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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0280**

State of Minnesota,
Respondent,

vs.

Michael Gene Southern,
Appellant.

**Filed January 16, 2018
Affirmed
Smith, John, Judge***

Aitkin County District Court
File No. 01-CR-16-419

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota (for respondent); and

Jim Ratz, Aitkin County Attorney, Lisa R. Rakotz, Associate Aitkin County Attorney, Aitkin, Minnesota (for respondent)

Thomas M. Skare, Cloquet, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Smith, Tracy M., Judge; and
Smith, John, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm appellant's conviction of felony burglary and felony assault because: (1) the waiver of his right to counsel was made knowingly, voluntarily and intelligently, (2) the failure to transcribe voir dire was not an error on the part of the district court, (3) the district court did not have a conflict of interest, and (4) the district court properly denied his postconviction prosecutorial misconduct claims without an evidentiary hearing.

FACTS

Appellant Michael Gene Southern and his friend, J.C., broke into M.D.'s cabin during the night while both M.D. and S.M.J were in the cabin. J.C. was armed with a pistol and Southern had a wooden bat. After breaking in, J.C. pointed his pistol at M.D. and Southern hit M.D. in the head and shoulder with his bat. S.M.J. moved between Southern and M.D. to try to prevent any more violence. Southern and J.C. then left the cabin.¹

Respondent State of Minnesota charged Southern with three counts of first-degree burglary and one count of second-degree assault. A public defender was appointed to represent Southern. Less than two months later, the district court held a hearing at which Southern requested to discharge his public defender and waive his right to counsel. The district court asked several questions about his request and had Southern sign a petition to proceed pro se, on the record, to waive his right to counsel.

¹ J.C. and Southern spent less than two minutes inside the cabin.

A jury found Southern guilty of all four charges and the district court later sentenced Southern to a 58 month prison term. Southern appealed to this court, and we stayed the appeal so he could seek relief. Southern also petitioned for postconviction relief. The postconviction court denied relief without an evidentiary hearing. This court reinstated the appeal.

D E C I S I O N

I. Southern knowingly, voluntarily, and intelligently waived his right to counsel.

If the facts are undisputed, this court will review a waiver of counsel de novo. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). The United States and Minnesota Constitutions guarantee criminal defendants the right to counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Although criminal defendants are guaranteed the right to counsel in criminal prosecutions, a defendant is allowed to waive this right if it is done so knowingly, intelligently, and voluntarily. *Rhoads*, 813 N.W.2d. at 885. To determine whether a waiver was knowing, intelligent, and voluntary, a court must analyze the facts and circumstances of the case, including the background, experience, and conduct of the accused. *Id.* at 884.

Southern argues that his right to counsel was violated when the district court failed to advise him of the information contained in Minn. R. of Crim. P. 5.04, subd. 1(4). Under Minn. R. Crim. P. 5.04, subd. 1(4), district courts are required to ensure that unrepresented defendants charged with a felony complete a voluntary and intelligent written waiver of the right to counsel. Before the district court may accept a waiver, it must first advise the defendant of the nature of his charges, specify the offenses included in the charges, disclose

the range of possible punishment, explain that there may be defenses or mitigating circumstances, and mention “other facts essential to a broad understanding of the consequences of the waiver of the right to counsel.” Minn. R. Crim. P. 5.04, subd. 1(4)(a)–(f).

Southern contends that his waiver was not knowing, intelligent, and voluntary because the district court incorrectly described the range of allowable punishment as 34 to 46 months. He also contends the district court failed to discuss the lesser-included charges, mitigating circumstances, or the advantages or disadvantages of waiving counsel. As an initial matter, a district court’s failure to strictly comply with the inquiry detailed in Minn. R. Crim. P. 5.04, subd. 1(4) does not necessarily require a reversal so as long as “the particular facts and circumstances of the case demonstrate a valid waiver.” *Rhoads*, 813 N.W.2d at 886. Our supreme court has affirmed several convictions in which the district court failed to properly advise defendants according to a particular procedure such as rule 5.04, subd. 1(4). *See State v. Worthy*, 583 N.W.2d 270, 274-77 (Minn. 1998) (concluding waiver was still valid even without advisement of charges or potential punishments because co-defendants were represented by counsel for over a month, they knew they were responsible for their own defense, they had prior experience with the criminal justice system, and the district court had appointed standby counsel); *State v. Brodie*, 532 N.W.2d 557 (Minn. 1995) (concluding waiver was valid because the defendant was represented by counsel for a month prior; the defendant knew he would need to represent himself; and the district court appointed standby counsel).

