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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Shawn DeAngelo VERNON, Appellant.

No. A03-348.
|
June 1, 2004.

Stearns County District Court, File No. K7-90-1880.

Attorneys and Law Firms

Mike Hatch, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, MN; and Janelle Kendall, Stearns County Attorney, St. Cloud, MN, for respondent.

Cynthia J. Vermeulen, Vermeulen Law Office, St. Cloud, MN, for appellant.

Considered and decided by LANSING, Presiding Judge, PETERSON, Judge, and HUSPENI, Judge.

UNPUBLISHED OPINION

HUSPENI, Judge. [*]

***1** Appellant Shawn DeAngelo Vernon challenges his conviction and sentence for first-degree assault, arguing that (1) the trial court erred by allowing the state to amend the complaint on the day trial began; (2) the trial court's response to a jury question violated procedural and substantive restrictions on such responses; (3) there was insufficient evidence to support the verdict; and (4) the trial court erred by denying his motion for a dispositional departure at sentencing. We affirm.

FACTS

By complaint filed on June 28, 1990, appellant was charged with one count of first-degree assault in violation of Minn.Stat. §§ 609 .021, .05, subd. 1 (1988). The state subsequently filed an amended complaint charging appellant with third-degree assault. On the first day of the jury trial, September 17, 1991, before the commencement of trial, the state filed a motion to withdraw the amended complaint and reinstate the original first-degree-assault charge. The court granted the state's motion and offered appellant a continuance; appellant declined the offer.

At trial, the state presented testimony from three eyewitnesses who claimed to have seen appellant assaulting the victim. Appellant and five witnesses testified on appellant's behalf, tending to minimize or deny appellant's involvement in the incident. During deliberations, the jury sent the judge a note requesting "a clear definition of what 'intentionally aided the other person in committing it, or has intentionally advised, hired, counseled, conspired with or otherwise procured the other person to commit it' [means]." The court sent back a note stating:

> In response to your question, the issue is not whether the defendant intended to agree, accept or assent to what was happening but whether he in some way, by word or deed, intentionally participated in the assault of [the victim] or in some way encouraged or aided others committing the assault.

The jury found appellant guilty as charged. After appellant failed to appear at his scheduled sentencing hearing in April 1992, the trial court issued a warrant for his arrest.

The FBI arrested appellant in July 2002 (10 years and 2 months after the initially-scheduled sentencing hearing), in Cincinnati, Ohio. A second sentencing hearing was scheduled. Before that hearing, and over the state's objection, the court granted appellant's request for an updated presentence investigation (PSI) to provide information regarding appellant's conduct during the ten years he was at large. The updated PSI indicated that the presumptive sentence for appellant's offense was an 81- to 91-month commitment to the Commissioner of Corrections. The PSI stated that since fleeing to Ohio in 1992, appellant had maintained steady employment, housing, and family situations.

Appellant sought a dispositional departure in sentencing, arguing that his lifestyle in Ohio demonstrated his amenability to probation. At the sentencing hearing, he called several witnesses to testify on his behalf; he also testified himself, stating that he had been "falsely accused" of the charged crime and that during his time in Ohio, he had "every intention of coming back [to Minnesota]."

***2** The trial court denied appellant's request for a dispositional departure and sentenced appellant to 81 months in prison, the low end of the presumptive sentence range. This appeal followed.

DECISION

We note as a threshold matter that appellant has not provided this court with complete transcripts of his trial. On appeal, the appellant has the burden of providing an adequate record comprised of "papers filed in the trial court, the exhibits, and the transcript of the proceedings." Minn. R. Civ.App. P. 110.01, 110.02, subd. 1; Minn. R.Crim. P. 28.02, subds. 8, 9; *State v. Smith,* 448 N.W.2d 550, 557 (Minn.App.1989), *review denied* (Minn. Dec. 29, 1989).

> Normally, a criminal defendant cannot obtain a new trial on appeal by establishing that error occurred in the conduct of the trial unless he provides this court with a complete transcript or an appropriate stipulation concerning what would be disclosed by a complete transcript. Without such a transcript or stipulation, we cannot verify whether the error resulted in prejudice.

State v. Anderson, 351 N.W.2d 1, 2 (Minn.1984).

