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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1921

State of Minnesota,
Respondent,

vs.

Joseph Thomas Rewitzer,
Appellant.

Filed September 30, 2019
Affirmed
Smith, Tracy M., Judge

Brown County District Court
File No. 08-CR-17-924

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

Charles W. Hanson, Brown County Attorney, Paul J. Gunderson, Assistant County Attorney, New Ulm, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Reyes, Judge; and Florey, Judge.

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

SMITH, TRACY M., Judge

Following a trial to the district court, appellant Joseph Rewitzer was found guilty and convicted of multiple crimes deriving from an incident in which he repeatedly

threatened a gas station employee and robbed the gas station. In this direct appeal, he argues that the district court erred by holding a court trial without receiving a proper waiver of his right to a trial by jury. We affirm.

FACTS

According to trial testimony, over the course of several hours one morning in September 2017, Rewitzer came and went from a gas station multiple times. During those visits, he left disjointed but vaguely threatening notes, verbally threatened an employee, and stole a small amount of property from the store. The employee called the police, who arrested Rewitzer when he returned for the fourth time that morning.

Rewitzer was charged with one count of threats of violence, two counts of stalking, one count of disorderly conduct, one count of theft, and one count of possession of a small amount of marijuana. At an omnibus hearing in October 2017, Rewitzer's attorney asked for a bench trial. The district court set the case for a court trial without asking Rewitzer personally whether he wished to waive his right to a jury trial. A week before the scheduled trial date, the state amended the complaint, adding a charge of simple robbery. The trial was delayed when, on the day of trial, the district court granted Rewitzer's attorney's request for a competency examination pursuant to Minn. R. Crim. P. 20.01.

Rewitzer was determined to be competent to proceed, and new pretrial hearings were held. At a pretrial hearing in April 2018, during a discussion among counsel and the court about the length of trial, the prosecutor suggested that the length would depend on whether it was a jury trial or a court trial. Rewitzer interrupted to ask that the trial continue to be a court trial, and the district court indicated that it would be.

Rewitzer's trial was held in June 2018. At the beginning of trial, the district court ruled that a second amended complaint filed two days earlier by the state would not be allowed and proceeded under the complaint as amended in November 2017. The district court then had the following interaction with Rewitzer:

> THE COURT: Mr. Rewitzer, I know we've discussed this in the past, but we're set for a trial by a judge today, without a jury. You understand you do have the right to a 12-person jury in this case or you can have the case tried by a judge; it's your choice. Are you choosing to have this case tried by me and not by a jury?
> THE DEFENDANT: Yes, Your Honor.

The district court immediately went on to receive Rewitzer's waiver of his right to a jury trial on the issue of aggravating factors for an enhanced sentence. In doing so, the district court gave a more in-depth explanation of Rewitzer's rights for the sentencing phase than it had when asking about Rewitzer's waiver on the guilt phase of the trial.

The district court found Rewitzer guilty on all counts except for possession of a small amount of marijuana and sentenced Rewitzer to two concurrent 54-month terms of imprisonment.

Rewitzer appeals.

D E C I S I O N

Rewitzer argues that the district court erred by conducting a bench trial because he did not validly waive his right to a jury trial. Criminal defendants are constitutionally entitled to trial by jury. U.S. Const. amend VI; Minn. Const. art. I, § 6. But the right may be waived by a "knowing, intelligent and voluntary" waiver. *State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991). Under the Minnesota Rules of Criminal Procedure, a "defendant,

with the approval of the court, may waive a jury trial on the issue of guilt provided the defendant does so personally, . . . on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(a).

We review de novo the question of whether a defendant has been denied the constitutional right to a jury trial. *See State v. Kuhlmann*, 806 N.W.2d 844, 848-49 (Minn. 2011). Similarly, we review de novo the "construction and application of procedural rules." *See St. Croix Dev., LLC v. Gossman*, 735 N.W.2d 320, 324 (Minn. 2007).

