IN THE COURT OF APPEALS OF IOWA

No. 9-142 / 08-0051
Filed March 26, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JODY NOLAN McCULLAH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza Ovrom, Judge.

Defendant appeals from judgment entered upon his convictions of escape and four counts of inmate assault. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Jason B. Shaw and Thomas J. Gaul, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Potterfield, JJ.

MAHAN, P.J.

Defendant Jody McCulluh appeals from judgment and sentences entered upon his convictions of escape and four counts of inmate assault. He contends there was insufficient evidence to support the inmate assault convictions and he was denied his right to self-representation. We affirm.

I. Background Facts and Proceedings.

Jody McCullah was an inmate at the Polk County Jail, held there on felony charges. Des Moines police officer Bonita Harper was employed as a detention officer at the jail, where she worked in the second floor control room. McCullah approached Officer Harper from behind and hit her on the right side of the head with his closed fist. Harper did not remember anything that happened after McCullah hit her. After the incident, Harper had blood on her chin and on her lip, as well as a large bruise on her forehead. Harper did not suffer any bleeding wounds, and knew the blood was not hers, but did not know its source.

Detention Officer Randall Rodish entered the area and saw McCullah at the control panel in the control room pushing buttons that locked and unlocked the doors on the second floor of the jail. Officer Harper was telling McCullah to leave the room, and trying to grab him to pull him out, but McCullah punched her a second time on the side of the face. Officer Rodish called for help using his shoulder radio, and then entered the control room and sprayed McCullah's face with a type of mace. This had no effect, so Officer Rodish kicked McCullah in the knee and grabbed him, trying to get him to the floor. McCullah fought back, but eventually Officer Rodish managed to wrestle him to the floor punching McCullah in the back three or four times as McCullah continued to fight back and try to get

up. In the struggle Officer Rodish suffered a cut on his head that required five staples to close. There was a great deal of blood on Officer Rodish's shirt, but he believed it was his own. However, McCullah also suffered cuts to his face during the struggle. The source of the blood on the shirt was never determined.

Polk County Deputies Joseph Purscell, Brandon Bracelin, and Mark VanDePol heard Officer Rodish's call for help and hurried to the control room. Arriving at the scene, the deputies saw Officer Harper lying on the floor, McCullah struggling with Officer Rodish, and a large amount of blood on the floor and the wall. The deputies struggled with McCullah for about two minutes, trying to get control of his arms and legs so he could be placed in restraints. Deputy VanDePol used a TASER on McCullah, who went limp, and the deputies were only then able to get him into handcuffs and leg irons. In the struggle Deputy Purscell got a large amount of blood on his arms, in his eye, and on his uniform. Deputy Purscell suffered no cuts, and the blood he contacted was not his own. However, he did not know the source of that blood. Deputy Bracelin got blood on his hand. There was no testimony concerning the source of this blood; Deputy Bracelin himself suffered no bruises or cuts. Deputy VanDePol did not suffer any injuries in the struggle. No steps were taken to determine the source of the blood in the control room.

The State charged McCullah with one count of escape in violation of Iowa Code section 719.4(1) (2007), and four counts of inmate assault in violation of section 708.3B, alleging assaults upon Officer Harper, Officer Rodish, Deputy Purscell, and Deputy Bracelin. McCullah was convicted as charged, and the court sentenced him to serve five consecutive five-year terms of imprisonment.

McCullah appeals. He first contends that Iowa Code section 708.3B, which criminalizes inmate assaults against jail employees and requires that either blood be cast or expelled upon a jail employee or that the employee come in contact with blood, implies that the source of bodily fluids must be that of the defendant. Because the State did not present evidence as to the source of the blood with which the jail employees came in contact, he argues the convictions are not supported by sufficient evidence. He also argues he was denied his right to self-representation.

II. Sufficiency of the Evidence.

Iowa Code section 708.3B provides:

> A person who, while confined in a jail or in an institution or facility under the control of the department of corrections, commits any of the following acts commits a class "D" felony:
>
> 1. An assault, as defined under section 708.1, upon an employee of the jail . . ., which results in the employee's contact with blood, seminal fluid, urine, or feces.
>
> 2. An act which is intended to cause pain or injury or be insulting or offensive and which results in blood, seminal fluid, urine, or feces being cast or expelled upon an employee of the jail . . . .

