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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS**

A22-1091

A22-1093

State of Minnesota,
Respondent,

vs.

Gerald Willy Dixon,
Appellant.

Filed May 22, 2023
Reversed and remanded; motion granted
Frisch, Judge

Scott County District Court
File Nos. 70-CR-21-5831, 70-CR-21-6344

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

Ronald Hocesvar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney,
Shakopee, Minnesota (for respondent)

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

Considered and decided by Frisch, Presiding Judge; Bjorkman, Judge; and Jesson,
Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

In this consolidated appeal of two matters where appellant was convicted of fourth-degree assault, appellant argues that he did not waive his right to counsel in either matter.

Appellant also moves to strike portions of the state’s brief referencing purported facts not included in the record on appeal. Because appellant did not waive his right to counsel in either matter, we reverse and remand both matters for new trials. And because the state’s brief references purported facts not contained in the record on appeal, we grant appellant’s motion to strike.

FACTS

On April 26 and May 11, 2021, respondent State of Minnesota filed two separate complaints against appellant Gerald Willy Dixon related to allegations of two distinct incidents of fourth-degree assault for transferring bodily fluids onto a correctional-facility employee.¹ *See* Minn. Stat. § 609.2231, subd. 3(2) (2020). The state separately prosecuted each incident.

Dixon thereafter appeared before the district court on multiple occasions. In addition to the two fourth-degree assault matters that are the subject of this appeal, Dixon also had multiple other criminal charges pending in separate court files, and the district court sometimes addressed varying combinations of Dixon’s pending criminal matters in the same proceeding.

The first relevant court appearance for these appeals occurred on April 28, 2021, and related to the second incident. During that appearance, the district court informed

¹ We refer to district court file number 70-CR-21-6334 as the “first incident” because the incident occurred first in time. We refer to the second incident in time, district court file number 70-CR-21-5831, as the “second incident.” We note that the charges for the second incident were brought before charges for the first incident, and Dixon’s district court appearances involved one incident, both incidents, or a combination of the incidents related to this appeal and other pending matters not part of this appeal.

Dixon, “You have the right to be represented by an attorney. If you could not afford an attorney, you could apply for the services of the public defender’s office.” The district court set bail and then inquired about representation:

THE COURT: Then, Mr. Dixon, regarding representation. Do you intend to represent yourself, apply for the public defender’s office, or hire an attorney?

MR. DIXON: I’ll do this myself right now.

THE COURT: Okay. Just know that you can apply for the public defender’s office. Obviously these are very serious matters. Uh, I’m not sure what you’re looking at as far as a commitment or not, uh, but it would be very helpful if you had legal guidance in this matter.

The district court then scheduled Dixon’s next appearance for the second incident. Although Dixon did not appear at the next hearing, the state made the following request: “And, Judge, I actually would also ask the court to look at the issue of appointing standby counsel. I know that Judge Metzen had an Order, and they have contacted her, I think, but that’s still something that hasn’t been resolved yet.” The district court indicated that it would attempt to provide an answer prior to another hearing scheduled for the following day.

The following day, Dixon appeared for a combined hearing involving the second incident and two other criminal files unrelated to this appeal. Dixon was not represented by counsel. At the hearing, the district court stated:

I’ve indicated to [Dixon] that I’m going to sign an order today or tomorrow appointing standby counsel to help represent him, that we then need to get all the discovery to that lawyer, and that that lawyer will be in touch, hopefully, by the end of this week if not sooner.

Dixon confirmed, “So the lawyer that you had to represent me he’s going to be representing me or be standby counsel for all three of these matters?” The district court responded that Dixon’s understanding was correct. The next day, the district court appointed standby counsel in the matter related to the second incident.

With respect to the first incident, Dixon appeared before the district court for the first time on May 11. Dixon was not represented by counsel. The district court asked Dixon whether he had heard from his standby counsel. Dixon replied:

MR. DIXON: He’s on vacation until Monday so I don’t know how he’s going to come see me or do anything with me.

THE COURT: Okay. I know he’s around. So let me figure that part out. I know when I sent him an email that he planned to appear Thursday morning at 9:00.

