COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1441-CR **Cir. Ct. No. 2014CF353**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH K. KIMPEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed*.

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. A jury found Kenneth K. Kimpel guilty of one count of repeated sexual assault of a child and one count of child enticement. *See*

WIS. STAT. §§ 948.025(1)(e) and 948.07(1) (2013-14).[1] Kimpel represented himself at trial, with assistance from standby counsel, and the appellate issues concern Kimpel's self-representation. He argues that his waiver of the right to counsel was not knowing and voluntary, that the circuit court did not adequately define the role of standby counsel, and that the circuit court erroneously exercised its discretion when it denied Kimpel's request for an adjournment. He also requests that this court order a new trial in the interest of justice. Because none of Kimpel's arguments are persuasive, we affirm.

Background

¶2 Kimpel was living with his parents when he befriended a neighbor boy, C.G. Kimpel told C.G. he would pay him to do yard work and C.G. agreed. C.G. told investigators that Kimpel had performed oral sex on him on many occasions, and he specifically described three incidents. C.G. said that Kimpel gave him money, candy, a cell phone, and cigarettes. Kimpel was charged with one count of repeated sexual assault of the same child and one count of child enticement. Further facts will be stated below as necessary.

Kimpel's Waiver of Right to Counsel, Right to Self-Representation, and Role of Standby Counsel

A. Facts.

¶3 The first attorney appointed to represent Kimpel withdrew on the basis of a poor attorney/client relationship. The second attorney withdrew immediately citing an unidentified conflict. Attorney Jack Hoag was then

[1] All other references to the Wisconsin Statutes are to the 2015-16 version unless noted.

appointed to represent Kimpel. Four months later, Hoag advised the circuit court that Kimpel wanted to represent himself, and Hoag moved to withdraw.

¶4 The circuit court conducted the following colloquy:

> THE COURT: All right. Why do you feel that you're in a position to try this case without counsel?
>
> [Kimpel]: I can try this case because it's very simple and plain to me that I am not guilty of these charges. I am being falsely accused of these charges and I can prove every aspect of every statement this kid has made to police, that all these statements are completely false. And I'm not saying proof by reasonable doubt. I can actually prove it by factual.
>
> ….
>
> THE COURT: Do you understand that you are charged with repeated sexual assault of a child and that charge subjects you to a penalty of a fine of not more than $100,000, imprisonment not more than 40 years or both?
>
> [Kimpel]: Yes, sir.
>
> THE COURT: And you are also charged with child enticement and that charge subjects you to a penalty of a fine of not more than $100,000, imprisonment not more than 25 years or both?
>
> [Kimpel]: Yes, sir.
>
> THE COURT: And from what you're telling me, you have some kind of a prior criminal record?
>
> [Kimpel]: I do have a prior criminal record, correct.
>
> THE COURT: Did you represent yourself in those matters in the past?
>
> [Kimpel]: That's why I was convicted because I was not representing myself.
>
> THE COURT: You had an attorney?
>
> [Kimpel]: Yeah. My attorney hung me dry.
>
> THE COURT: Did you have a trial?

[Kimpel]: Yes, I did.

THE COURT: And at that trial did you testify?

[Kimpel]: Yes, I did.

THE COURT: Do you have any medical diagnoses of any medical conditions?

[Kimpel]: I have a heart murmur.

THE COURT: Do you take medication for that?

[Kimpel]: Yes, I do.

….

THE COURT: Does [your medication] cause you any difficulties in understanding things?

[Kimpel]: No, sir.

THE COURT: Do you feel it doesn't impair your mental ability?

[Kimpel]: Absolutely not.

THE COURT: Today have you had any other drugs in the last 24 hours, any drugs or other intoxicants or alcohol?

[Kimpel]: No, sir.

THE COURT: So the only medication you take then on a regular basis is this heart murmur medication?

[Kimpel]: Yes, with two Aleve.

THE COURT: Is that related to the heart murmur or do you have some other pain?

[Kimpel]: Yeah, I have other pain, chest pains.

THE COURT: Has the physician told you that's related to your heart?

[Kimpel]: Oh, yes.

THE COURT: And do you understand you do have a constitutional right to be represented by an attorney?

[Kimpel]: Yes, sir.

THE COURT: And do you understand if you can't afford one, one would be provided to represent you at little or no expense to you? Do you understand that?

[Kimpel]: I'm not asking –

THE COURT: I understand.

[Attorney Hoag]: He is making a record.

THE COURT: Do you understand you have that right?

[Kimpel]: Yes, sir.

THE COURT: [to Attorney Hoag] You have been appointed …?

[Attorney Hoag]: I was, yes.

THE COURT: So you understand if I grant [the] request to withdraw, you could apply to the public defender and get other representation?

