


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WAYNE ANTHONY PORRETTI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 70117

**FILED**

NOV 21 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Wayne Anthony Porretti appeals from a judgment of conviction, pursuant to a jury verdict, of burglary while in possession of a firearm and robbery with use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Porretti entered a bar in Las Vegas, brandished a firearm at a bartender demanding the money in the register, and fled with approximately \$3,500.<sup>1</sup> Porretti was arrested shortly thereafter and charged with burglary while in possession of a firearm and robbery with use of a deadly weapon.

Porretti pleaded not guilty. He claimed that he did not remember and was not conscious of his actions on the night of the robbery due to his heavy use of drugs and alcohol earlier that day. Accordingly, he argued that he could not be liable as NRS 194.010(6) excuses criminal liability if one is “not conscious” of his actions. Ultimately, a jury found Porretti guilty of both charges.

Porretti appeals his convictions, raising three issues: (1) the district court improperly denied his request to represent himself at trial, (2) the district court failed to take sufficient steps to ensure the jury was

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.



impartial, and, (3) the district court improperly excluded evidence of his mental health history. For the following reasons, we affirm the judgment of conviction.

*The district court properly denied Porretti's request for self-representation*

Porretti argues on appeal that the district court improperly denied his request to exercise his right to self-representation. Porretti contends nothing in the record justified the district court's denial of his request. We disagree.

This court reviews a district court's decision concerning a defendant's request to waive his right to counsel for an abuse of discretion. *See Hyman v. State*, 121 Nev. 200, 213, 111 P.3d 1092, 1101 (2005). "[W]hen a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial *is not enough*; the waiver must also be intelligent and voluntary before it can be accepted." *Id.* at 212, 111 P.3d at 1101 (quoting *Godinez v. Moran*, 509 U.S. 389, 402 (1993)) (alteration in original) (emphasis added). When a defendant desires to make this waiver, a district court should inform the defendant of the risks of self-representation, but no "mechanical" series of notices is required. *See id.* (internal quotation marks omitted). Further, while "[d]eprivation of the right to self-representation is reversible, never harmless, error," "[a] court "may also deny a request for self-representation if the request is [among other things] . . . equivocal." *Vanisi v. State*, 117 Nev. 330, 338, 22 P.3d 1164, 1170 (2001).

Here, Porretti's request to represent himself at trial was the last in a series of informal and formal requests to remove numerous appointed attorneys for failure to take steps Porretti requested. However,

at several hearings on Porretti's motion requesting self-representation, Porretti appeared to renege on his request.<sup>2</sup>

During the first hearing, the district court did not conduct a *Faretta*<sup>3</sup> canvass because Porretti's counsel stated that he and Porretti spoke twice about his request for self-representation and that their relationship was "salvageable." In response, at the same hearing, Porretti did not contradict this account.

Later, at the second hearing on Porretti's motion for self-representation, counsel stated he did not expect Porretti to seek to remove him from the case. Porretti again did not contradict this part of his counsel's statement.

At the third and final hearing on his motion for self-representation, Porretti stated that counsel had done nothing and was not fighting for him. Counsel contradicted this account. However, neither Porretti nor counsel mentioned Porretti's request for self-representation or whether Porretti desired to remove counsel from his case.

In sum, we observe that the record demonstrates Porretti appeared to withdraw his request to remove his appointed counsel and represent himself after their relationship improved. If Porretti unequivocally desired to remove counsel and represent himself at trial, he needed to indicate as much when responding to counsel's statements to the contrary. Therefore, we conclude that the district court did not abuse its

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<sup>2</sup>The transcripts of each of these hearings included "Self-Representation" in their titles though the actual hearings only addressed Porretti's request briefly since Porretti seemed to withdraw this request.

<sup>3</sup>*Faretta v. California*, 422 U.S. 806 (1975).

discretion by denying Porretti's request for self-representation on the ground that this request was equivocal.

*The district court did not plainly err by not providing an additional admonishment warning sua sponte jurors not to discuss the case with third parties*

Porretti argues the district court failed to admonish the jury sufficiently to prevent juror misconduct after it permitted two related jurors to serve on the jury.<sup>4</sup> In particular, Porretti complains that the two related jurors may have discussed the case with each other and these discussions necessarily constituted juror conversations with a third-party since one of them served only as an alternate. Porretti does not argue that a conversation did, in fact, take place or that any conversation influenced the related juror or any other member of the jury.

Porretti admits he did not object to any admonishments given by the district court (or lack thereof) at trial. Further, the record demonstrates that Porretti did not request that the district court give any particular admonishment or instruction regarding juror discussions with third parties. Accordingly, we review the district court's admonishments concerning these related jurors for plain error. *See Bowman v. State*, 132 Nev. \_\_\_, \_\_\_, 387 P.3d 202, 207 (2016). "In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights."

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<sup>4</sup>The two jurors, Wendy Walker and Nieman Filter, were questioned by both parties about their relationship and if they could be impartial. Further, to resolve any potential issue of bias or undue influence, both parties agreed to select one of the two at random to be an alternate. Ms. Walker was selected to be the alternate and, in the end, did not participate in the deliberations.

*Id.* at \_\_\_, 387 P.3d at 208 (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)) (internal quotation marks omitted).

“The need for [an] instruction must be analyzed in light of the circumstances of the case.” *Id.* at \_\_\_, 387 P.3d at 207 (quoting *Bonin v. Vasquez*, 807 F. Supp. 589, 617 (C.D. Cal. 1992)) (alteration in original). Here, the district court admonished the jury at every recess that “it is your duty not to converse among yourselves or with anyone else on any subject connected with this trial.” Further, it instructed the jury that “[a]nything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.” We conclude that this admonishment and instruction were sufficient in this case. Accordingly, we conclude that the absence of an additional, specific admonishment tailored to the related juror was not error, plain or otherwise.

