COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00101-CR

BRODERICK DAYMON COFER — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 372ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1444505R

MEMORANDUM OPINION[1]

Appellant Broderick Daymon Cofer appeals from his conviction for four counts of sexual assault of a child, two counts of indecency with a child by contact, three counts of incest, and the resulting life sentences, arguing in a single issue

[1]*See* Tex. R. App. P. 47.4.

that the trial court reversibly erred by granting his request to represent himself.[2] We affirm.

I. BACKGROUND

The underlying complaint in this case was filed on October 10, 2014, and the trial court appointed counsel for Cofer on October 21, 2014. On September 3, 2015, Cofer filed a pro se motion seeking to waive his right to appointed counsel and to represent himself. The trial court held a pretrial hearing on January 25, 2016, during which Cofer invoked his right to self-representation and requested that the trial court allow him to proceed pro se. The trial court conducted a *Faretta* hearing and granted his request, though it ordered his appointed counsel to remain on the case as standby counsel. *See Webb v. State*, 36 S.W.3d 164, 177 n.4 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (op. on reh'g) (noting that a *Faretta* hearing is a hearing to ensure a criminal defendant's decision to waive counsel is made knowingly and intelligently, as required by *Faretta v. California*, 422 U.S. 806 (1975)). Cofer was subsequently reindicted, and the trial court conducted another

[2]In his brief, Cofer initially argued in a second issue that the prosecutor committed misconduct by reading the habitual-offender notice when reading the indictment in front of the jury. In response, the State asserted the reporter's record did not accurately disclose what occurred in the trial court, an assertion Cofer disputed. Thus, the State asked us to abate the appeal so the trial court could hold a hearing to settle that dispute. *See* Tex. R. App. P. 34.6(e)(2). We did so, and the trial court held a hearing. Following that hearing, the trial court found that the prosecutor did not read the habitual-offender notice in front of the jury and ordered a corrected record be filed with this court. Cofer subsequently filed a motion to withdraw his second issue, which we granted.

Faretta hearing, after which it again granted his request to proceed pro se and ordered his appointed counsel to continue as standby counsel.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING COFER TO REPRESENT HIMSELF

In his sole issue, Cofer argues the trial court abused its discretion by allowing him to represent himself without adequately determining whether he was mentally competent to do so. We find no abuse of discretion on this record.

A. APPLICABLE LAW AND STANDARD OF REVIEW

The Constitution guarantees a defendant the right to assistance of counsel in a criminal prosecution. *Gideon v. Wainwright*, 372 U.S. 335, 339–45 (1963); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). It also affords a defendant who validly waives his right to assistance of counsel the right to represent himself. *Godinez v. Moran*, 509 U.S. 389, 400, 402 (1993); *Faretta*, 422 U.S. at 807; *Collier v. State*, 959 S.W.2d 621, 625 (Tex. Crim. App. 1997). The right to self-representation is not absolute, however. *See Indiana v. Edwards*, 554 U.S. 164, 171 (2008). Relevant here, the Supreme Court has recognized a "mental-illness-related limitation on the scope of the self-representation right." *Chadwick v. State*, 309 S.W.3d 558, 561–62 (Tex. Crim. App. 2010) (quoting *Edwards*, 554 U.S. at 171). We discuss that limitation in more detail below.

The trial judge is in the best position to determine whether a defendant is competent to proceed pro se. *Chadwick*, 309 S.W.3d at 561. That inquiry presents a mixed question of law and fact that turns on an evaluation of credibility and

demeanor, and we therefore review a trial court's ruling on a defendant's competence to proceed pro se for an abuse of discretion. *Id.* We afford almost total deference to a trial judge's rulings on mixed questions of law and fact when the resolution of the issue turns on an evaluation of credibility and demeanor. *Id.* We view the evidence in the light most favorable to the trial judge's ruling, and we will imply any findings of fact supported by the evidence and necessary to support the trial judge's ruling. *Id.*

B. COFER'S WAIVER OF COUNSEL

The trial court found in the judgment that Cofer was competent to stand trial. The trial court implicitly found that Cofer's request to waive counsel was made competently, knowingly and intelligently, and voluntarily, and it does not appear that he challenges that finding.[3] However, to the extent Cofer's issue can be understood as arguing his waiver of counsel was not made competently, knowingly and intelligently, and voluntarily, we do not agree.

