville dont waiste your time, entrapment for a petty offences such losers!!!! Me and my little friend will be to see ya was that momma or autie we called punk!!!!" It also contained a self-photograph of a person, whose face was obscured by the camera's flash, pointing a handgun at the viewer. The time stamp on the advertisement indicated that it had been posted on May 15. A Sherburne County Sheriff's investigator contacted Craigslist and learned that the author's internet service provider was Qwest. The investigator contacted Qwest and learned that the computer

from which the posting originated was registered to Ashing. Another investigator applied for a warrant to search Ashing's Minneapolis residence.

Police executed the warrant on May 16 and arrested Ashing. He spontaneously told officers that he was sorry, that he "didn't mean it," and that "now things are even with Sherburne County." Police seized a computer and a replica handgun resembling the gun displayed in the threatening Craigslist advertisement. A forensic examiner determined that the computer had accessed the Craigslist posting on May 15 and found copies of the photograph and text on the computer. Ashing's bathroom visually matched the photograph's background.

The state charged Ashing in Sherburne County with making terroristic threats. Ashing initially retained a private attorney, but the court permitted the attorney to withdraw in March 2009 for lack of payment. Ashing demanded a speedy trial and was assigned a public defender, who moved to dismiss the complaint for lack of probable cause and improper venue, to suppress Ashing's statements at the time of his arrest, and to change venue. But at a later hearing on these motions, Ashing informed the court that he wished to discharge the public defender and proceed pro se. Disregarding the court's warnings of the difficulties and risks of representing himself, Ashing persisted. The court granted Ashing's motion and appointed advisory counsel to take over representation during trial if needed.

The court held a contested omnibus hearing on Ashing's motions on April 28, 2009. Ashing appeared pro se. He had not subpoenaed witnesses and had difficulty examining the state's witnesses and offering exhibits into evidence. Ashing asked the

court to subpoena witnesses for him, and the court explained that it would not independently issue subpoenas and that he would have to apply for them. With Ashing's agreement, the court set trial for May 26, approximately three weeks beyond the 60-day presumptive deadline for a speedy trial. And the court scheduled the omnibus hearing to continue on May 19 to take testimony from additional witnesses.

Ashing had not successfully subpoenaed witnesses by the second day of the omnibus hearing on May 19. When the court asked him whether he had any evidence to submit, Ashing stated, "Well, I submitted subpoenas. Have any of my subpoenas been sent out?" The court replied that it was Ashing's responsibility to serve subpoenas. Ashing explained that he had mailed subpoenas to the court and that he would need the clerk of court to sign them. He indicated that he wanted to call Craigslist and T-Mobile representatives to testify, as well as some police officers the state had not called. The court responded, "Mr. Ashing, you chose to represent yourself. As I told you at the beginning, you'll have to comply with the court rules and regulations."

Near the end of the hearing, Ashing asked for the public defender to be reappointed to represent him. The following exchange occurred:

> THE COURT: You had me discharge the public defender, and I questioned you very carefully about your thoughts and whether you had considered that carefully. I do not know whether the public defender is available to assist you at trial next week. And I'm not going to continue this matter if they're not available because this was of your own request and at your own making, Mr. Ashing.
>
> But I will inquire as to whether the public defenders are available to assist you at trial next week. If that's not possible, are you asking for a continuance in light of your speedy trial demand?

> THE DEFENDANT: Yes.
>
> THE COURT: So, you're telling me that if you can't get counsel in the next week, you want to waive speedy trial demand in order to have counsel to assist you through this process?
>
> THE DEFENDANT: I don't really want to waive the speedy trial demand.
>
> THE COURT: Well, there are your choices, sir. . . . I will reappoint the office of the public defender to represent you. However, if counsel are not available to assist you at trial next week, then your choice is to go forward without representation or to . . . waive your speedy trial demand and reschedule this matter so counsel can be prepared to assist you.
>
> THE DEFENDANT: I need at least like two more months because I'll go myself, but I just need to figure out how to get these warrants, these—
>
> THE COURT: Your request for a continuance to represent yourself is denied. So, trial will proceed next week as scheduled in this matter. Are you asking me to reappoint the office of the public defender?
>
> THE DEFENDANT: I'm just asking somebody to send out the subpoenas to subpoena the people to be at trial that I want to be at trial.
>
> THE COURT: Are you asking me to reappoint counsel in this matter?
>
> THE DEFENDANT: Yeah.

