STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1666

State of Minnesota,
Respondent,

vs.

Roderick R. Kottom,
Appellant.

Filed November 25, 2008
Affirmed
Worke, Judge

St. Louis County District Court
File No. 69HI-CR-05-973

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

Melanie S. Ford, St. Louis County Attorney, Stacey M. Sundquist, Assistant County Attorney, 1810 12th Avenue East, Hibbing, MN 55746 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

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

WORKE, Judge

Appellant challenges his convictions of possession of prohibited wild animals, failure to check traps or snares, and failure to provide identification of traps and snares, arguing that (1) the district court failed to obtain a waiver of his right to a jury trial; (2) the district court abused its discretion in admitting evidence that the state failed to authenticate and establish the chain of custody; (3) his conviction of possession of prohibited wild animals must be reversed because he was charged with a penalty, not a crime; (4) the evidence on the possession-of-prohibited-wild-animals charge is insufficient to support the conviction; (5) the district court failed to obtain a waiver of his right to counsel at sentencing; and (6) he was denied his right to effective assistance of counsel when his attorney failed to appear at sentencing. We affirm.

FACTS

On November 2, 2002, Conservation Officer Marty Stage responded to a report of a fisher in a snare. Trapping season for fisher was not open. When Stage arrived, he saw two fishers in snares that did not have any identification. Stage euthanized the fishers and left one in order to see if anyone came to get it. Stage returned later that night and over the next three days, but did not see anyone, and the fisher remained in the snare. On November 5, a surveillance camera was set up. On November 6, the fisher was gone. The surveillance tape showed a man get out of a vehicle, walk into the snare sight, return with the fisher, and put the fisher underneath the hood of his vehicle. The vehicle was identified as a Ford pickup with a topper and officers were able to partially read the

license-plate number. The license-plate number belonged to a Ford pickup registered to appellant Roderick R. Kottom. Officers believed that the build of the man on the video matched that of appellant.

On December 14, 2004, officers executed a search warrant at appellant's home. As a result of the search, officers seized 16 ½ fisher pelts and 23 pine marten pelts. None of the pelts showed any evidence of tagging or registration and none of the packages were plainly marked with ownership information or the number and species in the package. Appellant was charged with gross overlimits of wild animals; possession of prohibited wild animals; unlawfully buying or selling wild animals; failure to check traps or snares; failure to provide identification of traps and snares; and unlawful storage of protected wild animals. Following a court trial, the district court found appellant not guilty of over limits of wild animals and the unlawful-buying-and-selling charge was dismissed. The district court found appellant guilty and sentenced him for taking or possessing fisher in closed season in violation of Minn. Stat. § 97A.331, subd. 6 (2004); failure to check traps or snares; failure to provide identification of traps and snares; and unlawful storage of protected wild animals. This appeal follows.

D E C I S I O N

Waiver of Right to a Jury Trial

Appellant first argues that the district court failed to obtain a waiver of his right to a jury trial. The Minnesota Constitution provides for a jury trial, and for waiver of a jury trial "in the manner prescribed by law." Minn. Const. art. I, § 4.

> [A] defendant, with the approval of the court may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

Minn. R. Crim. P. 26.01, subd. 1(2)(a). "The interpretation of the rules of criminal procedure is a question of law subject to de novo review." *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

A waiver of the right to a jury trial must be knowing, intelligent, and voluntary. *State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991). "The waiver requirement of Rule 26.01 mandates only a relatively painless and simple procedure to protect a basic right. Just as the police are required to advise an arrested individual of his rights, so must the court comply with Minn. R. Crim. P. 26.01." *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002), *review denied* (Minn. June 18, 2002) (quotation omitted). A searching inquiry as to why a defendant is waiving his right is not required. *In re Welfare of M.E.M.*, 674 N.W.2d 208, 213 (Minn. App. 2004). However, the district court "must be satisfied that the defendant was informed of his rights and that the waiver was voluntary" and the required "inquiry may vary with the circumstances of a particular case." *Ross*, 472 N.W.2d at 653-54 (quotation omitted). "Waiver of jury trial may be withdrawn by the defendant at any time before the commencement of trial." Minn. R. Crim. P. 26.01, subd. 1(3).

On November 28, 2005, appellant first appeared with counsel who requested a contested omnibus hearing. Appellant's attorney appeared at the omnibus hearing on April 10, 2006. Appellant's counsel appeared again on June 26, 2006, when the parties

requested another date for a pretrial. On July 17, 2006, appellant appeared for the pretrial without counsel. However, appellant's counsel had contacted the court and indicated that appellant had rejected a plea offer and wanted the matter set for trial. The prosecutor indicated that appellant's attorney had notified her that appellant was intending to hire another attorney. On September 12, 2006, appellant's counsel filed a notice of withdrawal of counsel.

