STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1136

State of Minnesota,
Respondent,

vs.

Hiram Abdul Langston,
Appellant.

Filed April 9, 2018
Affirmed
Jesson, Judge
Dissenting, Reyes, Judge

Koochiching County District Court
File No. 36-CR-14-449

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

Jeffrey Naglosky, Koochiching County Attorney, International Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Jesson, Judge; and Randall, Judge.*

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

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

JESSON, Judge

After being placed on probation, appellant Hiram Abdul Langston appeared before the district court for a probation-revocation hearing. Langston displayed disruptive conduct at the hearing, such as interrupting the court on multiple occasions, providing vague and evasive answers to questions, and submitting a large amount of paperwork with quasi-legal language. Concerned about his mental health, the district court ordered a competency evaluation which Langston refused to cooperate with over the course of several hearings. Throughout this process, the court asked Langston at least three different times if he wanted a lawyer to represent him. Langston refused each time.

Despite Langston's refusal to cooperate, an evaluator eventually submitted a report indicating that Langston's behavior was due to his personal beliefs that the government is illegitimate—including the court system. The report noted that while Langston's behavior may be unusual, it was not the product of mental illness. The district court scheduled a new hearing where it resumed Langston's probation-revocation process. After hearing the evidence, the court revoked Langston's probation. Langston appeals, arguing that he was not competent to proceed, that the district court did not adequately advise him of his rights, that he did not adequately waive his right to an attorney, and that the district court abused its discretion when it revoked his probation. We disagree and affirm the district court.

FACTS

Appellant Hiram Abdul Langston was on probation, having pleaded guilty to first-degree assault in 2014 and given downward dispositional and durational departures by the

district court. Three months into his probationary sentence, Langston failed to complete a required nonviolence group program. He also submitted a urine test that came back positive for alcohol use, in violation of his probation. At a probation-violation hearing, Langston admitted that he failed to complete the nonviolence program and was sentenced to ten days in jail. The court reinstated the same probationary conditions, provided that Langston attend and finish the group program. Langston was represented by a public defender throughout these proceedings.

After the first probation violation, Langston again was accused of violating multiple terms of his probation—including failing to attend the nonviolence program. At a probation hearing on January 9, 2017, Langston appeared before the same judge who oversaw his initial plea, sentencing, and previous probation violation hearing. The judge began the hearing by giving Langston the usual advisories for a first appearance probation hearing, including the right to remain silent, the right to have a lawyer represent him throughout the probation process, the right to a hearing to contest the charges that he violated his probation, the right to confront witnesses and cross-examine those witnesses, the right to—or not to—testify, the right to see the government records against him, and if his probation was revoked, the right to appeal with the help of a lawyer.

Before this probation hearing, Langston had been represented by a public defender. But now, Langston was alone; and not just alone, but different—his demeanor changed. From the start of the hearing, Langston was disruptive—interrupting the judge's introduction of the case by referring to himself not as Hiram Abdul Langston, but as appearing on behalf of his "debtor," Hiram Abdul Langston. He handed the court a stack

of papers that had the veneer of being legal documents with technical jargon, but were mostly incomprehensible. The rest of the hearing was filled with Langston repeatedly interrupting the court; digressing into long speeches attacking the court's legitimacy which were peppered with unintelligible legal jargon; and referring to himself as the secured party known as Hiram Langston. The district court tried to make sense of Langston's behavior, but the attempts to untangle Langston's identity went nowhere and the court ultimately decided to take Langston into custody and order a competency evaluation from a local evaluator.

Over the next three months, the court struggled to get Langston to cooperate with the competency evaluation. In fact, the court scheduled three separate status hearings[1] between January 13 and March 21 and attempted to have Langston meet with a local evaluator, a county evaluator, and an evaluator from a state-operated agency, including allowing Langston to meet via video conference. Langston refused to cooperate each time. And at one of these status hearings, Langston interrupted the district court judge, a witness, and the prosecutor many times to declare that fraud was being committed upon the court and to use his time to speak at some length about obscure areas of contract law. Even after

[1] The dissent portrays these hearings as probation-revocation hearings, but we believe they are better understood as status hearings to check in and evaluate Langston's competence which seems evident from the court's parting words to Langston at the January 9 hearing when it said it was ordering a competency evaluation and scheduling the next hearing "to determine, whoever you are sir, that you are competent to go forward." The court concluded this hearing with, "If we don't have a [competency] report by Friday then I will have to consider continuing beyond that."

being admonished by the judge to remain quiet, the interruptions became so severe that the court was forced to end the proceeding early and had Langston taken back to jail.

A competency report was filed with the court on April 14, 2017 and acknowledged that Langston did not cooperate with the evaluation. Nonetheless, after reviewing a litany of Langston's medical and legal records, the evaluator determined that Langston was competent. The evaluator's report explained that Langston's behavior was the product of his personal belief that the government is illegitimate. His behavior was "not the result of a mental illness," the report concluded, "but instead the result of a culturally or subculturally held belief system."

With the competency report in hand, the parties reconvened on April 24, 2017. There, the court—referencing the report—found Langston competent to proceed and resumed the probation-revocation process that had been suspended since the court ordered the competency evaluation back in January. The court then heard testimony from Langston's probation officer. After considering the charges and evidence, the court revoked Langston's probation and executed his 36-month sentence. Langston appeals.

