

*This opinion is nonprecedential except as provided by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
A23-1801**

State of Minnesota,
Respondent,

vs.

Derrick Lee Preston,
Appellant.

**Filed October 7, 2024
Affirmed
Connolly, Judge**

Hennepin County District Court
File No. 27-CR-22-21686

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

Mary F. Moriarty, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Connolly, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

In this direct appeal from the judgment of conviction for unlawful possession of a firearm, appellant argues that the district court erred by removing him from the courtroom

for being disruptive on the second day of trial and continuing the trial in absentia without first appointing advisory counsel. We affirm.

FACTS

Respondent State of Minnesota charged appellant Derrick Lee Preston with unlawful possession of a firearm and felony threats of violence for offenses committed on October 26, 2022.¹ In April 2023, the district court granted appellant's request to discharge his public defender and proceed pro se. But the district court denied appellant's request for advisory counsel because it did not have concerns about appellant's ability to represent himself, and appellant had confirmed that he did not want a public defender's representation.

Prior to trial, the district court denied appellant's renewed request for advisory counsel. A two-day jury trial then started on July 25, 2023. Appellant participated in voir dire, jury instructions, and gave an opening statement. The district court admitted 24 exhibits and the jury heard from six witnesses. On direct examination, Officer C.M. testified that on the offense date, he and his partner, Officer J.M., were on routine patrol when the complainant signaled for assistance. The complainant indicated that appellant had a gun. Officer C.M. observed appellant throw "an object" into "a patch of grass" where he later recovered a revolver. During a search incident to arrest, Officer C.M. located a "nylon holster for a revolver-type handgun" on appellant's person. When appellant arrived at the police station, Officers C.M. and J.M. observed the holster on the floor of the squad

¹ Respondent dismissed the felony threats of violence charge before trial.

car. On cross-examination, appellant asked Officer C.M. approximately 22 questions before accusing Officer C.M. of perjury and filing a false police report; but appellant was nevertheless permitted to continue questioning. After the jury was dismissed for the evening, the district court reminded appellant that he was prohibited from testifying while cross-examining a witness.

The following morning, the district court explained impeachment to appellant, to which he responded, “I’m not going for that.” The district court reiterated that if appellant did not follow the court’s rulings, he would “not be able to go forward.” While cross-examining Officer C.M., for a second time, appellant ignored the district court’s two formal warnings to follow its instructions and accused Officer C.M. of lying. The district court called for a recess, and asked that appellant be removed from the courtroom.

Upon resuming proceedings, and with appellant present, the district court summarized its earlier decision:

[Appellant] was disruptive, loud, argument[at]ive with the Court, interrupted, did not abide by the Court’s evidentiary rulings, continued to make comments . . . and statements on the record in front of the jury regarding evidence that was not admissible. Prior to that, I had given [appellant] two very specific warnings and so [appellant] should consider the last a warning, a third official warning so that if he does not abide by the Court’s rulings, that if he continues to interrupt the other counsel, interrupt the Court, comment and give narrative and comments as opposed to questioning, this is how the Court will proceed. I will stop his questioning of the witness. And, if appropriate, it’s possible I’ll make a finding that his questions are not relevant, cumulative, and not allow him any additional questioning of that witness. It is also possible at this point, given he’s had three official warnings, under case law, the Court may make a finding under *Illinois versus Allen* and *State*

versus Gillam that he be removed from this trial and the trial may proceed without him being present.

Illinois versus Allen did uphold the court proceeding with a pro se defendant in absentia where his behavior was so disruptive. So, [appellant], *I hope you understand what the rules are going forward and the consequences of what you not abiding by them may be.* At this time, I am going to allow [appellant] one more opportunity to complete his cross-examination of [Officer C.M.]. However, if I find that his next question is not allowed and if he does not abide by my ruling, then I will not allow him any additional questioning of this witness.

(Emphasis added.) The district court later ended appellant's continued cross-examination of Officer C.M. because he again accused Officer C.M. of lying.

