STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2045

State of Minnesota,
Respondent,

vs.

Brandon Jon Urban,
Appellant.

Filed December 16, 2019
Affirmed in part, reversed in part, and remanded
Stauber, Judge[*]

Freeborn County District Court
File No. 24-CR-17-1070

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

David J. Walker, Freeborn County Attorney, Karyn D. Sackis Lunn, Assistant County Attorney, Albert Lea, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Stauber, 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

STAUBER, Judge

In this direct appeal from his judgment of conviction for second-degree driving while intoxicated (DWI), appellant Brandon Jon Urban argues that his conviction must be reversed because he did not submit a valid waiver of his right to counsel. Because we conclude that appellant knowingly, intelligently, and voluntarily waived his right to counsel, we affirm in part. But because the district court improperly convicted appellant of two DWI counts for a single behavioral incident, we reverse in part and remand for the district court to vacate one of appellant's DWI convictions and leave the finding of guilt in place.

FACTS

On May 21, 2017, at about 12:30 a.m., an officer was driving on Highway 65 in Freeborn County and his radar indicated that an approaching vehicle was speeding. The officer turned around, performed a traffic stop, and identified Urban as the driver. The officer "caught a smell of odor of alcohol" and asked Urban how much he had had to drink. Urban admitted to consuming one drink and offered to take a preliminary breath test (PBT). Urban failed the test, during which the officer could smell a "strong odor of alcohol" and noticed that Urban's eyes were watery. The officer then administered three field sobriety tests, which Urban failed. The officer also administered a second PBT, which Urban failed. The officer arrested Urban, transported him to jail, and informed him that he had the right to an attorney and the right to refuse an official DataMaster DMT (DMT) breath test. Urban

declined an attorney and agreed to submit a sample of his breath. Urban provided two samples, which both indicated an alcohol concentration of 0.08.

On June 20, 2017, the state charged Urban with (1) third-degree DWI (driving a motor vehicle under the influence of alcohol) under Minn. Stat. § 169A.20, subd. 1(1) (2016); (2) third-degree DWI (driving with an alcohol concentration of 0.08 or more) under Minn. Stat. § 169A.20, subd. 1(5) (2016); and (3) speeding under Minn. Stat. § 169.14, subd. 2(a) (2016).

The district court appointed a public defender who made his first court appearance on behalf of Urban at his arraignment hearing in July 2017. At the hearing, the court scheduled a settlement conference, a pretrial hearing, and a two-day jury trial starting in November 2017. The public defender proceeded to represent Urban at the settlement conference, a bail hearing, and a pretrial hearing.

At the pretrial hearing, Urban's attorney asked to continue the trial to challenge the DMT result, which was exactly 0.08 and within the margin of error for the test. Urban requested time to get an expert to testify. The district court rescheduled the trial for April 2018.

A new public defender began representing Urban in January 2018. Urban and his new attorney appeared for a pretrial hearing on March 23, 2018. At that hearing, Urban stated that he "would like to dismiss [his attorney]." The district court asked Urban if he would like to "represent [himself]." Urban responded, "Absolutely. [My attorney] has absolutely no interest, and he's obviously not prepared for my case whatsoever. It's very unfair to me that . . . my previous attorney . . . was switched at the last minute." The parties

then discussed a possible plea agreement, and the district court refused to discharge Urban's attorney until he had a chance to speak with Urban about any potential agreement. After an off-the-record discussion, Urban's attorney informed the court that the parties had still not reached an agreement and requested a speedy trial. The district court asked whether there was a possibility of a resolution; Urban's attorney stated that the "parties are talking." The district court did not discharge Urban's attorney.

At a pretrial hearing on April 20, 2018, Urban asked the court, "Did you get my memo, your Honor, that I sent, by any chance?" Urban indicated that he was referring to a written motion to discharge his attorney. The court appears to have returned the motion to Urban because it was not appropriately filed.

