STATE OF MINNESOTA
IN COURT OF APPEALS
A09-526

State of Minnesota,
Respondent,

vs.

Derrick Lee Riddle,
Appellant.

Filed March 9, 2010
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-08-53460

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Wright, Judge.

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

PETERSON, Judge

In this appeal from a conviction of attempted theft by swindle, appellant argues that the district court erred in (1) denying his request to call a witness who was in federal

custody at the time of trial, (2) instructing the jury on impossibility, and (3) denying his request for an abandonment instruction. In pro se supplemental briefs, appellant also argues that (1) surveillance recordings should have been suppressed, (2) he was denied the opportunity to challenge evidence, (3) he was denied his right to counsel during police interrogation, (4) he was denied adequate access to legal materials while incarcerated, and (5) the search warrant used to seize evidence from his residence was illegal. We affirm.

FACTS

In September 2008, Tom Petters was charged with a number of offenses in federal court. Petters hired attorney Jon Hopeman to represent him. The charges and proceedings were widely publicized in local and national media. Many news reports identified Hopeman as Petters' attorney.

On Sunday, October 19, 2008, Hopeman arrived at his office and checked his voicemail. A message had been left at 11:25 p.m. on October 17. In the message, a man who identified himself as "Derrick" stated that he knew people who wanted to "help [Petters] beat his case, you know, put a judge in his pocket. Two hundred and fifty thousand to beat the case." The man gave a telephone number and asked Hopeman to return the call. Hopeman called John Marti, one of the federal prosecutors assigned to Petters' case, and told him that a person had contacted him proposing to bribe a federal judge to make the Petters case go away. Marti told Hopeman that an FBI agent would contact him.

When Hopeman arrived at his office on October 20, his receptionist told him that a man had been in the office asking to see him. The man, who had identified himself as "Derrick," left a note with the same telephone number that had been given in the voicemail and asked Hopeman to call him. Hopeman again called Marti, who told him that an FBI agent would immediately be sent to Hopeman's office. FBI agent David Kukura soon arrived at Hopeman's office. After listening to the voicemail message, Kukura asked Hopeman to call Derrick. In a call recorded by Kukura, Hopeman asked Derrick to meet with him that afternoon in Hopeman's office. Kukura planned to pose as Hopeman's law partner during the meeting. With Hopeman's consent, Kukura placed audio and video surveillance equipment in a conference room at Hopeman's office.

At approximately 1:45 p.m., a man later identified as appellant Derrick Lee Riddle arrived at Hopeman's office. Appellant said that he did not want to meet with anyone but Hopeman, so appellant and Hopeman met alone in the conference room where Kukura had set up the surveillance equipment. During their recorded conversation, appellant told Hopeman that he was only a messenger, sent by an organization called "M.B.G., Motivated By Greed," which was made up of elected officials. Appellant said that judges, the prosecution, and individuals in the federal government can and want to make the case against Petters "go away." Appellant proposed that Hopeman meet with Petters to discuss appellant's proposal. On a piece of paper, appellant wrote: "$250,000 to this Address 4007 Bryant AVE N. By 12:00 pm friday." When asked what form the money should be in, appellant wrote and underlined the word "cash." When asked where the money would go, appellant stated, "That money is going to the judge he's payin'."

Appellant stated that, after the money was delivered, the judge would call Hopeman within 24 hours to further discuss details. Appellant also intimated that Hopeman stood to gain significantly financially in return for his cooperation. Near the end of the conversation, appellant asked Hopeman if the room was bugged. Hopeman replied that it was not and that he could lose his license for taping their conversation. Finally, Hopeman said that he would like to meet and talk with someone who was an "actor" in this proposal. At that point, appellant stated that he could get another representative to contact him and that his "job is done."

On October 24, Hennepin County Sheriff's deputies executed a search warrant at the Bryant Avenue address that appellant had given to Hopeman. The telephone number that appellant had provided traced back to that address. Inside the house, officers found and seized: a computer;[1] handwritten notes that contained Hopeman's name and the name of Hopeman's law firm; an employment application with appellant's name on it that listed the Bryant Avenue address as his home address; and appellant, hiding from the officers. The officers arrested appellant and took him to the county jail, where he denied taking part in any attempted bribery involving Petters or Hopeman. Appellant was charged by complaint with attempted theft by swindle in violation of Minn. Stat. §§ 609.52, subd. 2(4), .17, subd. 1 (2008), and attempted aiding and abetting an offender in violation of Minn. Stat. §§ 609.495, subd. 1(a), .17, subd. 1 (2008).

[1] A forensic analysis of the computer revealed that it had been used multiple times to search the terms "Petters," "Hopeman," and the name of Hopeman's law firm.

Jury Trial

At the outset of appellant's jury trial, the state dismissed the attempted-aiding-and-abetting-an-offender count. After discharging his appointed attorney, appellant represented himself at trial. Immediately after the district court accepted appellant's waiver of counsel, appellant told the court that he planned to call Petters as a witness. At that time, Petters was in custody awaiting trial on his federal charges. The state offered to stipulate to the facts that appellant hoped to elicit from Petters' testimony. Appellant declined the state's offer, and the district court denied appellant's request to call Petters. Appellant again stated his intention to call Petters. The district court cited the burden on the federal government and "security issues" in transporting Petters, as well as Minn. R. Evid. 608(b), as reasons for denying appellant's requests. The district court also stated that, given the state's offered stipulation, calling Petters was not necessary.

Appellant requested jury instructions on abandonment and impossibility. The district court denied appellant's request for an abandonment instruction for lack of evidence from which a jury could reasonably infer that appellant had abandoned his criminal intent voluntarily and in good faith. The district court granted appellant's request for an impossibility instruction, with additional language proposed by the state.

The jury found appellant guilty of attempted theft by swindle, and he was sentenced to 34 months in prison. This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court violated his federal and state constitutional rights to compulsory process when it denied his request to call Petters as a witness. Appellant contends that Petters' live testimony was essential to show that Petters had no knowledge of appellant's attempted swindle. We review evidentiary rulings under an abuse-of-discretion standard even when it is claimed that excluding evidence deprived the defendant of his constitutional right to present a complete defense. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006). "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).

"A criminal defendant has the right to a meaningful opportunity to present a complete defense." *Penkaty*, 708 N.W.2d at 201 (citing U.S. Const. amend. XIV; Minn. Const. art. I, § 7). This right "includes the ability to present the defendant's version of the facts through witness testimony." *Penkaty*, 708 N.W.2d at 201. A criminal defendant also has the right to compulsory process for obtaining witnesses. U.S. Const. amend. VI; Minn. Const. art. I § 6. But a criminal defendant does not have an absolute right to present evidence; evidence that is not relevant is inadmissible. *State v. Woelfel*, 621 N.W.2d 767, 773 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401.

Appellant argues that Petters' expected testimony—that he was not aware of appellant's plan to request $250,000 in the October 20 meeting with Hopeman—was relevant and material to his defense. Appellant contends that if he was attempting to swindle anyone, it was Petters, and that because appellant never communicated his request for money to Petters, he did not take a substantial step toward completing the crime of theft by swindle.

But to convict appellant of attempted theft by swindle, the state needed to prove that appellant did an act that is a substantial step toward, and more than preparation for, swindling, whether by artifice, trick, device, or any other means, in order to obtain property or services from another person. Minn. Stat. §§ 609.52, subd. 2(4), .17, subd. 1. The state did not need to prove that an intended victim knew about the swindle; it only needed to prove that appellant performed a substantial act toward swindling money from another person. Consequently, Petters' expected testimony that he did not know about the swindle would not have had any tendency to make the existence of any fact of consequence more or less probable than it would have been without the testimony. Appellant's constitutional right to compulsory process was not violated, and the district court did not abuse its discretion when it denied appellant's request to call Petters as a witness.

Appellant argues that the district court's reasons for denying his request to call Petters were improper. But because we have concluded that Petters' testimony was not relevant, we will not separately address each of the district court's reasons for denying appellant's request. *Cf. Myers Through Myers v. Price*, 463 N.W.2d 773, 775 (Minn.

App. 1990) (stating appellate court will affirm a summary judgment if it can be sustained on any grounds), *review denied* (Minn. Feb. 4, 1991).

Appellant further contends that the district court's willingness to allow a stipulation in lieu of Petters' live testimony violated his right to compulsory process. But because Petters' testimony was not relevant, appellant did not have a right to call Petters. Consequently, the court's willingness to allow a stipulation in lieu of live testimony did not violate appellant's constitutional right and was simply an accommodation that the court offered appellant.

II.

Impossibility Instruction

Appellant argues that the district court erred in modifying its impossibility instruction. District courts are allowed "considerable latitude" when selecting the language of jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "A jury instruction is in error if it materially misstates the law." *State v. Vance*, 765 N.W.2d 390, 393 (Minn. 2009).

Under Minnesota's attempt statute, an act may constitute an attempt to commit a crime, notwithstanding circumstances that render the crime impossible, "unless such impossibility would have been clearly evident to a person of normal understanding." Minn. Stat. § 609.17, subd. 2 (2008). This impossibility provision "is designed to exclude cases of such obvious impossibility that some other explanation than normal criminal design must account for the act." Minn. Stat. Ann. § 609.17, advisory comm. cmt. (West 2003).

