Affirmed; Opinion Filed March 30, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00436-CR

No. 05-17-00437-CR

DANIEL HALE KEIGLEY, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 59th Judicial District Court
Grayson County, Texas
Trial Court Cause Nos. 062462 & 062463

MEMORANDUM OPINION

Before Justices Bridges, Myers, and Schenck
Opinion by Justice Myers

A jury convicted appellant Daniel Hale Keigley of aggravated assault against a public servant,[1] theft of property valued at $1,500 or more but less than $20,000, and evading arrest with a vehicle.[2] *See* TEX. PENAL CODE ANN. §§ 22.02(b)(2)(B), 31.03(a), 38.04(a), (b)(2). Punishment was assessed at life imprisonment for the aggravated assault against a public servant offense, 20 years' imprisonment for the theft of property, and 75 years' imprisonment for evading arrest. The sentences were ordered to run concurrently. In three issues, appellant contends the trial court erred by (1) refusing to allow appellant to represent himself; (2) refusing to allow appellant his right to testify; and (3) refusing to allow appellant to be evaluated for competency following a suggestion

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[1] Appeal number 05-17-00436-CR; trial court cause number 062462.

[2] Appeal number 05-17-00437-CR; trial court cause number 062463.

of incompetency. We affirm.

BACKGROUND AND PROCEDURAL HISTORY

In cause number 05–17–00436–CR, the aggravated assault on a public servant case, the four-count indictment alleged appellant intentionally or knowingly threatened three City of Sherman police officers and an investigator with the Grayson County District Attorney's Office with imminent bodily injury by ramming their marked patrol cars, that appellant used or exhibited a deadly weapon, i.e., a "dually pickup truck," during the commission of these assaults, and that appellant knew these individuals were public servants who were lawfully discharging their duties by attempting to stop appellant. In cause number 05–17–00437–CR, the theft of property and evading arrest case, the two-count indictment alleged appellant unlawfully appropriated by acquiring or otherwise exercising control over a flatbed trailer, the value of which was $1,500 or more but less than $20,000,[3] from the owner thereof, with the intent to deprive the owner of the property; and that appellant fled from a person who appellant knew was a peace officer and who was attempting to lawfully arrest or detain appellant.

All of these offenses are alleged to have occurred on October 3, 2012, in Grayson County, Texas. The evidence at trial showed that appellant hitched a trailer valued at approximately $2,000 to the gray 2008 Dodge Ram "dually" pickup truck he was driving. The owner of the trailer saw appellant hooking up and driving away with the trailer and gave chase. After a brief high-speed pursuit, appellant unhooked the trailer and continued in the pickup truck with law enforcement officers (the owner of the trailer called 9-1-1 while he was chasing appellant and gave a description of the truck and its license number) now in pursuit. Appellant led law enforcement officers on a

[3] Pursuant to the former version of the penal code applicable in this case, theft was a state jail felony if (1) "the value of the property stolen is $1,500 or more but less than $20,000," or (2) "the value of the property stolen is less than $1,500 and the defendant has been previously convicted two or more times of any grade of theft." *See* Act of May 29, 2011, 82nd Leg., R.S., ch. 1234, § 21, 2011 Tex. Gen. Laws 3301, 3310 (amended eff. Sept. 1, 2015) (current version at TEX. PENAL CODE ANN. § 31.03(e)(4)); *Williams v. State*, No. 05–16–00860–CR, 2017 WL 2443133, at *4 (Tex. App.—Dallas June 6, 2017, no pet.) (mem. op., not designated for publication).

high-speed chase that continued into Denison, where he was taken into custody. During the pursuit, the truck appellant was driving rammed or collided with the four law enforcement vehicles mentioned in the four-count aggravated assault on a public servant indictment. The high-speed chase was recorded on dash-cam video that was admitted into evidence at trial.

On March 6, 2013, prior to the trial of this case, appellant was ordered by the trial court to be evaluated regarding his competency to stand trial, based on a motion filed by appellant's first trial counsel suggesting incompetency and requesting an examination of appellant. The evaluation found appellant incompetent to stand trial, and the trial court signed an order on May 30, 2013, committing appellant to the North Texas State Hospital for treatment and observation for a period not to exceed 120 days. After being returned to the court as competent to stand trial in February of 2014, appellant's new counsel—his previous attorney was granted leave to withdraw on February 20, 2014—moved the court on April 8, 2014, to appoint a mental health expert to evaluate appellant's sanity and competency to stand trial. The trial court signed such an order on May 12, 2014, and, as result of these evaluations, appellant was once again found to be incompetent to stand trial on October 1, 2014 and ordered committed to the North Texas State Hospital for a period not to exceed twelve months for further examination and treatment.

Appellant was deemed competent by the Texas Department of State Health Services in November of 2015. The November 30, 2015 written report concluded, based on appellant's performance during the evaluation and progress during hospitalization, that appellant possessed a rational as well as factual understanding of the charges and legal proceedings against him, and that he possessed sufficient rational capacity to consult competently with an attorney regarding his case. On February 19, 2016, however, appellant's second trial counsel again raised the issue of incompetency, citing the fact that appellant was refusing to communicate with defense counsel and his expert. On February 29, 2016, the trial court ordered another commitment and examination

of appellant to evaluate his competency to stand trial. On March 10, 2016, the appointed expert sent a letter informing the court that appellant could not be reexamined in the manner requested because the law allowed only one commitment and extension for the same criminal offense. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.085(a) (providing that court may order only one initial period of restoration and one extension in connection with the same offense). In a subsequent conference with the court, the State indicated it did not agree appellant was incompetent to stand trial, but it was unopposed to defense counsel's request for the appointment of a co-counsel to assist him—an appointment the court ordered on March 28, 2016. Thereafter, on November 29 and 30, 2016, a jury trial was held to determine appellant's competency to stand trial.