The court reappointed the public defender's office contingent on its having an attorney available for trial the next week. And the court stated that if a public defender was not available and Ashing did not waive his speedy-trial demand to allow the public defender time to prepare, Ashing would be required to represent himself at trial. The court denied all but one of Ashing's various pretrial motions, deferring a decision on the motion to change venue.

Ashing appeared pro se on the day of trial. The court began by recounting its prior ruling on Ashing's motion to reappoint the public defender. The court explained its

understanding that the public defender's office did not have an attorney available and prepared to assist Ashing. Ashing remained unwilling to waive his speedy trial demand and indicated that he wished to represent himself at trial.

Before jury selection, the court considered *sua sponte* whether evidence of the prostitution sting that resulted in Ashing's arrest for driving with a cancelled license should be presented to the jury. The court stated that it would permit reference to the undercover operation as being related to prostitution. But the court required the prosecution to "expressly declare through testimony of its witnesses that Mr. Ashing was never arrested, nor was there a bas[i]s for arrest for a prostitution matter regarding Mr. Ashing."

Just before trial began, Ashing again inquired about the status of the subpoenas he had mailed to the court for signing. The court stated that the parties were responsible to properly serve subpoenas, that the court had no involvement in this process, and that the court did not know whether Ashing went through the proper process. Ashing responded, "I don't think that it's fair that I have to go to trial without being able to have witnesses subpoenaed and to testify." But when the court asked him, "What are you asking for today, Mr. Ashing?" he replied only, "I just want it to be noted on the record, I mailed you six subpoenas. . . . And I never got none of the subpoenas back signed by your clerk. And I never got to subpoena my witnesses into court." The court again inquired, "Are you asking for anything today?" and Ashing responded by shaking his head no.

The case was tried. The prosecutor asked Investigator Grams how he came in contact with Ashing. Grams testified, "Mr. Ashing was the party that drove the prostitute

to the undercover apartment. Through our investigation it was kind of learned that he was acting as a pimp to the prostitute." Ashing objected, stating, "There's no foundation for that. I have not been charged with any type of charge like that." The district court sustained the objection and instructed the jury to disregard Grams's statement.

Ashing did not call any witnesses or testify himself. The jury found him guilty as charged, and the district court sentenced him to the presumptive term of 30 months in prison. He now appeals, offering both a brief prepared on his behalf by the public defender and his own pro se brief.

D E C I S I O N

I

Ashing first argues that the district court's denial of his request to relinquish self-representation violated his Sixth Amendment right to counsel. The Sixth Amendment guarantees a criminal defendant the "assistance of counsel for his defense." U.S. Const. amend VI; *cf.* Minn. Const. art. I, § 6 (same). But a criminal defendant also has the constitutional right to represent himself and may waive his right to counsel. *State v. Richards*, 552 N.W.2d 197, 205 (Minn. 1996) (citing *Faretta v. California*, 422 U.S. 806, 834−35, 95 S. Ct. 2525, 2540−41 (1975)). Once a defendant chooses to represent himself by waiving his right to counsel, he will not be permitted to relinquish self-representation "unless, in the trial court's discretion, his request is timely and reasonable and reflects extraordinary circumstances." *Id.* at 206 (quotation omitted).

The district court's denial of Ashing's request to relinquish self-representation was not an abuse of discretion. Ashing waived his right to counsel over the district court's

warnings that he would be held to the same standards as an attorney, and he does not claim that his waiver was invalid. But then, just one week before trial, he requested that the public defender be reappointed. The court provisionally reappointed the public defender. But anticipating that the public defender would need additional time to prepare for trial, the court conditioned the reappointment on either (1) the public defender's being ready to go to trial as scheduled or (2) Ashing's waiving his speedy trial demand and accepting a continuance so that the public defender could prepare.

