STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2101

State of Minnesota,
Respondent,

vs.

Desmond Lamart Jones,
Appellant.

Filed November 17, 2009
Affirmed
Huspeni, Judge[*]

Stearns County District Court
File No. 73-CR-07-10720

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, Carl Ole Tvedten, Law Clerk, 448 Administration Center, 705 Courthouse Square, St. Cloud, MN 56303-4773 (for respondent)

Marie L. Wolf, Interim Chief Public Defender, Sharon E. Jacks, Assistant Public Defender, 540 Fairview Avenue, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Kalitowski, Judge; and Huspeni, 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

HUSPENI, Judge

Appellant challenges a felony domestic abuse conviction that resulted from a bench trial at which he represented himself after he waived his right to counsel and after the district court declined to appoint the public defender as advisory counsel. Appellant argues that the district court's refusal resulted from its recognition that the county would incur the costs associated with the requested appointment, and that the district court thereby abused its discretion and prejudiced appellant's right to a fair trial. Because the record reflects that the district court acted within its discretion in declining to appoint the public defender as advisory counsel, we affirm.

FACTS

Appellant was charged with three counts of felony domestic abuse for violating a no-contact order. The record reflects that in the nearly nine months of pretrial and trial procedure, appellant knowingly and voluntarily waived his right to a jury trial, asserted his right to a speedy trial at least twice and waived that right at least once, asserted his right to an omnibus hearing at least once and waived it at least twice, requested and received at least two continuances, dismissed both his appointed public defender and his private attorney, waived his right to counsel three times, and specifically declined an offer the district court made three times to reinstate the public defender to represent appellant.

Although he was displeased with the representation of his public defender and had discharged him, appellant nevertheless requested that this same public defender serve as

advisory counsel. The district court, the prosecutor, and the public defender discussed whether the appointment requested by appellant must be made. The public defender stated that, if he were so appointed, the county rather than the state would be responsible for the costs incurred. Further discussion and research satisfied all involved that appointment of advisory counsel was discretionary. The district court denied appellant's request; the record is silent regarding the basis of the denial.

Appellant waived his right to a jury trial, appeared pro se at his bench trial, and was found guilty on all three counts.

D E C I S I O N

Appellant alleges that the district court abused its discretion in refusing to appoint advisory counsel and that prejudice resulted. We address each prong of this argument in turn.

We note initially that a defendant does not have a constitutional right to advisory counsel. *United States v. Webster*, 84 F.3d 1056, 1063 (8th Cir. 1996); *State v. Clark*, 722 N.W.2d 460, 466 (Minn. 2006). Rather, a district court *may* appoint advisory counsel to assist a defendant who validly waives the right to counsel. Minn. R. Crim. P. 5.02, subd. 2 (2007). Thus, we review a district court's decision to not appoint advisory counsel for an abuse of discretion. *State v. Jones*, 772 N.W.2d 491, 507 (Minn. 2009).

"[T]he role of advisory counsel is fundamentally different from the role of counsel generally." *Clark*, 722 N.W.2d at 468 (quotation omitted). Advisory counsel "steer[s] a defendant through the basic procedures of the trial" and "relieve[s] the judge of the need to explain and enforce basic rules of [the] courtroom." *Id.* (alteration in

original) (quotations omitted). Advisory-counsel appointments are justified in order to ensure fairness in the criminal-justice process, promote judicial efficiency, and preserve the appearance of judicial impartiality. *Id*. Although Minnesota courts have encouraged the use of advisory counsel for these reasons, a defendant is only entitled to a fair trial, not an error-free one. *Id*. at 469.

Appellant essentially argues that the sole basis for the district court's refusal to appoint advisory counsel was that the county, not the state, would bear the financial burden of that appointment. That basis, argues appellant, was impermissible and the discretion of the court was therefore abused. We disagree.

First, the record is silent as to the basis upon which the district court denied appellant's request. Even after learning that the county would be financially responsible for appointment of the public defender as advisory counsel, the district court reiterated its concern as to whether appointment was mandatory.[1] Only upon being satisfied that appointment was discretionary did the court deny the request.

[1] The district court's questions about whether it had to appoint advisory counsel are understandable. The rules formerly required the appointment of advisory counsel for felonies and gross misdemeanors but were amended in 1999 to make the appointment discretionary in all cases. *Compare* Minn. R. Crim. P. 5.02, subd. 2 (1999) *with* Minn. R. Crim. P. 5.02, subd. 1-2 (1998). Appointing public defenders as advisory counsel is further complicated by Minn. Stat. § 611.17 (b)(4) (2009), which states that "[t]he court must not appoint the district public defender as advisory counsel." Although this statute would appear to prohibit a district court from appointing a public defender as advisory counsel, the Minnesota Supreme Court has held that a district court may appoint a public defender as advisory counsel despite this statute because Minn. R. Crim. P. 5.02, which allows discretionary appointment, takes precedence over the statute. *Clark*, 722 N.W.2d at 466.

