STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2266

State of Minnesota,
Respondent,

vs.

Gale Rachuy,
Appellant.

Filed June 30, 2009
Reversed and remanded
Larkin, Judge
Concurring in part, dissenting in part, Harten, Judge

Ramsey County District Court
File No. K6-05-4413

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

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

Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Harten, Judge.*

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

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

LARKIN, Judge

Appellant challenges his conviction of felony check forgery, arguing that the district court (1) violated his Sixth Amendment right to counsel by disqualifying his chosen attorney based on its conclusion that the attorney would be a necessary witness at appellant's trial; (2) violated his right to be present at a critical stage of trial and his right to a public trial; (3) erred by allowing admission of irrelevant and prejudicial evidence of prior bad acts; and (4) erred by ordering restitution. Appellant raises additional arguments in his pro se brief. Because the district court disqualified appellant's counsel of choice based on the erroneous conclusion that counsel was a necessary witness, appellant's Sixth Amendment right to counsel was violated and a new trial is necessary. We also conclude that the award of restitution was erroneous because the victim of the charged offense suffered no financial loss. We therefore reverse and remand.

FACTS

The state charged appellant Gale Rachuy with one count of offering a forged check in the amount of more than $35,000 in violation of Minn. Stat. § 609.631, subds. 3, 4(1) (2004), two counts of offering a forged check in the amount of more than $2,500 in violation of Minn. Stat. § 609.631, subds. 3, 4(2), and one count of theft by swindle of more than $2,500 in violation of Minn. Stat. § 609.52, subds. 2(4), 3(2) (2004). The charges were based on checks that Rachuy presented for deposit in his account at Anchor Bank. On January 24, 2006, attorney Terry Duggins filed a certificate indicating that he represented Rachuy on the charged offenses. But at Rachuy's January 24 first

appearance, Duggins informed the district court that he represented Rachuy for that day only. On February 8, Duggins filed a motion to remove a district court judge assigned to hear the case. And on February 13, Duggins filed a second notice of representation. On February 15, Duggins represented Rachuy at his omnibus hearing. Duggins then sent the district court a letter dated February 16, indicating that Rachuy had fired him. Rachuy appeared pro se at his next appearance on March 14 and informed the district court that he did not plan to retain counsel.

On April 24, the parties appeared for a jury trial, and Rachuy told the court, "I represent myself partially pro se. I am represented also by Terry Duggins who will be here at 10:00 to argue my motion." But when Duggins arrived, he denied that he represented Rachuy, explaining, "[Rachuy] and I had a conversation, I told him that I would drop by the courtroom to see how things were going today. I didn't say I would actually be here to represent him and I do not represent him at this time." Further complicating matters, the state informed the district court that Duggins had been subpoenaed as a material witness in Rachuy's case because he had provided Rachuy with a $3,500 check that was allegedly used to open Rachuy's Anchor Bank account. The state also informed the district court that witnesses for the state had received what they perceived as threatening communications from Duggins. In response, the district court announced that it would hold an in camera hearing to investigate the allegations regarding Duggins's conduct and directed the state to make its witnesses available the next day so the district court could question them to determine whether a referral to the Lawyers Professional Responsibility Board (Board) was necessary.

On April 25, the district court questioned the witnesses at an in camera hearing. Neither Rachuy, nor Duggins, nor the prosecutor participated in the hearing. The district court informed each witness that it was investigating a potential ethical violation based on a claim that Duggins had threatened witnesses in the case. After the hearing, the district court reported its findings in open court in the presence of Rachuy, Duggins, and the prosecutor. The district court stated that "at least one of the witnesses substantiated the [state's] complaint that threats had been made," and that the district court was obligated to report Duggins's potential ethical violation to the Board.[1]

The district court also noted that Duggins had been subpoenaed to appear as a witness in the case against Rachuy and that this led the district court to conclude that Duggins was a material witness. The district court, sua sponte, informed Duggins:

> [Rachuy] who believes that you are his attorney needs to understand that you cannot represent him under any circumstances, whether or not I would indeed appoint you as standby counsel, that can't happen. Material witness for the prosecution. You can't be a witness and represent somebody at the same time. So, [Rachuy] needs to understand that you can't represent him and you can go back there and let him know right now and thereafter you can leave and I will talk with [Rachuy].

