STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1439

State of Minnesota,
Respondent,

vs.

Timothy Jerome Bailey,
Appellant.

Filed January 15, 2008
Affirmed
Wright, Judge

Hennepin County District Court
File No. 05061570

John Stuart, State Public Defender, Bridget Kearns Sabo, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Considered and decided by Peterson, Presiding Judge; Willis, Judge; and Wright, Judge.

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

WRIGHT, Judge

Appellant challenges his first-degree burglary conviction, arguing that (1) the district court abused its discretion by declining to appoint substitute counsel, and (2) he did not voluntarily waive his right to counsel. In his pro se supplemental brief, appellant argues that the evidence was insufficient to support the conviction and that the district court abused its discretion by not dismissing a juror. We affirm.

FACTS

On September 23, 2005, police found appellant Timothy Bailey hiding in the basement of a home after the homeowner returned and reported a break-in. The officer arrested and searched Bailey. Bailey's pockets contained a number of the homeowner's belongings, including a diamond engagement ring, several two-dollar bills, and a credit card. Bailey was charged with first-degree burglary, a violation of Minn. Stat. § 609.582, subd. 1(a) (2004).

A public defender was appointed as Bailey's counsel. He represented Bailey at the probable-cause hearing on October 19, 2005, and filed a notice of motion the next day indicating his intent to move the district court for relief on several grounds. At a hearing on January 3, Bailey's counsel advised the district court that he was prepared for trial but Bailey did not wish to proceed to trial or to accept the state's 39-month plea offer. Rather, Bailey wanted substitute counsel to be appointed and a continuance.

The district court granted Bailey leave to address it directly, whereupon Bailey stated that he had "a very, very strong conflict of interest" with his appointed counsel.

Bailey explained that his counsel had been "misrepresenting" him and "misleading [him] with the wrong legal advice." Bailey added that he and his counsel argued about how the case should be handled every time they met. Bailey indicated that, if forced to go to trial with his appointed counsel, he would feel like he was "brought up against two prosecutors instead of one." He also claimed to have fired his appointed counsel.

The prosecutor sought to clarify that Bailey's objection was not based on a legal conflict of interest. Bailey responded to the prosecutor's questions by repeating that he objected to his counsel because his counsel did not believe in Bailey's case. Bailey also expressed concern because his counsel would not disclose his "win and loss record." Bailey's counsel advised the district court that there was not a legal or factual conflict of interest between himself and Bailey. Because the nature of the conflict would not necessitate substitute counsel, Bailey's counsel opined to the district court that Bailey would not qualify for a substitute public defender. The district court continued the matter to permit Bailey to hire private counsel but declined to remove his appointed counsel from the case.

On January 11, Bailey refused to come to court for his hearing. His appointed counsel appeared at the hearing as counsel of record, and a private attorney was not present for Bailey. The district court continued the matter.

On January 13, January 27, February 9, and February 14, the district court granted Bailey continuances to hire a private attorney. Throughout that period, Bailey assured the district court that he had access to resources for retaining a private attorney and simply needed more time to do so. The district court warned Bailey numerous times

during this period that substitute counsel would not be appointed and that Bailey's rejection of his appointed counsel would require Bailey to proceed pro se if he were unable to retain private counsel.

On February 14, the district court advised Bailey that his appointed counsel was a good and experienced lawyer, it was going to be "virtually impossible for [Bailey] to get an acquittal," the presumptive guidelines sentence was 61 months' imprisonment, and Bailey should, "at a minimum," have his appointed counsel represent him at trial. Although his appointed counsel expressed his willingness to represent Bailey if Bailey desired, Bailey refused. When the district court asked if he was electing to represent himself, Bailey responded that he "should have counsel" by the trial date, April 3. The district court warned Bailey again that if he appeared for trial without an attorney, he would have to represent himself.

Bailey did not hire an attorney for trial. Refusing to have his appointed counsel represent him, Bailey proceeded pro se at the *Rasmussen* hearing and at the jury trial. His appointed counsel attended the proceedings as standby counsel. The district court advised Bailey that his appointed counsel was available for consultation but, because Bailey had chosen to forego representation, he was pro se. Bailey advised the district court that he would not seek assistance from his appointed counsel.

At trial, the police officer who found Bailey at the scene, the homeowner, and the homeowner's tenant testified. Bailey did not cross-examine any witnesses, call any witnesses, or present any evidence. Bailey was convicted of the charged offense, and this appeal followed.

D E C I S I O N

I.

The decision whether to grant a motion to substitute counsel rests within the discretion of the district court. *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). Absent an abuse of that discretion, the district court's decision will not be disturbed. *Id.*

The United States and Minnesota constitutions guarantee a criminal defendant the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. "This right includes a fair opportunity to secure counsel of [one's] own choice." *State v. Fagerstrom*, 286 Minn. 295, 298, 176 N.W.2d 261, 264 (1970). Although an indigent defendant has the right to appointed counsel at every stage of the criminal process, the defendant does not have "the unbridled right to be represented by counsel of his own choosing." *Id*. at 299, 176 N.W.2d at 264. Rather, an indigent defendant must accept the court's appointee. *Id.* A defendant's request for a substitution of counsel will be granted only when exceptional circumstances exist, the demand is reasonable, and the request is timely. *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977).

Exceptional circumstances are those that affect a public defender's "ability or competence to represent the client." *Gillam*, 629 N.W.2d at 449 (rejecting more stringent standard adopted in *United States v. Webster*, 84 F.3d 1056, 1062 (8th Cir. 1996)). In *Gillam*, the Minnesota Supreme Court held that the defendant's disagreement with appointed counsel about trial strategy and general dissatisfaction with the representation did not constitute exceptional circumstances. *Id*. at 449-50. Although an indigent defendant's disagreements with his court-appointed attorney could potentially affect the

attorney's ability or competence, *id.* at 450, general dissatisfaction or disagreement with appointed counsel's assessment of the case does not constitute exceptional circumstances warranting substitute counsel, *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998).

Here, what Bailey characterized as a "conflict of interest" with his appointed counsel amounted to a disagreement as to trial strategy and the merits of Bailey's case. Bailey's objection was not based on a legal conflict of interest. Bailey did not object based on a lack of diligence or incapability of providing adequate legal representation. Rather, Bailey objected to his appointed counsel's assessment of the likelihood of success on the merits at trial.

During the brief period in which Bailey permitted his appointed counsel to actively represent him, the representation was more than merely competent and adequate. *See Gillam*, 629 N.W.2d at 450 (finding no exceptional circumstance when attorney's representation was competent and adequate before defendant's objection). Appointed counsel is an experienced criminal-defense attorney who was ready and willing to represent Bailey throughout the proceedings. The record is devoid of any evidence of exceptional circumstances to support Bailey's argument.

Bailey also argues that the district court did not adequately evaluate his claim regarding the conflict with appointed counsel, but this argument also is without merit. The record demonstrates that, after the district court inquired as to the nature of the conflict between Bailey and his appointed counsel and determined that the source of the conflict did not warrant a substitution of appointed counsel, the district court reasonably declined to delay Bailey's trial further. Moreover, the district court afforded Bailey more

than ample opportunity to hire private counsel rather than his appointed counsel, thereby fulfilling any obligation it had under *Fagerstrom*, 286 Minn. at 298, 176 N.W.2d at 264, to permit Bailey an opportunity to secure counsel of his choice.

Accordingly, in the absence of exceptional circumstances, the district court did not abuse its discretion when it declined to appoint substitute counsel.

II.

Bailey also argues that he is entitled to a new trial because he did not voluntarily waive his right to counsel. We will reverse a district court's finding of a valid waiver of the right to counsel only if that finding is clearly erroneous. *Worthy*, 583 N.W.2d at 276. To be valid, the defendant's waiver of the Sixth Amendment right to counsel must be "voluntary [and] must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 1884 (1981) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938)). The district court must make the defendant "aware of the dangers and disadvantages of self-representation." *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975). To that end, the district court is required to "ensure that a voluntary and intelligent written waiver of the right to counsel is entered in the record" or permit an oral waiver on the record if the defendant refuses to sign the waiver form. Minn. R. Crim. P. 5.02, subd. 1(4).

In *State v. Krejci*, the Minnesota Supreme Court held that "[a] defendant's refusal without good cause to proceed with able appointed counsel constitutes a voluntary waiver of [the] right [to counsel]."[1] 458 N.W.2d 407, 413 (Minn. 1990) (quotation omitted). With facts similar to the instant case, in *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995), the supreme court rejected an involuntary-waiver challenge raised by a defendant who was appointed counsel and subsequently "fired" that counsel. The supreme court reasoned that appellant "knew that he did not have a right to a different public defender but would have to represent himself if he did not accept the services of the public defender." *Brodie*, 532 N.W.2d at 557.

