IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JEROME DESHONE HOPKINS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2016-549**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Jerome Deshone Hopkins, was tried by jury and convicted of Placing Bodily fluid on Government Employee (21 O.S.2011, § 650.9) After Two or More Felony Convictions in District Court of Muskogee County Case Number CF-2015-1072. The jury recommended as punishment imprisonment for ten (10) years. The trial court sentenced Appellant accordingly and granted Appellant credit for time served. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. The trial court erred by not ensuring that Appellant was knowingly and intelligently making the decision to represent himself.

II. Irrelevant evidence unconnected to this case cost Appellant a fair trial.

III. Prosecutorial misconduct deprived Appellant of a fair trial. The cumulative effect of prosecutorial misconduct constituted fundamental error and denied Mr. Fore his right to a fair trial.

IV. The mention of suspended sentences in the documents used to support former felonies deprived Appellant of a fair trial.

V. The appearance of Appellant during *voir dire* in shorts could have unfairly prejudiced the jurors against Appellant.

VI. Appellant was deprived of a fair trial and due process of law when the control restraint on his body was visible to the prospective and eventual jurors.

VII. The trial court erred by allowing Appellant to be tried in a restraint box without giving any reason for such restraint.

VIII. Cumulative error deprived Appellant of a fair trial and due process of law.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts and briefs of the parties, we have determined that Appellant is entitled to relief as to Propositions One, Six and Seven.

In Proposition One, Appellant contends that the trial court erred in allowing him to represent himself. He asserts that he did not knowingly and intelligently waive his right to the assistance of counsel. The United States Supreme Court has recognized that a criminal defendant has a constitutional right of self-representation under the Sixth Amendment. *Faretta v. California*, 422 U.S. 806, 818–21, 95 S.Ct. 2525, 2532–34, 45 L.Ed.2d 562 (1975); *Mitchell v. State*, 2016 OK CR 21, ¶ 4, 387 P.3d 934, 937. Since the right to the assistance of counsel is also a fundamental constitutional right, "a defendant who desires to represent himself must first 'knowingly and intelligently' waive the benefits of counsel." *Mathis v. State*, 2012 OK CR 1, ¶ 7, 271 P.3d 67, 71–72 (*quoting Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541). A record of the knowing and voluntary waiver is mandatory, and absent a sufficient record, waiver will not be

found. *Braun v. State*, 1995 OK CR 42, ¶ 10, 909 P.2d 783, 787; *Lineberry v. State*, 1983 OK CR 115, ¶ 6, 668 P.2d 1144, 1145-46. This Court reviews the totality of the circumstances to determine whether there has been a valid waiver of the right to the assistance of counsel in an individual case. *Mitchell*, 2016 OK CR 21, ¶ 11, 387 P.3d at 939; *Mathis*, 2012 OK CR 1, ¶ 7, 271 P.3d at 72.

We note that "a defendant must be competent to make this decision and must be clear and unequivocal in his desire to proceed *pro se*." *Mathis*, 2012 OK CR 1, ¶ 7, 271 P.3d at 72. However, "[u]nless the trial court has reason to doubt a defendant's competence, no separate determination of competence is required when determining whether a defendant may proceed *pro se*." *Mitchell*, 2016 OK CR 21, ¶ 12, 387 P.3d at 939–40; *see also Godinez v. Moran*, 509 U.S. 389, 400-01, 113 S.Ct. 2680, 2687, 125 L.Ed.2d 321 (1993) (holding same standard used to measure defendant's competency to stand trial and to waive his right to counsel).

Neither the United States Supreme Court nor this Court has adopted a precise warning that the trial court must give to a criminal defendant seeking to exercise his right to self-representation. *Mitchell*, 2016 OK CR 21, ¶ 11, 387 P.3d at 939. However, the defendant should be aware of the charges and the applicable range of punishment. *Id.* He or she must be informed that self-representation results in the waiver of any claim of ineffective assistance on appeal and that the trial court will not effectively operate as counsel or co-counsel for the defendant. *Coleman v. State*, 1980 OK CR 75, ¶ 8, 617 P.2d 243, 246. In addition, "a defendant must be warned of the dangers and

disadvantages of self-representation." *Mitchell*, 2016 OK CR 21, ¶ 4, 387 P.3d at 937.

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made 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.' *Adams v. United States ex rel. McCann*, 317 U.S., at 279, 63 S.Ct., at 242.

Faretta, 422 U.S. at 835, 95 S.Ct. at 2541. The trial judge must clearly explain to the defendant the inherent disadvantages in such a waiver, including a lack of knowledge and skill as to rules of evidence, procedure and criminal law. *Braun*, 1995 OK CR 42, ¶¶ 10-11, 909 P.2d at 787-88. However, "[i]t is only necessary that a defendant be made aware of the problems of self-representation so the record establishes that he understands that his actions in proceeding without counsel may be to his ultimate detriment." *Johnson v. State*, 1976 OK CR 292, ¶ 34, 556 P.2d 1285, 1294. "Anything less than a record which shows that the defendant rejected the offer of counsel with knowledge and understanding of the perils of self-representation is not waiver." *Braun*, 1995 OK CR 42, ¶ 10, 909 P.2d at 787; *Swanegan v. State*, 1987 OK CR 180, ¶ 5, 743 P.2d 131, 132.