The court's decision to condition Ashing's relinquishment of self-representation on waiver of his speedy trial demand appears to reflect the court's assessment that the request was neither timely nor reasonable absent an agreement to forgo a speedy trial to allow the newly reappointed public defender time to prepare. Ashing distinguishes his case from *Richards* and *State v. Clark*, two cases in which the supreme court upheld the denial of a defendant's request to relinquish self-representation. In *Richards*, the district court denied a request made "[a]fter extensive pretrial hearings and over six weeks of jury selection." 552 N.W.2d at 202. In *Clark*, the district court denied a request made after the defendant experienced difficulty cross-examining a state witness at trial. 722 N.W.2d 460, 463 (Minn. 2006). The fact that relinquishment of self-representation was properly denied in those cases, in which the request came later than in this case, does not mean that the district court's denial here was an abuse of discretion.

Ashing argues that waiving his right to a speedy trial was not necessary because he requested a two-month continuance to prepare to go to trial by himself. But Ashing's refusal to withdraw his speedy-trial demand to allow the public defender to prepare for

trial preserved the speedy-trial issue for possible appeal. *See State v. Windish*, 590 N.W.2d 311, 315−16 (Minn. 1999) (stating that length of delay between speedy-trial demand and trial is a factor in determining speedy-trial violation and that delay beyond 60 days raises presumption of violation). Ashing demanded a speedy trial on March 5, 2008, and his trial began on May 26, 2008, already a delay of more than 60 days. From the district court's perspective, obtaining Ashing's waiver would have been desirable because it would have prevented Ashing from both causing a substantial delay and relying on the delay to successfully appeal his conviction based on a speedy-trial violation.

Ashing argues finally that, given his willingness to delay trial to prepare on his own, his simultaneous unwillingness to waive his speedy-trial demand showed that he was "clearly confused" about the import of a speedy-trial waiver, and he complains that the district court did nothing to clear up the confusion. The district court had no basis to perceive Ashing's alleged confusion. Ashing had the opportunity to consult with a public defender before his final decision to proceed to trial pro se. A public defender's representative appeared on the morning of trial and told the court, "Everything that [Ashing] had to say is true. I did meet with him on Thursday. And he did not wish to waive his speedy trial." The district court could presume that Ashing had discussed any speedy-trial issues with counsel, and Ashing offers no factual basis to indicate that he was confused in his decision not to waive his right to a speedy trial.

II

Ashing argues that the district court deprived him of a fair trial by limiting the role of his advisory counsel. The district court may appoint advisory counsel to assist a pro se defendant, either because the court is concerned about the fairness of the process or because the court is concerned about delays in the trial caused by the defendant's potential disruptiveness. Minn. R. Crim. P. 5.04, subd. 2. But a pro se defendant has no constitutional right to advisory counsel. *Clark*, 722 N.W.2d at 466. The district court's decision whether to appoint advisory counsel is reviewed for an abuse of discretion. *See* Minn. R. Crim. P. 5.04, subd. 2 (stating that district court "*may* appoint [advisory counsel] to assist" a pro se defendant (emphasis added)); *Clark*, 722 N.W.2d at 465−66 (noting that the decision whether to appoint advisory counsel is a matter for judicial discretion).

The district court's appointment and limitation followed rule 5.04 exactly, and therefore was not an abuse of discretion. Ashing relies on rule 5.04, subdivision 2(1), which provides that when the district court appoints advisory counsel because of concerns that a pro se defendant will not be able to adequately represent himself, the defendant "retains the right to decide when and how [to use] advisory counsel." But the district court did not appoint counsel based on subdivision 2(1). It made clear that it was appointing counsel under subdivision 2(2), solely to take over full representation if Ashing became disruptive. Subdivision 2(2) does not contain language paralleling that of subdivision 2(1) allowing the defendant to decide how to make use of advisory counsel. Instead, it specifically limits the role directed by the appointment, which is to "assume

full representation" if the defendant becomes disruptive. Ashing conceded at oral argument that the right to advisory counsel that he is asserting derives from rule 5.04, subdivision 2 and not any constitutional source. The district court was within its discretion in appointing advisory counsel and limiting counsel's role to the specific purpose contemplated by rule 5.04, subdivision 2(2).

