

No. 1-14-0247

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 5345
)	
STEVIE JACKSON,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's request for self-representation was not clear and unequivocal where he vacillated between having appointed counsel and proceeding *pro se* and ultimately forfeited his request; Count 2 vacated under one-act, one-crime rule; remainder of judgment affirmed.

¶ 2 Following a bench trial, defendant Stevie Jackson was convicted of two counts of aggravated battery of a government employee and sentenced to concurrent terms of two years' imprisonment, to run consecutively to an eight-year sentence imposed in an unrelated case (12 CR 20089). On appeal, he contends that the trial court denied him his right to represent himself

under *Faretta v. California*, 422 U.S. 806 (1975). He also contends that this court should vacate Count 2 under the one-act, one-crime rule. We vacate Count 2, and affirm the remainder of the judgment.

¶ 3 Defendant was charged with two counts of aggravated battery for throwing a tape dispenser and striking the victim, Krystal Sankey, about the body, a person he knew to be an employee of a unit of the local government while she was performing her official duties on February 7, 2013. Count 1 alleged that defendant knowingly, without legal justification, caused bodily harm to the victim. Count 2 alleged that defendant knowingly, without legal justification, made physical contact of an insulting or provoking nature with the victim.

¶ 4 When the matter appeared on April 1, 2013, before the trial court, defendant indicated that he was proceeding *pro se* in a different case and wished to do so in this case as well. He also successfully moved for substitution of judge. The next day, defendant indicated that he was seeking a transfer to the veteran's court, and another substitution of judge. The court asked defendant if he wished to have counsel appointed, and he responded, "[y]es." The court then told defendant that he only receives one substitution of judge as a matter of right and the second one must be for cause, and asked if defendant wanted counsel appointed. Defendant responded that he would rather represent himself if he could get discovery that day. The State indicated that they needed two weeks to complete discovery. The court stated it would give both parties a few weeks for discovery for the State and for defendant to see if he could transfer to the veteran's court.

¶ 5 Two weeks later, defendant informed the court that he was representing himself, and the State tendered discovery. Defendant asked for an I-bond reduction. The court then asked if it

could appoint defendant counsel to help him with his case, but defendant did not respond to this question. Instead, he asked about home monitoring, which the court stated it would not grant. The court then stated that it would be happy to appoint defendant counsel if that was what he wanted. Defendant stated that he needed to look over the discovery and could do it that day, if the court wanted to appoint him counsel. Defendant then clarified that he still wanted to talk to a public defender if the court had one for him, "somebody who is going to help [him]." The court then stated that it would appoint the Public Defender's office, but, in the meantime, defendant was acting *pro se* and could take the discovery from the State.

¶ 6 On April 24, 2013, defendant informed the court that he was talking to public defender Waters and he was wondering, if he decided to have counsel appointed, whether it was possible to have Mr. Waters as his attorney. The court responded that it does not assign the public defenders and only appoints the office, and that defendant would be appointed either "Woelkers" or "Toussaint." Defendant then asked if he could talk to counsel, then come back to the courtroom. The court stated no. The court then asked defendant if he wanted counsel Woelkers appointed, and defendant said, "[y]es." The court then appointed counsel.

¶ 7 On May 29, 2013, defendant informed the court that counsel had refused his request to file a motion to dismiss the indictment because the investigator who testified at the indictment did not mention where the accident supposedly took place. Defendant said: "[s]o I think I'm gonna [*sic*] fire him." The court responded that, "[y]ou're not firing anybody." Counsel then stated that it was his professional opinion that there was no good faith basis to file a motion to dismiss the indictment. Defendant then asked if he could ask the court a question before he left,

and the court said, "[n]o, sir. No more on the record. You've got an attorney." Defendant responded that he was not doing anything, and the court stated, "[t]hat's it."

