ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

EDWARD TERRELL CHANDLER

Appellant.

Appellate Case No. 2016-001554

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUE ON APPEAL

The trial court did not err in postponing its ruling on Chandler's motion to proceed pro se, Chandler abandoned his motion and did not timely renew his motion until near the end of the prosecution's case. Further, Chandler was not prejudiced by any error since he was able to recall witnesses and present the case in the manner he saw fit.

STATEMENT OF THE CASE

Appellant Chandler was indicted for first degree burglary, strong arm robbery, kidnapping, and first degree criminal sexual conduct. The Honorable Eugen C. Griffith, Jr. held a hearing on July 14, 2016, on Chandler's July 12 motion to proceed pro se. Chandler decided at the end of the hearing to go to trial with his public defender. On July 18, 2016, the case proceeded to trial.

After the State called twelve witnesses, Chandler made a motion to represent himself following lunch recess on the third day of trial. After two more witnesses testified for the prosecution, Judge Griffith granted the motion and Chandler represented himself. The jury found Chandler guilty as charged. Judge Griffith sentenced Chandler to sixty years imprisonment for burglary, thirty years imprisonment for kidnapping and criminal sexual conduct, and fifteen years imprisonment for strong arm robbery.

STATEMENT OF FACTS

Victim is an eighty-four year old lady retired from a fifty-one year career in education, forty-eight years in Edgefield County. Now, she is the sole proprietor of a funeral home in Johnston. R. pp. 154-56. Appellant Chandler's father lived around the corner in her neighborhood. He did odd jobs for Peterson for ten to fifteen years. Chandler assisted in some of those odd jobs. R. pp. 155-58.

In the early morning hours, Victim opened the door for Chandler after he frantically rang the doorbell. Although not fully dressed, Victim opened the door slightly. Chandler claimed something was wrong with his father, he claimed his father was just shaking. Victim fetched her phone and began to dial, but Chandler demanded the phone and pushed his way inside as she tried to lock the door. Victim stepped back and fell down. She was frightened by the look in Chandler's eyes. R. pp. 158-62.

She backed up and sat on the couch. Chandler demanded her money. Victim testified Chandler took numerous $100 bills from her billfold that she still had from a recent trip to Florida. They were crisp $100 bills. Chandler demanded she write a check for him for $1,000. She said she did not have that much money in her bank account. He told her to write it for whatever and then specified an amount over $700. He wanted to know where her cellphone was. R. pp. 162-66.

Chandler then took Victim down the hallway. Looking around, he took her into the bedroom and pulled down her pants. Chandler put his penis in her mouth, then her vagina, and then her mouth once more. Chandler then tied Victim up with shoe string from his shoes. He tried to use a blanket and a pajama top to stuff into her mouth. He threatened to kill her if "they" come, meaning law enforcement. R. pp. 166-68.

Chandler demanded to know where Victim kept tape, and Victim responded she had some in the front room. Chandler told her to come on, Victim told him she could not walk (since her legs were tied with shoestrings). Chandler carried her to the front room, bound her with tape, and also tied her with coil. R. p. 168.

Chandler left, saying he was going to cash the check. Victim wiggled her way to the couch and called 911. Victim testified he was wearing a sweatsuit. Specifically, he was wearing grey sweatpants. R. pp. 169-70. She testified something white went into her mouth, although she did not know if Chandler ejaculated. Victim explained she did not resist because she was in fear for her life. R. pp. 168-72. Victim reported to the nurse that her vagina was hurting. R. p. 191. She identified blood on the couch where she was sitting when she was tied up. R. p. 192.

Victim called 911 to report the burglary and reported Chandler was the burglar. R. pp. 180-81. Victim admitted she told the 911 operator she was not hurt, but she explained "but what I meant by that was, I wasn't shot or cut up or anyway like that, life threatening." R. p. 181, lines 1-4. Victim was brought to the hospital and reported the assault to the nurse. Photographs admitted into evidence at trial showed cuts she sustained during the assault. R. p. 187-89.

