NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 KA 0378

STATE OF LOUISIANA

VERSUS

RODERIC K. GRANT

Judgment Rendered: SEP 19 2014

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 12-08-0097

Honorable Michael R. Erwin, Judge Presiding

* * * * *

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Defendant-Appellant,
In Proper Person

* * * * *

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Roderic K. Grant, was charged by grand jury indictment with a felony offense of aggravated rape, a violation of La. R.S. 14:42. At his arraignment, the defendant pled not guilty. He waived his right to a jury trial, and following a bench trial, was found guilty as charged. A motion for new trial was filed, but denied by the trial court. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. He now appeals with two counseled assignments of error and two pro se assignments of error. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On May 16, 2008, J.P.[1], an eleven-year old girl in the fourth grade, stayed home from school with her younger brother, W.P. Later in the day, J.P. and her brother went to the home of two boys to retrieve a movie J.P. had let them borrow. When they arrived, the friends, their parents, and the defendant were present. J.P. testified that she suspected the defendant was at the house to sell drugs to the parents of her friends. Eventually, the parents left "so they [could] go get high," and the four children were left with the defendant. J.P. and her brother testified that the defendant gave the other boys some money to go get "cold drinks," and though she specifically asked if she could go with them, the defendant told her no. Once the boys left, J.P. went into the middle room, but the defendant followed her, closed the door, pushed her onto the bed, and pulled her clothes to the side. J.P. slapped the defendant and tried to "squirm away," but was unsuccessful. The defendant told J.P. if she told anybody, he would shoot her. While being held down by the defendant, penetration did occur in J.P.'s "rear end."

[1] We reference the victim only by her initials. See La. R.S. 46:1844(W).

The three boys, realizing they were not given enough money, returned to the trailer where they heard screaming coming from within. Though the bedroom door was locked, W.P. and one of the boys were able to break in, and W.P. testified he "saw [the defendant] on top of [J.P.]" and she was screaming. They then pushed the defendant off her, and J.P. was able to escape through a bedroom window. J.P. and the three boys ran to the front of the trailer park, and J.P. told the parents of the boys what had happened. They returned J.P. to her mother, who called the police. During this time, the defendant was driving around the trailer park in his vehicle. J.P.'s brother testified that prior to May 16, 2008, he had never met or seen the defendant.

Detective Charles Montgomery of the East Baton Rouge Parish Sheriff's Office was dispatched to the trailer park in reference to the alleged rape. He spoke with J.P., who provided him with details of the events, reporting that the defendant held her in the facedown position, "took off her panties and skirt[,] and raped her anally." However, during his investigation, Detective Montgomery was never informed that someone saw the defendant penetrate J.P. Further, J.P. told Detective Montgomery that she attempted to jump out of the window, but was prevented by the defendant from doing so. Detective Montgomery noted that during his conversation with J.P., she was highly upset and would often break down "in hysterics." He believed J.P.'s story, and did not think that she was lying or made it up. Detective Montgomery then arranged for J.P. to be transported to Our Lady of the Lake Regional Medical Center for a rape examination.

Later, Detective Montgomery spoke with the boys, who indicated that J.P. came to their house, and at some point while they were playing, the defendant put J.P. in the bedroom "because she lost the quiet game," and that later, the defendant went into the same bedroom. The boys reported to Detective Montgomery that they subsequently heard yelling coming from within. The boys tried to open the

door, but it was locked. However, after they beat on it, the defendant opened the door, gave them money, and told them to go buy chips and a drink. Detective Montgomery also spoke to the parents of the boys, who informed him that they left earlier in the day and that the defendant volunteered to watch the children. When they returned home, their boys were not present, and J.P. seemed upset, but when asked if anything was wrong, J.P. ran out of the house. According to the father of the boys, the defendant "seemed agitated and left soon after that in his car." The father also reported to Detective Montgomery that the boys returned just prior to the defendant leaving the trailer. Detective Montgomery was not advised about the defendant threatening J.P. specifically with a pistol, though he recalled "[J.P.] 'said [the defendant] would kill her. If she told anyone he would kill her.'"