McCullah argues that this statute must be read to limit its application to assaults in which the inmate himself is the source of the blood. The district court rejected this argument, and we review its interpretation for errors at law. *See State v. Moorehead,* 699 N.W.2d 667, 671 (Iowa 2005).

> The rules of statutory interpretation that guide our analysis are well settled. When a statute's text is plain and its meaning clear, we do not search for meaning beyond [the statute's] express terms. The terms of a statute must be enforced as written.

State v. Iowa Dist. Ct., 730 N.W.2d 677, 679 (Iowa 2007) (internal citations and quotations omitted).

The language of Iowa Code section 708.3B is straightforward. There is nothing in the statutory language that requires the bodily fluids with which the employee comes in contact be that of the defendant. McCullah asks this court to read into the statute something that is not there.

> Statutory text may express legislative intent by omission as well as inclusion. The court may not enlarge or otherwise change the terms of a statute as the legislature adopted it. When a proposed interpretation of a statute would require the court to read something into the law that is not apparent from the words chosen by the legislature, the court will reject it.

Id. (internal citations and quotations omitted). Like the district court, we reject McCullah's strained reading of the statute. McCullah challenges the sufficiency of the evidence with respect to the inmate assault convictions.

When the record contains substantial evidence of guilt, we are bound by the jury's findings. *State v. Button,* 622 N.W.2d 480, 483 (Iowa 2001). In deciding whether the evidence is substantial, we view the evidence in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence. *Id.* Substantial evidence is evidence which could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *State v. Sutton*, 636 N.W.2d 107, 110 (Iowa 2001).

There is substantial evidence that McCulluh, while confined in jail, committed the requisite assault or act intended to cause pain or injury "which result[ed] in the employee[s'] contact with blood."[1] His convictions are thus supported by sufficient evidence.

[1] McCulluh also argues there is insufficient evidence that he assaulted Deputy Purscell. McCulluh did not make this argument before the district court and, consequently, it will not be considered on appeal. *See State v.* Houts, 622 N.W.2d 309, 311-12 (Iowa 2001).

III. Right to Self-representation.

In a state criminal trial, the defendant has a Sixth and Fourteenth Amendment right under the United States Constitution to self-representation. *State v. Martin*, 608 N.W.2d 445, 450 (Iowa 2000) (citing *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562, 566 (1975)). We review Sixth Amendment claims de novo. *Martin,* 608 N.W.2d at 449.

The Sixth Amendment "grants to the accused personally the right to make his defense." *Faretta,* 422 U.S. at 819, 95 S. Ct. at 2533, 45 L. Ed. 2d at 572. However, the right to self-representation is not effective until asserted. *State v. Rater,* 568 N.W.2d 655, 658 (Iowa 1997). Before the right to self-representation attaches, a defendant must voluntarily, clearly, and unequivocally elect to proceed without counsel by knowingly and intelligently waiving his Sixth Amendment right to counsel. *Hannan v. State*, 732 N.W.2d 45, 55 (Iowa 2007).

> The requirement serves two purposes. First, it acts as a backstop for the defendant's right to counsel, by ensuring that the defendant does not inadvertently waive that right through occasional musings on the benefits of self-representation. *See, e.g., Meeks* [*v. Craven*, 482 F.2d 465, 467 (9th Cir.1973)] (defendant cannot waive right to counsel by once stating "I think I will [represent myself]"). Because a defendant normally gives up more than he gains when he elects self-representation, we must be reasonably certain that he in fact wishes to represent himself. *See Brewer v. Williams,* 430 U.S. 387, 404, 97 S. Ct. 1232, 1242, 51 L. Ed.2d 424[, 440] (1977) (courts must indulge in every reasonable presumption against waiver of the right to counsel).
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> The requirement that a request for self-representation be unequivocal also serves an institutional purpose: It prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation. A defendant who vacillates at trial between wishing to be represented by counsel and wishing to represent himself could place the trial court in a difficult position: If the court appoints counsel, the defendant could, on appeal, rely on his intermittent requests for self-representation in arguing that he had been denied the right to represent himself; if

> the court permits self-representation, the defendant could claim he had been denied the right to counsel. *See Meeks,* 482 F.2d at 468. The requirement of unequivocality resolves this dilemma by forcing the defendant to make an explicit choice. If he equivocates, he is presumed to have requested the assistance of counsel.

Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989). We engage in every reasonable presumption against the waiver of the right to counsel. *Rater*, 568 N.W.2d at 661.

1. Prior to trial. After being charged, McCullah asked the court to appoint counsel for him, and the court appointed public defender Paul White. On attorney White's application, proceedings were stayed in this case (and another) pending a competency evaluation. The competency report by psychologist Steven Warner found that McCullah was competent to stand trial. Dr. Warner concluded that McCullah's self-reports of hallucinations and delusions did not appear credible, and that McCullah appeared to be malingering in an effort to gain an advantage within the legal system. Relying on Dr. Warner's evaluation, the court found McCullah competent, and lifted the stay.

In the course of a hearing on McCullah's motion to suppress, McCullah interrupted the proceedings to express dissatisfaction with attorney White and to ask for a continuance in order to seek additional counsel or new counsel. The court found McCullah had not established grounds for substitution of counsel and scheduled McCullah's trial for August 22, 2007.

In the course of a hearing on August 21, the day before trial, McCullah again asked for a continuance in order to find another attorney, and the court again found there was no basis for substitution of counsel. After hearing McCullah make a number of apparently irrational statements, and after the State

noted that Dr. Warner's evaluation might become admissible if McCullah tried to "look crazy" at trial, the court warned McCullah that he should let attorney White speak for him in front of the jury. McCullah responded as follows:

> DEFENDANT: Then I relieve Mr. White of his duties, and I will take control of my own case.
> THE COURT: Mr. White is representing you at this time.
> DEFENDANT: Then I deny representation.
> THE COURT: I'm just telling you when we're in front of the jury, he's going to be the one[.]
> DEFENDANT: I'm challenging your authority under act.com.
> THE COURT: I've allowed you to speak to me at this hearing which is fine, but I'm telling you when we're in front of the jury, Mr. White will –
> DEFENDANT: But I'm overruling your authority under the Patriot and G13 Step 5 act.com, and I'm asking you to enter a ruling for dismissal under the Patriot Act guidelines.

Following the hearing the court entered an order noting that McCullah had not shown cause to justify substitution of counsel, but it did not mention the issue of self-representation.

This case began with McCullah's request for appointment of counsel. In the ensuing four months McCullah expressed a desire to seek additional or new counsel, but did not express a desire to represent himself. In addition, Dr. Warner evaluated McCullah and found that he appeared to be malingering in an effort to manipulate the legal system. One day before trial McCullah again expressed a desire for a different attorney. Only after the court rejected McCullah's request did McCullah state, "Then I relieve Mr. White of his duties, and I will take control of my own case." This was not a clear and unequivocal waiver of his right to counsel.

McCullah's statement that he would "take control of my own case" appeared to be at least as much an expression of frustration with the court's

refusal to appoint substitute counsel as an expression of a considered desire to represent himself. A defendant's statement that he wishes to represent himself is not unequivocal "if he makes that statement merely out of brief frustration with the trial court's decision regarding counsel and not as a clear and unequivocal assertion of his constitutional rights." *State v. Spencer,* 519 N.W.2d 357, 359 (Iowa 1994) (citing *Burton v. Collins,* 937 F.2d 131, 133-34 (5th Cir. 1991) (defendant's statements correctly interpreted as indicating dissatisfaction with his attorney rather than an unequivocal assertion of right to self-representation)), *see also Hamilton v. Groose,* 28 F.3d 859, 860-62 (8th Cir. 1994) (request for self-representation equivocal where it was plain that defendant's real desire was for substitute counsel rather than self-representation, and defendant's failure to move for self-representation until three weeks before trial suggested that defendant's real motive was to delay trial). Because McCullah's request for self-representation was not clear and unequivocal, the court was not required to engage him in a *Faretta* dialogue. *United States v. Cromer,* 389 F.3d 662, 683 (6th Cir. 2004) ("Because there was no waiver, clearly and unequivocally asserted, there was no need to warn [defendant] about the consequences of that waiver.")

