2019 IL App (3d) 170354-U

Order filed September 12, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
	)	Knox County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0354
v.	)	Circuit No. 16-CF-296
	)	
LONDON T. GOLDEN,	)	Honorable
	)	Scott Shipplett,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Schmidt and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not deny defendant his right to self-representation. Any error admitting evidence of defendant's prior criminal history was harmless. And, this court lacks jurisdiction to consider defendant's challenge to the fines and fees imposed by the circuit court.

¶ 2 Defendant, London T. Golden, appeals his convictions and sentence. Defendant argues the circuit court erred in: (1) denying his request to proceed *pro se* at trial; (2) allowing evidence of defendant's prior criminal history at trial; and (3) imposing certain fines and fees. We affirm and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant with armed robbery (720 ILCS 5/18-2(a)(2) (West 2016)), theft (*id.* § 16-1(a)(1)(A)), aggravated robbery (*id.* § 18-1(b)(1)), and robbery (*id.* § 18-1(a)). The four counts all alleged that defendant, or someone for whose conduct he was legally responsible, took currency from the victim, Dewey Morris.

¶ 5 During *voir dire*, defendant interjected several times arguing that the proceedings were unfair and asked for a new appointed attorney. The court informed defendant that the cause would not be continued, then stated, "[counsel] will continue to be your attorney in this case. You could, I suppose, represent yourself if that was what you were inclined to do. I think it would be a grievous error." Defendant replied, "Yeah, I rather do that." In response, the court stated, "I believe that it would be a substantial error ***—on your behalf to, having started with an attorney, try to continue the case without one." Defendant then stated, "I'll be perfectly fine. I think I'd be better off."

¶ 6 The court then asked the State, "I think the defendant is entitled to represent himself during these trials but what about midstream?" The State answered that it believed defendant would be "eligible" to represent himself, but the court would need to admonish defendant. The court urged defendant to keep his attorney and informed him that it would declare a mistrial if his appointed counsel failed to provide effective assistance. The court again asked defendant if he wanted to keep his appointed counsel, and defendant responded,

> "I don't think I'm being given a fair trial. Period. It ain't just him. It's the whole situation. Since I first caught this case to the end, everything been happening. It's all leaning—leaning towards the State. Put it like that."

The court told defendant that it wanted to hear "unequivocally" from defendant that he did not want his appointed counsel. After defining the term "unequivocally" to defendant, he responded, "I'm representing myself."

¶ 7 The court continued to admonish defendant regarding the nature of the charges and potential penalties. The court told defendant that he was "taking a[n] extraordinary risk *** by representing yourself." The court continued, "So you know what you're charged with, and you know what is the possible outcome. I'm going to ask you again, do you want to represent yourself or do you want to have [appointed counsel] continue to help you?" Defendant answered, "I feel like I'm not getting a fair trial. So if that's what it takes me to get a fair trial, I would rather do it alone." The court responded by asking defendant again if he still wanted to represent himself at trial. Defendant then stated "Take me back," and the court deputy told defendant to stay seated. The court asked again if defendant wanted to have appointed counsel represent him at trial. Defendant responded, "If that's what it takes—if that's what it takes for me to be able to get time to get my own case together, to look up this one-twenty trial and everything else that's going on in my case, then that's what it is." The court then stated, "Well, there's not going to be continuance. You're going to have a trial today. Either you're going to be your own attorney or [appointed counsel is] going to represent you. I'm not going to continue it." The court finally asked defendant again if he wanted to represent himself, and defendant told the court that he needed his medicine. The court concluded that defendant's request to represent himself was not unequivocal and the cause proceeded to trial with counsel representing defendant.

¶ 8 At trial, Morris testified that he used Facebook to shop for an automobile. Morris found a 2000 Chevrolet Impala and asked to purchase the vehicle through the Facebook Messenger

application on his cell phone. The seller agreed to a price for the vehicle. The name appearing as the seller in the Facebook Messenger application was "Therealest Cuttinup." According to Morris, when he visited the profile page associated with the messages, the name "London" "definitely" appeared.