Factual similarities to *Brodie* and *Worthy* are present in Southern's waiver. The district court made sure that Southern understood that if he waived his right to counsel, he would be responsible for his own defense and the same rules that applied to attorneys would apply to him. Southern was represented by defense counsel for nearly two months. Southern also had a great deal of experience with the criminal justice system and its general procedure as he was convicted of nine different felonies between 1995 and 2012. And, like both *Brodie* and *Worthy*, the district court appointed standby counsel.

Southern also reviewed a petition to proceed pro se before his counsel was discharged by the court, which had the correct maximum and minimum sentencing range as well as most of the information the district court failed to mention. Southern notified the district court that he had enough time to review the petition, that he understood the petition, that he needed to discharge his attorney because he disagreed with him on how to proceed with his case, that he had given his decision adequate and sufficient consideration, and that the choice was not a choice that he made easily. Southern then signed the petition on the record and in front of the district court.

Because the totality of the facts and circumstances indicate that Southern was making a knowing, intelligent, and voluntary decision when he waived his right to counsel, the district court did not err in finding the waiver valid.

II. The district court did not err by failing to order a transcript of voir dire.

Southern argues that the district court erred by not ordering a transcript of voir dire for his appeal. Southern is incorrect in arguing that ordering any trial transcript is the district court's responsibility. The Minnesota Rules of Appellate Procedure require that

the “appellant shall” order parts of the transcript, “which are deemed necessary for inclusion in the record.” Minn. R. Civ. App. P. 110.02, subd. 1(a); *see also* Minn. R. Crim. P. 28.02, subd. 9 (stating that the rules of civil appellate procedure “govern preparation of the transcript of the proceedings”).

Southern had the opportunity to order the transcript covering voir dire, but he decided not to do so. The decision is his mistake, and his mistake alone, and means any claim regarding alleged error during voir dire is waived. *See State v. Barnes*, 713 N.W.2d 325, 337 (Minn. 2006).

III. The district court did not have a disqualifying appearance of bias during the trial.

Southern alleges that the district court created an appearance of bias because the judge who presided over his jury trial also presided over some of his “sobriety court appearances.” When a defendant does not preserve his judicial bias claim, the alleged judicial bias claim will be reviewed under a plain-error standard. *State v. Finch*, 865 N.W.2d 696, 701 n.3 (Minn. 2015).

Under plain-error review, we consider whether (1) there was an error; (2) which was plain; and (3) which affected the defendant’s substantial rights. *State v. Schlienz*, 774 N.W.2d 361, 366 (Minn. 2009). If each of these three prongs are satisfied, then we consider whether it is necessary to address the error to ensure the fairness and integrity of the judicial proceedings. *Id.* An error by the district court is plain if it “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error

affects the defendant's substantial rights when the error, "was prejudicial and affected the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

Whether a district court judge was disqualified due to an appearance of impartiality under the Minnesota Code of Judicial Conduct is a question of law we review de novo. *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005). A judge "must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct." Minn. R. Crim. P. 26.03, subd. 14(3). Moreover, a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Minn. Code Jud. Conduct Rule 2.11(A). Judges are presumed to have the ability to "approach every aspect of each case with a neutral and objective disposition." *Dorsey*, 701 N.W.2d at 247 (quotation omitted). But a judge is disqualified for lack of impartiality under rule 2.11(A) if a "reasonable examiner," from the perspective of an objective "layperson with full knowledge of the facts and circumstances," would "question the judge's impartiality." *State v. Pratt*, 813 N.W.2d 868, 876 & n. 8 (Minn. 2012) (quotation omitted). A particular litigant's subjective belief that a judge is or may be partial does not create a reasonable basis to question the judge's impartiality. *State v. Burrell*, 743 N.W.2d 596, 601-02 (Minn. 2008).

Southern argues that the district court judge should have recused himself sua sponte because he presided over both this trial and some of Southern's sobriety court appearances. However, judges commonly have repeated contacts with individual litigants in different judicial settings. See, e.g., *Rossberg v. State*, 874 N.W.2d 786, 790 (Minn. 2016) (assigning both trial and postconviction proceeding does not present an adequate ground

for disqualification by itself). A review of the record indicates that the district court judge acted impartially throughout the process, including by resolving more than a dozen evidentiary objections in Southern's favor.

Since Southern has not identified any errors, his claim fails and it is not necessary to consider whether his rights were substantially impacted. See *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012) ("If [an appellate court] conclude[s] that any prong of the plain error analysis is not satisfied, [the court] need not consider the other prongs.").

IV. The postconviction court did not abuse its discretion by denying Southern's postconviction petition based on prosecutorial misconduct claims.

We review the denial of a petition for postconviction relief without an evidentiary hearing for an abuse of discretion. *Buckingham v. State*, 799 N.W.2d 229, 231 (Minn. 2011). But we review the underlying issues of law de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). Additionally, evidentiary hearings are not required by the postconviction court if "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2016). Thus, it is the defendant's burden to allege facts that, if true, would entitle the defendant to relief. *Nissalke v. State*, 861 N.W.2d 88, 91 (Minn. 2015).

In his postconviction petition, Southern argued that the prosecution engaged in misconduct: (1) by telling Southern that he could not discuss certain witnesses' plea agreements or inconsistent statements to police during his trial; (2) by withholding potentially exculpatory evidence; (3) by having witnesses travel together in violation of a sequestration order; and (4) by having Sergeant Guida, an investigator for the state, threaten

one of his witnesses. He claims these alleged violations denied him due process and a fair trial and that they should not have been dismissed without an evidentiary hearing. As explained below, the district court did not err in dismissing the postconviction petition without an evidentiary hearing. Each of Southern's specific instances of alleged prosecutorial misconduct is analyzed in turn.

Improper Legal Advice

Southern alleges that the prosecutor privately told him that he "could not discuss the felonies or plea agreements of the witnesses because that information was irrelevant and that the inconsistencies in their statements were irrelevant." The prosecution denied Southern's allegations, explaining that these allegations were regarding a motion in limine in which the state asked the court to preclude Southern from asking S.M.J. or M.D. about their involvement in a pending investigation or their use of drugs. Southern did not object to this alleged instance of prosecutorial misconduct at trial, and thus it is reviewed under the modified plain-error test. *See Ramey*, 721 N.W.2d at 302.

Southern provides no evidence other than his affidavit to support his assertion that the prosecution discouraged him from asking these questions of the prosecution's witnesses. Regardless, the record demonstrates that even if Southern's allegation was accurate, this improper legal advice did not deter him from asking any of the witnesses questions regarding their past criminal histories or their inconsistent statements.² Since

² Southern asked J.C., S.M.J., and J.J. about their past criminal histories, and he asked M.D., S.M.J., and J.C. about various inconsistencies in their respective statements to the police.

this alleged advice did not deter Southern from asking questions, we are convinced that this alleged error, even if it occurred, did not impact his substantial rights. *See State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009) (a plain error only “affects a defendant’s substantial rights” when “there is a reasonable probability that the error actually impacted the verdict.”). Thus, the postconviction court correctly denied this claim without an evidentiary hearing.

Brady Violation

Southern alleges that the prosecution committed misconduct by improperly withholding a photograph of an injury S.M.J. sustained, J.C.’s plea agreement, and a written summary of the conversations that took place between Southern’s wife and Sergeant Guida. Southern alleges that this misconduct violated his right to due process as defined in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

Three elements must be established in order to establish a *Brady* violation. *See Pederson v. State*, 692 N.W.2d 452, 459-60 (Minn. 2005) (The three elements of a *Brady* violation are: (1) the evidence is favorable to the defendant; (2) the evidence was “suppressed by the state, either willfully or inadvertently;” and (3) prejudice to the accused resulted.).

Southern claims that the prosecution withheld from him a photo depicting a bruise to S.M.J.’s eye. However, according to the trial transcript, this photo was offered into evidence by the prosecution and without any objection from Southern. From the record, it also appears as though the photograph was turned over in the state’s initial disclosure.

Thus, Southern has failed to establish that the photograph was “suppressed by the state.” *See id.*, 692 N.W.2d at 459.

In regards to the alleged withholding of J.C.’s plea agreement, Southern was provided a copy of the transcript of J.C.’s guilty plea, along with J.C.’s sentencing worksheet, the original criminal complaint, and a written copy of the plea offer J.C. accepted. Later in the trial, Southern confirmed that he had the sentencing worksheet, offer sheet, and the original complaint. In fact, Southern even examined J.C. regarding his plea deal and submitted J.C.’s sentencing worksheet into evidence.

Southern also argues that the prosecution failed to disclose a written summary of Sergeant Guida’s conversation with his wife. At trial, the district court noted that the prosecution had made an adequate disclosure of the conversation and its contents. In addition, Southern later cross-examined Sergeant Guida at trial regarding the conversation. From the record, it does not appear that any evidence that Southern alleges was withheld was actually withheld from him.

Sequestration Claim

On July 6, 2016, the state moved to, among other things, have trial witnesses sequestered. The district court granted that motion.

