STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0290

State of Minnesota,
Respondent,

vs.

Perry Shawn Hardesty,
Appellant.

Filed June 3, 2008
Affirmed
Stoneburner, Judge

Dakota County District Court
File No. KX0681

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

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Lansing, Presiding Judge; Stoneburner, Judge; and Worke, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of and sentence for first-degree attempted aggravated robbery, arguing that: 1) the prosecutor committed prejudicial misconduct; 2) he was denied his rights to represent himself and to a speedy trial; 3) the district court abused its discretion by denying his motion for a new trial based on newly discovered evidence; and 4) the evidence does not support the jury's finding that he is a career offender. Appellant also argues that his attorney was ineffective. Because the record on appeal is not sufficient to permit review of appellant's ineffective-assistance-of-counsel claim, we preserve that issue for a postconviction proceeding. Because appellant's other claims do not warrant reversal or a new trial, we affirm.

FACTS

Appellant Perry Shawn Hardesty was identified as a suspect in an attempted armed robbery of a restaurant after photographs from the restaurant's surveillance videotape were circulated to area law-enforcement agencies for possible identification. Based on a tip from the Ramsey County Sheriff's Department, investigating police officer Stacey Convery compared Hardesty's driver's license picture to the surveillance photos and observed a resemblance. Officer Convery included a picture of Hardesty in a photographic lineup. The restaurant cashier, who had been threatened by the robber, was unable to identify the robber from the photographic lineup. But the restaurant manager, who had seen the robbery in progress on the surveillance camera in his office and had chased the robber from the restaurant, immediately picked Hardesty's picture out of the

lineup. Hardesty was charged with second-degree attempted aggravated robbery. Hardesty has continuously maintained his innocence.

Hardesty was initially represented by a privately retained pro-bono attorney from the Neighborhood Justice Center. At an omnibus hearing, Hardesty asserted his right to a speedy trial. The district court scheduled trial to begin 34 days later. On that date, Hardesty's attorney informed the district court that she was not prepared for trial and that the discovery produced by the state was incomplete. The district court continued trial to a date 61 days from Hardesty's demand for a speedy trial. The record reflects that Hardesty waived his right to a speedy trial for this continuance. The district court stated that there would be "[n]o further continuances of any kind."

On the continued trial date, Hardesty's attorney moved to withdraw because Hardesty had asked her to do so and because he had repeatedly complained that she was not adequately representing him. The district court told Hardesty that it would deny the motion if Hardesty wanted the attorney to continue to represent him. The district court also told Hardesty that he could proceed to trial pro se, or could come to some agreement with the prosecutor, but that "[o]ne way or another this matter is going to be resolved today." During Hardesty's discussion with the district court about how he wanted to proceed, Hardesty protested his innocence of the crime, complained that he did not believe his attorney wanted to represent him, and expressed that he was not able to defend himself adequately. The district court called a recess to allow Hardesty to consider how he was going to proceed.

After the recess, Hardesty's attorney again moved to withdraw based on Hardesty's expressed dissatisfaction with her representation. The district court granted the attorney's motion and asked Hardesty if he wanted to apply for a public defender, which would require an additional continuance. The district court strongly suggested that Hardesty needed an attorney and stated that the trial would be continued for two weeks, and a public defender would be appointed. Hardesty stated that he wanted to represent himself and proceed to trial immediately. After another recess and more discussion between Hardesty and the district court, as well as assurances from the district court that a public defender would be ordered to be prepared for trial in two weeks, Hardesty agreed to the appointment of a public defender and a two-week continuance.

One week before trial was scheduled to begin, Hardesty's public defender moved for another continuance. At the hearing on this motion, held four days before the scheduled trial date, the state opposed a continuance, noting that Hardesty was in custody, had requested a speedy trial, and the trial had already been continued twice. The public defender said he had not yet had any contact with Hardesty and that it would be impossible for him to be ready for a trial scheduled to begin in four days. After further discussion, during which Hardesty complained about having previously been forced to waive his demand for a speedy trial, Hardesty agreed that he wanted his attorney to be prepared and agreed to another continuance of 14 days. Hardesty stated that he understood that he would "not be able to raise this continuance [on appeal] as an issue of a speedy trial demand."