The evidence presented during the competency proceeding included a series of telephone calls that appellant placed from the county jail to his mother, which were recorded and introduced into evidence. During a call that was recorded on October 29, 2016, appellant and his mother discussed a recent postponement of the case. Part of that call was played in open court and is transcribed in the record. The relevant portion reads as follows:

> FEMALE SPEAKER: And Scott did call me that very day and he told me that they had postponed your court date.
>
> THE DEFENDANT: Why?
>
> FEMALE SPEAKER: Because the psychiatrist that is—that has determined you to be—what do they call it—incompetent?
>
> THE DEFENDANT: Incompetent.
>
> FEMALE SPEAKER: Is out of the country. He's on vacation. And because of that—him being the primary benefit.
>
> THE DEFENDANT: It wasn't a she?
>
> FEMALE SPEAKER: I—I don't know.
>
> THE DEFENDANT: Okay.
>
> FEMALE SPEAKER: It doesn't matter to me.

THE DEFENDANT: All right.

FEMALE SPEAKER: But the—the psychiatrist—

THE DEFENDANT: Woman psychiatrist.

FEMALE SPEAKER: —is out of the country.

THE DEFENDANT: All right.

FEMALE SPEAKER: —on a vacation, and therefore—therefore, your support system is not here. So, he did get a postponement. [T.] Scott [Smith, appellant's trial counsel] did tell me that he was of the opinion that you were not competent to stand trial. I told him I'm pleased with that because I don't think Daniel really is. And he said no, I don't either. He said he has to be able to communicate with his counsel and Daniel is not able to do that. So I suggest to you to keep it that way.

THE DEFENDANT: Yeah.

Other witnesses testified that appellant was usually well behaved and polite but he could be manipulative or uncooperative, refusing to behave unless some sort of favor was done for him or "acting out" as he got closer to a hearing or a court proceeding, and that he would quit taking his medications (which included Latuda, an anti-psychotic) when he had a court date approaching. Appellant told the medical staff at the jail that he stopped taking the Latuda because he did not like the way it made him feel, and he voiced a similar complaint in recorded jail telephone calls, telling his mother that his medication was giving him seizures. But Sherrell Killerlain, medical program director at the Grayson County Jail, testified that she did not observe appellant having any sort of "bad reaction" to the Latuda. She added that he did not go back to taking other medications prescribed prior to the Latuda (such as Klonopin, prescribed for panic and anxiety attacks) and that he was no longer "taking anything."

The evidence from the competency proceeding also included testimony from Dr. Jawad Riaz, one of the psychiatrists that conducted a competency evaluation on appellant while he was incarcerated at the county jail. He testified that there was no reason to believe appellant did not have sufficient ability to consult with his attorney with a rational degree of understanding, nor was

there any reason to think appellant did not have a rational as well as factual understanding of the legal system or why he was incarcerated. Dr. Riaz's cross-examination testimony includes the following exchange:

> Q. [DEFENSE COUNSEL:] Okay. And can you—for the jury, how would you define for the jury whether or not a person like Mr. Keigley is competent to stand trial?
>
> A. [RIAZ:] How do I explain that? Well, you know, like I said before, so there are —there are a few things that we look for as a psychiatrist that help us to determine whether they are—they are competent to stand trial. And—and the thing is they are aware of the situation they are in. And the defendant when I talked to him, he was aware where he was at. He was aware of the—the charges, and everything. And he was aware of the consequences—possible consequences. So, you know, that tells me he's—he was cognitively, or he's cognitively intact and competent because he understood, you know, all of these things.
>
> Q. Okay. And so I guess you questioned him and discussed in detail the—to see if he understood what he was charged with.
>
> A. Correct.
>
> Q. What type of punishment, or what the results might be?
>
> A. What the consequences might be and—and, you know, he was able to give me in a very coherent and clear manner the details of the charges. He was also able to give me detail about history of his mental illness, his previous hospitalizations and treatments.

After considering the evidence presented and the arguments of counsel, the jury found appellant competent to stand trial.

To the charges set forth in the indictments referenced above, appellant pleaded not guilty, and the charges proceeded to trial before a jury on January 23 through January 25, 2017. After the close of the evidence and the arguments of counsel, the jury found appellant guilty on all counts as charged in the indictments. Thereafter, as elected by appellant's counsel, the case proceeded to a punishment hearing before the same jury on January 25, 2017. After hearing the evidence and arguments, the jury assessed appellant's punishment at life imprisonment on each of the four counts of aggravated assault of a public servant; 20 years' imprisonment on the theft of property

charge; and 75 years' imprisonment for evading arrest, with all these sentences to run concurrently. Appellant's trial counsel filed motions for new trial, which were overruled by operation of law.

DISCUSSION

1. Self-Representation

In his first issue, appellant argues the trial court erred by refusing to allow him to represent himself after making "numerous requests to do so."

We review the denial of a defendant's request for self-representation for an abuse of discretion. *Lathem v. State*, 514 S.W.3d 796, 802 (Tex. App.—Fort Worth 2017, no pet.). We view the evidence in the light most favorable to the trial court's ruling, and we imply any findings of fact supported by the record and necessary to affirm the ruling when the trial court did not make explicit findings. *Id*.

Every criminal defendant has the constitutional right to the assistance of counsel, though not counsel of his own choice, *Hill v. State*, 666 S.W.2d 663, 667 (Tex. App.—Houston [1st Dist.] 1984), *aff'd*, 686 S.W.2d 184 (Tex. Crim. App. 1985); and the constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 818–20 (1975); *Hatten v. State*, 71 S.W.3d 332, 333 (Tex. Crim. App. 2002); *Lathem*, 514 S.W.3d at 802.