After a recess, Duggins informed the district court that he had complied with the district court's instructions and had told Rachuy that he was to have no further contact with Rachuy relative to the case. The district court then asked Rachuy whether he wanted to be represented by a public defender or to represent himself, "because

[1] The alleged threats did not involve threats of violence or harm. Instead, the witnesses reported that Duggins had threatened them with litigation.

Mr. Duggins cannot be counsel." Rachuy responded, "I want Mr. Duggins." The district court explained that regardless of his desire to have Duggins as counsel, "it just can't happen."

A public defender represented Rachuy at his next two appearances on May 17 and August 30. But the district court discharged the public defender on August 30 because Rachuy did not financially qualify for appointed counsel. Duggins, through counsel, filed an application of former counsel, notifying the district court that at Rachuy's hearing on October 2, Duggins would request a hearing to determine whether Duggins is a necessary witness and whether Duggins should be reinstated as counsel for Rachuy. On October 2, Rachuy appeared pro se and Duggins appeared with counsel. Duggins's attorney requested an evidentiary hearing to determine whether Duggins was in fact a necessary witness. The district court observed that a hearing might be redundant since the district court judge had reported the allegations regarding Duggins's behavior to the Board, but the district court scheduled an evidentiary hearing for November 20.

At the November 20 hearing, Duggins's attorney presented the district court with a fax from Rachuy that indicated that Rachuy wanted Duggins to be his lawyer. And Duggins's attorney informed the district court that Duggins wanted to be "put back in" as Rachuy's counsel. Duggins's attorney argued that the state's reasons for calling Duggins as a witness were "superfluous," that the proposed testimony was irrelevant, and that there was no reason to call Duggins as a witness in Rachuy's case.

After the November 20 hearing, the district court issued an order stating, "IT IS HEREBY ORDERED: 1. That Terry Duggins is precluded from representing the

defendant in any capacity regarding this criminal matter." The district court's supporting findings included the following:

> That a hearing on whether Duggins was properly removed as counsel for [Rachuy] occurred on November 20, 2006. . . .
>
> The Court was satisfied with the State's explanation as to why Duggins's testimony was necessary at trial and again concluded that Terry Duggins was a material witness in this case. The Court found that Duggins was therefore disqualified from representing [Rachuy] in any capacity.

The order does not address Duggins' argument that his proposed testimony was superfluous and irrelevant.

A jury trial occurred on May 21-22, 2007. The state did not call Duggins as a witness. Instead, the state called another witness who testified that one of the initial transactions on Rachuy's Anchor Bank account involved a check from Duggins. The jury found Rachuy guilty of all of the charged offenses. The district court sentenced Rachuy to a 102-month prison term on count one, offering a forged check in an amount more than $35,000. The district court did not sentence Rachuy for the remaining three counts, but the district court ordered him to pay restitution to Anchor Bank in the amount of $3,408.69. This appeal follows.

D E C I S I O N

Right to Counsel

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend VI. The United States Supreme Court has

"held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 2561 (2006); *see State v. Courtney*, 696 N.W.2d 73, 81 (Minn. 2005) (describing the right as a "fair opportunity to secure counsel of [one's] own choice"). We review a district court's decision to disqualify counsel for abuse of discretion. *See M.M. v. R.R.M.*, 358 N.W.2d 86, 90 (Minn. App. 1984) (finding no abuse of discretion in the district court's refusal to dismiss father's counsel because of a possible conflict of interest).

Minn. R. Prof. Conduct 3.7 states the following:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work a substantial hardship on the client.

