COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1899-CR **Cir. Ct. No. 2009CF3670**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOVAN DUKIC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Jovan Dukic appeals from a judgment of conviction, entered upon a jury's verdict, on one count of stalking a victim under the age of eighteen. Dukic contends the trial court erred by not conducting a proper colloquy when he asked to represent himself at trial, and he argues that

multiple erroneous evidentiary rulings had a cumulatively prejudicial impact. We reject these arguments and affirm the judgment.

¶2 On August 8, 2009, Dukic was charged with five counts: one count of first-degree sexual assault of a child, two counts of second-degree sexual assault of a child, kidnapping, and stalking. A projected plea hearing was held on September 14, 2009, but Dukic's behavior during the hearing caused the trial court to order a competency evaluation. Dukic was deemed competent to stand trial; that determination was accepted without objection. On October 22, 2009, Dukic submitted a written speedy trial demand.

¶3 On November 11, 2009, the trial court heard defense counsel's motion to withdraw. Counsel indicated that Dukic had asked him to contact several witnesses who spoke only Serbian, and counsel had been unable to get in touch with the one qualified Serbian interpreter he knew of. He suggested that Dukic might prefer an attorney who spoke Serbian and could expedite the witness-interview process. Counsel also suggested that Dukic would withdraw his speedy trial demand and reinstate it at a later date. Counsel further stated that he had contacted a local attorney who spoke Serbian, convinced that attorney to agree to take Dukic's case, and made arrangements with the public defender's office to ensure that the other attorney would be appointed if counsel withdrew.

¶4 When the trial court asked Dukic about his understanding of the situation, Dukic told the court he did not want any delay. The trial court explained that it could not guarantee the December 14, 2009 trial date if Dukic did want the new attorney—the trial court expected that a month would not be enough time for new counsel to prepare and, in any event, the odds of counsel's calendar being clear were slim. After Dukic argued with the trial court about whether a new

attorney could be prepared in a month, the trial court denied the motion to withdraw in order to preserve Dukic's speedy trial right.

¶5 On the second day of trial, Dukic repeatedly interrupted proceedings, causing the trial court to remove him from the courtroom. Equipment was set up so that Dukic could remotely view the trial. On the third day, Dukic was allowed back in the courtroom because he planned to testify. As soon as the jury was seated, Dukic demanded he be allowed to represent himself. The trial court refused, stating, "Based upon your conduct alone, sir, the court doesn't believe you're competent to proceed[.]" The State declined the trial court's mistrial offer.

¶6 The jury acquitted Dukic of the first four counts and convicted him of the stalking charge. The trial court sentenced him to twenty-seven months' initial confinement and thirty-three months' extended supervision out of a maximum total possible sentence of six years' imprisonment. Dukic appeals.

¶7 A criminal defendant has the right, under both the United States and Wisconsin Constitutions, to be assisted by counsel. *See* ***State v. Imani***, 2010 WI 66, ¶20, 326 Wis. 2d 179, 786 N.W.2d 40. The implicit corollary to this right is the defendant's right to self-representation. *See* ***id.*** Denial of either right is a structural error, subject to automatic reversal. *See* ***State v. Harvey***, 2002 WI 93, ¶37, 254 Wis. 2d 442, 647 N.W.2d 189. However, the right to an attorney is so important that nonwaiver of that right is presumed. *See* ***Imani***, 326 Wis. 2d 179, ¶22. The presumption may be overcome only by an affirmative showing that the defendant knowingly, intelligently, and voluntarily waived the right to counsel.

Id. In addition, even with a valid waiver, the defendant must also be competent to proceed *pro se*.[1] ***Id.***, ¶15.

¶8 In ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), the supreme court explained:

> To prove such a valid waiver of counsel, the [trial] court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice 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 against him, and (4) was aware of the general range of penalties that could have been imposed on him.

If the defendant does not fulfill these criteria, knowing and voluntary waiver will not be found, and the trial court must prevent the defendant from representing himself. *See* ***id.*** at 203-05. The supreme court further "mandate[d] the use of a colloquy in every case" where a defendant seeks to proceed *pro se*. *See* ***id.*** at 206. Here, the trial court did not engage Dukic in any colloquy whatsoever. It is this omission that leads him to argue he is entitled to a new trial and a proper colloquy. Dukic is mistaken.

¶9 In ***Imani***, the trial court had engaged the defendant in only two of the four ***Klessig*** inquiries. *See* ***Imani***, 326 Wis. 2d 179, ¶33. The supreme court reaffirmed the ***Klessig*** colloquy requirement, reminding trial courts that the colloquy is "mandated." It noted, however, that it "makes little practical sense to fault the [trial] court for not engaging Imani in the full colloquy; if any one of the

[1] The competency to proceed *pro se* is greater than the necessary competency to stand trial. *See* ***State v. Klessig***, 211 Wis. 2d 194, 212, 564 N.W.2d 716 (1997).

four conditions was not met, the [trial] court was required to conclude that Imani did not validly waive his right to counsel." ***Imani***, 326 Wis. 2d 179, ¶34.

¶10 Indeed, the supreme court also explained: "Logic commands that when a series of elements is stated in the conjunctive … thereby requiring a finding of each element in order to prove the conclusion, disproving the conclusion requires only one element to fail." ***Id.***, ¶34 n.11. Thus, if the trial court determines that the defendant is not competent to try to represent himself or herself, the waiver of counsel must be rejected. ***Id.*** "[W]e decline to place form over substance when logic commands the answer." ***Id.***

¶11 Here, while the trial court should have, according to ***Klessig*** and ***Imani***, engaged Dukic in a colloquy, there is no reversible error because the trial court determined he was incompetent to represent himself. The results of any colloquy would, therefore, have been wholly irrelevant. *See* ***Imani***, 326 Wis. 2d 179, ¶60; *cf.* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984) (courts need not address both prongs of ineffective-assistance claims if defendant fails to make proper showing on one of them).