The Supreme Court has held that that a defendant has a constitutional right to proceed without counsel if he voluntarily, knowingly, and intelligently chooses to do so, and that the state may not constitutionally force a lawyer on him. *Faretta*, 422 U.S. at 820–21; *Lathem*, 514 S.W.3d at 802. While, however, a defendant has a fundamental right to represent himself, representation by counsel is the standard, not the exception, and there is a strong presumption against the waiver of the right to counsel. *Martinez v. Ct. of App. of Cal.*, 528 U.S. 152, 161 (2000); *Lathem*, 514 S.W.3d at 802. The Sixth Amendment represents two competing rights because exercising the right to self-representation necessarily means waiving the right to counsel. *Lathem*, 514 S.W.3d

at 802. Therefore, while a criminal defendant's right to counsel remains in effect until waived, a defendant's right to self-representation is not triggered until it is asserted. *Faretta*, 422 U.S. at 835; *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000); *Lathem*, 514 S.W.3d at 802.

In order for a defendant to represent himself, his request must be clear and unequivocal. *Lathem*, 514 S.W.3d at 802–03. He must assert it in a timely manner, i.e., before the jury is impaneled. *Blankenship v. State*, 673 S.W.2d 578, 585 (Tex. Crim. App. 1984); *Lathem*, 514 S.W.3d at 803. He must also voluntarily, knowingly, and intelligently waive counsel. *Lathem*, 514 S.W.3d at 803. The request must be unconditional and not be a calculated attempt to disrupt, subvert, obstruct, or delay the orderly procedure of the courts or to interfere with the fair administration of justice. *Funderburg v. State*, 717 S.W.2d 637, 641–42 (Tex. Crim. App. 1986); *Blankenship*, 673 S.W.2d at 585; *Thomas v. State*, 550 S.W.2d 64, 68 (Tex. Crim. App. 1977). And "while the exercise of the right of self-representation may cause some inconvenience or even disruption at trial, as long as it is not a calculated obstruction, the delay cannot deprive the accused of the right once properly asserted." *Lathem*, 514 S.W.3d at 803.

If a defendant asserts his right of self-representation, in order to ensure the decision is constitutionally effective, the trial court must advise the accused of the dangers and disadvantages of self-representation. *Id*. The Supreme Court has emphasized that "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835; *see also Godinez v. Moran*, 509 U.S. 389, 400–01 (1993); *Ex parte Winton*, 837 S.W.2d 134, 135 (Tex. Crim. App. 1992); *Blankenship*, 673 S.W.2d at 583; *Lathem*, 514 S.W.3d at 803.

There is no need "for the trial court to recite a formulaic litany of questions or to follow a particular 'script' to assure itself that an accused who has asserted her right to self-representation

has done so with 'eyes open.'" *Lathem*, 514 S.W.3d at 803 (citing *Dolph v. State*, 440 S.W.3d 898, 902 (Tex. App.—Texarkana 2013, pet. ref'd) (quoting *Burgess v. State*, 816 S.W.2d 424, 428 (Tex. Crim. App. 1991)). But if such factors are not otherwise apparent from the record, the trial court's inquiry regarding the waiver of counsel should center on the defendant's background, age, experience, and education. *See Burgess*, 816 S.W.2d at 428; *Cofer v. State*, No. 02–16–00101–CR, 2017 WL 3821885, at *2 (Tex. App.—Fort Worth Aug. 31, 2017, no pet.) (mem. op., not designated for publication). The defendant should be aware there are technical rules of evidence and procedure and that he will not be granted any special consideration solely because he asserted his pro se rights. *Cofer*, 2017 WL 3821885, at *2. *Faretta* provides:

> that if (1) a defendant clearly and unequivocally declares to a trial judge that he wants to represent himself and does not want counsel, (2) the record affirmatively shows that a defendant is literate, competent, and understanding and that he is voluntarily exercising his informed free will, and (3) the trial judge warns the defendant that he thinks it is "a mistake not to accept the assistance of counsel" and that the defendant will "be required to follow all the 'ground rules' of trial procedure," the right of self-representation cannot be denied.

Dolph, 440 S.W.3d at 902 (quoting *Faretta*, 422 U.S. at 835–36). If a defendant unequivocally asserts the right to self-representation, it is "the trial court's duty to give the necessary explanations and warnings before ruling on his request." *Alford v. State*, 367 S.W.3d 855, 861–62 (Tex. App. —Houston [14th Dist.], pet. ref'd) (quoting *Birdwell v. State*, 10 S.W.3d 74, 78 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd)). "Sound authority dictates that if 'a trial court denies a defendant's 'eleventh hour' request for new counsel, and 'the [defendant] unequivocally assert(s) his right to self-representation under *Faretta*, persisting in that assertion after proper admonishment, the court must allow the accused to represent himself.'" *Lathem*, 514 S.W.3d at 803 (quoting *Alford*, 367 S.W.3d at 862 (quoting *Burgess*, 816 S.W.2d at 428–29)).

