

FILED: July 23, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

CHRISTINA M. TODD, aka Christina Marieann Todd,
Defendant-Appellant.

Multnomah County Circuit Court
100545057

A148667

Christopher J. Marshall, Judge.

Argued and submitted on September 30, 2013.

Laura A. Frikert, Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Matthew J. Lysne, Assistant Attorney in Charge, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Schuman, Senior Judge.

DUNCAN, P. J.

Reversed and remanded.

1 DUNCAN, P. J.

2 In this criminal case, defendant represented herself at trial and was
3 convicted of several prostitution-related crimes. On appeal, she argues that her
4 convictions should be reversed because she did not knowingly and voluntarily waive her
5 right to counsel.¹ We review for errors of law, *State v. Langley*, 351 Or 662, 666, 273
6 P3d 901 (2012), and we reverse and remand.

7 The procedural facts of this case are as follows. Defendant was charged by
8 information with six counts of attempted prostitution under ORS 167.007 and ORS
9 161.405, and six counts of unlawful prostitution procurement activity under Portland City
10 Code 14A.40.050. She was represented by a series of six court-appointed attorneys. All
11 of the attorneys had difficulty working with defendant; four of them moved to withdraw
12 as counsel because of a breakdown in the attorney-client relationship. Due to concerns
13 about defendant's mental health, one of the attorneys had defendant evaluated to
14 determine whether she was able to aid and assist in her own defense. On May 3, 2011,
15 the date set for trial, defendant appeared in court with her sixth attorney, Crow, who had
16 filed a motion to withdraw as defendant's attorney. The prosecutor explained to the court

¹ Defendant also argues that the trial court erred by denying her motion for a continuance; by accepting inconsistent verdicts from the jury; and by failing to grant her motion for a judgment of acquittal on certain counts. In light of our remand, we need not address the court's denial of defendant's motion for a continuance or its acceptance of the jury's verdicts. We reject defendant's arguments regarding her motions for a judgment of acquittal because they raise unpreserved claims of error that do not constitute error apparent on the record. *See State v. Brown*, 310 Or 347, 355-56, 800 P2d 259 (1990) (setting forth the requirements for plain-error review).

1 that defendant was "represented by Mr. Crow, and we have just been up to [the Criminal
2 Procedure Court]" and "were sent back down here, and a substitution of attorney, or a
3 release of attorney, was denied, Your Honor." Crow then informed the court that he was
4 "prepared to proceed with trial" but that defendant "may have something she wants to say
5 to Your Honor." Defendant then stated:

6 "[Crow] hasn't subpoenaed my main witness. He said the Court
7 wouldn't allow him to. He didn't know my criminal record when I came to
8 talk to him yesterday. * * *

9 "I am facing consecutive charges, and I don't feel that he has done
10 anything to help me in this matter. I mean he didn't even know my criminal
11 record the day before trial, and I don't want him to represent me."

12 At that point, the trial court explained to defendant that "what my job is, is
13 to do trials for this month in misdemeanor cases," and that "procedural issues that lead up
14 to those trials" are "resolved by the criminal procedure courts * * * so that when a case
15 comes here they're ready for trial." The court explained that it had not seen Crow's
16 motion to withdraw, because the motion had already been decided by a different judge.
17 A colloquy ensued, which we quote at length:

18 "THE DEFENDANT: I didn't request for [Crow] to get off my case.
19 He requested to get off.

20 "THE COURT: Okay.

21 "THE DEFENDANT: And he told me that I wasn't going to be
22 going to court today, that first thing in the morning he was going to get --
23 he was dropping the case.

24 "THE COURT: All right.

25 "THE DEFENDANT: So I came ill prepared. I'm not dressed for
26 court, I'm not ready for court, and --

1 "THE COURT: Okay. So this is the time that we have set for trial.
2 Your lawyer did a motion to no longer serve as your lawyer. The Court
3 denied that motion so we are ready to proceed for trial.

4 "THE DEFENDANT: So my other options -- Do I have another
5 option?

6 "THE COURT: Well, you keep talking, and I'm trying to talk and so
7 --

8 "THE DEFENDANT: I'm sorry, Your Honor.

