STATE OF MINNESOTA

IN SUPREME COURT

A21-1309

Hennepin County — Gildea, C.J.

State of Minnesota,

Respondent,

vs.

Filed: December 21, 2022
Office of Appellate Courts

Berry Alexander Davis,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Minneapolis, Minnesota, Sarah Jane Vokes, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Melissa Sheridan, Eagan, Minnesota, for appellant.

S Y L L A B U S

1. The district court did not err in joining defendant's and his codefendant's cases for trial.

2. The prosecutor did not commit prosecutorial misconduct in closing argument.

3. Defendant's pro se claims lack merit.

Affirmed.

O P I N I O N

GILDEA, Chief Justice.

Appellant Berry Alexander Davis appeals his convictions for first-degree premeditated murder, attempted first-degree murder, and kidnapping. Davis argues that the district court erred by joining his and his codefendant Cedric Berry's cases for trial and by denying subsequent, midtrial severance motions. Davis also argues that the State committed prejudicial prosecutorial misconduct during closing arguments by improperly belittling and disparaging his defense and defense counsel. Finally, Davis asserts six claims in his pro se supplemental brief. We conclude that the district court did not err by conducting a joint trial. We also conclude that the State did not commit prosecutorial misconduct in closing arguments. Finally, we conclude that the issues raised in Davis's pro se brief do not entitle him to relief. Accordingly, we affirm.

FACTS

This case arises from the kidnapping and murder of Monique Baugh and attempted first-degree premeditated murder of her boyfriend, Jon.[1] Davis and Berry were tried together for these crimes, and the facts surrounding the crimes are detailed in the opinion resolving Berry's appeal, which we release simultaneously with this opinion. *State v. Berry*, No. A21-1310, ___ N.W.2d ___ (Minn. Dec. 21, 2022). We discuss here only those facts relevant to Davis's appeal.

[1] We refer to witnesses and the surviving victim by their first name to protect their privacy. *See* Minn. R. Pub. Access to Recs. of Jud. 8, subd. 2(b)(5).

The State charged Davis and Berry with first-degree premeditated murder, Minn. Stat. § 609.185(a)(1) (2022), attempted first-degree murder, Minn. Stat. §§ 609.17, subd. 1 (2022), 609.185(a)(1), kidnapping to commit great bodily harm or terrorize, Minn. Stat. § 609.25, subd. 1(3) (2022), and first-degree intentional murder during a kidnapping, Minn. Stat. § 609.185(a)(3) (2022), all based on a theory of aiding and abetting liability, Minn. Stat. § 609.05 (2022). Before trial, the State moved for joinder of Davis's and Berry's cases for trial.

Over the objections of the defendants, the district court granted the motion. The court explained that the case was complex, with the State disclosing over 200 pieces of physical evidence, thousands of hours of digital records, and over 100 potential witnesses. The court also relied on the State's allegation that the two defendants committed the crimes together, acting in "close concert." In terms of the impact of separate trials on the victim, the court noted that the attempted murder victim, Jon, would have to testify twice and thus "relive the trauma" he suffered. The court also considered the potential prejudice to the defendants, concluding that the defendants did not have antagonistic defenses. Finally, the court determined that the case had garnered a great deal of media attention, which "could impact the potential jurors in [a] second trial." The court also noted that "it will be easier to accommodate social distancing and to occupy one of the few courtrooms large enough for felony trials for only three to four weeks instead of the six to eight weeks that separate

trials would require."[2] Based on this analysis, the court held that the defendants should be tried together.

During trial, Davis twice moved to have the cases severed, once after opening statements and once after Berry testified. Davis argued that the cases needed to be severed because the defenses were antagonistic. The district court denied the motions, determining that the defenses were not sufficiently antagonistic. Specifically, with respect to whether Berry's testimony created antagonistic defenses, the court noted that "there was no direct statement by Mr. Berry that [] Davis did this . . . or anything else that would be so antagonistic that it would require severance."

After closing argument—to which Davis made no objection—the jury found Davis guilty of the crimes charged. The district court convicted Davis of first-degree premeditated murder, attempted first-degree murder, and kidnapping, and sentenced Davis to life without the possibility of release for first-degree premediated murder, consecutive to 161 months for kidnapping, and to 240 months for attempted first-degree premeditated murder. This appeal follows.

ANALYSIS

On appeal, Davis argues that he is entitled to a new trial. Davis first contends that the district court erred by joining Davis's and Berry's cases for trial and by denying Davis's midtrial motions to sever. Next, he asserts that the prosecutor committed misconduct

[2] The district court's order noted that state courts were operating under the Chief Justice's order regarding COVID-19 precautions.

during closing arguments. Finally, Davis raises six claims in his pro se supplemental brief. We address each issue in turn.

