STATE OF MINNESOTA
IN COURT OF APPEALS
A10-825
A10-1397

State of Minnesota,
Respondent,

vs.

David Randy Sabby,
Appellant.

Filed April 12, 2011
Affirmed in part and reversed in part
Randall, Judge[*]

Otter Tail County District Court
File No. 56-CR-09-654

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

David J. Hauser, Otter Tail County Attorney, Michelle M. Eldien, Assistant County Attorney, Fergus Falls, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Stauber, Judge; and Randall, 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

RANDALL, Judge

Appellant argues that the district court erred by denying his request to withdraw his guilty plea and by ordering restitution. Because appellant's guilty plea was knowingly, intelligently, and voluntarily given, we affirm in part. Because the district court failed to secure a valid waiver of counsel prior to appellant's pro se appearance at the restitution hearing, we reverse on the issue of restitution.

FACTS

On March 7, 2009, appellant David Randy Sabby abducted his 17-year-old step-daughter, A.G.H., and drove to a remote cabin outside of Fergus Falls. After placing A.G.H. in the cabin, appellant made several trips to his truck to carry in supplies, including a kerosene heater and several containers of kerosene to warm the cabin. Appellant proceeded to force sexual intercourse with A.G.H. twice over the next few hours. Appellant eventually allowed A.G.H. to leave the cabin with his truck, and police were dispatched to the scene shortly thereafter. Upon arriving at the address, police found the cabin engulfed by a fire that was ignited by the kerosene heater. Appellant was apprehended at the scene.

Appellant entered an *Alford* plea to one count of first-degree criminal sexual conduct on December 14, 2009; the remaining charges, including charges of kidnapping and violating an order for protection (OFP), were dropped. During his plea, appellant admitted to having sexual intercourse with A.G.H. Appellant stated that he had a different view of A.G.H.'s frame of mind during the incident. But appellant conceded

that there was a substantial likelihood of the state obtaining a conviction for first-degree criminal sexual conduct based on A.G.H.'s reasonable fear of great bodily harm given the existing OFP, the kidnapping allegations, and the remote nature of the cabin. During the plea hearing, the district court also questioned appellant about an outstanding sentence to be served in Georgia:

> Q: And you understand that there will be a charge in Douglas County, Georgia, that will carry a maximum sentence after good time that will be equal to or less than the time being served here in Minnesota?
> A: That's correct.
> Q: So that it's clear, your understanding and my understanding, and I believe the County's understanding, is that when you complete the time[] that you need to serve here in Minnesota there would be no time left to serve in [Georgia]; is that your understanding?
> A: . . . correct.

Prior to sentencing, appellant moved to withdraw his plea, arguing that it was not knowingly, intelligently, and voluntarily made. The district court denied appellant's motion, concluding that the request was baseless. Appellant's sentencing hearing was held on February 8, 2010. Appellant received a 144-month sentence in Minnesota. Appellant also received a 144-month sentence in the unrelated matter in Georgia, set to run concurrently with the Minnesota sentence.

It is important to note that restitution was not requested by anyone at the sentencing hearing. In fact, the district court even explicitly asked, "no restitution?" at the sentencing hearing, to which the prosecutor responded, "*No restitution affidavit filed nor claimed*" despite having already received two restitution affidavits. Two days later, on February 10, 2010, the state filed a letter with the district court seeking restitution on

behalf of the cabin owner and the insurance company insuring the cabin. Appellant objected to the restitution request, and the district court scheduled a contested restitution hearing for March 26, 2010. Appellant discharged his counsel on March 12, 2010, and appeared at the hearing pro se. The district court began the restitution hearing by noting that "[Appellant] is here pro se representing himself, [his attorney] having been discharged." This was the extent of the district court's acknowledgment of appellant's decision to waive his right to counsel. Following the hearing, the district court ordered appellant to pay restitution ($83,847.03) to both the cabin owner and the insurance company for their losses incurred by the cabin fire. Appellant now challenges the district court's denial of his motion to withdraw his guilty plea and the award of restitution.

D E C I S I O N

Guilty Plea

In his pro se brief, appellant challenges the district court's decision denying his request to withdraw his guilty plea prior to sentencing. A defendant does not have an absolute right to withdraw a guilty plea. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). A district court may allow a defendant to withdraw a guilty plea prior to sentencing if it is "fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2. In making this determination, the district court must give "due consideration to the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea." *Id.* In order for a guilty plea to be fair and just, it must be "accurate, voluntary and intelligent." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

"Allowing withdrawal of a guilty plea is within the district court's discretion and is reviewed under an abuse-of-discretion standard." *Kaiser v. State*, 621 N.W.2d 49, 52 (Minn. App. 2001) (citing *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997)).

Appellant first argues that his plea was not accurate, voluntary, and intelligent because there was nothing violent about the conduct underlying his conviction, as evidenced by a medical examination of A.G.H. Appellant pleaded guilty to criminal sexual conduct in the first degree in violation of Minn. Stat. § 609.342, subd. 1(c) (2008). A person commits first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(c) by (1) engaging in sexual intercourse with another person (2) under circumstances causing the other person to have a reasonable fear of imminent bodily harm. 10 *Minnesota Practice*, CRIMJIG 12.03 (2008). Because appellant pleaded guilty to first-degree criminal sexual conduct on the basis of A.G.H.'s reasonable fear of great bodily harm, appellant's current assertion that the sexual intercourse was not violent is immaterial.

Appellant also argues that the plea was not accurate, voluntary, and intelligent because he received a longer sentence in the Georgia matter than he was promised during the plea negotiations. But appellant received an identical sentence in the Georgia matter as the one he received in this case, just as alluded to during the plea hearing. And appellant is serving the Georgia sentence concurrent with his sentence in this matter. Appellant fails to demonstrate how this affected the accuracy, voluntariness, and intelligence of his plea. *See Schwerm v. State*, 288 Minn. 488, 491, 181 N.W.2d 867, 868 (1970) (stating that a defendant is not entitled to withdraw a plea merely upon the belief

that he would receive a lesser sentence). Accordingly, the district court did not abuse its discretion by denying appellant's motion to withdraw his guilty plea before sentencing.

Restitution

Appellant also challenges the district court's grant of restitution. The purpose of restitution is to compensate victims for losses incurred as a result of crime. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). The district court has broad discretion concerning matters of restitution as long as a sufficient factual basis underlies its decision regarding the ordered restitution. *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000). But the interpretation of the restitution statute is a question of law that this court reviews de novo. *State v. Jones*, 678 N.W.2d 1, 23 (Minn. 2004).

Appellant raises several challenges to the district court's restitution award, including that the restitution hearing was procedurally flawed because the district court failed to ensure that appellant was voluntarily and intelligently waiving his right to counsel. Appellant is correct. The state argues that such a waiver is not necessary at a restitution hearing because Minn. R. Crim. P. 5.02 provides that "[i]f a defendant appearing without counsel *charged* with a felony or gross misdemeanor does not request counsel and wishes to represent himself . . . , the court shall ensure that a voluntary and intelligent [] waiver of the right to counsel is entered in the record." (Emphasis added.) Because appellant had been convicted prior to the late restitution hearing (again, we note that the state failed to raise the issue of restitution at sentencing), the state argues that he was no longer "charged with a crime" and, thus, the district court had no obligation to ensure a valid waiver of counsel.

The state's argument is unconvincing. First, the state's failure to request restitution at sentencing despite having already received restitution affidavits was a procedural irregularity that may have contributed to appellant's confusion and ultimate decision to waive counsel. Second, and more importantly, the federal and state constitutions provide a criminal defendant with the right to legal representation at *every stage* of a criminal proceeding where the substantial rights of the defendant may be affected. *See* U.S. Const. amends. VI, XIV, § 1; Minn. Const. art. I, § 6; *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S. Ct. 254, 257 (1967) (determining that the right to counsel exists at sentencing). Restitution is governed by Minn. Stat. § 611A.04 (2008), which provides that "[a] victim of a crime has the right to receive restitution *as part of the disposition of a criminal charge* . . . against the offender if the offender is convicted." (Emphasis added.) Restitution hearings are an integral component of the disposition of a criminal proceeding. And, like other stages of a criminal proceeding, restitution hearings adhere to evidentiary burdens and other procedural requirements. *See* Minn. Stat. § 611A.045, subd. 3 (2008) (placing the burden of producing evidence refuting a restitution claim on the offender and requiring an affidavit setting forth all of the challenges to the amount claimed by the victims to be served five days prior to a restitution hearing). The importance of the right to counsel at a restitution hearing is even more evident when a defendant objects to restitution on legal grounds, as appellant did below by arguing that the cabin owner and insurance company were not true "victims" of his crimes and that there was an insufficient factual basis for the court to award restitution. The district court was required to ensure a valid waiver of counsel prior to allowing appellant to represent

himself at the restitution hearing, just as the court is obligated at *every other stage of a criminal proceeding*.

When ensuring that the waiver of the right to counsel is voluntary, knowing, and intelligent, a defendant's waiver of the right to counsel must be in writing or made orally on the record if a defendant refuses to sign the written waiver. Minn. Stat. § 611.19 (2008); Minn. R. Crim. P. 5.02, subd. 1(4) (2008). Here, appellant did not waive his right to counsel in writing or orally, and the district court made no inquiry into the voluntariness and intelligence of appellant's decision. Accordingly, appellant did not validly waive his right to counsel. We reverse the restitution award. *See State v. Garibaldi*, 726 N.W.2d 823, 831 (Minn. App. 2007) (concluding that the record failed to demonstrate a valid waiver in part due to the district court's cursory inquiry of defendant's decision to waive his right to counsel).

The assessment of and liability for over $80,000 of collateral fire damage to an uninhabited cabin is a complicated process where an unrepresented defendant will be prejudiced by not having a continuing right to court-appointed counsel (or private counsel) fully explained.

Affirmed in part and reversed in part.