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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2022-000728

THE STATE,

Respondent,

vs.

GEORGE HOLMES,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II.

"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?"

III.

"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?"

COUNTER-STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge somehow err by declining to grant the directed verdict motion when the evidence and testimony presented during trial—which demonstrated Appellant forced entry into a fully-enclosed locked building housing an ATM during the nighttime and then aggressively used a tire iron or crowbar in an attempt to pry open the ATM's locked metal cabinet door in order to be able to steal the cash inside—supported a rational and logical conclusion Appellant was guilty of all the required elements of the charged offenses of second-degree burglary and safecracking?

II.

Did the trial judge violate Appellant's constitutional right to self-representation by denying Appellant's mid-trial request to relieve defense counsel when that request did not constitute a timely assertion of his right to self-representation as required since—just as the trial judge recognized—it was not raised until after the trial was already well underway?

STATEMENT OF THE CASE

In December of 2018, Appellant George Holmes was arrested shortly after he broke through the door of a building housing an automatic teller machine ("ATM") and unsuccessfully attempted to pry the machine open. In April of 2019, the Beaufort County Grand Jury indicted Appellant for one count of second-degree burglary and one count of safecracking. On May 16, 2022, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable Carmen T. Mullen, circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of fifteen years for second-degree burglary and twenty years suspended to fifteen years and five years of probation for safecracking. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

In December of 2018, Navy Federal Credit Union had a number of remote ATM sites in South Carolina, including one located off of Sea Island Parkway on Lady's Island.[1] (Tr. pp. 85-86). The ATM at that particular site was housed inside a fully-enclosed building, and the back portion of the building, which was secured by a locked door, was not open to the public. (Tr. p. 88; State's Ex. # 8 (Photograph); State's Ex. # 9 (Photograph); State's Ex. # 10 (Photograph); State's Ex. # 14 (Photograph); State's Ex. # 28 (Photograph)). Fortunately, the building was also equipped with a surveillance system, and that system was actively monitored by Navy Federal Credit Union's security department. (Tr. p. 86; p. 94).

Just before 1:30 a.m. on December 28, 2018, an unmasked man used a tire iron or crowbar to pry open the locked door of the building housing the Sea Island Parkway ATM. (Tr. p. 99; p. 107; pp. 135-136; p. 143). The man then entered the building, looked squarely at the surveillance camera, inspected the ATM for a few moments, and then headed back outside. (State's Ex. # 2 (Surveillance Footage); State's Ex. # 5 (Photograph)). A short time later, he returned back inside with a mask now covering his face and began aggressively trying to pry the ATM open with the tool he had used to force entry into the building. (Tr. pp. 97-98; p. 115; pp. 138-139; State's Ex. # 2).

Meanwhile, Jeffrey Martin, who worked in Navy Federal Credit Union's security department, had been alerted of the break-in, began remotely watching it as it occurred via the building's surveillance system, and quickly called 911 to report what was transpiring. (Tr. pp. 94-95; State's Ex. # 1 (911 Call Recording)). Based on Martin's report, deputies from the Beaufort County Sheriff's Office rushed to the scene, and the intruder, who was ultimately

[1] Subsequent to the incident in Appellant's case, the Sea Island Parkway site was relocated. (Tr. p. 90).

unsuccessful in his attempt to crack open the ATM, absconded just before the first deputy—Deputy Jonathan Hewitt—arrived at the burgled building. (Tr. p. 98; pp. 102-104; p. 106; State's Ex. # 2).

