STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1201

State of Minnesota,
Respondent,

vs.

David A. Meyer,
Appellant.

Filed September 16, 2008
Affirmed
Halbrooks, Judge

Dakota County District Court
File No. K8-06-46

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

Elliott B. Knetsch, Alina Schwartz, Campbell Knutson, P.A., 317 Eagandale Office Center, 1380 Corporate Center Curve, Eagan, MN 55121 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

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

HALBROOKS, Judge

Appellant challenges his convictions of violating a restraining order, harassment, invasion of privacy, and disorderly conduct on the grounds that he was denied his right to counsel and that the district court failed to obtain a knowing, voluntary, and intelligent waiver of his right to counsel. Appellant also argues that the prosecutor committed misconduct that warrants reversal of his convictions. We affirm.

FACTS

Appellant David Meyer was charged with violating a restraining order in violation of Minn. Stat. § 609.748, subd. 6(c) (2004); harassment in violation of Minn. Stat. § 609.749, subd. 2 (2004); interference with privacy in violation of Minn. Stat. § 609.746, subd. 1(a) (2004); and disorderly conduct in violation of Minn. Stat. § 609.72, subd. 1(3) (2004). Temporarily represented by a public defender, appellant made his first appearance in district court on March 20, 2006. Appellant waived his right to a reading of the complaint and asked the district court to schedule an omnibus hearing. Appellant then completed an application for a public defender.

Appellant's application indicated that he was employed full-time, earning $18.91 per hour; appellant claimed monthly living expenses for himself, his wife, and three-year-old child of $1,873. The district court concluded that appellant was not eligible for a public defender and set his omnibus hearing for May 4, 2006. Appellant appeared pro se at the omnibus hearing, and the district court concluded that there was sufficient probable cause to set the matter for trial. Appellant informed the district court that he was trying to

save money to hire a private attorney. In response, the prosecutor stated that he did not "want the case to be delayed any further. I just don't want [appellant] to call the night before trial and ask for a continuance." The district court set trial for August 1, 2006, and instructed appellant to get a private attorney, stating that if he came to court without one, he would have to represent himself. On August 15, appellant appeared before the district court without representation and proceeded pro se without providing a waiver of counsel in writing or orally on the record.

At trial, C.W. testified that on January 3, 2005, she was at home alone when she heard footsteps crunching in the snow in the back yard. C.W. turned out the lights and looked outside but saw nothing. When the sound of footsteps returned a short while later, C.W. testified that she became frightened and called her sister and roommate, A.W., to tell her that someone was walking around in the back yard. As she was talking with A.W., C.W. turned on the back yard light and saw appellant standing at the door. C.W. testified that after a few seconds appellant ran off.

According to C.W., she continued to hear the footsteps in the snow until A.W. got home, about 20 minutes later. A friend of A.W.'s, who came with her, went into the back yard and saw appellant running away. The police were contacted and responded. Officer Jeffrey Klingfus testified at trial that he obtained a physical description of the man from C.W. and observed tracks in the snow in the back yard. Based on the physical description and the information that A.W. had an order for protection against appellant, Officer Klingfus created a photo line-up. C.W. subsequently identified appellant as the person she saw outside their home.

A.W. testified at trial that she met appellant in July 1999 when she worked for Hennepin County Juvenile Probation and appellant was one of her clients. Her last contact with appellant as a client was in August 2000. A.W. testified that in the summer of 2001, she began to receive calls on her work cell phone with heavy breathing, mumbling, and groaning. The calls went on for months, and A.W. stated that she was initially unsure who was making them. But after A.W. encountered appellant, acting nervously around her in public, it made her think that appellant could be the caller. A.W. testified that she saw appellant again in June 2003 when he took a picture of her. A.W. informed the Minneapolis police about the encounter, and appellant was subsequently convicted of gross-misdemeanor harassment. A.W. obtained a restraining order against appellant in 2003 and a second one in August 2005. The investigating officer testified and corroborated the testimony of A.W. and C.W.

Appellant's wife testified on his behalf and stated that appellant woke up around 5:00 p.m. on the evening of January 3, took a nap around 8:00 p.m., and woke up again at 10:30 p.m. in order to arrive at work by 11:00 p.m. Appellant also testified and denied that he was outside the home of C.W. and A.W.

