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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0451**

State of Minnesota,
Respondent,

vs.

Abimbola Bakare,
Appellant.

**Filed March 12, 2018
Affirmed
Rodenberg, Judge**

Ramsey County District Court
File No. 62-CR-15-2329

Lori Swanson, Attorney General, Kelly L. Meehan, Assistant Attorney General, St. Paul, Minnesota; and

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and Smith Tracy M., Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Abimbola Bakare appeals from his judgment of conviction and sentence for multiple counts of medical-assistance fraud, arguing that the district court should have treated his convictions as misdemeanors, because the medical-assistance-fraud statute,

Minn. Stat. § 609.466 (2010), does not include a specific penalty provision. Therefore, he argues, violations of Minn. Stat. § 609.466 are misdemeanors by definition under Minn. Stat. § 645.241 (2010). In the alternative, appellant argues that Minn. Stat. § 609.466 is unconstitutionally vague. He further argues that the district court erred by failing to obtain a renewed waiver of counsel from appellant before he represented himself at his jury trial after circumstances changed following his initial waiver of counsel. We affirm.

FACTS

Appellant owned 49% of Dependable Care Inc., a business enrolled in the Minnesota Medical Assistance program. The business provided personal care assistant (PCA) services to medical-assistance recipients. Appellant was responsible for billing the Minnesota Department of Human Services (DHS) on behalf of the business.

On March 31, 2015, appellant was charged with one count of medical-assistance fraud pursuant to Minn. Stat. § 609.466 (2012), based on the allegation that he billed DHS for Medicaid services without documentation that the services were actually provided. The complaint alleged that appellant submitted false claims for reimbursement and that DHS relied on those claims and “gave up possession of more than \$5,000.” When appellant appeared in district court, he requested an attorney. A public defender was initially appointed to represent appellant, but the district court later determined appellant was financially ineligible for a public defender. The district court continued the case so that appellant could obtain counsel, and appellant next appeared in district court with his first private attorney.

Appellant appeared with his first private attorney at two hearings; at the second of those hearings, the attorney informed the district court that appellant no longer wanted his services and that appellant was in the process of obtaining a second private attorney. The district court warned appellant that he had “the right to an attorney, but that right to an attorney does not mean you can indefinitely continue the matter.” It continued appellant’s pretrial hearing to a later date to allow appellant’s new attorney to prepare.

Appellant appeared in district court with his second private attorney for the rescheduled pretrial. This new attorney informed the district court that appellant wanted to discharge him. Observing that appellant and his attorney had differing opinions regarding how the case should proceed and that appellant apparently lacked confidence in his second attorney, the district court informed appellant that it would not delay the matter any further and, if appellant chose to hire a third private attorney, that attorney must be prepared to proceed to trial as scheduled on February 29, 2016. Appellant responded that he wanted to go pro se “for now.” After the district court carefully, and over approximately seven pages of transcript, went through appellant’s rights with him, appellant signed a written petition to proceed pro se.

The state later filed an amended complaint, consistent with earlier discussions concerning plea offers. The amended complaint alleged aiding and abetting medical-assistance fraud from August 17, 2010 to September 10, 2013, based on the allegation that appellant submitted false claims to DHS and received payments totaling \$184,611.09. The district court explained to appellant that the amended complaint charged six counts of

aiding and abetting medical-assistance fraud, with an increased potential penalty from the initial complaint.

Appellant appeared for trial as scheduled on February 29, 2016. He had no lawyer and requested a six-month continuance to hire one. In response, the district court recognized that appellant was “dragging [his] feet.” Nevertheless, it continued appellant’s trial date to its next trial block, warning appellant that he either needed to get an attorney by then or proceed without one.

Represented by his third private attorney, appellant again appeared before the district court for trial. Appellant’s attorney represented to the court that he and appellant had not yet finalized an agreement for his services. This attorney also requested time to review the case because he had only recently been contacted by appellant. The district court again granted appellant a continuance, and a pretrial hearing was set for a month later.

Appellant appeared at this continued pretrial hearing without a lawyer. He informed the district court that he would represent himself. The district court set a new trial date, and warned appellant that there would be no more rescheduling. The district court did not require appellant to submit a renewed written waiver of counsel.

Shortly before trial, the state filed a second amended complaint which removed the reference to “aiding and abetting” medical-assistance fraud from the complaint. The second amended complaint was based on the same facts as the first amended complaint and was identical to the first amended complaint concerning the maximum possible penalty.

Trial began on September 28, 2016, approximately 18 months after appellant was charged. Appellant represented himself at trial. The district court noted on the record at the outset of trial and while discussing pretrial issues that appellant had earlier signed a written waiver of counsel, and that appellant had waived his right to an attorney. The district court asked if appellant was ready to proceed, and appellant replied that he was.