MR. DIXON: You know I don’t want him representing me, right? Like, I don’t want no—you know, he could be—I don’t know if—is he my standby counsel or something?

THE COURT: Yep. I know you don’t want a lawyer. And that’s why I’m going to appoint him as standby counsel. He’s extremely smart. He tries cases. And so I’m going to have him there as an aid to you.

On May 13, the parties appeared for a combined hearing consisting of a continued first appearance in the first incident and an omnibus hearing in the second incident. Dixon was present with standby counsel, who had been appointed in the matter related to the second incident.²

² The record on appeal does not contain an order formally appointing standby counsel in the case related to the first incident, although it appears that standby counsel appeared with Dixon in those proceedings, including at trial.

Both matters proceeded to separate jury trials, and Dixon represented himself during all proceedings related to both matters. The jury found Dixon guilty of fourth-degree assault for both the first and second incidents. The district court sentenced Dixon to 22 months in prison for the first incident and 14 months in prison for the second incident.

Dixon appeals both matters.

DECISION

Dixon argues that he did not validly waive his right to counsel in either matter because (1) he did not expressly waive his right to counsel and (2) the facts and circumstances do not demonstrate an intention to waive his right to counsel. We agree.

The United States and Minnesota Constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Minn. Const. art. I, §§ 6, 7. A defendant may waive the right to counsel but 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).

The Minnesota Rules of Criminal Procedure set forth the required process that a district court must follow when a defendant charged with a felony wishes to waive the right to counsel. *See* Minn. R. Crim. P. 5.04, subd. 1(4). A district court must advise the defendant of the “nature of the charges,” “all offenses included within the charges,” the “range of allowable punishments,” the facts that “there may be defenses” and that “mitigating circumstances may exist,” 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.” *Id.*, subd. 1(4)(a)-(f). A defendant must ordinarily complete a written waiver of the right to counsel. *Id.*, subd. 1(4) (stating that defendant must enter written waiver or otherwise waiver must be made on the record); Minn. Stat. § 611.19 (2022) (“[W]aiver shall in all instances be made in writing, signed by the defendant, except . . . if the defendant refuses to sign the written waiver.”).

The district court failed to obtain from Dixon a waiver of his right to counsel in either matter. The record does not contain any written waiver of the right to counsel from Dixon.³ The transcripts of all of the proceedings involving the first and second incidents do not reflect that the district court advised Dixon of any of the required information described in Minn. R. Crim. P. 5.04, subd. 1(4).⁴

³ We note that the order appointing counsel in the second incident includes an entry indicating that Dixon waived his right to counsel on April 12, 2021, and, at oral argument, the state argued that Dixon waived his right to counsel on that date. Dixon could not have waived his right to counsel for the matters on appeal on April 12 because the underlying incidents both occurred after that date. Charges for the second incident, which was charged first, were not brought until two weeks later, on April 26. And the state did not charge Dixon for first incident until May 11. To the extent the state is arguing that a waiver in a previously charged matter necessarily constitutes a waiver in a separate, subsequent matter that has not been charged, we are aware of no authority in any jurisdiction that would support such a conclusion.

⁴ It appears that the district court held off-the-record discussions forming the basis for certain decisions, including the decision to convert a first appearance to an omnibus hearing and the decision to appoint standby counsel in the matter related to the second incident. We are unable to discern whether Dixon was properly advised of his rights in discussions where the district court did not maintain a record. *See State v. Maddox*, 825 N.W.2d 140, 147 (Minn. App. 2013) (“A defendant is entitled to a new trial when the absence of a record of a defendant’s waiver of counsel renders it impossible to determine upon appellate review whether a waiver was knowing and intelligent.” (quotations omitted)).

Nor do the circumstances demonstrate that Dixon waived his right to counsel. A waiver of the right to counsel may be constitutionally valid even if the waiver is not in writing “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). The validity of the waiver of the right to counsel depends on “the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *State v. Worthy*, 583 N.W.2d 270, 275-76 (Minn. 1998) (quotation omitted). “[T]he record must demonstrate among other things that the defendant’s waiver is made with eyes wide open.” *Rhoads*, 813 N.W.2d at 888 (quotation omitted). “A defendant’s waiver is made with eyes open when he comprehends several matters, including the possible punishments.” *Id.* (quotation omitted).