I. A personal waiver after a court trial is scheduled is not automatically ineffective.

Rewitzer's principal brief argues that he never personally waived the right to a jury trial and that the only on-the-record waiver was by his attorney at the October 2017 hearing. His principal brief never addresses the two instances when Rewitzer personally, on the record, asked for a court trial on these charges. Only in his reply brief, filed after the state pointed out that the district court had asked Rewitzer personally about the waiver on the day of trial, does Rewitzer raise the argument that his personal waiver on the day of trial was invalid because the trial was already scheduled when it took place.[1] Rewitzer's position, though not expressly argued as such, appears to be that a defendant must

[1] We note that there is a significant difference between a claim that a personal waiver never occurred and a claim that a purported personal waiver was ineffective for some reason. The fairest account of the facts includes that Rewitzer personally waived his right to a trial by jury on the day of trial, and the appropriate framing of the issue is whether that waiver was effective.

personally waive the right to a jury trial before the trial is scheduled and that any waiver of the right to a jury trial after a court trial has been scheduled is ineffective.

Rewitzer cites no case law supporting the proposition that a defendant must personally waive the jury-trial right before a court trial is scheduled, rather than before the court trial takes place, and we believe that no cases addressing this question exist.

Minn. R. Crim. P. 26.01, subd. 1(2)(a), which provides the basic standards which must be followed for a defendant to waive the right to trial by jury on the issue of guilt, says nothing about when a waiver must take place. And the requirements of the rule—that a defendant waive the right "personally, . . . on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel," Minn. R. Crim. P. 26.01, subd. 1(2)(a)—can be followed at the start of trial just as they can before the trial is scheduled.

The district court can also evaluate the knowledge, intelligence, and voluntariness underlying the defendant's decision up to the start of trial. *See Ross*, 472 N.W.2d at 653 (requiring that a waiver of the right to a jury trial be knowing, intelligent, and voluntary). Rewitzer does not suggest any reason that knowledge, intelligence, and voluntariness would necessarily be affected by the fact that a formal waiver is provided after a trial is scheduled, nor can we conceive of any.

We reject Rewitzer's argument that a waiver of the right to a jury trial is automatically ineffective if it occurs after a court trial has been scheduled.

II. Rewitzer's waiver was valid.

Having determined that Rewitzer's waiver was not automatically ineffective because it occurred on the day of trial, we turn to the question of whether the waiver complied with the procedural and constitutional requirements for a valid waiver.

A. Procedural Requirements

Rule 26.01 establishes four requirements for waiver of the right to a jury trial: (1) the waiver must be personal, (2) the waiver must be written or on the record in open court, (3) the court must advise the defendant "of the right to trial by jury," and (4) the defendant must have had an opportunity to consult with counsel. Minn. R. Crim. P. 26.01, subd. 1(2)(a). Strict compliance with rule 26.01, subd. 1(2)(a) is required. *State v. Sandmoen*, 390 N.W.2d 419, 423 (Minn. App. 1986).

The first two requirements of rule 26.01, subd. 1(2)(a) are satisfied: Rewitzer personally said, on the record, that he wished to waive his right to trial by jury. The third requirement is also satisfied because the district court informed Rewitzer that he had "the right to a 12-person jury in this case." While this is certainly not the most detailed advisory of Rewitzer's rights, he was advised that he had the right to a jury, which is all the rule requires.

As to the fourth requirement, Rewitzer was not asked whether he was satisfied that he had the opportunity to fully discuss the matter with counsel, nor did he volunteer that information. While we think it a good practice for the district court to ask whether a defendant has had time to discuss the waiver with counsel, thus ensuring that there is a clear record of that fact, such inquiry is not required by the rule. *See* Minn. R. Crim. P.

26.01, subd. 1(2)(a). Rather, the rule only requires that a defendant actually have had the opportunity. *Id.* Additionally, the "opportunity to consult with counsel" need not be anything more than an opportunity—actual consultation is not required. *State v. Johnson*, 354 N.W.2d 541, 543 (Minn. App. 1984) (upholding a pro se defendant's waiver of his right to a jury trial because the defendant could have consulted with counsel). And district courts are discouraged from the sort of inquiry that could determine whether a defendant actually discussed the waiver with counsel. *See Ross*, 472 N.W.2d at 654 (noting that courts should avoid inquiry into attorney-client communications when evaluating the validity of a waiver). Thus, if a defendant, in fact, had the opportunity to consult with counsel, a lack of inquiry by the district court about that opportunity is immaterial.