D E C I S I O N

Langston makes four arguments in his appeal.[2] First, Langston argues that he was not competent to proceed and the district court's finding of competence is not supported by the evidence. Second, Langston claims the district court did not properly advise him of his right to an attorney during the probation-revocation process. Third, Langston argues

[2] The State of Minnesota failed to submit a brief in this case.

that he did not adequately waive his right to an attorney which requires this court to automatically reverse his probation revocation. And fourth, Langston claims the district court abused its discretion when it revoked his probation because the public policies in favor of keeping him on probation outweighed any need to confine him. We analyze each issue in turn.

I. The district court's competency finding is supported by the record.

A criminal defendant is not competent if he lacks the ability to "rationally consult with counsel" or cannot "understand the proceedings or participate in the defense due to mental illness or deficiency." Minn. R. Crim. P. 20.01, subd. 2; *see also State v. Ganpat*, 732 N.W.2d 232, 238 (Minn. 2007). A finding that the defendant is competent must be supported by the "greater weight of the evidence." Minn. R. Crim. P. 20.01, subd. 5(f). We independently review the record to determine if the district court gave proper weight to the evidence produced and if its findings are adequately supported by the record. *Ganpat*, 732 N.W.2d at 238.

We will begin our discussion of Langston's argument first by reviewing the history of the competency proceedings leading up to the April 14, 2017 competency report. We then discuss the report's conclusions and the district court's decision finding Langston competent. Finally, we address Langston's arguments rebutting the court's decision, specifically that the state failed to meet its burden of proof and that he was not given enough time to object to the report.

Langston's competency status conferences

We start our review with the January 9, 2017 probation hearing. This was the first time Langston demonstrated unusual behavior. At this hearing, Langston was verbally combative, interrupted the court multiple times, and insisted he was not Hiram Langston but a creditor to the secured party known as Hiram Langston. Because of this behavior, the court ordered a competency evaluation.

But determining Langston's competency would be no simple matter. The next three months would see three separate status hearings that were meant to check-in and evaluate whether Langston was competent. Three hearings were needed because Langston refused to cooperate with the evaluation each time. For instance, Langston refused to meet with the first, local competency evaluator and told the district court that someone had come to meet him at the jail, but this person "wished to speak to Mr. Langston and I am not Mr. Langston." He echoed this explanation about the second evaluator, explaining to the district court that this evaluator's paperwork showed that he was there to speak with Hiram Langston. "I am no Hiram Langston," he told the court.

Langston's competency report

Langston remained uncooperative for the court's third attempt to have an evaluator meet him, this time a forensic psychologist from a state-operated agency. Still, the evaluator was able to submit a report on April 14, 2017. That report found Langston competent. To reach this conclusion, and in spite of Langston's unwillingness to cooperate

and meet with her, the evaluator combed through a variety of Langston's medical and legal records to build a comprehensive history and evaluation of him.[3]

In the beginning of this report, the evaluator noted that Langston had a history of mental health issues. The report highlighted the period between 2009 and 2015 where Langston had several documented episodes of delusions, hallucinations, and mania, likely due to major depressive disorder, among other diagnoses. But the report concluded that Langston has not presented with "significant symptoms of mental illness in the recent past." The report indicated that jail records did not show any symptoms associated with delusional beliefs and that Langston has not been treated for these symptoms since December, 2015. Additionally, the evaluator's review of Langston on jail videos did not show any significant symptoms of mental illness. The evaluator acknowledged that Langston appeared agitated in these videos, but his thinking and speech were organized, his behavior was normal and goal-directed, he did not seem distracted or trying to respond to internal stimuli, and he tracked and understood what jail staff were telling him.[4] The report concluded that Langston's behavior was explained by his personal belief that the

[3] These records included the original complaint in Langston's case, Langston's pre-sentence investigation report, his first probation-violation report, his criminal history and related records, video and audio of Langston at the Koochiching County jail, social services records, medical treatment and counseling records, letters written to the evaluator from Langston himself, and the evaluator's communications with several staff members at the jail where Langston was housed.

[4] For more evidence of his mental acuity, the evaluator noted an incident in March 2017, when Langston was taken to a nearby hospital for physical complaints. These hospital records make no mention of any mental-health concerns and Langston was cooperative with the officers and medical staff during his visit.

government—including the court system—is not legitimate; it was not due to incompetency.

The district court's competency determination

After the report was filed, the district court held a final status hearing to evaluate and rule on Langston's competence. At that hearing, the court noted the report's conclusion that Langston was competent and asked if he wanted to challenge that conclusion. This sparked disruptions from Langston and prompted the prosecutor to read out sections of the report on the record explaining that Langston was competent to proceed. At the end, the court asked the prosecutor, "So it's your position . . . that there is no challenge on this?" The prosecutor agreed that Langston was not challenging the competency finding. Langston said nothing at this point. "All right," the court said, "In as much as there is no challenge then it appears that Mr. Langston's competent."