[Kimpel]: They were my—I had [p]ublic [d]efenders.

THE COURT: Do you understand that you have that right?

[Kimpel]: Yes.

THE COURT: At this point in time. And you also have the right to hire your own attorney if you don't want to have a public defender. Do you understand that?

[Kimpel]: Right.

THE COURT: And do you understand that if this matter proceeds or when this matter proceeds, that the State, the District Attorney, will not be your attorney?

[Kimpel]: Oh, yes, of course.

THE COURT: You understand they cannot advocate for you?

[Kimpel]: That's right.

THE COURT: And do you understand if you had an attorney, an attorney might be able to determine some legal or factual defenses that you don't have any knowledge about or not aware of, do you understand that?

[Kimpel]: Right.

THE COURT: Do you understand that there are rules of procedure that you are going to have to follow in this court that are legal rules?

[Kimpel]: That's why I need the Internet, yes, sir.

THE COURT: And do you understand that you are going to be required to follow those rules?

[Kimpel]: Yes, sir.

THE COURT: If you represent yourself, you're not going to get any benefit of the doubt as to whether you are following those rules or not. You are going to have to follow those rules entirely, do you understand that?

[Kimpel]: Yes, sir.

THE COURT: Do you understand there are also rules of evidence as to how to present the case, how the State has to present their case, rulings I have to make. You are going to have to follow those, as well, do you understand?

[Kimpel]: I will study that, sir.

THE COURT: But you understand that?

[Kimpel]: Yes.

THE COURT: And do you understand that as time goes on in this case there will be motion hearings, a trial. I'm not your advocate and cannot advocate on your behalf. Do you understand?

[Kimpel]: Yes, sir.

THE COURT: That the role of judge is to be a neutral party. Not a party, but neutral magistrate, do you understand that?

[Kimpel]: Yes, sir.

THE COURT: And has anybody forced you or threatened you to want to proceed or have you proceed without counsel?

[Kimpel]: No, sir.

THE COURT: You are doing that freely and voluntarily?

> [Kimpel]: Yes.
>
> THE COURT: And you do think that that's in your best interests?
>
> [Kimpel]: Oh, yes.
>
> ….
>
> THE COURT: Now, are you asking for stand-by counsel, as well, Mr. Kimpel[,] or not?
>
> [Kimpel]: Your Honor, the only thing I need an attorney [for] is to file subpoenas to the 17 witnesses that I need subpoenaed, because I do not know how to subpoena a witness. And just in case there is [prosecutorial] misconduct in the case, he can legally object because he would know what he is objecting to. I would not.
>
> THE COURT: So, you are asking me to appoint you stand-by counsel?
>
> [Kimpel]: Yes.

In addition, the court ascertained that Kimpel was forty-eight years old, had a high school education, could read and write English, but had no legal training.

¶5 The court found that Kimpel had "made it clear … that he would prefer to proceed without counsel." After summarizing the information given by the court and Kimpel's responses during the colloquy, the court stated, "[w]hile I might not think that that's what I would want to do in this particular matter, in his circumstances, I will find that he is competent to represent himself." The court appointed Attorney Philip Brehm to serve as standby counsel.

B. Discussion.

¶6 A defendant is guaranteed the fundamental right to the assistance of counsel by both article I, section 7 of the Wisconsin constitution and the Sixth Amendment to the United States Constitution. ***State v. Klessig***, 211 Wis. 2d 194,

201-02, 564 N.W.2d 716 (1997); ***Faretta v. California***, 422 U.S. 806 (1975). The same constitutional authorities give a defendant the correlative right to conduct his or her own defense. ***Klessig***, 211 Wis. 2d at 203; ***Faretta***, 422 U.S. at 807. The interaction of the right to counsel and the right of self-representation "create[s] somewhat of a dilemma for the [circuit] judge who is confronted with the unusual defendant who desires to conduct his own defense." ***Pickens v. State***, 96 Wis. 2d 549, 556, 292 N.W.2d 601 (1980), *overruled on other grounds by* ***Klessig***, 211 Wis. 2d at 206.

¶7 When a defendant seeks to proceed without an attorney, the circuit court must determine whether he or she (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed without an attorney. If the defendant knowingly, intelligently and voluntarily waives the right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow the defendant to do so. ***Klessig***, 211 Wis. 2d at 203-04. Whether a defendant's constitutional right to self-representation was violated is a question of law which we review de novo. ***State v. Darby***, 2009 WI App 50, ¶13, 317 Wis. 2d 478, 766 N.W.2d 770.

¶8 On appeal, Kimpel makes several arguments, all of which are refuted by the record. He first argues that he "did not understand what representing himself encompassed." The circuit court carefully explained what Kimpel would have to do if he represented himself. The court explained that Kimpel would have to follow procedural and evidentiary rules. The court told Kimpel that the State could not advocate for him and that the court was a "neutral magistrate." Kimpel told the court that he understood.

