STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0620

State of Minnesota,
Respondent,

vs.

Brian Kevin Mason,
Appellant.

Filed July 7, 2009
Affirmed
Johnson, Judge

Ramsey County District Court
File No. 62-K4-07-000431

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

JOHNSON, Judge

A Ramsey County jury found Brian Kevin Mason guilty of first-degree burglary and false imprisonment based on evidence that he broke into an apartment where his

girlfriend was staying and restrained her against her will when she attempted to flee. On appeal, he challenges his conviction, raising multiple issues. We affirm.

FACTS

Mason lived with K.R. for approximately eight years, from 1999 to 2007. But in early 2007, Mason and K.R. had difficulties in their relationship, so K.R. moved to the St. Paul apartment of a friend, J.P.

In the early morning hours of February 2, 2007, Mason climbed onto an exterior balcony of J.P.'s apartment, broke a sliding glass door, and entered the apartment. Mason took several items, including a laptop computer, two cellular telephones, and a carrying case, before retreating to his car. K.R. called 911 and told the dispatcher that Mason had broken into the apartment and stolen several items. Mason then returned to the apartment to speak with K.R. She left the apartment through an interior hallway, but Mason followed her into the hallway and grabbed her. Police officers who responded to K.R.'s 911 call testified that Mason held K.R. against her will. Mason testified at trial that he was hugging K.R. and pleading with her to leave the apartment with him.

Sergeant Karsten Winger of the St. Paul Police Department interviewed Mason on the evening of the incident. At the beginning of the interview, Mason signed a *Miranda* warning form indicating that he had been read his *Miranda* rights and that he understood them. Sergeant Winger attempted to record the interview with a battery-operated tape recorder, but the machine stopped recording halfway through the interview because the batteries expired. According to Sergeant Winger, Mason admitted breaking into the apartment and stealing several items.

The state charged Mason with first-degree burglary while committing assault in violation of Minn. Stat. § 609.582, subd. 1(c) (2006); first-degree burglary while entering an occupied dwelling in violation Minn. Stat. § 609.582, subd. 1(a) (2006); and false imprisonment in violation of Minn. Stat. § 609.255, subd. 2 (2006). The case was tried to a jury on four days in October 2007. The jury acquitted Mason of the charge of burglary while entering an occupied dwelling but found him guilty of the other two charges. The district court imposed a sentence of 88 months of imprisonment on the burglary conviction and a concurrent sentence of 19 months of imprisonment on the false-imprisonment conviction. Mason appeals.

D E C I S I O N

I. Motion to Suppress

Mason first argues that the district court erred by denying his motion to suppress statements he made during the police interrogation. Specifically, he argues that the statements were obtained without a waiver of his *Miranda* rights and that the interrogation was not recorded, as required by *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

A. Waiver of *Miranda* Rights

Mason argues that he did not make a valid waiver of his *Miranda* rights. The district court concluded that Mason was advised of his *Miranda* rights and that he knowingly, voluntarily, and intelligently waived them. "We review findings of fact surrounding a purported *Miranda* waiver for clear error" and legal conclusions based on those facts on a *de novo* basis. *State v. Burrell*, 697 N.W.2d 579, 591 (Minn. 2005).

A suspect may waive his *Miranda* rights so long as the waiver is knowing, voluntary, and intelligent. *State v. Camacho*, 561 N.W.2d 160, 168 (Minn. 1997). A waiver of constitutional rights need not be explicit and may be implied from a defendant's conduct. *State v. Blom*, 682 N.W.2d 578, 617 (Minn. 2004). The state satisfies its burden of proving waiver if it shows that (1) the defendant was advised of his *Miranda* rights, (2) the defendant stated he understood his rights, and (3) the defendant gave a statement. *State v. Farrah*, 735 N.W.2d 336, 347 (Minn. 2007); *State v. Scott*, 584 N.W.2d 412, 417 (Minn. 1998). Mason concedes that Sergeant Winger read him his *Miranda* rights and that he "understood each right." Thus, the first and second requirements of a waiver of *Miranda* rights are easily satisfied. The contested issue is the third requirement.