Langston's arguments

Langston argues that the state did not meet its burden of proving that he was competent, especially since the evaluator never met Langston in person, which rendered her report insufficient. But we recognize that the district court gave Langston three separate opportunities to meet with three different evaluators. It was Langston who chose not to meet with these professionals. We further note that the final evaluator who submitted the competency report did not simply file the report without background or research on Langston. The record shows that this evaluator used a large volume of Langston's medical and legal records to paint a full picture of him and his mental state—with some of these records reaching back many years into Langston's past. We are not convinced that the

evaluator's failure to meet face-to-face with Langston rendered the competency report unreliable given that it was Langston's choice not to be interviewed and considering the robust and thorough body of records used to complete the report.

Langston further points out that the report noted past evidence of psychosis and paranoia, which he claims manifested as his claims that he was *not* Hiram Langston. But the report did address Langston's behavior and his history of mental illness. The report first concluded that this history was not recent, and second, that his behavior fell in line with his personal belief in the illegitimacy of the government.[5]

Langston also argues that he was not given enough time to file an objection to this competency report. The Minnesota Rules of Criminal Procedure allow any party to file an objection to a competency report within ten days "after receipt." Minn. R. Crim. P. 20.01, subd. 5(a). The report in this case was filed on April 14, 2017, and a hearing was held ten days later, on April 24, 2017. Langston claims that it is "unlikely" he received it on the same day and there is nothing in the record demonstrating precisely when he actually

[5] The competency report concluded that Langston's disruptive behavior was likely a product of his belief in sovereign-citizen philosophy—a philosophy where adherents believe they can divest themselves of government jurisdiction by using specific language in formal settings. The report explained that sovereign citizens sometimes display odd behaviors like using "quasi-legal language," making "nonsensical objections during courtroom proceedings," and avoid having their legal names used in any courtroom proceeding in case such use invalidates their sovereign status, all of which Langston exhibited in district court. The report's conclusion was that these behaviors were not indicative of incompetency, which is supported by federal courts that have encountered this issue. *See, e.g., United States v. Coleman*, 871 F.3d 470, 478 (6th Cir. 2017) (writing that "simply espousing sovereign citizen and other fringe views does not necessarily demonstrate" lack of competence).

received it. But the record does clearly show that Langston had the report at the April 24 hearing and that he never filed a formal objection to it.

More to the point, when the district court asked Langston whether he wanted to challenge the competency determination, Langston became disruptive. Asked at least three more times if he would challenge the report, Langston would not answer the question. In light of both the failure to file an objection and the failure to respond to the court's repeated questions of whether he challenged the competency determination, we conclude that Langston had the opportunity to object to the competency report pursuant to Rule 20.01. He chose not to do so.

Support for the district court's competency finding

After independently reviewing the record, we are convinced that the district court's competency finding was not an error. The district court found that Langston was competent mainly by relying on the competency report. That report convincingly showed that Langston had not exhibited symptoms of mental illness in the recent past, that he understood and could track what people around him were saying, and that his speech and thinking appeared organized. The report also notes that video evidence of Langston in jail did not reveal any significant symptoms of mental illness. And the report singles out an instance where Langston was taken from jail to a local hospital where the hospital records do not indicate a concern about mental illness and where Langston was cooperative with jail and medical staff.

Given this typical behavior, the report explains Langston's disruptive behavior in court as a product of his personal belief that the government is illegitimate and that he

could divest himself of government jurisdiction by using specific language. But as the report explained, while Langston's beliefs may weave unusual theories, it is not necessarily indicative of mental illness. And after reviewing numerous medical, treatment, and court records, the evaluator specifically concluded that Langston "does not appear to present with a major mental illness or mental deficiency that would render him incapable of rationally consulting with counsel, understanding the proceedings or participating in his defense." We believe the district court gave proper weight to the evidence and properly found that Langston understood the proceedings and was capable of participating in his own defense. Minn. R. Crim. P. 20.01, subd. 2. For these reasons, we conclude that the district court's decision finding Langston competent to proceed was not an error.

II. The district court adequately advised Langston of his rights.

We now turn to Langston's claim that the district court did not adequately advise him of his rights before revoking his probation. To support his argument, Langston claims that the district court failed to adequately advise him of his right to counsel as it appears in Minnesota Rule of Criminal Procedure 5.04, subdivision 1(4). But we are not sure why Langston assumes Rule 5.04 applies in this probation-revocation context when Minnesota Rule of Criminal Procedure 27.04 is designed specifically for probation-revocation proceedings. Considering that these two rules contain different advisories courts must provide, we believe they are not interchangeable. [6]

[6] For example, a pre-trial defendant under Rule 5 must be advised of his right to remain silent, the right to a jury or court trial, and the right to have defense counsel present at police interrogations and interviews. Minn. R. Crim. P. 5.03. None of these advisories are

The rules falling under Criminal Procedure Rule 5 are meant to outline the requirements and procedures *during a first appearance hearing* that occurs *before* a trial and conviction. *See* Minn. R. Crim. P. 5.01 (outlining the purpose of a first appearance before trial) (emphasis added). In contrast, Rule 27.04 outlines the first appearance requirements *for a probationer* facing a possible probation-revocation *occurring after a conviction*—the very situation Langston faced in this case.[7] Minn. R. Crim. P. 27.04, subd. 1(a). To accept Langston's assumption that criminal Rule 5's requirements also apply to probation proceedings would essentially create two different first-appearance rules—each with different procedures and conflicting requirements. Some examples of conflicts between the two rules include the previously mentioned advisories courts must provide, differences in type of document triggering a pre-trial versus probationary first

required for a probationer facing a probation-revocation pretrial under Minnesota Rule of Criminal Procedure 27.04, subdivision 2(1)(c).

