IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1999 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9809-CC-00365
		#M1998-00059-CCA-R3-CD
Appellee,	*	GILES COUNTY
VS.	*	Hon. James L. Weatherford, Judge
TIMOTHY M. REYNOLDS,	*	(Aggravated robbery)
Appellant.	*	

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(on appeal)

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OPINION FILED:_____

REVERSED AND REMANDED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendant, Timothy M. Reynolds, was convicted of aggravated robbery. The trial court imposed a Range I sentence of twelve years. In this appeal

of right, the defendant presents three issues for review:

> (1) whether the trial court erred by refusing to allow a substitution of counsel and permitting the defendant to proceed to trial on a pro se basis;
>
> (2) whether the trial court erred by denying the defendant's request for a continuance; and
>
> (3) whether the trial court erred by refusing to instruct the jury on lesser included offenses.

Because the circumstances warranted a trial with the benefit of counsel and the evidence would have also supported a conviction on a lesser included offense, the conviction is reversed and the defendant is granted a new trial.

At approximately 9:00 P.M. on June 22, 1997, the victim, Howard Roberts, was fueling his truck in Wartrace, Tennessee, when the defendant asked if he could clean his windshield. When the victim declined, the defendant said, "I need some money." According to the victim, the defendant then moved closer and said, "You have 30 seconds to hand me your wallet or I'm going to kill you." While the victim could not unequivocally state that the defendant was armed, he did testify that the robber "did pull his hand up, and revealed what appeared to be the butt of a pistol or the handle of a pistol." The victim was uninjured during the robbery. The defendant took $1,630 in cash.

Kimberly Brown testified as an alibi witness for the defense. Although not positive as to the date, she believed that she was with the defendant at Victoria Apartments when the crime took place. Donna Willingham, also called as a defense witness, testified that the defendant was with her and a number of other friends at a party throughout the entire evening on the date of the offense.

I

The defendant first argues that the trial court should have ordered a substitution of defense counsel when it became clear that the relationship between the defendant and his appointed attorney had become irreconcilable. The state

submits that there was no error in allowing the defendant to proceed pro se.

Six days before trial, the defendant asked for new counsel, claiming that his attorney was deficient for having presented an unacceptable plea agreement offer made by the state and for having failed to interview potential alibi witnesses. At the hearing on the request for substitution, defense counsel remarked that "the situation between [us] has gotten to the point where I don't feel like I could be an effective mouthpiece for him because I think the lines of communication have fallen down..." In response, the state pointed out that a speedy trial was required by September 21, 1998, the limitations prescribed in the Interstate Compact on Detainers. See Tenn. Code Ann. § 40-31-101. The trial date, August 31, 1998, was defense counsel's last day of employment as a public defender. She again asked permission to withdraw and the defendant expressed concern that she was not motivated to vigorously represent him. After concluding that defense counsel had thus far provided representation well within the guidelines of the profession, the trial court rejected the substitution request and directed the defendant to proceed pro se with the trial accompanied by the public defender as "elbow counsel." The defendant, who complained, "I'm not prepared ... object[ed] to the whole procedure." He also remarked, "I would accept [a] court appointed lawyer that's qualified to defend me in this case."

At the hearing on the request for substitution, the trial judge told the defendant, "I'm going to let you do this: I'm going to let you represent yourself, if you want to do that. I'll have Ms. Flacy to be there with you, if you want to confer with her about anything." In response to the defendant's objections as to the proceedings, the trial judge then stated, "I'm going to deny Ms. Flacy's motion to withdraw. This case will go on as scheduled on August 31." On the date of the trial, the defendant again voiced his objection to the proceedings. The public defender then asked if the defendant was to proceed pro se with her as "armchair counsel."[1]

[1]"Elbow counsel," "standby counsel," "advisory counsel," and "arm chair counsel" are terms used interchangeably. In Smith v. State, 757 S.W.2d 14 (Tenn. Crim. App. 1988), this court rejected "as totally unfounded" the concept of "elbow counsel." Quoting State v. Burkhart, 541 S.W.2d 365 (Tenn. 1976), this court observed as follows:

The trial court responded, "Yes, ma'am. That's what we're going to do." The defendant then indicated that he was not prepared to go to trial. The trial, however, proceeded as scheduled. The defendant filed pretrial motions, cross-examined state witnesses, called and questioned defense witnesses, and presented his own arguments.

