695258

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NO. 69525-8-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

RENEE BISHOP-MCKEAN,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. When the defendant made an unexpected motion to represent herself on the trial call calendar, and the trial call judge had insufficient time to conclude a thorough colloquy to ensure the defendant's request was knowing and intelligent, did the trial call judge appropriately exercise his discretion by deferring a decision on the motion and sending the case to another judge to hear the motion?

2. When the defendant was questioned by a second judge her request to represent herself was equivocal. Did the trial judge properly exercise his discretion when he denied the motion without prejudice to renew the motion after the defendant had an opportunity to speak with her attorney?

II. STATEMENT OF THE CASE[1]

A. THE ATTEMPTED MURDER.

Brett Bishop and the defendant, Renee Bishop-McKean were married and had two children. Mr. Bishop had not been living in the family home for about one week prior to October 14, 2011.

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[1] The reports of proceedings for the trial are designated as follows: 1 RP – July 19 and September 17, 2012; 2 RP September 18, 2012; 3 RP September 19, 2012; 4 RP September 20, 2012. All other reports of proceedings are designated by hearing date. The hearings on April 6 are designated RP (Judge Downes) and RP (Judge Lucas).

He returned to the family home on that date at the defendant's request. 2 RP 40-41.

Prior to retiring for the night Mr. Bishop checked all of the doors and windows to ensure they were secured with the exception of the window in their daughter's bedroom. The defendant specifically asked Mr. Bishop not to go in that room. 2 RP 42.

Mr. Bishop heard and felt a crinkling sound when he lay down in their bed. The defendant explained she had put a blanket under the sheet. As Mr. Bishop was falling asleep he noticed the defendant getting out of bed. Once he was asleep Mr. Bishop was woken up when he felt the defendant lying across him and a Sawzall reciprocating saw on his neck. The Sawzall was running at the time. Mr. Bishop pushed the saw away and turned on the lights. The defendant was sitting in their bed, holding the Sawzall. The defendant screamed that someone was in their house. Mr. Bishop went to look for the intruder but could find no one. After that the defendant struck him on the arm with a hatchet, causing a large gash. The defendant also struck Mr. Bishop on the head with a mallet. 2 RP 44-46, 50.

Mr. Bishop secured himself in the bedroom. The defendant told Mr. Bishop to let her in because she was being attacked. Mr.

Bishop heard pounding on the wall. He opened the door and saw the defendant in the kitchen. Mr. Bishop ran outside and yelled for someone to call the police. The defendant followed Mr. Bishop outside where he told the defendant to get his phone. The defendant retrieved Mr. Bishop's phone and he called 911. 2 RP 49-52.

Officer Katzer was the first officer on the scene. While waiting for other officers he heard a male accusing a female of trying to cut him, and the female denying the accusation. Mr. Bishop came to the door where Katzer was standing. Katzer saw that Mr. Bishop had a large cut to his arm that was bleeding, as well as abrasions on his left side that were consistent with a Sawzall skipping across his skin. He also had superficial cuts to his throat that were bleeding. He had blood on his torso and head. Mr. Bishop identified the defendant as the person who had attacked him. The defendant then appeared at the door after Katzer called to her. She claimed that she had been attacked by a third person, although she had no injuries on her body. 1 RP 18-25, 36, 48-50; 2 RP 13, 91-92, 94-95, 98-99, 117.

Police entered the home and found no one else there. The defendant showed police the window in her daughter's bedroom

where she said the intruder had escaped. The window was open only inches, and secured by a child safety lock. The opening was not big enough for a person to get through. Later the defendant changed her statement, pointing to the open window in the master bedroom as the window where the intruder had escaped from. 1 RP 28-31, 39-40; 2 RP 18-23, 93, 98-99,118-119.

