STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1000

State of Minnesota,
Respondent,

vs.

Jerome Eugene Vann,
Appellant.

Filed August 11, 2009
Affirmed in part, reversed in part, and remanded
Hudson, Judge

Ramsey County District Court
File No. 62-K3-07-003045

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, Minnesota 55102-1657 (for respondent)

Marie Wolf, Interim Chief Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Klaphake, Judge; and Kalitowski, Judge.

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

HUDSON, Judge

Appellant Jerome Eugene Vann challenges his conviction of third- and fourth-degree criminal sexual conduct. We conclude that the district court was not required to give Vann an opportunity to be present at trial after he was removed from the courtroom following an outburst during which he spewed profanities at the district court; the district court was not required to order a rule 20 competency evaluation; and the prosecutor's comments during closing argument were not so prejudicial as to warrant a new trial. We also conclude that Vann was sentenced based on an incorrect criminal-history score. Finally, we conclude that Vann is not entitled to credit for time served after the court found him in direct contempt for his courtroom outburst; accordingly, we deny his request for jail credit. We, therefore, affirm in part, reverse in part, and remand.

FACTS

On the evening of July 25, 2007, Vann, his 22-year-old daughter, S.J., and several friends went to a party in north Minneapolis. At the end of the evening, Vann drove his friends home and was driving S.J. back to her apartment in St. Paul.

S.J. acknowledged that she had too much to drink and that she either passed out or fell asleep in the front passenger seat. S.J. testified that at some point, she became aware of someone touching her. She was lying face down on her stomach, with her legs hanging out of the opened passenger seat door. She soon realized that Vann was standing outside the passenger side of the car, digitally penetrating her vagina with his fingers.

S.J. heard Vann stating "this is some good pu--y" and "you know Daddy's going to tear . . . your a-- up right."

S.J. realized that Vann was trying to put his penis in her vagina and she sat up. She testified that Vann quickly pulled up his pants. S.J. asked Vann for her clothes, which were on the floor of the car, and she put on her underwear and shorts.

Vann got back into the car and drove S.J. to her apartment. S.J. testified that when they arrived at her apartment, Vann went to the kitchen sink and washed his hands. He then went upstairs and fell asleep in S.J.'s bed. S.J. did not call police to report the incident until early the next afternoon.

Vann was charged with third- and fourth-degree criminal sexual conduct. A public defender was appointed to represent Vann. Prior to trial, Vann made it clear that he wanted another attorney because he did not like or trust the assigned public defender. The district court repeatedly told Vann that if he discharged his attorney, the district court could appoint an advisory or standby attorney for him, but that Vann did not have the right to a substitute public defender. At various times, Vann would ignore the district court's questions, interrupt the district court, refuse to respond, or respond in inappropriate ways. The district court repeatedly warned Vann that he would not be allowed to "disrupt[] the courtroom," or "play games." But on the morning of trial, the district court allowed the first public defender to withdraw and assigned another public defender to represent Vann.

Vann's first public defender had requested a rule 20 competency evaluation, but Vann's second counsel indicated that he did not believe that an evaluation was necessary.

The district court agreed and determined that Vann was capable of understanding the proceedings and assisting in his own defense.

S.J. was the first witness called by the state. When she began to testify, Vann started yelling at her, called her a liar, and swore at her. The jury was excused, and Vann was removed from the courtroom. Vann was allowed to return to the courtroom, and the district court warned him that if he had any more outbursts or if he behaved inappropriately, he would be removed from the courtroom again. The district court asked Vann if he could act in a proper and respectful manner, and Vann replied that he could. Vann was allowed to remain in the courtroom for the remainder of the trial testimony.

