STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1340, A10-80

State of Minnesota,
Respondent,

vs.

Donald Bruce Schrupp,
Appellant.

Filed September 14, 2010
Affirmed
Wright, Judge

Kandiyohi County District Court
File Nos. 34-CR-05-1836, 34-CR-06-2578

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

Boyd Beccue, Kandiyohi County Attorney, John Kallestad, Assistant County Attorney, Willmar, Minnesota (for respondent)

Robert M. Christensen, Minneapolis, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

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

WRIGHT, Judge

In this appeal from his conviction of six offenses arising from his acrimonious interactions with his neighbors, appellant argues that the district court erred by permitting

the joinder of multiple charges in a single trial and that he received ineffective assistance of counsel in violation of the United States and Minnesota constitutions. We affirm.

FACTS

In early 2005, appellant Donald Schrupp married F.V. and moved into her home, which bordered property that belonged to H.J. and K.J. (collectively, the neighbors). This property was subject to an easement that permitted Schrupp and F.V. to use a driveway to access the township road. During the course of their acrimonious relationship with Schrupp, the neighbors made several complaints to law enforcement regarding Schrupp's conduct. The complaints included that Schrupp cut down trees on the neighbors' property, threatened H.J. with a brush saw, repeatedly yelled at the neighbors and called them vulgar names, blocked the driveway with his vehicle so they could not proceed to or from their property, and repeatedly drove along the driveway at an extremely slow speed while making obscene gestures.

The neighbors ultimately obtained a harassment restraining order against Schrupp. Schrupp and F.V. also obtained a harassment restraining order against the neighbors. As a result, the parties were ordered not to harass or have contact with each other, to stay away from each other's homes except to use the common driveway, and to maintain and plow that portion of the driveway on their property.

Between December 2005 and December 2006, the neighbors reported to law-enforcement officers several incidents involving Schrupp. The neighbors accused Schrupp of driving a lawn tractor at H.J., driving in and out of the driveway at an extremely slow speed with a sign in the vehicle's window saying "CANT SEE ME

NOW," blocking the driveway with his vehicle so that the neighbors' guest could not leave, and attempting to run over the neighbors with his vehicle.

Schrupp was charged with second-degree assault with a dangerous weapon, Minn. Stat. § 609.222, subd. 1 (2006), and felony violation of a harassment restraining order while possessing a dangerous weapon, Minn. Stat. § 609.748, subd. 6(d)(4) (2006), for attempting to run over the neighbors with his vehicle on December 26, 2006. In a separate complaint, Schrupp was charged with harassment/stalking, Minn. Stat. § 609.749, subd. 2(1) (2006); disorderly conduct, Minn. Stat. § 609.72, subd. 1 (2006); fourth-degree criminal damage to property, Minn. Stat. § 609.595, subd. 3 (2006); and two counts of violation of a harassment restraining order, Minn. Stat. § 609.748, subd. 6(a), (b) (2006), for his conduct between July 2005 and December 2006. Schrupp was charged with additional counts in two other complaints that were later dismissed and are not the subject of this appeal.

Schrupp agreed in writing to join each of the cases for trial. At a pretrial hearing at which two of the four complaints were dismissed, the district court confirmed with Schrupp that he requested joinder of the charges in the two remaining complaints for a single trial. Following a jury trial, Schrupp was convicted of six of the seven charges and acquitted of second-degree assault. Schrupp initiated a direct appeal from the convictions, which was stayed pending his petition for postconviction relief. After Schrupp's petition for postconviction relief was denied, he also appealed from the denial of postconviction relief. We consolidated Schrupp's direct and postconviction appeals,

State v. Schrupp, Nos. A08-1340, A10-80 (Minn. App. Feb. 4, 2010) (order), which we now consider.

D E C I S I O N

I.

Schrupp argues that the district court erred by failing to deny sua sponte his request to join the complaints against him in a single trial. The charges against Schrupp were initially set forth in four separate complaints. Approximately one year before his trial, Schrupp requested in writing that the complaints be joined for one trial. Two of the complaints were later dismissed and their charges were added to one of the remaining complaints. After confirming at a pretrial hearing that Schrupp understood his right to request that the charges be tried separately and that he sought one trial on all of the charged offenses, the district court joined the two remaining complaints for trial.

Rule 17.03, subdivision 4, of the Minnesota Rules of Criminal Procedure permits joinder of complaints for trial at the defendant's request, "even if the offenses and the defendants . . . could not have been joined in a single indictment, complaint, or tab charge." A defendant may seek severance of the charged offenses by motion to the district court. Minn. R. Crim. P. 17.03, subd. 3(1). We review the district court's joinder and severance decisions de novo. *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006) (severance); *see also State v. Powers*, 654 N.W.2d 667, 674 (Minn. 2003) (joinder of defendents).

Joinder of charges for trial is a procedural issue that does not implicate a fundamental right. *See Santiago v. State*, 644 N.W.2d 425, 444 (Minn. 2002) (stating

that joinder and severance of defendants involve procedural issues, rather than substantive rights); *see also Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983) (stating that fundamental rights include the right to decide to plead guilty, waive a jury trial, testify on one's own behalf, and appeal an issue). Procedural rights, such as joinder and severance, are implemented by a party's motion and are not subject to the rigorous waiver standard applicable to fundamental rights. *See* Minn. R. Crim. P. 10.01, subd. 2, 10.03 (providing that all available "[d]efenses, objections, issues, or requests which are capable of determination without trial on the merits" not made by motion before trial are waived). A defendant's failure to object to the joinder of charges for trial ordinarily constitutes a waiver of that issue. *State v. Hudson*, 281 N.W.2d 870, 872-73 (Minn. 1979) (citing *State v. Moore*, 274 N.W.2d 505 (Minn. 1979)).

Here, not only did Schrupp fail to object to joinder of the charges, he moved for joinder. The district court granted his motion. He now assigns error to the district court for granting precisely the motion he sought. A clearer indication of waiver is difficult to contemplate. Although Schrupp could have moved to sever the charges against him, *see* Minn. R. Crim. P. 17.03, subd. 3, *after* the district court granted his joinder motion, he failed to do so. Instead, Schrupp expressly waived his right to separate trials on two occasions. First, Schrupp signed and filed an agreement to join the cases in March 2007, wherein Schrupp agreed to combine the four cases "for the purpose of consolidation." In the agreement, Schrupp asserts that he understands that he could request separate trials, but he is waiving that request. Second, at an October 11, 2007 hearing, Schrupp was

questioned on the record about joinder of the cases and his right to request separate trials. After two of the four cases were dismissed, the following colloquy occurred:

> DISTRICT COURT: I believe we've already gone over this on the record with you before, but I want to make sure that you understand that you do have the right to have two separate trials on each separate case, and that—they would take place at different times and they would have different juries if you wanted to have two different trials.
> SCHRUPP: What got dismissed here?
> DEFENSE COUNSEL: The—some of the tickets got dismissed. I can take you through it later . . . . You're still charged with the same offenses but they were just stated different ways.
> SCHRUPP: Yeah, I'll have them all together.
> DISTRICT COURT: All right. *Now when you say you'll have them all together and are you agreeing that we can try all of the charges in these two remaining cases together at one – in one trial with one jury?*
> SCHRUPP: *Yes.*
> DISTRICT COURT: And have you discussed this decision with your attorney?
> SCHRUPP: Yes.
> DISTRICT COURT: Are you satisfied he's explained to you the positive attributes of doing this and the negative attributes of doing this?
> SCHRUPP: Yes.

(Emphasis added.) The district court determined that Schrupp knowingly and voluntarily waived his right to request two separate trials and joined the offenses for a single trial.

Because the right to request severance of charges for separate trials is procedural rather than substantive, Schrupp was not required to waive the right personally, knowingly, and intelligently for the waiver to be effective. *See* Minn. R. Crim. P. 10.03 (providing that all available requests must be made before trial or they are waived); *Hudson*, 281 N.W.2d at 872-73 (stating that failure to object to joining of charges

constitutes waiver of that issue). Nonetheless, the record establishes that Schrupp's waiver was personal, knowing, and voluntary.

At the pretrial hearing, Schrupp was questioned on the record regarding whether he had discussed joinder with his attorney, and he agreed that he did not object to joinder of the charges for a single trial. Indeed, it was his motion to do so. Schrupp argues that he demonstrated that he was confused by asking about which charges were dismissed after the district court began the consolidation discussion. But two charges against Schrupp were dismissed immediately preceding the above colloquy. Schrupp's question about the dismissed charges came at the first opportunity to ensure that he understood which charges remained for joinder; it does not reflect confusion regarding his right to request separate trials. Further, even after Schrupp's attorney stated that he could explain the dismissals more thoroughly after the hearing, the district court continued to question Schrupp regarding his understanding that all of the charges would be tried at one time before one jury and that he had the right to request separate trials. Schrupp was unequivocal in his responses, stating clearly that he discussed the issue with his attorney and that he agreed to one trial on all of the charges against him.

Schrupp not only failed to object to joining the charges before trial, thus waiving the issue, *see Hudson*, 281 N.W.2d at 872-73, he moved to join them. And he expressly waived his right to request separate trials. Schrupp fails to cite any legal authority for the proposition that the district court erred by granting his motion after ensuring that he understood and voluntarily waived the right to separate trials. Indeed, none exists. Accordingly, the district court did not err by granting Schrupp's motion to join the

charges for a single trial after ensuring that Schrupp understood that he could have two separate trials.

II.

Schrupp next argues that the district court abused its discretion by denying his petition for postconviction relief because he received ineffective assistance of counsel. A petitioner seeking postconviction relief must establish by "a fair preponderance of the evidence" the facts alleged in the petition. Minn. Stat. § 590.04, subd. 3 (2008). We review the district court's decision in a postconviction proceeding to determine whether there is sufficient evidence to support the district court's findings and whether the district court's decision constitutes an abuse of discretion. *Jihad v. State*, 594 N.W.2d 522, 524 (Minn. 1999).

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) his counsel's performance fell below an objective standard of reasonableness and (2) he was prejudiced by his counsel's performance. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). The burden of proof on this claim rests with the defendant, who must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007); *see Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (noting that judicial review should be "highly deferential" to counsel's performance). When the defendant fails to prove either counsel's deficient performance or resulting prejudice, the defendant's claim of ineffective assistance of counsel fails. *State v. Blanche*, 696 N.W.2d

351, 376 (Minn. 2005); *see Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064 (noting that defendant must prove both prongs).

A.

Schrupp first argues that his trial counsel's failure to obtain a knowing, voluntary waiver of his right to request separate trials was professionally unreasonable and prejudiced Schrupp. As discussed above, although waiver of a procedural issue need not be personal, knowing, and voluntary, the record establishes that Schrupp was fully advised by his attorney of the right to separate trials. The district court also questioned Schrupp thoroughly about his understanding of his rights, and Schrupp stated on the record both that he had discussed the consequences of joining the charges with his attorney and that he understood that he had a right to request separate trials. Schrupp then knowingly and voluntarily chose to seek joinder and, thereby, rejected that option. At the postconviction evidentiary hearing, Schrupp's trial counsel also testified that he discussed the potential positive and negative consequences of joining the charges for a single trial, detailing the explanations he gave to Schrupp. Based on our careful review of the record, trial counsel's efforts to explain the consequences of joining the charges were objectively reasonable. Schrupp, therefore, has failed to establish that he received ineffective assistance of counsel on this ground.

B.

Schrupp next argues that trial counsel's failure to pursue certain pretrial motions constituted ineffective assistance of counsel. First, Schrupp contends that his trial counsel's performance fell below an objective standard of reasonableness because his

counsel failed to move to dismiss two counts for lack of specificity. Schrupp contends that, because the harassment/stalking and disorderly conduct charges involve conduct from July 2005 to December 2006, they were so broad as to severely prejudice his substantial rights. "The precise time at which the offense was committed need not be stated in the indictment, but may be alleged to have been committed at any time before the finding thereof, except where the time shall be a material ingredient in the offense." Minn. Stat. § 628.15 (2006); *see also State v. Waukazo*, 269 N.W.2d 373, 375 (Minn. 1978) (stating that the indictment or complaint need not allege the particular date of the offense). Notwithstanding this general rule, there may be cases in which "the allegations as to time in the indictment or complaint would be so vague under the circumstances as to make it impossible for a defendant to prepare his defense." *Waukazo*, 269 N.W.2d at 375. The district court has inherent authority to exercise discretionary control over such matters, and an appellate court has the authority to reverse a conviction if the charge was so vague on the matter of time as to make it impossible for the defendant to defend against the charges. *Id*.

Such is not the case here. The amended complaint sets forth in extensive detail the specific conduct alleged in each count and provides Schrupp with ample notice of the charges against him. Specific dates and a brief paragraph describe each specific act alleged. Accordingly, the charges were not impermissibly broad, and Schrupp's trial counsel did not provide ineffective assistance by failing to pursue dismissal of the charges on this ground.

Schrupp also contends that, by not challenging an "illegal arrest," trial counsel's performance failed to meet objective standards of reasonableness. Schrupp maintains that he was arrested for a misdemeanor offense that was not committed in the presence of a police officer, in violation of Minn. Stat. § 629.34, subd. 1(c) (2006). Even assuming, without deciding, that the arrest was unlawful and that trial counsel's failure to challenge it fell below the objective standard of reasonableness, Schrupp does not specify how this failure to pursue relief prejudiced him. As the district court correctly observed, Schrupp does not allege that any evidence was obtained as a result of the arrest. Consequently, Schrupp has not established that he has been prejudiced by his counsel's representation. Therefore, this aspect of his ineffective-assistance-of-counsel claim fails.

C.

Schrupp also argues that his trial counsel conducted a privileged conversation on the record, with the judge and prosecutor present, which prejudiced his case. During Schrupp's testimony, he discussed an incident involving a brush saw in which it was alleged that he raised the saw to H.J.'s face. Schrupp testified that he did not raise the blade more than 12 inches off the ground. Trial counsel later asked Schrupp whether he brought the blade close to H.J. Schrupp replied that he did not. Trial counsel then asked where the blade was, and the prosecutor objected that the question had been asked and answered. After the district court sustained the objection, trial counsel moved on to a different topic. Schrupp interrupted, and the following colloquy occurred:

SCHRUPP: I would like to answer the buzz saw incident.

DEFENSE COUNSEL: Okay. I believe that what the judge said was that we covered that yesterday and so we're going to move on to a different topic.
SCHRUPP: It was covered partially yesterday.
DEFENSE COUNSEL: Okay.
SCHRUPP: It don't seem like I can —
DISTRICT COURT: We're going to take a break. . . .
[The jury was excused.]
DISTRICT COURT: Would you like to talk with your client for a few minutes?
DEFENSE COUNSEL: I would, Judge. We talked before and Mr. Schrupp expressed to me that—and I'm not waiving attorney-client privilege—but maybe the Court can help clarify. My recollection is that we did talk about the brush saw incident yesterday. Mr. Schrupp thought that some of his testimony was restricted but I didn't have a recollection of that. My recollection of the testimony was that he said that the brush saw was kept very close to the ground and he didn't place it near the window.
. . . .
DEFENSE COUNSEL: May I make an offer of proof as to additional information that Mr. Schrupp would intend to offer—
DISTRICT COURT: Sure.
DEFENSE COUNSEL: —by simply asking him what additional information he would like to give to the jury.
DISTRICT COURT: Sure.
DEFENSE COUNSEL: Mr. Schrupp, what else should the jury know about the brush saw incident?
SCHRUPP: Well, there was an objection shortly after that question.
DISTRICT COURT: Mr. Schrupp, you've got to quit worrying about objections, and I'm going to tell you. You're going to hurt your case with the jury if you continue to do what you're doing and you're hurting yourself with me. . . .
DEFENSE COUNSEL: Mr. Schrupp, the question is other than the information that [the district court] just read back to us from her notes, is there any other information about the brush saw incident that is important for the jury to hear.
SCHRUPP: Yes.
DEFENSE COUNSEL: What is that information?
SCHRUPP: That I had in my mind I didn't like this man to start with from our first encounter and I thought well, I should

> saw his tire, and I did move the saw four to six inches toward his tire, never to his face.
> . . . .
> DEFENSE COUNSEL: Okay. Mr. Schrupp, I'm going to advise you on the record that I would not intend to ask you about that, what you just described, because I don't think it adds to the jury's understanding or is helpful to your case.

During cross-examination, the prosecutor asked Schrupp whether he tried to strike H.J.'s tire with the brush saw. Schrupp said that he thought about it. When the prosecutor asked him why, Schrupp responded that the neighbors were not nice people.

Even if we assume that trial counsel's actions were objectively unreasonable, Schrupp has failed to establish that the above colloquy prejudiced him. In order to assess the prejudice caused by unreasonable representation, we consider whether "there is a reasonable probability that, but for counsel's errors, the result . . . would have been different." *Patterson v. State*, 670 N.W.2d 439, 442 (Minn. 2003). To evaluate the likelihood of prejudice, we ordinarily balance the egregiousness of the error with the weight of the evidence against the defendant. *See Dukes v. State*, 660 N.W.2d 804, 813 (Minn. 2003) (balancing purported concessions by defense counsel against substantial evidence of homicide); *State v. Rhodes*, 657 N.W.2d 823, 843-44 (Minn. 2003) (rejecting claim for ineffective assistance of counsel, based on failure of defense counsel to challenge the evidence, when testimony overwhelmingly supported the conviction).

The prosecutor may have asked Schrupp about the brush saw because of the information Schrupp provided in the above colloquy. Schrupp's response informed the jury that he thought the neighbors were "not nice people" and that he thought about cutting H.J.'s tire, but he chose not to. However, even before the colloquy to which

Schrupp now objects, there was ample evidence in the record regarding Schrupp's animosity toward the neighbors. The neighbors testified about Schrupp's conduct toward them, and there were several videotapes in evidence showing Schrupp yelling vulgar names and directing obscene gestures toward the neighbors. Independent of this colloquy, Schrupp also offered evidence about his relationship with the neighbors when he testified that he drove down the driveway because he was angry at the neighbors and that calling K.J. a racial epithet was a name that was too good for her. Based on this record, Schrupp's testimony that he thought the neighbors were "not nice people" was not prejudicial because it did not provide the jury with information that it would not otherwise have received. Although the jury also learned that Schrupp thought about sawing the tire, any prejudicial effect of this information is negligible, as Schrupp testified that he thought better of it and did not act on his dislike of the neighbors. Indeed, this testimony was potentially beneficial to Schrupp, as it supports a defense theory of the case—that Schrupp stopped himself from engaging in inappropriate behavior in spite of his negative feelings toward the neighbors. Any error committed by Schrupp's attorney in the above colloquy therefore resulted, at most, in minimal prejudice.

We balance this minimal prejudice against the weight of the evidence against Schrupp. *See Dukes*, 660 N.W.2d at 813 (balancing egregiousness of error with weight of the evidence against the defendant). Schrupp's convictions were based on a series of incidents that were presented to the jury through evidence consisting of photographs of damage to the neighbors' property; videotapes of Schrupp's interactions with the

neighbors; and testimony from the neighbors, five law-enforcement officers, and two additional witnesses. Given the weight of this evidence, Schrupp's statement regarding the brush-saw incident, which did not give rise to evidence that would not otherwise have been presented and which comprised less than one-half page of more than 900 pages of trial transcript, does not support a reasonable probability that the result would have been different but for any error committed when his trial counsel engaged him in the colloquy. *See Patterson*, 670 N.W.2d at 442. Consequently, this aspect of Schrupp's ineffective-assistance-of-counsel claim also fails.

D.

Schrupp next argues that trial counsel provided ineffective assistance by failing to present testimony from various witnesses favorable to the defense. Specifically, Schrupp contends that trial counsel failed to present testimony from Schrupp's current and former neighbors and certain law-enforcement officers. Decisions as to which witnesses and what evidence to present at trial rest within the proper discretion of trial counsel and will not be reviewed on appeal. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004); *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Matters of trial strategy also are not subject to review based on a claim of ineffective assistance of counsel. *State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (stating that supreme court does not "review for competence matters of trial strategy"). Accordingly, Schrupp is not entitled to relief on this ground.

In light of the foregoing analysis, the district court did not abuse its discretion by denying postconviction relief to Schrupp based on his claim of ineffective assistance of counsel.

Affirmed.