IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 18, 2025

STATE OF TENNESSEE v. BERNARD ADRIAN SMITH, a/k/a ADRIAN SMITH, a/k/a ADRIANNE SMITH

Appeal from the Criminal Court for Hamilton County
No. 308484 Boyd M. Patterson, Judge

No. E2024-01711-CCA-R3-CD

The Defendant, Bernard Adrian Smith, a/k/a Adrian Smith, a/k/a Adrianne Smith, was convicted of attempted first degree murder and aggravated domestic assault following a bench trial. The Defendant represented himself at these proceedings, although he was appointed an attorney as "counsel to assist," also known as "standby counsel." On appeal, the Defendant contends, *inter alia*, that he did not ask to represent himself, even with the aid of standby counsel, and that the trial court improperly required him to do so against his expressed wishes. After a thorough review of the record, we agree with the Defendant that he was denied his right to counsel. Therefore, we reverse the judgments of the trial court and remand the case for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed; Case Remanded

KYLE A. HIXSON, J., delivered the opinion of the court, in which TOM GREENHOLTZ and STEVEN W. SWORD, JJ., joined.

David W. MacNeill (on appeal and standby counsel at sentencing and on motion for new trial), and Michael L. Acuff (standby counsel at trial), Chattanooga, Tennessee, for the appellant; and Bernard Adrian Smith, a/k/a Adrian Smith, a/k/a Adrianne Smith, Mountain City, Tennessee, Pro Se (at trial).

Jonathan Skrmetti, Attorney General and Reporter; Lacy E. Wilber, Senior Assistant Attorney General; Coty G. Wamp, District Attorney General; and AnCharlene D. Davis and Carl Huskins, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

On August 21, 2019, a Hamilton County grand jury indicted the Defendant, charging him with attempted first degree murder and aggravated domestic assault. *See* Tenn. Code Ann. §§ 39-12-101, -13-102, -13-111, -13-202. The indictment related to an incident on May 22, 2019, where it was alleged that the Defendant barricaded himself and the victim, his former girlfriend, inside the bathroom of the victim's apartment located in Chattanooga. He proceeded to stab her multiple times in the chest with a kitchen knife. Body camera footage showed that, as soon as officers gained entry into the bathroom, the Defendant twice exclaimed, "I'm a mental patient." Four of the victim's wounds required stitches, and she still had scars at the time of trial in 2024.

Shortly after the Defendant was indicted, the original trial judge in this case appointed the Defendant counsel on September 6, 2019. In March 2020, the COVID-19 pandemic began to spread across the United States, which largely halted in-court proceedings for some time. On May 19, 2020, the Defendant sent his first letter to the trial court, requesting a bond reduction so he could "get medical treatment." This was accompanied by a separate letter addressed to the Defendant's first attorney, asking for this attorney to come visit him, so they could discuss a potential bond reduction for the Defendant, as well as possible medical treatment for the Defendant and the Defendant's possible cancer diagnosis. On September 25, 2020, the trial court entered an order directing that the Defendant be forensically evaluated to determine his competency to stand trial and mental condition at the time of the crimes. This forensic evaluation was undertaken by Volunteer Behavioral Health, and the Defendant was interviewed on October 13, 2020. In the subsequent December 14, 2020 report from the evaluators, the Defendant was found competent to stand trial, and it was determined that he did not meet the criteria for an insanity defense.

In July 2021, the Defendant sent a letter to the trial court expressing his various concerns "with [his] current attorney." The Defendant noted that his last court appearance was "quite some time" ago, and during that appearance, the trial court told the parties that "this case ha[d] gone on long enough and . . . [the parties] needed to get to a conclusion in the matter." The Defendant then indicated that he had requested his attorney to obtain four specific items of evidence in preparation for his defense, none of which had been completed. The Defendant felt that he was being "misrepresented" and "neglected." The Defendant also noted that he was "trying to get the proper help needed for [his] mental health issue." The Defendant asked for the trial court to "see [him]" at his next court date,

mentioning that many of those dates "ha[d] been put off." On August 2, 2021, the Defendant's first attorney filed a motion for bond reduction. A minute entry reflects that the case was set "on the docket for settlement" on August 5, 2021, but the Defendant made an oral motion for new counsel at that time. The trial court found that this motion was well-taken, and the Defendant's first attorney was relieved from the representation.

Attorney Michael L. Acuff was appointed to represent the Defendant on August 19, 2021. A minute entry reflects that the Defendant's motion for reduction of bond was denied on October 7, 2021; a pre-trial conference date was set for December 2, 2021; and the case was set for trial on March 29, 2022. The Defendant wrote the trial court another letter on November 21, 2021. Therein, he requested a "motion for discovery urgently" and noted that he had been in contact with the Board of Professional Responsibility ("BPR") regarding his belief that his first attorney had conspired with the assistant district attorney to withhold evidence from him. He "ha[d] no complaint against" Mr. Acuff at that time but noted that he had "no way of contacting" him. On February 28, 2022, the Defendant, through Mr. Acuff, filed a notice advising that he would be advancing the affirmative defense of insanity at trial and that there was "the possibility he w[ould be] rely[ing] upon expert testimony at trial" in support of this claim. On March 16, 2022, the Defendant sent another letter to the trial court requesting evidence "for [his] case that still ha[d] not been provided to [him]" and indicating his continued correspondence with the BPR about his lawyer's failure to provide these materials. Later in March, the Defendant sent another letter seeking dismissal of his case based upon his belief that the body camera footage "did not match" the information contained in the affidavit of complaint and that certain evidence "may have been falsely manufactured or [a]ltered."

Then, on May 13, 2022, a third attorney was appointed to represent the Defendant, though the record provides no official indication of the reason for the new appointment, nor does it reflect that Mr. Acuff was ever formally relieved from representation. The Defendant, thereafter, sent two more letters to the trial court. In his September 1, 2022 letter, the Defendant asked the trial court to look into the status of his plea negotiations, seeking a more lenient offer due to his "dangerously high medical issues" and claimed that the crime scene had been tampered with and staged to look "more violent than it truely [sic] was." By the time of the Defendant's October 4, 2022 letter, it appears from the record that the original trial judge assigned to the Defendant's case had retired, and a new trial judge had succeeded him. This letter, was addressed to this new trial judge, and the Defendant again requested for the trial court to look into the details of his case and consider dismissing the charges against him.

On January 10, 2023, the Defendant sent the trial court a letter asking for his third lawyer to be relieved from representation "due to his unresponsiveness and lack of attention to [the Defendant's] case" and naming a fourth attorney to be placed in prior counsel's stead. In the letter, the Defendant indicated that he once again intended to contact the BPR. Subsequently, third counsel filed a motion to withdraw on January 19, 2023, stating that the Defendant had failed to cooperate with him and that communication had "broken down" irreparably such that "proper representation [could]not be had." Third counsel continued,

> In addition, [the Defendant] has threatened to report counsel to the [BPR] and claims to have fired him. He further threatens to sue counsel because of the offer made by the [S]tate in his case.
>
> Counsel had scheduled a securus [v]ideo call with client on 1/19/23 at 2:00. As soon as the call began, client threatened, cursed and would not communicate about his case or what he wanted to do. Instead he threatened, cursed his counsel for several minutes and then hung up the telephone.

Third counsel closed by requesting that a new attorney be appointed for the Defendant "to shout at." It appears that the trial court granted this motion, though there is no official notation of any kind in the record.

On January 20, 2023, the trial court conducted a hearing regarding the Defendant's representation, the transcript of which reflects that, at the start of the hearing, the Defendant was provided with a written "waiver of counsel" document[1] reflecting that he was representing himself. The trial court indicated that it intended to review this document with the Defendant, and the following exchange took place:

> THE COURT: Mr. Smith, this is basically the waiver of counsel part where, since you're representing yourself, I just want to make sure for the record that you understand certain things about that, okay?
>
> THE DEFENDANT: I'm not—
>
> THE COURT: Okay. So I need you to listen carefully. If you have any questions, let me know.

[1] This document does not appear in the appellate record.

You understand you have a right to be represented by counsel at every critical stage of this case; correct?

THE DEFENDANT: Yes. That's what I need.

THE COURT: And you know about, from having three attorneys before, what attorneys are supposed to do for your case; correct?

THE DEFENDANT: Yes. I know what they're supposed to do. They, they didn't do it.

THE COURT: Okay. . . . [I]f a lawyer is appointed for you, they would assist you, advise you, speak for you, and you would have one appointed free of charge; correct?

THE DEFENDANT: Yeah.

THE COURT: Okay. And now you want to represent yourself?

THE DEFENDANT: No, I don't want to. I, I would—I need a—

THE COURT: Well, you've had three attorneys so you're either going to have to stick with one of them or represent yourself.

THE DEFENDANT: That—

THE COURT: The fact that you've—do you want me to get one of those other three attorneys back on your case for you?

The Defendant expressed confidence in Mr. Acuff, who had previously been appointed to his case. The trial court inquired about the circumstances surrounding Mr. Acuff's withdrawal—whether the Defendant requested Mr. Acuff's removal or whether Mr. Acuff had filed a motion to withdraw. The Defendant explained as follows:

No. I—no. He—I asked him, I said, "Look, because of the district attorney," after we had went, got all this information from the grand jury report and everything I've told him that went after it, that man's the only one that went to my house, talked to the victim and got everything straight, then

> they still want me to take a Range II. I'm a Range I offender. How do you—you can't just . . . why not just let me sign a Range I and just get it over with?

The trial court said that it would reset the Defendant's case to the following Friday and that, in the interim, it would "see if [it could] talk Mr. Acuff into coming back on [the Defendant's] case." On January 27, 2023, the trial court entered an order reappointing Mr. Acuff as "Counsel To Assist." As we will explain in more detail below, we are hereafter referring to Mr. Acuff as "standby counsel."

The Defendant sent another letter on April 27, 2023, because he felt it necessary to do so "concerning [his] case after four years of the snail-paced process of justice." He noted that his "appointed legal advisors ha[d] neglected to look at vital facts [he] ha[d] expressed to them." He also complained about the plea offers being given to him and described problems inside the correctional facility where he was being housed, including difficulty obtaining adequate medical treatment. He concluded the letter by mentioning his right to legal counsel and asking for "proper" representation "to attend, advise and truly represent [his] best interest." He sought the first possible court date. In July 2023, the Defendant sent a pro se motion seeking dismissal of his case or, in the alternative, exclusion of certain evidence relating to the allegedly tampered with crime scene.

Trial began on August 15, 2023, with the Defendant acting pro se and attended by standby counsel. At the outset, the Defendant indicated his desire to proceed with a bench trial. A colloquy between the Defendant and standby counsel regarding the Defendant's proposed waiver of a jury trial then took place on the record. They first discussed the Defendant's acting pro se:

> [STANDBY COUNSEL:] All right. And in the recent past, we've had multiple discussions about whether you—I would recommend that you represent yourself.
>
> [THE DEFENDANT:] Well, now, I didn't want to do that. I was forced to do that.
>
> [STANDBY COUNSEL:] Right, but I talked to you about it—
>
> [THE DEFENDANT:] He forced me to do that.
>
> [STANDBY COUNSEL:] I talked to you about it multiple times?

[THE DEFENDANT:] Yes.

[STANDBY COUNSEL:] About representing yourself. And as a matter of fact, you know that my recommendation is that you not represent yourself?

[THE DEFENDANT:] Yeah, mine too, but I don't control it.

The colloquy continued with the Defendant affirmatively stating that he wished to proceed with a bench trial, also against the advice of standby counsel. At the conclusion of the colloquy, the trial court made the following statement:

> Now, again, a couple of things were said at the podium and we want to readdress [those points]. We talked about preferring not to represent yourself. I mean, you're on your third attorney right now, and [standby counsel] can step in at any time and be your lead attorney, if you want. He's a very competent attorney. I've told you that many times. And so you're not being forced to represent yourself. You've been given numerous attorneys. You have one standing next to you right now who is very[,] very experienced, has practiced law for decades, and at any time you can choose to let him lead your defense, if you want.
>
> So even during the course of this trial, you can stop and say, "Right now I want [standby counsel] to be my lead attorney on this," and that would happen right now. So basically, you're the one that's decided whether or not you're representing yourself or not.

The Defendant executed a written waiver of his right to a trial by jury and proceeded to a bench trial.

During the reading of the indictment, the trial court and the Defendant engaged in a discussion regarding the charge of aggravated domestic assault:

THE COURT: How do you plead to count 2, [Defendant]?

THE DEFENDANT: I'm guilty.

THE COURT: I'm sorry?

THE DEFENDANT: Guilty of that.

THE COURT: You're pleading guilty to domestic aggravated assault?

THE DEFENDANT: That's my—yeah.

THE COURT: I just want to make sure I heard you right.

THE DEFENDANT: Yes.

THE COURT: You're pleading guilty to count 2, domestic aggravated assault?

THE DEFENDANT: Yes.

THE COURT: Not guilty to count 1. Okay.

THE DEFENDANT: Yes. Thank you.

THE COURT: Okay. All right. Thank you.

The record does not reflect that the trial court conducted any additional colloquy with the Defendant regarding this plea at any point after this brief exchange.

At trial, the victim testified about the events, and she provided some details of the Defendant's mental health history, as she understood it. The victim confirmed that the Defendant had mental health issues, which had worsened over time due to his drug use. She agreed that the Defendant had been diagnosed as a paranoid schizophrenic. She stated that, over their time together, she never knew what the Defendant's "intentions were" or what would trigger him and make "his anger kick in."

Dr. June Young, a clinical psychologist and forensic evaluator, evaluated the Defendant for sanity and concluded that he did not meet the criteria for the insanity defense. She noted that the Defendant had been diagnosed with "schizoaffective disorder, depressive type," accompanied by alcoholism and other drug use. She clarified that the Defendant had not been diagnosed with paranoid schizophrenia and opined that he did not show any signs of such. Based on her training and experience, she concluded the Defendant was malingering to try to "appear more mentally ill than he was."

