STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0286

State of Minnesota,
Respondent,

vs.

Demetrius Jermaine Miller,
Appellant.

Filed November 4, 2013
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Ramsey County District Court
File No. 62-CR-11-3803

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

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

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Renee Bergeron, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct and first-degree aggravated robbery, arguing that he was denied effective assistance of counsel, that the district court abused its discretion in denying appellant's motion for postconviction investigative services and in admitting five unspecified felony convictions as impeachment evidence, and that appellant's waiver of his right to counsel at the sentencing hearing was not knowing and voluntary. Because appellant did not show that he was denied effective assistance of counsel and the district court did not abuse its discretion in denying investigative services or in admitting unspecified felony convictions, we affirm appellant's conviction. But, because the record does not show that appellant's waiver of his right to counsel at the sentencing hearing was knowing and intelligent, we reverse his sentence and remand for a sentencing hearing at which appellant will either be represented by counsel or will waive his right to counsel on the record and in accord with Minn. R. Crim. P. 5.04.

FACTS

In May 2011, appellant Demetrius Miller and D.B. were together in an alley behind a gas station in an incident that led to appellant being charged with first-degree criminal sexual conduct and first-degree aggravated robbery.

At trial, D.B. and appellant offered conflicting testimony. D.B. testified that appellant grabbed her around the shoulders with force, succeeded in taking her shorts off to get her phone and iPod, hit her in the face and upper lip, and penetrated her briefly.

She said she was struggling, trying to fight back, kicking, screaming, and hitting appellant.

Appellant testified that he wanted to steal D.B.'s phone, iPod, and money; they arranged to have sex; D.B. pushed appellant to the ground, and got on top of him; appellant changed positions with D.B. because he wanted to be able to take D.B.'s property and run; D.B. grabbed appellant by the penis, hurting him; appellant penetrated D.B. for about ten seconds, during which D.B. was "[j]ust laid back, just enjoying it"; and, when appellant started taking D.B.'s property, D.B. did not fight back but did try to get the shorts.

During trial, appellant was represented by two public defenders and criticized their representation of him. The jury found appellant guilty on both counts. At the sentencing hearing, appellant discharged the public defenders who had been representing him. He was sentenced to consecutive guideline sentences of 281 months in prison on the criminal-sexual-conduct count and to 48 months in prison on the robbery count.

Appellant challenges his conviction, arguing that he was denied effective assistance of counsel and that the district court abused its discretion in denying his motion for postconviction investigative services and in admitting five unspecified prior felony convictions as impeachment evidence; he also challenges his sentence, arguing that his waiver of the right to counsel at the sentencing hearing was not knowing and voluntary.

D E C I S I O N

1. Ineffective Assistance of Counsel

A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

> The defendant must affirmatively prove that his counsel's representation "fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Gates v. State, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). If either prong is determinative, this court need not address the other. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Appellant argues that he is entitled to a new trial because his counsel failed to investigate sufficiently, failed to find and present certain witnesses, and failed to present the video-surveillance tape of the area where he and D.B. spent a few minutes before moving away to the scene of the rape and robbery. But both the scope of an investigation and what evidence to present, including what witnesses to call, are matters of trial strategy and are therefore not reviewable. *Opsahl*, 677 N.W.2d at 421 (scope of

investigation); *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (what evidence to present).[1]

Appellant also argues that his counsel should have called three witnesses: (1) a friend of D.B. who was a gas-station employee who had not yet arrived for work; (2) another friend of D.B. whom D.B. claimed to have visited before coming to the gas station; and (3) the clerk on duty at the gas station at the time of the incident. Appellant does not allege that any of these people witnessed his sexual penetration of D.B. or could have provided any information as to whether it was consensual. Moreover, the two friends of D.B. were not anywhere near the premises, and the clerk was inside the gas station when the incident occurred.