The record in the present case, however, shows no clear and unequivocal, much less timely, request from appellant for self-representation. In fact, throughout the proceedings in this case

appellant was, at various times, uncooperative or argumentative; told the court he was in the process of hiring an attorney; refused to speak to his appointed counsel; said he was unhappy with his attorneys and wanted to fire them; or implied that he would represent himself. At a hearing held on January 3, 2013, for example, several months after his arrest, the trial court asked appellant if he had an attorney, and appellant said he was "in the process of obtaining an attorney," and that he did not have one at that time. Appellant added that he had been looking for an attorney for four months, and the court told appellant that four months was enough time to find counsel and that appellant should fill out an application for a court-appointed attorney. Appellant, however, was hesitant to do so. The court told appellant that his case would not progress unless he had an attorney, but appellant still refused to fill out the application. The court ordered appellant returned to the county jail. At a competency hearing held on October 1, 2014, appellant's by-then-appointed counsel told the court that appellant "doesn't talk to me. We had one visit. He won't come out from the jail. He won't accept my mail. He does not want me to be his lawyer, and he told me that much for sure. So, I've not had much interaction with him." At a November 28, 2016 pretrial conference, appellant told the court he was not satisfied with his appointed attorneys and that they did not represent him. When the court asked appellant who he wanted representing him, he said his mother was "checking into" hiring another attorney and that he was "going to need a good criminal attorney to come in here and clean things up."

At a pretrial hearing held on January 5, 2017, defense counsel told the court he had been advised appellant's family had engaged outside counsel. The relevant portion of the record reads as follows:

> [DEFENSE COUNSEL]: I have standard pretrial motions. We've gone through them with the State. I think before I do that I should let the Court know that Mr. Keigley has advised me that his family has engaged counsel.
>
> THE COURT: What?

[DEFENSE COUNSEL]: Mr. Keigley has advised me that his family has engaged counsel. I have not been able to verify that. I tried calling his mother and she's not been able to answer the phone, but that's my understanding so . . .

THE COURT: This is set for trial—

[STATE]: 23rd.

THE COURT: Of this month? This has been pending how long?

[STATE]: Four years, Judge.

THE COURT: Yeah. Okay. Well, Mr. Keigley, if you do hire an attorney, what he'll—he'll know what he has to do. He has to file a Motion to Substitute Counsel. I may or may not grant it. We'll have to have a hearing on it.

[DEFENSE COUNSEL]: Mr. Keigley, did you hear that?

THE DEFENDANT: What?

[DEFENSE COUNSEL]: The Court has advised that if you desire to engage counsel, that person will have to file a Motion to Substitute and there may be a hearing and the Judge may or may not allow it. So, you understand what's going on?

THE DEFENDANT: No, I don't understand any of that.

Appellant argued with the court and refused to "be quiet" when asked to do so. After he was removed from the courtroom, appellant's counsel and the trial court had the following exchange:

[DEFENSE COUNSEL]: Your Honor, I know the Court is not receptive to changing counsel at this late date, but Mr. Keigley remains dissatisfied with my services.

THE COURT: I suspected he will be dissatisfied with everyone's services. He has so far. So, you know, I'll tell you, and maybe you can convey this to him. It's unlikely I'm going to allow somebody to substitute in at this late date, so everyone will know, because this has got a 2012 date on it and he's had plenty of time to hire counsel.

The following week, on January 11, 2017, less than two weeks before the start of trial, defense counsel told the court that appellant "still does not want me to serve as his attorney." The record then reads as follows:

[DEFENSE COUNSEL]: . . . He's been found competent. I've advised him he has the right to hire his own attorney or he has the right to represent himself, should he choose to do that, although I've advised him that's a bad idea. I think the Court

needs to address him on that second matter.

> THE COURT: If—let me put it this way: If he does hire his own attorney, I have no objection to that, but that attorney is going to need to be ready for trial because this thing has been going on, I think, since 2012, and you're not his first attorney. It simply keeps delaying and delaying this matter. If the new attorney is ready for trial, fine, I'll substitute that attorney in. If the attorney needs more time, then what I would suggest is that I'll allow that attorney to sit at the bar and counsel with Mr. Keigley, but since you're familiar with the case, you have to stay on as lead attorney.
>
> [DEFENSE COUNSEL]: I think you need to address the request that he may have to represent himself because I believe he has that right. I think it's ill-advised, but he's aware of that.
>
> THE COURT: Well, I hear you saying he wants to hire his own attorney and I hear you saying he wants to represent himself. I'm not sure—you can't have both.
>
> [DEFENSE COUNSEL]: I understand. It's unlikely his family is going to have the funds to hire an attorney. That's my belief. It may not be his, but that's my belief here 11 days before trial. They haven't done it yet. I don't think it's going to happen. And he's told me he does not wish for me to serve as his attorney. I told him what the options are. And as you know, he's fairly vocal about things and he's sitting here quietly. I think he would like to address the Court on that matter.

The trial court later had the following discussion with appellant, where it attempted to advise him of the dangers and disadvantages of self-representation:

> THE COURT: Do you want to represent yourself in this matter?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You don't want to hire an attorney and you don't want Mr. Smith to represent you?
>
> THE DEFENDANT: Well, my mom said she was hiring—she had an appointment with Bob Jarvis, John Hunter Smith, and she talked to Pamela McGraw, and she is paying to obtain legal counsel. Plus, the news is—I don't see how I can get a fair trial here in this county with them accusing me of assault, and now they're saying I stole my own truck from a family member. My sister bought that truck for me brand-new in Carter County Dodge and I didn't steal it. That's been my truck.
>
> THE COURT: Well, that's why we're having a trial is to determine guilt or innocence. That's not what we're doing today.
>
> THE DEFENDANT: What are we doing today?
>
> THE COURT: Did you listen to what Mr. Smith said?

THE DEFENDANT: What? I didn't understand it. What is it about?

THE COURT: Trying to find out if you want to represent yourself in this matter.

THE DEFENDANT: Yeah, I think that would be best.

THE COURT: I don't. Let me tell you why. For instance, this amendment of the indictment, do you know what that section of the Code of Criminal Procedure says?

THE DEFENDANT: No, but I know what's right and what's wrong. I know that I didn't do the wrong that I'm being accused of. I know that for sure, for certain, regardless of the videos.

