STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARLBORO COUNTY

Court of General Sessions

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2014-002442

THE STATE,

Respondent,

v.

DERRICK D. DUPREE,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court correctly permitted Appellant to represent himself after inquiring into his knowing and intelligent waiver of counsel and desire to appear *pro se* by following the guidelines set forth in Faretta v. California.

STATEMENT OF THE CASE

A Marlboro County Grand Jury indicted Appellant for kidnaping, first-degree burglary, first-degree criminal sexual conduct, and possession of a weapon during the commission of a violent crime. (R.578-585.) On October 13–15, 2014, Appellant proceeded to a trial before the Honorable Michael J. Nettles and a jury. Appellant represented himself with Richard Jones and Julie Wooten as standby counsel, and Deputy Solicitors Kernard E. Redmond and Mary Thomas Johnson Lee represented the State. The jury found Appellant guilty of all charges. (R. 569.) Judge Nettles sentenced him to thirty years' concurrent imprisonment on the first three charges and five years' consecutive imprisonment on the weapon charge. (R. 572.)

On October 20, 2014, Appellant filed a Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On September 8, 2013, the seventy-six-year-old Victim was watching television in the den with her eighty-one-year-old husband when the doorbell rang. (R. 90, lines 15–19; R. 104, lines 20–25.) When she answered the door, a man asked her if the house was for sale and whether he could come in and look around. (R. 105, lines 3–16.) She let the man in and showed him around, and before he left she asked him for his contact information in case they decided to sell the house. (R. 105, line 18–R. 106, line 8.) The man grabbed her around the neck from behind, pushed her over on the couch, and raped her. (R. 106, lines 22–25.) During the attack, Victim was able to push her alert button, which answered in the den. (R. 107, line 21–R. 108, line 2.) Victim was not sure whether the attacker heard the alert call being answered from the den, but he left and she answered the emergency call and told them what happened. (R. 108, lines 2–9.) Police first arrested Kadeem Hooks for the crime but later released him. (R. 216, lines 3–8; R. 269, lines 14–22.) After receiving information from SLED that Appellant's fingerprint was on the note Victim gave to the man to write down his contact information, the Marlboro County Sheriff's Office arrested Appellant and charged him with first-degree criminal sexual conduct, first-degree burglary, kidnaping, and possession of a weapon during the commission of a violent crime. (R. 217, line 23-R. 221, line 11.)

When Appellant proceeded to trial, the judge called the case and announced the charges he faced. (R. 2, lines 6–10.) Pretrial, Appellant told the trial court he had not really spoken with his attorney, Richard Jones, and had filed a motion that his attorney refused to file. (R. 3, lines 16–21.) He wrote to the Office of Disciplinary Counsel asking that the attorney be removed from his case for the lack of interest he had shown in the case. (R. 3, lines 22–25.) Appellant stated his attorney had only visited him three

times and asked him the same question each time about a statement he made. (R. 4, lines 1–5.) He told the trial court he felt the attorney is "not in my best interest as far as representation." (R. 4, lines 6–8.) The trial court requested Jones address the court regarding his preparation for the case. (R. 4, lines 17–21.) Jones informed the trial court he was Appellant's fourth attorney, he had spoken to him "considerably more than three times," and Appellant had been completely uncooperative as far as assisting with the preparation of the defense. (R. 4, line 22–R. 5, line 17.) After deciding to prepare the case on his own, Jones stated he had prepared very hard and very diligently. (R. 5, lines 17–22.) Jones stated Appellant believed the State was hiding evidence but he did not agree. (R. 5, line 23–R. 6, line 4.)

The trial court then advised Appellant as follows:

> [T]he Court system does not allow someone to be hauled into Court and face charges without representation. Certainly not with charges of this magnitude.
>
> And if you can't afford a lawyer one will be appointed for you. If you're not satisfied with the lawyer that's appointed to you then you can retain your own lawyer have you made an effort to retain your own lawyer?

