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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-262

State of Minnesota,
Respondent,

vs.

Glenn Francis Hazelton,
Appellant.

Filed February 13, 2012
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CR-09-9371

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant Hennepin County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Wright, Judge; and Schellhas, Judge.

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

WRIGHT, Judge

Appellant challenges his conviction of felony fifth-degree assault, a violation of Minn. Stat. § 609.224, subd. 4(b) (2006). Appellant argues that the district court erred by denying his requests for substitute counsel and compelling him to represent himself without obtaining a valid waiver of the right to counsel. Appellant also argues that the evidence presented during his bench trial is insufficient to support the guilty verdict. We affirm.

FACTS

In spring 2008, appellant Glenn Francis Hazelton rented living space in the Minnetonka home of S.N. After S.N.'s 11-year-old son, J.N., advised his therapist in May 2008 that Hazelton had physically assaulted him, J.N. and his mother reported to the Minnetonka police three separate incidents of assault that occurred in April or May 2008. Specifically, J.N. reported that Hazelton wrestled J.N. and kicked him in the face; Hazelton twisted J.N.'s arm behind his back; and Hazelton squeezed J.N.'s fingers until he complied with Hazelton's command to "kiss the ground." Following an investigation, Hazelton was charged with felony fifth-degree assault.

The district court appointed a Hennepin County assistant public defender to represent Hazelton. At a pretrial hearing on July 28, 2009, Hazelton moved the district court to discharge his counsel and appoint substitute counsel because, Hazelton maintained, his counsel was not "doing the job" for him. Hazelton's counsel explained that she had limited her contact with Hazelton because he had been aggressive and

disrespectful, but she had Hazelton's "best legal interests at heart." The district court advised Hazelton that his counsel had been working "behind the scenes" to assist him by consulting with the prosecutor and the district court clerk, consolidating Hazelton's charges, and rescheduling his trial. Hazelton replied "I just don't want her." The district court advised Hazelton against representing himself and declined to appoint a different public defender. The district court explained that the public defender's office assigns its attorneys; and under its policy, the public defender's office does not assign substitute counsel when a client discharges a public defender. The district court explained that Hazelton's options were to retain his court-appointed counsel, obtain private counsel, or represent himself. Hazelton repeatedly stated that he understood these consequences and permitted his court-appointed counsel to continue representing him at that time.

At a hearing on January 21, 2010, Hazelton again moved to discharge his counsel and sought the appointment of substitute counsel. He explained that his court-appointed counsel had not been communicating with him. Rather, she had yelled at him, "stormed" out of a meeting, "hung up the phone" when he attempted to make suggestions about his case, and declined to investigate witnesses and other aspects of the case that Hazelton suggested. The district court again advised Hazelton that his options were to retain his court-appointed counsel, obtain private counsel, or represent himself. Stating that he understood those choices, Hazelton discharged his court-appointed counsel and declared his intention to obtain private counsel. The district court continued the trial to permit Hazelton to do so.

On May 28, 2010, Hazelton appeared with his private counsel, who moved to withdraw as counsel because Hazelton could not pay his attorney fees. Hazelton's private counsel told the district court that he had urged Hazelton "very strongly" to obtain a public defender to represent him and vouched for the experience and commitment of the court-appointed counsel that Hazelton had previously discharged. The district court permitted Hazelton's private counsel to withdraw and advised Hazelton that he could contact the public defender's office and attempt to obtain his previously appointed counsel.

Hazelton did not obtain counsel. Instead, he represented himself at a three-day bench trial in September 2010. The state's witnesses included J.N., J.N.'s parents, and two Minnetonka police officers who had interviewed J.N. and his parents. Admitted in evidence without objection were certified copies of Hazelton's July 10, 2007 Petition to Enter a Plea of Guilty and an accompanying October 2, 2007 sentencing order for domestic assault by strangulation in *State v. Hazelton*, No. 27-CR-07-026483. Also admitted in evidence without objection was a certified copy of the Minnesota State Court Information System (MNCIS) Register of Actions for *State v. Hazelton*, No. 27-CR-05-018025, which reflects that on June 14, 2005, Hazelton pleaded guilty to violating a domestic abuse order for protection, a violation of Minn. Stat. § 518B.01, subd. 14(a) (2004).

