72812-1

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Feb 11, 2016
Court of Appeals
Division I
State of Washington

No. 72812-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Ira J. Uhrig

REPLY BRIEF

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A. APPEAL SUMMARY

In assignments of error 1 and 2, Mr. Williams argued (1) that his request to represent himself at his trial was not unequivocal, and (2) that he did not knowingly, intelligently, or voluntarily waive his right to appointed counsel, because the actual risks of self-representation were not adequately conveyed to him so he could make a decision understanding the serious tasks ahead of him.

In assignment of error 3, Mr. Williams argued that the trial court erred in denying the defense motion to sever the charges as to each complainant, M.W. and E.W.

Regarding the further assignments of error as to discovery issues and the absence of a jury verdict supporting the LWOP sentence, Mr. Williams relies on the arguments in his Appellant's Opening Brief.

B. REPLY ARGUMENT

(1). THE STATES CONTENTION -- THAT THE DEFENDANT'S REQUEST FOR STANDBY COUNSEL "INVITED" THE COURT'S ERROR OF ACCEPTING A WAIVER OF COUNSEL THAT WAS EQUIVOCALLY SOUGHT AND UNINTELLIGENTLY MADE – DOES NOT APPLY TO THESE CIRCUMSTANCES, WHERE THE TRIAL COURT HAS AN INDEPENDENT DUTY.

a. After multiple hearings at which Mr. Williams equivocated about whether he wanted to represent himself, on November 9, Williams simply yet again, although even more overtly, showed that his request was equivocal and that he did not intelligently waive counsel while aware of the serious risks of self-representation.

These equivocal requests were made during the pre-trial phase in January and February of 2014, and again in April. On November 9, the following occurred:

When the court asked Mr. Williams why he wanted to represent himself, Mr. Williams complained that Mr. Fryer was not "representing me in my best interest" and simply returned to his requests for substitute counsel. 10/9/14RP at 141-44. This request was the latest in a series of the same requests, that the defendant explicitly indicated were actually requests for new counsel. On November 9, Mr. Williams also made clear that his desire was to represent himself, not fully, but with standby counsel:

> If I have standby counsel, I think I can do it, Your Honor.

10/9/14RP at 146. The present case inheres in great part in this statement.

First, this case is not a forfeiture-of-the-right-to-counsel case, in which the issue is whether a defendant has had self-representation properly imposed upon him from above by the court, like the Respondent's cited cases of State v. DeWeese, 117 Wn.2d 369, 376-78, 816 P.2d 1 (1991) (defendant's refusal without good cause to continue with able appointed counsel allowed court to require defendant to represent himself, although waiver must still be intelligent) and United States v. Gallop, 838 F.2d 105, 109 (Fourth Cir. 1988) (defendant properly told he would have to represent himself if he did not go forward with existing counsel, despite defendant desiring to not represent himself). See generally City of Tacoma v. Bishop, 82 Wn. App. 850, 859, 920 P.2d 214, 219 (1996) (discussing forfeiture and waiver by conduct); but see Freytag v. Comm'r of Internal Revenue, 501 U.S. 688, 894 n. 2, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring) (defendant can never waive counsel by forfeiture).

This is not a forfeiture case where the defendant repeatedly or obstreperously indicated his complete refusal to go forward because he disliked his lawyer, such that it was proper for the trial court to deem that the defendant -- if properly warned

that he was facing this possibility -- had thereby waived counsel by his conduct, and would have to represent himself.

Nor is the case like State v. Modica, 136 Wn. App. 434, 442, 149 P.3d 446 (2006), where the Court of Appeals held that a defendant's request for self-representation was not rendered equivocal by virtue of the defendant's motivation being that he wished to commence trial sooner than his new lawyer could prepare for the case. Modica, at 441-42 (and also stating that defendant's request must still be intelligent).

Mr. Williams argues that a defendant's request for self-representation cannot be deemed unequivocal where it is expressly stated by him to be a *means* to ask for a new lawyer. This case does not involve an "alternative" request. Opening Brief, at pp. 18-19.

Nor may such a request be deemed unequivocal where the option the court gives the defendant is self-representation with stand-by counsel, with pro se status revocable at any time. This circumstance makes the request less unequivocal in terms of whether the defendant is asking to represent himself, because the defendant is being given a wholly inaccurate description of what self-representation really means.

Further, even if – arguendo -- the defendant Mr. Williams' request was unequivocal, the question whether his waiver was constitutionally valid as knowing and intelligent, fully remains.

The defendant's request for self-representation cannot be deemed knowing or intelligent where virtually every circumstance, including particularly the court's statements to him that he would have a stand-by lawyer if he chose to represent himself, and that he could reverse course anytime and have his lawyer re-appointed, showed that the defendant did not even remotely understand the grave risks of self-representation. No reasonable trial court could tenably find a knowing intelligent waiver in such circumstances. See Opening Brief, at pp. 18-22.

b. The Respondent's argument of "invited error" mistakes that doctrine, which does not apply to these circumstances where the trial court has an independent duty. Mr. Williams has argued on appeal that the request to proceed pro se was equivocal and involuntary and unintelligent, in part because of the defendant's statement that he could represent himself if he had standby counsel, the failure of the court to make clear standby counsel was not included in self-representation, and the court's statements to the defendant that

he could change his mind and have his lawyer re-appointed.