¶ 8 On June 27, 2013, defendant's counsel informed the court that he believed that defendant might be considering proceeding *pro se*. Defendant informed the court that he wanted a motion to quash and suppress filed because he had been illegally arrested, to which the court responded that this had happened in jail. Defendant then claimed that there was a camera where the incident occurred, and that counsel had done nothing to retrieve it. The first part of counsel's response was inaudible, but then provided, "I subpoenaed on this." Defendant stated that he and counsel were not coming to a "head" on anything, he did not understand why he needed counsel, and that he was the one on trial. Defendant then stated, "[I] got to have some say so in this so, if he's not going to help me, then I don't need him. I don't need nobody I'm arguing with him." The court responded, "[y]ou made your statement. Now, be quiet."

¶ 9 The court then asked counsel if he had investigated the video. Counsel responded that he would subpoena it, but that he doubted it was still in existence. Counsel further stated that the issues to which defendant was referring were trial issues, and that he had explained to defendant that there was no need for a motion to suppress because there was no evidence to suppress at this stage of the proceedings. He had also informed defendant that his constitutional rights while he in jail were different from when he was "out on the street." Counsel stated he would attempt to obtain the video. Defendant then stated that the alleged incident occurred on the jail tier and not at the law library as indicated in the indictment by the Assistant State's Attorney. The court responded that this was a trial issue, and defendant can impeach the witness at trial with any "different story." Defendant then asked the court a myriad of questions regarding, *inter alia*,

impeachment, directed verdict and weighing the evidence. The court answered several of the questions, but then stated, "[m]y class is closed now. I'm not teaching a class here, sir. I've already answered too many questions. You've already gone into too many facts of the case." Defendant then asked for a jury trial date, and the court responded that he was being "ridiculous" as he did not even have the evidence that he wanted produced. Counsel stated that he needed time to retrieve the video. The court continued the matter to August 5, 2013, noting that whether or not there was a video, a trial date would be set then. Defendant then stated he had one more question, and the court responded, "[n]o, no no."

¶ 10 On August 5, 2013, counsel informed the court he was in the process of attempting to receive materials and needed a continuance. Defendant then stated there were records he wanted and he had "all kinds of grievances, even from this situation," that "they" beat him up and had taken him to the hospital. Defendant noted that the court indicated on the last date that they would set a trial date. The court responded that, if defendant wanted "all these records" and did not have them, how could a trial date be set. The court stated that counsel was attempting to obtain "all that" and continued the matter.

¶ 11 On September 9, 2013, counsel informed the court that he had subpoenaed some items and had an outstanding investigation request, but that there seemed to be a disagreement between him and defendant regarding how to proceed in the case. Defendant then stated, "I don't want to go any further with him. I am putting in an ineffective assistance of counsel." The court responded, "[t]hat doesn't mean anything." Defendant stated that counsel knew nothing about his case, never came to see him, did not know anything about what was going on, everything counsel subpoenaed he never received, and counsel had not "got anything yet." The court then

noted that defendant had another trial pending in another case, and "[w]e will see what happens with your other trial first, and then we will take it from there." Defendant then stated that he wished to file motions that day. The court replied, "[n]ot yet."

¶ 12 On October 7, 2013, defendant told the court that he spoke with counsel, who told him that he was not representing him. Defendant then stated that all the witnesses in his case were saying he did not attack the victim, and were willing to sign affidavits and testify, but counsel was not doing anything. Defendant noted that the court told counsel to retrieve the video, but counsel had not done that and had not sent anybody, and that he did not want counsel to represent him anymore. He further told the court that he had written the Attorney Registration and Disciplinary Commission (ARDC) and been told to take the matter up with the judge. Defendant stated that he was done with counsel. The court then asked if the other trial was set for October 28th, and counsel indicated that it was. Defendant then stated, "[b]ut I can still get rid of him now so I can at least get somebody to help investigate this is what I'm trying to do." Defendant stated that counsel had not done anything he had told him to do, had never talked to any of the witnesses, and had done nothing regarding the fact that the "nurse" indicated she never examined anybody on this aggravated battery. Defendant further stated, "[w]hat I need to do right now is get rid of him so I can get somebody to help me." The court responded that defendant needed to get his other trial done, then the court would take care of it. The court told defendant to put his "complaints" in writing.

