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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2270**

State of Minnesota,
Respondent,

vs.

Glen Edward Underdahl,
Appellant.

**Filed December 8, 2009
Affirmed
Larkin, Judge**

Polk County District Court
File No. 60-KX-04-001342

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

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Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for
appellant)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant claims that the district court erred by instructing the jury that anything that appellant said during his trial, at which he appeared pro se, was not evidence unless appellant testified under oath and by allowing the state to inform the jury that appellant had requested that his infirm mother be arrested in order to compel her testimony. Appellant further contends that the district court abused its discretion by admitting evidence of appellant's flight from police. Because our review reveals no reversible error, we affirm.

FACTS

Appellant Glen Edward Underdahl was convicted of a crime of violence in 1991. Upon release from probation in January 1998, Underdahl's discharge order specified that he was prohibited from shipping, transporting, possessing, or receiving a firearm for ten years. On September 10, 2004, Underdahl visited his neighbor, and his neighbor's friend sold him a truck. Later that day, the same friend observed Underdahl in possession of several firearms.

On September 11, Underdahl's sister reported to the Polk County Sheriff's Office that their mother, who lived across the street from Underdahl, was missing several firearms and ammunition. Underdahl's mother was in the hospital at the time. Later that day, deputies returned to Underdahl's mother's house because Underdahl's sister reported that she had seen Underdahl. One of the deputies was aware of a warrant for Underdahl's arrest. The deputies searched for Underdahl and discovered a campsite and

the truck that Underdahl had purchased the day before. The truck contained ammunition. The individual who sold Underdahl the truck reported that this ammunition was not in the truck when he sold it. Deputies spoke to Underdahl's neighbor that evening, and he reported observing Underdahl in possession of multiple firearms the day before. Underdahl was subsequently arrested in Moorhead on September 26. Underdahl provided a false name and date of birth at the time of his arrest.

Underdahl was charged with one count of felon in possession of a firearm (count one) and one count of possession of a stolen firearm (count two) for the time period of April to May 2004. Underdahl was also charged with one count of felon in possession of a firearm (count three) with an offense date of August 19, 2004. Finally, Underdahl was charged with one count of felon in possession of a firearm (count four), one count of felony theft of firearms (count five), and one count of felony possession of a stolen firearm (count six) for the time period of September 10, 2004, through October 8, 2005. Underdahl's motion to sever the charges for separate trials was granted.

On September 16-19, 2008, a jury trial occurred on counts four through six. Underdahl represented himself at trial and was convicted of count four, but was acquitted on counts five and six. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court erred by giving the following preliminary jury instruction:

Nothing that [the prosecutor] or [Underdahl] says during the trial, including opening statements and closing arguments, is evidence. However, if [Underdahl] chooses to testify, once he is placed under oath and is seated in the witness stand, his statements become evidence. Other than those statements made under oath and in the witness stand, [Underdahl's] statements are not evidence.

District courts are allowed “considerable latitude” in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). “[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case.” *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

Underdahl argues that the district court erred by commenting on his right not to testify. But Underdahl did not object to the instruction at trial. “Although some accommodations may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules.” *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). Therefore, Underdahl now bears the burden of proving that this jury instruction constituted plain error. *See* Minn. R. Crim. P. 31.02 (stating that plain errors or defects may be considered by an appellate court even when not brought to the attention of the district court); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

“The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights.” *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). “If those three prongs are met, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.*

(quotations omitted) (alteration in original). An error in instructing the jury is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict. *Griller*, 583 N.W.2d at 741.

It is error for the district court to allude to a defendant's failure to testify. Minn. Stat. § 611.11 (2008) states, in relevant part, that "failure to testify shall not create any presumption against the defendant, nor shall it be alluded to by the prosecuting attorney or by the court." An "[a]dverse comment is per se reversible error when the comment is extensive, when the comment stresses to the jury that an inference of guilt from silence is a basis for conviction, and when there is evidence that could have supported acquittal." *State v. Whittaker*, 568 N.W.2d 440, 451 (Minn. 1997).

In this case, the district court, at most, made an indirect comment regarding Underdahl's right not to testify while attempting to explain to the jury that statements made by a pro se party at trial are not evidence unless the party takes the stand as a witness. The comment was not extensive. And it did not stress to the jury that an inference of guilt from silence is a basis for conviction. Moreover, in its final instructions the district court, relying on the jury instruction guides, instructed the jury, with Underdahl's consent, that

the [s]tate must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime or crimes charged. The defendant has no obligation to prove innocence. The defendant has the right not to testify. This right is guaranteed by the federal and state constitutions. You should not draw any inference from the fact that the defendant has not testified in this case.

10 Stephen E. Forestell & Wayne A. Logan, *Minnesota Practice* § 3.17 (5th ed. 2006).

On this record, the district court's earlier instruction was not erroneous.

II.

At trial, a subpoena was issued to compel Underdahl's mother to testify. Because she had severe health problems, Underdahl's mother refused to voluntarily appear. In response, Underdahl requested that the district court issue a warrant for her arrest in order to compel her to testify. The prosecutor specifically stated that he intended to inform the jury of Underdahl's request for the warrant. When the district court asked Underdahl if he understood this information, he said yes.

Underdahl now argues that the district court erred by allowing the prosecutor to inform the jury, through cross-examination, that Underdahl requested that the court arrest his infirm mother in order to compel her to testify. The scope of cross-examination is left largely to the district court's discretion and will not be reversed absent a clear abuse of discretion. *State v. Parker*, 585 N.W.2d 398, 406 (Minn. 1998). Because Underdahl did not object at trial, he now bears the burden of proving that plain error occurred. *See* Minn. R. Crim. P. 31.02 (stating that plain errors or defects may be considered by an appellate court even when not brought to the attention of the district court); *Griller*, 583 N.W.2d at 740.

Underdahl specifically argues that "[w]here the manner in which the witness was brought to court and at [whose] insistence that was done had no relevance to the charges and it was highly prejudicial, it penalized [me] for exercising [my] constitutional right to compulsory process and it deprived [me] of [my] constitutional right to a fair trial." This

argument ignores Minn. R. Evid. 616, which states “[f]or the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.” In this case, the prosecutor was entitled to draw attention to any potential bias that Underdahl’s mother might feel toward her son. The mother-son relationship was obviously one factor the jury could have considered in finding that Underdahl’s mother was biased in favor of Underdahl. However, fear of Underdahl, given his insistence that a warrant be issued for her arrest despite her serious health issues, was another factor that indicated potential bias for Underdahl. Because this cross-examination falls within the scope of Minn. R. Evid. 616, the district court did not abuse its discretion by admitting this evidence.

Underdahl argues that the state’s cross-examination deprived him of his constitutional right to a fair trial and penalized him for exercising his constitutional right to compulsory process. But Underdahl cites no direct authority for the proposition that a district court’s admission of bias evidence concerning the circumstances under which a witness is brought before a jury may constitute constitutional error, and we are not persuaded by Underdahl’s limited arguments on these claims.

III.

Underdahl argues that the district court abused its discretion by admitting evidence that he fled from law enforcement and gave a false name and birth date when arrested. At trial, the prosecution provided notice of its intent to introduce redacted transcripts of this evidence. Underdahl stated, “I’m objecting to them. I’m not allowing—I object to

them being allowed.” We are not persuaded by the state’s argument that this objection was insufficient to preserve this issue for consideration on appeal.

“Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Juries may consider evidence of flight that occurs before a defendant’s arrest because it suggests consciousness of guilt. *State v. McTague*, 190 Minn. 449, 453-54, 252 N.W. 446, 448 (1934). Evidence regarding concealment or use of a false name is also admissible to show consciousness of guilt. *Id.* Other motivations for flight do not make the evidence inadmissible; rather, they present alternative theories for the jury’s consideration. *State v. Hagen*, 391 N.W.2d 888, 892 (Minn. App. 1986), *review denied* (Minn. Oct. 17, 1986).

In this case, evidence was admitted that Underdahl fled from police on September 11, 2004. Evidence was also admitted indicating that Underdahl gave a false name and birth date to the police officers upon his arrest on September 26. This information was relevant to show consciousness of guilt and its admission was not an abuse of discretion. However, evidence was also admitted that Underdahl fled from law enforcement on August 19. This flight occurred well before the alleged crimes for which Underdahl was tried. Underdahl’s actions on August 19 could not show consciousness of

guilt for offenses not yet committed. Because this evidence was irrelevant, its admission was an abuse of discretion.

When the district court has erred in admitting evidence, the reviewing court must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id.* If there is no reasonable possibility that the verdict would have been more favorable to the defendant without the evidence, then there is no prejudice and reversal is not warranted.

Here, there is not a reasonable possibility that the verdict might have been more favorable to Underdahl without the evidence regarding his actions on August 19. The jury heard evidence that two eyewitnesses observed Underdahl with several firearms on September 10. The evidence showed that police found ammunition in Underdahl's truck on September 11. Underdahl fled police on September 11 and gave a false name and birth date when he was arrested two weeks later. Evidence regarding Underdahl's actions on August 19 was merely cumulative to what occurred on September 11. Its admission was not prejudicial, and reversal is not required.

IV.

Underdahl claims, in a pro se brief, that he was the target of an illegal search, he was denied a speedy trial, and his right to counsel was violated. Underdahl also makes vague assertions regarding other constitutional violations. The pro se brief contains no citations to the record and does not indicate whether these claims were raised below.

Moreover, Underdahl fails to provide legal argument or authority to support these claims. We therefore deem them waived. *State v. Ture*, 632 N.W.2d 621, 632 (Minn. 2001) (citing *McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998)).

Affirmed.

Dated:

Judge Michelle A. Larkin