17CA0847 Peo v Sayed 02-13-2020

COLORADO COURT OF APPEALS

DATE FILED: February 13, 2020

Court of Appeals No. 17CA0847
Logan County District Court No. 15CR120
Honorable Charles M. Hobbs, Judge
Honorable Michael K. Singer, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Hazhar A. Sayed,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE FURMAN
Welling and Pawar, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 13, 2020

Philip J. Weiser, Attorney General, Trina K. Taylor, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Patrick R. Henson, Alternate Defense Counsel, Denver, Colorado, for Defendant-Appellant

¶ 1 A jury found Hazhar A. Sayed, an inmate, guilty of one count of second degree assault and one count of third degree assault after an altercation between Sayed and a corrections officer. The trial court sentenced him to three years in prison.

¶ 2 On appeal, Sayed contends we should reverse his conviction because the trial court (1) violated his Fifth Amendment rights by admitting evidence of his silence; (2) did not give an affirmative self-defense instruction to the jury; and (3) allowed the trial to proceed without ordering a competency evaluation for him.

¶ 3 Because we conclude that any error in admitting evidence of Sayed's silence was harmless beyond a reasonable doubt, and disagree with Sayed's final two contentions, we affirm the judgment of conviction.

I. Sayed's Trial

¶ 4 At trial, the jury heard the following evidence.

¶ 5 Sayed was an inmate in the custody of the Department of Corrections (DOC) who filed a grievance about the prison's policies. Captain Michael Tidwell escorted Sayed from his cell to an office where the two could discuss Sayed's grievance.

¶ 6 Tidwell testified that while they were walking toward the office, Sayed balled up his fists, took an "aggressive stance," and said, "We're going to fight." Tidwell ordered Sayed to "get on the wall" so he could restrain him. But Sayed again said, "We're going to fight," and moved toward Tidwell.

¶ 7 Fearing for his safety, Tidwell grabbed Sayed's arms and pushed him toward the wall. Sayed struck him in the face. Then, the two exchanged punches. Tidwell attempted to "utilize an inside takedown" on Sayed but slipped to one knee. Then, he testified, Sayed hit him in the back of the head. Eventually, Tidwell wrestled Sayed to the ground.

¶ 8 Tidwell testified that Sayed tried to stab him with a ballpoint pen while they were on the ground. He also testified that Sayed hit him in the face, "towards the eye," on the nose, on the top of his head, and in the back. After thirty seconds, another corrections officer came to help Tidwell. This officer testified that he saw Sayed "stabbing at [Tidwell] in a downward motion," so the officer struck Sayed in the chest. Sayed continued to hit Tidwell, so the officer used "knee strikes" on Sayed until other officers arrived. The

altercation ended when other officers arrived and used a taser on Sayed.

¶ 9 Tidwell testified that he was "bleeding pretty badly" from the top of his head. A third corrections officer testified that she saw blood coming from Tidwell's head and took him to receive medical assistance.

¶ 10 The jury saw security footage of the altercation, along with photographs of blood on the floor, a bent ballpoint pen, blood on Tidwell's uniform, and some bruising near Tidwell's left eye.

¶ 11 Sayed testified that he never struck nor stabbed Tidwell. He also testified that the prison guards assaulted him because they mistook him for a "snitch" and a "federal informant." And he claimed that someone tampered with the security footage of the altercation.

II. Evidence of Sayed's Silence

A. Testimony About Sayed's Silence

¶ 12 After Sayed testified, the prosecution called a DOC investigator as a rebuttal witness. The prosecution engaged the investigator in the following line of questioning:

> Q: You heard all of the defendant's testimony today?
>
> A: Yes.
>
> Q: Did he tell you everything today that he told you back on [the day of the charged offenses] when you saw him?
>
> A: No.

Sayed objected, contending that these questions violated his Fifth Amendment right to remain silent. The court overruled Sayed's objection, and the prosecutor continued,

> Q: Allow me to state the question again, Investigator.
>
> You heard everything the defendant testified to in court today?
>
> A: Yes.
>
> Q: Did he tell you the same account back on May 2, 2015, when you met with him?
>
> A: No.

On cross-examination, Sayed's counsel asked the investigator

> Q: When you met with him[,] he actually said I have nothing to say to you, turned around, and walked away; right?
>
> A: Correct.

Q: He didn't make any statement at all, did he?

A: Correct.

Q: Yeah. So it's not that he made a different statement . . . it's that he didn't make any statement as is his right; right?

A: Correct.

¶ 13 Sayed contends that the investigator's testimony violated his Fifth Amendment right against self-incrimination.