(R. 6, lines 14–21.) Appellant told the trial judge he had spoken to several lawyers and was trying to retain a paid attorney. (R. 7, lines 3–5.) The trial judge noted the case had been pending in excess of a year and Appellant had ample opportunity to obtain a private attorney. (R. 7, lines 21–24.) He presented two choices to Appellant: keep his appointed lawyer, Richard Jones, or try the case by himself. (R. 8, lines 2–10.) The trial judge told him he had an absolute constitutional right to represent himself but admonished him that it was not a good idea to do that. (R. 8, lines 10–16.) When Appellant said he felt he knew "more about this case to represent myself" and said he was willing to represent himself, the trial judge asked if he wanted Jones to assist him or if he would rather do it

all by himself. (R. 8, lines 19–24.) Appellant agreed to allow Jones to assist him. (R. 8, line 25–R. 9, line 2.)

The trial judge then advised Appellant as follows:

> I think it would be an extreme error in judgment for you to represent yourself. I don't think it's a good idea. I don't think you ought to [do] that, but once again, you have an absolute right to do that.
>
> If you go forward and you represent yourself then you're going to be charged with the responsibility of knowing the substantive law in South Carolina, the procedural law and the consequences of your decision. You're not—I can say with absolute certainty that you're not equipped to do that, but at the same time I can't make you use the services of Mr. Jones.

(R. 9, line 19–R. 10, line 4.) The trial judge then asked Appellant to think hard about whether he wanted him to discharge Jones, and Appellant answered that he did. (R. 10, lines 5–8.) The trial judge then asked Jones to sit in the front row so Appellant could confer with him as needed, and Appellant agreed that arrangement sounded fair. (R. 10, lines 12–18.) Jones then asked the trial judge if Ms. Wooten could also assist Appellant, and Appellant agreed that both attorneys could sit at the table with him. (R. 11, lines 1–12.) Next, the trial judge explained what an opening statement was and asked if Appellant wanted to do it or whether he wanted one of the lawyers to do it, and Appellant stated he would like one of the lawyers to do it.[1] (R. 11, line 21–R. 12, line 6.) The trial judge then told Appellant the next step would be to draw the jury and told him that while the lawyers could assist him, he would make the ultimate decision as to which jurors to pick. (R. 13, lines 10–14.)

[1] Appellant actually decided to give his own opening statement when the time came. (R. 8, line 21–R. 89, line 3.)

After selecting a jury and holding a Jackson v. Denno hearing, during which the trial judge determined the statement was freely and voluntarily given, the trial judge again discussed the dangers of self-representation with Appellant.[2] Specifically, he told Appellant he would be held responsible for knowing the rules of evidence, the rules of criminal procedure, and the substantive rules of law. (R. 86, lines 7–15.) He asked Appellant if he understood he would be going forward at his own peril and whether he understood the trial judge thought it was not in his best interest, and Appellant answered in the affirmative to both and said he still wanted to represent himself. (R. 86, lines 15–25.) At that point, the trial judge asked about Appellant's level of education. Appellant told him he had a tenth grade education, had been reading some law books, and felt confident he could do it. (R. 87, lines 1–10.) The trial judge stated that he would allow him to represent himself under the circumstances and reminded him the lawyers were there to help him he if felt uncomfortable about proceeding at any time. (R. 87, lines 11–15.)

During the trial, Appellant conducted cross-examination of the State's witnesses, objected to evidence, conferred with his standby counsel, moved for a directed verdict at the close of the State's case, and testified in his own defense. Appellant called his own witnesses and conducted direct examination. (R. 459–502.) Appellant also gave his own closing statement. (R. 508–534.)

[2] The trial judge told Appellant he could conduct cross-examination during the Jackson v. Denno hearing or one of his standby attorneys could, and Appellant elected to do it. (R. 65, lines 1–4.)

