MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael Jay McCune,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 6, 2023

Court of Appeals Case No. 23A-CR-135

Appeal from the Madison Circuit Court

The Honorable Angela Warner Sims, Judge

Trial Court Cause No. 48C01-2001-F1-92

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Michael Jay McCune appeals his conviction for Level 3 felony aggravated battery. On appeal he raises two issues, which we reorder and restate as:

> I. Whether the trial court abused its discretion when it denied McCune's request for standby counsel; and
>
> II. Whether the trial court abused its discretion when it excluded character evidence of the victim's propensity for violence.

[2] We affirm.

Facts and Procedural History

[3] On January 11, 2020, LaVerne Pflugh Jr. ("Verne") planned a surprise birthday gathering for his girlfriend Stephanie Kitner at a bar in Madison County, Indiana. McCune, who was Verne's employee and friend, attended the gathering. Later that evening, McCune returned to Verne's home with Verne, Kitner, and Kitner's son. McCune regularly stayed at Verne's home.

[4] McCune was sitting in the living room watching television when he heard Verne and Kitner arguing. Verne and Kitner were in the garage but proceeded to come inside the home where they continued to argue while in the kitchen. McCune joined them in the kitchen and began arguing with Verne. McCune punched Verne in the mouth, and Verne retaliated by grabbing McCune and pushing him to the ground. Verne then hit McCune in the head. Kitner was able to deescalate the situation, and Verne told McCune to leave the house.

[5] After McCune left, Verne and Kitner began to prepare to go to bed. McCune returned to Verne's home approximately fifteen minutes later and parked his vehicle in the driveway. Verne saw McCune's car in the driveway and exited his house as McCune began walking toward the home. McCune yelled at Verne, and Verne told him to leave. But McCune continued to walk toward the porch of the home. McCune was armed with a knife and, when he reached Verne, he stabbed him multiple times in the chest and abdomen. Verne was unarmed. Verne fell on top of McCune, and McCune stabbed him in the groin and back. Verne then hit McCune in the face and separated himself from McCune.

[6] Kitner told McCune to leave and called 9-1-1. McCune drove away and was apprehended by the police shortly thereafter. Paramedics responded to the scene and transported Verne to a hospital in Anderson via ambulance. Due to the severity of his wounds, medical personnel later transferred Verne to a hospital in Indianapolis.

[7] On January 15, 2020, the State charged McCune with Level 1 felony attempted murder. McCune expressed dissatisfaction with his appointed counsel numerous times until May 25, 2022, when he filed a motion with the trial court requesting permission to represent himself. The trial court held a hearing and thoroughly advised McCune of the dangers of self-representation. After ensuring that McCune understood the advisements, the court granted McCune's motion. Prior to trial, McCune requested standby counsel. The trial court denied his request.

[8] McCune's jury trial commenced on November 29. During trial, McCune argued that he acted in self-defense and returned to Verne's home after leaving the first time because he was concerned for Kitner's safety. He also attempted to introduce evidence to establish that Verne had a propensity for violence and had bullied him in the past. The State objected, and the trial court sustained the objection.

[9] Ultimately, the jury found McCune guilty of Level 3 felony aggravated battery, a lesser included offense of attempted murder. The trial court ordered McCune to serve sixteen years in the Department of Correction. McCune now appeals.

Standby Counsel

[10] The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel. *Jones v. State*, 783 N.E.2d 1132, 1138 (Ind. 2003). Implicit in the right to counsel is the right to self-representation.[1] *Drake v. State*, 895 N.E.2d 389, 392 (Ind. Ct. App. 2008); *see also Wright v. State*, 168 n.E.3d 244, 255 (Ind. 2021). Before a defendant waives his right to counsel and proceeds pro se, the trial court must determine that the defendant's waiver of counsel is knowing, voluntary, and intelligent. *Jones*, 783 N.E.2d at 1138. "When a defendant asserts the right to self-representation, the court should tell

[1] The right to self-representation is not absolute. *See Wright v. State*, 168 N.E.3d 244, 258 (Ind. 2021) (citing *Indiana v. Edwards*, 554 U.S. 164, 171 (2008)). And "there are case-specific circumstances in which 'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id.* at 259 (quoting *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000)).

the defendant of the 'dangers and disadvantages of self-representation.'" *Poynter v. State*, 749 N.E.2d 1122, 1126 (Ind. 2001) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)). "Although a trial court need not follow specific 'talking points' when advising a defendant of the dangers and disadvantages of proceeding without counsel, a trial court must come to a 'considered determination' that the defendant is making a knowing, voluntary, and intelligent waiver of his right to counsel." *Wilson v. State*, 94 N.E.3d 312, 320-21 (Ind. Ct. App. 2018) (citation omitted).

[11] McCune does not dispute that he knowingly, voluntarily, and intelligently waived his right to counsel. Indeed, the trial court thoroughly discussed the dangers and disadvantages of self-representation with McCune before granting his request to proceed pro se. McCune only argues that the trial court abused its discretion when it denied his subsequent, pre-trial request for standby counsel.

[12] The appointment of standby counsel can be an appropriate prophylactic device when a defendant assumes the burden of conducting his own defense. *Wilson*, 94 N.E.3d at 324 (citing *Jackson v. State*, 441 N.E.2d 29, 33 (Ind. Ct. App. 1982)). However, a defendant who proceeds pro se has no right to demand the appointment of standby counsel for his assistance. *Kindred v. State*, 521 N.E.2d 320, 323 (Ind. 1988). Rather, the decision of whether to appoint standby counsel is a discretionary one made by the trial court. *Id.*

[13] We also observe that "[s]tandby counsel is not considered to have been appointed to represent the defendant" who is only entitled to confer with

standby counsel. *Goble v. State*, 766 N.E.2d 1, 5 n.5 (Ind. 2022). A defendant "is not entitled to have standby counsel actively participate in the proceedings." *Id.*

[14] Approximately two and one-half months before his scheduled trial date, McCune requested standby counsel because he 1) was faced with the inherent difficulty in questioning himself, 2) desired assistance to investigate witnesses relevant to his defense, 3) had limited access to legal materials and information necessary to complete discovery, and 4) was disabled and bound to a wheelchair. Appellant's App. Vol. 3, p. 28. McCune cites these reasons in his Appellant's Brief but does not develop any argument explaining why the trial court abused its discretion after it considered his request and denied his motion. Moreover, after reviewing his motion, we surmise that McCune wanted standby counsel to actively participate in his case. The trial court acted within its discretion when it denied McCune's attempt at hybrid representation. *See Henley v. State*, 881 N.E.2d 639, 647-48 (Ind. 2008); *Sherwood v. State*, 717 N.E.2d 131, 134 (Ind. 1999).

[15] In his brief, after noting that the ABA's recommendation that trial courts should appoint standby counsel in cases where the maximum penalty is life without parole, McCune argues that because he was charged with Level 1 felony attempted murder and he was over sixty-two years old, he "faced what amounted to life in prison[.]" Appellant's Br. at 17. But the ABA's recommendation is not binding on our courts, and McCune was not faced with a life sentence without the possibility of parole. We are also not persuaded by McCune's claim that the trial court should have appointed standby counsel

because he made a mistake when he filed a motion to continue the sentencing hearing without including a supporting affidavit. McCune elected to proceed pro se, and in doing so, he accepted the burdens and hazards of self-representation. *See* *Carter v. State*, 512 N.E.2d 158, 162 (Ind. 1987).

[16] For all of these reasons, McCune has not persuaded us that the trial court abused its discretion when it denied his motion to appoint standby counsel.

Character Evidence

[17] McCune claims the trial court abused its discretion when it excluded evidence concerning Verne's propensity for violence. Decisions regarding the admission or exclusion of evidence are entrusted to the sound discretion of the trial court. *Laird v. State*, 103 N.E.3d 1171, 1175 (Ind. Ct. App. 2018), *trans. denied*. On appeal, we review the trial court's decision only for an abuse of that discretion. *Id.* The trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before it, or if the court has misinterpreted the law. *Id.*

[18] In support of his claim of self-defense, McCune sought to admit evidence that Verne had a propensity for violence and had committed prior violent acts. Character evidence is generally prohibited under Indiana Evidence Rule 404(a)(1), which provides that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."

[19] However, because a defendant claiming self-defense must establish that he had a reasonable fear of harm, evidence tending to support his theory is generally admissible.[2] *Brand v. State*, 766 N.E.2d 772, 780 (Ind. Ct. App. 2002), *trans. denied*. For this reason, a victim's reputation for violence may be pertinent to a defendant's claim of self-defense. *Weedman v. State*, 21 N.E.3d 873, 891 (Ind Ct. App. 2014) (citing *Brand*, 766 N.E.2d at 780), *trans. denied*.

