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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHEMUAL N. YISRAEL,

APPELLANT

APPELLATE CASE NO. 2022-001044

INITIAL BRIEF OF APPELLANT

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II.

Whether the court erred in excluding relevant testimony from Chief Alexander that Appellant had reported to the FBI that he was abused by members of the Yemassee Police Department, where the testimony was admissible under Rule 403, SCRE, and where the jury asked during deliberations, "Does the defendant have reports/phone calls to the FBI?"

STATEMENT OF THE CASE

On October 18, 2018, a Beaufort County Grand Jury indicted Shemuel[1] Yisrael, Appellant, for failure to stop for blue lights. Appellant was tried before the Honorable Robert J. Bonds and a jury, from July 11 – 13, 2022. Appellant represented himself at trial, with Courtney Gibbes as standby counsel. Mary Jordan Lempesis prosecuted the case. Appellant was convicted as indicted. He was sentenced to three years' imprisonment, suspended upon the service of twenty months, with twelve months of probation.[2]

This appeal follows.

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[1] Mr. Yisrael's first name is spelled Shemuel. Tr. 256, l. 21 – 257, l. 11.

[2] R. *(indictment); R. *(sentence sheet); Tr. 1 – 2; Tr. 446, ll. 4-11.

STATEMENT OF FACTS

Failure to stop for blue light

On May 8, 2018, Officer Weston of the Yemassee Police Department attempted to serve an arrest warrant on Appellant for illegal dumping or littering, over five hundred pounds. According to Officer Weston, Appellant said: "Not today," ran through his house, and drove away in his truck, which was pulling a homemade trailer. A police chase ensued for approximately thirty minutes. Officer Weston had his blue light and siren activated. Other officers joined the chase, but it was eventually called off for safety reasons. It was undisputed that Appellant called 911 during the chase, and he told the operator that he would drive to the jail and surrender. Appellant drove to the jail, and he was detained.[3]

Appellant had a history of run-ins with the Yemassee police. The town owned some "abandoned railroad property" adjacent to Appellant's junkyard. According to Appellant, the town had sued him twice previously, and it had tried to remove some of his "stuff" from the property, property which Appellant had been using for years and said he had "claimed." According to Appellant, over the years he had approximately one hundred "false warrants," about thirty of which had been dismissed and about seventy which were still pending. Appellant also said he had filed twenty lawsuits related to "abuses" by the police, and that he had received a $24,000 settlement.[4]

Faretta

At the beginning of Appellant's trial, he appeared pro se. The court asked Appellant if he was aware this trial was for the offense of failure to stop for a blue light, and Appellant replied that he was. Appellant moved to recuse the trial judge and two other circuit judges, based on an order

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[3] Tr. 137, l. 14 – 145, l. 11; Tr. 193, l. 6 – 194, l. 23; Tr. 221, l. 21 – 222, l. 3; Tr. 56, ll. 14-25.

[4] Tr. 222, l. 1 – 223, l. 11; Tr. 323, l. 17 – 325, l. 24; Tr. 346, ll. 7-16; Tr. 352, l. 10 – 353, l. 1.

issued by the trial judge in a 2019 civil case in which Appellant was the plaintiff, wherein Appellant was sanctioned for filing baseless complaints. The trial court denied the motion. Pretrial matters continued, and the court stated, "And you've repeatedly [sic] want to represent yourself; is that right?" Appellant said, "Yes, and I still do." The court asked Appellant to sign a "piece of paper" stating that he wanted to represent himself. The paper was not made an exhibit. The court referenced previously having Appellant sign the "same thing." However, Appellant told the court, "Nobody wants to touch this case. I went to this case [sic], I went to the Public Defender . . ."[5]

The court also stated, "You understand, Mr. Yisrael, the Court's advised you that you need to have a lawyer." The court then asked Appellant if he would like standby counsel appointed, and Appellant stated that he would. Appellant stated, "I've done that before." The court appointed Courtney Gibbes as standby counsel and the trial proceeded. During her cross-examination of Appellant, the solicitor brought out that Appellant had sometimes "spread urine and feces" on his own body to keep the police from arresting him. During opening statements, Appellant stated that he was 66 years old. Appellant also said during opening statements that the penalty for failure to stop for a blue light was "up to three years" "or something like that." At sentencing, the solicitor said Appellant had three prior criminal convictions.[6]

Proffered testimony from Chief Alexander

Appellant's defense was that he had been beaten up by the police on several occasions, and he was afraid of being arrested out of the public eye, so he drove himself to the jail and allowed himself to be arrested there. During the defense's case, the former police chief, Gregory Alexander, testified about the illegal dumping warrants, and about the police chase. Alexander said Appellant

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[5] Tr. 6, ll. 20-25; Tr. 8, l. 11 – 22, l. 15; Tr. 28, l. 8 – 29, l. 7; Tr. 12, ll. 11-12.