¶ 13 On November 6, 2013, the court noted that defendant was convicted in the other trial. Defendant informed the court that he had civil cases pending against the people who were filing complaints against him to show motive and these cases were not subpoenaed. Defense counsel

interjected that he explained to defendant that these issues were not relevant to the instant case. Defendant informed the court that he also had a case against the victim. The court told defendant to give everything he had to his counsel and not the court, and following sentencing on the other case, the court would set this case for trial.

¶ 14 On December 3, 2013, defendant told the court that he had been asking for the videotape and did not know whether counsel had "anything," the incident had occurred on the tier, and counsel "just comprehended" that he had federal complaints against people at the jail. The court then told defendant to stop screaming and yelling. Counsel indicated that he had subpoenaed the materials in defendant's case. Defendant then stated that counsel had not subpoenaed the "people" who were on the tier and some of them had left. Defendant said that counsel "[a]in't [sic] done nothing." Counsel responded that defendant had given him names of witnesses on the tier, he was going to give them to his investigator, and when the case was set for trial, he would subpoena them. Defendant also indicated that there was a nurse at the jail that no one had come to talk to and that counsel had done nothing. The matter was then continued several times and ultimately set for a trial on January 7, 2014.

¶ 15 On that date, a bench trial was held. The evidence adduced at trial based on the testimony of Cook County Correctional Officer Dreena Spann and the victim, law librarian Krystal Sankey, showed that on February 7, 2013, defendant was incarcerated at Cook County Jail in Division X. At 1 p.m. that day, the law librarian was working at the jail in her Cook County Department of Corrections t-shirt, which has a sheriff's star on it, and she was also wearing her identification card and pushing a library cart. She went to the interlock for defendant's tier, 1D, with Officer Spann and told her she had some documents for defendant. The interlock is where the officers sit

to watch the inmates on the tier and control the opening of the detainees' doors. It is between two doors, one leading to the tier. Defendant came into the interlock, and the victim told him she had the documents he had ordered.

¶ 16 Defendant informed the victim he was also requesting postage. She told him that she saw this on his request list but that his trust fund balance had too much money in it for him to be considered indigent to receive postage. Defendant became very angry, irate and began to yell vulgar words at the victim, who was only a foot away from defendant and explained to him again the procedure for obtaining postage. The officer told defendant to go back to the tier, and the victim stepped back. Defendant then threw a roll of surgical tape towards her face, and she reacted by covering her face with her hand. The tape roll struck her left hand, which left it bruised and red. The victim gave the roll of tape to Sergeant Lewis.

¶ 17 The victim went to the jail nurse who told her to see her primary care physician, which she did. At the time of trial, the victim's hand was still injured. The court noted that the victim had a bump on her hand, and the victim indicated that she did not have that bump prior to the incident with defendant.

¶ 18 Defendant testified that when the victim came to his tier, he asked her for the postage he had ordered. Defendant noted that he had no funds in his trust fund account. The victim responded that she was not going to give him any stamps to send out mail for "crack money," and called him a number of improper names. Defendant denied throwing anything at the victim, and testified that he was ordered back to his cell. Defendant further testified that he had filed grievances against the victim in the past. The parties stipulated that defendant had prior convictions including a 2013 possession with intent to deliver for which he was sentenced to

eight years' imprisonment, a 2008 escape conviction for which he received five and a half years' imprisonment, and a 2004 possession of a controlled substance for which he received four years' imprisonment.

¶ 19 At the close of evidence, the court found defendant guilty of two counts of aggravated battery of a government employee. In doing so, the court found that the victim testified "in a very very credible fashion." The court noted that there was no evidence that Officer Spann had "any axe to grind against [defendant]," and that she had corroborated the victim's testimony. The court also noted that there was a knob like injury on the victim's hand that was more than a bruise, and thus, there was evidence of bodily harm as a result of defendant's action. The court found defendant's testimony impeached by his prior convictions and the "extremely" credible testimony of the victim and Officer Spann.

¶ 20 On the next court date, defendant requested a *Krankel* hearing, noting that he wanted to file an ineffective assistance of counsel motion and a motion for a new trial. Defendant filed a *pro se* motion of ineffective assistance of counsel, alleging that the incident did not take place in the law library as indicated in the indictment, that counsel had initially refused to subpoena the video, telling him it was irrelevant and the court would not allow video footage into evidence, and that to this day he did not know whether the video was subpoenaed. Defendant also alleged that counsel never interviewed any witnesses. Defendant alleged that the jail nurse told him she never attended to the victim and was not going to lie, but counsel told him that the court would probably not allow the nurse's testimony and they did not need her because the State would probably use her. Defendant alleged he asked counsel to subpoena certain people who would testify that his trust fund account would show he qualified for postage. Defendant maintained

that he tried everything in his power to fire his counsel, but the court would not allow him to do so. Defendant also alleged that counsel did not impeach any witnesses or file any motions on his behalf and did not call the investigator, who had interviewed the victim and Officer Spann and testified before the grand jury. Defendant maintained that counsel neither filed a motion to dismiss the indictment nor subpoenaed the grievances he filed against the victim or any civil or criminal matters against the State witnesses. He also maintained that Officer Spann and her fellow officers had beaten him, but counsel had not subpoenaed his related complaint against Officer Spann. Finally, defendant alleged that counsel improperly set his trial date in his absence.

¶ 21 On January 10, 2014, the court allowed defendant to state anything additional to what he had written in his motion. Defendant essentially repeated the allegations in his motion, and maintained his innocence. Counsel then stated that he never received a list of witnesses from defendant, but had subpoenaed defendant's complaints against persons in the jail. Counsel also stated that he subpoenaed a videotape but "[t]here wasn't a video." Counsel further noted that there were six pending lawsuits in federal court, but that they were irrelevant to defendant's case. Counsel also noted that the case was "a credibility case" and there were no defense witnesses. Defendant then was allowed to speak, and said that counsel was lying and that defendant gave him names of witnesses to call.

¶ 22 The court denied defendant's motion. In doing so, it found that the allegations set forth in defendant's motion were frivolous and without merit, and in some cases were plainly false or irrelevant. The court further found that counsel's performance was well above the standard of an attorney at trial. The court concluded that there was no basis to hold that counsel was ineffective

in his assistance during the course of defendant's trial and thus no need to appoint additional counsel.

¶ 23 Defendant then sought to file a *pro se* motion for a new trial. The court told him that counsel still represented him so he could not file his own motion. Defendant responded, "[o]kay." Counsel then argued counsel's motion for a new trial based on the credibility of defendant, which the court denied.

¶ 24 Thereafter, defendant was sentenced to two years' imprisonment on each count to run consecutive to an eight-year sentence imposed in an unrelated case. The court advised him that he had the right to appeal the sentence, but was required to first file a motion to reconsider sentence. Defendant then inquired, "[h]e doesn't do that for me?" The court advised defendant that counsel could, and counsel then filed the motion, which the court denied.

¶ 25 On appeal, defendant contends that his convictions should be reversed and the matter remanded for a new trial because the trial court denied him his right to represent himself under *Faretta v. California*, 422 U.S. 806 (1975). He contends that he invoked his right to represent himself on June 27, 2013, that the trial court disregarded his right and ordered him to stop invoking it, and that he did not forfeit his right to self-representation by failing to raise the issue after the court definitively denied his request.