Second, appellant's argument regarding the basis for the district court's denial of the request for appointment of the public defender as advisory counsel is undercut by Minnesota Rule of Criminal Procedure 5.02. Appellant's claim that in denying advisory counsel, the judge did not consider whether advisory counsel would ensure fairness, promote judicial efficiency, and preserve the appearance of impartiality is without merit. We recognize that the record does not explicitly demonstrate that the court considered the factors appellant lists; however, the court is not obligated to explain its reasons for denying advisory counsel. Minn. R. Crim. P. 5.02, subd. 2 requires that the court state the basis of its action only if advisory counsel is appointed; no basis need be stated on the record if the court denies appointment.[2] *See id*; *cf. Clark*, 722 N.W.2d at 466-69 (holding that the district court's failure to exercise any discretion and even consider whether to appoint advisory counsel is not reversible error).

Also unavailing is appellant's attempt to add substance to his argument by contrasting the district court's willingness to appoint counsel at the state's expense with its unwillingness to appoint advisory counsel at the expense of the county. Counsel and advisory counsel serve different functions. As noted earlier, defendants have a constitutional right to the former but not the latter. *Compare Jones*, 772 N.W.2d at 507 *with Clark*, 722 N.W.2d at 466. Upon request and qualification of indigent defendants

[2] It may be argued that a reviewing court is in a better position to review the denial of advisory counsel if the district court states its reasons for doing so on the record. As noted, the rule does not require this. Concerns such as those raised by appellant in this case about the language of the rule should be directed to the Advisory Committee on the Rules of Criminal Procedure. *See State v. Ross*, 732 N.W.2d 274, 280 n.5 (Minn. 2007) (referring issues related to the Minnesota Rules of Criminal Procedure to the committee).

who might face incarceration, district courts *must* appoint counsel, whereas courts *may* appoint advisory counsel. *Compare* Minn. R. Crim. P. 5.02, subd. 1 *with* Minn. R. Crim. P. 5.02, subd. 2. The district court's willingness to reappoint the public defender to represent appellant at the state's expense and its refusal to appoint that same public defender as advisory counsel at the county's expense reflect both the different functions of each representation and the discretion or lack thereof vested in the court. The distinction between and comparison of the two types of appointment do not—and cannot—bolster a claim that the district court improperly exercised its discretion to deny advisory counsel. The district court did not abuse its discretion in denying appellant's request that the public defender be appointed as advisory counsel.

Even if we were to assume for the sake of further analysis that an abuse of discretion occurred in this case, that further analysis would require that we address the following question: Was appellant prejudiced by the abuse of discretion? Clearly, the answer would be "No." Appellant claims that advisory counsel would have told him not to waive a jury trial, which would have been better for his case because of the chance that the jury would disregard the law and acquit him by means of jury nullification. This claim fails because it is speculative, because it presumes that a bench trial is prejudicial, and because the record demonstrates that the district court and the prosecutor ensured that appellant did receive a fair trial.

First, it is impossible to determine whether advisory counsel would have discouraged waiver of a jury trial. Initially, it is questionable whether advisory counsel would even have deemed such advice to fall within the parameters of his duty to "steer a

defendant through the basic procedures of the trial" and "to relieve the judge of the need to explain and enforce basic rules of [the] courtroom." *Clark*, 722 N.W.2d at 468 (alterations in original) (quotations omitted).

Further, even if advisory counsel had encouraged appellant not to waive a jury trial, it is doubtful that appellant would have heeded the advice of the counsel whose full representation had been adamantly rejected. "A defendant . . . need not heed the advice of standby counsel." *State v. Richards*, 552 N.W.2d 197, 206 (Minn. 1996).

Additionally, appellant's argument assumes that a jury trial would have increased the chance of acquittal through jury nullification and that this loss of chance amounted to prejudice. Such assumption is at best dubious; it is also very likely fanciful. Jury nullification is an "extraordinary power," *State v. Hooks*, 752 N.W.2d 79, 86 (Minn. App. 2008), which implies that its use is infrequent. And the Minnesota Supreme Court has held both that a district court did not err in failing to instruct the jury that it has the power to nullify, and has relied on federal court cases holding that district courts should not give such an instruction. *State v. Perkins*, 353 N.W.2d 557, 562 (Minn. 1984). "[W]ithout evidence to the contrary, Minnesota case law presumes that a jury follows a district court's instructions." *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). The record reflects that after reviewing the district court's proposed jury instructions, appellant believed he could not win. The chance that jury nullification would have been available to appellant is slim indeed, if not non-existent.

Further, to the extent appellant argues that having a bench trial rather than a jury trial prejudiced him, he does not allege that the district court failed to follow the law. Indeed, he argues instead that the judge "was compelled to follow the law." There is nothing prejudicial[3] about receiving a trial where the law is followed; that is a fair trial—precisely that to which appellant is entitled. *Clark*, 722 N.W.2d at 469. Finally, the record is replete with examples of the district court and the prosecutor patiently, respectfully, and at length explaining to appellant the various aspects of pretrial, trial, and sentencing procedure. And, finally, we note again that the court made three offers to appoint counsel for appellant; all made after appellant had dismissed two separate attorneys.

There was no abuse of discretion; there was no prejudice.

Affirmed.

[3] Courts are essentially concerned with *prejudice* as a term properly understood as *unfair* or *undue prejudice*. A defendant's fingerprints on a murder weapon make acquittal less likely. That does not make such evidence *prejudicial* in this special sense. Such evidence does not constitute *unfair* or *undue prejudice*. It is precisely the type of relevant and material evidence that prosecutors are expected to adduce at trial.