THE COURT: Whatever you think is right or wrong—I don't know what you think is right or wrong, but what I do know is this book right here, I have to follow the rules in it and I know pretty much what they are, so does Mr. Smith and Mr. Johnson. And I seriously doubt if you do. And if you don't—and you represent yourself and you don't know these rules, plus the stack of other— these stacks of other books I have over here, you're going to be in real trouble. I can promise you that.

THE DEFENDANT: Well, Smith told me you'll give me 20 years, that I'm guilty and the jury—

THE COURT: Mr. Smith doesn't have any idea what I would do.

THE DEFENDANT: He said I'm going to be found guilty already, though. So given that—

THE COURT: Nobody knows whether or not you're going to be found guilty or not.

THE DEFENDANT: That's what I thought. But the letter says that I'm going to be found guilty and I might as well plea out with you—or, better you than the jury because the jury—

THE COURT: That may be one person's opinion. That may be your attorney's opinion. Somebody else may have a different opinion. But nobody knows for sure.

THE DEFENDANT: I believe I can convince the jury and present the truth that tell—tell them— show them that I did not hit—went out of my way not to hit any police officers and did try to get away when I was shot. And that's—I pulled over and stopped. And then, as soon as he started shooting me, that's when I—

THE COURT: I'm sure Mr. Smith has told you that you're going to have a right to testify in this case.

THE DEFENDANT: Yeah, then I—he didn't tell me that. He just said I was going to be found guilty.

THE COURT: I'll tell you that. You're more than entitled to get up during the trial and testify and answer questions from both sides, tell your side of the story if you want to.

THE DEFENDANT: Okay. Yeah.

THE COURT: And Mr. Smith will ask you questions and Mr. Johnson will ask you questions. Mr. Smith may advise you not to do that for certain reasons he will explain to you, but you certainly have that right.

THE DEFENDANT: Yeah—yeah, I think that—you know, all of this—you know, you guys has a certain type of language that I'm not—a vernacular that I'm not accustomed to. It's different than mine. I'm—

THE COURT: That's another reason why I advise you not to represent yourself. You said you want to present evidence. You have to know how to present evidence. It's not just getting up and saying whatever you want to. You have to know—there's another book over here called the Rules of Evidence. You have to know what's in it in order to be able to present evidence in the case. Unless you know what's in this book, you may not be able to get the evidence in that you want to get in in [sic] front of the jury. That's why you have an attorney.

THE DEFENDANT: How can I find the evidence that—that there's proof that I did not hit any of these police cars that I've got pictures of?

THE COURT: I couldn't tell you that. I couldn't tell you that. I know very little about your case.

THE DEFENDANT: I've been here since 2012. You know very little?

THE COURT: It's not my job to investigate the facts of your case and determine what the facts are and present those facts. That's the attorneys['] job to do that.

THE DEFENDANT: Well, all of a sudden we are running out of time. I have been postponed—

THE COURT: Mr. Keigley, this has been going on since 2012. I don't think we're all of a sudden running out of time.

THE DEFENDANT: I know—

THE COURT: It does come to a conclusion at some point in time, and that time is nearing in 11 about 11 days, I think.

THE DEFENDANT: Yeah, and I've never professed—never claimed to be incompetent, but, yet, they accuse me of playing to be incompetent and I've always said I'm competent and, yet, the jury thought I was scamming to be incompetent to avoid trial. I don't want to go to a mental hospital anymore. I'm off of my medication and I've never felt better for the first time in 30 years.

THE COURT: Well, I would seriously advise you in the strongest term possible not to represent yourself. There are so many pitfalls that you don't know about that could result and—could possibly result in, not only you being found guilty, but also receiving a very high sentence. That's why you have an attorney.

THE DEFENDANT: Life? Life sentence is what?

THE COURT: I don't know what the range of punishment on this is. I haven't looked.

THE DEFENDANT: Five to 99 to life is what the letter said.

THE COURT: It may be. I don't know. I'm not here to tell you that right now. But I am here—

THE DEFENDANT: They promised me 80 years. The district attorney promised 80 from what I've been told.

THE COURT: I am here to tell you that you shouldn't represent yourself. There's too many pitfalls. There's too many laws, too many rules you don't know about that will get you in serious trouble if you don't know them. I say that with you in mind, not anybody else, taking you into consideration and no one else. So, I would suggest that you stay with Mr. Smith. And if you do decide to hire a lawyer, you heard me say how we will proceed if you do that.

THE DEFENDANT: Well, Judge, it sounds real—I mean, you—you've almost convinced me that for my sake, you speak for me, but I can't forget—and my intentions to wear the suit was not to lie to the jury. But after it was all over, I realized that the suit was to make me appear competent. And even though I am, for me to wear that suit—my mother was furious that I wore it. And I said I was just trying to obey what the judge told me to do, like you guys told me and cooperate. She said that you shouldn't have wore [sic] the suit because you could have went to the state hospital as found incompetent versus now facing a trial to send you to prison. And I thought, that's true. Because [the State] said he looks competent and I thought, yeah, for the first time I look competent wearing these nice clothes up here and the jury's being told that I'm claiming to be incompetent. Yet, I'm telling you guys I'm competent and I've told the doctors I'm competent. I'm just telling you the truth. And that to me—I felt like you put me out here to—to look like to the jury that here's a guy that's scamming, a con artist, highly intelligent—which I'm not that intelligent or I wouldn't—I wouldn't have cooperated to wear that suit.

THE COURT: Well, I'll tell you, you don't have to wear a suit if you—during trial.