Officer Gill, a K-9 handler, and Officer O'Hara approached the residence from the alley. As they approached they saw the defendant standing in the kitchen window looking at them. She then turned and walked away. The officers saw no indication that someone had escaped out the bedroom windows. Although there was dew on the grass, they saw no footprints leading from the house. The K-9 was unable to locate a scent from the home to track. 1 RP 34; 2 RP 11-12, 25-27, 100.

Inside the home the police found a Sawzall on the bedroom floor that had fresh blood on it. Police also found a mallet with blood on it in the kitchen. They found a hatchet sitting on top of the dryer, next to the refrigerator in the kitchen. The hatchet was wet as if it had just been washed. The bathroom sink had blood and water in it as if the sink had just been used. Mr. Bishop had not seen the Sawzall, hatchet, or mallet before his temporary

separation from the defendant. 1 RP 32-33; 2 RP 54-55, 102-103, 111-117.

Mr. Bishop found several other unusual items in his home. He found four bottles of bleach under the kitchen sink, and two more under the bathroom sink, in addition to the single bottle they customarily kept on top of the refrigerator. Mr. Bishop found seven or eight disposable roaster pans and a roll of large plastic garbage bags under the kitchen sink. He found a plastic tarp underneath the fitted sheet on his bed. Before he had gone to bed there were no towels on the floor next to the bed. When he awoke during the assault towels had been placed on the floor on his side of the bed. After the police arrested the defendant Mr. Bishop found those towels in the washer. He had not put them there. He also found the box for the Sawzall, an extra battery, and a charger in a bag in the closet of his daughter's bedroom. 1 RP 51-52; 2 RP 32-33, 56-66, 79, 112, 129-131.

Police obtained a DNA sample from the defendant and Mr. Bishop and submitted those samples to the crime lab for comparison with any DNA found on the Sawzall, mallet, and hatchet. The blood on the head of the mallet, the Sawzall blades, and the hatchet contained DNA that matched Mr. Bishop's DNA.

The likelihood it was some unrelated person was 1 in 2.8 quintillion. There was a mixture of DNA on the mallet handle that was consistent with Mr. Bishop's and the defendant's DNA. The analyst calculated that it was 230 trillion times more likely that the DNA profile resulted from a mixture of Mr. Bishop's and the defendant's DNA than from Mr. Bishop and an unknown, unrelated person. There was also a mixture of DNA on the handle and trigger of the Sawzall. The analyst calculated that it was 1.1 trillion times more likely that the mixed profile originated from Mr. Bishop and the defendant, than from Mr. Bishop and some unrelated, unknown person. 3 RP 16-17, 24, 31-51.

B. THE PRE-TRIAL PROCEDURE.

The defendant was charged with one count of first degree assault alleging the defendant used a power saw as a deadly weapon. Five days later, on November 9, 2011, the defendant's attorney, Ms. Rancourt, asked the court to stay the proceedings and enter an order to evaluate the defendant for competency to stand trial. The court granted those motions. After a 15 day evaluation the court concluded the defendant was not competent to stand trial and entered an order to commit the defendant for 90 days to restore her competency. On February 28, 2012 the court

found the defendant competent to stand trial. The court set trial for April 6. The last allowable date for trial pursuant to CrR 3.3 was April 30. 11-7-11 RP 2-4; 11-29-11 RP 1-3; 2-28-12 RP 3-6; 1 CP 126-131, 135-136, 2 CP 139-140.

On March 30 the defendant requested substitute counsel. The defendant confirmed that she was asking for a new attorney, and that she did not want to represent herself. 3-30-12 RP 3-4. Thereafter Mr. Pandher was appointed to represent the defendant. On the April 6 trial call calendar on which Judge Downes presided, Mr. Pandher told the court that he had been appointed earlier that week and would need a continuance to effectively represent the defendant. He then told the court that the defendant wanted to represent herself, and that she thought she would be ready to go to trial the following Monday. 4-6-12 RP 7-8 (Judge Downes).

