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NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

2017-SC-000186-MR

WILLIAM TRENT

APPELLANT

V. ON APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
NO. 15-CR-00413

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

William Trent appeals as a matter of right from the Henderson Circuit Court judgment sentencing him to fifty-five years' imprisonment for first-degree sodomy and first-degree sexual abuse, and for being a first-degree persistent felony offender. Before trial, Trent filed a motion to represent himself, which the trial court granted after conducting a *Faretta* hearing.¹ The trial court found that Trent knowingly, intelligently, and voluntarily waived his right to counsel, but declined to allow Trent to cross-examine his alleged victim and

¹ A *Faretta* hearing ensures that a defendant knowingly, intelligently and voluntarily waives his right to counsel. Typically, the trial court conducts a hearing in which the defendant testifies about the waiver. The trial court must warn the defendant of the dangers from and benefits given up by waiving counsel. *Faretta v. California*, 422 U.S. 806 (1975); *Commonwealth v. Terry*, 295 S.W.3d 819, n.13 (Ky. 2009).

instead ordered Trent's appointed attorney to conduct the cross-examination and act as standby counsel. As explained below, for some reason the *Faretta* hearing was not recorded. At the conclusion of voir dire, Trent requested that he be relieved of his duties and that his standby counsel take over, which the trial court allowed. The case proceeded to opening statements and the jury ultimately found Trent guilty on all counts.

On appeal, Trent argues that (1) the trial court erred by not ensuring he knowingly, intelligently, and voluntarily waived his right to counsel, and (2) the trial court committed palpable error by giving jury instructions that violated his rights against double jeopardy and to a unanimous verdict. However, Trent failed to comply with Kentucky Rule of Civil Procedure (CR) 75.13 by providing a narrative statement of the missing *Faretta* hearing, which means this Court is left to assume the missing record supports the trial court's findings. Additionally, given that Trent tendered jury instructions substantially similar to those ultimately given by the trial court, palpable error review is denied. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Sally met Trent at a senior citizen facility.² After learning that Trent was homeless, Sally offered him work around her house cleaning gutters and mowing her lawn, for \$20 per task. Trent performed work at Sally's house for the first time on October 13, 2015, and again on October 15, 2015. On the

² In keeping with this Court's policy of using pseudonyms for victims of sexual assault, this opinion refers to the victim as "Sally."

15th, Trent told Sally he was sick, and she offered to let him sleep in a storage building on her property. He left the next morning.

Trent returned to Sally's house late at night on October 19, 2015, and, apparently aware that she used to cut her late husband's hair, asked her to cut his hair for a job interview the next day. Sally testified that she was hesitant but felt sorry for him and invited him inside. Trent sat in the kitchen while she retrieved the clippers. At some point during the haircut, Sally noticed that Trent's head tilted all the way back and that his eyes rolled back into his head. He also began to run his hand up her leg, but she pulled away and asked him to leave. Trent responded by saying "I'm going to teach you how to suck dick," and immediately got up from his chair and pinned her arms down so she could not move.

Sally began to struggle, but Trent overpowered her and led her down the hallway toward the bedroom. Sally screamed, but Trent threatened to hurt her if she did not stop. He put one arm around her neck and used his other fist to hit her in the head several times as she tried to escape. Once in the bedroom, he pushed her down on the bed and took her shorts and underwear off. Sally screamed again, but Trent covered her face with a pillow and sat on it. He told her he would kill her if she did not shut up. She begged him to get off her, but he rammed his fist into her mouth, knocking her dentures out. He then forced his penis in her mouth and put his hand on the back of her head, forcing her to perform oral sex. Trent also stuck his fingers in her anus.

Sally heard Trent make an awful, rumbling sound. He fell back on the bed and his eyes rolled into the back of his head. Trent vomited on the bed and floor. Freed from his control, Sally got up and grabbed her gun. She pointed it at Trent and tried to shoot, but the safety was on, so she grabbed her robe and ran to her neighbor for help. The police came and collected evidence from Sally's home, including the vomit-covered sheet and a pair of men's underwear. When police found Trent shortly thereafter, they noticed he had vomit on his shirt and was not wearing underwear.

As noted, Trent was convicted of first-degree sodomy, first-degree sexual abuse and being a first-degree persistent felony offender and sentenced to fifty-five years' imprisonment. Trent represented himself during voir dire but was represented by standby counsel throughout the remainder of the trial.

ANALYSIS

I. Waiver of Right to Counsel

Trent argues that the trial court erred by not ensuring that he knowingly, intelligently, and voluntarily waived his right to counsel. On January 5, 2017, Trent filed a motion to represent himself. The motion was set for a hearing on the morning of January 9, 2017, but the jail failed to bring Trent over for the hearing, so the trial court rescheduled the hearing for 4:00 p.m. that same day. The *Faretta* hearing occurred that afternoon, but there is no recording of the hearing in the trial court record. The trial court entered an order on January 10, 2017, referencing the *Faretta* hearing, making the necessary findings and allowing Trent to represent himself, but also ordering that Trent's appointed

counsel remain on the case as standby counsel to cross-examine the victim. The order stated that standby counsel was also to make himself available to advise Trent of rules and courtroom procedures before and after the trial, and that standby counsel should be fully prepared to represent Trent and ready to proceed with trial. As noted above, counsel assumed full representation at the conclusion of voir dire when Trent asked to be relieved of representing himself.

Trent admits that this alleged error was not preserved but asks for review by this Court as structural error, or, in the alternative, palpable error under Kentucky Rule of Criminal Procedure (RCr) 10.26. Structural error exists “only in a very limited class of cases.” *Neder v. United States*, 527 U.S. 1, 8 (1999). This Court has identified very few errors that constitute structural errors: “(1) complete denial of counsel, (2) biased trial judge, (3) racial discrimination in selection of grand jury, (4) denial of self-representation at trial, (5) denial of public trial, (6) defective reasonable-doubt instruction, and (7) erroneous deprivation of the right to counsel of choice[.]” *McCleery v. Commonwealth*, 410 S.W.3d 597, 605 (Ky. 2013). While this Court has determined that the failure to conduct a *Faretta* hearing constitutes structural error, in the present case there is no dispute that the trial court conducted a *Faretta* hearing. *Swan v. Commonwealth*, 384 S.W.3d 77, 94 (Ky. 2012). Trent’s case does not fall into any of the above categories. Trent did not suffer from a complete denial of counsel, nor was he deprived of the right to counsel of choice. Trent asked to proceed *pro se* and was allowed to do so after the trial court ensured that Trent knew the consequences of such action. When he asked that his standby

counsel take over prior to opening statements, the trial court granted that request as well. Simply put, this case does not involve a structural error and therefore if review is warranted, it must be for palpable error.

Trent argues that “[a] more thorough, careful, and patient approach was required of the trial court before it allowed [Trent] to sabotage his own case and represent himself at trial.” When a defendant seeks to waive his right to assistance of counsel, *Faretta* obligations are triggered. 422 U.S. 806. *Faretta* requires that a defendant seeking to proceed *pro se* 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.” *Id.* at 835. A decision to forego the aid of counsel must be made knowingly, intelligently and voluntarily. *Id.*

In the order allowing Trent to proceed *pro se*, the trial court stated that it had reviewed the record. The trial court also stated that it had questioned Trent under oath regarding his education and experience with legal matters. Ultimately, the trial court concluded that Trent’s choice to represent his own interests was made knowingly, intelligently and voluntarily. The court also allowed Trent to have “actual control over the case he [chose] to present to the jury.” *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

Citing *Partin v. Commonwealth*, 168 S.W.3d 23, 27 (Ky. 2005), the trial court limited Trent’s representation role in only one way; it declined to allow him to personally cross-examine Sally, the victim of the alleged sodomy and sexual abuse. Instead, standby counsel was ordered to conduct the cross-

examination with questions provided by Trent. Standby counsel was also ordered to advise Trent on evidentiary rules and courtroom procedures. Therefore, Trent was able to direct his own representation and control how his case was presented. Trent was able to conduct his own representation with the benefit of guidance from a knowledgeable attorney who was ordered to be prepared to take over Trent's representation at any time, and who did so.

Further, the Appellant has the burden to "present a complete record" for our review. *Early v. Commonwealth*, 470 S.W.3d 729, 734 (Ky. 2015). While parties have little control over equipment used in the trial court, if issues arise regarding the completeness of the record then parties are "specifically allowed to submit narrative supplements where there are gaps in the record." *Id.* CR 75.13.³ The narrative supplement must be submitted to the opposing party to

³ CR 75.13 states:

(1) In the event no stenographic or electronic record of the evidence or proceedings at a hearing or trial was made or, if so, cannot be transcribed or are not clearly understandable from the tape or recording, the appellant may prepare a narrative statement thereof from the best available means, including his/her recollection, for use instead of a transcript or for use as a supplement to or in lieu of an insufficient electronic recording. This statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service upon him/her. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the trial court for settlement and approval, and as settled and approved shall be included in the record on appeal.

(2) By agreement of the parties a narrative statement of all or any part of the evidence or other proceedings at a hearing or trial may be substituted for or used in lieu of a stenographic transcript or an electronic recording.

allow for objections or amendments, then submitted to the trial court for approval. *Id.* Only then can the narrative statement be included in the record on appeal. *Id.*

Trent did not avail himself of CR 75.13. “It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). This Court has no way of knowing what evidence the trial court relied upon during the *Faretta* hearing in making its determination that Trent could represent himself with the assistance of standby counsel. “In the absence of any showing to the contrary, we assume the correctness of the ruling by the trial court.” *Chestnut v. Commonwealth*, 250 S.W.3d 288, 303-04 (Ky. 2008). Therefore, we assume that the trial court’s order resulted from a proper *Faretta* hearing that included all the relevant and required considerations.

Trent acknowledges in his brief that the trial court made the finding that he knowingly, intelligently and voluntarily waived his right to counsel and allowed him to proceed *pro se* with the aid of standby counsel. Trent also notes that the trial court order allowing him to represent himself did not include any of Trent’s answers to questions regarding his education and experience with legal matters. However, in *Faretta* the Court held that a defendant’s “technical legal knowledge, as such, [is] not relevant to an assessment of his knowing exercise of the right to defend himself.” 422 U.S. at 836. Furthermore, we have no requirement that such information be included in the trial court’s

order and, again, without a recording or narrative statement, we have no record of his responses.

During a *Faretta* hearing, the trial court assesses whether the defendant is “proceeding with eyes open,” and “such a determination can rarely be made in passing or without consideration of case-specific factors such as the defendant’s education, experiences, sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.” *Grady v. Commonwealth*, 325 S.W.3d 333, 342 (Ky. 2010). While there is no record to ensure that the trial court conducted this type of assessment, we reiterate that Trent had the opportunity to reconstruct the missing record through compliance with CR 75.13 and failed to do so. Given the gap in the record, this Court is bound to assume that the missing record supports the trial court order.

In his reply brief, Trent states that he is not really arguing that the trial court erred at the *Faretta* hearing and therefore he did not need a narrative statement of the hearing under CR 75.13. Trent instead asserts that despite the trial court’s finding that he knowingly, intelligently, and voluntarily waived his right to counsel, the record indicates that he was in fact not competent to waive counsel or to represent himself.

Trent points to his competency evaluations. On March 17, 2016, neuropsychologist Dr. Nicholas visited Trent at the detention center and performed a two-hour clinical interview. Dr. Nicholas reported that Trent exhibited an inability to concentrate and reported a long history of substance

abuse. Dr. Nicholas opined that due to memory and reason deficits, Trent could not participate rationally in his own defense, but Trent might be returned to competency under proper medication.

On September 13, 2016, Trent was transferred to the Kentucky Correctional Psychiatric Center (KCPC) for further evaluation by Dr. Allen. He stayed there for twenty-three days and appeared to be functioning highly. Results from tests administered to Trent indicated that he was putting forth little effort. His results were worse than would result by mere chance – meaning he was deliberately choosing wrong answers. Tests also indicated that he was exaggerating his psychological symptoms and previous hospitalizations indicated that Trent had a history of malingering. Despite reporting a composite IQ of 64, Dr. Allen concluded that the test results did not reflect Trent’s true abilities. Dr. Allen stated that Trent could describe his version of the facts which led to the charges, knew the basics of a courtroom trial, and had a fair understanding of plea bargaining. Dr. Allen concluded that Trent had the capacity to appreciate the nature and consequences of the proceedings against him and could participate rationally in his own defense.

The trial court held a competency hearing and allowed testimony from both of the doctors who evaluated Trent. As this Court has held, the trial judge may make the competency decision by relying on the testimony of one witness to the exclusion of others. *Edmonds v. Commonwealth*, 586 S.W.2d 24 (Ky. 1979) (overruled on other grounds by *Wellman v. Commonwealth*, 694 S.W.2d 696 (Ky. 1985)). Here, the trial court deemed Trent competent.

Despite Dr. Nicholas's initial conclusion that Trent could not participate rationally in his own defense, it was proper for the judge to base her competency determination on Dr. Allen's findings and testimony. Dr. Allen's evaluation was conducted more recently and during Trent's twenty-three day stay at KCPC. Trent seems to use his competency argument as a way to avoid acknowledging his failure to comply with CR 75.13. Regardless, the trial court determined that Trent was competent to represent himself and that his waiver of counsel was proper. Trent's argument that he was not competent to represent himself fails.