Here, the transcripts from appellant's 1991 trial were destroyed in 2001 pursuant to standard district court transcript-retention procedure and were therefore no longer available when appellant was located and arrested in 2002. The partial transcripts of his own trial that appellant did submit were apparently prepared for the 1993 trial of appellant's co-defendant. Where a complete transcript of the proceedings is not available, the appellant may prepare and file a statement of the proceedings pursuant to Minn. R. Civ.App. P. 110.03. "Failure to follow rule 110.03 may result in dismissal of the appeal or affirmance of the trial court's actions, absent a showing there was a clear abuse of discretion." *Schmuckler v. Creurer,* 585 N.W.2d 425, 429 (Minn.App.1998), *review denied* (Minn. Dec. 22, 1998). Here, appellant filed a statement of the proceedings-including the partial transcript-that was accepted by the trial court.

I.

Appellant argues that the trial court abused its discretion by granting the state's motion to amend the complaint by withdrawing the amended third-degree assault charge and reinstating the original first-degree assault charge on the first day of trial. Appellant contends the amendment was improper because (1) he was not given time to obtain a medical expert to address the severity of his alleged victim's injuries; (2) he was not given adequate time to respond to the state's motion; and (3) there is no record evidence that the trial court properly considered whether he would be substantially prejudiced by the amendment.

The portion of the transcript concerning the motion to amend is not in the record. Appellant-by his decision to flee before his 1992 sentencing hearing-bears sole responsibility for the incomplete record. The statement of the proceedings reflects only that the trial court granted the motion over appellant's opposition and that appellant then declined the court's offer for a continuance. Because the existing record contains no details relating to appellant's objections to the motion, appellant has not met his burden to provide this court with a record sufficient to preserve those objections for review. *See id.* Despite appellant's urging, we are unwilling to presume that the trial court failed to properly consider the possible prejudicial effect of the state's motion. *See Pederson v. State,* 649 N.W.2d 161, 163 (Minn.2002) (holding that a district court's judgment "carries a presumption of regularity").

II.

***3** Appellant next argues that the trial court erred procedurally and substantively by responding in writing to the jury's written query concerning the definition of the charged offense. The only evidence of this exchange in the record is the piece of paper bearing the jury's question and the court's response.

As to the alleged procedural violation, appellant contends that the trial court violated Minn. R.Crim. P. 26.03, subd. 19(3)(1), which provides that "[i]f the jury, after retiring for deliberation, desires to be informed on any point of law, the jurors ... shall be conducted to the courtroom" for instructions. There is no record evidence indicating whether appellant or his counsel was notified of the jury's question or whether the jury was conducted into the courtroom. Meaningful review of this issue is precluded by appellant's failure to provide this court with an adequate record. We further observe that insofar as appellant claims no prejudice arising from the alleged procedural error, the trial court's failure to comply with the procedure regarding jury questions is harmless. *See State v. Holscher,* 417 N.W.2d 698, 703 (Minn.App.1988), *review denied* (Minn. Mar. 18, 1988).

As to the alleged substantive violation, appellant contends that the trial court violated Minn. R.Crim. P. 26.03, subd. 19(3)(1)(a), which prohibits giving an additional instruction to the jury where the jury could be "adequately informed by ... the original instructions" and violated Minn. R.Crim. P. 26.03, subd. 19(3)(1)(c), which prohibits answering a jury question in a way that expresses the court's opinion on "factual matters that the jury should determine."

In response to a jury's question on any point of law, "[t]he [trial] court has the discretion to decide whether to amplify previous instructions, reread previous instructions, or give no response at all." *State v. Murphy,* 380 N.W.2d 766, 772 (Minn.1986). "The only real limitation ... is that the additional instruction may not be given in such a manner as to lead the jury to believe that it wholly supplants the corresponding portion of the original charge." *Id.* "[I]f a jury is confused, additional instructions clarifying those previously given may be appropriate since the interests of justice require that the jury have a full understanding of the case and the rules of law applicable to the facts under deliberation." *Id.* (quotation omitted).

Here, the jury presumably asked for clarification because the original instructions confused it. The trial court's response to the jury question was taken nearly verbatim from *State v. Hayes,* 431 N.W.2d 533, 535-36 (Minn.1988), where the supreme court proposed language intended to assist juries to determine what level of participation is necessary to convict a defendant of aiding and abetting a crime. The court did not abuse its discretion in giving the instruction.

III.

Appellant also argues that the evidence presented at trial was insufficient to convict him of first-degree assault. In reviewing a challenge to the sufficiency of the evidence, we are limited to ascertaining whether, given the facts in the record and any legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the charged offense. *State v. Merrill,* 274 N.W.2d 99, 111 (Minn.1978). We view the evidence in the light most favorable to the jury's verdict and assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Pierson,* 530 N.W.2d 784, 787 (Minn.1995). It is the function of the jury to determine witness credibility. *State v. Tovar,* 605 N.W.2d 717, 726 (Minn.2000).