B. Constitutional Harmless Error

¶ 14 Because Sayed preserved this contention and claims an error "of constitutional dimension," we review for constitutional harmless error. *Hagos v. People*, 2012 CO 63, ¶ 11. Under this standard, if we perceive an error, we will reverse unless the error is harmless beyond a reasonable doubt. *Id.* An error is harmless beyond a reasonable doubt if there is no reasonable possibility that it contributed to the conviction. *Id.* The People bear the burden of proving that a constitutional error was harmless beyond a reasonable doubt. *Id.*

¶ 15 The People contend that any error in admitting evidence of Sayed's silence was harmless beyond a reasonable doubt. We agree with the People, for three reasons.

¶ 16 First, the reference to Sayed's silence was brief. The only evidence of Sayed's silence came in during his counsel's cross-examination of the DOC investigator. And the prosecution never commented on Sayed's silence during its opening statement, case-in-chief, or closing argument.

¶ 17 Second, the evidence at trial strongly established that Sayed committed the two offenses of which the jury found him guilty. Tidwell testified that Sayed struck him in the face and the back of the head. Tidwell also testified that Sayed hit him in the face, "towards the eye," on the nose, on the top of his head, and in the back while the two men were on the ground. The jury also heard Tidwell and another officer testify that Tidwell's head was bleeding. And, the jury saw photographs of bruising near Tidwell's left eye, blood on the floor where the assault occurred, and drops of blood on Tidwell's uniform. Taken together, this evidence strongly established that Sayed committed the two offenses of which the jury found him guilty.

¶ 18 And third, the jury returned a split verdict, acquitting Sayed of first degree assault; finding him guilty of the second degree assault by a person lawfully confined or in custody; and finding him guilty of third degree assault, a lesser included offense on count three. The split verdict suggests that the jury did not blindly infer Sayed's guilt from the brief reference to his silence, but instead focused on the evidence the prosecution introduced at trial. *See Martin v. People*, 738 P.2d 789, 796 (Colo. 1987) (A jury's split verdict suggested that "the jurors exercised some discretion in their deliberations and did not blindly convict the defendant based upon inferences drawn from the nature of the [defendant's] previous conviction.").

¶ 19 For these reasons, we see no reasonable possibility that the evidence of Sayed's silence contributed to the two guilty verdicts. *Hagos*, ¶ 11. Thus, we need not decide whether the evidence violated, or even implicated, Sayed's Fifth Amendment rights.

III. Self-Defense Jury Instruction

¶ 20 We next conclude that Sayed waived his right to request a self-defense jury instruction.

¶ 21 Waiver is the "intentional relinquishment of a known right or privilege." *People v. Rediger*, 2018 CO 32, ¶ 39 (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)). A waived claim of error presents nothing for an appellate court to review. *People v. Tee*, 2018 COA 84, ¶ 14 (citing *People v. Bryant*, 2013 COA 28, ¶ 13 n.2). Thus, a party who waives an issue extinguishes appellate review of that issue. *Rediger*, ¶ 39.

¶ 22 At a hearing on the morning of trial, the trial court and Sayed's counsel had the following discussion:

> [Court]: Could you share with the Court — is the defense in this matter a general denial or are there affirmative defenses?
>
> [Sayed's Counsel]: Yes, it's a general denial.
>
> [Court]: Are there any affirmative defenses that are likely to be raised?
>
> [Sayed's Counsel]: I have discussed affirmative defenses and there are not affirmative defenses that Mr. Sayed wishes to proceed with. So I am limited on my ability, as the Court knows. I can't offer an affirmative defense without his okay. And he is adamant that he was not responsible for the assault that happened and it was not an assault that happened at his hands.

Consistent with this exchange, Sayed's counsel requested multiple jury instructions at the close of evidence but did not request an affirmative defense instruction.

¶ 23 The record establishes that Sayed knowingly and intentionally waived his right to request an affirmative defense instruction. So, there is nothing for us to review. *See id.* at ¶ 40 ("[A] waiver extinguishes error, and therefore appellate review . . . .").

IV. Competency Evaluation

¶ 24 We last conclude that the trial court did not err by declining to order a competency evaluation for Sayed.