[3]We note that whether a defendant was competent to stand trial, whether a defendant's waiver of counsel was valid (i.e., whether it was made competently, knowingly, intelligently, and voluntarily), and whether a defendant was mentally competent to conduct trial proceedings by himself are separate inquiries. *See, e.g., Fletcher v. State*, 474 S.W.3d 389, 395–402 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (analyzing complaint that defendant's waiver of counsel was invalid separately from complaint that he was not mentally competent to represent himself at trial); *see also Baker v. State*, No. 04-14-00676-CR, 2016 WL 1588278, at *2–7 (Tex. App.—San Antonio Apr. 20, 2016, pet. ref'd) (mem. op., not designated for publication) (same and separately addressing complaint that defendant was not competent to stand trial).

In order to represent himself at trial, a criminal defendant must first validly waive his right to counsel. *See Godinez*, 509 U.S. at 400, 402; *Faretta*, 422 U.S. at 807; *Collier*, 959 S.W.2d at 625. A waiver of counsel is valid if it was made competently, knowingly and intelligently, and voluntarily. *Godinez*, 509 U.S. at 400, 402; *Faretta*, 422 U.S. at 807; *Collier*, 959 S.W.2d at 625. The decision to waive counsel and proceed pro se is made "knowingly and intelligently" if it is made with a full understanding of the right to counsel being abandoned, as well as the dangers and disadvantages of self-representation. *Fletcher*, 474 S.W.3d at 395–96 (citing *Faretta*, 422 U.S. at 835–36; *Cudjo v. State*, 345 S.W.3d 177, 184 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd)). The decision is made "voluntarily" if it is uncoerced. *Id.* at 396 (citing *Godinez*, 509 U.S. at 401 n.12).

A trial court need follow no formulaic questioning or particular script in ascertaining the knowing and voluntary nature of a defendant's waiver of counsel. *See Burgess v. State*, 816 S.W.2d 424, 428 (Tex. Crim. App. 1991); *Lathem v. State*, 514 S.W.3d 796, 804 (Tex. App.—Fort Worth 2017, no pet.). However, if such factors are not otherwise apparent from the record, a trial court's inquiry regarding the defendant's waiver of counsel should center on his background, age, experience, and education. *See Burgess*, 816 S.W.2d at 428; *Cantu v. State*, No. 02-11-00056-CR, 2012 WL 3499750, at *5 (Tex. App.—Fort Worth Aug. 16, 2012, pet. ref'd) (mem. op., not designated for publication). The defendant should be aware that there are technical rules of evidence and procedure, and he will not be granted any special consideration solely because he asserted his pro se rights.

Johnson v. State, 760 S.W.2d 277, 279 (Tex. Crim. App. 1988); *Cantu*, 2012 WL 3499750, at *5.

In this case, the trial court held two *Faretta* hearings, both of which were quite thorough. Those hearings revealed that Cofer was forty-five years old, had obtained his GED, had a work history that included working in oil fields, youth entertainment centers, and barbershops, and had usually worked for himself in businesses that he solely or partially owned. He had never been treated for any mental disorders or mental disabilities, and he stated that he had only seen a psychiatrist or undergone a psychiatric evaluation as a teenager for hyperactivity. The trial court also made sure Cofer understood the charges against him and the range of punishment he was facing.

The trial court made certain that Cofer understood that he had the right to counsel and that if he waived that right and proceeded pro se, he would be held to the same standards as a trained lawyer despite his lack of professional training and would be required to comply with all applicable procedural and evidentiary rules, as well as the applicable substantive law. It explained to Cofer that his lack of legal training and knowledge could have devastating consequences for him, including the potential that the State would be able to introduce evidence against him that a trained lawyer might have been able to have excluded; that he could forfeit any potential defenses by failing to properly raise and prove them; that he could potentially be convicted upon incompetent, irrelevant, or otherwise inadmissible evidence; and that he faced the danger of conviction even though he

might not be guilty because he did not know how to establish his innocence. The trial court additionally informed Cofer that the purpose of appointed counsel is to help protect his rights to a fair trial, due process, selection of a fair impartial jury, and errorless jury instructions, and that he would be giving up those rights if he chose to proceed pro se.

