COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1077-CR **Cir. Ct. No. 2006CF296**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK P. STAFFA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Mark Staffa appeals a judgment of conviction for second-degree sexual assault as party to a crime and an order denying his postconviction motion for relief. Staffa complains the trial court erroneously permitted him to proceed pro se and made inappropriate, biased comments in front

of the jury. He also seeks a new trial in the interests of justice. We conclude Staffa forfeited his right to counsel and the court appropriately determined him competent to represent himself; the court's comments, placed in context, do not demonstrate bias; and a new trial is not warranted. We therefore affirm the judgment and order.

Background

¶2 The State Public Defender appointed three attorneys for Staffa. Each was fired or moved to withdraw because of difficulty working with him. After the third attorney withdrew, the court directed Staffa to explain why he had been through so many attorneys. In short, Staffa was not convinced they were working in his best interest and, at a status conference, he indicated his frustration that the attorneys would not do everything he wanted. The court informed Staffa of the attorneys' obligations to avoid advancing frivolous claims and offered to find a fourth attorney,[1] but warned Staffa he was on the cusp of losing the right to counsel.[2] The court contacted an attorney who, after reviewing the file, was willing to take the case. However, while the attorney was solicited in November 2006, he informed the court that he would likely be unavailable for trial until April 2007. Staffa thus refused his representation. The court directed Staffa to proceed pro se.

[1] Staffa threatened to sue the SPD if it appointed another attorney for him.

[2] Prior to finding a fourth attorney, the court asked Staffa how many attorneys had been hired so far. Staffa answered there had been four. The record contains appointment notices for three attorneys from the SPD. It appears Staffa may have counted the public defender who represented him at the initial appearance in his tally. However, that attorney's performance and interaction with Staffa is not relevant to this appeal.

¶3 Staffa was convicted after a jury trial. The court set a date for sentencing and ordered a presentence investigation, with which Staffa refused to cooperate. The day of sentencing, Staffa requested an attorney. The SPD appointed one, who asked for an adjournment for a psychiatric evaluation of her client. Staffa refused to submit to the evaluation. The court ultimately sentenced Staffa to fifteen years' initial confinement and ten years' extended supervision.

¶4 Staffa moved for a new trial, arguing: (1) his due process right was violated when the court failed to conduct a waiver colloquy under ***State v. Klessig***, 211 Wis. 2d 194, 204-05, 564 N.W.2d 716 (1997), before making Staffa proceed pro se; (2) the trial court demonstrated prejudice against Staffa in front of the jury; (3) there was insufficient evidence to support the conviction; and (4) the interests of justice warranted a new trial. The court denied the motion and Staffa appeals.[3]

Discussion

I. Whether the Court Properly Ordered Staffa to Proceed Pro Se

¶5 The right to counsel is guaranteed by both the United States and Wisconsin Constitutions. ***State v. Cummings***, 199 Wis. 2d 721, 747-48, 546 N.W.2d 406 (1996). However, a defendant also has the right to be his or her own advocate. ***State v. Marquardt***, 2005 WI 157, ¶56, 286 Wis. 2d 204, 705 N.W.2d 878. Because the right to counsel is one of the most important elements of due process, we expect the trial court to ensure a waiver of that right is knowing, intelligent, and voluntary. *See* ***Klessig***, 211 Wis. 2d at 204-05.

[3] Sufficiency of the evidence is not raised on appeal.

¶6 Nevertheless, a defendant "may, by his or her conduct, forfeit the right to counsel." ***State v. Coleman***, 2002 WI App 100, ¶16, 253 Wis. 2d 693, 644 N.W.2d 283. This most often occurs in the case of a manipulative or disruptive defendant, where the defendant "obstruct[s] the orderly procedure of the courts" or hinders the administration of justice. ***Id.***; ***State v. Woods***, 144 Wis. 2d 710, 715, 424 N.W.2d 730 (Ct. App. 1988). In other words, forfeiture of the right to counsel means waiver occurs "not by virtue of a defendant's express verbal consent to such procedure, but rather by operation of law because the defendant has deemed *by his own actions* that the case proceed accordingly." ***Woods***, 144 Wis. 2d at 715-16.

¶7 Before forfeiture can be appropriate, the trial court must: (1) provide explicit warnings that, if the defendant persists in specific conduct, the court will find that the right to counsel has been forfeited; (2) engage in a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation; (3) make a clear ruling when the court deems the right to counsel to have been forfeited; and (4) make factual findings to sufficiently support the court's ruling. ***State v. McMorris***, 2007 WI App 231, ¶24, 306 Wis. 2d 79, 742 N.W.2d 322.