A little bit after that, another of the responding deputies—Deputy Kyle Breland—was alerted of a potential suspect walking along a nearby roadway in the vicinity of the ATM site, and, instead of continuing on to the scene, he made contact with the man, who was the only person in the area at that time. (Tr. pp. 150-152; p. 157; pp. 162-164). The man—Appellant—claimed he was heading to the hospital, but, due to the suspicious circumstances, Deputy Breland temporarily detained him. (Tr. pp. 153-154). Shortly after that, law enforcement obtained a surveillance photograph of the burglar from the credit union's security department, and Appellant matched the person depicted in the photograph. (Tr. pp. 109-110; p. 152). At that point, Appellant was placed in handcuffs, and a tracking bloodhound was deployed at the ATM site to attempt to track the perpetrator. (Tr. pp. 165-166). Unsurprisingly, the tracking dog—Copper—tracked from the crowbar found just outside the burgled building all the way to Appellant, and he stopped after putting his nose up to Appellant's crotch to signal he had found his target. (Tr. p. 107; p. 153; pp. 168-171; p. 175; State's Ex. # 38 (Diagram)). Appellant was then placed under arrest. (Tr. p. 112).

Following that, the investigation into the incident continued, the considerable damage to the building's door and the locked ATM cabinet was photographed, and the scene was processed for evidence. (Tr. p. 111; p. 130; pp. 135-136; pp. 138-139; State's Ex. # 23 (Photograph); State's Ex. # 31 (Photograph)). Amongst the evidence discovered, an apparent blood stain was found on the building's interior door, and swabs were collected from the stain and from the damaged ATM cabinet. (Tr. pp. 134-135; pp. 139-140; pp. 182-184; State's Ex. # 17

(Photograph); State's Ex. # 19 (Photograph)). Significantly, upon later analysis, a forensic DNA expert determined Appellant's DNA profile matched profiles developed from the swabs collected from the blood stain and from the "interior of the ATM hood and safe."[2] (Tr. p. 140; pp. 178-180; pp. 182-184).

Subsequently, Appellant was indicted for second-degree burglary and safecracking, and he elected to proceed forward to trial. (Tr. p. 30; p. 73; Indictments). During trial, Martin and the deputies recounted what occurred on the date of the incident that culminated in Appellant's arrest, and the surveillance footage, a recording of the 911 call, and the photographs of the scene after the break-in were admitted into evidence. (Tr. pp. 83-84; p. 87; pp. 84-99; pp. 102-116; pp. 128-143; pp. 150-160). In addition to that, the forensic DNA expert testified about the compelling results of his analysis that implicated Appellant in the charged crimes, and Sergeant David Tafoya recounted the details of Copper's successful track from the ATM site to Appellant shortly after the site was burgled. (Tr. pp. 162-175; pp. 178-184).

Ultimately, following the presentation of all that testimony and evidence, the case was submitted to the jury. (Tr. p. 187; p. 240). After just over an hour of deliberations, the jury unanimously convicted Appellant of both indicted offenses. (Tr. p. 240; pp. 242-243).

[2] The match related to the ATM cabinet was 1.34 million times more likely than a coincidental match to an unrelated individual's DNA profile. (Tr. p. 183). Meanwhile, the match related to the blood stain was 2.46 *nonillion* times more likely than a coincidental match to an unrelated individual's DNA profile. (Tr. p. 184).

ARGUMENT

I.

The trial judge correctly declined to grant the directed verdict motion because the evidence and testimony presented during trial—which demonstrated Appellant forced entry into a fully-enclosed locked building housing an ATM during the nighttime and then aggressively used a tire iron or crowbar in an attempt to pry open the ATM's locked metal cabinet door in order to be able to steal the cash inside—supported a rational and logical conclusion Appellant was guilty of all the required elements of the charged offenses of second-degree burglary and safecracking.

Relevant Facts

After all the State's evidence and testimony was presented, defense counsel moved for a directed verdict. (Tr. p. 188). As support for the motion in regard to the second-degree burglary charge, defense counsel alleged the State had purportedly failed to show "anybody had a possessory interest to occupy and control" the "given space" in which the ATM was housed. (Tr. p. 190). Likewise, relying on the statutory language of Section 16-11-380 of the South Carolina Code of Laws, defense counsel contended the structure housing the ATM was not actually a building as necessary to support the charge. (Tr. p. 191). Furthermore, defense counsel asserted the directed verdict should be granted because a customer using an ATM would have no right to exclude others from also using it. (Tr. p. 192). Similarly, in arguing for a directed verdict as to the safecracking charge, defense counsel noted the term "safe" was left undefined in the safecracking statute. (Tr. p. 192). He then averred an ATM was not a safe and, instead, was more like a vending machine. (Tr. pp. 192-193).

In rebuttal, the solicitor noted the burgled ATM site building was the property of Navy Federal Credit Union and the ATM contained the bank's property until the money inside it was withdrawn by customers. (Tr. pp. 193-194). Additionally, the solicitor argued the ATM was

locked and securely held money and, thus, fit within the statutory language of the safecracking statute. (Tr. pp. 195-196).

Upon considering the arguments of counsel, the trial judge agreed with the solicitor and denied the directed verdict motion as to both charges. (Tr. pp. 195-196). Thereafter, the trial proceeded forward, the trial judge instructed the jury on the elements of both indicted offenses along with the other applicable law, the case was submitted to the jury, and the jury convicted Appellant as indicted. (Tr. pp. 220-236; p. 240; pp. 242-243).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004). In other words, "unless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986); see United States v. Ashley, 606 F.3d 135, 138 (4th Cir. 2010) ("Reversal for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." (citation and internal quotations omitted)).

Argument

When presented with a motion for a directed verdict challenging the sufficiency of the evidence presented, the question before the trial judge is simply whether any rational juror could

find the essential elements of the crime beyond a reasonable doubt from the evidence viewed in a light most favorable to the State. State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016); see Jackson v. Virginia, 443 U.S. 307, 319 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."). In resolving that question, the trial judge must be concerned solely with the existence or non-existence of evidence and is not permitted to personally weigh the evidence, decide credibility issues, or resolve conflicts in the testimony or evidence presented. Harvey v. Strickland, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002); see State v. Franklin, 80 S.C. 332, __, 60 S.E. 953, 955 (1908) ("The orderly administration of justice requires that all proper evidence should be admitted, and the jury must determine the facts, and testimony should be exceedingly clear and without contradiction where a circuit judge assumes to direct a verdict.").

Significantly, if there is *any* direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced, the trial judge should deny a directed verdict motion and submit the case to the jury. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992); see State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955) ("[O]n a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced."). By doing so under such circumstances, the trial judge correctly avoids improperly encroaching upon the jury's exclusive role to find the facts, weigh the evidence,

evaluate witness credibility, determine what inferences should be drawn from the facts, and resolve any evidentiary conflicts that may have arisen during trial. See Jackson, 443 U.S. at 319 ("[The directed verdict] standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."); State v. Cheeks, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013) ("It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts.").

In the present case, one of Appellant's two charged offenses was second-degree burglary. Pursuant to Section 16-11-312, that offense has been committed in South Carolina when a person "enters a *building* without consent and with intent to commit a crime therein" and—amongst other things—"[t]he entering or remaining occurs in the nighttime." S.C. Code Ann. § 16-11-312(B) (emphasis added). Importantly, "[f]or purposes of Section 16-11-311 through 16-11-313[,]" "[b]uilding" means any structure, vehicle, water, or aircraft" where—amongst other things—"people assemble for purposes of business, government, education, religion, entertainment, public transportation, or public use or where goods are stored." S.C. Code Ann. § 16-11-310(1).

Likewise, Appellant was also charged with the statutory offense of safecracking. Pursuant to Section 16-11-390, "[i]t 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." S.C. Code Ann. § 16-11-390. Notably, based on the plain language of that statute, "[i]t is not essential to constitute a safe cracker that he shall be successful in his attempt to break open the safe." State v. O'Day, 74 S.C. 448, __, 54 S.E. 607, 608 (1906).

Viewing the evidence and testimony presented during trial in a light most favorable to the State as required, it demonstrated Appellant—under the cover of darkness during nighttime hours—pried open a locked door with a tire iron or crowbar to gain entry into a fully-enclosed building in which an ATM was stored and then proceeded to aggressively attempt to gain access to the inside of the ATM, which is a machine commonly known and understood to contain cash. Based on that, the jury could logically and rationally conclude Appellant entered a building without consent and with intent to commit a crime therein during the nighttime and, thus, was guilty of each and every required element of second-degree burglary. See McMillian v. State, 383 S.C. 480, 488, 680 S.E.2d 905, 909 (2009) ("The law is well settled and widespread that where one breaks into the property of another in the nighttime, an inference may be drawn that he did so with the intent to commit larceny. A reasonable mind recognizes that people do not usually break into and enter the building of another under the shroud of darkness with innocent intent and that the most usual intent is to steal[.]" (citation omitted)); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) (recognizing the criminal intent necessary to prove burglary can be inferred from a defendant's actions after entry); State v. Christensen, 194 S.C. 131, __, 9 S.E.2d 555, 560 (1940) (recognizing "the presence of closed doors and locked windows" constitutes "notice to the world entry is forbidden"). And, due to the plain and unambiguous language outlining the definition of "building" applicable to Section 16-11-311, that remained true regardless of whether the building housing the ATM would have constituted a "building" for purposes of some *other* statute setting out offenses for which Appellant was *not* arrested, indicted, tried, and convicted. Compare S.C. Code Ann. § 16-11-310(1) (identifying the applicable definition of "building" for purposes of an expressly-identified range of statutes that includes the second-degree burglary statute); with S.C. Code Ann. § 16-11-380(F) ("To the

extent that *this section* applies to bank night depositories, ATMs, and other automated banking devices, it applies only to these devices which are not located in a building or structure and those to which banking customers have access when they are outside a building or structure. 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. However, the provisions of this section do apply to drive-through banking terminals.").

Beyond that, the evidence and testimony presented during trial—when again viewed in a light most favorable to the State as required—demonstrated Appellant used a tool to aggressively attempt to pry open the *locked metal cabinet* of the ATM, which is a machine that is commonly known to securely hold a bank's money so that it can be accessed by the bank's customers if and when needed, for the readily-apparent purpose of obtaining the cash stored inside. Based on that, the jury could logically and rationally conclude Appellant used a tool or other implement in or about "a safe used for keeping money" with intent to commit larceny or some other crime and, thus, was guilty of each and every required element of safecracking. See State v. Magee, 158 N.E.3d 630, 640 (Ohio Ct. App. 2020) (recognizing an ATM can be classified as a "safe" for purposes of a safecracking statute because "an ATM is a receptable which purpose is to dispense money to customers and to keep the money inside the ATM safe"); see also Collins English Dictionary 1748 (13th ed. 2018) (defining "safe" as "a strong container, usually of metal and provided with a secure lock, for storing money or valuables"); Merriam-Webster's Collegiate Dictionary 1095 (11th ed. 2020) (defining "safe" as "a place or receptacle to keep articles (as valuables) safe"); New Oxford American Dictionary 1537 (3rd ed. 2010) (defining "safe" as "a strong fireproof cabinet with a complex lock, used for the storage of valuables"); cf. Shelnut v. State, 247 S.C. 41, 45, 145 S.E.2d 420, 422 (1965) (agreeing "the use of the hammer on the safe

in Greenville County with intent to commit larceny constituted the commission of" the charged offense of safecracking).

Because the evidence and testimony presented supported a fair and reasonable conclusion Appellant was guilty of both the indicted offenses, the trial judge was required to submit Appellant's case to the jury so it could carry out its fact-finding role. See State v. Al-Amin, 353 S.C. 405, 411, 578 S.E.2d 32, 35 (Ct. App. 2003) (recognizing the trial judge is "required" to submit a case to the jury when substantial evidence is presented reasonably tending to prove the guilt of the accused or from which the accused's guilt may be fairly and logically deduced), overruled on other grounds by State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015). Accordingly, the trial judge correctly declined to grant the directed verdict motion as to Appellant's two charges, and there is no legitimate or logical basis upon which that ruling can be disturbed on appeal. See Cavazos v. Smith, 565 U.S. 1, 2 (2011) ("A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury."); Bennett, 415 S.C. at 236-237, 781 S.E.2d at 354 ("[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and *must* submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." (emphasis added and citation and internal quotations omitted)). Appellant's convictions should be affirmed.