The state gave notice of its intent to seek an aggravated sentencing departure based on Hardesty's repeated felony offenses, and on the first day of trial, the state successfully amended the complaint to add one count of first-degree attempted aggravated robbery. Hardesty gave notice that he intended to rely on an alibi defense and subpoenaed his ex-girlfriend, Tascha Zapata, as an alibi witness, to testify that he was babysitting her children at the time of the attempted robbery. Zapata failed to appear on the first day of trial despite the subpoena.

On the second day of trial, Hardesty's attorney introduced into evidence a police report showing that, at the time of the attempted robbery, Hardesty had a six-inch hair tail. The report, written by Officer Donald Rindal, was from Hardesty's arrest for an unrelated offense eight days after the attempted robbery. Hardesty's attorney offered the evidence to show that Hardesty was not the person depicted on the restaurant surveillance video because that person did not have a hair tail. The state objected and moved for a mistrial, claiming that the police report had not been provided to the state in discovery and that its introduction would deprive the state of a fair trial. The district court stated that it would withdraw the report from evidence and caution the jury, but that it would not grant a mistrial. Hardesty's attorney then joined in the motion for mistrial, stating his intention to subpoena Officer Rindal to testify at the next trial. The district court granted a mistrial.

Hardesty's second trial began 26 days later. Hardesty abandoned his alibi defense for this trial and instructed his attorney not to call Zapata as a witness. His theory of defense was that he could not have been the robber because the surveillance video did not

show a person with a hair tail. The state, however, called Zapata in its case in chief and questioned her about the fact that Hardesty sometimes tucked his hair tail into his baseball cap so that it was not visible. Zapata also testified that she did not know where Hardesty was on the day of the attempted robbery.

On cross-examination, Hardesty's attorney impeached Zapata by eliciting testimony that Hardesty had assaulted her and that their relationship was abusive. Hardesty's attorney also attempted to impeach Zapata by questioning her about statements she had made to defense investigator Krista Marks that Hardesty was watching Zapata's children on the day of the robbery. Zapata testified that she did not remember making those statements. The prosecutor asked follow-up questions about the abusive relationship. After Zapata's testimony, Hardesty personally moved for a mistrial based on what he asserted was prejudicial prior-bad-acts evidence that he had abused Zapata. The district court denied the motion.

Later in the trial, Hardesty's attorney called Officer Rindal to describe his contacts with Hardesty and his observation of Hardesty's hair tail. Hardesty's attorney also called defense investigator Marks to testify that Zapata had told her that Hardesty was watching Zapata's children at the time of the robbery. On cross-examination, the state asked Marks if she had "investigate[d] any other leads or defenses for [Hardesty]." Specifically, the state asked if Marks had "investigate[d] whether [Hardesty] was in custody at the time of the offense." She responded that she did not investigate this fact, explaining that police reports established that he was not in custody. The state then asked: "And yet he told the officers at the time that he was in custody on the [day of the

attempted robbery]?" The district court sustained an objection to this question, struck it, and instructed the jury to disregard it.

The jury convicted Hardesty of both first-and second-degree attempted robbery and the district court adjudicated him guilty of first-degree attempted robbery. In a bifurcated proceeding, the jury was then asked to determine whether aggravating sentencing factors existed, including whether Hardesty had five or more prior felony convictions and whether the present offense was committed as part of a pattern of criminal conduct. After considering evidence presented on these issues, the jury answered "yes" to both questions.