¶9 Kimpel argues that his comment that the case was "very simple and plain" showed his lack of understanding. We disagree. Kimpel takes the "very simple and plain" language out of context. Kimpel was not suggesting that the case was very simple and plain. Rather, he said that it was "very simple and plain to [him] that [he was] not guilty of these charges." He went on to aptly note that the truth of C.G.'s statements was critical. The colloquy shows that Kimpel was clearly representing that he understood what he would have to do if he represented himself, and that the court appropriately probed the basis for that representation.

¶10 Kimpel next contends that he "thought that he had no choice [other than self-representation] after his prior attorney moved to withdraw." The record shows that Kimpel's attorney moved to withdraw because Kimpel wanted to represent himself. The court explained that another attorney would be appointed if Kimpel wanted one. Kimpel expressly rejected that offer, stating his belief that his attorney in a prior criminal matter had "hung [him out to] dry." Kimpel's conduct and statements to the circuit court defeat his appellate argument.

¶11 Kimpel argues that he did not truly understand the seriousness of the charges. Again, the record defeats his argument. During the colloquy, the court explained to Kimpel the penalties for both charged crimes. Kimpel assured the court that he understood he faced a possible imprisonment of forty years for the sexual assault charge and twenty-five years for the child enticement charge. Moreover, Kimpel had previously served over nine years in prison in Nevada for a 1993 conviction for attempted sexual assault of a child, giving him first-hand experience with the gravity of a charge of sexual assault of a child. The record shows that Kimpel understood the charges.

¶12 The record also shows that Kimpel was competent to represent himself. When assessing a defendant's competence, the court "should consider factors such as 'the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate.'" ***Klessig***, 211 Wis. 2d at 212 (quoted source omitted). The court found that Kimpel was competent and the record supports that conclusion. *See* ***Faretta***, 422 U.S. at 807 (a literate defendant with a high school education who understood the court's warnings was competent to represent himself).

¶13 Kimpel contends that he did not understand the role of standby counsel and that the circuit court failed to explain to him what standby counsel could do. The decision to appoint standby counsel is left to the discretion of the circuit court. *See* ***State v. Campbell***, 2006 WI 99, ¶64, 294 Wis. 2d 100, 718 N.W.2d 649. "The role of standby counsel can vary over a wide spectrum, ranging from a warm body sitting beside the defendant throughout trial to participation that is tantamount to [] defense counsel." ***Id.***, ¶66.

¶14 Kimpel is correct to the extent that there was no discrete explanation by the circuit court about how standby counsel could assist Kimpel. The court, however, did note that standby counsel could assist with subpoenaing witnesses and explain the procedural and evidentiary rules to Kimpel. Kimpel told the court he needed help watching for prosecutorial misconduct. During subsequent motion hearings, the court referred Kimpel to standby counsel on several occasions for help procuring witnesses and issuing subpoenas. As the prosecution continued, standby counsel provided considerable assistance far beyond those two areas. When he accepted the appointment, Brehm told the court he would help Kimpel to file a motion seeking the release of C.G.'s school records. Such a motion was filed, and the court released certain records after an in camera review. Brehm

explained court rulings to Kimpel, counseled Kimpel during his opening statement, consulted with Kimpel about the content of jury instructions, discussed with Kimpel whether he should testify in his own defense, and conducted the bulk of the in-court examination of C.G.

¶15 To be sure there were times during trial when Kimpel was stymied by procedural or evidentiary rules that he did not appear to fully grasp. Virtually every non-lawyer defendant who exercises the constitutional right to self-representation encounters points in the process where, in hindsight, having an attorney looks to have been the better option. That, however, is not controlling of whether Kimpel's self-representation passes constitutional scrutiny. *See* ***Imani v. Pollard***, 826 F.3d 939, 944 (7th Cir. 2016) (stating "[u]nder ***Faretta,*** … a defendant's reason for choosing to represent himself is immaterial. Defending *pro se* will almost always be foolish, but the defendant has the right to make that choice, for better or worse.").[2]

Continuance

¶16 As noted previously, Kimpel had been convicted of attempted sexual assault of a child in 1993 in Nevada. Although the circuit court initially denied the State's motion to admit evidence of that conviction under WIS. STAT. § 904.04(2),[3]

[2] In ***Imani v. Pollard***, 826 F.3d 939 (7th Cir. 2016), the court granted federal habeas corpus relief to the defendant, ordering either his release or a new trial. In its decision, the court described the Wisconsin Supreme Court's decision upholding the denial of Imani's request to represent himself as "flatly contrary" to ***Faretta v. California***, 422 U.S. 806 (1975), ***Imani***, 826 F.3d at 943.

