STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0081

State of Minnesota,
Respondent,

vs.

Chad Harold Krueger,
Appellant.

Filed December 18, 2017
Affirmed
Bratvold, Judge

Clay County District Court
File No. 14-CR-16-1342

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

Brian J. Melton, Clay County Attorney, Alexander J. Stock, Assistant County Attorney, Moorhead, Minnesota (for respondent)

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

Considered and decided by Florey, Presiding Judge; Rodenberg, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

Appellant challenges his conviction of disorderly conduct. He argues that (1) the district court abused its discretion by refusing to appoint an attorney for him; (2) the district court erroneously determined that he waived his right to counsel; and (3) his conviction violates the First Amendment because the record does not contain sufficient evidence to prove "fighting words." We affirm.

FACTS

On April 14, 2016, appellant Chad Harold Krueger was sitting in a bar. Krueger's sister-in-law, K.T., arrived at the same bar, looking for her sister. Krueger and K.T. have a strained relationship; K.T. testified that she has "avoided [Krueger] for ten years." After entering the bar, K.T. spoke to the bartender. Krueger, who was nearby, told his companion that K.T. was a "f-cking c-nt." K.T. overheard and replied, "[y]ou don't talk to me." According to K.T., Krueger began to "scream and yell" at her, calling her a "f-cking c-nt," "f-cking wh-re," and a "f-cking tw-t." She testified that Krueger repeated these insults "over and over." Officer Ryan Beattie, who was driving by with his windows open, testified that he could hear Krueger yelling.

K.T. left the bar and, at about the same time, the bartender told Krueger to leave. Outside the bar, Krueger shouted at K.T., repeating the same insults, and saying she "was so f-cking stupid that he couldn't even believe [she] was alive." Also at about the same time, Beattie parked his car nearby. K.T. approached Beattie; she was "crying and shaking" and asked Beattie if he would walk her to her car. Krueger continued to yell the same insults

about K.T. while he walked away. Beattie stopped Krueger and arrested him. The state charged Krueger with one count of disorderly conduct under Minn. Stat. § 609.72, subd. 1(3) (2016).

Over the course of the next several months, Krueger made several court appearances and submitted three applications requesting the appointment of a public defender. All of Krueger's applications were denied by separate written orders; each order had an explicit finding that he was not financially eligible. Krueger ultimately represented himself throughout his pretrial and trial proceedings.

Krueger's first application for a public defender was submitted on the date he was arraigned, May 24, 2016. His application listed his occupation as "roughneck" and stated he earned $580 per week in unemployment and had no dependents. Krueger's application identified his wife and her employment, but not her income; his application also noted some assets and expenses.[1]

The district court asked Krueger about his wife's income, and he said he had "no idea what she makes" and he did not "know why her income is part of it." After explaining that household income was relevant, the court told Krueger that his income of "[$]580 [per] week . . . exceed[ed] the guidelines" and denied his request for a public defender.[2] Krueger

[1] While Krueger submitted some additional financial information about his home, vehicles, mortgage and car payments, neither party contends that this additional financial information had a significant bearing on the issue on appeal.

[2] During Krueger's arraignment, the district court also asked if he understood the Statement of Rights form. Krueger responded "I kind of skimmed through it. I understand my rights, [y]our Honor." The form, which Krueger signed, stated "I understand. . . . I have the right to be represented by an attorney at all times and an attorney will be appointed without cost

entered a not guilty plea and asked for a pretrial, along with "a full disclosure of the evidence."

At Krueger's first pretrial hearing, the district court asked Krueger if he was representing himself. Krueger responded "yes" and then said, "I can't afford an attorney." Krueger added, "I'm making good money on unemployment but it ain't covering even my bills." Krueger also said "I didn't even call an attorney because I knew I couldn't afford it." The district court informed Krueger that he should contact at least two attorneys for estimated fees and include that information on his application if he reapplied for a public defender. The court also granted Krueger a continuance to hire a lawyer, mentioning that some attorneys will work out payment plans.

At Krueger's second pretrial hearing, Krueger advised the court that he had been trying to contact an attorney. "If I get back to work, then I can afford an attorney for this." The district court granted him a second continuance to obtain counsel. The court also told Krueger that, if he did not qualify for a public defender, then he would "have to make arrangements to either hire an attorney, or figure out how [he was] going to take care of these motions you're discussing here in court by yourself." The court also noted that Krueger could submit another application for a public defender.

