COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2238-CR **Cir. Ct. No. 99 CF 4849**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE C. SIMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Willie C. Simpson appeals from a judgment of conviction entered after a bench trial where he was found guilty of two counts of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (1999-

2000).[1] He also appeals from a postconviction order. Simpson raises two claims of error. He contends that the trial court violated his federal and state constitutional rights to self-representation when it denied his request to *pro se* cross-examine a witness. He also asserts that the evidence was insufficient to support the guilty verdicts on the two first-degree sexual assault of a child charges. Because Simpson did not clearly and unequivocally request to discharge his attorney and proceed *pro se*, and because the evidence was sufficient to support the verdicts, we affirm.

I. BACKGROUND

¶2 On September 21, 1999, T.H. notified the Milwaukee Police Department that her six-year-old daughter, L.H., related that she had been sexually assaulted by Simpson. After an investigation, the State charged Simpson with two counts of first-degree sexual assault of a child. A public defender was appointed to represent him. Simpson waived his right to a jury trial, in favor of a trial to the court. The bench trial lasted two days.

¶3 During the first day, the victim, L.H., and her doctor, Theodore Green, testified for the prosecution. T.H., the victim's mother, started her testimony but did not finish. On the second day of trial, before testimony resumed, Simpson's counsel informed the court that Simpson had drafted some questions which he wanted counsel to ask T.H., but that he, counsel, did not feel comfortable asking Simpson's questions. As a result, defense counsel asked the court to allow Simpson to personally cross-examine T.H. because Simpson felt he

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

could conduct a better cross-examination than counsel. Simpson indicated that he did not want to "dump" his trial counsel, but he simply wanted to personally cross-examine T.H. The court ruled that Simpson had no constitutional right to concurrent self-representation and representation by a lawyer. It further ruled that Simpson was not competent to represent himself in the middle of a trial.

¶4 When the trial continued, Simpson, his wife, and daughter testified in his defense. After testimony was completed, the trial court found him guilty of both charges. Post-trial, but before sentencing, Simpson moved, *pro se*, to dismiss his trial counsel. Trial counsel also moved to withdraw. The trial court granted the motion and then appointed a successor counsel for sentencing purposes. The trial court sentenced Simpson to two consecutive terms of twenty-five years each. Thereafter, numerous proceedings followed, including the filing of numerous motions *pro se*, the appointment of appellate counsel, appointment of successor appellate counsel, and finally a postconviction motion seeking a new trial on the ground that the trial court improperly denied Simpson the right to represent himself during trial. This motion was denied. Simpson now appeals.

II. ANALYSIS

A. Request to Cross-Examine T.H.

¶5 Simpson first contends that when the trial court denied his motion to proceed *pro se* in order to cross-examine T.H., it improperly infringed upon his constitutional right to self-representation under the Sixth Amendment of the United States Constitution and Article I, § 7 of the Wisconsin Constitution.

¶6 Whether Simpson was denied his constitutional right to self-representation raises an issue of constitutional fact, which we review

independently. ***State v. Johnson***, 184 Wis. 2d 324, 343, 516 N.W.2d 463 (Ct. App. 1994). To successfully claim the denial of the right to self-representation, an accused must demonstrate he or she unequivocally demanded that his or her trial counsel be discharged and that he or she be permitted to proceed *pro se*. *See* ***id.*** at 345. Simpson falls far short of meeting his burden.

¶7 The colloquy between the trial court, Simpson, and his trial counsel is lengthy, consuming fourteen pages of trial transcript. We have excised those portions relevant to a resolution of this issue. Simpson now claims he "requested to represent himself alone or with standby counsel." We are not persuaded.

¶8 The relevant tracts of testimony are:

> [DEFENSE COUNSEL]: I just wanted to address the court to make the court aware that he is of the mindset that he would like to ask his own -- address the witnesses during cross and I assist him because he feels that he can do that in a better fashion than I can.…
>
> ….
>
> Now it's awkward for me to conduct a trial and represent you in a manner that you -- that you -- you mandate because I'm not comfortable….
>
> ….
>
> THE COURT: … Mr. Toran, however, is trying your case, and I will tell you this…. I know that he takes his job seriously…. I know that he prepares for a case…. I know that he formulates his own trial tactics and strategy to best represent a client.
>
> ….
>
> Now I have monitored Mr. Toran's conduct in other cases and in this case, and I know he's given 110 percent.…
>
> ….
>
> You're getting good representation from your lawyer. And so you may have concerns that have been expressed by Mr. Toran. But we're not stopping this trial. We are going forward. Do you want to say something?

DEFENDANT: Yes, sir.

….

I never called Mr. Toran a bad attorney and I never wanted to stop this trial. That's -- that's not what I wanted to go on record to say today.…

And the only thing that I ask today, I didn't ask this trial be stopped and I don't want to fire him…. The only thing I -- I've asked is that, how you say it …. Um, a person … when they represent theyself, I don't want this trial to stop ….

And what I, only thing I was asking was that I be given a chance to represent myself with the help of my -- with the assistance, with the assistance of my attorney, what do you call it, pro se. We was taking about it last night, and he agreed. Because there's things that I don't know. I just really don't know, but I do know this. I know these questions….

THE COURT: … I'm not going to allow you to go pro se and to use Mr. Toran as stand-by counsel and I'll tell you why in just a moment….

All right, I'm construing what you're saying here … is that what you want to do is you want to conduct this trial yourself and use Mr. Toran as standby, kind of an aid to you or an assistant. Right?

DEFENDANT: Yes, see I couldn't … ask myself questions if I had to go to the stand --

….

THE COURT: … First of all, you don't have a constitutional right to concurrent self-representation and representation by your lawyer….

Next, with respect to allowing you to proceed on your own and use Mr. Toran as a stand-by, I'm not satisfied that you can represent yourself based on what you've said. The law in this state with respect to waiver of counsel is that it has to be knowingly, intelligently, and voluntarily done, and you have to be competent to proceed pro se.…

Now, I'm satisfied that you have the ability to waive counsel, but I'm not satisfied that you are competent to represent yourself even with stand-by counsel….

….

You are attempting to make a deliberate choice, but the problem here is, out of your own mouth, you don't know

> the law, all you know are the facts. And that makes you not competent to represent yourself.
>
> ….
>
> So I'm not satisfied under Klessig that -- that Mr. Simpson is competent to proceed pro se based on what he told me here, and that is I don't know the law and you got to an extent know the law.
>
> ….
>
> [DEFENSE COUNSEL]: Your Honor, just for the record, and your ruling is clear, what Mr. Simpson was proposing is that I not be stand-by counsel --
>
> DEFENDANT: Not trying to dump him.
>
> [DEFENSE COUNSEL]: --that I just -- he just be permitted to cross examine one witness which would be [T.H.]. That's all he wanted to do.
>
> THE COURT: No … you don't both do it….
>
> ….
>
> DEFENDANT: --can I just say one thing?
>
> THE COURT: One thing.
>
> DEFENDANT: I'm not trying to fire my attorney or any of that and I said I didn't know the law…. I'm not trying to dump my attorney …. But I am saying that I do know these dates and times better. He don't…. All I'm asking is that he assist me….
>
> ….
>
> THE COURT: He is going to ask the questions.

¶9 From this recitation of the colloquy that took place, it is manifest that Simpson did not want to shoulder the responsibility of full self-representation. He had no desire to discharge his trial counsel. Nor did Simpson, as clarified by his counsel, seek standby counsel. Rather, he sought something in between; i.e., the ability to cross-examine one witness. But "the something in between" does not constitute an unequivocal request to proceed *pro se*. "While a defendant has a constitutional right to be represented at trial, he has no constitutional right to concurrent self-representation and representation by counsel." ***State v. Wanta***,

224 Wis. 2d 679, 699, 592 N.W.2d 645 (Ct. App. 1999). The appointment of standby counsel is for the convenience of the trial court, not the defendant. It is usually invoked after an accused is allowed to proceed *pro se*. ***State v. Cummings***, 199 Wis. 2d 721, 754 n.17, 546 N.W.2d 406 (1996); ***State v. Lehman***, 137 Wis. 2d 65, 77, 403 N.W.2d 438 (1987). Simpson wanted what he may have deemed the best of two worlds, but legally he only had the right to one. His selection was not unequivocal. Therefore, he suffered no constitutional deprivation.[2]

B. Insufficient Evidence.

¶10 Simpson also claims that the evidence was insufficient as a matter of law to sustain the charged crime of sexual assault. As acknowledged by Simpson, we shall not reverse a conviction on the basis of insufficient evidence:

> [U]nless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes the trier of fact should not have found guilt based on the evidence before it.

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[2] Simpson also argues that when the trial court concluded that he was incompetent to proceed *pro se*, it erred by not undertaking a ***State v. Klessig*** colloquy, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). Because such an inquiry was not necessary in view of our determination that no unequivocal demand for *pro se* representation was made, we deem it unnecessary to consider that issue.

Simpson also suggests that the trial court was biased as evidenced by its comments that his appointed counsel was a good lawyer. We are not persuaded. Even if these comments could somehow suggest bias, there was no prejudice to Simpson because he failed to unequivocally assert that he wanted to proceed *pro se*.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted). Subsumed in this standard of review is the well-recognized principle that when the trial court is the finder of fact, it is responsible for assaying and assigning the weight and credibility to the testimony of the witnesses. ***Thomas v. State***, 92 Wis. 2d 372, 381, 284 N.W.2d 917 (1979). Where more than one reasonable inference can be drawn from the credible evidence, we must accept the inference drawn by the trier of fact. ***Milbauer v. Transport Employes' Mut. Benefit Soc'y***, 56 Wis. 2d 860, 865, 203 N.W.2d 135 (1973).

¶11 Simpson bases his contention upon the testimony of Dr. Green, who stated that his examination did not reveal any bruising of the victim's vagina, interruption of hymenal ring or discharge, redness or other forms of sexual assault. He also testified that the victim had made no disclosures of sexual abuse herself, but was responding to questions asked by her mother.

¶12 In contrast, the trial court found that none of the witnesses really gave any information about seeing anything regarding these incidents except the victim, L.H. The trial court found the victim's testimony credible and most compelling. The victim did not exaggerate, nor did her mother, whereas the accused minimized his actions and his wife gave incredible exculpatory testimony that she never gave to the investigating officers. The trial judge remarked that what stood out in his mind was Dr. Green's testimony that this was a "child who was normally happy, would give him a hug, was a happy-go-lucky child, [who] was [now] mentally upset and she was tearful. And the fact that there is no physical evidence did not surprise him because there was no penetration and the last time was more than just a few days before." In any event, the victim's testimony alone was sufficient to sustain the convictions.

¶13 From our review of the record and the trial court's analysis of the evidence before it, we cannot conclude that no trier of fact, acting reasonably, could have found Simpson guilty beyond a reasonable doubt. We therefore affirm.

By the Court.—Judgment and order affirmed.

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