

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

ARGUMENT

1.

The trial judge erred by denying Appellant’s motion for a directed verdict for the offense of second degree burglary where Appellant allegedly entered a standalone structure housing an automated teller machine (ATM), which is not a “building” as intended by the legislature for purposes of S.C. Code Ann. § 16-11-312(B)(3).....5

2.

The trial judge erred by denying Appellant’s motion for a directed verdict for the offense of safecracking where the state alleged Appellant attempted to pry open an automated teller machine (ATM) since an ATM does not constitute “a safe used for keeping money or other valuables” as intended by the legislature for purposes of S.C. Code Ann. § 16-11-390.....9

3.

The trial judge erred by denying Appellant’s motion to relieve counsel and proceed *pro se* without conducting the proper inquiry pursuant to Faretta v. California, 422 U.S. 806 (1975) in violation of Appellant’s federal and state constitutional rights..... 12

CONCLUSION.....17

STATEMENT OF ISSUES ON APPEAL

1.

Did the trial judge err by denying Appellant's motion for a directed verdict for the offense of second degree burglary where Appellant allegedly entered a standalone structure housing an automated teller machine (ATM), which is not a "building" as intended by the legislature for purposes of S.C. Code Ann. § 16-11-312(B)(3)?

2.

Did the trial judge err by denying Appellant's motion for a directed verdict for the offense of safecracking where the state alleged Appellant attempted to pry open an automated teller machine (ATM) since an ATM does not constitute "a safe used for keeping money or other valuables" as intended by the legislature for purposes of S.C. Code Ann. § 16-11-390?

3.

Did the trial judge err by summarily denying Appellant's motion to relieve counsel and proceed *pro se* without conducting the proper inquiry pursuant to Faretta v. California, 422 U.S. 806 (1975) in violation of Appellant's federal and state constitutional rights?

ARGUMENT

1.

The trial judge erred by denying Appellant's motion for a directed verdict for the offense of second degree burglary where Appellant allegedly entered a standalone structure housing an automated teller machine (ATM), which is not a "building" as intended by the legislature for purposes of S.C. Code Ann. § 16-11-312(B)(3).

Relevant Facts

After the state's presentation of evidence, Appellant moved for a directed verdict. Tr. 188, ll. 11-12. Defense counsel argued that the structure housing the ATM Appellant allegedly entered does not constitute a "building" for purposes of S.C. Code Ann. § 16-11-312(B)(3). Citing Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Plan. Comm'n, 426 S.C. 97, 105, 825 S.E.2d 721, 726 (Ct. App. 2019), counsel emphasized "the importance of reading an entire section of statutory language together." Tr. 190, l. 19 – 191, l. 2. He argued that when the sections of Title 16, Chapter 11, Article 5 are read together, the enclosure in this case is explicitly excluded from being a "building" for purposes of second degree burglary. He explained that subsection (F) of S.C. Code Ann. § 16-11-380, which criminalizes bank robbery and solicitation of a person using an ATM, provides, "A building or structure does not include an enclosure erected solely for the purpose of containing an otherwise outdoor or detached ATM or automated banking device." Tr. 191, ll. 3-15. Counsel asserted that the enclosure in this case is a "stand-alone structure" in "the middle of a parking lot" that was only "erected" for the sole "purpose of keeping this ATM out of the rain." Tr. 191, ll. 16-23. Consequently, counsel concluded that when § 16-11-312(B) and § 16-11-380(F) are read as a whole, the enclosure is

242 F.3d 1191, 1198 (9th Cir. 2000)). “Specifically, we review a circuit judge’s findings of historical fact for clear error; however, we review the denial of the right of self-representation based upon those findings of fact de novo.” *Id.* (citing United States v. Bush, 404 F.3d 263, 270 (4th Cir. 2005)). “In doing so, this Court must consider the defendant’s testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request.” *Id.* (citing United States v. Singleton, 107 F.3d 1091, 1097 (4th Cir. 1997)).

Discussion

The trial judge erred by denying Appellant’s motion to relieve counsel and represent himself without conducting the proper inquiry pursuant to Faretta v. California, 422 U.S. 806 (1975) in violation of Appellant’s federal and state constitutional rights.