Judge Downes then inquired into the defendant's age, education, courtroom experience, experience with the rules of evidence and criminal procedure, the potential penalty and maximum penalty for the offense Judge Downes took a recess to obtain a written colloquy to ensure he had conducted an adequate inquiry before ruling on the motion. After asking several more questions the trial call judge decided that more inquiry was

necessary, but due to time limits from other cases on the calendar he did not have time to conduct that inquiry. Judge Downes then sent the case to another judge to hear the defendant's motion for self-representation. 4-6-12 RP 10-22 (Judge Downes).

Judge Lucas then conducted further inquiry into the motion. The defendant told the court that she was ready to go to trial the following Monday, but that she "would like to reserve Mr. Pandher...in case I get cold feet." After further inquiry into the defendant's understanding of what she would be required to do if she represented herself the defendant explained:

> Six months I have been in jail for a crime I didn't commit with ineffective counsel, and it has been horrible. . .
>
> Now the Court and prosecution is asking me to start all over again, and I refuse to do that. I would much rather represent myself with the outcome I perceive it to be and what I wish to happen, I would have better luck if I do it myself rather than someone else who doesn't care and is unavailable and ineffective.

4-6-12 RP 8-15 (Judge Lucas).

The defendant clarified that she was referring to Ms. Rancourt. The defendant had no problem with Mr. Pandher except that he wanted a continuance until June to prepare. She agreed Mr. Pandher's reasons for requesting the continuance were

understandable, but she did not want to sit in jail that long. 4-6-12 RP 15 (Judge Lucas).

The defendant and the court then had the following exchange:

> COURT: So is that the real problem, the June request?
>
> DEFENDANT: Yes, sir. Your jail is just too hard. It's too difficult. People would rather be in prison or dead than be in your jail.
>
> COURT: Okay. So it sounds to me like that really the problem is not that you want to be pro se and that you want a new attorney. The problem is you just want to go to trial.
>
> DEFENDANT: Yes.
>
> COURT: What do you think is a more reasonable time?
>
> . . .
>
> DEFENDANT: Sooner. April 30 when the trial date starts. Within the confines of my 60-day trial rights is what I'm hoping for.
>
> COURT: Okay. So if the case was continued—let me take a look. If the case was continued to April 27, then under those circumstances, you would be happy with Mr. Pandher and be ready to proceed?
>
> DEFENDANT: Absolutely.
>
> . . .
>
> COURT: Do you think it might be helpful before you make a final decision on going pro se to meet with [Mr. Pandher] and talk with him about the case?

DEFENDANT: That would be a pretty good idea, absolutely.

4-6-12 RP 15-17.

Based on this colloquy the court decided to continue the trial for two weeks to allow the defendant the opportunity to talk with Mr. Pandher and decide if she truly wanted to represent herself. The court denied the motion without prejudice to renew should the defendant still want to represent herself after talking to Mr. Pandher. 4-6-12 RP 19-23. (Judge Lucas). The defendant did not thereafter renew her request to represent herself.

The defendant was tried on a second amended information charging attempted first degree murder (DV) and first degree assault with a deadly weapon (DV) alleging the power saw, mallet, and hatchet as deadly weapons. 1 CP 104-05. The defendant was found guilty of each charge. 1 CP 76-77. She was sentenced on count I only. 1 CP 14-24.

III. ARGUMENT

A. THE COURT ACTED WITHIN ITS DISCRETION WHEN IT DEFERRED RULING ON A MOTION TWO WAIVE ASSISTANCE OF COUNSEL UNTIL A COMPLETE COLLOQUY COULD BE CONDUCTED. AFTER A FULL COLLOQUY THE DEFENDANT'S REQUEST TO REPRESENT HERSELF WAS EQUIVOCAL.

An accused has a constitutional right to be represented by counsel or to represent herself as provided by the Sixth

Amendment and Washington Constitution, Art. 1, §22. The defendant must timely assert the right. State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978). If the motion is made at or shortly before trial then the right to pro se representation is dependent on the facts and circumstances of the case, with a measure of discretion in the trial court. Id. at 361.