Prior to sentencing, Hardesty's attorney moved for a new trial based in part on (1) evidence that the state committed misconduct in asserting a discovery error in the first trial and (2) the state's failure to produce an adequate copy of the surveillance video until "a few hours" before jury selection in the second trial. At the hearing on this motion, Hardesty's attorney argued that the state's claim at the first trial, that it did not know about Officer Rindal's report, was "disingenuous" because Hardesty's first attorney had provided the state with five separate booking photographs all showing him to have a hair tail at the time of the attempted robbery. Hardesty's attorney also argued that the state's delay in providing an adequate copy of the video during the second trial prevented the defense from making enhanced still photos from the video. In addition, Hardesty himself told the district court that he had newly discovered evidence of who actually committed the crime but that police were not responding to his request for a statement from the

person who gave him the information. The district court continued the hearing on the motion.

At the continued hearing, Hardesty's attorney informed the court that Geronimo Estrata, who had been in jail with Hardesty, told Hardesty and his attorney that Estrata's brother-in-law, "Joel Royce,"[1] had admitted to the attempted robbery. At the time of the hearing, Royce was serving time at a federal penitentiary in Terre Haute, Indiana, for armed robbery of a credit union. Hardesty's attorney was in the process of contacting Royce for a statement. The district court took Hardesty's new-trial motion under advisement.

At the same hearing, Hardesty personally addressed the court and asked that his public defender be discharged. The district court denied that request. Nonetheless, it appears that Hardesty's attorney withdrew prior to sentencing due to ongoing disputes with Hardesty. The public defender's office assigned Hardesty a different public defender to represent him at sentencing.

At the sentencing hearing, Hardesty again personally addressed the district court, this time on his motion for the trial judge to recuse himself from sentencing and on his motion for a new trial. Hardesty requested a hearing to prove that the state knowingly elicited perjured testimony and suppressed favorable evidence at trial. Hardesty alleged that the state knew that when Zapata said he wore his hair "up," she was "refer[ring] to it as being in a braid," but that the state led her into saying she meant under a hat.

[1] The name "Joel Rice" appears in the transcript but Hardesty asserts that this is a typographical error and that the correct name is "Joel Royce."

Regarding his claim of newly discovered evidence, Hardesty asked the district court to look at the videotapes of a previous bank robbery committed by Royce, arguing that Royce "very much resembles me with the hat on." Hardesty's attorney informed the district court that Royce had been contacted and refused to give any statement. The district court denied all of Hardesty's motions.

Hardesty's attorney then argued that the state had failed to establish that Hardesty should be sentenced as a career criminal because one of his six convictions did not qualify as a "prior" conviction; two of the remaining five convictions were not proven to be felony-level convictions; and there was insufficient evidence to support the finding of a pattern. The district court nonetheless sentenced Hardesty as a career criminal to 120 months in prison. This appeal followed.

D E C I S I O N

I. Prosecutorial misconduct

Hardesty argues that the state engaged in a pattern of misconduct that denied him a fair trial and that the district court abused its discretion by failing to grant his motion for a new trial based on prosecutorial misconduct. "The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). A prosecutor commits misconduct when he or she engages in acts that "undermin[e] the fairness of a trial," or "violat[e] [] clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *Id.* The prosecutor "must

avoid inflaming the jury's passions and prejudices against the defendant." *State v. MacLennan*, 702 N.W.2d 219, 235 (Minn. 2005) (quotation omitted).

A district court's denial of a new-trial motion based on alleged prosecutorial misconduct will be reversed "only when the misconduct, considered in the context of the trial as a whole, was so serious and prejudicial that the defendant's constitutional right to a fair trial was impaired." *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000). Generally, a new trial will not be granted "if the misconduct was harmless beyond a reasonable doubt." *State v. Hunt*, 615 N.W.2d 294, 301-302 (Minn. 2000). "Reversal is required for unusually serious misconduct unless it was harmless beyond a reasonable doubt, but reversal is required for less serious misconduct only when it substantially influenced the verdict." *State v. Ahmed*, 708 N.W.2d 574, 583 (Minn. App. 2006) (citing *State v. Steward*, 645 N.W.2d 115, 121 (Minn. 2002). "[T]he constitutional right to a fair criminal trial does not guarantee a perfect trial." *State v. Greenleaf*, 591 N.W.2d 488, 505 (Minn. 1999).