“A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions.” State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)). “This right must be preserved even if the court believes that the defendant will benefit from the advice of counsel.” State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999) (citing United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997)).

“Recognizing that it may be to the defendant’s detriment to be allowed to proceed *pro se*, his knowing, intelligent and voluntary decision ‘must be honored out of that respect for the individual which is the lifeblood of the law.’” Barnes, 407 S.C. at 35-36, 753 S.E.2d at 550 (quoting Faretta v. California, 422 U.S. 806, 834 (1975)). “Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel.” *Id.* at 36, 753 S.E.2d at 550 (citing State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998)).

However, § 16-11-380(F)¹, which is within the same title, chapter, and article, specifically excludes a standalone enclosure housing an ATM from the definition of a building. It states in relevant part, “A building or structure does *not* include an enclosure erected solely for the purpose of containing an otherwise outdoor or detached ATM or automated banking device.” (emphasis added). Because sections of the “same general statutory scheme must be construed together,” the standalone enclosure housing the ATM in this case does not constitute a “building” for purposes of second degree burglary. The language of § 16-11-380(F) is unambiguous and makes evident that the legislature intended to exclude such enclosures from the definition of a “building.” Additionally, the more specific language found in § 16-11-380(F) controls. See Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468-69 (2010) (“where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.”) (citing Spectre, LLC v. S.C. Dept. of Health and Env'tl. Control, 386 S.C. 357, 688 S.E.2d 844, 851 (2010)).

Respectfully, this Court should direct a verdict of acquittal for second degree burglary since there was no evidence presented that Appellant entered a “building” for purposes of § 16-11-312(B)(3).

¹ S.C. Code Ann. § 16-11-380 is titled, “Entering bank, depository or building and loan association with intent to steal; theft or solicitation of person using automated teller machine.”

Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)) (internal quotation marks omitted). “As such, a court must abide by the plain meaning of the words of a statute.” State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (citing Hodge v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Also, penal statutes must be strictly construed against the state and in favor of the defendant. Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (citing State v. Cutler, 274 S.C. 376, 378, 264 S.E.2d 420, 420-421 (1980)); State v. Muldrow, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002).

Section 16-11-390, which codifies the offense of safecracking, states in relevant part, “It is unlawful for a person to use explosives, tools, or any other implement in or about *a safe used for keeping money or other valuables* with intent to commit larceny or any other crime.” (emphasis added). An automated teller machine is not a safe as intended by our legislature for purposes of safecracking. According to the Merriam-Webster online dictionary, an ATM is “a computerized electronic machine that performs basic banking functions (such as handling check deposits or issuing cash withdrawals). ATM, Merriam-Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/atm#h1> (last visited April 18, 2023). An ATM is not a container or “secure box” used for safekeeping money or valuables. It is an electronic machine used by banking institutions, in this case, Navy Federal Credit Union, to conduct transactions on behalf of its customers, including dispensing cash or depositing checks, without a live teller.

Respectfully, this Court should direct a verdict of acquittal for safecracking since there was no evidence presented that the automated teller machine Appellant allegedly attempted to pry open was a “safe” as intended by the legislature for purposes of § 16-11-390.

The trial judge erred by summarily denying Appellant's motion to relieve counsel and proceed *pro se* without conducting the proper inquiry pursuant to *Faretta v. California*, 422 U.S. 806 (1975) in violation of Appellant's federal and state constitutional rights.

Relevant Facts

Shortly after testimony began, defense counsel informed the judge during a recorded bench conference that Appellant wished to be heard on a motion to relieve counsel. Counsel explained that Appellant had "indicated" that he wanted "to fire" both of his attorneys. Tr. 122, ll. 20-23. The judge immediately responded, "He [Appellant] would have to represent himself. Not happening." Tr. 123, ll. 1-2. After the bench conference concluded, defense counsel again stated that Appellant wished to be heard on a motion to relieve counsel before the jury returned to the courtroom. Tr. 123, ll. 7-13. When permitted to speak, Appellant expressed dissatisfaction with his attorney because counsel failed to impeach Deputy Jonathan Hewitt with a prior inconsistent statement Hewitt had made during Appellant's preliminary hearing. Tr. 123, l. 15 – 124, l. 7. Appellant expressed frustration that Hewitt had "lied under oath" thereby committing "perjury" and defense counsel did not impeach Hewitt when Hewitt testified before the jury. Tr. 124, ll. 3-20. Defense counsel confirmed Appellant was "upset" that counsel did not ask Hewitt "if he lied under oath at Mr. Holmes' preliminary hearing." Tr. 125, ll. 7-10.

