STATE OF SOUTH CAROLINA

ORIGINAL

IN THE COURT OF APPEALS

Appeal from Marlboro County

Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK D. DUPREE,

APPELLANT

APPELLATE CASE NO. 2014-002442

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in permitting Appellant to proceed *pro se* where the judge failed to ensure Appellant understood the dangers and disadvantages of self-representation and the record does not disclose that Appellant had sufficient background to intelligently waive his right to counsel or was apprised of his rights by some other source?

STATEMENT OF THE CASE

On April 29, 2014, a Marlboro County grand jury indicted Appellant for burglary in the first degree (2014-GS-34-0159), criminal sexual conduct in the first degree (2014-GS-34-0303), kidnapping (2014-GS-34-0304), and possession of a weapon during the commission of a violent crime (2014-GS-34-0305). R. 578 - 585. The state, represented by Kernard E. Redmond and Mary Thomas Johnson Lee, called the case for trial on October 13, 2014 before the Honorable Michael J. Nettles and a jury. Initially, Richard Jones represented Appellant. R. 1. However, Judge Nettles permitted Appellant to represent himself during the trial. R. 10, lines 12-23. The jury found Appellant guilty as charged. R. 569, lines 2-16. Judge Nettles sentenced Appellant to thirty years' imprisonment for burglary, thirty years' imprisonment for criminal sexual conduct, thirty years' imprisonment for kidnapping, and five years' imprisonment for the weapon. He ordered the sentences for burglary, criminal sexual conduct, and kidnapping to be served concurrently. However, he ordered the five-year sentence for the weapon to be served consecutively to the others. R. 571, line 18 – R. 572, line 18; R. 586 - 589.

Appellant filed a notice of appeal. This brief follows.

STATEMENT OF FACTS

On the afternoon of September 8, 2013, Lottie Thomas and her husband were watching television when the doorbell rang. R. 104, lines 20-25. Although she was wearing only a long red t-shirt and no underwear, Thomas answered the door. R. 105, lines 3-4; R. 108, lines 10-14; R. 112, lines 14-22.[1] According to Thomas, Appellant was at the bottom of her steps and asked if her home was for sale. R. 105, lines 6-9. Thomas informed him the home was not for sale at the moment but may be in the future. R. 105, lines 10-12. When he asked to look inside the home, Thomas agreed. R. 105, lines 13-19. When the individual asked Thomas to get in touch if she sold the home in the future, Thomas retrieved a pad and pen for him to leave his name and number. Thomas promised to call if she decided to sell the home. R. 106, lines 3-8. Thomas claimed Appellant then pushed her over on the couch and raped her. R. 106, lines 22-25.

The following day, the police arrested Kadeem Lateef Hooks after he confessed. R. 216, lines 3-16; R. 268, line 23 – R. 269, line 20; State's Exhibit #54. Later, the interrogating officer, Jamie Seals, would testify that he had used an "interview technique" that day that "was not as professional as it usually is." R. 270, lines 15-16. He blamed it on being up for "28, 29 hour straight." R. 270, lines 14-15. He explained that "it was evident" he had asked Hooks several questions that Hooks could not answer, but Seals had given him the answers. The officer claimed he did not realize it during the interrogation, but that it was obvious when he watched the video of the interrogation that he had supplied Hooks with answers to the questions. R. 270, line 2 – R. 271, line 9.

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[1] Thomas put on underwear after the alleged assault "in case there was evidence." R. 112, line 14 – R. 113, line 2.

