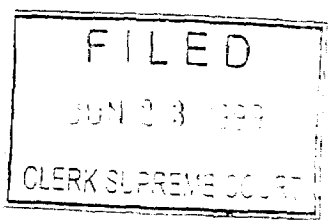
IN THE COURT OF APPEALS OF IOWA

No. 9-158 / 98-0114
Filed June 23, 1999



STATE OF IOWA,

Plaintiff-Appellee,

vs.

JEFF ALAN STEPHENSON,

Defendant-Appellant.

Appeal from the Iowa District Court for Kossuth County, Cameron B. Arnold, District Associate Judge, and W. B. MacDonald, District Associate Judge.

Defendant appeals from judgment and sentence entered for first-degree harassment. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, David Skilling, County Attorney, and Conrad Meis, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Schlegel,* JJ.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

SACKETT. C.J.

Defendant-appellant Jeff Alan Stephenson appeals following his conviction of first-degree harassment in violation of Iowa Code section 708.7(2) (1997). Defendant was charged on the basis of two telephone conversations he had with Julie Winkel concerning defendant's mother, Darlene Stephenson. Julie had intervened when defendant and his mother disagreed about her care. Defendant contends (1) there is not substantial evidence to support the conviction; (2) the district court failed to determine whether his waiver of counsel was knowing, voluntary, and intelligent; and (3) the district court imposed an illegal sentence. We affirm in part, reverse in part, and remand for a new trial.

Darlene was sick, and on July 28, 1997, Julie went to Darlene's home to check on her. Once there, Julie found defendant yelling at his mother because she was not eating. Defendant appeared upset and apparently had been drinking. Julie left but later returned. She then assisted in taking Darlene to a local medical clinic.

Defendant subsequently called his mother at the clinic. Darlene did not want to talk to him and asked Julie to speak with him. Julie did. Defendant told Julie he was going to kill her for meddling in their affairs. Julie told defendant she would let him know what she learned about his mother's condition. Later that day, Julie called defendant to tell him his mother was to be taken to a hospital in Mason City. Defendant again threatened to kill Julie. Defendant also repeated to others his threat to kill Julie.

Based on these two telephone calls, the State charged defendant with one count of first-degree harassment. *See* Iowa Code § 708.7(2) (1997).[1] The district court appointed two different attorneys to represent defendant. They both withdrew before defendant, on August 25, 1997, signed and filed a written arraignment and plea of not guilty, showing he was pro se, and containing the following paragraph:

> 4. I have been advised by the above named attorney and I understand that I have a right to arraignment in open court, and I hereby voluntarily waive that right, choosing instead to sign this written arraignment and plea of not guilty. I understand that times for further proceedings which are computed from the date of arraignment will be computed from the date this written arraignment and plea of not guilty is filed.

On October 14, 1997, the associate district court judge, who earlier had recused himself, entered what was termed an administrative order. Included in the order was the following paragraph: "The Defendant has indicated to the Court that he wishes to proceed pro se, although no formal record has been made on this, but that the Defendant has requested standby counsel." On October 21, 1997, the same judge appointed attorney Mark Laddusaw to serve as standby counsel at trial. The order included the following: "The undersigned judge visited with the Defendant . . . and

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[1] Iowa Code section 708.7(2) provides:

> 2. A person commits harassment in the first degree when the person commits harassment involving a threat to commit a forcible felony, or commits harassment and has previously been convicted of harassment three or more times under this section or any similar statute during the preceding ten years.
>
> Harassment in the first degree is an aggravated misdemeanor.

Iowa Code § 708.7(2).

the Defendant was still a little resistant to the appointment of standby counsel, but I explained the necessity of this to him and that it was the Court's decision . . . ."

Trial commenced on October 22, 1997. Defendant represented himself and his standby counsel was present. At the close of the State's case, defendant moved for judgment of acquittal. He stated, "Move to dismiss because they haven't proved the essential element of being without legitimate purpose in these communications." Standby counsel stated:

> I think the argument that he's making is that according to the Code, communications with another person by telephone without a legitimate purpose, and I think the argument that he's making is that there was a legitimate purpose for the making of the phone call. It wasn't purely for the purpose of the harassment, that the State has not made any prima facie showing that the only purpose was for the harassment, which would imply that there was no other legitimate purpose.

On December 15, 1997, after the jury returned a guilty verdict, the district court sentenced defendant to twenty-four months in the county jail, with six months suspended. On January 15, 1998, the district court resentenced defendant and imposed an eighteen-month sentence to be served with the Department of Corrections, with two years of probation thereafter.

Defendant first contends there is no evidence supporting the charge because the statute requires the alleged harasser make the initial telephone call. He contends the first call was a call to his mother and not to Julie. He further contends Julie said she was not concerned about the first call. Defendant contends the second call was a call from, not to, Julie.

The State contends this issue was not preserved for appellate review. Defendant advances (1) the motion for judgment of acquittal was minimally sufficient; (2) the court should adopt an exception-to-error-preservation rule that would permit direct review of the legal sufficiency of the evidence; and (3) review should be allowed because defendant represented himself.

Without addressing the preservation of error issue, we address defendant's claim that because defendant did not place either phone call to the victim, defendant is entitled to a judgment of acquittal. Iowa Code section 708.7(1)(a)(1) says:

> 1. a. A person commits harassment when, with intent to intimidate, annoy, or alarm another person, the person does any of the following:
>
> (1) Communicates with another by telephone, telegraph, or writing without legitimate purpose and in a manner likely to cause the other person annoyance or harm.

Iowa Code § 708.7(1)(a)(1). There is no language in the statute requiring the harassing call to be placed by the defendant to the victim; it only requires communication by telephone. *See* Iowa Code § 708.7(1)(a). There is evidence defendant made threats to the victim while communicating by telephone. Contrary to defendant's argument, we find nothing about the statutory language unclear or ambiguous; rather, we find the language plain and its meaning clear. Consequently, we need not look to statutory construction. *See State v. Hickman*, 576 N.W.2d 364, 368 (Iowa 1998); *State v. Ahitow*; 544 N.W.2d 270, 272 (Iowa 1996). There was substantial evidence introduced to support the elements of the charge.

Secondly, defendant contends the district court did not make a sufficient inquiry regarding his waiver of his Sixth and Fourteenth Amendment rights to assistance of counsel. The State advances defendant waived this error because he did not obtain transcripts of any discussions of the waiver with the district court as reflected in the October 14 and 21 orders, nor did he provide a supplemental statement of proceedings under Iowa Rule of Appellate Procedure 10(c).[2]

There is no evidence either of the two hearings were transcribed; consequently, defendant could not have supplied a transcript. The only remaining question, therefore, is whether defendant's failure to supply more record precludes us from addressing his claim. The record before us is sufficient for us to address defendant's claim.

Our review of this matter is de novo, constitutional issues being involved. *State v. Rater*, 568 N.W.2d 655, 657 (Iowa 1997).

The Sixth Amendment to the United States Constitution guarantees in all criminal prosecutions the accused shall enjoy "the right . . . to have the assistance of

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[2] Iowa Rule of Appellate Procedure 10(c) provides:

> If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be filed with the clerk of the trial court and served on appellee within twenty days after the filing of the notice of appeal. Appellee may file with the clerk of the trial court and serve on appellant objections or proposed amendments to the statement within ten days after service of appellant's statement. Thereupon the statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and as settled and approved shall be included in the record on appeal.

Iowa R. App. P. 10(c).

counsel for his defense." The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562, 572 (1975) (Burger, C.J., Blackburn and Rehnquist, JJ., dissenting).

Unlike the Sixth Amendment right to counsel, which is in effect until waived, the right of self-representation is not effective until asserted. *Williams v. Bartlett*, 44 F.3d 95, 100 (2nd Cir. 1994); *Burton v. Collins*, 937 F.2d 131, 133 (5th Cir. 1991). To invoke his right to represent himself, a defendant must knowingly, intelligently, voluntarily, and unequivocally waive his right to counsel and state his intentions to represent himself. *Hamilton v. Groose*, 28 F.3d 859, 861 (8th Cir. 1994).

In a state criminal trial, a defendant has a Sixth and Fourteenth Amendment right under the United States Constitution to self-representation. *See Faretta*, 422 U.S. at 806, 95 S. Ct. at 2532, 45 L. Ed. 2d at 572. Before the right attaches, the defendant must voluntarily elect to proceed without counsel by "knowingly and intelligently" waiving his Sixth Amendment right to counsel. *See id.* at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581-82. In addition, the defendant's request to proceed without counsel must be "clear and unequivocal." *Id.* at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 582. Before a trial court accepts the request, the court must make the defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.*

In *McKaskle v. Wiggins*, 465 U.S. 168, 184, 104 S. Ct. 944, 954, 79 L. Ed. 2d 122, 137 (1984) (White, Brennan, and Marshall, JJ., dissenting), the Supreme Court held a court may appoint "standby counsel" over a defendant's objection. In so ruling, the Supreme Court outlined two general limitations upon standby counsel's unsolicited participation at trial. *Id.* at 178, 104 S. Ct. at 951, 79 L. Ed. 2d at 133. First, the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. *Id.* Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself. *Id.* Essentially, standby counsel has two purposes -- to act as a safety net to ensure the litigant receives a fair hearing of his claims and to allow the trial to proceed without the undue delays likely to arise when a layman presents his own case.

In *Rater*, the record did not contain an exchange between Rater and the district court where the court explained to Rater he was entitled to an attorney at all critical stages, nor was there an admonishment as to what defendant faced by representing himself. The record did show Rater was familiar with the legal process, he had been convicted by the court for contempt, and he was intelligent and educated, holding both a bachelor's degree and a master of science degree in mathematics.

