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**IN THE
COURT OF APPEALS OF INDIANA**

KENDALL D. MCGEE,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 20A03-1010-CR-568

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0907-FC-16

April 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Kendall D. McGee (“McGee”) appeals following convictions for Criminal Confinement, as a Class C felony¹, Strangulation, as a Class D felony², and Battery, as a Class A Misdemeanor³, and the trial court’s finding that he is a habitual criminal offender.⁴ He raises one issue for our review, whether he knowingly, intelligently, and voluntarily waived his right to trial counsel.

We affirm.

Facts and Procedural History

Early on July 18, 2009, McGee had arrived at Jocelyn Weekly’s (“Weekly”) sister’s home, where Weekly was living at the time. McGee and Weekly had previously dated. McGee forced Weekly from the home, slammed Weekly’s face into the side of his truck, shoved her into his truck, grabbed her hair and forced her face into the truck’s interior console, struck her face several times, punched her left eye, whipped her with his belt, hit her with a stick, choked her with his hands, and said that he would kill her. McGee then left Weekly nude in an alley, and she walked naked and barefoot through downtown Elkhart to return to her home. McGee eventually drove up behind Weekly and forced her to get back in the truck.

Around 7:40 a.m., Officer James Wrathell of the Elkhart Police Department was

¹ See Ind. Code § 35-42-3-3.

² See I.C. § 35-42-2-9.

³ See I.C. § 35-42-2-1.

⁴ See I.C. § 35-50-2-8.

dispatched to respond to a domestic disturbance call. Upon arriving at the scene, Officer Wrathell observed tire tracks consistent with a vehicle reported to police as being involved in the disturbance. While searching for the vehicle reported by dispatch, Officer Wrathell received a radio call from Corporal Willie Lee, indicating that he had stopped a vehicle matching the description reported by dispatch.

Officer Wrathell and Corporal Lee approached the vehicle. McGee and Weekly were inside. Weekly was naked, with her clothes crumpled in her lap, and appeared “terrified.” (Tr. 89.) Weekly got out of the car, and Officer Wrathell instructed Weekly to dress herself. Weekly expressed her desire at that time to get away from McGee.

Upon examination, Officer Wrathell observed a pink spot on Weekly’s face and a “dry red substance around the edge of her lips” that appeared to Officer Wrathell to be dried blood. (Tr. 92.) While still at the scene, Corporal Lee made a visual observation and took photographs of Weekly’s body, which revealed injuries to her face, back, right shoulder, neck, and foot. McGee was arrested at the scene.

On July 22, 2009, McGee was charged with Criminal Confinement, Strangulation, and Battery. The State also sought an enhancement of his sentence as a habitual criminal offender.

On March 24, 2010, McGee requested permission to defend his case without representation of counsel. A hearing was held on the request on May 6, 2010. At the beginning of the hearing, McGee tendered a signed Waiver of Attorney form that indicated his acknowledgment of the disadvantages posed by proceeding *pro se* and providing

information on his education and background. During the hearing, the trial court inquired as to McGee's educational and criminal background, his prior experience with the courts, and his motivations for proceeding without representation by counsel. McGee indicated his dissatisfaction with his court-appointed attorney, insisting that he wished to seek a speedy trial, and that she refused to do so. The trial court on numerous occasions indicated that proceeding *pro se* posed significant disadvantages and dangers. McGee repeatedly acknowledged his understanding of these and his desire to go without representation of counsel. At the end of the hearing, the trial court granted McGee's motion, and retained his court-appointed attorney as standby counsel, to which McGee agreed.

A bench trial⁵ was conducted on June 8, 2010, at which McGee represented himself with standby counsel. At the conclusion of the trial, the court found him guilty of all the charged offenses and found him to be a habitual criminal offender. On August 12, 2010, the trial court entered judgment and sentenced McGee to six years imprisonment for Criminal Confinement, two years imprisonment for Strangulation, and one year imprisonment for Battery. The trial court enhanced the six year term for Criminal Confinement by eight years as a result of McGee's habitual criminal offender status, resulting in a total term of fourteen years imprisonment for the Criminal Confinement conviction. The trial court then ordered that the term for Criminal Confinement run consecutive to the term for Strangulation, yielding a sixteen year aggregate sentence, with 390 days of credit time.

⁵ McGee himself sought a bench trial instead of a jury trial, filing his motion seeking a bench trial on June 4, 2010, four days before his scheduled trial date, and waiving jury trial. He does not raise any issue as to his waiver of jury trial before this court today.

This appeal followed.

Discussion and Decision

McGee insists that the trial court's granting of his waiver of trial counsel was in error. McGee draws our attention to a number of points, including the extent of the trial court's inquiry into and existing evidence of his education, experience with prior criminal proceedings, and his comprehension of the possible adverse effects to him of waiving representation, as well as the context of McGee's request to proceed *pro se*.

We review claims of the absence of a knowing, intelligent, and voluntary waiver of counsel *de novo*. Miller v. State, 789 N.E.2d 32, 37 (Ind. Ct. App. 2003). The United States Supreme Court has stated that "whether there has been an intelligent waiver of the right to counsel depends on the 'particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" Poynter v. State, 749 N.E.2d 1122, 1127 (Ind. 2001) (quoting Johnson v. Zerbst, 304 U.S. 458, 462-64 (1938)). In Poynter, our supreme court adopted four factors the United States Seventh Circuit Court of Appeals uses to review appeals arguing that waiver of counsel was not intelligent: (1) the extent of the trial court's inquiry into the request for waiver, (2) whether other evidence in the record establishes that the defendant understood the dangers and disadvantages of proceeding *pro se*, (3) the background and experience of the defendant, and (4) the context of the defendant's decision to waive counsel. Id. at 1127-28 (citing United States v. Hoskins, 243 F.3d 407, 410 (7th Cir. 2001)).

The trial court conducted a separate hearing with McGee, with the State and McGee's

court-appointed attorney, Fay Schwartz, present. The trial court inquired into McGee's education and background with the legal system, and other evidence was presented by the State on these matters. In particular, the trial court ascertained from McGee directly that McGee had reached twelfth grade, but did not graduate from high school and that he could read, write, and understand English fluently.⁶

When the trial court inquired as to McGee's experiences with prior criminal proceedings, McGee at first denied such familiarity, but later acknowledged prior criminal convictions, explaining that he at first thought the trial court was inquiring as to whether he had previously undertaken a defense *pro se*. The State also presented evidence on this point, noting that McGee was involved in eight juvenile delinquency proceedings, and had adult criminal convictions for two felonies and nine misdemeanors. McGee then acknowledged his prior experiences in the courts.

The trial court issued numerous warnings to McGee during the hearing as to the disadvantages and risks involved with proceeding *pro se*. In particular, the trial court noted that it would hold him to the same standard as if he were an attorney, indicating that he would "get no consideration due to the fact that you are untrained in the law." (Tr. 41.) Indeed, the judge noted his own extensive experience with the criminal courts as a public defender, deputy prosecutor, and trial court judge, and indicated that he would not represent

⁶ McGee points out, and we acknowledge, that the written waiver McGee signed states that he completed high school and attended two years of college. This is apparently inaccurate, but we do not think that this dramatically changes the circumstances of the case, particularly when it is McGee's own statement as to his education that was presented to the trial court at the hearing.

himself in court because “[a]n individual . . . who attempts to represent himself . . . operates at a considerable disadvantage for a number of strategic and practical reasons.” (Tr. 41.) McGee acknowledged his understanding of these points, nevertheless repeating his expressed desire to proceed *pro se*.

McGee now expresses his most grave concerns as to the context under which he sought to proceed *pro se*, that is, that he sought to waive his right to counsel because he wanted a speedy trial and claimed that his court-appointed attorney refused to pursue such for him. McGee stated in his letter to the court requesting permission to proceed *pro se* that he was unhappy with his appointed counsel’s performance generally. McGee also indicated during the hearing on his request to waive trial counsel that he thought his appointed counsel sought to deny him a speedy trial. While we take note of the reason for McGee’s motion, we go on to observe that the trial court acknowledged McGee’s dissatisfaction with his appointed counsel, but nevertheless warned him that “people who have chosen to represent themselves have not been happy with the outcome.” (Tr. 44.) When McGee again insisted that he was unhappy with being represented by counsel, the trial court warned him that “if you’re convicted, you’ll have plenty of time to reconsider your choice,” to which McGee simply responded, “If.” (Tr. 44-45.) All of this came after McGee signed the waiver form, but before the trial court granted McGee’s request to proceed *pro se*.

Under these circumstances, we cannot agree that the trial court erred when it granted McGee’s request to proceed *pro se*. The trial court made a thorough inquiry into McGee’s background and motivation for waiving counsel, and warned McGee of the implications of

this decision numerous times. At each opportunity, McGee expressed his understanding of the trial court's warnings, insisting nevertheless on proceeding to trial without representation. That McGee now regrets his decision was a risk of which he was warned and which he undertook knowingly and intelligently.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.