The following exchange occurred at a pretrial hearing on November 20, 2006:

> THE COURT: [Appellant] you previously had an attorney but no longer and therefore you are planning on representing yourself at trial? Is that accurate?
>
> APPELLANT: Yeah, I am going to try, your Honor. I'll do the best job I can.
>
> THE COURT: Okay. You still want to have a jury trial?
>
> APPELLANT: Yeah either that or in front of a judge. Either one is fine with me.
>
> THE COURT: Well you have a right to a jury trial and you may waive that right and have a trial to the court without a jury where a judge rather than a jury decides whether or not you are guilty. The difference is that the judge would find the facts rather than the jury. You [are] still under the same standards of proof . . .
>
> APPELLANT: I can understand that.
>
> THE COURT: the state has to prove you're guilty beyond a reasonable doubt. It's just than rather having to prove it to a [unanimous] jury . . .
>
> APPELLANT: I think I would feel a little more comfortable with you rather than a jury.

> THE COURT: Well it would save you from attempting to go through the process of jury selection and probably we can give you a little more leeway on the rules of evidence we couldn't in front of a jury.
>
> APPELLANT: Well thank you.
>
> THE COURT: You want to do that?
>
> APPELLANT: Yeah, I'd rather do that.

The court then continued the trial date. On January 24, 2007, appellant's new attorney requested a continuance. A court trial finally occurred on April 9-10, 2007.

Appellant waived his right to a jury trial on November 20, 2006, on the record and in open court after he had been advised by the court of his right to a jury trial. Further, appellant waived his right after he had the opportunity to consult with counsel because he had representation until September 12, 2006. Moreover, appellant was able to withdraw his waiver at any time before the trial commenced. Appellant retained new counsel before January 24, 2007. Appellant could have withdrawn his waiver at any time between November 20, 2006, and April 9, 2007. At no time did appellant's counsel move to withdraw his waiver. Therefore, the district court did not err in accepting appellant's waiver of his right to a jury trial.

Admission of Evidence

Appellant next argues that the district court abused its discretion in admitting evidence of a videotape and of a photo taken from the video, contending that the state failed to authenticate the evidence and did not establish the chain of custody. The district court has broad discretion when determining the sufficiency of the foundation for the

admission of evidence. *State v. Winston*, 300 Minn. 314, 316-17, 219 N.W.2d 617, 619 (1974).

Authentication is a condition precedent to admissibility. Minn. R. Evid. 901(a). "If, upon consideration of the evidence as a whole, the court determines that the evidence is sufficient to support a finding by a reasonable juror that the matter in question is what its proponent claims, the evidence will be admitted." *State v. Hager*, 325 N.W.2d 43, 44 (Minn. 1982) (quotation omitted). When evidence is not unique or readily identifiable, the integrity or control of the evidence must be authenticated by establishing the chain of custody. *Id.* "Chain-of-custody authentication requires testimony of continuous possession by each individual having possession, together with testimony by each that the object remained in substantially the same condition during its presence in his possession." *Id.* (quotation omitted). In order to establish a valid chain of custody, the state must reasonably demonstrate that the evidence offered is the same as that seized and it is in substantially the same condition at the time of trial as it was at the time of seizure. *State v. Johnson*, 307 Minn. 501, 504, 239 N.W.2d 239, 242 (1976).

> Admissibility should not depend on the prosecution negativing all possibility of tampering or substitution, but rather only that it is reasonably probable that tampering or substitution did not occur. Contrary speculation may well affect the weight of the evidence accorded it by the factfinder but does not affect its admissibility.

Id. at 505, 239 N.W.2d at 242.

Stage testified that he and two other officers set up the video camera and viewed the tape. Stage testified that the officers viewed the tape on high-resolution television

sets in order to read the license-plate number, and were able to take digital photos of the image on the television. One of the officers, Lieutenant Michael Ramstorf, testified that several days after the case began, he left his position and handed off all evidence to Lieutenant Gregory Payton. Ramstorf testified that the videotape was kept in an evidence locker in his office until he gave it to Payton. Payton testified that the videotape was kept in an evidence locker, which is a gun safe that only he had access to. The officers' testimony established the authenticity and the chain of custody of the evidence. Therefore, the district court did not abuse its discretion in admitting the evidence.

Complaint at Variance with the Conviction

Appellant next argues that his conviction must be reversed because he was charged with a penalty, not the crime for which he was convicted. The charges upon which the state may proceed at trial must be included within the complaint. *See* Minn. R. Crim. P. 10.01. "It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him." *Schmuck v. United States*, 489 U.S. 705, 717, 109 S. Ct. 1443, 1451 (1989). The purpose of restricting the prosecution to the charges included in the complaint is to provide the defendant with notice and an opportunity to prepare his or her defense. *State v. Clark*, 270 Minn. 538, 552, 134 N.W.2d 857, 867 (1965).

Appellant was charged by complaint with possession of prohibited wild animals in violation of Minn. Stat. § 97A.331, subd. 6. The complaint states that appellant "did illegally take, transport, or possess a prohibited wild animal, to-wit: 16 fisher and 23 pine marten." The statute provides that "[a] person that takes, transports, or possesses pine

marten, otter, fisher, or wolverine in violation of the game and fish laws is guilty of a gross misdemeanor." Minn. Stat. § 97A.331, subd. 6. The Department of Natural Resources (DNR) has administrative rules—game and fish laws—that pertain to the taking of fisher and pine marten. The DNR rules provide that the open season for fisher and pine marten is from the first Saturday following Thanksgiving to the Sunday nearest December 12. Minn. R. 6234.1700, subp. 1 (2001).