[6] Tr. 29, l. 2 – 33, l. 5; Tr. 347, ll. 15-25; Tr. 99, ll. 1-5; Tr. 433, l. 12 – 434, l. 8; Tr. 99, ll. 2-4.

had been arrested four or five times for illegal dumping. After Alexander testified, another officer, Joseph Loadholt, was called. Appellant asked Loadholt whether he, Appellant, had ever been hospitalized after any arrests in which Loadholt had participated. Loadholt stated, "I can't remember." Loadholt admitted that he had arrested Appellant a "few" times. Appellant asked Loadholt if Loadholt had ever used a taser on Appellant and Loadholt said he did not remember. Loadholt denied that he was "deliberately forgetting incidents."[7]

Appellant then asked the court that he be permitted to recall Chief Alexander in response to Loadholt's claims he could not remember whether he had injured Appellant. Appellant wished to recall Alexander and ask him whether the Police Department had been investigated by SLED or the FBI. The State noted that Rule 611, SCRE, permitted such a recall in the court's discretion, but it argued Appellant should have asked Alexander the question "yesterday," and the matter was not relevant.[8]

Appellant argued the testimony was "directly relevant to what I'm saying are mitigating circumstances, I'm afraid. I'm terrified–" The court allowed Appellant to proffer Alexander's testimony. Alexander admitted he had been contacted by the FBI, and he said, "I do know that you called the FBI on us, and they called us and told us you called them on us, that it caused an investigation? No, sir."[9]

The court ruled Appellant would not be permitted to enter the proffered testimony that Alexander had been contacted by the FBI. The court found that if Appellant "thought this was

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[7] Tr. 222, ll. 1-3; Tr. 230, l. 9 – 231, l. 8; Tr. 226, ll. 14-19; Tr. 246, l. 7 – 250, l. 5.

[8] Tr. 308, l. 19 – 310, l. 25.

[9] Tr. 312, l. 5 – 316, l. 15.

going to be an issue, you could have gotten somebody from the FBI here, you could have gotten records, or some type of other documents to verify that. And that they were investigated, I'm not gonna allow you to get into that evidence, and have the jury speculate as to what that means because that's just calling for speculation about the matter, so I'm not going to allow that."[10]

Appellant went on to testify in his defense that he had been "beat up by cops" six or seven times and he had called the FBI about it. Appellant said his response to this arrest was "years into planning." Appellant stated his plan was to drive to the jail and call 911 because: "I'm thinking this guy's going to beat me up." Appellant said he drove to the jail rather than stop because he was "in great fear of my life." In closing argument, Appellant told the jury he had "mitigating circumstances" for his failure to stop since he thought he would be "injured or killed by crooked cops."[11]

After the jury began deliberations, it sent a question to the court: "Does the defendant have reports/phone calls to the FBI?" The court proposed to answer the jurors that they "have all the evidence that you are to consider in this matter." Appellant asked, "Can you add you have the evidence Alexander, the FBI, did call[?]" However, the court noted it had not permitted that testimony to go before the jury.[12]

Appellant was convicted as indicted.

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[10] Tr. 316, l. 23 – 317, l. 14.

[11] Tr. 325, ll. 12-14; Tr. 329, l. 1 – 332, l. 11; Tr. 379, ll. 8-14; Tr. 386, ll. 3-4.

[12] Tr. 418, l. 14 – 424, l. 22.

ARGUMENT

I.

Appellant did not knowingly, intelligently, and voluntarily waive his right to counsel where the court did not engage in a colloquy with Appellant pursuant to *Faretta v. California*, 422 U.S. 806 (1975), and where the record does not show he had a sufficient background to appreciate the dangers and disadvantages of self-representation.

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, 813 S.E.2d 487, 490 (2018) (citing *United States v. Lopez-Osuna*, 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)). "[A]ppellate courts review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 194, 810 S.E.2d 836, 847 (2018).