¶ 9 Morris and the seller agreed to meet at a location in Galesburg, Illinois, to complete the transaction. The seller told Morris that he would not be available until after midnight because he worked. Morris, his brother and his brother's girlfriend drove together to Galesburg. The group arrived at approximately11:45 p.m. and waited at a gas station for the seller to contact Morris. Photographs of the text message exchanges show that around 12:33 a.m., Morris asked the seller if he was ready. The two spoke over the phone and the seller told Morris to meet him at 234 North Seminary Street. When Morris arrived, he approached the home alone. Morris saw a man sitting on the front porch who motioned for Morris to follow him toward the garage. When they approached the garage, two individuals appeared holding guns. The individuals yelled at Morris to get on the ground and to give them his wallet. Morris got to his knees and held out his wallet. The seller took the wallet from Morris. Although the area was only lit by the garage light, Morris saw the seller's face from approximately three to four feet away. Morris identified the seller as defendant.

¶ 10 After defendant stole Morris's wallet, Morris "blacked" out and came around as the three individuals ran away. Morris ran back to the vehicle his brother and brother's girlfriend were driving and drove away. Morris called the police and was interviewed. Morris spoke to Detective Todd Olinger and recalled telling Olinger that the name attached to the Facebook profile was "Golden something." Morris identified defendant's photograph from a lineup.

¶ 11 Olinger testified that at approximately 1 a.m. he was informed that Morris was at the police station and needed to be interviewed. Olinger prepared a photographic lineup for Morris to view. Olinger explained how he created the lineup:

> "We have a report system that when someone's arrested at the jail by the—and processed by the deputies, they take that photograph, and it's downloaded into our—our joint report system that we use in both Galesburg Police Department and the Sheriff's Office. That allows us to access photos of all the individuals ever arrested from the inception of that system ***."

The defense objected, and the court held a discussion off the record. The court ultimately overruled the defense's objection. Olinger continued to explain that the system provided the ability to input specific features about an individual and create a lineup of various different individuals with similar features to choose from. Olinger presented the photographic lineup to Morris, and Morris identified defendant as the perpetrator in "about half a second." The photograph of defendant was admitted into evidence, but the court did not allow the photograph to be published to the jury. Olinger also acknowledged that he failed to comply with some requirements for administering a photographic lineup. Specifically, Olinger forgot to tell Morris that it was just as important to exclude an innocent person than it was to identify the perpetrator. Olinger also forgot to inform Morris that he would continue the investigation even if Morris could not make an identification.

¶ 12 Officer Kyle Winbigler testified that on the night in question he was dispatched to meet Morris shortly before 1 a.m. Winbigler described Morris as "hysterical" and paramedics had been called due to a concern that Morris was having a panic attack. Morris spoke with Winbigler and informed him of a possible suspect named "London Golden." Winbigler "checked [the

police department's] system. [He] knew of a London Golden. [He] checked [the] system for London," and obtained defendant's address from the system. The defense objected on the basis that the testimony implied that defendant had a prior criminal history. Outside the presence of the jury, the court overruled the objection. Winbigler continued his testimony and stated that he obtained defendant's last known address, which abutted the backyard of 234 North Seminary Street.

¶ 13 Aricka Maltbia, defendant's girlfriend, testified that she lived with defendant at the time of the incident. At that time, defendant worked from 4 p.m. until midnight. Maltbia drove defendant home from work on the evening in question. Maltbia arrived at defendant's work a few minutes before midnight. Maltbia believed they returned home around 12:20 a.m., and she went "straight to bed." She estimated that she fell asleep about 20 minutes after they arrived. Maltbia thought that defendant was either lying or sitting on the bed at the time. Although defendant was in bed with her when she woke up the next morning, she did not know if defendant spent the entire night in bed.

