



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,)
Respondent,)
v.) WD83914
MATTHEW JAY SCHURLE,) FILED: September 7, 2021
Appellant.)

**Appeal from the Circuit Court of Nodaway County
The Honorable Corey K. Herron, Judge**

**Before Division One: Lisa White Hardwick, P.J., and
Alok Ahuja, and Anthony Rex Gabbert, JJ.**

Following a jury trial in the Circuit Court of Nodaway County, Matthew Schurle was convicted of delivery of methamphetamine, in violation of § 579.020,¹ possession of marijuana, in violation of § 579.015, and unlawful possession of drug paraphernalia, in violation of § 579.074. Schurle appeals. He contends that there was insufficient evidence to support his conviction for delivery of a controlled substance. Schurle also argues that the circuit court plainly erred in finding that he waived his right to counsel, without conducting a hearing to determine that Schurle knowingly and voluntarily chose to represent himself, and without securing his written waiver. Finally, Schurle argues that the circuit court plainly erred in finding that he was not indigent, and therefore that he was not eligible for appointed counsel.

¹ Unless otherwise indicated, statutory citations refer to the 2016 edition of the Revised Statutes of Missouri, updated by the 2017 Supplement.

We conclude that the evidence was sufficient to support Schurle's conviction for delivery of a controlled substance. As the State concedes, however, the circuit court plainly erred by proceeding to trial without determining after a hearing that Schurle was knowingly and intelligently waiving his right to representation. Consistent with the State's concession of error, Schurle's convictions are reversed, and the case is remanded for further proceedings consistent with this opinion.

Factual Background

At approximately 3:00 a.m. on March 29, 2018, Sergeant Austin Hann of the Nodaway County Sheriff's Department witnessed Schurle make a left turn without signaling at an intersection east of Ravenwood. Sergeant Hann followed Schurle's vehicle, and observed it drift toward the soft shoulder of the roadway. Sergeant Hann initiated a traffic stop.

When Sergeant Hann approached the vehicle, he observed that Schurle was on his phone and appeared to be leaving a voicemail for someone, indicating that he had been pulled over, and giving his location. Schurle's hands were visibly shaking, and he avoided eye contact with Sergeant Hann. This led Sergeant Hann to suspect that some criminal activity was underway. Throughout their conversation, Sergeant Hann noted that Schurle repeatedly said "uh" and "um", and would trail off without completing his sentences, suggesting that Schurle was delaying as he attempted to think of things to say.

Schurle stated that he was coming from his storage unit, but based on the direction Schurle had been driving, Sergeant Hann concluded that he was headed toward the only storage units in the area, not away from them. Sergeant Hann asked Schurle if anything was going to "come up" when Sergeant Hann checked Schurle's identification, and Schurle informed him that there was an active warrant for his arrest. Sergeant Hann then requested that Schurle step out of the vehicle,

handcuffed him, and had him sit in Sergeant Hann's patrol car. Sergeant Hann confirmed that there was an active warrant for Schurle's arrest.

Sergeant Hann arranged for Schurle's vehicle to be towed, since Schurle was being arrested. As a part of standard protocol, Sergeant Hann attempted to conduct an inventory search of Schurle's vehicle, but found that the car was locked with the keys in the ignition. Sergeant Hann felt that Schurle was "making a great effort to prevent anyone from gaining access [to his] vehicle."

Through the windows of Schurle's vehicle, Sergeant Hann was able to see what appeared to be a marijuana cigarette sitting in plain view in the center console. Sergeant Hann then had his dog sniff around the outside of Schurle's car, and the dog indicated that it had detected narcotics in the trunk area.

Sergeant Hann searched Schurle and found \$480 in cash, all in \$20 bills, in Schurle's pocket. Schurle claimed that he had just gotten paid, but then "immediately stated that he did not have a job." At trial, Schurle admitted that the explanation for the money which he gave to Sergeant Hann was a lie. Schurle offered another explanation for the money at trial, testifying that it was gas money to enable him to drive to California. He testified that his sister had wired \$300 of the money to him, and that he had earned the remainder.

Sergeant Hann also found a digital scale in the front pocket of Schurle's hooded sweatshirt. The scale was covered in a crystal residue, which was later determined to be methamphetamine. The scale was packaged to look like a bar of soap from a hotel. Sergeant Hann testified without objection that the digital scale he found in Schurle's pocket was consistent with "[t]he weighing and measuring of narcotics for distribution," and that such digital scales were commonly used in drug transactions.

Schurle was transported to the jail and was searched again by Sergeant Hann. Sergeant Hann found a spare key for Schurle's vehicle hidden in the lining of his vest.

A search of Schurle's vehicle was conducted once it arrived at the jail. Officers found a marijuana cigarette and a lock pick set in the center console, as well as a portion of a glass pipe with residue on it in the back seat. In the trunk, officers found rubber tubing containing a methamphetamine residue, and a marijuana test kit.

Schurle was charged with delivery of a controlled substance, for his possession of methamphetamine with the intent to distribute; possession of a controlled substance, for his possession of marijuana; and possession of drug paraphernalia, for his possession of "rolling papers formed as a join[t]."

Schurle posted a \$10,000 bond and hired two private attorneys to represent him. A year after private counsel entered their appearances, they filed motions to withdraw. As justification for their withdrawal, the attorneys cited an inability to agree with Schurle on litigation strategy, and his non-responsiveness concerning payment of their past-due fees. Schurle consented to his attorneys' withdrawal. He asked the court how he could receive the assistance of the Public Defender, because "[t]he limiting factor [on obtaining new counsel] is finances." The court granted the motions to withdraw on April 22, 2019, and continued Schurle's trial to allow him time to obtain new counsel.

Schurle applied to the Public Defender for representation. On May 6, 2019, the Public Defender filed a Determination of Non-Indigency with the circuit court, which concluded that Schurle was not indigent because he had previously retained private counsel, and had also posted a \$10,000 bond. Even though private counsel had withdrawn due in part to Schurle's inability to pay their fees, the Public Defender asserted that "[i]t is not presumed that when private counsel requires

further compensation to take a case to trial, that a Public Defender Attorney can be utilized by default when private counsel chooses to discontinue their relationship with the defendant.”

Schurle appealed to the circuit court, which held a hearing on May 16, 2019. Schurle informed the court that he had posted bond and retained private counsel with money he had received from his father. Schurle stated that his father had stopped paying for the costs of his defense, and that further financial resources from his father “[we]re no longer available.” Schurle informed the court that he was presently unemployed and homeless, living on a friend’s couch. Although Schurle stated that it was his intent to move to California, the court noted that Schurle was able-bodied, and that there was nothing preventing him from obtaining a temporary job in Missouri. Ultimately, the court determined it could not “find any grounds to overturn the public defender’s decision.” “You have the ability . . . to earn income, you just choose . . . not to, so I’m [not] going to overrule their finding.” The court then set the case for trial on September 30, 2019, stating that this should give Schurle enough time to retain counsel.

The trial began as scheduled, with Schurle representing himself. The jury convicted Schurle as charged and recommended a term of imprisonment and fines on each offense. The court accepted the jury’s recommendation, sentencing Schurle to ten years’ imprisonment on Count I, to run consecutively to sentences of one year in the county jail on Counts II and III (which were to run concurrently with each other). The court also assessed a \$1,000 fine on Count I, and \$500 fines on both Count II and Count III.

Schurle appeals. He has been represented by the Public Defender in connection with this appeal.

Discussion

Schurle raises three Points on appeal. First, he argues that there was insufficient evidence to support his conviction for delivery of a controlled substance, as there was no evidence presented at trial that Schurle intended to distribute the methamphetamine residue found in his possession. Second, Schurle argues that he did not effectively waive his right to the assistance of counsel, since the circuit court failed to secure Schurle's written waiver of counsel, and failed to hold a hearing to ensure that he understood his rights and the perils of self-representation. In his final Point, Schurle argues that it was plain error for the circuit court to find him ineligible for Public Defender services based on his future earning capacity.

I.

In his first Point, Schurle argues that the evidence was insufficient to support his conviction for delivery of methamphetamine, because the evidence fails to prove that he had an intent to distribute the methamphetamine residue found on the digital scale in his possession at the time of his arrest.

