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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1067**

State of Minnesota,
Respondent,

vs.

Aaron Lavell Ross,
Appellant.

**Filed May 28, 2019
Affirmed
Cleary, Chief Judge**

Clay County District Court
File No. 14-CR-17-4449

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

Pamela L. Foss, Acting Clay County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Florey, Judge; and Cochran, Judge.

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

CLEARY, Chief Judge

In this direct appeal from a final judgment of conviction, appellant Aaron Lavell Ross argues that the district court erred by failing to appoint substitute counsel and by instructing the jury that he had a duty to retreat before acting in self-defense. Ross also raises several issues in his pro se supplemental brief. We affirm.

FACTS

Following a domestic incident involving T.R., the state charged Ross with felony domestic assault under Minn. Stat. § 609.2242, subd. 4 (2016) and third-degree assault under Minn. Stat. § 609.223, subd. 1 (2016). Ross demanded a speedy trial. Before trial, the state notified Ross that it intended to introduce testimony from L.C.—an alleged victim in a different domestic assault case pending against Ross—as relationship evidence. The day before trial, Ross voiced complaints about his public defender, stating that counsel refused to introduce certain text messages from L.C. Ross argued that these messages proved L.C. had lied to the police about a sexual encounter she had with Ross and she had a motive to lie in this case. Ross also complained that his public defender lied to the chief public defender and refused to introduce letters into evidence that Ross had written to the state.

Ross then requested a different attorney, stating that his current public defender was not adequately representing him and had told him to “piss off.” Ross continued that because the public defender would not introduce the text messages, Ross was not comfortable with him as counsel: “He ain’t willing to do it, and I just want somebody who [is] willing to do it.” Counsel responded that his “office makes a decision on what is and is not admissible into evidence and what [the office] will bring forward.” The district court determined that this was a disagreement over trial strategy. The district court informed Ross that he could hire a private attorney if he wanted, but the court declined to appoint substitute counsel.

Ross continued to complain about his public defender and insisted that the text messages and letters be introduced into evidence. The district court told Ross that these were trial strategy issues and it was not going to appoint a new public defender. Counsel stated that he thought, “because of the . . . attitude of Mr. Ross, if he wants to represent himself, he should be given that opportunity.” The district court then offered Ross the option of proceeding with the public defender or pro se. Ross stated that he felt like he had no choice but to allow the public defender to continue to represent him.

At trial, T.R. testified to the following. In early December, T.R. and her two children moved into Ross’s house. According to T.R., at first she intended to rent a room from Ross, but shortly after moving in, the two began dating and T.R. moved her things into Ross’s bedroom. A few days later, T.R. left the house to bring her older daughter and Ross’s two children to school. She then ran some errands, picked up her brother, and returned to the house around noon. T.R. had intended to drop off a bike at the house and then give her brother a ride, but when she entered the house, Ross became agitated because he had told her not to bring any men over. T.R. left with her brother and began to argue with Ross through text messages.

When T.R. returned to the house, the two continued to argue in person, and eventually, Ross demanded that T.R. move out. Ross then went downstairs to his bedroom and began to take T.R.’s things out of the closet. T.R. followed and tried to grab the clothes out of Ross’s hands. T.R. testified that as they struggled over the clothing, Ross punched her three times and one of the blows split her lip open. T.R. also claimed that while

struggling with Ross, she never hit or scratched him, but on cross examination, she admitted that she hit Ross with her phone.

According to Ross's testimony, as he began to remove T.R.'s clothes from the closet, T.R. grabbed him from behind and began "bludgeoning" him on the head with her phone. Ross claimed that to get T.R. to stop hitting him, he punched her once. He also testified that he was in the closet and could not retreat. Ross continued to move T.R.'s things upstairs while T.R. called 911 to report that Ross had hit her. After T.R. called the police, Ross went outside to wait for their arrival. When officers responded to the scene, Ross told them that T.R. had started hitting him in the head and he hit her in self-defense. Ross also claimed that he felt sick and dizzy due to the blows to his head. He requested medical attention, and the officers brought him to a hospital. An officer took several photos of Ross's head, which showed a long cut or scratch on the top of his head and what Ross claimed were bruises inflicted by T.R.

L.C., T.R.'s medical provider, and two police officers also testified at trial. Ross argued that he acted in self-defense. After the state and Ross rested, the district court gave the jury instructions, including a self-defense instruction. The district court told the jury that "[t]he legal excuse of self-defense is available only to those who act honestly and in good faith. This includes the duty to retreat or avoid danger if reasonably possible." Although the parties suggested changes to the self-defense instruction, neither objected to including the "duty to retreat" language. The jury returned guilty verdicts on both counts.

DECISION

Ross first argues that the district court erred by failing to appoint substitute counsel. Criminal defendants have a constitutional right to counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. This includes the right to counsel of choice. *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998). But when an indigent defendant is given court-appointed counsel, he must accept the attorney appointed. *Id.* A district court may grant a defendant's request for substitute counsel only if exceptional circumstances exist and the request is timely and reasonably made. *Id.* We review a district court's decision not to appoint substitute counsel for an abuse of discretion. *State v. Munt*, 831 N.W.2d 569, 586 (Minn. 2013).

