

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0093**

State of Minnesota,
Respondent,

vs.

Andrew John Kramer,
Appellant.

**Filed December 27, 2022
Reversed and remanded
Cochran, Judge**

Steele County District Court
File No. 74-CR-20-1552

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

Daniel McIntosh, Steele County Attorney, Robert J. Jarrett, Assistant County Attorney,
Owatonna, Minnesota (for respondent)

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Considered and decided by Reilly, Presiding Judge; Cochran, Judge; and
Rodenberg, Judge.*

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

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this direct appeal, appellant challenges his conviction of fifth-degree assault, arguing that the district court failed to obtain a valid waiver of his constitutional right to counsel. Because the record does not establish a valid waiver of appellant's right to counsel, we reverse and remand for a new trial.

FACTS

In July 2020, a man hit and killed a dog with his truck in Owatonna, Minnesota. The man did not see anyone around, so he continued driving and returned to the accident site approximately 20 minutes later. By that time, a crowd of people, including appellant Andrew John Kramer, had gathered. The man stepped out of his truck to apologize. According to the man, Kramer proceeded to yell and swear at him and also tried to hit him with a stick. Kramer and the man fought for some time before the man returned to his truck to call the police.

Respondent State of Minnesota charged Kramer with misdemeanor fifth-degree assault in violation of Minn. Stat. § 690.224, subd. 1(2) (2018). Kramer appeared without counsel at his arraignment, an evidentiary hearing, three settlement conferences, a jury trial, and sentencing. The following summarizes the facts relevant to the issue of his waiver of counsel.

Arraignment

On December 10, 2020, the district court arraigned multiple defendants, including Kramer, via Zoom. The district court first addressed the defendants as a group, providing

a general description of their rights. The district court noted that jury trials are available to gross misdemeanor and misdemeanor defendants but not to petty misdemeanor defendants, and then reviewed a defendant's rights at trial. The district court explained that gross misdemeanor and misdemeanor defendants (but not petty misdemeanor defendants) are entitled to legal representation because conviction of those charges can result in imprisonment. The district court also clarified that defendants must qualify and apply for a public defender to obtain one. The district court then conducted individual arraignments.

At his arraignment, Kramer appeared without counsel. When the district court asked Kramer if he wanted to apply for a public defender, Kramer initially declined. The district court then asked Kramer if he wanted to represent himself, and Kramer said, "Sure." The district court did not expressly ask Kramer if he was waiving his right to counsel. Nor did the district court make any inquiry into Kramer's knowledge and understanding of his rights. Instead, the district court next asked Kramer if he wanted a jury or bench trial, and Kramer opted for a jury trial. Kramer also requested an "evidence" hearing, which the district court interpreted to be a request for a probable cause hearing. The district court set a date for the hearing.

Toward the end of Kramer's arraignment, following Kramer's request for an evidentiary hearing, the prosecutor asked Kramer to complete a petition to proceed pro se. At this point, Kramer requested an application for a public defender. After confirming with Kramer that he wanted to apply for a public defender, the district court said, "Okay. So we'll try a public defender." The district court gave Kramer an application for a public

defender and a petition to proceed pro se, and Kramer responded, “Make sure I know which [form is] which. I’m kind of illiterate.”

Evidentiary Hearing

Kramer appeared without counsel at the evidentiary hearing, which was held by Zoom. The district court did not ask Kramer about the public-defender application or the petition to proceed pro se that Kramer received at the end of the arraignment. The record on appeal does not reflect that Kramer filed either form.

Kramer proceeded to represent himself at the evidentiary hearing. At the beginning of the hearing, the district court confirmed with the parties that the purpose of the hearing was to address whether the state had probable cause to charge Kramer with fifth-degree assault. However, throughout the hearing, Kramer appeared confused about the hearing’s purpose and seemed to think that he was at trial. In response, the district court explained the difference between an evidentiary hearing and a trial. Kramer continued to be confused. At one point, Kramer said, “So you’re leaving me here misunderstanding everything that’s going on. I thought I had a right to a fair trial.” The district court reminded Kramer that he had “elected to represent [himself],” which Kramer neither confirmed nor denied.

In a written order following the hearing, the district court found that the state established probable cause and denied Kramer’s request to dismiss the fifth-degree assault charge.

Settlement Conferences

Kramer also appeared without counsel and represented himself at three settlement conferences. During the first settlement conference, the district court asked Kramer, “And

you're representing yourself, Mr. Kramer, and you want to continue to represent yourself?"