Appellant said in his petition that his counsel failed to investigate unnamed individuals who lived near the gas station or were in the area and who might have heard screaming. Both appellant and D.B. testified that D.B. screamed: she said she screamed throughout the time she and appellant were in the alley; he said she screamed only during the robbery, not during the rape. Even if any witnesses who heard screaming had been identified, they could not have testified as to what was going on at the time or whether the penetration was consensual. And this court cannot "base a reversal on speculation

[1] Appellant also argues that he was entitled to an evidentiary hearing on his ineffective-assistance claims. A summary denial of a postconviction petition is reviewed for an abuse of discretion. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). In his postconviction petition, appellant alleged no facts that would have resolved or pertained to the only issue, i.e., whether his sexual penetration of D.B. was consensual. "[A]n evidentiary hearing is unnecessary if the petitioner fails to allege facts that are sufficient to entitle him or her to the relief requested." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007)." The district court did not abuse its discretion in not holding an evidentiary hearing on the ineffective-assistance claims.

that an investigation might have found someone who would have helped defendant's case." *Gates*, 398 N.W.2d at 563; *see also Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009) (concluding that the decision not to call certain witnesses was not ineffective assistance because the defendant "ha[d] not demonstrated that their testimony would have made any difference in the outcome; indeed he offer[ed] no evidence as to what any additional investigation would have produced"). The same is true here: appellant does not explain what evidence the putative witnesses could have provided.

Appellant also objects that his counsel did not offer a surveillance video from the gas station into evidence. But the video did not cover the place where the rape occurred; it would only have corroborated what both appellant and D.B. said about their initial encounter, and photographs were offered that showed the scene of the video, i.e., the front of the gas station, while appellant and D.B. were conversing there. The video would not have been pertinent to the question of whether D.B. consented to appellant's penetration.

2. Investigative Services

If counsel for an indigent defendant considers that investigative services are necessary for an adequate defense, counsel may petition the court to authorize the expenditure for the services. Minn. Stat. § 611.21(a) (2012). A court that declines to authorize such an expenditure must make written findings of fact and conclusions of law stating the basis for its decision. *Id.* at (c) (2012). After his conviction, appellant, pro se, moved for such investigative services. The district court denied the motion, finding "that there [was] not an adequate factual basis showing that such services [were] necessary."

This court reviews an order denying Minn. Stat. § 611.21 investigative fees under an abuse-of-discretion standard. *In re application of Wilson*, 509 N.W.2d 568, 570 (Minn. App. 1993).

Nothing in Minn. Stat. § 611.21 indicates that it was intended to provide postconviction relief, and it has been construed to apply only to pretrial situations. *See State v. Griffie*, 281 Minn. 569, 571, 161 N.W.2d 551, 552 (1968) (denial of motion under Minn. Stat. § 611.21 made on final day of trial held not to be abuse of discretion because "[t]he request was not timely, and the result of the [investigation] would at best have been wholly inconclusive"). Appellant wanted to conduct an investigation of two individuals who were not present when the crime occurred and could not have had any information as to whether appellant's penetration of D.B. was consensual and of the clerk working in the gas station who also would have had no relevant information on whether D.B. consented. The district court did not abuse its discretion in finding that posttrial services to investigate three people who could not have addressed the only issue were unnecessary.

3. Admission of Felony Convictions

The state sought to admit evidence of appellant's ten prior convictions. These included five misdemeanors: providing false information to the police in 2003 and four thefts, one in 2004 and three in 2010; and five felonies: terroristic threats in 2004, fifth-degree controlled substance in 2005 and 2006, theft in 2000, and sale of simulated controlled substance in 2009.

Under Minn. R. Evid. 609(a), a party may "impeach a witness with unspecified felony convictions." *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011). "[T]he decision about what details, if any, to disclose about the conviction at the time of impeachment is a decision that remains within the sound discretion of the district court[, which] must weigh the probative value of admitting the evidence against its prejudicial effect[,]" and the standard of review for the admission of prior-crime evidence is abuse of that discretion. *Id.* at 652. In balancing the probative value and the prejudicial effect of evidence of a prior crime, a district court must consider: "'(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime . . . , (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue.'" *Id.* at 653 (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)).

The district court noted that "[t]here is some similarity with some of the felonies to the aggravated robbery charge here" and "relie[d] on *State v. Hill* . . . [to] permit impeachment with the felony record, provided that it's in an unspecified fashion that does not identify the crimes but may refer to felonies." The district court's further explanation of its reasoning reflects its consideration of the five *Jones* factors.

> The Court understands the rule about a crime involving dishonesty or false statements having probative value regarding credibility, no matter what the conviction, but I think that would confuse the jury at this point rather than assist. So I think the record of prior felonies during the ten-year period is the limit of where the Court will go with this and expects there to be no reference to misdemeanors of any kind.

> The Court finds that the probative value of introducing the felony record as unspecified felonies outweighs any potential prejudicial effect.
>
> The Court acknowledges that [appellant's] testimony is of great importance, particularly because he has claimed self-defense,[2] and his attorneys have indicated that he wishes to, as I understood the description, provide context with respect to remarks he made to an investigating officer.
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> Credibility is a central issue here. There's been testimony from [D.B.], and credibility . . . is a crucial issue in this case.
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> . . . .
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> . . .[Y]ou can talk about how many [felonies] there are and what year they come from, but not the nature of the offenses.

Appellant's theory of the case was that he robbed D.B. to obtain money to buy drugs, but did not commit criminal sexual conduct because D.B. consented to the penetration. Appellant argues that he was prejudiced by the decision to admit only unspecified felonies because

> [r]ather than prejudicing [appellant], the theft and drug convictions supported [his] defense to the much more serious first-degree criminal sexual conduct charge. What prejudiced [appellant was] informing the jury that [he] had five prior felony convictions and leaving it to the jury to imagine what heinous activity [he] committed prior to the charges in this case.[3]

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[2] The term "self-defense" does not occur in the trial transcript except in the district court's statement. In light of the fact that appellant repeatedly claimed D.B. wanted and consented to their sexual contact and D.B. repeatedly denied that she wanted or consented to it, it seems reasonable to assume that the district court meant to say "consent," not "self-defense."

[3] We note that this issue is not properly before us. Appellant does not refute the state's argument that appellant failed to raise this argument to the district court and therefore cannot raise it on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) ("This court generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure." (citation omitted)). The

In *Hill*, evidence of a robbery conviction four months earlier was admitted as evidence of an unspecified felony at the trial of a defendant charged with first-degree premeditated murder and first-degree aggravated robbery who denied that he attempted to rob the victim before shooting him. *Id*. at 650. Appellant attempts to distinguish *Hill* on the ground that, in *Hill*, one of the charged offenses and the prior conviction were very similar, so not specifying the nature of the prior conviction was helpful to the defendant, whereas in appellant's case, none of his five prior felonies was similar to his criminal-sexual-conduct charge, so not specifying the nature of the prior felonies was prejudicial. But appellant was also charged with aggravated robbery, and his prior theft convictions were similar to that. The fact that appellant chose to admit to robbery as a defense strategy against a criminal-sexual-conduct charge did not impose on the district court an obligation to identify appellant's prior thefts to the jury and, as the district court noted, identifying some prior felonies but not others would only have confused the jury.

The district court did not abuse its discretion in admitting evidence of appellant's five prior unspecified felony convictions.

4. Waiver of the Right to Counsel

When the facts are undisputed, review of whether a waiver of counsel was knowing and intelligent is a constitutional question and is reviewed de novo. *State v.*

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transcript supports the state's argument: appellant's counsel opposed the admission of admitting the terroristic-threats conviction, conceded to the admission of the controlled-substance offenses and the false information to the police, and did not mention the theft convictions. We nevertheless address the issue in the interest of completeness.

Rhoads, 813 N.W.2d 880, 885 (Minn. 2012). Just before the sentencing hearing, appellant, pro se, submitted a motion. At the opening of the hearing, one of his attorneys told the district court, "We did attempt to speak to [appellant] about this motion, primarily to establish whether or not he wishes to represent himself. . . . [Appellant] basically refused to discuss the issue with us. . . . One of the things that seems to be coming through on it is he is alleging ineffective assistance of counsel."

The district court said to appellant, "[You] chose not to talk with [your attorneys] this morning and you are asking that they be discharged as your attorneys. I will permit you to do that and proceed pro se. I will also let you know that I am going to proceed with your sentencing this morning . . . based on the fact that I find your motion is not timely and that it indicates substantial confusion." The confusion resulted from appellant's frequent references to his guilty plea when he had in fact been convicted by a jury after a trial. Appellant then read aloud a portion of his motion; it concerned the criteria for withdrawing a guilty plea.

The district court asked appellant, "Now, you've told me this morning that you want me to discharge your attorneys, is that correct?" Appellant answered, "Yes, ma'am." The district court responded, "All right. I respect your request, and I am respectful of the public defenders." The district court also observed that appellant and the court "had lots of conversations about whether [he was] going to be represented by these attorneys or not" and "[Appellant] frequently raised complaints about [his] representation during the time this case was pending and before trial, and so there was a lot of conversation about that. [The district court] understood when trial started that

[appellant was] represented by those two attorneys and that [he] went forward with that representation."

The attorneys remained in the courtroom after the district court discharged them, and appellant represented himself during the sentencing hearing. He did not waive his right to counsel in writing, and the district court did not question him further about his waiver.

In felony cases, "a voluntary and intelligent written waiver of the right to counsel" must be entered on the record, or the waiver must be made on the record, and the court must advise the defendant of any "facts essential to a broad understanding of the consequences of the waiver of the right to counsel." Minn. R. Crim. P. 5.04, subd. 1 (4); *see also Rhoads*, 813 N.W.2d at 885-86 ("[D]istrict courts should comprehensively examine the defendant regarding [his] comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts relevant to the defendant's understanding of the consequences of the waiver." (quotation omitted)).

The state concedes that "[t]he trial court did not specifically comply with [Minn. R. Crim. P.] 5.04 requirements regarding waiver of counsel in felony cases, nor did the trial court otherwise comprehensively examine appellant regarding his understanding of the consequences of his expressed wish to represent himself at sentencing."

The state argues that, although appellant refused to talk to his attorneys about his desire to go pro se before the sentencing hearing, "it should be presumed that the attorneys had discussed self-representation with appellant earlier, particularly given his specific complaints about their representation to the trial court." Before closing

arguments, appellant asked to speak to the district court privately. The district court advised him not to do so before his attorneys reviewed what he planned to say and offered to let him speak to his attorneys before trial began that day. One of appellant's attorneys then noted that what appellant wanted to do was complain to the district court about his attorneys' representation of him. Appellant was sworn in and complained that he had not been getting enough time, that his attorneys had falsely represented him because he testified when he was "sky-high," that they should have filed more motions, and that he wanted to "file for ineffective counsel." Throughout this exchange, appellant was complaining about his counsel, but he did not indicate that he understood the procedural posture of his case, i.e., that evidence was no longer being presented, or that he understood the consequences of proceeding to sentencing without counsel. The state's argument that appellant's discussion of self-representation with his attorneys "should be presumed" is without support in the record.

We affirm appellant's conviction on the grounds that he did not prove he was denied effective assistance of counsel at trial and the district court did not abuse its discretion in denying appellant's posttrial motion for investigative assistance or in admitting evidence of appellant's five unspecified prior felonies. But we reverse appellant's sentence and remand for a sentencing hearing at which appellant will either be represented by counsel or waive his right to counsel in compliance with Minn. R. Crim. P. 5.04.

Affirmed in part, reversed in part, and remanded.