Since *Brodie*, Minnesota appellate courts have consistently applied *Brodie* and *Krejci* to refute claims of involuntariness when the defendant fires appointed counsel with the knowledge that another will not be appointed. *See Worthy*, 583 N.W.2d at 276 (upholding defendants' waiver of counsel based on *Brodie* because defendants "were fully aware of the consequences" of firing appointed counsel on day of trial); *State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997) (relying on *Brodie* and holding that waiver of counsel was not involuntary when defendant knew declining appointed counsel would result in proceeding pro se); *Finne v. State*, 648 N.W.2d 732, 736 (Minn. App. 2002)

[1] This does not substitute for the analysis demanded by *Edwards* and *Johnson* because it addresses only the issue of voluntariness, not intelligence or knowledge. The narrowness of the *Krejci* rule is apparent from the supreme court's separate conclusion that the defendant "made the waiver knowingly and intelligently." *Krejci*, 458 N.W.2d at 413. Because Bailey did not challenge the waiver on other grounds, our analysis is limited to its voluntariness.

(observing that defendant released appointed counsel "knowing full well that she would be expected to represent herself should she fail to hire private counsel").

It is undisputed that Bailey did not want to represent himself at trial. But Bailey does not dispute that, despite his desire not to represent himself, he dismissed his appointed counsel when he knew that a substitute would not be appointed. Bailey's refusal without good cause to proceed with able appointed counsel, therefore, constitutes a voluntary waiver of the right to counsel.

III.

In his pro se supplemental brief, Bailey challenges the sufficiency of the evidence to support his conviction and argues that the district court erred by declining to dismiss a juror who was acquainted with one of the witnesses. We address each argument in turn.

A.

When reviewing a challenge to the sufficiency of the evidence, we conduct a painstaking analysis of the record to determine whether the fact-finder could reasonably find the defendant guilty of the offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999), *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). In doing so, we view the evidence in the light most favorable to the verdict and assume that the fact-finder believed the evidence supporting the verdict and disbelieved any contrary evidence. *Chambers*, 589 N.W.2d at 477. We will not disturb the verdict if the fact-finder, 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. *Alton*, 432 N.W.2d at 756.

Whoever enters a dwelling without consent is guilty of first-degree burglary if either (1) a person other than an accomplice is present in the dwelling or (2) a person other than an accomplice enters the dwelling while the burglar is in it. Minn. Stat. § 609.582, subd. 1(a) (2004). Our review of the record establishes that the evidence supporting the guilty verdict is overwhelming. Bailey entered a residence without the homeowner's permission and was found in the residence. That the residence was unoccupied when Bailey entered does not bar his conviction of first-degree burglary because the elements of the offense are satisfied when someone other than an accomplice is present in the dwelling at any time while the offender is there. The uncontroverted evidence establishes that the homeowner returned and entered his home while Bailey was in it. Thus, Bailey's challenge to the sufficiency of the evidence fails.

B.

Bailey's argument that his conviction was tainted by juror bias is similarly without merit. We will not substitute our judgment for that of the district court in evaluating juror bias because the district court is in the best position to weigh the testimony and demeanor of potential jurors and decide, when necessary, whether the juror "can set aside his or her impression or opinion and render an impartial verdict." *State v. Anderson*, 603 N.W.2d 354, 356 (Minn. App. 1999), *review denied* (Minn. Mar. 14, 2000).

During the trial, a juror indicated that she knew a testifying witness, although she had not recognized the witness's name when it was read during jury selection. The

district court permitted the witness to testify and the juror to remain on the panel for the testimony. After the trial, the district court questioned the juror and determined that the juror's acquaintance with the witness was limited. The juror assured the district court that she could be impartial. The district court afforded the prosecutor and Bailey the opportunity to question the juror, and Bailey declined to do so. The record also demonstrates that Bailey did not object at any time during or immediately after trial.

It is evident from the record that the district court made a reasonable determination that the juror's minimal contact with the witness was unlikely to influence her ability to render an impartial decision. Absent any evidence that the district court's decision resulted in actual prejudice, we conclude that the district court's exercise of its discretion was sound.

Affirmed.