I.

We first consider whether the district court improperly joined Davis's and Berry's cases for trial and erred by refusing to sever the cases once the trial was underway. We address the joinder question first.

A.

Davis contends that the district court erred by granting the State's joinder motion. Minnesota Rule of Criminal Procedure 17.03, subdivision 2, governs joinder of criminal trials. This rule neither favors nor disfavors joinder. *State v. Jackson*, 773 N.W.2d 111, 118 (Minn. 2009). In deciding whether to join cases for trial, the rule requires that the district court consider four factors: "(1) the nature of the offense charged; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice." Minn. R. Crim. P. 17.03, subd. 2. The district court examined each of these factors and concluded that the trials should be joined.

The district court found that the nature of the offenses charged favored joinder. We agree. When the "codefendants act in close concert with one another," our precedent recognizes that joinder is appropriate. *State v. Powers*, 654 N.W.2d 667, 674 (Minn. 2003). Codefendants act in close concert if they face the same charges and the evidence against each is "nearly identical." *State v. Greenleaf*, 591 N.W.2d 488, 499 (Minn. 1999). Here, Davis and Berry faced the same charges and the State's evidence against each was nearly identical. *See Jackson*, 773 N.W.2d at 118 (upholding joinder where defendants "were

charged with the same crimes and . . . the evidence against them was virtually identical"). The State's evidence showed that each codefendant played a role in planning the crimes and that they worked together on the day of the kidnapping and shootings to commit the crimes and cover them up. Cell-site location data placed each codefendant near the scenes of the crimes. And the State relied on surveillance footage, DNA evidence, and witness testimony to place vehicles connected with the codefendants near the scenes of the crimes. As a result, the district court properly determined that this factor weighed in favor of joinder.[3]

The district court also determined that the impact of separate trials on the victim weighed in favor of joinder. The court's determination is consistent with *Powers*. There, we considered "the violent nature of the crime charged" and need for witnesses, including a "surviving shooting victim," "to testify to the same facts on numerous occasions" in upholding the decision to join the defendants for trial. 654 N.W.2d at 675. As in *Powers*, here, the surviving victim of the attempted murder would have to testify to the same facts twice if the codefendants were tried separately. The district court properly determined that this factor weighs in favor of joinder.

We now move to the factor evaluating potential prejudice to the defendant. One way for a defendant to show potential prejudice is to demonstrate that the codefendants

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[3] Davis argues that this factor weighed against joinder because the district court did not join the cases of two others who were also charged in connection with the murder of Baugh and the attempted murder of Jon. But unlike the codefendants here, the other two individuals, while participants in the crimes, were not alleged to have moved with Davis throughout the set up and commission of the crimes. Their participation was materially different and required different evidence and proof.

would assert antagonistic defenses at trial. *See Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002). We have said that antagonistic defenses exist when the defendants "seek to put the blame on each other," forcing the jury "to choose between the defense theories advocated by the defendants." *Id.*

Davis argues that he demonstrated that his and Berry's defenses were antagonistic, relying on *Santiago.* There, the codefendants had antagonistic defenses because each defendant "sought to shift the blame for the shooting to the other." *Santiago*, 644 N.W.2d at 446. Santiago argued that his codefendant "was the shooter and . . . acted alone." *Id.* By contrast, the codefendant argued that Santiago was the shooter. *Id. Santiago* thus presented a "classic example[]" of antagonistic defenses. *Id*. This case is unlike *Santiago*.

At a pretrial hearing addressing the issue of joinder, Davis pointed out that Berry had listed him as a potential alternative perpetrator and argued that he and Berry would "point the finger" at each other at trial. But, as the district court properly reasoned, Davis and Berry were each charged under an aiding and abetting theory of liability, and the State's theory was that they worked together to set up and commit the crimes. Given the charges, it did not matter who pulled the trigger because the State must simply show that the crime was committed and that the defendants intentionally aided the commission of the crime. The defenses Davis argued that each would offer—that the other one did it—are not antagonistic because both defendants could still be liable so long as they each assisted in the commission of the crime. In other words, the jury would not have to choose between defense theories. The jury could accept both theories and find each defendant guilty because they helped in the commission of a crime that another person committed.

Accordingly, there is no prejudice to the defendants for purposes of this factor.