Hardesty argues that the state engaged in a pattern of misconduct by (1) shifting to him the burden to disprove an alibi he did not argue; (2) eliciting inadmissible evidence of his criminal history and uncharged criminal conduct; and (3) eliciting inadmissible opinion evidence from a police officer. By asserting that cumulative misconduct deprived him of a fair trial, Hardesty implicitly concedes that none of the specific allegations independently warrants a new trial, and we agree with that apparent concession.

Alibi defense

Hardesty claims that the state called Zapata to shift the burden to him to disprove an alibi he was not asserting in the second trial. We disagree. The state established through Zapata that Hardesty sometimes wore his hair tail under his cap in order to explain why a hair tail is not visible in the surveillance video. The state also asked Zapata if she knew where Hardesty was on the day of the robbery, but this question did not shift any burden of proof to Hardesty. At that point the jury had not heard any reference to Zapata's prior statements that Hardesty was watching her children on the day of the robbery. Consequently, there was nothing for Hardesty to disprove.

Hardesty also argues that the state's questions to Marks on cross-examination shifted the burden of proof to Hardesty to disprove a non-existent alibi defense that Hardesty was in custody on the day of the robbery. We agree that the state engaged in improper questioning by asserting that Hardesty told police officers he was in custody. But the district court promptly intervened, sustaining defense counsel's objection and instructing the jury to disregard the question. Any prejudice from the improper question was cured by the district court's prompt ruling and cautionary instruction. *See Gum v. Medcalf Orthopaedic Appliance Co.*, 380 N.W.2d 916, 921 (Minn. App. 1986) (stating that a curative instruction will generally mitigate any prejudice arising from the misconduct).

Testimony about Hardesty's prior crimes and bad acts

Hardesty contends that the state elicited prejudicial and irrelevant testimony from Zapata that Hardesty had assaulted her in the past. But, as Hardesty acknowledges, the

state was not the first to question Zapata about prior assaults. Hardesty's attorney elicited this information on cross-examination in an effort to impeach Zapata and to establish a motive for Zapata to be a state's witness. Hardesty's attorney also questioned Zapata about her previous statements to Marks that Hardesty had been watching her children on the day of the attempted robbery. On redirect, the state asked follow-up questions about Hardesty's abusive behavior toward Zapata, but the district court sustained an objection to the relevance of the questions. The state concluded the redirect by establishing that Zapata fears Hardesty and that he was not watching her children on the day of the attempted robbery. Hardesty's attorney then impeached Zapata with prior statements that she could not remember what had occurred on the day of the attempted robbery and with evidence that she had sent Hardesty a letter with a heart on it after the date on which she said she had begun to fear him. A portion of Zapata's testimony dealt with communication she had with Hardesty while he was in jail.

After Zapata's testimony, Hardesty requested a mistrial, expressing his dissatisfaction with his representation, the state's conduct, and his fear that evidence that he is a violent person would prejudice the jury. The district court addressed Hardesty's concerns at length and denied his request for a mistrial. Based on the record, we conclude that the state did not commit misconduct in calling Zapata or in following up on testimony elicited by Hardesty's attorney that the relationship between Zapata and Hardesty was abusive.

Additionally, Hardesty asserts that the state elicited inadmissible, prejudicial information from Officer Rindal about the reasons for his contact with Hardesty. But

Hardesty's attorney called Officer Rindal and was the first to establish that he had come into contact with Hardesty due to an arrest warrant on an unrelated matter. Therefore, we conclude that the state did not engage in any misconduct in questioning Officer Rindal.

