2021 IL App (1st) 192220-U

No. 1-19-2220

Order filed September 20, 2021

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 17 CR 11466
	)	
ROSCOE HOLLIE,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COGHLAN delivered the judgment of the court.
Justice Pierce concurred in the judgment.
Presiding Justice Hyman dissented.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in denying defendant's request to proceed *pro se*.

¶ 2 Following a jury trial, defendant Roscoe Hollie was found guilty of two counts of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2016)) and sentenced to consecutive terms of 5 and 10 years' imprisonment. On appeal, defendant argues that the trial court erred in denying his pretrial request to represent himself. For the following reasons, we affirm.

¶ 3 Defendant was charged by information with kidnapping Sinthia Williams (count I), domestic battery for biting and striking her (counts II and III, respectively), and unlawfully restraining her (count IV). Defendant was also charged with domestic battery of Williams in two other cases. On August 8, 2017, defendant appeared before the Honorable Judge Ursula Walowski, who arraigned him and appointed assistant public defender (APD) Theodore Thomas.

¶ 4 The Honorable Judge Stanley Sacks presided over the subsequent proceedings. The case was continued numerous times for discovery and plea negotiations, and for the State to prepare a motion to admit proof of other crimes. On June 12, 2018, the State elected to proceed on the instant case and filed the motion to admit proof of other crimes, including the incidents underlying defendant's two other cases.

¶ 5 On the next date, APD Thomas requested a continuance after receiving reports regarding the other crimes evidence. On August 6, 2018, APD Thomas filed a response, and Judge Sacks held a hearing, granting the State's motion as to the incidents of alleged domestic battery underlying the other two cases, as well as one other incident of alleged domestic battery against Williams. Judge Sacks denied the motion as to other incidents except to potentially impeach defendant's trial testimony.

¶ 6 On September 10, 2018, APD Thomas explained that the parties were negotiating. On September 24, 2018, APD Thomas stated he was tendering the State's offer to defendant, which he believed defendant would reject, and requested one more date to file an answer and then set the case for trial.

¶ 7 On October 25, 2018, APD Niyati Thakur appeared for defendant, stating she was stepping up for APD Tammi Ford-Sanderson. On defendant's motion, the case was continued to December

3, 2018. APD Ford-Sanderson appeared for defendant on December 3, 2018, and the case was set for jury trial on February 11, 2019, by agreement.

¶ 8 On February 11, 2019, Judge Sacks noted a second new attorney would join APD Ford-Sanderson and the case would be held to February 14, 2019. APD Ford-Sanderson then explained that the defense may not be ready because she had not yet been able to meet with defendant, he had made statements to her that day that required investigation, and much had happened in the case before she was appointed. The State also provided that Williams was concerned about testifying on that date, and the parties confirmed that neither was ready for trial. By agreement, the case was set for jury trial on March 1, 2019.

¶ 9 On March 1, 2019, APD Doris Funches appeared with APD Ford-Sanderson, and the State answered ready for trial. Judge Sacks could not oversee jury selection that day, however, so APD Ford-Sanderson requested the case be held until March 5, 2019. On March 5, 2019, the case was set for jury trial on May 1, 2019, by agreement.

¶ 10 On May 1, 2019, the parties appeared before Judge Sacks and answered ready for trial. However, Judge Sacks was engaged in a jury trial, and the case was transferred to the Honorable Judge Mary Margaret Brosnahan.

¶ 11 The parties then appeared in front of Judge Brosnahan. Outside the presence of the venire, Judge Brosnahan noted the case had been transferred and stated that the elected case would go to trial. The State nol-prossed count IV, and explained that it did not plan to call witnesses on May 1, 2019, but would pick the jury and begin presenting evidence the following day. The parties tendered to Judge Brosnahan a plea negotiation disclosure form, and the court admonished defendant regarding a plea offer in which the State would dismiss the two other cases and

recommend an extended term of nine years' imprisonment in exchange for defendant's guilty plea to count III. Judge Brosnahan noted that, based on defendant's background, he could be sentenced as a Class X offender on count I, and face 6 to 30 years' imprisonment on that charge and 2 to 10 years' imprisonment on the domestic battery charges. Defendant rejected the offer.

