IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
	)	
Respondent,	)	No. 62717-1-I
	)	
v.	)	
	)	
CHRISTOPHER D. BARNHILL,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: November 16, 2009
	)	

Dwyer, A.C.J. — A defendant must be aware of the maximum possible penalties for the crimes with which he is charged in order to make a knowing waiver of the right to counsel. State v. Silva, 108 Wn. App. 536, 541, 31 P.3d 729 (2001). Because there is no evidence in the record that Christopher Barnhill, prior to waiving his right to the assistance of counsel, was made aware of the nature and classification of the charges levied against him or the maximum penalties he faced upon conviction, we reverse and remand for a new trial. In addition, we accept the State's concession that insufficient evidence was produced at trial to support one count of communication with a minor for immoral purposes and four counts of tampering with a witness. We therefore reverse those counts and dismiss those charges.

FACTS

On January 26, 2007, 13-year-old H.R.T. met Christopher Barnhill at a skating rink in Auburn. Barnhill was 20 years old at the time. H.R.T. liked Barnhill and they

talked for about three hours. H.R.T. gave Barnhill her phone number and kissed him on the lips when she left the skating rink.

Soon after, Barnhill started sneaking over to H.R.T.'s house to see her. H.R.T.'s bedroom is on the second floor of the house, next to the garage. Barnhill would climb on top of the garage and go into H.R.T.'s bedroom through the window. H.R.T. testified that Barnhill spent the night several times and that she and Barnhill had sex "a couple of times."

On February 12, 2007, H.R.T.'s father, Steven, contacted the police to report a stolen computer. Barnhill called the police and admitted he had taken the computer. Barnhill told the officer that he was in love with H.R.T. and was going to come back to get her. In late February, Steven saw a man standing on the garage roof talking to H.R.T. and a friend. Steven chased after him, but the man ran away. H.R.T. told Steven that the man was Barnhill.

Steven became suspicious and installed a lock on the family's mail box. The next day, there were three letters from Barnhill to H.R.T. with instructions on how to contact him, suggestions to lie to the authorities, and asking for pictures. Barnhill also told H.R.T. how to run away with him. H.R.T. saw her parents reading the letters and "went ballistic" trying to take the letters away from them. Steven took the letters to the police on May 8. H.R.T. never read the letters her father intercepted from Barnhill.

H.R.T. made inconsistent statements to officers about the number of times she and Barnhill had sex. She told one officer that they had sex five times and another that they had sex 15 times. H.R.T.'s parents obtained a sexual assault protection order

prohibiting Barnhill from having contact with H.R.T.

After his arrest, Barnhill called H.R.T. from jail on her prepaid cell phone. H.R.T. said that Barnhill told her to lie about having had sex with him.

The State charged Barnhill with two counts of communication with a minor for immoral purposes (counts I and X), rape of a child in the second degree (count II), five counts of tampering with a witness (counts III, IV, V, VI, and VII), and two counts of misdemeanor violation of a sexual assault protection order (counts VIII and IX).

On December 21, Barnhill filed a motion to represent himself. After asking Barnhill about his education, familiarity with the law, and whether he had ever been through a trial, the court set over Barnhill's motion to proceed pro se for the next week. The court told Barnhill to talk with his attorney about whether self-representation was a good idea because he was facing serious charges.

On December 28, Barnhill again asked the court to proceed pro se. The court asked Barnhill about his educational background, whether he had been through a trial before, and whether he understood that he would have to follow the rules of evidence and would be held to the same standards as an attorney. Barnhill stated that he had a GED, had not been through a trial, but had spent the previous six months studying the law and understood that his standby counsel's participation would be limited. The court granted Barnhill's motion to proceed pro se.

After a five-day trial, the jury found Barnhill guilty as charged. Barnhill appeals.

