STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1880

State of Minnesota,
Respondent,

vs.

Keith Ward Hohlen,
Appellant.

Filed September 10, 2012
Affirmed as modified
Rodenberg, Judge

Mille Lacs County District Court
File No. 48CR11175

Lori Swanson, Attorney General, Jennifer R. Coates, Assistant Attorney General, St. Paul, Minnesota; and

Janice S. Jude, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard A. Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and Harten, Judge.[*]

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

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

RODENBERG, Judge

On appeal from his conviction of terroristic threats in violation of Minn. Stat. § 609.713, subd. 1, appellant argues that: (1) the district court committed prejudicial error when, after appellant discharged his public defender without explanation, it informed appellant that the public defender's office would not provide appellant with a different public defender; (2) the prosecutor committed reversible misconduct in closing argument when she stated that appellant's license had not been revoked for nonpayment of child support after the court had ruled prior to trial that the actual reason for revocation was irrelevant and should be ignored by the jury; and (3) the court erred by sentencing appellant to a stayed term of 15 months when the presumptive sentence under the Minnesota Sentencing Guidelines was a term of a year and a day stayed, based on the erroneous assignment of a custody status point to appellant when he was not on probation at the time of this offense. Appellant's pro se supplemental brief argues that the jury erred in finding the state's witnesses credible. We affirm as modified.

FACTS

On January 10, 2011, appellant Keith Hohlen telephoned a Mille Lacs County child-support officer at her office. When the officer answered the phone, appellant immediately launched into an expletive-laden tirade against her and demanded that she reinstate his driver's license. Appellant threatened to kill her if she did not comply. The child-support officer told appellant that she would be calling law enforcement. Appellant

repeated his threat to kill the child-support officer. The child-support officer indicated that she was going to end the call. Appellant repeated his threat again, and the call ended.

The child-support officer contacted law enforcement and informed her supervisor of the call. Appellant then called the supervisor. The supervisor testified that appellant was angry and hostile during this conversation. Appellant asked the supervisor why the child-support officer was still assigned to his case. The supervisor informed appellant that she would check on whether he still owed child support and would get back to him.

The chief of police of Milaca, Minnesota, interviewed the child-support officer and the supervisor. The police chief also conducted a brief investigation, during which he learned that appellant's driver's license was revoked due to an implied-consent refusal, not child support arrearages. The police chief informed appellant of this fact in a conversation later that day.

Appellant was charged with terroristic threats. Appellant was appointed a public defender but appeared without counsel at the pretrial hearing held a few days before trial. The district court asked where appellant's attorney was, and appellant stated, without further explanation, that the attorney had been "excused." After ascertaining that appellant had been represented by a public defender, the district court asked whether appellant had hired another attorney.

The district court then told appellant, "Okay. Once you've discharged one public defender, they, they will not appoint another one for you. I have no control over that." The district court then informed appellant that he could hire another attorney or represent himself, and appellant stated that he did not intend to hire another attorney.

On the day of trial, the district court again asked appellant whether he wished to proceed without a public defender, and appellant stated that he did. Appellant stated, without elaboration, that he had filed a "complaint" against his public defender. The district court offered appellant stand-by counsel, which appellant accepted. The district court then led appellant through a waiver of his right to counsel.

At trial, the police chief testified under direct examination by the state that appellant's driver's license had been revoked for reasons unrelated to nonpayment of child support. The police chief did not disclose the reason for the revocation. As the prosecutor began to transition to questions related to appellant's conversation with the police chief, the district court interrupted and gave the jury a cautionary instruction directing them not to speculate as to the reason for the license revocation.

Appellant, when cross-examining the police chief, asked why his driver's license had been revoked. The police chief responded that it was the result of an "implied consent" in a different county. The district court again intervened and instructed the jury not to consider the reason for the revocation because it was not relevant.

During her closing argument, the prosecutor stated:

> [S]hould it be part of [the child support officer's] job that someone threatens to kill her because they're upset about a driver's license situation that in fact doesn't even have to do with [her] or child support? It has something to do with, who knows, some other issue, but it's being blamed on [her] outta the blue at 8:06 on a—on a business day when she receives this call.

Appellant did not object to this statement, nor did the district court intervene. The jury found appellant guilty, and this appeal follows.

D E C I S I O N

I.

Appellant first argues that the district court erred when it informed him that the public defender's office would not assign a new public defender to him after he discharged his original public defender. Appellant contends that this alleged error rendered involuntary his subsequent waiver of his right to counsel.