ARGUMENT

The trial court correctly inquired into Appellant's knowing and intelligent waiver of counsel and desire to appear *pro se* by following the guidelines set forth in Faretta v. California.[3]

Appellant argues the trial court erred when it permitted him to represent himself during his trial. Specifically, he argues (1) the trial court failed to ensure he understood the dangers and disadvantages of self-representation, (2) the record does not disclose he had sufficient background to intelligently waive his right to counsel, and (3) he was not apprised of his rights by some other source. On the contrary, the trial court diligently advised Appellant of his right to counsel, warned him about the dangers of representing himself, and gave him a choice as to whether he wanted standby counsel. Further, the Record demonstrates he understood the dangers of self-representation and was aware of the requirements that would be placed on him during trial. The evidence presented clearly indicates he knew he had a right to counsel and voluntarily waived that right. The trial court was correct in following the Faretta guidelines and its decision should be affirmed.

South Carolina appellate courts have made clear one can waive one's right to counsel based on Faretta v. California, 422 U.S. 806 (1975). State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009). "The right to proceed *pro se* must be clearly asserted by the defendant prior to trial." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) (emphasis added). "It is the trial court's responsibility to determine whether there was a knowing and intelligent waiver by the accused." Bryant, 383 S.C. at 414, 680 S.E.2d at 13. "To effectuate a valid waiver, the accused must (1) be

[3] 422 U.S. 806 (1975).

advised of the right to counsel and (2) be adequately warned of the dangers of self-representation." Id. (citing State v. McLauren, 349 S.C. 488, 493 94, 563 S.E.2d 346, 348 49 (Ct. App. 2002)); see also Faretta, 422 U.S. at 835.

"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, 422 U.S. at 807. A defendant may waive the right to counsel. "It is the trial court's responsibility to determine whether there was a knowing and intelligent wavier by the accused." Bryant, 383 S.C. at 414, 680 S.E.2d at 13; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) ("It is beyond question that an accused person may waive counsel and represent himself. However, it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver.").

Faretta requires a defendant "be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open." 422 U.S. at 835. "While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding." Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). If the trial court fails to explicitly address the disadvantages of proceeding *pro se*, as required by the second prong of Faretta, this Court may look to the record to determine whether the appellant had sufficient background to understand the dangers of self-representation or was apprised of his rights by some other source. See Watts v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001). Factors this Court considers in determining if an accused had sufficient background to understand the disadvantages of self-representation include:

> (1) the accused's age, educational background, and physical and mental health;
> (2) whether the accused was previously involved in criminal trials;
> (3) whether he knew of the nature of the charge and of the possible penalties;
> (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case;
> (5) whether he 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 he knew of legal challenges he could raise in defense to the charges 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.

See State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992); see also Bryant, 383 S.C. at 415, 680 S.E.2d 11 at 14.

Here, the record demonstrates the trial judge clearly advised Appellant of the right to counsel and adequately warned him of the dangers of self-representation. Specifically, he told Appellant he would be held responsible for knowing the rules of evidence, the rules of criminal procedure, and the substantive rules of law. (R. 86, lines 7–15.) He asked Appellant if he understood he would be going forward at his own peril and whether he understood the trial judge thought it was not in his best interest, and Appellant answered in the affirmative to both and said he still wanted to represent himself. (R. 86, lines 15–25.) The trial judge told him:

> I think it would be an extreme error in judgment for you to represent yourself. I don't think it's a good idea. I don't think you ought to [do] that, but once again, you have an absolute right to do that.

> If you go forward and you represent yourself then you're going to be charged with the responsibility of knowing the substantive law in South Carolina, the procedural law and the consequences of your decision. You're not—I can say with absolute certainty that you're not equipped to do that, but at the same time I can't make you use the services of Mr. Jones.

(R. 9, line 19–R. 10, line 4.) It is abundantly clear from the record the trial judge warned Appellant of the perils of representing himself, including telling him he did not think it was in his best interest, and informed him he would be responsible for knowing the rules and laws of the state. The trial judge acknowledged he could not force Appellant to be represented by counsel because he had an absolute right to represent himself. The trial judge adequately followed the guidelines of Faretta and sufficiently warned Appellant.