Officer's opinion testimony

Hardesty argues that the state's questioning of Officer Convery constituted prosecutorial misconduct because her testimony included "overly prejudicial opinion" evidence and a "sneaky" reference to Hardesty's prior criminal record by referencing a booking photograph. The state called Officer Convery to explain how Hardesty came to be charged with the attempted robbery. She testified that photographs developed from the restaurant's surveillance tapes had been circulated to law-enforcement agencies with a description of the attempted robbery. The next day, a Ramsey County sheriff's deputy suggested to Officer Convery that she look at Hardesty as a possible suspect. Officer Convery obtained a photograph of Hardesty from the Department of Motor Vehicles and compared it with the stills from the video. She testified: "I thought that there was a striking resemblance between the driver's license photograph and that person on the video surveillance." She testified that she then obtained a booking photograph of Hardesty to make a photographic lineup with five other photographs. Hardesty's attorney did not object to this testimony.

We review unobjected-to conduct under a three-part plain-error analysis: (1) whether error is present, (2) whether the error is plain, and (3) whether the error affected the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Error affects a defendant's substantial rights if there is a reasonable likelihood that the misconduct had a significant effect on the verdict. *Id.*

Regarding Officer Convery's reference to the booking photograph, Hardesty himself introduced evidence of his prior involvement with law enforcement and a booking photograph to establish that he had a hair tail, the existence of which was critical to his defense. Officer Convery's reference to a booking photograph was not a result of prosecutorial misconduct and was not prejudicial.

Officer Convery's testimony that "there was a striking resemblance between" the surveillance video photos and Hardesty's driver's license photo was inadmissible opinion evidence, and its admission constituted error that was plain. But the state's questions were not designed to elicit the officer's opinion. The question only called for her to relate that, based on information from the Ramsey County Sheriff's Department, she obtained a photograph of Hardesty and included it in a photographic lineup. Therefore, the inadmissible testimony was not the result of prosecutorial misconduct.

Furthermore, there is no reasonable likelihood that Officer Convery's opinion had any effect on the verdict. The restaurant manager, who had come face-to-face with the robber, immediately picked Hardesty from the photographic lineup and confidently identified Hardesty in the courtroom as the would-be robber. The jury viewed the video, saw photographs made from the video, and saw booking photographs of Hardesty. The jury was able to form its own opinions about the resemblance. Any error in admitting Officer Convery's opinion about the photos was harmless beyond a reasonable doubt.

II. Right to a speedy trial and right to self-representation

Hardesty argues that he was denied his right to a speedy trial and his right to represent himself. The record demonstrates that these issues are intertwined. There is much discussion on the record between Hardesty and the district court on the issues of self-representation and speedy trial. Hardesty clearly demanded a speedy trial from the start, and the state and district court had this demand in mind each time a continuance was granted. Hardesty also clearly stated, more than once, that he would rather represent himself than delay trial. At the end of each of the lengthy discussions between Hardesty and the district court on these issues, however, Hardesty admitted that he was ill-prepared to represent himself, and he agreed to all of the continuances in order to be represented by an attorney.

Self representation

Defendants in state criminal proceedings have a right under the Sixth and Fourteenth Amendments to the United States Constitution to represent themselves. *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990). "The right is so fundamental that it is not subject to harmless error analysis." *State v. VanZee*, 547 N.W.2d 387, 390 (Minn. App. 1996), *review denied* (Minn. July 10, 1996). A defendant whose right to self-representation has been violated need not show prejudice. *Richards*, 456 N.W.2d at 263. A district court will generally allow self-representation if (1) "the request is clear, unequivocal, and timely"; and (2) "the defendant knowingly and intelligently waives his right to counsel." *Id.*

The district court continuously acknowledged Hardesty's right to represent himself, but also continuously cautioned Hardesty that he would be ill-advised to exercise this right, a fact that Hardesty himself recognized in every exchange with the district court prior to trial. *See* Minn. R. Crim. P. 5.02, subd. 1(4) (mandating that prior to accepting a waiver of the right to counsel the district court advise a defendant of all facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision). Hardesty never unequivocally asserted a right to self-representation, and therefore the district court never denied an unequivocal request by Hardesty to represent himself. Although Hardesty persistently asserted his frustration with delays and expressed dissatisfaction with almost everyone who represented him, we find no merit in Hardesty's claim that he was denied the right to represent himself.