To warrant disqualification, it is insufficient to merely assert that an attorney will be called to testify; rather an attorney's testimony must be "necessary." *Humphrey ex rel. State v. McLaren*, 402 N.W.2d 535, 541 (Minn. 1987). "If the evidence sought to be elicited from the attorney-witness can be produced in some other effective way, it may be that the attorney is not necessary as a witness." *Id.* Additionally, if the attorney's testimony is "cumulative," "peripheral," or "contained in a document [that is] admissible as an exhibit," the attorney is not a necessary witness and that attorney's recusal as trial counsel is unnecessary. *Id.*

Rachuy argues that (1) the district court erroneously concluded that Duggins was a necessary witness and violated his Sixth Amendment right to the counsel of his choice by disqualifying Duggins on this ground; (2) the alleged threats that Duggins made are insufficient alternative grounds for disqualification; and (3) the district court's erroneous deprivation of his right to counsel of choice is a structural error that mandates reversal.

On appeal, the state concedes that it did not demonstrate to the district court that Duggins was a necessary witness. In the district court, the state claimed that Duggins's testimony was necessary to establish the source of the funds used to open Rachuy's account at Anchor Bank. The state then established the source of the funds through other witnesses, without calling Duggins to the stand. On this record, we agree that Duggins's testimony was unnecessary. *See id.* at 541 (explaining that an attorney's recusal is unnecessary where the testimony is merely "cumulative," "peripheral," or already "contained in a document admissible as an exhibit").

Conceding that Duggins was not a necessary witness, the state argues that the record establishes other grounds for the district court's disqualification order. Specifically, the state argues that the district court's report of Duggins's alleged misconduct to the Board justifies his disqualification. The state did not raise this argument in the district court.

An appellate court will ordinarily not decide issues that were not raised in the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). An exception to this rule allows the state, without filing a cross-appeal, to "raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record

for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted." *State v. Grunig*, 660 N.W.2d 134, 136-37 (Minn. 2003) (citing Minn. R. Crim. P. 29.04, subd. 6, and concluding that the court of appeals erred by failing to apply the rule). But the state waives its right to raise an alternative theory on appeal if it failed to raise the issue in the district court and to build a factual record regarding the issue. *Garza v. State*, 632 N.W.2d 633, 637 (Minn. 2001) (concluding that the state waived the issue of standing by failing to raise it at an omnibus hearing).

We are unwilling to consider the state's alternative argument in support of the district court's disqualification order because the argument lacks legal support and there are insufficient facts in the record for us to consider the alternative theory. *Grunig*, 660 N.W.2d at 137. The state cites no legal authority to support its contention that the district court's referral of Duggins's misconduct to the Board is a basis for disqualification regardless of the nature of the alleged misconduct or the merits of the referral.[2] But because the right to counsel of one's choice may be overcome by the judiciary's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them," *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 1698 (1988), we agree that an allegation of attorney misconduct may support disqualification. However, a charge of unprofessional conduct or a violation of a rule of professional conduct does not

[2]This contention, if carried to extremes, could arguably necessitate the removal of a judge from a case when a lawyer makes a referral to the Minnesota Board on Judicial Standards.

automatically require an attorney's disqualification. *See Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 991 (8th Cir. 1978) ("Although the Code of Professional Responsibility establishes proper guidelines for the professional conduct of attorneys, a violation does not automatically result in disqualification of counsel."). Rather, disqualification is a matter involving judicial discretion. *Id.* (noting that "[t]he sanction of disqualification" is within the district court's discretion and will not be overturned absent an abuse of that discretion).

To meaningfully review a district court's discretionary decision to disqualify an attorney based on a charge of unprofessional conduct, we would necessarily consider the nature of the alleged misconduct. We are unable to do so in this case because the factual record is insufficient. The factual record regarding Duggins's alleged misconduct is limited to the transcript of the in camera hearing. Neither Rachuy nor the prosecutor participated in the hearing. Had the parties participated, each side would have had an opportunity to develop a factual record that supported its position regarding whether Duggins's behavior warranted disqualification. And the district court would have had the benefit of cross-examination when assessing the credibility of the witnesses and the veracity of the allegations. The in camera approach does not substitute for an adversarial hearing, and we are not satisfied that the resulting record is sufficient to allow us to determine whether Duggins's behavior justifies his disqualification.