2. Prior to jury selection. On the date of trial, the court warned McCullah to heed attorney White's advice to say nothing more. McCullah responded as follows:

> DEFENDANT: I'm going to have to fire my attorney, Your Honor, and take control of my case. I assume the Polk County – what is your designation?

> MR. WHITE [2] : I'm an attorney.
>
> DEFENDANT: You're an attorney, okay. I'm going to take over my case, Your Honor, under the grounds of fraudulent representation. I'm going to allege collusion, conspiracy, and corruption in this case, and I'm taking control of this case, *and I will accept the Polk County attorney as co-counsel.* I reaffirm my movement for the dismissal on the grounds of illegal procedure, and I'm making allegations of corruption, collusion, and conspiracy between the Polk County Attorney and Mr. White.
>
> THE COURT: I'm going to deny that at this point. It's so late in the trial. We're just getting ready to start trial, so that motion is denied at this time.

(Emphasis added.) McCullah's statement that he would "take over [his] case" and "accept the Polk County attorney as co-counsel," does not indicate an unequivocal election to proceed without counsel.

In any event, the district court acted within its discretion in finding McCullah's request was untimely.

> Once the trial has begun with the defendant represented by counsel . . . his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance.

State v. Smith, 215 N.W.2d 225, 227 (Iowa 1974) (internal quotation omitted); *see also United States v. Edelmann,* 458 F.3d 791, 808-09 (8th Cir. 2006) (finding the trial court acted within its discretion in denying request for self-representation in part because it was made four or five days before trial); *United States v. Smith,* 413 F.3d 1253, 1280-81 (10th Cir. 2005) (finding request for self-representation untimely when made six days before trial, trial had already been

[2]Apparently an error. The context suggests that the speaker was the prosecutor, Assistant Polk County Attorney Jeffrey Noble.

continued, and allowing self-representation would necessitate yet another continuance to give defendant time to prepare).

3. During trial. As the trial progressed, it appeared that a major source of McCullah's dissatisfaction with attorney White arose from the fact that McCullah wanted White to ask certain questions of the State's witnesses, but White believed McCullah's proposed questions were not proper and some of them did not support the defense. McCullah asked for a continuance to review his legal materials and prepare his case, saying:

> [A]ll I'm trying to do is say that I'm trying to represent myself as an individual. I don't feel that my attorney has done an ample or adequate job in doing that, and I'm asking the Court for a new attorney or either to represent myself in this case with Mr. White as co-counsel . . . .

The State argued that McCullah's "eleventh hour" request for a continuance and request to represent himself constituted "gamesmanship," and the court said it did not "believe the defendant has shown cause to justify replacement of attorney or to dispense with services of an attorney at this late stage of the proceeding." The court told McCullah he could write out the questions he wanted attorney White to ask the witnesses, and White would ask those questions on McCullah's behalf. McCullah replied:

> THE DEFENDANT: . . . . In response to that, Your Honor, I'm willing to proceed with a caveat that I am unhappy with my counsel and I did make an opening request in open court for new counsel and I did make allegations of malicious prosecution, prosecutorial misconduct, just so it's on the record that these are my concerns.

Within the space of a few minutes, McCullah stated he was "trying to represent myself," he wanted "a new attorney," he wanted "to represent myself in

this case with Mr. White as co-counsel," and he was "willing to proceed with a caveat that I am unhappy with my counsel." We cannot find such statements as unequivocal requests for self-representation. And, as already noted any such request was not timely.

McCullah's vacillation between requests for substitute counsel and requests for self-representation, both before and during the trial, rendered his language equivocal, particularly in view of the fact that his final words on the subject were an expression of willingness to proceed with attorney White as counsel.

This court reviews "the record as a whole to determine whether the defendant desired to be represented by counsel." *State v. Spencer,* 519 N.W.2d at 360. Viewed as a whole, the record made before and during the trial indicates McCullah did not assert his right to self-representation clearly and unequivocally. The district court acted within its discretion in refusing to allow McCullah to represent himself. Because McCullah's request was not clear and unequivocal, the court was not required to engage McCullah in a *Faretta* colloquy.

IV. Conclusion.

Inmate assault does not require that the blood with which the victim comes in contact be the defendant's. McCullah did not unequivocally invoke his right to self-representation. Because we find his claims of error without merit, we affirm.

AFFIRMED.