[7] We are not saying that the right to counsel embodied in Rule 5 does not apply to probation-revocation proceedings. Quite the opposite. We agree with the dissent that a probation hearing is a "critical stage" of a criminal proceeding that entitles an offender to an attorney. *State v. Ferris*, 540 N.W.2d 891, 893 (Minn. App. 1995). Instead, what we are saying is that the procedural rules facilitating the right to counsel at a probation hearing can be found at the rule explicitly designed for probation hearings, that rule being Rule 27.04. And the rule facilitating the right to counsel at a pre-trial first appearance can be found at the rule built for that purpose: Rule 5. This distinction between the two procedural rules makes sense, because probationers facing revocation do not have the "full panoply" of procedural due process rights that pre-trial defendants do. *State v. Beaulieu*, 859 N.W.2d 275, 280 (Minn. 2015) (emphasis added) (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972)). So while the substantive right to counsel remains the same at these different criminal stages, the procedures used are different.

appearance and the contents of those documents,[8] and differing burdens of proof required to release a pre-trial defendant versus a probationer on his own recognizance.[9]

When faced with conflicts, we read the criminal procedural rules "as a whole" and interpret each section "in light of the surrounding sections to avoid conflicting interpretations . . . ." *State v. Carpenter*, 893 N.W.2d 380, 384 (Minn. App. 2017). The conflicts created by Langston's reading of the rules are addressed by simply reading Rule 5 as applying to pre-trial first appearances and Rule 27.04 as applying to post-conviction probation proceedings.

Nor does the fact that Rule 27.04 refers to Rule 5 with regard to appointment of counsel change our conclusion. Rule 27.04 invokes certain procedural requirements of Rule 5 when it states, "Rule 5.04 governs the appointment of counsel for a probationer unable to afford counsel." Minn. R. Crim. P. 27.04, subd. 2(2). Read in context and as a whole, the plain language of Rule 27.04 directs us to look to Rule 5.04 to see what procedures are required when *appointing* counsel, which then leads us to the specific provision in Rule 5.04 dealing with "*Appointment* of the Public Defender." Minn. R. Crim.

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[8] A pre-trial first appearance requires a "charging document" which must contain facts establishing that the defendant committed "the charged offense." Minn. R. Crim. P. 5.01(c); 2.01, subd. 1. Compare this with the probationary first appearance which requires a "warrant or summons" which must contain "a description of the [offender's] sentence and the probationary terms allegedly violated." Minn. R. Crim. P. 27.04, subd. 1(2).

[9] Rule 27.04, subdivision 2(3)(c), gives the "probationer" the burden of showing that they are not a flight risk or danger in order to be released. But a pre-trial defendant is presumed to be released on his own recognizance in a Rule 5, pre-trial first appearance. *State v. Rogers*, 392 N.W.2d 11, 14 (Minn. App. 1986); *see also* Minn. R. Crim. P. 6.02, subd. 1 ("On appearance before the court, a person must be released on personal recognizance . . . unless a court determines that release will endanger the public safety or will not reasonably assure the defendant's appearance.").

P. 5.04 subd. 1(2) (emphasis added). But this does not mean that the entirety of Rule 5.04 applies—only those procedures touching on appointment. *State v. Carpenter*, 893 N.W.2d 380, 384 (Minn. App. 2017) (explaining that the criminal procedure rules should be read as a whole and in context with one another). And here the district court clearly offered to appoint counsel for Langston.

Based on our reading that Rule 27.04's procedural requirements apply to this case, we turn to whether the district court adequately advised Langston of his rights during his probation process under criminal Rule 27.04.

Langston's argument is that the district court failed to adequately advise him of his right to an attorney at his January 9, 2017 first-appearance hearing for his probation-revocation process. Because Langston did not object to the court's alleged failure, we analyze the district court's advisories under the plain-error doctrine. *State v. Beaulieu*, 859 N.W.2d 275, 281 (Minn. 2015). The plain-error doctrine requires Langston to establish three things: (1) an error occurred, (2) the error was plain, and (3) the error affected his substantial rights. *Id.* at 279.

The district court was required to advise Langston that he has the right to "a lawyer, including an appointed lawyer" if Langston could not afford his own. Minn. R. Crim. P. 27.04, subd. 2(1)(c)a. At Langston's probation-revocation first appearance, the court said to Langston,

> You have the right to be represented by a lawyer licensed under the state laws of Minnesota. And if you feel you cannot afford to pay for a lawyer with whatever currency or means of conveyance that you have, then you can ask the court to appoint a lawyer under our laws to represent you . . . .