III

Ashing argues that the statute under which he was convicted (threatening a crime of violence with purpose to terrorize) conflicts with a related statute setting forth a more specific offense (displaying a replica firearm in a threatening manner) and that the specific statute with its lesser penalty controls. "The basic rule is that absent legislative intent to the contrary . . . , the prosecutor may prosecute under any statute that the defendant's acts violate without regard to the penalty." *State v. Chryst*, 320 N.W.2d 721, 722 (Minn. 1982). "But when two criminal statutes, one general and one specific, conflict because they have the same elements but differing penalties, the more specific statute governs over the more general statute, unless the legislature manifestly intends for the general statute to control." *State v. Craven*, 628 N.W.2d 632, 635 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001). Issues of statutory interpretation are questions of law that this court reviews de novo. *Id.* at 634.

Caselaw establishes that when one offense is simply a subset of another more general offense, the defendant can be prosecuted only for the more specific offense. *See State v. Kalvig*, 296 Minn. 395, 400−01, 209 N.W.2d 678, 681 (1973) (holding that parties who fraudulently obtained welfare could be prosecuted only for welfare fraud and

not for theft); *Craven*, 628 N.W.2d at 637 (holding that felony-murder charge predicated on felony of fleeing peace officer "would swallow up the more specific charge of fleeing [a peace officer] causing death"), *review denied* (Minn. Aug. 15, 2001); *see also State v. Lewandowski*, 443 N.W.2d 551, 554 (Minn. App. 1989) (holding that when defendant could arguably be prosecuted either for escape from custody or failure to appear, defendant could be convicted only of the offense with the lower penalty). But when two offenses merely overlap in the conduct they prohibit, the rule does not apply. *See Chryst*, 320 N.W.2d at 722 (holding that defendants who sold cars after altering the odometers could be prosecuted for either theft by swindle or odometer tampering because, while defendants' acts in that case happened to violate both statutes, it was possible in hypothetical scenarios to violate each statute without simultaneously violating the other).

Here, display of a replica firearm is merely a subset of the more general threatening-a-crime-of-violence offense. Minnesota Statutes section 609.713 (2008) sets forth both offenses. Subdivision 1 provides, "Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror . . . may be sentenced to imprisonment for not more than five years . . . ." Crimes of violence are defined in Minnesota Statutes section 609.1095 (2008) and include various degrees of murder, manslaughter, assault, and harassment, among other offenses. And Subdivision 3 provides, "Whoever displays, exhibits, brandishes, or otherwise employs a replica firearm . . . in a threatening manner, may be sentenced to imprisonment for not more than one year and one day . . . if, in

doing so, the person either . . . causes or attempts to cause terror in another person; or . . . acts in reckless disregard of the risk of causing terror in another person."

The state argues that if Ashing had exhibited a replica firearm without threatening to commit a statutorily enumerated "crime of violence," he could only have been charged under subdivision 3. But the state could provide no example of conduct that would satisfy subdivision 3's definition but not also satisfy subdivision 1.

There may be some theoretical distinction between displaying a replica firearm in a threatening manner and threatening a crime of violence. But in practice the distinction is too hairsplitting to be given effect and the state's inability to describe any useful example confirms our impression. Because displaying a replica firearm is merely a subset of threatening a crime of violence, we reduce Ashing's conviction from the latter offense to the former, *see Lewandowski*, 443 N.W.2d at 554 (reducing appellant's conviction from escape from custody to "lesser included offense of failure to appear"), and remand to the district court for resentencing, *see* Minn. R. Crim. P. 28.02, subd. 12(c).