Krueger submitted his second public defender application on the same day as his second pretrial. Krueger's application stated he earned $568 per week in unemployment

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to me if I cannot afford to pay for an attorney." The form also stated that Krueger had a right "for the case to be continued for me to obtain or speak to an attorney."

and his wife earned $1,800 (gross) or $1,540 (net) per month. This application included estimated fees from three lawyers; the estimates ranged from $5,000-$10,000.

Not long after, Krueger submitted a third public defender application. This time, Krueger stated that he was unemployed and his wife's gross earnings were $1,920 (gross) or $1,650 (net) per month. The record reflects that the final order denying Krueger's application was issued on August 30, 2016.

At Krueger's third pretrial hearing, the district court asked Krueger if he wanted a jury trial, to which Krueger said yes. Krueger then asked the court why it had denied his public defender application. "I understand why the first time. I was on unemployment, and they said it was too much money. But now I'm not even collecting unemployment benefits no more."

The district court judge, who had played no part in the decisions to deny Krueger's applications, responded that orders had been issued denying his public defender applications. The judge then asked Krueger whether there had been any change since his last application. Krueger clarified that he had unemployment benefits until he submitted his third application. The judge commented his "guess" was that Krueger was not eligible for a public defender because of "household income versus just your income alone." The judge asked Krueger if he wanted the court to review the application and Krueger said "yeah, whatever. . . . If I can't get [an attorney], I'll go ahead by myself." The district court said it would "take under advisement whether your application for [a] public defender should be reviewed again." No additional order was issued on Krueger's public defender applications.

In September 2016, Krueger filed a written motion for an evidentiary hearing, arguing that the First Amendment protected his statements.[3] Krueger's evidentiary hearing occurred in October. Officer Beattie testified, and Krueger reiterated his argument that the First Amendment protected his statements from prosecution for disorderly conduct. The district court issued a written order, determined Krueger's insults at the bar were fighting words, and his conduct was "sufficiently noisy or boisterous." The district court concluded that Krueger's statements received no First Amendment protection, denied his motion, and set a final pretrial.

On the day of Krueger's jury trial, the district court asked him to submit a "Petition to Proceed Pro Se Counsel," also known as a Form 11, which explained his constitutional rights, including the right to be represented by an attorney and to waive his right to counsel because he wished to represent himself. Krueger examined and signed the form. The court asked Krueger "you understood everything in that Form 11 and filled it out accurately; is that correct?" Krueger responded "I asked a couple questions with [court administration] and they answered it to me so I think so, yes."

The jury found Krueger guilty of disorderly conduct under Minn. Stat. § 609.72, subd. 1(3). The district court sentenced Krueger to 90 days in jail, stayed execution for one year, and imposed a $400 fine. This appeal follows.

[3] Krueger's motion raised a second issue regarding his *Miranda* rights, but that issue is not on appeal.

D E C I S I O N

I. The district court did not abuse its discretion by denying Krueger's multiple requests to appoint a public defender.

Krueger argues that the district court abused its discretion by not appointing counsel because the court failed to make a sufficient inquiry into Krueger's finances and failed to issue any findings justifying its decision.[4] This court reviews a district court's decision denying an application the public defender for abuse of discretion. *State v. Jones*, 772 N.W.2d 496, 502 (Minn. 2009).

The United States and Minnesota Constitutions guarantee a right to counsel. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. But "the right to representation by a public defender is statutory." *Jones*, 774 N.W.2d 502. Minnesota Rule of Criminal Procedure 5.04, subd. 1(2), requires courts to "appoint [a] public defender on request of a defendant who is: (a) charged with a felony, gross misdemeanor, or misdemeanor punishable by incarceration, or subject to an extradition proceeding or probation revocation proceeding; (b) not represented by counsel; and (c) financially unable to obtain counsel."

[4] In his reply brief, Krueger argues that he was disadvantaged in this appeal because he did not have access to his public defender applications. After the appeal was filed, the state sought and received an order from the district court unsealing his applications for a public defender. According to Krueger, the state did not provide the applications to him. This court received Krueger's applications as part of the appellate record and, consequently, we doubt that Krueger's counsel did not have access to the appellate record. It is clear, however, that Krueger could have obtained these applications because he is now represented by a public defender and Minnesota law provides the court and the public defender with exclusive access. Minn. Stat. § 611.17(b) (2016) ("The information contained in the [public defender application] shall be confidential and for the exclusive use of the court and the public defender except for any prosecution under [Minn. Stat. § 609.48].").