¶ 26 The sixth amendment to the Constitution of the United States provides for the right to self-representation in criminal proceedings. *Faretta*, 422 U.S. at 819. Waiver of counsel, however, must be clear and unequivocal, not ambiguous. *People v. Baez*, 241 Ill. 2d 44, 116 (2011) (citing *People v. Burton*, 184 Ill. 2d 1, 21 (1998)). The purpose of requiring a criminal defendant to make an unequivocal request to waive counsel is to 1) prevent defendant from

appealing the denial of his right to self-representation or the denial of his right to counsel, and 2) prevent defendant from manipulating or abusing the system by going back and forth between his request for counsel and his wish to proceed *pro se*. *Baez*, 241 Ill. 2d at 116.

¶ 27 In determining whether defendant's statement is clear and unequivocal, a court must determine whether defendant truly desires to represent himself and has definitively invoked his right of self-representation. *Id.* The determination of whether there has been an intelligent waiver of right to counsel depends upon the particular facts and circumstances of each case, including the background, experience and conduct of defendant. *Id.* We review a trial court's determination for an abuse of discretion. *Id.*

¶ 28 Here, defendant argues that he made a clear, unequivocal and unambiguous request to represent himself on June 27, 2013. Defendant maintains that he first responded affirmatively when counsel indicated to the court that he was considering going *pro se*, and then later explicitly told the court that, because he wanted control over his defense, he did not "need nobody" to help him with his defense. The court, however, responded that his request would not be honored and that, "[y]ou made your statement. Now, be quiet." Defendant maintains that his request was effective to invoke his right to self-representation and his acquiescence in the court's instruction to cease asking did not vitiate his invocation. Defendant also contends that the court's repeated peremptory denial of his attempts to dismiss counsel and represent himself definitively closed the door on the possibility of his request being granted at some later date. He specifically points to May 29, 2013, when he attempted to "fire" counsel, but the court told him he was not firing anybody.

¶ 29 The State responds that, viewing the record in its entirety, defendant failed to make a clear and unequivocal request to proceed *pro se*, and further, abandoned any request to proceed *pro se* when he acquiesced to representation at trial and explicitly inquired into counsel acting on his behalf during post-trial proceedings. The State notes that, in determining whether defendant's statement is clear and unequivocal, courts look at the overall context of the proceedings to assess whether defendant truly desires to represent himself and has definitively invoked his right to self-representation.

¶ 30 Here, defendant, at his first court appearance, asked to proceed *pro se* and was allowed to do so. The next day, the court asked defendant if he wished to have counsel appointed, and he responded, "[y]es." He then indicated he would rather represent himself if he could get discovery that day. He thus indicated a conditional willingness to represent himself at some point if he could get discovery that day, which was not a clear and unequivocal request to represent himself. *Burton*, 184 Ill. 2d at 24-25. About two weeks later, defendant stated that he still wanted to talk to a public defender if the court had one for him, "somebody who is going to help [him]." The court then stated that it would appoint defendant counsel, but, in the meantime, he was acting *pro se*. On April 24, 2013, defendant informed the court that he was talking to a specific public defender and wanted him appointed to represent him. The court appointed defendant counsel. On May 29, 2013, defendant told the court he was thinking of firing counsel, and the court responded, "[y]ou're not firing anybody." Defendant asked if he could ask the court a question before defendant left, and the court said, "[n]o, sir. No more on the record. You've got an attorney." Defendant responded that his attorney was not doing anything, and the court stated, "[t]hat's it." As the above recitation shows, defendant initially wanted to proceed *pro se* but then

wanted counsel appointed. On May 29, 2013, defendant indicated he was thinking about firing his counsel but did not say that he wanted to proceed *pro se*. At this time, defendant was vacillating between going *pro se* and wanting counsel to represent him. Vacillating between wanting new counsel and wanting to represent himself is not an unequivocal assertion that defendant wants to proceed *pro se*. *People v. Ashoor Rasho*, 398 Ill. App. 3d 1035, 1041-42 (2010).