At the end of the second day of trial, Southern told the district court that he wanted J.C. to remain available to testify in his case-in-chief. Southern, the district court, and the prosecution then discussed how J.C. would be transported back to the courthouse the next day. Southern advised the district court that J.C. had been transported by Sergeant Guida.

The district court then ordered the sheriff's office to transport J.C. to the courthouse the next morning, to which Southern responded, "[T]hat's fine."

In his petition for postconviction relief and now on appeal, Southern argues that "the State's witnesses were transported to court together," and that this arrangement violated his right to a fair trial. Even assuming this allegation is true, Southern is not entitled to relief.

In order to obtain relief from a violation of a sequestration order, the complaining party is required to demonstrate "actual prejudice." *State v. Miller*, 396 N.W.2d 903, 906 (Minn. App. 1986). Specifically, there "must be an indication in the record that statements made in violation of a sequestration order were made in an attempt to influence the testimony of other witnesses, or that the statements did influence the testimony of other witnesses, before the trial court need even consider it as grounds for a new trial." *State v. Erdman*, 383 N.W.2d 331, 334 (Minn. App. 1986), *review denied* (Minn. April 24, 1986). Southern's postconviction petition does not allege any of the witnesses were influenced by the words or testimony of another witness. Rather he simply states that the "State's witnesses were transported to court together." Since Southern has not even alleged the requisite facts that, if proven to be true, would warrant relief, it was not an abuse of discretion for the district court to reject this claim without an evidentiary hearing.

Witness Interference

During trial, Southern made a discovery request for a written summary of a conversation that took place between his wife and Sergeant Guida. The prosecution noted that Sergeant Guida had already provided an oral summary of the conversation to Southern.

The district court ruled that this disclosure was sufficient and noted that Southern would have ample opportunity to cross-examine the witness about his alleged statement.

On appeal, Southern argues that the exchange between Sergeant Guida and his wife was “an attempt by a State actor to intimidate [his] witness.” During the trial, and before any witness had testified, Southern alleged that Sergeant Guida tried to influence his wife’s testimony through intimidation by implying she would likely perjure herself and that she could lose her kids if she did perjure herself. Southern’s wife’s affidavit says that Sergeant Guida told her, “I wouldn’t want you to perjure yourself on the stand because the kids need a parent.”

Later in the trial, Southern did have the opportunity to cross-examine Sergeant Guida about this conversation and Sergeant Guida replied by saying:

So [Southern’s] wife was in the courtroom. I hadn’t seen her. I had been trying to get ahold of her. I approached her and said, How you doing, [S.S.]? Just a little bit of small talk. Your wife and I have talked to each other many, many times. Not, she knows who I am, I know who she is, it’s not like I approached a random stranger. And I said, [S.S.], I want you to be careful because I don’t want you to perjure yourself on the stand, you might have a lot to lose. I said there’s a lot riding, at stake on your telling the truth here. And I was worried that maybe your influence would cause her not to do that.

Witness interference by a government actor is analyzed under the substantial-interference test. *Colbert v. State*, 870 N.W.2d 616, 623 (Minn. 2015). To obtain a new trial under this test, a defendant must show (1) a government actor interfered with a defense witness’s decision to testify, (2) the interference was substantial, and (3) the defendant was prejudiced by the conduct. *Id.* at 625.

Even assuming that Sergeant Guida's conversation with S.S. was both (1) an interference and (2) substantial, Southern's argument fails because he cannot show that he was prejudiced by Sergeant Guida's statement to S.S. The testimony S.S. provided was favorable to Southern's defense as it provided him with an alibi during the assault. Moreover, S.S. also noted that Sergeant Guida's statement to her did not influence her testimony in any way. Because he cannot show Sergeant Guida's alleged statement had any prejudicial impact, Southern has failed to satisfy the third requirement of the substantial-interference test. Therefore, the postconviction court did not abuse its discretion by summarily denying Southern's claim that Sergeant Guida intimidated Southern's witness.

In sum, the postconviction court did not abuse its discretion in denying an evidentiary hearing on any of Southern's prosecutorial misconduct claims because the record conclusively shows that Southern is not entitled to relief.³

Affirmed.

³ To the extent that Southern argues that there has been cumulative error entitling him to relief, he is incorrect. Trial errors that do not impact the outcome of a proceeding are not sufficient to show cumulative error. *State v. Erickson*, 610 N.W.2d 335, 341 (Minn. 2000). While Southern has not demonstrated error, even if he had, he has failed to claim or show that any of these alleged errors were prejudicial to him. Without any prejudice shown or alleged, Southern cannot receive any relief under a theory of cumulative error.