Thus, it is not necessary to look at whether he had sufficient background to understand the dangers of self-representation or was apprised of his rights by some other source. However, if this Court somehow determines the trial judge's warnings were not sufficient and must look at the Cash factors above, the record shows Appellant had a tenth grade education and nothing indicates he had any problems with his physical or mental health that would have prevented or hindered his ability to proceed *pro se*. While Appellant is correct that the record does not provide information regarding his previous conviction and whether he had a trial or pled, the fact remains that he had some experience with being before a judge on criminal charges. He served time in prison and on probation so he clearly had some exposure to the legal system. (R. 165, lines 13–24.) He told the trial court he could read and write, had been reading law books, and felt confident he could represent himself. (R. 87, lines 1–10.) He was aware of what the charges were because the trial judge named them during the jury voir dire, even though nothing indicates he was aware of the possible penalties. (R. 2, lines 7–10.) However,

the trial judge did refer to them as "charges of this magnitude" and Appellant referred to the warrants when he made his pretrial motions. He was represented by counsel until he requested the trial court, over a year later, relieve him of his representation based on his attorney refusing to file a motion for him and showing a general lack of interest in the case. Jones, the attorney Appellant had at the time of trial, was his fourth attorney. (R. 4, line 22–R. 5, line 7.) The trial judge appointed Jones and another of Appellant's former attorneys as standby counsel with Appellant's agreement.

Additionally, nothing in the record indicates Appellant asked to represent himself in an attempt to delay or manipulate the proceedings. He was told and understood he would be required to comply with court rules. He was aware of legal challenges he could raise in defense because he challenged evidence and questioned witnesses about mistakes made during the investigation. Specifically, he cross-examined Sergeant John Walters regarding Walters getting his own print on some evidence. (R. 127, lines 7–13.) He also cross-examined nurse Maria Todd regarding a box she forgot to mark on the sexual assault kit. (R. 148, line 23–R. 149, line 23.) In addition, he knew of the significance of the trial and the ability to present a defense because he acknowledged during a discussion with the court that he had been reading some law books and felt confident he could do it. (R. 87, lines 1–10.) Rather than conducting an exchange of merely pro forma questions and answers, the trial judge extensively discussed the dangers of self-representation with Appellant multiple times. Finally, there is absolutely no evidence he was coerced or forced into proceeding *pro se* and all of his interactions with the court demonstrate a requisite knowledge of the proceedings and their significance.

Further, the record demonstrates Appellant was able to fully participate in his trial. He conducted an opening statement, cross-examined the State's witnesses, objected

to the admission of evidence, moved for a directed verdict, presented his own witnesses, and testified on his own behalf. Prior to trial, Appellant recognized the importance of seeing the evidence the State had against him. He chose to consult with his standby counsel prior to presenting his motion requesting the remainder of the State's evidence. In response to Appellant's motion, the trial judge asked that Appellant and his standby counsel make an itemized list of any evidence they did not have. Accordingly, even if the record is insufficient to demonstrate Appellant was adequately warned of the dangers of proceeding *pro se*, his decision to proceed without representation was knowing and voluntary. The record demonstrates a sufficient background and ability to make a valid waiver pursuant to the Cash factors. See State v. McLauren, 349 S.C. 488, 496, 563 S.E.2d 346, 350 (Ct. App. 2002). Thus, it is not necessary to determine whether he was apprised of his rights by some other source. As a result, the circuit court properly permitted Appellant to proceed *pro se*, and Appellant's conviction and sentence should be affirmed.

Even if this Court disagrees with whether Appellant demonstrated the relevant knowledge and had sufficient background and ability to make a valid waiver pursuant to the Cash factors, the appropriate remedy is to remand for consideration of the voluntariness of his waiver by the trial court. See State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991) (finding "except in extraordinary cases where it is clear that a hearing on remand would serve no useful purpose, the remedy when the record fails to show a knowing and intelligent waiver of the right to counsel will be a remand for a Dixon hearing.").

CONCLUSION

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

Respectfully submitted,

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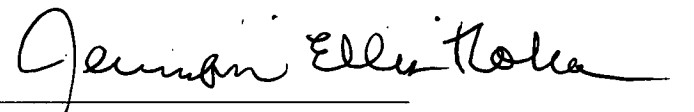
BY: 
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February 24, 2016

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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