The second amended complaint charged appellant with six counts of “Medical Assistance Fraud (over \$5,000)” under “Minnesota Statute: 609.466, with reference to: Minn. Stat. § 609.52.3(2), 609.17.1, 609.17.4(2).”¹ The state appears to have begun trying the case as though appellant was charged with theft under Minn. Stat. § 609.52 (2010). For example, in its opening statement, the state posited that appellant had committed theft, not attempted theft under the medical-assistance-fraud statute. The prosecutor stated: “Theft comes in many forms. . . . It can also take the form of stealing from the government.” The state suggested that “at its core this is a case about theft.” Later, the state backtracked and noted that medical-assistance fraud under Minn. Stat. § 609.466 is an attempt crime not requiring proof that appellant received money. Despite this, the state presented trial testimony from an auditor who investigated Dependable Care’s billing activity for fraud. The state questioned this witness in detail regarding calculations of the amount Dependable Care was overpaid as a result of appellant’s false claims. On cross-examination, appellant

¹ Although the complaint referred to Minn. Stat. § 609.17, subd. 1 (2010), the general attempt statute, the state realized late into trial that Minn. Stat. § 609.17, subd. 1, did not properly apply to appellant’s charges because, under Minn. Stat. § 609.466 (2010), medical-assistance fraud is itself an “attempt” crime.

also questioned the auditor about her calculations regarding the amount paid for two particular claims. The case was submitted to the jury on verdict forms calling for the jury to determine as to each count whether appellant was guilty or not guilty and, if guilty, to answer interrogatories concerning “the total value of the property taken.”

The jury found appellant guilty of all six counts of medical-assistance fraud, but it returned an incomplete verdict on count four.² The district court stayed imposition of felony sentences on counts one, two, three and five, dismissed count four, and imposed a stayed felony sentence of one year and one day in prison on count six. Although count six was a presumptive prison commitment, the district court dispositionally departed from the Minnesota Sentencing Guidelines and stayed the execution of sentence. For all of his convictions, appellant’s presumptive sentence was calculated under the guidelines using Minn. Stat. § 609.52, subd. 3(2), theft over \$5,000, as modified by Minn. Stat. § 609.17, subd. 4(2). Minn. Sent. Guidelines 2.G (2010 & 2012). This resulted in a presumptive sentence of one year and one day in prison for count six under the Minnesota Sentencing Guidelines. If Minn. Stat. § 609.17, subd. 4(2), was not applied as a modifier, the presumptive sentence would have been 19 months. See Minn. Sent. Guidelines, 2.G.1-2 (2012) (providing that, for a sentencee for an attempt offense under Minn. Stat. § 609.17, the presumptive duration is half of that found in the appropriate grid cell, except a

² Count four of the complaint alleged fraud in the amount of over \$82,000, and the jury verdict form only permitted the jury to find appellant guilty of “taking” an amount less than \$35,000. The jury, consistent with the evidence at trial, found appellant guilty but did not answer the special interrogatory, owing to the absence of a special interrogatory conforming to the trial evidence.

presumptive sentence “cannot be less than one year and one day”); *see also* Minn. Stat. § 609.17, subd. 4(2) (providing that, for crimes for which the maximum sentence is less than life imprisonment, the maximum penalty for an attempt shall be “not more than one-half of the maximum imprisonment or fine or both provided for the crime attempted”). Appellant was placed on supervised probation for five years and was ultimately ordered to pay restitution in the amount of \$102,935.98.³

This appeal followed.

DECISION

Appellant argues both that Minn. Stat. § 609.466 is unconstitutionally vague and that the district court erred by convicting him of a felony and not of a misdemeanor, because Minn. Stat. § 609.466 does not include a penalty provision. Appellant also argues that the district court erred by failing to obtain a renewed waiver of counsel from him before he represented himself at his jury trial when circumstances changed following his initial waiver of counsel. Finally, appellant, in his pro se brief, raises a number of issues regarding the district court’s evidentiary rulings at trial.

Minn. Stat. § 609.466

Appellant argues that Minn. Stat. § 609.466 is unconstitutionally vague. The statute provides:

Any person who, with the intent to defraud, presents a claim for reimbursement, a cost report or a rate application, relating to the payment of medical assistance funds pursuant to chapter

³ Appellant’s restitution obligation is joint and several with appellant’s ex-wife, a co-owner of Dependable Care Inc., who was also convicted of similar fraud charges in a separate proceeding.

256B, to the state agency, which is false in whole or in part, is guilty of an attempt to commit theft of public funds and may be sentenced accordingly.