Speedy trial

Similarly, although Hardesty requested a speedy trial and vociferously objected to each continuance, he also, in the end, agreed to each continuance on the record. Although Hardesty now claims that he was coerced into waiving his right to a speedy trial, the record demonstrates that he knowingly waived the right in order to have an attorney who was prepared to represent him.

In determining whether or not there has been a violation of a defendant's right to a speedy trial, one thing we examine is the defendant's assertion of his right. *State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977). Because in each instance Hardesty agreed to

continue the trial date and because every continuance was at the request of the defense, we find no merit in Hardesty's claim that he was denied his right to a speedy trial.[2]

III. Newly discovered evidence

Hardesty argues that the district court erred in denying his motion for a new trial based on what he claims is newly discovered evidence that someone else admitted to the attempted robbery. This court will not disturb a district court's decision to grant or deny a new trial on the basis of newly discovered evidence absent an abuse of discretion. *State v. Rhodes*, 657 N.W.2d 823, 845 (Minn. 2003). To be granted a new trial for newly discovered evidence, a defendant must prove that: (1) neither he nor his attorney knew of the evidence before trial; (2) due diligence would not have produced the evidence before trial; (3) the newly discovered "evidence is not cumulative, impeaching, or doubtful"; and (4) the newly discovered "evidence would probably produce an acquittal or a more favorable result." *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997).

The flaw in Hardesty's argument is that the evidence he proffers is extremely doubtful. Hardesty asserts that Geronimo Estrata told Hardesty that Estrata's brother-in-law, Joel Royce, admitted to Estrata that he committed the attempted robbery. Royce, who is serving time in a federal penitentiary, has refused to give a statement, and Hardesty has no evidence beyond Estrata's hearsay statement to support his claim that Royce committed this crime. Hardesty even explained to the district court that Royce considers Hardesty a "snitch" and is unlikely to confess to the crime. On this record, we

[2] Even the mistrial was at Hardesty's request. The district court had denied the state's request for a mistrial and mistrial was only granted when Hardesty joined in the request.

cannot conclude that the district court abused its discretion by denying Hardesty's motion for a new trial.

IV. Sentencing

The career-offender statute permits a judge to impose an upward sentencing departure, up to the statutory maximum, "if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed as part of a pattern of criminal conduct." Minn. Stat. § 609.1095, subd. 4 (2006). Hardesty argues that the state's evidence of his prior felony convictions is insufficient to support the jury's findings that he is a career offender because the evidence fails to show that he had five prior felony-level convictions and failed to show a pattern to his criminal behavior. We review a claim of insufficiency of evidence through "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" factfinder to reach the verdict that it reached. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

The record supports the determination that Hardesty had five prior felony convictions

The state introduced evidence of Hardesty's six prior felony convictions. Hardesty acknowledges that the state adequately proved that he was convicted of two felonies in 1993, and the state concedes that one of the six convictions it offered does not qualify as a prior felony conviction because Hardesty was sentenced for the offense after the date of the attempted robbery in this case. We must therefore consider whether the evidence sufficiently supports a determination that the remaining three convictions are

for felony-level offenses and whether that determination can be made by the district court.

Hardesty first challenges the evidence of his Indiana conviction of possession of a stolen vehicle in 1997, asserting that the jury should have been properly instructed to find whether this conviction constituted a felony-level conviction in Minnesota. Hardesty argues that this determination must be made by the factfinder and not the district court, citing *Hankerson v. State*, 723 N.W.2d 232 (Minn. 2006). *Hankerson*, however does not support this assertion. Instead, the case merely quotes *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000) for the proposition that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Hankerson*, 723 N.W.2d at 234 (emphasis added). Moreover, this court has recently held that "a sentencing court does not violate a defendant's right to a jury trial when it determines whether out-of-state convictions are felonies under Minnesota law." *State v. Outlaw*, ___ N.W.2d ___, ___, 2008 WL 1971456, at *3 (Minn. App. May 6, 2008). Prior convictions remain a determination to be made by the district court and Hardesty cites no authority to support the proposition that the determination of the level of conviction is a jury question.

