STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1447

State of Minnesota,
Respondent,

vs.

Maurice Culpepper,
Appellant.

Filed August 5, 2013
Affirmed
Cleary, Judge

Hennepin County District Court
File No. 27-CR-10-57688

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota; and

Stan Keillor, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Cleary, Judge; and Smith, Judge.

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

CLEARY, Judge

Following a jury trial during which he proceeded pro se, appellant was found guilty of theft and criminal damage to property and not guilty of aggravated forgery. Appellant challenges his convictions and sentences, arguing that the district court and the prosecution made numerous prejudicial errors before and during trial, that the evidence presented at trial was insufficient to sustain his convictions, and that the court should not have ordered him to pay restitution. We affirm.

FACTS

J.L. was the owner of a two-story building in Minneapolis that had commercial space on its lower level and residential space on its upper level. In February 2010, J.L. leased the residential space to appellant Maurice Culpepper and leased the commercial space to appellant and V.F. jointly. J.L. commenced an eviction proceeding against appellant in July 2010, alleging that appellant had failed to pay the rent for the month of July. During an eviction hearing in August 2010, appellant produced residential and commercial leases, which he claimed were the leases that he and J.L. had entered into. The district court ultimately determined that appellant could not be evicted because J.L. had accepted partial payment of the July rent, but that J.L. could commence another eviction proceeding if appellant failed to pay the rent in the future. The court noted in its order that the leases that appellant had produced appeared to be forged. When appellant failed to pay the rent for the month of August 2010, J.L. commenced a second eviction

proceeding. The district court subsequently issued an eviction order that required appellant to vacate the premises by September 27, 2010.

On September 27, J.L. went to the building with law enforcement to evict appellant. When they went inside, they found that the building had been damaged extensively. Cabinets, countertops, light fixtures, windows, walls, and flooring had been torn apart and broken. The building's water heaters and wiring had been destroyed, and appliances were missing. D.S., a neighbor of the property, later reported that he saw a moving truck backed up to the building's garage on September 26, and that appellant and others were loading the truck. D.S. stated that he saw the men loading a stove or dishwasher into the truck and that he was able to look into the truck and saw furniture and a refrigerator inside. He further reported that, on the night of September 25, he heard loud, repeated banging and pounding and what sounded like a gathering or party at the property.

Appellant was charged with theft, criminal damage to property, and aggravated forgery. At the first appearance, appellant was ordered to stay away from the property at issue. A jury trial was held in May 2012, during which appellant proceeded pro se. The jury subsequently found appellant guilty of theft and criminal damage to property and not guilty of aggravated forgery. At sentencing, appellant was ordered to, among other things, pay $10,213.74 in restitution. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court erred by failing to sever the charges against him and try the forgery charge separately from the charges of theft and damage to property. Appellant admits that he never requested that the court sever the charges, and thus the state maintains that appellant waived his argument on this issue by failing to raise it below.

> *On motion of the prosecutor or the defendant*, the court must sever offenses or charges if:
>
> (a) the offenses or charges are not related;
>
> (b) before trial, the court determines severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense or charge; or
>
> (c) during trial, with the defendant's consent or on a finding of manifest necessity, the court determines severance is necessary to fairly determine the defendant's guilt or innocence of each offense or charge.

Minn. R. Crim. P. 17.03, subd. 3(1) (emphasis added). Defendants who do not move to sever charges in district court generally waive the right to challenge the joinder of charges on appeal. *See, e.g.*, *State v. Hudson*, 281 N.W.2d 870, 872–73 (Minn. 1979) (stating that "failure to move for severance constitutes a waiver unless [the] defendant can show good cause for relief from the waiver"); *State v. Moore*, 274 N.W.2d 505, 506–07 (Minn. 1979) (noting that a defendant may make a deliberate decision not to request severance of charges for reasons of strategy or to avoid having to defend himself in separate trials). Appellant does not provide a reason for failing to request severance

below and has waived his right to challenge the joinder of the charges against him. The district court had no obligation to sever the charges sua sponte.

