COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0722-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ERNEST E. HALFORD, A/K/A EDWARD E. ROLLINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washburn County: THOMAS J. GALLAGHER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Ernest Halford appeals a judgment of conviction for one count of first-degree intentional homicide contrary to WIS. STAT. § 940.01(1), two counts of burglary contrary to WIS. STAT. §§ 943.10(1)(a) and 943.10(2)(b),

and two counts of theft contrary to WIS. STAT. §§ 943.20(1)(a).[1] Halford contends that he is entitled to a new trial because (1) he was deprived of his right to a fair trial by being permitted to represent himself, and (2) the trial court committed prejudicial error by not suppressing his two oral statements made after he invoked his ***Miranda***[2] rights. We reject Halford's arguments and affirm.

BACKGROUND

¶2 Halford and three companions burglarized a residence in Springbrook on May 23, 1998. During the burglary, Paul Barton, a neighbor, drove up to the house. The intruders confronted Barton. Halford and a companion then tied Barton to a tree and shot him twice in the head. Halford was arrested three days later in St. Paul, Minnesota.

¶3 The next day—May 27—while in custody in St. Paul, Halford was questioned by the St. Paul police. He invoked his ***Miranda*** rights and the questioning stopped. Later that day, the police asked Halford if he was willing to talk. He said he was and met with Wisconsin investigators. He was re-advised of his ***Miranda*** rights, waived those rights and made detailed statements about the events surrounding Barton's murder. A criminal compliant was filed against Halford the following day in Washburn County.

¶4 On June 9, 1998, Halford asked to talk with the Wisconsin investigators again. He was again given ***Miranda*** warnings. Halford stated he

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

understood those rights and wished to waive them. He again gave detailed statements about Barton's murder.

¶5 Halford moved to suppress both the May 27 and June 9 statements. The trial court denied the motion, and the statements were admitted into evidence at trial.

¶6 Before his jury trial, Halford dismissed several attorneys. Ultimately, he requested to represent himself. The trial court engaged in an extensive colloquy with Halford and found that he knowingly and voluntarily waived his right to be represented by counsel and that he was competent to represent himself. However, the trial court appointed standby counsel.

¶7 During trial, the court became concerned whether Halford was competent to represent himself. After a meeting in chambers with standby counsel, the trial court allowed Halford to continue as his own counsel. Halford was subsequently convicted on all counts. This appeal followed.

DISCUSSION

I. SELF-REPRESENTATION

¶8 Halford argues that: (1) he was not aware of the difficulties and disadvantages of self-representation; (2) prior to trial, he was not competent to represent himself; and (3) during the trial when the court questioned Halford's competency, the court erred by not conducting another colloquy. We disagree.

A. STANDARD OF REVIEW

¶9 Criminal defendants are guaranteed the fundamental right to assistance of counsel under art. I, § 7, of the Wisconsin Constitution and the Sixth

Amendment to the United States Constitution as made applicable to the states through the Fourteenth Amendment. *See* ***State v. Klessig***, 211 Wis. 2d 194, 201-02, 564 N.W.2d 716 (1997). The scope and interpretation of the right to assistance of counsel under the Wisconsin Constitution and the United States Constitution are identical. *See* ***id.*** at 202-03. Additionally, the Sixth Amendment and art. I, § 7, grant defendants the right to conduct their own defense. *See* ***id.*** at 203.

¶10 When a defendant seeks to proceed pro se, the trial court must engage in a colloquy with the defendant to ensure that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel (waiver); and (2) is competent to proceed pro se (competency). *See* ***id.*** If both parts of the two-part inquiry are not satisfied, the trial court "must prevent the defendant from representing himself or deprive him of his constitutional right to the assistance of counsel." ***Id.*** at 203-04. On the other hand, if the defendant knowingly, intelligently and voluntarily waives the right to assistance of counsel and is competent to proceed pro se, the trial court must allow the defendant to do so. *See* ***id.***

¶11 To ascertain whether a defendant has knowingly, intelligently and voluntarily waived the right to counsel, the trial court's colloquy must probe whether the defendant: (1) deliberately chose to proceed without counsel; (2) was aware of the difficulties and disadvantages of self-representation; (3) was aware of the seriousness of the charge or charges; and (4) was aware of the general range of penalties that a sentencing court could impose. *See* ***id.*** at 206; *see also* ***Pickens v. State***, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980), *overruled on other grounds by* ***Klessig***, 211 Wis. 2d at 206.

