IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	**WD83890**
v.	)	
	)	**OPINION FILED:**
	)	**November 9, 2021**
JOHNNY D. FLOYD,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Henry County, Missouri
The Honorable M. Brandon Baker, Judge

Before Division Four: Cynthia L. Martin, Chief Judge, Mark D. Pfeiffer, Judge, and James E. Welsh, Senior Judge

Mr. Johnny Floyd ("Floyd") appeals from the judgment of the Circuit Court of Henry County, Missouri ("trial court"), entered after a jury trial in which he was found guilty and convicted of unlawful use of a weapon, unlawful possession of a firearm, resisting arrest, and burglary in the first degree. Floyd asserts that the trial court violated Due Process in allowing him to represent himself at trial and in refusing to offer a self-defense instruction. The State concedes that "the trial court erred in allowing him to represent himself at trial" without the requisite *Faretta*[1]

[1] *Faretta v. California*, 422 U.S. 806, 814, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

hearing. Finding merit in Floyd's self-representation claim on appeal, we reverse his convictions and sentences and remand the case for a new trial consistent with today's ruling.

Factual and Procedural Background[2]

On May 11, 2017, Mr. Garrett Reed ("Reed") came home and found a green Ford Escort in his driveway. Floyd was behind the wheel of the Escort. Reed asked Floyd, "[W]hat are you doing here, what can I help you with?" Floyd responded that he was on his phone and would leave when he was "good and ready." Reed informed Floyd that it was Reed's private property and told Floyd to leave. Floyd again said he would leave when he was ready. Floyd and Reed engaged in "several minutes of altercations," during which Floyd went back and forth multiple times between his car and Reed's truck. Eventually, Floyd "peel[ed] out" and left Reed's property.

Reed followed Floyd down the highway to get his license plate number. When Reed caught up to Floyd, Floyd slowed down in front of him. Reed passed Floyd, and then Floyd passed Reed. Both were driving in excess of ninety miles per hour. When they came to a two-lane highway, Reed was in "the proper right-hand lane" while Floyd was in the left lane of oncoming traffic. Floyd pulled up next to Reed and pointed a snub-nose revolver at Reed. Reed "thought about swerving" his truck into Floyd's car but slowed down instead. As Floyd passed, he fired two shots. Reed called 911.

An Officer with the Clinton Police Department received a call from the dispatcher that shots had been fired, identifying the vehicle involved and its location. The Officer proceeded to the location. When Floyd was boxed in by other cars in traffic, the Officer exited his vehicle and proceeded toward Floyd's car. The Officer saw Floyd throw his revolver underneath the car.

[2] We view the facts in the light most favorable to the jury's verdict. *State v. Kelliker,* 605 S.W.3d 440, 442 n.2 (Mo. App. W.D. 2020).

Floyd exited the vehicle and began to flee. He ran into a restaurant through the back door to evade law enforcement officers. Although Floyd resisted, officers were eventually able to arrest him.

Floyd was charged as a prior and persistent offender with the class B felony of unlawful use of a weapon by knowingly discharging a firearm from a motor vehicle, § 571.030 (Count I); the class D felony of unlawful possession of a firearm, § 571.070 (Count II); the class E felony of resisting arrest by fleeing from a law enforcement officer, § 575.150 (Count III); and the class B felony of burglary in the first degree by unlawfully entering a building for the purpose of resisting arrest, § 569.160 (Count IV).[3]

Prior to trial, Floyd had been represented by numerous attorneys and he fired all of them. Floyd informed the trial court that he wanted to proceed to trial *pro se* and presented to the trial court a signed handwritten waiver of counsel. However, Floyd thereafter requested a bond so he could hire another lawyer. The trial court told Floyd that he could hire a lawyer or reapply for the Public Defender from jail. Floyd failed to hire another attorney before trial and the trial court proceeded to trial with Floyd representing himself and without the trial court first conducting the requisite *Faretta* hearing to establish that Floyd understood what rights and privileges he was waiving, the dangers associated therewith, and that his waiver of counsel was knowing, intelligent, and voluntary.

After the jury was sworn and the parties were in chambers, Floyd asked for a continuance and to "be put on the public defender's list and wait for a lawyer." The trial court denied both requests. At the instruction conference, Floyd asked for a self-defense instruction. The prosecutor objected on the grounds that Floyd had not given the State advance notice of his intent to rely on

[3] All statutory references are to the REVISED STATUTES OF MISSOURI 2016.

that affirmative defense and did not present any evidence to support that defense. The trial court denied Floyd's request.