We conclude in § II, below, that Schurle is entitled to a new trial because the circuit court failed to obtain a valid waiver from Schurle of his right to counsel. Despite that conclusion, we must separately address Schurle's first Point, which makes a sufficiency-of-the-evidence argument. "The double jeopardy clause of the United States constitution precludes a second trial after a reversal based solely on the insufficiency of evidence." *State v. Barber*, 635 S.W.2d 342, 345 (Mo. 1982); accord *State v. Lehman*, 617 S.W.3d 843, 844 n.2 (Mo. 2021) ("[I]f a conviction is reversed solely due to evidentiary insufficiency the double jeopardy clause requires judgment of acquittal." (quoting *State v. Liberty*, 370 S.W.3d 537, 553 (Mo. 2012))). Therefore, if we determined that the evidence was insufficient to support Schurle's conviction for delivery of methamphetamine, the double jeopardy clause would bar a retrial for that offense. Because Schurle's sufficiency-of-the-evidence argument

would entitle him to broader relief than his right-to-counsel arguments, we consider Point I despite our disposition of his remaining claims. *See, e.g., State v. Matthews*, 552 S.W.3d 674, 681 n.6 (Mo. App. W.D. 2018); *State v. Feldt*, 512 S.W.3d 135, 154–55 (Mo. App. E.D. 2017).

When considering the sufficiency of the evidence on appeal, this Court must determine whether sufficient evidence permits a reasonable juror to find guilt beyond a reasonable doubt. The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict. This is not an assessment of whether the Court believes that the evidence at trial established guilt beyond a reasonable doubt but rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt.

State v. Stewart, 560 S.W.3d 531, 533 (Mo. 2018); *State v. Naylor*, 510 S.W.3d 855, 859 (Mo. 2017). “In reviewing the sufficiency of the evidence supporting a criminal conviction, an appellate court does not act as a super juror with veto powers but gives great deference to the trier of fact.” *State v. Wright*, 382 S.W.3d 902, 903 (Mo. 2012 (cleaned up)). We “may not supply missing evidence, or give the State the benefit of unreasonable, speculative, or forced inferences.” *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. 2001) (cleaned up).

“A person commits the offense of delivery of a controlled substance if . . . he . . . [k]nowingly possesses a controlled substance with the intent to distribute or deliver any amount of a controlled substance” § 579.020.1(3). Accordingly, to sustain a conviction for delivery of a controlled substance, the State must prove, beyond a reasonable doubt, that the defendant had (1) conscious and intentional possession of a controlled substance, either actually or constructively; (2) awareness of the presence and illegal nature of the substance; and (3) the intent to deliver the substance. *State v. McCleod*, 186 S.W.3d 439, 443-44 (Mo. App. W.D. 2006) (quoting *State v. Sutherland*, 11 S.W.3d 628, 631 (Mo. App. E.D. 1999)).

“In determining whether there is sufficient evidence supporting a conviction for possession of a controlled substance with intent to distribute, it is the reviewing court's role to determine whether the quantity possessed, along with all other circumstances and evidence, supports a reasonable inference from which a jury could find that the defendant had the intent to distribute the substance.” *State v. Lawson*, 232 S.W.3d 702, 706 (Mo. App. W.D. 2007). Although the quantity of methamphetamine that was in Schurle’s possession is too small, on its own, to support an inference of his intent to distribute methamphetamine, other circumstances may support the inference of an intent to distribute, including possession of unusual amounts of money,² and possession of paraphernalia associated with drug dealing, such as a scale.³

In this case, the evidence was sufficient to support an inference that Schurle had an intent to distribute methamphetamine. When his vehicle was stopped, Schurle was visibly nervous, and gave Sergeant Hann a deceptive explanation as to the nature of his travel. Schurle was in possession of an unusual amount of cash, and admitted at trial that he lied to Sergeant Hann as to the source of the money. “[G]uilt may be inferred when an accused attempts to deceive the police, as in making a false exculpatory statement.” *State v. Mueller*, 568 S.W.3d 62, 72-73 (Mo. App. S.D. 2019) (citation omitted). The fact that Schurle lied about the source of the money – whose possession was not in itself illegal – supported the inference that the money was derived from illegal activity. Schurle was also in possession of a digital scale, which Sergeant Hann testified was consistent with drug distribution.

² See, e.g., *State v. Gonzalez*, 108 S.W.3d 209, 210 (Mo. App. S.D. 2003); *State v. Fairow*, 991 S.W.2d 712, 714 (Mo. App. E.D. 1999)

³ *State v. Taylor*, 373 S.W.3d 513, 525 (Mo. App. E.D. 2012); *State v. Lloyd*, 205 S.W.3d 893, 909 (Mo. App. S.D. 2006) (inference of intent to distribute marijuana supported by “the discovery of a scale in Defendant’s residence”); *State v. Cortez-Figueroa*, 855 S.W.2d 431, 434 (Mo. App. W.D. 1993) (inference that defendant had intent to distribute supported by possession of large number of baggies, and a scale with residue on it).

Further, a methamphetamine residue was present on the scale, indicating that it had recently been used to weigh methamphetamine. The scale was deceptively packaged, to conceal what the object actually was. The jury could also find that Schurle intentionally locked his keys in his vehicle, and failed to disclose that he had another key concealed in his clothing, to prevent Sergeant Hann from searching the vehicle and finding additional evidence of Schurle's illegal activity.

Schurle's real complaint is not that the evidence was insufficient to support an inference that he had the intent to distribute drugs, but that he was not arrested while in actual possession of a distributable quantity of methamphetamine. Thus, Schurle argues that "the question is not whether Mr. Schurle . . . sold [methamphetamine] in the past. Instead, under Section 579.020(4), the State was required to prove that Mr. Schurle intended to sell the methamphetamine *residue* that he possessed."

We recognize that, to support a defendant's conviction of delivery of a controlled substance, the State must prove that the defendant possessed a quantity of a controlled substance with the intent to distribute that quantity. See MAI-CR4th 425.04.3 (2020) (requiring jury to find that "the defendant knowingly possessed ([*name of controlled substance*])" and that the defendant "intended to (distribute) (deliver) (sell) the ([*name of controlled substance*])"). It was not necessary, however, that Schurle actually be "caught in the act" of possessing a distributable quantity of methamphetamine at the moment of his arrest, or that he actually be observed in possession of such a quantity. Even if there was no direct evidence of Schurle's possession of a distributable quantity of methamphetamine, the jury could still draw an inference of such possession from the circumstantial evidence. "An "inference" is a conclusion drawn by reason from facts established by proof; a deduction or conclusion from facts or propositions known to be true." *State v. Kinsella*, 578 S.W.3d 802, 815 (Mo. App. E.D. 2019) (quoting *State v. Waller*, 163

S.W.3d 593, 595 (Mo. App. W.D. 2005)). It is well established that “[r]easonable inferences” supporting a criminal conviction “can be drawn from both direct and circumstantial evidence, and circumstantial evidence alone can be sufficient to support a conviction.” *State v. Peeler*, 603 S.W.3d 917, 920 (Mo. App. E.D. 2020) (quoting *State v. Brown*, 360 S.W.3d 919, 922 (Mo. App. W.D. 2012)). “Furthermore, circumstantial evidence is given the same weight as direct evidence in considering whether there was sufficient evidence to support a conviction.” *State v. Mills*, 623 S.W.3d 717, 724 (Mo. App. E.D. 2021) (citing *State v. McBenge*, 507 S.W.3d 94, 104 (Mo. App. E.D. 2016)).

In this case, the evidence described above was sufficient for a reasonable juror to conclude that Schurle had recently been in possession of a quantity of methamphetamine which he had actually distributed to others. Schurle possessed an instrumentality of drug distribution (the digital scale), which had a methamphetamine residue on it. Schurle was also in possession of what the jury could find were the fruits of drug distribution (\$480 in cash, in \$20 bills), for which he offered a false explanation. Schurle was nervous, lied about the reason for his travel, and attempted to prevent Sergeant Hann from searching his vehicle. All of this supports the common-sense conclusion that Schurle had recently been selling methamphetamine. While the quantity of methamphetamine which Schurle possessed for distribution may be unknowable, the statute specifies that an individual commits the offense of delivery of a controlled substance if he or she “[k]nowingly possesses a controlled substance with the intent to distribute or deliver *any amount* of a controlled substance.” § 579.020.1(3) (emphasis added).