The trial court made another effort to clarify whether appellant wanted to represent himself, holding the following inquiry out of the jury's presence on January 24, 2017, just before the start of trial:

THE COURT: All right. Mr. Keigley, before we get started this morning, before I bring the jury in, I want to make some inquires. It was mentioned this morning that you had mentioned to Mr. Smith that you may want to proceed in this case representing yourself. But I think since that time you decided you want to go ahead and proceed with Mr. Smith as your attorney; is that right?

THE DEFENDANT: Huh-uh.

THE COURT: You'll have to say yes or no. I didn't—

THE DEFENDANT: If the truth is going to be heard, I'll have to speak it. That's the only way the truth is—and you should want to know the truth, the whole truth, and nothing but the truth. So, what's true in this case—

THE COURT: We're talking about two different things. I think you're talking about your right to testify, which you're entitled to do. My question is: Do you want to represent yourself in this matter or do you—

THE DEFENDANT: Should I sit with [counsel for the State]?

THE COURT: You didn't answer my—you're not answering—

THE DEFENDANT: Have them come over here—

THE COURT: You're not answering my question.

THE DEFENDANT: —or have him go over there?

THE COURT: You're not answering my question.

THE DEFENDANT: That's what it is. He's with them.

THE COURT: Okay. Would you answer my question?

THE DEFENDANT: Do you want to know the truth about the case?

THE COURT: I want you to answer my question.

THE DEFENDANT: Isn't this about whether or not I have did what the accusers have accused me of—falsely accusing me of doing.

THE COURT: Let me put it to you this way, Mr. Keigley, if you refuse to answer my question, we're going to go ahead and proceed with Mr. Smith as your attorney. Do you understand that?

THE DEFENDANT: I have not consented for four years, and I've told you for five years that he is not my attorney. He has not represented me. He's told me that I'm guilty before even the jury trial.

THE COURT: All right.

THE DEFENDANT: How could I possibly allow him to represent me when he's representing the district attorneys that are wanting to give me the death penalty, lethal injection for something that I did not do?

THE COURT: Will you bring the jury in, please?

As the above record excerpts suggest, at no point during the proceedings in this case did appellant make a clear and unequivocal request for self-representation. He vacillated and wavered on whether he wanted to exercise his right to self-representation or accept representation by appointed counsel. Appellant repeatedly complained about the attorneys appointed to represent him and emphasized they were not his attorneys of choice, but it has long been held that defendants are not entitled to the appointed counsel of their own choice. *See Hill*, 666 S.W.2d at 667. The trial court nevertheless attempted to determine whether appellant was competent to choose to represent himself and whether he was aware of the pitfalls and disadvantages of doing so. The court advised appellant that he had the right to counsel and that if he waived that right and proceeded to represent himself, he would be held to the same standards as a trained lawyer and would be required to comply with applicable procedural and evidentiary rules and substantive law. The court also repeatedly pressed upon appellant that it believed he would be making a serious mistake by waiving counsel and representing himself. Given the record in this case, we conclude no abuse of discretion has been shown. Moreover, even if one assumes a clear and unequivocal request from appellant for self-representation, which we do not find in this record, the record also shows appellant was uncooperative, argumentative, and that he repeatedly refused to comply with the trial court's directives. "A trial court does not abuse its discretion in denying a defendant's ability to represent himself where the defendant's 'behavior demonstrated an attempt at calculated obstruction and delay, not an earnest attempt to act in his own defense' and where the defendant exhibited 'deliberate and calculated disruptions.'" *Long v. State*, 525 S.W.3d 351, 370 (Tex. App. —Houston [14th Dist. 2017, pet. ref'd) (quoting *Lewis v. State*, 532 S.W.3d 423, 432 (Tex. App.

—Houston [14th Dist.] 2016, pet. ref'd)). We overrule appellant's first issue.

2. Right to Testify

In his second issue, appellant contends the trial court erred by refusing to allow him to testify in his own defense after he asked to testify and stated he would "affirm to tell the truth."

The record shows that on January 24, 2017, during the guilt/innocence phase of the trial of this case, after the State rested, the jury was excused and defense counsel told the court appellant was going to testify. The record shows appellant refused to be sworn to tell the truth, but it also shows he would affirm to tell the truth. The following day, the trial court again raised the issue of whether appellant wanted to testify. The relevant portion of the record reads as follows:

> THE COURT: All right. Mr. Keigley, yesterday at the end of the day you were given an opportunity to testify in this matter and chose not to take the oath, but you did indicate that you would tell the truth if you did testify. And I'm going to allow that statement to stand as an oath or statement that you will tell the truth. So, if you do want to testify in this matter, I will let both sides reopen, and I'll allow you to testify if you want to.
>
> THE DEFENDANT: I made the statement I was competent and I didn't have to swear by that and that was admitted to the last jury. I—
>
> THE COURT: Well, I think the record is going to show that you said that if you did testify that you would testify to the truth, and that, in my mind, is going to be sufficient. So, if you do want to testify, you are more than welcome to do that.
>
> THE DEFENDANT: Well, I wanted to tell the jury what took place through the whole deal. I—I did not want to be questioned and manipulated with trick—loaded questions by these three, the DA and the DA that plays to be the defense, and be questioned versus being able to go from the start to the finish, so the jury could know exactly what happened.
>
> THE COURT: Okay.
>
> THE DEFENDANT: There's so many glitches in this case that are twisted and not true that I think they deserve to know, but to get up there and be questioned with their—with their already—
>
> THE COURT: I'm sure—
>
> THE DEFENDANT: —set of questions would be to—would be to further go along with the deception and the unfair trial that I've had throughout the whole five years here.

> THE COURT: Okay. I'm sure [defense counsel] explained to you that if you do testify you're going to be questioned.
>
> THE DEFENDANT: I still claim five years later, he is not my attorney. I do not want him to represent me. I'm representing myself the whole time. He is not my attorney. I've never consented—
>
> THE COURT: Okay.
>
> THE DEFENDANT: —and signed anything with this man. I told him for five years he's not my attorney. I've told you that for five years. He has said I'm guilty the whole time.
>
> THE COURT: Do you want to testify?
>
> THE DEFENDANT: I've made my—I have stated the truth, the whole time.
>
> THE COURT: Do you want to testify?
>
> THE DEFENDANT: That's not my truck and that's not me hitting those cars in those videos.
>
> THE COURT: Mr. Keigley, can you answer my question? Do you want to testify?
>
> THE DEFENDANT: That's why my truck got burned up.
>
> THE COURT: All right. I'm going to take it by your refusal to answer my question and your statement that you don't want to be questioned that you do not want to testify in this matter, so— and you certainly have been given that opportunity. And if you don't want to answer my question, you don't have to, but I'm going to take it as a refusal to testify.

At this point, the trial court turned its attention to how much time the parties needed for their closing arguments. There were no further requests from appellant to testify, and no objections from the defense to the trial court's ruling.

A defendant has a right to testify at his own trial, and such a right is fundamental and personal to the defendant. *Johnson v. State*, 169 S.W.3d 223, 236 (Tex. Crim. App. 2005) (citing *Rock v. Arkansas*, 483 U.S. 44, 52 (1987)). It is counsel's responsibility to inform the defendant of the right to testify, including the fact that the ultimate decision belongs to the defendant. *Id*. In *Rock*, the Supreme Court held that defendant's right to testify derives from the Fifth and Sixth Amendments to the United States Constitution, is personal to the defendant, and cannot be waived

by counsel. *Rock*, 483 U.S. at 52. A defendant may knowingly and voluntarily waive this right. *See Smith v. State*, 286 S.W.3d 333, 338 n. 9 (Tex. Crim. App. 2009) (citing *Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997)).

In this case, the record shows appellant was not denied his constitutional right to testify. Appellant stated that he "wanted to tell the jury what took place through the whole deal," but he also made it clear he did not want to be questioned by his defense counsel or the prosecutors. Defendants do not have the right to testify free from cross-examination. *See Grant v. State*, 247 S.W.3d 360, 367 (Tex. App.—Austin 2008, pet. ref'd); *Brent v. State*, 916 S.W.2d 34, 40 (Tex. App.—Houston [1st Dist.] 1995, pet ref'd). Furthermore, the record shows appellant refused to answer direct questions posed by the trial court. *See Gonzales v. State*, 2 S.W.3d 600, 607 (Tex. App.—Texarkana 1999, pet. ref'd) (trial judge has inherent power to maintain dignity, order, and decorum essential to orderly court proceedings). We overrule appellant's second issue.

3. Competency Evaluation

In his third issue, appellant argues the trial court erred by not having him evaluated for competency during the trial after defense counsel "suggested to the court that appellant had become incompetent during the trial."

The prosecution and conviction of a defendant while he is legally incompetent violates due process. *Morris v. State*, 301 S.W.3d 281, 299 (Tex. Crim. App. 2009). Although a defendant is presumed to be competent to stand trial, he is incompetent if he does not have (1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or (2) a rational as well as factual understanding of the proceedings against him. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.003(a). The initial inquiry is informal and is required if evidence suggesting incompetency to stand trial comes to the trial court's attention. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.004(b), (c); *Jackson v. State*, 391 S.W.3d 139, 141 (Tex. App.—Texarkana 2012, no pet.).

The statutory scheme set forth in article 46B of the Texas Code of Criminal Procedure codifies the constitutional standard for competency to stand trial and describes the circumstances that require, and the procedures for making, a determination of whether a defendant is competent to stand trial. *Turner v. State*, 422 S.W.3d 676, 689 (Tex. Crim. App. 2013). "Either party may suggest by motion, or the trial court may suggest on its own motion, that the defendant may be incompetent to stand trial." *Id*. art. 46B.004(a). If evidence suggesting a defendant is incompetent comes to the trial court's attention, "the court on its own motion shall suggest the defendant may be incompetent to stand trial" and "shall determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial." TEX. CODE CRIM. PROC. ANN. art. 46B.004(b), (c). The threshold requirement for an informal inquiry is a suggestion of incompetency, and it "may consist solely of a representation from any credible source that the defendant may be incompetent." *See id.* art. 46B.004(c–1). "A further evidentiary showing is not required to initiate the inquiry, and the court is not required to have a bona fide doubt about the competency of the defendant." *Id.* "Evidence suggesting the need for an informal inquiry may be based on observations made in relation to one or more of the factors described by Article 46B.024 or on any other indication that the defendant is incompetent within the meaning of Article 46B.003." *Id*. Those factors include the defendant's capacity during criminal proceedings to (a) rationally understand the charges against him and the potential consequences of the pending criminal proceedings; (b) disclose to counsel pertinent facts, events, and states of mind; (c) engage in a reasoned choice of legal strategies and options; (d) understand the adversarial nature of criminal proceedings; (e) exhibit appropriate courtroom behavior; and (f) testify. *Id*. art. 46B.024(1). "If after an informal inquiry the court determines that evidence exists to support a finding of incompetency, the court shall order an examination under [Chapter 46] Subchapter B to determine whether the defendant is incompetent to stand trial in a criminal case."

Id. art. 46B.005(a); *Turner*, 422 S.W.3d at 692.