*The district court did not abuse its discretion by excluding some evidence of Porretti’s mental health history*

Porretti argues the district court abused its discretion by excluding some evidence of his mental health history. Specifically, Porretti argues the mental health evidence the district court excluded directly supported his defense that he was not conscious of his actions at the time he committed the offense, was therefore relevant, and so its exclusion cannot be harmless beyond a reasonable doubt. Further, he also argues this evidence would have bolstered his credibility in the eyes of the jury. Porretti, however, does not argue that the exclusion of this evidence affected his “substantial rights,” or amounted to a “constitutional violation” that “contributed to the verdict.” See *Guitron v. State*, 131 Nev. \_\_\_, \_\_\_, 350 P.3d 93, 99 (Ct. App. 2015).

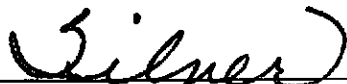
This court reviews “a district court’s decision to admit or exclude evidence for an abuse of discretion.” *McLellan v. State*, 124 Nev.


263, 267, 182 P.3d 106, 109 (2008). "Evidence which is not relevant is not admissible." NRS 48.025(2). "[R]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." NRS 48.035(1).

The record reveals that the district court sustained the State's objection to the introduction of evidence concerning Porretti's mental health for two reasons. First, some of the evidence Porretti sought to introduce concerned his relationship with a man who was involved in a prior robbery case connected to Porretti that was not relevant to the current case and would unduly prejudice Porretti. Second, some of the evidence Porretti sought to introduce concerning his Tourette syndrome, obsessive compulsive disorder, and attention deficit hyperactive disorder were "not issues involving [Porretti's] unconsciousness at the time of the event here."

Thus, we conclude the district court carefully considered the relevance and potential effects of this evidence before excluding it. As a result, we conclude the district did not abuse its discretion in excluding this evidence. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

  
Silver, C.J.

  
Gibbons, J.

TAO, J., concurring:

This case isn't just about the application of technical legal doctrines. It's about something more fundamental: the relationship between a citizen and his government, and the rights the Constitution guarantees every citizen against the force and majesty of the state.

When the state seeks to deprive a defendant of life, liberty, or property through a criminal prosecution, the Constitution guarantees him the right to choose to face the charges in a number of different ways. He is entitled to the assistance of an attorney. *Gideon v. Wainwright*, 372 U.S. 335 (1963). He is, moreover, entitled to the assistance of an attorney who's at least minimally effective. *Strickland v. Washington*, 466 U.S. 668 (1984). But he's not required to have one forced upon him against his will if he doesn't want one. The Constitution guarantees a defendant the right to represent himself at trial if he so chooses. See *Faretta v. California*, 422 U.S. 806 (1975); *Hymon v. State*, 121 Nev. 200, 212, 111 P.3d 1092, 1101 (2005). This is an ancient right that derives from English common law. It's subject to only a few exceptions: if the request was untimely, equivocal, made solely for purposes of delay, abusive and disruptive of the judicial process, or the defendant was incompetent to make the request, then the court may deny it. But otherwise it cannot. See *O'Neill v. State*, 123 Nev. 9, 17, 153 P.3d 38, 44 (2007).


Here, Porretti indicated more than once, including in two separate written motions (titled "motion to self-representation" and "motion to remove attorney of record"), that he wanted to exercise his right to represent himself at trial. Yet the district court ignored his requests and dragged things out over the course of multiple hearings spanning several weeks, forcing him to stay with an attorney that he said he didn't want.

If Porretti didn't want an attorney to represent him, then no court should force one on him. The judiciary is a branch of the government, just as much as the Legislature and prosecutors of the Executive branch. We might not have the power of the purse or the sword, but in circumstances like this, a court's power can be just as coercive on an individual as that of any other branch of government. When a court ignores a defendant's invocation of a recognized right, that's not liberty and it's not due process, but rather something close to their exact opposites. The district court's intention might have been wholly benevolent; it might well have thought it was helping Porretti from his own ignorance and pride and protecting his best interests. But a benevolent trampling of a constitutional right is still a trampling of a constitutional right, whatever the intention. It's also paternalistic, patronizing, and condescending of that person's right to decide for himself how to best safeguard his own liberty within the boundaries of the law in accordance with the dictates of his own conscience. As a general proposition I think it foolish and self-defeating, bordering on suicidal, for a defendant with no legal training to defend himself without the assistance of an attorney against the power of the state and its experienced and battle-tested prosecutors. But the right is guaranteed by the Constitution whether I think it a wise thing to exercise or not. Whether I, or the district court, think Porretti would have been better off with an attorney at his side is not the point. The point is that it was his choice, not ours.

I'm troubled that the district court ignored Porretti's pleas and refused over and over to recognize his right to represent himself until, finally, Porretti dropped the request right before trial. I'm concerned that he might have abandoned it out of sheer frustration. But, whatever the



reason, abandon it he did. As the majority notes, that severely limits our appellate inquiry. By withdrawing the request, whether out of exhaustion or something else, Porretti made the request "equivocal," one of the five exceptions that grant the court the power to deny the request. Legally, the majority is correct that we therefore must affirm. But this all went down in a questionable way and I'm of a mind that lurking within this appeal may be a violation of the Constitution that we no longer can do anything about.

  
\_\_\_\_\_, J.  
Tao

cc: Hon. Michael Villani, District Judge  
Ristenpart Law  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk