STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1724

State of Minnesota,
Respondent,

vs.

Brian Anthony Varnado,
Appellant.

Filed August 3, 2020
Affirmed in part, reversed in part, and remanded
Hooten, Judge

Ramsey County District Court
File No. 62-CR-17-9201

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Hooten, Judge.

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

HOOTEN, Judge

In this direct appeal from final judgment of conviction for aggravated robbery, appellant argues that his conviction must be reversed because the district court failed to

obtain a valid waiver of counsel before allowing him to represent himself. Appellant also challenges his sentence, arguing that the state failed to establish that his criminal-history score should include 3.5 felony points for out-of-state convictions, which occurred on the same day and involved the same victim. We affirm in part, reverse in part, and remand.

FACTS

On July 25, 2017, appellant Brian Anthony Varnado entered BMO Harris Bank in St. Paul and approached the counter. Varnado handed a note to the teller, which read "give [me] the money." The teller testified that Varnado appeared to be carrying a gun, and she handed him the money she had in the teller drawer. A second teller approached, saw the note, and proceeded to open her teller drawer and hand Varnado the money from the drawer.

On August 9, 2017, Varnado entered Anchor Bank in St. Paul and approached the counter. After exchanging pleasantries with the teller, he slid his right hand into his pocket, took out a note, and showed it to the teller. The note read: "This is a robbery. I have a gun. No dye packs. No trackers." The teller opened the teller drawer and handed Varnado about $2,000. As a second teller approached the scene, Varnado showed the second teller the note. The second teller opened her teller drawer and handed Varnado "close to [$]10,000, if not over."

On August 22, 2017, Varnado entered TopLine Federal Credit Union and approached the counter. Varnado handed the teller a note that said he had a gun and did not want any dye packs or trackers. Varnado then spoke to the teller, stating "Give me your bottom drawer. No dye packs. No trackers." The teller handed the man "maybe

around [$]8,000." After seeing the note, a second and then a third teller gave Varnado the money in their teller drawers.

Following a police line-up and an FBI investigation, the state charged Varnado with eight counts of second-degree aggravated robbery and one count of attempted second-degree aggravated robbery. Varnado was detained and the district court appointed him counsel. Though these charges were filed in Ramsey County, Varnado was concurrently the subject of a criminal proceeding in Hennepin County District Court for possessing a firearm as a felon.

At a pretrial omnibus hearing held on January 25, 2019, Varnado requested to discharge his attorney following a disagreement regarding trial strategy. The district court directed Varnado to "have that discussion with [his defense counsel]." The case was reassigned to a different judge shortly thereafter.

At a pretrial hearing in February, Varnado again requested to discharge his attorney and proceed pro se. The root of the disagreement in strategy appeared to be based on whether or not a motion for a *Rasmussen* hearing should be filed. Varnado requested that he be permitted to proceed pro se. In considering his request, the district court briefly discussed the providence of appointing advisory counsel should Varnado proceed pro se. Varnado was amenable to such an appointment, but no further discussion was had regarding the nature of the charges Varnado faced or the consequences of proceeding pro se.

On February 12, 2019, Varnado submitted a signed "memorandum in support of motion pro se" to the district court, in which he asked the district court to allow him to

proceed pro se. In the memorandum, Varnado explained that he believed that his appointed attorney was "not even trying to defend the defendant but pushing the case . . . along without [sic] trying the [e]vidence and investigation" and that there was a conflict of interest because he and his attorney "[do] not get along." Varnado's defense counsel was subsequently discharged and an advisory counsel was appointed. The district court advised the advisory counsel to speak with Varnado regarding his defense. At all times during the proceeding, Varnado either was represented by his appointed attorney, or had access to his advisory counsel.

A bench trial was held on June 5, 2019. At trial, the following witnesses testified: a manager and a teller from BMO Harris Bank; two tellers from Anchor Bank; three tellers from TopLine Federal Credit Union; and seven law enforcement officers from the St. Paul Police Department, the Golden Valley Police Department, and the Hennepin County Sheriff's Office. Tellers from each bank identified Varnado as the robber. The state introduced evidence of photos and text messages from Varnado's phone. The photos, taken on the day of the TopLine robbery, showed wads of cash identified by the employees at Topline as having wrapping consistent with the bills they gave the robber. The text messages included references to Varnado being "flat broke," needing to "hit me a lick" (a "lick" is slang for robbery), and losing thousands of dollars at a river boat casino in Indiana. When asked in a text message how he got the money, Varnado responded "from something new that I learned." Finally, Varnado stated "I made $30,000 last month and messed it all up. You struggling and I'm struggling with this money and gambling."