After Mason stated that he understood his rights, Sergeant Winger asked Mason questions about the nature of his relationship with K.R. and the circumstances surrounding the alleged burglary. Mason answered those questions and did not exercise any aspect of his *Miranda* rights. Mason contends that his initials and signature on the *Miranda* form are insufficient to prove waiver because his writings merely indicate that he understood his *Miranda* rights, not that he agreed to waive them. Mason further contends that Sergeant Winger never asked him to state explicitly whether he wished to waive his *Miranda* rights. But the caselaw does not require a person to expressly waive his *Miranda* rights. *Blom*, 682 N.W.2d at 617. A defendant's voluntary statement is sufficient evidence of waiver if the defendant understands the rights at issue. *Farrah*, 735 N.W.2d at 347; *Scott*, 584 N.W.2d at 417. Here, the district court found that Mason

"voluntarily submitted to questioning." This finding is supported by the transcript of the audiorecording of that part of the interview and by the testimony of Sergeant Winger. Thus, the third requirement for waiver of *Miranda* rights is satisfied.

Because all three requirements for waiver are satisfied, the district court did not err by rejecting Mason's challenge to the waiver of his *Miranda* rights. *See id.*

B. *Scales* Requirement

Mason argues that Sergeant Winger did not comply with *Scales* because only part of the interrogation was recorded. The district court found that the partial recording of Mason's interrogation was not a substantial violation of the *Scales* rule and, thus, not a reason to suppress the statement. Whether a failure to record an interrogation is a substantial violation of the *Scales* recording requirement is a question of law, which is subject to a *de novo* standard of review. *State v. Inman*, 692 N.W.2d 76, 79 (Minn. 2005).

Under its supervisory power, the supreme court has held that "all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention." *Scales*, 518 N.W.2d at 592. If a violation of the recording rule is "substantial," statements taken during the interrogation should be suppressed. *Id.* The factors relevant to substantiality in this context include (1) the extent of the deviation, (2) whether the violation was willful, and (3) the extent to which the violation prejudiced the defendant's ability to defend himself in the proceeding in

which the statement will be used. *Id.* at 592 n.5 (citing Model Code of Pre-Arraignment P. § 150.3(2)-(3)).

With respect to the first *Scales* factor, the extent of the deviation from the recording requirement appears to have been moderate. A portion of the interrogation was recorded. That portion was transcribed, and the six-page transcript was introduced into evidence as an exhibit. There appears to be no evidence in the record as to the length of the entire interview and, thus, no evidence from which we can ascertain the length of the unrecorded portion of the interview. Thus, this factor weighs in favor of neither the state nor Mason.

With respect to the second *Scales* factor, the district court found that "Sgt. Winger made every attempt to comply with the requirements of the *Scales* decision." The district court also stated that the violation was due to "a tape recorder malfunction" and that "[t]here is no evidence to suggest that Sgt. Winger intentionally used worn out batteries." These findings are supported by the testimony of Sergeant Winger, who said that he was not aware that the interview had not been fully recorded until the prosecutor asked him for a copy. Thus, this factor weighs in favor of the state.

With respect to the third *Scales* factor, prejudice may arise if it is unclear whether a defendant waived the *Miranda* rights. *See State v. Williams*, 535 N.W.2d 277, 289 (Minn. 1995). But if it is undisputed that a *Miranda* warning was administered, or that the defendant waived the *Miranda* rights, "the lack of a recording creates no prejudice to the accused." *Inman*, 692 N.W.2d at 81. Here, the facts pertaining to Mason's waiver of

his *Miranda* rights are not in dispute because those facts were recorded. Thus, the partial recording did not cause prejudice to Mason with respect to his *Miranda* argument.

Mason argues that he was prejudiced by the *Scales* violation because he disputes that he made the inculpatory statements about which Sergeant Winger testified at trial. The record shows that the recording stops just as Mason was beginning to answer Winger's questions regarding the circumstances of his entry into the apartment. This form of prejudice weighs in favor of a finding that the violation was substantial. But the prejudice was limited because, when testifying, Mason gave his own account of the police interrogation. *Cf. State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995) (holding that officer's testimony regarding confession not prejudicial to defendant where "little more than corroborative" of other evidence of guilt). Thus, this factor weighs in favor of neither the state nor Mason.

In sum, two of the three *Scales* factors are in balance, and one factor weighs in favor of the state. The district court placed the most emphasis on the second factor in light of the inadvertent failure of the tape recorder to function as intended. We conclude that the district court did not err in holding that there was not a substantial violation of the *Scales* requirement.

II. Admission of Prior Convictions

Mason next argues that the district court erred by ruling that the state could introduce evidence of two prior convictions to impeach Mason if he testified. The district court analyzed the five *Jones* factors and ruled that a terroristic-threats conviction from 2000 and a second-degree controlled substance offense from 2001 were admissible but

that a second-degree assault conviction from 1995 was not admissible. A district court's ruling on the admissibility of prior convictions for impeachment of a defendant is reviewed for abuse of discretion. *State v. Tscheu*, 758 N.W.2d 849, 861 (Minn. 2008).

This issue is governed by Minn. R. Evid. 609. In applying rule 609, courts consider the five *Jones* factors:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Davis, 735 N.W.2d 674, 680 (Minn. 2007) (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)) (alteration in original).

A. Impeachment Value

The district court reasoned in part that the terroristic-threats and controlled-substance convictions had impeachment value because they allowed the jury to see Mason as a "whole person." "A witness may be impeached with evidence of a prior conviction only if the conviction was a felony or if the conviction involved dishonesty." *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006) (citing Minn. R. Evid. 609(a)). The supreme court repeatedly has held that evidence of prior felony convictions, including convictions of crimes that do not involve dishonesty, generally has impeachment value because "it allows the jury to see the whole person and thus to judge better the truth of [the witness's] testimony." *Davis*, 735 N.W.2d at 680 (quotation omitted) (affirming admission of multiple convictions of burglary and drug offenses in trial for first- and second-degree murder); *see also State v. Pendleton*, 725 N.W.2d 717,

729 (Minn. 2007) (affirming admission of evidence of prior convictions of fleeing an officer and making terroristic threats in trial for first-degree murder); *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006) (affirming admission of evidence of convictions of theft of motor vehicle, assault, criminal vehicular operation, and possession of stolen property in trial for murder, kidnapping, and false imprisonment); *State v. Ihnot*, 575 N.W.2d 581, 588 (Minn. 1998) (affirming ruling of admissibility of prior convictions for criminal sexual conduct in trial for criminal sexual conduct in which defendant did not testify); *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (affirming admission of evidence of convictions for check forgery, possession of firearm, attempted murder, and aggravated robbery in trial for first-degree murder).

Mason argues that the "whole person" test has eroded the *Jones* analysis. This argument is properly addressed to the supreme court. In light of the supreme court's repeated affirmation of the whole-person doctrine, the evidence of Mason's terroristic threats and controlled substance convictions has impeachment value. Thus, the first factor weighs in favor of admitting the prior convictions.

B. Dates of Prior Convictions

The district court reasoned that both convictions occurred within the past ten years but that the defense could argue that Mason had been rehabilitated. Convictions for certain crimes that involve dishonesty, such as forgery, are "automatically" admissible if they are less than 10 years old. *State v. Kruse*, 302 N.W.2d 29, 31 (Minn. 1981); *see also* Minn. R. Evid. 609(a)(2), 609(b). Both convictions at issue are less than ten years old. Thus, this factor weighs in favor of admitting the prior convictions.

