In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-15-00450-CR

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CAROL ANN DAVIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 13-03-02547-CR

MEMORANDUM OPINION

A grand jury indicted Carol Ann Davis (Davis or Appellant) for the offense of retaliation. Tex. Penal Code Ann. § 36.06(a)(1) (West Supp. 2016).[1] A jury found Davis guilty and assessed punishment at ten years' confinement and a fine of $10,000. Davis appeals her conviction, raising two issues. We affirm.

[1] We cite to the current version of applicable statutes because any subsequent amendments do not affect the outcome of this appeal.

Factual Background

Davis was initially charged by information, and a grand jury indicted Davis for the offense of retaliation on May 23, 2013. The indictment was amended on or about March 20, 2015, and it alleged that Davis had intentionally and knowingly harmed or threatened harm to Julie Stern (Julie) by making threatening phone calls and sending threatening emails in retaliation for Julie's husband Ron Stern's (Ron) service as a witness. The affidavit for the warrant of arrest stated in relevant part:

> On February 28, 2013, Carol Ann Davis, known to this affiant to be a person accused of making harassing phone calls and currently being prosecuted for harassment, placed a call from phone number [] and left a voicemail for one Ronald Stern, a retired FBI agent. Ronald Stern testified for the Montgomery County District Attorney's Office in a competency proceeding against Davis in the fall of 2012. Davis has a delusional belief that she is an undercover FBI informant and that Ronald Stern is her handler.
>
> Since testifying, Davis has been calling Ronald Stern and his spouse, Assistant United States Attorney Julie Stern, and sending them repeated threatening e-mails.
>
> On March 5 and 6, 2013, Julie Stern received several e-mails from Davis, which were provided to me [], that contained language threatening Julie Stern's personal and physical safety. Both Ron and Julie Stern recognized the e-mail address the communications were sent from as being Carol Davis's from prior dealings. Davis accused both Julie and Ronald of being guilty of various crimes and threatened them based on Ronald's testimony against Davis during the competency hearing. She repeats the phrase "Ron told me to get a good lawyer in connection with job" and repeatedly accuses Julie Stern of being a murderer and attempting to kill Davis.

> In the email chain, Davis also spoke harshly regarding the Sterns' daughter and threatened Julie repeatedly. . . .
>
> . . . .
>
> Both Julie and Ronald admit to being frightened and threatened by Davis, and fear further reprisals from her. Julie believes that Davis continues to call her office and make threats based on her employment by the Federal Government and on account of Ronald's former employment by the Federal Bureau of Investigation. Ronald believes that Davis's actions are in retaliation for his having testified against Davis for the Montgomery County District Attorney's Office.

The affidavit also included further detail about the emails and phone calls made by Davis, which included profanity, and suggestions regarding sexually explicit things that Davis wanted done to Julie.

Davis pleaded not guilty. The matter was tried to a jury on October 20-22, 2015. Ron testified that in April of 2012 he testified in a different proceeding to refute allegations by Davis that she worked for him. According to Ron, that proceeding resulted in a finding adverse to Davis. Ron told the jury that about six to eight months after he testified, he received "bizarre[]" and "threatening[]" phone calls on his personal cell phone. Ron further testified that on February 28, 2013, Davis called his cell phone and left a voice mail, which he recorded and provided a copy to the Montgomery County Sheriff's office. A copy of the recorded voicemail was admitted as State's Exhibit 1, and Ron testified that he identified the voice on the recording as Davis's.

Julie testified that she is an assistant U.S. Attorney and is married to Ron. According to Julie, after Ron testified against Davis in April of 2012, Ron received some "angry" and "disturbing" phone calls from Davis. Julie explained that she received an email from Davis on March 5, 2013 and a phone call on March 6, 2013. Julie identified State's Exhibit 2 as a copy of several emails that Julie received from Davis. Julie testified that she gave a copy of the emails to the Montgomery County Sheriff's office. Julie read the emails to the jury and summarized the detail in the email as stating "[Davis] wants to see me raped by a bunch of men and she wants to watch and see how horrible it is for me. I mean, it's awful." Julie described the email as "horrible[,]" and explained that she felt scared and threatened and she was "freaking out[]" upon receiving it.

The jury found Davis guilty and assessed punishment at ten years' imprisonment and a $10,000 fine. Davis timely appealed.

Right to Appointed Counsel

In her first issue on appeal, Davis argues that the trial court improperly denied her request for appointed counsel. Davis argues that "[t]he Sixth Amendment right to counsel . . . mandates reversal without consideration of whether harm was caused, if the right is violated." In her motion for new trial, Davis argued that she did not knowingly, intelligently, and voluntarily waive an attorney being appointed.

Generally, a point of error on appeal must comport with the objection made at trial. *See Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014). Assuming Davis sufficiently preserved error by raising a right-to-counsel argument at trial, we consider her issue on appeal.

The Sixth Amendment guarantees a defendant the right to counsel. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984); *see generally Gideon v. Wainwright*, 372 U.S. 335 (1963). The Sixth Amendment also protects the right to self-representation. *See Williams v. State*, 252 S.W.3d 353, 356 (Tex. Crim. App. 2008) (citing *Faretta v. California*, 422 U.S. 806, 818 (1975)). And the Texas Constitution explicitly provides that a defendant "shall have the right of being heard by himself or counsel, or both[.]" Tex. Const. art. I, § 10.

"A defendant may not use his right to counsel to manipulate the court or to delay his trial." *Culverhouse v. State*, 755 S.W.2d 856, 861 (Tex. Crim. App. 1988); *see also Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976) (citing *Thompson v. State*, 447 S.W.2d 920 (Tex. Crim. App. 1969); *Estrada v. State*, 406 S.W.2d 448 (Tex. Crim. App. 1966)); *Burks v. State*, 227 S.W.3d 138, 145 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (citing *Green v. State*, 840 S.W.2d 394, 408 (Tex. Crim. App. 1992). In the interest of minimizing disruptions and maintaining continuity at trial, "an accused may not wait until the day of trial to

demand different counsel or to request that counsel be dismissed so that he may retain other counsel." *Webb*, 533 S.W.2d at 784; *see also Chapman v. United States*, 553 F.2d 886, 893 (5th Cir. 1977) ("[M]ost courts of appeals have established the rule that the fundamental right to conduct the case pro se must be claimed before the trial begins."). Likewise, a defendant may only withdraw the waiver of her right to counsel when the decision will not disrupt the orderly administration of trial court business. *See Hubbard v. State*, 739 S.W.2d 341, 344 (Tex. Crim. App. 1987); *Medley v. State*, 47 S.W.3d 17, 23 (Tex. App.—Amarillo 2000, pet. ref'd).

As a general rule, a defendant seeking to withdraw a previous waiver of a right is entitled to do so if her request is made "sufficiently in advance of trial such that granting [her] request will not: (1) interfere with the orderly administration of the business of the court, (2) result in unnecessary delay or inconvenience to witnesses, or (3) prejudice the State." *Cf. Marquez v. State*, 921 S.W.2d 217, 223 (Tex. Crim. App. 1996) (discussing the withdrawal of a waiver of the right to a trial by jury); *see also* Tex. Code Crim. Proc. Ann. art. 1.051(h) (West Supp. 2016) ("A defendant may withdraw a waiver of the right to counsel at any time but is not entitled to repeat a proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel. If the defendant withdraws a waiver, the trial court, in its discretion, may provide the appointed counsel 10 days to prepare.");

Medley, 47 S.W.3d at 24 (applying *Marquez* analysis to the attempted withdrawal of the waiver of the right to counsel).

A trial court has discretion to grant or deny a request to change counsel on the morning of trial. *Medley*, 47 S.W.3d at 23 (citing *United States v. Magee*, 741 F.2d 93, 95 (5th Cir. 1984)). A trial court does not abuse its discretion by denying a request for court-appointed counsel when the trial court correctly determines that the defendant is manipulating the right to counsel for purposes of delay. *See Lewis v. State*, No. 02-12-00246-CR, 2014 Tex. App. LEXIS 1405, at *9 (Tex. App.—Fort Worth Feb. 6, 2014, pet. dism'd) (mem. op., not designated for publication); *Glover v. State*, No. 09-06-325-CR, 2008 Tex. App. LEXIS 7321, at **18-20 (Tex. App.—Beaumont Aug. 27, 2008, no pet.) (mem. op., not designated for publication).

A trial court need not follow any particular questioning to assure itself that an accused who has asserted her right to self-representation "does so with eyes open." *See Burgess v. State*, 816 S.W.2d 424, 428 (Tex. Crim. App. 1991). In order for a waiver to be effective, the trial court must make the defendant aware of the dangers and disadvantages of self-representation so that the record will establish that the defendant knows what she is doing. *See Faretta*, 422 U.S. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). A trial court's refusal to appoint counsel at the eleventh hour does not render the defendant's invocation of

the right to self-representation involuntary. *See Tutt v. State*, 339 S.W.3d 166, 173 (Tex. App.—Texarkana 2011, pet. ref'd).

Prior to trial, Davis was represented by appointed counsel Tony Duckworth from March 11, 2013 through January 29, 2014, and she was then represented by appointed counsel William Harrison from January 30, 2014 through August 18, 2014. Thereafter, Davis appeared pro se. The docket sheet reflects that, at a pretrial hearing on October 2, 2015, the court admonished Davis that "she is at a disadvantage [for] not having a lawyer." The trial commenced on October 19, 2015, and Davis appeared pro se. On the morning of trial, but prior to voir dire, Davis requested a continuance, and the following exchange occurred:

> MS. DAVIS: I have explained to you before that I needed a lawyer. And I have been very ill. And I still am suffering from the original problems that I had explained to the Court, the two emergency hospitalizations . . . . And I'm really weak from all of that, and but I need a lawyer. And that is just no one, anyone that is in my condition particularly needs an attorney and I would wait, ask the Court, you know --
>
> THE COURT: We have been through this before and at this -- you did not want a court appointed lawyer.
>
> MS. DAVIS: No, ma'am.
>
> THE COURT: And you chose not to hire a lawyer. You cannot change all that on the day of trial in order to get a continuance.
>
> MS. DAVIS: You said --

> THE COURT: We are going to [go] forward today.
>
> MS. DAVIS: Yes, ma'am. You said I wasn't entitled to a court appointed lawyer. That is what happened. Okay. I would also ask the Court to hold until Mr. Payne arrives because he is my civil right's attorney and I feel like I should have some type of counsel here to assist me.
>
> THE COURT: The trial has been set now for two weeks and I am not going to hold the trial for any -- the State is ready. Everybody has been told we're going to start today. I had thought 9:00 o'clock, the jury -- we're not able to get a jury until 10:30. We're going to start at 10:30.
>
> MS. DAVIS: Okay. Judge, and all I'm saying is the State is ready but the defense is not ready; and for medical reasons and because Mr. Payne is not here, my paralegal is being stopped, he can't come, and other reasons the defense is not ready to go to trial. And it would seem to me that the defense should be ready to go. But they are not. And the other thing is that --
>
> THE COURT: Let me just respond to that by saying that this trial has been set for some time. There has been some problem with getting this case heard. So in order to make everybody totally aware of when this case was going to be set, it has -- we've had many, many, many resets and time to prepare. And if one side or the other cho[o]ses not to prepare, the Court is not going to grant the continuance based on that.

Appellant argues that the record shows no indication that appointing counsel would have resulted in unnecessary delay, would not have interfered with the administration of justice, and would not have prejudiced the State. However, the record shows otherwise. The record reflects that Davis had appointed counsel from about the time she was indicted in 2013 until August 18, 2014. Davis then appeared pro se for more than a year. Prior to trial, the court explained to Davis that she was

at a disadvantage for not having an attorney. Yet Davis only requested an attorney on the day trial commenced, at the same time she requested a continuance. The trial court explained that there had been "many, many, many resets and time to prepare[]" and that Davis had previously made it known that she did not want appointed counsel.

The trial court could have reasonably concluded that Davis's request for an attorney was made in a manner that "obstruct[ed] the judicial process or interfere[d] with the administration of justice." *See Green*, 840 S.W.2d at 408. We find no abuse of discretion. Because we find the trial court did not abuse its discretion in denying Davis appointed counsel that she requested on the day of trial, we need not conduct a harm analysis. *See* Tex. R. App. P. 44.2(a) (harm analysis required if the appellate record reveals constitutional error). We overrule Appellant's first issue on appeal.

Right to Testify

In her second issue, Appellant argues that the trial court erred in denying her the right to testify on her own behalf. According to Davis's brief, "[i]n the middle of her testimony, the judge decided that Ms. Davis was not providing relevant information, interrupted Ms. Davis[']s testimony, and ended it." Appellant argues that the trial court abused its discretion in preventing Davis from testifying and

thereby violated her rights under the United States and Texas Constitutions as well as the Code of Criminal Procedure.

A criminal defendant has a constitutional right to testify on her own behalf. *Smith v. State*, 286 S.W.3d 333, 338 n.9 (Tex. Crim. App. 2009) (citing *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987)). The Due Process Clause of the Fourteenth Amendment and the Compulsory Process Clause of the Sixth Amendment provide for an accused's right to testify, and the right is a "necessary corollary" to the Fifth Amendment right against self-incrimination. *See Nelson v. State*, 765 S.W.2d 401, 404 (Tex. Crim. App. 1989) (citing *Rock*, 483 U.S. at 51-52); *see also* U.S. Const. amends. V, VI, XIV. The Texas Constitution states that in all criminal prosecutions, the accused "shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both[.]" Tex. Const. art. I, § 10. And article 38.08 of the Texas Code of Criminal Procedure provides that "[a]ny defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause." Tex. Code Crim. Proc. Ann. art. 38.08 (West 2005).

Trial courts may place reasonable limits on the examination of witnesses based on such concerns as harassment, prejudice, confusion of the issues, the

witness's safety, or interrogation that is repetitive or only marginally relevant. *See Matchett v. State*, 941 S.W.2d 922, 940 (Tex. Crim. App. 1996), *superseded by statute on other grounds as stated in VanNortrick v. State*, 227 S.W.3d 706, 709 (Tex. Crim. App. 2007) (citing *Moody v. State*, 827 S.W.2d 875, 891 (Tex. Crim. App. 1992)).

Therefore, although a defendant has a constitutional right to testify as a witness in her own defense, the right to testify is not unlimited. *See Rock*, 483 U.S. at 49, 55 (explaining that although "a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense[]" that "the right to present relevant testimony is not without limitation."); *see also United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."); *Potier v. State*, 68 S.W.3d 657, 659 (Tex. Crim. App. 2002) (same); *Alexander v. State*, 740 S.W.2d 749, 763 (Tex. Crim. App. 1987) (A defendant who testifies in his own defense is subject to the same rules governing direct and cross-examination as other witnesses, including rules of relevancy.). A trial court does not abuse its discretion by excluding a witness's testimony that is not material to or probative of any fact of consequence. *See Henley v. State*, 493 S.W.3d 77, 95-96 (Tex. Crim. App. 2016). A trial court's exclusion of evidence is unconstitutional only if it significantly

undermines fundamental elements of the accused's defense. *Potier*, 68 S.W.3d at 666 (citing *Scheffer*, 523 U.S. at 315). Determinations of admissibility of evidence rest within the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *See Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016) (citing *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011)); *McCray v. State*, 873 S.W.2d 126, 128 (Tex. App.—Beaumont 1994, no pet.) (citing *Montgomery v. State*, 810 S.W.2d 372, 386 (Tex. Crim. App. 1991) (op. on reh'g)).

In this case, after the State rested, Davis called two witnesses and then expressed her intent to testify. The reporter's record includes approximately fifty pages of testimony by Davis. Davis testified that she met Ron Stern "in the early 90s[,]" that he asked her to make a tape recording for him, and that she did so. Davis agreed that Ron subsequently testified against her in an earlier but separate case. Davis testified that, after Ron testified against her in 2012, she went to a mental hospital and she went to jail. Davis agreed that she later wrote the email to Julie Stern contained in State's Exhibits 2 and 2A. The court asked Davis why she wrote the email, and Davis explained it was "[b]ecause [she] was agitated about the state fabricating the evidence that they always fabricate." Davis denied that she intended to threaten or frighten Julie. Davis also explained that she intended for the email to

be for Davis's family, Davis's sister had been communicating with Julie, and Davis did not intend to send the email to Julie.

According to Davis, she started taking Adderall in the summer of 2009 or 2010, she took it for about six months, she was not taking Adderall when Ron testified against her, and she was not taking Adderall when she wrote the emails on March 6, 2013. The court asked Davis about the effects of Adderall as follows:

> THE COURT: No, what is the Adderall? How did the Adderall affect your leaving messages with --
>
> MS. DAVIS: I was aggressive.
>
> THE COURT: It made you aggressive?
>
> MS. DAVIS: Yes.

Outside the presence of the jury, Davis expressed interest in testifying concerning various other matters, including "fabricated evidence[,]" that she was not mad at Ron even though she believed that he lied, her experience at a mental hospital, messages she left for an attorney with the Texas Municipal League, and a prior fraudulent identity lawsuit. The following exchange occurred:

> THE COURT: You are not discussing anything relevant. I told you it had to be relevant to this case. So, do you have any further witnesses? Any other witnesses?
>
> MS. DAVIS: No, ma'am.
>
> THE COURT: Okay, you rest?

MS. DAVIS: If that's what you say.

The reporter's record gives no indication that Davis made a timely, specific objection that, in excluding any part of her testimony, the trial court denied her the right to testify. Neither did she argue that she was denied her right to testify in her motion for new trial. Consequently, she failed to preserve error for appeal. *See* Tex. R. App. P. 33.1 (to preserve error for appeal, a party must make a timely and specific objection at trial); *Pabst v. State*, 466 S.W.3d 902, 907 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995)) (explaining that even constitutional errors may be waived by failure to make a timely and specific complaint to the trial court).

Nevertheless, even if she had preserved this complaint, the record reflects that Davis was permitted to testify about the offense charged, and the trial court merely limited the scope of Davis's testimony. Therefore, on this record, we conclude that the trial court did not abuse its discretion in limiting any additional testimony from the Appellant or excluding testimony as not material to or probative of any fact of consequence. *See Henley*, 493 S.W.3d at 95-96. Although the denial of the right to testify is subject to a harm analysis, *see Johnson v. State*, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005), we need not undergo a harm analysis because we conclude that Davis was not denied her right to testify. We overrule Appellant's second issue.

Having overruled both of Appellant's issues on appeal, we affirm the judgment of the trial court.

AFFIRMED.

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LEANNE JOHNSON
Justice

Submitted on March 7, 2017
Opinion Delivered May 10, 2017
Do Not Publish

Before Kreger, Horton, and Johnson, JJ.