Appellant requested an impossibility instruction based on the fact that when he made his proposal to Hopeman, no judge had been assigned to Petters' case. Appellant argues that because this is a fact that Hopeman knew, Hopeman could not possibly have been tricked because he knew that what appellant was saying was not true. The district court agreed to give the recommended impossibility instruction, which states:

> Even though the commission of a crime was impossible because of the circumstances under which the act was performed or because of the inadequacy of the means employed, a person is guilty of an attempt to commit that crime if the person intended to commit the crime and took a substantial step toward its commission. However, if the impossibility of committing the crime would have been obvious to a person of normal understanding, you cannot find that an attempt to commit a crime occurred.

10 *Minnesota Practice*, CRIMJIG 5.03 (2006).

At the state's request, and over appellant's objection, the district court added the following sentence to the instruction: "In order to find someone guilty of Attempt to Commit Theft By Swindle, it is not necessary that the target or targets of the alleged swindle believed that the false representations were true."

Appellant argues that this sentence is argumentative because it essentially restates the prosecution's argument why the impossibility defense did not apply to this case. The supreme court has discouraged the use of jury instructions that "tend to inject argument into the judge's charge and lengthen it unnecessarily." *State v. Valtierra*, 718 N.W.2d 425, 432 (Minn. 2006) (quotation omitted). But "[t]he purpose of a jury instruction is to convey a clear and correct understanding of the law of the case as it relates to all the parties involved." *Peterson v. Sorlien*, 299 N.W.2d 123, 131 (Minn. 1980). The

additional sentence clarified relevant law. *See State v. Smith*, 192 Minn. 237, 240, 255 N.W.2 826 827 (1934) ("It is a well-settled rule of law that in order to sustain a conviction for an attempt to obtain money upon false representations it is not necessary that the complainant believe the false representations."). Appellant also argues that the instruction is confusing because it seems to negate the impossibility instruction. But appellant has not explained how the instruction would mislead a juror with respect to the relevant law. *See State v. Caine*, 746 N.W.2d 339, 355 (Minn. 2008) (requiring jury instruction to be misleading or confusing on fundamental point of law to be erroneous). The additional sentence correctly informed the jury that the impossibility defense does not apply merely because the intended target of a false representation did not believe the representation. The district court did not abuse its discretion by including the sentence in the instruction.

Abandonment Instruction

Appellant argues that because there is evidence that he voluntarily and in good faith desisted and abandoned the intention to swindle anyone, the district court erred by refusing his request for an abandonment instruction. *See* CRIM.JIG, 5.04 (abandonment of intention). The refusal to give a requested instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). If there is evidence to support a defendant's theory of the case, it is an abuse of discretion to refuse to give an instruction on that theory. *Id.* at 557. Ultimately, the focus of the analysis is whether the refusal resulted in error. *Id.* at 555.

Under Minnesota's attempt statute, "[i]t is a defense to a charge of attempt that the crime was not committed because the accused desisted voluntarily and in good faith and abandoned the intention to commit the crime." Minn. Stat. § 609.17, subd. 3 (2008). Appellant argues that when Hopeman stated at the end of their conversation that he would like to speak to an "actor" in the bribery scheme, Hopeman had rejected appellant's proposal, and appellant's response that his "job [was] done" and his act of leaving the room following the rejection are evidence that he abandoned his attempt.

To justify an abandonment instruction, the evidence must show that the defendant took affirmative, reasonable efforts to prevent the crime. *State v. Volk*, 421 N.W.2d 360, 365 (Minn. App. 1988), *review denied* (Minn. May 18, 1988). Neither appellant's statement that his "job [was] done" nor his leaving the room is evidence that appellant took affirmative, reasonable efforts to prevent the swindle.

With respect to committing theft by swindle, appellant's job was done when he approached Hopeman with an offer to bribe a judge in exchange for $250,000 and told Hopeman where to deliver the money. Delivering the money was all that needed to be done to complete the offense. Appellant's statement, "my job is done," does not indicate that he intended to do anything other than wait for the money to be delivered. And appellant's leaving the room is not evidence that he abandoned his attempt to obtain money from Hopeman. Appellant directed Hopeman to deliver the money to the Bryant Avenue address by the following Friday. Appellant's statement plainly indicated that he did not expect to receive the money while in the conference room, and leaving the room is not evidence that appellant abandoned his intention to receive the money. Therefore,

the district court did not abuse its discretion in denying appellant's request for an abandonment instruction.

III.

In a pro se supplemental brief and a pro se supplemental reply brief, appellant argues that (1) the surveillance recordings should have been suppressed, (2) he was denied the opportunity to challenge evidence, (3) he was denied his right to counsel during his police interrogation, (4) he was denied adequate access to legal materials while incarcerated, and (5) the search warrant used to seize evidence from his residence was illegal.

Surveillance recordings

Appellant argues that because he did not consent to being recorded and Kukura did not obtain a warrant, it was illegal for Kukura to record appellant's October 20 conversation with Hopeman, and, therefore, the recording should have been suppressed. But it is well-settled that a warrant is not required to record a conversation when one of the parties to the conversation consents to the recording. *See* Minn. Stat. § 626A.02, subd. 2(c) (2008) ("It is not unlawful under this chapter for a person acting under color of law to intercept a wire, electronic, or oral communication, where such person is a party to the communication or one of the parties to the communication had given prior consent to such interception."); 18 U.S.C. § 2511(2)(c) (2006) (accord); *see also United States v. Caceres*, 440 U.S. 741, 744, 99 S. Ct. 1465, 1467 (1979) ("Neither the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the consent of one of the

conversants."); *State v. Olkon*, 299 N.W.2d 89, 102-03 (Minn. 1980) (holding that defendant's constitutional right to be free from unreasonable searches and seizures was not violated when one party to conversation consented to recording of communication). Before appellant arrived at Hopeman's office, Hopeman allowed Kukura to set up surveillance equipment in the conference room so that his conversation with appellant could be recorded.

Opportunity to challenge evidence

Appellant contends that his Fourteenth Amendment right to due process was violated when he was denied the opportunity to challenge evidence to be used against him, including the video and audio recordings. A criminal defendant has a right to make motions challenging the admissibility of evidence offered against him. *See* Minn. R. Crim. P. 11.03 (requiring court to hear all motions made by defendant). The record reflects that, on at least three occasions before the jury was sworn, appellant's appointed attorney moved to suppress evidence. After hearing from each party, the district court denied each of these motions. Appellant has not identified any occasion when he was not allowed to challenge the admissibility of evidence.

Right to counsel

Appellant argues that he was denied his right to counsel during his interrogation by police. Appellant's right-to-counsel challenge was not raised in the district court. This court generally will not decide issues that were not raised before the district court, including constitutional questions of criminal procedure. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But we may deviate from this rule when the interests of justice require

consideration of such an issue and doing so would not unfairly surprise a party to the appeal. *Id.*

"An accused who has 'expressed his desire to deal with the police only through counsel[ ] is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" *State v. Chavarria-Cruz*, 771 N.W.2d 883, 887 (Minn. App. 2009) (alteration in original) (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885 (1981)). To invoke the right to counsel, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355 (1994).

> The applicability of the rigid prophylactic rule of *Edwards* requires courts to determine whether the accused *actually invoked* his right to counsel. To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.

Id. at 458-59, 114 S. Ct. at 2355 (quotations and citation omitted).

At the police station, appellant was informed about his *Miranda* rights and interrogated. The focus of the interrogation was appellant's October 20 conversation with Hopeman. During the interrogation, the following exchange occurred:

> OFFICER: And what did you talk to that guy about?
> APPELLANT: Looking for a lawyer for my lawsuit. I got a lawsuit happening in June and I need to find me a lawyer.
> . . . .
> OFFICER: And when you went to talk to this lawyer, what was the content of that discussion?
> APPELLANT: Obtaining me a lawyer.
> . . . .
> OFFICER: Did you write on any kind of document or anything like that while you were there? You sign anything? Put your name or write any handwriting down on something while you were there?
> APPELLANT: Um, I told him about the lawsuit, my car accident.
> OFFICER: Um-hum.
> APPELLANT: And I told him how much I'm willing to fight for it because I'm in trial right now.
> OFFICER: Um-hum.
> APPELLANT: I need a lawyer.
> OFFICER: Okay.
> APPELLANT: I told him I'm trying to get, I'm trying to get close, I think I said 2.5 million from my car accident.

Appellant argues that his statement, "I need a lawyer," was a request for a lawyer.

In the context in which it was made, appellant's statement, "I need a lawyer," could not reasonably be construed to be an expression of a desire for the assistance of an attorney during the police interrogation. Appellant was talking about his reason for being in Hopeman's office on October 20, and he explained that he was there because he needed a lawyer to represent him in a lawsuit regarding a car accident. Appellant's statement that he needed a lawyer referred to his need for a lawyer to represent him in his lawsuit, not during his interrogation.

Other issues

Appellant has not cited any authority or made any arguments that support his claims that he was denied adequate access to legal materials while incarcerated and that the search warrant used to seize evidence from his residence was illegal. Assignment of error based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State by Humphrey v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997); *see State v. Yang*, 774 N.W.2d 539, 552 (Minn. 2009) (applying standard in criminal case). Because we find no obvious error, these claims are waived.

Affirmed.