Kramer replied, "Yes." The district court also asked, "And you understand you have the right to an attorney, and if you can't afford one, you can apply for a public defender?"

Kramer again replied, "Yes."

At the second settlement conference, the district court neither mentioned Kramer's right to counsel nor inquired about his decision to appear without counsel.

At the third settlement conference, at which the district court also addressed the state's motions in limine, the district court asked Kramer if he knew that he could still apply for a public defender. Kramer responded, "Yep."

Jury Trial

Kramer appeared for trial without counsel. At the beginning of the trial, the district court asked whether Kramer had "been through" a jury trial before, and Kramer confirmed that he had. The court did not ask Kramer if he was representing himself or conduct any formal inquiry into whether Kramer was waiving his right to counsel.

At trial, the state called three witnesses: the man who alleged that he was assaulted by Kramer and two responding police officers. The state also presented photographs of the man's injuries, the man's truck, and a stick found at the scene. Kramer cross-examined the state's witnesses, but he did not call any witnesses of his own. During the trial, Kramer seemed confused about trial procedure and the burden of proof. The jury found Kramer guilty of fifth-degree assault.

Sentencing

Finally, Kramer appeared without counsel at sentencing. During the sentencing hearing, the district court did not remind Kramer of his right to counsel or inquire about whether he was waiving his right to counsel at sentencing. The district court sentenced Kramer to 90 days in jail, with credit for time served.

Kramer appeals.

DECISION

The United States and Minnesota Constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Minn. Const. art. 1, §§ 6, 7. In Minnesota, an accused has a right to the assistance of counsel in a misdemeanor prosecution whenever a conviction may lead to incarceration. *State v. Nordstrom*, 331 N.W.2d 901, 905 (Minn. 1983). This right applies to all critical stages of a criminal proceeding, including sentencing. *State v. Maddox*, 825 N.W.2d 140, 144 (Minn. App. 2013). A defendant may waive this right, but they must do so knowingly and intelligently. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). The district court has a duty to ensure a knowing and intelligent waiver of the right to counsel. *State v. Hawanchak*, 669 N.W.2d 912, 914 (Minn. App. 2003).

Waiver requirements vary based on the level of the charged offense. *See* Minn. R. Crim. P. 5.04, subd. 1(3)-(4). For a misdemeanor punishable by incarceration, the rules provide that a defendant “must waive counsel in writing or on the record.” *Id.*, subd. 1(3). In addition, a district court cannot accept that waiver “unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of

the defendant’s rights.” *Id.* Caselaw also establishes that “[a] district court’s failure to conduct an on-the-record inquiry regarding waiver . . . does not require reversal when the particular facts and circumstances of the case demonstrate a valid waiver.” *State v. Bonkowske*, 957 N.W.2d 437, 442 (Minn. App. 2021) (quoting *Rhoads*, 813 N.W.2d at 886); *see State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998).

We review a finding that a defendant validly waived the right to counsel for clear error. *Rhoads*, 813 N.W.2d at 885; *Bonkowske*, 957 N.W.2d at 440. But where a district court makes no findings as to waiver and the facts are not disputed, we review de novo whether there was a valid waiver of the right to counsel. *See Rhoads*, 813 N.W.2d at 885. An invalid waiver and the corresponding denial of the right to counsel are “structural error[s]” that require reversal. *Bonga v. State*, 765 N.W.2d 639, 643 (Minn. 2009).

Kramer argues that the district court erred because it did not obtain a valid waiver of his right to counsel. Kramer specifically contends that the district court erred by failing to conduct a comprehensive on-the-record inquiry into Kramer’s decision to represent himself. And Kramer asserts that the circumstances do not otherwise indicate that he waived his right to counsel. We consider these arguments in turn.

First, Kramer argues that the district court erred by failing to “comprehensively examine” him to determine whether he knowingly and intelligently waived his right to counsel. Here, Kramer misapprehends the law of express waiver. For a criminal defendant charged with a misdemeanor, the law does not require a comprehensive on-the-record inquiry into defendant’s waiver of counsel. Minn. R. Crim. P. 5.04, subd. 1(3); *Bonkowske*, 957 N.W.2d at 441-42. Rather, the law only requires that a misdemeanor defendant “waive

counsel in writing or on the record” and that the district court be “satisfied that [the waiver] is voluntary and has been made . . . with full knowledge and understanding of the defendant’s rights.” Minn. R. Crim. P. 5.04, subd. 1(3). The more comprehensive on-the-record inquiry applies to defendants charged with a felony. *Id.*, subd. 1(4); *Bonkowske*, 957 N.W.2d at 441-42.