Finally, we address the interests of justice factor. The district court found that this factor weighed in favor of joinder based on the case's complexity, media attention, and COVID-19 concerns. In urging us to reach a contrary conclusion, Davis makes two arguments. First, he claims that the voir dire process could sort out any prejudice from pretrial publicity in a separate trial, and second, he contends that social distancing is made worse through combining two trials in one courtroom, not better. We are not persuaded.

In this case, there was extensive media coverage of the crime. With separate trials, as the district court properly noted, there is the chance that additional media coverage from the first trial would prejudice prospective jurors for a second trial. *See Powers*, 654 N.W.2d at 675 (acknowledging that potential prejudice to jurors by publicity from first trial supported joinder). And we are not equipped to second guess the district court's decision about how best to allocate courtroom space during a global pandemic.

Our analysis confirms that all four factors favored joinder. Accordingly, we hold that the district court did not err in granting the State's motion for joinder of Davis's and Berry's cases for trial.

B.

Next, we address the question of midtrial severance. Davis made two motions for severance during trial, one after opening statements and one after Berry testified. The standard for midtrial severance is set out in Minn. R. Crim. P. 17.03, subd. 3(3). The rule requires severance if it is needed "to fairly determine the guilt or innocence of one or more of the defendants." *Id*. In evaluating this, we apply the "fair determination test." *Santiago*,

644 N.W.2d at 448. Under this test, we first evaluate whether "the trier of fact is able to distinguish the evidence and apply the law intelligently as to each defendant" and then whether "the defendants have inconsistent or antagonistic defenses." *Id.*

In assessing whether the jury can distinguish the evidence and apply the law intelligently as to each defendant, we have relied on the fact that the jury was instructed to consider the evidence against each defendant separately when evaluating this factor. *Powers*, 654 N.W.2d at 677. The district court gave a similar instruction in this case. And just as we concluded in *Powers*, "[t]here is no reason to believe the jury would be unable to intelligently apply the law to each defendant." *Id.*

On the question of antagonistic defenses, when "the defenses are inconsistent" and the defendants "seek to put the blame on each other," forcing the jury "to choose between the defense theories advocated by the defendants," the defenses will be considered antagonistic under the severance rule. *Santiago*, 644 N.W.2d at 446. In moving to sever, Davis relied on the opening statements and Berry's testimony.

The opening statements from defense counsel were not antagonistic. Davis's counsel contended that the State did not conduct an adequate or thorough investigation and asserted that there would be no witness testimony placing Davis at the crime scenes. Berry's counsel similarly emphasized that there would be no witness testimony placing Berry at the crime scenes, and he argued that the State had no motive for Berry to commit the crimes. Berry's counsel also emphasized that he could not have committed the crimes because Berry was doing other things all day including "bagging up the dope he was going

to sell that day." Importantly, neither defendant argued that the other committed the crimes.

Berry's testimony did not create antagonistic defenses either. Viewed as a whole, Berry attempted in his testimony to downplay his own involvement in the crime, but as the district court noted, Berry never directly contended that Davis committed the crimes.

Davis focuses on Berry's testimony that his relationship with Lyndon is "through Bro," referencing Davis. But this testimony does not make the parties antagonistic. The State's theory and proof demonstrated that Davis and Berry moved together to commit the crimes. Whether Berry knew Lyndon through Davis or independently negates none of the evidence tying both of them to the crimes.

Davis also argues that he was prejudiced from testimony Berry offered and elicited from another witness about the fact that Davis was a drug dealer. Davis argues that if he were tried separately, the fact of his drug dealing would not have been admissible at trial. Berry's evidence about Davis's drug dealing did not create antagonistic defenses or unfairly prejudice Davis. The jury heard about Davis's drug dealing from Keith, the witness who testified that Davis and Berry gave him drugs in exchange for his renting of the U-Haul which was then used in the commission of the crimes. Berry's cross-examination of the police investigator first revealed that the State's investigation into Davis and Berry before the charged crimes was a narcotics investigation, and during redirect, the State elicited, without objection from Davis, that Davis was charged with a narcotics crime as a result of that investigation. But this prior drug charge did not directly implicate Davis in the current offenses, and Davis has not otherwise demonstrated any prejudicial impact

from this testimony, especially given that the district court limited the jury's use of testimony about the codefendants' drug dealing to the extent it showed Davis and Berry's relationship.

It is also important to look at the manner in which a codefendant cross-examined another codefendant who chose to testify and the contents of the codefendants' closing arguments in determining if antagonistic defenses were presented. *See Powers*, 654 N.W.2d at 677. Here, Davis chose not to cross-examine Berry. And the closing arguments show parallel stories between the defenses. Davis emphasized what the State did not prove and attacked the DNA evidence as a potential secondary transfer. Berry argued what the State did not prove and pointed to the unidentified person seen on video running through the alley in which the murder occurred as a potential alternative perpetrator, and he focused on what was not tested for DNA. In short, Davis's and Berry's closing arguments each argue a theory of the case that is not antagonistic with the other.

Based on our analysis, we hold that the district court did not err in denying Davis's motions to sever.

II.

We next turn to Davis's argument that the prosecutor committed misconduct during closing arguments by disparaging and belittling the defense. We review the prosecutor's statements under a modified plain error analysis because Davis did not object at trial. *See State v. Ramey*, 721 N.W.2d 294, 299–300, 302 (Minn. 2006) ("When there is no objection" to a claim of prosecutorial misconduct "and the misconduct is plain," then "the burden [is] on the prosecution to show lack of prejudice.").

The State has "a right to vigorously argue its case," including during closing arguments. *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005). Prosecutors need not be "colorless" and may argue that "the evidence does not support particular defenses." *State v. Davis*, 735 N.W.2d 674, 682, (Minn. 2007). But a prosecutor should not disparage defense counsel personally or "belittle" the defense, "either in the abstract or by suggesting that the defendant raised the defense because it was the only one with any hope for success." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016).

Davis contends that the prosecutor disparaged and personally attacked his defense counsel for misrepresenting the truth. Davis points to two instances where the prosecutor used the word "fantasy." In her initial closing argument, the prosecutor predicted possible defenses that could be raised, including defense counsel pointing to a "fantasy" in the form of "some kind of conspiracy" among the police. During rebuttal closing argument, the prosecutor addressed how the defense had characterized the investigation and concluded by saying "[t]hat's a defense attorney's fantasy." Davis argues that these statements are misconduct, and he chiefly relies on *State v. McDaniel* for support. 777 N.W.2d 739 (Minn. 2010). *McDaniel* does not help Davis.

In *McDaniel*, the prosecutor's statements "crossed the line between questioning opposing counsel's substantive arguments and questioning his personal credibility." *Id.* at 752. In reference to defense counsel's failure to ask a witness a question, the prosecutor said, "Do you remember any question like that? Well that's because it's not true and counsel knows it's not true and misrepresents that to you." *Id.* We explained that accusing "defense counsel of misrepresenting the truth" turned "the argument into a personal attack"

and made the statements "disparaging." *Id.* The statements at issue here were not personal attacks like those made in *McDaniel*.

Rather, the statements at issue here, when viewed in context, were about the merits of potential defenses and an actual defense argument in closing argument; the statements were not about defense counsel personally. We have recognized that a prosecutor's argument, even when "expressed in colorful terms," is not misconduct when the argument is about the "merits" of the defense. *Davis*, 735 N.W.2d at 683. Calling the defense's possible theory a "fantasy" was a reference to the evidence. The initial statement and the list of defenses were bookended by qualifying statements that relate these statements to the evidence. The prosecutor told the jury that the defense attorneys "will likely try to get you to focus on anything but the evidence." Then, the prosecutor listed possible things that would be "anything but the evidence," including the "fantasy" of a "conspiracy." The section ends with the prosecutor saying, "if you focus on the evidence," the only conclusion it supports is convictions for the charged crimes. And in her rebuttal, the prosecutor referenced specific evidence that disputed the defense's characterization of the investigation before saying this was "a defense attorney's fantasy." Similar to *Davis*, when put into proper context, the statements at issue here relate to the merits or the supporting evidence of possible defenses. 735 N.W.2d at 683. As a result, these statements are not misconduct.

Next, Davis argues that the prosecution belittled the defense theory by stating, after listing possible defenses that could be raised, that Davis's "only hope" was to get the jury to ignore the "facts." Davis argues that the prosecutor's "only hope" language was

misconduct because it implies that the possible defenses referenced are being used because they are the only ones available—a tactic that is misconduct. *See id*. We disagree. We have concluded that a prosecutor's statements about defense tactics that "were couched in arguments about the evidence" did not belittle the defense. *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009). As explained above, the prosecutor's statements were made in the context of an argument about the evidence. Because the prosecutor's statements were not misconduct, we hold that Davis is not entitled to relief on his prosecutorial misconduct claims.

III.

We turn next to the claims Davis raises in a pro se supplemental brief.

A.