In its October 25, 2010 order, the district court found Hazelton guilty of felony fifth-degree assault. The district court found that J.N.'s testimony regarding the assault incidents is credible and consistent with the statements J.N. made to his therapist and the

police. The district court also found that the evidence establishes beyond a reasonable doubt that Hazelton intentionally inflicted bodily harm on J.N. and caused physical pain when doing so, within three years of two prior qualified domestic-violence-related convictions. The district court subsequently imposed an executed sentence of 27 months' imprisonment. This appeal followed.

D E C I S I O N

I.

Hazelton argues that the district court erred by denying his requests for substitute court-appointed counsel. An indigent defendant has a constitutional right to the effective assistance of counsel at every stage of the criminal process. U.S. Const. amend. VI; Minn. Const. art. I, § 6. But an indigent defendant does not have "the unbridled right to be represented by counsel of his own choosing." *State v. Fagerstrom*, 286 Minn. 295, 299, 176 N.W.2d 261, 264 (1970). The district court is obligated to furnish an indigent defendant with a capable attorney, who the indigent defendant must accept unless the defendant's request for substitute counsel is reasonable and justified by "exceptional circumstances." *Id.* The decision to appoint substitute counsel rests within the district court's discretion. *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001).

Exceptional circumstances are "those that affect a court-appointed attorney's ability or competence to represent the client." *Id.* at 449-50 (concluding that general dissatisfaction with court-appointed counsel's representation and disagreements about trial strategy did not meet "ability or competence" standard); *accord State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (concluding that "personal tension" between counsel

and indigent defendant during trial-preparation phase was not exceptional circumstance); *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998) (concluding that general dissatisfaction or disagreement with court-appointed counsel's assessment of case does not constitute exceptional circumstance warranting substitute counsel); *State v. Benniefield*, 668 N.W.2d 430, 434-35 (Minn. App. 2003) (holding that defendant who was dissatisfied with court-appointed counsel's handling of case and wanted attorney who was "willing to fight" was not entitled to substitute counsel), *aff'd on other grounds*, 678 N.W.2d 42 (Minn. 2004). When a defendant raises "serious allegations of inadequate representation before trial has commenced," a searching inquiry by the district court may be necessary. *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006).

At the July 28, 2009 hearing, the district court declined to appoint different counsel to represent Hazelton. Although any suggestion by a district court that it lacks the discretion to appoint substitute counsel is contrary to longstanding law, here the district court found that Hazelton presented no "compelling circumstances" demonstrating his court-appointed counsel's lack of ability or competence. *See, e.g.*, *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977) (stating that district court may appoint substitute counsel when "exceptional circumstances" exist). The record supports this finding. Hazelton told the district court that his court-appointed counsel was not "doing the job for [him]," she had not contacted him for more than three weeks, and he "just [did not] want her." Hazelton's court-appointed counsel explained that Hazelton had expressed dissatisfaction with her since she began to work on his case. He had been aggressive and disrespectful. And he had walked away from her when she was speaking

with him. The record does not reflect serious allegations of inadequate representation. Rather, the record reflects a personality conflict or "personal tension" between Hazelton and his court-appointed counsel, neither of which constitutes exceptional circumstances warranting the appointment of substitute counsel. *See Voorhees*, 596 N.W.2d at 255. Moreover, a defendant's general dissatisfaction with court-appointed counsel's representation and disagreements about trial strategy do not demonstrate exceptional circumstances warranting substitution of counsel. *Gillam*, 629 N.W.2d at 449-50. Thus, Hazelton's subsequent disagreements with his court-appointed counsel's decisions regarding which witnesses to call and what evidence to gather also do not support his contention that the district court erred by declining to appoint substitute counsel at the January 21, 2010 hearing.

Hazelton's allegations were not sufficiently serious to warrant a more searching inquiry, and they failed to establish "exceptional circumstances" affecting his court-appointed counsel's ability to represent him. Accordingly, the district court did not abuse its discretion by declining to appoint substitute counsel.

II.