We also decline to consider Duggins's alleged misconduct as an alternative basis for disqualification because Rachuy was not allowed to participate in the in camera hearing. Minnesota Rule of Criminal Procedure 26.03, subdivision 1(1), states: "The

defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules." If evidence elicited at the in camera hearing is now relied on to justify the district court's decision to disqualify Duggins over Rachuy's objection, the hearing should not have been conducted outside of Rachuy's presence. *See State v. Keeton*, 589 N.W.2d 85, 87-88 (Minn. 1998) (holding that the district court erred by excluding defendant and his attorney from the pretrial in camera hearing "to determine if the defendant threatened a witness, thus waiving his right to confrontation").

We recognize that Rachuy did not ask to participate in the in camera hearing. But the district court's stated purpose for the hearing was to determine whether a referral to the Board was appropriate. We will not fault Rachuy for failing to request participation in the in camera hearing when the district court did not articulate an intent to sua sponte disqualify Duggins until *after* the hearing. If the district court planned to disqualify Duggins based on information obtained at the in camera hearing, as opposed to his status as a necessary witness, Rachuy was entitled to notice and an opportunity to be heard. *See Juster Bros., Inc. v. Christgau*, 214 Minn. 108, 119, 7 N.W.2d 501, 508 (1943) ("Notice and an opportunity to be heard are universally recognized as essential to due process.").

The unique procedural history of this case obviously impacts our decision. And the district court's only stated basis for disqualification, both after the in camera hearing and after the hearing on Duggins's request to be reinstated as counsel for Rachuy, was its conclusion that Duggins was a material witness. Thus, we limit our review to the district

court's stated basis for disqualification: Duggins's status as a necessary witness. The state concedes, and we agree, that Duggins was not a necessary witness. *See McLaren*, 402 N.W.2d at 541; *see also Fratzke*, 325 N.W.2d at 13. The district court therefore abused its discretion by disqualifying Duggins on this ground.

We next consider the proper remedy. In *United States v. Gonzalez-Lopez*, the Supreme Court held that (1) when a defendant's Sixth Amendment right to counsel of his choice is violated because the disqualification of his chosen counsel was erroneous, no additional showing of prejudice is required to make the violation complete, and (2) the district court's erroneous deprivation of the defendant's Sixth Amendment right to choice of counsel entitles defendant to reversal of his conviction, because the error is structural and not subject to review for harmlessness. 548 U.S. at 147-51, 126 S. Ct. at 2563-64. Because the district court disqualified Duggins based on the erroneous conclusion that he was a necessary witness and thereby violated Rachuy's Sixth Amendment right to counsel of his choice, reversal is necessary.

Restitution Order

Even though we reverse and remand for a new trial, we nonetheless address Rachuy's claim that the district court erred by ordering Rachuy to pay restitution to Anchor Bank. "[T]rial courts are given broad discretion in awarding restitution." *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). Therefore, this court reviews a district court's restitution award for an abuse of discretion. *See State v. Palubicki*, 727 N.W.2d 662, 667 (Minn. 2007) (holding that the district court did not abuse its discretion when ordering $300 in compensation for meals because the restitution request in its entirety

was sufficiently detailed to meet the statutory requirement). "The primary purpose of the statute is to restore crime victims to the same financial position they were in before the crime." *Id*. at 666 (quotation omitted). A district court cannot use restitution as a form of punitive damages; restitution should compensate a victim for expenses incurred as a result of the offense. *State v. Fader*, 358 N.W.2d 42, 48 (Minn. 1984).

Rachuy argues that because Anchor Bank suffered no economic loss from his actions, the district court erred by ordering restitution. The state agrees. Because Anchor Bank recovered its loss from funds in Rachuy's account, the district court abused its discretion by ordering restitution. *See State v. Glewwe*, 307 Minn. 513, 515, 239 N.W.2d 479, 480 (1976) (concluding that restitution was improper because the stolen property had been returned to the victim and directing that the district court delete restitution on remand).

We reverse and remand for a new trial without addressing Rachuy's additional claims of error.

Reversed and remanded.