However, on September 11, 2013, the course of the investigation changed when SLED recovered a fingerprint from the note allegedly left by the man who assaulted Thomas. Thomas had given the note with the individual's name and phone number on it to the police. R. 112, lines 7-13.[2] However, the officer who first received the note was not wearing gloves and left his fingerprint on it. R. 123, lines 1-20; R. 124, lines 8-11; R. 125, lines 1-3; R. 175, lines 7-8. Additionally, the officer used the note as a piece of paper on which he scribbled a few lines regarding the information he received from Thomas. R. 124, lines 20-21; R. 573 - 574. Nevertheless, SLED recovered three fingerprints from the note. R. 174, line 20 – R. 175, line 9. Using the Automated Fingerprint Identification System (AFIS), the SLED analyst matched one of the prints to Appellant. R. 173, lines 22-24; R. 174, lines 4-11. Thereafter, the police arrested Appellant and released Hooks. R. 217, line 19 – R. 218, line 10; R. 220, line 9 – R. 221, line 5.

In addition to the fingerprint evidence, SLED developed DNA profiles from a cutting from Thomas's shirt/gown (item 2.1) and a cutting from her underwear (item 5.1). R. 412, lines 13-15; R. 412, lines 18-20. Both profiles matched Appellant's DNA profile. R. 440, lines 16-20. SLED analyzed the vaginal swab (item 3.2) taken from Thomas and developed a DNA profile consistent with Appellant's DNA profile. R. 440, lines 16-20. Analysis. of the rectal swab (item 3) revealed a mixture of two people. The major

[2] According to the officer, the note said "Dwayne Stranton or Stanton" and listed a phone number of 537-9389. R. 123, lines 12-20. The note in evidence appears to say "Dewayne Stanton." R. 573 - 574.

contributor was Thomas, but no conclusive statement could be made regarding the exclusion of Appellant. R. 441, line 3 – R. 442, line 3.[3]

Finally, on September 16, 2013, Seals interrogated Appellant. R. 280, lines 21-23. Appellant eventually confessed to creating a false story to enter the house and rape Thomas. R. 284, line 15 – R. 285, line 5; State's Exhibit #24.

[3] When SLED received the cuttings and swabs, the DNA analyst developed the DNA profiles from them and entered the profiles into the Combined DNA Index System (CODIS). R. 437, line 3 – R. 439, line 17. On September 13, 2013, CODIS indicated that Appellant's DNA matched the DNA profile from the cutting from the shirt/gown (item 2.1) entered by Gallman. R. 389, line 1 – R. 392, line 11.

ARGUMENT

The trial judge erred in permitting Appellant to proceed *pro se* where the judge failed to ensure Appellant understood the dangers and disadvantages of self-representation and the record does not disclose that Appellant had sufficient background to intelligently waive his right to counsel or was apprised of his rights by some other source.

Relevant facts

After the judge conducted *voir dire* of the venire, the judge explained that trial counsel "in the presence of [the solicitor] has indicated that there is some concerns with regard to [his] representation." R. 3, lines 12-15. Appellant explained that he had not spoken to trial counsel regarding his representation. R. 3, lines 16-18. He elaborated that he had not spoken to trial counsel "in reference to this case" except for trial counsel asking him the same question three times concerning an alleged confession and meeting with him three times. R. 3, line 25 – R. 4, line 5. According to trial counsel he had met with Appellant "considerably more than three times," but he claimed Appellant had been "completely uncooperative." R. 5, lines 5-17.

Thereafter, the judge explained that Appellant was entitled to be represented by a lawyer and that one would be appointed if he could not afford one. He also explained that if Appellant were not satisfied with his appointed lawyer, then he could retain a lawyer. R. 6, lines 11-21. Appellant informed the judge that he had attempted to retain counsel, but had been unable to so because he had no money. R. 7, lines 3-5; R. 7, lines 14-20. The judge responded that because the case had been pending for over a year, Appellant had ample opportunity to retain counsel. According to the judge, "[a]s a general rule if you're appointed if you can't afford a lawyer and the court appoints you one and is that a

competent lawyer that's pretty much what you get. You can't tell the court which lawyer you want if you're indigent." R. 7, line 21 – R. 8, line 3.