DISCUSSION

Waiver of Right to Assistance of Counsel

Barnhill asserts that the trial court erred by granting his request to waive his right to the assistance of counsel and to proceed pro se. Barnhill specifically contends that because there is no evidence in the record that the court informed him of the nature and classification of the charges or the maximum penalty upon conviction before he waived his right to assistance of counsel, reversal is required. We agree.

The state and federal constitutions guarantee a criminal defendant both the right to counsel and the right to self-representation. United States Const. amends. VI and XIV; Wash. Const. art. 1, § 22; Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Luvene, 127 Wn.2d 690, 698, 903 P.2d 960 (1995). A criminal defendant who wants to waive the right to counsel and proceed pro se must make an affirmative demand. Luvene, 127 Wn.2d at 698. "The trial court must establish that a pro se defendant who has relinquished his or her right to counsel made a knowing and intelligent waiver." State v. Bebb, 108 Wn.2d 515, 525, 740 P.2d 829 (1987). The waiver must be unequivocal. Silva, 108 Wn. App. at 539. "There is no formula for determining a waiver's validity, but the preferred method is a court's colloquy with the accused on the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the accused's defense." Silva, 108 Wn. App. at 539 (footnote omitted). "Whether the waiver is valid lies within the sound discretion of the trial court, who should indulge every presumption against a valid waiver." Silva, 108 Wn. App. at 539.

Barnhill relies primarily on State v. Silva. In that case, Silva argued that the

court provided him with insufficient information from which he could validly waive his constitutional right to assistance of counsel. Silva, 108 Wn. App. at 539. The court agreed, concluding that "even the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision. Silva was never advised of the maximum possible penalties for the crimes with which he was charged. Absent this critical information, Silva could not make a knowledgeable waiver of his constitutional right to counsel." Silva, 108 Wn. App. at 541. The court also held that the right to counsel is so fundamental to the right to a fair trial that any deprivation of it cannot be treated as harmless error. Silva, 108 Wn. App. at 542.

The State argues that because Barnhill learned of the standard sentencing ranges and maximum penalties before the beginning of trial and expressed no interest in the assistance of counsel, the court properly allowed Barnhill to represent himself. The State also notes that on August 14, 2008, before trial, the court asked Barnhill again whether he wished to proceed pro se and Barnhill said that he did. At the same hearing, the prosecutor stated the standard sentence ranges for all of the charges in the Second Amended Information. But "the proper inquiry in determining the 'knowing' waiver of a right to counsel is the state of mind and knowledge of the defendant at the time the waiver is made." State v. Modica, 136 Wn. App. 434, 445, 149 P.3d 446 (2006) (citing United States v. Erskine, 355 F.3d 1161, 1169-70 (9th Cir. 2004), affirmed on other grounds, 164 Wn.2d 83, 186 P.3d 1062 (2008). A defendant must accurately understand the penalty at the time the waiver is made, not at a later time. Modica, 136 Wn. App. at 445.

Here, although the court inquired into Barnhill's educational background and asked whether he understood that he would be held to the same standard as an attorney, there is no evidence in the record that the court informed Barnhill of the possible maximum penalties involved. As in Silva, we must reverse.[1]

Communication with a Minor for Immoral Purposes

Barnhill next contends that there was insufficient evidence to support the conviction for communication with a minor for immoral purposes (count I) and that this charge should be dismissed.

"When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it." State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). If there is insufficient evidence to prove an element of a crime, reversal is required. State v. Smith, 155 Wn.2d 496, 505, 120 P.3d 559 (2005). "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (quoting State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)).

Under RCW 9.68A.090, a person who communicates with a minor for immoral

[1] Because we reverse, we need not reach the sentencing issues that Barnhill raises regarding whether his juvenile Texas adjudications are comparable to Washington felonies. If convicted upon remand, Barnhill will have an opportunity to raise these issues at sentencing, should he choose to do so. We also need not reach the issues Barnhill raises in his statement of additional grounds.

purposes is guilty of a gross misdemeanor. "Unless a person's message is both transmitted by the person and received by the minor, the person has not communicated 'with children,' the act the statute is designed to prohibit and punish." Hosier, 157 Wn.2d at 9.