¶8 Staffa's primary complaint on appeal is that the court failed to conduct the appropriate colloquy under ***Klessig*** before it found his waiver of the right to counsel was knowing, intelligent, and voluntary. Questions related to a constitutional right present us with questions of constitutional fact. ***Cummings***, 199 Wis. 2d at 748. The trial court's historical factual findings are affirmed unless clearly erroneous, but we review de novo application of the law to those facts. ***State v. Johnson***, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182. Here, we

agree with the State that Staffa forfeited, not waived, his right to counsel, making a ***Klessig*** colloquy unnecessary.

¶9 Consistent with ***McMorris***, the court advised Staffa that his repeated firing of attorneys was potentially abusive. In November 2006, when the court agreed to find a fourth attorney, it advised Staffa that if he fired that attorney, "then the lawyer is off and you're on your own." In a December letter setting a status conference, the court advised Staffa that it would "probably make a determination that you have forfeited your right to counsel … based upon the amount of attorneys you have been through, your failure to cooperate with attorneys, and the fact that the court believes that your conduct has seriously interfered with the orderly administration of the case."

¶10 At the January status conference, the court detailed Staffa's history of attorneys. The court advised Staffa that attorneys provide services, including a defense or the best case possible within the law, and that lawyers know more than Staffa about how to present a case to the jury. The court also advised Staffa that he would be held to the same standards as an attorney. As Staffa extemporaneously offered information at the hearing, the court advised him that certain things, such as calling the victim a "known lesbian," would not be permitted and ran the risk of a mistrial. This conversation served to demonstrate the difficulties and dangers of self-representation.

¶11 Further, it was clear the court deemed the right to counsel forfeited when it concluded the status conference by advising Staffa, "You are now the lawyer." The record adequately supports the forfeiture determination based on

Staffa's refusal to cooperate with counsel, and the court's obligation under ***McMorris*** was satisfied.[4]

II. Whether Staffa was Competent to Proceed Pro Se

¶12 A defendant who appears pro se, either because of waiver or forfeiture, must be competent to represent himself. *See* ***Klessig***, 211 Wis. 2d at 208. Competence to stand trial requires a defendant to be able to understand the proceedings against him and to assist in his own defense. *See* ***id.***; *see also* WIS. STAT. § 971.13 (2005-06). But competence to represent one's self is greater than this standard. ***Klessig***, 211 Wis. 2d at 212. Thus, a trial court should also consider a defendant's "education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." ***Id.*** (quoted source omitted).

¶13 This test for competency should not prevent an individual of average ability and intelligence from self-representation. ***Klessig***, 211 Wis. 2d at 212. A timely and otherwise proper request should be denied only if there is a specific problem or disability that can be identified which may prevent a meaningful defense from being offered, should one exist. ***Id.*** Competence is not the same as eloquence or sophistication, nor does competence guarantee success. We will not reverse a competency determination unless it is clearly erroneous. ***State v. Byrge***, 2000 WI 101, ¶46, 237 Wis. 2d 197, 614 N.W.2d 477. In some cases, though, the

[4] Despite an adequate record supporting a forfeiture determination, the court also concluded Staffa had knowingly, intelligently, and voluntarily waived his right to counsel, and the State argues we could alternatively affirm that finding. Because we conclude the record supports forfeiture, we do not reach the question of whether there was also, or instead, waiver.

record will be so clear that an evidentiary hearing on the matter is unnecessary. ***Klessig***, 211 Wis. 2d at 214 n.9.

¶14 Here, the trial court indicated in its postconviction ruling that Staffa was clearly able to represent himself. The record supports this determination. Although Staffa previously experienced some head trauma which resulted in seizures and memory issues, there is no showing that these maladies hindered his defense in any way.[5] Indeed, the record indicates the contrary.

¶15 Although Staffa had only an eighth-grade education, he obtained his general equivalency diploma. He had been a self-employed mechanic, owning his own business. Staffa was familiar with the criminal justice system, having been accused and acquitted of another set of sexual assault charges. Staffa was able to file motions, understand the proceedings, and conduct legal research. Further, Staffa provided a cogent defense. He offered an alternate explanation for why he was with the victim, offered testimony regarding a knee injury to counter testimony he ran away from the victim when caught, emphasized the victim's drug and alcohol use, objected to improper testimony, impeached his co-actor, and emphasized there was no DNA evidence to link him to the victim. Thus, Staffa's assertion he had "no clue … how to present his case" misrepresents the record. He was able to understand the case against him, conduct his own defense, and had no identifiable disability preventing him from communicating a defense to the jury. We are satisfied Staffa was competent to represent himself.