Hazelton next argues that the district court compelled him to represent himself because it did not obtain a valid waiver of the right to counsel. A criminal defendant has a constitutional right to be represented by counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The defendant may waive this right, however, if the waiver is competently and intelligently made. *Worthy*, 583 N.W.2d at 275. We will not disturb a district court's finding on waiver unless it is clearly erroneous. *Id.* at 276. Here, without an express

finding of waiver, we must construe the district court's implicit finding that Hazelton waived his right to counsel when he decided to proceed to trial pro se after his private counsel withdrew in May 2010.[1]

Hazelton asserts that his waiver of the right to counsel was invalid because it was not made in writing. Under Minnesota law, when a defendant waives the right to counsel, "the waiver shall in all instances be made in writing, signed by the defendant, except that in such situation if the defendant refuses to sign the written waiver, then the [district] court shall make a record evidencing such refusal of counsel." Minn. Stat. § 611.19 (2006). The written waiver also must be "voluntary and intelligent." Minn. R. Crim. P. 5.04, subd. 1(4). Prior to accepting a waiver, the district court must advise the defendant (1) of the nature of the charges, (2) of the statutory offenses included within the charges, (3) of the range of permitted punishments, (4) that defenses may exist, (5) that mitigating circumstances may exist, and (6) of "all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel." *Id.*

The state does not contest, and the record reflects, that the district court neither obtained a written waiver of Hazelton's right to counsel nor formally advised Hazelton of the factors provided in rule 5.04, subdivision 1(4). But an unwritten waiver of the right to counsel may be constitutionally valid if the surrounding circumstances support the waiver. *See Worthy*, 583 N.W.2d at 275-76 (holding that absent a "detailed on-the-record

[1] The record is silent as to whether Hazelton followed the advice of his private counsel and the district court and sought to resume his attorney-client relationship with the court-appointed counsel that he discharged.

colloquy," a valid waiver of the right to counsel may be inferred from particular facts and circumstances of the case, including defendant's background, experience, and conduct). "[E]ven if a waiver is not in writing, it may still be constitutionally valid if the circumstances demonstrate that the defendant has knowingly, voluntarily, and intelligently waived his right to counsel." *State v. Haggins*, 798 N.W.2d 86, 90 (Minn. App. 2011); *cf. In re Welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000) (observing that criminal defendant's waiver of constitutional right to counsel has been held valid in Minnesota notwithstanding district court's failure to follow "a particular procedure," and applying that rule to statutory right to counsel in context of termination of parental rights). Moreover, when a defendant has consulted with counsel before waiving the right to counsel, a district court may presume that the defendant is aware of the benefits of legal counsel and the risks of proceeding without legal counsel. *Worthy*, 583 N.W.2d at 276; *see also Finne v. State*, 648 N.W.2d 732, 736 (Minn. App. 2002) (affirming waiver of right to counsel because appellant discharged public defender "knowing full well that she would be expected to represent herself should she fail to hire private counsel"), *review denied* (Minn. Oct. 29, 2002).

After Hazelton expressed his intent to proceed to trial without his court-appointed counsel, the district court warned Hazelton that he was charged with felony fifth-degree assault and faced "significant consequences," including possible imprisonment. The district court advised Hazelton against representing himself because of the "significant disadvantages" of self-representation. Hazelton told the district court that he understood these consequences and predicted he would "probably do better by [himself] than with

[his court-appointed counsel]." Hazelton was represented by counsel, court-appointed and privately retained, for approximately ten months, which included at least five pretrial hearings, before he waived the right to counsel. This experience also suggests that Hazelton was aware of the benefits of legal counsel's assistance and the risks of proceeding without it.[2] Indeed, Hazelton's private counsel also advised Hazelton on the record that Hazelton should obtain counsel rather than represent himself. And Hazelton has prior experience as a defendant in the criminal justice system, which suggests that his waiver of the right to counsel was voluntary and intelligent. *See Worthy*, 583 N.W.2d at 276 (implying that defendants' familiarity with criminal justice system may suggest that waiver of right to counsel was voluntary and intelligent).

Hazelton also asserts that the district court's denial of his requests for substitute counsel renders his waiver of the right to counsel involuntary. We disagree. When, as here, counsel is appointed but discharged, the defendant is advised that substitute counsel will not be forthcoming, the defendant is encouraged to attempt to resume his attorney-client relationship with court-appointed counsel after his private counsel withdraws, the district court warns the defendant of the "significant disadvantages" of self-representation, and the defendant nonetheless advises the district court that he expects that he will provide better representation than his court-appointed counsel, the

[2] Hazelton relies on *State v. Garibaldi*, in which we reversed and remanded for a new trial based on an invalid waiver of the right to counsel. 726 N.W.2d 823, 831 (Minn. App. 2007). But in *Garibaldi*, we observed that the defendant did not have extensive contact with defense counsel and the record was "ambiguous" as to whether the defendant understood or had any questions regarding the criminal charge and his options. *Id.* at 828, 830-31. The facts presented here are readily distinguishable.

defendant's conduct demonstrates that his waiver of the right to counsel was voluntary. *See id*.

Accordingly, the district court's waiver finding is not clearly erroneous because the record establishes that Hazelton competently, voluntarily, and intelligently waived his right to counsel.

III.

Hazelton next asserts that there is insufficient evidence to sustain his conviction because the certified copy of the MNCIS Register of Actions that was admitted in evidence is insufficient proof of a prior qualified conviction for the purpose of enhancing the misdemeanor fifth-degree assault to a felony. *See* Minn. Stat. § 609.224, subd. 4(b).[3] When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis to determine whether the fact-finder reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). We will not disturb the guilty verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

A misdemeanor fifth-degree-assault offense may be enhanced to a felony offense if the charged offense occurred "within three years of the first of any combination of two or more previous qualified domestic violence-related offense convictions." Minn. Stat.

[3] Hazelton did not object at trial to the admission of the MNCIS Register of Actions.

§ 609.224, subd. 4(b). The definition of a "qualified domestic violence-related offense" includes "a violation of or an attempt to violate sections 518B.01, subdivision 14 (violation of domestic abuse order for protection) . . . [and] 609.224 (fifth-degree assault)." Minn. Stat. § 609.02, subd. 16 (2006 & Supp. 2007). If the degree or penalty of an offense depends on the existence of a prior conviction, proof of the prior conviction "is established by competent and reliable evidence, including a certified court record of the conviction." Minn. Stat. § 609.041 (2006). Here, the state offered, and the district court admitted in evidence, a certified copy of the MNCIS Register of Actions reflecting that Hazelton pleaded guilty to and was convicted of violating a domestic abuse order for protection on June 14, 2005, and certified copies of Hazelton's July 10, 2007 Petition to Enter a Plea of Guilty and an accompanying October 2, 2007 sentencing order for domestic assault by strangulation. The district court found that this evidence proves beyond a reasonable doubt that Hazelton had two prior qualified domestic-violence-related offense convictions within three years of the date of the instant offense.

Hazelton does not challenge the sufficiency of the evidence of his 2007 conviction. Rather, he argues that the MNCIS Register of Actions fails to prove beyond a reasonable doubt that he was convicted on June 14, 2005 of violating a domestic abuse order for protection. An appellate court ordinarily will not consider matters that were not raised in the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Absent an objection at trial as to the nature of the evidence offered, Hazelton has forfeited this issue on appeal. Moreover, Minn. Stat. § 609.041 requires only that proof of a prior conviction "is established by competent and reliable evidence;" it does not limit such proof to a

certified copy of a judgment of conviction. *State v. Eller*, 780 N.W.2d 375, 380-81 (Minn. App. 2010), *review denied* (Minn. June 15, 2010). We observe that the MNCIS Register of Actions is not a preferred method to prove a prior conviction because it is susceptible to data-entry inaccuracy and it is not a judgment. The better method of proof is by a certified copy of the judgment of conviction. But Hazelton did not challenge the evidentiary competence and reliability of the MNCIS Register of Actions when it was offered for admission at trial, and he has not identified on appeal any inaccuracy or defect contained in this piece of evidence.

In addition to the evidence of Hazelton's two prior qualified convictions, the record contains ample evidence to sustain Hazelton's conviction of felony fifth-degree assault. Testimony expressly credited by the district court establishes that, in April or May 2008, Hazelton wrestled J.N. and kicked him in the face, twisted J.N.'s arm behind his back, and squeezed or bent J.N.'s fingers until he complied with Hazelton's command to "kiss the ground." Thus, Hazelton's challenge to the sufficiency of the evidence to sustain his conviction of felony fifth-degree assault fails.

Affirmed.