"[I]n deciding whether out-of-state convictions can be treated as felonies for determining a guidelines criminal history score, the [district] court may look to the definition of the offense, the nature of the offense, and the sentence received." *State v. Combs*, 504 N.W.2d 248, 250 (Minn. App. 1993) (citation omitted), *review denied*

(Minn. Sept. 21, 1993); *see also* Minn. Sent. Guidelines cmt. II.B.5 (stating that "[t]he determination of the equivalent Minnesota felony for an out-of-state felony is an exercise of the sentencing court's discretion and is based on the definition of the foreign offense and the sentence received by the offender"). The state introduced evidence that Hardesty was sentenced in Indiana to three years in prison for the 1997 possession-of-a-stolen-vehicle offense, making it a felony-level sentence under Minnesota law. *See* Minn. Stat. § 609.02, subd. 2 (2006) (defining a felony as an offense punishable by a prison sentence of more than one year). We therefore conclude that the district court properly classified this offense as a felony-level offense.

Hardesty also challenges whether his Indiana conviction for attempted auto theft in 1997 constitutes a felony-level conviction in Minnesota. Hardesty was sentenced to three years in prison for this offense, but two years of his sentence were suspended. Hardesty argues that because he only served one year in jail for this offense, it is not a felony in Minnesota. Hardesty cites no authority, however, for the proposition that because part of a sentence is stayed, the level of the offense is diminished, and we find his argument without merit.

Hardesty further argues that the state failed to establish that a Minnesota escape-from-custody conviction in 2001 is a felony-level offense. The state offered the complaint and plea-hearing transcript in this matter to show that it was charged as a felony. But Hardesty asserts that this is not sufficient proof that he was actually convicted of a felony, and that the plea transcript fails to establish facts that support the contention that he was convicted of a felony. However, the plea transcript shows that

Hardesty pleaded guilty to "the charge of escape from custody, as a felony." And Hardesty's plea petition, also in evidence, is captioned "PETITION TO ENTER PLEA OF GUILTY IN A FELONY CASE PURSUANT TO RULE 15." Moreover, Hardesty's challenge to the authenticity of the admitted documents is without merit because the documents were certified by a court clerk. *See* Minn. R. Evid. 902(4) (stating that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to" certified copies of public records).

Lastly, Hardesty similarly challenges his 2004 conviction for theft of a motor vehicle. But certified documents showing Hardesty's conviction and sentence to 13 months in prison are sufficient to support the conclusion that it was a felony-level conviction.

The record supports the finding of a pattern

Hardesty argues that the state failed to prove that he committed the present offense as part of a pattern of criminal conduct. "A pattern is the organizing principle or relationship binding certain things, in this case incidents of criminal conduct, together. Such a 'pattern of criminal conduct' may be demonstrated by proof of criminal conduct similar, but not identical, in motive, purpose, results, participants, victims or other shared characteristics." *State v. Gorman*, 546 N.W.2d 5, 9 (Minn. 1996) (interpreting the meaning of the term "pattern of criminal conduct" as used in the career-offender statute, Minn. Stat. § 609.1095, subd. 4).

Hardesty argues that his convictions for drug possession, assault, escape, motor vehicle crimes, and the attempted robbery of the restaurant, fail to show a similar purpose

or motivation, and that the only common link among them is that all of the offenses were a violation of the law. At trial, the state argued to the jury that Hardesty's criminal history demonstrated two patterns, thefts and violence, which were combined in the current aggravated robbery conviction. Hardesty argues that "most likely the laypersons serving on the jury were confused by the [state's] arguments and [Hardesty's attorney] failed to zealously rebut these arguments or to object." There is no support in the record for the assertion that the jury was confused. We conclude that the evidence, although minimal, was sufficient to support the jury's determination that a pattern exists.