Even if the charges should have been severed, we hold that the failure to sever was harmless because evidence of the alleged forgery would likely have been introduced during a separate trial on the charges of theft and damage to property. "Joinder is not unfairly prejudicial if evidence of each offense would have been admissible at a trial of the other offenses had the offenses been tried separately." *State v. Kendell*, 723 N.W.2d 597, 608 (Minn. 2006). If evidence of the improperly-joined offense could have been admitted as *Spreigl* evidence during a trial for the other offenses, then the defendant was not prejudiced. *State v. Ross*, 732 N.W.2d 274, 280 (Minn. 2007). Evidence of another crime, wrong, or act may be admissible for purposes other than to prove the character of a person in order to show action in conformity therewith, and permissible purposes include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b).

The evidence of forgery demonstrated the antagonistic relationship between appellant and J.L. regarding the property. It reflected appellant's desire to remain as tenant of the building, provided a motive for appellant to commit the theft and property damage, and was probative on the issue of identity. Appellant was not prejudiced by the joinder of the charges.

II.

The United States and Minnesota Constitutions guarantee criminal defendants the right to assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Appellant

argues that his right to assistance of counsel was violated during the course of this proceeding. During the first appearance, a public defender was appointed to represent appellant. More than eight months later, appellant notified the district court that he wished to discharge the public defender and retain private counsel. The court ordered that $2,000 in cash bail that appellant had previously posted be refunded to allow him to do so. At the next hearing, appellant appeared pro se and stated that he had spoken with attorneys but had decided to represent himself. The court strongly suggested that appellant consider hiring an attorney, but it nonetheless discharged the public defender. At several hearings held during the course of the next six months, the court repeated its suggestion that appellant hire an attorney and appellant confirmed that he wished to proceed pro se, understood that it would be difficult, and did not want to be represented by a public defender.

When the parties appeared for the first day of trial in May 2012, appellant told the court that he had changed his mind about representing himself and decided that he needed the assistance of an attorney. He further stated that he had begun the process of hiring an attorney just that week. The court telephoned the attorney that appellant sought to hire, and that attorney stated that appellant had not yet signed the necessary documents that would allow the attorney to file a certificate of representation. The court reminded appellant that several trial continuances had already been granted, but nevertheless agreed to an additional continuance to allow appellant to complete the process of retaining the attorney. When trial commenced the following day, appellant proceeded pro se.

Appellant argues that the district court failed to obtain a valid waiver of counsel from him. *See* Minn. R. Crim. P. 5.04, subd. 1(4) (requiring a defendant's waiver of counsel to be made in writing or on the record and for the defendant to be advised of several specific factors); *see also* Minn. Stat. § 611.19 (2010). The state concedes that the required waiver was not completed, but asserts that appellant forfeited his right to counsel. A court's finding of forfeiture of the right to assistance of counsel is reviewed for clear error. *State v. Krause*, 817 N.W.2d 136, 144 (Minn. 2012).

A defendant who engages in "extremely dilatory conduct" may forfeit the right to assistance of counsel. *State v. Jones*, 772 N.W.2d 496, 505 (Minn. 2009) (quotation omitted). "Forfeiture results in the loss of the right to counsel regardless of the defendant's knowledge of either the consequences of his actions or the dangers of self-representation." *Krause*, 817 N.W.2d at 148. "The rationale behind applying the forfeiture doctrine is that courts must be able to preserve their ability to conduct trials," for "a balance must exist between a defendant's right to counsel of his choice against the public interest of maintaining an efficient and effective judicial system." *Jones*, 772 N.W.2d at 505–06 (quotation omitted) (holding that a defendant forfeited his right to assistance of counsel when almost a year passed between his first appearance and trial, he appeared for numerous hearings without counsel, and the court repeatedly told him to retain counsel and granted multiple continuances to allow him to do so).