“We review a finding that a defendant validly waived his right to counsel for clear error.” *State v. Bonkowske*, 957 N.W.2d 437, 440 (Minn. App. 2021) (citing *Worthy*, 583 N.W.2d at 276). “When the facts are undisputed, however, the question of whether a waiver-of-counsel was knowing and intelligent is a constitutional one that is reviewed de novo.” *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. *See Bonga v. State*, 765 N.W.2d 639, 643 (Minn. 2009). Against this backdrop, we consider several circumstances to determine whether Dixon validly waived the right to counsel.

Pre-Waiver Counsel Participation and Termination

We first consider whether Dixon was represented by counsel before deciding to proceed pro se. *See State v. Garibaldi*, 726 N.W.2d 823, 828 (Minn. App. 2007)

(recognizing that, in previous cases affirming waiver of counsel despite the district court’s failure to conduct on-the-record colloquy on the decision, the defendants had “either extensive contact with defense attorneys or stand-by counsel or both”). “When a defendant has consulted with an attorney prior to waiver, a [district] court could ‘reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel.’” *Worthy*, 583 N.W.2d at 276 (quoting *State v. Jones*, 266 N.W.2d 706, 712 (Minn. 1978)).

The record reflects that Dixon was not represented by counsel at any point in time in either matter. We therefore do not weigh this consideration in favor of concluding that Dixon validly waived his right to counsel.

The state argues that we should consider a statement made on the record in the second incident that, in a different matter not the subject of this appeal, Dixon was represented by counsel at one point during that proceeding but later chose to proceed without counsel. As a threshold matter, we observe that this statement was made by the district court at a hearing where Dixon was not present. The record on appeal contains no express dismissal of counsel *from Dixon* in any matter. Even so, we cannot presume from the district court’s statement or any other circumstance evident from the record on appeal that Dixon was advised of “the benefits of legal assistance and the risks of proceeding without it . . . in detail” with respect to the two matters that are the subject of *this* appeal. *Worthy*, 583 N.W.2d at 276 (quotation omitted). And to the extent the state asks us to assume the constitutional validity of Dixon’s prior discharge of counsel in any other matter, we decline to do so because we cannot “base [our] decision on matters outside the record

on appeal” or consider “matters not produced and received in evidence below.” *State v. Patzold*, 917 N.W.2d 798, 812 (Minn. App. 2018) (quotation omitted), *rev. denied* (Minn. Nov. 27, 2018).

Because Dixon was not represented by counsel at any time in the matters subject to this appeal and we cannot presume that Dixon was advised of the consequences of self-representation in these matters, this consideration does not weigh in favor of determining that Dixon validly waived his right to counsel.

Standby Counsel

We also consider whether Dixon had the benefit of standby counsel. *See Garibaldi*, 726 N.W.2d at 830 (noting that the defendant was not “offered the benefit” of standby counsel); *State v. Krejci*, 458 N.W.2d 407, 412-13 (Minn. 1990) (noting that the court appointed the defendant’s second public defender as standby counsel); *Haggins*, 798 N.W.2d at 91 (noting that the district court offered standby counsel).

The district court appointed Dixon standby counsel. Standby counsel did not accompany Dixon to all of his court appearances in these matters, and the record reflects that Dixon had not communicated or consulted with standby counsel before certain court appearances. The record on appeal also shows that standby counsel attended a plea negotiation and both trials and corresponded with the district court on Dixon’s behalf on a few occasions regarding scheduling matters and continuances. And standby counsel assisted Dixon with discovery matters, describing a pending motion to the district court, explaining the relevance of witness testimony, and deciding whether to call a witness at

trial. The district court consistently encouraged Dixon to utilize his standby counsel throughout the proceedings.

