STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0307

State of Minnesota,
Respondent,

vs.

Matthew Starnes,
Appellant.

Filed January 21, 2014
Affirmed
Hudson, Judge

Anoka County District Court
File No. 02-CR-12-5831

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

Anthony C. Palumbo, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka, Minnesota (for respondent)

Melissa Sheridan, Special Assistant State Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Stoneburner, Judge; and Hudson, Judge.

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

HUDSON, Judge

On appeal from his convictions of first-degree burglary and receiving stolen property, appellant argues that the district court erred by failing to determine whether

exceptional circumstances existed to justify appointing substitute counsel after appellant discharged his public defender. Appellant also raises several arguments in his pro se supplemental brief. We affirm.

FACTS

Appellant Matthew Starnes was charged with first-degree burglary, third-degree burglary, receiving stolen property, and financial-transaction fraud in connection with two home burglaries. A resident of the first home testified that stereo speakers and an amplifier were stolen out of his car, which was parked in a garage detached from his home. The resident was able to provide a serial number for the amplifier, and it was found at a Pawn America store in Coon Rapids. Appellant was identified on a security-camera video pawning the amplifier.

Residents of the second home testified that they awoke one morning to find their patio door open and the front door to their townhome unlocked. A purse, laptop, DVDs, and video games had been stolen from the home. It was later confirmed that appellant pawned some of the DVDs at a Pawn America Store in Fridley. D.P., who lived in an apartment building behind the townhome, told police that around midnight the night of the burglary she saw a black man wearing a white t-shirt and baseball cap leave her apartment building. One of the townhome residents discovered that a credit card inside the stolen purse had been used at a nearby gas station around 1:00 a.m. Surveillance footage from the gas station showed a black man wearing a white t-shirt and black shorts getting out of a car, milling around, and then getting back in the car and driving away. The car in the video had been stolen a few days before the townhome burglary. A few

days later, an officer saw the car in a parking lot and watched a black male exit the car, leaving the driver's side door open. The officer discovered a phone on the driver's seat that was open to appellant's Facebook page, a black baseball cap, a do-rag, and the stolen credit card. Appellant's DNA was on the black baseball cap and the do-rag.

The first morning of trial, appellant voiced concerns about his public defender's representation. The judge outlined appellant's options and gave him time to consult with his public defender. After the meeting, appellant stated that he wished to represent himself but also requested that his public defender be available to assist him during the trial. The district court concluded that appellant's public defender was not eligible to serve as advisory or standby counsel in this case, and appellant agreed to continue his trial date for a short time to allow the district court to find an alternative advisory attorney. During that same hearing, appellant waived his right to counsel on the record.

Advisory counsel was appointed and a jury trial began on November 26, 2012. The jury found appellant guilty of first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(a) (2010) and receiving stolen property in violation of Minn. Stat. § 609.53, subd. 1 (2010). The jury found appellant not guilty of third-degree burglary and financial-transaction fraud. This appeal follows.

D E C I S I O N

I

Appellant argues that the district court erred by failing to conduct a "searching inquiry" to determine whether exceptional circumstances existed such that appellant was entitled to substitute counsel. On the first morning of trial, appellant stated:

> Well, it's not my intention to represent myself, but at the same time, me and [my public defender] have—I feel he's not representing me diligently and putting forth effort as necessary for this case. And things that I go over with him, he agrees with me one day and disagrees with the next day. And it just—I have less faith in him the more he does that, so I wouldn't feel comfortable with him representing me at this trial. And I feel that if I'm—if there's going to be any mess-ups, I'd rather it be on my behalf than blaming someone else when I foresee that he is not going to do it diligently.

Appellant also stated that he disagreed with some of his public defender's arguments regarding the admissibility of DNA evidence during pretrial motions.