Rewitzer's argument that he did not have an adequate opportunity to consult with counsel is based wholly on his position that the waiver occurred in early October 2017. He contends that, because he was assigned a new attorney at the end of September and had only been represented by his attorney for a few days when that attorney requested a court trial at the October omnibus hearing, he lacked an opportunity to consult with counsel. But the waiver that we consider took place in June 2018. Rewitzer gives no reason that he could not consult with counsel during the eight months that he was represented between the end of September and the beginning of June. Thus, we conclude that Rewitzer did have a sufficient opportunity to consult with counsel.

Rewitzer's day-of-trial waiver of his right to a jury trial complied with the four requirements of Minn. R. Crim. P. 26.01, subd. 1(2)(a).

B. Constitutional Requirements

In addition to strict compliance with the requirements of Minn. R. Crim. P. 26.01, a defendant's waiver of the right to a jury trial must be knowing, intelligent, and voluntary. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); *State v. Little*, 851 N.W.2d 878, 882 (Minn. 2014). The district court therefore must engage in a colloquy "to learn whether the defendant's waiver is knowingly and voluntarily made," focusing on "the basic elements of a jury trial." *Ross*, 472 N.W.2d at 654. However, the precise nature of the colloquy is flexible; "[t]he nature and extent of the inquiry may vary with the circumstances of a particular case." *Id.* Thus, while it may be helpful in many cases for a defendant to be told about the number of jurors, the defendant's ability to participate in the selection of jurors, the requirement of unanimity, or the judge's role if the right to a jury is waived, none of those things is strictly required. *Id.* A defendant's familiarity with the judicial system, such as through past convictions, and the extent of the defendant's opportunity to consult with his attorney can justify a less probing colloquy. *Id.*

Rewitzer argues that the colloquy fails to demonstrate that his waiver was knowing, intelligent, and voluntary. He is correct that the colloquy alone is insufficient to establish those facts. The entire colloquy is a single question and answer, in which Rewitzer is informed that he has a right to a 12-person jury and that it is his choice whether to have the trial before a jury or a judge.

But the supreme court has affirmed a waiver involving an even less informative colloquy. In *State v. Pietraszewski*, the entire colloquy was:

> THE COURT: The next question, Mr. Pietraszewski, your counsel tells me that you were willing and in fact preferred to waive jury for the purpose of this Trial, but I want to confirm that for the record at this time.
> MR. PIETRASZEWSKI: That's true, Your Honor.

283 N.W.2d 887, 890 (Minn. 1979). The district court in *Pietraszewski* told the defendant nothing about the substance of the right he was waiving or even that waiver was his decision to make and not his attorney's. *Id.* Nonetheless, the supreme court concluded that there was "sufficient evidence in the entire record from which the trial court could have determined that [the] defendant's waiver was voluntarily and intelligently made." *Id.*

Rewitzer does not make any argument that the entire record is insufficient to show voluntariness, intelligence, or knowledge, and our review of the record suggests that those requirements were satisfied. Rewitzer was advised of his right to a jury trial at his first appearance. That advisory was moderately detailed, and Rewitzer affirmed that he understood his rights. Rewitzer was also advised of his jury trial right during part of a hearing related to another crime. While that advisory related to a misdemeanor, so Rewitzer was informed of the right to a six-person jury, the other jury rights were the same. And Rewitzer had been convicted of seven prior felonies, meaning that he was familiar with the court system. On this record, Rewitzer's waiver was knowing and intelligent.

The last issue is whether Rewitzer's waiver was voluntary. At a pretrial hearing, immediately after the state said that the length of trial would depend on whether it was a jury trial or court trial, Rewitzer, unprompted, said "I would like -- I would like to remain

court trial." At the time, no one was suggesting that it should be one or the other, and Rewitzer's comment appears to be nothing more than an expression of his will. Similarly, during the colloquy on the day of trial, the district court did inform Rewitzer that it was his choice whether to have a court trial or a jury trial and Rewitzer affirmed that he wanted a court trial. On this record, it is apparent that Rewitzer's waiver of his right to a jury trial was voluntary.

Rewitzer's waiver of the right to a jury trial complied with the requirements of rule 26.01, subd. 1(2)(a), and was knowing, intelligent, and voluntary. The district court did not err by accepting the waiver.

Affirmed.