But even by the less-demanding misdemeanor standard, the record does not establish a valid waiver by Kramer of his right to counsel. The record does not contain either an express written waiver or an oral waiver. The district court did inquire as to whether Kramer intended to represent himself, but the district court never obtained an express oral or written waiver by Kramer of his right to counsel. At most, the district court confirmed with Kramer that he was representing himself. Moreover, it did so without questioning Kramer to ensure that he fully knew and understood his rights.

In sum, Kramer did not expressly waive his right to counsel during any of his appearances before the district court, and the district court’s bare inquiry did not ensure that Kramer’s waiver was knowing and intelligent. Accordingly, we conclude that Kramer did not expressly waive his right to counsel.

Having concluded that there was no express waiver, we next consider whether the circumstances of this case permit an inference of waiver. As discussed above, courts may infer waiver based on the particular facts and circumstances of the case. *Bonkowske*, 957 N.W.2d at 442. When determining whether the circumstances support an inference of waiver, we consider the background, experience, and conduct of the defendant. *Id.* In doing so, we consider the defendant’s familiarity with the criminal justice system and

whether the defendant had an opportunity to consult with counsel prior to proceeding self-represented. *Id.* Here, these factors do not support a finding of waiver.

The record shows that Kramer was not represented by an attorney at any point during this case. This suggests that Kramer did not have an opportunity to consult with counsel about the implications of his decision to proceed pro se, which cuts against waiver. *Cf. Bonkowske*, 957 N.W.2d at 440, 442 (concluding that the appellant’s representation by counsel from the beginning of the case through an evidentiary hearing supported the district court’s finding of waiver of counsel for trial). Thus, this factor does not support an inference that Kramer waived his right to counsel.

Additionally, the record contains only three pieces of evidence of Kramer’s familiarity with the criminal justice system: (1) Kramer’s on-the-record statement indicating that he had “been through a jury trial before,” (2) a sentencing order in a previous case which was executed by the same district court judge who presided over this case, and (3) the presentence investigation report in this case, which lists several previous convictions of felony and misdemeanor offenses.¹ Although this evidence shows that Kramer was familiar with the criminal justice system, it does not show that he knew or understood the rights he was waiving in this case. In fact, there is ample evidence that

¹ The state asserts that Kramer has participated in two prior jury trials: one where he was represented by counsel and one where he represented himself. The state further contends that, when Kramer represented himself, he appeared before the same district court judge who presided over this case. The record before us does not support these assertions. Accordingly, we do not consider them. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (“An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.”).

Kramer did not understand the implications of proceeding pro se. For instance, during trial, Kramer became increasingly frustrated by the district court's enforcement of the rules of trial practice, in part because he did not understand them. Thus, we conclude that Kramer's experience with the criminal justice system does not support an inference of waiver and that the circumstances, as a whole, do not justify such a finding.

We are not persuaded otherwise by the state's reliance on *Worthy*. In *Worthy*, the defendants fired their attorneys on the morning of trial, despite being told that they would be held to the same standard as attorneys if they chose to represent themselves. *Worthy*, 583 N.W.2d at 276. In considering the question of whether the defendants' waiver of counsel was valid, the supreme court noted that the defendants had legal representation for over a month before trial and "took full advantage of that representation up until the morning of their scheduled trial date." *Id.* The supreme court also emphasized that the defendants "were familiar with the criminal justice system," noting that both defendants had at least four prior felony convictions and at least one of them "had seen a lot of trials of late." *Id.* Accordingly, the supreme court concluded that the defendants "were fully aware of the consequences" of proceeding pro se and had waived their right to counsel. *Id.* at 276-77. By contrast, Kramer was not represented by counsel during any of his appearances before the district court, and the district court did not explain what would be expected of him if he chose to represent himself. Additionally, although Kramer has been convicted of one felony and a number of misdemeanors, the record does not show that he has participated in multiple jury trials. Thus, the circumstances here do not support the

conclusion that Kramer was aware of the consequences of proceeding pro se, and the state's reliance on *Worthy* is unavailing.

In summary, Kramer did not expressly waive his right to counsel, and the circumstances do not support an inference of waiver. Accordingly, Kramer's conviction must be reversed and remanded for a new trial. *See Bonga*, 765 N.W.2d at 643.

Reversed and remanded.