¶12 Then, to determine whether a defendant is competent to represent himself or herself, a trial court considers the defendant's (1) education; (2) literacy; (3) fluency in English; and (4) "any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." ***Klessig***, 211 Wis. 2d at 212 (citing ***Pickens***, 96 Wis. 2d at 569). In considering these factors, a trial court is guided by the principle that a competency determination should not prevent persons of average ability and intelligence from self-representation unless the court can identify a specific problem or disability that might prevent a meaningful defense from being offered, if one indeed exists. *See* ***Klessig***, 211 Wis. 2d at 212. Technical legal knowledge is irrelevant to an assessment of a knowing exercise of the right to defend oneself. *See* ***Faretta v. California***, 422 U.S. 806, 836 (1975)). A competency determination rests to a large extent on the trial court's judgment and experience. *See* ***Klessig***, 211 Wis. 2d at 212.

¶13 Our standard of review for a waiver of counsel is mixed. We will independently determine whether the record establishes that the waiver was knowingly, intelligently and voluntarily made. *See* ***id.*** at 204. However, because the trial court is in the best position to observe the defendant, we will uphold its competency determination unless it is totally unsupported by the facts of record. ***Pickens***, 96 Wis. 2d at 568-70.

B. WAIVER

¶14 Halford first argues that his right to counsel was not properly waived, thus resulting in a manifest injustice requiring a new trial. He contends that the colloquy conducted by the trial court did not demonstrate that he was aware of the difficulties and disadvantages of self-representation. We disagree.

¶15 The trial court engaged in a lengthy discussion with Halford regarding his experience with the legal system. Halford informed the trial court that he had spent two and one-half years in college. He additionally informed the trial court that he had previously been involved in a jury trial concerning criminal proceedings, however, he was represented by counsel at that trial.

¶16 The trial court directly asked Halford what he knew about the law and whether he had any experience in questioning witnesses at a trial. The trial court posed a hypothetical question to Halford asking him what he would do if the trial court told him some of the questions he wished to ask were irrelevant. Halford replied, "Have no choice but to accept your ruling." Halford was even asked whether he had undertaken any legal training on his own by reading books, statutes and manuals. Halford replied that he had.

¶17 The trial court then specifically asked Halford whether he understood that "if you choose to represent yourself there are some difficulties, or disadvantages that may arise in that you're not a trained lawyer." Halford replied, "Of course."

¶18 During the hearing, the trial court again pointed out to Halford the difficulties and disadvantages of representing himself. For example, while discussing a motion for continuance, the trial court specifically asked Halford, "Are you beginning to understand some of the disadvantages of trying to represent yourself?" The trial court then told Halford, "I will let you change your mind." Halford was not persuaded to change his decision to represent himself. Not only did the trial court point out the difficulties of self-representation, it actually gave Halford the opportunity to observe the difficulties he was facing and gave him the opportunity to reconsider his decision.

¶19 A pro se defendant may not fully understand every issue in a complex legal defense. However, under Halford's reasoning, a trial court fails to adequately advise a defendant about the difficulties and advantages of self-representation unless the trial court essentially provides courses on evidence, procedures and substantive criminal law to the pro se defendant. The practical result would be a prohibition on self-representation for individuals with no legal training and would impose upon the court a burdensome requirement. This would violate the Sixth Amendment right to self-representation and art. I, § 7, of the Wisconsin Constitution. *See* ***Klessig***, 211 Wis. 2d at 212.

¶20 The record establishes that Halford was aware of the difficulties and disadvantages of self-representation. Through the trial court's discussions with Halford, the record reveals that Halford had experience with the legal system and that his level of education allowed him to grasp the difficulties and complications of self-representation. Therefore, we conclude that Halford knowingly, intelligently and voluntarily waived his right to counsel.

C. COMPETENCY

¶21 Next, Halford argues that the trial court erred by initially finding him competent to represent himself. Halford bases his argument on his claim that he had a psychological disability that impaired his ability to present a defense. *See* ***id.***

¶22 The record shows that the trial court considered the necessary factors under ***Klessig*** when determining that Halford was competent to represent himself. Halford contends that the trial court erred by failing to consider information concerning a not guilty by reason of insanity commitment in Colorado thirteen years earlier. The trial court, however, did consider an evaluation of Halford

performed at the Mendota Health Institute three months earlier. The evaluation found that Halford had a mixed personality disorder with antisocial and narcissistic traits. There was evidence that Halford was manipulative, but the evaluation also found that he had a "good degree of sophistication surrounding" the legal process.

¶23 Halford argues that his personality disorder is "exactly the type of psychological disorder" that would impair his ability to present a defense. He did not, however, present evidence to that effect in a postconviction motion, and there is no basis in the existing record for this court to conclude that Halford's personality disorder significantly impaired his ability to present a defense. Further, there was no reason for the trial court to examine dated records when current evaluations of Halford were available. Therefore, we affirm the trial court's initial determination that Halford was competent to represent himself.

¶24 Halford further argues that during the trial, when the trial court stated on the record that "it is pretty obvious to me that the defendant is not competent to represent himself," it committed constitutional error by not conducting another competence colloquy. We disagree.