The judge then gave Appellant "two choices at this juncture." However, he only explained one of the choices: "You can either try the case by yourself. You have an absolute constitutional right to do that by yourself. I can't keep you from doing that. This is your day in court. If you want to try it yourself you can." R. 8, lines 9-13. The following colloquy between Appellant and the judge then transpired:

> THE COURT: I would admonish you that that probably not a good idea to do that because I would anticipate that you have not been to law school, have you?
>
> MR. DUPREE: Sir?
>
> THE COURT: Have you been to law school?
>
> MR. DUPREE: No, sir. I feel that I know more about this case to represent myself. I will be willing to represent myself, sir. Yes sir.
>
> THE COURT: All right. Do you want Mr. Jones to assist you in any way or do you want to do it all by yourself?
>
> MR. DUPREE: I mean if he can be available to assist me that will be all right. I prefer to represent myself if this is going to go on. Yes, sir.

R. 8, line 14 – R. 9, line 2. Later, the judge stated, "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." R. 9, lines 19-22.

The judge admonished Appellant that if he represented himself, he would "be charged with the responsibility of knowing the substantive law in South Carolina, the procedural law and the consequences of [his] decision." R. 9, line 23 – R. 10, line 1. The judge noted that he could "say with absolute certainty" that Appellant was "not equipped to

do that." R. 10, lines 2-3. Appellant responded affirmatively when the judge asked if he wanted to discharge trial counsel and "go forward on [his] own." R. 10, lines 5-11.

The judge then appointed two lawyers to serve as stand-by counsel. R. 10, line 12 – R. 11, line 19. When the judge inquired if Appellant would give his opening statement, Appellant responded, he did not have "too much knowledge of that" so he "guess[ed] one of them [stand-by counsel] could do the opening statement." R. 12, lines 1-6. The judge then agreed to handle the representation issue in a "piecemeal" fashion permitting Appellant to pick and choose when he would act as counsel and when he would ask stand-by counsel to do so. R. 12, lines 7-10.

Immediately after the colloquy, trial counsel handled jury selection and informed the court there were no motions regarding the jury selection process. R. 15, line 1 – R. 23, line 19. After swearing and excusing the jury, the judge entertained Appellant's arguments regarding several pre-trial motions, including a hearing to determine the admissibility of Appellant's statement to law enforcement. R. 25, lines 4-5; R. 26, line 12 – R. 85, line 25.

Prior to the opening statements, the judge engaged Appellant in another colloquy regarding "proceeding forward ex parte [*sic*] at least some hybrid form of representation with the assistance of your lawyers who are seated there with you." R. 86, lines 2-6. The judge noted Appellant was "taking the lead in this case" and was representing himself. R. 86, lines 7-8. Appellant had the ability to confer with his attorneys seated at his table as well. R. 86, lines 8-10. Again, the judge warned Appellant that although he had not attended law school, he would be held responsible "just as if [he] knew what the rules of evidence were, the rules of criminal procedure and the substantive rules of law." R. 86, lines 10-15. He also explained that Appellant was "going forward at [his] own peril." R.

86, lines 15-17. He again remarked that he did not think it was in Appellant's "best interest." R. 86, lines 22-23.

During the colloquy, Appellant responded affirmatively to the judge's questions, indicating he had a tenth grade education, could read and write, had been reading "some law books," and felt confident. R. 87, lines 1-10. The judge then held that he would allow Appellant to represent himself "under those circumstances." R. 87, lines 11-12. The trial then proceeded with Appellant handling every aspect of the case.

Discussion

A criminal defendant "has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014)(citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)). "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975). "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." Id. at 835. Thus, the decision to proceed *pro se* must be made knowingly, intelligently, and voluntarily. Id. In fact, "[t]he courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights." State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003).

"Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel." Barnes, 407 S.C. at 36, 753 S.E.2d

at 550; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977)(explaining "it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver"). "Faretta requires that 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.'" Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990)(quoting Faretta, 422 U.S. at 835). "To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." Prince v. State, 301 S.C. 422, 423-424, 392 S.E.2d 462, 463 (1990).