Financial eligibility is defined by statute. Minn. Stat. § 611.17(a) provides that a defendant is "financially unable to obtain counsel" if:

> (1) the defendant, or any dependent of the defendant who resides in the same household as the defendant, receives means-tested governmental benefits; or
> (2) the court determines that the defendant, through any combination of liquid assets and current income, would be unable to pay the reasonable costs charged by private counsel in that judicial district for a defense of the same matter.

It is the defendant's "burden to show financial eligibility for a public defender." *Jones*, 772 N.W.2d at 503. But "[t]he court has a duty to conduct a financial inquiry to determine the financial eligibility of a defendant." Minn. R. Crim. P. 5.04, subd. 4. The court must "consider all available information about the defendant's financial circumstances." *Jones*, 772 N.W.2d at 503. Appropriate information may include the income of a live-in partner, "especially when the defendant does not dispute including the income." *Id.*

In *Jones*, the supreme court upheld a district court's decision not to appoint counsel for a defendant where the district court conducted a sufficient financial inquiry into Jones's ability to obtain counsel. 772 N.W.2d at 499. The supreme court pointed out that the district court discussed with Jones his "family situation, his and his girlfriend's income, his current cost of child support, and his ability to post bond and retain counsel." *Id.* at 503. The court also pointed out that Jones's application for a public defender "included significant detail about his income sources, assets, and expenses." *Id.*

Comparing the inquiry in *Jones* to the district court's inquiry in Krueger's case, there are three reasons the district court did not abuse its discretion by denying his request to appoint a public defender. First, the district court conducted a sufficient inquiry into

Krueger's finances. Krueger submitted three public defender applications, which included information about his income, his spouse's income, assets, dependents, and monthly expenses. In addition, at his arraignment, the district court asked Krueger about his income, his wife's income, and number of dependents in his household. All told, the financial information that the district court gathered in Krueger's case is nearly identical to the information that the district court obtained in *Jones*. *See id.*

Second, the district court's findings sufficiently state why it rejected Krueger's applications. The written orders state that Krueger was not financially eligible. In *Jones*, the district court declined to appoint counsel because Jones's income exceeded 125% of the federal poverty guidelines. *Id.* at 503. The supreme court was satisfied that this explanation was sufficient and did not require the district court to issue additional findings.[5] *Id.* Here, we discern no reason to require the district court to issue additional findings because its written orders contained the essential finding to support its decision and was based on record evidence.

Third, we reject Krueger's contention that the district court erred when it denied Krueger's third public defender application because, after the loss of unemployment benefits, Krueger's household income was below 125% of the federal poverty line.[6]

[5] In his dissent, however, Justice Page argued that the majority opinion should have remanded the case for further explanation as to why the district court denied two of Jones's applications for a public defender. *Jones* 772 N.W.2d at 508-12 (Page, J., dissenting).

[6] At oral argument before this court, Krueger's attorney clarified that Krueger was not claiming that the district court had abused its discretion by denying Krueger's first two applications, given that Krueger's unemployment earnings placed him above 125% of the federal poverty guidelines.

Krueger's third public defender application informed the court that he was unemployed and his sole income was his wife's earnings of $1,920 (gross) or $1,650 (net) each month. It is true that 125% of the federal poverty line for a family of two is $20,300, and if annualized, Krueger's *net* household income as of his third application is $19,800.[7] But Krueger's *gross* household income was $23,040, which placed him above 125% of the federal poverty guidelines for a family of two. *Id.* We are aware of no legal authority, and Krueger cites no legal authority, supporting the proposition that a district court must consider a defendant's net income as opposed to his gross income when determining whether a defendant is financially eligible for a public defender.[8] We conclude that the district court's apparent reliance on Krueger's gross income was reasonable, based on the record in this case. Accordingly, we determine that the district court did not abuse its discretion in rejecting Krueger's public defender applications.

