IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOE EDWARD HUDSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68574

ORDER OF REVERSAL AND REMAND

Appellant Joe Edward Hudson appeals from a judgment of conviction entered pursuant to a jury verdict of battery with the use of a deadly weapon constituting domestic violence, battery with the use of a deadly weapon, and battery constituting domestic violence (strangulation). Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.[1]

Hudson claims he did not knowingly, intelligently, and voluntarily waive his right to assistance of counsel when he sought to represent himself at trial because he was not made aware of the possible penalties he faced if he lost at trial and was adjudicated a habitual criminal. We agree.

"[I]n order to exercise the right to self-representation, a criminal defendant must knowingly, intelligently, and voluntarily waive the right to counsel." *Hooks v. State*, 124 Nev. 48, 53-54, 176 P.3d 1081, 1084 (2008). "[A] criminal defendant must knowingly, intelligently, and voluntarily waive the right to counsel." *Id.* at 53-54, 176 P.3d at 1084.

[1]The Honorable Michelle Leavitt, District Judge, presided over the trial and sentencing, and the Honorable Elissa F. Cadish, District Judge, presided over the canvass conducted pursuant to *Faretta v. California*, 422 U.S. 806 (1975).

To this end, at a minimum, the defendant must understand (1) the nature of the charges against him, (2) the possible penalties, and (3) the dangers and disadvantages of self-representation. *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004). "[W]hen reviewing the sufficiency of a waiver to counsel, we must consider the record as a whole, including any canvass by the district court." *Hooks*, 124 Nev. at 55, 176 P.3d at 1085.

The record reveals Hudson rejected the State's plea offer, which included a stipulation to a prison term of 12 to 30 months, and he told the district court he wanted to represent himself at trial. The district court conducted a *Faretta* canvass, during which Hudson was informed that the range of his potential sentences was two to ten years for the battery with the use of a deadly weapon counts and one to five years for the battery by strangulation count. When the district court asked the State if it would be seeking habitual criminal adjudication, the following colloquy occurred:

> [THE STATE]: Your Honor, I don't have the file on me. It's Ms. Cannizzaro's case. But based on his prior record and then the violence involved in these cases I can't imagine we're not seeking habitual treatment.
>
> [DEFENSE COUNSEL]: He had '89, '97, '99; two '97, one '89, one '99 case. And then it doesn't up here and that's why I was confused is the murder case from that -- I don't remember if it was '75?
>
> THE DEFENDANT: '76.
>
> . . .
>
> THE COURT: So potentially and I don't know if there's a habitual notice which --
>
> . . .
>
> [DEFENSE COUNSEL]: I don't think I've gotten one.

> THE COURT: Okay, we're 15 days before the trial right now. What's the -- how long before trial does that have to go 21 or 14? I don't --
>
> [THE STATE]: I believe it's 21.
>
> [DEFENSE COUNSEL]: Yeah, 21.
>
> [THE STATE]: I believe it's 21.
>
> THE COURT: Okay.
>
> [THE STATE]: So we may not be seeking it based on the age of those convictions.
>
> THE COURT: Right. Okay.

The district court did not discuss the possibility of habitual criminal adjudication any further, and it did not inform Hudson of the potential sentences he faced if he was adjudicated a habitual criminal. The district court found that Hudson had waived "his right to counsel freely, voluntarily, and knowingly, and [had] a full appreciation and understanding of the waiver and its consequences."

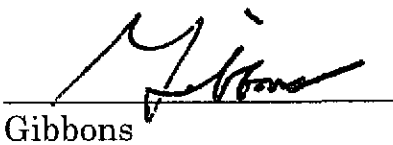
Four days after the district court's *Faretta* canvass, the State filed notice of its intent to seek punishment as a habitual criminal. It is not clear from the record that Hudson received this notice. During the February 9, 2015, calendar call, the State announced it was "hopeful the defendant was aware" that it had filed a notice of intent to seek punishment as a habitual criminal and it "attempted to send at least him or his standby counsel [that] notice." At this hearing, the district court did not address the habitual criminal notice with Hudson, inquire whether Hudson received the notice, or inform Hudson of the potential sentences he faced if he was adjudicated a habitual criminal. And habitual criminal treatment was not discussed during the course of the trial.