According to the South Carolina Supreme Court, "a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred." Id.[4] However, "[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is the defendant's understanding." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). Therefore, "[i]n the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the reviewing court] will look to the record to determine whether [the defendant] had sufficient background or was apprised of his rights by some other source." Prince, 301 S.C. at 424, 392 S.E.2d at 463. In other words, "[i]f the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." Wroten, 301 S.C. at 294, 391 S.E.2d at 576.

[4] The trial judge must "make a meaningful inquiring into [a defendant's] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel." Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001).

According to this Court, a variety of factors may be considered by a reviewing court when determining if an accused has sufficient background to comprehend the dangers of self-representation, including:

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

In re Christopher H., 359 S.C. 161, 167-168, 596 S.E.2d 500, 504 (Ct. App. 2004).

The Supreme Court held the record did not demonstrate Wroten was sufficiently aware of the dangers of self-representation to make an informed decision to proceed without counsel. Wroten, 301 S.C. at 294-295, 391 S.E.2d at 576-577. Notably, the trial judge made no specific inquiry to determine whether Wroten made his choice to represent himself voluntarily and knowing. Id. at 294, 391 S.E.2d at 576. Wroten was forty-five years old at the time of his guilty plea and had only a fifth-grade education. Id. at 295, 391 S.E.2d at 576. Wroten had spoken to a public defender only once. Id. at 295, 391 S.E.2d at 576-577. When the plea judge asked if he wanted an attorney, Wroten responded that he did not know what to do. Id. at 295, 391 S.E.2d at 577. Wroten had one prior conviction on his record – a guilty plea in 1979. Id. Not only did the trial judge fail to provide proper Faretta warnings, the record failed to disclose that Wroten had sufficient background to make a voluntary

waiver or that Wroten was advised of the dangers of self-representation from some other source.

Likewise, the Supreme Court held the record failed to reveal that Watts made an intelligent waiver of counsel. Watts, 347 S.C. at 403-404, 556 S.E.2d at 371. First, the plea judge failed to make a meaningful inquiry into Watts's background to determine whether he had sufficient experience or knowledge to waive counsel. Id. at 403, 556 S.E.2d at 371. The judge elicited from Watts that he was forty-one years old and had graduated from high school. Id. at 404, 556 S.E.2d at 371. When the judge asked about his prior criminal history, the solicitor, not Watts, answered that he had been convicted of simple possession of marijuana and strong arm robbery "some time ago." Id. The judge made no further inquiry into the prior conviction. Id. According to the Court, the record failed to demonstrate Watts was warned adequately of the dangers of self-representation when he relieved his appointed counsel, and affirmatively demonstrated that he was not warned by the plea judge as required by Faretta. Id. Additionally, the record failed to demonstrate that Watts had sufficient background to make an intelligent waiver of counsel absent the proper Faretta warnings. Id.

The Court held Prince was not sufficiently aware of the dangers of self-representation to make an informed decision to proceed *pro se* based on the record before it. Prince, 301 S.C. at 424, 392 S.E.2d at 463. Prince was twenty-two years old at the time of his guilty plea, had completed high school, and had some college education. Id. Additionally, Prince had previously pleaded guilty to armed robbery. Id. However, the record indicated Prince "was mentally disturbed at the time of his plea." Id. When he was incarcerated, Prince began receiving psychiatric treatment was still undergoing treatment

three years later at the time of his PCR hearing. Id. During the PCR hearing, Prince "exhibited little understanding of criminal proceedings" and "testified he relied upon the solicitor's advice at the plea hearing." Id.

The colloquy between Judge Nettles and Appellant differed sharply from the colloquies held sufficient by courts to warn a defendant of the dangers and disadvantages of self-representation. In Reed, 332 S.C. at 41, 503 S.E.2d at 749-750, the "trial judge questioned [Reed] in camera about his knowledge of the proceedings and what it would mean to represent himself rather than have representation by two capital trial qualified attorneys." Further, "[t]he trial judge warned [Reed] of the dangers and disadvantages of self-representation. [Reed] stated that he understood what he was waiving but still chose to waive counsel." Id. at 41, 503 S.E.2d at 750. In fact, the "trial judge held several hearings to determine whether [Reed] understood what it meant to represent himself and to waive the appointment of experienced counsel." Id. When the judge informed Reed of the dangers and disadvantages of self-representation, Reed "continued to assert that he understood what he was waiving and demonstrated to the judge that he was making a knowing, intelligent perhaps unwise, voluntary decision to represent himself." Id. at 41-42, 503 S.E.2d at 750.

In Graves v. State, 309 S.C. 307, 310, 422 S.E.2d 125, 127 (1992), the South Carolina Supreme Court examined the entire record, both the trial and PCR transcripts, to determine whether facts beyond the trial judge's colloquy with Graves showed he had sufficient background or was apprised of his rights by some other source. The record revealed Graves had completed three years at the John J.R. Law School of Criminal Justice, had an extensive criminal background, and had worked at a law library. Id. Additionally,

Graves' trial counsel testified at the PCR hearing that he had discussed with Graves some of the risks of proceeding *pro se*. Id.

In Starnes, 388 S.C. 590, 601, 698 S.E.2d 604, 610 (2010), the Court held a capital defendant's waiver of counsel was valid where the waiver was addressed several times prior to trial, during the hearing on the motion to proceed pro se, the trial court "methodically and carefully explained the dangers of self-representation and ensured [Starnes] understood the various issues at trial." The trial judge inquired into Starnes's mental state, his knowledge of the numerous aspects of a trial, his knowledge of the elements of the charges against him, and his knowledge of available defenses. Id.

No proper Faretta warnings

The United States Supreme Court held that when a defendant requests to proceed *pro se*, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). "To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id. at 724. Thus, a judge must make "a penetrating and comprehensive examination of all the circumstances." Id.

"The judicial inquiry and educative effort concerning the importance of legal representation that must necessarily precede any knowing and intelligent waiver of counsel cannot be cursory or by-the-way in nature." United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991). At a minimum, a court must inform a defendant "of the crimes with which he was charged, the nature of those charges, and the possible sentences they carry." Id.

Also, "a defendant should be made aware of the 'difficulties he would encounter in acting as his own counsel.'" Id. at 919 (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)).

Although the trial judge clearly explained that Appellant had a right to appointed counsel, the judge failed to explain the dangers and disadvantages of self-representation. The judge told Appellant was "probably not a good idea to represent himself," that "it would be an extreme error in judgment" to represent himself, and that he was going forward at his "own peril." The only danger the judge explained was that Appellant would "be charged with the responsibility of knowing the substantive law in South Carolina, the procedural law and the consequences of [his] decision." In fact, the judge explained that he could "say with absolute certainty" that Appellant was "not equipped to do that."

In discussing Appellant's right to proceed *pro se*, the judge's admonishment were too general to convey to Appellant the dangers and disadvantages of self-representation. In fact, the admonishments could be summarized simply that it would be dangerous for Appellant to represent himself, rather than an actual advisement of the dangers and disadvantages associated with self-representation as required by Faretta. The judge never ensured Appellant understood the charges against him or the nature of those charges. The judge never advised Appellant of the sentencing range of those offenses or of the collateral consequences, such as registration as a sexual offender. No one advised Appellant of any defenses he may have or the ability to present mitigation during sentencing. Other than simply stating Appellant would be held to the rules of court, the judge failed to explain the difficulties he would encounter during self-representation, as was evident from the record when he cross-examined witnesses and testified in his own defense.

Further, the judge's appointment of two lawyers to act as stand-by counsel and the judge's willingness to permit stand-by counsel to represent Appellant during certain portions of the trial in some form of hybrid representation further diluted any warnings about the dangers and disadvantages of self-representation that may have been conveyed to Appellant. First and foremost, South Court does not permit "hybrid representation." Miller v. State, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010)("there is no right to 'hybrid representation' that is partially *pro se* and partially by counsel"). Second, the trial judge's assurance to Appellant that he would take the lead in the case but that stand-by counsel would be permitted to select the jury, conduct opening statement and closing argument, and question witnesses tempered any warnings about the dangers of self-representation because Appellant would be permitted to rely upon the skill and knowledge of stand-by counsel.

Insufficient background to waive

This Court and the South Carolina Supreme Court have set forth a non-exhaustive list of factors to determine whether the record as a whole indicates Appellant had a sufficient background to understand the dangers and disadvantages of self-representation in order to make a knowing and voluntary waiver. An analysis of those factors demonstrates Appellant's background was insufficient to waive his right to counsel.

During the colloquy, Appellant responded affirmatively to the judge's leading questions, indicating he had a tenth grade education, could read and write, had been reading "some law books," and felt confident. R. 87, lines 1-10. There were no questions asked regarding physical or mental health. In fact, the judge made no inquiry regarding Appellant's mental status, whether he suffered from any mental illness or was taking medication for a mental condition. During the colloquy between the judge and Appellant

concerning his right to testify, the solicitor informed the judge that Appellant had been convicted in 2003 of distribution of crack cocaine and had received a ten-year sentence. R. 381, lines 13-22. Appellant informed the judge that he had been released from prison on that charge on March 1, 2012. R. 382, lines 9-11. The record lacks any information concerning whether Appellant entered a guilty plea or went to trial on the charge. The record also lacks any information concerning whether Appellant was represented by counsel on the charge. Thus, Appellant's prior criminal conviction provides little assistance in determining whether his waiver of counsel was voluntary and knowing.

As mentioned previously, the record is devoid of any indication that Appellant knew the nature of the charges and possible penalties. Certainly, Appellant was present when the charges were read to the jury and probably had been served with arrest warrants and/or indictments, but the record shows no understanding by Appellant of the *nature* of those charges – meaning the elements of the offenses and the state's purported evidence to support those offenses. Further, there was no indication that trial counsel had explained the dangers of self-representation. In fact, the record counsels otherwise, as discussed in greater detail below.

Appellant's waiver of his right to counsel in no way demonstrates an attempt to delay or manipulate the proceedings. Although Appellant moved to relieve appointed counsel, he did so because appointed counsel was not providing him with the services he believed he deserved. Appointed counsel's statements supported this view as he indicated that Appellant was uncooperative with him. The court appointed stand-by counsel. Typically, that factor would weigh in favor of finding Appellant's waiver voluntary and knowing, but in the instant matter in weighs against such a finding. As discussed earlier, the

judge appointed stand-by counsel, but explained to Appellant that he would address representation in a "piece meal" fashion and that he would permit Appellant and stand-by counsel to work more like co-counsel. The judge assured Appellant he would take the lead, but he permitted stand-by counsel to act as counsel, specifically permitting stand-by counsel to select the jury, and informing Appellant that stand-by counsel would be allowed to question witnesses and conduct other aspects of the trial, such as opening statement and closing argument.

The judge warned Appellant twice that he would be required to comply with the rules of court if he chose to represent himself. However, the judge acknowledged that Appellant was not equipped for such an undertaking. From the record, it appears that Appellant was aware of at least one defense he could present – alibi. Appellant testified that he was somewhere else at the time of the alleged offense and called witnesses purportedly to support that defense. However, the witnesses were harmful to Appellant's case as they could not supply an alibi and actually reinforced the state's case against him.

The record contains no other evidence that Appellant was aware of the challenges he could present to evidence. Although Appellant challenged the admissibility of his statement, he missed the best argument against admissibility during his questioning of the witness – that he had invoked his right to counsel during a previous interrogation. Rather, the judge noted this fact and elicited testimony concerning the invocation. See R. 61, lines 17-25 (judge questioning the interrogating officer about the invocation); R. 80, lines 16-19 (judge questioning the prosecutor regarding the impact of the invocation on admissibility of the statement). Further, Appellant failed to object to the introduction of the statement; thus, he failed to preserve the issue for appeal. R. 282, lines 14-17.

The judge's exchange with Appellant concerning his waiver of counsel was simply *pro forma* answers to *pro forma* questions. The judge asked leading questions concerning a limited scope of Appellant's background to which Appellant simply responded affirmatively. The other aspects of the colloquy on this topic consisted of the judge stating he believed self-representation was a bad idea, but Appellant's insistence that he preferred to represent himself. There was no "penetrating and comprehensive examination of all the circumstances." Although there was no evidence that Appellant's waiver was the result of mistreatment, the record supports Appellant may have felt coerced to elect to represent himself. The trial judge gave him a Hobson's choice – move forward with counsel whom he believed was not prepared, which was no choice at all, or move forward by representing himself.

The record as a whole does not support a finding that Appellant's background was sufficient to permit a knowing and voluntary waiver of his right to counsel. In addition to his failure to object to the admissibility of his statement to preserve his objections for appeal, he failed to object to the introduction of an expert report concerning handwriting. The expert never testified and no other testimony supported admissibility of the report. Further, the report was damaging to Appellant as it stated that Appellant's handwriting in the known sample did "not appear to have been freely and naturally written and contain[ed] features consistent with an attempt to disguise." R. 416, lines 4-13; R. 575 - 577. The record is replete with other examples of Appellant's inability to represent himself at a minimal level of competence. See e.g. R. 37, line 15 – R. 41, line 3 (moving to quash the burglary indictment because burglary requires "without consent" but he entered the home with consent demonstrating his lack of knowledge of the nature of the charge in light of section

16-11-310 of the South Carolina Code defining "without consent" to include deception and trickery); R. 42, line 22 – R. 43, line 10 (moving to quash the kidnaping indictment because the victim never left the house showing a lack of knowledge of the nature of the charge in light of State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983) deciding the very issue he argued).

No evidence he was advised of dangers from another source

Finally, the record provides no evidence Appellant was advised of the dangers and disadvantages of self-representation from another source. Appellant informed the trial judge that he had not spoken to trial counsel about representation and that his only discussions with trial counsel had been three questions regarding his confession. Although trial counsel disputed how many times he had met with Appellant, trial counsel confirmed that his meetings had not been substantive because Appellant was allegedly uncooperative with him. Trial counsel gave no indication that he had advised Appellant of the dangers and disadvantages of self-representation.

Remedy

In State v. Dixon, 269 S.C. 107, 109, 236 S.E.2d 419, 420-421 (1977), the South Carolina Supreme Court remanded the case "to the lower court for a determination of whether the waiver [of counsel] was intelligently made." According to the Court, "[t]he justice of the case [did] not require a new trial." Id. at 109, 269 S.E.2d at 420. However, the proper remedy for determining the validity of such waivers was called into question in State v. Coto, 296 S.C. 480, 374 S.E.2d 181 (1988) and State v. Bateman, 296 S.C. 367, 373 S.E.2d 470 (1988) when the Court ordered new trials. In State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991), the South Carolina Supreme Court attempted to clarify the proper remedy in such cases in light of the differing opinions. The Court held that "except

in extraordinary cases where it is clear 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." Id.; see also In re Christopher H., 359 S.C. 161, 169, 596 S.E.2d 500, 505 (Ct. App. 2004)(finding a remand for a factual determination regarding whether the waiver was knowingly and intelligently made would serve no useful purpose where the record clearly reflected the judge failed to adequately advise Christopher of the right to counsel, failed to make a specific inquiry as to Christopher's knowledge of the dangers of self-representation, and demonstrated that Christopher had insufficient background to comprehend the dangers of self-representation).

Here, the judge failed to engage in a formal inquiry with Appellant to apprise him of the dangers and disadvantages of self-representation. Further, the record failed to demonstrate that Appellant had a sufficient background to understand the dangers and disadvantages of self-representation. Therefore, a remand would serve no useful purpose.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of March, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

March 2, 2016

Susan B. Hackett

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589