The court has an obligation to ensure the request is made knowingly and intelligently. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). At a minimum the defendant must be aware of the risks and disadvantages of self representation so that she is fully informed of the choice she is making. Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A colloquy on the record is the preferred method of ascertaining whether the waiver of counsel is knowing and intelligent. Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). A cursory or routine inquiry is insufficient. Id. at 210.

> [A] judge must investigate as long and as thoroughly as the circumstances... demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility.

Id quoting, Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed.2d 309 (1948).

A sample colloquy designed to assist trial courts and the parties in assessing a request for self representation was set out in State v. Christensen, 40 Wn. App. 290, 295, n. 2, 698 P.2d 1069 (1985). This colloquy has been approved by this Court as the kind of colloquy trial courts should engage in when faced with a motion by a defendant for self representation. State v. Vermillion, 112 Wn App. 844, 858 n. 3, 51 P.3d 188 (2002), review denied, 148 Wn.2d 1022 (2003).

The request must also be made unequivocally "[t]o protect defendants from making capricious waivers of counsel, and to protect trial courts from manipulative vacillations by defendants regarding representation." DeWeese, 117 Wn.2d at 376. "An unequivocal request is one that is clear and lacks ambiguity." In re Detention of J.S., 138 Wn. App. 882, 892, 159 P.3d 435 (2007).

A trial court's decision to deny a request for self-representation is reviewed for an abuse of discretion. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). Discretion is abused when the decision is "manifestly unreasonable or 'rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" Id. quoting State v. Rohrich, 149 W.2d 647, 654, 71 P.3d 638 (2003).

Here the defendant's motion to represent herself was made on the date the case was set for trial.[2] The motion was made without warning; the defendant filed no written motion, or otherwise gave the court or the State any notice that she intended to bring the motion at the trial call calendar. Despite the lateness of her motion the trial judge, Judge Downes, attempted to comply with his obligation to ensure the request was a knowing, intelligent, and unequivocal waiver of the right to be represented by counsel. A number of the questions asked were similar to those outlined by the court in its sample colloquy in Christensen. To ensure he complied with his duty the judge footed the case in order to obtain a written colloquy. Ultimately he concluded that he could not do a complete colloquy given the number of cases left on the calendar and the time available to handle them. Under similar circumstances the Court has held that it was not an abuse of discretion to defer ruling on a motion for self-representation. Madsen, 168 Wn.2d at 506. Here Judge Downes reasonably exercised his discretion by sending the case to another judge when he believed the colloquy

[2] The record indicates that there were other cases on the calendar that were also set for trial that date. It should be noted that trials customarily start on the Monday following the trial call calendar in Snohomish County.

he had done was incomplete, but he had insufficient time to complete it.

Within two hours after the defendant originally brought her motion to represent herself Judge Lucas considered the motion. 2 CP 137-138. During that colloquy the defendant's request was equivocal. Her comment that she wanted Mr. Pandher retained in "case I got cold feet" demonstrates the defendant was not certain that she really wanted to represent herself, rather than have the assistance of counsel. Judge Lucas's inquiry into the reasons the defendant wanted to represent herself was consistent with the recommended colloquy in Christianson, 40 Wn. App. at 296, n. 2 ("[12. Ask the defendant why he does not want an attorney]"). That inquiry revealed that the defendant did not so much want to dispense with Mr. Pandher's assistance as she wanted to get out of the Snohomish County jail. To that end she wanted her trial date sooner, rather than the later date Mr. Pandher had requested. Her comments reflect a clear belief that the only way she could get a trial without a continuance was to represent herself. When faced with the possibility that she might have a trial within the existing time for trial deadline, the defendant was willing to accept the assistance of counsel. 4-6-12 RP 15-17.