¶ 12 Judge Brosnahan asked if motions *in limine* had been filed, and stated she "wanted to have that part of the conversation before I send them over for the jury." APD Ford-Sanderson noted that the defense had civilian clothes for defendant, but then explained that "prior to us being sent here, [defendant] did indicate that he did not want us to continue representing him." Defendant agreed, explaining that APD Ford-Sanderson had only met with him once for approximately 20 minutes since she began representing him. The following exchange occurred:

"THE COURT: So what is it you are asking of me?

THE DEFENDANT: That you relieve them of my case or they relieve they self of my case.

THE COURT: And then what?

THE DEFENDANT: And I go to trial, I guess, by myself because I definitely don't—if I can get ten years with them, I can get ten years by myself. So what do I need them for?

THE COURT: Well, no, by yourself, you could get up to 30 years.

THE DEFENDANT: With them, I could get up to 30.

THE COURT: That is a big difference.

THE DEFENDANT: With them, I can get up to 30.

THE COURT: Well, this matter is set down for trial today. Like I said, I don't take cases unless everybody answers ready for trial. I'm told you answered ready for trial in front of Judge Sacks. That is where it came from; is that right?

MS. FORD SANDERSON: Yes, [Y]our Honor.

THE COURT: This case has been up 22 times in front of Judge Sacks. That's including today's date, 22 times. It indicates both sides answered ready in front of him."

¶ 13 APD Ford-Sanderson denied that defendant had previously indicated that he did not want the public defenders to represent him or asked to represent himself, or that APD Thomas told her that defendant indicated he did not want the public defenders to represent him. Defendant denied that he had hired a private attorney, and answered affirmatively when Judge Brosnahan inquired whether he was asking for different public defenders. Judge Brosnahan stated:

"That is denied. You can't pick your public defender. You get who you are assigned. So that is not an option. Here we are the day of trial.

So I find that asking for a different attorney or saying that you would represent yourself, you would like to represent yourself, it seems to this Court to be a dilatory tactic. Everybody is ready. The parties have answered ready."

¶ 14 Defendant alleged that APD Ford-Sanderson had not met with him or showed him the State's evidence, and APD Ford-Sanderson responded that APD Thomas had shown defendant discovery and litigated the "extensive" proof of other crimes motion. Defendant asserted that APD Thomas would only show him evidence when they would stand outside the courtroom. The following colloquy occurred:

"THE COURT: What new information do you have to tell these attorneys?

THE DEFENDANT: I don't have any information. I want to see the evidence that the State have against me. I have that right, right?

THE COURT: You have no idea what you are charged with after all these years?

THE DEFENDANT: Ma'am, yes, I know what I'm charged with. I'm saying as far as me being able to read over the preliminary transcripts, me to see the videos. I haven't saw any of these things. She said that Mr. Thomas told her that, but Mr. Thomas only showed me the things standing there as we was waiting to go in the courtroom.

THE COURT: It sounds to me like you are just getting scared feet and you don't want to go to trial.

THE DEFENDANT: I have been fighting the case 22 months. I'm ready to get it over with regardless of the fact of what happened. I'm so ready to get it over with."

¶ 15 APD Ford-Sanderson denied that defendant had indicated any of his concerns in front of Judge Sacks. Judge Brosnahan stated:

"I'm going to go back to this. You tell me what you are asking me to do. I'm not giving you a different public defender. So what do you want to do?

Everyone is answering ready for trial. The case is going on two years old. It has been up 22 separate times. There were negotiations that didn't work out which is your right. I mean, half the time they don't work out. Your attorneys pursued that.

I went through that just to make certain that you understood the offers. I think you fully understand what you are facing."

¶ 16 Judge Brosnahan then confirmed that the State would not offer a sentence of less than nine years and stated she would not remove the APDs from the case, which was "at the end," and so

would go to trial that day. Defendant responded, "Okay." Judge Brosnahan asked, "You are not asking to do this yourself without having any reports?" Defendant responded, "I guess I have to. *** That is what I would have to do then because I'm not going to let them represent me if they not working in my favor." Judge Brosnahan stated that she did not understand why defendant believed counsels were not working in his favor, asked what defendant could tell them that they did not know based on the reports they possessed, and noted that counsels had reviewed the motion to admit proof of other crimes. Defendant noted APDs Ford-Sanderson and Funches had not litigated that motion, and Judge Brosnahan responded, "What does that matter? They know what it is. It is not like they are not reading what happened before them."

¶ 17 Judge Brosnahan then asked, "Tell me again what—you want to represent yourself today? That's it." Defendant replied, "Yes, ma'am." Judge Brosnahan instructed defendant to complete a motion to proceed *pro se* and announced it would then rule on defendant's request and determine whether it was a dilatory tactic. Judge Brosnahan asked how many times the case had been set for trial, and the State answered that it believed it had been set once before. Judge Brosnahan passed the case while defendant completed the motion.

¶ 18 The motion, which is included in the record on appeal, comprised a pre-printed form with blank spaces containing handwritten details pertaining to defendant. According to the motion, defendant was 35 years old, did not graduate from high school or obtain a GED, did not have any work history, was not being treated for mental illness or on medication, and had never been found unfit for trial or represented himself. The pre-printed text listed defendant's rights to representation, a trial by jury, to subpoena witnesses and documents, question witnesses, and testify, and noted that he did not have an absolute right to an investigator or stand-by counsel. The

text provided a list of advantages of being represented by counsel and disadvantages of self-representation.

¶ 19 The motion also provided a space wherein defendant wrote the charges and possible penalties. Defendant listed domestic battery, a Class 3 felony, with a term of 2 to 10 years. Defendant also listed kidnapping, with a term from 2 to 10 years.[1] The last page, which defendant signed and dated, provided that he was freely and voluntarily waiving his constitutional right to counsel.

¶ 20 The case was recalled, and Judge Brosnahan noted that it had been up 22 times over nearly two years, and both parties answered ready for trial in front of Judge Sacks. Judge Brosnahan further noted that defendant's form indicated that he had not graduated high school or worked, was not on medication, had never been found unfit, and never represented himself. Judge Brosnahan stated that she knew defendant understood the sentencing range because she discussed it with him. However, Judge Brosnahan found that defendant's request was dilatory, because if it had been "genuine," defendant would have communicated it to Judge Sacks, "especially when it was on the verge of getting sent out to trial on today's date."

¶ 21 Judge Brosnahan then announced that the jurors were "out in the hallway," and she planned to give them opening remarks, have the parties introduce themselves, and then send the jury to lunch. APD Ford-Sanderson asked whether, given defendant's assertions, she and APD Funches could spend the remainder of the day reviewing discovery with defendant, with jury selection occurring the next day instead of that afternoon. The State did not object, and stated that its

[1] In the space wherein defendant was prompted to provide the class of the offense, his handwriting is illegible.

witnesses would still be available. Judge Brosnahan answered that defendant and his attorneys could review discovery in court that day, "after the jury has been selected and prior to them being sworn." Judge Brosnahan further requested that APD Thomas appear to discuss whether he reviewed discovery with defendant, repeated that the jurors were "in the hallway," and instructed defendant be dressed in civilian clothes.

¶ 22 After a recess, the venire entered the courtroom. The parties introduced themselves, and Judge Brosnahan recited the charges and inquired whether anyone in the venire knew the parties or witnesses. Judge Brosnahan gave opening remarks, swore the jurors to answer questions truthfully, and excused them for lunch.

¶ 23 Before the parties broke for lunch, APD Thomas appeared and explained that, prior to being transferred to a different unit in October 2018, he discussed the police reports with defendant. During the court's opening remarks to the venire, APD Thomas confirmed with a former law clerk that the law clerk also met with defendant and reviewed all three cases against him. APD Thomas also discussed the defense with APDs Ford-Sanderson and Funches, whom he knew had visited defendant in jail. APD Thomas noted that he discussed the State's other-crimes evidence with defendant and showed defendant the response, and denied that defendant ever indicated he wished to represent himself. APD Ford-Sanderson confirmed that she first met defendant in December 2018, after she was transferred to Judge Sacks's courtroom, and stated that she had informed defendant about her discussions with APD Thomas. Judge Brosnahan announced:

> "My finding does continue to stand that the defendant's request to represent himself *pro se* was a dilatory tactic, the case having been up 22 times, and the defendant made

certain representations that he had not been shown the discovery or talked to. While I find it is dilatory and I don't have to make any finding beyond that, I think that the statements of both attorneys do not support those allegations further leaving the Court to stand firm in my decision that it is a dilatory tactic. I just wanted to make that record."

¶ 24 Following the lunch break, Judge Brosnahan completed *voir dire*, and the jury was selected and excused for the day. She then heard argument and ruled on the parties' motions *in limine*, and announced the court would be in recess until the next morning. Judge Brosnahan asked if APDs Ford-Sanderson and Funches would be able to review discovery with defendant, and they responded that they did so during the lunch break. APD Ford-Sanderson further noted that, during the break, APD Thomas confirmed with his former law clerk that the law clerk had shown defendant videos related to his case. Judge Brosnahan noted that she saw defendant reviewing a transcript during the lunch break, and defendant then confirmed that the APDs had shown him transcripts and videos. Judge Brosnahan asked:

"THE COURT: Now that you have had a chance to talk with the attorneys more today, are you satisfied with proceeding with these attorneys to trial tomorrow?

THE DEFENDANT: That's not even a question to answer because I had already tried to get rid of them. I guess it is a forced hand. I have no other choice, right?

THE COURT: I'm just asking you do you feel like you have now had a chance to talk with them and go through things with them?

THE DEFENDANT: Yeah.

THE COURT: I'll just make that record. I already made my ruling earlier. I'm not changing my ruling."

¶ 25 The court recessed until the next day, May 2, 2019, when the jury was sworn, the parties gave opening statements, and trial commenced.

¶ 26 The State called Williams, her daughter, her nephew, a nurse, two police officers, and a detective. The testimony established that, on May 23, 2017, defendant lived with his ex-girlfriend Williams. Shortly after midnight, defendant arrived at Williams's friend's house, where Williams had been drinking and playing cards. Defendant became "aggressive" and pulled Williams's hair. The two entered Williams's vehicle, which defendant drove to an abandoned building. In the vehicle, defendant punched Williams multiple times, including in her face, and bit her feet. Defendant then drove to their home, where Williams ran upstairs. Defendant entered the apartment and threatened to kill Williams, but escaped when police officers entered. Williams later received several stitches to her face and was diagnosed with nasal and orbital fractures. The witnesses described other incidents in which defendant beat Williams on February 9, 2016; June 20, 2017; and July 10, 2017. Defendant did not present evidence.

¶ 27 Following closing arguments, the jury found defendant not guilty of kidnapping but guilty of both counts of domestic battery. Defendant's amended motion for judgment notwithstanding the verdict or a new trial was denied. Following a hearing, the court sentenced defendant to 5 years' imprisonment on count II, and 10 years' imprisonment on count III, to be served consecutively. Counsel tendered a motion to reconsider sentence, which the court denied.

¶ 28 On appeal, defendant argues that the trial court erred in denying his request to proceed *pro se* as dilatory. Defendant notes that he made the request prior to jury selection, did not request a continuance, confirmed he wanted to represent himself "today" and stated he wanted to "get [the case] over with," and prior continuances were not due to his behavior or requests. The State argues

that defendant's request was not clear and unequivocal, and must have been dilatory because the reasons for his request are rebutted by the record.

¶ 29 Initially, the State notes, and defendant admits, that he failed to preserve the issue by objecting below and raising it in a posttrial motion. *People v. Hunt*, 2016 IL App (1st) 132979, ¶ 15. However, defendant requests plain-error review.

¶ 30 Under the plain-error doctrine, we may review an unpreserved error when a clear or obvious error occurred and (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or (2) "that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." (Internal quotation marks omitted.) *People v. Coats*, 2018 IL 121926, ¶ 9. The erroneous denial of self-representation is a structural error (*People v. Averett*, 237 Ill. 2d 1, 13 (2010)), and our supreme court has equated structural error with second-prong plain error (*People v. Clark,* 2016 IL 118845, ¶ 46). Accordingly, we have reviewed the denial of self-representation under the plain error rule because it potentially involves a structural error which affects the entire trial and requires automatic reversal. *Hunt*, 2016 IL App (1st) 132979, ¶ 15; see also *People v. Albea*, 2017 IL App (2d) 150598, ¶ 28 (finding erroneous denial of request for self-representation to be second-prong plain error). The first consideration is whether clear or obvious error occurred. *People v. Harvey*, 2018 IL 122325, ¶ 15. If there is no error, there can be no plain error. *People v. Hood,* 2016 IL 118581, ¶ 18.

¶ 31 The sixth amendment guarantees a criminal defendant the right to proceed with or without the assistance of counsel. *People v. Wright*, 2017 IL 119561, ¶ 39. However, "[c]ourts must

indulge in every reasonable presumption against waiver of the right to counsel." (Internal quotation marks omitted.) *People v. Span*, 2011 IL App (1st) 083037, ¶ 59. To invoke the right of self-representation, the defendant must knowingly and intelligently relinquish his right to counsel. *Hunt*, 2016 IL App (1st) 132979, ¶ 16. The waiver must be clear and unequivocal. *Id.* To determine whether waiver was clear and unequivocal, courts consider "the overall context of the proceedings, including the defendant's conduct following his request to represent himself." *Id.* Further, the right is not absolute and may be forfeited if the defendant cannot knowingly and intelligently waive counsel's assistance or engages in serious, obstructionist misconduct. *Id.*

¶ 32 "The timing of a defendant's request is also significant." *People v. Burton*, 184 Ill. 2d 1, 24 (1998). "A number of courts have held that a defendant's request is untimely where it is first made just before the commencement of trial, after trial begins, or after meaningful proceedings have begun." *Id.* (collecting cases). While a request to proceed *pro se*, made before trial and unaccompanied by a request for additional preparation time, "should generally be viewed as timely," a request may also be rejected if it comes so late that granting it would disrupt "the orderly schedule of proceedings." (Internal quotation marks omitted.) *Hunt*, 2016 IL App (1st) 132979, ¶ 18; see also *People v. Rasho*, 398 Ill. App. 3d 1035, 1042 (2010) (affirming denial of self-representation where request to proceed *pro se* on day of trial was untimely and accompanied by "implicit" motion for continuance).

¶ 33 A trial court's ruling on a request for self-representation is reviewed for an abuse of discretion, and therefore will only be reversed if the ruling is arbitrary and without logical basis. *Hunt*, 2016 IL App (1st) 132979, ¶ 16. "Our mere disagreement with the court's decision would not make the decision an abuse of discretion." *People v. Fisher*, 407 Ill. App. 3d 585, 589 (2011).

¶ 34 Defendant was arraigned in August 2017. The case was set for jury trial on February 11, 2019, March 1, 2019, and May 1, 2019. On May 1, 2019, the parties answered ready for trial before Judge Sacks, and the case was transferred to Judge Brosnahan. After defendant rejected the plea offer, APD Ford-Sanderson indicated that defendant wished to proceed *pro se*.

¶ 35 When the court queried defendant as to why he wished to proceed *pro se*, he asserted that APD Thomas had only shown him discovery while they stood outside the courtroom and stated that he "want[ed] to see the evidence" against him. The court queried APD Ford-Sanderson, who denied defendant's assertions that he had not been shown the evidence. In denying defendant's motion as dilatory, the court noted that the jurors were "out in the hallway." APD Ford-Sanderson asked whether jury selection could be delayed until the next day, so they could review discovery with defendant. The court stated that they could review discovery after the jury was selected. The court gave its opening remarks to the venire, then queried APD Thomas, who also denied defendant's assertions he had not seen the evidence, and reiterated that it found defendant's request dilatory. During lunch, the APDs showed defendant transcripts and videos, and then the jury was selected and excused for the evening. When the court asked whether defendant was "satisfied" with proceeding to trial with the APDs the next day, he answered: "That's not even a question to answer because I had already tried to get rid of them. I guess it is a forced hand. I have no other choice, right?" The court confirmed that he had opportunity to review the case with them and stated it would not change its ruling.

¶ 36 At the outset, we note the record supports that defendant's request was clear and unequivocal. Although defendant stated that he sought different public defenders, and failed to renew the request when trial began, he completed a form motion to proceed *pro se* and did not

concede to representation even after, during the lunch break, he reviewed the discovery materials he had complained he had not seen. See *People v. Rainey*, 2019 IL App (1st) 160187, ¶¶ 67-68 (collecting cases and noting that a request for self-representation does not become unclear or equivocal because it was the defendant's second choice, behind an unavailable option); *Hunt*, 2016 IL App (1st) 132979, ¶ 26 ("[a] defendant need not futilely request to represent himself" if his request has already been conclusively denied).

¶ 37 However, while defendant's request to proceed *pro se* was made before the jury was selected, we decline to find that the court's denial of the request was arbitrary or without logical basis. This court has emphasized the importance of "[t]he context in which a defendant makes such a request." *Hunt*, 2016 IL App (1st) 132979, ¶ 16. Here, the case was set for trial, had been pending for nearly two years without prior indication that defendant desired to proceed *pro se*, an "extensive" proof of other crimes motion had already been litigated, motions *in limine* remained pending, and by the time the court reviewed and denied defendant's form motion to proceed *pro se*, the venire was "out in the hallway." See *id.* ¶ 18 (although pre-trial requests without accompanying request for a continuance are "generally" timely, a request may also be rejected if it comes so late that granting it would disrupt "the orderly schedule of proceedings" (internal quotation marks omitted)). Again, while the sixth amendment guarantees criminal defendants the right to proceed without counsel (*Wright*, 2017 IL 119561, ¶ 39), denying a request to proceed *pro se* is within the trial court's discretion and we are to indulge in every reasonable presumption against waiver of counsel. *Hunt*, 2016 IL App (1st) 132979, ¶ 16; *Span*, 2011 IL App (1st) 083037, ¶ 59.

¶ 38 Defendant correctly notes that he never requested a continuance and stated he was "ready to get [the case] over with." However, his request was accompanied by a desire "to see the

evidence" against him. Although the APDs ultimately reviewed discovery with defendant during the lunch break, it was within the trial court's discretion to conclude that allowing defendant to proceed *pro se* just before jury selection would cause delay when defendant desired to review discovery. See *Rasho*, 398 Ill. App. 3d at 1042 (affirming trial court's ruling that request for self-representation was dilatory when made immediately before trial and accompanied by "implicit motion for a continuance" because defendant wished to "procure additional documents and call witnesses who were not present"); see also *Hunt*, 2016 IL App (1st) 132979, ¶ 18 (request may be denied if granting it would disrupt orderly schedule of proceedings).

¶ 39 Defendant compares his case to *Hunt*, but we find it distinguishable. In *Hunt*, the defendant first indicated he wished to proceed *pro se* on a day the case was set for jury trial, in front of a substitute judge. *Hunt*, 2016 IL App (1st) 132979, ¶¶ 5-6. The substitute judge did not rule on the request and held the case over for the trial judge. *Id.* ¶ 6. The trial judge found the request dilatory because defendant had not indicated his desire until he appeared before the substitute judge. *Id.* ¶ 7. However, the defendant's jury trial did not commence for roughly six more months. *Id.* ¶¶ 8-9. On appeal, the State argued that the timing of the defendant's request, made on a day the case was set for jury trial, was sufficient grounds to deny the request. *Id.* ¶ 23. We disagreed because the substitute judge continued the case for the trial judge to rule on the request, it was unclear whether the substitute judge would commence trial on that date, and trial did not commence for six more months. *Id.* We also noted that the defendant never requested a continuance. *Id.* ¶ 21. Lastly, we stated:

> "[W]ithin the context of the proceedings, we are left with no rationale as to the trial court's denial of defendant's request. In finding defendant's request was a delay tactic, the trial

> judge did not delineate a basis for this determination. Furthermore, the trial judge did not inquire into why defendant sought to proceed *pro se* nor did she question defendant regarding whether he was displeased with his counsel." *Id.* ¶ 27.

¶ 40 Here, in contrast, Judge Brosnahan was clearly set to select the jury, which was in the hallway when she ruled on defendant's request, on May 1, 2019, and commence trial the following day. As noted, it was within the trial court's discretion to conclude that allowing defendant to proceed *pro se* would disrupt or delay the proceedings when it was accompanied by a desire to review the evidence. See *Rasho*, 398 Ill. App. 3d at 1042. Further, Judge Brosnahan extensively queried defendant as to why he sought to proceed *pro se* and his current and former APDs about his assertions, and explained the reasons for finding his request to be dilatory. We do not find that her reasons were arbitrary and without logical basis.

¶ 41 Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's request to proceed *pro se*. As there is no error, there can be no plain error. *Hood*, 2016 IL 118581, ¶ 18.

¶ 42 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 43 Affirmed.

¶ 44 PRESIDING JUSTICE HYMAN, dissenting:

¶ 45 Embedded in the sixth amendment is this most fundamental principle: "the right to defend is given directly to the accused; for it is he [or she] who suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 819 (1975). Of course, a defendant's choice to represent themselves may be unwise or inconvenient, but "to deny [them] in the exercise of [their] free choice the right to dispense with some of these [constitutional] safeguards is to imprison [them] in

[their] privileges and call it the Constitution." *Id.* at 815 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279-80 (1942)) (internal alterations omitted); See also, *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring) (defendant's choice must be honored by reason of "that respect to the individual which is the lifeblood of the law.").

¶ 46 To reject a component of due process based on a trial court's "impression" of delay requires reversal as a matter of law. Compounding the error, the majority's assertions contradict the record at every turn. I must respectfully dissent.

¶ 47 I also dissent from the majority's choice to issue this decision as a written order. I disagree that the mandate for publication as an opinion under Supreme Court Rule 23(a) has not been meet. Ill. S. Ct. Rule 23(a)(1) (eff. Jan. 1, 2021) (listing criteria for publication including "modif[ying] *** an existing rule of law"). Despite the amendment permitting the citing of written orders "for persuasive purposes," occasional disagreements on whether a decision falls within the scope of Rule 23(a) continue. I believe these disagreements limit the robust free exchange of ideas, views, and decision-making options, and urge that Rule 23(a) be amended to allow issuance as an opinion whenever any panel member determines that the criteria have been satisfied.

¶ 48 A Defendant's Free Choice of Self-Representation

¶ 49 The majority acknowledges that Hollie's request to represent himself was clear and unequivocal. The majority also correctly identifies the general governing principles. But I cannot entirely agree with how the majority applies those principles, specifically as they relate to delay. The State has cited no cases, and I am aware of none, where an appellate court has recognized a defendant's mere request for self-representation on the day of trial as dilatory or disruptive tactics.

As that is the only ground on which the trial court denied Hollie's request, I would find the court's decision constitutes an abuse of discretion.

¶ 50 The majority cites *People v. Burton*, 184 Ill. 2d 1, 24 (1998), for its collection of cases showing that untimeliness of the request for self-representation can be sufficient to withhold this Constitutional right. But not a single case cited by *Burton* is analogous. See *United States v. Jones*, 938 F.2d 737, 742-43 (7th Cir. 1991) ("there was never any unequivocal request to proceed *pro se*" then the request was made "on the second day of trial after the jury had been selected"); *United States v. Oakey*, 853 F.2d 551, 553 (7th Cir. 1988) (defendant's request "made prior to the *fourth* day of trial") (emphasis added); *United States v. Betancourt-Arretuche*, 933 F.2d 89, 96 (1st Cir. 1991) (defendant's request made after "the jury had already been selected and sworn"); *Pitts v. Redman*, 776 F. Supp. 907, 914 (D. Del. 1991) (defendant's "request was not clearly made until the third day of trial"); *People v. Woodruff*, 85 Ill. App. 3d 654, 658 (1980) (defendant "did not make a direct, verbal request to defend *pro se*" and issue before court was whether trial court had duty to *sua sponte* advise defendant that he could do so); *Mallory v. State*, 483 So. 2d 907, 911 (Ga. Ct. App. 1997) (defendant's assertion of right to self-representation not made until "after the jury was empaneled").