¶ 31 Then, on June 27, 2013, the date defendant specifically relies on to show that he requested to proceed *pro se*, defense counsel informed the court that he believed defendant might be considering going *pro se*. Defendant told the court that he and counsel were not coming to a "head" on anything, he did not really understand the purpose that he needed counsel for, and that he was the one on trial. Defendant then stated, "[I] got to have some say so in this so, if he's not going to help me, then I don't need him. I don't need nobody I'm arguing with him." The court responded, "[y]ou made your statement. Now, be quiet." The record shows that, although defendant indicated that he was unhappy with counsel and did not want him, he never indicated that he wanted to proceed *pro se*. Notwithstanding defendant's assertion to the contrary, his statement, "I don't need nobody I'm arguing with him" is ambiguous. It shows that defendant did not want the specific counsel with whom he was arguing, but did not clearly reflect that he wanted no attorney to represent him at all and that he wanted to proceed *pro se*.

¶ 32 Then, on September 9, 2013, defendant told the court, "I don't want to go any further with [counsel]. I am putting in an ineffective assistance of counsel." He again did not indicate that he wanted to proceed *pro se*. In fact, on October 7, 2013, defendant told the court "I can still get rid of him now so I can at least get somebody to help investigate this is what I'm trying to do."

Defendant further stated, "[w]hat I need to do right now is get rid of him so I can get somebody to help me." Defendant clearly on this date did not want to act *pro se*, but, instead, wanted new counsel to represent him.

¶ 33 Looking at the context of the proceedings as a whole (*Burton*, 184 Ill. 2d at 23), it is clear that defendant initially vacillated between proceeding *pro se* and having counsel represent him (*Rasho*, 398 Ill. App. 3d at 1042 (citing *People v. Rohlfs*, 368 Ill. App. 3d 540, 545 (2006)) (defendant's request to proceed *pro se* was not unequivocal where he vacillated between that and having counsel)). Then, having chosen to proceed with counsel, he was unsatisfied with his counsel's performance and again vacillated, this time between proceeding with this counsel or new counsel. It is clear from defendant's vacillating positions and his pretrial courtroom behavior that, after having been appointed counsel, he never made an unequivocal invocation of his right to proceed *pro se*.

¶ 34 Furthermore, on the day of trial, defendant did not indicate that he wanted to proceed *pro se*, and during post-trial proceedings, he indicated that he wanted counsel to assist him with the filing of a motion to reconsider sentence. "A defendant may forfeit self-representation by remaining silent at critical junctures of the proceedings." *Burton*, 184 Ill. 2d at 24. By remaining silent at the critical junctures of the proceedings here, *i.e.*, the bench trial and motion to reconsider sentence, defendant abandoned his ambiguous request to proceed *pro se*, forfeiting self-representation. We thus find that the trial court did not abuse its discretion in requiring counsel's continued representation. *Id.* at 25.

¶ 35 Defendant next contends, and the State concedes, that this court should vacate his conviction under Count 2 of the indictment for aggravated battery based on insulting or physical

contact, based on the one-act, one-crime rule. Although defendant did not object below to his conviction on both counts, violation of the one-act one-crime rule amounts to plain error. *People v. Artis*, 232 Ill. 2d 156, 167-68 (2009). We agree with the parties that only one of defendant's convictions should stand under the one-act one-crime rule as the two aggravated batteries were based on the same physical act of throwing a tape dispenser and striking the victim. Defendant may be convicted for the most serious offense based on that single act. *People v. King*, 66 Ill. 2d 551, 562 (1977). Count 2 is the lesser of the two offenses here because Count 1 alleged that defendant caused the victim bodily harm, while Count 2 alleged that he only insulted or provoked her. Therefore, we vacate defendant's conviction and sentence on Count 2.

¶ 36 In light of the foregoing, we vacate Count 2, and affirm the remainder of the judgment of the circuit court of Cook County.

¶ 37 Affirmed in part; vacated in part.