When an accused desires to proceed pro se, the trial judge must conduct an intensive inquiry as to his ability to represent himself. State v. Northington, 667 S.W.2d 57, 61 (Tenn. 1984). The waiver of the right to counsel must be knowingly and intelligently made. State v. Armes, 673 S.W.2d 174, 177 (Tenn. Crim. App. 1984); Tenn. R. Crim. P. 44. In Johnson v. Zerbst, 304 U.S. 458, 465, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938), the United States Supreme Court placed "the serious and weighty responsibility ... of determining whether there is an intelligent and competent waiver" directly upon the trial judge. In a subsequent case, more specific guidelines were established:

> [A] judge must investigate as long and as thoroughly as the circumstances of the case before him 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. To be valid such 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.

> The right of a defendant to participate in his own defense is an alternative one. That is, one has a right either to be represented by counsel or to represent himself, to conduct his own defense.... It is entirely a matter of grace for a defendant to represent himself and have counsel, and such privilege should be granted by the trial court only in exceptional circumstances.

In Smith, this court at least recognized the concept of "standby counsel," which was described as allowing the defendant to conduct his own defense accompanied by the largess of the trial court in providing a lawyer with whom to confer. A defendant has no constitutional right, of course, to act as co-counsel when he is represented by counsel. State v. Franklin, 714 S.W.2d 252 (Tenn. 1986). Before trial courts may allow defendants to participate in a dual representation, there must be a determination that the defendant (a) is not seeking to destruct orderly trial procedure and (b) that the defendant has the intelligence, ability, and general competence to participate in his own defense. State v. Burkhart, 541 S.W.2d at 371. Even if both factors are satisfied, the trial judge may nevertheless decline to permit dual representation. State v. Franklin, 714 S.W.2d at 261. Here, the trial court did not address either factor on the record. In State v. Small, 988 S.W.2d 671 (Tenn. 1999), our supreme court held that the decision whether to appoint advisory counsel to assist a pro se defendant rests entirely within the discretion of the trial court, who should make the determination based "upon the nature and gravity of the charge, the factual and legal complexity of the proceedings, and the intelligence and legal acumen of the defendant." Id. at 674. Here, the trial court made no such determination.

> A judge can make certain that an accused's professed wavier of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Von Moltke v. Gillies, 332 U.S. 708, 723-23 (1984). Rule 44(a) of the Tennessee Rules of Criminal Procedure places a similar obligation on the trial court:

> Every indigent defendant shall be entitled to have counsel assigned to represent him in all matters necessary to his defense and at every stage of the proceedings, unless he executes a written waiver. Before accepting such waiver the court shall first advise the accused in open court of his right to the aid of counsel in every stage of the proceedings. The court shall, at the same time, determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience and conduct of the accused and such other matters as the court may deem appropriate. Any waiver shall be spread upon the minutes of the court and made a part of the record of the cause.

See also State v. Gardner, 626 S.W.2d 721, 723 (Tenn. Crim. App. 1981). This court has previously ruled that trial courts should question a defendant who wishes to proceed pro se according to the guidelines contained in 1 Bench Book for United States District Judges 1.02-2 to -5 (3d ed. 1986), also contained in the appendix to United States v. McDowell, 814 F.2d 245, 251-52 (6th Cir. 1987). State v. Herrod, 754 S.W.2d 627, 630 (Tenn. Crim. App. 1988).