9 "THE COURT: -- only one of us can speak and the other one can
10 listen, and that's the way we need to communicate.

11 "* * * * *

12 "THE COURT: * * * So here's our situation. We are set for trial.
13 You have a lawyer that's been appointed for you and so that's the current
14 setup. If you are wishing to proceed in a different manner, then you need to
15 let me know that now.

16 "THE DEFENDANT: Yes, please.

17 "THE COURT: Okay. So go ahead. What is it that you're asking
18 for?

19 "THE DEFENDANT: To -- If you're forcing me to rep -- in order
20 for me to get a fair trial.

21 "THE COURT: I'm not forcing you to do anything.

22 "THE DEFENDANT: Okay. Now, if the Court is -- To me, I don't
23 feel safe with this attorney. I don't feel he's worked on my case, at all. We
24 haven't even -- We discussed it one time very briefly, and like I said, he
25 hasn't subpoenaed even my main witness, and I want to testify and we
26 haven't gone over any of my testimony. I would -- don't want to be with --
27 If I have to go by myself to get a fair trial, I would prefer to do that.

28 "THE COURT: *Is that what you're asking for? Because the choices*
29 *here -- We are set for trial today, and the Court's understanding is that this*
30 *case originated back in May of 2010, so we are going to trial today.*

1 "THE DEFENDANT: So I haven't even gotten full discovery. No
2 one's given me none of the evidence. I haven't gotten to see anything.

3 "THE COURT: [Defendant], my job is to act as the trial judge in
4 this case. The Court, not this Judge, but the Court has made rulings on this
5 case --

6 "THE DEFENDANT: Uh-huh.

7 "THE COURT: -- that have brought it here today for trial, and that's
8 what we're here for, and the Court this afternoon, the Criminal Procedure
9 Court Judge, addressed the issue that your lawyer brought to the Court of
10 wanting to withdraw as your lawyer, and the Criminal Procedure Court
11 Judge denied that motion so we're not revisiting that issue.

12 *"So here's the choices. We're proceeding with trial. [Crow] is
13 going to represent you or you will represent yourself.*

14 "THE DEFENDANT: *I'll represent myself.*

15 "THE COURT: *So you are not wanting him to act as your lawyer;
16 is that correct?*

17 "THE DEFENDANT: *No. Correct.*

18 "THE COURT: Okay. So there is currently a motion that has been
19 filed by your lawyer. *Are you wanting him to represent you for purposes of
20 that motion and then end his representation, or are you asking that the
21 Court say, 'Okay, you're representing yourself for all purposes from here
22 forward'?* Which of those is it that you're wanting?

23 "THE DEFENDANT: *I don't really know. I don't even understand
24 what you just said to me."*

25 (Emphasis added.)

26 The trial court then clarified that Crow had filed a motion to dismiss based
27 on multiplicity of charges. Defendant responded that she "thought I had three motions
28 filed; one for a change of venue and for--against [prior bad acts] and one to * * * sever
29 my cases. There should be four motions." Defendant, Crow, and the court then

1 discussed what other motions had been previously filed by defendant's other attorneys,
2 which resulted in the following exchange:

3 "THE DEFENDANT: What about the other motions that were
4 supposed to be? So they're just gone and then those don't count and I can't
5 argue those because they disappeared?

6 "THE COURT: We have not said that. *All I'm trying to do at this*
7 *point is initially make the determination whether you want Mr. Crow to*
8 *represent you any longer --*

9 "THE DEFENDANT: *I don't want him to represent me, at all, for*
10 *anything.*

11 "THE COURT: -- for any purpose whatsoever.

12 "THE DEFENDANT: Any purpose whatsoever.

13 "THE COURT: Okay. All right. So we will allow you to represent
14 yourself, right? *You understand you have a right to be represented by a*
15 *lawyer here, right?*

16 "THE DEFENDANT: *I don't understand anything that you're*
17 *saying, Your Honor. All I know is that he's not ready and he's lied to me*
18 *already and I don't want him to be my attorney.*

19 "THE COURT: Okay. Let's back up.

20 "THE DEFENDANT: *I don't understand what you're saying; no, I*
21 *don't.*

22 "THE COURT: Okay. You understand that you're charged with
23 one, two, three, four, five, six -- six counts of attempted prostitution and six
24 counts of prostitution procurement, correct? You understand those are the
25 charges, right?

