DIVISION ONE
FILED: 08/21/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0105
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
OTIS EUGENE BUNN,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-129654-001 DT

The Honorable John R. Ditsworth, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Otis Eugene Bunn (Defendant) appeals from his convictions and sentences on one count each of fraudulent

schemes and artifices and theft. His sole argument on appeal is that the trial court committed structural and/or fundamental error when it permitted him to represent himself at trial without first making the requisite finding that he knowingly, intelligently and voluntarily had waived his right to counsel. For reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 In September 2005, the State charged Defendant in the present case (CR 2005-129654)[2] with one count of fraudulent schemes and artifices, a class 2 felony; one count of theft, a class 3 felony; one count of possession of drug paraphernalia, a class 6 felony[3]; and two counts of forgery, each a class 4 felony. The charges arise from the investigation of a series of checks drawn on the victim's Charles Schwab account, without the victim's authorization, and deposited in Defendant's bank account. After a trial in October 2009 at which Defendant represented himself, a jury found Defendant guilty of fraudulent

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[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against the defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

[2] Defendant had three other criminal cases pending prior to trial in the present case: CR 2003-023301, in which he was convicted on September 7, 2006 for possession of narcotic drugs and criminal damage; CR 2005-006930 for aggravated assault; and CR 2007-006368 for two counts of failure to register.

[3] The court granted Defendant's motion to sever the drug paraphernalia charge from the rest of the counts.

schemes and artifices and theft but acquitted him of the two counts of forgery. On May 6, 2010, the trial court sentenced Defendant to concurrent presumptive prison sentences of 15.75 years on the fraudulent schemes and 11.75 years on the theft; and this timely appeal followed. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 (2010) and -4033.A.1 (2010).

DISCUSSION

¶3 The most complete exchange that occurred between Defendant and the trial court relative to the waiver of counsel consists of the following exchange at a hearing on February 26, 2007:

> [Defense Counsel]: [Defendant], at the last proceedings, has filed a motion to go pro per. He did advise he wished the Court that picked up this case or cases to rule on it.
>
> ****
>
> The Court: [Defense Counsel], are you asking to be relieved on these three cases or asking to be in the role of advisory counsel?
>
> [Defense Counsel]: Well, Your Honor . . . I don't think it's really my choice initially because it's [Defendant] that is requesting to go pro per; and he just says that he wants advisory counsel. It's not clear whether he wants me as advisory counsel. I am not going to go into the merits. I don't want to prejudice [Defendant] in any way, shape, or form in front of the Court.

> The Court: I only ask that because of your other schedule. That is why I was asking. Let me ask [Defendant]. . . . [I]s it still your desire to go pro per?
>
> The Defendant: Yes, sir.
>
> The Court: Have you considered this?
>
> The Defendant: Yes.
>
> The Court: Have you talked about this with [Defense Counsel]?
>
> The Defendant: We did talk somewhat.
>
> The Court: With respect to advisory counsel, do you wish new advisory counsel appointed? Do you wish to continue with [present Defense Counsel] in that role because you have a relationship with him?
>
> The Defendant: I think it probably would be better for new advisory counsel.
>
> The Court: Okay.
>
> ****
>
> The Court: I am going to order that [Defendant's] pro per motion for pro per status is granted. It is ordered appointing new advisory counsel and allowing withdrawal of [present Defense Counsel].

Defendant argues that the fact the trial court granted his motion to represent himself on the basis of this exchange alone, without also making a specific finding of a knowing, intelligent and voluntary waiver of his right to counsel or obtaining his written waiver, was structural and/or fundamental error. He further argues that the trial court's failure to make these

findings is analogous to failing to make the specific findings required in a waiver of a jury trial.

¶4 Arizona recognizes few, limited errors as structural error. *See State v. Le Noble*, 216 Ariz. 180, 184, ¶ 19, 164 P.3d 686, 690 (App. 2007) (recognizing as structural error the complete failure to provide trial counsel, the denial of a public criminal trial, and the failure to obtain the defendant's knowing, intelligent, and voluntary waiver of the right to a jury trial); *State v. Ward*, 211 Ariz. 158, 162-63, ¶ 13, 118 P.3d 1122, 1126-27 (App. 2005) (noting the right to a jury trial may not be waived without the defendant's knowledge and absent a voluntary and intelligent waiver). However, our supreme court has determined that a trial court's ruling on whether a defendant has knowingly, intelligently, and voluntarily waived the right to counsel is subject to an abuse of discretion review standard. *State v. Gunches*, 225 Ariz. 22, 24, ¶ 8, 234 P.3d 590, 592 (2010); *State v. Dann*, 220 Ariz. 351, 360, ¶ 25, 207 P.3d 604, 613 (2009). Thus, the sole issue on appeal is whether the trial court here abused its discretion when it impliedly determined that Defendant knowingly, intelligently and voluntarily waived counsel without engaging defendant in either a formal colloquy or securing a written waiver.

¶5 It is well established that an individual has a fundamental constitutional right to represent himself in court

in a criminal case. *See Faretta v. California*, 422 U.S. 806, 817-19 (1975) (recognizing the Sixth Amendment right of an accused to manage and conduct his own defense in a criminal case); *State v. Martin*, 102 Ariz. 142, 144, 426 P.2d 639, 641 (1967) (finding Article 2, Section 24, of the Arizona Constitution vests the explicit right in a defendant to represent himself if he so chooses). A valid waiver of the right to counsel "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Dann*, 220 Ariz. at 359, ¶ 16, 207 P.3d at 612 (citation and internal quotation marks omitted). To ensure that his waiver is valid, therefore, "[a] prospective pro se litigant must understand (1) the nature of the charges against him, (2) the dangers and disadvantages of self-representation, and (3) the possible punishment upon conviction." *Id.* at 360, ¶ 24, 207 P.3d at 613.

¶6 While a defendant "need not himself have the skill and experience of a lawyer" 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 open.'" *Faretta*, 422 U.S. at 835 (citation omitted); *see also State v. Cornell*, 179 Ariz. 314, 323-24, 878 P.2d 1352, 1361-62 (1994) (finding waiver of the right to counsel where the judge adequately warned of the dangers and disadvantages of proceeding pro per and the specific problems the defendant would face). However, while a trial court "should warn of the dangers and disadvantages generally inherent in self-representation, it is not reversible error to fail to warn of every possible strategic consideration." *Id*. at 324, 878 P.2d at 1362 (citation omitted).

¶7 It is ultimately more prudent for a trial court to follow the procedure set forth in Rule 6.1 of the Arizona Rules of Criminal Procedure and secure a defendant's written waiver of his right to counsel after expressly having ascertained that the defendant knowingly, intelligently and voluntarily waived the right. Ariz. R. Crim. P. 6.1.c. Although the trial court may make specific findings on the record when called upon to assess the voluntary waiver of the right to counsel, the court is not constitutionally required to do so for the waiver to be valid "as long as the record as a whole and inferences drawn therefrom show the waiver is voluntary and knowing." *State v. Hunnel*, 873 P.2d 877, 880 (Idaho 1994) (cited with approval in *State v. Lehr*, 227 Ariz. 140, 146, ¶ 12, 254 P.3d 379, 385 (2011)). The record in this case fully supports a finding that Defendant

knowingly, intelligently and voluntarily chose to represent himself at trial.

¶8 First, and perhaps most importantly, it is clear that Defendant understood the nature of the charges against him and the potential punishment he faced upon conviction well before his trial. *See Dann*, 220 Ariz. at 360, ¶ 24, 207 P.3d at 613. At a settlement conference held on January 11, 2008, the trial court reviewed the charges and the sentences Defendant faced in the present case and in his other outstanding cases, as well as the State's plea offers. Although defense counsel appeared at that hearing with Defendant, Defendant addressed the court himself and stated that he was representing himself and that he was not interested in a "plea bargain" but only a "fair trial." Defendant also demonstrated his understanding of the trial process by complaining to the court that he had filed several motions[4] for discovery that he had still not received from the State and to which he had a "due process right."

¶9 On August 12, 2008, Defendant filed a pro se motion to dismiss his counsel as "counsel of record and advisory counsel" and to proceed alone in all of his pending cases. The motion

[4] In March, April, and May 2007, Defendant filed a series of pro per motions with the court concerning, among other things, discovery requests, suppression of his confession to police, and suppression of his identification as "unduly suggestive," which also support Defendant's understanding of what a trial attorney would do for him.

stated, “This Defendant seeks self-representation,” cited Rule 6.1.c and *Faretta*, and also noted that the Sixth Amendment granted an accused “personally the right to make his defense.”

¶10 In June 2009, Defendant filed a formal, written “Motion to Change Counsel,” in which he requested that his then counsel “be withdrawn as [his] counsel of record, and that NO Attorney be substituted as [his] attorney in all future proceedings in the trial court.” The motion specifically cited Rule 6.1.c, recited the reasons why Defendant wished to dismiss appointed counsel in all of his cases, and clearly stated, “The Defendant seek[s] self-representation.”

¶11 These motions are the functional equivalent of Defendant’s voluntary, written waiver for Rule 6.1 purposes. Defendant’s June 2009 motion also contains attachments in which Defendant specifically complains about appointed counsel’s failure to effectively represent him by refusing to file Defendant’s “requested motions” or interview his witnesses, which also supports the inference that Defendant clearly understood the role of trial counsel and, consequently, that his decision to represent himself was knowingly and intelligently made. *See Dann*, 220 Ariz. at 359, ¶ 16, 207 P.3d at 612.

¶12 The record shows that, at a status conference on February 15, 2007, the trial court cautioned Defendant, albeit in general terms, concerning self-representation, stating, “It’s

my job to advise you of the dangers and disadvantages of representing yourself . . . .” The court did not rule on Defendant’s request to proceed pro per at that time. Thus, Defendant was made aware of the fact that there were “dangers and disadvantages” generally inherent in his choice to represent himself prior to the court’s final ruling on his motion on February 26. *See Id.* at 360, ¶ 24, 207 P.3d at 613. At that time, Defendant also avowed to the court that he had discussed his decision “somewhat” with his then trial counsel and confirmed his desire to proceed alone.

¶13 At another status conference on June 29, 2009, Defendant once again confirmed that he “[did not] want any lawyer” and felt “qualified” to proceed on his own. Prior to voir dire on October 6, 2009, the trial court reviewed the role of Defendant’s advisory counsel with Defendant and also informed Defendant, “You’re the one in charge because this is the decision you’ve made.” The court then once again asked Defendant, “Is that still your desire, to go forward as your own lawyer?” Defendant replied, “Oh, yes, sir.”

¶14 Numerous other factors in this record support the finding that Defendant was fully aware of a trial attorney’s role and of the disadvantages of self-representation and that he knowingly, intelligently and voluntarily waived his right to counsel. We note only an additional few here. First, Defendant

has an extensive criminal record,[5] which, in and of itself, supports the inference that Defendant was aware of the role of trial counsel and, consequently, of the risks and dangers of self representation. *See, e.g.*, *State v. Rigsby*, 160 Ariz. 178, 182, 772 P.2d 1, 5 (1989) (noting that "considerable experience with the criminal justice system" supports an inference of the defendant's understanding of the trial process and the dangers of self-representation). Second, Defendant testified at trial, admitted three prior felony convictions, and acknowledged that he was represented by an attorney on two of them, which further supports that inference. Third, during voir dire two prospective jurors expressed their reluctance to serve on the jury precisely because Defendant was representing himself. One of them characterized Defendant's situation as "it's like a little leaguer playing against a major league baseball [sic]." During his questioning of the prospective jurors, Defendant addressed the jury panel stating,

> And I wanted to touch just real quickly on the gentleman that didn't quite understand why a person would want to represent himself. See, that is a part of our right as citizens of the United States. You don't necessarily have to have a lawyer to represent you. This is part of the Constitution. And I'm a man that believes in the Constitution very strongly. . . . [I]f anybody has a problem with this, please let me know . . . .

[5] According to the trial court, the current offenses marked Defendant's eleventh and twelfth criminal convictions.

This statement clearly supports the inference that Defendant's decision to represent himself was knowing and voluntary. Finally, Defendant had the assistance of advisory counsel at trial, *see Cornell*, 179 Ariz. at 324, 878 P.2d at 1362 (viewing the trial court's appointment of advisory counsel as addressing inherent disadvantages of self-representation); and Defendant's performance at trial, as reflected in the record on appeal, confirms that Defendant managed his defense capably, ultimately securing not guilty verdicts on two of his four charges. *See Rigsby*, 160 Ariz. at 182, 772 P.2d at 5 (viewing favorably the defendant's competent performance at trial in rejecting the defendant's claim that the trial court failed to inform him of the dangers and disadvantages of self-representation).

¶15 Based on the particular facts and circumstances of this case, we find that the trial court did not abuse its discretion in implicitly finding that Defendant knowingly, intelligently and voluntarily waived his right to counsel and granting Defendant's motion to represent himself at trial. *See Gunches*, 225 Ariz. at 24, ¶ 8, 234 P.3d at 592; *Dann*, 220 Ariz. at 360, ¶ 25, 207 P.3d at 613.

CONCLUSION

¶16 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/S/
PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
PETER B. SWANN, Presiding Judge

/S/
MARGARET H. DOWNIE, Judge