[3] WISCONSIN STAT. § 904.04(2) sets forth the general rule that "evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." The statute expressly excepts evidence "when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

the court later ruled that the State could introduce evidence of the Nevada conviction. After that ruling, Kimpel asked for a continuance so that he would have time to obtain witnesses to rebut the suggestion that he was sexually attracted to adolescent boys. The court denied the request because the testimony described by Kimpel would not be admissible.

¶17 The decision to grant or deny a continuance is a matter within the discretion of the circuit court. *See* ***State v. Fink***, 195 Wis. 2d 330, 338, 536 N.W.2d 401 (Ct. App. 1995).[4] The denial of a request for a continuance will not be overturned on appellate review unless three qualifications are met:

> (1) there must have been actual surprise which could not have been foreseen; (2) where the surprise is caused by unexpected testimony, the party who sought the continuance must have made some showing that contradictory or impeaching evidence could probably be obtained within a reasonable time; and (3) the denial of the continuance must have been, in fact, prejudicial to the party who sought it.

Id. at 339-40. Generally, "probing appellate scrutiny" of a decision to deny a continuance is not warranted. ***Id.*** at 338-39.

¶18 Kimpel cannot establish any of the three ***Fink*** criteria. He cannot show unforeseen actual surprise. The admissibility of the Nevada conviction had been a focal point of the State's pretrial strategy. The question was first raised

[4] Faced with a request for a continuance, a circuit court should balance six factors: (1) the length of the requested delay; (2) whether another attorney other than the "lead counsel" can be prepared to try the case; (3) whether other continuances have been granted to the requesting party; (4) the effect of the delay on the parties, witnesses, and the court; (5) whether the delay seems to be for a legitimate reason or whether its purpose is dilatory; and (6) any other relevant factors. *See* ***State v. Leighton***, 2000 WI App 156, ¶28, 237 Wis. 2d 709, 616 N.W.2d 126. Because Kimpel was representing himself, not all of those factors were pertinent.

nearly four months before the start of trial. The State's reconsideration motion relied on new factual information about the Nevada conviction—information given to the State by Kimpel.[5]

¶19 To meet the second prong, Kimpel must show that if a continuance had been granted, "contradictory or impeaching evidence could probably be obtained within a reasonable time." ***Fink***, 195 Wis. 2d at 339. Kimpel fails to meet this prong. Kimpel told the circuit court that he needed time to obtain expert witnesses to show that he was not attracted to adolescent boys. Kimpel identified his federal probation officer as someone who could testify about a polygraph examination taken by Kimpel. Kimpel also said he wanted to obtain mental health and DNA experts. The State countered by noting that polygraph-based evidence is not admissible, *see* ***State v. Dean***, 103 Wis. 2d 228, 229, 307 N.W.2d 628 (1981), and that the State's expert would testify about the results of the DNA testing performed in this case. The circuit court agreed with the State, stating that the testimony from Kimpel's desired witnesses would not be admissible. On appeal, Kimpel does not dispute that conclusion, nor does he identify what additional witnesses could have been procured "within a reasonable time."

¶20 To meet the third prong, Kimpel must show that the denial of the request for a continuance was prejudicial. Kimpel argues that he was prejudiced because he was representing himself and was not prepared to go to trial. Kimpel, however, does not explain how additional time would have assisted him. Therefore, Kimpel cannot meet the third prong of the ***Fink*** test. *See* ***Angus v.***

[5] The State's initial motion relied on police reports. The reconsideration motion relied on the transcript of a pretrial hearing at which the victim testified and was cross-examined at length by Kimpel's attorney.

State, 76 Wis. 2d 191, 197-98, 251 N.W.2d 28 (1977) (denial of a continuance request in order to present alibi witnesses not prejudicial when no alibi existed). The circuit court properly exercised its discretion when it denied Kimpel's request for a continuance.

New Trial in the Interest of Justice

¶21 Kimpel asks this court to order a new trial in the interest of justice because the real controversy was not fully tried. *See* WIS. STAT. § 752.35. An appellate court may order a new trial in the interest of justice when "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case." ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶22 Kimpel argues that the jury did not hear important evidence, such as alibi evidence, and that Kimpel's cross-examination was ineffective. The essence of those arguments is that Kimpel did a poor job representing himself. Because Kimpel had a constitutional right to represent himself and, as we have concluded above, the circuit court did not err when it permitted Kimpel to do so, Kimpel's after-the-fact complaint that the real controversy was not fully tried must fail. *See* ***State v. Clutter***, 230 Wis. 2d 472, 477-78, 602 N.W.2d 324 (Ct. App. 1999) (the "rescue" of a self-represented defendant by ordering a new trial because the real controversy was not tried "would diminish the serious consequences of the decision" to waive counsel).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.