***4** Appellant's challenges to the sufficiency of the evidence are exclusively concerned with witness credibility and the weight accorded by the jury to various witnesses. The record before us does not justify disturbing the verdict on those grounds.

IV.

Finally, appellant argues that the trial court abused its discretion by denying his motion for a dispositional departure at sentencing. We disagree.

"An appellate court will not generally review the trial court's exercise of its discretion in cases where the sentence imposed is within the presumptive range." *State v. Witucki,* 420 N.W.2d 217, 223 (Minn.App.1988), *review denied* (Minn. Apr. 15, 1988). "[T]he [Sentencing] Guidelines state that when substantial and compelling circumstances are present, the judge 'may' depart." *State v. Back,* 341 N.W.2d 273, 275 (Minn.1983). Clearly, the trial court has broad discretion in deciding whether to depart from a presumptive sentence, and the reviewing court generally will not interfere with the exercise of that discretion. *Id.* Indeed, "it would be a rare case which would warrant reversal of the refusal to depart." *State v. Kindem,* 313 N.W.2d 6, 7 (Minn.1981). We conclude that this is not that rare case.

Appellant's primary argument in favor of his motion for a dispositional departure is his amenability to treatment, as demonstrated by his lack of prior arrest record, his age at the time of the offense, the support of his family and friends, and his law-abiding behavior since the offense. We recognize that "[a]menability to treatment (or, more generally, to probation) is by itself a sufficient basis for a ... dispositional departure." *State v. Hamacher,* 511 N.W.2d 458, 461 (Minn.App.1994); *see also* *State v. Trog,* 323 N.W.2d 28, 31 (Minn .1982) (setting forth factors a district court considers in determining a defendant's amenability to treatment). And the trial court found that two of the *Trog* factors were, in fact, present: appellant's lack of prior arrest record and the support of his family and friends. Importantly, however, the court also observed that appellant fled the state before sentencing in 1992 and was a fugitive for over ten years. While appellant's rehabilitation of his life is commendable, that rehabilitation occurred at a time when he was a fugitive from justice. The trial court was indisputably within its discretion in denying a dispositional departure in sentencing.

Affirmed.

All Citations

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Footnotes

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,
v.
Perry Lynn HECK, Respondent.

No. A04-475.
|
Oct. 12, 2004.

Renville County District Court, File No. KX-03-953.

Attorneys and Law Firms

Mike Hatch, Attorney General, St. Paul, MN; and David Torgelson, Renville County Attorney, Glen M. Jacobsen, Assistant County Attorney, Olivia, MN, for appellant.

Mark D. Nyvold, St. Paul, MN, for respondent.

Considered and decided by SCHUMACHER, Presiding Judge, ANDERSON, Judge, and HALBROOKS, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge.

***1** The state appeals the district court's pretrial order denying its motion to amend its complaint, arguing that the court's denial has a critical impact on its ability to successfully prosecute the additional charges at a later time and that the pretrial order was erroneous. The district court concluded that respondent's speedy-trial right would be unduly infringed if the state were allowed to amend the complaint. We affirm.

FACTS

On December 8, 2003, respondent Perry Lynn Heck was charged with two counts of criminal sexual conduct in the third degree, in violation of Minn.Stat. § 609.344, subds. 1(d) (incapacity), and 1(b)(age) (2002), for events allegedly occurring in his apartment during the weekend of July 25-27, 2003. The complaint was filed four days after Investigator Doug Pomplun, the chief detective working on the case, and Laurie Rauenhorst, a Department of Human Services representative, interviewed the victim. During that interview, the victim related the details of only one incident of sexual contact with Heck.

On December 8, 2003, Heck made his first court appearance and a trial date of March 17, 2004 was established. On January 2, 2004, Heck entered a plea of not guilty and made a demand for a speedy trial. At that time, Heck's attorney stated that he would consent to the March 17 trial date, even though it was beyond 60 days, but he would not consent to "any other later [date]." *See* Minn. R.Crim. P. 11.10 (providing that upon demand, trial shall be commenced within 60 days from the date of the demand unless good cause is shown why the defendant should not be brought to trial within that period). The district court then denied Heck's request for a reduction in bail. Heck remained in custody awaiting trial on this as well as other charges.

On January 16, 2004, the prosecutor met with the victim and requested that she write out the events of the July 25-27 weekend and submit the written statement to Investigator Pomplun. The prosecutor told the victim to contact the investigator as soon as her written statement was finished. Approximately one week later, the state dropped the mental-incapacity count, effectively amending the complaint, after investigating and discovering that the victim had voluntarily used illegal drugs. The case then proceeded on the remaining count.

On February 25, 2004, the prosecutor again met with the victim, at which time she offered to give her written statement to him. But in an effort to distance himself from the investigation process, he declined to take it. Instead, the prosecutor told the victim to deliver the statement to Investigator Pomplun, which she did on March 3 or 4, 2004. The written statement contained a much more detailed account of the sexual contact between the victim and Heck during the July 25-27 weekend.

The state, therefore, conducted further investigation and, on March 12, 2004, filed an amended complaint, including ten additional counts. Counts 1 and 2 involved the sale of a controlled substance to the victim and another minor during the weekend, in violation of Minn.Stat. § 152.022, subd. 1(5) (2002). Counts 3 through 5 and 7 through 8 involved third-degree criminal sexual conduct during the weekend, in violation of Minn.Stat. § 609.344, subds. 1(b), (c) (2002). Count 6 also involved third-degree criminal sexual conduct, in violation of Minn. Stat § 609.344, subd. 1(b), but the conduct allegedly occurred in Heck's vehicle sometime before November 30, 2003. Counts 9 through 11 involved fourth-degree criminal sexual conduct during the weekend, in violation of Minn.Stat. § 609.345, subd. 1(b), (c) (2002).

***2** On March 15, 2004, the district court denied the state's motion to amend the complaint, concluding that Heck's speedy-trial right would be unduly infringed if the state were allowed to amend. This decision was based on the fact that the original trial date was already beyond 60 days from Heck's speedy-trial demand, the state had unnecessarily delayed its investigation without an adequate explanation, and a continuance would be necessary if the court accepted the amended complaint. This appeal follows.

DECISION

The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion. *State v. Ostrem,* 535 N.W.2d 916, 922 (Minn.1995). "Interpretation of the rules of criminal procedure is a question of law, which we review de novo." *State v. Whitley,* 649 N.W.2d 180, 183 (Minn.App.2002).

I.

The state may appeal pretrial orders in felony cases pursuant to Minn. R.Crim. P. 28.04. "To prevail, the state must clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Zanter,* 535 N.W.2d 624, 630 (Minn.1995) (quotations omitted) (stating the correct standard for reviewing a pretrial order denying amendment of a complaint although specific to pretrial order suppressing evidence). The state satisfies the critical-impact test when the district court's order is based on an interpretation of a rule that bars further prosecution of a defendant. *Whitley,* 649 N.W.2d at 183.

We conclude that the critical-impact requirement is satisfied here based on a "single-behavioral-incident theory." *See State v. Baxter,* ---N.W.2d. ---, ---, 2004 WL 2050800, at *2 (Minn.App. Sept. 14, 2004). Minn.Stat. 609.035, subd. 1 (2002), provides that where conduct constitutes more than one offense, a conviction for one offense bars prosecution for any of the others. *State v. Meland,* 616 N.W.2d 757, 759 (Minn.App.2000). In determining whether section 609.035 bars prosecution for multiple offenses, a court must determine whether the charged offenses resulted from a single behavioral incident. *State v. Johnson,* 273 Minn. 394, 404, 141 N.W.2d 517, 524 (1966). Offenses are found to be part of a single behavioral incident if they (1) arise from a continuous and uninterrupted course of conduct, (2) occur at substantially the same time and place, and (3) manifest an indivisible state of mind. *State v. Chidester,* 380 N.W.2d 595, 597 (Minn.App.1986), *review denied* (Minn. Mar. 21, 1986).

Here, counts 1, 2, and 6 in the proposed amended complaint involve conduct that is separate from the criminal sexual conduct charged in the original complaint. Counts 1 and 2 are separable because they involve the alleged sale of a controlled substance the night before the alleged criminal sexual conduct, and count 6 is separable because the alleged criminal sexual conduct did not occur during the July 25-27 weekend.

***3** But the remaining criminal-sexual-conduct offenses charged in the original and amended complaints arose from a single behavioral incident. These incidents allegedly took place over a continuous period of time and in the same location, namely on July 26, 2003, in Hecks apartment. Moreover, the nature of the alleged incidents evinces an indivisible intent of sexual gratification. Because they are part of the same behavioral incident, the state will be barred from prosecuting the additional counts at a later time if Heck is convicted under the original complaint. *See Baxter,* 686 N.W.2d. at ---, 2004 WL 2050800, at *2. Because of this potential bar, we conclude that the denial of the states motion has a critical impact on the outcome of the trial. *See id.*

II.

In addition to showing "critical impact" on the ability to prosecute the defendant successfully, the state also must show that the pretrial order under review was erroneous. *Zanter,*