26 "THE DEFENDANT: Correct.

27 "THE COURT: Okay. You understand the gentleman next to you is
28 Mr. Crow, and he is a lawyer. He's been appointed by the Court to
29 represent you, right? Do you understand that?

1 "THE DEFENDANT: Yes.

2 "THE COURT: *And you understand that you are asking that he not*
3 *represent you, correct?*

4 "THE DEFENDANT: *What I'm asking for is a fair trial, and I*
5 *believe that if he go -- if he is my attorney during this trial, I will not get a*
6 *fair trial.*

7 "THE COURT: *Okay. So I will take that as a yes, that you're*
8 *asking that he not represent you. So we will allow you to proceed forward*
9 *as -- in your own defense, representing yourself. Okay? And Mr. Crow*
10 *will no longer have any obligation to represent you on any issue in this*
11 *case. That's what you're asking for, correct?*

12 "THE DEFENDANT: *Correct.*

13 "THE COURT: All right. So that's the way we'll have it.

14 "So [the prosecutor] will represent the State, you will represent
15 yourself, and we'll proceed forward on the case with our trial."

16 (Emphasis added.)

17 Defendant then expressed a desire to subpoena a witness and asked the
18 court for a setover to allow her to prepare her case. The court denied the motion and
19 disputed defendant's contention that the court was "forcing" her to go to trial. The court
20 excused Crow from the proceeding and stated, "No, we are not forcing you. We are
21 providing a forum for you to have a trial on the charges that have been brought against
22 you. So Mr. Crow will no longer be representing you."

23 The state indicated that it was ready to proceed with trial, and the court
24 made the following finding on the record:

25 "Okay. So I'm going to find, based on all that you've told me here so
26 far, that you're making a knowing, voluntary, and intelligent right to waive
27 the right to counsel here. *You understood that you had a right to counsel,*

1 *you had counsel.* You're asking us not allow -- to not allow him to
2 represent you and so we're going to go ahead and find that, as we said,
3 you've made a knowing, voluntary, intelligent waiver of your right to
4 counsel."

5 (Emphasis added.)

6 Defendant proceeded to represent herself with regard to the pending
7 motions, maintaining at various points that she was being forced to represent herself and
8 was unable to understand what the prosecutor and trial court were talking about. The
9 court denied defendant's pretrial motions and allowed the state to introduce evidence of
10 defendant's previous convictions for prostitution.

11 Defendant then represented herself throughout the course of the jury trial.
12 Notwithstanding the trial court's "leeway" and attempts to explain certain procedural
13 aspects of the trial (such as the difference between direct examination and cross-
14 examination), defendant often (including during the prosecutor's closing argument)
15 repeated her concerns that she did not understand the procedure and did not want to be
16 *pro se*. The court, each time, explained that it had already found that defendant had
17 knowingly and voluntarily waived the right to counsel, and that it would not revisit the
18 question.² The jury convicted defendant of two counts of attempted prostitution (Counts

² Toward the end of trial, defendant presented a motion requesting appointed counsel, which the court denied. The court explained that it was denying that motion for

"all of the reasons that we have given before, finding that you made a knowing, voluntary, intelligent right to your waiver of a right to counsel after having had at least six court-appointed lawyers prior to beginning the trial and having had Judge Fuchs deny your motion just before the trial started for -- I'm sorry, it wasn't your motion, your attorney's motion to

1 1 and 11) and five counts of unlawful prostitution procurement activity (Counts 2, 4, 8,
2 10, and 12), and acquitted her of the remaining charges.

3 On appeal, defendant assigns error to the trial court's ruling that she
4 knowingly and voluntarily waived the right to counsel. Defendant argues that she did not
5 voluntarily choose to represent herself; she contends that she was forced to represent
6 herself rather than accept counsel whom she reasonably believed was ill-prepared for
7 trial. She further argues that, even assuming that her choice was voluntary, it was not
8 knowingly made because the record does not demonstrate that she understood the risks of
9 self-representation. In response, the state argues that defendant voluntarily waived her
10 right to counsel by "consistently and repeatedly" insisting on representing herself. The
11 state further argues that defendant's waiver was knowingly made because, although the
12 trial court did not advise defendant of the risks of self-representation, the record
13 establishes that defendant was aware of particular risks -- including the charges against

withdraw, and that motion was denied by Judge Fuchs, the criminal
procedure court judge because, for the record, in Multnomah County, that's
how we proceed on such a motion.

"When we get that kind of motion it's decided by the criminal
procedure court judge, so then you folks came back down after that motion
was denied and then you informed the Court that you wanted to proceed
without that lawyer, and we told you what the two choices were. You
would have that lawyer represent you or you could proceed and represent
yourself, and you chose to represent yourself after a full discussion of that
issue, so that motion is denied."

In response to defendant's contention that she had only four lawyers on her case, the court
explained that its "ruling on whether you knowingly, voluntarily, and intelligently waived
your right to counsel * * * had nothing to do with whether you've had four lawyers or six
lawyers so it's not a factor."

1 her, the penalty she faced, and the fact that she had not subpoenaed witnesses -- and that
2 she was aware of certain benefits counsel could provide -- including access to discovery
3 and knowledge of how to argue motions.

4 Under Article I, section 11, of the Oregon Constitution, a defendant has the
5 right "to be heard by himself and counsel * * *."³ A defendant may waive the right to be
6 represented by counsel in a criminal proceeding, but the waiver "must be voluntarily and
7 intelligently made." *State v. Meyrick*, 313 Or 125, 132, 831 P2d 666 (1992).

8 "Voluntarily" refers to whether the waiver is an intentional act that is not coerced,
9 whereas "intelligently" refers to "a defendant's knowledge and understanding of the right
10 to counsel." *Id.* at 132 n 8 (emphasis added). Whether there has been an intentional and
11 knowing waiver of counsel "depend[s] on the particular circumstances of each case,
12 including the defendant's age, education, experience, and mental capacity." *Id.* at 132.

13 In determining whether a defendant's waiver of counsel is "the intentional
14 relinquishment or abandonment of a known right, [a] trial court should focus on what *the*
15 *defendant* knows and understands." *Id.* (emphasis in original). In order to validly waive
16 counsel, a defendant must not only know that he or she has the right to counsel, the
17 defendant must understand the risks of self-representation. *Id.*

18 "A colloquy on the record between the court and the defendant
19 wherein the court, in some fashion, explains the risks of self-representation

³ Defendant also argues that she did not validly waive her right to counsel under the Sixth Amendment to the United States Constitution. Because we conclude that defendant did not validly waive her Article I, section 11, right to counsel, we do not reach that argument or further discuss the Sixth Amendment.

1 is the preferred means of assuring that the defendant understand the risks of
2 self-representation. The more relevant information that a trial court
3 provides to a defendant about the right to counsel and about the dangers
4 and disadvantages of self-representation, the more likely it will be that a
5 defendant's decision to waive counsel is an intentional relinquishment or
6 abandonment of a known right or privilege and that the record will so
7 demonstrate."

8 *Id.* at 133. However, "Article I, section 11, does not require a catechism by the trial
9 court." *Id.* at 134. "The failure of a trial court to impart a particular piece of information
10 to a defendant will not, of itself, require reversal of a conviction if the record as a whole
11 shows that the defendant knew of his or her right to counsel and that the waiver of
12 counsel was an intentional relinquishment or abandonment of that known right." *Id.*
13 "Thus, *Meyrick* does not require that a defendant know and completely appreciate every
14 potential risk of self-representation in his or her case. Nor does *Meyrick* prescribe
15 particular risks that a defendant must understand." *State v. Jackson*, 172 Or App 414,
16 423, 19 P3d 925 (2001). "Conversely, however, a defendant's abstract knowledge that
17 there may be risks and disadvantages of self-representation, without any appreciation of
18 what those risks might be, is insufficient." *Id.* "'Understanding' under *Meyrick* means
19 that a defendant, in the totality of the circumstances, substantially appreciates the material
20 risks of self-representation in his or her case." *Id.*

21 Accordingly, we have held that evidence of a defendant's general awareness
22 that a lawyer might be helpful is not sufficient to establish a knowing waiver of counsel.
23 *See, e.g., State v. Erb*, 256 Or App 416, 423, 300 P3d 270 (2013) (defendant's written
24 waiver of counsel, which stated that she was "aware of the help a lawyer might be to me,"

1 was insufficient to establish that the defendant was aware of the risks of self-
2 representation); *State v. Reed*, 247 Or App 155, 161-62, 268 P3d 756 (2011) (evidence
3 that defendant had appeared at prior probation violation hearings, both with and without
4 counsel, was insufficient to show a knowing waiver of counsel); *State v. Massey*, 160 Or
5 App 197, 199, 981 P2d 352 (1999) (evidence that defendant had worked as a paralegal,
6 had been involved in several civil lawsuits before the commencement of his criminal
7 case, and had been represented by several different lawyers in the criminal case was
8 insufficient to establish that defendant understood the risks of proceeding *pro se*); *State v.*
9 *Richardson*, 159 Or App 592, 600-01, 978 P2d 435, *rev den*, 329 Or 479 (1999) (trial
10 court's statement that "a lawyer may be able to assist you in challenging the indictment"
11 was insufficient under *Meyrick*); *State v. Chambers*, 150 Or App 336, 339, 946 P2d 300
12 (1997) (instructing a *pro se* defendant as to the importance of subpoenaing witnesses and
13 that he should "get some help from an attorney or somebody on how to make sure you get
14 that done" was inadequate to assure that defendant was aware of the risks of self-
15 representation).

16 Similarly, we have held that a trial court's statement to a defendant that she
17 "may be at a disadvantage without a lawyer" and the defendant's acknowledgement that
18 she "may be" did not demonstrate that the defendant adequately understood the risks of
19 self-representation. *Erb*, 256 Or App at 423; *see also State v. Culver*, 198 Or App 267,
20 270-71, 108 P3d 104 (2005) (colloquy in which the trial court asked the defendant
21 whether he understood that he would be "at a disadvantage" if he represented himself was

1 insufficient under *Meyrick*); *State v. Meyer*, 116 Or App 80, 84, 840 P2d 1357 (1992)
2 (trial court's warning that jury trials are "kinda tricky" did not adequately inform
3 defendant of the risks of self-representation).

4 In this case, the trial court did not speak to defendant about the risks of self-
5 representation. As recounted above, the court focused on whether defendant wanted to
6 be represented by Crow or proceed *pro se*. The colloquy between the court and
7 defendant was focused entirely on which of those options defendant wanted. The court
8 asked defendant, "You understand you have a right to be represented by a lawyer here,
9 right?" When defendant responded that she did not "understand anything that you're
10 saying, Your Honor," the court went over the charges with defendant ("You understand
11 that you're charged with * * * six counts of attempted prostitution and six counts of
12 prostitution procurement, correct?"), and asked defendant whether she understood that
13 "the gentleman next to you is Mr. Crow, and he is a lawyer." The court then asked
14 defendant, "And you understand that you are asking that he not represent you, correct?"
15 When defendant then reiterated that she did not believe she would get a fair trial with
16 Crow as her attorney, the court replied, "Okay. So I will take that as a yes, that you're
17 asking that he not represent you," and released Crow from his duty to represent
18 defendant. At no point during that colloquy--or at any point before defendant purportedly
19 waived her right to counsel--did the trial court discuss the risks of self-representation or
20 determine whether defendant understood those risks. That failure to even mention any of
21 the risks of self-representation, or put on the record any facts indicating that defendant

1 understood the risks, is akin to the circumstances that we have described as *prima facie*
2 error. *E.g., Erb*, 256 Or App at 423 (holding that the trial court had committed *prima*
3 *facie* error where "[t]he trial court's comment regarding the disadvantages of self-
4 representation was extremely general" and "[t]he court did not offer any warnings
5 regarding the specific risks of self-representation, nor did it ask defendant any questions
6 that would have revealed the extent of defendant's knowledge of those risks").