Dated: _____

_____
The Honorable Michelle A. Larkin
Minnesota Court of Appeals

HARTEN, Judge (concurring in part, dissenting in part)

The parties having agreed that the $3,408.69 restitution order to Anchor Bank was inappropriate, I concur in reversal of that order. But, because I believe that the district court did not abuse its discretion in declining to reinstate attorney Duggins to represent appellant, I respectfully dissent from the majority's decision to reverse and remand.

The record details the curious on-again/off-again pretrial activities relating to Duggins's appearance for appellant in this case. The fact is that there is no contemporaneous district court order "disqualifying" Duggins because there was no necessity for it. On 15 February 2006, appellant himself preemptively terminated Duggins as his attorney and chose to represent himself.

At the 24 April hearing, appellant told the district court that he was appearing partially pro se but that Duggins would appear later to argue a motion. When Duggins arrived, he told the district court: "Mr. Rachuy and I had a conversation, (sic) I told him that I would drop by the courtroom to see how things were going today. I didn't say I would actually be here to represent him and I do not represent him at this time." Thus, Duggins confirmed appellant's previous indication. Both appellant's and Duggins's statements to the district court support an inference of lack of candor, at best.

The next day in court, appellant abruptly insisted that he wanted Duggins to represent him. The district court was then under the impression that Duggins could not

undertake appellant's defense because he, Duggins, had an "ethical dilemma," having been subpoenaed to the trial as a material witness for the state.

The district court then convened an *in camera* hearing that resulted in its finding corroboration for the report that Duggins had threatened one of the state's witnesses; the district court also disclosed its understanding that Duggins had been subpoenaed to testify as a material witness for the state at the trial.[3] Assuming that the "disqualification" of Duggins because of his status as a potential material witness was an abuse of discretion, that conclusion does not foreclose a stronger alternative reason to deny Duggins's reinstatement—namely, the corroborated allegation that Duggins had threatened at least one of the state's witnesses. If the district court had one adequate basis for its decision to "disqualify" Duggins, the inclusion of another inadequate or defective basis is harmless error. *See Hanka v. Pogatchnik*, 276 N.W.2d 633, 636 (Minn. 1979) ("Where a decisive finding of fact is supported by sufficient evidence and is adequate to sustain the conclusions of law, it is immaterial whether some other findings are not so sustained."); *see also Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (noting that this court does "not reverse a correct decision simply because it is based on incorrect reasons"). The district court could not lawfully ignore such an allegation, and the allegation alone provided a sufficient basis for the district court's refusal to reinstate Duggins as appellant's attorney.

[3] It eventually turned out that Duggins was not called as a witness.

A judge is obliged to initiate disciplinary action upon learning of an attorney's unprofessional conduct relating to a matter before the judge. Minn. Code Jud. Conduct, Canon (3)(c)(1) (stating judges' disciplinary responsibilities). Here, testimony presented at the *in camera* proceeding gave the district court cause to believe that, because of his involvement with one of the state's witnesses, Duggins had violated Minn. R. Prof. Conduct 4.1, 4.2, and 4.4(a). Obviously, the district court was then compelled to take action to ensure the continuing integrity of its own administration of justice. No court can tolerate the chilling of witnesses.

Moreover, a litigant has no *absolute* right to be represented by the attorney of his choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126 S. Ct. 2557, 2565 (2006). The district court reasonably exercised its discretion by rejecting appellant's request to reinstate Duggins as his attorney.

Appellant's assertion that the district court violated his right to appear at the *in camera* hearing raises, in my opinion, a specious issue. Appellant neither requested that he be allowed to attend the hearing nor objected to his failure to attend it in district court. Accordingly, he waived the issue. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (this court does not generally consider matters not argued and considered in the district court). Moreover, the purpose of the hearing was to investigate alleged unprofessional conduct of appellant's ex-counsel; it was not a "stage" of appellant's trial.

Finally, I agree with the state's indication in its brief that "[appellant's] sudden expression of interest in having Mr. Duggins serve as trial counsel suggests that he was using the Sixth Amendment right to the attorney of his choice to create an issue he could pursue on appeal."

I would affirm the district court's adjudication except for the restitution order.