The jury found Floyd guilty as charged. Floyd filed a *pro se* motion for new trial, asserting that the trial court erred in rescinding its appointment of standby counsel, in failing to hold a *Faretta* hearing before allowing Floyd to proceed *pro se*, in denying his repeated request for counsel, and in denying his request for a self-defense instruction. The trial court appointed the Public Defender to represent Floyd at sentencing. The trial court, having previously found that Floyd was a prior and persistent offender, sentenced him to fifteen years' imprisonment without the possibility of parole on the unlawful use of a weapon charge, ten years' imprisonment on the unlawful possession charge, five years' imprisonment on the resisting arrest charge, and ten years' imprisonment on the burglary charge, to be served concurrently.

After being granted an extension by this Court, Floyd appealed. Additional facts will be presented as necessary in the analysis section below.

Standard of Review

Floyd argues on appeal that, in allowing Floyd to represent himself, the trial court violated both his constitutional rights and a statute. He did not raise either of these claims at trial. "Constitutional claims must be made at the first opportunity to be preserved for review." *State v. Ndon*, 583 S.W.3d 145, 153 (Mo. App. W.D. 2019) (internal quotation marks omitted). "However, 'a self-represented defendant's failure to object at trial regarding the knowing, voluntary, and intelligent nature of his waiver of the right to counsel is generally excused.'" *Id*. (quoting *State v. Kunonga*, 490 S.W.3d 746, 759 (Mo. App. W.D. 2016)). "This is because a *pro se* defendant 'cannot be expected to object that a waiver-of-counsel was not voluntary because of alleged inadequacies in an on-the-record inquiry designed to determine whether [the] waiver is knowing,

voluntary, and intelligent.'" *Id*. (quoting *Kunonga*, 490 S.W.3d at 759). "Thus, we review a claim that the waiver of counsel hearing was inadequate *de novo*." *Id*.

Analysis

Floyd asserts four points on appeal. In Points I, II, and III he claims trial court error in allowing him to proceed to trial *pro se*. Specifically, he contends that the trial court erred in accepting a statutorily insufficient waiver of counsel from him (Point I); in failing to conduct a *Faretta* hearing on the record to ensure that his waiver of counsel was knowing, intelligent, and voluntary (Point II); and in accepting his equivocal waiver of counsel (Point III). In Point IV he claims the trial court committed instructional error. Because Floyd's second point is dispositive, Points I, III, and IV are moot and will not be addressed.

Floyd contends that the trial court violated his constitutional rights to a fair trial, effective assistance of counsel, and due process by allowing him to represent himself without first conducting a *Faretta* hearing on the record to ensure that his purported waiver of counsel was knowing, intelligent, and voluntary. He argues that the trial court's failure to conduct such a hearing on the record amounted to structural error and that his convictions should be reversed and his case remanded for a new trial.

"The Sixth Amendment right to counsel 'implicitly embodies a correlative right to dispense with a lawyer's help.'" *Ndon*, 583 S.W.3d at 154 (quoting *Faretta v. California*, 422 U.S. 806, 814, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). "This right applies to the states through the Due Process Clause of the Fourteenth Amendment." *Id.* (internal quotation marks omitted). The trial court does not have the discretion to force an attorney upon a defendant who validly waives the right to counsel. *Id*. However, due process requires that for a waiver of counsel to be effective it must be knowingly and intelligently made. *Id*.

"Missouri has two requirements that must be satisfied before the [trial] court can conclude that a defendant has effectively waived the right to counsel." *Id.* (citing *Kunonga*, 490 S.W.3d at 764). First, "[t]here must be a thorough [*Faretta*] evidentiary hearing that establishes that the defendant understands exactly what rights and privileges he is waiving, as well as the dangers associated with waiving constitutional rights." *Id*. (internal quotation marks omitted). "Second, the defendant must be given the opportunity to sign the written waiver of counsel form mandated by Section 600.051." *Id.*

A close review of the record reveals that, between options of retained counsel and appointed counsel, Floyd was represented at various stages of the proceedings below by no fewer than six attorneys—all of whom Floyd fired. One of the attorneys was appointed by the trial court as standby counsel and Floyd sought and was granted permission by the trial court to fire that attorney as well. To say the least, Floyd's behavior was recalcitrant and we do not fault the trial court for being frustrated with Floyd's pre-trial antics.