Reviewing the totality of the circumstances in the present case, we are forced to conclude that the record fails to establish that Appellant knowingly and intelligently waived his right to the assistance of counsel. The colloquy which the trial court conducted was insufficient. The trial judge's declaration that Appellant would be held to follow the rules just as a licensed attorney in the state did not adequately warn Appellant of the perils, pitfalls or problems associated with self-

representation. The trial court's solitary statement did not clearly explain to Appellant that because he lacked the knowledge and skill as to the rules of evidence, procedure and criminal law he would be at an extreme disadvantage. Although the trial court clearly explained the role of standby counsel, the judge did not inform Appellant that the trial court would not effectively operate as counsel or co-counsel for him. Instead of advising Appellant that self-representation results in the waiver of any claim of ineffective assistance on appeal, the trial court assured Appellant that he would be able to appeal based upon the "great record" which they would make for him and, later, erroneously informed Appellant that "it's going to be awfully difficult for you, if you get convicted, to appeal on the basis of incompetent counsel."[1] Despite the fact that Appellant had not seen all of the discovery materials and had not subpoenaed any witnesses, the trial court did not warn Appellant of the perils of switching to self-representation the day before his trial was to begin. Accordingly, we find that the trial court erred when it accepted Appellant's waiver and allowed him to represent himself at trial.

In concluding that Appellant's conviction must be reversed and this matter remanded to the district court for a new trial, we note that the harmless error doctrine of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), does not apply to the acceptance of an invalid waiver of the right to the assistance of counsel. *United States v. Allen*, 895 F.2d 1577, 1580 (10th Cir. 1990); *see also Penson v. Ohio*, 488 U.S. 75, 88, 109 S.Ct. 346, 353–54, 102

[1] (Mtn. Tr. 9, 23-24).

L.Ed.2d 300, 313–14 (1988) ("*Chapman* recognizes that the right to counsel is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'"); *Rose v. Clark*, 478 U.S. 570, 578–79, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460, 471 (1986) (recognizing that harmless-error analysis does not apply in all contexts and noting that the doctrine presupposes that a defendant is represented by counsel); *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680, 702 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."). Thus, we find that Appellant's conviction must be reversed.

In Proposition Seven, Appellant contends that the trial court erred when it put him to trial in a restraint box without any reason for such restraint. In Proposition Six, Appellant contends that the restraint was visible during *voir dire.* Appellant failed to raise these challenges before the trial court, thus waiving appellate review of the issues for all but plain error. *Mitchell v. State*, 2016 OK CR 21, ¶ 26, 387 P.3d 934, 944. We review his claims pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Tollett v. State*, 2016 OK CR 15, ¶ 4, 387 P.3d 915, 916; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*; *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

The State concedes that error occurred when the trial court put Appellant to trial in a control device without making the record required by *Sanchez v. State*, 2009 OK CR 31, ¶ 34, 223 P.3d 980, 994. We agree. *See Deck v. Missouri*, 544 U.S. 622, 629, 125 S.Ct. 2007, 2012, 161 L.Ed.2d 953 (2005); *Ochoa v. State*, 2006 OK CR 21, ¶ 21, 136 P.3d 661, 667; 22 O.S.2011, § 15. Appellant acting as his own attorney was brought up from the jail and appeared for trial in shorts causing the control device on his person to be sufficiently visible that the prosecutor asked that Appellant be provided pants to avoid prejudicing him before the jury. Appellant tried the case under the restraint of the control device.

The State asserts that the device was only visible to the prosecutor and argues that the error was harmless. *See Sanchez*, 2009 OK CR 31, ¶ 35, 223 P.3d at 995 (finding violation of § 15 harmless where not proven to have substantial influence on the outcome of the trial); *Owens v. State*, 1982 OK CR 187, ¶ 6, 654 P.2d 657, 659 (concluding no relief required where error of putting defendant to trial in visible restraints was harmless beyond a reasonable doubt). There is some evidence within the record to suggest that the device was visible during the first day of trial. Appellant was not provided with pants until the second day of trial and repeatedly moved about the courtroom in the shorts and the control device during *voir dire*.[2] Regardless, we are unable to separate this error from Appellant's claim of error in Proposition One. Accordingly, we find that relief must additionally be granted as to Propositions Six and Seven.

[2] (Tr. 88-103, 106-07, 262).

DECISION

This case is hereby **REVERSED** and **REMANDED** for a **NEW TRIAL**. The district court is instructed to hold a proper hearing to determine whether Appellant desires counsel or knowingly and intelligently waives the right to assistance of counsel prior to scheduling the matter for trial. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2017), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY
THE HONORABLE MICHAEL NORMAN, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.
LEWIS, V.P.J.: Concur
HUDSON, J.: Concur