STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0242

State of Minnesota,
Respondent,

vs.

Bryant Jerome Stephenson,
Appellant.

Filed February 6, 2023
Affirmed in part, reversed in part, and remanded
Reilly, Judge

Stearns County District Court
File No. 73-CR-19-11005

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

Janelle Kendall, Stearns County Attorney, Lisa Lodin Peralta, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Melissa Sheridan, Eagan, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

In this direct appeal from the judgment of conviction for second-degree murder, appellant argues that: (1) the district court erred by declining to appoint substitute counsel, (2) the district court erred in imposing an upward durational departure without articulating

the justification for departure, (3) his conviction for second-degree unintentional murder must be vacated because it is an included offense of his conviction for second-degree intentional murder, (4) he received ineffective assistance of counsel, and (5) the prosecutor committed misconduct by failing to disclose discovery materials. We conclude that the district court erred in imposing an aggravated sentence, and we reverse and remand for resentencing within the presumptive range. We also conclude that the district court erred by entering judgment on both murder charges, and we remand with instructions to vacate the conviction for second-degree unintentional murder. We affirm in all other respects.

FACTS

In the early morning hours of December 29, 2019, appellant Bryant Jerome Stephenson was at a club in St. Cloud with two other men. The three men got into a fight with a fourth man, the victim. The club's bouncers broke up the fight and told the victim to leave the club. The victim fell down in front of the club, leaving a trail of blood behind him. A witness saw the victim bleeding and called the police. The responding police officer saw the victim lying face up on the sidewalk in front of the club. The officer saw a great deal of blood on the victim and "a significant laceration" on the right side of the victim's chest. The victim had either "a very weak" pulse, or "nothing at all." The officer tried to resuscitate the victim. At about the same time, paramedics arrived and transported the victim to the hospital.

The victim did not have a pulse and was not breathing when he arrived at the hospital. Doctors saw a stab wound in the victim's lower right chest, bleeding from the lung, and bleeding across the diaphragm. The victim lost all cardiac activity and was

pronounced dead. A forensic pathologist performed an autopsy on the victim. The pathologist noted that the victim had a black eye, a stab wound on the lower right chest, and three stab wounds in the back. The cause of death was multiple stab wounds and the manner of death was homicide.

Respondent State of Minnesota charged appellant by amended complaint with aiding and abetting second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2018); and aiding and abetting second-degree murder, without intent while committing a felony, in violation of Minn. Stat. § 609.19, subd. 2(1) (2018). The district court held a five-day jury trial in April 2021. The jury found appellant guilty of both crimes. The district court adjudicated appellant guilty of second-degree intentional murder and sentenced him to 480 months in prison, which represented an upward departure from the presumptive prison term.

This appeal follows.

DECISION

I. The district court did not abuse its discretion by declining to ask whether appellant wanted substitute counsel.

The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *see also* U.S. Const. amend. VI; Minn. Const. art. I, § 6. If a criminal defendant complains about their appointed counsel's ineffective representation and requests substitute counsel, the district court must grant the request "only if exceptional circumstances exist and the demand is timely and reasonably made." *State v. Munt*, 831

N.W.2d 569, 586 (Minn. 2013). Exceptional circumstances are those that affect counsel's "ability or competence to represent the client," not the defendant's mere "general dissatisfaction" with counsel. *Id.* (quotation omitted). We review "the district court's decision to appoint substitute defense counsel for an abuse of discretion." *Id.*

Appellant was represented by a public defender at trial. At the beginning of the fourth day of trial, appellant sought to discharge the public defender's office because they "misrepresented" him. Appellant did not specifically request substitute counsel. After further questioning, appellant withdrew his request to discharge his attorney and agreed to go forward with trial with his appointed counsel. Appellant now claims that there were grounds to appoint substitute counsel. We disagree.