In Northington, our supreme court held that the trial court had "wholly failed to properly investigate [whether] the defendant understood the consequences of self-representation in light of the Von Molke factors." 667 S.W.2d at 61 (internal quotation marks omitted). The trial court had addressed the seriousness of the charges, had advised that a pro se defendant would be held to the same standard as a lawyer, and was assured that the pro se defendant had discussed the case with his appointed attorney. Id. at 59. The age and education of the accused was also determined in advance of the acceptance of the waiver of the right to counsel. Id. The trial court had warned Northington that proceeding pro se was unwise. Id. Our supreme court set aside the conviction because the trial court "failed to diligently examine the defendant's background and experience, failed to notify defendant as

to the possible extent of any penitentiary sentence, and failed to elaborate fully to defendant why he thought it 'unwise' to waive counsel." Id. at 61 (emphasis added).

In State v. Goodwin, 909 S.W.2d 35 (Tenn. Crim. App. 1995), a panel of this court ruled that Goodwin had validly waived his right to counsel. Id. at 41. In that case, the trial court inquired as to Goodwin's age and education and warned him that proceeding pro se would cause confusion. Id. at 40. Goodwin was informed that an attorney would be provided for him for pretrial proceedings through an appeal, if needed. Id. He was warned that he would not have access to a law library and that his advisory counsel was not required to provide him with photocopies of relevant legal materials. Id. The trial judge told him that the trial would proceed at the same pace as it would if he had appointed counsel, that he would not have an opportunity to confer with advisory counsel for every question, and that he was responsible for understanding the rules of evidence and local rules of court. Id. at 41. The trial judge informed Goodwin that, as a litigant, he would have "no greater right than any other litigant" and that he would be treated the same as if he were represented by counsel. This court concluded that the trial court is not required to interrupt the trial to explain procedural rules, legal terms, or consequences of the litigant's actions and ruled that Goodwin "clearly understood the hazards of representing himself." Id.

The state has cited an unpublished opinion, Fowler v. State, No. 03C01-9711-CR-00509 (Tenn. Crim. App., at Knoxville, July 30, 1999), as authority for the proposition that this defendant waived the right to counsel. In Fowler, a panel of this court, while finding that the trial court had not complied with the requirements of Rule 44, Tenn. R. Crim. P., or followed the suggestions outlined in Herrod, nevertheless determined that the defendant had knowingly and voluntarily waived his right to the assistance of counsel. In that case, the trial court placed great emphasis on the fact that the defendant had fired his counsel, expressed a wish to proceed pro se, and had a long history of criminal experiences and a familiarity with both the federal and state criminal courts. The trial court determined

that the defendant had previously entered five or six guilty pleas in various courts and had participated in a number of criminal trials, including one in the state of Alabama, where the defendant represented himself and won a jury acquittal. The trial court also found that the defendant was fully aware of the nature of the charges he faced and had an adequate grasp of courtroom procedures. This court determined the defendant's direct and cross-examination of the witnesses supported the conclusions of the trial court and ruled that the defendant had knowingly and intelligently waived his right to the assistance of counsel.

In Smith v. State, 987 S.W.2d 871 (Tenn. Crim. App. 1998), this court determined that the trial court had failed to ascertain that the defendant had knowingly and intelligently waived counsel. Id. at 875. Because the trial court failed to warn of the specific dangers of self-representation and had not inquired about the defendant's background, education, or experience with the court system, a new trial was granted. In Smith, the trial court did not ask whether the defendant understood available defenses or the range of possible punishments or fines he might face, if convicted, and failed to question the defendant about his knowledge of the elements of the crime charged and his lesser offenses. Most importantly, the trial court failed to warn the defendant that self-representation was "unwise," that he would be held to the same standards as an attorney trained in the law, and that he would not have access to legal reference materials. Despite some previous knowledge of and experience with the criminal justice system by this defendant, this court concluded that the waiver of counsel was ineffectual.