Appellant stated that he wanted to call his prior attorney, only identified as Mr. Stephens, who represented him during his preliminary hearing, as a witness to testify concerning Hewitt's false testimony. Defense counsel informed the judge that Stephens was "on stand-by." Tr. 125, ll. 11-22. The judge told Appellant that he could later call Stephens as a witness. Tr. 125, ll. 23-

25. However, Appellant was “not satisfied.” He asserted, “It’s not looking right at all.” Tr. 126, ll. 5-7.

The judge then inquired whether Appellant was under the influence of any drugs or alcohol. Appellant responded, “No, ma’am” and again stated that he was “not satisfied with his [counsel’s] service.” The following colloquy then took place:

THE COURT: Sir, if you want him to be relieved, I can entertain that. But we’re still going forward with the trial and you would have to represent yourself.

MR. HOLMES: **I’ll represent myself. Mental health and all – let’s represent myself. And tell the Lord Jesus, I’ll represent myself. I don’t want his service. I’ll represent myself.**

MR. HAMILTON [Defense Counsel]: It would be against the advice of –

THE COURT: Counsel, obviously. Mr. Holmes, we need to go forward. We’re in the middle of your trial, sir. You have not been to law school. You don’t know the rules of evidence and you will do better having the assistance of counsel.

MR. HOLMES: God is all - - **I don’t want his service.** This is not going right.

MR. HAMILTON: I’d like to reserve the right that Mr. Holmes can reraise this motion at a time in the future if he so chooses.

THE COURT: That’s fine. That’s fine. Okay. Let’s bring the jury in.

Tr. 126, l. 12 – 127, l. 8 (emphasis added).

The jury then entered the courtroom and testimony resumed. Tr. 127, ll. 9-12. The judge never entertained Appellant’s motion to relieve counsel and represent himself nor did she conduct a Faretta colloquy.

Standard of Review

“Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo.” State v. Samuel, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018) (citing United States v. Lopez-Osuna,

summarily rejected Appellant's request to relieve his counsel and represent himself without conducting any Faretta colloquy. It is apparent from the record that Appellant did not seek to delay his trial, which had already begun. Rather, he was dissatisfied with his attorney because his attorney failed to properly impeach a key witness. Notably, despite telling Appellant he could call Mr. Stephens, his prior attorney, as a witness, the defense rested without presenting any evidence.

Since the trial judge here failed to make the proper inquiries under Faretta and did not honor Appellant's desire to waive his right to counsel and proceed *pro se*, respectfully this Court should reverse Appellant's conviction and remand for a new trial.

CONCLUSION

Based on the foregoing argument, this Court should direct a verdict of acquittal for the offenses of second degree burglary and safecracking. In the alternative, Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy _____
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of April, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

RECEIVED
MAY 16 2023
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

GEORGE HOLMES,

APPELLANT

APPELLATE CASE NO. 2022-000728

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blich, Jr., Esquire, at the primary email address listed in the Attorney Information System (AIS); and on George Holmes, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 19th day of April, 2023.

s/ Lara M. Caudy _____

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

George Holmes #8114
Lee C.I/P-2-2121
990 Wisack Hwy
Bishopville SC 29010

PLEASE OPEN
IMMEDIATELY

US POSTAGE
ZIP 29010 \$001.74⁰
000031866 MAR 11 2023



RECEIVED
MAY 16 2023
SC Court of Appeals

RECEIVED
MAY 15 2023
SC Court of Appeals

RECEIVED
MAY 16 2023
S.C. SUPREME COURT

The Supreme Court of SC
Patricia A. Howard/Clerk of Court
P.O. Box 11330
Columbia, SC 29211

LEGAL MAIL ONLY