¶12 Dukic attempts to distinguish his case from ***Imani***, noting that the trial court here did not attempt any portion of a colloquy. However, the message from the supreme court is clear: the lack of a complete colloquy is not necessarily an automatic basis for reversal. Like the supreme court, we refuse to elevate form over substance.

¶13 Dukic nevertheless complains that the trial court erred because it failed to consider things like his education level, his mastery of English, and his experience with the court system when determining his competence. *See* ***Klessig***, 211 Wis. 2d at 212.

¶14 The defendant's competency to proceed *pro se* is "'uniquely a question for the trial court to determine.'" ***Imani***, 326 Wis. 2d 179, ¶37 (quoted source omitted). We uphold the trial court's competency determination unless totally unsupported by the facts. ***Id.***, ¶19. "[A] defendant's 'timely and proper request' should be denied only where the [trial] court can identify a specific problem or disability that may prevent the defendant from providing a meaningful defense." ***Id.***, ¶37 (quoted source omitted).

¶15 Here, the trial court's comment that Dukic's behavior prevented him from proceeding *pro se* was an adequate finding. *See, e.g.*, ***State v. Haste***, 175 Wis. 2d 1, 22, 26, 500 N.W.2d 678 (Ct. App. 1993). Dukic disrupted the proceedings and his behavior was distressing to the victim when she testified. As Dukic's lawyer put it at an earlier hearing, Dukic was better at talking than listening, and Dukic repeatedly failed to abide by the trial court's instructions and admonitions. We discern no error in the competency determination.

¶16 Alternatively, we conclude that Dukic's request to represent himself was not timely. *See* ***id.*** at 24; *see also* ***Imani***, 326 Wis. 2d 179, ¶37. Dukic did not make his request in November 2009, when counsel moved to withdraw. He did not make his request on the first or the second day of trial. Instead, it was not until the third day of trial that Dukic asked to represent himself. Dukic attempts to distinguish his case from others like ***Haste***, where the defendant's request prior to jury selection was deemed untimely, because Dukic did not seek an adjournment like other defendants. He does not, however, explain the inherent untimeliness of

his request.[2] *See* ***Hamiel v. State***, 92 Wis. 2d 656, 673-74, 285 N.W.2d 639 (1979). We thus conclude the request to proceed *pro se* was untimely. *See* ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985) (we may affirm on grounds other than those presented to trial court).

¶17 Dukic also argues, in rather conclusory fashion, that the trial court made several erroneous rulings on trial counsel's objections to testimony, the cumulative effect of which was to deny Dukic a fair trial. The decision to admit or exclude testimony is committed to the trial court's discretion. *See* ***Steinbach v. Gustafson***, 177 Wis. 2d 178, 185-86, 502 N.W.2d 156 (Ct. App. 1993). We generally look for reasons to sustain discretionary determinations. ***Id.*** Here, we conclude that even if there was error, it was harmless. *See* ***State v. Hale***, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W.2d 637 (error is harmless if beneficiary proves beyond reasonable doubt that error did not contribute to verdict).

¶18 In his brief, Dukic identified seven specific instances[3] where defense counsel objected to testimony and the trial court overruled the objections.[4] Example A, a question about why the victim was in a pavilion, and Example G,

[2] The State argues persuasively that the request was a tactic designed to prevent the trial court from removing Dukic from the courtroom again. That is, Dukic appeared to believe that if he represented himself, the trial court could not remove him, no matter how disruptive. For the same reason that the courts do not allow the right to counsel to be manipulated to cause delay, neither will we permit the right to proceed *pro se* to be used to facilitate a defendant's obstreperous and defiant behavior. *See* ***Hamiel v. State***, 92 Wis. 2d 656, 673-74, 285 N.W.2d 639 (1979) (where request to proceed *pro se* is made on day of trial or immediately prior, determinative question is whether request proffered merely to secure delay or tactical advantage; right to proceed *pro se* "intended to ensure the defendant's right to a full and fair trial," not to allow defendant to delay trial for unjustifiable reason).

[3] We do not consider any alleged errors not specifically identified.

[4] We note that these objections, as set forth in the brief, are wholly devoid of any useful context.

regarding the direction in which someone was running through a park, appear to relate to crimes for which Dukic was acquitted. Admission of that testimony, then, was clearly harmless. Examples E and F relate to whether a restraining order was obtained against Dukic. To the extent this testimony relates to the charges of which Dukic was acquitted, its admission was harmless. If this testimony relates somehow to the stalking charges, Dukic makes no specific argument about why he thinks this particular testimony was prejudicial. We do not consider undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶19 Examples B, C, and D are excerpts from a deputy's testimony, relating to the contention that Dukic made more than sixty phone calls per day to his victim. This testimony goes to the stalking charge of which Dukic was convicted. While it appears that Dukic's main argument is that this testimony is cumulative and should be excluded, we note two points. First, the trial court *may* exclude cumulative evidence; it is not required to do so. *See* WIS. STAT. § 904.03 (2009-10). Second, and more importantly, not only did the victim testify about the volume of calls she received from Dukic, but Dukic himself admitted calling her over sixty times. Therefore, any admission of the deputy's testimony, even if erroneous, was harmless.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).