The district court did not canvass Hudson regarding habitual criminal treatment during the *Faretta* canvass. Further, the district court failed to canvass Hudson regarding the potential sentences he would receive if adjudicated a habitual criminal after the notice of habitual

criminal was filed. And nothing in the record demonstrates that Hudson was aware of the potential habitual criminal adjudication and habitual criminal sentences until after the district court granted his request to represent himself. Therefore, the record as a whole does not show that Hudson's waiver of his right to assistance of counsel was knowing, intelligent, and voluntary—"particularly given the U.S. Supreme Court's mandate that we 'indulge in every reasonable presumption against waiver' of the right of counsel." *Hooks*, 124 Nev. at 57, 176 P.3d at 1086 (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). "Because harmless-error analysis does not apply to an invalid waiver of the right to counsel, we must reverse [Hudson's] judgment of conviction and remand for a new trial." *Id.* at 1086-87, 176 P.3d at 57-58. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[2]

_____, C.J.
Silver



_____, J.
Gibbons

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[2]Hudson raises several other issues on appeal. In light of our decision to reverse the judgment of conviction based on Hudson's invalid waiver of his constitutional right to counsel, we need only address his claim regarding the sufficiency of the evidence. We conclude that the evidence, when viewed in the light most favorable to the prosecution, was sufficient for a rational juror to find that Hudson was not acting in self-defense when he strangled the 17-year-old victim and stabbed the 17-year-old victim and another victim with a knife. *See* NRS 33.018(1); NRS 200.481(1); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

TAO, J., concurring:

I agree that this appeal appears to be governed by the literal language of *Hooks v. State*, 124 Nev. 48, 176 P.3d 1081 (2008), but I wonder why we can't just vacate the sentence and order a new sentencing hearing consistent with Hudson's waiver, rather than vacating the entire trial.

When Hudson expressed his desire to proceed to trial without counsel, the district court conducted a proper canvass pursuant to *Faretta v. California*, 422 U.S. 806 (1975), including accurately apprising Hudson of the range of potential punishments that he faced at the time. Everyone appears to agree that Hudson's waiver of his right to counsel was knowing, intelligent, and voluntary in every respect as of the moment the canvass was conducted.

But then things changed four days later when the State filed its notice of intent to seek to have Hudson sentenced as a habitual offender. The State's notice increased the range of potential sentences that Hudson could face at sentencing if convicted at trial, and indeed following Hudson's conviction the district court did eventually sentence him to a life sentence under the habitual sentencing statutes. Once the State filed its notice, the district court should have re-canvassed Hudson to ensure that he understood its effect, but the court didn't, and consequently we have no indication in the record that Hudson clearly understood what he faced at sentencing. I fully agree that his sentence was therefore imposed invalidly.

But, as a matter of logic, I'm not sure why this requires us to go all the way back in time to vacate the conviction and order an entirely new trial, rather than simply vacating the sentence and requiring Hudson

to be re-sentenced pursuant to the range of sentences that he was properly canvassed on and expected to confront.

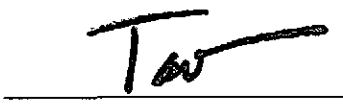
In our criminal justice system, the question of guilt is insulated from the question of sentencing: the jury determines guilt, and only months later does the judge impose any sentence based upon the jury's verdict. The State's sentencing notice affected only the latter and not the former: whether the State filed the notice or not had no effect whatsoever on how the trial was conducted; it didn't change the State's trial burden or Hudson's trial defense, it didn't change whether any trial evidence was admissible or not, and it couldn't have affected the jury's verdict when the jury is prohibited from knowing or considering either the range of possible sentences or that Hudson was eligible for habitual treatment.

If Hudson's *Faretta* waiver of his right to trial counsel on the question of guilt was valid before the State filed its notice—and everyone seems to agree that it was—then what made it invalid afterwards when the State's notice had nothing to do with the conduct of the trial or the question of guilt? The only thing that the State's notice changed was what the judge could do at sentencing months after the jury rendered its verdict.

It seems to me that the logical thing to do is to vacate what Hudson wasn't canvassed on and didn't voluntarily agree to face without counsel, and re-sentence Hudson under the range of sentences that he was properly canvassed on and did voluntarily agree to face without counsel. I would therefore prefer that we simply strike the State's notice of habituality and remand with instructions to the district court to re-sentence Hudson without it. We'd save everybody considerable time, money, and effort, and Hudson couldn't complain about getting exactly

what he thought he was eligible to get when he underwent his *Faretta* canvass.

But whether we have the power to do this is unclear under *Hooks*. My colleagues think not, but I'm not so sure; perhaps clarification by the Nevada Supreme Court might be appropriate.



_____, J.
Tao

cc: Hon. Michelle Leavitt, District Judge
Hon. Elissa F. Cadish, District Judge
Pitaro & Fumo, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk