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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-760**

State of Minnesota,
Respondent,

vs.

Danny Lewis Stamps,
Appellant.

**Filed June 25, 2012
Affirmed
Hudson, Judge
Concurring specially, Randall, Judge**

Ramsey County District Court
File No. 62-CR-10-7876

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

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Hudson, Judge; and Randall,
Judge.*

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

UNPUBLISHED OPINION

HUDSON, Judge

In this appeal following his conviction of second-degree attempted murder, appellant asserts that (1) the district court abused its discretion by refusing to continue appellant's trial to allow him to retain private counsel and by sentencing appellant to the maximum presumptive sentence; (2) the district court plainly erred by not instructing the jury regarding evidence of his domestic-assault charge; and (3) the prosecutor committed misconduct in his closing argument. We conclude that the district court properly exercised its discretion in denying appellant's motion to continue trial and refusing to depart from the presumptive sentence. Additionally, the lack of a cautionary instruction regarding other-crimes evidence is not reversible error, and the prohibition on were-they-lying questions does not apply to a closing argument addressing a witness's credibility. We affirm.

FACTS

In the early morning hours of September 17, 2010, appellant shot J.J. seven times at a park where multiple people had gathered to confront appellant. Appellant was charged by amended complaint with second-degree attempted murder in violation of Minn. Stat. §§ 609.19, subd. 1(1), 609.17, subd. 17(1) (2010) and domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2010).

Late on September 16, 2010, appellant was arguing with his girlfriend, A.C., at the home of D.S., the girlfriend of A.C.'s brother, D.H. Appellant hit A.C. in the face as she sat on the couch and then pushed her so that she stumbled and fell over a table, causing a

cut and a large bruise on her back. After appellant left, D.S. called D.H. and told him that appellant had assaulted his sister, and he needed to come to her apartment to check on A.C.

D.H. had been drinking for a few hours with friends at a bar in St. Paul when D.S. called. One of the friends called appellant and arranged a meeting at a local park for a fight between D.H. and appellant. D.H. and the group of friends, including J.J., left the bar in a van. D.H., J.J., and others arrived at the park and were standing outside the van when appellant drove up alone and then left. He came back to the park a short time later. D.H. was in the van and appellant approached it, pointing a gun from inside his pocket at D.H. Appellant told D.H., "I'll kill you." J.J. was standing by a tree next to the van. Appellant shot J.J. several times and continued to shoot him after J.J. fell to the ground. J.J. had been shot seven times and was transported to the emergency room. He ultimately underwent two surgeries and spent two weeks in the hospital.

While in the hospital, J.J. identified appellant from a photo lineup as the person who shot him and stated he was 100 percent sure. Police never recovered a weapon and found only two of seven shell casings; forensic analysts could not determine whether the recovered shell casings came from the same weapon. Additionally, appellant was not tested for gunpowder residue when he was arrested.

Appellant did not testify. P.W., who then lived with appellant's sister, testified regarding appellant's whereabouts the night of September 16. P.W. testified that it was appellant's sister's birthday and that P.W., appellant's sister, and appellant went to a couple of bars and a bowling alley that night. On their way home, they stopped at

another apartment so that appellant could speak with his girlfriend. The three then returned to appellant's sister's apartment, where appellant had been staying off and on and where appellant was planning to stay that night. P.W. testified that he and appellant's sister went to bed and did not know where appellant slept. When they awoke the next morning, appellant was gone, and P.W. did not know when appellant had left.

Before trial, appellant moved for the domestic-assault charge and attempted second-degree murder charge to be severed, which the district court granted. The district court concluded that the two incidents were factually connected but had different criminal objectives and allowed the state to present evidence regarding the domestic assault as it pertained to how the shooting came about.

Appellant was represented by a public defender at his first appearance on September 20, 2010. At an October 27, 2010 hearing, appellant told the district court that he wanted to fire his public defender and waive his speedy-trial demand in order to hire private counsel. Appellant stated:

I don't feel like he's representing me correctly. He's not doing any investigation on the case. He seems he's always wanting me to take a deal. He ain't trying. So I feel like it would be best for me to go to trial with this guy as my lawyer? I would like to waive my speedy trial and fire him.

COURT: Well, Mr. Stamps, I'm not going to let Mr. Carlson off the case unless you have another attorney that would take the case. Okay. If you want to fire your lawyer, you're not going to be able to change your mind later on. I'll discharge Mr. Carlson and the public defender's office. That means you'll have to seek a private attorney, or represent yourself at trial. My assumption is that you think about it. My suggestion is that you think about this before you make a decision like this. Okay. Mr. Carlson is a good lawyer. He's

got a lot of experience. But he can't make the facts better for you But the next time I see you, if you want to, or Mr. Carlson can't work with you, or you don't want to cooperate with him, and if he wants to schedule it back in front of me, I would be willing to re-address it. My suggestion, again, is that you rethink this before you make this decision.

At the start of trial on November 30, appellant moved for a continuance to retain private counsel; the district court denied the motion. The district court stated, "We're about to start trial here, sir. Your request is untimely." The jury found appellant guilty.

The presumptive sentencing range for appellant was 181 to 240 months. At the sentencing hearing, the prosecutor asked for the maximum sentence of 240 months, stating:

The defendant's criminal history speaks for itself. He was off supervised release two months before he committed this offense. He was convicted of an attempted murder. He tried very hard in this case to kill the victim. After shooting him twice he stood over the victim and put a total of seven rounds into the victim.

In the past the defendant's been on probation. He's been to prison. Nothing's worked. The state's asking for the top of the guidelines box, which is 240 months, which is what's recommended by probation. So the public can be protected from Mr. Stamps in the future for the longest time possible.

Appellant's attorney requested that the district court sentence appellant to the lower end of the presumptive sentence. The district court sentenced appellant to 240 months and stated:

I think that the actions that you took that day of shooting this individual, who you barely knew, causes me concerns with regard to you, sir. And so I've taken the only step that I can

take, to make sure that you stay in prison for as long as I could put you there.

This appeal follows.

DECISION

I

A defendant's right to the assistance of counsel includes a fair opportunity to secure an attorney of the defendant's choice. *State v. Fagerstrom*, 286 Minn. 295, 298, 176 N.W.2d 261, 264 (1970); U.S. Const. amend. VI; Minn. Const. art. 1, § 6. The denial of a continuance to allow a defendant to retain new counsel is within the district court's discretion. *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). In exercising its discretion, the district court must base its decision to deny a continuance "on the facts and circumstances surrounding the request." *Fagerstrom*, 286 Minn. at 299, 176 N.W.2d at 264. Reviewing courts also evaluate "whether the defendant was so prejudiced in preparing or presenting his defense as to materially affect the outcome of the trial." *Vance*, 254 N.W.2d at 358–59.

As an initial matter, appellant appears to argue that the district court is required to make findings on whether a defendant delayed the proceedings and whether the defendant was prejudiced by denial of his motion for a continuance. Appellant cites no caselaw to support this proposition. Whether appellant delayed the proceedings with a motion to continue and whether appellant was prejudiced by the denial of the motion are simply considerations taken into account by reviewing courts. For example, in *State v. Courtney*, 696 N.W.2d 73, 82 (Minn. 2005), the supreme court upheld a district court's

denial of a motion to continue sought by the defendant to seek new counsel. The supreme court held that the district court did not abuse its discretion by denying the continuance because of appellant's lack of diligence in procuring new counsel and his failure, once he obtained new counsel, to provide his counsel the proper trial date. *Id.*

Facts and circumstances

Consideration of the facts and circumstances surrounding a district court's denial of a continuance generally focuses on the timeliness of the request and the diligence of the defendant in obtaining new counsel. *See, e.g., State v. Johnson*, 417 N.W.2d 143, 145 (Minn. App. 1987) (concluding appellant had ample opportunity to hire private counsel in four months between arrest and trial). Appellant asserts that a district court may deny a continuance request for time to procure a new attorney only when a defendant is found to have manipulated or delayed the proceedings by claiming to want a new attorney but not timely obtaining one. But the two cases cited by appellant to support this proposition are inapposite because the cases do not involve denials of motions to continue. *See State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995) (addressing waiver of right to counsel); *Finne v. State*, 648 N.W.2d 732, 736 (Minn. App. 2002) (same), *review denied* (Minn. Oct. 29, 2002). Instead, appellate courts must determine if the district court's denial of a continuance was based on "the facts and circumstances surrounding the request." *Fagerstrom*, 286 Minn. at 299, 176 N.W.2d at 264.

The facts and circumstances here show that appellant was arrested on September 17, 2010, and made his first motion for a continuance to obtain new counsel on October 27, 2010. The district court told appellant that he would have to procure

private counsel before it would discharge the public defender. One month later, when the district court denied appellant's continuance to obtain new counsel at the start of trial, more than two months had passed from his arrest and four weeks from his first request to discharge his attorney to locate and hire a private attorney. Furthermore, the record indicates that appellant was no closer to hiring a private attorney on November 30 than he was when he first asked to discharge his public defender on October 27, which demonstrates a lack of diligence. *Cf. State v. Olson*, 609 N.W.2d 293, 302–03 (Minn. App. 2000) (concluding defendant hired new attorney in timely manner when he did so the day after the district court granted a one-day continuance), *review denied* (Minn. July 25, 2000).

Furthermore, the right to counsel of a defendant's choice must be balanced against "the public interest of maintaining an efficient and effective judicial system." *Courtney*, 696 N.W.2d at 82. Here, the jury had been selected and trial was about to start when appellant moved for a continuance. The district court judge denied appellant's motion and stated that his continuance request was untimely. We conclude that the district court properly exercised its discretion in denying the motion in light of appellant's lack of diligence in hiring a private attorney balanced against the interest in an efficient, effective judicial system.

Prejudice

Reviewing courts also consider whether a defendant was prejudiced by the district court's denial of his continuance to the extent that it materially affected the outcome of the trial. *Vance*, 254 N.W.2d at 358–59. Where a competent attorney represented a

defendant who was denied his choice of counsel, reviewing courts have determined that a defendant was not prejudiced by not receiving his choice of counsel. *See id.* at 359 (concluding no prejudice where attorney thoroughly investigated facts and was prepared for trial); *State v. LaDoucer*, 477 N.W.2d 905, 907 (Minn. App. 1991) (concluding no prejudice where trial counsel presented a reasonable defense, called witnesses who corroborated appellant's testimony, and made reasonable objections); *State v. Alexander*, 398 N.W.2d 24, 28 (Minn. App. 1986) (affirming denial of continuance for substitution of counsel where court-appointed attorney showed familiarity with case and performed thorough cross-examination), *review denied* (Minn. Feb. 13, 1987).

Here, appellant's attorney succeeded in severing the domestic-assault charge from the second-degree murder charge prior to trial, cross-examined six of the state's nine witnesses, and called a witness to provide alibi testimony on behalf of appellant. Although a review of the record reveals only one objection in a two-day trial by appellant's attorney, appellant agreed during questioning by his attorney that he and his attorney had conversed multiple times about whether he should testify, and the district court noted that the public defender was a good, experienced attorney—all of which speak to the competence of appellant's attorney. Appellant was represented by competent counsel and was therefore not prejudiced by denial of his motion for a continuance to obtain his choice of counsel.

II

Appellant also argues that the district court erred by not providing a cautionary instruction to the jury regarding testimony from multiple witnesses about the argument

between appellant and A.C. and appellant's alleged assault of A.C. Unobjected-to error is reviewed under a three-factor test which requires an error, that is plain, and that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If appellant satisfies these three prongs, "the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

The district court severed the domestic-assault charge from the attempted second-degree murder charge but allowed evidence of the argument and alleged assault to provide context for appellant's conduct surrounding the shooting of J.J. Appellant did not request a cautionary instruction regarding admission of this evidence.

Appellant asserts that a cautionary instruction was required "under settled and well-known case law," but the authority he provides is inapposite. Appellant cites to *State v. Bauer*, in which the supreme court held that, even without a request by the defense, a limiting instruction should be given before admission of other-crimes evidence and again at the end of the trial. 598 N.W.2d 352, 365 (Minn. 1999). But *Bauer* also stated that a district court's failure to provide the instruction does not warrant reversal without plain error. *Id.* Additionally, we acknowledge that the supreme court has advised district courts to provide a cautionary instruction regarding other-crimes evidence, but the lack of such an instruction is not ordinarily reversible error under the plain-error standard. *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). Therefore, the district court did not plainly err by not providing a cautionary instruction regarding the admission of other-crimes evidence.

III

When not objected to at trial, prosecutorial misconduct is analyzed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). The standard requires an error, that is plain, and that affects substantial rights. *Griller*, 583 N.W.2d at 740. If appellant establishes that plain error exists, the burden then shifts to the state to establish a lack of prejudice and that the misconduct did not affect the outcome of the case. *Ramey*, 721 N.W.2d at 302. If the three prongs are satisfied, the court then assesses whether “fairness and the integrity of the judicial proceedings” require addressing the error. *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010).

Appellant argues that the prosecution committed misconduct during its rebuttal argument by arguing to the jury that believing appellant’s alibi would require believing that key witnesses were lying, thereby violating the prohibition on “were-they-lying” questions. Were-they-lying questions are generally improper because they lack probative value, unless a criminal defendant makes the issue of witness credibility a core focus of his case. *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999); *State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005). Such questions are “improper and argumentative because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence.” *Pilot*, 595 N.W.2d at 518.

The supreme court has also stated that were-they-lying questions tend to “shift the jury’s focus,” implying they must find that the state’s witnesses lied to acquit the defendant. *State v. Dobbins*, 725 N.W.2d 492, 511 (Minn. 2006); *Morton*, 701 N.W.2d at 235. Appellant argues that this shifting of the focus improperly places the burden on

appellant to demonstrate that the state's witnesses were lying. But a prosecutor may "vigorously argue that the defendant and his witnesses lack credibility." *State v. Dupay*, 405 N.W.2d 444, 450 (Minn. App. 1987) (quotation omitted). Accordingly, we conclude that, although the state could have better articulated its argument that appellant presented a weak alibi, the prosecution's statement was a fair comment on the evidence, which did not constitute a were-they-lying question and was not plain error.

IV

A sentence imposed by the district court is reviewed for an abuse of discretion. *State v. Ford*, 539 N.W.2d 214, 229 (Minn. 1995). "This court will not generally review a district court's exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range." *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010), *cert. denied*, 131 S. Ct. 920 (2011). Only in a rare case will imposition of a presumptive sentence be overturned. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "Absent compelling circumstances," this court generally will not modify a sentence within the presumptive range. *State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982).

Here, the prosecution argued for the maximum presumptive sentence of 240 months, which was the sentence imposed by the district court. Although appellant's sentence is within the presumptive range, he argues that the district court abused its discretion by ordering the maximum presumptive sentence rather than a shorter presumptive sentence because the sentence imposed was based on the state's argument that appellant had a prior criminal history, which already was taken into account in

calculating the presumptive range. Appellant does not provide any “compelling circumstances” to justify modification of the presumptive sentence. Instead, appellant asserts that the district court should provide a rationale for choosing the maximum, rather than the mid-range, presumptive sentence. In fact, the district court did provide a rationale for the 240-month sentence by stating that it was imposing the maximum presumptive sentence because appellant shot a person he barely knew. This rationale appears to be based on the criminal conduct for which appellant was being sentenced, not appellant’s prior criminal history.

Any number within the presumptive sentence range constitutes an acceptable sentence. *State v. Jackson*, 749 N.W.2d 353, 359 n.2 (Minn. 2008). Because the district court did not depart from the presumptive sentence, it did not abuse its discretion in sentencing appellant to 240 months.

Affirmed.

RANDALL, Judge (concurring)

I concur in the result.