Detective Montgomery then met with a crime scene technician and the two looked through the trailer for evidence, taking such items as sheets, a pillow case, a shoe, and a BB gun that was located on top of the refrigerator. While searching the trailer, Detective Montgomery did not notice that the bedroom door appeared kicked or damaged.

Later in the day, the defendant turned himself in, and was transported to the detective bureau where he was interviewed by Detective Montgomery. After being advised of his **Miranda**[2] rights, the defendant denied raping J.P., asserted that she made sexual advances to him, and claimed the kids were "plotting against him." The defendant voluntarily provided a DNA sample from his mouth and penis, and was then placed under arrest.

J.P. was eventually taken to Our Lady of the Lake Regional Medical Center, where she was examined by Dr. Catherine L. Loe, who described J.P.'s demeanor as calm, but embarrassed. In her report[3], Dr. Loe noted that J.P. did not attend

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[2] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[3] The parties stipulated to the admissibility of Dr. Loe's medical report.

school that day. Further, Dr. Loe noted that J.P. locked herself into the middle room, and tried to escape through a window, but the defendant picked the lock with a knife, and that J.P. saw the defendant place it in the kitchen. In her report, Dr. Loe recorded that "[J.P.] says [the defendant] pulled her shirt and shorts down and put his penis in her bottom 10 or 12 times." Dr. Loe observed no vaginal redness, tears, discharge or tenderness, and did not find evidence of fluid on J.P.'s skin, but small superficial rectal fissures were identified without evidence of blood.

EXCESSIVE SENTENCE; INEFFECTIVE ASSISTANCE OF COUNSEL

In his first counseled assignment of error, the defendant argues the mandatory life sentence imposed by the trial court is unconstitutionally excessive. Furthermore, in his second counseled assignment of error, he avers this Court should consider the constitutionality of his sentence even though his trial counsel failed to file a motion to reconsider sentence; and, in the event this Court finds the failure of trial counsel to file a motion to reconsider sentence precludes consideration of the constitutionality of the sentence, then this failure constitutes ineffective assistance of counsel.

The record does not contain an oral or written motion to reconsider sentence. Louisiana Code of Criminal Procedure Article 881.1(E) provides that the failure to file or make a motion to reconsider sentence precludes the defendant from raising an excessive sentence argument on appeal. Ordinarily, pursuant to the provisions of this article and the holding of **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam), we would not consider an excessive sentence argument. However, in the interest of judicial economy we will address this assignment of error, even in the absence of a timely filed motion to reconsider sentence or a contemporaneous objection, because it would be necessary to do so in order to analyze the ineffective assistance of counsel claim.

See **State v. Bickham**, 98-1839 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 891-92.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief in the trial court rather than on appeal. This is because post-conviction relief provides the opportunity for a full evidentiary hearing[4] under La. Code Crim. P. art. 930. However, when the record is sufficient, this Court may resolve this issue on direct appeal in the interest of judicial economy. **State v. Lockhart**, 629 So.2d 1195, 1207 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132.

The Eighth Amendment to the United States Constitution and Article I, Section 20 of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. **State v. Lilly**, 2012-0008 (La. App. 1st Cir. 9/21/12), 111 So.3d 45, 63, writ denied, 2012-2277 (La. 5/31/13), 118 So.3d 386.

The Louisiana Code of Criminal Procedure sets forth, in Article 894.1, items which must be considered by the trial court before imposing sentence. Generally, the trial court need not recite the entire checklist of factors, but the record must

[4] To receive such a hearing, the defendant would have to satisfy the requirements of La. Code Crim. P. art. 924, et seq.

reflect that it adequately considered the criteria. **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. However, the failure to articulate reasons for the sentence as set forth in Article 894.1 when imposing a mandatory life sentence is not an error; articulating reasons or factors would be an exercise in futility since the court has no discretion. **State v. Hano**, 2005-2090 (La. App. 1st Cir. 6/9/06), 938 So.2d 181, 194, writ denied, 2006-1713 (La. 1/26/07), 948 So.2d 164.

A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for the defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 859-60 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

The failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. However, if the defendant can show a reasonable probability that, but for counsel's error, his sentence would have been

different, a basis for an ineffective assistance claim may be found. Thus, the defendant must show that but for his counsel's failure to file a motion to reconsider sentence, his sentence would have been changed, either in the district court or on appeal. **State v. Collins**, 2009-1617 (La. App. 1st Cir. 2/12/10), 35 So.3d 1103, 1107, writ denied, 2010-0606 (La. 10/8/10), 46 So.3d 1265.