Victim's son, Noah, testified he knew Chandler's father and testified his brother and Chandler were friends when they were little. Chandler's father's house is right around the corner from Victim's house. R. pp. 133-34. Noah testified Chandler was living with Chandler's father at the time of the assault. He testified Chandler helped his father with odd jobs. R. pp. 139-43. However, Chandler's father no longer does work for Victim. R. p. 150.

Noah testified he received a phone call from the dispatcher and promptly drove to his mother's house. The deputies would not let him inside. But the door was open and he saw his

mother tied up. The rescue squad arrived and took Victim to the hospital. R. pp. 143-45.

Victim's neighbor and good friend, Darlene Smith, testified she lives around the corner from Victim. R. p. 205. She confirmed she and Victim recently travelled to Florida. R. p. 207. The morning of the assault, she noticed an extra car in the driveway at around 6:30 a.m. Victim called her nervous and upset. She said she was robbed and she knew who did it. It was Chandler. Smith saw Victim while she was still tied up. R. pp. 213-15.

Gary Doran owns a convenience store. Chandler came in his store and attempted to cash a check made out for $735. He told Chandler he did not have that kind of money that morning. Then Doran heard a BOLO on the police scanner in his store that the police were looking for Chandler. Doran confronted Chandler on this and Chandler claimed that was not his name, as he left the store, he turned around and said his name was "Michael." The store video was entered into evidence. R. pp. 218-23; pp. 230-32; pp. 237-38.

Deputy Chris Peterson heard a BOLO with a vehicle description on a call for a home invasion and sexual assault. He stopped Chandler's vehicle because it matched the description, which included a Barrett Auto Sales tag. He placed Chandler in investigative detention. Chandler turned around on Deputy Peterson and Deputy Peterson grabbed him and put him in handcuffs. R. pp. 258-62. Chandler was driving south towards North Augusta at the time he stopped Chandler's vehicle. R. p. 264.

Deputy Tracy Wood testified she took Chandler's shoes into evidence. They were missing shoelaces. R. p. 267. She also took grey sweatpants that Chandler was wearing at the time of arrest. R. p. 271. Chandler also had four $100 bills, plus some smaller bills. R. p. 273.

Linda Herald, an EMS responder, testified she arrived at Victim's house at 7:48 a.m. An

eighty-three year old female sat on the couch in just a shirt and with tape on her. There was tape wrapped around her and a black cord. There were shoe laces tied around her ankles. Blood on the couch came from Victim's private areas. She had scratches on her hand. Victim's demeanor became upset, then she asked what if she got AIDS. R. pp. 286-292.

Investigator Morris, the crime scene investigator, confirmed that the $100 bills taken from Chandler were firm and crisp, as if new. R. p. 333. Morris took the shoelaces that were tied around Victim's ankles. R. pp. 300-01. He attempted to get fingerprints, but there were only smudges. R. p. 307. He took vomit into evidence, but SLED would not accept it for testing. R. pp. 325-26. There was fresh blood, and Victim was still tied up when he arrived. She was transported to the hospital by EMS. R. pp. 300-01. Subsequently, Nike sent sample shoes to compare with Chandler's shoes. R. p. 334.

Nurse Lindsey Stone, an ER nurse, saw Victim on February 24, 2015. She collected Victim's underwear and took swabs for the rape test kit. Victim reported she was gagged and vomited. She had bruising and vaginal bleeding. R. pp. 369-76; p. 379. She had an abrasion on the left hand and a laceration on the labia minora. R. p. 381. Victim was trembling and crying. She reported soreness in the vaginal area. R. pp. 386-87.

Nurse Stone was the twelfth witness for the State. It was following her testimony when Chandler started complaining his attorneys would not do anything he asked. This is discussed later in the brief. R. p. 393.

