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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0955**

State of Minnesota,
Respondent,

vs.

David Allen Reynolds,
Appellant.

**Filed May 13, 2019
Affirmed
Larkin, Judge**

Ramsey County District Court
File No. 62-CR-17-7414

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant
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Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

On appeal from his conviction of first-degree aggravated robbery, appellant challenges the district court's denial of his request for substitute counsel, arguing that the request was timely and supported by exceptional circumstances. Appellant also makes several pro se arguments. We affirm.

FACTS

Respondent State of Minnesota charged appellant David Allen Reynolds with first-degree aggravated robbery. On October 4, 2017, the district court appointed the public defender's office to represent Reynolds. On October 27, Reynolds and his assigned public defender appeared at an omnibus hearing. Reynolds pleaded not guilty and demanded a speedy trial. On November 13, Reynolds appeared for a pretrial hearing, and expressed dissatisfaction with his public defender as follows:

REYNOLDS: Excuse me. I don't want to go to trial with this man. I don't think he is for me. He is not trying to help me. He just want to take a plea. He is telling me two different things. Back there he is saying—

DISTRICT COURT: Okay. So, I don't need to know about any conversations that you had with [your public defender]. What I understand just happened, Mr. Reynolds, is that [your public defender] just conveyed to me the fact that you rejected the offer that was made.

REYNOLDS: I reject everything; him, too. I want to go to trial, yes, but I don't—I don't want him as my lawyer. I don't think he is helping me. He ain't got my best interests at hand.

DISTRICT COURT: Well, if you wanted to fulfill that decision and discharge [your public defender], you effectively would be discharging the services of the public defender's office altogether. So you would be proceeding without a lawyer.

Reynolds expressed frustration with the district court's response and complained that his public defender wanted him to plead guilty. The district court continued the hearing and encouraged Reynolds to talk with his public defender.

At the continued pretrial hearing on December 4, the district court asked Reynolds if he wished "to have the public defender's office continue to represent [him]." Reynolds replied as follows:

Here is the thing, Judge. I could have—my understanding was the last time I was here, you said you would push [the hearing] back to today so me and my lawyer could have time to talk to get on the same page. Right? I can't do that when I only see him for two minutes right before I walk out here. So a whole, you mean from the 13th to now, he never came to see me. He never talked to me. He never did nothing. He come back there for two minutes, and that's it. You can't get no understanding on that. And if I fire him, you telling me I can't get another PD. . . . He's trying to send me to jail. . . . If I defend myself, I'm going to jail. So there is no other—the only thing for me is to go to jail. That's it.

. . . .

Because he don't have my best interests at hand. He's telling me—I said, well, where is the discovery at. He said, there ain't no such thing. I said, well, where [are] the investigators—he had to investigate something. Where is that at? He said there ain't no such thing.

The district court told Reynolds that it wanted to give him "time to speak with [his public defender] so that [they] could get on the same page" and that it wanted to provide Reynolds "with a meaningful opportunity for representation so that [he could] avoid going to prison if [he was] not guilty." The district court also stated that it did not want Reynolds "to fire the public defender's office and go at it alone." Reynolds responded that he did not "want to fire the office. Just [his public defender]." Reynolds again expressed

frustration that his public defender was not giving his case attention and alleged that he had told Reynolds that there was no discovery, which Reynolds doubted. Reynolds also mentioned that he “gave [his public defender] a plea [deal] to get to the prosecutor” at his omnibus hearing and that his public defender had not done so. The district court asked the public defender to comment, and he replied as follows:

Judge, first of all, I don’t know of any offer that Mr. Reynolds has conveyed to me to take to the state. Ethically, if he makes me an offer to take to the state, I will always do that. I’m not going to address his other statements about what I have or have not told him because of attorney-client privilege. I will just have to let his rant stand. But it is clear that he doesn’t want me representing him and I am not in a position to beg him. So if he doesn’t want me, if he thinks he is better off without me, that’s fine by me.

Reynolds reiterated that he did not believe that his public defender had his best interests in mind, but that he did not want to represent himself. The district court expressed its concern regarding self-representation and stated that the court could not “pick [Reynolds’] public defender.” The district court once again continued the pretrial to give Reynolds an additional opportunity to discuss his case with his public defender. In doing so, the district court encouraged the parties to discuss resolving the case and stated that “if there is an avenue here” for resolving the case “that Mr. Reynolds has an idea about, . . . that can be conveyed through [the public defender] to [the prosecutor].”

At the continued pretrial on December 11, the district court asked Reynolds how he wanted to proceed. Reynolds answered, “I guess I have to keep him if I can’t get no other lawyer.” The district court stated:

If you ask me to discharge [your public defender], you are discharging the public defender's office. And we talked about that. And I understand that relationships between lawyers and clients may not be perfect. Sometimes they may be rather strained, but I can tell you that representing yourself is a very risky, and I would argue, a poor idea.

I know that you feel frustrated that you don't have choices, but I can tell you that [your public defender] is a very effective advocate. He has tried many cases before me and gotten very good results for his clients.

With that, do you still wish to retain the services of the public defender's office, and specifically, [your current public defender]?

Reynolds responded that he did.

The case was tried to a jury over the course of four days. At trial, J.C. testified that he was robbed at gunpoint by two men in his vehicle during an attempted drug purchase and that after the robbery, the men fled in a white car driven by a third man. J.C. reported the robbery to the police and described the suspects. Officers testified that approximately two hours later, J.C. called 911 and reported that the men who had robbed him were at a store and that the white car was parked outside. Officers testified that when police arrived at the scene, J.C. ran up to them and exclaimed that Reynolds, who was standing outside of the store, was one of the men who robbed him. An officer testified that J.C. told the police that the other man was inside the store. Officers testified that the other man came out of the store, and J.C. identified him as the man who had held the gun to his head during the robbery. An officer found a gun hidden in the store from which the second suspect had emerged. Officers further testified that J.C. identified the gun as the one that was used during the robbery.

Although officers testified that J.C. identified Reynolds as one of the robbers hours after the robbery, J.C. did not identify Reynolds as one of the robbers at trial, as indicated in the following portion of his direct examination by the state.

Q: . . . Did you park your car and walk up to this white car?

A: Yes.

Q: Which of the three people did you speak to?

A: I speak to the guy who put the gun in my head and the guy who just grab my neck.

Q: Do you see either of those two men in the courtroom today?

A: No.

Q: Do you know whether you would recognize either of those two men if you were to see them again?

A: Yes.

Despite J.C.'s testimony indicating that Reynolds was not one of the men who robbed him, the jury found Reynolds guilty of first-degree aggravated robbery. The district court entered judgment of conviction and sentenced Reynolds to serve 75 months in prison. Reynolds appeals.

D E C I S I O N

I.

Reynolds contends that the district court committed reversible error by denying his request for substitute counsel because the request was timely and supported by exceptional circumstances.

The law governing requests for substitute court-appointed counsel is as follows:

The United States and Minnesota Constitutions guarantee a criminal defendant the right to the assistance of counsel for his defense. If the defendant cannot employ counsel, the defendant is entitled to appointed counsel. But the right of an indigent defendant to court-appointed defense

counsel is not an unbridled right to be represented by counsel of the defendant's choosing.

When a defendant raises complaints about the effectiveness of appointed counsel's representation and requests substitute counsel, the district court must grant such a request only if exceptional circumstances exist and the demand is timely and reasonably made. Exceptional circumstances are those that affect appointed counsel's ability or competence to represent the client. But a defendant's general dissatisfaction with appointed counsel does not amount to an exceptional circumstance. *When the defendant voices serious allegations of inadequate representation, the district court should conduct a searching inquiry before determining whether the defendant's complaints warrant the appointment of substitute counsel.*

State v. Munt, 831 N.W.2d 569, 586 (Minn. 2013) (emphasis added) (quotations and citations omitted). Appellate courts review the district court's decision whether to appoint substitute defense counsel for an abuse of discretion. *Id.*

Reynolds argues that the district court's "refusal to use its authority to appoint substitute counsel before conducting an inquiry into [his] claims about his legal representation was error."

As a threshold issue, it is "not an accurate statement of the law" to inform a criminal defendant that he "[cannot] have a different public defender under any circumstances." *State v. Lamar*, 474 N.W.2d 1, 3 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991); *see also State v. Vance*, 254 N.W.2d 353, 358-59 (Minn. 1977) (noting that an indigent defendant may request substitute counsel, but the "request will be granted only if exceptional circumstances exist and the demand is timely and reasonably made"). Thus,

the district court inaccurately suggested that it was not possible for Reynolds to obtain substitute counsel under any circumstances.¹

In district court, Reynolds alleged that his public defender (1) did not give his case adequate attention, (2) failed to communicate with him regarding his case and discovery, (3) did not properly investigate the case, (4) failed to communicate his plea-negotiation offer to the state, and (5) generally did not have his best interests in mind in making decisions about the case.

The district court's inquiry into those allegations was limited to the alleged failure to communicate a plea offer to the state. The district court asked the public defender about that allegation. The public defender responded that Reynolds had not conveyed any plea offer for him to communicate to the state, that if Reynolds were to make such an offer, he would communicate it to the state, and that he would not address Reynolds' other claims because of attorney-client privilege. The district court asked the parties "if there is an avenue here" for resolving the case that "Reynolds has an idea about," which could be conveyed through the public defender to the prosecutor. The district court did not further inquire regarding Reynolds' allegations, but Reynolds does not explain, nor do we discern, why additional inquiry was necessary.