After appellant interrupted the prosecutor's redirect-examination, the district court gave appellant a "final warning." Appellant remained in the courtroom and later conducted recross-examination. But appellant continued to testify and ignore the district court's evidentiary rulings. When the district court warned appellant that questioning would stop if his behavior continued, appellant addressed the jury directly:

APPELLANT: Jury, I have my constitutional rights.

THE COURT: All right. At this time –

APPELLANT: I have my constitutional rights. She's violating my Sixth Amendment.

THE COURT: . . . I'm going to count to three –

APPELLANT: I'm going to read it to ya'll.

THE COURT: -- and if you don't stop, you will be removed.

APPELLANT: The accused, I have the right –

THE COURT: One –

APPELLANT: -- to be confronted –

THE COURT: -- two –

APPELLANT: -- with the witnesses against me.

THE COURT: -- three. Remove [appellant] from the courtroom.

APPELLANT: Ain't no witness. They don't have no witness.

That's why she's getting upset. She's violating my Sixth Amendment right, my constitutional right.

At that point, the district court had appellant removed from the courtroom. The district court explained that appellant had “waived his right by conduct to be present in the courtroom for his trial.” It also instructed the jury to disregard appellant’s removal when deciding his guilt or innocence.

Respondent called two more police officers, Officer J.M. and Sergeant B.R. Officer J.M. testified consistent with Officer C.M.’s testimony. Sergeant B.R. testified that appellant is ineligible to possess a firearm. Respondent also called three experts. One expert testified that appellant’s DNA was present on the handgun, but the others could not determine whether appellant’s DNA was present on the handgun’s bullets or the holster.

After the close of respondent’s case, appellant was permitted to enter the courtroom. The district court informed appellant of who had testified, what exhibits were received, and the proposed jury instructions. Appellant did not call any witnesses and invoked his right to remain silent. After ignoring the district court’s warnings to follow instructions during his closing argument, appellant was again removed from the courtroom.

Appellant was permitted to return for the jury’s verdict. The jury found appellant guilty of unlawful possession of a firearm. Appellant was sentenced to 60 months in prison.

This appeal follows.

DECISION

I. The district court did not abuse its discretion by removing appellant from the courtroom and continuing the trial in absentia.

The United States Constitution and the Minnesota Rules of Criminal Procedure both protect a defendant's right to be present during trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (emphasizing that the Sixth Amendment's Confrontation Clause guarantees a defendant's right "to be present in the courtroom at every stage of his trial"); *see also* Minn. R. Crim. P. 26.03, subd. 1(1). But a defendant may lose that right when, "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Allen*, 397 U.S. at 343; *see also* Minn. R. Crim. P. 26.03, subd. 1(2). A defendant may return if he "is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Allen*, 397 U.S. at 343. Appellate courts review a district court's decision to proceed with a trial in absentia for an abuse of discretion. *State v. Gillam*, 629 N.W.2d 440, 450 (Minn. 2001).

Appellant argues that the district court abused its discretion by conducting trial in his absence because his conduct does not compare to other cases in which removal was warranted. And he argues that the district court should have appointed advisory counsel before removing him, a pro se defendant, from the courtroom. As such, appellant argues that he is entitled to a new trial. Appellant's arguments are unavailing.

We turn first to appellant's argument that he was improperly removed from his trial for disruptive conduct. In removing appellant from the courtroom, the district court relied on two cases: *Allen* and *Gillam*. In *Allen*, the United States Supreme Court held that Allen was properly removed from his trial for disruptive behavior after he threatened the judge, tore up his attorney's files, and threw the papers on the floor. 397 U.S. 340, 347 (1970). Similarly, in *Gillam*, the Minnesota Supreme Court determined that the district court did not abuse its discretion by removing Gillam from the courtroom three times based on his disruptive conduct. 629 N.W.2d at 451-52. First, Gillam, who was confined to a wheelchair, was removed for threatening to throw his urine bag at the courtroom deputies. *Id.* at 447. After returning to the courtroom, Gillam was removed after he disobeyed court instructions, swore at the judge, and made obscene gestures and comments to the entire courtroom. *Id.* at 451. Finally, after returning for a second time, Gillam was removed for the rest of the trial because he disrupted the state's opening argument. *Id.* at 447-48.