Discussion

No *Faretta* colloquy was performed by the trial judge. The court did not adequately advise Appellant of his right to counsel; it only remarked, "[Y]ou need to have a lawyer." Although Appellant said he wished to represent himself, he also said he had been to the Public Defender, but they did not "want[] to touch this case." This exchange was insufficient to advise Appellant of the

right to counsel and the dangers of proceeding pro se under *Faretta v. California*, 422 at 835. Moreover, the record does not show that Appellant had a sufficient background to understand the dangers and disadvantages of self-representation such that his election to represent himself was a knowing, voluntary, and intelligent waiver of his right to counsel.

The Sixth Amendment right to counsel is a fundamental right made obligatory on the states by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). "The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." *Faretta v. California*, 422 U.S. at 807. The Constitution requires that "no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979). "The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages." *State v. George*, 323 S.C. 496, 508, 476 S.E.2d 903, 911 (1996).

A "defendant may waive his Sixth Amendment right to counsel. A waiver is an intentional and voluntary relinquishment of a known right." *State v. Boykin*, 324 S.C. at 556, 478 S.E.2d at 690 (citing *United States v. Goldberg*, 67 F.3d 1092, 1099 (3d Cir. 1995)). *See Faretta v. California*, 422 at 835 (defendant must be informed of the dangers and disadvantages of self-representation, or record must show he had sufficient background to appreciate them before he waives his right to counsel); *Prince v. State*, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (for a knowing and intelligent waiver to occur, defendant must be advised of right to counsel and adequately warned of dangers of self-representation). The most common method of waiving a right is by an affirmative, verbal request." *State v. Boykin*, 324 S.C. at 556, 478 S.E.2d at 690 (citing

Goldberg, 67 F.3d at 1099). The courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights. *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

To effectuate a valid waiver of the right to counsel, the two-pronged *Faretta* test must be met in which the accused is (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. *State v. Thompson*, 355 S.C. 255, 262, 584 S.E.2d 131, 134-35 (Ct. App. 2003) (citing *Prince v. State*, 301 S.C. at 423–24, 392 S.E.2d at 463). Where the trial judge fails to address the disadvantages of appearing pro se, as required by the second prong of *Faretta*, the appellate court must look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. *Id.*; *Watts v. State*, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001); *Gardner v. State*, 351 S.C. 407, 411-12, 570 S.E.2d 184, 186 (2002); *Wroten v. State*, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990).

In making this determination, the Court considers a variety of factors, including:

> (1) the accused's age, educational background, and physical and mental health;
> (2) whether the accused was previously involved in criminal trials;
> (3) whether the accused knew the nature of the charge(s) and of the possible penalties;
> (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;
> (5) whether the accused was attempting to delay or manipulate the proceedings;
> (6) whether the court appointed stand-by counsel;
> (7) whether the accused knew he would be required to comply with the rules of procedure at trial;
> (8) whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him;
> (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and
> (10) whether the accused's waiver resulted from either coercion or mistreatment.

Gardner, 351 S.C. at 412-13, 570 S.E.2d at 186-87 (citing *State v. Cash*, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992)) (hereafter *Cash* factors). "If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." *Wroten v. State*, 301 S.C. at 294, 391 S.E.2d at 576.

Because the trial court failed to engage in a *Faretta* colloquy with Appellant, this Court must look to the record to determine if Appellant had sufficient background to comprehend the dangers of self-representation, and consider the *Cash* factors: (1) Appellant was 66 years old. His education, and physical and mental health are unknown. However, it appears Appellant may have some mental illness or impairment given testimony that he spread bodily waste on his person to avoid arrests. (2) The solicitor stated Appellant had three prior convictions, but the record does not disclose how many of those were trials. Appellant indicated he had standby counsel previously. (3) The court told Appellant what charge he faced at the beginning of the trial. Appellant mentioned the penalty during opening statements. (4) It does not appear Appellant was ever represented by counsel in this matter. Appellant said the Public Defender did not "want[] to touch this case."

(5) There is no indication Appellant was attempting to manipulate or delay proceedings by appearing pro se. (6) The court did appoint stand-by counsel. (7) The record is silent on whether Appellant knew he had to comply with the procedural rules. (8) It appears Appellant knew some, but not other, legal challenges he could raise to the charge. The facts Appellant presented may have supported a jury charge on necessity, for example, but Appellant did not request such an instruction. *See State v. Cole*, 304 SC 47, 49, 403 S.E.2d 117, 119 (1990) (recognizing necessity as a defense to driving under a suspended license). (9) The exchange between Appellant and the

court did not even rise to the level of pro forma questions and answers. (10) There is no indication that appellant's pro se representation was the result of coercion or mistreatment.