Again, exceptional circumstances warranting appointment of substitute counsel are "those that affect appointed counsel's ability or competence to represent the client." *Munt*,

¹ The state seems to concede this point, stating, "By indicating to [Reynolds] that discharge of his appointed counsel effectively discharged the entire public defender's office, the [district] court perhaps prematurely eliminated the possibility, however remote, of a substitute appointment."

831 N.W.2d at 586. That is the type of serious allegation that requires a searching inquiry by the district court. Reynolds’ general allegations that his public defender did not give his case adequate attention, failed to communicate with him about his case and discovery, did not properly investigate his case, and did not have his best interests in mind do not suggest inability or incompetence. Additional inquiry into those complaints was therefore not required. *See id.* (requiring a district court to conduct a searching inquiry if the defendant voices serious allegations of inadequate representation).

In sum, the district court’s inquiry regarding Reynolds’ complaints about his public defender was adequate under the circumstances, and the district court did not abuse its discretion by denying Reynolds’ request for substitute counsel. However, for the reasons that follow, even if the district court had erred, Reynolds has not established a basis for relief.

“Any error that does not affect substantial rights must be disregarded.” Minn. R. Crim. P. 31.01. “Generally, most constitutional errors are reviewed for harmless error.” *State v. Kuhlmann*, 806 N.W.2d 844, 850 (Minn. 2011). Thus, to prevail on appeal, a party usually must show error and prejudice resulting from that error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981). But “[w]here the right to be assisted by counsel of one’s choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 126 S. Ct. 2557, 2563 (2006). However, “the right to counsel of choice does not extend to defendants who require counsel to be appointed for them.” *Id.* at 151, 126 S. Ct. at 2565. And, “[a] defendant is not entitled to a new trial if no harm results from

the [district] court’s failure to ascertain whether there is good cause for substitution of *appointed* counsel.” *Lamar*, 474 N.W.2d at 1 (emphasis added).

Thus, Reynolds must show prejudice to obtain relief. Yet Reynolds’ principal brief does not explain how he was prejudiced by his public defender’s representation.² And the record does not suggest prejudice. Reynolds’ public defender cross-examined the state’s witnesses and made numerous objections, some of which the district court sustained. Reynolds’ public defender objected to the admission of an officer’s testimony that J.C. identified Reynolds as one of the robbers. In closing argument, the public defender argued that J.C. was not credible. The public defender emphasized that although an officer testified that J.C. said he was “1000 percent sure” that the gun the police had recovered was the one used in the robbery, “when [J.C.] was asked, do you see the man in this courtroom who was in the back seat who participated in the robbery,” J.C. said, “No.” Reynolds’ public defender ended his closing argument by again emphasizing that J.C.’s testimony indicated that Reynolds was not one of the robbers. On this record, Reynolds has not established that the denial of his request for substitute counsel was prejudicial. It therefore does not provide a basis for relief. *See id.*

² Reynolds’ principal brief asserts that his conviction must be reversed if the district court erroneously denied his request for substitute counsel, without identifying any prejudice stemming from that denial. In the alternative, Reynolds’ principal brief asks this court to remand for a hearing to determine whether he was entitled to new counsel, “if this Court is not convinced that exceptional circumstances existed.” In his pro se brief, Reynolds argues that he was prejudiced by his attorney’s representation. Those arguments are addressed in section II of this opinion.

II.

In a pro se supplemental brief, Reynolds claims that his public defender's representation was inadequate. His arguments on that point seem to address whether the district court erred by refusing to appoint substitute counsel, which we have already addressed in section I of this opinion. But Reynolds also asserts, albeit generally, that he was denied his right to "effective assistance of counsel."

An ineffective-assistance-of-counsel claim involves a mixed question of law and fact that is reviewed de novo. *Dereje v. State*, 837 N.W.2d 714, 721 (Minn. 2013). Appellate courts generally analyze ineffective-assistance-of-counsel claims as trial errors under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Id.* To prevail under *Strickland*, a "defendant must show that counsel's representation fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 687-88, 694, 104 S. Ct. at 2064, 2068; *see also State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (applying *Strickland* to a claim of ineffective assistance of counsel). Appellate courts need not analyze both parts of the *Strickland* test if either one is determinative. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009).