An informal inquiry may be satisfied when the trial court poses simple, short questions to the defendant and/or defense counsel regarding the defendant's competency. *Luna v. State*, 268 S.W.3d 594, 598–600 (Tex. Crim. App. 2008); *Jackson*, 391 S.W.3d at 142; *Gray v. State*, 257 S.W.3d 825, 829 (Tex. App.—Texarkana 2008, pet. ref'd); *Stevenson v. State*, Nos. 05–12–01668–CR, 05–12–01669–CR, 2014 WL 3555767, at *2 (Tex. App.—Dallas July 17, 2014, pet. ref'd) (not designated for publication); *Coyt–Sowells v. State*, No. 14–11–00986–CR, 2013 WL 1499579, at *1 (Tex. App.—Houston [14th Dist.] Apr. 11, 2013, no pet.) (mem. op., not designated for publication). "[E]xhaustive inquisitions are not required." *Coyt–Sowells*, 2013 WL 1499579, at *1 (citing *Luna*, 268 S.W.3d at 599–600; *Gray*, 257 S.W.3d at 829); *see also Stevenson*, 2014 WL 3555767, at *2. Furthermore, the inquiry may be appropriate at any time before the defendant's sentence is pronounced. *Rodriguez v. State*, 329 S.W.3d 74, 78 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

The Court of Criminal Appeals has noted that the fact a defendant is mentally ill does not by itself mean he is incompetent, nor does the fact that he obstinately refuses to cooperate with his trial counsel. *See Turner*, 422 S.W.3d at 691. The inquiry is whether a defendant's mental illness "operates in such a way as to prevent him from rationally understanding the proceedings against him or engaging rationally with counsel in the pursuit of his own best interests." *Id*. "Evidence that raises this possibility necessitates an informal inquiry. . . ." *Id*.

We review a trial court's decision regarding an informal competency inquiry for an abuse of discretion. *Montoya v. State*, 291 S.W.3d 420, 426 (Tex. Crim. App. 2009), *superseded by statute on other grounds as recognized in Turner*, 422 S.W.3d at 692 n. 31. In conducting our review, we do not substitute our judgment for that of the trial court, but rather determine whether the trial court's decision was arbitrary or unreasonable. *Id*.

The record shows that, at the conclusion of the trial on the merits and prior to closing arguments, defense counsel told the trial court he no longer thought appellant was competent. This occurred shortly after the trial court had ruled appellant did not want to testify. After turning its attention to other matters, the court eventually asked whether the defense had any objections to the charge, and the following occurred:

> [DEFENSE COUNSEL]: No objections to the Charge. I do need to raise an additional issue with the Court when the Court is ready for me to address it.
>
> THE DEFENDANT: I'm objecting the whole way, Judge. He don't need to speak–
>
> THE COURT: Be quiet, Mr. Keigley. We can do this without you. You can go back there to the holding cell, if you'd like. If you're going to interrupt the proceedings, that's where you're going to be. Go ahead, Mr. Smith.
>
> [DEFENSE COUNSEL]: Your Honor, while the Court was preparing the Charge, Mr. Keigley has been, for want of a better word, making extraneous comments, ranting to everybody here in the courtroom for the last ten, 15 minutes. I feel like I'm duty bound to advise the Court that I no longer feel like he's competent to proceed in these matters.

The court agreed to take the matter into consideration. Later, after the jury retired to deliberate, the trial court turned its attention to defense counsel's earlier suggestion of incompetency. The court told defense counsel that it assumed counsel was making "basically what amounts to under the rules is another suggestion of incompetency," and defense counsel stated that he was "duty bound if I believe that to be the case to alert the Court." The trial court said it was "not sure where that goes since there has been a jury finding of competency already," and that it did not think it could sua sponte declare appellant incompetent. The court briefly discussed with counsel for the State and defense counsel what the record on appeal would include, and ended the hearing.

"[D]ue process requires the trial court to remain ever vigilant for changes in circumstances that would make a formal adjudication appropriate." *Turner*, 422 S.W.3d at 693. In this case, the trial court implicitly concluded appellant's mental status had not materially changed after he was

previously found to be competent, such that no further competency inquiry was required. Also relevant to our inquiry is the fact that the trial court had ample opportunity to observe appellant's conduct. The proceedings in this case, including the November 2016 jury trial on competency, took place over a five year period and were presided over by the same trial judge. A trial court's first-hand factual assessment of a defendant's competency is entitled to great deference on appeal. *See Ross v. State*, 133 S.W.3d 618, 627 (Tex. Crim. App. 2004); *Jackson*, 391 S.W.3d at 142. Defense counsel's suggestion of incompetency did not indicate appellant's inability to rationally consult with counsel or to understand the proceedings against him, but rather that appellant was "making extraneous comments" and "ranting to everybody here in the courtroom for the last ten, [fifteen] minutes." The trial court could have reasonably concluded appellant's disruptive and generally uncooperative behavior was not evidence of an inability to factually appreciate the proceedings or to communicate with his counsel. *See Moore v. State*, 999 S.W.2d 385, 395 (Tex. Crim. App. 1999) (defendant's unruly and disruptive courtroom demeanor not probative of his competence to stand trial). Based on this record, we cannot say the trial court abused its discretion by concluding no further competency inquiry was warranted. We overrule appellant's third issue.

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DANIEL HALE KEIGLEY, Appellant	On Appeal from the 59th Judicial District Court, Grayson County, Texas
No. 05-17-00436-CR V.	Trial Court Cause No. 062462. Opinion delivered by Justice Myers.
THE STATE OF TEXAS, Appellee	Justices Bridges and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 30th day of March, 2018.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DANIEL HALE KEIGLEY, Appellant	On Appeal from the 59th Judicial District Court, Grayson County, Texas
No. 05-17-00437-CR V.	Trial Court Cause No. 062463. Opinion delivered by Justice Myers.
THE STATE OF TEXAS, Appellee	Justices Bridges and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 30th day of March, 2018.