This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2066

State of Minnesota,
Respondent,

vs.

Brandon Jon Urban,
Appellant.

Filed January 21, 2020
Affirmed in part, reversed in part, and remanded
Cochran, Judge

Freeborn County District Court
File No. 24-CR-17-1065

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, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Reilly, Judge; and Cochran, Judge.

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

COCHRAN, Judge

In this direct appeal, appellant Brandon Jon Urban argues that his convictions must be reversed because (1) he did not submit a valid waiver of his right to counsel, (2) he did

not submit a valid waiver of his right to a jury trial, and (3) the district court erred by entering convictions for two driving while intoxicated (DWI) counts that arose from a single behavioral incident. Because we conclude that appellant validly waived his right to counsel and his right to a jury trial, we affirm in part. And because the district court improperly convicted Urban of two DWI counts for a single behavioral incident, we reverse in part and remand for the district court to vacate one of Urban's DWI convictions.

FACTS

On June 19, 2017, officers were dispatched to Urban's residence regarding a possible domestic assault. Urban told the officers that he drove his car into his girlfriend's car after she locked herself in her car. The officers could smell alcohol on Urban and asked Urban if he was drinking. Urban told the officers that he had "had a couple drinks." The officers gave Urban a preliminary breath test. The officers then arrested Urban and transported him to the local detention center. At the detention center, officers administered another breath test. The test results revealed a 0.21 alcohol concentration.

The Initial Charges

The state initially charged Urban with felony second-degree assault with a dangerous weapon; misdemeanor domestic assault; gross-misdemeanor second-degree DWI (under the influence of alcohol); gross-misdemeanor second-degree DWI (alcohol concentration of 0.08 or more); and gross-misdemeanor driving after cancellation (inimical to public safety). The felony assault charge carried a maximum sentence of imprisonment

for seven years and a $14,000 fine.[1] *See* Minn. Stat. § 609.222, subd. 1 (2016). The two gross-misdemeanor DWI charges and the misdemeanor driving-after-cancellation charge each carried a maximum sentence of imprisonment for one year and a $3,000 fine. *See* Minn. Stat. § 609.03(2) (establishing maximum sentences for gross misdemeanors). The misdemeanor domestic assault charge carried a maximum sentence of imprisonment for 90 days and a $7,000 fine. *See id.*(3) (establishing maximum sentences for misdemeanors).

Urban was initially denied a public defender, but the district court later appointed one who made his first court appearance on behalf of Urban in July 2017. The public defender represented Urban at multiple court appearances over a period of seven months.

Urban's first public defender left the case for unknown reasons, and a new public defender 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." The parties then discussed a possible plea agreement, and the district court refused to discharge Urban's attorney until the attorney 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 not come to an agreement. Urban's attorney also told the court that Urban requested a speedy trial. The district court did not dismiss Urban's attorney at that time.

At a pretrial hearing on April 20, Urban asked the court if it had received his "memo." Urban indicated that he was referring to a written motion requesting dismissal

[1] The district court ultimately dismissed both assault charges for a lack of probable cause.

of his attorney. The court indicated that it did not review the motion because the motion was filed by Urban personally, and not by his attorney.

Five days later, Urban signed and filed a petition to proceed pro se. In the petition, Urban acknowledged that he understood: (1) the charges against him; (2) the range of sentences and fines that could be imposed; (3) that he had a right to an attorney; (4) that he had discussed his desire to represent himself with his attorney; and (5) that, if the petition was granted, he would be responsible for preparing his case for trial and trying the case.

At the next pretrial hearing on May 25, 2018, Urban and his public defender asked the court to rule on Urban's petition to proceed pro se. The district court acknowledged Urban's written request to proceed pro se and went through a series of waiver questions with Urban. Urban confirmed that he understood that he had a right to an attorney, that his written request to proceed pro se meant that he had to represent himself, and that he would be held to the same standard as an attorney. Urban said that he had "read all the criminal procedures and all the rules" and that he was "very aware" of his decision. Ultimately, the district court dismissed Urban's public defender.

