2015 IL App (2d) 131077-U
No. 2-13-1077
Order filed September 17, 2015



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>DANIEL AMAYA,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Lake County.<br><br><br><br>No. 12-CF-1319<br><br>Honorable Daniel B. Shanes, Judge, Presiding. |

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) The trial court did not deny defendant his constitutional right to self-representation: although defendant initially said that he wanted to proceed *pro se*, he later indicated that he thought, wrongly, that in doing so he would still have some assistance of counsel, and he did not disabuse the court of that impression, which supported the court's denial of his request; (2) we modified the mittimus to properly reflect that defendant was convicted of child pornography, not aggravated child pornography.

¶ 2 Following a jury trial in the circuit court of Lake County, defendant, Daniel Amaya, was convicted of two counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(3) (West 2012)) and a single count of child pornography (720 ILCS 5/11-20.1 (a)(1) (West 2010). Defendant was

sentenced to 11 years' imprisonment for each criminal-sexual-assault conviction and 18 years' imprisonment for aggravated child pornography. The trial court ordered the sentences to be served consecutively. Defendant argues on appeal that his convictions must be reversed because the trial court failed to honor his request to discharge his privately retained attorney and exercise his constitutional right of self-representation. He alternatively argues that the mittimus must be corrected to reflect that he was convicted of child pornography rather than aggravated child pornography. We affirm defendant's convictions, but we modify the mittimus to reflect a conviction of child pornography (not aggravated child pornography).

¶ 3 The criminal-sexual-assault convictions were based on evidence that defendant committed acts of sexual penetration on C.L., his 13-year-old stepdaughter. The child-pornography conviction was based on a video recording found on defendant's cell phone showing him committing an act of sexual penetration on C.L.

¶ 4 Defendant was briefly represented by the office of the Lake County public defender before retaining attorney Barry H. Boches. Boches entered his appearance on May 16, 2012. Defendant later retained attorney Gregory Nikitas as substitute counsel. Nikitas entered his appearance on July 27, 2012. On May 17, 2013, the trial court set a trial date of July 8, 2013. At a pretrial hearing on June 26, 2013, defendant advised the trial court that he no longer wanted Nikitas to represent him. Defendant complained that Nikitas had not kept him informed about the case. After pointing out that the case was set for trial in a week-and-a-half, the trial court inquired whether defendant had another lawyer. Defendant responded, "No, I want to pro se my case." The following exchange then took place:

> "THE COURT: Do you know what that means?
>
> [DEFENDANT]: That I would be representing myself.

THE COURT: What does that mean to you?

[DEFENDANT]: It means that I would be able to look at all my paperwork and make an informed decision.

THE COURT: What decisions do you want to make that you don't think you have been able to make so far?

[DEFENDANT]: I haven't been talking to Mr. Nikitas about everything, so I can't make a decision based on stuff that I haven't seen.

THE COURT: What kinds of decisions do you feel that you've not been able to make?

There are actually five of them, and I'm wondering whether one of the decisions you haven't made is one of those five?

[DEFENDANT]: That's the reason I want—I want to see my paperwork, because I haven't.

He hasn't represented me, you know, as far as the motions, as far as communicating with me, as far as talking about defenses.

THE COURT: So it sounds like you're talking it's just that you don't feel like you have made some decisions that you want to make; is that right?

[DEFENDANT]: Correct."

¶ 5 The trial court then advised defendant that he was personally entitled to make certain decisions, such as whether to plead guilty or not guilty, whether to have a bench trial or a jury trial, and whether to testify. The court further explained:

"There are a lot of other decisions made at trial, hundreds, thousands maybe, what the defense to the case is, what witnesses to call, what questions to ask, if it is a jury trial,

what questions to ask the prospective jurors, assuming the judge allows it in the first place, what juror to pick, what evidence to offer, when to object, things like that.

Motions to file, you know, things like that, too.

All of those things are things that the lawyers get to decide.

* * *

All those other decisions about what questions to ask and things like that, the lawyer gets to decide, if there is a lawyer, because the lawyer is the one who has all the experience and training how to do that.

If you do convince me that you really want to represent yourself and not have a lawyer, I will let you do it, but I feel like it's my job to tell you why it's a bad idea."

¶ 6 After asking defendant about his education and prior experience with the criminal-justice system, the trial court offered an example of the possible drawback of proceeding to trial without counsel. The court noted that, if the prosecutor asked a witness an improper question, "Mr. Nikitas would know it's not proper, and he might object. But if he's not here, and you're doing this by yourself, you probably won't know that it's improper." Defendant responded, "I would I [*sic*] go with assistance of counsel." The trial court and defendant then engaged in the following exchange:

"THE COURT: That's one or the other.

So, this is what I'm saying, if you wanted assistance of counsel, I think that's a good idea.

You need to have a lawyer, but that's different than pro se.

In fact, it's the opposite of pro se.

> Because, if you don't have the assistance of counsel, and [the prosecutor] asks an improper question, you know what I'm going to do.
>
> [DEFENDANT]: Nothing.
>
> THE COURT: I'm not going to do anything, because I can't be your lawyer.
>
> So I would probably allow it because there would be no objection, because you wouldn't know to object. That's why you need the assistance of counsel, which you're right."

The trial court again asked defendant whether he had an attorney other than Nikitas to represent him. Defendant responded that he did not. The trial court then stated, "I suppose, you can keep looking into that if you wanted to, but until you get another lawyer, Mr. Nikitas is your lawyer, becasue [*sic*] you're right, you should have the assistance of counsel."

¶ 7 At the outset we note that, in his posttrial motion, defendant failed to raise the issue of the denial of his right to self-representation. Ordinarily, a criminal defendant's failure to raise an issue in his or her posttrial motion forfeits appellate review of the issue. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant argues, however, that the issue he raises is reviewable under the plain-error rule, which permits review of a forfeited error "where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence" (*People v. Herron*, 215 Ill. 2d 167, 178 (2005)) or "where the error is so serious that the defendant was denied a substantial right" (*id.* at 179). Generally, "the first step in determining whether the plain-error doctrine applies is to determine whether any reversible error occurred." *People v. Miller*, 2014 IL App (2d) 120873, ¶ 17. We conclude that no error occurred here.

¶ 8 This court has recently had occasion to review the principles governing a criminal defendant's request to proceed without counsel. In *People v. Jones*, 2015 IL App (2d) 120717, ¶¶ 33-35, we observed:

> "A defendant has a constitutional right to represent himself. [Citations.] In order to represent himself, a defendant must knowingly and intelligently relinquish his right to counsel. [Citation.] It is 'well settled' that a waiver of counsel must be clear and unequivocal, not ambiguous. [Citation.] A defendant waives his right to self-representation unless he articulately and unmistakably demands to proceed *pro se*. [Citation.] The purposes of requiring that a defendant make an unequivocal request to waive counsel are to: '(1) prevent the defendant from appealing the denial of his right to self-representation or the denial of his right to counsel, and (2) prevent the defendant from manipulating or abusing the system by going back and forth between his request for counsel and his wish to proceed *pro se*.' [Citation.]
>
> In determining whether a defendant's statement is clear and unequivocal, a court must determine whether the defendant truly desires to represent himself and has definitively invoked his right of self-representation. [Citation.] Courts must 'indulge in every reasonable presumption against waiver' of the right to counsel. [Citations.] The determination of whether there has been a knowing and intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances of that case, including the background, experience, and conduct of the accused. [Citation.] We review a trial court's determination for an abuse of discretion. [Citation.]
>
> Although a court may consider a defendant's decision to represent himself unwise, if his decision is freely, knowingly, and intelligently made, it must be accepted.

> [Citation.] However, '[a]lthough a defendant need not possess the skill and experience of a lawyer in order to choose self-representation competently and intelligently, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.' [Citation.] The requirement of a knowing and intelligent choice calls for nothing less than a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. [Citation.] Even if a defendant gives some indication that he wants to proceed *pro se*, he may later acquiesce in representation by counsel. [Citation.]"

¶ 9 Here, when the trial court first asked defendant whether he had a new attorney to replace Nikitas, defendant replied, "No, I want to pro se my case." Defendant indicated that he understood that this meant that he would represent himself, which meant that he "would be able to look at all [his] paperwork and make an informed decision." Defendant argues that he thereby made a clear and unequivocal request to represent himself. Yet, while the trial court was in the process of explaining the perils of self-representation to defendant, notably that he would not be equipped to prevent the State from introducing improper evidence, defendant responded, "I would I [*sic*] go with assistance of counsel." Defendant contends that this remark does not signify a withdrawal of his request to represent himself. However, the remark clearly reflects defendant's understanding that he would have at least *some* assistance of counsel. Thus, if the remark "I would I [*sic*] go with assistance of counsel" was not a withdrawal of the request to proceed *pro se*, it would seem to reflect a fundamental misconception that proceeding *pro se* did not entail a waiver of the constitutional right to counsel. This would appear to be how the trial court regarded defendant's statement. Thus, the trial court advised defendant, "That's one or the

other," *i.e.* defendant could represent himself or he could proceed with the assistance of counsel, but he could not do both. It appears that it was the trial court's understanding that defendant did want the assistance of counsel.