The district court's advisory meets the requirements under Rule 27.04. All the court was required to do was advise Langston that he had a right to "a lawyer, including an appointed lawyer" if Langston could not afford one. Minn. R. Crim. P. 27.04, subd. 2(1)(c)a. The court did exactly that when it advised Langston that he had the right to be "represented by a lawyer licensed under the state laws of Minnesota." Because the court adequately advised Langston of this right, it did not commit any error and Langston fails to establish the first part of the plain-error analysis.

III. Langston adequately waived his right to an attorney.

Next, Langston argues that the district court did not obtain a valid wavier of his right to counsel, which would require us to reverse his probation revocation. Even in the probation-revocation process, defendants have the right to be represented by an attorney. *State v. Ferris*, 540 N.W.2d 891, 893 (Minn. App. 1995). And although the right to counsel is a constitutional requirement, it can be surrendered in three ways: (1) waiver, (2) waiver by conduct, and (3) forfeiture. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). If a defendant chooses to give up his right to counsel, there are certain procedural safeguards in place to ensure the defendant understands the gravity of this decision. Those safeguards require a defendant to knowingly, intelligently, and voluntarily waive the right. *State v. Osborne*, 715 N.W.2d 436, 443-44 (Minn. 2006). When the facts are undisputed—such as in Langston's case—we review a defendant's waiver of counsel de novo. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012).

Determining if a defendant adequately waived his right to counsel depends on the unique facts and circumstances of each case. *Id.* at 884-85. We consider factors such as

the defendant's background, his experience, and his conduct. *Id*. at 889 (citing *State v. Worthy*, 583 N.W.2d 270, 275-76 (Minn. 1998)). When allowing a defendant to waive the right to counsel, district courts should have an on-the-record inquiry with the defendant to ensure that he understands the charges against him, the possible punishments he faces, and anything else that would be important for the defendant to know in making the decision to waive an attorney. *Id.* Still, a district court's failure to have this on-the-record inquiry does not necessarily mean the defendant's revocation should be reversed. If the particular facts and circumstances of the case show that the waiver was valid, we will keep the waiver intact. *Id.*

At Langston's January 9, 2017 probation hearing, the district court advised him that he had "the right to be represented by a lawyer licensed under the state laws of Minnesota." If he could not afford a lawyer, the court advised, "then you can ask the court to appoint a lawyer . . . to represent you." As the court looked to schedule a future hearing, it asked,

> COURT: We can do it on Friday and you can represent yourself or if you feel you need to—
> LANGSTON: I can't represent myself, Your Honor, I am myself.
> THE COURT: Well then you go right ahead—
> LANGSTON: I will be representing Hiram Abdul Langston.

At the status hearing to check Langston's competency held just four days later, the district court again asked Langston, "Would you like a lawyer?" "No, I would not," Langston responded. "Why would I need a lawyer?" And later that month, at another hearing after Langston refused to meet with his competency evaluator, the court asked,

> COURT: Well let me ask you another question. Do you want to be represented by a lawyer here today, Mr. Hiram Abdul of the family of

> Langston, also known as the secured party, formally known as Hiram Langston?
> LANGSTON: I wasn't formally known as anyone. Um, no, I would not.
> COURT: All right.
> LANGSTON: No, thank you.

Also at this hearing, Langston objected that his probation officer was not credible. After the district court denied the objection, Langston said that he did not understand why the objection was denied. The court explained, "I can't advise you what your rights or the law is. That's subject matter for a lawyer and that's why I kept saying if you want a lawyer I will get you one. But I can't advise you what the law is."

When we view the district court's multiple inquiries with Langston, the language used in those inquiries, Langston's overall behavior, and the whole context of the proceedings, we are convinced that Langston knowingly, intelligently, and voluntarily waived his right to counsel. We acknowledge that the district court's inquiries with Langston about waiving his right to an attorney were somewhat atypical, but we observe that this is likely explained by Langston's conduct rather than a lack of diligence by the district court judge. Langston's personal beliefs cultivated a chaotic court environment. We are allowed to consider Langston's conduct as an important factor in the waiver analysis.

And given the overall context and language of the court's discussions and advisories, Langston's behavior, and Langston's familiarity with the legal system, we

believe that the overall circumstances show that Langston waived his right to counsel knowingly, intelligently, and voluntarily. *Rhoads*, 813 N.W.2d at 884-85.[10]

Langston also argues that the district court failed to secure his waiver of counsel in writing as required by Minnesota Statute section 611.19 (2016) and Minnesota Criminal Procedural Rule 5.04, subdivision 1(3). But we previously determined that Rule 5 applies to first appearances in a pre-trial setting and not to first appearances in a probation-violation context—which is what we have in Langston's case.[11] And while it is true that Minnesota Statute section 611.19 imposes a written-waiver requirement, we have previously held that it is not a constitutional requirement and allowed oral, on-the-record waivers if the surrounding circumstances support it. *See State v. Nelson*, 523 N.W.2d 667, 670 (Minn. App. 1994) (determining that a criminal defendant's oral waiver of counsel was valid even in light of section 611.19's requirement that the waiver be "in writing," and citing previous cases for support); *see also Worthy*, 583 N.W.2d at 275-76 ("Whether a waiver of a constitutional right is valid depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.")