7 Nonetheless, the state argues that the record "shows that before [defendant]
8 waived her right to counsel, she was aware of the following risks":

- 9 "• that she had been charged with six counts of attempted prostitution
10 and six counts of prostitution procurement;
- 11 "• that she faced 'six months' on one of the charges; and
- 12 "• that she had the right to call witnesses, and that she had not
13 subpoenaed a witness."

14 (Footnotes and record citations omitted.)

15 Furthermore, the state argues, defendant was aware of the following
16 "benefits counsel could provide":

- 17 "• she knew that she intended to be a primary witness and would want
18 to testify, but that she had not discussed her testimony with counsel yet;
- 19 "• that defense counsel had access to discovery and evidence; and
- 20 "• that she had several (at least three) pretrial motions for the court,
21 including a motion to change venue, and that she was 'not an attorney' and
22 '[did not] know how to argue' such a motion."

23 (Footnotes and record citations omitted.)

24 We are not persuaded that defendant's awareness of those risks is sufficient

1 to demonstrate that she understood the risks *inherent in self-representation*. Awareness
2 of the first two risks that the state identifies--the charges against her and the potential
3 penalty--might suggest that defendant understood, in an abstract sense, the consequences
4 of trial, but it does not demonstrate that she understood any of the added risk inherent in
5 proceeding without counsel. Nor is defendant's awareness of the difficulty in securing
6 witness testimony sufficient to demonstrate that she understood the danger of self-
7 representation. In fact, we have stated that even a trial court's explicit instruction to a *pro*
8 *se* defendant as to the importance of subpoenaing witnesses, and warning that he should
9 "get some help from an attorney or somebody on how to make sure you get that done,"
10 would have been inadequate to convey the "dangers and disadvantages of self-
11 representation." *Chambers*, 150 Or App at 340.

12 Defendant's awareness of certain benefits of counsel are, on this record,
13 also insufficient to demonstrate that she understood the risks inherent in self-
14 representation. The first two benefits of counsel identified by the state are services that,
15 in defendant's view, her appointed attorney had not provided. Defendant's decision to
16 proceed without counsel was based, in large part, on her belief that Crow was unprepared
17 because he had refused to subpoena her witness and had not spoken with her about her
18 testimony. Thus, even though she was aware that attorneys can provide those benefits, it
19 does not follow on this record that she understood how self-representation--as opposed to
20 keeping Crow as her attorney--posed inherent risk.

21 Finally, defendant's awareness that attorneys, unlike herself, would know

1 how to argue motions is not, on this record, sufficient to demonstrate the level of
2 awareness of the risk of self-representation that is required for a knowing waiver of the
3 right to counsel. As explained above, in the absence of a sufficient warning about the
4 dangers of self-representation or specific information about the benefits of counsel, we
5 have consistently rejected the argument that a generalized understanding of a lawyer's
6 services demonstrates knowledge of the risks of self-representation. *See Erb*, 256 Or
7 App at 423.

8 In sum, where a trial court puts a defendant to the type of choice that was
9 offered here--*i.e.*, keep your attorney or proceed *pro se*--the court must determine that the
10 defendant understands the risks of self-representation, to ensure that the waiver of the
11 right to counsel is an intelligent relinquishment of that right. Because the trial court did
12 not engage in a colloquy with defendant about those risks, and the record does not
13 otherwise establish that defendant sufficiently understood them, we must reverse and
14 remand. Although the record reflects that the trial court was extremely patient with
15 defendant, who made repeated outbursts during trial, that patience does not remedy the
16 prejudice that resulted from proceeding to trial without an attorney.⁴ Accordingly, we

⁴ The state has not suggested that the court's ruling on the waiver of counsel, if error, was harmless. Suffice it to say that, given the nature of the evidence, the arguments presented at trial, and the conduct of the trial generally, we are unable to tell what the outcome of defendant's case would have been if she had been represented by counsel. *See Erb*, 256 Or App at 427 (applying the test for harmless error in a similar context).

1 reverse defendant's convictions and remand for further proceedings.⁵

2 Reversed and remanded.

⁵ Because we remand on the ground that the state failed to establish that defendant's waiver was made knowingly, we do not address her contention that the waiver was not voluntary and that "the trial court's 'choice' to defendant to proceed to trial with court-appointed counsel or represent herself was impermissible" under *Langley*, 351 Or 662.