Convictions obtained as a consequence of prejudicial constitutional errors are reversible. *State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986). On appeal, the record is examined to determine whether there is a reasonable possibility that the error contributed to the conviction. *Id.* "If the verdict actually rendered was surely unattributable to the error, the error is harmless beyond a reasonable doubt," and the conviction must be affirmed. *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996).

Criminal defendants have a constitutional right to the assistance of counsel in their defense. U.S. Const. amends. VI, XIV; Minn. Const. art. 1, § 6; *see also Gideon v. Wainwright*, 372 U.S. 335, 342–45, 83 S. Ct. 792, 795–97 (1963) (incorporating the Sixth Amendment right to counsel into the Due Process Clause of the Fourteenth Amendment and applying it against the states). The district court's obligation when a criminal defendant discharges his attorney is "to first ascertain how the defendant wishes to proceed after counsel is discharged, and then determine whether it is appropriate for the defendant to proceed as requested." *State v. Paige*, 765 N.W.2d 134, 139 (Minn. App. 2009).

A criminal defendant's right to counsel entitles the defendant to be allowed "a fair opportunity to secure counsel of his choice," and an indigent defendant must "be provided competent counsel in all criminal proceedings." *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). However, an indigent defendant's right to the appointment of counsel "does not give him the unbridled right to be represented by counsel of his choice," and "[a]lthough he may request a substitution of counsel, his request will be granted only if exceptional circumstances exist and the demand is timely and reasonably made." *Id.* Therefore, it is inaccurate to assert that an indigent defendant could not, under any circumstances, obtain a different public defender. *State v. Lamar*, 474 N.W.2d 1, 3 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991).

However, "[a] defendant's refusal without good cause to proceed with able appointed counsel constitutes a voluntary waiver" of the right to counsel. *State v. Krejci*, 458 N.W.2d 407, 413 (Minn. 1990) (quotation omitted). Furthermore, a public defender's office may reasonably establish and enforce a rule "that it does not exchange counsel merely because a party is unhappy with the counsel appointed." *State v. Nace*, 404 N.W.2d 357, 361 (Minn. App. 1987) (reciting such a rule and indicating that it was reasonable), *review denied* (Minn. June 25, 1987). Where a defendant dismisses his public defender without making a showing as to the existence of exceptional circumstances justifying the substitution of counsel, it is not error for a district court to inform the defendant of such a policy but not prompt the defendant to expound upon any

exceptional circumstances.[1] *See State v. Clark*, 698 N.W.2d 173, 178 (Minn. App. 2005) (concluding that court's statement that defendant would not be assigned a new public defender was accurate because defendant failed to establish exceptional circumstances), *aff'd* 722 N.W.2d 460 (Minn. 2006); *see also State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006) (mentioning the fact that the district court had informed the defendant of such a rule). Therefore, "*any overstatement* in the court's explanation of the law [is] harmless." *Clark*, 698 N.W.2d at 178 (emphasis added); *but cf. Lamar*, 474 N.W.2d at 3 ("Here there was no explicit request for a change in counsel and no showing of improper representation. *Any error*, therefore, was harmless." (emphasis added)).

Here, appellant did not request substitute counsel. He merely informed the district court that he had discharged the public defender and provided no explanation for that action. The district court appropriately asked appellant whether he intended to proceed pro se or wished to hire another attorney. The district court did not err by informing him that because appellant "discharged one public defender, they, they will not appoint another one for [him]. I have no control over that." Finally, per *Krejci*, appellant's discharge of the public defender without showing good cause amounted to a waiver of his right to counsel. *See* 458 N.W.2d at 413 (holding that a defendant's refusal to proceed with appointed counsel without good cause constitutes waiver of the right to counsel).

[1] While *Lamar* indicates that this might be error (albeit harmless error), *Clark* states that it is not error. *Compare Lamar*, 474 N.W.2d at 3, *with Clark*, 698 N.W.2d at 178. *Clark* controls here. *Clark* was decided more recently and was affirmed by the supreme court. *Lamar* is an older case of which the supreme court denied review. Therefore, under existing Minnesota law, it is not error for a district court to inform a defendant of the public defender's policy without further explanation where appellant has given no indication that exceptional circumstances might apply.

Additionally, appellant informed the court both at the pretrial hearing and immediately prior to his trial that he intended to represent himself at trial.

II.

Appellant next argues that the prosecutor committed misconduct in closing arguments by asking the jury to speculate on evidence that the district court had instructed them not to consider.

