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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0042**

State of Minnesota,
Respondent,

vs.

Patrick J. Modtland,
Appellant.

**Filed April 22, 2008
Affirmed in part, reversed in part, and remanded
Crippen, Judge***

Hennepin County District Court
File No. 06035992

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Crippen, Judge.

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

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant Patrick Modtland was convicted by a jury of possession of theft tools. His primary claim of error is directed at jury instructions that specifically mentioned a flashlight and screwdrivers as the tools allegedly possessed; he contends that the court should have permitted the jury to decide whether these tools constituted a “device” or “instrumentality” within the meaning of the governing statute. We remand for a sentence correction, but because appellant has failed to show the district court’s instruction was erroneous or that there is merit in additional claims of error, we otherwise affirm.

FACTS

Appellant was charged with possession of theft tools after he was apprehended around 3:00 a.m. in a neighborhood where a person had broken into and stolen items from two automobiles. He was identified by two eyewitnesses during a show-up procedure conducted soon after he was detained. In August 2006, when trial was first set, appellant terminated the services of the public defender who had been appointed to represent him; he requested and was denied substitute counsel. At his trial in September, he elected to defend himself with his former attorney acting as stand-by counsel. Appellant was convicted.

DECISION

1. Jury Instruction

Appellant contends that the district court erred by giving an instruction on possession of theft tools, under Minn. Stat. § 609.59 (2004), that assumed a flashlight and

screwdrivers constituted a “device” or “instrumentality,” as specified in the statute. The court used the standard JIG instruction, which called for inserting the identity of the tools at issue in the case: The instruction stated that the offense was “possession of any device or other instrumentality with intent to use or permit the use of the same to commit theft,” and the court stated as the first element of the offense “that the Defendant had in possession a flashlight and/or one or two screwdrivers.”

Appellant asserts that the question of whether a specific item is a “device” or “instrumentality” within the meaning of the statute is a question for a jury that should not have been determined by the court. He also argues that he was denied his right to a unanimous verdict because the jury’s decision could have been based on a finding that he possessed a flashlight “or” a screwdriver. Neither contention has merit.

Appellant did not raise an objection to this jury instruction at trial. Thus, we review his claim to determine if the instructions contain plain error affecting his substantial rights or an error of fundamental law affecting the fairness and integrity of the trial. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Only when errors in instructions are prejudicial will this court reverse. *State v. Larson*, 281 N.W. 2d 481, 485 (Minn. 1979).

Minn. Stat. § 609.59 does not define device or instrumentality but qualifies the terms with the adjective “any.” The plain meaning of this statute is that the defendant must possess an item with the intent to use it to commit a theft or burglary, and the district court’s instruction is consistent with the statute. Appellant has not articulated any means by which the jury could find that the flashlight or screwdriver would not constitute

a “device” or “instrumentality.” Nor does he provide any scenario whereby the description of the items in question as a device or instrumentality might ever be disputed as an element of the charge. *See Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986) (specifying that charge taken in its entirety should correctly state the law and not assume existence of facts in controversy). Finally, appellant has cited no case, and we are aware of none, finding it error to assume facts not reasonably disputed by the parties. In the event an error occurred, appellant has failed to show that the instruction “had a significant effect on the verdict of the jury.” *Griller*, 583 N.W.2d at 741 (quotation omitted).

Nor is this a case which requires a unanimous verdict instruction under *State v. Shamp*, 427 N.W.2d 228, 231 (Minn. 1988) (permitting verdict without unanimity on specific acts when there was no reasonable likelihood that incriminating testimony went to one act but not the other). There is no reasonable likelihood that the jury would have credited the eyewitness’s testimony about appellant’s use of a flashlight but not about appellant being in the car where the screwdrivers were found.

There is no showing of error or prejudice in the district court’s instructions challenged by appellant.

2. Other Issues

A. Substitute Counsel

Appellant also contends that the district court erred by failing to appoint him substitute counsel when he discharged his public defender on the day scheduled for trial and requested a continuance to find new counsel. He claims the district court mistakenly

stated that he was not entitled to a substitute public defender without evaluating whether exceptional circumstances existed.

A defendant in criminal proceedings is entitled to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. “This right includes a fair opportunity to secure counsel of [one’s] own choice.” *State v. Fagerstrom*, 286 Minn. 295, 298, 176 N.W.2d 261, 264 (1970). But the indigent defendant’s right does not include “the unbridled right to be represented by counsel of his own choosing.” *Id.* at 299, 176 N.W.2d at 264. A defendant’s request for a substitution of counsel will be granted only when exceptional circumstances exist, the demand is reasonable, and the request is timely. *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). Absent an abuse of discretion by the district court, its decision will not be disturbed. *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001).

Exceptional circumstances are “those that affect a court-appointed attorney’s ability or competence to represent a client.” *Id.* In *Gillam*, the supreme court held that the defendant’s disagreement with appointed counsel about trial strategy and general dissatisfaction with the representation did not constitute exceptional circumstances. *Id.* at 449-50. A defendant has the burden of showing the existence of exceptional circumstances. *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998).

Appellant fails to meet the burden of showing exceptional circumstances requiring substitution of appointed counsel. He argues that he and his public defender had a “conflict of interest,” “had issues,” did not see eye to eye, and that she failed to provide “documentation” he requested, refused to give him legal authority for her

recommendations, refused to provide or share information, and did not believe in his innocence. But appellant has failed to show that the public defender lacked competence.

What appellant characterizes as a “conflict of interest” with his appointed counsel amounts to disagreement as to trial strategy and the merits of the case. He does not state that counsel was incapable of providing adequate legal representation or had a legal conflict of interest.

Appellant also asserts that the trial court should have conducted an inquiry as to whether there were exceptional circumstances, relying on dictum in *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006). When appellant first asserted his request for substitute counsel, the district court observed that the request was untimely, that appellant’s appointed attorney appeared to be very competent, and that if he chose to dismiss his public defender, he would represent himself or obtain private counsel. *See State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997) (recognizing waiver of counsel notwithstanding substitution request when defendant “is aware that he has no right to a different attorney and must proceed pro se upon rejection of the appointed attorney’s assistance”). After the district court denied appellant’s substitution request, the court afforded him an ample opportunity of over one month to hire private counsel. *See Fagerstrom*, 286 Minn. at 300, 176 N.W.2d at 265 (demanding this opportunity).

The district court did not err in refusing to appoint substitute counsel or request further evidence.

B. Show-up Identification

Appellant claims that identification testimony based on a suggestive show-up should have been excluded. Generally, evidentiary rulings rest within the sound discretion of the district court, and this court will not reverse those rulings absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). But when reviewing a district court's decision on a pretrial motion to suppress, if the facts are not disputed and the district court's decision is a question of law, this court "may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999).

"[R]eliability is the linchpin in determining the admissibility of identification testimony" *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977). The issue is determined on the facts of each case, taking into account the identification procedure and the question of whether the witness's in-court identification has an adequate independent origin so as to negate or reduce the likelihood of misidentification. *State v. Bellcourt*, 312 Minn. 263, 264, 251 N.W.2d 631, 633 (1977). Reliability of the independent origin is assessed by considering the witness's opportunity to view the suspect, the degree of the witness's attention, the accuracy of the witness's initial description, the certainty of the witness, and the time elapsed between the crime and the identification. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995); *Seelye v. State*, 429 N.W.2d 669, 672 (Minn. App. 1988) (citing *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 380-83 (1972)).

We assume for purposes of this argument that the show-up procedure was unduly suggestive, but the district court concluded that there was a sufficient independent basis for the identification. The court made specific findings that each witness had ample time to view appellant's acts, near the window where they watched, and under a street light. The court found each witness was attentive due to the anxiety of the situation. There was no evidence of a significant difference between the witnesses' descriptions of the person seen breaking into the automobiles before and after the show-up—his race, hair color, build, and dark clothing. The court also found that both witnesses were sufficiently certain of their identification. The short amount of time that passed between the crime and the witnesses' identification weighs in favor of finding the identification to be reliable. The court did not err in refusing to suppress evidence of the witnesses' pretrial and in-court identification of appellant.

Appellant also argues that Minnesota courts should reject the totality of the circumstances test and instead follow other jurisdictions that have concluded that tainted identification evidence should not be admitted. We decline again to challenge the established precedent on this issue. *State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005) (stating that as an “error-correcting court,” it is not our role “to abolish established judicial precedent”).

C. Concurrent, Not Consecutive, Sentences

Appellant challenges and respondent agrees that the court mistakenly imposed a 26-month sentence to be served consecutively, rather than concurrently, with his previously stayed 107-month sentence for an earlier offense. Interpretation of the

language of the sentencing guidelines is a legal issue, subject to de novo review. *State v. Myers*, 627 N.W.2d 58, 62 (Minn. 2001).

The presumptive guidelines sentence for appellant's current offense was a 26-month prison sentence. The list of offenses eligible for permissive or presumptive consecutive sentencing does not include possession of theft tools in violation of Minn. Stat. § 609.59. Minn. Sent. Guidelines II.F.02, VI. And there is no indication that the district court intended to depart from the presumptive sentence. We reverse and remand for the district court to order that appellant serve the presumptive 26-month sentence concurrently with the sentence for his prior offense.

3. Pro se Issues

Appellant claims ineffective assistance of counsel by the appointed public defender, whom he terminated on the original trial date, a month before the actual trial. He also faults counsel's provision of stand-by assistance. Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than a direct appeal. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). Because the record on appeal is inadequate to make a judgment on several allegations appellant raises, we decline to address this issue in this appeal, but preserve appellant's right to address the topic in a postconviction proceeding. Minn. Stat. § 590.01, subd. 1 (2006).

Appellant also contends that he was severely prejudiced by the state's failure to fully disclose material evidence prior to trial. Here, too, the record is insufficient for this court to fully evaluate this claim, and it is more appropriate for the issue to be raised in a petition for postconviction relief. *Id.*

Appellant claims he was denied a right to a meaningful appellate review due to alleged missing or inaccurate parts of the record in the trial transcript, but he failed to seek correction of the record as provided by Minn. R. Civ. App. P. 110.05 (calling for corrected statement of proceedings, submitted to the trial court).

Appellant's general assertion that his due process rights were violated in the manner that the trial was conducted lacks the specificity and legal basis to warrant a new trial.

Affirmed in part, reversed in part, and remanded.