SLED serologist Courtney Thompson testified she found p30 on the oral swab, which is a component of seminal fluid and may be found in pre-ejaculate (which typically does not contain sperm cells and therefore DNA). R. p. 426; pp. 434-35. Thompson explained the test was

presumptive, not conclusive, R. pp. 438-39. The fact that it was present orally was an indication that the p30 was not there long. R. pp. 441-42. Analyst Maryann Boehm testified she was unable to develop a DNA profile from the oral swab. R. p. 448.

Herb Hedges, a Nike shoes consultant, testified he has assisted law enforcement investigations in at least thirty states as well as in Europe and Australia. R. pp. 510-11. He identified the shoes Chandler wore as Nike Airmax 90's. He had a sample of the shoes to compare them with. R. p. 519. Hedges also identified the shoe laces used to tie up Victim as consistent with the shoe laces Nike used for that model shoe. R. pp. 521-22.

Chandler, representing himself pro se at this point, put up several witnesses. He called Alvin Stevens, his boss, to talk about when he was paid. R. p. 551. Stevens confirmed on cross-examination that Chandler was living with his father, something the defense up to that point contested. R. p. 554, lines 7-12.

Walker Posey, who is the funeral director, confirmed Stevens is a contract employee with the funeral home. However, he could not recall Chandler ever working at this funeral home, which apparently came as a surprise to Chandler. R. pp. 555-56.

Adrena Chandler, Chandler's sister, was Chandler's third witness. She testified he borrowed her car, but she did not know when because she was asleep. The car has a Barrett's tag. R. pp. 569-70. Apparently, Chandler put her up to testify that she was watching his kids while he was allegedly at work. R. pp. 567-68.

Chandler recalled Officer Morris. For the State, he confirmed again that Chandler did not have any shoestrings in his shoes when he was arrested. R. p. 581. For the defense, he admitted he did not take any pictures of the fingerprint smudges, which he typically does not do if the fingerprint

is merely a smudge. R. pp. 576-77.

Investigator Smith testified about the time of calls on a cell phone and fielded some questions from Chandler on the search warrant. R. pp. 591-94; p. 606. He pointed out on cross-examination that the distance between Doran's store and Victim's house was two tenths of a mile. It was only a couple hundred yards between Victim's house and Chandler's father's house. R. p. 615. Chandler called two more law enforcement witnesses to talk about phone calls, the search warrant, and the seizure of the car. R. pp. 619-23.

Chandler then testified he took his brother in law to his sister's house so "we could party or whatever." R. p. 626. Chandler claimed he worked at Posey's with his uncle. R. p. 626. Chandler also explained to the jury, "On the side, I sold a little drugs, on the side just to have more money." R. p. 626, lines 23-24. He assured the jury he knew it was wrong. R. p. 626. Chandler claimed that he walked in on Victim's son and another man, and that the son threatened to have him locked up if he told anyone. R. p. 627-28. He claimed the son paid him $250 cash and a check for $750. Apparently, Chandler also had money from drug sales. R. pp. 628-29.

He admitted he had grey pants on at the time of arrest. R. p. 629, lines 11-12. He admitted he tried to cash the check and they would not cash it. So he bought soda and chips, which left him with $447. He admitted trying to cash the check at Doran's store, but denied there was a scanner on in the store. R. pp. 629-30. Chandler claimed he was set up by the Johnston police. R. p. 633.

On cross-examination, Chandler admitted he had convictions for possession with intent to distribute cocaine and forgery of a check. He admitted he was trying to cash a check, but claimed it was from Noah because Noah gave him the check to keep a secret that Noah had an affair. R. pp. 637-38. He admitted he did various odd jobs for Victim in the past and had been to her house. R. p.

639. He claimed there were shoestrings in his shoes when they were seized. R. pp. 640-41. He clarified he did not need money, he just sold drugs for extra spending money. R. p. 648, lines 4-16.

The last witness Chandler called was Tracy Wood. On cross-examination, she verified that at the time Chandler was booked for arrest, he was wearing shoes with no shoe laces, a fact he was contesting. R. pp. 655-56.

ARGUMENT

The trial court did not err in postponing its ruling on Chandler's motion to proceed pro se, Chandler abandoned his motion and did not timely renew his motion until near the end of the prosecution's case. Further, Chandler was not prejudiced by any error since he was able to recall witnesses and present the case in the manner he saw fit.

Chandler complains the trial court erred in not granting his motion to represent himself on July 14. However, Chandler vacillated on this request and waived his right to self-representation when he withdrew his motion after his public defender indicated Chandler chose to go to trial with the public defender representing him. Chandler did not attempt to represent himself until the third day of trial after the State called twelve witnesses. Ultimately, Chandler was able to try the case the way he wanted, so his rights were not denied.

Chandler filed a written motion to relieve counsel and proceed pro se on or about July 12, 2016, only six days before trial. On July 14, 2016, four days before trial, the trial court convened a hearing on the motion. (R. p. 4). The public defender informed the trial court that Chandler wanted to represent himself. However, Chandler wanted the public defender as standby counsel. R. p. 4. It was clearly an act of desperation on the part of Chandler, his public defender advised the trial court that there were "no technical legal defenses." R. p. 8, lines 13-19.

Chandler explained he wanted to represent himself because the case was not so technical as much as a matter of common sense. R. p. 9, lines 8-14. Chandler completed some college coursework and was twenty-eight years old. He claimed he studied the case day and night, explaining "I don't go to sleep sometimes, Your Honor." R. p. 12, lines 6-8. The prosecution offered that it would not oppose substitute counsel. R. p. 12.

The prosecutor expressed her concerns that Chandler has a history of mental health problems and he was last evaluated over a year earlier. Further, the doctor performing the evaluation was no longer employed with the Department of Mental Health and the prosecution had not been able to serve her with a subpoena. The prosecution believed a full Blair[1] hearing would be necessary to ensure a waiver of right to counsel was knowingly entered into, including an orientation assessment. The prosecution did not believe this could be done by the time of trial and suggested postponing the case until the next term of court in Edgefield County, which was October 10. R. pp. 16-17.

The trial court advised Chandler as follows:

> And that's . . . considering, you know, that you, just the day before yesterday, asked to have Mr. Driley set aside, I'm kind of inclined to get all these pieces lined up for October. So here's your choice: You can let Mr. Driley go forward and we'll start Monday . . .
>
> If you want to represent yourself, that's your request. If you want to do that, **I would be much more comfortable in protecting your rights** that we get these things done and start this trial in October.

R. p. 20, lines 9-25. The trial court then let Chandler speak with his attorney some more. R. pp. 22-24. When resuming the proceeding, the public defender indicated that Chandler wanted to proceed to trial the next week with the public defender continuing to represent Chandler. Chandler confirmed this when he indicated he was withdrawing his motion to represent himself. R. p. 24.

Four days later, the trial began. A jury was selected and the trial court heard several motions before recessing for the day. The next day the trial resumed. The trial court dealt with a juror issue. Then he made his opening remarks to the jury. The State and co-counsel for Chandler made their opening arguments. Over the next two days, the State called twelve witnesses: the 911 operator, two

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1 See State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

of Victim's sons, Victim, Victim's neighbor, the convenience store owner, two Edgefield Sheriff's deputies, the EMS responder, the Edgefield crime scene investigator, the latent print examiner, and the SANE nurse, before Chandler started complaining about his attorney. R. pp. 40-392.

It was only at this point during trial that Chandler asked to represent himself. This was the third day of trial, counting jury selection, and occurred when court resumed following a lunch recess. R. p. 393. Chandler complained that his attorneys were not doing anything he told them to do. He wanted the trial court to look at some papers. He complained that his defense attorneys were not going to call Investigator Smith, which Chandler thought was important because he was the lead investigator who "made all of these mistakes and they are trying to hide it." R. pp. 393-94 (direct quote, p. 394, lines 1-2). Chandler claimed, "Your Honor, they are working together. I will be honest with you and I cannot let that happen. They are working together, him and the Solicitor, they are." R. p. 394, lines 1-5. Chandler also let the trial court know that he was scared. R. p. 394, line 9.

Chandler complained that his attorneys were recommending he not testify and did not want to call any witnesses. R. pp. 394-95. He claimed his attorney "has not cross-examined anybody. He cross-examined one person and it really don't matter." R. p. 395, lines 13-17. Actually, at that point in the trial, defense counsel examined nine of the State's twelve witnesses, asking a total of 188 questions. Chandler pleaded he needed somebody else to represent him or he needed to represent himself. R. p. 395, lines 17-21.

Chandler's public defender explained, "Judge, we just went and talked about possible scenarios that could play out and possible options that we could have and some ways in which I'm leaning on those options." R. p. 396, lines 10-13. He further elaborated, "And that's based largely

on my experience of having tried a number of cases now and there's really, whatever decision you make, there's risk and there's reward. . . . And sometimes the reward is pretty minimal and the risk is pretty great." R. p. 396, lines 10-18.

Following Chandler's further remonstrations, the trial court found it prudent to move the discussion to the judge's chambers before Chandler said something in open court against his interests. The trial court initially advised Chandler that he could not dismiss his attorneys after the trial began. R. pp. 399-402.

The trial court offered a parable about a defendant who represented himself and did fairly well until he failed to understand the trial court's rulings and "got aggravated with me and he got real loud and belligerent and started waving his arms and raised his voice and I warned him." R. p. 403, lines 9-15. Chandler replied "Sorry about that." R. p. 403, line 16. At that time, the trial court denied Chandler's motion to represent himself and warned him the jury is watching everything he does and his body language. R. pp. 404-05. The prosecutors left the chambers so the trial court could speak with Chandler about the specific things he felt the defense attorneys should be doing. R. pp. 413-20.

The trial resumed and testimony was taken from two more witnesses – a serologist and forensic DNA analyst. The serologist found pre-ejaculate on the oral swab. R. pp. 434-35. The DNA analyst testified she could not develop a DNA profile from the swab. R. p. 448.

Then Chandler moved to represent himself. R. p. 480. Chandler explained he wanted to call or recall a total of eight witnesses. R. p. 482. He was allowed to represent himself after the trial court gave extensive instructions about the dangers of self-representation. R. pp. 480-87.

Chandler took over representation, handling the State's last two witnesses. He was able to call all eight witnesses he previously requested and testified himself, as he had wanted. Tr. pp. 541-712. Chandler made his own closing argument. R. pp. 673-99.

A defendant may waive his right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806 (1975); State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010). "The request to proceed pro se must be clearly asserted by the defendant prior to trial." Winkler (quoting Farretta). "Because an exercise of the right of self-representation necessarily entails a waiver of the right to counsel – a defendant obviously cannot enjoy both rights at trial – the exercise of the right of self-representation must be evaluated by using many of the same criteria that are applied to determine whether a defendant has waived the right to counsel." United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). Under Frazier-El, in order for a defendant to conduct his own defense, the court **must be certain** that the defendant's choice is (1) clear and unequivocal, (2) knowingly, intelligently, and voluntarily made, and (3) is timely. Id.

"The requirement that the assertion be clear and unequivocal 'is necessary to protect against an inadvertent waiver of the right to counsel by a defendant's occasional musings,' and it also 'prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation.'" United States v. Bush, 404 F.3d 263, 271 (4th Cir. 2005) (quoting Frazier-El, 204 F.3d at 558-59). "This protection against an inadvertent waiver of the right to counsel is especially important because representation by counsel does not merely tend to ensure justice for the individual criminal defendant, it marks the process as fair and legitimate, sustaining public confidence in the system and in the rule of law." Frazier-El, at 559 (citation and internal quotation marks omitted).