First, Davis argues that the district court erred by failing to give an accomplice-corroboration instruction to the jury with respect to Berry's testimony. Convictions may not be based on "the testimony of an accomplice, unless it is corroborated. . . ." Minn. Stat. § 634.04 (2022). The accomplice-corroboration instruction is a prophylactic measure that notifies the jury that it may not convict a defendant based on uncorroborated accomplice testimony. *See State v. Shoop*, 441 N.W.2d 475, 478 (Minn. 1989). We require district courts to give the instruction "in any criminal case in which any witness against the defendant might reasonably be considered an accomplice to the crime." *Id.* at 479. Because Davis did not request an accomplice-corroboration instruction, we review the failure to give the instruction under the plain error standard. *State v. Ezeka*, 946 N.W.2d

393, 407 (Minn. 2020) (identifying the three parts of the plain error standard, including that the appellant must establish the error affected their substantial rights).

It is unclear whether the district court should have given the instruction in this case, when the State did not call the accomplice as a witness and instead the accomplice is a codefendant who chose to testify in his defense. But we need not decide this issue. Even if the instruction should have been given, Davis has failed to prove that the failure to give the instruction affected his substantial rights. *Id.* at 409 (explaining that to show an error affected substantial rights, an appellant "bears the burden of showing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict" (citation omitted) (internal quotation marks omitted)). As discussed above, Berry's testimony did not directly implicate Davis in the crimes, and Davis has not otherwise shown how the jury could have convicted Davis based on Berry's testimony, corroborated or not.

B.

Second, Davis argues that his trial counsel was ineffective for failing to ask the district court for an accomplice-corroboration instruction regarding Berry's testimony. To prevail on an ineffective assistance of counsel claim, Davis is required to show that (1) his counsel's representation at trial "fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 689, 694 (1984); *see also Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001). Because we concluded that the lack of an accomplice-corroboration instruction did not affect Davis's

substantial rights, there is no reasonable probability that, but for the lack of this instruction, the result of the proceeding would have been different. Consequently, Davis is not entitled to relief on his ineffective assistance of counsel claim.

C.

Third, Davis argues that his grand jury indictment was defective. In support of this claim, Davis argues that the basis for the indictment was (1) hearsay and inadmissible evidence and (2) false information. Our precedent recognizes that "a presumption of regularity attaches to the indictment, and it is a rare case where an indictment will be invalidated." *State v. Scruggs*, 421 N.W.2d 707, 717 (Minn. 1988). This is not that rare case. Much of the evidence Davis challenges was admitted at trial, and he was found guilty after that trial. *See id*. (recognizing that a defendant who has been found guilty after a fair trial did not meet the "heavy burden" to overturn the indictment).

D.

Fourth, Davis argues that the district court's imposition of a life-without-the-possibility-of-release sentence violated his Sixth Amendment right to a sentencing jury. Davis claims that the district court relied on facts not found by the jury, in violation of *Blakely v. Washington*, 542 U.S. 296, 301 (2004), when it sentenced him to life without the possibility of release for first-degree premeditated murder. In *McKenzie v. State*, we held that a district court does not violate *Blakely* when it imposes a life sentence without the possibility of release after a jury finds a defendant guilty of first-degree premediated murder. 713 N.W.2d 840, 842 (Minn. 2006). *McKenzie* is dispositive of this claim.

E.

Fifth, Davis challenges his sentences for first-degree premediated murder and attempted first-degree premediated murder. Davis argues that these sentences violate Minn. Stat. § 609.035 (2022). Specifically, he argues that he was sentenced for multiple offenses that arose from the same course of conduct. And he contends that the "judicially created" multiple-victim exception to the statute violates separation of powers.

We rejected this argument in *Munt v. State*. 920 N.W.2d 410 (Minn. 2018). In *Munt*, we held that what had been characterized as the "multiple-victim exception" to section 609.035 was merely an "interpretation of what actions satisfy the definition of conduct" under the statute. *Munt*, 920 N.W at 418 (internal quotation marks omitted). And as an interpretation of statutory language, "the rule is within the judicial branch's authority and does not violate separation-of-powers principles." *Id.* at 419. *Munt* is dispositive of this claim.

F.

Finally, Davis argues that his appellate counsel was ineffective for failing to raise the issues he raised in his pro se supplemental brief. Appellate counsel "is not required to raise claims on direct appeal that counsel could have legitimately concluded would not prevail." *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009). As discussed previously, all of the claims Davis contends appellate counsel impermissibly refused to raise were considered and are without merit. As a result, Davis's claim of ineffective assistance of appellate counsel lacks merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of convictions.

Affirmed.