Louisiana Revised Statutes 14:42(D)(2)(b), in pertinent part, provides that "if the victim was under the age of thirteen years...[a]nd if the district attorney does not seek a capital verdict[5], the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence." (Footnote added.) Courts are charged with applying a statutorily mandated punishment unless it is unconstitutional. **State v. Dorthey**, 623 So.2d 1276, 1278 (La. 1993). In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 676, the Louisiana Supreme Court re-examined the issue of when **Dorthey** permits a downward departure from a mandatory minimum sentence, albeit in the context of the Habitual Offender Law. The court held that to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

Johnson, 709 So.2d at 676, quoting **State v. Young**, 94-1636 (La. App. 4th Cir. 10/26/95), 663 So.2d 525, 528 (Plotkin, J., concurring), writ denied, 95-3010 (La. 3/22/96), 669 So.2d 1223. While both **Dorthey** and **Johnson** involve the mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused

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[5] The United States Supreme Court has held that the death penalty is not a proportional punishment for the rape of a child in cases where the victim's life was not taken. **Kennedy v. Louisiana**, 554 U.S. 407, 446, 128 S.Ct. 2641, 2664, 171 L.Ed.2d 525 (2008). See also **State v. Davis**, 2008-1378 (La. 12/12/08), 995 So.2d 1211, 1212 (per curiam).

in **Dorthey** are not restricted in application to the penalties provided by La. R.S. 15:529.1. **Collins**, 35 So.3d at 1108.

At the sentencing hearing, the defendant presented no evidence to rebut the presumption that the mandatory life sentence was constitutional. The trial court imposed a sentence of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. On appeal, the defendant argues that because "[c]ounsel for the defense was able to appropriately cross examine each of the children and the deputies as to numerous inconsistencies between their testimony and the statements they gave and evidence collected at the scene," and since the defendant's sperm was not found on J.P.'s rectal swabs or clothing, and because J.P. did not sustain a rectal injury, he should be given a reduced sentence.

We find that the defendant failed to "clearly and convincingly" rebut the presumption that the mandatory life sentence was constitutional. The defendant did not present to the trial court any particular or special circumstances that would support a deviation from the mandatory life sentence provided in La. R.S. 14:42(D)(2)(b).

Moreover, in **State v. Foley**, 456 So.2d 979, 981 (La. 1984), the Louisiana Supreme Court discussed the penalty for aggravated rape, noting that the "mandatory life sentence for aggravated rape is a valid exercise of the state legislature's [prerogative] to determine the length of sentence for crimes classified as felonies." Further, the defendant's guilt having been established, the trial court is not required to reweigh the sufficiency of the evidence as a sentencing factor. **State v. Harris**, 518 So.2d 590, 595 (La. App. 1st Cir. 1987), writ denied, 521 So.2d 1184 (La. 1988). Based on the record before us, we find that the defendant failed to clearly and convincingly show that because of unusual circumstances he was a victim of the legislature's failure to assign sentences that were meaningfully tailored to his culpability, the gravity of the offenses, and the circumstances of the

case. See **Johnson,** 709 So.2d at 676. Given the defendant's deviant sexual nature, exhibited by anally raping an eleven-year old girl, we find that the defendant is exactly the type of offender that La. R.S. 14:42(D)(2)(b) intends to punish. See **State v. Lindsey**, 99-3302 (La. 10/17/00), 770 So.2d 339, 344, cert denied, 532 U.S. 1010, 121 S.Ct. 1739, 149 L.Ed.2d 663 (2001). Accordingly, there was no reason for the trial court to deviate from the provisions of La. R.S. 14:42(D)(2)(b) in sentencing him. Additionally, the sentence imposed was not grossly disproportionate to the severity of the offense, and thus, was not unconstitutionally excessive.

In regard to the defendant's ineffective assistance of counsel claim, even assuming, arguendo, that trial counsel performed deficiently in failing to timely move for reconsideration of the sentence, the defendant suffered no prejudice from the deficient performance because this Court considered the defendant's excessive sentence argument in connection with the ineffective assistance of counsel claim. The defendant has not shown that his sentence was excessive and would have been changed, either in the district court or on appeal, had such a motion been filed. See **Collins**, 35 So.3d at 1107.