¶ 25 Due process dictates that a defendant may not be tried or sentenced while incompetent to proceed. § 16-8.5-102(1), C.R.S. 2019; *People v. Corichi*, 18 P.3d 807, 810 (Colo. App. 2000). A defendant is incompetent to proceed if a mental or developmental disability prevents him from (1) "having sufficient present ability to consult with [his] lawyer with a reasonable degree of rational understanding in order to assist in the defense" or (2) "having a rational and factual understanding of the criminal proceedings." § 16-8.5-101(5), C.R.S. 2019. If the court "has reason to believe that the defendant is incompetent to proceed," it shall suspend the

proceedings to determine whether the defendant is competent. § 16-8.5-102(2)(a). And, if there is "sufficient doubt" that the defendant is competent, due process requires the court to make a competency determination before proceeding. *People v. Kilgore*, 992 P.2d 661, 663 (Colo. App. 1999).

¶ 26 But due process does not require trial courts to "accept without questioning a lawyer's representations concerning the competence of his client." *Id.* (quoting *People v. Morino*, 743 P.2d 49, 51 (Colo. App. 1987)). And a defendant is presumed to be competent to stand trial. *People v. Stephenson*, 165 P.3d 860, 866 (Colo. App. 2007).

¶ 27 Because the trial court is in the best position to observe the defendant's actions and demeanor, "it has substantial discretion in determining whether a legitimate issue respecting that defendant's competency has been raised." *Kilgore*, 992 P.2d at 663-64. Thus, we will affirm the trial court's competency determination absent an abuse of discretion. *Stephenson*, 165 P.3d at 866. A trial court abuses its discretion only if its decision is manifestly arbitrary, unreasonable, or unfair. *Id.*

¶ 28 On the morning of trial, the court held a "*Bergerud*" hearing with Sayed and Sayed's counsel outside the presence of the prosecution. *See People v. Bergerud*, 223 P.3d 686, 702-03 (Colo. 2010) ("When a defendant requests substitute counsel . . . the trial court must be able to inquire into the details of a dispute between a defendant and his attorneys — outside the presence of opposing counsel . . . ."). During this hearing, Sayed told the court that he wanted to continue the trial so he could interview 120 other inmates who witnessed the assault and investigate whether the videotapes of the assault had been altered.

¶ 29 At the end of the *Bergerud* hearing, Sayed's counsel asked "whether the Court believes . . . we have any issues with competency to proceed . . . ." Sayed's counsel stated, "I'm not raising competency as an issue right now" but asked for a "very short discussion as to whether . . . the court believes that some of [Sayed's] more fantastic claims" made the court question whether Sayed was competent to proceed.

¶ 30 The trial court responded, "Even though I refer to his theories as somewhat fantastical or conspiratorial, nothing that Mr. Sayed has presented to me, either in writing or in his presence today,

suggested to me that I would raise competency." And the trial began later that day.

¶ 31 Based on this exchange, we question whether Sayed preserved the issue of competency. Even so, we need not address the issue of preservation because we conclude the trial court did not abuse its discretion in declining to order a competency evaluation for Sayed.

¶ 32 The following facts support the trial court's assessment of Sayed's competency. Sayed instructed his counsel not to pursue an affirmative defense because he was "adamant" that he did not assault the prison officer. This suggests he had the "present ability to consult with [his] lawyer with a reasonable degree of rational understanding in order to assist in the defense." § 16-8.5-101(5). Sayed's counsel stated that Sayed "is well spoken and presents well." And the trial court stated that after observing Sayed in person and reviewing Sayed's pro se fillings, the court had seen "nothing" suggesting that Sayed was incompetent to proceed. *See Stephenson*, 165 P.3d at 866. We again note that the trial court was in the best position to assess Sayed's competency. *Id.*; *Kilgore*, 992 P.2d at 663-64.

¶ 33 We also note that Sayed's counsel suggested she agreed with the trial court's assessment of Sayed's competency. After the trial court said it saw "nothing" suggesting Sayed was incompetent, Sayed's counsel responded, "And I haven't raised [competency] up until now based on kind of that same analysis. I was just wondering if the Court was having a different view of that than perhaps I was."

¶ 34 Based on these facts, we conclude that the trial court did not have reason to believe Sayed was incompetent to proceed to trial. Thus, the court did not abuse its discretion when it declined to order a competency evaluation for Sayed.

V. Conclusion

¶ 35 The judgment is affirmed.

JUDGE WELLING and JUDGE PAWAR concur.

Sayed v. People, 2020 Colo. LEXIS 615

Supreme Court of Colorado

June 29, 2020, Decided

No. 20SC209

Reporter

2020 Colo. LEXIS 615 *

Petitioner: Hazhar A. Sayed, v. Respondent: The People of the State of Colorado.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] Court of Appeals Case No. 17CA847.

Opinion

Petition for Writ of Certiorari DENIED. EN BANC.