But we are not persuaded that the appointment of standby counsel necessitates a determination that Dixon validly waived his right to counsel at all critical stages of the proceedings in these matters. *See State v. Rosenbush*, 931 N.W.2d 91, 94-95 (Minn. 2019) (stating that the right to counsel applies to all critical stages of a criminal prosecution); *Maddox*, 825 N.W.2d at 144 (same). We note that the record demonstrates that Dixon may have been confused about the role of standby counsel, at one time stating his understanding that standby counsel was appointed to “represent me . . . or be standby counsel” and at a later hearing asking the district court to confirm that standby counsel was acting in that capacity. And the district court’s initial explanation of the role of standby counsel was limited: “He’s extremely smart. He tries cases. And so I’m going to have him there as an aid to you.” We therefore do not consider the presence of standby counsel in these matters as a factor suggesting that Dixon knowingly and intelligently waived his right to counsel.

District Court Engagement

We also consider the district court’s statements to Dixon about the right to counsel. Reminders by the district court of the right to counsel followed by repeated refusals of representation may indicate that a defendant’s choice to proceed without counsel was knowing and intelligent. *Cf. Burt v. State*, 256 N.W.2d 633, 635-36 (Minn. 1977) (concluding that a waiver was not adequately shown to be intelligent where the defendant was of lower-than-average intelligence and the court should have made a more detailed inquiry as to the defendant’s capacity); *Krejci*, 458 N.W.2d at 412 (“The trial court told

defendant that if he changed his mind, he could have a public defender at any time.”); Minn. R. Crim. P. 5.04, subd. 1(1) (stating that as part of the notice of the right to counsel, “[t]he court must also advise the defendant that the defendant has the right to request counsel at any stage of the proceedings”). We may also consider a district court’s confirmation of a defendant’s decision to waive the right to counsel, offers of standby counsel, and explanation of the stakes in the proceeding. *Haggins*, 798 N.W.2d at 91.

The district court’s engagement with Dixon regarding representation by counsel was minimal. The district court informed Dixon at the first hearing for the second incident of his right to counsel and suggested he consider employing counsel. Dixon stated that he wanted to represent himself and repeatedly confirmed that standby counsel was not representing him. But after these initial hearings, the district court did not revisit the topic except for on one occasion, when the district court asked Dixon whether he intended on trying a case himself or whether standby counsel would try the case. The district court said, “I want to make sure that you know what you’re getting yourself into and that—that I can help you get to where you need to be, whatever that means.” The record for both matters does not reflect that the district court further engaged with Dixon about his decision to proceed pro se at trial or whether he understood the consequences of that choice. This factor therefore does not weigh in favor of a determination that Dixon validly waived his right to counsel.

Prior Experience

We also consider Dixon’s familiarity with the criminal justice system, which may have diminished the need for a detailed, on-the-record colloquy regarding the choice to

waive counsel. *See Worthy*, 583 N.W.2d at 276. The circumstances may show a defendant's understanding of what is "at stake" at trial. *Krejci*, 458 N.W.2d at 413 (noting that the defendant's "letters to the court also show him to be an articulate, intelligent man who understood the legal system and what was at stake at his trial").

The record reflects that Dixon is familiar with the criminal justice system. It is apparent from the record that the district court judges handling these matters were familiar with Dixon. The record contains references to Dixon's other then-pending matters and a prior criminal history. And Dixon actively advocated for himself in certain matters on appeal. But we are not persuaded that the record here shows that Dixon understood what was at stake *in these matters* despite his prior experience with the criminal justice system. *Cf. Haggins*, 798 N.W.2d at 89, 91 (noting that the defendant "on at least two occasions" stated that he had successfully represented himself in another matter and "that he would do so again" and proceeded pro se even though the district court explained the circumstances that made the current case different from the prior case).