The trial court asked Dr. Young to review the body camera footage of the officers who arrived at the victim's apartment on May 22, 2019, through the portion when the officers breached the bathroom door and the Defendant informed the officers that he was "a mental patient." Dr. Young agreed with the court that the Defendant appeared to understand what was happening and said that, in her professional opinion, the Defendant was using mental illness as an excuse for his behavior. She explained that people with mental illness diagnoses tend to hide that fact because they do not want people to know it. They usually recognized the "stigma" associated with mental illness, and if they were truly paranoid, they would tend to withhold such information, not share it.

The Defendant testified and said he had a long history of mental illness from the time he was young in Oklahoma to the time he moved to Chattanooga. The Defendant said he was having "blackouts" at the time of the incident.

During the trial proceedings, the Defendant undertook the questioning of witnesses and interacted with the trial court, but on occasion, standby counsel performed these functions as well. Standby counsel eventually took over sole responsibility for making and responding to objections during the proceedings, moving for a judgment of acquittal, and making the closing argument for the defense. At the conclusion of the proof and arguments by the parties, the trial court found the Defendant guilty of attempted first degree murder. The trial court also noted that the Defendant had "pled guilty to aggravated domestic assault. If he hadn't pled guilty, I think the facts would be there for that."

Thereafter, standby counsel was relieved at his own request, and a new lawyer was appointed to assist the Defendant during his post-trial proceedings ("post-trial counsel"). Post-trial counsel filed a sentencing memorandum, requesting alternative sentencing or a sentence "at the lower end of the applicable sentencing range," in large part due to his mental health condition. It was noted therein that the Defendant's various "diagnoses ha[d] rendered [him] unable to maintain a normal relationship with many of his family members, as the disorders manifest[ed] principally with violent mood swings, severe depressive episodes, auditory and visual hallucinations, and suicidal ideations." It was also mentioned that the Defendant was prescribed a medication regime to manage these conditions. At the subsequent sentencing hearing, Officer Kristina Creekmore with the Tennessee Department of Correction testified that she interviewed the Defendant to prepare the presentence report ordered by the court. During this interview, the Defendant repeatedly claimed he was "being railroaded." The Defendant discussed his mental health and said he had "homicidal thoughts" about a particular correctional officer at the facility where he was being housed. Ultimately, the trial court sentenced the Defendant to twenty years' incarceration for his attempted first degree murder conviction and five years' incarceration

for his aggravated domestic assault conviction, to be served concurrently but without merger of the offenses.[2] The trial court explained that the Defendant was not operating under a significant mental defect at the time of the offenses.

Post-trial counsel filed a motion for new trial on the Defendant's behalf. In the motion, it was asserted that the Defendant moved the court for the appointment of counsel, but that the trial court "entered an order compelling [him] to represent himself" with standby counsel "should the Defendant be inclined to rely on counsel at any point during trial." The Defendant asserted that this was in violation of his constitutional rights to the assistance of counsel at all stages of trial and constituted reversible error. The Defendant also noted the egregious nature of this violation, "especially in light of the uncontroverted evidence presented at trial, of [his] history of severe mental illness and disturbances which ha[d] rendered [him] unable to form the requisite *mens rea* for the offenses charged." A hearing on the motion for new trial took place on February 29, 2024, during which post-trial counsel was present to assist the Defendant.

Post-trial counsel recounted the procedural history of the Defendant's case and argued that the trial court committed reversible error by requiring the Defendant to represent himself, noting particularly the Defendant's mental health conditions. The prosecutor, responding to this argument, stated the following:

> The State would contend [the Defendant] delayed and then wanted to . . . represent himself, told the Court he wanted to represent himself. And Your Honor appointed . . . elbow[3] counsel. During the trial, Mr. Acuff went above and beyond almost at times in representing the Defendant . . . . [H]e did the closing argument. He basically almost ascended to the role beyond elbow counsel. The State would contend that . . . there is no error, . . . that Mr. Acuff went above and beyond, and it was the Defendant's own will to represent himself.

The prosecutor then requested that the trial court deny the Defendant's motion.

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[2] The uniform judgment documents indicate that both convictions resulted from a judicial finding of guilt following a bench trial; no indication appears regarding a guilty plea as to count 2.

[3] The trial court and the parties refer to Mr. Acuff as "elbow counsel" throughout the hearing on the motion for new trial. We have not altered these quotations, so as to preserve the exact meaning of the parties' statements. We, however, will continue to refer to Mr. Acuff as "standby counsel."

The Defendant next gave a lengthy statement on his own behalf, restating many similar claims to those he had included in his various letters relative to a staged crime scene. The Defendant also reiterated that he never wanted to represent himself at trial and that he was forced to do so by the trial court.

In rending its ruling regarding the issue of the Defendant's self-representation and whether the Defendant was treated unfairly, the trial court first "address[ed] the mental health aspect of it." The trial court explained,

> The Court's very clear on [the Defendant's] articulate representation of himself which indicates that he's not exactly impaired to the degree that it would affect his . . . case. Also, one of the things that the Court gave weight to was as soon as the police pulled [the Defendant] off of the victim as he was stabbing her, he threw his hands up saying I'm a mental health patient. I'm a mental health patient which indicates to the Court that contrary to [the Defendant's] assertion in court, that other people use his diagnosis to their advantage, that [the Defendant] was trying to manipulate the situation by claiming to suffer from some mental health issue that caused him to do that. That was pretty clear throughout the course of [the Defendant's] appearances in court that he was doing the very thing that he [was] accusing others of just a moment ago.
>
> I don't find that there was a mental health issue present to the degree that would require some type of competency hearing beyond what's already been done.

The trial court then indicated that the Defendant had implicitly waived his right to counsel by manipulating or abusing it in order to delay or disrupt trial proceedings. Specifically, in this regard, the trial court reasoned,

> [The Defendant] ended up representing himself by again trying . . . to delay the case, use the magic words of how his attorneys weren't doing what he wanted them to do over and over again to the degree that he was advised that if he did it again, that he'd have elbow counsel. And he chose to take that route. And what actually happened in court was not exactly [the Defendant's] representing himself, while he did cross-examine the victim, Mr. Acuff certainly represented [the Defendant] well beyond what elbow counsel typically does. Actually got up and made arguments, made the closing. And that indicates that the [D]efendant . . . was clearly aware that

> Mr. Acuff could serve well beyond what elbow counsel typically does, because that's exactly what Mr. Acuff did. He represented [the Defendant] in court the way that a regular attorney would in any other case when representing the client fully. So [the Defendant] was certainly aware of that, so . . .
>
> The exact same considerations that went into giving [the Defendant] lots of leeway, getting him yet another attorney, letting him know that if there's any more of the same issues, then it'll indicate that it was just [the Defendant's] trying to manipulate the system to delay his trial, you know, getting Mike Acuff.

Following the denial of his motion for new trial, the Defendant timely appealed.

II. ANALYSIS

On appeal, the Defendant contends, among other things, that the trial court erred by compelling him to represent himself against his wishes and in the absence of an inquiry regarding his ability to do so. Specifically, the Defendant frames the issue as follows: "Did the learned trial court abuse its discretion, and commit reversible error when it allowed [the D]efendant to proceed pro se, with counsel being appointed as counsel to assist, and permitting the [D]efendant at trial to participate as co-counsel in a hybrid representation context?" The State concedes that this was reversible error, stating that "[t]he court made none of the required inquiries and failed to warn the [D]efendant that he could forfeit the right to counsel if any misconduct continued." We agree with the parties that the Defendant was denied his right to counsel.

The Sixth Amendment of the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant a right to counsel. *See Gideon v. Wainwright*, 372 U.S. 335, 339 (1963); *State v. Holmes*, 302 S.W.3d 831, 838 (Tenn. 2010). The right to counsel is a constitutional safeguard "deemed necessary to insure fundamental human rights of life and liberty." *Holmes*, 302 S.W.3d at 838 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)). Concomitant with the right to counsel is the constitutional right to represent oneself. *State v. Hester*, 324 S.W.3d 1, 30 (Tenn. 2010); *see also Faretta v. California*, 422 U.S. 806, 832 (1975). These rights are alternative, however, and "a criminal defendant cannot logically waive or assert both rights." *State v. Burkhart*, 541 S.W.2d 365, 368 (Tenn. 1976) (quoting *United States v. Conder*, 423 F.2d 904, 908 (6th Cir. 1970)).

Historically, "courts have assigned a constitutional primacy to the right to counsel over the right of self-representation." *Hester*, 324 S.W.3d at 30. "[I]t is clear that it is representation by counsel that is the standard, not the exception." *Id.* (quoting *Martinez v. Ct. of Appeal of Cal*., *Fourth App. Dist.*, 528 U.S. 152, 161 (2000)). That said, the voluntary exercise of the right to self-representation requires the waiver of the right to counsel. *Id.* Typically, in order to activate the right of self-representation, the defendant must: (1) timely assert the right to proceed pro se; (2) clearly and unequivocally exercise the right; and (3) knowingly and intelligently waive the right to assistance of counsel. *Id.* at 30-31. Before accepting a waiver of the right to counsel, the trial court must "advise the accused in open court of the right to the aid of counsel at every stage of the proceedings[,]" and it must "determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience, and conduct of the accused, and other appropriate matters." Tenn. R. Crim. P. 44(b)(1). In addition, waiver usually "occurs only after the trial judge advises a defendant of the dangers and disadvantages of self-representation and determines that the defendant 'knows what he is doing and his choice is made with eyes open.'" *State v. Carruthers*, 35 S.W.3d 516, 546 (Tenn. 2000) (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942)). A defendant's waiver of the right to counsel must be in writing and must be included in the record. Tenn. R. Crim. P. 44(b)(2)-(3).

The right to counsel is not without its limits, however. *Holmes*, 302 S.W.3d at 838. "The right to counsel is limited by the interest in proceeding with prosecutions on an orderly and expeditious basis." *State v. Parsons*, 437 S.W.3d 457, 478 (Tenn. Crim. App. 2011) (quoting *United States v. McQueen*, 445 F.3d 757, 760 (4th Cir. 2006)). And, the right to counsel "must be balanced against the court's authority to control its own docket, and a court must beware that a demand for counsel may be utilized as a way to delay proceedings or trifle with the court." *Id.* (quoting *United States v. Krzyske*, 836 F.2d 1013, 1017 (6th Cir. 1988)). As such, a defendant may implicitly waive the right to counsel by manipulating or abusing it in order to delay or disrupt trial proceedings.[4] *Carruthers*, 35 S.W.3d at 547. However, such a waiver may only be presumed "*after* he has been made aware that his continued misbehavior will result in the dangers and disadvantages of proceeding pro se." *Holmes*, 302 S.W.3d at 840. Although "extensive and detailed warnings" are not necessary, *see Carruthers*, 35 S.W.3d at 549, "[e]ssential to implicit waiver . . . is . . . an opportunity for the defendant to avoid the extreme sanction of the loss

[4] In extreme circumstances that are not present in this case, such as those involving a defendant's "extremely serious misconduct" against his or her attorney, the right to counsel may be forfeited by the defendant without requiring waiver. *See Holmes*, 302 S.W.3d at 840-41 (detailing the "slight" distinction between forfeiture of the right to counsel in extreme cases and implicit waiver of the right to counsel following adequate warnings given by the trial court).

of the right to counsel." *State v. Reece*, No. M2011-01556-CCA-R3-CD, 2013 WL 1089097, at *18 (Tenn. Crim. App. Mar. 14, 2013). After being warned by the court, a defendant will implicitly waive his right to counsel if he "persist[s] in his misconduct." *Carruthers*, 35 S.W.3d at 549.

Appellate review of a waiver of the right to counsel is de novo with a presumption of correctness afforded to the trial court's factual findings. *Hester*, 324 S.W.3d at 29-30 (quoting *Holmes*, 302 S.W.3d at 837). An error in denying the right to exercise self-representation is a structural constitutional error that is not subject to harmless error review and requires automatic reversal. *Id.* at 30 (citing *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008)). Conversely, "[a] trial court's erroneous ruling to deprive a defendant of his fundamental constitutional right to counsel is per se reversible error." *Holmes*, 302 S.W.3d at 848 (first citing *Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967); and then citing *Rodriguez*, 254 S.W.3d at 371).

Before turning to our analysis of the issue presented, we pause here to comment on the varying terms that have been used to describe Mr. Acuff's role in these proceedings. Mr. Acuff is described in the record as "counsel to assist," as well as "elbow counsel." Our supreme court has noted the confusion that may arise in using interchangeable terms to describe an attorney who is accompanying a pro se defendant in some manner at trial:

> The parties use the term "elbow counsel." We interpret "elbow counsel" to mean an attorney who functions in a purely advisory role, without actively participating in the trial. A pro se defendant who is permitted such counsel may consult counsel for guidance and advice, but otherwise handles the defense of the case on his or her own. Because we find the term "advisory counsel" to more accurately describe the role such an attorney plays, we will use that term in place of "elbow counsel." Another term commonly used in other jurisdictions is "standby counsel." We perceive "standby counsel" to mean counsel who is not actively participating in the trial but is available to step in and take over as counsel if called upon to do so by either the defendant or the trial court. We recognize that in the past, appellate courts have used the terms "elbow counsel," "advisory counsel," and "standby counsel" interchangeably. We now take the opportunity to clarify these terms for Tennessee.

State v. Small, 988 S.W.2d 671, 672 n.1 (Tenn. 1999). Despite this language in *Small*, we are aware that the term "elbow counsel" persists in usage in both our trial and appellate courts to this day. We fear, however, that the generalized usage of the term creates

confusion when it is unclear whether it is being used to describe an attorney acting in a standby versus an advisory role. Indeed, such confusion exists in this case; although the *Small* court eschewed the term "elbow counsel" for the more descriptive terms "advisory counsel" and "standby counsel," the parties below used "elbow counsel" to describe an attorney acting in a true standby role.

