STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2015-001843

The State, Respondent,

vs.

Wayne Gary Polite, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly refused to allow Appellant to represent himself when he admitted he was unable to do so and agreed it was not in his best interest.

II. The trial court did not err in refusing to charge the lesser included offenses because no evidence established any valuation less than $10,000. Further, any error in refusing to charge the lesser valuation is harmless because the jury clearly found beyond a reasonable doubt the value of the vehicle was $10,000 or more or he would have been acquitted.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly refused to allow Appellant to represent himself when he admitted he was unable to do so and agreed it was not in his best interest.

Appellant contends the trial court erred in refusing to allow him to represent himself after he moved to recuse trial counsel. Appellant clearly indicated he did not desire to represent himself at trial, and as a result, the trial court did not err in denying his motion to recuse counsel or refusing to allow Appellant to proceed *pro se*.

A defendant has a constitutional right to self-representation under the Sixth and Fourteenth Amendments. Faretta v. California, 422 U.S. 806, 807 (1975). "However, the right of self-representation is not absolute." State v. Samuel, 414 S.C. 206, 211, 777 S.E.2d 398, 401 (Ct. App. 2015) (citing United States v. Frazier–El, 204 F.3d 553, 559 (4th Cir. 2000)). "A defendant's assertion of his right to self-representation must be: '(1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely.'" Id. at 212, 777 S.E.2d at 401 (quoting Frazier–El, 204 F.3d at 558). So important is the right to counsel that the Supreme Court has instructed courts to "indulge in every reasonable presumption against [its] waiver." Brewer v. Williams, 430 U.S. 387, 404 (1977).

Significantly, a request to proceed *pro se* must be clearly articulated and unequivocal. See State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (stating "[t]he request to proceed pro se must be clearly asserted"); see also Raulerson v. Wainwright, 469 U.S. 966, 970–71 (1984) (Marshall, J., dissenting from denial of cert.) ("If a request [for self-representation] is ambiguous, the trial judge need not respond, because there has been no clear indication of a desire to waive a right to counsel."). Because of the importance of the right to counsel, "[a]n assertion of the right of self-representation therefore must be (1) clear and unequivocal." United

States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000) (citing Faretta, 422 U.S. at 835, 95 S.Ct. 2525; United States v. Lorick, 753 F.2d 1295, 1298 (4th Cir.1985)).

The Tenth Circuit Court of Appeals explained the reasoning for requiring a clear and unequivocal request from a defendant before allowing the defendant to waive his right to counsel:

> A defendant's waiver of his right to representation and his concomitant election to represent himself must be "clearly and unequivocally" asserted. United States v. Bennett, 539 F.2d 45, 50 (10th Cir.), *cert. denied*, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976). The reason that a defendant must make an "unequivocal" demand for self-representation is that otherwise "convicted criminals would be given a ready tool with which to upset adverse verdicts after trials at which they had been represented by counsel." Meeks v. Craven, 482 F.2d 465, 467 (9th Cir.1973), cited with approval by this court in United States v. Bennett, at 51.
>
> It follows that if a defendant in a criminal proceeding makes an equivocal demand on the question of self-representation, he has a potential ground for appellate reversal no matter how the district court rules. If the district court denies defendant's equivocal demand to represent himself, the defendant, on appeal, will argue that his constitutional right to self-representation has been denied. And if the district court grants defendant's demand for self-representation, the defendant, on appeal, will argue that his waiver of his right to counsel was not intelligent, knowing and unequivocal. All of which is a form of the "cat and mouse" game mentioned in United States v. Padilla, 819 F.2d 952, 959 (10th Cir.1987) and in United States v. Gipson, 693 F.2d 109, 112 (10th Cir.1982), *cert. denied*, 459 U.S. 1216, 103 S.Ct. 1218, 75 L.Ed.2d 455 (1983).

United States v. Treff, 924 F.2d 975, 978-79 (10th Cir. 1991). The Fourth Circuit Court of Appeals has also explained:

> This requirement that a defendant invoke his self-representation right clearly and unequivocally also serves an additional purpose. A trial court evaluating a defendant's request to represent himself must "traverse ... a thin line" between improperly allowing the defendant to proceed pro se, thereby violating his right to counsel,

> and improperly having the defendant proceed with counsel, thereby violating his right to self-representation. A skillful defendant could manipulate this dilemma to create reversible error. The requirement that a defendant invoke his self-representation right clearly and unequivocally greatly aids the trial court in resolving this dilemma by allowing the court safely to presume that the defendant should proceed with counsel absent an unmistakable expression by the defendant that so to proceed is contrary to his wishes.

Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995) (internal citation omitted); see also, United States v. Ductan, 800 F.3d 642, 650 (4th Cir. 2015) (Since our *en banc* decision in Fields, we have consistently held that as between counsel and self-representation, counsel is the "default position" unless and until a defendant explicitly asserts his desire to proceed *pro se*.").

In the present case, Appellant never clearly, explicitly, or unequivocally asked to proceed pro se. Instead, he acknowledged his inability to represent himself and proceed without counsel. The following portion of the colloquy between Appellant and the trial court is instructive:

> The Defendant: I don't want him as my lawyer.
>
> The Court: Then here are your options, either Mr. Malloy represents you or you represent yourself.
>
> The Defendant: I'll represent myself.
>
> The Court: I don't think that's such a good idea.
>
> The Defendant: **At the moment - - I think you're right** because I don't have a law library. I don't have case law in front of me.

(T.11; R.___) (emphasis added). Recognizing the defendant was not really seeking to represent himself but continued to insist he did not want trial counsel to represent him, the trial court explained Appellant's only recourse was to hire someone. (T.11-12; R.___). Contrary to asserting his right to proceed *pro se*, Appellant responded by indicating: "Well, I have someone

working on it, but the person hasn't come to see me. One of them is Smiley, and a few other people that I inquired of. They're supposed to come visit me this week, but they haven't come to see me yet." (T.12; R.___). The remainder of the discussion regarding relieving trial counsel focused on substituting counsel with someone hired by Appellant and he never again mentioned proceeding *pro se*. Appellant never clearly, explicitly, and unequivocally sought to represent himself, and instead immediately withdrew the possibility at the mere hint of difficulty by the trial court.

Appellant also seems to indicate the trial court failed to properly warn him of the dangers pursuant to Faretta. However, because he never made an unequivocal request, no warning was necessary. Further, the trial court did not have to give a full warning because as soon as she indicated it would not be a good idea for Appellant, he withdrew his request to proceed pro se. Therefore, the requirement of a warning to allow a defendant to proceed with his eyes open appears to have opened Appellant's eyes to the folly of proceeding pro se.

II. The trial court did not err in refusing to charge the lesser included offenses because no evidence established any valuation less than $10,000. Additionally, much of the argument presented on appeal was never presented to the trial court and, therefore, is not preserved for review on appeal. Further, any error in refusing to charge the lesser valuation is harmless because the jury clearly found beyond a reasonable doubt the value of the vehicle was $10,000 or more or he would have been acquitted.

Appellant maintains the trial court erred in failing to charge lesser included offenses for obtaining property based on false pretenses based on the value of the property obtained, arguing there was evidence to support both lower value charges. The argument as raised in Appellant's brief is not preserved for review on appeal because the arguments were not presented to the trial court. In addition, the issue was waived by trial counsel. Further, the trial court properly determined the only evidence regarding fair market value indicated a value of $10,000 or more and, therefore, provided the correct charge to the jury. Finally, any error is harmless in light of the jury's determination the value of the property was above $10,000.

Preservation

Initially, the issue as argued by appellate counsel is not preserved for review on appeal. Appellant maintains in his brief the trial court erred by only charging section 16-13-240(1) and not subsections (2) and (3) of the South Carolina Code. He references figures arguing they demonstrate the need for the lesser included charges. However, none of these figures or arguments in favor of the lesser included offenses were provided to the trial court. Instead, trial counsel based his request solely on the testimony of Mr. Tursi, one of the State's witnesses. In arguing for the lesser included offenses, counsel indicated: "I think there was testimony regarding the older model vehicle. He bought it for $10,000, he adjusted that threshold . . . ." When the court questioned counsel, indicating there was no testimony about an adjustment to the

value of the vehicle, counsel indicated: "That would have been John Tursi. He testified he bought it for $10,000." Counsel appears to be arguing that because there is testimony the vehicle was purchased for $10,000 then he should have received a charge on subsection (2) of the statute. He never makes an argument based on the figures in the Conditional Approval (State's Exhibit 13; R.___) or the recorded phone call between Appellant and his girlfriend (State's Exhibit 14). As a result, none of the argument presented on appeal is preserved for review on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

Additionally, Appellant waived any challenge to the jury instructions. When the trial court completed giving her instructions, she asked if there were any exceptions to the charge by the defense. Appellant's counsel responded: "Not from the defense." As a result, he waived any objection to the charge. See State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal.").