Five days later, Urban signed and filed a Minn. R. Crim. P. Form 11 petition to proceed pro se. In the petition, he stated that he understood the charges against him and that the minimum prison sentence was one month and the maximum was one year and/or a fine of $3,000. He also indicated that he understood that he had an absolute right to an attorney and agreed that he had discussed his desire to represent himself with his attorney. He further stated that he understood that the consequence of the district court granting his petition to represent himself was that he would be responsible for preparing his case for trial and trying the case.

At the next pretrial hearing on May 25, 2018, Urban's attorney asked the court to rule on Urban's motion to discharge him and stated that their relationship had "broken down" because Urban had "been filing papers with the Court even though he's been represented by counsel; and the public defender's office can't act in an advisory capacity."

Urban's attorney also stated on the record that a conviction would require "mandatory jail, and it could be more."

The district court acknowledged Urban's written request to proceed pro se and asked Urban what he "want[s] to do" in regards to his representation. The district court confirmed that Urban understood he had the right to an attorney, and that his written request to proceed pro se means that he would have to represent himself, and that he would be held to the same standard as an attorney. The waiver exchange ended with Urban's attorney stating that Urban would not receive another public defender even if he "decides that he wants the public defender in the future." The district court then confirmed Urban's understanding:

> THE COURT: You understand—you've heard [your attorney] speak. You understand that, Mr. Urban?
>
> THE DEFENDANT: Yes, Sir.
>
> THE COURT: And that's—and that's agreeable to you as well? You understand that and you understand you're not going to get a different public defender?
>
> THE DEFENDANT: I understand. I've read all the criminal procedures and all the rules.
>
> THE COURT: Okay.
>
> THE DEFENDANT: I'm very aware. Thank you.
>
> THE COURT: Counsel is relieved. That's all.

Four days later, Urban appeared without counsel for his jury trial. The state moved to amend the complaint to charge two felony second-degree DWI counts because of Urban's prior DWI convictions in Wisconsin. Because it appeared there were only two prior convictions, the court determined that the counts were still gross misdemeanors but

could be changed in the second degree. The state filed an amended complaint charging appellant with: (1) second-degree DWI under Minn. Stat. § 169A.20, subd. 1(1) (driving under the influence of alcohol); (2) second-degree DWI under Minn. Stat. § 169A.20, subd. 1(5) (driving with an alcohol concentration of 0.08 or more); and (3) speeding. The district court then arraigned Urban under the amended complaint. Before starting the trial, the district court asked Urban, "Do you intend on being represented by an attorney, or are you going to represent yourself?" Urban responded, "I'll waive my right to counsel." The jury found Urban guilty of all three charges. In September 2018, the district court sentenced Urban to one year in jail stayed for four years, on the condition that he serve 90 days in jail. Urban appeals.

D E C I S I O N

I. The district court did not err in determining that Urban validly waived his right to counsel.

Urban argues that his DWI convictions should be reversed because he did not validly waive his right to counsel. Urban concedes that the "district court here did engage in an on-the-record inquiry," but contends that the "inquiry was insufficient to determine whether [Urban] actually understood the 'significance and consequences' of his decision." The state argues that Urban validly waived his right to counsel after filing a "Petition to Proceed as Pro Se Counsel" and engaging with the district court in an on-the-record waiver colloquy.

"Criminal defendants have a constitutional right to an attorney and a corollary constitutional right to choose to represent themselves in their own trial." *State v. Worthy*,

583 N.W.2d 270, 279 (Minn. 1998); *see generally* U.S. Const. amend. VI; Minn. Const. art. I, § 6. Accordingly, a defendant can waive his right to an attorney. *See Worthy*, 583 N.W.2d at 279. The Minnesota Supreme Court has held that the right to an attorney "may be relinquished in three ways: (1) waiver, (2) waiver by conduct, and (3) forfeiture." *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009).

When a defendant waives his constitutional right to counsel, his waiver must be "knowing, intelligent, and voluntary." *Id.* "Whether a waiver of a constitutional right was knowing, intelligent, and voluntary depends on the facts and circumstances of the case, including the background, experience, and conduct of the accused." *State v. Rhoads*, 813 N.W.2d 880, 884 (Minn. 2012). We review a district court's finding of a valid waiver for clear error. *Jones*, 772 N.W.2d at 504. But when the facts are undisputed, "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. The denial of the right to counsel "is a structural error." *Bonga v. State*, 765 N.W.2d 639, 643 (Minn. 2009). Structural error "does not require a showing of prejudice to obtain reversal." *State v. Camacho*, 561 N.W.2d 160, 171 (Minn. 1997).

Minnesota Statutes and the Minnesota Rules of Criminal Procedure impose requirements on district courts for accepting a defendant's waiver of counsel. "[T]he waiver [of the right to counsel] 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." Minn. Stat. § 611.19 (2018); *see also* Minn. R. Crim. P. 5.04, subd. 1(3) (providing that misdemeanor

defendants wishing to represent themselves "must waive counsel in writing or on the record"). Before accepting a waiver, the district court must be "satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of the defendant's rights." Minn. R. Crim. P. 5.04, subd. 1(3); *see also State v. Krejci*, 458 N.W.2d 407, 412 (Minn. 1990) (providing that the district court's duty is "to ensure a knowing and intelligent waiver of the right to counsel").

The rules of criminal procedure provide a standard form, titled "Petition to Proceed as Pro Se Counsel," for courts to establish a written record of a defendant's waiver of counsel and decision to proceed pro se. *See* Minn. R. Crim. P. Form 11. The comment to rule 5 provides, "In practice, a Petition to Proceed as Pro Se Counsel 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." Minn. R. Crim. P. 5 cmt.

Here, Urban signed and filed his Form 11 petition on April 25, roughly one month before his trial. About one month before filing the petition, Urban stated on the record that he would like the district court to discharge his attorney, but the district court did not relieve counsel. After Urban filed the petition, the district court acknowledged that he had filed it. The district court proceeded with an on-the-record colloquy, which explained Urban's constitutional right to an attorney, established that Urban would not be receiving another public defender, and informed Urban that he would be held to the same standard as an attorney if he chose to represent himself. Just before the colloquy, Urban's attorney also indicated the seriousness of the potential penalty for his offenses, stating on the record that

a conviction would require "mandatory jail, and it could be more." On this record, it appears that the district court appropriately complied with the statutory and rule requirements, and Urban validly waived his right to an attorney.

Even if the district court did not fully comply with the procedural requirements, deviating from statutory and procedural guidelines does not invalidate a waiver if the "particular facts and circumstances surrounding th[e] case" nevertheless show that the waiver was valid. *Rhoads*, 813 N.W.2d at 889. Facts and circumstances supporting a valid waiver may include a defendant discharging counsel without good cause, a defendant consulting with his attorney prior to discharge, a defendant's familiarity with the criminal justice system, and a defendant's opportunities to avail himself of representation. *See Krejci*, 458 N.W.2d at 413 ("A defendant's refusal without good cause to proceed with able appointed counsel constitutes a voluntary waiver of that right." (quotation omitted)); *Worthy*, 583 N.W.2d at 276 (concluding that a defendant's familiarity with the criminal justice system weighs in favor of voluntary waiver; moreover, when a defendant consults his attorney prior to waiver, the district court can "reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel"); *Finne v. State*, 648 N.W.2d 732, 736 (Minn. App. 2002) (providing that appellant's "numerous chances to avail herself of representation" was a relevant circumstance weighing in favor of a valid waiver), *review denied* (Minn. Oct. 29. 2002).

Here, four facts and circumstances support the conclusion that Urban validly waived his right to counsel. First, Urban did not have good cause to discharge his attorney. Urban appears to argue that he had good cause to discharge his attorney because he "believed his

attorney was unprepared to represent him, while defense counsel expressed frustration that [Urban] was too involved and filing his own motions." But, without more, Urban's dissatisfaction with his attorney does not present good cause to terminate him; to do so, he must demonstrate that his attorney lacked "ability and competence." *See State v. Gillam*, 629 N.W.2d 440, 450 (Minn. 2001). Urban provides no evidence of his attorney's incompetence, and the record only reflects that his attorney represented him in court at least three times and attempted to negotiate a plea deal on his behalf.

Second, the record supports that Urban spoke with his attorney after stating that he wished to discharge him. This supports an inference that his attorney described the risks of proceeding without counsel. *See Worthy*, 583 N.W.2d at 276.

Third, the record supports that Urban had some familiarity with the criminal justice system. He was also capable of filing motions on his own behalf.

Fourth, Urban had multiple opportunities to avail himself of representation. *See Finne*, 648 N.W.2d at 736. The first time he requested the district court to discharge counsel, the court did not relieve counsel as plea negotiations continued. Urban then filed his rule 11 petition waiving his right to counsel, and the district court dismissed Urban's attorney after an on-the-record colloquy that explained Urban's constitutional rights. Immediately before the trial started, the district court once again asked Urban if he wished to be represented by an attorney, to which he responded, "I'll waive my right to counsel." In short, with multiple opportunities to change his mind, Urban continually stated that he wished to discharge counsel over a period of more than two months.

On this record, even if the district court did fail to follow proper procedures, Urban validly waived his right to counsel based on the "particular facts and circumstances surrounding th[e] case." *Rhoads*, 813 N.W.2d at 889.[1]

II. Remand is necessary to vacate one of Urban's convictions.

Urban does not challenge his two DWI convictions on the basis that they arose from a single behavioral incident. "Generally, we consider an argument not raised in the parties' briefs to be forfeited." *State v. Vasko*, 889 N.W.2d 551, 555-56 (Minn. 2017). But "it is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's . . . failure to specify issues or to cite relevant authorities." *Id.* (quotations omitted). We may consider an issue not raised on appeal if the "prejudicial error is obvious on mere inspection." *See State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015).

Under Minn. Stat. § 609.04, subd. 1 (2016), "[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." An included offense may be "[a] lesser degree of the same crime" or "[a] crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1. Section 609.04

[1] Urban also filed a pro se supplemental brief. His brief does not present an argument and only provides a personal narrative of the facts leading to his decision to represent himself. We consider his brief to have no merit for two reasons. First, a party who submits a brief without any legal authority or legal argument generally forfeits their claims. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (refusing to consider pro se supplemental brief because it contained "no argument or citation to legal authority"). Second, the majority of Urban's narrative is not part of the record. *See* Minn. R. Crim. P. 28.02, subd. 8 (limiting the record on appeal to "the documents filed in the district court, the offered exhibits, and the transcript of the proceedings, if any").

also forbids "multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (quoting *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985)). In *Clark*, we held it was plain error for the district court to convict the defendant of both driving while under the influence of alcohol *and* driving with an alcohol concentration over the legal limit because the two DWI convictions arose from the same behavioral incident. *Id.* at 171. This court determined that "[o]ne of the convictions must be vacated," and then vacated one conviction. *Id.*

We conclude that Urban's two DWI convictions were for an act committed during a single behavioral incident. The proper procedure in such cases is for the district court "to adjudicate formally and impose sentence on one count only." *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). The district court should not formally adjudicate the second count. *Id*. But the finding of guilt should be left in place so it can later be formally adjudicated if "the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s)." *Id.*

We reverse and remand for the district court to vacate one of Urban's convictions as required by Minn. Stat. § 609.04, subd. 1, but to leave both findings of guilt in place.

Affirmed in part, reversed in part, and remanded.