And, although Floyd presented the trial court with a signed handwritten waiver of counsel document that purported to comply with section 600.051,[4] it is also clear from the record that the trial court never conducted a *Faretta* hearing establishing Floyd's knowing, intelligent, and voluntary waiver of counsel after first being thoroughly advised of the constitutional rights and

[4] The Missouri General Assembly enacted section 600.051 in 1976, one year after *Faretta* was decided, to create a procedure through which the waiver of counsel could be effectuated. *State v. Kunonga*, 490 S.W.3d 746, 764 (Mo. App. W.D. 2016). "[T]he purpose of section 600.051 . . . is to provide objective assurance that the defendant's waiver is knowing and voluntary." *Id.* (internal quotation marks omitted). "[S]ection 600.051 is very specific in its identification of the minimum required content of a written waiver of counsel form." *Id*. Floyd did prepare and sign a waiver form that followed the format of section 600.051.1(1)-(6). However, "the obligation to ensure that the waiver of counsel is knowing, voluntary, and intelligent is not extinguished merely by the signing of the form required by section 600.051." *Id*. at 771 (internal quotation marks omitted). Furthermore, Floyd's handwritten waiver of counsel was deficient in that it did not accurately state the range of punishment for two of the charges against him. "[A] violation of section 600.051 satisfies the first step of plain error review because section 600.051 protects a fundamental constitutional right, and compliance with section 600.051 is essential to the State's ability to sustain its burden to establish a waiver of counsel." *Id*. at 761. Furthermore, "a violation of section 600.051 constitutes a manifest injustice or miscarriage of justice as required by the second step of plain error review because a violation of the right to counsel is structural error that is presumed to infect the entirety of a trial." *Id*.

privileges that he was waiving, as well as the associated dangers of such a waiver. The State concedes this point and affirmatively represents the following in its appellate briefing:

> [Floyd] did prepare and sign a waiver form that tracked the language of section 600.051, RSMo. However, the State's burden of proving a knowing and intelligent waiver is not met simply because the trial court received and reviewed the form. *State v. Grant*, 537 S.W.3d 426, 428-29 (Mo. App. S.D. 2018). The court is still required to make an on-the-record inquiry that timely informs the defendant of the nature of the charges against him, potential sentences if convicted, potential defenses he might offer, the nature of trial proceedings, and dangers of proceeding *pro se*. *Id.* at 428.
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> The record . . . does not demonstrate that the court engaged in the required *Faretta* inquiry prior to [Floyd] being allowed to waive counsel and proceed *pro se*. Accordingly, the State must concede error.

We agree with the State's detailed concession on appeal and appreciate the candor of the State in admitting the constitutional infirmity below.

The State bears the burden to prove that an unrepresented defendant waived the right to counsel; to sustain its burden, the State must prove that a defendant was afforded a *Faretta* hearing in compliance with section 600.051. *Kunonga*, 490 S.W.3d at 765. "Only then will the burden shift to the unrepresented defendant to establish that the waiver of counsel was not knowing, voluntary, or intelligent." *Id*. Although no specific litany is required for a *Faretta* hearing, "[a] trial court can only make certain that a defendant has knowingly, voluntarily, and intelligently waived the right to counsel from a penetrating and comprehensive examination of all the circumstances." *Id*. at 763-64 (internal quotation marks omitted). Whether a defendant's waiver is made knowingly and intelligently depends on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *State v. Black*, 223 S.W.3d 149, 154 (Mo. banc 2007). Fundamentally:

> [i]n Missouri, a defendant's waiver is not knowing and intelligent unless the court timely informs him as to the nature of the charges against him, potential sentences if convicted of the offenses, potential defenses he can offer, the nature of the trial

> proceedings, [and] the fact that, if the defendant refuses counsel, he will be required to proceed *pro se* and the dangers of proceeding *pro se*.

Id. (quoting *City of St. Peters v. Hodak*, 125 S.W.3d 892, 894 (Mo. App. E.D. 2004)). The record reveals that the trial court did not conduct a *Faretta* evidentiary hearing to establish that Floyd understood exactly what rights and privileges he was waiving and the dangers associated with waiving his constitutional rights by proceeding *pro se*.

Here, as stated previously, the State concedes that the requisite *Faretta* inquiry was not made by the trial court and we agree as well that the record establishes that no such *Faretta* inquiry was made by the trial court prior to permitting Floyd to proceed to trial *pro se*. Accordingly, Floyd is entitled to a new trial. *See, e.g.*, *State v. Campanella*, 609 S.W.3d 526, 526-27 (Mo. App. S.D. 2020); *State v. Grant*, 537 S.W.3d 426, 429-30 (Mo. App. S.D. 2018); *State v. Rawlins*, 248 S.W.3d 680, 685 (Mo. App. W.D. 2008); *State v. Johnson*, 172 S.W.3d 900, 902 (Mo. App. S.D. 2005); *State v. Wilkerson*, 948 S.W.2d 440, 445-46 (Mo. App. W.D. 1997).

Point granted.

Conclusion

Floyd's convictions and sentences are reversed, and the case is remanded for a new trial to be conducted in a manner consistent with our ruling today. Specifically, upon remand, should Floyd persist in his desire to represent himself *pro se*, the trial court must comply with the Due Process requirements that are fully detailed in today's ruling.

/s/ *Mark D. Pfeiffer*
Mark D. Pfeiffer, Judge

Cynthia L. Martin, Chief Judge, and James E. Welsh, Senior Judge, concur.