In addition to all of this, the trial court also repeatedly pressed upon Cofer that it believed he would be making a serious mistake by waiving counsel and representing himself. Throughout the two *Faretta* hearings, Cofer continuously stated he understood the trial court's admonishments, and he also repeatedly insisted upon waiving counsel and proceeding pro se nonetheless. So, the trial court let him.

As the sole evidence supporting his contention that he "suffered from some type of mental disorder" that rendered him incompetent to represent himself, Cofer cites his pretrial and trial conduct. He points to the first *Faretta* hearing that, he argues, demonstrates his belief that the fact that he was proceeding pro se would preclude the State from pursuing the habitual-offender count against him. He points to the second *Faretta* hearing and argues that he still did not appreciate the true range of punishment he was facing. He points to his offering the full arrest affidavits into evidence, which he offered to show a jurisdictional defect, but which also contained his entire criminal history. He points to his direct and cross-examinations of witnesses during the trial, arguing they show that he believed the sexual acts he committed against the complainant to be merely immoral but not

criminal, that he attempted to defend himself by arguing he had good character, and that his illicit conduct was justified because he did it for the complainant's benefit.

These alleged deficiencies, however, do not show Cofer's waiver of counsel was not made competently, knowingly and intelligently, and voluntarily. With respect to Cofer's claim that he did not understand the punishment range he was facing, the record shows the trial court took pains to ensure he did, and after the trial court explained Cofer's punishment range to him, Cofer confirmed that he understood it. The remaining deficiencies Cofer points out demonstrate not that his waiver of counsel was invalid, but simply that, as the trial court repeatedly warned him, his lack of knowledge, training, and experience in the law could have devastating consequences for him if he insisted upon representing himself. Whether a defendant has a technical understanding of trial procedure and available defenses is not relevant to a determination of whether he validly waived his right to counsel. *Faretta*, 422 U.S. at 836 (stating defendant's technical legal knowledge was not relevant to an assessment of his knowing exercise of the right to defend himself); *Geeslin v. State*, 600 S.W.2d 309, 313 (Tex. Crim. App. [panel op.] 1980) (same); *Fletcher*, 474 S.W.3d at 395 ("The competence that is required of a defendant seeking to waive his right to assistance of counsel is the competence to waive the right, not the competence to represent himself.").

The record shows Cofer's decision to waive counsel was made with a full understanding of the right he was abandoning, as well as the dangers and

disadvantages of self-representation, and it also shows he was not coerced into waiving counsel. Therefore, that decision was competently, knowingly and intelligently, and voluntarily made. *See Godinez*, 509 U.S. at 400, 402; *Faretta*, 422 U.S. at 807; *Collier*, 959 S.W.2d at 625; *Fletcher*, 474 S.W.3d at 395–96.

C. COFER'S COMPETENCE TO REPRESENT HIMSELF

Cofer implicitly argues his decision to waive counsel was not competently, knowingly and intelligently, and voluntarily made because the trial court should have ordered a psychological examination to rule out any mental illness or defect in his thinking. In his brief, Cofer states the main basis of his argument is that the trial court should have denied his request to represent himself because he "suffered from some type of mental disorder" that rendered him incompetent to do so "in both the psychological and the legal sense." He relies on this court's decision in *Logan v. State*, arguing it "mandates that the trial court take a 'realistic account' of [a] defendant's capacity or ability to represent himself" before allowing him to do so. *See* 484 S.W.3d 579, 583 (Tex. App.—Fort Worth 2016, no pet.). He contends his pro se motions, his pretrial conduct, and his conduct during trial put the trial court on notice that he suffered from a mental disorder and, consequently, the trial court was required to further inquire into his competency to represent himself before allowing him proceed pro se.