II.

The trial judge neither erred in any manner nor violated Appellant's constitutional right to self-representation by denying Appellant's mid-trial request to relieve defense counsel because that request did not constitute a timely assertion of his right to self-representation as required since—just as the trial judge recognized—it was not raised until after the trial was already well underway.

Relevant Facts

After the jury had been sworn, Appellant's trial had gotten underway, and four separate witnesses had testified, defense counsel—following a recess—alerted the trial judge Appellant wished to fire him and his co-counsel. (Tr. p. 73; p. 83; p. 85; p. 94; 102; p. 122). In response to that, the trial judge immediately inquired if Appellant wanted to represent himself, but, before defense counsel could fully reply to that query, the trial judge stated it was "[n]ot happening." (Tr. pp. 122-123). At that point, Appellant personally interjected and alleged he had "stamped notarized" evidence proving the last witness that testified—Deputy Hewitt—had lied during a preliminary hearing. (Tr. p. 123). Following Appellant's claim, defense counsel clarified Appellant's evidence was actually a handwritten note from Appellant himself that was written when "he was in jail demanding a speedy trial," and defense counsel further confirmed that note was not "in any way" a notarized statement from Deputy Hewitt. (Tr. p. 124). Undeterred, Appellant again personally addressed the trial judge, alleged it was "notarized [the deputy] lied under oath," and now claimed "the tape" was his purported evidence of perjury. (Tr. p. 124).

As the discussion continued, Appellant continued to allege Deputy Hewitt had lied during the preliminary hearing and indicated he was upset with defense counsel because defense counsel had not asked Deputy Hewitt if he had lied at that earlier point. (Tr. p. 125). Appellant then confusingly alleged a different defense attorney—"Mr. Stephens"—was "representing [him]" and asserted he "want[ed] him to represent me as a witness because he wrote that." (Tr.

p. 125). In response to that, the trial judge noted Stephens was on the witness list and would be available to be called as part of the defense's case.[3] (Tr. p. 125). Despite that, Appellant asserted he was still not satisfied and was likewise not satisfied with defense counsel's service to him. (Tr. p. 126). At that point, the trial judge indicated she could entertain a motion to relieve defense counsel but noted the trial would nonetheless still go forward with Appellant being required to represent himself. (Tr. p. 126). Appellant responded: "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." (Tr. p. 126).

After hearing Appellant's remarks in that regard, the trial judge advised Appellant they were already "in the middle of [his] trial" and further noted he had not been to law school, was not familiar with evidentiary rules, and would be better served by having the assistance of counsel. (Tr. pp. 126-127). Accordingly, the trial judge indicated the trial was going to move forward. (Tr. p. 126). However, the trial judge advised Appellant he could re-raise his motion to relieve counsel at a later point if he wished to do so. (Tr. p. 127).

Following that, the trial proceeded forward with defense counsel continuing to represent Appellant and without Appellant ever renewing his request for defense counsel to be relieved, and several other witnesses testified as part of the State's case. (Tr. p. 128; p. 150; p. 162; p. 178). Notably, at a few points during that testimony, Appellant interrupted the proceedings and

[3] Prior to the jury being sworn in Appellant's case, the trial judge questioned Stephens—who was present in the courtroom at that time—as to why he was on the witness list. (Tr. p. 59). Stephens responded he had been one of Appellant's appointed public defenders at an earlier point. (Tr. p. 60). He further explained he and Appellant had had disagreements during his representation of him but he did not know anything else. (Tr. p. 60). At that point, defense counsel explained Stephens was on the witness list based on: "Conversations between – and really testimony that was elicited, questions and things Mr. Stephens learned from the preliminary hearing in this case that was a little over three years ago at this point." (Tr. p. 60).

had to be quieted by the trial judge. (Tr. pp. 133-134). At one point, he even audibly stated: "I'm going to kill myself. Of course, they say I'm going to kill myself."[4] (Tr. p. 133).