[20] Specifically, "the victim's reputed character, propensity for violence, prior threats and acts, if known by the defendant, *may* be relevant to the issue of whether a defendant had fear of the victim prior to utilizing deadly force against him." *Brand*, 766 N.E.2d at 780 (emphasis added); *see also Holder v. State*, 571 N.E.2d 1250, 1254 (Ind. 1991) (explaining that "[e]vidence of the victim's character may be admitted for either of two distinct purposes: to show that the victim had a violent character giving the defendant reason to fear him or to show that the victim was the initial aggressor"). However, the "defendant must first introduce appreciable evidence of the victim's aggression to substantiate the claim of self-defense before evidence is admissible to show the reasonableness of the defendant's fear of the victim." *Brand*, 766 N.E.2d at 780.

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[2] A valid claim of self-defense is legal justification for an otherwise criminal act. *Hall v. State*, 166 N.E.3d 406, 412 (Ind. Ct. App. 2021) (citing *Wilson v. State*, 770 N.E.2d 799, 800 (Ind. 2002)). "To prevail on a claim of self-defense involving deadly force, the defendant is required to show that he or she '(1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm.'" *Id.* at 412-13 (quoting *Wilson*, 770 N.E.2d at 800).

[21] McCune's proffered evidence would not have supported a reasonable belief that deadly force was necessary. McCune sought to admit the testimony of Verne's former employee who would have testified that Verne bullied his employees, including McCune. But this evidence, without more, would not support a reasonable fear of death or great bodily harm.

[22] The trial court also did not allow McCune to testify to Verne's alleged commission of prior violent acts. Tr. Vol. 3, pp. 225-26. McCune did not make an offer to prove, and, therefore, only McCune's general assertion that Verne had committed prior bad acts is in the record before us. Evidence of prior specific bad acts would only have been admissible if McCune had provided a foundation showing that he knew about the acts before he stabbed Verne. *See Holder*, 571 N.E.2d at 1254. Because this evidence is not in the record, it is not available for appellate review.

[23] McCune's own conduct established that he did not fear Verne and that Verne was not the aggressor under these circumstances. McCune worked for Verne and considered him a friend. He spent time with Verne socially and lived in Verne's home with him. On the night the stabbing occurred, McCune inserted himself into Verne's argument with Kitner. McCune then instigated a physical alternation with Verne by punching Verne in the mouth. Finally, McCune complied with Verne's demand that McCune leave his home, but McCune returned to the home fifteen minutes later while armed with a knife. This evidence was not disputed at trial.

[24] Moreover, even if the trial court erred when it refused to allow McCune to introduce evidence of Verne's alleged prior violent acts or that he bullied McCune, the error would be harmless. To determine whether an error in the exclusion of evidence was harmless, our court considers whether "its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." *Hayko v. State*, 211 N.E.3d 483, 491 (Ind. 2023) (citing Ind. Appellate Rule 66(A)).

[25] After reviewing the record on appeal, we are convinced that the impact of any error in the exclusion of evidence of the victim's character was sufficiently minor. McCune admitted that he stabbed Verne multiple times. The only issue at trial was whether McCune acted in self-defense. The State presented overwhelming evidence that McCune was the aggressor. McCune inserted himself into Verne's argument with Kitner and punched Verne. In retaliation, Verne struck McCune several times. Kitner deescalated the physical confrontation, and McCune complied with Verne's demand to leave the home. McCune then returned to Verne's home while armed with a knife and stabbed Verne before Verne fell on top of McCune forcing both men to the ground. McCune then stabbed Verne in the back and groin. Finally, McCune's claim that Verne physically attacked him first as he stood near his vehicle was not consistent with physical evidence establishing that the physical encounter occurred near Verne's front porch. McCune also fled from the scene after stabbing Verne. After reviewing the record in its entirety, we are not persuaded that the excluded evidence would have had an impact on the outcome at trial.

Conclusion

[26] The trial court acted within its discretion when it denied McCune's request for standby counsel. And the trial court also did not abuse its discretion when it excluded evidence McCune wanted to introduce in an attempt to establish the victim's violent character. We therefore affirm McCune's Level 3 felony aggravated battery conviction.

[27] Affirmed.

Vaidik, J., and Pyle, J., concur.