II. The district court did not clearly err when it determined that Krueger waived his right to counsel.

Krueger contends that, while he signed Form 11, he did not validly waive his right to counsel. This court reviews a district court's factual findings about waiver of counsel under the clearly erroneous standard. *Jones*, 772 N.W.2d at 504. "A finding is clearly erroneous when there is no reasonable evidence to support the finding or when an appellate

[7] Univ. of Minn. Extension, *Poverty Income Guidelines*, 1, (2017), http://www.extension.umn.edu/family/personal-finance/basic-financial-education/dollarworks2/docs/poverty-income-guidelines.pdf.

[8] We also note that the United States Department of Health and Human Services does not specify whether the federal poverty guidelines are based on net or gross income. *See* Annual Update of the HHS Poverty Guidelines, 82 Fed. Reg. 8831-32 (Jan. 31, 2017).

court is left with the definite and firm conviction that a mistake occurred." *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012).

A defendant may relinquish the right to counsel in "three ways: (1) waiver, (2) waiver by conduct, and (3) forfeiture." *Jones*, 772 N.W.2d at 504. Waiver of the right to counsel "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege." *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 1884 (1981). The district court must do more than merely advise a defendant of his right to counsel. *Burt v. State*, 256 N.W.2d 633, 635 (Minn. 1977). Rather, it must conduct a "'penetrating and comprehensive examination of all the circumstances under which'" the defendant relinquishes his right to an attorney. *Id.* (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S. Ct. 316, 323 (1948)). In addition, the district court must "emphasize to the defendant the 'dangers and disadvantages of self-representation.'" *State v. Richards*, 552 N.W.2d 197, 205 (Minn. 1996) (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975)).

Minnesota Rule of Criminal Procedure 5.04, subd. 1(3), provides that misdemeanor defendants who wish to represent themselves "must waive counsel in writing or on the record." It also provides that "[t]he court must not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of the defendant's rights." *Id.* The Minnesota Rules of Criminal Procedure provide a standard form—Form 11, Petition to Proceed as Pro Se Counsel—that courts may use to establish a written record of the defendant's voluntary waiver of the right to counsel and the decision to self-represent. Minn. R. Crim. P. Form 11.

Krueger reviewed and signed Form 11 before his trial. He also filled out a "[s]tatement of [r]ights" earlier in his criminal proceeding, which described his right to counsel. Because Krueger reviewed and signed these forms, and because the district court discussed the right to counsel with Krueger to determine whether he understood his rights, the district court did not clearly err in determining that Krueger validly waived his right to counsel.

Krueger argues that reviewing and signing Form 11 was insufficient because the district court did not conduct an adequate on-the-record colloquy. While a detailed, on-the-record waiver colloquy is desirable, it is not necessary. Minnesota Rule of Criminal Procedure 5.04, subd. 1(3), states that a waiver may be oral *or* written. The comment to Minnesota Rule of Criminal Procedure 5 states "[i]n practice, a [Form 11] may fulfill the dual requirements of providing the defendant with the information necessary to make a voluntary and intelligent waiver of the right to counsel as well as providing a written waiver." Moreover, the district court asked Krueger if he understood Form 11, to which Krueger replied that he did. While Form 11 was not presented to Krueger until the day of his trial, the district court had already discussed with Krueger his right to counsel at several previous court appearances. On this record, we conclude that the district court's finding that Krueger validly waived his right to counsel was not clearly erroneous. Because we affirm the district court's finding that Krueger waived his right to counsel, we do not reach the state's alternative argument that Krueger forfeited his right to an attorney.

We add, however, that while Krueger's multiple on-the-record discussions about his right to counsel support the district court's ultimate decision that he validly waived his

right to counsel, best practices were not followed in Krueger's case. His written waiver did not occur until the morning his trial began, seven months after he was arraigned and two months after Krueger represented himself in an evidentiary hearing. We emphasize the importance of providing self-represented defendants with Form 11 early in their criminal cases so that the court may ensure defendants are proceeding with a full understanding of their rights.

III. The record contains sufficient evidence to support Krueger's conviction of disorderly conduct.

Krueger argues that the First Amendment to the United States Constitution protected his statements to K.T., thus, the evidence is insufficient to support his conviction of disorderly conduct. "When reviewing a claim that an adjudication of disorderly conduct violates the First Amendment, [this court] view[s] the evidence in the light most favorable to the state, but independently determine[s] whether the conduct falls outside constitutional protection." *In re Welfare of W.A.H.*, 642 N.W.2d 41, 47 (Minn. App. 2002).

The jury convicted Krueger of violating Minn. Stat. § 609.72, subd. 1(3), which may be violated in two ways: (1) by "engag[ing] in offensive, obscene, abusive, boisterous, or noisy conduct" or (2) by using "offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others." Minn. Stat. § 609.72, subd. 1(3). Convicting a defendant of disorderly conduct only for engaging in offensive or obscene language violates the First Amendment, unless that language involves "fighting words," which receive no protection under the First Amendment. *In re Welfare of S.L.J.*, 263 N.W.2d 412, 418-19 (Minn. 1978). Noisy or boisterous conduct, on the other hand, is

not speech, and thus receives no First Amendment protection. *In re Welfare of T.L.S.*, 713 N.W.2d 877, 881 (Minn. App. 2006).

This court addressed the distinction between boisterous, noisy conduct, and offensive or obscene language in *T.L.S.*, 713 N.W.2d at 881. There, we held that police had probable cause to arrest a former student for disorderly conduct on the grounds that she was shouting and screaming profanities in a school administration office. *Id.* The court determined that T.L.S.'s "loud shrieking" was "boisterous and noisy conduct" that a reasonable person could determine violated Minn. Stat. § 609.72. *Id.* This court reasoned that the disorderly conduct statute may be "applied to punish the manner of delivery of speech when the disorderly nature of the speech does not depend on its content." *Id.* Ultimately, the court held that T.L.S.'s conduct supported probable cause for arrest. *Id.*

T.L.S. is instructive here. Several witnesses at Krueger's trial testified that Krueger, like T.L.S., made his statements at an extremely high volume. K.T. said Krueger "scream[ed] and yell[ed] at [her]." The bartender testified Krueger's insults were "[r]eally loud. Like yelling." Beattie testified that Krueger was yelling loud enough that he could hear Krueger "from inside the building" while Beattie was passing by in his squad car with the window down. After hearing this testimony, the jury could have found that Krueger violated the disorderly conduct statute by being noisy and boisterous. Minn. Stat. § 609.72, subd. 1(3). Like T.L.S.'s speech, the content of Krueger's speech was irrelevant, and the First Amendment does not protect him from conviction for disorderly conduct.

We also agree with the district court that Krueger used fighting words. "Fighting words" are words "that 'have a direct tendency to cause acts of violence by the persons to

whom, individually, the remark is addressed.'" *State v. Crawley*, 819 N.W.2d 94, 105 (Minn. 2012) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 770 (1942)). Statements are not fighting words merely because they are "vulgar, offensive, and insulting and that their use is condemned by an overwhelming majority of citizens." *S.L.J.*, 263 N.W.2d at 416.

In *City of Little Falls v. Witucki*, the supreme court upheld the defendant's disorderly conduct conviction for obscenities used in a bar. 295 N.W.2d 243, 246 (Minn. 1980). Witucki told a bartender to "get f-cked" and "I don't have to take any of your crap" in addition to calling her a "black-haired witch," a "c-cksucker," and a "son-of-a-b-tch." *Id.* at 244. The supreme court reasoned Witucki's insults were fighting words because they "could readily be found by a jury to be inherently likely to incite violence." *Id.* at 245; *cf. In re S.L.J.*, 263 N.W.2d at 419-20 (concluding that a 14-year-old child's insults directed at police who were in a squad car 15 to 30 feet away were not fighting words because a violent reaction was not likely).

Krueger's statements were likely to provoke violence for several reasons: his extreme volume and vulgarity, he leaned in toward K.T. as he spoke, and he followed K.T. outside of the bar and continued to yell vulgar and taunting remarks. Because Krueger's statements were fighting words, they do not warrant First Amendment protection. Additionally, the district court instructed the jury on the definition of fighting words, and

the jury found Krueger guilty of disorderly conduct.[9] We are confident the jury took these instructions seriously and determined that Krueger's words were fighting words.

Affirmed.

[9] The district court also informed the jury that noisy, boisterous conduct and obscene language both violate Minn. Stat. § 609.72, subd. 1(3), but receive different levels of constitutional protection. Krueger did not object to the court's jury instructions during trial and does not challenge the instructions on appeal.