Our review of the record demonstrates that, although Dixon may have been familiar with the criminal justice system, the circumstances do not indicate that he understood that he had a right to counsel at all critical stages of the proceedings, that he knowingly waived his right to counsel at all critical stages of the proceedings, or that the need for a detailed and recorded colloquy regarding the decision to waive the right to counsel was diminished. The record does not reflect that Dixon understood the potential consequences of waiving the right to counsel for these particular charges. In response to the inquiry from the district court about representation at the first appearance for the second incident, Dixon stated that

he would represent himself “right now.” At the same hearing, the district court told Dixon that it was unsure of the potential range of consequences for the charged offense and suggested that Dixon should seek legal advice about those consequences. The record does not reflect that the district court ever inquired as to whether Dixon had been so advised. Dixon did not affirmatively indicate that he understood the consequences of self-representation in these two matters. And the record is unclear as to whether Dixon actually understood the distinction between being represented by counsel and having standby counsel. When Dixon next appeared for the second incident, he asked the district court whether the lawyer identified by the judge as standby counsel will “represent me” or be “standby counsel.” At a later hearing, which was the first hearing for the first incident, Dixon informed the district court that he did not want “him” (meaning standby counsel) to represent Dixon. But Dixon never informed the district court on the record that he did not want to be represented by counsel at all stages of the proceedings. Notwithstanding Dixon’s general familiarity with the criminal justice system, the record does not reflect that Dixon’s experience was such that he possessed sufficient knowledge and understanding required for us to conclude that he validly waived his right to counsel.

These facts and circumstances not only fail to show a valid waiver of counsel, but also underscore the importance and necessity of obtaining a procedurally valid waiver from a defendant who wishes to represent themselves. “[A] thorough and careful waiver procedure will ultimately result in conservation of time and treasure, and will reduce the emotional toll extracted from all participants in the judicial system. Conversely, acceptance of an

inadequate waiver invites not only appeal, but reversal and remand for a new trial.” *Garibaldi*, 726 N.W.2d at 831.

We are mindful of the challenges district courts face in managing a significant volume of cases and the “very real time pressures present each day.” *Id.* But when a defendant charged with a felony wishes to proceed pro se, a district court is obligated *in every individual case* to ensure that a defendant is fully advised of their right to counsel and the consequences of waiving that right. *See* Minn. Const. art. I, § 6 (stating that in all criminal prosecutions “[t]he accused shall enjoy the right . . . to have the assistance of counsel in his defense”); *Hawanchak*, 669 N.W.2d at 915 (“[I]t [is] the duty of the district court to ensure that appellant’s waiver of counsel [is] knowing and intelligent.”). Because Dixon did not validly waive his right to counsel in either matter, we must reverse the convictions and remand for new trials.⁵

⁵ Dixon also submitted a pro se supplemental brief identifying the following issues: (1) that the district court abused its discretion by denying his request for a lesser-included-offense instruction in both matters; (2) that the district court erred by excluding certain email evidence and related questions as unfairly prejudicial to Dixon at the trial for the first incident; (3) that the district court erred by reconsidering its decision to dismiss a count charged in the second incident and permitting the state to amend its complaint; (4) there was insufficient evidence that the victim in the second incident was an employee of a correctional facility pursuant to Minn. Stat. § 609.2231, subd. 3 (2020); and (5) that the district court abused its discretion by permitting certain testimony from the second-incident victim. Because we conclude that Dixon did not validly waive his right to counsel and reverse and remand for new trials, we need not reach the merits of those arguments. We note that to the extent Dixon argues that the evidence was insufficient to show that the victim in the second incident was not a corrections officer, that assertion is belied by the victim’s direct testimony that at the time of the incident, they were “the state officer” employed by Scott County and working in the Scott County jail, charged with the responsibility of performing health and welfare checks required by the department of corrections for safety purposes. We conclude this direct testimony is sufficient evidence

Motion to Strike

Finally, Dixon moves to strike portions of the state’s brief referencing matters not at issue or part of the record on appeal. Dixon specifically requests that we strike those portions of the state’s brief referencing documents, hearing transcripts, charges, appeals, or alleged statements or actions occurring in other files. The appellate record is limited to “documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any.” Minn. R. Civ. App. P. 110.01. We do not base our decision on matters outside the record on appeal. *State v. Dalbec*, 594 N.W.2d 530, 533 (Minn. App. 1999); *see Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). To the extent that the state’s brief references matters not on appeal and documents and transcripts that are not part of the record on appeal, we grant Dixon’s motion.

Reversed and remanded; motion granted.

showing that the victim in the second incident was an employee of a correctional facility under Minn. Stat. § 609.2231, subd. 3.