The jury convicted appellant of all charges, and appellant's sentencing hearing was set for November 30, 2006. When appellant failed to appear at the sentencing hearing, the district court issued a warrant, resulting in appellant's arrest. He posted bail and was released on the condition that he have no contact with C.W. But the bond was subsequently revoked because appellant failed to cooperate with the presentence investigation, and appellant was taken into custody. When appellant next appeared in

district court on March 8, 2007, he stated that he was no longer employed, and the district court concluded that appellant was then eligible for the services of the public defender. Appellant, represented by a public defender, was sentenced on March 19, 2007, to a year in county jail for violating his restraining order and a consecutive sentence of 90 days for the interference-with-privacy conviction. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by refusing to appoint a public defender to represent him at trial. Appellate courts review a district court's decision to appoint a public defender for an abuse of discretion. *In re Stuart*, 646 N.W.2d 520, 523 (Minn. 2002). The United States and Minnesota Constitutions guarantee a criminal defendant the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. "[C]ourts have long required appointment of counsel for criminal defendants who are financially unable to obtain counsel for their defense." *Stuart*, 646 N.W.2d at 524 (citing *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S. Ct. 792, 796-97 (1963)). "'[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him.'" *Id.* (alteration in original) (quoting *Gideon*, 372 U.S. at 344, 83 S. Ct. at 796).

The resources of the public defender are not limitless, so the right to appointed counsel must be protected from those who can otherwise afford their own attorney. *Id.* at 524-25. The Minnesota Rules of Criminal Procedure state that a defendant is "financially unable to obtain counsel" if:

> (1) The defendant, or any dependent of the defendant who resides in the same household as the defendant, receives means-tested governmental benefits; or
>
> (2) The defendant, through any combination of liquid assets and current income, would be unable to pay the reasonable costs charged by private counsel in that judicial district for a defense of the same matter.

Minn. R. Crim. P. 5.02, subd. 3. The burden of proof is on the defendant seeking a public defender to show that he is financially unable to provide his own counsel. *Stuart*, 646 N.W.2d at 526. The defendant must show that any combination of his liquid assets and current income is insufficient to pay the reasonable costs charged by private counsel for defense of the charged crime. *Id.* at 527. When examining the defendant's assets to determine if they are insufficient, the district court must include:

> (1) the liquidity of real estate assets, including the defendant's homestead;
> (2) any assets that can be readily converted to cash or used to secure a debt;
> (3) the determination of whether the transfer of an asset is voidable as a fraudulent conveyance; and
> (4) the value of all property transfers occurring on or after the date of the alleged offense. The burden is on the accused to show that he or she is financially unable to afford counsel. Defendants who fail to provide information necessary to determine eligibility shall be deemed ineligible. The court must not appoint the district public defender as advisory counsel.

Minn. Stat. § 611.17, subd. 1(b) (2006); *see also* Minn. R. Crim. P. 5.02, subd. 4. The district court, in its discretion, should also appoint a public defender to represent a person of moderate means if they would be subject to substantial financial hardship if forced to pay the full cost of adequate representation. Minn. R. Crim. P. 5.02 cmt. "The ability to

pay part of the cost of adequate representation at any time while the charges are pending against a defendant shall not preclude the appointment of the public defender for the defendant." Minn. R. Crim. P. 5.02, subd. 5. If the district court appoints a public defender and later determines that the defendant has the ability to pay part of the costs, it may require the defendant to pay part of the costs of representation to the extent that he is able. *Id.*

The record here demonstrates that the district court considered appellant's financial situation before determining that he did not qualify for a public defender. The application for a public defender in the record indicates that appellant was working 40 hours per week, earning $18.91 per hour. For a family of three, that income well exceeds the eligibility guidelines. Appellant acknowledged to the district court at the omnibus hearing that he understood that he needed to hire private counsel and that, if he appeared for trial without representation, he would have to proceed pro se. Appellant bears the burden of establishing that he was unable to afford private counsel. *See Stuart*, 646 N.W.2d at 526. On this record, he has failed to meet that burden.