A conviction will be reversed for prosecutorial misconduct only if, "when considered in light of the whole trial, [the misconduct] impaired the defendant's right to a fair trial." *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). If no objection was made at trial to the alleged misconduct, the review is conducted under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 299–300 (Minn. 2006) (announcing the applicable standard of review).

Under the plain-error standard as it is generally expressed, the appellant has the burden of demonstrating that there is "(1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). However, in cases where the prosecutor's conduct is being reviewed for plain error, the appellant bears the burden of showing that plain error occurred, but the state bears the burden of showing that the error did not affect the appellant's substantial rights. *Ramey*, 721 N.W.2d at 299–300, 302.

"An error is 'plain' if it is clear or obvious," such as in cases where the prosecutor's conduct "contravenes case law, a rule, or a standard of conduct." *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008). An "error affects substantial rights if there is

a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007), *abrogated on other grounds by State v. Fleck*, 810 N.W.2d 303, 311 (Minn. 2012).

When the misconduct is alleged to have occurred during a closing argument, any offending statements must be considered in the context of the argument as a whole, and undue prominence must not be ascribed to an isolated remark. *Jones*, 753 N.W.2d at 691. It is inappropriate for a prosecutor, in closing arguments, to invite jurors to speculate about facts that are not in evidence, particularly where this contravenes a prior ruling as to the admissibility of evidence. *See State v. Thompson*, 578 N.W.2d 734, 742–43 (Minn. 1998).

In this case, the fact that appellant's license had been revoked for an unspecified reason other than nonpayment of child support was in evidence. Appellant's mistaken belief with respect to his license revocation was the impetus for appellant's call to the child-support officer, and appellant's belief was tied directly to the threats that constituted the criminal act. This evidence was necessarily a part of the state's case.

Thus, while the district court correctly instructed the jury not to speculate as to the *reason* for the revocation, the prosecutor was entitled to state in summation that the revocation was not related to child support. The complained-of comment in the prosecutor's closing argument respected the distinction established by the district court's evidentiary ruling.

The complained-of comment, in context, did not amount to prosecutorial misconduct or error.

III.

The sentencing worksheet prepared in this case incorrectly indicated that appellant had a criminal-history score of 1, when his score was actually 0. As a result, the worksheet incorrectly reported a presumptive stayed sentence of 15 months when the presumptive stayed sentence should have been 12 months and 1 day. The district court sentenced appellant to what it believed was the presumptive sentence. The state gave no notice that it was seeking an upward departure. On appeal, appellant and the state agree that the sentencing worksheet was in error and that the sentence should be corrected.

A court has authority to modify or correct a sentence at any time if the sentence is the result of a clerical mistake, an error resulting from oversight, or unauthorized by law. Minn. R. Crim. P. 27.03, subds. 9, 10. This court may modify a criminal sentence that is based on an incorrectly calculated criminal-history score. *See State v. Zeimet*, 696 N.W.2d 791, 798 (Minn. 2005) (correcting an incorrect sentence and affirming as modified); *State v. Anderson*, 345 N.W.2d 764, 766 (Minn. 1984) (same); *State v. Walker*, 351 N.W.2d 679, 679–80 (Minn. App. 1984) (same). Therefore, we modify appellant's stayed sentence and reduce it from 15 months to 12 months and 1 day, consistent with appellant's correct criminal-history score.

IV.

Appellant's pro se supplemental brief appears to argue that the jury erred in finding the state's witnesses credible. However, "it is for the jury, not [an appellate court], to determine the credibility and weight to be given to the testimony of witnesses." *State v. Pendleton*, 706 N.W.2d 500, 512 (Minn. 2005). This is especially true where the

credibility of the witnesses was challenged at trial. *See id.* (stating that "[e]ven where witness credibility has been challenged, the jury may nonetheless believe the witness"). Accordingly, this court defers to the jury's determination that the state's witnesses were credible.

V.

In sum, the district court did not err by informing appellant that the public defender's office would not appoint him another public defender after he discharged his public defender without asking for a new attorney or indicating that exceptional circumstances warranted the appointment of a new attorney. The prosecutor did not commit prosecutorial misconduct during her closing arguments, but instead respected the limits appropriately imposed by the district court. This court defers to the jury's determination that the state's witnesses were credible.

Because the sentencing worksheet incorrectly indicated a presumptive stayed sentence of 15 months rather than the correct stayed sentence of 12 months and 1 day, and because appellant and the state agree that the sentence should be modified to 12 months and 1 day, we modify appellant's sentence to a stayed sentence of 12 months and 1 day.

Affirmed as modified.