In this case, appellant had representation for more than eight months before expressing his desire to discharge his public defender and retain private counsel. The district court released $2,000 of previously posted cash bail to allow him to retain an

attorney, but appellant appeared at the next hearing and stated that he wished to represent himself. Appellant subsequently appeared for several hearings pro se, and the court repeatedly told him to hire an attorney. The court also continued the trial multiple times. More than a year after the first appearance, appellant appeared for the first day of trial and stated that he thought he should be represented and that he had begun the process of hiring an attorney just that week. The court granted a final continuance to allow appellant to complete the process of retaining the attorney, which appellant did not do. Under these circumstances, the district court did not err by finding that appellant forfeited his right to assistance of counsel.

Appellant also contends that the district court abused its discretion by failing to appoint advisory counsel to assist him. "The court may appoint advisory counsel to assist a defendant who voluntarily and intelligently waives the right to counsel." Minn. R. Crim. P. 5.04, subd. 2. The appointment of advisory counsel is discretionary and is a procedural matter; there is no constitutional right to the appointment of advisory counsel. *Jones*, 772 N.W.2d at 507. The district court was under no obligation to appoint advisory counsel, although it is certainly a better practice to do so in cases such as this. Given that appellant never requested that advisory counsel be appointed and repeatedly stated that he wished to represent himself, the court did not abuse its discretion by failing to appoint advisory counsel.

III.

Appellant maintains that the prosecution violated his right to meaningful discovery after he had been ordered to stay away from the property at issue. During several

hearings, appellant requested permission to go to the property and photograph it. Appellant also wished to back a rental truck up to the property with the garage door open, apparently to attempt to refute D.S.'s assertion that D.S. was able to see inside the moving truck on September 26, 2010. The prosecution arranged an opportunity for appellant to visit the property with law enforcement and photograph its exterior, but appellant never took advantage of this opportunity. The prosecution advised appellant and the district court that the state no longer had access to the interior of the building because J.L. had sold the property. The prosecution provided appellant with approximately 200 photographs of the interior of the building, which had been taken immediately after the theft and property damage occurred. The district court concluded that the prosecution had met its discovery burden.

Whether a discovery violation occurred is an issue of law that is reviewed de novo. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). "The prosecutor must, at the defense's request and before the Rule 11 Omnibus Hearing, allow access at any reasonable time to all matters within the prosecutor's possession or control that relate to the case . . . ." Minn. R. Crim. P. 9.01, subd. 1. The prosecutor must disclose "the location of buildings and places" that relate to the case. *Id.*, subd. 1(3)(e). These rules were complied with in this case, and there was no discovery violation. The prosecution provided appellant with the information that it had access to when appellant was given the photographs of the interior of the building and the opportunity to visit the property and photograph its exterior.

IV.

Appellant contends that the district court erroneously prevented him from talking to a prospective witness. During trial, appellant called J.P. to purportedly testify regarding his own participation in the theft and property damage. J.P.'s public defender told the court that J.P. was asserting his Fifth Amendment right not to testify regarding the incident, as testifying could expose him to criminal liability. The following colloquy then took place:

> APPELLANT: Is there any way I can talk to the witness before, is there a way I can have a five minute break, Your Honor, before we go into trial?
> THE COURT: Okay well the question is do you still want to call [J.P.] knowing that he's going to invoke his right to remain silent against self-incrimination?
> APPELLANT: I can tell you as soon as I talk to him.
> J.P.'s ATTORNEY: Your Honor, I will advise this [c]ourt and all parties that [J.P.] will not answer questions . . . from anybody about what is alleged in this.
> THE COURT: Okay.
> APPELLANT: I understand that, Your Honor.
> THE COURT: Okay so then I would say no . . . .
> . . . .
> APPELLANT: . . . If he agrees to talk to me can I talk to him for five minutes?
> THE COURT: I think his lawyer just said he's not going to talk to anybody . . . .
> APPELLANT: It doesn't have to be about the case.
> THE COURT: Well if it's not about the case you can talk to him some other time.
> APPELLANT: Okay. Yes, Your Honor.

Later that day, after both parties had rested, appellant told the court:

> I was informed by [J.P.] when I was outside that he wants to give up his right to remain silent and he would like to take the stand. . . . He informed me that he hasn't signed anything with an attorney so he's not like in any contract with

> any attorney at this time and wants to tell the truth to the best of his ability, is that something that we can do, Your Honor?

The court replied that appellant had rested and that it would not allow him to reopen his case to have J.P. testify. The court also noted that J.P. had been appointed a public defender and was not required to sign a retainer agreement; that the attorney had told the court that he was representing J.P., who wished to invoke his right to remain silent; and that the attorney had not informed the court either that he was withdrawing or that J.P. wished to testify.

Appellant does not argue that the district court erred by holding that J.P. had validly invoked his Fifth Amendment right to remain silent, nor does appellant challenge the court's decision not to allow him to reopen his case after he had rested. Rather, appellant asserts that the court erred when it did not allow him to take a break before trial recommenced to speak with J.P. about the case. District courts have discretion in the management of the trials before them. *State v. Erickson*, 610 N.W.2d 335, 341 (Minn. 2000). J.P. was represented by an attorney, who told the court that his client was asserting his Fifth Amendment right not to testify regarding the theft and property damage. The attorney stated that J.P. was not willing to answer questions from anyone regarding the incident. Given these circumstances, the district court did not abuse its discretion by declining to allow appellant a break to speak with J.P.

V.

Appellant argues that the district court abused its discretion by excluding from evidence an anonymous, handwritten, and threatening note that V.F. allegedly found on

her car parked outside of the building two days after appellant moved in. Appellant wished to introduce this note to show that there was "an ongoing history of violence" at the property and that he was not the one who had committed the theft or property damage. The court ruled that the note was inadmissible because it was irrelevant in that it did not reflect on whether appellant had stolen or destroyed property. The court also held that the note's language was "extremely prejudicial" and that its prejudicial effect greatly outweighed any probative value that the note may have.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403.

Appellant sought to introduce a note that was allegedly written and left anonymously in February 2010, more than seven months before the theft and property damage occurred. There was no foundation provided for the note. The note threatened violence against people, not against the property itself, and does not reflect whether there was past vandalism at the property. The note was not relevant to show whether appellant or another person committed the theft or property damage. Even if the note had some

probative value, that value was substantially outweighed by the danger of unfair prejudice given the language used in the note and the fact that it was allegedly left anonymously long before the events at issue. The district court did not abuse its discretion by excluding the note from evidence.

VI.

Appellant claims that the prosecutor committed misconduct by making improper statements during her closing argument. Appellant acknowledges that he did not object to this alleged misconduct during trial and that plain-error analysis therefore applies. "On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006) (applying plain-error analysis to an allegation of unobjected-to prosecutorial misconduct). An error is "plain" if it is "clear or obvious" in that it "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 the error was prejudicial and affected the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). When prosecutorial misconduct reaches the level of plain error, the state bears the burden of demonstrating that the misconduct did not affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 299–300. If the appellate court identifies plain error affecting substantial rights, the court "may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (alteration in original) (quotation omitted).

Appellant argues that the prosecutor impermissibly personalized the case and interjected her opinion by using the word "I" during her closing argument when she stated, "I can assure you that [J.L.] did not give anyone permission to take [the appliances]" and, "Now you and I both know that burglaries happen in this world and you and I both know that this is not a burglary." The state concedes that this was error. *See State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991) (stating that an attorney may not "personally attach[] himself or herself to the cause which he or she represents"). However, given the extent of the evidence against appellant and the fact that the prosecutor's impermissible statements were brief in the context of the entire trial, we hold that the statements did not affect appellant's substantial rights. *See State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (explaining that, when assessing whether prosecutorial misconduct likely had a significant effect on the jury's verdict, a court should consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to rebut the improper suggestions); *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) ("Even if an argument is in some respects out-of-bounds, it is normally regarded as harmless error unless the misconduct played a substantial part in influencing the jury to convict the defendant.").

Appellant contends that the prosecutor impermissibly provided testimony as to an element of theft when she stated that J.L. "did not give anyone permission to take [the appliances] from his home." An attorney may not become an unsworn witness. *Everett*, 472 N.W.2d at 870. But J.L. testified during trial that he had bought the appliances, that they belonged to him, that they were installed in the building, and that they "were stolen"

and "missing from the home." The prosecutor's statement that J.L. "did not give anyone permission" to take the appliances was not plain error.

Appellant argues that the prosecutor committed misconduct by stating, "Now the time has come for [appellant] to be held accountable for his actions. The song and dance, the diversion, the pointing at every direction but him, it has to stop. He did it." Appellant first contends that it is improper for a prosecutor to make a statement regarding a defendant's accountability. But it is proper for a prosecutor to talk about accountability as long as the prosecutor does not "emphasize accountability to such an extent as to divert the jury's attention from its true role of deciding whether the state has met its burden of proving defendant guilty beyond a reasonable doubt." *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985). The prosecutor's single statement regarding accountability did not constitute plain error. Appellant also contends that the prosecutor's statement belittled the defense. A prosecutor is free to argue that there is no merit to a particular defense, but may not belittle the defense in the abstract. *State v. Martin*, 773 N.W.2d 89, 108 (Minn. 2009). The prosecutor made her comment after addressing appellant's theories that an unknown burglar may have destroyed the building or that J.L. may have hired someone to destroy the building. The prosecutor's comment appears to have been in response to these theories, and it did not constitute plain error.

VII.

Appellant contends that the evidence presented at trial was insufficient to permit the jury to find him guilty of theft and criminal damage to property. When the sufficiency of the evidence is challenged, appellate review "is limited to a painstaking

analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The verdict should not be disturbed "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004) (quotation omitted).

During trial, J.L. and his friend J.M. testified regarding the circumstances leading to appellant's eviction. J.M. testified that, following an eviction hearing, appellant told J.M. that he had "trashed the place" and done extensive damage. J.M. further testified that, when he later went to the property to inspect it for J.L., appellant refused to allow him to enter and physically prevented him from doing so, despite the fact that a court order and law enforcement stated that J.M. had the right to enter the building. The neighbor D.S. testified that, on the night of September 25, 2010, he heard repeated "clunking" noises and what sounded like a gathering or party at the property. D.S. stated that, on September 26, he saw a moving truck backed up to the building's garage and that appellant and others were loading the truck with appliances. An employee of a rental company testified that appellant rented a truck on September 26 and returned it on September 27. Finally, J.L. and a police officer testified regarding what they discovered at the property when they entered it on September 27, 2010, and photographs of the

property damage were admitted into evidence. The police officer testified that the magnitude of destruction was much greater than he had experienced at burglary scenes and that the damage appeared to have been done maliciously by a disgruntled tenant.

Appellant challenges the police investigation of the crimes, arguing that the police quickly focused on him as a suspect and failed to investigate whether there were other potential suspects. But appellant does not cite any evidence in the record regarding the extent and adequacy of the police investigation. Viewing the evidence presented in the light most favorable to the conviction, the evidence was sufficient to permit the jury to reasonably conclude that appellant was guilty of theft and criminal damage to property.

VIII.

At sentencing, the district court ordered appellant to pay $10,213.74 in restitution for the theft and property damage. Appellant argues that the court erred by ordering him to pay restitution. The state objects that appellant's claim regarding restitution is not properly before this court because he failed to challenge the amount of restitution in district court. After a restitution order has been issued:

> An offender may challenge restitution, but must do so by requesting a hearing within 30 days of receiving written notification of the amount of restitution requested, or within 30 days of sentencing, whichever is later. . . . The hearing request must be made in writing and filed with the court administrator. A defendant may not challenge restitution after the 30-day time period has passed.

Minn. Stat. § 611A.045, subd. 3(b) (2010). When a defendant fails to challenge restitution in district court, a challenge to the amount of restitution on appeal is procedurally barred, and plain-error analysis does not apply. *State v. Thole*, 614 N.W.2d

231, 235–36 (Minn. App. 2000). Because appellant did not follow the statutory procedure to challenge the restitution order in district court, we will not address his claim on this issue.

Affirmed.