STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2325

State of Minnesota,
Respondent,

vs.

John Albert Schmitz,
Appellant.

Filed December 28, 2010
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge

Dakota County District Court
File No. 19HA-CR-08-1148

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

James C. Backstrom, Dakota County Attorney, Amy A. Schaffer, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Minge, Judge.

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

KALITOWSKI, Judge

Appellant John Schmitz argues that his theft convictions should be reversed because (1) there was insufficient evidence to sustain the convictions; (2) he did not

effectively waive his right to counsel; and (3) the district court abused its discretion by denying his application for a public defender. Appellant also argues that he is entitled to a restitution hearing. We affirm in part in part, reverse in part, and remand for a restitution hearing.

D E C I S I O N

I.

Appellant argues that the state did not present sufficient evidence to sustain his convictions of theft. We disagree.

Appellant was appointed as the personal representative of his uncle's estate when his uncle died in November 2002. The estimated value of the estate was $199,000. Other heirs hired an attorney in November or December 2003 to challenge the probate proceedings. The district court determined that appellant had been reimbursing himself with funds from the estate for excessive hours and at an unreasonable rate of pay for his services as personal representative. The district court ordered that "[u]nless and until the court approves the amended final account," appellant "shall not distribute any further estate funds to anyone, including himself."

Appellant, pro se, appealed the district court's order. *In re Estate of Schmitz*, No. A05-1175, 2006 WL 1460690 (Minn. App. May 30, 2006). By notice of review, the heirs challenged the district court's denial of their petition to remove appellant as personal representative. *Id*. at *2. This court affirmed the district court's determination that appellant had reimbursed himself in excess, and remanded to the district court to reconsider whether appellant should remain as personal representative. *Id*. at *1-2. In

November 2006, on remand, the district court removed appellant as personal representative and appointed two of the heirs as co-personal representatives. At that time, $65.07 remained in the estate account. One of the new personal representatives determined that appellant, without authorization, had paid himself $24,995 from the estate from April 2005 to April 2006, during the appeal of the April 2005 order.

The payments that appellant made to himself from the estate between April 2005 and April 2006 formed the basis of appellant's criminal charges and his subsequent convictions of two counts of theft following a jury trial.

In considering a claim of insufficient evidence, review by this court is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Appellate courts cannot retry the facts but must take the view of the evidence most favorable to the state. *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). The appellate court must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). The jury is in the best position to weigh the evidence and evaluate the credibility of witnesses; therefore, its verdict must be given due deference. *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998).

For a defendant to be found guilty of theft, the state must prove that the defendant:

> [I]ntentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property . . . .

Minn. Stat. § 609.52, subd. 2(1) (2004).

Claim of Right

Appellant argues that the state did not prove he committed theft because he had a claim of right under Minnesota probate law to compensation in his role as the personal representative. We disagree. Although appellant had a statutory right to compensation for his services as personal representative, he did not have a right to *unreasonable* compensation or "overpayment" for those services. *See* Minn. Stat. § 524.3-719(a) (2004) ("A personal representative is entitled to reasonable compensation for services."); Minn. Stat. § 524.3-720 (2004) ("Any personal representative . . . who defends or prosecutes any proceeding in good faith . . . is entitled to receive from the estate necessary expenses and disbursements including reasonable attorneys' fees incurred.").

The state presented evidence at the criminal trial that the district court in the probate matter determined that $50 per hour, the amount appellant was paying himself, was unreasonable, and that $25 per hour was more appropriate. This court affirmed. *Schmitz*, 2006 WL 1460690, at *1. The state also presented evidence that appellant continued to bill the estate at $50 per hour for his alleged work on the appeal. Expert testimony indicated that the amount appellant billed the estate was excessive, both in the amount of hours required to complete the work and the dollar amount charged. The jury

was entitled to believe the evidence. *See Rainforest Cafe, Inc. v. State of Wis. Inv. Bd.*, 677 N.W.2d 443, 451 (Minn. App. 2004) (stating that the fact-finder determines weight and credibility of evidence, including expert testimony).

Appellant argues that he did not commit theft because he had a claim of right to reasonable compensation as a personal representative. Appellant cites *State v. Dahl*, 498 N.W.2d 258 (Minn. 1993), to support his assertion that "a claim of right defeats a theft charge." Appellant asserts that "[t]he fact that the probate court found that [he] overpaid himself as the personal representative doesn't mean that [he] committed a crime." But *Dahl* does not support this point, and the facts of *Dahl* are distinguishable. In *Dahl*, the supreme court reversed a sheriff's deputy's conviction of misdemeanor theft by false representation. 498 N.W.2d at 260. The deputy claimed that he was entitled to two hours of overtime pay for a 5-to-15-minute conversation he had with a city police officer and an undercover officer. *Id*. at 259. The supreme court determined that the deputy did not overpay himself; he was entitled to overtime pay according to his union contract and the established practices of the office for which he worked. *Id*. at 259-60. Conversely, although appellant was statutorily entitled to compensation as personal representative of the estate, he was not entitled to overpayment or unreasonable payment. Thus, he did not have a claim of right to money the jury deemed he overpaid himself.

We conclude that there was sufficient evidence to support the jury's determination that appellant did not have a claim of right to the money he overbilled the estate.

Intent

Appellant argues that he lacked the requisite intent to commit the theft offenses. "With intent to" means that the actor "either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(4) (2004). Intent is inferred by the jury from the totality of the circumstances. *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989). Generally, intent is proven as the only reasonable inference that the jury could draw from all the evidence, and the jury may infer that a person intends the natural and probable consequences of his actions. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

Appellant contends that his "good faith reliance" on the statute that allows reasonable compensation for the work done by a personal representative "negates his criminal intent." He asserts that even if he was "mistaken in his interpretation of the law," he can still use the defense of "mistake" because it negates the element of intent. *See State v. Jacobson*, 697 N.W.2d 610, 615-16 (Minn. 2005) (stating that a defendant's mistake of law may be relevant to negating an element of the crime charged, intent in particular). We disagree that the record supports appellant's contention that he relied on the statute in good faith. Appellant continued to bill his time at $50 per hour after the district court specifically determined that $50 per hour constituted an unreasonable rate of compensation.

Appellant also argues that reimbursement for his services, even if unreasonable, cannot be considered theft because "[t]here is no evidence that the work was not done, only that it took appellant too long, in a probate attorney's opinion, to do it." We

disagree. The state presented evidence at the criminal trial that although the brief appellant wrote for the probate appeal was "two and a half typewritten pages, double spaced, with no citation of law," appellant billed the estate for 28 hours of work at $50 per hour. The state also presented evidence that appellant billed the estate for 289 hours of work at $50 per hour during a time period in which, according to the state's expert witness, appellant would have been "sitting and waiting for the Appellate Court to get back to [him] with the order." The jury could reasonably infer from this evidence that appellant was billing the estate for hours that he was not performing work related to the appeal or the estate.

Finally, appellant argues that "[t]he state cannot prove that appellant committed a theft because nothing he did was concealed from the heirs." Appellant asserts that because he "turned over the bank records, and all of the checks had notations in the memo portion indicating how the money was spent," he did not conceal anything. But most of the checks had only general descriptions written in the memo line: "for estate services"; "appellate costs/fees"; or "appellate admin. costs." Appellant provided no evidence of the specific tasks he accomplished or how much time it took him to do each task. Furthermore, the theft statute is not limited to persons who "conceal" something; it is enough that the defendant "takes, uses, transfers, conceals *or* retains possession" of another's property without the other's consent. *See* Minn. Stat. § 609.52, subd. 2(1) (emphasis added). The new personal representatives appointed by the district court did not authorize, affirm, or otherwise consent to any of the payments from the estate that appellant made to himself between April 2005 and April 2006.

We conclude that the state presented sufficient evidence of appellant's actions from which the only reasonable inference the jury could make was that, given the work he was performing, appellant took excessive amounts of money from the estate with the intent to wrongfully deprive the rightful owners of the money. *See Cooper*, 561 N.W.2d at 179. Thus, the jury's verdicts were supported by sufficient evidence.

II.

In the alternative, appellant argues that his convictions should be reversed because he did not effectively waive his right to counsel. We disagree.

A written waiver of the right to counsel is required in felony cases unless the defendant refuses to sign such a waiver. Minn. Stat. § 611.19 (2004); Minn. R. Crim. P. 5.04, subd. 1(4). But an oral, factual inquiry into whether a knowing, voluntary, and intelligent waiver of counsel has been made is permissible even if the statute and rule are not satisfied. *See In re Welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000) (stating that a district court's failure to follow "a particular procedure" does not automatically invalidate a waiver). Additionally, waiver of counsel by forfeiture can occur when the defendant exhibits "extremely dilatory" conduct, even where the defendant has not received a full waiver colloquy. *State v. Jones*, 772 N.W.2d 496, 504-06 (Minn. 2009), *cert. denied*, 130 S. Ct. 3275 (2010). "[A] balance must exist between a defendant's right to counsel of his choice [and] the public interest of maintaining an efficient and effective judicial system," and the ability of district courts to conduct trials must be preserved. *Id.* at 505-06 (quotation omitted).

The record indicates that there was neither a written waiver nor a full waiver colloquy made on the record. Thus, the issue here is whether appellant's conduct constituted waiver by forfeiture.

At his first appearance on August 22, 2008, one year before trial, appellant responded affirmatively when asked if he was going to hire an attorney. Appellant was then advised that he had the right to be represented by an attorney and that if he could not hire one, the district court would appoint one for him. The district court asked appellant if he understood the basic constitutional rights that had just been stated to him. Appellant responded in the affirmative and stated that on the "advice of [his] attorney" he was "going to use [his] Fifth Amendment rights." When the district court asked appellant why he had failed to make a first appearance in court that was initially scheduled for an earlier date, appellant answered, "I'm going to use my Fifth Amendment rights, as per my attorney." During a discussion about scheduling a speedy omnibus hearing, appellant said, "Can my attorney let you know?"

At an omnibus hearing on November 10, 2008, nearly three months after the first appearance, the prosecutor explained to appellant that he had the right to an attorney. Appellant told the prosecutor that "he may or may not be hiring one in the future." Noting that appellant had asked for a continuance of his omnibus hearing so that he could try to hire counsel, the district court informed appellant that it "would be a good idea for [him] to hire an attorney." Appellant then indicated that he planned to obtain an application for a public defender, "just . . . to see if [he] qualif[ied]," and that he was "not saying [he'd] hire one."

At the contested omnibus hearing on June 12, 2009, appellant again appeared without an attorney, knowing at that point that he did not qualify for a public defender. The district court suggested that appellant "consider a change of approach" because he was facing "the maximum sentence available to the court under the law." Appellant replied that he had consulted several attorneys, felt that he had an "excellent" case, and planned to go to trial. On August 25, 2009, appellant appeared pro se for jury trial. When advised about his right to make an opening statement, appellant said, "I feel my constitutional rights have been violated by not having a defender provided. . . . [T]hat would be something for the appellate court to look at."

The district court denied appellant's application for a public defender on November 10, 2008. The earliest trial date was set for April 21, 2009, giving appellant more than five months to obtain counsel before trial. Appellant was told by the district court and the prosecutor that he had a right to an attorney, and the district court told him several times that it would be in his interests to hire one. At each appearance before trial, appellant told the district court that he was consulting with counsel or that he may hire counsel, yet he continued to attend court without an attorney.

A written consent form is the preferred method of waiving the right to an attorney, and its absence cannot be dismissed lightly in a felony criminal proceeding. But there is a strong competing interest in maintaining an efficient and effective judicial system and in not rewarding a defendant for manipulating the system. Here, appellant's demeanor, attitude, and representations throughout the course of the criminal proceedings regarding his retention of an attorney resulted in a waiver of his right to counsel by forfeiture.

Thus, we conclude that the district court did not abuse its discretion in proceeding without appellant having explicitly waived his right to counsel in accordance with the statute and the rule of criminal procedure.

III.

Appellant argues that the district court abused its discretion by denying his application for a public defender. We disagree.

A district court's decision whether to appoint a public defender is reviewed for an abuse of discretion. *In re Stuart*, 646 N.W.2d 520, 523 (Minn. 2002). But issues involving statutory construction and construction of rules of criminal procedure are reviewed de novo. *State v. Stevenson*, 656 N.W.2d 235, 238 (Minn. 2003); *State v. Nerz*, 587 N.W.2d 23, 24 (Minn. 1998).

A person charged with a felony, gross misdemeanor, or misdemeanor is entitled to representation by a public defender only if he or she is unable to afford or obtain counsel. Minn. Stat. § 611.15 (2004); Minn. R. Crim. P. 5.04, subd. 1(2). And the burden is on the defendant to show that he or she is financially unable to afford counsel. *Jones*, 772 N.W.2d at 502. Moreover, although indigent criminal defendants have a right to appointed counsel, the courts jealously guard public-defender resources to ensure that these limited resources "are not unnecessarily depleted by people who, in their own right, can obtain legal counsel with their own resources." *Stuart*, 646 N.W.2d at 525.

A defendant is "financially unable to obtain counsel" if (1) anyone in defendant's household receives "means-tested governmental benefits," or (2) the defendant, "through any combination of liquid assets and current income," is unable to pay the reasonable

costs charged by private defense counsel. Minn. Stat. § 611.17 (2004). The district court must determine the financial eligibility of the defendant for the appointment of a public defender, and the inquiry must include (1) the value of defendant's real-estate assets, including the homestead, and (2) any other assets that can be readily converted to cash or used to secure a debt. Minn. Stat. § 611.17(b). The applicant must submit a financial statement under oath or affirmation "setting forth the applicant's assets and liabilities, including the value of any real property owned by the applicant, whether homestead or otherwise, less the amount of any encumbrances on the real property, the source or sources of income, and any other information required by the court." *Id.*

Here, appellant indicates that he has income from a part-time job, for which he earns $40 per day, and his wife works 30 hours per week, earning $10-$12 per hour. In making his argument, appellant references the federal poverty guideline for a family of two in 2008, which was $14,000 per year. *See* Annual Update of the HHS Poverty Guidelines, 73 Fed. Reg. 3, 971 (Jan. 17, 2008). But appellant's disclosures show that the income of appellant and his wife is well above the federal poverty guidelines. Moreover, appellant owns two major assets unencumbered, a house and a car, that he could use to secure debt.

Finally, we reject appellant's contentions that, under section 611.17, the district court cannot examine the income and liabilities of an applicant's spouse, and that the disclosure form relied on by the district court did not adequately reveal appellant's financial situation.

On this record, we conclude that the district court did not abuse its discretion by denying appellant's application for a public defender.

IV.

At appellant's sentencing hearing on December 3, 2009, the district court ordered restitution in the amount of $108,695. Appellant filed a challenge to the restitution amount on December 23, 2009, within the statutory deadline to challenge restitution. *See* Minn. Stat. § 611A.045, subd. 3(b) (2004) (stating that an offender may challenge restitution by requesting a hearing within 30 days of sentencing). A hearing has not been held. Appellant argues that if this court does not reverse his convictions, he is entitled to a remand for a hearing on his restitution challenge. We agree. Therefore we reverse the restitution order and remand for a hearing.

V.

Appellant submitted a pro se supplemental brief that raises some of the same issues that his public defender addressed in the principal brief, as well as additional issues. Appellant does not cite any authority to support his claims of error. Rather, his arguments are based on mere assertions composed of personal notes. Thus, we decline to address these issues and conclude that they are waived. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that an assignment of error in a brief based on a mere assertion that is not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

Affirmed in part, reversed in part, and remanded.