Indigent criminal defendants have a right to appointed counsel. *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). The assistance provided by counsel must be effective. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). But the right to effective assistance of counsel does not include a right to be represented by an attorney chosen by the defendant. *State v. Fagerstrom*, 286 Minn. 295, 299, 176 N.W.2d 261, 264 (1970). When a defendant requests new counsel, a "searching inquiry" should be conducted if the defendant "voices serious allegations of inadequate representation." *State v. Munt*, 831 N.W.2d 569, 586 (Minn. 2013) (quotation omitted). A defendant's request for replacement of appointed counsel will be granted "only if exceptional circumstances exist and the demand is timely and reasonably made." *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998) (quotation omitted). "[E]xceptional circumstances are those that affect a court-appointed attorney's ability or competence to represent the client." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). We review

the district court's decision on whether to appoint replacement counsel for an abuse of discretion. *Munt*, 831 N.W.2d at 586.

Here, appellant's claims amount to disagreements on trial strategy between himself and appointed counsel and are not serious allegations of inadequate representation, nor do they identify exceptional circumstances affecting his attorney's ability to represent him. *See Gillam*, 629 N.W.2d at 449–50 (holding that dissatisfaction with counsel and disagreements over trial strategy were not exceptional circumstances); *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (concluding that personal tension between counsel and defendant was not an exceptional circumstance); *Worthy*, 583 N.W.2d at 279 (noting that general disagreement with counsel's assessment of the case was not an exceptional circumstance). Further, appellant's attorney had already argued pretrial motions before the district court and the district court judge noted that he was an excellent attorney and had obtained favorable rulings for appellant. *See State v. Clark*, 722 N.W.2d 460, 464–65 (Minn. 2006) (holding that the district court did not abuse its discretion in denying a request for substitute counsel where the public defender obtained favorable pretrial rulings for the defendant and the district court was satisfied that the attorney was prepared for trial).

Finally, appellant's request for a new attorney was untimely because it was made on the first morning of trial. *See id.* at 465 (concluding that a request for substitute counsel was untimely when it was made on the first morning of trial after jury selection had begun). Thus, the district court did not abuse its discretion in failing to conduct further inquiry into appellant's claims or in failing to appoint substitute counsel.

II

Appellant argues in his pro se supplemental brief that he was denied his right to a speedy trial. A defendant has the right to a trial within 60 days of a speedy-trial demand. U.S. Const. amend. VI; Minn. Const., art. I, § 6; Minn. R. Crim. P. 11.09(b). At appellant's first appearance on August 6, 2012, a second appearance date was set for September 5, 2012. Appellant claims that he demanded a speedy trial at this hearing and was wrongfully denied a transcript of the hearing. But a review of the relevant district court records shows that, although a scheduling order was issued, no formal hearing took place on that date. Thus, there could not have been a speedy-trial demand on September 5, 2012, as appellant claims. The record reflects that a speedy-trial demand was actually made on October 3, 2012, at the contested omnibus hearing. Appellant's trial began 54 days later on November 26, 2012. Thus, there was no speedy-trial violation here because appellant's trial began within 60 days of his demand.

III

Appellant argues that the district court abused its discretion in admitting the testimony of D.P. and the gas station surveillance video because the evidence is irrelevant and prejudicial. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant must also establish that he was prejudiced by the abuse of discretion. *Id*. Relevant evidence is generally admissible, Minn. R. Evid. 402, but may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403.

a. Statements of D.P.

D.P. lived near the site of the townhome burglary. Her testimony was offered to establish that she saw a man matching appellant's description leaving her apartment complex on the night of the burglary. Appellant objected on the grounds that the testimony was irrelevant because D.P. didn't actually identify him as the person she saw, nor did she claim that the person she saw was engaged in any wrongdoing.

The district court concluded that appellant's concerns could be addressed on cross-examination of D.P. and that it would be up to the jury to decide how helpful D.P.'s testimony was. D.P.'s testimony was relevant because it provided circumstantial evidence that appellant was near the site of the burglary, and the testimony posed no danger of unfair prejudice. Thus, the district court's decision was not an abuse of discretion.

b. Gas Station Surveillance Video

The state offered surveillance video from the gas station where the stolen credit card from the townhome burglary was used. The video showed a black male wearing a white t-shirt at the station sometime between midnight and 1:00 a.m. the night of the burglary but did not show him actually pumping gas. Appellant argued that the video was prejudicial.

The district court found that, although the video did not actually show the individual pumping gas, it was relevant circumstantial evidence connecting a man from the burglary location with use of the stolen card at a nearby gas station. That decision was not an abuse of discretion. Moreover, the video was used primarily to prove the

charge of financial-transaction-card fraud, of which appellant was acquitted. Appellant argues that the video was prejudicial regardless because it purported to show that he was in the area of the townhome burglary. While the evidence may have been damaging to appellant's case, it was not unfairly prejudicial because appellant was free to point out the tape's flaws through cross-examination of the gas station worker who laid foundation for the video. *See State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005) (explaining that unfair prejudice is evidence that "persuades by illegitimate means" not "merely damaging evidence, even severely damaging evidence"). Thus, the district court did not abuse its discretion in admitting the video.

IV

Appellant argues that the judge and the prosecutor interfered with his right to present a complete defense by telling a defense witness that his testimony could be used against him in a later prosecution. At trial, the district court judge noted that a public defender would be available to advise the witness of the possible effects of his testimony. The judge further stated that he had an obligation to make sure the witness understood his Fifth Amendment right not to testify. The prosecutor stated that she had no contact with the witness involving his decision to testify but that she had an obligation to make sure that the witness's Fifth Amendment rights were not violated. The witness stated on the record that he had spoken with a public defender about his rights and decided to testify. During his testimony, the witness invoked his Fifth-Amendment rights on two questions.

Every criminal defendant must be given a meaningful opportunity to present a complete defense, including the opportunity to present their version of the facts through

witness testimony. *Munt*, 831 N.W.2d at 583. When a defendant alleges that the government interfered with defense witnesses, the dispositive question is "whether the government actor's interference with a witness's decision to testify was substantial." *State v. Beecroft*, 813 N.W.2d 814, 839 (Minn. 2012) (quotation omitted). Here, there is no evidence in the record that either the prosecutor or the judge made threats to the witness as appellant claims. Rather, the district court properly ensured that the witness knew his rights. The witness's decision to testify, even after being advised of his rights, further confirms that the government did not substantially interfere with his decision. Thus, appellant was not denied a meaningful opportunity to present a complete defense.

V

Finally, appellant argues that the prosecutor committed misconduct by failing to abide by a pretrial order. The judge granted appellant's pretrial motion to prevent a police officer from testifying that someone had "rummaged a vehicle." The officer's testimony was related to the stolen vehicle shown in the gas-station video. Appellant was not on trial for any charges related to that stolen vehicle. The prosecutor agreed that she would talk to the officer about not mentioning anyone rummaging through the vehicle. At trial, the officer testified that a photograph of the interior of the car contained "the black hat of the suspect that we were looking for that was involved in motor vehicle tampering, tampering of a motor vehicle in a garage." Appellant did not object to the officer's testimony, but following the verdict, he filed a motion for a new trial based on the alleged misconduct; the district court denied the motion, finding that even if there was

error it was harmless. A district court's denial of a motion for a new trial is reviewed for an abuse of discretion. *State v. Berkovitz*, 705 N.W.2d 399, 405 (Minn. 2005).

We agree with the district court that even if there was error in the officer's testimony, it did not result from prosecutorial misconduct and was harmless. But we affirm on a basis different than the basis on which the district court relied. *See State v. Fellegy*, 819 N.W.2d 700, 707 (Minn. App. 2012) ("We may affirm the district court on any ground, including one not relied on by the district court."), *review denied* (Minn. Oct. 16, 2012). The district court found that the officer's testimony was harmless because it was related to the third-degree burglary charge, of which appellant was acquitted. But a review of the record indicates that the officer's testimony was actually related to acts never charged.

Eliciting inadmissible evidence is improper and may constitute prosecutorial misconduct. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Here, the prosecutor asked the officer to describe what was in the photograph; nothing in the question indicated that the prosecutor was seeking a response about someone rummaging in the vehicle or the tampering charge. Rather, it appears that the officer spontaneously offered that testimony, which alone does not prove that the prosecutor failed to abide by the judge's order. In addition, the prosecutor did not inquire further into the tampering charges and there was no further mention of "rummaging" or tampering by any witness or in closing argument. Accordingly, the record does not support the claim that the prosecutor committed misconduct and any error resulting from the witness's spontaneous comment was harmless; the district court did not abuse its discretion in denying appellant's motion for a new trial.

Affirmed.