STATE OF MINNESOTA
IN COURT OF APPEALS
A10-835

State of Minnesota,
Respondent,

vs.

Todd Bradley Gunderson,
Appellant.

Filed April 26, 2011
Affirmed
Worke, Judge

Cass County District Court
File No. 11-CR-09-2695

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

Christopher J. Strandlie, Cass County Attorney, Walker, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, Lydia Maria Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota; and

Teresa E. Knoedler, Special Assistant Public Defender, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Stauber, Judge.

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

WORKE, Judge

Appellant challenges his conviction of violating an order for protection (OFP), arguing that (1) there was insufficient evidence to support the conviction and (2) his constitutional right to testify was violated. We affirm.

D E C I S I O N

Sufficiency of Evidence

Appellant Todd Bradley Gunderson first argues that the evidence was insufficient to convict him of violating an OFP under Minn. Stat. § 518B.01, subd. 14(c) (2008). In considering a claim of insufficient evidence, our review is limited to a thorough review of the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict [that] they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). An appellate court "cannot retry the facts, but must take the view of the evidence most favorable to the state." *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). The jury is in the best position to weigh the evidence and evaluate the credibility of witnesses; therefore, its verdict must be given due deference. *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980); *see also State v. Anderson*, 379 N.W.2d 70, 75 (Minn. 1985) (reviewing circumstantial evidence). An appellate court must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). And we will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably

conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant was charged with violating the OFP obtained by his ex-wife, M.W., by calling her on the phone. A person is guilty of violating an OFP when: (1) there was an existing OFP, (2) the defendant's conduct violated a term of the OFP, and (3) the defendant knew of the OFP. 10 *Minnesota Practice*, CRIMJIG 13.54 (2008). Appellant does not deny that an OFP existed. Nor does appellant deny knowledge of the OFP. Instead, appellant argues that there was insufficient evidence of conduct violating a term of the OFP because the calls M.W. complained of were made from a private number and there is no proof that he was the caller.

But two witnesses testified to the contrary. M.W. testified that appellant called her from a private number, she warned him not to call again, she received repeated phone calls from a private number days later, and she finally answered a call from the private number and appellant was the caller. This account was consistent with the testimony offered by the arresting officer, who testified that he was dispatched to M.W.'s house, she showed him the missed calls on her phone from a private number, and she informed him that she answered a call from a private number and appellant was the caller. Under the plain terms of the existing OFP, appellant is prohibited from having any contact with M.W., including contact by telephone. Accordingly, there was sufficient evidence to support appellant's conviction.

Right to Testify

Appellant also argues that he did not knowingly and voluntarily waive his right to testify. "The defendant's right to testify in his . . . own defense is protected by both the [Fourteenth] Amendment Due Process Clause of the Federal Constitution and Minnesota state law." *State v. Ihnot*, 575 N.W.2d 581, 587 (Minn. 1998). This right is personal and may be waived only by the defendant. *State v. Rosillo*, 281 N.W.2d 877, 878 (Minn. 1979). The defendant's waiver must be knowingly and voluntarily made. *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997). Whether a constitutional right was violated is a question of law that we review de novo. *State v. Sewell*, 595 N.W.2d 207, 211 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999).

Appellant asserts that the district court never informed him of his right to testify; thus, he did not knowingly and voluntarily waive this right. Appellant primarily relies on *State v. Halseth*, in which this court granted a new trial after a district court failed to ensure a valid waiver of trial rights, including the right to testify. 653 N.W.2d 782, 786-87 (Minn. App. 2002). But *Halseth* was a stipulated-facts proceeding, *see id.*, and a valid waiver of the right to testify unquestionably must occur in such a proceeding. *State v. Ehmke*, 752 N.W.2d 117, 122-23 (Minn. App. 2008). Appellant was convicted after a jury trial. In a jury-trial setting, a district court should place a defendant's personal waiver of his right to testify on the record, but is not obligated to do so. *See Walen*, 563 N.W.2d at 751-52.

Here, appellant insisted upon representing himself, and the district court ensured a valid waiver of counsel before trial. By representing himself, appellant assumed the

responsibilities and obligations of a licensed attorney. *See State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998) (noting district court's practice of holding pro se defendants to the same standard as licensed attorneys after defendants waived their right to counsel). It is not the district court's responsibility to explain to appellant how best to present his defense. And when a record is silent as to a waiver of the right to testify, as it is here, an appellate court "must presume that the decision not to testify was made . . . voluntarily and intelligently." *State v. Smith*, 299 N.W.2d 504, 506 (Minn. 1980). Accordingly, appellant's right to testify was not violated.

Affirmed.