Here, the district court stopped appellant's trial three times. First, on the second day of trial, the district court held a 30-minute recess after appellant repeatedly accused Officer C.M. of perjury and filing a false police report. At that point, appellant had been warned after the first day of trial, and at the start of the second day, that he was not allowed to testify while questioning a witness. And despite accusing the district court of violating his constitutional rights, appellant was permitted to cross-examine Officer C.M. once more.

Appellant continued to ignore the district court's evidentiary rulings, including the procedure for refreshing Officer C.M.'s recollection. The district court twice warned appellant that he needed to change his behavior. After receiving a third warning for

accusing Officer C.M. of perjury and telling the jury that “the Judge should be telling you that’s perjury. That’s up to five years,” appellant was removed from the courtroom. The district court explained to the jury that it would give appellant “a number of more opportunities” to be present and held a 20-minute recess. After the recess, the district court explained that appellant had been removed for refusing to abide by the district court’s evidentiary rulings, referencing inadmissible evidence, providing narrative testimony, and ignoring three specific warnings to follow courtroom rules.

The district court permitted appellant to cross-examine Officer C.M. for a third time but warned appellant that if he failed to follow its ruling, questioning would end. Appellant again gave narrative testimony and accused Officer C.M. of lying. The district court concluded appellant’s cross-examination but allowed him to remain in the courtroom. When appellant interrupted respondent’s redirect examination, the district court gave appellant a “final warning” to correct his inappropriate behavior. On recross-examination, appellant again provided narrative testimony despite the district court’s repeated warnings. Rather than correct his behavior, however, appellant told the jury that the district court was violating his Sixth Amendment rights. The district court counted to three before removing appellant from the courtroom.

The district court explained to the jury that appellant had been removed for disruptive conduct; interrupting the district court; disregarding evidentiary rulings; continuing to ask improper questions; disrespecting the courtroom process; and providing narrative testimony despite approximately 20 admonishments, five warnings, and the opportunity to resume cross-examination. And appellant had responded to adverse rulings

by standing up; interrupting; and refusing to sit down while speaking loudly, becoming argumentative, and holding his papers above his head.

After the close of respondent's case, appellant was permitted to return to the courtroom. Appellant had a chance to call witnesses and exercised his right not to testify. During appellant's seven-page closing argument, the district court repeatedly warned him not to discuss evidence outside the record, state that he could not defend himself, instruct the jury on legal matters, and accuse the complainant—who did not testify at trial—of lying to the police. When appellant did not correct his behavior, the district court had appellant removed from the courtroom.

As in *Gillam*, the district court gave appellant many warnings and multiple chances to comport himself respectfully. *See Gillam*, 629 N.W.2d at 452. And like *Allen*, the district court removed appellant when it was clear that he did not intend to comport himself. *See, e.g., Allen*, 397 U.S. at 346 (holding the defendant had waived his Sixth Amendment right to be present at trial when “his unruly conduct . . . demonstrate[d] that [he] would not have been at all dissuaded by the trial judge's use of his criminal contempt powers”). On this record, the district court did not abuse its discretion by removing appellant from the courtroom and proceeding with trial in absentia.

Appellant cites two nonbinding cases that do not persuade us otherwise. *See United States v. Ward*, 598 F.3d 1054 (8th Cir. 2010); *Tatum v. United States*, 703 A.2d 1218 (D.C. App. 1997); *see also* Minn. R. Civ. App. 136.01, subd. 1(c). In *Ward*, the district court abused its discretion because the defendant was removed from his trial before the jury was empaneled, did not receive an option to return, and was never asked whether he

could comport himself. 598 F.3d at 1054, 1059-60. Here, appellant participated in voir dire; opening statements; entering evidence; the direct and cross-examination of respondent's key witness, Officer C.M.; and closing arguments. And appellant received many opportunities to return to the courtroom.

Tatum is also distinguishable. In that case, the district court abused its discretion in removing the defendant who had laughed, nodded his head, and spoke during a witness's testimony because, while distracting, his behavior was unlikely to impede the progress of his bench trial. *Tatum*, 703 A.2d at 1220-22, 1224 (noting that a judge is more likely to disregard disruptions than a jury). Here, appellant impeded the examination of a witness, told the *jury* to consider inadmissible evidence, and delayed the trial.

We turn next to appellant's argument that because the district court failed to appoint advisory counsel, he should not have been removed from the courtroom as a pro se defendant. Under Minnesota Rule of Criminal Procedure 5.04, subd. 2, a district court "may appoint advisory counsel to assist a defendant who voluntarily and intelligently waives the right to counsel" based on concerns for fairness or trial delays. This decision is left to the district court's discretion; it is not a constitutionally protected right. *State v. Chavez-Nelson*, 882 N.W.2d 579, 587 (Minn. 2016).

Appellant cites *Walford v. State* to support his proposition that failure to appoint standby counsel for a pro se defendant shows that the district court abused its discretion by removing him from his trial. *See Walford v. State*, No. A21-1628, 2022 WL 3581806 (Minn. App. Aug. 22, 2022). *Walford* is neither binding nor persuasive. *See* Minn. R. Civ. App. 136.01, subd. 1(c). In *Walford*, this court held that it was an abuse of discretion to

remove a pro se defendant, who remained silent throughout his trial, because that behavior did not preclude the district court from continuing to hear testimony and receive evidence. *Id.* at *3-4. And we noted that the defendant’s removal had “prevented him from presenting any defense to the jury.” *Id.* at *4.

Walford is distinguishable. Before trial, appellant discharged his court-appointed public defender, proceeded pro se, requested advisory counsel, and acknowledged that discharging his attorney meant he would discharge the entire public defender office. In denying appellant’s requests for advisory counsel, the district court reasoned that it did not have concerns about appellant’s pro se status, as appellant was well prepared, understood the relevant law, and comported himself according to the court’s rules. *See* Minn. R. Crim. P. 5.04, subd. 2 (explaining that district courts may appoint advisory counsel based on concerns for fairness or delays to the trial); *see also State v. Fellegy*, 819 N.W.2d 700, 704 (Minn. App. 2012) (explaining that “pro se litigants are generally held to the same standards as attorneys and must comply with all rules of procedure”), *rev. denied* (Minn. Oct. 16, 2012). We see no abuse of discretion in the district court’s assessment and, unlike *Walford*, appellant actively participated in his trial until it became impossible to continue in his presence.

In sum, the district court did not abuse its discretion by removing appellant from the courtroom and continuing with trial in absentia. And the district court’s decision not to appoint advisory counsel does not persuade us otherwise. *See State v. Holland*, 421 N.W.2d 382, 387 (Minn. App. 1988) (“The right of self-representation gives neither

a license to abuse the dignity of the courtroom, nor a license not to comply with relevant rules of procedural and substantive law.” (quotations omitted)).

II. Appellant’s pro se argument does not warrant relief.

In a pro se supplemental brief, appellant challenges Officer C.M.’s credibility. Officer C.M.’s police report indicates that appellant threw “an object” into a grassy area. At trial, Officer C.M. testified that “the object thrown was the recovered handgun.” On appeal, appellant impliedly argues that the two statements are inconsistent because Officer C.M.’s police report did not identify the “object” thrown as the handgun.

Because appellant offers no argument or legal authority on why Officer C.M.’s testimony was not credible, his claim is forfeited. *See State v. Reek*, 942 N.W.2d 148, 165 (Minn. 2020) (“We will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority.” (quotation omitted)). But even if appellant’s claim was not forfeited, we see no reason to disrupt the jury’s implicit credibility determination when the handgun was recovered from the grassy area in which Officer C.M. observed appellant throw the “object.” *See State v. Olson*, 982 N.W.2d 491, 495 (Minn. App. 2022) (explaining that appellate courts “defer[] to the fact-finder’s credibility determinations and will not reweigh the evidence on appeal”).

Affirmed.