For the foregoing reasons, these assignments of error lack merit.

AUTHENTICATION OF EVIDENCE

In his first pro se assignment of error, the defendant claims the trial court erred by allowing J.P.'s rape kit to be introduced into evidence at trial. Specifically, he argues that because crime scene investigator Amie Genola broke the rape kit seal and placed its contents into a "dryer" for preservation, the chain of custody was broken. As such, the defendant avers "[t]here is a great possibility that Investigator, Amie Genola, may have mishandled the DNA evidence taken from both, the [d]efendant and the victim, which resulted in the 'mixture' of their

DNA's together." Therefore, the defendant argues his conviction and sentence should be reversed.

Initially, the record does not support the defendant's claim that Genola placed rape kit evidence and oral and penile swabs taken from the defendant into a dryer. Genola testified that she placed only the items from the rape kit into the dryer. Further, evidence at trial indicated that Detective Montgomery, rather than Genola, obtained the oral and penile swabs from the defendant.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. La. Code Evid. art. 901(A). For admission, it suffices if the custodial evidence establishes that it was more probable than not that the object is the one connected to the case. Furthermore, any lack of positive identification or a defect in the chain of custody goes to the weight of the evidence rather than its admissibility. Ultimately, a chain of custody or connexity of the physical evidence is a factual matter to be determined by the factfinder. **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 455, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603. Moreover, questions regarding the admissibility of evidence are within the discretion of the trial court and should not be disturbed absent a clear abuse of that discretion. **State v. Mosby**, 595 So.2d 1135, 1139 (La. 1992); **State v. Schleve**, 99-3019 (La. App. 1st Cir. 12/20/00), 775 So.2d 1187, 1199, writs denied, 2001-0115 (La. 12/14/01), 804 So.2d 647 & 2001-0210 (La. 12/14/01), 803 So.2d 983, cert. denied, 537 U.S. 854, 123 S.Ct. 211, 154 L.Ed.2d 88 (2002).

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, *i.e.*, unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial

court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751.

At trial, Amie Genola, a crime scene investigator with the East Baton Rouge Parish Sheriff's Office, testified regarding her interaction with J.P.'s rape kit. She stated that upon receipt of J.P's rape kit from the hospital, she removed the items contained therein, and placed them into a secured dryer, the purpose of which is to preserve any bodily fluids which may be present on the items. Genola testified it was protocol for rape kit evidence to be placed in a dryer, and she was the only person authorized to place and access evidence in the secured dryer. She described the dryer as an "air dryer," and stated that the items inside do not touch or come into contact with each other. Two days after the alleged incident, the items were removed from the dryer, placed back into the rape kit, and transported to the crime lab for analysis.

Julia D. Naylor Kirks, a forensic scientist with the Louisiana State Police Crime Lab, was accepted as an expert in the field of forensics. Kirks analyzed a recovered pair of pink underwear, a skirt, rectal swabs and a rectal smear from J.P., a dried secretion swab, buccal swabs from J.P. and the defendant, and penile swabs from the defendant. Initially, Kirks examined the rectal swab and smear of J.P., but was unable to identify any foreign DNA. While she was also unable to identify any seminal fluid, Kirks was able to determine that the DNA profile found on the defendant's penile swab contained a mixture of DNA from both J.P. and the defendant, and that the mixture was 29.2 billion times more likely to come from J.P. and the defendant, rather than from a DNA mixture of the defendant and a randomly selected individual. Furthermore, the DNA mixture found on the inside crotch of J.P.'s skirt/bloomers, though not semen, was consistent with a DNA mixture from both J.P. and the defendant.

On the morning of the second day of trial, defense counsel moved to suppress this evidence based on contamination of evidence/defective chain of custody. The trial court denied the motion to suppress. Considering the above, we find that the trial court did not err or abuse its discretion in allowing the admission of the evidence concerning the rape kit. Any doubts regarding the authenticity of the rape kit were matters of the weight of the evidence, not its admissibility.

Therefore, this assignment of error is without merit.