Merits

On the merits, the trial court properly charged the jury on the applicable law based on the testimony and evidence presented. Further, Appellant received the charge he asked for and argued the evidence demanded. Finally, to the extent this Court finds error, it is entirely harmless and the failure to charge the lesser included could not have impacted the verdict.

South Carolina Code section 16-13-240 provides for three different offenses based on the value of the property obtained under false pretenses:

> A person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from

> another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty of a:
>
> (1) felony and, upon conviction, must be fined not more than five hundred dollars and imprisoned not more than ten years if the value of the property is **ten thousand dollars or more**;
>
> (2) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years if the value of the property is more than two thousand dollars but less than ten thousand dollars
>
> (3) misdemeanor triable in magistrates court or municipal court, notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, and 14-25-65, if the value of the property is two thousand dollars or less. Upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days.

S.C. Code Ann. § 16-13-240 (Supp. 2014) (emphasis added).

First, Appellant's counsel maintained he was entitled to a lesser included charge because the testimony by Mr. Tursi indicated the car was valued at $10,000. However, a value of $10,000 would still covered by subsection (1) which indicates a value of "ten thousand dollars or more." As a result, he received the only charge he was entitled to receive based on the lowest valuation he presented to the trial court.

On appeal, Appellant for the first time argues other valuations for the vehicle were presented to the jury. He maintains a valuation of $800 was presented to the jury through the recorded testimony of Appellant and his girlfriend. (State's Exhibit 14). Additionally, he maintains the Conditional Approval contains a valuation of $8,875 for the vehicle.

The testimony regarding the $800 valuation belies its applicability to the current vehicle in question, and further does not demonstrate a valid valuation for consideration under section 16-13-240. Appellant's girlfriend testified the vehicle being discussed was not the 2004 BMW X3 which is the subject of the charges against Appellant for obtaining property by false

pretenses. Instead, she testified the discussions involved a green two-door BMW that Appellant gave her. (T.261; R.___).

Further, the proper consideration of value is the fair market value of the property. See e.g., State v. Clamp, 225 S.C. 41, 45, 80 S.E.2d 512, 513 (1954) (in prosecution for receiving stolen goods with value over $20, the Court explained to determine the value of the property it would not be sentimental value, but instead "the true test [of the stolen property's value] was its commercial value."). South Carolina defines fair market value as "that price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used." Hous. Auth. of City of Charleston v. Olasov, 282 S.C. 603, 608, 320 S.E.2d 478, 481 (Ct. App. 1984); see also, Mazloom v. Mazloom, 382 S.C. 307, 321, 675 S.E.2d 746, 753 (Ct. App. 2009) (recognizing the following definitions of "fair market value": (1) "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction"; (2) "the price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell").

In this instance, the discussion of $800 in the recorded conversation involved the possible scrap value of the vehicle. Additionally, it was not supported by anything but the conjecture and speculation of Appellant that he could only get $800 for scrap. Finally, because the vehicle clearly still had value as a drivable vehicle, its scrap value does not represent its fair market value. The scrap value of the vehicle certainly has nothing to do with its fair market value and a lesser included charge based on scrap value was not appropriate.

Additionally, the $8,875 is listed on the Conditional Approval as the "Clean Trade-In" value as determined by Pelican Auto Finance. There is nothing in the record to support how that

value was derived or what it means. As the trial court explained, there has been no testimony regarding Blue Book value for the vehicle. (T.279; R.___). The only valuation explained and placed in the record was the value Mr. Tursi paid another dealer—$10,000—and the value Appellant agreed as a willing buyer to purchase the vehicle from Mr. Tursi as a willing seller—$13,862. (T.117; State's Exhibit 11; R.___).

The only evidence presented to the jury placed the fair market value of the vehicle at either $10,000 or $13,862. As a result, the trial court did not err in refusing to charge the jury on subsections (2) and (3) of section 16-13-240, which would have required a showing the fair market value was below $10,000.

Finally, any error is harmless. In order to convict Appellant of the crime charged—obtaining property based on false pretenses with a value of $10,000 or more—the jury had to find the property had a value over $10,000. As a result, the jury could not have concluded the same property had a value under $10,000. Therefore, any error in failing to provide the lesser included offenses to the jury did not alter the jury's verdict. See State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) ("When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." (internal quotation marks omitted)).

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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