Appellant asserts that even if he was not financially eligible for a public defender, the district court should have appointed a public defender and required appellant to pay part of the cost. We disagree. Minn. R. Crim. P. 5.02, subd. 5, allows a district court to require a defendant who receives the services of the public defender to pay part of the costs of representation, but only "after previously finding that the defendant is eligible for public defender services." The rule's language allows for appointment and reimbursement of the cost of a public defender only when the district court, in its

discretion, has determined that a defendant is eligible for the services of the public defender.

Appellant also asserts that the appointment of a public defender for the sentencing hearing is evidence that the district court abused its discretion in denying his earlier request for a public defender. But appellant was unemployed at the time a public defender was appointed for him. Because appellant's financial situation had changed by the time of sentencing, the district court properly exercised its discretion in reconsidering his eligibility for a public defender. But the district court's decision to appoint a public defender when appellant was unemployed posttrial does not make the initial determination of his ineligibility an abuse of the district court's discretion.

II.

Appellant argues that he did not make a knowing, intelligent, and voluntary waiver of his right to counsel before proceeding pro se, and, as a result, he is entitled to a new trial. We disagree. As we have recently announced, appellant's argument lacks merit. *See State v. Jones*, ___ N.W.2d ___, ___, No. A07-1168, slip op. at 21 (Minn. App. Sept. 2, 2008) (holding that a defendant validly waives his right to counsel when he repeatedly refuses to hire a private attorney after being advised by the district court that he does not qualify for a public defender). Appellant was told that he did not qualify for the services of a public defender and that he should retain private counsel or he would have to proceed pro se. Despite this instruction and warning from the district court, appellant failed to hire a private attorney. Appellant was given nearly five months to find an attorney or demonstrate to the district court that he needed more time to hire private

counsel. Because appellant's actions constituted a waiver by conduct, the district court's decision to proceed was not a violation of appellant's constitutional right to counsel.

III.

Appellant argues that the prosecutor committed misconduct that was prejudicial error, adversely affecting the jury's verdict and warranting reversal of his conviction. Because appellant did not object to the conduct that he now argues is misconduct, we analyze the prosecutor's conduct under the plain-error doctrine. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An appellant claiming plain error must demonstrate that an error occurred that was clear or obvious. *Id.* If an appellant can demonstrate such an error, the burden of persuasion shifts to the state to demonstrate that the error lacked prejudicial effect and that the misconduct did not significantly affect the outcome of the case. *Id.* If the state meets its burden, an appellate court "will then correct the error only if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected." *State v. Morton*, 701 N.W.2d 225, 234 (Minn. 2005) (citing *State v. Jones*, 678 N.W.2d 1, 18 (Minn. 2004)).

Appellant argues that the prosecutor asked improper questions of A.W. involving appellant's punishment for a past criminal offense. But appellant, himself, introduced the issue of his past criminal act by asking C.W., "What are your feelings to what I did to [A.W.] between 2001 and 2003? Were you happy with the sentence I received at the time?" By raising the issue of his prior conviction and punishment, appellant opened the door to the prosecutor's limited questions regarding his prior sentence. *See State v. Edwards*, 343 N.W.2d 269, 273 (Minn. 1984). After the prosecutor questioned A.W.

about appellant's past acts and sentence, the district court sua sponte gave the jury a cautionary instruction, despite the fact that the prosecutor's questions were proper, stating:

> The state has introduced evidence of occurrences in 2003 and earlier. This evidence is being offered for the limited purpose of assisting you in determining whether the defendant committed those acts with which the defendant is charged in this complaint.
>
> This evidence is not to be used to prove the character of the defendant or that the defendant acted in conformity with such character. The defendant is not being tried for and may not be convicted of any offenses other than the charged offenses.
>
> You are not to convict the defendant on the basis of occurrences in 2003 and earlier. To do so might result in unjust double punishment.

The district court repeated this instruction before the parties' closing arguments. We presume that the jury followed these instructions. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). And although we conclude that no prejudice resulted from the prosecutor's comments, any presumed prejudice was mitigated by the district court's instructions.

Finally, appellant asserts that it was improper for the prosecutor to ask A.W. how she felt about appellant's intrusion into her privacy. But Minn. Stat. § 609.749, subd. 1, defines "harass" as intentional conduct that "(1) the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimated; and (2) causes this reaction on the part of the victim." By

asking A.W. about her feelings, the prosecutor was addressing one of the elements of one of the charged offenses, not making an appeal to the emotions of the jury.

Affirmed.