Here, the inquiry was not nearly as extensive as in Smith and, prior to trial, there were no warnings at all of the pitfalls of self-representation. The trial court accepted the petitioner's waiver of counsel without asking about the defendant's background, education, or experience with the court system. The trial court failed to warn the defendant that self-representation was "unwise," that he would be held to the same standards as an attorney trained in the law, and that he would not have access to legal reference materials. In fact, the defendant was not

warned about the dangers of self-representation until the hearing on the motion for new trial. This case is easily distinguishable from the facts in Fowler. Fowler actively sought pro se representation despite the warnings of the trial judge. Here, the defendant objected to proceeding without a lawyer and only proceeded pro se because the trial court refused a motion to substitute counsel and a motion to continue for that purpose. While both had significant prior criminal histories, Fowler appeared to have had more prior experience in criminal trials than the defendant.

In our view, the inquiry by the trial court should have been more extensive. The circumstances establish that the defendant did not make a knowing or intelligent waiver of his right to counsel. In our view, the evidence preponderates against the trial court's finding. See Brooks, 756 S.W.2d at 289. Even with "standby or elbow counsel," a full inquiry must be made before the allowance of pro se representation.[2]

II

The defendant also complains that the trial court should have granted his motion to continue. The state argues that the defendant has failed to show prejudice. See Morehead v. State, 409 S.W.2d 357 (1966).

Typically, the grant or denial of a continuance is discretionary with the trial court. State v. Seals, 735 S.W.2d 849 (Tenn. Crim. App. 1987). Under the circumstances presented in this case, however, the denial of a continuance effectively denied the defendant the right to counsel. Tenn. Const. art. I, § 9; Powell v. Alabama, 287 U.S. 45 (1932). That right has been described as the most basic and fundamental of all constitutional guaranties because if affects the defendant's "ability to assert any other right he may have." U.S. v. Decoster, 487 F.2d 1187

[2]Substitution of appointed counsel requires a showing of good cause, which may include a conflict of interest or a complete breakdown of communication. United States v. Gallop, 838 F.2d 105 (4th Cir. 1988). A defendant may not, however, manipulate his counsel in order to delay or disrupt a trial. United States v. Fowler, 605 F.2d 181 (5th Cir. 1979). A defendant does not have the right to appointed counsel of his choice. See Morris v. Slapy, 461 U.S. 1 (1983). Here, the state makes no claim that the defendant forfeited his right to counsel. See United States v. Goldberg, 67 F.2d 1072 (3rd Cir. 1995).

(1973).

In State v. Covington, 845 S.W.2d 784 (Tenn. Crim. App. 1992), Judge Joe B. Jones wrote that continuances should generally be granted "to insure that the accused is afforded his constitutional right to the effective assistance of counsel." Id. at 787. A delay at the request of the defendant would not have terminated the right of the state to prosecute under the interstate compact. State v. Gipson, 670 S.W.2d 637, 639 (Tenn. Crim. App. 1984). While the defendant had no entitlement to the counsel of his choice, a better alternative would have been to allow the continuance, even if the defendant had chosen to proceed pro se.

III

Finally, the defendant argues that the trial court erred by failing to provide the jury with an instruction on the lesser included offenses of simple robbery and theft. The state contends that the record clearly shows he was guilty of aggravated robbery and therefore, there was no error.

The trial judge, of course, has a duty to give a complete charge of the law applicable to the facts of the case. State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986). There is an obligation "to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so." Tenn. Code Ann. § 40-18-110(a). Pursuant to our statute and case law interpretations, defendants are entitled to jury instructions on all lesser offenses if the evidence would support a conviction for the offense. Complete instructions allow the jury to determine among each alternative the appropriate offense, if any, for conviction and more evenly balance the rights of the defendant and the state. It is only when the record is devoid of evidence to support an inference of guilt of the lesser offense that the trial court is relieved of the responsibility to charge the lesser crime. State v. Stephenson, 878 S.W.2d 530, 549-50 (Tenn. 1994); State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990).