IV

Ashing argues that the prosecutor committed misconduct either by intentionally eliciting inadmissible testimony that Ashing was a pimp or by failing to instruct Investigator Grams not to blurt out the "highly prejudicial testimony" referring to Ashing as D.S.'s "pimp." "It is improper for a prosecutor to ask questions that are calculated to elicit or insinuate an inadmissible and highly prejudicial answer." *State v. Henderson*, 620 N.W.2d 688, 702 (Minn. 2001). Prosecutors also have a duty to prepare witnesses so

that they do not give improper testimony. *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). This court will reverse if "the misconduct was so prejudicial as to have substantially affected the jury and denied appellant a fair trial." *Id.*

The state argues that Ashing's claim of prosecutorial misconduct should be reviewed, if at all, only for plain error because although Ashing did object to the testimony at trial, he did not object on the basis he now articulates. Ashing argues on appeal that the testimony that he was a pimp is highly prejudicial and violated the court's pretrial evidentiary ruling, but at trial he argued only that the testimony lacked foundation. Appellate courts review claims of unobjected-to prosecutorial misconduct under a modified plain-error test, which requires the appellant to show error that was "plain." *State v. Jones*, 772 N.W.2d 496, 506 (Minn. 2009). The burden then shifts to the state to show that the error did not affect the appellant's substantial rights. *Id.* We conclude that there was no misconduct and therefore need not decide whether to review for plain error.

Ashing maintains that the prosecutor's eliciting testimony that Ashing was a pimp was misconduct because the testimony violated the court's earlier ruling. He argues that "the misconduct was clear" because the prosecutor "was explicitly warned not to introduce testimony that appellant was involved in [D.S.'s] prostitution offense." This mischaracterizes, slightly, the district court's ruling. The court stated that it would permit the state to refer to the fact that the undercover operation that resulted in Ashing's initial arrest was related to prostitution. Ashing did not object to this restriction. The only constraints the court put on the prosecutor was a requirement that she "expressly declare

through testimony of [her] witnesses that Mr. Ashing was never arrested, nor was there a bas[i]s for arrest for a prostitution matter regarding Mr. Ashing." Ashing does not contest the propriety of this ruling, and the prosecutor did expressly elicit testimony that Ashing was not arrested for prostitution. The prosecutor's asking Investigator Grams how he came into contact with Ashing was not misconduct. The answer was inappropriate, and the district court directed the jury to disregard it.

V

In his pro se brief, Ashing raises many arguments, none of which compels reversal.

1. Ashing's arguments pertaining to his conviction of threatening a crime of violence are moot.

At trial, the state's theory was that Ashing violated Minnesota Statutes section 609.713, subdivision 1 by threatening to commit second-degree assault—assault with a dangerous weapon. Ashing argues that the district court improperly instructed the jury that second-degree assault requires intent to cause fear and that the evidence was insufficient to prove that he threatened to commit assault with a dangerous weapon because he used a replica firearm. Because we reduce Ashing's conviction to brandishing a replica firearm, his arguments relating to his threatening-a-crime-of-violence conviction are moot.

2. Venue was proper in Sherburne County.

Ashing argues that venue was not proper in Sherburne County because the threat was posted from a computer in Hennepin County to craigslist.org, a public website. A

criminal defendant has the right to a trial in the county where the offense was committed. Minn. Const. art. I, § 6; Minn. R. Crim. P. 24.01. This includes any county where he committed any element of the offense. Minn. Stat. § 627.01, subd. 2 (2008); *State v. Hanson*, 285 N.W.2d 483, 486 (Minn. 1979). The terroristic threats offense requires communication of the threat to the victim as an element. *State v. Schweppe*, 306 Minn. 395, 399−400, 237 N.W.2d 609, 613 (1975). Investigator Grams received the threat while he was in Sherburne County, and venue was therefore proper in that county.

3. The district court did not improperly admit *Spreigl* evidence.

Ashing challenges the district court's admission of alleged *Spreigl* evidence, including testimony that (1) Ashing was a pimp and drove a prostitute to Elk River, (2) Ashing told police that he had done time in Oak Park Heights and had gotten away with murder, and (3) Ashing was arrested and jailed for driving with a cancelled license. Evidence of other crimes or bad acts is inadmissible to prove that a defendant acted in conformity with his character. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). But evidence of offenses or other actions that are a "part of the immediate episode for which defendant is being tried" is admissible. *Spreigl*, 272 Minn. at 497, 139 N.W.2d at 173. The evidence whose admission Ashing challenges relates to the immediate episode for which he was charged. The district court limited the testimony and sustained Ashing's objection to the "pimp" reference, and did not err by admitting the other evidence challenged by this argument.

4. The district court's pretrial fact findings did not violate Ashing's confrontation right.

Ashing challenges fact findings in the district court's May 24 order denying his motion to dismiss. Ashing appears to argue that the court relied on hearsay statements from witnesses who did not appear at the omnibus hearing, violating his confrontation right. A defendant has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. But this right applies only to trial testimony. *See State v. Koonsman*, 281 N.W.2d 487, 490 (Minn. 1979) ("The objective[] of the confrontation clause . . . [is] to . . . enable the defendant to examine witnesses whose statements are used against him *at trial*." (emphasis added)). The state did not offer hearsay statements from these witnesses at trial, and Ashing's argument fails.

5. Police had probable cause to search Ashing's residence.

Ashing re-raises an argument considered by the district court in denying his motion to dismiss. He asserts that the statement in the warrant application that police obtained information from Qwest identifying his computer as the source of the posting is false and argues that without this information, there was no probable cause to support the search warrant. The district court concluded that there was probable cause even without this information, and we agree. The issuing magistrate would still have been informed of all the background information leading police to suspect Ashing. And Ashing's home address was obtained from the Department of Motor Vehicle records and confirmed by tax records and publically available telephone listings.

6. Police officers' conflicting testimonies do not entitle Ashing to a new trial.

Ashing argues that inconsistent testimony by police in a different case involving him entitles him to a new trial. Ashing attaches to his brief transcripts purporting to describe a January 29, 2009, hearing in Hennepin County. He points out that at the omnibus hearing, Investigator Nikol Blood testified that Ashing was not read his *Miranda* rights upon his May 16 arrest, while in the earlier Hennepin County proceeding, Blood testified that another officer told Ashing he had the right to remain silent. And Ashing notes that Sergeant Blair Fildes testified that Ashing was not asked questions, while in the earlier proceeding, Fildes testified that another officer asked Ashing if there were any guns in the immediate area.

Ashing's argument faces several insurmountable difficulties. First, the inconsistent statements from the Hennepin County proceeding are not part of the record in this appeal. *See* Minn. R. Crim. P. 28.02, subd. 8 (stating that the record on appeal consists of the documents filed in the trial court, offered exhibits, and the transcript of the proceeding); *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001) ("The general rule is that this court will not consider evidence outside the record."). Second, the statements are not newly discovered evidence because the Hennepin County proceeding occurred in January 2009—before Ashing's omnibus hearing in this case. And third, whether or not Ashing was read his *Miranda* rights is irrelevant because he was not interrogated. Ashing does not provide any other basis for the relevance of the inconsistent statements.

7. The prosecutor committed no discovery violations.

Ashing argues that the state failed to provide him with complete discovery and that this entitles him to a new trial. But Ashing's claim lacks support in the record. On the first day of the omnibus hearing, Ashing claimed that he had not received his discovery materials, but the prosecutor stated that she had supplied him with an additional complete copy of all discovery. Ashing could not identify any specific discovery document in the prosecutor's possession that she had not given him and stated that he had no reason to believe that the prosecutor had withheld anything. On the second day of the hearing, Ashing claimed that he had not received part or all of several police reports. The prosecutor again stated that she had supplied Ashing with a complete copy of all discovery.

Ashing also claims for the first time that the prosecutor withheld testimony of D.S. and attaches what appear to be notes of D.S.'s testimony taken on May 27, 2009. May 27 was the day that D.S. testified in Ashing's trial, and there is no basis to conclude that these notes were written before trial. They do not constitute discoverable material.