After the parties rested and the jury was excused, the district court asked Vann if he wanted the jury to be instructed on a defendant's right to remain silent. Vann stated that he wanted to fire his substitute counsel, but the district court told him that was not going to happen at that stage. The following exchange then took place:

> MR. VANN: Whatever. Whatever. You all can do what you all going to do, all right, but when I hit this appeal I'm going to tear all your a--es up.
>
> THE COURT: Okay, now I told you before about that kind of language.
>
> MR. VANN: I don't give a f--- what you told me and f--- you and your bi--h a-- too, you fa--ot-a-- mother f---er, right now.
>
> THE COURT: Well, he can leave the courtroom.
>
> MR. VANN: Intimidate -- intimidate -- court, you mother f---er.

Vann was removed from the courtroom and did not return. After the verdicts were read and the jury was excused, the district court held Vann in direct contempt of court, sentenced him to 90 days, and fined him $100.

At his sentencing hearing 94 days later, Vann was present, but he again uttered profanities at the district court and attorneys. Vann was sentenced to the statutory maximum 180 months in prison, based on what was believed to be Vann's criminal-history score of six. This appeal follows.

D E C I S I O N

I

On appeal, Vann argues that he is entitled to a new trial because the district court erred in failing to personally ask him, after he was removed from the courtroom, whether he would behave and if he wished to be present for the remainder of the trial.

Vann's outburst occurred at the close of evidence, outside the presence of the jury, and at the end of the day. Trial resumed the following morning with jury instructions and closing arguments. The substitute public defender indicated to the district court that he had spoken with Vann prior to coming to court and that Vann had reiterated "I told you before I don't give a f--- what you people do." The judge responded that he had considered allowing Vann into the courtroom for the verdict, but that he had to reconsider because there was a "good chance that [Vann] would indulge in more profanity if he were allowed to be in the courtroom based on what you have said and . . . on the three or four previous incidents in this courtroom in which he engaged in outbursts." Vann was not allowed to return.

A defendant has the right to be present during trial. Minn. R. Crim. P. 26.03, subd. 1(1). But the defendant may waive his right to be present by disruptive conduct. *Illinois v. Allen*, 397 U.S. 337, 346, 90 S. Ct. 1057, 1062 (1970). In addition, *Allen* requires that the defendant must "be warned by the judge that he will be removed if he continues his disruptive behavior, [and] he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Id.* at 342, 90 S. Ct. at 1060–61. Although *Allen* suggests that a judge should allow the defendant to regain the right to be present, it does not hold that the judge must personally repeatedly question the defendant regarding his promise to behave, particularly when the defendant's outbursts are directed at the judge.

Moreover, in *State v. Gillam*, 629 N.W.2d 440, 452 (Minn. 2001), the supreme court stated that *Allen* does not require a judge to "continually question an obstreperous defendant to determine whether that defendant is ready to behave." Similar to the defendant in *Gillam*, Vann's actions demonstrated that he "intended from the beginning to do whatever was necessary to prevent his trial from proceeding." *Id.* This concern was voiced by both attorneys and by the district court at different times during trial. The district court warned Vann when he returned to the courtroom after his first outburst that if he behaved inappropriately again he would again be removed. Vann indicated that he could act in a proper and respectful manner. He did not do so. On this record, we conclude that the district court did not err in excluding Vann from the courtroom following his second outburst and in not personally questioning Vann a second time about whether he would behave.

II

Vann argues that the district court should have ordered a competency evaluation to determine whether he was able to assist in his defense. The rules require that a competency evaluation shall be ordered when the judge, the defense attorney, or the prosecutor has reason to conclude that the defendant "(1) lacks sufficient ability to consult with a reasonable degree of rational understanding with defense counsel; or (2) is mentally ill or mentally deficient so as to be incapable of understanding the proceedings or participating in the defense." Minn. R. Crim. P. 20.01, subds. 1, 2.

