STATE OF MINNESOTA
IN COURT OF APPEALS
A10-390

State of Minnesota,
Respondent,

vs.

Dominic Junior Barry,
Appellant.

Filed March 8, 2011
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CR0930955

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

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

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Wright, Judge; and Bjorkman, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of aggravated first-degree robbery, arguing that the district court failed to obtain a valid waiver of his right to counsel and abused its discretion by excluding certain witnesses and testimony. Appellant also argues that he received ineffective assistance of counsel. We affirm.

FACTS

Geramy Hopson went into a Brooklyn Park bank and cashed a check for more than $7,000. He made no attempt to conceal the fact that he was receiving a large amount of cash. Later that day, Hopson was robbed by three men. Hopson reported the robbery. He told officers that one of the robbers had been in the bank at the time he cashed the check, and he gave officers the license-plate numbers of the vehicle in which the robbers left the scene of the robbery.[1]

On the day of the robbery, police had contact with appellant, Dominic Junior Barry. When the police contacted Barry, he was in possession of $2,948 in cash. Hopson identified Barry from a photographic lineup as a person who had been in the bank when Hopson cashed the check and as one of the men who had robbed him. A witness to the robbery also identified Barry as one of the robbers. Bank surveillance tapes show Barry in the bank at the time Hopson cashed the check. Barry admitted being in the bank and

[1] Hopson initially gave officers a false name because he had an outstanding warrant. He was arrested and later convicted for giving false information to a police officer.

having left the bank in a vehicle with license-plate numbers matching the plate numbers of the vehicle in which the robbers reportedly fled. Barry denied committing the robbery.

Hopson later wrote a letter stating that he had changed his mind about Barry's involvement in the robbery and was now "more than 100 percent certain" that Barry was not the man who robbed him. But at trial, Hopson again identified Barry as one of the robbers and explained that he had written the letter because he had been "pesterized" by a long-time friend and by Barry to write the letter. He also stated that he had reason to believe that Barry would give the money back to him if he wrote the letter.

A public defender was appointed to represent Barry, but Barry discharged this attorney prior to the probable-cause hearing because Barry had obtained counsel from the Legal Rights Center. At a pretrial hearing, Barry continuously interrupted his attorney and addressed the district court directly, despite admonitions from the district court. At a subsequent pretrial hearing, Barry's attorney moved to withdraw, citing a conflict of interest that counsel did not want to state on the record. After a conference in chambers, the district court granted the motion, and at Barry's request, reappointed the original public defender for purposes of the Rasmussen hearing.

At a subsequent hearing, the public defender's status was clarified: the public defender agreed to represent Barry and Barry agreed to the representation, but due to the prosecutor's schedule, the Rasmussen hearing had to be rescheduled for the morning of trial. Barry objected to the change. The district court explained that it was common in Hennepin County for such hearings to occur on the morning of trial, but Barry continued to address his objections to the district court.

The issues addressed at the hearing, which occurred on the morning of trial, were the admissibility of the photo identification of Barry and Barry's statement to the police. Barry insisted on personally questioning witnesses and addressing the district court directly. At counsel's request, the district court instructed Barry that it is the role of counsel to decide how a case is presented. Barry inquired whether he could ask questions if he said he did not want counsel to represent him. The district court told Barry that if he tried the case himself, it would be his responsibility to know the rules of court and try the case according to the rules. Barry continued to address the district court directly and attempted to raise issues not involved in the hearing. The district court concluded the hearing and took the issues of identification evidence and admission of Barry's statement under advisement.

Prior to trial, the district court ruled that the photo identification of Barry and Barry's statement to the police would be admitted during trial, but excluded references to Barry's contact with police on the day of the robbery. During a recess, Barry discussed self-representation with his public defender. When court reconvened, Barry's counsel told the district court that Barry wanted to proceed pro se. The district court verified that Barry was making this request freely and voluntarily and appointed the public defender as advisory counsel.

The district court described the trial process to Barry and answered his questions. The district court told Barry that it could not advise him about the case itself, that Barry would have to make tactical decisions about how to try the case, and that there was an advantage to having an experienced attorney. The district court warned Barry that if he

said "the wrong thing, it could hurt [him]." After discussing the requirements of presenting a case without an attorney, the court asked, "[t]hat's your final decision?" Barry said that it was.

Before the jurors were brought in for voir dire, Barry disclosed witnesses not previously disclosed to the state. Barry asserted that certain witnesses would support his alibi defense, which also had not been disclosed to the state. Barry proposed that other previously undisclosed witnesses would testify about Hopson's gang affiliation and vendetta against people who, like Barry, were new to the community. Barry also proposed to introduce Hopson's retraction letter. The state objected. The district court held that Barry could testify about where he was when the robbery occurred and could introduce Hopson's retraction letter, but that he could not present undisclosed alibi witnesses and could not mention Hopson's alleged gang affiliation or present witnesses to establish the alleged gang affiliation and prior bad acts of Hopson.

The district court explained to Barry that he could demand presentation of the evidence and achieve a mistrial, in which case another trial would be scheduled more than two months later, or Barry could proceed based on the district court's evidentiary rulings. Barry objected to the alternatives offered, asserting that any failure of notice was due to his former lawyer's trial strategy and that he was unfairly being denied the right to a full defense. But Barry agreed to proceed with trial as scheduled. Barry represented himself at trial. Barry cross-examined Hopson, who denied any contact with Barry prior to the day of the robbery. Barry did not testify. The jury found him guilty as charged. The district court sentenced Barry to 68 months in prison. Barry appeals his conviction,

arguing that his waiver of counsel was not valid, he received ineffective assistance of counsel, and the district court improperly excluded evidence.

D E C I S I O N

I. Waiver of counsel

A. Standard of review

Barry first argues that the district court erred when it allowed him to proceed without the assistance of counsel because the district court failed to obtain a valid waiver of his constitutional right to counsel. A reviewing court will only overturn a district court's finding of a valid waiver of a defendant's right to counsel if that finding is clearly erroneous. *State v. Camacho*, 561 N.W.2d 160, 168 (Minn. 1997).

B. Waiver analysis

The United States Constitution guarantees criminal defendants the right to an attorney. *Gideon v. Wainwright*, 372 U.S. 335, 343–45, 83 S. Ct. 792, 796–97 (1963). But "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533 (1975). The district court must ensure that a defendant waiving the right to counsel "enter on the record a voluntary and intelligent written waiver of the right to counsel." Minn. R. Crim. P. 5.04, subd. 1(4). "If the defendant refuses to sign the written waiver form, the waiver must be made on the record." *Id.* Rule 5.04, subd. 1(4), contains a list of specific information that the district court "must advise the defendant of" before accepting a waiver of counsel. *Id.* In this case, the district court failed to follow the rule; Barry was not asked to provide a written

waiver of his right to counsel and there is no record that the district court advised Barry of any of the factors listed in the rule.

Notwithstanding the requirements of Rule 5.04, subd. 1(4), this court has concluded that the determination of whether a waiver of counsel is valid in a criminal case depends on the specific facts of each case. *See State v. Garibaldi*, 726 N.W.2d 823, 827–29 (Minn. App. 2007) (noting that after the 1999 adoption of rule 5.02,[2] subd. 1(4), the supreme court continued to cite with approval pre-rule cases stating that a criminal defendant's waiver of his constitutional right to counsel may be valid even though the district court failed to follow a particular procedure).

In *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995), the supreme court concluded that a defendant's waiver of counsel was constitutionally valid without a record of a detailed colloquy discussing waiver. The supreme court noted that "[t]his is not a case in which the record is silent on whether defendant knowingly and voluntarily waived his right to counsel," noting that Brodie had been given counsel, fired counsel knowing that he would have to represent himself, and had a public defender appointed as standby counsel at trial. In *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998), the supreme court found a waiver of counsel valid where defendants were given counsel but fired counsel after becoming fully aware of the consequences. The supreme court stated:

> When a defendant has consulted with an attorney prior to waiver, a trial court could "reasonably presume that the benefits of legal assistance and the risks of proceeding

[2] In 2010, rule 5.02 was renumbered as 5.04, and while the rule was altered slightly, the changes made to the language did not impact the substance of the renumbered rule. *See* Minn. R. Crim. P. 5.04 (2010).

> without it had been described to the defendant in detail by counsel."

Id. (citation omitted). Similarly, in this case, Barry and the district court engaged in several colloquies about the role of counsel, the importance of counsel, and the risks of self-representation. The record reflects that Barry consulted with counsel before having counsel tell the district court that he wanted to proceed pro se, and the district court appointed counsel to be standby counsel during the trial. Although we do not condone the failure to ensure the validity of waiver of counsel through the straightforward procedures set out in rule 5.04, subd. 1(4), on this record we conclude that the district court did not err in finding Barry's waiver of counsel constitutionally valid.

II. Exclusion of alibi witnesses

Minn. R. Crim. P. 9.02, subd. 1(7)(a)–(b), provides that, at the prosecutor's request and before the rule 11 omnibus hearing, "[i]f the defendant intends to offer evidence of an alibi, the defendant must inform the prosecutor of: (a) the specific place or places where the defendant was when the alleged offense occurred; [and] (b) the names and address of the witnesses the defendant intends to call at the trial in support of the alibi."

On the day of trial, after discharging his attorney, Barry disclosed that he intended to offer the testimony of Vicktar Williams and Jeremiah Barry as part of his alibi defense. Barry also indicated that "Vicktar[']s baby momma," Barry's aunt, and Paul Kronah could attest to his whereabouts at the time in question. The prosecution objected, noting

that it had not received notice of Barry's intent to present this alibi theory and that these proposed witnesses were never identified for trial.

The court explained to Barry that he had not properly notified opposing counsel of this testimony and the witnesses would not be allowed to testify. The district court proposed the alternative of declaring a mistrial and rescheduling the trial, which would allow the state time to prepare. Barry elected to proceed to trial.

On appeal, Barry asserts that the district court abused its discretion by precluding him from presenting these alibi witnesses as a sanction for failing to disclose the witnesses or give notice of an alibi defense. "The imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the trial court." *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979) (noting the need for meaningful sanctions to enforce discovery rules and affirming preclusion of witnesses not disclosed prior to trial as warranted where there was no justification for failure to disclose, it was too late in the trial to consider a continuance, and the state was prejudiced by nondisclosure).

Barry concedes that the alibi defense and the witnesses were not formally disclosed to the prosecutor pursuant to the rule. But Barry argues that any failure to disclose was due to ineffective assistance of counsel. He asserts that the prosecutor received notice of his alibi defense and witnesses at a pretrial hearing when his then-counsel stated that, after Barry left the bank, he was dropped off at his aunt's house. And Barry stated that he was accompanied by Zeddy Davis, "Freeze," and "Money-P." But

the people identified at the pretrial hearing were not the witnesses that Barry proposed on the day of trial.

Barry asserts that the district court erred when it failed to expressly analyze the appropriate sanction for the lack of disclosure under the factors described in *State v. Lindsey*, 284 N.W.2d at 373. *See Woodruff v. State*, 608 N.W.2d 881, 886 (Minn. 2000) (stating that the supreme court set forth in *Lindsey* the factors to be considered in determining sanctions or remedies for discovery violations). The factors to be considered are (1) the reason for non-disclosure; (2) the extent of prejudice to other party; (3) the feasibility of rectifying prejudice with a continuance; and (4) any other relevant factors. *Id.*

Although the district court did not explicitly analyze sanctions under the *Lindsey* factors, we can infer from the record that (1) the reason for nondisclosure was that the attorneys who represented Barry did not intend to pursue an alibi defense and (2) that the prosecution was prejudiced by failure to disclose numerous witnesses before trial. Because the district court offered an alternative that would have resulted in giving the state time to prepare, we can infer that the district court did not believe that a brief continuance would be sufficient to remedy the nondisclosure. And there do not appear to be any other relevant factors that warranted consideration. *See State v. Moon*, 717 N.W.2d 429, 440 (Minn. App. 2006) (stating that we review a district court's response to discovery violations in light of the *Lindsey* factors and will not reverse absent a clear abuse of discretion).

Barry rejected the option of a rescheduled trial that would have permitted him to call his proposed witnesses. We conclude that the district court did not abuse its broad discretion to determine the appropriate remedy for Barry's discovery violation. We note that the district court did not preclude Barry from presenting his alibi defense through his own testimony, but Barry chose not to testify.

III. Exclusion of witnesses to Hopson's alleged gang affiliation and prior bad acts

After voir dire had been conducted, Barry announced, for the first time, that he intended to present witnesses to prove that Hopson was a member of a gang and that Hopson had a "vendetta" against Barry because he was "a new face in town." And Barry wanted to call witnesses who, he asserted, had been "jumped and beat up on" by Hopson to show that Hopson was "a violent dude." The district court excluded this evidence as more prejudicial than probative. Barry challenges the exclusion as an abuse of discretion.

Evidentiary rulings lie within the discretion of the district court, and those determinations will not be reversed absent a clear abuse of discretion. *State v. Willis*, 559 N.W.2d 693, 698 (Minn. 1997). "In criminal cases, the defendant's right to cross-examine witnesses for bias is secured by the Sixth Amendment." *State v. Brown*, 739 N.W.2d 716, 720 (Minn. 2007). The Supreme Court has recognized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* (quoting *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 1110 (1974)). But evidence of gang membership is prejudicial. *State v. Carlson*, 268 N.W.2d 553, 558–59 (Minn. 1978). And evidence may not be admissible when the danger of unfair prejudice substantially outweighs its

probative value. Minn. R. Evid. 403. "[M]embership in a gang, by itself, does not necessarily have a direct bearing on the fact of bias or the source and strengths of the witness's bias." *Brown*, 739 N.W.2d at 720. And trial courts have wide latitude to limit testimony that is only marginally relevant. *Id.*

In this case, Barry sought to present witnesses to testify about gang affiliation and prior bad acts. Barry did not assert that his proposed witnesses' testimony involved direct interaction between Barry and Hopson or between Barry and members of Hopson's alleged gang. And Barry did not explain how gang affiliation contributed to any "vendetta" Hopson had against Barry, other than to assert that this gang did not like new faces in town. Under these facts, we conclude that the district court did not abuse its discretion in excluding the proposed evidence of gang affiliation and prior bad acts.

Likewise, the district court's exclusion of evidence that Hopson had stabbed Barry's younger brother at an undisclosed time was not an abuse of discretion because Barry failed to demonstrate how this incident, which may have occurred after the robbery, established a motive for Hopson to identify Barry as the robber.

On appeal, Barry implies that he was not allowed to effectively cross-examine witnesses on issues of bias and that Barry should have been allowed to establish that the victim knew Barry and had a history with Barry that could explain motive to falsely accuse Barry. Barry argues that this restriction violates the Confrontation Clause of the United States Constitution's Sixth Amendment. But other than excluding references to gang affiliation and prior bad acts, the district court did not restrict Barry's cross-examination of Hopson or any other witness. The record reflects that, during cross-

examination, Barry asked Hopson many questions about any prior relationship with or knowledge about Barry. Hopson denied having known Barry or known about Barry prior to the robbery. We conclude that Barry's claim that he was not allowed to effectively cross-examine witnesses is without merit.

IV. Additional claims

In his supplemental pro se brief, Barry raises several additional issues, asserting ineffective assistance of counsel and a demand for a postconviction hearing. Barry argues that his counsel failed to establish Barry's alibi defense, did not argue the victim's recantation, and did not seek to establish that the victim was in a gang and acquainted with Barry before the robbery took place. Ineffective assistance of counsel can be found when (1) the attorney fails to exercise the ordinary skill and diligence of a competent attorney and (2) but for the attorney's incompetence, a different outcome would have been achieved. *Strickland v. Washington*, 466 U.S. 668, 686–87, 104 S. Ct. 2052, 2064 (1984).

Here, the criticized decisions made by counsel were tactical decisions regarding the strategy to present at trial. These decisions related to the effective presentation of witnesses and testimony, which are decisions that are best left to the discretion of trial counsel. *State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006). A lawyer's performance enjoys a strong presumption of being "reasonable professional assistance." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Barry was plainly dissatisfied that his attorney did not agree with Barry's idea of how the case should be tried, but ultimately

Barry chose to represent himself and that decision makes him responsible for how the case was tried.

Barry has not raised any issues warranting a postconviction hearing. A postconviction hearing based on ineffective assistance of counsel will only be granted when a convicted person demonstrates facts showing that counsel's conduct was objectively unreasonable and that the case would have resulted in a different outcome but for the attorney's incompetence. *Hodgson v. State*, 540 N.W.2d 515, 518 (Minn. 1995). Here, Barry has only established that his attorneys did not lay the groundwork for Barry's desired trial strategy.

Affirmed.