To our knowledge, no Missouri appellate court has previously considered whether a defendant may be convicted of delivery of a controlled substance when the defendant is not arrested while in actual possession of a distributable quantity (or is not actually observed delivering the controlled substance to another person).

Courts in other jurisdictions have addressed this question, however, and a majority of those courts have held that a defendant may be convicted if the evidence supports the inference that the defendant was recently in possession of a distributable quantity of a controlled substance, even if the defendant is not caught, or observed, in actual possession of a distributable quantity. For example, in *United States v. Campbell*, 732 F.2d 1017 (1st Cir. 1984), a search of a defendant's apartment "discovered various cocaine paraphernalia, including scales, cutting and other equipment, and approximately 1,000 glassine envelopes, but no cocaine except measurable residue attached to the equipment." *Id.* at 1019. The Court rejected the defendant's argument that the evidence was insufficient to support his conviction of possession of cocaine with intent to distribute. The Court concluded that the jury could reasonably infer, from the equipment and cocaine residue discovered in the defendant's apartment, that he had recently possessed a distributable quantity of the drug.

During its deliberation the jury requested instructions, and was told that it could convict defendant of intent to sell cocaine other than the found residue if it concluded that he had had further cocaine for sale within a reasonable time of the date stated in the indictment. As to this we find no error. . . . In view of the amount of equipment discovered, still with residue present, it would be reasonable for the jury to conclude that defendant was conducting an ongoing business, and that more substantial amounts of cocaine had been present within a reasonable time of the discovery.

Id. at 1020.

The Court reached the same conclusion in *Commonwealth v. LaPerle*, 475 N.E.2d 81 (Mass. App. 1985). In *LaPerle*, like in *Campbell*, a search of the defendant's apartment discovered various paraphernalia associated with cocaine distribution, but only a residue of cocaine itself. *Id.* at 82-83. "According to a State chemist, the amount [of cocaine residue] was visible to the naked eye but probably was not susceptible to measurement on an instrument less sensitive than an

analytical balance.” *Id.* at 83. Despite the fact that the defendant was not arrested in possession of a distributable quantity of cocaine, the Court held that a jury could reasonably infer that the defendant had been in possession of such a quantity close to the time of the search:

In this case we have the existence of a residue of cocaine on several items associated with cocaine use or distribution. We have the pan of the scale, containing residue, a quantity of cutting powder far in excess of the amount, if any, needed to “cut” the residue, as well as two packages of wrapping papers. This evidence, taken as a whole, permits inferences that a merchantable amount of cocaine had previously been present, and that LaPerle had intended to distribute it.

Id. at 85; accord *State v. Gibson*, 52 P.3d 339, 352 (Kan. App. 2002) (although acknowledging that “the amount of marijuana found at [the defendant’s] apartment was small,” affirming conviction of possession with intent to distribute where “[t]he paraphernalia [associated with drug distribution found in the defendant’s apartment] . . . provided strong circumstantial evidence in support of the State’s case”); *State v. Simpson*, 272 S.E.2d 431, 431 & n.2 (S.C. 1980) (affirming conviction of possession with intent to distribute marijuana, although police recovered only “3.47 grams of marijuana leaf and seeds” by vacuuming the interior of the defendant’s airplane, based on the “circumstantial evidence that the plane had been used in a drug-smuggling operation”).

The Court of Appeals of Virginia reached a contrary conclusion in *Stanley v. Commonwealth*, 407 S.E.2d 13 (Va. App. 1991). In *Stanley*, officers searched the defendant’s vehicle when they arrested him. They found “a triple beam balance scale and a plastic straw, both of which contained cocaine residue,” as well as a powder used to “cut” or dilute cocaine, “glassine type bags and cut twist ties, caps from hypodermic needles, an envelope labelled ‘Cocaine Importing Company of Miami, Florida,’ and account papers and ledgers.” *Id.* at 14. Despite the presence of cocaine residue, and a large quantity of drug-distribution paraphernalia, in the

defendant's vehicle, the Court held that the evidence was insufficient to support the defendant's conviction of possession with intent to distribute cocaine:

Possession with intent to distribute is a crime which requires "an act coupled with a specific intent." We hold that for a defendant to be convicted of possession of a controlled substance with the intent to distribute, the Commonwealth must prove that the defendant possessed the controlled substance contemporaneously with his intention to distribute that substance.

In the case before us, no evidence was presented to support an inference that Stanley intended to distribute the residue found in his possession. To the contrary, the quantity of residue found in [Stanley's] possession was too small to be distributed. Assuming that the trier of fact could infer from the evidence introduced at trial that Stanley had in the past distributed cocaine, there was no basis on which the trier of fact could infer that the residue introduced at trial was part of that larger supply. Moreover, no evidence was presented as to when or where the supply had been either possessed or distributed. Because we find that the Commonwealth failed to prove contemporaneous possession and intent to distribute, Stanley's conviction must be reversed.

Id. at 15.

We find *Stanley* to be unpersuasive. We agree with the *Stanley* court that, to sustain a conviction, the State must prove that the defendant possessed a quantity of a controlled substance with the intent to distribute *that quantity*. We also agree that the drug residue found on the paraphernalia in Schurle's possession could not itself support his conviction, since that residue was not itself distributable.

Nevertheless, we believe *Stanley* erroneously discounts the inferences which may reasonably be drawn from the evidence found in a defendant's possession at the time of his arrest. In this case, the evidence discovered at the time of Schurle's arrest supported an inference that he had engaged in drug distribution, and that he had done so recently (given his possession of cash which the jury could infer was derived from drug dealing, his deceit concerning his travels at 3:00 a.m. on a

Thursday morning, and the presence of a methamphetamine residue on the scale, suggesting its recent use).

Schurle cites to *United States v. Latham*, 874 F.2d 852 (1st Cir. 1989), to support his argument that the evidence was insufficient to sustain his conviction. But *Latham* addressed a different issue. In *Latham*, the trial court instructed a jury “that it could find [the defendant] guilty of possession with intent to distribute cocaine even if the defendant did not intend to distribute the cocaine he in fact possessed, but if he had the intent to distribute some unspecified amount of cocaine, that he did not currently possess, at some unspecified time in the future.” *Id.* at 861. The First Circuit held that this instruction was erroneous. *Id.* The Court emphasized that “[t]he statute requires that the government prove that [the defendant] possessed, actually or constructively, cocaine that he intended to distribute.” *Id.* at 862.

We do not disagree with *Latham*’s holding. As we have explained above, to convict Schurle of delivery of methamphetamine the State was required to prove that Schurle had actually possessed a quantity of methamphetamine with the intent to distribute *those drugs*. We reject Schurle’s sufficiency argument because we are persuaded by the rationale of *Campbell* and *LaPerle*: the jury could reasonably find, based on the circumstantial evidence, that Schurle had previously, and recently, possessed a distributable quantity of methamphetamine with the intent to distribute it – even though that quantity was not still in his possession at the time of his arrest.

Point I is denied.

II.

In Point II, Schurle argues that the circuit court plainly erred by allowing him to proceed to trial without counsel, where the court failed to comply with § 600.051’s requirement of a signed written waiver, and where the court failed to

hold an evidentiary hearing to ensure that Schurle understood the consequences and perils of self-representation, as required by *Faretta v. California*, 422 U.S. 806 (1975).