¶25 After the trial court has granted a defendant's request to proceed pro se, it has a continuing responsibility to monitor the defendant's handling of the defense. *See* ***Pickens***, 96 Wis. 2d at 569. "If, during the course of the trial, it becomes apparent that the defendant is simply incapable, because of an inability to communicate or because of a complete lack of understanding, to present a defense that is at least prima facie valid, the trial court should step in and assign counsel." ***Id.*** "[C]ounsel should be appointed after trial has begun, or a mistrial ordered,

only where it appears the defendant should not have been allowed to proceed *pro se* in the first place." ***Id.***

¶26 The record reveals that Halford encountered significant difficulty during cross-examination of the State's witnesses due to his unfamiliarity with the rules of evidence. As a result, the trial court adopted a procedure under which, outside the presence of the jury, Halford was required to obtain court approval for the questions he wished to ask. While dealing with this cumbersome process, the trial court observed that it was getting "sick of running an evidence school." Halford places great significance on the trial court's statement during the trial that he was "not competent to represent himself." The trial court convened an in-chambers conference and stated its concern that Halford was "delusional" and "far removed from reality."

¶27 The trial court asked for any suggestions from stand-by counsel. Counsel told the court that with additional guidance, Halford would be able to ask appropriate questions. The trial court concluded that it would give Halford the opportunity to follow stand-by counsel's guidance on proper questioning. On the record, the trial court stated:

> During the break in chambers we discussed the issue that I raised concerning the defendant's competency to represent himself, to defend himself. I suppose I should say, explain for the record that because the defendant, I believe, at a time prior to my getting on the case had raised the issue of his competency to proceed as a defendant, period, not competency to represent himself, that those are two completely different issues. The question as to whether he was competent to simply proceed as a defendant is completely different than the issue of whether he's competent to proceed as his own lawyer to defend himself.
>
> There is a considerably higher standard to find competency to proceed as a lawyer to defend yourself. And what has been happening concerning his apparent inability to grasp

> the rules of evidence and my rulings on them and the advice that he's getting from his stand-by counsel led me to question whether we might have that problem.
>
> Stand-by counsel convinced me that she thinks he can handle it, and we will proceed as long as the defendant will take the advice he gets from stand-by counsel on these issues and follows it.

From that point on, Halford did not encounter any significant difficulties.

¶28 We conclude that the trial court properly determined that Halford should be allowed to continue as his own counsel. When read in context, the trial court's statements regarding Halford's competency to represent himself merely reflect its frustration. The trial court's primary concern was with Halford's apparent inability to grasp the rules of evidence. The trial court resolved that concern to its satisfaction. We do not interpret the court's statements as a finding of incompetence. Thus, the trial court was not required to conduct an additional colloquy to determine whether Halford was competent to represent himself. Halford's competency to represent himself was "uniquely a question for the trial court to determine" based on its observations of Halford's conduct, demeanor, and abilities. *See* ***Pickens***, 96 Wis. 2d at 568. The facts in the record support the trial court's finding that Halford was competent to represent himself. Therefore, the trial court's decision to allow Halford to continue as his own counsel is affirmed.

II. ORAL STATEMENTS

¶29 Halford argues that his statements taken at the May 27 and June 9 interviews violated his Fifth Amendment right to counsel because police improperly reinitiated questioning after he had invoked his ***Miranda*** rights. Halford further contends that the admission of the statements at trial was not harmless error. We agree with Halford and the State that the May 27 statement

was improperly admitted; however, its admission was harmless error. We further conclude that the June 9 statement was properly admitted.

A. STANDARD OF REVIEW

¶30 In reviewing an order allowing statements into evidence, this court upholds the trial court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); *see also* ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional principles to the facts as found is a question of law this court decides independently. *See* ***State v. Patricia A. P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

B. MAY 27 AND JUNE 9 INTERVIEWS

¶31 The State concedes that the May 27 statement was improperly admitted because the police initiated questioning after Halford had already invoked his ***Miranda*** rights during a police interview that morning. There is no dispute that Halford sufficiently invoked his right to counsel during the morning interview on May 27.

¶32 The trial court ruled that both of Halford's statements were admissible because the required ***Miranda*** warnings were given and the statements were voluntary. In ***Miranda***, the Supreme Court held that a suspect subject to custodial interrogation has a right to consult with an attorney and to have counsel present during questioning and that the police must explain those rights before questioning begins. *See* ***Miranda***, 384 U.S. at 469-73.

¶33 In ***Edwards v. Arizona***, 451 U.S. 477 (1981), the Supreme Court held that if a suspect requests counsel at any time during the interview, the suspect

is not subject to further questioning until a lawyer has been made available or the suspect reinitiates conversation. *See* ***Davis v. United States***, 512 U.S. 452, 458 (1994).[3] Under ***Edwards***, once the Fifth Amendment right to counsel has been invoked, all police-initiated questioning must stop until counsel is present, unless the accused initiates further communication with police and validly waives the right. *See* ***State v. Franklin***, 228 Wis. 2d 408, 412, 596 N.W.2d 855 (Ct. App. 1999).

¶34 We agree with the State that the May 27 statement was improperly admitted. The June 9 statement, however, was properly admitted because it was Halford who initiated further communication. St. Paul Police sergeant Neal Nelson testified at the suppression hearing that Halford had requested to speak with the Wisconsin investigators. Halford does not argue that he did not receive ***Miranda*** warnings prior to the June 9 statement or that his statement was involuntary.

¶35 Halford limits his argument to the Fifth Amendment. He makes no Sixth Amendment claim that his right to counsel was violated. However, even under that analysis, Halford's argument fails. "The Sixth Amendment right to counsel does not attach until the initiation of criminal charges." ***State v. Dagnall***, 2000 WI 82, ¶52, 236 Wis. 2d 339, 612 N.W.2d 680. The criminal complaint and arrest warrant were not filed until May 28, 1998. Therefore, Halford had no Sixth Amendment right to counsel during the May 27 interviews.

[3] The ***Edwards v. Arizona***, 451 U.S. 477 (1981), rule applies only when a defendant has unambiguously invoked the right to counsel. *See* ***Davis v. United States***, 512 U.S. 452, 458-59 (1994); ***State v. Rodgers***, 203 Wis. 2d 83, 89, 552 N.W.2d 123 (Ct. App. 1996). The trial court held for purposes of deciding the motion to suppress that it would assume that Halford's statement to the investigators that he wanted to invoke his rights was a sufficient invocation of his right to counsel.

¶36 Because it was Halford who initiated the interview, and because the record demonstrates that Halford did not ask for counsel and validly waived that right, the trial court properly admitted the June 9 statement. *See* ***State v. Kramar***, 149 Wis. 2d 767, 790-91, 440 N.W.2d 317 (1989).

B. HARMLESS ERROR

¶37 We now address whether the admission of the May 27 statement was harmless error. Pursuant to WIS. STAT. § 805.18(2), the denial of a substantial right is not harmless error. Halford contends that the right to counsel is a substantial right and that he was denied that right, because statements he made on May 27 were admitted into evidence. We disagree.

¶38 If a statement that should have been suppressed has been erroneously admitted at trial, that admission is subject to a harmless error analysis. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 367-68, 588 N.W.2d 606 (1999). Error is harmless if there is no reasonable possibility that the error contributed to the conviction. *See* ***id.*** at 369. A reasonable possibility is one sufficient to undermine the confidence in the outcome of the proceeding. *See* ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556, 500 N.W.2d 289 (1993). The burden of proof is on the beneficiary of the error, here the State, to show that the error was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 544 n.11, 370 N.W.2d 222 (1985).

¶39 In ***State v. Harris***, 199 Wis. 2d 227, 544 N.W.2d 545 (1996) (Abrahamson, J., concurring), our supreme court adopted the "harmless constitutional error" standard of ***Arizona v. Fulminante***, 499 U.S. 279, 285 (1991). Halford argues that the concurrence in ***Harris*** indicated that the court

might have had a potentially different holding in light of WIS. STAT. § 805.18[4] had the issues been better briefed. *See* ***Harris***, 199 Wis. 2d at 267. We reject his argument. The court of appeals is an error-correcting court. *See* ***State ex rel. Swan v. Elections Bd.***, 133 Wis. 2d 87, 93-94, 394 N.W.2d 732 (1986). We are bound by prior decisions of the Wisconsin Supreme Court. *See* ***State v. Olsen***, 99 Wis. 2d 572, 583, 299 N.W.2d 632 (Ct. App. 1980). We infer from the majority's decision in ***Harris*** that it implicitly rejected the potential argument regarding WIS. STAT. § 805.18.

¶40 Any error in admitting Halford's May 27 statement was harmless because the jury also heard his properly admitted June 9 statement, which was a full confession that he shot Barton twice. The jury also heard abundant incriminating evidence from his accomplices in addition to the confessions to support the verdict. The record demonstrates that the State presented a complete and compelling case against Halford even without the May 27 statement. There were no gaps in the State's case that needed to be filled by the May 27 statement. *Cf.* ***State v. Middleton***, 135 Wis. 2d 297, 322, 399 N.W.2d 917 (Ct. App. 1986) (declining to find harmless error where the State's case contained "critical gaps" and the defendant's admissions "filled the gaps which the jury

[4] WISCONSIN STAT. § 805.18 reads as follows:

> (1) The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.
> (2) No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

would have had to fill by inference."). Accordingly, even though the May 27 statement should have been excluded, the error in admitting it was harmless.

By the Court.—Judgment affirmed.

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