[10] Langston also argues that the district court's failure to ensure he adequately waived counsel is a structural error that requires automatic reversal of his probation revocation. A structural error is an error in a proceeding that is so severe that it triggers "automatic reversal of a conviction." *State v. Kuhlmann*, 806 N.W.2d 844, 850-51 (Minn. 2011). But we have already determined that Langston adequately waived his right to counsel, which means that the district court did not commit an error and we do not reach this argument.

[11] Even if Rule 5's pre-trial requirements applied in this case, our analysis would not change. The "in writing" requirement in Rule 5.04, subdivision 1(3), is similar to Minnesota Statute section 611.19 and our analysis would be the same for both.

(quotation omitted).[12] We further note that "[a]ny error that does not affect substantial rights must be disregarded." Minn. R. Crim. P. 31.01.

Based on the authorities discussed, we are convinced that failing to get a defendant's waiver of counsel in writing does not trigger automatic reversal of the defendant's conviction. A defendant's oral, on-the-record waiver may be valid if the surrounding circumstances justify it.[13] With this in mind, and given Langston's disruptions, the courtroom environment in this case, and the fact that the court asked Langston at least three times if he wanted a lawyer and was met with an emphatic "no" each time, we conclude that the district court did not err by failing to secure Langston's waiver in writing.

For all the reasons discussed, we conclude that Langston adequately waived his right to counsel, the district court's failure to capture that waiver in writing was not a reversible error, and the district court employed the proper procedures under Rule 27.04.[14]

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[12] The dissent also attempts to distinguish Langston's case by relying on *State v. Garibaldi* for the idea that a defendant who was not offered standby counsel did not adequately waive counsel. 726 N.W.2d 823, 831 (Minn. App. 2007). A close reading of *Garibaldi* supports our determination that Langston waived counsel based on the circumstances. This court decided *Garibaldi* by relying on a supreme court decision stressing that the waiver-of-counsel analysis is a "fact-specific examination" of the "surrounding circumstances" of each individual case, and it is not subject to a strict, checking-the-boxes approach. *Id.* at 829. The failure to offer standby counsel was just one of many variables to take into account. *Id.* at 831.

[13] We also recognize *State v. Hawanchak* where we reversed a defendant's conviction because the court failed to obtain a written waiver of counsel. 669 N.W.2d 912, 915 (Minn. App. 2003). But in *Hawanchak*, the defendant explicitly *asked* the district court for a public defender twice—which the court disregarded, and the court failed to make a record showing that the defendant waived counsel. *Id*. In contrast, the district court asked Langston at least three times if he wanted an attorney and made a thorough record of Langston's responses. Langston said "no" each time.

[14] Langston also claims that the district court should have asked him if he wanted a lawyer one final time when the court resumed his probation-revocation hearing after finding him

IV. The district court did not abuse its discretion in revoking Langston's probation.

Langston finally argues that the district court abused its discretion by revoking his probation. A district court has "broad discretion in determining if there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion." *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005) (quotation omitted). A district court abuses its discretion when "it acts arbitrarily, without justification, or in contravention of the law." *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Probation is meant to rehabilitate a defendant, so revocation should only be used as a last resort when treatment has failed. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). Before revoking probation, a district court must do three things: (1) specifically identify the condition or conditions violated; (2) find that the violation was intentional or inexcusable; and (3) find that the policies favoring probation no longer outweigh the need for confinement. *Id.*

Langston only centers his argument around the last factor of the probation-revocation analysis, that is, whether the need to confine Langston outweighed the public policies encouraging probation. He claims that the district court had alternate treatment

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competent on April 24, 2017. Certainly, this would be the preferred practice. But the Minnesota Supreme Court has held that a district court does not need to renew a defendant's waiver of counsel unless there has been a "substantial change in circumstances" after the initial waiver. *Rhoads*, 813 N.W.2d at 887. Here, the only thing that changed between Langston's previous waivers and his probation-revocation hearing is that he was found competent, and we are not aware of any authority saying that a finding of competence is a substantial change in circumstances.

and local jail-time options at its disposal that counterbalanced any reason to send him to prison. To weigh this factor, courts consider three questions:

- Is confinement necessary to protect the public from further criminal activity by the offender?
- Is the offender in need of correctional treatment which can most effectively be provided if he is confined?
- Would it unduly depreciate the seriousness of the violation if the probation were not revoked?

Id. at 251. Revoking probation cannot be a "reflexive reaction to an accumulation of technical violations," but instead, there must be a showing that the offender's behavior demonstrates that he "cannot be counted on to avoid antisocial activity." *Id.* (citation omitted).

The district court decided that incarcerating Langston outweighed the public policy benefits of probation for multiple reasons. The court started by observing that Langston has a history of violence, including a charge of disorderly conduct.[15] Next, the court mentioned Langston's refusal to cooperate with all three competency evaluations as recent evidence that Langston "violated his probation willfully and knowingly, intentionally and without justified excuse." The court also acknowledged the seriousness of the underlying crime, mentioning that Langston was originally charged with first-degree assault, which the court described as a "very, very serious offense."[16] Given the severity of the offense,

[15] The district court judge also referenced a domestic-violence report concerning Langston in explaining the decision to revoke probation.