¶ 14 Defendant did not present any evidence in his defense. The jury ultimately found defendant not guilty of armed robbery. However, the jury found defendant guilty of aggravated robbery, theft, and robbery. The court merged all three counts and entered a conviction for aggravated robbery. The court sentenced defendant to 12 years' imprisonment, restitution and costs. Later that day, the court entered a supplemental sentencing order imposing several fines.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant argues the circuit court erred in: (1) denying his request to proceed *pro se* at trial; (2) allowing evidence of defendant's prior criminal history at trial; and (3) imposing certain fines and fees. We discuss each argument in turn.

¶ 17 A. Waiver of Counsel

¶ 18 First, defendant contends the circuit court abused its discretion in denying his request to discharge counsel and proceed to trial *pro se*. The circuit court's decision on a defendant's election to represent himself will not be reversed absent an abuse of discretion. *People v. Rohlfs*, 368 Ill. App. 3d 540, 545 (2006). A circuit court abuses its discretion only "where the court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." (Internal quotation marks omitted.) *People v. Baez*, 241 Ill. 2d 44, 106 (2011) (quoting *People v. Patrick*, 233 Ill. 2d 62, 68 (2009), quoting *People v. Hall*, 195 Ill. 2d 1, 20 (2000)).

¶ 19 Here, defendant contends that he made an unequivocal request to represent himself when he stated that he was dissatisfied with counsel and wished to represent himself at trial. We find that defendant failed to make an unequivocal request to proceed *pro se*. Therefore, we hold that the court did not err when it refused to allow defendant to represent himself.

¶ 20 Before a court permits a defendant to waive counsel, a defendant must demonstrate that he can knowingly and intelligently relinquish the right to counsel. *Faretta v. California*, 422 U.S. 806, 835 (1975). Defendants must also make a "clear and unequivocal" request to waive counsel and proceed *pro se*. *People v. Burton*, 184 Ill. 2d 1, 21 (1998). When determining whether a defendant's statement to discharge appointed counsel is clear and unequivocal, courts have looked to the overall context of the proceedings. *Id*. at 22. "A court must determine whether the defendant truly desires to represent himself ***." *Id*. Courts may look to defendant's conduct following the purported request to represent himself. *Id*. at 24. "Even if a defendant gives some indication that he wants to proceed *pro se*, he may later acquiesce in

representation by counsel," such as by vacillating or abandoning an earlier request to proceed *pro se*. *Id*. at 23.

¶ 21 In the instant case, defendant announced his dissatisfaction with the proceedings during *voir dire*. Defendant initially told the court that he wished to represent himself at trial. When the court informed defendant that it needed to know whether he unequivocally wanted to represent himself, defendant replied "I'm representing myself." However, after admonishing defendant, the court again asked defendant if he still desired to represent himself at trial. Defendant responded by complaining about the fairness of the proceedings. The court again asked defendant if he wanted to represent himself, defendant responded, "If that's what it takes—if that's what it take for me to be able to get time to get my own case together, to look up this one-twenty trial and everything else that's going on in my case, then that's what it is." When the court informed defendant that the case would not be continued and again asked defendant if he wanted to represent himself, defendant ignored the question. The court then concluded that defendant's demand was equivocal. We agree, because defendant's request was conditioned on his ability to continue the trial so that he could research and prepare for trial. Therefore, although defendant initially stated that he wanted to discharge his counsel, we find that after questioning from the court, his demand was equivocal. Consequently, we hold that the court did not violate defendant's right to self-representation.

¶ 22 In reaching this conclusion, we reject defendant's argument that the court abused its discretion by repeatedly asking defendant if he truly desired to proceed *pro se*. According to defendant, the court denied his request to represent himself on the basis that the decision was unwise. However, the court did not deny defendant's request on this basis. The court denied the request because it was equivocal. Additionally, defendant cites no law to support the proposition

that a court abuses its discretion by questioning defendant's desire to proceed *pro se* multiple times. We believe that the court's questioning was proper to ensure that defendant truly desired to represent himself.

¶ 23 B. Evidence of Prior Arrests

¶ 24 Next, defendant contends that the circuit court erred in allowing Olinger and Winbigler to testify regarding defendant's prior criminal history. Specifically, defendant contends that it was improper for the officers to testify that defendant's information was in the police database and that the officers identified defendant with his prior mug shot. The parties agree that defendant preserved this error by objecting at trial and including the issue in a posttrial motion. However, even assuming the court erred in allowing this testimony, we find that the error is harmless given the evidence presented at trial.

¶ 25 While the erroneous admission of other-crimes evidence carries a high risk of prejudice and ordinarily calls for reversal (*People v. Lindgren*, 79 Ill. 2d 129, 140 (1980)), the evidence must be so prejudicial as to deny the defendant a fair trial, *i.e.*, it must have been a material factor in his conviction such that without the evidence the verdict likely would have been different (*People v. Williams*, 161 Ill. 2d 1, 41-42 (1994)). If the error is unlikely to have influenced the jury, admission will not warrant reversal. See *People v. Wilson*, 164 Ill. 2d 436, 459 (1994).

¶ 26 In this case, we find the outcome of defendant's trial would not have been different if the court had excluded the prior bad-acts evidence. Morris observed defendant's face from a short distance and positively identified defendant as the perpetrator at trial. Morris also stated that the Facebook account associated with the seller included defendant's name. That same night, Morris "quickly" identified defendant from the photographic lineup as the person that stole his wallet.

Defendant's work schedule that ended at midnight is also consistent with the seller's messages to Morris that he would be unable to show Morris the vehicle until he got off work at midnight. Morris asked defendant at 12:33 a.m. if he was ready. Although Maltbia stated that she was in bed with defendant around 12:20 a.m., she testified that she fell asleep quickly and did not know for certain whether defendant stayed in bed with her the entire night. Defendant, therefore, had the opportunity to travel to the scene of the crime and rob Morris while Maltbia slept. Moreover, the testimony of Olinger and Winbigler was not so prejudicial as to deny defendant a fair trial. Both officers' references to defendant's presence in their police databases were brief. While each officer did imply that the police database systems contained individuals that had been previously arrested, neither officer testified that defendant had a prior conviction. Nor did the officers testify to any specific crime defendant was previously arrested for.

¶ 27 In reaching our conclusion, we reject defendant's argument that Morris's identification of defendant was unreliable. Specifically, defendant points to the fact that Morris was young, the experience was traumatic, and the area was poorly lit. Defendant also notes that Olinger failed to fully comply with the requirements to administer a photographic lineup. Defendant's argument ignores Morris' positive identification of the defendant at trial. Morris's identification is also supported by his testimony that the Facebook account associated with the seller contained the name "London" and "Golden"—a fact corroborated by Winbigler's testimony that Morris provided him the perpetrator's name shortly after the crime.

¶ 28 C. Fines and Fees

¶ 29 Finally, defendant asks this court to vacate the fines imposed in the circuit court's supplemental sentencing order because it conflicts with the court's oral pronouncement of the sentence. Pursuant to Illinois Supreme Court Rule 472, we lack jurisdiction to address this

argument. Ill. S. Ct. R. 472(a)(3) (eff. May 1, 2019). Rule 472 provides that the circuit court retains jurisdiction to correct certain sentencing errors, "[e]rrors in the calculation of presentence custody credit," at any time following judgment. *Id.* Rule 472(e) provides that where, as here, a criminal case was pending on appeal as of March 1, 2019, and a party raised sentencing errors covered by Rule 472 for the first time on appeal, "the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019). Thus, pursuant to Rule 472(e), defendant must first file a motion in the circuit court requesting the correction of the errors alleged here. *People v. Whittenburg*, 2019 IL App (1st) 163267, ¶ 4. We remand to the circuit court to give defendant the opportunity to do so.

¶ 30 III. CONCLUSION

¶ 31 The judgment of the circuit court of Knox County is affirmed and remanded with directions.

¶ 32 Affirmed and remanded with directions.