The complaint alleges that on November 2, 2002, during closed season, officers received a report of fishers in snares. On November 6, officers viewed surveillance videotape showing an individual drive to the snare site in a vehicle matching the description and license-plate number of a vehicle registered to appellant. The video shows an individual matching the build of appellant returning to his vehicle carrying the snared fisher and placing the fisher inside the hood of the vehicle. Appellant was on notice from the complaint that he may be found liable for taking, transporting, or possessing fisher during closed season because the state included the facts in the complaint that could establish his guilt. *See State v. DeVerney*, 592 N.W.2d 837, 847 (Minn. 1999) (stating that it is the language of the charging document, not the actual statutory citations contained in it, that provides notice); *see also State v. DeFoe*, 280 N.W.2d 38, 40 (Minn. 1979) (noting that "the reports and statements attached to the complaint made it clear what the state basically contended had happened . . . [and] therefore [there is] no possibility that [the] defendant was confused as to the nature of the charges"). Thus, appellant's argument that the complaint is at variance with the conviction fails.

Sufficiency of the Evidence

Appellant also argues that the evidence is insufficient to sustain his conviction of taking or possessing fishers in closed season. When considering a claim of insufficient evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "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 [the] defendant was [] guilty of the offense charged." *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Appellant was charged with taking two fishers in early November 2002 during closed season. The district court found that the evidence taken as a whole proved beyond a reasonable doubt that appellant was guilty of this offense. The evidence included a citizen report of two nearly dead fishers caught in snares during closed season; the surveillance video of a vehicle matching the description and license-plate number of a vehicle registered to appellant arriving at the scene; the video of a man with the same build as appellant putting the dead fisher in his vehicle; and the search of appellant's home resulting in the seizure of 16 ½ fisher pelts. The evidence is sufficient to support appellant's conviction.

Waiver of Right to Counsel at Sentencing

Appellant argues that the district court failed to obtain a waiver of his right to counsel at sentencing. A criminal defendant is constitutionally guaranteed the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6.

Appellant's attorney was not present at sentencing, but submitted a letter in lieu of her appearance, which the district court read in open court. The letter states:

> Over this preceding week, [appellant] and I have discussed at some length my attendance at this hearing. Although he'd like me present, he still faces significant legal issues and thinks my time will be better spent working on them. I agree. Given his decision, I counseled [appellant] accordingly and he will attend this hearing on his own. . . .
>
> Even though I will not be attending this hearing, I will none the less take this opportunity to submit my recommendations for sentencing . . . .

In her letter, appellant's counsel moved for an order vacating the judgment and dismissing count 2 and a sentencing recommendation. After the state presented its sentencing recommendation, appellant presented an argument. Appellant stated that his attorney told him that she would submit a letter to the district court, and instructed appellant to take her phone number with him to sentencing in case the court needed to reach her.

Appellant was aware that his attorney was not going to be at sentencing and instead was going to send a letter to the district court and work on his appeal. This is not a situation in which a waiver of the right to counsel is required because appellant and his attorney decided that she would not be present at sentencing. The Sixth Amendment guarantees the right to the *assistance* of counsel and appellant received the assistance of

counsel even though his attorney was not physically present. Therefore, the district court was not required to obtain a waiver of appellant's right to counsel.

Ineffective Assistance of Counsel

Alternatively, appellant argues that his attorney's failure to appear at sentencing constituted ineffective assistance of counsel. When reviewing an ineffective-assistance-of-counsel claim, this court applies the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998).

The first prong requires a showing that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064. The reasonableness of counsel's performance is an objective standard of "representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (quotation omitted). There is a strong presumption that counsel's performance was reasonable. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Analysis of counsel's performance generally "does not include reviewing attacks on counsel's trial strategy." *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005); *see also Jones*, 392 N.W.2d at 236 (stating trial strategy lies within counsel's discretion). The second prong requires a showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. For the claim to succeed, both prongs must be met. *Id.* at 687, 104 S. Ct. at 2064. This court may "address the two prongs of

the test in any order and may dispose of the claim on one prong without analyzing the other." *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

Appellant fails to meet either prong of the *Strickland* test. Appellant's counsel's absence at sentencing was not unreasonable because it was part of her strategy. Appellant and his attorney decided that her time would best be spent working on the appeal rather than appearing at sentencing. And appellant was not prejudiced—there is not a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. Appellant's attorney presented her arguments regarding sentencing in a letter that was read in open court and made part of the record. Appellant was given ample opportunity to argue his position on sentencing. The district court addressed each of appellant's attorney's and appellant's arguments related to sentencing. Appellant has failed to meet either of the two prongs of the *Strickland* test; therefore, his ineffective-assistance-of-counsel claim fails.

Affirmed.