C. Similarity

The district court reasoned that the terroristic-threats and controlled-substance convictions were not so similar to the current charges of false imprisonment and burglary that they would cause the jury to convict on the basis of his prior convictions. The use of prior convictions that are similar to the charged offenses poses a risk that "the jury will use the convictions as substantive evidence, in addition to impeachment evidence." *Pendleton*, 725 N.W.2d at 729. But a cautionary instruction to the jury regarding the proper use of the prior convictions for impeachment generally alleviates these concerns. *Id.*; *State v. Vanhouse*, 634 N.W.2d 715, 720 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

In this case, the prior convictions are not similar to the current charges. The controlled-substance and the terroristic-threats offenses require proof of elements that are completely different from the elements of false imprisonment and burglary. Furthermore, the district court instructed the jury that it could not "convict the defendant on the basis of any [prior] felony occurrences" and that the prior convictions were admitted "for the limited purpose of assisting [the jury] in determining whether the defendant committed those acts with which the defendant is charged in the Complaint." Thus, this factor weighs in favor of admitting the prior convictions.

D. Importance of Mason's Testimony and Centrality of Credibility

If a defendant's version of the relevant events is important to the jury's verdict, the importance of the defendant's testimony weighs in favor of excluding the impeachment evidence if, "by admitting it, appellant's account of events would not be heard by the

jury." *Gassler*, 505 N.W.2d at 67. If, however, the defendant's credibility would have been the main issue for the jury to consider, this would weigh in favor of admitting the impeachment evidence. *Id.*; *see also Pendleton*, 725 N.W.2d at 729 ("'If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions'" (quoting *Swanson*, 707 N.W.2d at 655)); *Ihnot*, 575 N.W.2d at 587 ("if the issue for the jury narrows to a choice between defendant's credibility and that of one other person then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater" (quotation omitted)).

Mason's defense to the burglary charge at trial was that he did not intend to forcibly enter the apartment but that he accidentally fell against the sliding glass door. No witness observed the means by which Mason went through the sliding glass door, which might have shed light as to whether he did so intentionally. The evidence does reflect that Mason removed items from the apartment after entering the apartment, which tends to indicate that his entry was intentional and purposeful. Mason's defense to the false imprisonment charge at trial was that he was "hugging" K.R. while talking to her and that he let go of her when police instructed him to do so. Mason's testimony conflicts with the testimony of Officer Jason Giampolo of the St. Paul Police Department, who testified that when he arrived at the scene, Mason was pulling on K.R.'s arm and that K.R. was screaming, "Help." According to Giampolo, Mason ignored the officer's orders to let go of K.R. and had to be forcibly subdued. Thus, Mason's credibility was central to both the burglary charge and the false-imprisonment charge. Because Mason's credibility was central to the case, the fifth factor weighs in favor of admitting the

evidence of the prior convictions to impeach Mason. *See Pendleton*, 725 N.W.2d at 729; *Swanson*, 707 N.W.2d at 655.

Although Mason's testimony also was important to his defense, the fourth factor does not favor reversal in this case because Mason actually testified, which provided the jury with an opportunity to hear his account of the events in question. *See Vanhouse*, 634 N.W.2d at 720 (holding that fourth *Jones* factor does not favor reversal because defendant "made it clear that he intended to testify no matter . . . the outcome of his motion in limine" and did testify at trial); *see also State v. Mitchell*, 687 N.W.2d 393, 398 (Minn. App. 2004) (holding that fourth *Jones* factor favored admission of prior convictions because defendant's "version of the facts was heard by the jury, notwithstanding his decision to refrain from testifying"), *review granted* (Minn. Dec. 22, 2004), *review denied* (Minn. Dec. 13, 2005).

E. Summary

Four of the *Jones* factors weigh in favor of admitting the evidence of Mason's prior convictions to impeach him. One factor is neutral. Therefore, the district court did not abuse its discretion by admitting evidence of Mason's prior convictions.

III. Fifth Amendment Advisory

Mason next argues that the district court violated his right to due process of law when it interrupted K.R.'s testimony to inform her of her Fifth Amendment right to remain silent and appointed an attorney to represent her. An allegation of a due process violation based on undisputed facts presents a question of law, which is subject to a *de novo* standard of review. *State v. Wiltgen*, 737 N.W.2d 561, 566 (Minn. 2007). "Trial

courts have broad discretion in deciding whether a claim of [Fifth Amendment] privilege is valid." *State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003).

The state introduced the testimony of K.R. during its case in chief but, before doing so, informed the district court that it intended to treat her as a hostile witness. K.R. testified that she had lived with Mason for almost eight years, that she was engaged to marry Mason, and that she wanted Mason to be acquitted. K.R. also testified that Mason was merely hugging her in the hallway of the apartment and that she "wanted to go with him."

K.R.'s testimony, which occupies 25 pages of transcript, ended when the district court interrupted her as she began to testify that she had been untruthful in her report to the police:

> PROSECUTOR: Isn't it true that you told police that you heard Mr. Mason say to you, "You're coming with me. Don't leave me after seven years?"
>
> . . . .
>
> K.R.: I'm not sure. I could have.
>
> PROSECUTOR: And then you continued to tell police that Mason continued to drag you by your wrist out of the doorway, outside towards [the apartment].
>
> K.R.: I don't remember that. I've exaggerated a lot, speaking with it --
>
> THE COURT: At this time, I'm going to stop these proceedings.

At this point, the district court excused the jury and proceeded to conduct a colloquy with K.R.:

> THE COURT: Ms. [R.], the reason why I excused the jury is because you have rights. You have the right to remain silent, and any statements that you make in this courtroom can be used against you. Do you understand that?
>
> K.R.: Yes.
>
> THE COURT: You also have the right to an attorney. Do you wish to exercise that right to an attorney?
>
> K.R.: I don't -- I don't have money to pay for an attorney.
>
> . . . .
>
> THE COURT: I'm going to have to take a recess and look at the qualifying factors . . . . [I]f you do qualify, I will appoint a conflict attorney from the Public Defender's Office to represent you . . . .

The district court then appointed a public defender to advise K.R. After consulting with appointed counsel, K.R. exercised her Fifth Amendment right to not testify, and the district court released her from the subpoena. The defense moved for a mistrial on the ground that it had not had an opportunity to cross-examine K.R., and the district court denied the motion.

"Due process requires that defendants be afforded meaningful opportunity to present a complete defense." *State v. McArthur*, 730 N.W.2d 44, 54 (Minn. 2007). The right to present a complete defense includes the right to "present the defendant's version of the facts through the testimony of witnesses," *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003), and to "confront and cross-examine witnesses," *State v. Richards*, 495 N.W.2d 187, 193 (Minn. 1992) (quotation omitted). Concurrent with a defendant's right to call and cross-examine witnesses, the Fifth Amendment to the United States Constitution prohibits the government from compelling a person to testify against

himself. *State v. Clark*, 738 N.W.2d 316, 331 (Minn. 2007). Trial courts have a duty to protect a witness's Fifth Amendment privilege by disallowing questions that would invade upon a witness's Fifth Amendment rights. *State v. Spencer*, 311 Minn. 222, 227, 248 N.W.2d 915, 919 (1976).

In certain circumstances, a trial court's abuse of its duty to protect a witness's Fifth Amendment privilege may violate a defendant's due process rights. *Webb v. Texas*, 409 U.S. 95, 98, 93 S. Ct. 351, 353 (1972). In *Webb*, the trial court admonished the defense's only witness, who was serving a prison sentence at the time, before the witness took the stand. *Id.* at 95, 93 S. Ct. at 352. After informing the witness of his Fifth Amendment right, the trial court stated, "If you take the witness stand and lie under oath, the Court will personally see that . . . you . . . be indicted for perjury and the likelihood is that you would get convicted of perjury and that it would be stacked onto what you have already got . . . ." *Id.* The trial court also warned the witness that a conviction would result in several more years of incarceration and would jeopardize his eventual application for parole. The Supreme Court concluded that the admonishment violated Webb's due process rights because it "effectively drove that witness off the stand." *Id.* at 98, 93 S. Ct. at 353. The Court noted that the judge "did not stop at warning the witness of his right" not to testify and the need to tell the truth but suggested that "he expected [the witness] to lie" and assured the witness that doing so would likely result in a conviction, additional jail time, and a reduced chance for parole. *Id.* at 97, 93 S. Ct. at 353. The Supreme Court also noted that "[a]t least some of these threats may have been beyond the power of this judge to carry out." *Id.* at 97-98, 93 S. Ct. at 353.

This case is distinguishable from *Webb* in several respects. First, the trial court in *Webb* implied that the witness would lie and admonished him on the duty of honesty before he took the witness stand. But the district court in this case informed K.R. of her rights only after she began to testify that she had exaggerated in her interview with police officers. Second, the trial court in *Webb* went beyond informing the witness of his rights and threatened to personally ensure that he was prosecuted if he perjured himself. But the district court in this case merely informed K.R. that she had a right to remain silent and appointed an attorney to fully advise her of her rights. Third, the trial court's warning in *Webb* kept the defendant's sole witness from taking the stand. But K.R. already had presented 25 pages of testimony that was favorable to Mason's defense.

The district court's interruption of K.R.'s testimony to inform her of her Fifth Amendment right to remain silent and to appoint a public defender to advise her was a proper balancing of Mason's constitutional rights and the witness's constitutional rights. Thus, there was no violation of Mason's right to due process.

IV. Sufficiency of the Evidence

Mason next argues, in his *pro se* supplemental brief, that the evidence is insufficient to convict him of either offense. When considering a challenge to the sufficiency of the evidence to sustain a conviction, this court's review consists of "ascertaining whether under the evidence contained in the record the jury could reasonably find the accused guilty of the offense charged." *State v. Franks*, 765 N.W.2d 68, 72-73 (Minn. 2009).

With respect to the burglary offense, the state was required to prove that Mason entered the apartment without consent and assaulted a person in the building. *See* Minn. Stat. § 609.582, subd. 1(c). The evidence established that Mason broke the sliding glass door of the apartment and entered J.P.'s apartment. Sergeant Winger testified that Mason admitted during the interrogation that he kicked the sliding glass door and forced his way into the apartment. The transcript of the recording of the 911 call, which was played for the jury, reveals that K.R. told the dispatcher that Mason had broken into her friend's apartment and stolen several items. Mason testified that he broke the glass accidentally, but the jurors were free to disbelieve that testimony and apparently did so. The evidence also established that Mason assaulted K.R. by grabbing her and holding her against her will. This evidence is sufficient to support the conviction of first-degree burglary while committing assault.

With respect to the offense of false imprisonment, the state was required to prove that Mason intentionally restrained K.R. without her consent. *See* Minn. Stat. § 609.255, subd. 2. Officer Giampolo testified that when he arrived at the scene, Mason was pulling on K.R.'s arm and K.R. was screaming, "Help." Although K.R. and J.P. both recanted their incriminating statements to police, the prosecution effectively impeached both of them by introducing their prior statements to law enforcement and by showing their close personal relationships with Mason. This evidence is sufficient to support the conviction of false imprisonment.

Based on the evidence in the record, the jury could "reasonably find the accused guilty of the offense charged." *Franks*, 765 N.W.2d at 73.

V. Juror Issues

Mason next argues, in his *pro se* supplemental brief, that irregularities related to the jury require reversal of his convictions.

First, Mason argues that the jury prejudged his case. He bases this contention on his assertion that the jury informed the district court's law clerk that it was eager to complete testimony. The legal basis for Mason's challenge is unclear. However, we need not determine whether Mason's argument sets forth a claim for relief because the record does not indicate what statements, if any, the jurors made to the law clerk. The record reflects only that the law clerk informed the district court judge that the jury was "anxious to conclude the testimony." In response to this information, the district court thanked the jurors on the record for their patience and reminded them of the importance of giving their full attention to the case. The jurors deliberated for at least 45 minutes and acquitted Mason on one of three counts. This record does not support Mason's argument that the jury had "already made [its] decision" before the defense rested.

Second, Mason argues that *voir dire* was ineffective and unfair because many of the jurors were biased and because he did not have an opportunity to strike an alternate juror who later replaced another juror. A party's failure to bring allegations of juror bias to the attention of the district court by requesting a *Schwartz* hearing typically constitutes forfeiture of that issue. *See State v. Everson*, 749 N.W.2d 340, 349 (Minn. 2008). But as with the previous issue, we need not determine whether Mason's argument sets forth a claim for relief because Mason did not supply this court with a transcript of *voir dire* proceedings. *See State v. Mogler*, 719 N.W.2d 201, 210 (Minn. App. 2006) (declining to

analyze challenge to *voir dire* because defendant "did not provide voir dire transcripts to permit an assessment" of the claim); *see also* Minn. R. Civ. App. P. 110.02, subd. 1 (stating that appellant has duty to order relevant transcripts for appeal).

Third, Mason argues that a juror eavesdropped on a conversation between Mason and his counsel in the hallway during a break in the trial. Generally, a juror's out-of-court acquisition of information relevant to the case raises the possibility of prejudice. Minn. R. Crim. P. 26.03, subd. 9; *see also State v. Evans*, 756 N.W.2d 854, 863 (Minn. 2008). The record reflects that the district court questioned a juror because someone had observed her waiting for an elevator near Mason and defense counsel. The juror told the court that she was not aware that Mason and his attorney were nearby and did not overhear any of their conversations. The district court did not pursue the matter further, and neither counsel objected. Thus, the district court record does not support Mason's argument.

Fourth, Mason argues that, during a break in the trial, a juror had a verbal exchange in the hallway with K.R. and, thus, was biased. "A finding by a district court of the presence or absence of bias is based upon determinations of demeanor and credibility and, thus, entitled to deference." *Evans*, 756 N.W.2d at 870 (quotation omitted). The district court record demonstrates only that the district court rebuked K.R. for being "loud and boisterous" and "yelling about this case" in the hallway during a recess. There is no indication that K.R.'s alleged comments were directed at a particular juror or that any juror responded. The district court warned K.R. that she could be held in contempt and

be criminally charged if she interfered with the jury. Neither party objected to the district court's resolution of the matter.

Mason has not pointed to irregularities relating to jurors that constitute reversible error.

VI. Prosecutorial Error

Mason argues, in his *pro se* supplemental brief, that the state removed the district court judge who originally was assigned to preside over the case because the state believed that the judge would be favorable to his defense. The district court record does not indicate the circumstances of the removal and reassignment. Even if Mason's allegation regarding the state's motives were true, it would not be error for the prosecution to remove a judge for strategic reasons. *See* Minn. R. Crim. P. 26.03, subd. 13(4) (allowing parties removal of one assigned judge "as a matter of right").

Mason also argues that the county attorney should not have prosecuted him because K.R. repeatedly stated that she did not want him to be prosecuted. A victim's preferences, however, are not controlling. The decision to bring criminal charges rests "solely within the discretion of the prosecution." *State v. Jackson*, 749 N.W.2d 353, 358 (Minn. 2008). In light of the evidence presented at trial and the totality of the circumstances, it is plain that this is not one of the rare cases in which a court will set aside a conviction because the county attorney abused her discretion in prosecuting the case. *See State v. Suhon*, 742 N.W.2d 16, 23 (Minn. App. 2007) (stating that judiciary will interfere with charging decision only in rare case where prosecutor clearly abuses discretion), *review denied* (Minn. Feb. 19, 2008).

Mason also argues in conclusory fashion that the prosecutor tampered with a witness by "interrogat[ing]" J.P. before calling her as a witness. In short, Mason has not identified any conduct by the prosecutor that constitutes wrongdoing.

VII. Admissibility of Winger Testimony

Mason last argues that the district court erred by admitting the testimony of Sergeant Winger about pre-trial statements made by K.R. and J.P. Mason contends that there was a lack of foundation for the testimony because Sergeant Winger did not have personal knowledge of their statements. Because there was no objection at trial, the plain error test applies. *See* Minn. R. Crim. P. 31.02. The district court record demonstrates that Sergeant Winger interviewed both K.M. and J.P. by telephone. Thus, Sergeant Winger had knowledge of their statements, and the district court did not plainly err by admitting the testimony.

Affirmed.