The district court found Varnado guilty of seven of the eight counts of second-degree aggravated robbery and dismissed the remaining charge. Based on three convictions from Indiana, the district court determined that Varnado had a criminal-history score of six. The district court imposed consecutive prison sentences of 68 months on count 2, 25 months on count 4, and 25 months on count 6. Varnado appeals.

D E C I S I O N

I. Under the circumstances of his case, the district court did not err when it accepted Varnado's waiver of his right to counsel.

Varnado argues that the district court erred when it failed to obtain a valid waiver of counsel from Varnado and proceeded to allow Varnado to represent himself pro se, albeit with the aid of an appointed advisory counsel.

An appellate court reviews for clear error a finding that a defendant has validly waived the right to counsel. *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998). "A finding is clearly erroneous when there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred." *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). When the facts are undisputed, however, this court reviews de novo whether a waiver of counsel was knowing and intelligent. *Id*.

A criminal defendant's right to counsel is guaranteed under the Minnesota and United States constitutions. U.S. Const. amends. VI, XIV; Minn. Const. art. 1, §§ 6, 7. Waiver of the right must be knowing and intelligent. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975); *Burt v. State*, 256 N.W.2d 633, 635 (Minn. 1997). If a

defendant intelligently and knowingly waives the right to counsel, the defendant "must be allowed to represent himself despite his lack of the legal ability to conduct a good defense." *State v. Thornblad*, 513 N.W.2d 260, 262 (Minn. App. 1994), *review denied* (Minn. Mar. 14, 1995). "The purpose of the 'knowing and voluntary' inquiry, . . . is to determine whether the defendant actually does understand the significance and consequences of a particular decision . . . ." *Godinez v. Moran*, 509 U.S. 389, 401 n.12, 113 S. Ct. 2680, 2687 n.12 (1993) (emphasis omitted). It is the district court's duty to ensure a valid waiver of the right. *State v. Bauer*, 245 N.W.2d 848, 858 (Minn. 1976).

To ensure vindication of the right to counsel, Minnesota statute requires that a defendant must first submit a written and signed waiver to the court. Minn. Stat. § 611.19 (2016). This requirement is elaborated in the Minnesota Rules of Criminal Procedure, which state that a defendant charged with a felony must enter "a voluntary and intelligent written waiver of the right to counsel." Minn. R. Crim. P. 5.04, subd. 1(4). The index to the Minnesota Rules of Criminal Procedure include "Form 11—Petition to Proceed Pro Se Counsel," to be filled out by the defendant, which satisfies the requirement described in Minn. R. Crim. P. 5.04, subd. 1(4).

However, it is insufficient for a district court to merely accept a written waiver of counsel before it allows a defendant to proceed pro se. Instead, before accepting such a waiver, Minn. R. Crim. P. 5.04, subd. 1(4), requires that the district court also advise the defendant of the following:

> (a) [the] nature of the charges;
> (b) all offenses included within the charges;
> (c) [the] range of allowable punishments;

> (d) [possible] defenses;
> (e) mitigating circumstances may exist; and
> (f) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

Minn. R. Crim. P. 5.04, subd. 1(4)(a)–(f).

Further, the district court "may" appoint the public defender "for the limited purpose of advising and consulting with the defendant as to the waiver. *Id.*, subd. 1(4); *see also State v. Jones*, 772 N.W.2d 496, 507 (Minn. 2009) (stating that appointment of standby counsel is discretionary); *State v. Garibaldi*, 726 N.W.2d 823, 831 (Minn. App. 2007) (suggesting that the consequences of a district court's failure to adhere to waiver of counsel rules may be mitigated by the appointment of an advisory counsel).