These distinctions are significant. An attorney who is asked to serve as standby counsel, it seems, would require a much greater level of preparation and familiarity with the case than an attorney who is asked to serve merely as an advisory counsel. The generic usage of "elbow counsel" might cause an attorney to agree to serve in one role, only to find that he or she will actually be serving in another more-involved role at trial.[5] For these reasons, we have adhered to the clarification in *Small* and eschewed the term "elbow counsel" for the more descriptive term "standby counsel." With that explanation, we now move to our analysis of the Defendant's claim.

At the outset, we observe that the Defendant's issue, as phrased on appeal, contains two facets: (1) whether the trial court erred by allowing the Defendant to proceed pro se with standby counsel and (2) whether the trial court erred by permitting the Defendant to participate at trial as co-counsel in a hybrid representation context. We agree that the arrangement at trial commenced as pro se representation with standby counsel—following the trial court's assessment that the Defendant had implicitly waived his right to counsel—before morphing into a form of hybrid representation, allowing both the Defendant and counsel to participate in the defense.

Neither the United States Constitution nor the Tennessee Constitution grants the accused the right to "hybrid representation." *State v. Berry*, 141 S.W.3d 549, 574 (Tenn. 2004) (citing *Burkhart*, 541 S.W.2d at 371). Our supreme court has repeatedly discouraged trial courts from permitting hybrid representation. *See Small*, 988 S.W.2d at 673; *State v. Franklin*, 714 S.W.2d 252, 260-61 (Tenn. 1986). "It is entirely a matter of grace for a defendant to represent himself and have counsel, and such privilege should be granted by the trial court only in exceptional circumstances." *State v. Melson*, 638 S.W.2d 342, 359 (Tenn. 1982). Hybrid representation should be permitted "sparingly and with caution and only after a judicial determination that the defendant (1) is not seeking to disrupt orderly trial procedure and (2) that the defendant has the intelligence, ability and general competence to participate in his own defense." *Burkhart*, 541 S.W.2d at 371.

[5] We in no way mean to indicate that this was the situation in this case. Mr. Acuff served admirably under what were surely difficult circumstances. We applaud his efforts in this case, as well as those of the other appointed counsel involved.

As stated, however, the trial began after the trial court's apparent finding of implicit waiver of counsel due to the Defendant's behavior, with the Defendant representing himself with counsel to assist. We accordingly begin our analysis here and proceed to our de novo review of the Defendant's implicit waiver of his right to counsel, giving due deference to the trial court's factual findings.

By January 2023, this prosecution had been pending for almost three and a half years, the beginning of which coincided with the global COVID-19 pandemic that greatly impacted the legal landscape of in-court proceedings for an extended period.[6] Since the case's inception in August 2019 until the hearing in January 2023, the trial court had appointed three attorneys, conducted competency proceedings, granted multiple continuances, and addressed numerous pro se filings, yet the case remained untried. Also, during this time, the Defendant had repeatedly clashed with each of his appointed attorneys, accusing them of unethical conduct, misrepresentation, and neglect, and he frequently contacted the BPR to complain about perceived deficiencies in his representation. His third attorney's motion to withdraw was particularly detailed, explaining that the Defendant refused to communicate with him, obstructed trial preparation, shouted profanities, and threatened to file a disciplinary complaint.

As previously noted, trial courts are not required to allow a defendant to manipulate the right to counsel indefinitely through recurring conflicts with appointed counsel or through conduct that impedes the orderly progress of the case. *See Carruthers*, 35 S.W.3d at 549. Moreover, Tennessee courts have recognized that threats of disciplinary complaints and allegations of unethical conduct can severely hinder counsel's ability to continue representation and, ultimately, result in the loss of the right to counsel. *See, e.g.*, *State v. Willis*, 301 S.W.3d 644, 651-52 (Tenn. Crim. App. 2009) (holding that the defendant forfeited his right to counsel after he refused to discontinue his disruptive behavior despite multiple warnings to do so, refused to work with counsel, refused to participate in a forensic evaluation, and filed a lawsuit against his counsel in federal court and a complaint with the BPR); *State v. Thigpen*, No. M2019-00047-CCA-R3-CD, 2020 WL 2216205, at *9-11 (Tenn. Crim. App. May 7, 2020) (holding that the defendant, who had been represented by multiple attorneys during the trial proceedings, forfeited his right to appellate counsel as a result of his refusing to cooperate with his attorneys, engaging in disruptive trial conduct,

[6] On March 13, 2020, the Tennessee Supreme Court suspended in-person court proceedings, which included jury trials, subject to certain exceptions. *See In re COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. Mar. 13, 2020) (order). The supreme court lifted the suspension of jury trials, effective following the close of business on March 31, 2021, and subject to the terms of the comprehensive written plan promulgated in each local judicial district for in-person proceedings. *See In re COVID-19 Pandemic*, No. ADM2020-0428 (Tenn. Feb. 12, 2021) (order).

threatening to file complaints against his lawyers with the BPR, and naming trial counsel in a federal civil lawsuit).

At the January 20, 2023 hearing, the trial court made clear its concern that the Defendant was attempting to further delay and disrupt the proceedings by continually clashing with appointed counsel while simultaneously insisting that he be represented. When the Defendant repeated that he wanted an attorney, the trial court responded, "Well, you've had three attorneys so you're either going to have to stick with one of them or represent yourself." In other words, the trial court informed him that his conduct would no longer be tolerated and that he would be forced to represent himself unless he accepted one of his prior attorneys. At the hearing on the motion for new trial, the trial court reiterated its view that the Defendant's persistent behavior was calculated to delay and disrupt the proceedings and that he was invoking his mental health issues as a pretext.

From the trial court's vantage point, the Defendant's pattern of cycling through appointed counsel while the case remained pending threatened the orderly administration of justice. Indeed, even the Defendant acknowledged the length of the prosecution in one of his letters to the trial court, describing its "snail-paced" progress as a grievance.

Although we do not condone the Defendant's uncooperative conduct toward his attorneys or the trial court, we are nonetheless constrained to conclude that the procedural safeguards governing implicit waivers were not fully satisfied before he was required to proceed without full representation. While "extensive and detailed warnings" are not necessary, a defendant must be "made aware that his continued misbehavior will result in the dangers and disadvantages of proceeding pro se." *Holmes*, 302 S.W.3d at 840; *see also Carruthers*, 35 S.W.3d at 547-49. Notably, the appellate record does not show a clear admonishment from the trial court that the Defendant's continued misconduct would result in a waiver of his right to counsel, which was accompanied by advising him of the dangers and disadvantages of self-representation. *See Holmes*, 302 S.W.3d at 840. The Defendant must be afforded a meaningful opportunity to correct his behavior while still represented by appointed counsel and to avoid the severe consequence of losing the right to counsel. *See, e.g.*, *State v. Hambrick*, No. M2024-00514-CCA-R3-CD, 2025 WL 1504852, at *5-6 (Tenn. Crim. App. May 27, 2025) (determining that no implicit waiver occurred where the trial court granted third counsel's motion to withdraw and refused to appoint the indigent defendant new counsel, but instead gave the defendant an ultimatum that she must hire counsel or proceed pro se without the required warnings), *no perm. app. filed*; *Reece*, 2013 WL 1089097, at *18 (holding that no implicit waiver occurred because the defendant was not advised that persisting in his refusal to cooperate with counsel and wavering on proceeding pro se could lead to a loss of the right to counsel).

Accordingly, we conclude, based upon the record before this court, the Defendant did not implicitly waive his right to counsel and that the trial court erred by requiring the Defendant to represent himself, even with the aid of counsel to assist. This structural constitutional error requires reversal of the Defendant's convictions, which were adjudicated in violation of that right.[7] *See Holmes*, 302 S.W.3d at 848; *see also Momon v. State*, 18 S.W.3d 152, 165-66 (Tenn. 1999) (discussing structural constitutional error). Our holding likewise invalidates the Defendant's waiver of his right to a jury trial and any plea of guilty in count 2, both of which occurred after the deprivation of counsel.

Because this constitutional error infected the trial from its outset, we need not dwell on the hybrid representation that occurred later in the trial. To provide guidance on remand, however, we repeat that hybrid representation is not constitutionally guaranteed and should only be allowed under exceptional circumstances and after a judicial determination of the *Burkhart* factors set forth above. No such findings appear to be present in the record of this case.

III. CONCLUSION

Based upon the foregoing and consideration of the record as a whole, we reverse the judgments of the trial court, the Defendant's convictions are vacated, and this case is remanded for appointment of counsel and further proceedings consistent with this opinion. However, we recognize that continued legal representation for the Defendant on remand need not be the permanent state of affairs if his disruptive behavior persists, but sufficient procedural safeguards must be in place.

s/Kyle A. Hixson
KYLE A. HIXSON, JUDGE

[7] The Defendant also challenges the sufficiency of the evidence and the trial court's sentencing determination. Because these claims concern only those proceedings that occurred after the Defendant was unconstitutionally denied the right to counsel, necessitating wholly new proceedings that may or may not include the same approaches to the proof as to guilt or punishment, we decline to address these issues in the present appeal. *See State v. Dickerson*, 789 S.W.2d 566, 567-68 (Tenn. Crim. App. 1990) (declining to address the defendant's sentencing claim in light of reversal of the conviction).