In its Brief, the State contends that Schurle’s conduct impliedly waived his right to counsel, and that it was therefore unnecessary for the court to obtain the written waiver required by § 600.051. *See State v. Kunongo*, 490 S.W.3d 746, 765-66 (Mo. App. W.D. 2016) (discussing the exceptions to § 600.051’s written-waiver requirement); *State v. Rawlins*, 248 S.W.3d 680, 684 (Mo. App. W.D. 2008) (same). The State nevertheless concedes that the circuit court plainly erred by permitting Schurle to proceed *pro se* without conducting a *Faretta* hearing. Based on its confession of error, the State concedes that Schurle’s convictions must be reversed, and that the case must be remanded to the circuit court for further proceedings.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to counsel in all felony prosecutions. *Gideon v. Wainwright*, 372 U.S. 335, 339-42 (1963). This right also “implicitly embodies a correlative right to dispense with a lawyer’s help” and proceed to trial *pro se*. *Faretta*, 422 U.S. 806, 815 (1975); *State v. Ndon*, 583 S.W.3d 145, 154 (Mo. App. W.D. 2019). The Sixth Amendment, however, withholds from courts “the power and authority to deprive an accused of his life or liberty unless . . . [he effectively] waives the assistance of counsel.” *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (footnote omitted). “For a waiver of counsel to be effective, due process requires that the waiver be made knowingly and intelligently.” *State v. Hunter*, 840 S.W.2d 850, 857 (Mo. 1992); *see also Rawlins*, 248 S.W.3d at 683 (“[A]bsent a knowing and intelligent waiver of counsel, no defendant may be imprisoned unless represented by counsel at trial.” (citation omitted)).

“There is a strong presumption against the waiver of counsel.” *Kunongo*, 490 S.W.3d at 762 (citations omitted). Under *Faretta*, before a circuit court can conclude

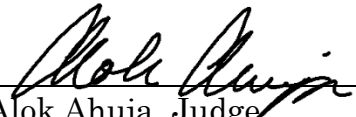
that a defendant has effectively waived the right to counsel, the court must conduct “a thorough evidentiary hearing” which establishes “that ‘the defendant understands exactly what rights and privileges he is waiving, as well as the dangers associated with waiving constitutional rights.’” *Id.* at 763 (quoting *State v. Black*, 223 S.W.3d 149, 155, 156 (Mo. 2007)).

Here, the State concedes that Schurle was not given the on-the-record admonitions required by *Faretta*. We agree, and conclude that Schurle did not effectively waive his right to counsel. Although the circuit court conducted two hearings at which the status of Schurle’s legal representation was explored, and gave Schurle opportunities to attempt to obtain counsel, the court never expressly advised Schurle of the risks and responsibilities of proceeding *pro se*. It was error for the circuit court to proceed to trial, with Schurle acting *pro se*, without having made the inquiries necessary to ensure that Schurle had knowingly and voluntarily waived his right to counsel. In these circumstances, reversal is required. *See, e.g., State v. Campanella*, 609 S.W.3d 526, 526-27 (Mo. App. S.D. 2020); *State v. Grant*, 537 S.W.3d 426, 429-30 (Mo. App. S.D. 2018); *Rawlins*, 248 S.W.3d at 685; *State v. Johnson*, 172 S.W.3d 900, 902 (Mo. App. S.D. 2005); *State v. Wilkerson*, 948 S.W.2d 440, 445-46 (Mo. App. W.D. 1997).⁴

⁴ Because we are reversing for a new trial based on Schurle’s second Point, it is unnecessary to address his third Point, which challenges the circuit court’s conclusion that Schurle was not eligible for representation by the Public Defender because he was able-bodied and capable of obtaining employment. We note that Schurle has been represented by the Public Defender on appeal, and it is unclear whether issues concerning his indigency will recur on remand. We remind the circuit court, however, that a determination of indigency must be based on “the means at [the defendant’s] disposal or available to him to obtain counsel.” § 600.086.1. If the defendant’s financial circumstances later change, a further determination of indigency may be made “at any stage of the proceedings.” § 600.086.3. The relevant statutes also provide that, if a defendant “becomes financially able to meet all or some part of the cost of services rendered to him,” “at any time, either during or after the disposition of his case,” the defendant may *at that time* be required to reimburse the Public Defender for the costs of his representation “in such amounts as he can reasonably pay.” § 600.090.1(2).

Conclusion

We reject Schurle's argument that the evidence at trial was insufficient to support his conviction for delivery of methamphetamine. We conclude, however, that Schurle is entitled to a new trial because the circuit court failed to conduct a hearing to ensure that Schurle was knowingly and voluntarily waiving his right to counsel, before conducting a trial at which Schurle was unrepresented. We accordingly reverse the circuit court's judgment, and remand for further proceedings consistent with this opinion.


Alok Ahuja, Judge

All concur.