Finally, we note that if Trent had properly availed himself of CR 75.13, the argument would be subject to palpable error review under RCr 10.26. Palpable error review requires reversal when "manifest injustice has resulted from the error." *Elery v. Commonwealth*, 368 S.W.3d 78, 98 (Ky. 2012) (quoting RCr 10.26). In determining whether there has been manifest injustice, the Court focuses "on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006).

To the extent Trent's argument focuses on what occurred after the *Faretta* hearing, the trial court did not palpably err in allowing Trent to represent himself with the benefit of his appointed attorney acting as standby counsel. Trent points to the fact that he did not question any of the potential jurors during voir dire and merely stated to them that he hoped whoever was on the jury would make the right decision, and that he was leaving it in God's

hands. While this Court recognizes the importance of voir dire, Trent's choice to not ask the potential jurors any questions does not render the trial shockingly unfair. Trent was permitted to represent himself by court order on January 10, 2017, and by January 11 at approximately 10:22 a.m., recognizing his situation, Trent relieved himself of duty and informed the trial court that he wanted his appointed counsel to take over his representation.

In sum, due to the lack of record or narrative statement as provided by CR 75.13, this Court must assume that the gap in the record supports the trial court's decision that Trent knowingly, intelligently, and voluntarily waived his right to counsel. In the alternative, the trial court did not commit palpable error in allowing Trent to represent himself with the aid of standby counsel because he was appropriately found competent to make that decision and the short time Trent proceeded *pro se* did not result in manifest injustice.

II. Palpable Error Review of the Trial Court's Jury Instructions is Unavailable

Trent argues that the trial court further erred because the jury instructions did not protect his rights against double jeopardy and a unanimous verdict. He claims that it was impossible to determine which criminal act served as the basis for the jury's decision because the instructions failed to factually differentiate between the separate offenses according to the evidence. Trent's proposed instructions and the instructions given by the trial court are as follows:

Trent's proposed instruction for first-degree sodomy:

You shall find William Trent not guilty of Sodomy in the First Degree under this Instruction unless you believe from the evidence beyond a reasonable doubt that in Henderson County, on October 19, 2015 and before the finding of the Indictment herein, he:

- A) Knowingly engaged in deviate sexual intercourse with [Sally];
- AND
- B) That he did so by forcible compulsion.

Trial Court's instruction for first-degree sodomy:

You will find the Defendant guilty of First Degree Sodomy under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A) That in this county on or about October 19, 2015, he engaged in deviate sexual intercourse with [Sally];
- AND
- B) That he did so by forcible compulsion.

Trent's proposed instruction for first-degree sexual abuse:

You shall find William Trent not guilty of Sexual Abuse in the First Degree under this Instruction unless you believe from the evidence beyond a reasonable doubt that in Henderson County, on October 19, 2015 and before the finding of the Indictment herein, he:

- A) Subjected [Sally] to sexual contact;
- AND
- B) That he did so by forcible compulsion.

Trial Court's instruction for first-degree sexual abuse:

You will find the defendant guilty of First Degree Sexual Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A) That in this county on or about October 19, 2015, he subjected [Sally] to sexual contact;
- AND
- B) That he did so by forcible compulsion.

Both the trial court's instructions and Trent's proposed instructions also contained the appropriate statutory definitions of "deviate sexual intercourse" and "sexual contact." Kentucky Revised Statute (KRS) 510.010.

This issue is not preserved and thus would ordinarily be subject to palpable error review under RCr 10.26. However, this Court recently denied palpable error review in two cases where “a party tender[ed] instructions that [were] substantially similar to those ultimately given by the trial judge.” *Webster v. Commonwealth*, 438 S.W.3d 321, 324 (Ky. 2014). As we explained in the earlier opinion, even if the instruction given was actually erroneous, “[a]ppellant not only failed to preserve the error by making the concern known to the trial court, he *invited* the error by affirmatively proposing an instruction that contains the very defect he now opposes.” *Thornton v. Commonwealth*, 421 S.W.3d 372, 376 (Ky. 2013).

The instructions Trent proposed are essentially identical to the instructions issued by the trial court. Given the substantial similarities between the instructions, no further consideration of this argument is necessary.⁴

CONCLUSION

For the foregoing reasons, we affirm the trial court’s conviction and sentence.

All sitting. All concur.

⁴ We further note that Trent has not responded to this argument that he waived palpable error review by having submitted substantially similar jury instructions, despite the opportunity to do so in his reply brief.

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