The district court did not abuse its discretion when it refused to appoint substitute counsel because Ross's complaints did not establish exceptional circumstances. Exceptional circumstances affect counsel's ability or competence to represent the defendant. *Id.* Ross's main complaint was that counsel would not introduce certain text messages into evidence. The decision on what evidence to present is part of an attorney's trial strategy and lies within counsel's discretion. *Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015). The supreme court has stated that, in certain circumstances, disagreements over trial strategy could affect the appointed attorney's ability or competence to represent the defendant. *State v. Gillam*, 629 N.W.2d 440, 450 (Minn. 2001). But here, Ross does not explain why counsel's decision was unreasonable or negatively affected counsel's ability or competence to represent him.

It also was not an abuse of discretion to find that Ross's claim that counsel had told him to "piss off" did not establish exceptional circumstances. Although this may show

personal tensions between Ross and counsel, it does not establish an effect on counsel's ability or competence. *Cf. State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (agreeing with the district court's conclusion that the defendant's proffered reason for requesting substitute counsel, that he had "been belittled, yelled at, in my trauma through this," was merely "personal tension" between counsel and the defendant and did not establish exceptional circumstances). Ross also made his request for substitute counsel the day before trial and after he had made a speedy-trial demand, rendering the request untimely. *Cf. State v. Clark*, 722 N.W.2d 460, 465 (Minn. 2006) (concluding the defendant's request for substitute counsel was untimely when the defendant made the request after jury selection and a speedy trial demand); *State v. Reed*, 398 N.W.2d 614, 616 (Minn. App. 1986) (concluding that the defendant's request for substitute counsel a week before trial was not timely), *review denied* (Minn. Feb. 13, 1987).

Ross argues that he raised serious allegations that required the district court to conduct a searching inquiry. "When a 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." *Munt*, 831 N.W.2d at 586 (quotation omitted). The district court allowed Ross to voice his concerns about counsel and allowed counsel to respond. But Ross's complaints were mere general dissatisfaction with appointed counsel and did not require further inquiry. *Id.* ("But a defendant's general 'dissatisfaction' with appointed counsel does not amount to an exceptional circumstance."). The district court did not abuse its discretion by failing to appoint substitute counsel.

Next, we consider whether the district court committed plain error by instructing the jury that Ross had a duty to retreat. Generally, an appellate court will not consider an alleged error in jury instructions unless an objection was made at trial. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Even so, this court may consider the issue if there is plain error affecting the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under plain-error review, Ross must show that there was (1) an error; (2) that is plain; and (3) that affects his substantial rights. *Id.* If Ross satisfies all prongs, this court "may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted).

Instructing the jury that Ross had a duty to retreat in his own home was error that is plain. "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). Generally, a defendant has the duty to retreat, if reasonably possible, before acting in self-defense. *State v. Glowacki*, 630 N.W.2d 392, 399 (Minn. 2001). It is well established, however, that when a defendant is in his home, he need not retreat before acting in self-defense. *Id.* at 402. It is uncontested that Ross was acting in his own home. As a result, it was a material misstatement of the law to instruct the jury that Ross had the duty to retreat. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). That misstatement was error, and that error is plain. *Id.*

Yet this error did not affect Ross's substantial rights. Plain error affects substantial rights when it was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d

at 741. Prejudice is shown if there is a “reasonable likelihood” that the error “had a significant effect” on the jury’s verdict. *Id.* Ross bears the heavy burden of establishing an effect on substantial rights. *Id.* When deciding whether an error had a significant effect on the jury’s verdict, we consider the pervasiveness of the error and the strength of the state’s case. *State v. Sontoya*, 788 N.W.2d 868, 873 (Minn. 2010).

Here the error was not pervasive. The state did not argue or emphasize that Ross had a duty to retreat. The state did not cross-examine Ross on his claim that he could not retreat, nor question any of the witnesses on whether Ross could retreat, or otherwise present any evidence that Ross could have retreated. Additionally, Ross’s injuries were minimal, belying his claim that he had been hit ten times. After reviewing the record, we conclude that Ross has not shown that there is a reasonable likelihood that the duty-to-retreat instruction influenced the jury’s verdict.

In a *pro se* supplemental brief, Ross argues that his counsel was ineffective in declining to introduce L.C.’s text messages into evidence. To show ineffective assistance of counsel, Ross must show “that counsel’s representation fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel’s errors.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Counsel’s decision on what information to present to the jury is part of trial strategy. *Id.* at 789-90. We therefore decline to address Ross’s claim. See *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008) (“Generally, we will not review ineffective assistance of counsel claims based on trial strategy.”).

Ross also argues in his pro se supplemental brief that the state committed prosecutorial misconduct by suppressing a supplemental report of a pretrial interview with L.C. and a police interview of Ross about the incident involving L.C. Under *Brady*,¹ if the state suppresses material evidence favorable to the defendant, there is a due process violation. *Campbell v. State*, 916 N.W.2d 502, 510 (Minn. 2018). “Evidence is material under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 511 (quotation omitted). Ross argues that the supplemental report and police interview prove that L.C. did not tell the police about a sexual encounter with Ross that occurred just before the alleged domestic assault involving L.C. This evidence is not material because L.C. admitted during her testimony that she did not initially tell the police about this encounter.

Affirmed.

¹ *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).