Subsequently, after all the State's evidence and testimony was presented, the State rested its case, Appellant personally elected not to testify on his own behalf, and the defense rested. (Tr. p. 187; pp. 199-201). The solicitor and defense counsel then presented their closing arguments, the trial judge instructed the jury on the applicable law, and the case was submitted to the jury. (Tr. pp. 202-236; p. 240). Ultimately, after just over an hour of deliberations, the jury convicted Appellant as indicted. (Tr. pp. 242-243).

Standard of Review

When a defendant requests to proceed pro se after his trial has begun, "the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge[,]" and, therefore, such a ruling must necessarily be reviewed on appeal for an abuse of discretion. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 171 (1999); see United States v. Singleton, 107 F.3d 1091, 1099 (4th Cir. 1997) (reviewing a trial judge's ruling on a mid-trial assertion of the right to self-representation for an abuse of discretion). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." State v. Mazique, 419 S.C. 282, 288, 797 S.E.2d 730, 733 (Ct. App. 2016).

Argument

Pursuant to both the United States Constitution and the South Carolina Constitution, a criminal defendant brought to trial in South Carolina "must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v.

[4] Later on, defense counsel revealed Appellant had dealt with significant mental health issues throughout his life and had been diagnosed with schizophrenia, and Appellant confirmed he had been prescribed medication to help address his condition. (Tr. pp. 253-254).

California, 422 U.S. 806, 807 (1975); see U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); S.C. Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both."). However, "[t]he right to defend is personal." Faretta, 422 U.S. at 834. As a result, a defendant is permitted to waive his right to counsel and represent himself during a trial in a pro se capacity. State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003); see State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) ("A South Carolina criminal defendant has the constitutional right to represent himself under both federal and state constitutions."). Thus, even though it ultimately may be detrimental for a defendant to personally conduct his own defense, that defendant's choice to do so "must be honored out of 'that respect for the individual which is the lifeblood of the law.' " Thompson, 355 S.C. at 262, 584 S.E.2d at 134 (citation omitted).

In order to invoke the right to self-representation, a defendant "must take affirmative steps" to *timely* advise the trial judge of his desire to proceed in that manner. Benitez v. United States, 521 F.3d 625, 632 (6th Cir. 2008); see United States v. Leggett, 81 F.3d 220, 224 (D.C. Cir. 1996) ("The law presumes that a defendant has not exercised his right to represent himself nor waived the right to counsel in the absence of an articulate and unmistakable demand by the defendant to proceed pro se."); see also Wayne R. LaFave et al., 3 Crim. Proc. § 11.5(d) (4th ed. 2022 update) ("Faretta stressed that the request [for self-representation] in that case was made 'well before the date of trial.' . . . [A]ppellate courts uniformly accept a trial court's broad discretion to treat as untimely a request made during the course of the trial." (footnotes omitted)). Therefore, if a defendant actually wishes to proceed pro se during trial, the defendant must clearly and unequivocally make an assertion of the right to self-representation *prior to trial*.

Mazique, 419 S.C. at 291, 797 S.E.2d at 734; see State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) ("The right to proceed pro se must be clearly asserted by the defendant prior to trial."). Significantly, the requirement for a clear, unequivocal, and timely assertion of the right to self-representation both "protect[s] against an inadvertent waiver of the right to counsel by a defendant's occasional musings on the benefits of self-representation" and "prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation." United States v. Frazier-El, 204 F.3d 553, 558-559 (4th Cir. 2000) (citations and internal quotations omitted)).