Appellate courts apply "a strong presumption that [an attorney's] performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). A reviewing court "generally will not review attacks on counsel's trial strategy." *Opsahl v.*

State, 677 N.W.2d 414, 421 (Minn. 2004). “The extent of counsel’s investigation is considered a part of trial strategy.” *Id.*

Reynolds argues that “the record clearly shows that prior to trial no motions were filed to challenge the state’s case” and that the record indicates that his public defender did not “conduct[] an independent examination of the facts, circumstances, pleadings and laws involved and then offer his informed opinion as to what to plead.” Reynolds does not explain what motions should have been filed on his behalf or how those motions would have affected the verdict. Nor does he support his general assertion that his public defender was uninformed regarding his case. General assertions of error without evidentiary support are not adequate to establish ineffective assistance of counsel. *See, e.g., White v. State*, 711 N.W.2d 106, 112 (Minn. 2006) (rejecting claim that trial counsel was ineffective for failing to request a *Schwartz* hearing where defendant failed to provide evidence to support assertion that juror was unable to be impartial); *State v. Miller*, 666 N.W.2d 703, 718 (Minn. 2003) (rejecting claim that trial counsel was ineffective because of a conflict of interest where defendant provided no evidence to support assertion that conflict of interest existed). In sum, Reynolds does not provide a basis for this court to disregard the strong presumption that his public defender’s representation fell within the wide range of reasonable professional assistance.

Reynolds also argues that, if his public defender had investigated his case, he would have discovered that J.C. told the state before trial that he did not want to testify against Reynolds and that Reynolds was not one of the men who robbed him. Reynolds does not point to anything in the record supporting his assertion that J.C. made pretrial statements

exonerating Reynolds. Even if Reynolds is correct that his public defender would have discovered such evidence through an investigation, the extent of counsel's investigation was a part of trial strategy, which this court generally will not review. See *Opsahl*, 677 N.W.2d at 421. Moreover, Reynolds does not explain why the result of the trial would have been different but for counsel's failure to investigate. Again, J.C. testified that he would recognize the robbers if he saw them again and that neither of the robbers was in the courtroom. Thus, the exonerating impact of the proposed investigation was realized at trial.

Reynolds also claims that the district court abused its discretion by preventing him from cross-examining J.C. regarding his initial failure to appear for trial because that testimony "was pertinent [and] exculpatory" in that it "would [have] raise[d] a reasonable doubt by . . . suggesting another person committed the crime." Appellate courts review the district court's evidentiary rulings, including its exclusion of defense evidence, for an abuse of discretion. *State v. Anderson*, 789 N.W.2d 227, 234 (Minn. 2010). "Erroneous exclusion of defense evidence is subject to harmless error analysis." *State v. Greer*, 635 N.W.2d 82, 90 (Minn. 2001). Appellate courts will affirm if they are "satisfied beyond a reasonable doubt that an average jury (i.e., a reasonable jury) would have reached the same verdict if the [erroneously excluded] evidence had been admitted and the damaging potential of the evidence fully realized." *Id.* (quotation omitted).

J.C. failed to appear to testify on the second day of trial, and the district court issued a warrant for his arrest. J.C. was arrested and held in custody pending his appearance as a witness at trial. On the third day of trial, the prosecutor explained that J.C. had not appeared

the day before because he misunderstood what a victim-witness advocate had told him regarding when he was needed to testify. Reynolds' public defender told the district court that he may want to cross-examine J.C. regarding his failure to appear. The district court prohibited that cross-examination, reasoning that J.C.'s failure to appear was a result of confusion and that cross-examination regarding his failure to appear would be irrelevant and could confuse the jury. *See* Minn. R. Evid. 402 ("Evidence which is not relevant is not admissible."); Minn. R. Evid. 403 (stating that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues").

Assuming without deciding that Reynolds has established error, we are satisfied that such error was harmless because J.C. testified that he would be able to identify the robbers if he saw them again and that neither of the robbers was in the courtroom. That testimony was exculpatory in that it suggested that another person committed the crime. Although evidence regarding J.C.'s initial failure to appear as a witness might have enhanced his exoneration of Reynolds at trial, we are satisfied, beyond a reasonable doubt, that cross-examination on that point would not have changed the jury's verdict.

Lastly, Reynolds claims that the prosecutor withheld exculpatory evidence and that "the actions of [the prosecutor] transcend to the level of malicious prosecution." He argues that, on the first day of trial, the prosecutor misrepresented to the district court that she did not know whether J.C. was present. He asserts that a victim-witness advocate sent the prosecutor "a note prior to trial that stated that [he] was not one of the robbers and that the victim left the building because he did not want to testify."

“An assignment of error based on mere assertion and not supported by legal authority or argument is waived unless prejudicial error is obvious on mere inspection.” *Brooks v. State*, 897 N.W.2d 811, 818 (Minn. App. 2017), *review denied* (Minn. Aug. 8, 2017). In addition, issues not adequately briefed are waived. *Id.* at 819. Because Reynolds does not provide any legal argument in support of his claims that the prosecutor withheld exculpatory evidence and engaged in malicious prosecution, and because prejudicial error is not obvious, these assignments of error are waived.

Affirmed.