IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

JOSEPH FRANK BOVA, II,

Appellant,

v. Case No. 5D19-3199

STATE OF FLORIDA,

Appellee.

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Opinion filed February 5, 2021

Appeal from the Circuit Court
for Flagler County,
Terence R. Perkins, Judge.

Matthew J. Metz, Public Defender, and Steven N. Gosney, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Whitney Hartless, Assistant Attorney General, Daytona Beach, for Appellee.

SASSO, J.

Appellant, Joseph Frank Bova, II, appeals the judgment and sentence entered after a jury convicted him of first-degree murder with a firearm. Appellant argues a new trial is required because the trial court applied an incorrect legal standard when it denied his unequivocal request to represent himself. Because the trial court's stated reason for

denying Appellant's request was Appellant's capacity to successfully represent himself, as opposed to his capacity to make a knowing waiver of his right to counsel, we agree and reverse.

FACTS

On September 27, 2013, Appellant was charged by indictment with first-degree murder with a firearm. In September 2019, the case proceeded to trial. Prior to jury selection, defense counsel informed the court that Appellant wanted to represent himself and requested a *Faretta*[1] inquiry. Following Appellant's request, an exchange between the court and Appellant occurred in which it became clear that Appellant's request was primarily based on a disagreement with counsel regarding the direct examination of an expert witness. Specifically, Appellant was pursuing an insanity defense, and, according to the trial court, wanted to "push" the expert into saying that Appellant was not guilty by reason of insanity. In the trial court's view, asking a specific question in that regard would have been fatal to Appellant's defense. Accordingly, the trial court stated:

> [H]ere's the reason why I'm not granting your Faretta. . . . It's not the nature of the charge. It's not a fact that you had a history of mental illness. It's not the fact that you still have a mental illness based on all the experts that have looked at you. You are competent. I get that. The reason I'm not letting you represent yourself in this case is your disagreement with your attorneys is basically over one question on one witness. . . .

The following day, and after the jury was empaneled, the trial court provided additional explanation of its reason for denying Appellant's request, this time noting Appellant's previously diagnosed mental illness. Even so, the trial court again expressed

[1] *Faretta v. California*, 422 U.S. 806 (1975).

its concern that Appellant would ask the "wrong" questions and concluded that it would be fatal to his case to allow him to represent himself.

The trial commenced, and ultimately, the jury found Appellant guilty as charged. Defense counsel filed a motion for new trial based on Appellant's unequivocal request to represent himself, which was denied in an unelaborated order.

STANDARD OF REVIEW

We review the trial court's decision on a request for self-representation for an abuse of discretion. *Slinger v. State*, 219 So. 3d 163, 164 (Fla. 5th DCA 2017).

ANALYSIS

In *Faretta*, the United States Supreme Court held that a criminal defendant has a constitutional right to represent himself provided that the decision to do so is knowing, intelligent, and voluntary. This right, along with the Supreme Court's subsequent qualification of the right as expressed in *Indiana v. Edwards*, 554 U.S. 164 (2008), is codified at rule 3.111, which states in relevant part:

> Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel, and does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by himself or herself.

Fla. R. Crim. P. 3.111(d)(3).

Importantly, and as the text of rule 3.111 conveys, the likelihood that a defendant would inadequately represent himself is not a valid reason to deny an unequivocal request for self-representation. *See Hooker v. State*, 152 So. 3d 799, 802 (Fla. 4th 2014); *see also Hooks v. State*, 286 So. 3d 163, 168 (Fla. 2019) ("[T]he ability to prepare a competent legal defense and technical legal knowledge (or lack thereof) are not relevant issues in a

self-representation inquiry." (citing *McKenzie v. State*, 29 So. 3d 272, 282 (Fla. 2010))). Instead, the test for permitting a defendant to represent himself is not whether the defendant is competent to represent himself effectively but whether he is competent to make a knowing and intelligent wavier. *Hooker*, 152 So. 3d at 802. Indeed, even if a trial court disagrees with a defendant's choice, the choice "must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta*, 422 U.S. at 834.

Here, the record demonstrates the trial court failed to apply the appropriate legal standard as announced in *Faretta* and required by rule 3.111. First, the trial court's *Faretta* inquiry focused on the merit of Appellant's proposed trial strategy, rather than his competence to make a knowing and intelligent waiver of his right to counsel. Second, although the trial court found Appellant's request was unequivocal,[2] the trial court explicitly stated that the reason for denying Appellant's request was its perception that Appellant's trial strategy would be fatal to his case. Third, the trial court's post hoc clarification of its ruling, after a material stage in the proceedings had occurred, does not cure this error. And although we recognize the narrow exception recognized in *Indiana v. Edwards*, the trial court's comments do not dissuade this Court of its conclusion that the trial court applied a standard other than the one articulated in Florida Rule of Criminal Procedure 3.111.

In sum, Appellant made an unequivocal request to represent himself, which the trial court denied based on an incorrect application of both *Faretta* and rule 3.111(d)(3). Consequently, we determine the trial court abused its discretion in denying Appellant's

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[2] We determine the trial court did not err in determining Appellant's request was unequivocal and reject the State's argument in this regard.

request and reverse and remand for a new trial. *See Tennis v. State*, 997 So. 2d 375, 379 (Fla. 2008) (noting that the denial of the right of self-representation is not amenable to harmless error analysis (citing *Goldsmith v. State*, 937 So. 2d 1253, 1256–57 (Fla. 2d DCA 2006))).

REVERSED and REMANDED.

EVANDER, C.J., and NARDELLA, J., concur.