STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0361

State of Minnesota,
Respondent,

vs.

Travis Clay Andersen,
Appellant.

Filed March 31, 2014
Affirmed
Crippen, Judge[*]

Carver County District Court
File No. 10-CR-11-387

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

Mark Metz, Carver County Attorney, Mary E. Shimshak, Assistant County Attorney, Chaska, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CRIPPEN, Judge

Appellant Travis Andersen disputes the district court's denial of his request for a trial continuance that would have permitted his further efforts to arrange for services of counsel. He also asserts error in the court's jury instruction on a charge of violating an order for protection (OFP). Because appellant waived counsel by his conduct and because appellant's rights were not substantially affected by the court's erroneous instruction, we affirm.

FACTS

In January 2011, I.A.H. obtained a two-year OFP that precluded contacts from appellant, whom she had previously dated. Appellant was charged with a felony-level violation of the order four months later. He was also charged with simple robbery arising in the course of the same incident.

Initially, appellant was represented by the public defender's office. Prior to the jury trial, appellant appeared multiple times before the district court for hearings in this case and in at least two other Carver County files. In November 2012, a jury trial was held and appellant appeared pro se.

At trial, Carver County Sheriff Deputy Richard Raschke testified that he personally served the OFP and told appellant that he was to have no contact with the named party on the OFP (I.A.H.). I.A.H. testified that on the morning of April 15, 2011, she found appellant waiting for her at her place of employment. She told appellant that he was not allowed to have contact with her, and appellant left once I.A.H.'s supervisor

arrived. Later the same day, I.A.H. drove to the residence of E.B., a friend both of I.A.H. and of appellant. While I.A.H. was parked in E.B.'s driveway, appellant approached her vehicle and knocked on the vehicle's window. When she rolled down the window to tell appellant to leave, appellant pushed down the window, unlocked the door, and forced his way into the vehicle. Appellant then grabbed her purse and ran away. I.A.H. also testified that appellant was "very aware that there was a restraining order [and] that he wasn't supposed to come near me."

E.B. testified that he heard I.A.H. yelling at appellant to get away from her, and that he saw appellant exiting I.A.H.'s vehicle, holding her purse. The police were called, but they were unable to locate appellant in the immediate vicinity. A jury found appellant guilty of both the OFP and simple robbery charges.

D E C I S I O N

I.

Appellant argues that because he did not waive or forfeit his right to public defender representation, the district court violated his rights when it forced him to proceed without a continuance to make further efforts to obtain counsel. Appellant also asserts that because the district court did not ask appellant whether he understood the advantages and disadvantages of waiving counsel, his waiver was not knowing, voluntary, or intelligent.

We review a district court's finding of a valid waiver-of-counsel to determine whether it was clearly erroneous. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). "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." *Id.* (citing *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008)).

The right to counsel is a constitutional right. U.S. Const. amend. VI; Minn. Const. art. I, § 6. But the right to a public defender is a statutory right. Minn. Stat. § 611.14 (2010). The district court must advise a defendant of his right to counsel, and the court must appoint a public defender if a defendant is financially unable to obtain counsel. Minn. R. Crim. P. 5.04, subd. 1(1). The right to counsel also implies the right to self-representation. *Rhoads*, 813 N.W.2d at 885-86 (citing *Faretta v. California*, 422 U.S. 806, 819 (1975)). But a defendant asserting his right of self-representation must waive his right to counsel knowingly and intelligently. *State v. Jones*, 772 N.W.2d 496, 504-05 (Minn. 2009).

To ensure that a waiver is knowing and intelligent, the supreme court has instructed district courts to "comprehensively examine the defendant regarding [his] comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts relevant to [his] understanding of the consequences of the waiver." *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998); *see also* Minn. Stat. § 611.19 (2010) (requiring either a written waiver or an on-the-record waiver); Minn. R. Crim. P. 5.04, subd. 1(4) (same). But the lack of an on-the-record waiver "does not require reversal when the particular facts and circumstances of the case demonstrate a valid waiver." *Rhoads*, 813 N.W.2d at 886.

A defendant may validly waive his right to counsel when he fires his public defender and is aware of the fact that he must then represent himself. *Worthy*, 583

N.W.2d at 276-77 (citing *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995)); *see State v. Krejci*, 458 N.W.2d 407, 413 (Minn. 1990) ("A defendant's refusal without good cause to proceed with able appointed counsel constitutes a voluntary waiver of that right."). And, when a waiver occurs after a defendant has consulted with an attorney, it is presumed that attorney has already made the defendant aware of "the benefits of legal assistance and the risks of proceeding without it." *Worthy*, 583 N.W.2d at 276 (quoting *Jones*, 266 N.W.2d at 712).

At an August 14, 2012 hearing, nearly three months before trial, the district court set a scheduling conference for August 31 and addressed the public defender on an appearance from his office at the conference. Because in hearings over the course of the prior 16 months appellant had announced from time to time that he wished to proceed without the public defender, the court informed him that he needed to decide what he wanted to do with respect to representation before August 31, advising him to talk to the public defender or visit with the public defender at the conference.

The August 31st hearing date was moved to September 21, 2012. At this hearing, the district court announced a November trial date in this matter. The court inquired into appellant's representation and told appellant that he would not receive a trial continuance on the issue of representation:

> COURT: I understand that you may be inclined to discharge the Public Defender's Office for those other files and seek private counsel, and you're certainly welcome to do so. I would just caution you that if you are not able to find private counsel that is willing to accept the cases and go forward to trial on the dates that we scheduled today, don't expect to get a continuance. We've been talking about this for some time

> now and we're going to get these set for trial and we're going to get them done. So another option would be to continue with the representation with the Public Defender's Office until you're aware that you can secure counsel to represent you in those matters. So I'll leave that up to you.

Informed later in the August hearing that appellant had discharged the public defender's office, the court went back on the record to instruct appellant that he would have to reapply for their representation if he chose to proceed with them at the November trial in this matter or later trials in other cases.

In timely and complete instructions, appellant was fully informed that his case was to be tried on November 6th and that the proceedings would not be further continued for his arrangements for counsel. Despite this advice on the record, appellant neither re-applied for public defender representation nor secured private counsel. And because appellant was represented by counsel in numerous proceedings for over a year and a half before trial, it was reasonable to assume that he was aware of the consequences and risks of proceeding without counsel. The district court did not clearly err in finding that appellant's conduct constituted a valid waiver of his right to counsel.

II.

Appellant also argues that he should be granted a new trial because the district court instructed the jury on the elements required to prove a misdemeanor-level OFP violation instead of a felony-level OFP violation. Using the language of CRIMJIG 13.54, the district court instructed the jury that the mens rea requirement for a felony violation of an OFP required a finding that appellant "knew of the existence of the [OFP]." This language directly reflects the statutory language used in defining a misdemeanor-level

OFP violation. *Compare* Minn. Stat. § 518B.01, subd. 14(b) (2010), *with* Minn. Stat. § 518B.01, subd. 14(d) (2010). Under section 518B.01, subdivision 14, a felony-level OFP violation requires proof (1) of an existing OFP, (2) that defendant had knowledge of the order, (3) that defendant violated the order, (4) of venue, (5) of either two or more previous qualified domestic-violence-related offense convictions or possession of a dangerous weapon, and (6) that defendant *knowingly* violated the order. *See State v. Gunderson*, 812 N.W.2d 156, 160 (Minn. App. 2012) (comparing elements of a felony-level violation of a harassment restraining order to a misdemeanor-level violation).

Because appellant did not object to the jury instructions, we are to review the instruction if the "instructions constitute plain error affecting substantial rights or an error of fundamental law." *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012).

Under the plain error standard, we consider (1) whether there was an error, (2) whether such error was plain, and (3) whether it affected the defendant's substantial rights. *Id.* at 655-56. An error is plain if it is "clear" or "obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). "Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the three plain-error factors are established, we then consider whether the error seriously affected the fairness and integrity of the judicial proceedings. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) *holding modified by Ramey*, 721 N.W.2d at 302 (explaining that a court may exercise its discretion to correct a plain error only if

such error seriously affected fairness, integrity, or public reputation of judicial proceedings).

The supreme court recently addressed the issue of a defendant's rights associated with omission of the knowingly element in the district court instructions on a felony OFP charge. *State v. Watkins*, 840 N.W.2d 21 (Minn. 2013). The court determined that the omission does not affect a party's substantial rights as a matter of law and specified three factors for consideration in determining the effect of the error, "whether: (1) the defendant contested the omitted element and submitted evidence to support a contrary finding, (2) the State submitted overwhelming evidence to prove that element, and (3) the jury's verdict nonetheless encompassed a finding on that element." *Id.* at 28-29.

Here, appellant did not testify at trial, but he claimed that he did not know of the OFP's existence by disputing whether he was ever served with the OFP. He denied violating the OFP by presenting an alibi witness for his location on the night of April 15, 2011. In contrast, the state presented unequivocal evidence that the OFP was issued and served on appellant, along with two witnesses who confirmed his presence at E.B.'s residence on the night of April 15.

In the circumstances of this case, the jury's verdict encompasses the "knowingly violates" element of a felony-level OFP violation. The guilty verdict on the OFP-violation charge conflicts with appellant's claims, confirming that appellant knew of the OFP and acted in violation of the rule by contact with I.A.H. on April 15. It was undisputed that the contact at issue here—appellant climbing into I.A.H.'s car—was

prohibited by the OFP, and no argument was presented at trial challenging whether this contact was prohibited and in violation of the OFP.

Under the considerations articulated by the supreme court in *Watkins*, there was no reversible error in the district court's instructions because the error did not affect appellant's substantial rights.

Affirmed.