Varnado argues that he is entitled to a new trial because the district court committed two errors when it failed to: (1) require Varnado to sign a "Form 11 Petition to Proceed as Pro Se Counsel" and (2) provide a "penetrating and comprehensive examination" of Varnado's understanding of the factors listed in Minn. R. Crim. P. 5.04, subd. 1(4).

After requesting to proceed pro se during a hearing, Varnado submitted a signed "memorandum in support of motion pro se" to the district court, in which he once again asked the district court to allow him to proceed pro se. The district court did not obtain a "Form 11—Petition to Proceed as Pro Se Counsel." Although the proper procedure is for a district court to obtain a signed copy of Form 11 from the defendant, which details the charges against the defendant and the consequences of proceeding pro se, the plain language of the statute and the rule only require a defendant charged with a felony to enter

a written, signed, voluntary, and intelligent waiver of his right to counsel. Minn. Stat. § 611.19; Minn. R. Crim. P. 5.04, subd. 1(4).

Varnado's handwritten and signed memorandum included a list of the charges against him and a relatively detailed explanation of the reasons why Varnado wished to proceed pro se, including irreconcilable differences between himself and his counsel regarding defense strategy. However, we are not persuaded that his handwritten waiver alone truly constitutes an intelligent waiver of counsel as contemplated under Minn. R. Crim. P. 5.04, subd. 1(4).

Nevertheless, a reviewing court may conclude that a waiver was intelligent based on a review of "the particular facts and circumstances surrounding [a] case, including the background, experience, and conduct of the accused." *Worthy*, 583 N.W.2d at 275–76 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938)). Relevant facts and circumstances include a defendant's failure to provide good cause for discharging counsel, a defendant consulting with an attorney before discharging counsel, and a defendant's familiarity with the criminal justice system. *Id.* at 276–77. Significantly, when a defendant consults with his or her counsel before waiving his right to counsel, even if the district court fails to question the defendant on the record, we may "reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to the defendant in detail by counsel." *Id.* at 276 (quoting *State v. Jones*, 266 N.W.2d 706, 712 (Minn. 1978)); *see also Thronblad*, 513 N.W.2d at 263 (stating that it may be presumed that counsel representing a defendant at a waiver proceeding advised the

defendant so that he could make an informed decision even when the district court failed to adequately question the defendant on the record).

After reviewing the record in the case before us, we conclude that Varnado intelligently waived his right to counsel as required by Minn. R. Crim. P. 5.04, subd. 1(4).

At a pretrial omnibus hearing held on January 25, 2019, Varnado first requested that the district court discharge his attorney following a disagreement regarding trial strategy. Varnado, whose criminal history demonstrates significant experience with the criminal justice system—and who had recently proceeded pro se in a proceeding in Hennepin County District Court, *State v. Varnado*, No. 27-CR-17-25701 (Minn. Dist. Ct. Nov. 16, 2018)—was directed by the district court to "have that discussion with [his defense counsel]."

At a pretrial hearing in February, Varnado again requested to discharge his attorney and proceed pro se. The district court stated the following:

> THE COURT: So here's how I do things, Mr. Varnado, because most of the folks who come before me don't know anything about the rules of evidence, and they don't know anything about the rules of criminal procedure and they don't have any experience cross-examining folks or developing trial strategy. I would discourage them from representing themselves, but you certainly have a right just like everybody else to represent yourself.
>
> But I'm not going to discharge the public defender's office because sometime during that trial you're likely to need some legal advice or some strategic advice. And so what I would likely do if we got to that point is to appoint [his defense counsel] and the public defender's office as standby counsel. So that if you got to a point where you needed some help you got somebody who knows the law and who knows criminal

> procedure, and strategy that you can have a chat with. Does that make sense?
>
> [VARNADO]: I understand what you're saying.
>
> THE COURT: You're not penalized by having—there is no disadvantage to you to have standby counsel.
>
> [VARNADO]: I understand.
>
> THE COURT: If you're pro se, it's your show, it's your case. She's there to help you when you need it; do you understand that?
>
> [VARNADO]: Yeah.
>
> . . . .
>
> THE COURT: Between now and [trial], I would urge you to talk with [your defense counsel] about how to proceed with filing the motions or motion that you want to file. Okay? They need to be clearly written. And they need to be timely filed so that the state has an opportunity to prepare for them. And so the court also has an idea of where you're going. Does that make sense?

At the February hearing, Varnado's defense counsel acknowledged that she and Varnado did not have "a lot of time to talk" about specific trial strategy but acknowledged that, based upon their discussions, she was satisfied that Varnado still wished to proceed pro se. Indeed, Varnado's wish to proceed pro se was further evidenced by the submission of his handwritten memorandum in support of his motion to proceed pro se. Given these circumstances, we may reasonably presume that Varnado's attorney, as directed by the district court, discussed the consequences of proceeding pro se and that, as a result, Varnado's desire to proceed pro se was an intelligent decision as required by Minn. R. Crim. P. 5.04, subd. 1(4). *See Worthy*, 583 N.W.2d at 276. The fact that defense counsel

or advisory counsel was available to Varnado at all times during his proceedings, and that Varnado never appeared before the district court without the presence of advisory counsel, further supports this determination. *See Garibaldi*, 726 N.W.2d at 831 (suggesting that the consequences of a district court's failure to adhere to waiver of counsel rules may be mitigated by the appointment of an advisory counsel).

Varnado argues that the circumstances in this case are similar to those that occurred in *Garibaldi*, in which we determined that a waiver of counsel was not knowing because the district court's questioning did not satisfy Minn. R. Crim. P. 5.04, subd. 1(4). 726 N.W.2d at 829–30. In *Garibaldi*, the district court discharged Garibaldi's defense counsel just before trial, without appointing advisory counsel, and therefore it was not clear that Garibaldi had an adequate opportunity to consult with his counsel before waiving his right to counsel. *Id.* at 829–31. When comparing the factual situation in *Garibaldi* with that in the instant case, there are several key distinctions. First, Garibaldi's defense counsel only attended one hearing and was not directed to speak with his client regarding the perils of proceeding pro se, *id.* at 829, whereas Varnado was represented by defense counsel at four hearings over several months and was directed by the district court to discuss the issue with his counsel before deciding to proceed pro se. Second, Garibaldi did not present the district court with a written waiver of his right to counsel, *id.* at 825, whereas Varnado submitted a handwritten and signed motion to proceed pro se to the district court. Finally, the district court did not appoint advisory counsel for Garibaldi, *id.* at 8, whereas the district court not only appointed advisory counsel for Varnado but directed Varnado to consult with advisory

counsel regarding trial strategy. Therefore, we conclude that this case is distinguishable from *Garibaldi*.

Accordingly, in light of the specific circumstances of this case, we conclude that Varnado's waiver of his right to counsel was an intelligent waiver as required by Minn. R. Crim. P. 5.04, subd. 1(4). *See Worthy*, 583 N.W.2d at 275–76 (determining that a waiver is "competent and intelligent" based on the specific circumstances of a case). In light of the district court's appointment of advisory counsel, direction to speak with his defense counsel regarding the providence of proceeding pro se, and Varnado's extensive history with the criminal justice system, we are not left with the firm conviction that the district court erred when it accepted Varnado's waiver of counsel without questioning Varnado on the record. *See id.* at 276 (determining that a district court's failure to conduct an inquiry on the record can be overcome when the defendant is "fully aware of the consequences"). Therefore, we hold that the district court's acceptance of Varnado's waiver of counsel was not clear error.

II. The district court erred when it calculated Varnado's criminal-history score based on three foreign offenses.

Varnado argues that the district court erred when it calculated his criminal-history score based on three offenses from Indiana because the record is unclear as to whether the offenses arose from the same behavioral incident and whether the offenses would constitute felonies in Minnesota. The state concedes that this issue should be remanded to the district court for further assessment of the Indiana convictions.

Convictions from other jurisdictions must be considered in calculating an offender's criminal-history score. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001); *see also* Minn. Sent. Guidelines 2.B.5.a (2017) ("The court must make the final determination as to whether and how a prior non-Minnesota conviction should be counted in the criminal-history score."). A non-Minnesota conviction "may be counted as a felony only if it would *both* be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence." Minn. Sent. Guidelines 2.B.5.b (2017). "[W]hile the main focus should be on the offense definition, the sentencing court should also consider the nature of the offense and the sentence received by the offender." *Hill v. State*, 483 N.W.2d 57, 61 (Minn. 1992) (internal quotations omitted).