¶ 10 In arguing that the trial court violated his right to self-representation, defendant relies heavily on *People v. Ward*, 208 Ill. App. 3d 1073 (1991), and *People v. Fisher*, 407 Ill. App. 3d 585 (2011). In *Ward*, the trial court told the defendant:

> " 'I do not have to permit you to represent yourself because I have to find that you are capable of doing that. I find specifically for the record *** that you are not capable of doing it, that you are kind of entering into that on the basis that well, I at least will be more interested in my case than the lawyer will be and I will do a [*sic*] better than the lawyer will do, I am not convinced that is true and, accordingly, I am not going to discharge court appointed counsel.' " *Ward*, 208 Ill. App. 3d at 1079.

The *Ward* court reversed the defendant's conviction, reasoning that "[o]nce the trial court (1) has addressed a defendant in open court who wishes to proceed *pro se*, (2) has appropriately informed him of the rights he is waiving and the potential disadvantages of his action, as we have discussed in this opinion, and (3) finds that defendant is knowingly waiving his right to counsel, then the court should make its findings accordingly and, thereafter, respect the defendant's decision to exercise his constitutional right of self-representation." *Id.* at 1084-85. The court added that the right of self-representation "may not be thwarted by the trial court's opinion that defendant's decision is ill-advised, unwise, or unsound, however correct that opinion may be." *Id.* at 1085.

¶ 11 Similarly, in *Fisher*, the trial court denied the defendant's request to proceed *pro se* solely because the defendant "had evinced an ignorance of the technical rules of law and thus he clearly

needed an attorney, regardless of whether he wanted one." *Fisher*, 407 Ill. App. 3d at 589. Relying, in part, on *Ward*, the *Fisher* court held that the trial court violated the defendant's constitutional right to self-representation.

¶ 12 The parallels that defendant attempts to draw between this case and *Ward* and *Fisher* rest largely on his assertion that "[i]t appears [the judge] acted as he did because he believed [defendant's] decision to represent himself was not a wise choice." Clearly, the trial court believed that it would be unwise for defendant to waive the right to counsel. However, nothing in the record suggests that the trial court was under the impression that defendant's right to proceed without counsel depended on whether defendant was capable of doing so. Rather, the trial court's remarks show that the court was under the impression that, despite defendant's statement that he wanted to "*pro se* [his] case," defendant did not wish to proceed without any assistance of counsel, but rather wanted greater control over counsel's activities.

¶ 13 Defendant argues that, after warning him of the dangers of self-representation, the trial court should have expressly asked defendant whether he "wished to continue with Nikitas as his attorney or represent himself." Perhaps such an inquiry would have been useful. However, inasmuch as the trial court was under the impression that defendant wanted the assistance of counsel, it was incumbent upon defendant to speak up if that was not the case. When the trial court advised defendant that he could try to retain a new attorney, but until then "Mr. Nikitas is your lawyer, *becasue* [sic] *you're right, you should have the assistance of counsel*" (emphasis added), defendant could have corrected any misunderstanding by the trial court. By failing to do so, defendant acquiesced to further representation by Nikitas. *Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989), cited by defendant in his reply brief, does not require a different result. In *Orazio*, the court observed that "[t]o avoid a waiver of a previously-invoked right to self-

representation, a defendant is not required continually to renew a request once it is conclusively denied ***." *Id.* at 1512. That does not mean that a defendant who has left the trial court with the impression that he or she expects to have some form of assistance of counsel is under no obligation to clarify his or her true wishes.

¶ 14 We agree with defendant, however—as does the State—that the mittimus must be corrected to reflect that he was convicted of child pornography rather than aggravated child pornography. The mittimus indicates that the offense in question occurred in 2010 and was charged as aggravated child pornography under section 11-20.3(a)(1)(vii) of the Criminal Code of 1961 (Code) (720 ILCS 5/11-20.3(a)(1)(vii) (West 2010). In fact, the offense occurred in 2012 and was charged as child pornography under section 11-20.1(a)(1) of the Code (720 ILCS 5/20.1(a)(1) (West 2010). The mittimus is hereby corrected accordingly. *Cf. People v. Harris*, 2012 IL App (1st) 092251, ¶ 39 (correcting mittimus to reflect proper statutory citation for offense).

¶ 15 For the foregoing reasons, the mittimus is modified to reflect that defendant was convicted of child pornography, not aggravated child pornography. In all other respects, the judgment of the circuit court of Lake County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 16 Affirmed as modified.