We have reviewed the record carefully, and various colloquies reflect that Vann engaged in odd behavior and made odd, sometimes nonsensical, statements that initially might suggest he was not competent. But the record also suggests—as both attorneys and the district court concluded—that Vann's behavior was intended to manipulate the proceedings. And he was successful in doing so, as evidenced by the fact that he eventually obtained substitute counsel and then disrupted trial with his profane outbursts. Significantly, the district court explained the rationale for its ruling, stating that it was not going to order a rule 20 evaluation because, based on its observations of Vann and on its conversations with him, Vann was lucid, able to communicate with his attorney, capable of understanding the process, and able to assist in his own defense when he chose to do so. While Vann asserts that the district court did not have the medical expertise to make an informed judgment regarding whether Vann's actions were intentional, this record fully supports the district court's decision. Accordingly, we conclude that the district court did not abuse its discretion by refusing to order a rule 20 examination.

III

Vann argues that the prosecutor committed misconduct by repeatedly stating to the jury during closing arguments that it could acquit Vann only if it found that S.J. was lying. In particular, the prosecutor stated that "[i]f you believe [S.J.] and what she told you, your job is done. If you believe she's telling the truth, the defendant is guilty. And if you don't believe she's telling the truth, if you think she lied to you, he's not guilty." The prosecutor later repeated this argument by stating that "the only way that this defendant is not guilty is if you think she's lying."

The supreme court has held that it is plain error for a prosecutor to ask a witness "were they lying" questions because such questions "shift[] the jury's focus by creating the impression that the jury must conclude that . . . witnesses were lying in order to acquit [the defendant]." *State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005). But asking the jury during closing arguments to weigh the credibility of witnesses is not the same as asking "were they lying" questions to a witness at trial, and is not necessarily improper. *State v. Caine*, 746 N.W.2d 339, 359–60 (Minn. 2008) (stating that a prosecutor telling jurors during closing argument that they must decide who to believe "is not analogous to 'were they lying' questions of witnesses on the stand").

By telling the jury that the defense had not provided it with any evidence about why S.J. would lie, the prosecutor in this case implied that the defense was required to provide some explanation. Such arguments tend to misstate the burden of proof and are improper. *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1982). While a prosecutor is

free to argue that particular witnesses were or were not credible, he is not permitted to insinuate that the defendant has the burden of proof.

The burden thus shifts to the state to establish that the error did not affect Vann's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 301–02 (Minn. 2006). "[E]rror affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

Vann insists that the state cannot make such a showing because he could not possibly win if the jury thought in terms of having to find that S.J. was lying, rather than in terms of holding the state to its burden of proof. But the jury was well aware that the state had the burden to prove Vann was guilty beyond a reasonable doubt, as emphasized by both attorneys during closing arguments and by the district court in its instructions. While Vann's attorney pointed out the inconsistencies in S.J.'s story and suggested that S.J.'s memory may have been impaired by her intoxicated state, S.J.'s reports of the incident to police officers and to the sexual assault nurse were strong and consistent. S.J. and each of the witnesses testified at trial to the basic details of the incident and particularly to the fact that S.J. remembered waking up when she heard Vann state "this is some good pu--y" and that "you know Daddy's going to tear . . . your a-- up right." Each witness reiterated these phrases almost word for word. Given the strength of the evidence against Vann, there is little reason to believe that the prosecutor's comments had any effect on the jury's verdict. *See State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994).

IV

The parties agree that Vann's presentence-investigation report incorrectly calculated his presumptive sentence based on a criminal-history score of six, when he only had four criminal-history points. Vann asserts that he should receive the presumptive 117-month sentence based on a criminal history score of four; the state asserts that the matter should be remanded for resentencing to allow the district court to consider whether to impose an upward departure based on aggravating factors found by the jury.

Vann cites *State v. Thieman*, 439 N.W.2d 1 (Minn. 1989), in support of his argument that the state withdrew its request to depart when the district court pointed out that 180 months is the statutory maximum sentence and that remand is not appropriate. In *Thieman*, the supreme court held that because it was clear that the district court intended to impose the presumptive sentence and no reasons for departure were stated on the record, the matter would not be remanded to allow the court to consider reasons and to depart from the guidelines. 439 N.W.2d at 7.

Here, however, departure was requested and aggravating factors were found by the jury. But the district court had no reason to consider the state's departure request because it was imposing what the district court and both attorneys believed was the statutory maximum sentence of 180 months. We therefore conclude that the matter must be remanded to correct the improperly calculated guidelines sentence and to allow the district court to consider whether departure is justified based on the aggravating factors found by the jury.

V

Vann argues that he is entitled to jail credit for days he spent in custody serving the contempt sentence while awaiting sentencing on his conviction. Vann alternatively argues that if his sentence is deemed to be consecutive, he must be sentenced with a criminal-history score of zero, which would result in a presumptive sentence of 48 months. *See* Minnesota Sentencing Guidelines II.F.7 ("For each offense sentenced consecutive to another offense(s), other than those that are presumptive, a zero criminal history score, or the mandatory minimum for the offense, whichever is greater, shall be used in determining the presumptive duration.").

A defendant is entitled to credit for time spent in custody before sentencing if the time is "in connection with the offense or behavioral incident for which sentence is imposed." Minn. R. Crim. P. 27.03, subd. 4(B). The term "in connection with" has been broadly construed to cover almost any time spent in custody before sentencing. *See State v. Fritzke*, 521 N.W.2d 859, 862 (Minn. App. 1994) (stating jail credit includes "all time spent in custody following arrest, including time spent in custody on other charges"). "The granting of jail credit is not discretionary with the [district] court." *State v. Parr*, 414 N.W.2d 776, 778 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988).

"[C]onduct directed against the dignity and authority of the court" is punishable by fine, imprisonment, or both. *State v. Garcia*, 481 N.W.2d 133, 136 (Minn. App. 1992); Minn. Stat. § 588.02 (2008) (authorizing fine and imprisonment as sanctions for contempt of court). A district court's decision to invoke its contempt powers should not

be overturned absent an abuse of discretion. *Erickson v. Erickson*, 385 N.W.2d 301, 304 (Minn. 1986).

"Direct contempts are those occurring in the immediate view and presence of the court," and can arise from "disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to interrupt the due course of a trial or other judicial proceedings." Minn. Stat. § 588.01, subd. 2(1) (2008). Under Minn. Stat. § 588.03 (2008), direct contempt may be punished summarily, but the court is required to make an order "reciting the facts as occurring in the immediate view and presence of the court or officer, and adjudging the person proceeded against to be guilty of a contempt, and that the person be punished as therein specified."

A sentence imposed for direct contempt is not subject to criminal law rules or standards. *See generally State v. Tatum*, 556 N.W.2d 541, 546–47 (Minn. 1996) (explaining inherent judicial authority to punish direct criminal contempt without statutory limits or authorization). Because a contempt sentence is judicially crafted rather than statutorily mandated, criminal law sentencing rules and standards do not apply. Thus, the time Vann spent in custody for his direct contempt of court was not, by definition, "in connection with" the offense of which he was convicted and awaiting sentencing. Vann is not entitled to jail credit.

VI

Vann has filed two pro se supplemental briefs. He also filed a third pro se supplemental brief with a motion to accept that this court denied.

Vann raises numerous arguments. We have carefully reviewed these arguments and conclude that many of his claims were raised by appellate counsel and have been addressed and rejected earlier in this opinion. Other claims are difficult to understand, are mere allegations, and are unsupported by any legal or factual basis. Finally, the claims that could be construed as raising ineffective assistance of trial or appellate counsel, which are often more appropriately raised in postconviction proceedings, are without merit. Trial counsel was given the entire file, had several days to review the file, and was prepared for trial, as demonstrated by his opening statement and closing argument, his questioning of witnesses, his objections, and his overall performance. And appellate counsel has identified and adequately briefed appropriate issues. Thus, none of Vann's pro se claims have merit.

Affirmed in part, reversed in part, and remanded.