We first observe that appellant did not raise this issue in the district court. Generally, we “will not decide issues which were not raised before the district court.” *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). When invalidation of a statute for constitutional infirmity is sought, “[t]he law is clear in Minnesota that the constitutionality of a statute cannot be challenged for the first time on appeal.” *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980). Because appellant failed to timely assert his constitutional challenge in district court, he has forfeited that argument on appeal. *See State v. McCauley*, 820 N.W.2d 577, 583-84 (Minn. App. 2012) (refusing to consider an appellant’s argument that the statute under which he was convicted is void for vagueness because appellant did not raise the issue in district court), *review denied* (Minn. Oct. 24, 2012).

Appellant also argues that, because the language of Minn. Stat. § 609.466 includes neither a penalty provision nor any reference to a penalty provision in another statute, he should be sentenced for a misdemeanor. Minn. Stat. § 645.241 (2010) (providing that, when an act is prohibited by statute and no penalty for a violation “shall be imposed in any statute, the doing of such act shall be a misdemeanor”). The state responds that we should decline to address the issue because it was not raised to the district court; and, should we address the issue, the state argues only that “the language of § 609.466 referring to theft of public funds is a clear reference to Minn. Stat. § 609.52, subd. 3(3)(d)(iv) which provides that theft of public funds is a felony offense regardless of the value of the property stolen.”

We are persuaded that, as the case was tried by the parties, appellant forfeited the argument that all medical-assistance-fraud convictions are misdemeanors. Appellant failed to raise this issue to the district court, despite multiple opportunities (and after consulting with at least three private attorneys) to do so. The initial complaint and two amended complaints each alleged that appellant had received DHS funds as a result of his false claims. All three complaints referenced Minn. Stat. § 609.52, subd. 3(2). As outlined in the facts section, above, the state vacillated at trial between arguing that appellant was charged with and could be convicted of theft, and arguing that it needed only to prove that appellant *attempted* to receive funds from DHS through false claims. The verdict forms proposed by the state, agreed to by appellant, and given to the jury by the district court, treated the charged offenses as thefts. Each verdict form required the jury to find, if appellant was guilty, “the total value of the property taken.” Appellant’s statements on the record at trial clearly indicate that he regarded the charges against him as theft charges, despite the principal charging statute—medical-assistance fraud—not requiring proof of a completed theft.

Had appellant raised to the district court the argument he now raises on appeal, the state undoubtedly would have done explicitly what it did implicitly—that is, try appellant for a completed theft under Minn. Stat. § 609.52. As it was, the state only charged an attempt offense under Minn. Stat. § 609.466. That appellant completed the theft does not negate his culpability under Minn. Stat. § 609.466; he did present a claim for reimbursement with the intent to defraud—and the jury found that he did so successfully.

The jury answered interrogatories on the verdict forms indicating that the state proved that appellant had actually “taken” the amounts alleged.

Whether appellant realized it at trial or not, his not raising to the district court the issue he argues on appeal benefitted him. Because the state undercharged the case only as an attempt, despite having proved a completed theft, the district court properly sentenced appellant only for the attempt crime of which he was convicted. *See* Minn. Sent. Guidelines 2.G (2010 & 2012); Minn. Stat. § 609.52, subd. 3(2); Minn. Stat. § 609.17, subd. 4(2) (providing that, for crimes for which the maximum sentence is less than life imprisonment, the maximum penalty for an attempt shall be “not more than one-half of the maximum imprisonment or fine or both provided for the crime attempted”). Appellant was not sentenced for the completed theft that the jury found the state to have proved. Because appellant did not raise this argument below, he was sentenced only for attempted theft.

If we were to reach appellant’s argument that all convictions under Minn. Stat. § 609.466 are misdemeanors because there is no penalty provision attached to it, we would reject the argument in any event.⁴ The apparent purpose of section 609.466 is to reduce the level of proof required to prove an attempted theft when a false claim is submitted for

⁴ We do not agree with the state’s argument that Minn. Stat. § 609.466 includes a “clear reference” to Minn. Stat. § 609.52, subd. 3(3)(d)(iv) (2010) and that this is the penalty provision for all violations of section 609.466. Minn. Stat. § 609.52, subd. 3(3)(d)(iv), is the sentencing provision applicable *only* to theft cases where “the value of the property or services stolen is not more than \$1,000, and . . . the property consists of public funds.” Here, every count in the amended complaint charged the theft or attempted theft of far more than \$1,000. None of the charged offenses is governed by Minn. Stat. § 609.52, subd. 3(3)(d)(iv).

medical-assistance funds with intent to defraud. That described conduct makes the actor “guilty of an attempt to commit theft of public funds.” The “attempt to commit theft” language of Minn. Stat. § 609.466, to our reading, refers sufficiently to Minn. Stat. § 609.52 (the only crime defined as “theft” by the criminal code) that no resort need be made to Minn. Stat. § 645.241 in search of a penalty provision. Minnesota’s criminal code contains a detailed list of sentencing alternatives for theft crimes, depending on the amount stolen, the thing stolen, the identity of the victim, the manner in which the theft is committed, and other factors. Minn. Stat. § 609.52, subd. 3. Minnesota Statutes section 645.241 provides a catchall for cases where the statutes provide “no penalty.” Theft is not such a case. The legislature’s inclusion in Minn. Stat. § 609.466 of submission of false medical-assistance claims as sufficient to prove an attempted theft of public funds causes no occasion for resort to section 645.241.⁵

⁵ Despite rejecting appellant’s argument concerning Minn. Stat. § 609.466, we acknowledge that the legislature could have better expressed how violations of the statute should be handled by the district courts. The Minnesota Jury Instruction Guides recommend what the district court did here, which is to include interrogatories for the jury concerning the aggregate value of property involved in the theft offense (reflecting the sentencing provisions of Minn. Stat. § 609.52). 10 *Minnesota Practice*, CRIMJIGS 16.83. Further, the Minnesota Sentencing Guidelines classify a violation of Minn. Stat. § 609.466 as a felony offense. In the context of this case, and given how the case was tried by the parties and submitted to the jury, we see no error in the district court’s treatment of the jury instructions and verdict forms. To the extent that this manner of submitting the medical-assistance-fraud charges to the jury benefitted anyone, it benefitted appellant, as discussed above.

Appellant's Waiver of Counsel

Appellant also argues that the district court erred by failing to obtain a renewed waiver of his right to counsel before trial. Appellate courts review a district court's factual findings regarding waiver of counsel under the clearly erroneous standard. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). "A finding is clearly erroneous when there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred." *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). "[A]s a general rule, a defendant who has knowingly, intelligently, and voluntarily waived his right to counsel need not renew his waiver-of-counsel at subsequent proceedings." *Id.* at 889. The Minnesota Supreme Court adopted a limited exception to this rule in *Rhoads*, holding that an exception to the general rule is warranted when an amended charge doubles the maximum possible punishment to an offense. *Id.* at 888. However, "an exception to the general rule is unwarranted when the amended charge does not increase the possible range of punishment." *Id.*

Appellant does not challenge the validity of his original waiver, and to our view of the record, the district court both obtained appellant's written waiver and carefully explained appellant's rights to him. Appellant now argues that this waiver should have been renewed on two particular occasions: when appellant requested counsel after his initial waiver, and when the state amended its complaint for the second time.

Appellant argues that his request for counsel after the state's first amendment of the complaint, and his subsequent appearance before the court with counsel, constitutes a changed circumstance that required a renewed waiver. Appellant provides no authority

that sufficiently supports his argument, and we see no reason here to depart from the general rule provided in *Rhoads*. The record clearly evidences appellant's desire to represent himself, despite having had at least three different attorneys representing him or accompanying him at various court appearances during the life of this case. Each time appellant appeared with counsel, he ultimately—and by all appearances freely and voluntarily—discharged each attorney and chose to represent himself. The district court did not clearly err in honoring appellant's wish to represent himself at trial without going through additional waiver-of-counsel petitions and proceedings.

Appellant also challenges the adequacy of his waiver of counsel because the state amended the complaint a second time. Despite that second amendment, resulting in charges of medical-assistance fraud rather than aiding and abetting medical-assistance fraud, the amendment did not change the potential penalties. Appellant does not argue otherwise. An amended complaint that does not change the potential punishment for a defendant is not a sufficient change in circumstances to warrant a renewed waiver of counsel. *Id.* Therefore, the state's second amended complaint was not a changed circumstance that required the district court to obtain a renewed waiver of counsel from appellant.⁶

⁶ The district court was exceedingly patient with appellant during his multiple changes of mind concerning whether he would have a lawyer, and who that lawyer would be. Appellant's written petition to proceed pro se was explained fully and in detail by the district court. In each successive change of mind by the appellant, the district court carefully and patiently allowed appellant to fully explore his legal-representation options. On this record, it is evident that appellant's choice to represent himself was informed and voluntary.

The District Court's Evidentiary Rulings

In his pro se brief, Appellant raises a number of challenges to the district court's evidentiary rulings at trial regarding the spousal-communications privilege, the impeachment of one of his witnesses with a prior crime, the admission of an exhibit, and a time limitation placed on his closing argument. We review the district court's evidentiary and other rulings for abuse of discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). After a careful review of the record, we conclude that the district court's evidentiary rulings at trial were well within its discretion, and that appellant's pro se claims are without merit.

Affirmed.