"[T]he right to self-representation and the right to representation by counsel, while independent, are essentially inverse aspects of the Sixth Amdendment and thus that assertion of one constitutes a de facto waiver of the other." United States v. Singleton, 107 F.3d 1091, 1096 (4th Cir. 1997) (citations omitted). "In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation." Frazier-El, at 559.

"At bottom, the Faretta right to self-representation is not absolute, and the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." Id. (citation and internal quotation marks omitted). A request for self-representation must "generally must be asserted before meaningful trial proceedings have begun." United States v. Hilton, 701 F.3d 959, 965 (4th Cir. 2012). Thereafter, a defendant's request for self-representation is a matter submitted to the sound discretion of the trial court. Id.

"[I]nvocation [of the right to self-representation] does not set into motion rigid, mechanical procedures that must be followed to the letter to avoid an error. The invocation of the right and whether the proper procedures were followed must be evaluated in the context of a given case." Swan v. Commonwealth, 384 S.W.3d 77, 94-95 (Ky. 2012). "[W]hile the right is a structural right, it must still be applied in the real world, which sometimes requires a practical approach, not an absolute and unbending one." Id. at 95.

Chandler argues the trial court erred because it was holding Chandler to a higher standard of competency, citing State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014). Chandler simply misconstrues the record. The trial court did not make a determination pre-trial whether Chandler

could knowingly waive his right to counsel, instead, the trial court indicated it was not prepared to grant the motion on the eve of trial. To the extent the trial court was considering ordering a mental evaluation, it was merely preparing to seek more information before considering the request for self-representation. Chandler had a mental health history and the last mental evaluation was a year prior to trial. This information, whether or not dispositive in a ruling on self-representation, nonetheless was important in determining whether or not Chandler would be making a knowing and voluntary waiver. Chandler cites the ten factor test used to determine if the accused had sufficient background to understand the disadvantages of self-representation:

> (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 and 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.

State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992). While there may not be a separate standard for competency to stand trial and competency to represent oneself, the Cash factors make clear it is a consideration, and the trial court would not have abused its discretion, had its

exercise of discretion became necessary, to seek updated information on Chandler's competency. See generally United States v. Washington, 596 F.3d 926, 941 (8th Cir. 2010) (noting "the trial judge will often prove best able to make more fine-tuned mental capacity decisions" (quoting Indiana v. Edwards, 554 U.S. 164 (2008))).

"Even if a request is unequivocal, timely, voluntary, knowing, and intelligent, a court may defer ruling if the court is reasonably unprepared to immediately respond to the request." State v. Madsen, 229 P.3d 714, 717 (Wash. 2010). "The trial court was within the bounds of proper discretion to delay ruling on the matter until it could properly prepare to rule on the issue." Id. at 718. "[A] court's discretionary decision to defer ruling on a motion to proceed pro se should be upheld if the deferral was based on tenable grounds and tenable reasons." Id. at 722; see also, Russell v. State, 383 N.E.2d 309, 314 (Ind. 1978) (noting "experience has shown that day of trial assertions of the self-representation right are likely to lead to a rushed procedure, increasing the chances that the case should be reversed because some vital interest of the defendant was not adequately protected.").

Chandler made his motion to represent himself only six days before trial, even though the case was nearly a year-and-a-half old. He was given the option of representing himself and having an additional three months to prepare for trial. Instead, he withdrew the motion after further discussion with his attorney. Because he withdrew his motion to represent himself and did not disagree with counsel's assertions that he was choosing to go to trial with his public defender continuing to represent him, Chandler waived his right to proceed pro se. He would not seek to represent himself again until after the State presented twelve witnesses at trial.

The Fifth Circuit Court of Appeals addressed the differences between the waiver of a right to counsel and the waiver of the right to represent oneself, noting, "The important distinction in the manner in which the two rights come into play requires that a different waiver analysis be applied to the right of self-representation than to the right to counsel. Unlike the right to counsel, the right of self-representation can be waived by defendant's mere failure to assert it." Brown v. Wainwright, 665 F.2d 607, 610-11 (5th Cir. 1982). "Even if defendant requests to represent himself . . . the right may be waived through defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether." Id. at 611. The Fifth Circuit further surmised, "Since the right of self-representation is waived more easily than the right to counsel at the outset, before assertion, it is reasonable to conclude it is more easily waived at a later point, after assertion." Id. Thus the Fifth Circuit concluded, "A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself." Id.

In that case, the Fifth Circuit found that the trial court's finding of waiver was supported by counsel's statement to the court that he and the defendant worked out their differences, and the observation that after the initial hearing, the defendant never informed the court of his continuing desire to conduct his own defense. The defendant only informed the trial court of the desire to represent himself on the third day of trial prior to closing arguments. Accordingly, the Fifth Circuit found the request was untimely. Id.; see also Hodge v. Henderson, 761 F.Supp. 993, 1003 (S.D.N.Y. 1990) (finding even if Hodge's conduct could be construed as an assertion of the right to represent himself, Hodge did not persist in his desire to appear pro se and it was not reasserted unambiguously before Justice Fraiman at trial. Unlike the right to counsel, the right to self-representation can be

waived by failure to timely assert it, or by subsequent conduct giving the appearance of uncertainty.").

The Federal District Court for Deleware, citing Wainwright, observed that "the right of self-representation may vanish if the defendant later vacillates or accepts the representation of counsel at trial." Pitts v. Redman, 776 F.Supp. 907, 916 (D.Del. 1991). The Delaware district concluded, "On balance, the right to self-representation is fragile." Id.

In the instant case, the trial court reasonably determined it would not be ready four days from trial to determine if Chandler should proceed pro se. Indeed, Chandler's decision, despite the age of the case, was a recent one and the trial court might be concerned that Chandler's sudden desire to represent himself was a fleeting sentiment. The trial court suggested speaking with counsel some more to see if they could work out their differences. They did, and the motion to proceed pro se became moot. Accordingly, the trial court did not err, particularly where Chandler vacillated. See also Swan v. Commonwealth, 384 S.W.3d 77, 94 (Ky. 2012) (finding no error where trial court refrained from rushing into a Faretta hearing and instead directed Swan to consult with his lawyer and think about his request, allowing Swan to reassert the request; since Swan did not raise the issue again, the issue was waived).

Chandler claims, "Although Appellant initially chose to proceed to trial immediately, his displeasure with counsel was evident from the beginning, particularly as Appellant voiced his displeasure to the judge repeatedly over counsel's failings." Br. of App. p. 19. This is not true: at trial, Chandler did not make any complaints about his counsel until after the lunch recess on the third day of trial. He did not re-raise the motion until the State presented twelve of its sixteen witnesses. He also asked the trial court to delay the trial until October, suggesting he was not really prepared to

represent himself at the time he originally made the motion (and therefore, was not really put in the imagined Hobson's choice between a speedy trial and self-representation depicted by Chandler in his brief). R. p. 373. Chandler ultimately was allowed to represent himself after two more witnesses testified, either of which could have been recalled by Chandler during his case, if he desired. See also State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999) ("If the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge.").

Moreover, Chandler was allowed to present the case from that point as he wanted, including recalling the witnesses he felt should have been cross-examined better. The United States Supreme Court has explained:

> The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.

McKaskle v. Wiggins, 465 U.S. 168, 174 (1984). Ultimately, the Court found that to determine "whether a defendant's Farretta rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." Id. at 177.

In the instant case, Chandler only made his motion towards the end of the State's case, so he cannot and does not complain about his ability to make pre-trial motions or participate in voir dire. However, he was allowed to call the witnesses he wanted and pose questions to them he felt important to ask. He was allowed to make closing argument, and fully participate from the point the trial court granted his motion. Accordingly, the trial court did not commit any error to the degree it forestalled allowing Chandler to represent himself.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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December 8, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

EDWARD T. CHANDLER,

Appellant.

Appellate Case No. 2016-001554

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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