RIGHT TO COUNSEL

In his second pro se assignment of error, the defendant contends that he had a "very contentious attorney-client relationship," and that the "[t]rial court erred by making the [d]efendant go to trial with counsel that the trial court knew the [d]efendant was in conflict with; and, by failing to inquire whether the [d]efendant wished to represent himself, or not."

A defendant in a state criminal trial has a Sixth Amendment right to proceed without counsel when he voluntarily and intelligently elects to do so. **Faretta v. California**, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975). When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes wide open. **Faretta**, 422 U.S. at 835, 95 S.Ct. at 2541; **State v. Robinson**, 2008-0820 (La. App. 1st Cir. 6/4/10), 42 So.3d 435, 437, writ denied, 2010-1549 (La. 5/20/11), 63 So.3d 974.

In light of the fundamental significance attached to the right to counsel, the jurisprudence has engrafted a requirement that the assertion of the right to self-representation must be clear and unequivocal. Furthermore, courts are encouraged to indulge in every reasonable presumption against waiver. Whether the defendant has "knowingly, intelligently, and unequivocally asserted the right to self-representation" must be determined based on the facts and circumstances of each case. **State v. Bridgewater**, 2000-1529 (La. 1/15/02), 823 So.2d 877, 894, cert denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003).

Further, as a general proposition, a criminal defendant has the right to counsel of his choice. This right, however, is the flip-side of the right to self-representation. Like self-representation, this right cannot be manipulated to obstruct orderly court procedure or to interfere with the fair administration of justice. A defendant must exercise his right to counsel of his choice at a reasonable time, in a reasonable manner, and at an appropriate stage of the proceedings. Absent a justifiable basis, there is no constitutional right to make a new choice of counsel on the very date that the trial is to begin, with the attendant necessity of continuance and its disrupting implications. A trial court's ruling on this issue will not be disturbed in the absence of a clear showing of abuse of discretion. **Bridgewater**, 823 So.2d at 896.

Prior to opening statements, the following exchange occurred between defense counsel, the defendant, and the court:

> [Defense counsel]: And the second segment of business I want to put on the record, [the defendant] and I have not – it's been a very contentious attorney-client relationship. He doesn't understand some fine points of the law. He believes he does. He wants to essentially represent himself. I've actually told him if he wants to represent himself, he's quite willing to. The law affords him and allows him to represent himself. And he wants to make these, all these arguments about different things. I told him he doesn't understand certain fine points of the law. But, judge, again, our philosophy, we can't really work

> together. It's been contentious. I think he hates me, and I think he wants to either represent himself or have a new counsel appointed. I just want the court to know, I want the record to be clear that I've done everything I can to - -
>
> [Court]: Well, we're not going to appoint a new lawyer. Let's go ahead.
>
> [Defense counsel]: -- zealously represent him, judge, including putting forth[.]
>
> * * * *
>
> [Defendant]: Your honor, you can set this back. You can set this matter back. I try to get me a lawyer or something. I don't - - I think he fixing to try to railroad me. Could I get a lawyer, your Honor, try to get me a paid lawyer? Because this ain't going to work. I know it ain't. [Defense counsel] ain't trying to represent - -
>
> [Court]: We're not putting it off anymore. Then you'll come back and complain again that it got put off.
>
> [Defendant]: No, sir. I ain't going to complain.
>
> [Court]: Let's go.

The defendant relies upon **Holloway v. Arkansas**, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) for the proposition that a trial court has a duty to avoid potential conflicts of interest, and must initiate an inquiry if it knows, or reasonably should know, that a potential conflict exits. The defendant's reliance is misplaced. **Holloway** addresses a situation with one attorney representing multiple defendants at trial, and the potential conflicts of interest that may arise in such a situation; here, trial counsel was only representing one individual – the defendant. As such, **Holloway** is factually distinguishable, and its holding is not applicable to the instant appeal.

There was no violation of the defendant's right to self-representation or counsel in this matter. The defendant failed to "knowingly, intelligently, and unequivocally" assert his right to self-representation. Further, the defendant's request to "set this matter back" so that he could "try to get" retained counsel was

untimely. We note that approximately five years passed from the defendant's arraignment to his equivocal request to retain new counsel on the morning of trial.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.