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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0061**

State of Minnesota,
Respondent,

vs.

TreJuan Dominic Miller,
Appellant.

**Filed November 18, 2019
Affirmed in part, reversed in part, and remanded
Slieter, Judge**

Hennepin County District Court
File No. 27-CR-18-10225

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

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Senior Assistant
County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

SLIETER, Judge

Appellant TreJuan Dominic Miller challenges his judgment of conviction because he was denied his constitutional right to call witnesses at his jury trial, and he contests the restitution order that included economic losses that exceeded the amount caused by his

theft offense. Because the district court did not abuse its discretion by applying Minn. R. Evid. 613(b) at Miller's trial, the district court did not deprive Miller of his constitutional right to present witnesses and his conviction is accordingly affirmed. However, because the district court improperly construed Miller's absence from his restitution hearing as a waiver of his restitution challenge, we reverse and remand on that issue only. Miller also raises two issues in his *pro se* supplemental brief, which we conclude lack merit.

FACTS

The state tried Miller in a jury trial on three criminal charges: (1) simple robbery, in violation of Minn. Stat. § 609.24 (2016); (2) theft, in violation of Minn. Stat. § 609.52, subd. 2(a)(1) (2016); and (3) financial transaction card fraud, in violation of Minn. Stat. § 609.821, subd. 2(1) (2016). The state presented all three charges to the jury on the theory that Miller aided and abetted his accomplice A.F.

During the trial, E.S. testified that shortly after midnight on April 20, 2018, she was in downtown Minneapolis with friends. E.S. and her friends separated and she started walking alone back to her hotel at approximately 12:45 a.m. During her walk, two men approached her and asked for money. After E.S. denied having money, the two men began walking with her and said that they would find an ATM for E.S. to withdraw money. E.S. explained to the jury that she complied with the men because she was worried about potentially being hurt. The two men found an ATM and directed E.S. to withdraw money. As E.S. gave the money to A.F., E.S. felt her wallet being removed from her purse, and the two men ran in separate directions. E.S. estimated that \$80 to \$100 was taken from her purse. E.S. called law enforcement who subsequently arrested A.F. and Miller. Law

enforcement found debit cards bearing E.S.'s name in an alleyway near where they found Miller and A.F. Approximately 15 minutes after she called 911 to report the theft, E.S. discovered that one of her debit cards was again used at an ATM. Law enforcement reviewed the bank records showing \$103 withdrawn on that occasion.

At the end of the first day of trial, Miller's counsel wished to recall Officer Brazeau—a state's witness who already testified—or, alternatively, to recall E.S. who also had testified for the state. Miller's counsel, as explanation to recall these witnesses, noted that Officer Brazeau's report indicated that E.S. offered the two men \$20. The state objected based upon Minn. R. Evid. 613 because Miller's counsel had completed cross-examination of E.S. and failed to ask her questions related to this statement. The district court sustained the objection.

The jury returned a partial verdict¹ finding Miller not guilty of simple robbery, finding him guilty of theft of property not more than \$1,000, and returning no verdict on financial transaction card fraud. The district court sentenced Miller to 21 months' imprisonment but stayed execution of the sentence for three years. Miller's sentence included an order to pay restitution to E.S. in the amount of \$200.

Miller timely filed a written objection to the district court's restitution order asserting a factual challenge to E.S.'s claimed amount of loss sustained. The district court scheduled a restitution hearing, but Miller failed to appear. Because Miller failed to appear,

¹ The parties agreed to receive a partial verdict after the jury indicated it could not reach a decision on one of the charged offenses. "[T]he court may accept a partial verdict if the jury has reached a verdict on fewer than all of the charges and it is unable to reach a verdict on the rest." Minn. R. Crim. P. 26.03, subd. 20(7).

the district court cancelled the hearing and summarily affirmed the restitution order without addressing Miller's legal challenges identified in his affidavit.

This appeal follows.

DECISION

I. The district court did not abuse its discretion by its application of Minn. R. Evid. 613(b).

“Evidentiary rulings rest within the sound discretion of the district court, and [appellate courts] will not reverse an evidentiary ruling absent a clear abuse of discretion.” *See State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). The abuse-of-discretion standard applies even when a defendant claims the district court's evidentiary ruling excluded evidence and thereby deprived the defendant of his or her constitutional right to a complete defense. *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017).

A witness's prior inconsistent statement is not admissible through extrinsic evidence “unless the witness is afforded a prior opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.” Minn. R. Evid. 613(b). The witness “must also be given the opportunity to ‘admit, deny, or explain the inconsistency in order for the statement to be admissible to impeach the witness.’” *State v. Graham*, 764 N.W.2d 340, 354 (Minn. 2009) (quoting *State v. Martin*, 614 N.W.2d 214, 224 (Minn. 2000)); *see also Carroll v. Pratt*,

76 N.W.2d 693, 697 (Minn. 1956) (holding that “it is usually necessary to lay a proper foundation first on the cross-examination of the witness to be impeached by asking him [or her] whether he [or she] made the alleged inconsistent statement, giving its substance and the time, place, and person to whom made”) (footnote omitted).

Miller asserts that the district court abused its discretion in its application of Minn. R. Evid. 613(b) because the district court prevented him from recalling Officer Brazeau to provide testimony related to E.S.’s alleged contradictory statement. Miller also contends that the district court should have waived strict compliance with rule 613(b) in deference to the “interests of justice” exception described in the same rule.

Miller’s counsel did not ask E.S. about statements she made to law enforcement regarding her offer of \$20 to A.F. and Miller. Only at the end of the first day of trial—after E.S. and Officer Brazeau were excused—did Miller’s counsel indicate a desire to recall Officer Brazeau. The district court ruling that Miller’s counsel could not recall Officer Brazeau to elicit the alleged prior inconsistent statement from E.S. complies with rule 613(b) because Miller failed to provide an opportunity for E.S. to admit, deny, or explain the prior statement.

Miller also argues that the district court erred by refusing to allow the testimony in “the interests of justice.” See Minn. R. Evid. 613(b). The district court’s ruling, which disallowed Miller calling Officer Brazeau, did not misapply the law. Miller failed to comply with the requirement to provide E.S. an opportunity to affirm, deny, or explain the alleged inconsistent statement. Minn. R. Evid. 613(b); *Graham*, 764 N.W.2d at 354. Although a district court may allow testimony despite rule 613(b) in the interests of justice,

we do not conclude that the district court acted improperly in applying the rule here. Because Miller fails to establish that the district court incorrectly applied rule 613(b), his constitutional right to present a complete defense was not violated. We accordingly affirm Miller's theft conviction.

II. The district court abused its discretion by construing Miller's absence at the restitution hearing as a waiver of his restitution challenge.

"A district court has broad discretion to award restitution, and the district court's order will not be reversed absent an abuse of that discretion." *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015). "But questions concerning the authority of the district court to order restitution are questions of law subject to de novo review." *Id.*

Miller raises two challenges to the district court's restitution order. First, Miller asserts that the district court abused its discretion by ordering him to pay restitution not supported by the trial record. Second, Miller contends that the district court abused its discretion by not requiring the state to meet its burden to prove the restitution amount. The state asserts that we need not reach Miller's challenges to the restitution order because he failed to preserve the challenge. We conclude that it was an error for the district court to construe Miller's absence from the hearing as a waiver of his restitution challenge and that this error resulted in a failure to hold the state to its burden of proof.

We determine that Miller sufficiently preserved his restitution challenge. Miller filed a timely challenge to restitution as required by the statute. *See* Minn. Stat. § 611A.045, subd. 3(b) (2016) (requiring a defendant challenging restitution to file a request for "a hearing within 30 days of receiving written notification of the amount of

restitution requested, or within 30 days of sentencing, whichever is later”). Accordingly, Miller implicated his statutory right to have a restitution hearing. *See State v. Willis*, 898 N.W.2d 642, 648 n.8 (Minn. 2017) (recognizing that “if the defendant challenges the restitution amount sought, the statute requires the court to conduct a restitution hearing, and the Rules of Evidence apply to that hearing even if it is held during the same court appearance in which the imposition of a sentence length and other sanctions are announced”) (citation omitted); *see also Howard v. State*, 909 N.W.2d 595, 598 (Minn. App. 2018) (holding a district court abused its discretion by not scheduling a restitution hearing on a defendant’s timely challenge to restitution). The state bears the burden of proof at the restitution hearing to demonstrate that the amount of economic loss that the victim suffered resulted from the offense and to establish the appropriateness of the type of restitution. Minn. Stat. § 611A.045, subd. 3(a).