[5] Staffa relies, in part, on the fact that the attorney appointed for him at sentencing wanted him to submit to a psychological exam. Staffa refused to submit to that examination, and the mere fact that the attorney asked for it does not indicate Staffa suffers any psychological disability. Further, Staffa does not demonstrate on appeal that he has any diagnosed issue which prevented him from putting on a defense.

III. Alleged Trial Court Bias

¶16 Staffa points to two comments the court made in his allegation of bias. As reproduced in his brief, they are as follows:

> DEFENDANT STAFFA: Well, why ask the question if everything I ask he doesn't have to answer?
>
> COURT: Well, because he's supposed to be able to read your mind, okay.
>
> DEFENDANT STAFFA: No, I asked him a question why he portrayed me to be a certain way.
>
> COURT: He's sworn to tell the truth under oath and he just did.
>
> DEFENDANT STAFFA: Okay, whatever. I'm done with you.
>
> ….
>
> COURT: You can testify to that. If he said that, that's what he said.
>
> DEFENDANT STAFFA: I know, but I'm coming around to a question, trust me.
>
> COURT: Well, I'm not sure you're worthy of the trust. (Underlining in brief.)

Staffa contends the first statement is an improper comment on the witness's veracity, and the second statement is an improper comment on Staffa's credibility.

¶17 We agree with the State that these complaints were waived. Staffa failed to object at trial, ask the judge to remove himself, or otherwise complain. *See* ***State v. Davis***, 199 Wis. 2d 513, 517-18, 545 N.W.2d 244 (Ct. App. 1996); ***State v. Marhal***, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992).

¶18 Even on the merits, however, Staffa's claim of error fails. Whether a judge was a "neutral and detached magistrate" is a question of constitutional fact.

State v. Neuaone, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298. We presume that a judge is free of bias and prejudice. ***Id.*** The burden is on the party asserting judicial bias to demonstrate that bias by a preponderance of the evidence. ***Id.*** Further, we apply both a subjective and an objective test. ***Id.*** Subjectively, we first look to the judge's determination of whether he or she will be able to act impartially. ***Id.*** Objectively, we look to whether there are objective facts demonstrating that the judge was actually biased, which requires the judge actually treated the defendant unfairly. ***Id.***

¶19 The subjective test was never truly applied because Staffa never asked the judge to recuse himself and thus the court never had to determine whether it could proceed impartially. Under the objective test, however, the context of the challenged comments and the court's postconviction decision reveal there was no actual bias. The court explained:

> The first comment, referencing witness Michael Peterson … was made by the Court after a lengthy exchange with Mr. Staffa about the appropriateness of certain statements Mr. Staffa had made regarding [Peterson's] credibility …. [I]t was the Court's intent to underline to the jury that, in fact, Mr. Peterson was under oath in front of the jury at the time he testified. The Court was making no comment about Mr. Peterson's credibility….
>
> The next statement by the Court … came again at the end of a conversation between Mr. Staffa and the Court wherein the Court was trying to get Mr. Staffa to focus on questioning the witness and not testify[ing] from the defendant's table, including the offering of irrelevant, inadmissible and unfairly prejudicial statements. The Court is satisfied that the jury clearly understood that the "trust" issue raised had to do with whether Mr. Staffa could understand and follow the Court's clear direction in this regard.

Our review of the transcript reveals the trial court appropriately characterized these comments. They do not reveal "that the judge actually treated the defendant unfairly." ***Id.***

¶20 At worst, the court's comments in this case reveal judicial frustration, not judicial bias.

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. … Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women … sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.

Liteky v. United States, 510 U.S. 540, 555-56 (1994).

IV. A New Trial in the Interests of Justice

¶21 Finally, Staffa seeks a new trial in the interests of justice, *see* WIS. STAT. § 752.35 (2005-06), asserting he had no idea how to present a defense. Because we have concluded he was capable of self-representation, his claim for a new trial on the contrary notion fails. Staffa also asserted judicial bias as a justification when he made his argument for a new trial in the trial court. Although not repeated on appeal, we note that because there was no judicial bias, it cannot serve as a basis for a new trial either. Consequently, there is no reason to invoke our discretionary reversal power.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).