This argument, and indeed the excerpt from *Logan* Cofer quotes to support it, involves the "mental-illness-related limitation on the scope of the self-representation right" that the Supreme Court first recognized in *Edwards*. 554 U.S.

at 171; *Logan*, 484 S.W.3d at 583 & n.8 (citing *Edwards*, 554 U.S. at 177–78, for the proposition that "when determining the ability of a defendant to represent herself pro se, the trial court should take a realistic account of the particular defendant's capacity to represent herself"). *Edwards* involved a criminal defendant who suffered from schizophrenia. 554 U.S. at 169. The trial court determined he was competent to stand trial. *Id.* However, when the defendant sought to represent himself, the trial court denied his right to do so because it found that although he was competent to stand trial, he was not competent to conduct his own defense at trial. *Id.* Consequently, the trial court required him to be represented by counsel in his trial. *Id.* The jury found him guilty of the charged offenses. *Id.* On appeal, the defendant argued the trial court violated his constitutional right to self-representation, and both the intermediate appellate court and the Indiana Supreme Court agreed, reversed the trial court, and ordered a new trial. *Id.* Indiana then appealed to the Supreme Court, presenting it with a quite precise question: "whether the Constitution permits a State to limit [a] defendant's self-representation right by insisting upon representation by counsel at trial—on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." *Id.* at 174. The Supreme Court delivered an equally precise answer, holding that

> the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to

> stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Id. at 177–78.

It is significant that this holding—this "mental-illness-related limitation on the scope of the self-representation right," *see id.* at 171—is cast in permissive, not mandatory language. *Id.* at 177–78 ("the Constitution *permits* judges to take realistic account . . . ."; "the Constitution *permits* states to insist upon representation by counsel . . . ." (emphasis added)). For that very reason, courts have considered and rejected the argument Cofer makes here—that the mental-illness-related limitation on the scope of the self-representation right *requires* a trial court to deny the right of self-representation of a defendant who is competent to stand trial but who is incompetent to conduct trial proceedings by himself because of a severe mental illness. *See, e.g.*, *Baker*, 2016 WL 1588278, at *7 (noting *Edwards* "decided only that it is *permissible* for the State to *limit* the constitutional right to self-representation of severely mentally ill defendants under certain circumstances"); *Fletcher*, 474 S.W.3d at 400 (noting the Constitution does not require States to impose counsel on criminal defendants who are competent to stand trial but nevertheless unable to proceed pro se due to severe mental illness); *see also, e.g.*, *Panetti v. Stephens*, 727 F.3d 398, 415 n.112 (5th Cir. 2013) ("*Edwards* is permissive, holding only that the Constitution does not *forbid* a state to demand representation by counsel for defendants who, though competent to stand trial, suffer from severe mental illness."); *United States v. Bernard*, 708 F.3d

583, 587–90 (4th Cir. 2013) (noting *Edwards* does not require a trial court to deny the right of self-representation to a defendant of questionable mental competence).

Simply put, when a defendant who is competent to stand trial invokes his right to self-representation and competently, knowingly and intelligently, and voluntarily waives his right to counsel, the trial court is not constitutionally required to conduct a further inquiry into his competence to conduct his own defense at trial before allowing him to proceed pro se. *See Baker*, 2016 WL 1588278, at *7 (rejecting argument that "when a competent-to-stand-trial defendant validly waives his right to counsel, the trial court is required to hold an additional hearing to determine if the defendant is competent to represent himself"); *Fletcher*, 474 S.W.3d at 400–01 (holding the trial court was not constitutionally required to conduct a further inquiry into appellant's competence to conduct his own defense once it was determined he was competent to stand trial); *see also Bernard*, 708 F.3d at 590 (noting *Edwards* reaffirmed that a court may constitutionally permit a defendant to represent himself so long as he is competent to stand trial). Here, there is no suggestion that Cofer was not competent to stand trial, and the record shows that he validly waived his right to counsel. Accordingly, the trial court was not constitutionally required to conduct a further inquiry into Cofer's competence to conduct his own defense at trial. Consequently, the trial court did not abuse its discretion by declining to further determine his mental competency to conduct his own defense. *See Fletcher*, 474 S.W.3d at 400–01 (holding similarly); *Baker*, 2016 WL 1588278, at *7 (same).

We overrule Cofer's sole issue.

III. CONCLUSION

Having overruled Cofer's sole issue, we affirm the trial court's judgment. Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: WALKER, GABRIEL, and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 31, 2017