The State concedes that there is insufficient evidence to support count I, communicating with a minor for immoral purposes, because there was presented no evidence that H.R.T. received the letter from Barnhill. The State argues that instead of dismissal, the remedy is to remand for entry of a judgment upon a conviction of attempted communication with a minor for immoral purposes. However, the State fails to cite any cases where the appellate court found insufficient evidence of a crime and remanded for entry of a conviction for attempt to commit that crime. Because the State cites no authority, we presume it has found none. State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978). Consequently, we reverse and dismiss count I.

Tampering with a Witness

Barnhill also asserts that there was insufficient evidence to support the charges of tampering with a witness (counts III, IV, V, VI, and VII).

Tampering with a witness is an alternative means crime. Under RCW 9A.72.120, a person is guilty of tampering with a witness if he attempts to induce a witness to "(a) [t]estify falsely or, without right or privilege to do so, to withhold any testimony; or (b) [a]bsent himself or herself from such proceedings; or (c) [w]ithhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency." "If one or more of

the alternative means is not supported by substantial evidence, the verdict will stand only if we can determine that the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means." State v. Fleming, 140 Wn. App. 132, 136, 170 P.3d 50 (2007), review denied, 163 Wn.2d 1047 (2008).

The State concedes that there is insufficient evidence to support four of the counts of tampering with a witness, count IV, V, VI, and VII. At trial, the parties stipulated that the calls recorded in Exhibit 4 were made by Barnhill to H.R.T. from the King County jail and that Exhibit 3 is accurate transcripts of those calls. However, the numbering in the transcript does not correspond to the numbering on the stipulation and the recordings do not reference the dates of the call. Accordingly, there is insufficient evidence to show which calls pertained to which count.

In addition, the jury was instructed on each of these charges that to convict Barnhill of tampering with a witness, it had to find that Barnhill "attempted to induce a person to testify falsely, to withhold testimony, or absent himself or herself from any official proceeding . . . ." On some of the tracks, Barnhill told H.R.T. to testify falsely, but on others, he only asked her to talk to his attorney. Because the evidence is insufficient to show which tracks correspond to each count and there is insufficient evidence that Barnhill asked H.R.T. to testify falsely on some of the tracks, we accept the State's concession that there is insufficient evidence to support counts IV, V, VI, and VII.

The parties agree that the track identification is clear for count III, a phone call

between Barnhill and H.R.T. on November 22. Barnhill contends that there is insufficient evidence to support that charge because there is only evidence that Barnhill induced H.R.T. to testify falsely, not on the alternative means that he told her to "absent . . . herself from any official proceeding." The State argues that the verdict was only based on one of the alternative means, that Barnhill told H.R.T. to testify falsely, and substantial evidence supports that alternative means.

In the November 22 phone call, Barnhill told H.R.T. to talk to his attorney and say that she had lied in her previous statement. Barnhill said, "[T]hey cannot convict me unless you go in there and say that we did anything." Barnhill did not say that H.R.T. should not testify, but instead that "if you don't show up and you don't give anymore statement, and you refuse to talk to my attorney, I get convicted." In closing, the State argued that it had proved Count III because Barnhill asked H.R.T. to testify that she had lied in her past statements.

Based on this record, we can determine that the verdict for count III was only based on one of the alternative means, that Barnhill induced H.R.T. to testify falsely. We also conclude that there was substantial evidence to support this alternative means. Thus, the verdict can be sustained against an insufficiency claim. Fleming, 140 Wn. App. at 136-37.

We reverse and dismiss counts I, IV, V, VI, and VII based on insufficiency of the evidence. On all other counts, we reverse and remand for further proceedings.

Dwyer, A.C.J.

We concur:

Appelwick, J.

Cox, J.