V. Ineffective assistance of counsel

Hardesty urges this court to apply a plain-error standard to hold that he received ineffective assistance of counsel or, in the alternative, to preserve his right to pursue an argument based on ineffective assistance of counsel in a postconviction proceeding.

> A convicted defendant who claims ineffective assistance of counsel so egregious that a new trial is required must prove: First . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Robinson v. State, 567 N.W.2d 491, 494 (Minn. 1997) (quotation omitted). "Moreover, there is a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance." *Id.* But, "[o]nce an appeal has been taken, all issues raised and all issues known but not raised will not be considered upon a subsequent

petition for postconviction relief." *Id.* (citing *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976)). "This generally includes claims for ineffective assistance of counsel, unless the claim is such that the reviewing court needs additional facts to explain the attorney's decisions." *Id.*

Here, Hardesty was represented by three separate attorneys. The record is replete with Hardesty's challenges to the representation provided by his first and second attorneys, and there is a suggestion in the record that Hardesty's trial attorney withdrew prior to sentencing due to ongoing disputes with Hardesty. The mistrial appears to implicate a lack of communication between Hardesty's first and second attorneys. And much of the evidence Hardesty objects to as prejudicial was elicited in the second trial by defense counsel.

However, the existing record and briefing does not permit this court to adequately review Hardesty's claims of ineffective assistance of counsel in this appeal. We therefore conclude that Hardesty's right to make a full record on his claims of ineffective assistance of counsel should be preserved. *See Robinson*, 567 N.W.2d at 495 (noting that an ineffective-assistance-of-counsel claim can be raised in a petition for postconviction relief, even though the claim was known at the time of direct appeal, if the claim cannot be evaluated by the appellate court on direct appeal because determination depends on testimony from the defendant and/or his attorney).

VI. Hardesty's pro se supplemental claims

Hardesty submitted two pro se supplemental briefs to "expose a pattern of prosecutorial misconduct." He argues that the stated improperly provoked the mistrial,

presented perjured testimony, violated discovery rules, and tampered with witnesses. Hardesty also claims that the state added the charge of first-degree attempted aggravated robbery and sought career-offender sentencing to punish him for not accepting a plea agreement. Most of these issues were not raised in the district court and are supported by documents that are not part of the district court record. This court will generally not consider matters not argued and considered in the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Perjured testimony

A person commits perjury by "mak[ing] a false *material* statement *not believing it to be true*" in a proceeding in which the statement is made under oath. Minn. Stat. § 609.48, subd. 1 (2006) (emphasis added). Hardesty's allegations that the state solicited perjured testimony involve immaterial inconsistencies between reports or prior statements and trial testimony, or between testimony at the first and second trials. These inconsistencies could have been used to impeach witnesses, and the record demonstrates that Zapata was aggressively questioned about the inconsistencies between her prior statements and her trial testimony. But there is no evidence that the state solicited, or any witness provided, perjured testimony.

Discovery violations

Many of Hardesty's allegations of discovery violations were not addressed in the district court, and the discovery issues that were discussed were not the subject of motions to compel or motions for sanctions. Many of Hardesty's complaints center on the state's delay in providing a clear copy of the surveillance videotape to the defense.

But the record shows that a copy was available prior to trial and was delivered to defense counsel at the beginning of trial, and defense counsel did not move for a continuance, recess, or any sanction related to late delivery of the video before trial. We conclude that Hardesty has failed to assert any reversible error based on discovery violations.

Amended complaint/aggravating factors

There is also no evidence to support Hardesty's allegation that the state acted in bad faith by moving to amend the complaint and to sentence Hardesty under the career-offender statute. Both motions were vigorously opposed by Hardesty's attorney, who acknowledged that rules of criminal procedure allow the state to freely amend the complaint until the jury begins its deliberations. *See* Minn. R. Crim. P. 17.05 (stating that a complaint may "be amended at any time before a verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced").

Affirmed.