The defendant's responses to some of Judge Lucas's questions also showed that she was trying to give Judge Lucas the answers she thought he wanted. At one point she asked the judge "Is that what you want to hear?" 4-6-12 RP 10. When asked what she thought her obligations at trial were she stated, "I don't know what you're looking for, sorry." 4-6-12 RP 13. These statements indicate that her request was not based on personal knowledge of the risks and obligations she would be taking on if she represented herself. Rather she was guessing at what the "right" answers should be in order to attain her ultimate goal to start trial sooner than Mr. Pandher wished.

Under these circumstances Judge Lucas had a tenable reason to deny the defendant's motion to for self representation "without prejudice." Mr. Pandher had not had the opportunity before the trial call to talk to the defendant. The defendant agreed that it would be a good idea to at least talk to Mr. Pandher before making the decision to accept counsel or to represent herself. The judge made it clear to the defendant that if after talking to Mr. Pandher she still wanted to represent herself, she could do so. The judge also made it clear that the defendant could opt for Mr. Pandher as standby counsel. 4-6-12 RP 19-23.

Although the defendant did not thereafter file a written motion to represent herself, the issue was revisited at the next hearing. On April 20, the date Judge Lucas had reset the trial to, Mr. Pandher sought to withdraw based on a Bar grievance the defendant filed against him, alleging ineffective assistance of counsel. The defendant agreed with Judge Krese that a new attorney would require a continuance. Judge Krese allowed Mr. Lee to substitute for Mr. Pandher. The defendant did not renew her request to represent herself. Instead she informed the court that before agreeing to a continuance she wanted to consult with Mr. Lee. 4-20-12 RP 3-9. Under these circumstances the defendant abandoned her request for self-representation.

The defendant argues that she was entitled to represent herself as a matter of law, citing State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994). She also compares her case to Vermillion, supra. The facts in Barker and Vermillion are far different from those here.

In Barker the defendant sought to represent himself on a trial call calendar after unsuccessfully seeking appointment of new counsel. Unlike Judge Downes and Judge Lucas however, the judge in Barker conducted no colloquy, instead telling the

defendant it was too late to make that motion. Barker 75 Wn. App. at 242. The record showed the defendant was literate and exercising his free will, but it did not show the trial court analyzed the facts and circumstances of the case or exercised any discretion. Id.

In Vermillion the defendant made five requests to represent himself. The court conducted a colloquy after four of the five requests. In each colloquy the defendant expressed no hesitation in his desire to represent himself. He also demonstrated an understanding of what he was facing, at one point noting that he had represented himself in another case. The trial court denied the requests on the basis that it would not be in the defendant's best interest. Vermillion, 112 Wn. App. at 852-57. Since the purpose of the colloquy was not to determine if the defendant had the technical skill to represent himself, but to determine if he understood the risks involved in self-representation, this Court held that the trial court's reason for denying the motion was an untenable. Id. at 857-58.

In contrast, here two judges conducted extensive colloquy with the defendant that revealed her request was equivocal; she would have accepted counsel had counsel agreed to start trial on the following Monday, or within the time for trial deadline. Further

the defendant's responses suggested that she did not truly understand what her request would entail. Judge Lucas analyzed the defendant's request based on all of the circumstances and her responses. He then exercised his discretion by allowing the defendant an opportunity to consult with her new attorney before definitively deciding to forgo the assistance of counsel.

Finally the defendant takes issue with Judge Downes' and Judge Lucas' admonitions to her about the risks of self-representation. BOA at 13. That type of admonition was specifically included in the colloquy set out in Christiansen.

> "[14.] (Then say to the defendant something to this effect.) I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself. [This could be expanded and repeated.]

Christensen, 40 Wn. App. at 297.

The admonition by both judges did not demonstrate an abuse of discretion on the part of either judge. Rather it was an important part of a thorough inquiry into whether the defendant was making a knowing, intelligent, and unequivocal waiver of her right to counsel and assertion of her right to represent herself. The

defendant's decision to heed the judges' admonitions and ultimately decide to employ the assistance of counsel demonstrates that her earlier request for self representation was equivocal.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on July 12, 2013.

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