8. Ashing waived the issue of whether the district court improperly denied his request for subpoenas.

Ashing argues that he was wrongfully hampered by the district court from calling witnesses in his defense. A defendant has the right to compulsory process for obtaining witnesses. U.S. Const. amend. VI; Minn. Const. art. I, § 6. A district court has some responsibility to respond to a pro se defendant's request for subpoenas. *See* Minn. R. Crim. P. 22.01, subd. 3 (stating that subpoena may not be issued without court order and

pro se defendant may make oral request to court for subpoenas); Minn. Stat. § 611.06 (2008) (requiring court administrator to issue to pro se defendant as many blank subpoenas as are approved by order of court). Although the district court seems to have acted under the mistaken belief that it had no obligation to respond to Ashing's requests for subpoenas, Ashing confirmed at trial that he was seeking no relief for his inability to subpoena witnesses and that, for trial, there was nothing he was asking the district court to do regarding his subpoenas. He therefore waived the issue.

Ashing orally requested subpoenas on both days of his omnibus hearing and submitted six subpoenas to the district court for signing on the second day of the hearing. The district court did not respond to Ashing's requests other than to tell him that he needed to follow the proper procedure for obtaining subpoenas. But Ashing did follow rule 22.01, subdivision 3's procedure by providing the subpoenas for signature and then orally requesting that they be processed, and the district court's response was inadequate. Ashing's appeal, however, appears to contest only the district court's failure to allow him to subpoena witnesses for trial. On the day of trial, Ashing stated that he felt it was unfair that he would not be allowed to call witnesses to testify at trial. But when the court followed up by asking Ashing if he was seeking any relief, he confirmed that he was not. Because Ashing does not appeal the pretrial denial of subpoenas, and because he confirmed that he was seeking no relief for his inability to subpoena witnesses for trial, the district court's inadequate response to Ashing's subpoena requests provides no basis for reversal.

9. There was no basis for a jury instruction on accomplice testimony.

Ashing argues that the district court should have given the jury an instruction stating that it could not find him guilty based on D.S.'s testimony without corroboration by other evidence that tended to convict him. D.S., the prostitute whom Ashing drove to the Elk River sting, was living with him in May 2008. She testified that she did not post the threatening statement, that no one else had access to Ashing's computer, and that Ashing was the person who appeared in the threatening photograph. An accomplice-testimony instruction must be given in any case where a witness "might reasonably be considered an accomplice to the crime." *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989).

There is no reasonable basis to consider D.S. a potential accomplice. Although she was arrested for prostitution by Sherburne County investigators, giving her a potential motive for posting the threat, and she may have had access to Ashing's computer, all evidence points to Ashing as the author of the threatening posting. The posting referred to petty offenses, and Ashing had complained at the time of his arrest that he was being arrested for a petty driving offense. The posting also referred to the voicemail received by Investigator Grams's mother. And when police executed the search warrant, Ashing spontaneously told officers that he was sorry, that he "didn't mean it," and that "now things are even with Sherburne County." The district court did not err by failing to give an unrequested accomplice-testimony instruction.

10. Neither the judge nor the prosecutor committed misconduct.

Ashing makes various claims of judicial and prosecutorial misconduct. All of these claims either relate to previously discussed, unpersuasive arguments or lack legal argument or citation to authority. We deem these claims waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) ("The brief contains no argument or citation to legal authority in support of the allegations and we therefore deem them waived.").

11. Ashing's criminal history score was properly calculated.

Ashing argues that the district court erroneously gave him an additional 1.5 criminal history points for an offense he committed after May 15, 2008. However, Ashing's sentencing worksheet shows that the disposition date of this offense was February 2009. Ashing does not appear to dispute that he was convicted of this offense before sentencing in the present case. A defendant's criminal history score includes his prior felony record. Minn. Sent. Guidelines II.B. Ashing's prior conviction can factor into his criminal history score even though the conduct that supported that conviction occurred before the conduct at issue in this case.

Affirmed in part, reversed in part, and remanded.