In State v. Williams, 977 S.W.2d 101, 105 (Tenn. 1998), our supreme court rejected a long line of cases which had concluded that the right to instructions on lesser offenses was founded in the Tennessee Constitution and ruled instead that entitlement was based on statute. In consequence, the high court directed that any error would be subject to a harmless error analysis:

> Reversal is required if the error affirmatively appears to have affected the result of the trial on the merits, or in other words, reversal is required if the error more probably than not affected the judgment to the defendant's prejudice (citing Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b)).

"Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a). Aggravated robbery occurs when the robbery is "[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon." Tenn. Code Ann. § 39-13-402(a)(1).

Theft and robbery are lesser included offenses of aggravated robbery. State v. King, 905 S.W.2d 207, 214 (Tenn. Crim. App. 1995) (overruled on other grounds). In our view, this not a case in which the record is devoid of proof of the lesser included offense of robbery. See State v. Lewis, 978 S.W.2d 558 (Tenn. Crim. App. 1997). The guiding principle is that if there is evidence in the record from which the jury could have concluded that the lesser included offense was committed, there must be an instruction for the lesser offense. See Johnson v. State, 531 S.W.2d 558, 559 (Tenn. 1975). To rule otherwise would effectively deprive a defendant of a trial on the lesser offense. Taken in a light most favorable to the defendant, it is our view that the evidence in this case could have supported a conviction for robbery. See State v. Elder, 982 S.W.2d 871, 877 (Tenn. Crim. App. 1998). The victim could only testify that the robber pulled his hand up and revealed what "appeared to be" the butt or handle of a pistol. He was unable to unequivocally state that the defendant was armed. It was the task of the jury to determine whether or not the defendant, under these circumstances, was in possession of a deadly weapon. The question was one of fact rather than one of

law. Juries must examine the circumstances on a case-by-case basis. The failure to charge the jury with robbery precluded the jury from making this assessment. Because the proof of the greater offense was not so overwhelming that the jury inevitably would have chosen the greater offense over the lesser offense had they been given the choice, the error appears to have been harmful, whether by the constitutional standard or by the standard announced in Williams.

Accordingly, the judgment of the trial court is reversed and remanded for a new trial.

_____

_____Gary R. Wade, Presiding Judge

CONCUR:

_____
John H. Peay, Judge

_____
Norma McGee Ogle, Judge

APPENDIX

The following excerpt is from United States v. McDowell, 814 F.2d 245, 251-52 (6th Cir. 1987) (quoting Guideline[s] For District Judges from I Bench Book for United States District Judges 1.02-2 to -5 (3d ed. 1986)):

> When a defendant states that he wishes to represent himself, you should... ask question similar to the following:
>
> (a) Have you ever studied law?
>
> (b) Have you ever represented yourself or any other defendant in a criminal action?
>
> (c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)
>
> (d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court must impose an assessment of at least $50 ($25 if a misdemeanor) and could sentence you to as much as ____ years in prison and fine you as much as $____?
>
> (e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?
>
> (f) You realize, do you not, that if you represent yourself you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.
>
> (g) Are you familiar with the [Tennessee] Rules of Evidence?
>
> (h) You realize, do you not, that the [Tennessee] Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?
>
> (i) Are you familiar with the [Tennessee] Rules of Criminal Procedure?
>
> (j) You realize, do you not, that those rules govern the way in which a criminal action is tried in [this] court?
>
> (k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.
>
> (l) (Then say 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.

(m) Now in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

(n) Is your decision entirely voluntary on your part?

(o) If the answers to the two preceding questions are in the affirmative, [and in you opinion the waiver of counsel is knowing and voluntary,] you should then say something to the following effect:

"I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."

(p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself.