STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1898

State of Minnesota,
Respondent,

vs.

Gregory Alan Scott,
Appellant.

Filed December 9, 2008
Affirmed
Klaphake, Judge

Hubbard County District Court
File Nos. 29-CR-07-251, 29-CR-07-604

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

Donovan D. Dearstyne, Hubbard County Attorney, Hubbard County Courthouse, 2nd Floor, 301 Court Avenue, Park Rapids, MN 56470 (for respondent)

Arthur R. Martinez, Law Offices of Arthur R. Martinez, P.A., 250 Second Avenue South, Suite 205, Minneapolis, MN 55401 (for appellant)

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

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

KLAPHAKE, Judge

Appellant Gregory Alan Scott challenges his two convictions for violating an order for protection (OFP), Minn. Stat. § 518B.01, subd. (d)(1) (2006), asserting that the

district court erred by granting his attorney's motion for joinder of offenses from three different dates. Appellant further argues that he was deprived of his right to a fair trial because his trial counsel provided ineffective assistance.

Because we conclude that (1) the district court did not err by granting appellant's motion for permissive joinder, (2) appellant was not prejudiced by the joinder, and (3) appellant's trial counsel was not ineffective, we affirm.

D E C I S I O N

We review de novo the district court's joinder and severance decisions in order to make "an independent inquiry into any substantial prejudice" resulting from the decision. *State v. Powers*, 654 N.W.2d 667, 674 (Minn. 2003) (discussing joinder of defendants); *see also Santiago v. State*, 644 N.W.2d 425, 444 (Minn. 2002) (discussing severance).

Joinder of Offenses

Offenses may be joined in a complaint when the defendant's conduct constitutes more than one offense. Minn. R. Crim. P. 17.03, subd. 1. If it concludes that two or more offenses could be joined in a single complaint, the district court may order joinder, on its own initiative or on the prosecution's motion. Minn. R. Crim. P. 17.03, subd. 4. On defendant's motion, the court also may join two or more offenses for trial, even if the offenses could not have been prosecuted under a single complaint. *Id.* It is this last situation that occurred here: appellant's attorney moved to join four offenses from three different dates for a single trial, although originally the state had charged appellant by three separate complaints.

On motion by either the state or the defendant, the district court must sever offenses or charges if (1) the charges are not related; (2) severance is necessary or appropriate to promote a fair trial; or (3) during trial, the court determines that severance is necessary in the interests of fairness. Minn. R. Crim. P. 17.03, subd. 3(1). Joinder and severance are considered to involve procedural issues, rather than substantive rights. *Santiago*, 644 N.W.2d at 444.

Most Minnesota cases in this area discuss misjoinder when either defendants or offenses are improperly joined in a complaint or for trial, or when the district court denies a motion for severance. *See, e.g.*, *State v. Ross*, 732 N.W.2d 274, 277 (Minn. 2007); *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006); *Santiago*, 644 N.W.2d at 440; *State v. Profit*, 591 N.W.2d 451, 458 (Minn. 1999); *State v. Jackson*, 615 N.W.2d 391, 394 (Minn. App 2000), *review denied* (Minn. Oct. 17, 2000). No Minnesota case discusses the procedure to be applied when a defendant has requested joinder under Minn. R. Crim. P. 17.03, subd. 4, and then asserts error after trial.

Charges or offenses are properly joined when they involve a single behavioral incident or criminal objective. *Kendell*, 723 N.W.2d at 607-08. Offenses are related if they are limited by time, geographic place, or a single criminal objective. *Id.* Here, the four offenses involve the same defendant and victim, the same location, and the same criminal objective of intimidating the victim, but they were committed over a two-month period. We conclude that the district court committed no error by joining these four offenses for trial.

Even if offenses are improperly joined, remand is not required unless the error was prejudicial. *Ross*, 732 N.W.2d at 280. Generally, if the joined offenses could have been presented as *Spreigl* evidence in separate trials of the offenses, the error is not prejudicial. *Id.* at 281. Under the facts of this case, the other offenses could have been offered as relationship evidence under Minn. Stat. § 634.20 (2006) (permitting introduction of evidence of similar conduct by accused against the same victim of domestic abuse, including abuse and OFP violation). Relationship evidence is similar to *Spreigl* evidence. *See State v. Meldrum*, 724 N.W.2d 15, 20 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). Here, appellant was charged with engaging in a pattern of harassing conduct, including domestic abuse and violation of an OFP, in violation of Minn. Stat. § 609.749, subd. 5 (2006). Proof of this charge would necessarily include evidence of the prior violations.

Appellant argues that by joining three complaints for one trial, he waived his right to two jury trials and that a defendant must personally waive this substantive right. But we treat issues of joinder and severance as procedural matters rather than as substantive matters. *See Santiago*, 644 N.W.2d at 444. Appellant was afforded his right to a jury trial, the assistance of counsel, a unanimous verdict, the presumption of innocence and proof beyond a reasonable doubt, the right to call, confront, and cross-examine witnesses, the right to testify or remain silent, and the right to a pretrial determination of the admissibility of evidence. *See* Minn. R. Crim. P. 15.01.

Under the facts of this case, the district court did not err by granting appellant's motion to join the four offenses for trial.

Ineffective Assistance of Counsel

Appellant argues that he was deprived of his right to a fair trial because of the ineffective assistance of his trial counsel. Specifically, he asserts that his attorney's motion to join the offenses in a single trial constituted ineffective assistance of counsel.

The Sixth Amendment guarantees a criminal defendant assistance of counsel in order to ensure a fair trial. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2064 (1984). In Minnesota, a defendant claiming ineffective assistance of counsel must show by a preponderance of the evidence that "his counsel's performance was so deficient that it fell below an objective standard of reasonableness" and that "his counsel's error so prejudiced the defendant at trial that a different outcome would have resulted but for the error." *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (quotations omitted). There is a strong presumption that an attorney acted competently if he or she used the skills and diligence of a reasonably competent attorney acting under the same circumstances. *Id.* Matters involving trial strategy, "including which witnesses to call, what defenses to raise at trial, and specifically how to proceed at trial" do not provide a basis for an ineffective assistance claim, so long as the trial strategy was reasonable. *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003). Although a postconviction petition is a more appropriate vehicle for claims of ineffective assistance of counsel when additional fact finding is needed, such claims can be heard on a direct appeal when all the essential facts are known at the time of the direct appeal. *Id.*

The decision to join all four offenses in a single trial is a matter of trial strategy. In fact, appellant's counsel explained his trial strategy: he considered consolidation of

the charges to be more favorable to appellant because otherwise it could lead to "multiple convictions, which result[s] in multiple sentences, theoretically consecutive, and also result in increasing his criminal history score for the future." He was particularly concerned about the pattern of harassing conduct charge; in this same motion hearing, the state asked to add charges of patterned conduct to the first two offense dates. After appellant's counsel requested joinder, the state agreed not to amend the first two complaints to include the patterned conduct charges. This was not an unreasonable strategy to pursue; appellant was acquitted of two of the charges despite the joinder. We are unwilling to second-guess what appears to be a reasonable trial tactic. We therefore affirm.

Affirmed.