If a criminal defendant in South Carolina makes a proper timely request to exercise his right to self-representation, the trial judge must take steps to ensure the defendant is knowingly, voluntarily, and intelligently waiving his right to counsel, including by advising the defendant of his right to counsel and adequately warning him of the dangers and disadvantages of self-representation. See Barnes, 407 S.C. at 35, 753 S.E.2d at 550 ("So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta."); see also Thompson, 355 S.C. at 262-263, 584 S.E.2d at 135 (explaining the preferred method for determining whether the defendant knowingly and voluntarily waived his right to counsel is for the trial judge to conduct a specific inquiry addressing the dangers and disadvantages of pro se representation with the defendant). However, absent an unambiguous and timely assertion of the right to self-representation, the trial judge is under no obligation to conduct *any inquiry* on the matter. Singleton, 107 F.3d at 1099; see United States v. Cromer, 389 F.3d 662, 682 (6th Cir. 2004) ("Faretta procedures are only required when a defendant has clearly and unequivocally asserted his right to proceed pro se."); see also Benitez, 521 F.3d at 632 (instructing the trial judge has a duty to determine the validity of an attempted waiver of the right to counsel when the

defendant has taken steps to communicate his desire for self-representation); cf. State v. Winkler, 388 S.C. 574, 587, 698 S.E.2d 596, 603 (2010) ("[Winkler] argues the trial court erred by failing to properly provide [him] with Faretta warnings when [he] sought to proceed pro se at the beginning of the sentencing phase. . . . [Winkler] did not timely waive his right to counsel and proceed pro se. Hence, [Winkler]'s reliance on Faretta is misplaced. Had [Winkler] moved to proceed pro se before the trial began, then Faretta would apply.").

In the case at bar, Appellant did nothing—as he appears to readily acknowledge on appeal—to invoke his right to self-representation at any point *prior to* the beginning of his trial and, instead, first attempted to invoke that right after the jury had been sworn and the trial was already well underway. See Reed, 332 S.C. at 41, 503 S.E.2d at 750 (instructing the right to self-representation must be clearly invoked *prior to trial*); see also People v. Thomas, 523 P.3d 323, 371 (Cal. 2023) (instructing there is no constitutional basis for a mid-trial assertion of the right to self-representation); cf. United States v. Lawrence, 605 F.2d 1321, 1325 (4th Cir. 1979) ("[M]eaningful trial proceedings had commenced prior to Lawrence's request, and we can envision few things more disruptive or confusing than to permit Lawrence to take over his defense at that point. A court should, of course, vigilantly protect a defendant's constitutional rights, but it was never intended that any of these rights be used as a ploy to frustrate the orderly procedures of a court in the administration of justice."). As a result, Appellant did not make a timely assertion of his right to represent himself, and the trial judge—who expressly noted the assertion was not raised until the middle of trial—was under no obligation whatsoever to permit Appellant to begin representing himself after the trial had already begun. See Singleton, 107 F.3d at 1099 ("[T]he court was under no obligation to allow Singleton to begin representing himself *at all* at mid-trial[.]" (emphasis added)); cf. State v. Sims, 304 S.C. 409, 415, 405 S.E.2d

377, 381 (1991) ("Sims . . . argues that the trial judge erred in not allowing him to proceed pro se. We disagree. The right to appear pro se must be clearly asserted by the defendant before trial. Here, Sims gave no indication of a desire to proceed pro se prior to trial. This contention is without merit." (citation omitted)). Accordingly, because Appellant did not make a timely invocation of his right to self-representation as required, the trial judge neither erred through the manner in which she addressed Appellant's untimely mid-trial attempt to first assert that right nor infringed in any way upon that right. See United States v. Lorick, 753 F.2d 1295, 1298 (4th Cir. 1985) ("To arise, this right [to self-representation] must be clearly asserted by a defendant *before trial*." (emphasis added)); United States v. Dunlap, 577 F.2d 867, 868 (4th Cir. 1978) ("[A] defendant does not have an absolute right to dismiss counsel and conduct his own defense after the trial has commenced."); cf. Singleton, 107 F.3d at 1100 ("[B]y proceeding to trial with court-appointed counsel, [Singleton] gave up any right he may have had to require the court to permit him to proceed without counsel."); United States v. Nunez, 877 F.2d 1475, 1478 (10th Cir. 1989) (holding Nunez's request to invoke his right to self-representation on the third day of trial was untimely and, thus, properly denied). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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