The state bears the burden to "show that a prior conviction qualifies for inclusion within the criminal-history score." *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). To meet its burden, "[t]he state must establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006).

The district court "must make the final determination as to whether and how a prior non-Minnesota conviction should be counted" in a defendant's criminal-history score. Minn. Sent. Guidelines 2.B.5.a. "[W]e will not reverse a district court's determination of a defendant's criminal-history score absent an abuse of discretion." *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). But the

interpretation of the sentencing guidelines presents a question of law that we review de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018).

The district court relied on three 2002 Indiana convictions, and one custody status point, to determine that Varnado had a criminal-history score of six when it sentenced him on the first count of aggravated second-degree robbery. The Indiana offenses (one count of felony attempted battery for which he was sentenced to six years in prison, one count of felony robbery resulting in bodily harm for which he was sentenced to ten years in prison, and one count of felony resisting law enforcement for which he was sentenced to three years in prison) all occurred on the same day. Although the PSI notes an equivalent Minnesota statute for each of the Indiana offenses, the PSI does not contain any information regarding the specific Indiana statutes violated, the duration of the potential punishments for the violation of those statutes, or if there was a common victim so as to indicate that the crimes were part of a single course of conduct.

As a non-Minnesota conviction "may be counted as a felony *only* if it would both be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence," Minn. Sent. Guidelines 2.B.5.b (emphasis added), we conclude that the absence of the violated Indiana statutes makes it impossible for this court to assess whether or not the Indiana convictions truly constitute felony convictions in Minnesota. Therefore, we remand this issue to the district court so as to determine whether or not the specific Indiana statutes violated by Varnado would constitute felonies in Minnesota for the purpose of determining his criminal-history score and whether the Indiana convictions were part of a single course of conduct.

III. Varnado's pro se arguments either are not properly before this court or have no merit.

Varnado makes six arguments in his pro se supplemental brief. However, four of his arguments relate to a different proceeding than the one on appeal before this court. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (noting that "the function of the court of appeals is limited to identifying errors [in the present proceeding] and then correcting them").

Varnado's fifth argument is related to the allegedly ineffective assistance of his court-appointed counsel. We conclude that this argument also fails because Varnado discharged his counsel long before trial began and then proceeded pro se at trial. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003) (noting that a party cannot complain of its own mistake).

Finally, Varnado argues that the district court erred when it did not find that Varnado "had been charged multiple times for one criminal act." Varnado appears to argue that all of his charges, which resulted from the robbery of three different banks on three different days, violated collateral estoppel and double jeopardy.

A. *Collateral estoppel did not bar prosecution of Varnado's offenses.*

"Collateral estoppel, also known as issue preclusion, prohibits a party from relitigating issues that have been previously adjudicated." *Barth v. Stenwick*, 761 N.W.2d 502, 507 (Minn. App. 2009). Collateral estoppel may bar the relitigation of an issue when:

> (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits in the prior proceeding; (3) the estopped party was a party or in privity with a party to the

> prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id. at 508.

As all of Varnado's counts were addressed in a single proceeding, there can be no collateral estoppel because there was never a "final judgment on the merits." *See id.* Therefore, the district court was not collaterally estopped from finding Varnado guilty on seven counts of aggravated second-degree robbery.

B. *Double jeopardy does not apply to the present proceeding.*

"The Double Jeopardy Clauses of the United States Constitution and the Minnesota Constitution protect a criminal defendant from three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense" *State v. Hanson*, 543 N.W.2d 84, 86 (Minn. 1996). The only protection applicable in this case is a protection from multiple punishments for the same offense.

Varnado appears to argue that because he was charged eight times for robbery, and once for attempted robbery, he is being punished multiple times for the same offense—namely, robbery. However, a review of the record clearly shows that each charge is for his conduct with respect to a different individual teller. As he robbed seven different tellers, at three different banks, on three different days, we conclude that Varnado was not unconstitutionally subjected to multiple punishments for the same offense.

Affirmed in part, reversed in part, and remanded.