Based on Miller’s failure to appear,² the district court cancelled the hearing and relied on *State v. Rodriguez*, 889 N.W.2d 332 (Minn. App. 2017), by finding that Miller waived his right to be present and also waived his restitution challenge. In *Rodriguez*, we explained that “a criminal defendant has the right to be present at all critical stages of a criminal proceeding and . . . a restitution hearing [is] a critical stage of a criminal proceeding.” *Id.* at 336; *see also State v. Maddox*, 825 N.W.2d 140, 146 (Minn.

² The record on appeal is unclear as to the facts relied upon by the district court to cancel the restitution hearing. The record consists of a district court order identifying that Miller failed to appear and he was represented by an attorney through the public defender’s office. In its findings, the district court noted that Miller failed to “inform the Court through his counsel or any other means that he had a justifiable reason to be absent.”

App. 2013). And yet, “[a] defendant may expressly waive the right to be present or the district court may imply waiver from the defendant’s conduct, such as his absence from a hearing without explanation.” *Rodriguez*, 889 N.W.2d at 336. Neither party challenges the district court’s findings that Miller voluntarily waived his appearance, so we do not address that finding. However, in *Rodriguez*, we did not hold that the absence from a restitution hearing relieves the state of its burden of proof. See Minn. Stat. § 611A.045, subd. 3(a). Because the restitution statute requires the state to provide sufficient evidence to support a restitution order, the district court erred by cancelling the hearing and ordering restitution without evidence. We accordingly reverse and remand for further proceedings on the issue of restitution.

III. Miller’s *pro se* supplemental claims lack merit.

Miller raises two *pro se* supplemental claims: (1) ineffective assistance of counsel, and (2) denial of his right to testify. We address each argument.

First, when a defendant raises an ineffective-assistance-of-counsel claim in a direct appeal, we examine the claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 678 (1984). See *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). “Under the *Strickland* test, [a criminal defendant] must demonstrate that (1) his [or her] counsel’s performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel’s errors.” *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Appellate courts “need not address both the performance and prejudice prongs if one is dispositive.” See *id.* Miller’s argument focuses solely on his attorney’s decision not to call

certain witnesses, namely his accomplice, which is squarely within the discretion of trial counsel. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). These decisions “should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight. Counsel must, after all, have the flexibility to represent a client to the fullest extent possible.” *Id.* Miller’s counsel explained at the time of trial why he did not call the accomplice—he understood the testimony would not be helpful to Miller. Miller therefore fails to present a claim for relief based on ineffective assistance of counsel.

Second, “the right to testify in one’s own defense is a personal right which counsel does not have the ultimate authority to waive.” *State v. Rosillo*, 281 N.W.2d 877, 878 (Minn. 1979); *see also Rock v. Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704, 2709 (1987) (“Logically included in the accused’s right to call witnesses whose testimony is material and favorable to his defense, is a right to testify himself, should he decide it is in his favor to do so.”) (quotation and citation omitted). If a defendant was denied the right to testify at trial that constitutes a structural error that requires an automatic reversal for a new trial. *See Rosillo*, 281 N.W.2d at 879 (“Our opinion is that the right to testify is such a basic and personal right that its infraction should not be treated as harmless error.”) (footnote omitted). But defendants may waive their constitutional right to testify like other constitutional rights—so long as that waiver is “voluntary and knowing.” *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997). Miller, on the record, expressly waived his right to testify at the time of trial. Contrary to Miller’s claim in his *pro se* supplemental briefing and without any citation to the record, Miller did not attempt to exercise his right to testify

after his explicit waiver. Accordingly, Miller fails to present a claim for relief based on his allegation that the district court deprived him of the right to testify.

Affirmed in part, reversed in part, and remanded.