On June 6, Urban filed a written waiver of his right to a jury trial. On the waiver form, Urban signified that he had an opportunity to consult with counsel regarding his decision to waive a trial by jury.

On June 12, Urban appeared pro se at a bail hearing for violating his release conditions. Urban was again informed of his right to counsel. Urban replied that he would be representing himself. The court then asked Urban if he wanted to waive a jury trial and Urban responded, "[a]s long as you are the presiding official." The court noted that Urban

had gone through a jury trial in another case and asked Urban if he understood the difference between a court trial and a jury trial. Urban said that he did and the court proceeded to schedule a bench trial for June 19.

The Amended Charges

On the morning of trial, the state amended the two gross-misdemeanor DWI counts to felony DWI charges. The state amended the complaint because it learned that Urban had recently been found guilty by jury trial of another DWI and, as part of that proceeding, had stipulated to two prior DWI convictions.[2] The amended complaint reflected three counts: felony DWI under Minn. Stat. § 169A.20, subd. 1(1) (2016) (driving under the influence of alcohol) (count one), felony DWI under Minn. Stat. § 169A.20, subd. 1(5) (2016) (driving with an alcohol concentration of 0.08 or more) (count two), and gross-misdemeanor driving after cancellation (count three).

The district court arraigned Urban under the amended complaint. The court named each felony charge and described the associated maximum sentence. The court informed Urban that count one was a felony charge that carried a maximum penalty of seven years in prison and a $14,000 fine. The court then reviewed count two, informing Urban that the second count also was a felony charge that carried a maximum penalty of seven years and

[2] *Compare* Minn. Stat. § 169A.25, subd. 1 (2016) (A person is guilty of a gross-misdemeanor second-degree driving while impaired "if two or more aggravating factors were present when the violation was committed.") *with* Minn. Stat. § 169A.24, subd. 1 (2016) (A person is guilty of felony first-degree driving while impaired if the person "commits the violation within ten years of the first of three or more qualified prior impaired driving incidents").

a $14,000 fine. Finally, the court reviewed count three, which was unchanged. The court asked Urban if he understood the charges and he responded, "I do."

Next, the court advised Urban of his rights. The court told Urban that he had a "right to an attorney" including having one "appointed to represent [him]" and that the court would grant a continuance for him to "get or speak to an attorney." The court told Urban that he was "entitled to a jury trial on this matter." The court asked Urban if he understood his rights and he responded, "I do, your honor."

The court asked Urban if he intended on being represented by an attorney and Urban responded, "I do. I'm going to need a continuance . . . ." When the court asked Urban why he was requesting a continuance, Urban stated that he needed to subpoena a witness. The state objected to the continuance request noting that while the level of the DWI offenses had changed, "the crime itself has not changed." The state noted that Urban had not previously disclosed that he would be calling any witnesses and indicated that it was ready to proceed with trial that day. The state also emphasized that Urban requested a speedy trial and that they were past "the 60 days at [that] point." Urban stated that he was "looking forward to this going forth today until [the complaint] got amended to a felony charge, which carries a mandatory year of prison[.]"

Urban and the court then had a discussion about the likely sentence if Urban were to be convicted. The court told Urban that the felony DWI charge carried a presumptive 36-month stayed sentence and that he was "not looking at prison." Urban asked follow up questions, including what would happen if his criminal history score were higher and if the sentence would still be stayed. The court confirmed the sentence would be stayed. Urban

responded that "as long as [the sentence is] stayed," he was "not concerned." Urban indicated that he was ready to proceed.

During the course of this discussion, the court also asked Urban if he wanted to waive his right to counsel, including his right to a public defender. Urban replied "yes" and "that's correct." The court asked Urban if he wanted to waive his right to a jury trial. Urban replied "[y]es, [y]our [h]onor." The court proceeded with trial.

In the middle of the questioning of witnesses, the court stopped the trial to clarify that Urban had already been arraigned on the amended complaint, that he was read his rights, and that he waived his right to counsel and a jury trial. The court asked if Urban pleaded "not guilty" on all counts. Urban admitted to count three (the driving-after-cancelation charge) and confirmed that he was proceeding with a "not guilty" plea on counts one and two (the DWI charges). The bench trial continued.

During the trial, Urban questioned witnesses, cross-examined the state's witnesses, and delivered a closing argument. At the end of trial, the district court took the matter under advisement. In a written verdict and order, the district court found Urban guilty of all three counts.

The district court subsequently convicted Urban of all three counts, but sentenced him on only two of the counts. On count two (driving with an alcohol concentration above the legal limit), the district court sentenced Urban to 36 months in prison, stayed for seven years, and ordered Urban to serve 180 days in jail. For count three (driving after cancellation), the court sentenced Urban to serve 180 days in jail, consecutive to the

sentence for count two. The court did not sentence Urban on count one (driving under the influence of alcohol), but did enter a conviction.

Urban appeals.

D E C I S I O N

Urban first argues that he did not knowingly or intelligently waive his right to counsel on the amended complaint. Urban then argues that he did not knowingly or intelligently waive his right to a jury trial on the amended complaint. Urban also contends that the district court erred by entering two DWI convictions for conduct that arose out of the same set of circumstances. We address each issue in turn.

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.[3] Urban concedes that the district court told him that the charges were "more serious because they called for a stayed 36-month sentence" and that the "maximum penalty was seven years." But Urban contends that the on-the-record inquiry was insufficient because the court did not "sufficiently advise [him] of the increased allowable punishments" and because the waiver was required to be in writing. The state argues that the district court was not required to renew Urban's waiver on the amended complaint and, regardless, Urban knowingly waived his right to counsel.

[3] Urban does not argue that his gross-misdemeanor conviction for driving after cancelation requires reversal.

"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 also* 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. In felony cases, a written waiver of the right to counsel is necessary unless the defendant refuses to sign such a waiver. Minn. Stat. § 611.19 (2018); *see also* Minn. R. Crim. P. 5.04,

subd. 1(4). However, the supreme court has held that deviating from the required procedures does not invalidate a waiver if the "particular facts and circumstances surrounding th[e] case including the background, experience, and conduct of the accused" show that the waiver was valid. *Worthy*, 583 N.W.2d at 275-76.

The parties agree that Urban's waiver of counsel on the original complaint was valid. Generally, a defendant who has knowingly, intelligently, and voluntarily waived his right to counsel is not required to renew the waiver at subsequent proceedings. *Rhoads*, 813 N.W.2d at 889. But in *Rhoads*, the supreme court held that an exception to the general rule is warranted when an amended charge doubles the maximum possible punishment to an offense. *Id.* at 888. Here, the amended complaint increased Urban's maximum sentence for each of the DWI charges from one year and a $3,000 fine to seven years and a $14,000 fine. Under *Rhoads*, the district court was required to obtain a new knowing and intelligent waiver of Urban's right of counsel.[4] *Id.*

To determine whether Urban's renewed waiver of his right to counsel was knowing and intelligent, we apply the *Worthy* analysis. *Id.* at 889. The validity of Urban's waiver depends on the particular facts and circumstances surrounding this case, including "the background, experience, and conduct of the accused." *Worthy*, 583 N.W.2d at 275-76. Specifically, under *Rhoads*, the record must demonstrate that Urban renewed his waiver in

[4] We note that in its brief the state incorrectly relies on this court's holding in *State v. Rhoads* to assert that Urban was not required to renew his waiver. 802 N.W.2d 794, 805, 808 (Minn. App. 2011), *rev'd*, 813 N.W.2d 880 (Minn. 2012). But the supreme court overruled this court's decision on that issue. *See Rhoads*, 813 N.W.2d at 888.

a manner that demonstrates that he understood the increase in the maximum possible punishment for the amended charges. 813 N.W.2d at 888.

We conclude that Urban was aware of the maximum possible punishments and knowingly and intelligently renewed the waiver of his right to counsel after the state amended the charges. As discussed above, the record demonstrates that the district court reviewed the charges and the maximum punishment of seven years in prison with Urban on the record. Urban acknowledged the charges, including the increase in the maximum punishment, and confirmed that he understood them. Urban asked several questions about his possible sentence and determined that he was "not concerned." Based on his understanding of the potential punishment, Urban ultimately decided to waive his right to counsel.

The surrounding circumstances also demonstrate that Urban was fully aware of the consequences of proceeding pro se. Urban was familiar with the judicial system. Urban had contact with the court over a period of approximately one year. He was represented for ten months out of this year, including when he was charged with a felony assault (later dismissed) that carried a maximum punishment of seven years in prison. Throughout the year, Urban made multiple attempts to proceed pro se. The district court judge conducted a thorough waiver of counsel on the original complaint before dismissing the public defender. Then, Urban appeared pro se on several occasions, filed motions on his own behalf, and asked probing questions to the court. When the district court renewed Urban's waiver of counsel, the judge expressly and clearly asked Urban if he wanted to waive his

right to counsel. Accordingly, Urban's background, experience with the judicial system, and conduct show that the waiver was valid. *See Worthy*, 583 N.W.2d at 275-76.

Urban maintains that he could not knowingly waive his right to counsel because the district court did not explain that the minimum sentences and probation periods increased. But there is no requirement that Urban understand every potential sentence. *See Rhoads*, 831 N.W.2d at 889 (determining that "knowingly" relates to a defendant's understanding of the "*increase in the maximum possible* punishment" (emphasis added)). And, a lack of a written waiver does not require reversal where the facts and circumstances show that the waiver was valid. *Worthy*, 583 N.W.2d at 275-76. We conclude that Urban understood the implications of the increase in the maximum possible sentence and the implications of proceeding pro se. Thus, we conclude that Urban validly waived his right to counsel. *Rhoads*, 813 N.W.2d at 889.

II. Urban's waiver of his right to a jury trial was knowing and intelligent.

Urban alternatively argues that his DWI convictions should be reversed because he did not validly waive his right to a jury trial. Urban contends that his waiver was not knowing or intelligent because the district court did not properly advise him about the consequences of being convicted of the felonies. The state argues that Urban's written waiver of his right to a jury trial for the original charges was a valid waiver on the amended complaint. The state further argues that the waiver made at trial was knowing and intelligent. We conclude that Urban's renewed waiver of his right to a jury trial was knowing and intelligent.

The Minnesota Rules of Criminal Procedure set forth four requirements for waiving one's 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).

In addition to the requirements set forth in the rules, 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); *State v. Little*, 851 N.W.2d 878, 882 (Minn. 2014). To ensure a waiver is "knowingly and voluntarily made," the district court should engage in an on-the-record colloquy focusing on "the basic elements of a jury trial." *State v. Ross*, 472 N.W.2d 651, 654 (Minn. 1991). "The nature and extent of the inquiry may vary with the circumstances of a particular case." *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.* This court reviews de novo whether a defendant properly waived his right to a jury trial. *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002), *review denied* (Minn. June 18, 2002).

Urban completed a valid jury-trial waiver for the original complaint in early June after consulting with his then-appointed attorney. But "when the [s]tate amends the complaint after a defendant's jury-trial waiver, the district court must obtain a renewed waiver of the defendant's right to a jury trial on the newly added charge." *Little*,

851 N.W.2d at 883. Here, the state amended the complaint and the court was required to obtain a renewed waiver of Urban's right to a jury trial. *Id.* The requirements for an initial waiver of one's right to a jury trial also apply to a renewed waiver. *Id.*

We conclude that Urban knowingly, intelligently, and voluntarily waived his right to a jury trial on the amended complaint. The district court advised Urban of his right to a jury trial after the charges were amended. The court later asked Urban if he wanted to waive his right to a jury trial on the amended charges and Urban replied "[y]es, [y]our [h]onor." *See* Minn. R. Crim. Pro. 26.01, subd. 1(2)(a) (a "defendant . . . may waive a jury trial on the issue of guilt provided the defendant does so personally, in writing or on the record in open court"). While the district court could have asked more probing questions, the circumstances of Urban's case support the district court's less-probing colloquy. *See Ross*, 472 N.W.2d at 654. Urban was familiar with the judicial system. Urban had numerous contacts with the court over a period of a year. This was Urban's fourth court proceeding for a DWI charge—including a jury trial in a separate case that took place less than a month before the trial in this case. And Urban had the opportunity to consult with counsel when he first decided to waive his right to a jury trial on the original complaint. Here, Urban's familiarity with the judicial system and his prior opportunity to consult with his attorney justified a less probing colloquy. *Ross*, 472 N.W.2d at 654.

Urban maintains that he did not knowingly waive his right to a jury trial because the district court did not "properly advise him about the consequences of being convicted" of the felonies. But there is no requirement that a district court "advise" a defendant on all of the consequences of being convicted of a crime. Instead, the district court must "advise"

the defendant of his right to a trial by jury and the basic elements of a jury trial. *See* Minn. R. Crim. P. 26.01 (requiring a court to "advise" the defendant of the "right to a trial by jury"); *Ross*, 472 N.W.2d at 654 (stating that the colloquy should focus on "the basic elements of a jury trial"). Here, the court told Urban that he was "entitled to a jury trial on [the] matter," and that "any jury verdict must be unanimous before [he could] be found guilty." Accordingly, Urban was sufficiently advised of his right to a trial by jury.

Finally, Urban maintains that his waiver on the amended complaint was not knowing or intelligent because his case is similar to *Little*. 851 N.W.2d at 883. In *Little*, the supreme court addressed whether a jury-trial waiver was valid on an amended complaint. *Id.* In *Little*, the added charge "significantly increased the range of potential punishment," the defendant "did not receive a copy of the amended complaint," and it was likely "that [the defendant] did not know about the added charge until after he was found guilty." *Id.* at 885. The defendant in *Little* did not personally waive his right to a jury trial. *Id.* at 881. This case is different. Urban received a copy of the amended complaint before his waiver. And, unlike *Little*, Urban was fully aware of the amended charges, and the maximum punishment associated with those charges, when he waived his right to a jury trial. Further, unlike the defendant in *Little*, Urban personally waived his right to a jury trial. As a result, *Little* does not support Urban's argument that his renewed waiver of his right to a jury trial was not valid.

While the district court could have questioned Urban more thoroughly about his understanding of a jury trial, we conclude that there is "sufficient evidence in the entire record from which the [district] court could have determined that [the] defendant's waiver

was voluntarily and intelligently made." *State v. Pietraszewski*, 283 N.W.2d 887, 890 (Minn. 1979) (finding that a one-sentence colloquy was sufficient where the trial court had "numerous contacts" with the defendant prior to trial). Accordingly, Urban's waiver of his right to a jury trial was valid.

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

Urban argues, and the state concedes, that the district court erred by entering convictions for both felony DWI charges. Urban argues that one of the convictions should be vacated because the convictions arose from the same behavioral incident and derive from different subsections of the same statute.

Under Minn. Stat. § 609.04, subd. 1 (2016), an "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." *Id.* We have held that section 609.04 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) (quotations omitted).

In *Clark*, this court stated that driving under the influence of alcohol and driving with an alcohol concentration over the legal limit "do not necessarily rest upon the same proof and are not lesser-included offenses of each other," but instructed that statute "[n]onetheless . . . forbids" multiple convictions under the same statute for the acts committed during a single behavioral incident. *Id.* at 170-71. We held it was plain error for the district court to convict the defendant both of driving while under the influence of alcohol *and* driving with an alcohol concentration over the legal limit because the

defendant's dual DWI convictions stemmed from the same series of acts. *Id.* We concluded that "[o]ne of the convictions must be vacated." *Id.* at 171.

Similarly, in this case, Urban was convicted of both driving under the influence of alcohol and driving with an alcohol concentration over the legal limit. Applying this court's precedent in *Clark*, we conclude that it was error for the district court to convict Urban of both DWI charges because both convictions were based on the same behavioral incident. 486 N.W.2d at 170-71. Accordingly, we reverse and remand to the district court with instructions to vacate one of the DWI convictions, but to leave both findings of guilt in place.

Affirmed in part, reversed in part, and remanded.