A defendant's request for substitute counsel must be "timely and reasonably made." *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998). Here, appellant did not communicate to the district court that he wanted substitute counsel. While appellant suggested that he wanted to "discharge the public defender's office," he did not ask the district court to replace his defense counsel with alternate counsel. Moreover, appellant's request was not timely. In *Worthy*, the supreme court determined that a substitution request was untimely when the defendant requested substitution for his court-appointed attorneys on the morning of trial. *Id.* at 278-79. Similarly, in *State v. Clark*, the supreme court determined that the defendant's request for substitute counsel was untimely when the request was made the morning of the first day of trial, after jury selection had begun, and when the defendant had made a speedy-trial demand. 722 N.W.2d 460, 465 (Minn. 2006). Here, appellant did not

seek to discharge the public defender's office until the fourth day of trial. Appellant's request was not timely, nor was it reasonably made.

Appellant also argues that the district court failed to conduct an inquiry into whether substitute counsel should be appointed. If 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. *Id.* at 464. As stated, appellant did not request substitute counsel, nor did he voice "serious allegations" that his representation was inadequate. When a defendant fails to make "serious allegations of inadequate representation," a district court is "not required to engage in a 'searching inquiry' before refusing to appoint new [substitute counsel]." *State v. Woods*, 961 N.W.2d 238, 247 n.7 (Minn. 2021). Given appellant's failure to timely request substitute counsel, we determine that the district court did not abuse its discretion by declining to appoint a new attorney.[1]

II. The district court erred by imposing an aggravated sentence.

Appellant argues that the district court erred in sentencing because it imposed an upward durational departure without explaining why an aggravated sentence was justified. The sentencing guidelines provide for presumptive sentences for felony offenses. Minn. Sent'g Guidelines 2.C (2020). The presumptive sentence is "presumed to be appropriate for the crimes to which they apply." Minn. Sent'g Guidelines 2.D (2020). A district court

[1] The state urges us to apply the plain-error standard of review, rather than the abuse-of-discretion standard of review. Because we conclude that appellant is not entitled to relief under the abuse-of-discretion standard, we do not address the state's plain-error argument.

must impose a sentence within the presumptive sentencing range "unless there exist identifiable, substantial, and compelling circumstances to support a departure." *Id.* One aggravating factor identified in the sentencing guidelines is when "[t]he offender committed the crime as part of a group of three or more offenders who all actively participated in the crime." Minn. Sent'g Guidelines 2.D.3.b.10 (2020). We will affirm a district court's departure so long as it is factually supported and the reasons given are legally permissible. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009).

Under the Minnesota Sentencing Guidelines, "[a] pronounced sentence for a felony conviction that is outside the appropriate prison range on the applicable [g]rid . . . is a departure from the Guidelines." Minn. Sent'g Guidelines 2.D.1. The facts underlying the departure must be found by a jury unless waived by the defendant. *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009). The district court must then "explain why the circumstances or additional facts found by the jurors . . . provide the district court a substantial and compelling reason to impose a sentence outside the range on the grid." *State v. Rourke*, 773 N.W.2d 913, 920 (Minn. 2009). A district court "has broad discretion to depart *only if* aggravating . . . circumstances are present." *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989). If a district court does not provide reasons for the departure, the departure will not be allowed. *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003); *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985).

Before trial, the state sought an aggravated durational departure from the sentencing guidelines, asserting that appellant committed each crime as part of a group of three or more offenders who all actively participated in the crime. After the jury found appellant

guilty, the district court charged the jury with determining whether an aggravating factor existed. The special verdict form asked for each charge, "Did the defendant commit the crime as part of a group of three or more persons who all actively participated in the crime?" The jury answered "yes" to each question.

Under the guidelines, the presumptive sentence for a defendant with appellant's criminal history score of zero is 306 months, with a lower range of 261 months and an upper range of 367 months. The district court sentenced appellant to 480 months in prison for intentional murder, which represented an upward departure from the maximum presumptive term. But the district court did not identify that the sentence it was imposing was an upward departure based on the jury finding of an aggravating factor. Instead, the district court stated it believed that a 480-month sentence was "within the sentencing guidelines." The district court did not articulate the basis for its departure on the record. And the district court failed to explain why the circumstances found by the jury provided the district court with "a substantial and compelling reason" to depart from the guidelines. *Rourke*, 773 N.W.2d at 920. Thus, the district court imposed an unsupported durational departure, which constitutes an impermissible aggravated sentence.

The state argues that we should review the district court's sentencing decision for invited error. Under this doctrine, "a party cannot assert on appeal an error that he invited or that could have been prevented at the district court." *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). This rule "discourage[s] litigants from intentionally creating appealable issues." *State v. Gisege*, 561 N.W.2d 152, 159 (Minn. 1997). But "[t]he invited-error doctrine . . . does not require us to turn a blind eye to errors that seriously

affect the fairness, integrity or public reputation of judicial proceedings." *State v. Benton*, 858 N.W.2d 535, 540 (Minn. 2015).

The state concedes that the district court erred by imposing an upward departure without stating its reasons for departure on the record. But the state argues that the presentencing investigation report (the PSI) and defense counsel's statements at sentencing were misleading and caused the district court to incorrectly accept that the 480-month sentence did not constitute an upward departure. The PSI revealed that the state sought an upward departure "due to the aggravating factor of committing the crime as part of a group of three or more persons who all actively participated in the crime." The PSI stated twice that the probation officer did "not support a dispositional or durational departure" for appellant. Despite these statements, the officer concluded, "In accordance with Minnesota Sentencing Guidelines, it is recommended that the defendant be committed to the custody of the Commissioner of Corrections for a period of 480 months." At sentencing, the state noted that the jury found the presence of an aggravating factor. The state argued that this finding "allows the Court to go above the sentencing guideline range and sentence to the top of the box or the top of the statute, which is 480 months." The district court asked defense counsel whether she agreed "that with the determination by the jury of these aggravating factors that the 480 months is within the sentencing guidelines?" Defense counsel responded, "we would agree that it's within the guidelines that the Court can sentence [appellant] to." The state argues that defense counsel's statement was inaccurate and invited the district court to err. Given the confusion in the record, the state contends

that the appropriate remedy is to remand to the district court so it may determine whether a guidelines sentence or an aggravated departure is appropriate.

We do not agree that the invited-error doctrine applies here. Instead, caselaw compels us to reverse the district court's sentencing decision and remand for imposition of a sentence within the presumptive range. The supreme court adopted a clear rule stating that "[i]f no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed." *Williams*, 361 N.W.2d at 844. The supreme court expressly reaffirmed this rule in *Geller*, where it again stated that "absent a statement of the reasons for the sentencing departure placed on the record at the time of sentencing, no departure will be allowed."[2] 665 N.W.2d at 517. The remedy for an unsupported durational departure is to remand for resentencing within the presumptive range. *Id.* When the district court does not state its reasons for departure on the record at the time of sentencing, it is error for a reviewing court to remand to the district court to allow it to provide reasons for the departure after sentencing has occurred. *Id.* Based on this binding caselaw, we remand for the district court to modify appellant's sentence to within the applicable presumptive guidelines range.

III. The district court erred by entering judgment on both murder charges.

Appellant argues that the district court erred by entering judgments of conviction on both murder charges. We agree. A criminal defendant "may be convicted of either the

[2] The holdings of *Williams* and *Geller* were modified by the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004), requiring that the existence of aggravating factors be found by a trier of fact. No precedential caselaw has directly addressed the issue presented here since *Blakely* was issued.

crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2018). Section 609.04 also "bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). The application of section 609.04 is a question of law reviewed de novo. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

The jury found appellant guilty of second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1); and second-degree murder, without intent while committing a felony, in violation of Minn. Stat. § 609.19, subd. 2(1). At the sentencing hearing, the district court adjudicated appellant guilty of intentional murder. The district court imposed a 480-month prison sentence for this crime. As for the second count, the district court entered a judgment of conviction for felony murder but did not impose a sentence. The warrant of commitment reflects that appellant was convicted of both crimes.

Felony murder is a lesser-included offense of intentional murder. *See State v. Lory*, 559 N.W.2d 425, 426 (Minn. App. 1997) ("Second-degree felony murder is a lesser-included offense of second-degree intentional murder."), *rev. denied* (Minn. Apr. 15, 1997). Because intentional murder and felony murder are different sections of the same criminal statute, and because *Lory* instructs us that felony murder is a lesser-included offense of intentional murder, we conclude that the district court erred by issuing a warrant of commitment convicting appellant of both crimes. *See State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (holding that "section 609.04 forbids multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident" (quotation omitted)). We therefore remand to the district court with instructions

to vacate the felony murder conviction and correct the warrant of commitment, leaving the jury's finding of guilt on the vacated count in place.

IV. Appellant is not entitled to a new trial on his ineffective-assistance-of-counsel claims.

Appellant claims he received ineffective assistance of counsel. We examine ineffective-assistance-of-counsel claims under the two-prong test set forth in *Strickland*. 466 U.S. at 687; *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). Under the *Strickland* test, a defendant "must demonstrate that (1) his 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). The objective standard of reasonableness is defined as "representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *State v. Miller*, 754 N.W.2d 686, 709 (Minn. 2008) (quotation omitted). "If a claim fails to satisfy one of the *Strickland* requirements, [an appellate court] need not consider the other requirement." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). "Application of the *Strickland* test involves a mixed question of law and fact, which we review de novo." *State v. Mouelle*, 922 N.W.2d 706, 715 (Minn. 2019).

Appellant claims he received ineffective assistance of counsel because counsel did not properly impeach a key witness. Appellant also claims counsel failed to call two

witnesses who were allegedly at the club and could have provided testimony helpful to the defense. We ordinarily "give trial counsel wide latitude to determine the best strategy for the client." *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013). Questions of trial strategy, including which witnesses to call and what information to present to the jury, is within counsel's discretion and is not reviewed on appeal. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986); *see also Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008) (noting that appellate courts do not "review ineffective assistance of counsel claims based on trial strategy"). Because the decisions related to which witnesses to call and whether or not to impeach witnesses are matters of trial strategy, we do not consider them. Appellant has not satisfied the first *Strickland* prong as to these claims.

Appellant next argues that his counsel failed to request a rule 20.01 competency hearing to evaluate his mental state. Appellant submitted information on appeal about his previous mental-health evaluations. But this information is outside the scope of the trial record. A reviewing court "cannot base its decision on matters outside the record on appeal." *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001) (quotation omitted). The trial court record contains no evidence that appellant would have been eligible for a rule 20.01 evaluation. *See State v. Bartylla*, 755 N.W.2d 8, 22-23 (Minn. 2008) (noting that this court does not consider pro se claims on appeal that are not supported by argument or citation to legal authority). As a result, appellant has not shown that his counsel's representation fell below an objective standard of reasonableness under the first *Strickland* prong.

Lastly, appellant claims his counsel failed to move to suppress a voluntary statement made during a meeting with police. The record does not support this argument. Instead, the record shows that, in July 2020, defense counsel filed a notice of motion and motion to suppress the statement. The district court denied the motion. Because the record shows that appellant's counsel did seek to suppress his police statement, this argument lacks merit.

V. The prosecutor did not commit misconduct by failing to disclose discovery materials.

Appellant claims the prosecutor committed misconduct by failing to disclose all discovery materials. The state has a constitutional duty to disclose all exculpatory evidence in its possession. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *see also* U.S. Const. amend. XIV, § 1; Minn. R. Crim. P. 9.01; *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999) (noting that the prosecution has a duty to disclose "favorable and material" evidence to the defense). To establish a violation, appellant must show:

> (1) the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching;
>
> (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and
>
> (3) the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant.

Zornes v. State, 903 N.W.2d 411, 417 (Minn. 2017) (quotation omitted).

Appellant argues that there were two unknown men at the club who could have offered first-hand knowledge of the assault. Appellant claims the state and the police department withheld the names and addresses of these two unknown men, which constitutes a discovery violation. But appellant fails to point to facts in the record that

support this theory. Appellant has presented no evidence suggesting that the two unknown men would have provided testimony favorable to the defense, appellant has not shown that the state withheld this evidence, and appellant has not shown that the evidence was material or that he was prejudiced. For those reasons, this claim fails.

Affirmed in part, reversed in part, and remanded.