[16] The court explained that this was a severity level nine offense that carried a minimum imprisonment of 74 months and a maximum of 103 months in prison.

his lack of cooperation with probation, his previous probation violation, his demeanor in court, and his previous history of violence, the court believed that Langston "is a danger to society" and that his treatment and counseling would be "best obtained in a confined institutional setting."

Although Langston argues that alternate treatment and local jail-time options outweighed the need to imprison him, the district court addressed this by emphasizing Langston's prior probation violation where he failed to comply with treatment. The court was also concerned that Langston's refusal to cooperate with the competency evaluator patterned behavior similar to his previous refusal to attend a required nonviolence program, which resulted in his first probation violation. And while Langston claims there is no evidence showing he was susceptible to violence, the court clearly underscored that the underlying offense was very serious and that Langston had a history of violence.

We are also mindful that the district court judge in this case was the same judge who sentenced Langston to both a dispositional and durational departure. This is the same judge who—when Langston first violated probation—gave Langston ten days in jail while keeping all other probationary terms intact and encouraged Langston to continue working on treatment. From our view of the complete record, this district judge was interested in giving Langston every opportunity to take advantage of treatment and to help Langston emerge from this process with a positive outcome and experience. Langston did not avail himself of these opportunities. The district court's decision to revoke Langston's probation was not made arbitrarily, without justification, or in contravention of the law—the requirements to find an abuse of discretion. *Mix*, 646 N.W.2d at 250.

Overall, we do not believe the district court made an error in this case. The court's competency determination was based on a thorough report. The court also properly advised Langston of his right to an attorney and Langston adequately waived that right at least three times. Finally, the court did not abuse its discretion when it found that the need for confining Langston outweighed the public-policy goals of keeping him on probation. For all these reasons, we affirm the district court's decision to revoke Langston's probation.[17]

Affirmed.

[17] Langston submitted a pro se brief in this case, and after considering his claims in that brief, we find no discernable legal argument with which this court has the authority to address. For this reason, we do not address Langston's pro se arguments. *See State v. Palmer*, 803 N.W.2d 727, 740-41 (Minn. 2011) ("Claims contained in a pro se supplemental brief with no argument or citation to legal authority in support of the allegations are deemed waived.") (internal quotation marks omitted).

REYES, Judge (dissenting)

I respectfully dissent. Appellant Hiram Abdul Langston pleaded guilty to first-degree assault—great bodily harm. The district court sentenced him to 36 months in prison, stayed execution of the sentence, and placed him on supervised probation for four years. Court-appointed counsel represented appellant from his initial appearance until sentencing.

After appellant's first probation violation, the district court held a probation-revocation hearing, where appellant was represented by court-appointed counsel. At the hearing, the district court ordered appellant to serve ten days in jail and reinstated his probation on several conditions.

Approximately two years later, appellant violated the conditions of his probation again. Appellant was not represented by counsel during the subsequent probation-revocation hearing. The record does not contain any explanation as to why appellant was not represented by court-appointed counsel even though he qualified as indigent. After appellant displayed unusual behavior during this hearing, in contrast to prior appearances, the district court ordered a psychiatric evaluation pursuant to Minn. R. Crim. P. 20.01. However, appellant adamantly refused to meet with the psychiatric examiners and then interfered multiple times at subsequent hearings, which resulted in four additional probation-revocation hearings. Appellant was not represented by counsel at any of those hearings either. The district court revoked appellant's probation and this appeal follows.

Appellant argues that the district court failed to obtain a valid waiver of counsel during the probation-revocation hearings. Appellant's argument has merit.

The Constitutions of both the United States and Minnesota guarantee criminal defendants the right to the assistance of counsel and the implied right to self-representation, U.S. Const. amend. VI; Minn. Const. art. 1, § 6; *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533 (1975), both of which extend these rights to probation-revocation hearings. *State v. Kouba*, 709 N.W.2d 299, 304 (Minn. App. 2006) (citations omitted); *see Mempha v. Rhay*, 389 U.S. 128, 135-37, 88 S. Ct. 254, 257-58 (1967) (concluding that counsel must be provided during hearings that combine sentencing and probation revocation). Because a pro se defendant relinquishes many of the traditional benefits of counsel, any waiver of the right to counsel must be made voluntarily, knowingly, and intelligently. *Faretta*, 422 U.S. at 806, 835, 95 S. Ct. at 2527, 2541. Minnesota statute and rules provide clear and explicit safeguards to ensure that criminal defendants voluntarily, knowingly, and intelligently waive their right to counsel. Minn. Stat. § 611.19 (2016); Minn. R. Crim. P. 5.04, subd. 1(4).

Minn. Stat. § 611.19 states that "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 court *shall* make a record evidencing such refusal of counsel." (emphasis added). "The canons of statutory construction provide that 'shall' is mandatory." *State v. R.H.B.*, 821 N.W.2d 817, 821 (Minn. 2012) (citation omitted); *see* Minn. Stat. § 645.44, subd. 16 (2016).