The remedy for the absence of evidence of a knowing and intelligent waiver of the right to counsel is ordinarily a remand to the trial court for a determination as to whether the waiver was knowingly and intelligently made. *State v. Dixon*, 269 S.C. 107, 109, 236 S.E.2d 419, 420-21 (1977). However, where it would be "almost impossible to find a knowing and intelligent waiver of the right to counsel even if a *Dixon* hearing were ordered," a new trial should be granted. *Cash*, 304 S.C. at 225, 403 S.E.2d at 634.

Applying the *Cash* factors to the case, the record does not show that Appellant had sufficient background to understand the dangers and disadvantages of proceeding pro se. The court did not adequately advise Appellant of his right to counsel and it did not adequately warn him of the dangers of self-representation pursuant to *Faretta*. Accordingly, this case should be remanded for a new trial. *In re Christopher H.*, 359 S.C. 161, 169-70, 596 S.E.2d 500, 505 (Ct. App. 2004) (reversed and remanded for new trial where record showed court failed to advise defendant of right to counsel, failed to inquire as to his knowledge of the dangers of self-representation, and demonstrated defendant had insufficient background to comprehend dangers of self-representation); *Cash*, 304 S.C. at 225, 403 S.E.2d at 634. *See also Watts*, 347 S.C. at 402-03, 556 S.E.2d at 370 (Where the record fails to demonstrate the defendant made an informed choice to proceed pro se, with eyes open, then a knowing and voluntary waiver of counsel is not effectuated, and the case should be remanded for a new trial.).

II.

The court erred in excluding relevant testimony from Chief Alexander that Appellant had reported to the FBI that he was abused by members of the Yemassee Police Department, where the testimony was admissible under Rule 403, SCRE, and where the jury asked during deliberations, "Does the defendant have reports/phone calls to the FBI?"

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Discussion

Appellant had reported alleged police abuse to the FBI. Outside the presence of the jury, Chief Alexander admitted that Appellant had contacted the FBI. The court should have permitted this information to go to the jury.

Appellant correctly argued the evidence was relevant. Rule 401, SCRE, provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The testimony was admissible under Rule 402, SCRE, which provides that, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."

The court erroneously excluded the evidence based on Rule 403, SCRE, finding its admission would cause the jury to speculate. Rule 403, SCRE, provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This evidence would not have confused the jury. It would have given the jury an additional tool to use in evaluating the credibility of Appellant and of the testifying officers. Appellant's defense was that he had mitigating circumstances. The jury could have found that the existence of mitigating circumstances depended upon whether Appellant had been abused by Yemassee Police Department members. Whether or not Appellant had contacted the FBI was relevant to this determination. Moreover, Alexander had personal knowledge that he was contacted by the FBI. Appellant was not obliged to call other witnesses to testify to this. The court should have admitted the testimony.[13]

However, error which is harmless beyond a reasonable doubt does not require reversal. *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002). When a jury submits a question to the court following a jury charge, "[i]t is reasonable to assume" the jury has "focused critical attention" on the specific question asked. *State v. Blassingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 529-30 (1978). The jury had focused its critical attention on the matter of whether Appellant had reported abuse to the FBI, as evidenced by the jury question, "Does the defendant have reports/phone calls to the FBI?" It cannot be said the error did not contribute to the verdict beyond

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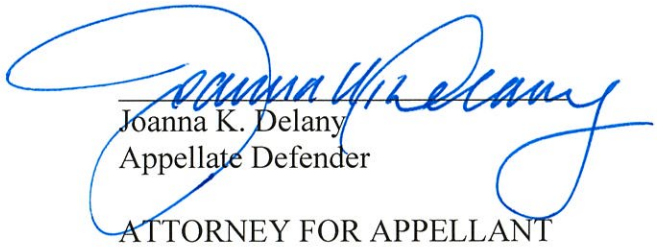
[13] The trial court correctly recognized that Rule 611, SCRE permitted the recall of the witness. Rule 611(d), SCRE, provides in relevant part that, "After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court."

a reasonable doubt, given the jury question and the credibility evaluations the jury was called upon to make in evaluating Appellant's defense.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.



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This 30th day of August, 2023.