Mr. Williams presented the facts of the various pre-trial hearings in this case in the Opening Brief, and they show that as a whole, the court always made clear to Mr. Williams that standby counsel was part of the package that Mr. Williams would receive if he represented himself. The record of each of the hearings in the Opening Brief, and those hearings as a whole, shows that Mr. Williams was given the impression that pro se status simply meant that he would be able to ask witnesses the questions he wanted his lawyer to ask but that the lawyer wouldn't, and that he would have his lawyer next to him to handle the technical aspects of the defense.

The Respondent points to an instance (noted in the Opening Brief) in which the trial court uttered that standby counsel is not a legal right, see BOR at p. 20, but in the very same breath at that time, the court discussed how Mr. Williams would in fact have "quite capable counsel who is very familiar with the case" (i.e. his current lawyer, Mr. Fryer) as standby counsel if he did proceed pro se. See Opening Brief, at pp. 15-16 (citing 10/9/14RP at 136-37). The question whether the defendant's request to represent himself is knowing and

intelligent is assessed in light of the entire record. See Opening Brief, at p. 11. Because the facts are undisputed, the issue becomes a legal one, regarding whether the trial court abused its discretion by an untenable application of the law. Opening Brief, at pp. 7-8 (citing State v. Madsen, 168 Wn. 2d 496, 504, 229 P.3d 714 (2010).[1]

Of course, the State's primary argument in response is that Mr. Williams "invited" the errors of equivocality, and unintelligent waiver, because he asked for standby counsel. Brief of Respondent, at pp. 19-22.

This remarkable proposition has, as a matter of law, no application whatsoever to the waiver of a constitutional right such as the right to counsel. When a court finds that a defendant's request for self-representation is a valid waiver, but

[1] In general, the Court of Appeals reviews alleged constitutional violations de novo. State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012) (citing State v. Vance, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010)). Applying a *de novo* standard of review to a criminal defendant's waiver of his Sixth Amendment right to assistance of counsel is consistent with that general rule and with the courts that have considered and decided the issue. United States v. McBride, 361 F.3d 360, 365–66 (6th Cir.2004) (noting that the Ninth, Tenth, and Eleventh Circuits all apply a de novo standard of review, while other circuits apply a de novo review when the facts are not in dispute); Maine v. Watson, 900 A.2d 702, 712–13 (Me.2006) (approving a bifurcated standard of review for counsel waiver, reviewing any express or implicit factual findings for clear error, and the legal conclusions de novo).

it turns out the court was in error (here, because the promises of standby counsel rendered the waiver one made without awareness of the true risks of the enterprise), the defendant's own request for standby counsel is precisely the very mis-impression about that grave risk, which the trial court has a duty to correct. The unintelligent nature of the defendant's sense of the task he needs to assume knowingly, is not an invitation of the error that occurs when the court grants pro se status to a defendant despite the fact that he is plainly laboring under that ignorance.

The Respondent's invited error argument mistakes the nature of the error. The constitutional rights at issue require that the trial court must ensure the defendant is acting knowingly and intelligently before it accepts a waiver of counsel. In this case, statements by the defendant about his desire for standby counsel and the court's indulgence of his erroneous belief that standby counsel was a part of the package of pro se representation are part of what demonstrates that the defendant was not knowingly waiving counsel. It is the court who has independent responsibility for ensuring that a waiver of counsel is knowing and intelligent, before the court accepts it in its

courtroom.

> When a defendant requests permission to proceed pro se the court must ensure the waiver is voluntary, and that the defendant is aware of the risks of self-representation as a prerequisite to a valid waiver.

City of Tacoma v. Bishop, 82 Wn. App. at 858.

The invited error doctrine does not allow the State to argue that the defendant affirmatively led the trial court down a primrose path and caused it to mistakenly assess the waiver as knowledgeable. It may be that the Respondent is attempting to re-characterize the error Mr. Williams alleges in this case as being 'the grant of pro se status with standby counsel.' That is not the error assigned. The error is the granting of pro se status to a defendant who labored under so many incorrect misunderstandings about the grave risks of self-representation that his decision to represent himself cannot possibly meet the high standards required before a court can accept a waiver of counsel as knowing and intelligent in defeat of the presumption against such waiver. As with the waiver of any constitutional right, the court has an independent duty to assess validity of the waiver:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the

> protection of a trial court, in which the accused-whose life or liberty is at stake -is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.

Von Moltke v. Gillies, 332 U.S. 708, 723-24, 68 S.Ct. 316, 92 L.Ed. 309 (1948) (cited with approval in State v. Chavis, 31 Wn. App. 784, 789, 644 P.2d 1202, 1205 (1982)).