Similarly, Minn. R. Crim. P. 5.04, subd. 1(4), states that the district courts "must ensure that defendants . . . enter on the record a voluntary and intelligent written waiver of the right to counsel." Rule 5.04 also mandates that the district court advise the defendant

of the implications of self-representation, including the charges, offenses, possible punishments, that there may be defenses and mitigating circumstances, and "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." Minn. R. Crim. P. 5.04, subd. 1(4). The United States Supreme Court has made clear that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541 (quotation omitted). In addition, the Minnesota Supreme Court has emphasized the need for a "heightened degree of caution in waiver procedure," *In re welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000), and this court has consistently emphasized the importance of adhering to rule 5.04, *see State v. Garibaldi*, 726 N.W.2d 823, 830-31 (Minn. App. 2007).

The majority states that rule 5.04 applies to pre-trial initial appearances but does not apply to probation-revocation hearings. Not so. Not applying Rule 5.04 to probation-revocation hearings would violate constitutional protections of a defendant's right to counsel at all 'critical' stages of the criminal proceedings. *United States v. Wade*, 388 U.S. 218, 227, 87 S. Ct. 1926, 1932 (1967). Furthermore, it runs contrary to this court's precedent. This court has applied rule 5.04 to proceedings conducted after the pre-trial stage. *See State v. Maddox*, 825 N.W.2d 140, 147 (Minn. App. 2013) (applying rule 5.04 to a restitution hearing); *State v. Balma*, 549 N.W.2d 102, 104 (Minn. App. 1996) (applying rule 5.04 to a probation-revocation hearing). And the plain language of rule 27.04 expressly states that rule 5.04 governs the appointment of counsel for an indigent

probationer. Minn. R. Crim. P. 27.04, subd. 2(2). The record is clear that appellant could not afford counsel. When a defendant is charged with a felony, the appointment-of-counsel process under Rule 5.04 includes the waiver of counsel. Minn. R. Crim. P. 5.04, subd. 1(4).

Here, appellant did not explicitly waive his right to counsel because the district court failed to meet the requirements of Minn. Stat. § 611.19, rule 5.04, or the precedent that binds it. Beginning in January of 2017, appellant had five probation-revocation hearings where the district court did not obtain or attempt to obtain a written waiver of counsel from appellant. The district court did not conduct an on-the-record colloquy regarding the implications of the waiver, including the advantages and disadvantages of self-representation, prior to concluding that appellant had waived counsel. *See* Minn. R. Crim. P. 5.04, subd. 1(4); *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541. Additionally, the district court did not appoint advisory counsel to assist appellant after it determined that he had waived counsel. *See* Minn. R. Crim. P. 5.04, subd. 2 (permitting appointment of advisory counsel to combat concerns of "the potential disruption by the defendant").

During the first hearing, after appellant made confusing remarks about his wish to appear pro se that did not unequivocally waive his right to counsel, the district court asked no further questions. At the second hearing, the district court asked whether appellant would like a lawyer. When appellant said no, the district court ended the conversation without answering appellant's question, "why would I need a lawyer?" At the third hearing, appellant asked the district court a question about contract law. The district court answered, "[t]hat's subject matter for a lawyer and that's why I kept saying if you want a

lawyer I will get you one." There was no discussion of appellant's right to counsel or a waiver that occurred during the fourth and fifth hearings. Thus, although the district court expressed some general concerns about appellant proceeding without counsel, it did not rise to the level of the advice required to validly waive counsel, such as the implications of self-representation.

Nor did appellant implicitly waive his right to counsel by conduct. Waiver by conduct "occurs if a defendant engages in dilatory tactics after he has been warned that he will lose his right to counsel." *State v. Jones*, 772 N.W.2d 496, 505 (Minn. 2009). "The same colloquy required for affirmative waivers must also be given before a defendant can be said to have waived his right to counsel by conduct." *Id.* at 505. Again, no such on-the-record colloquy occurred here. The record also does not indicate whether appellant understood the dangers and disadvantages of representing himself. *See State v. Worthy*, 583 N.W.2d 270, 276 ("[T]o determine whether a waiver of the right to counsel is knowing, intelligent, and voluntary, [district] courts should comprehensively examine the defendant regarding the defendant's comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts relevant to the defendant's understanding of the consequences of the waiver.") (quotation omitted). Unlike the defendants in *Worthy* and *State v. Brodie*, 532 N.W.2d 557 (Minn. 1995), appellant did not unequivocally terminate court-appointed counsel. In addition, appellant was not offered the benefit of advisory counsel after the district court determined that he had waived counsel. *See Garibaldi*, 726 N.W.2d at 831 (determining no valid waiver when defendant did not have advisory counsel). *See also Worthy*, 583 N.W.2d at 276 (valid waiver when defendant

terminated court-appointed counsel and had advisory counsel); *Brodie*, 532 N.W.2d at 557 (Minn. 1995) (same).

Appellant unquestionably engaged in dilatory conduct during the probation-revocation hearings, and I commend the district court for its patience in dealing with appellant throughout the proceedings. However, appellant was never asked for and did not provide a written waiver of counsel nor was he informed of the consequences of his waiver as required by U.S. Supreme Court and Minnesota precedent, Minn. Stat. § 611.19, and rules 5.04 and 27.04. Because appellant neither explicitly nor implicitly waive his right to counsel, I would reverse.[18]

[18] Because I would reverse and remand due to the lack of a valid waiver by appellant, I do not address appellant's additional arguments raised in this appeal.