The State has the burden of proving the waiver was valid. *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S. Ct. 1404, 1409, 89 L. Ed. 2d 631, 640 (1986). In *State v. Hindman*, 441 N.W.2d 770 (Iowa 1989), the court stated the degree of inquiry

which is required in order to assure a valid waiver of the Sixth Amendment right to counsel varies with the nature of the offense and the ability of the accused to understand the process. *Id.* at 772.

In evaluating the record, we indulge in every reasonable presumption against waiver. *State v. Newsom*, 414 N.W.2d 354, 358 (Iowa 1987); *State v. Nelsen*, 390 N.W.2d 589, 592 (Iowa 1986).

In assessing the significance of standby counsel, we note the appointment of standby counsel is insufficient to satisfy the Sixth Amendment right to counsel when the district court has failed to conduct an inquiry to ensure the defendant's waiver of that right was knowing and intelligent. *See United States v. Sandles*, 23 F. 3d 1121, 1126-128 (7th Cir. 1994); *United States v. Padilla*, 819 F.2d 952, 956-57 (10th Cir. 1987). Also, while a defendant has a right to waive the assistance of counsel and conduct his own defense, if standby counsel is appointed, the defendant "remains free . . . to elevate standby counsel to a lead counsel role, thereby waiving the defendant's *Faretta* rights." *United States v. Swinney*, 970 F.2d 494, 498 (8th Cir. 1992).

Whether defendant was actually prejudiced by the district court's failure to conduct a sufficient inquiry or by its decision to require him to proceed pro se is immaterial. Harmless error analysis is not applicable to Sixth Amendment rights to self-representation questions. *See McKaskle*, 465 U.S. at 177 n. 8, 104 S. Ct. at 950 n. 8, 79 L. Ed. 2d at 133 n. 8; *Abdullah v. Groose*, 44 F.3d 692, 696 (8th Cir. 1995).

The State has failed to make a sufficient showing there was a valid waiver by defendant of his right to counsel. There is nothing in this record to show a meaningful inquiry into defendant's waiver of his Sixth and Fourteenth Amendment right to counsel. Defendant having constructively been denied his constitutional right to counsel, the appointment of standby counsel was not sufficient to satisfy defendant's Sixth Amendment rights. The State has failed to meet its burden of proving a valid waiver. We reverse defendant's conviction and remand for a new trial. *See State v. Wiese*, 587 N.W.2d 488, 490 (Iowa App. 1998).

Because there will be a new trial, we address defendant's third contention his sentence was illegal because a sentence of eighteen months is not recognized by law, and probation cannot be ordered without the suspension of sentence or deferral of judgment. The State agrees with this argument. Should defendant again be convicted, the court should take note on resentencing.

We have agreed with the district court and the State there was substantial evidence to support the charge. We order a new trial.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED FOR A NEW TRIAL.

No. 98-0114. [9-158] STATE v. STEPHENSON

Appeal from the Iowa District Court for Kossuth County, Cameron B. Arnold and W. B. MacDonald, District Associate Judges. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.** Heard by Sackett, C.J., Vogel, J., and Schlegel, S.J. Opinion by Sackett, C.J. (10 pages $4.00)

Defendant appeals following his conviction of first-degree harassment in violation of Iowa Code section 708.7(2) (1997). Defendant was charged on the basis of two telephone conversations he had with Julie Winkel concerning defendant's mother, Darlene Stephenson. Defendant contends (1) there is not substantial evidence to support the conviction; (2) the district court failed to determine whether his waiver of counsel was knowing, voluntary, and intelligent; and (3) the district court imposed an illegal sentence. We affirm in part, reverse in part, and remand for a new trial. Julie assisted in taking Darlene to a medical clinic. Defendant called his mother at the clinic. Darlene asked Julie to speak with him. Julie did. Defendant told Julie he was going to kill her for meddling in their affairs. Later, Julie called defendant to tell him his mother was taken to a hospital. Defendant again threatened to kill Julie. The court appointed two different attorneys to represent defendant. They both withdrew before defendant signed and filed a written arraignment and plea of not guilty, showing he was pro se. The associate district court judge entered an administrative order. In the order was: "The Defendant has indicated to the Court that he wishes to proceed pro se, although no formal record has been made on this, but that the Defendant has requested standby counsel." The judge appointed standby counsel. The order included: "The undersigned judge visited with the Defendant . . . and the Defendant was still a little resistant to the appointment of standby counsel, but I explained the necessity of this to him and that it was the Court's decision . . . ." Defendant represented himself at trial. Defendant contends there is no evidence supporting the charge because the statute requires the harasser make the initial telephone call. There is no language in the statute requiring the harassing call to be placed by the defendant; it only requires communication by telephone. There was substantial evidence to support the charge. Defendant contends the district court did not make a sufficient inquiry regarding his waiver of his Sixth and Fourteenth Amendment rights to assistance of counsel. There is nothing in this record to show a meaningful inquiry into defendant's waiver of his right to counsel. Defendant having constructively been denied his constitutional right to counsel, the appointment of standby counsel was not sufficient to satisfy defendant's rights. The State has failed to meet its burden of proving a valid waiver. We reverse defendant's conviction and remand for a new trial.