In sum, Mr. Williams did not unequivocally demand to represent himself, because he did not ask to actually do so given the miscomprehension he had been allowed to operate under regarding what self-representation entailed; further, his request to proceed pro se was not coupled with an alternative request for a new lawyer, but instead his request was expressly stated to be a means of obtaining a new lawyer.

In the alternative, Mr. Williams' waiver of his right to counsel was not knowing, voluntary and intelligent, where the trial court's repeated assurances of a case-knowledgeable standby counsel, and the court's statement that he had the option and ability to change his mind later, resulted in Williams not having anything close to the knowledge or intelligent information a defendant needs in order for their waiver to be made with "eyes wide open," i.e., while truly appreciative of the

grave risks and legal disadvantages of foregoing representation by an attorney, and the magnitude of going it alone as a pro se defendant. The result of this inadequate waiver was that Mr. Williams, instead of knowingly assuming that grave task, was essentially allowed to 'experiment' with self-representation, which was correctly perceived by all involved to be a disaster that unfolded in front of the jury .

Because of the fundamental importance of the right to counsel, and the detrimental result of relinquishing that right, trial courts are cautioned to "indulge in every reasonable presumption" against finding a defendant has validly waived his right to counsel. In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999); Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)).

The court did not adequately do so here. The waiver in this case did not meet the knowing voluntary or intelligent standard and the convictions must be reversed.

(2). THE COURT ERRED IN DENYING THE MOTION TO SEVER WHERE THEIR WAS NO CROSS-ADMISSIBILITY ANALYSIS ON THE RECORD AND THE RECORD DOES NOT SHOW THE COURT'S CONSCIOUS DECISION TO ADMIT THE EVIDENCE AFTER CONSIDERING THE REQUIREMENTS OF THE RULE.

The ER 404(b) analysis the trial court conducted was inadequate, as argued in the Opening Brief. The State concedes that the trial court did not place its reasoning on the multiple evaluative steps required for cross-admissibility under ER 404(b) on the record. Brief of Respondent, at pp. 32-33; see Opening Brief, at pp. 28-29. Below, at oral argument in opposition to severance, the prosecutor simply stated, "Most, if not all of the facts relating to one victim would, I believe, come in as to the other." 4/8/14RP at 110. The State merely argued that the girls would testify about "related similar instances of abuse," including ones in which a camera was discussed or used. CP 95. This does not meet the threshold for "common scheme or plan." See State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003) ("common scheme," requires the other act and the charged crime must be "naturally explained as individual manifestations of a general plan."). The court placed no ER 404 or ER 403 analysis on the record.

The Respondent therefore refers to the court's reference to the record of the prior trial, but the State also concedes that the evidentiary issue at that time was the prior conviction in the first trial. Brief of Respondent, at p. 33 and n. 11 (referencing 1RP 109-111, 3RP 169; CP 77-97 and "First Trial Vol 1 RP 141, 165-68.").

Even more crucially, the issue was dramatically different then -- because the trial court, at that time, was determining admissibility of prior acts under both ER 404 and former RCW 10.58.090, an evidentiary statute that permitted introduction of prior bad acts for any purpose whatsoever. See First Trial Vol. 1 RP (3/14/11) at 139-44, 152-56. Thus the ER 404(b) analysis was conducted in circumstances where the evidence was already admissible per se – rendering the multiple evaluative steps required for ER 404(b) admissibility essentially moot, since ER 403 (the final ER 404(b) step) by its plain language involves a balancing or weighing process under which evidence may be more or less appropriate for exclusion depending on the party's relative need for the evidence in question. 5 Karl B. Tegland, Washington Practice, Evidence § 105 (2d ed.1982); see State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997); United

States v. Wasman, 641 F.2d 326, 329-30 (5th Cir.1981).

Finally, of course, reliance on an idea of adoption of the prior ER 404(b) analysis would be completely unhelpful for a party or the trial court because this Court of Appeals subsequently reversed Mr. Williams' judgment from the prior trial, concluding that error occurred under ER 404(b) and the stricken RCW 10.58.090, and that admission of the prejudicial prior bad act evidence, particularly where it was accompanied by a limiting instruction under the statute that removed any ER 404(b)-like limitation on the jury's use of the bad act evidence, required a new trial. See State v. Williams, No. 67194–4–I (Court of Appeals of Washington, Division 1, December 17, 2012) (10272012 WL 6554786).

As argued in the Opening Brief, Mr. Williams suffered specific prejudice as a consequence of the denial of severance. Opening Brief, at pp. 32-34 (Part f). Reversal is required.

C. CONCLUSION

Based on the foregoing and on his Opening Brief, Mr. Williams argues that this Court of Appeals should reverse his convictions.

Respectfully submitted this 11 February, 2016

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	)	
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	)	
v.	)	NO. 72812-1-I
	)	
FREDERICK WILLIAMS,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	HILLARY THOMAS WHATCOM COUNTY PROSECUTOR'S OFFICE [Appellate_Division@co.whatcom.wa.us] 311 GRAND AVENUE BELLINGHAM, WA 98225	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF FEBRUARY, 2016.

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