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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1866**

State of Minnesota,
Respondent,

vs.

Starrie Keith Marmon,
Appellant.

**Filed September 26, 2011
Affirmed
Stoneburner, Judge**

Hennepin County District Court
File No. 27CR1011334

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Johnson, Chief Judge;
and Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges his conviction of first-degree burglary, arguing that he is entitled to a new trial because his waiver of counsel was invalid. Because the district court did not err by finding that appellant's waiver of counsel was valid, we affirm.

DECISION

Criminal defendants are guaranteed the right to assistance of legal counsel. U.S. Const. amend. VI, XIV; Minn. Const. art. I, § 6. But criminal defendants also have the constitutional right to represent themselves in criminal proceedings. *Faretta v. California*, 422 U.S. 806, 836, 95 S. Ct. 2525, 2541 (1975). “When a criminal defendant asks to represent himself, the court must determine (1) whether the request is clear, unequivocal, and timely, and (2) whether the defendant knowingly and intelligently waives his right to counsel.” *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990) (citing *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541). Minnesota requires that the district court “make a thorough inquiry into all pertinent concerns . . . to make sure the defendant knows what he is doing.” *Id.* at 264. This court reviews the adequacy of a district court's finding of valid waiver of the right to legal counsel for clear error. *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998).

Appellant Starrie Keith Marmon was charged with two counts of first-degree burglary for breaking into a friend's home through her bedroom window and grabbing her by her arms and neck. A public defender was appointed to represent him. During voir dire on the morning of the second day of trial, Marmon told the judge that he wanted

to fire his attorney and that his family was hiring private counsel to represent him. The district court told Marmon that the trial would not be continued but that he could represent himself with counsel acting in an advisory role, or continue with the appointed counsel representing him.

The district court told Marmon that the charges against him, which the district court had explained to the jury panel in Marmon's presence at the beginning of the trial, were serious and carried a presumptive prison sentence. The district court explained the role of advisory counsel and encouraged Marmon to rely on the advice of his experienced counsel, stating that it would not be in his best interest to represent himself although he and had the right to do so. Marmon stated that he wanted to represent himself. The district court provided a recess so that Marmon could talk to advisory counsel before he began to represent himself.

After the recess, the district court explained the exercise of preemptory challenges and opening statements to Marmon. Marmon exercised his challenges to remove five potential jurors. Marmon began his opening statement, which drew several objections. The district court called a recess, during which Marmon decided to allow his advisory counsel to represent him. Marmon's counsel's request for a new jury was denied, but the district court permitted Marmon's counsel to give an additional opening statement after the jury was informed that Marmon was no longer representing himself. Marmon was convicted and sentenced on one count of first-degree burglary.

Marmon first asserts that the district court erred by failing to obtain a signed, written waiver of his right to counsel, as required by the Minnesota Rules of Criminal

Procedure. *See* Minn. R. Crim. P. 5.04, subd. 1(4) (requiring a voluntary and intelligent written waiver of the right to counsel, or, if the defendant refuses to sign a written waiver form, a waiver on the record after the district court has advised the defendant of the nature of the charges, all included offenses, the range of allowable punishments, that there may be defenses, that mitigating circumstances may exist, and “all other facts essential to a broad understanding of the consequences of the waiver”). It is undisputed that the district court did not follow the procedures set out in rule 5.04, subd.1(4).

Notwithstanding the requirements of Minn. R. Crim. P. 5.04, subd. 1(4), this court has stated that the determination of whether a waiver of counsel is valid in a criminal case depends on the specific facts of each case, rather than whether the rule was followed. *See State v. Garibaldi*, 726 N.W.2d 823, 827–29 (Minn. App. 2007) (noting that after the 1998 amendment to Minn. R. Crim. P. 5.02,¹ subd. 1(4), the supreme court has continued to cite with approval pre-amendment cases stating that a criminal defendant’s waiver of his constitutional right to counsel may be valid even though the district court failed to follow a particular procedural rule). A valid waiver can be found even when the record does not contain “a detailed on-the-record colloquy” between the defendant and the district court with regard to waiver. *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998) (citing *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995)). We therefore examine the record to determine whether the facts in the record support the district court’s conclusion that Marmon intelligently waived his right to legal counsel.

¹ Effective in 2010, rule 5.02 was renumbered as 5.04, and while the rule was altered slightly, the changes made to the language did not impact the substance of the renumbered rule. *See* Minn. R. Crim. P. 5.04, subd. 1(4) (2010).

In addition to the requirements in Minn. R. Crim. P. 5.04, subd. 1(4), case law requires that, on a defendant's request to waive his or her right to counsel, the court "should . . . make a comprehensive examination of the defendant [regarding] his comprehension of the charges against him, the possible punishments, the defenses, mitigating circumstances, and any other facts relevant to an understanding of the consequences of the waiver." *State v. Krejci*, 458 N.W.2d 407, 412 (Minn. 1990) (quotation omitted). The "defendant should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with his eyes open." *Richards*, 456 N.W.2d at 264 (quotations omitted).

Marmon argues that the district court impermissibly failed to make a record of a "penetrating, and comprehensive inquiry" into his desire to waive his right to legal counsel. *See State v. Rubin*, 409 N.W.2d 504, 506 (Minn. 1987) (discussing the necessary components of a sufficient inquiry into a defendant's waiver). But based on our painstaking review of the record, we conclude that the district court's colloquy with Marmon, together with the procedural posture of the case at the time Marmon requested self-representation, demonstrate an adequate, if not exemplary, inquiry and advisory regarding self-representation.

At the pretrial, on the record, the charges against Marmon were explained in the context of an offer from the state for a plea agreement. Marmon rejected the proposed plea agreement because he believed that there was incorrect information in the complaint and he did not believe that he was guilty of the charges against him. At the beginning of

trial, the judge explained the charges to the jury in Marmon's presence. When Marmon stated that he wanted to represent himself, the judge explained to Marmon that, because Marmon knew nothing about conducting a criminal trial, it was inadvisable for him to conduct a trial without the assistance of his attorney, who had 25 years of experience trying criminal cases. The district court judge advised Marmon that the charges were "serious" and that punishment may include a "presumptive prison sentence." Marmon, who had been represented throughout the proceedings to that point, was plainly aware of the gravity of the offense and the possible punishment on conviction.

The court then asked Marmon why he wanted to fire his attorney. Marmon responded that he disagreed with his attorney's questions regarding whether Marmon had a past sexual relationship with the victim. Marmon also objected to his attorney's refusal to call character witnesses to bolster his character on the basis that he was a good employee or student. The district court explained to Marmon that his past relationship with the victim is relevant to the case and that putting character at issue could be damaging in many criminal cases. The court advised Marmon that certain witnesses may be helpful based on the availability of certain defenses, but that those defenses had not been asserted in this case. The court encouraged Marmon to rely on his experienced counsel to make good decisions and stated that Marmon was "[v]ery starkly, very boldly" presented with a choice of whether it was in his best interest to represent himself rather than "hav[e] a lawyer with 25 years of experience" represent him. Marmon responded that he wished to proceed without counsel. After appointing advisory counsel and

explaining advisory counsel's role to Marmon, the district court accepted Marmon's waiver of counsel.

Marmon describes the district court's inquiry and advisories as "a far cry from the intense, penetrating, and comprehensive inquiry required." Specifically, Marmon argues that (1) the district court failed to inquire into his education and legal aptitude; (2) there is no record that the district court or counsel advised Marmon about his decision to proceed without representation; and (3) a harmless-error analysis is not applicable in this case.

But Marmon's education, knowledge of the charged crimes, and lack of legal training was sufficiently known to the district court from the pretrial proceedings at which Marmon's counsel had stated the elements of the charges against Marmon, and had requested Marmon's release from custody due to his recent graduation from a local school and his desire to be employed.

Marmon complains that his waiver was invalid because his attorney did not advise him of the consequences of proceeding pro se. Marmon cites *Camacho*, among other cases, for the proposition that counsel should be appointed to discuss the consequences of proceeding without representation. *See State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997) (stating that "[t]his court has also recommended that an attorney be appointed to discuss with the defendant the consequences of the waiver if the defendant has not previously consulted with an attorney"). But Marmon had been represented by counsel throughout the proceedings, and the district court provided a recess so that Marmon and counsel could further discuss self-representation before Marmon took over his own defense. And, when a defendant has consulted with an attorney prior to waiver, a district

court may “reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel.” *State v. Jones*, 266 N.W.2d 706, 712 (Minn. 1978). The district court ensured that Marmon was aware of the risks of proceeding pro se and specifically explained to Marmon that the concerns Marmon expressed about counsel’s representation were without merit.

Marmon correctly asserts that where waiver of counsel is invalid, reversal is warranted without a showing of prejudice. *See Bonga v. State*, 765 N.W.2d 639, 643 (Minn. 2009) (stating that denial of the right to counsel is a structural error that precludes harmless-error analysis). But, in this case, the district court did not err in concluding that Marmon’s waiver of counsel was valid.

Affirmed.