¶ 51 In cases like those collected in *Burton*, we see evidence of delay that had the potential to "be disruptive of the orderly schedule of proceedings" or evidence of "serious and obstructionist misconduct." *People v. Hunt*, 2016 IL App (1st) 132979, ¶ 18 (explaining type of delay that justifies denying right to self-representation). The majority does not attempt to suggest Hollie engaged in obstructionist misconduct, nor could it. Nothing in the record indicates "obstructionist misconduct," let alone "serious" misconduct. *Id.*

¶ 52 Each time the trial court told Hollie it thought his request sought a delay, he responded that he was ready to proceed. He told the court he was "so ready to get it over with" and was willing to proceed without "any reports."

¶ 53 Like the trial court, the majority seems concerned that Hollie did not bring up representing himself during the preceding 22 months. But one need look no further than the majority's statement of facts for the explanation. Most of the first year of continuances involved discovery, and the State did not elect on this case until after 10 months. Then came ongoing plea negotiations. Indeed, 18 months in, the newly assigned assistant public defender had yet to meet with Hollie. At that point, the State also answered not ready for trial. The first time the case was set for trial, the *judge* was unavailable due to another trial. On the next date set for trial, again, the judge was engaged in a jury trial. And that precipitated the transfer. The State did not plan to call any witnesses on the first day, and an offer was still outstanding on the day Hollie asked to represent himself. How could Hollie have decided to reject the assistance of the public defender until he knew the case was actually going to trial and that all outstanding plea offers (perhaps one he would have accepted) were off the table? These facts provide wholly insufficient evidence to reasonably conclude that Hollie made his request to delay the proceedings.

¶ 54 What occurred after the trial court denied Hollie's request belies its ostensible concern for delay. The court gave counsel time to review the discovery documents and video with Hollie and then, after *voir dire*, again ensured that counsel had enough time to discuss the case with him. Hollie requested no more solicitude to review documents himself than what the trial court afforded his counsel. Moreover, nothing in the record before us indicates that granting Hollie's request would have "be[en] disruptive to the orderly schedule of proceedings." *Id.*

¶ 55 The majority adopts the State's argument that we must "indulge every reasonable presumption against the waiver" of the right to counsel. *E.g.*, *People v. Baez*, 241 Ill. 2d 44, 116 (2011). That admonishment, however, occurred in a far different context—determining whether the defendant made a clear and unambiguous request to represent himself or herself. *Id.* And in that context, it makes sense— we should presume that a defendant did not intend to proceed on their own where the record is capable of multiple interpretations of a defendant's complaints about counsel. Notably, the State has cited no case, and I have found none where we apply the presumption when considering delay.

¶ 56 The State similarly cites no Illinois case in which the defendant's request to represent themselves on the day of trial was considered dilatory absent other facts and for good reason. See *People v. Ward*, 208 Ill. App. 3d 1073, 1084 (1991) ("when a request to proceed *pro se* is made and there is no request of additional time to prepare, a motion to proceed *pro se* should generally be viewed as timely as long as it is made before trial"). Hollie's request came before trial, and he did not ask for more time, even telling the court that he would proceed without some reports if necessary. To repeat, nothing in the record contradicts Hollie's assurances that he was ready to proceed.

¶ 57 The trial court was not without recourse. For example, the trial court could have engaged in an analysis that Hollie did not make a knowing and intelligent waiver of his right to counsel. *Id.* Or, if it granted Hollie's request and then found Hollie ended up displaying obstructionist conduct, the trial court could have terminated his self-representation. *Id.* Instead, the trial court concluded, without sufficient evidentiary support, that Hollie's request was nothing but a delay tactic.

¶ 58 No reasonable review of the record could lead one to conclude that Hollie was attempting to delay or disrupt the proceedings. On the contrary, Hollie told the court he wanted to represent himself and was ready to proceed that day. Accordingly, I would hold that the refusal of Hollie's request to represent himself gives rise to an abuse of discretion.

¶ 59 Because denial of the right to self-representation is second-prong plain error, see *Hunt*, 2016 IL App (1st) 132979, ¶ 15 (citing *People v. Wrice*, 2012 IL 111860, ¶ 66), I would reverse Hollie's conviction and remand for a new trial.

¶ 60 An Entreaty for the Supreme Court to Modify Rule 23

¶ 61 I must dissent from the majority's choice to issue its decision as a written order rather than an opinion. As I explained in my discussion of the merits, the majority "modifies *** an existing rule of law," Ill. S. Ct. Rule 23(a)(1), by holding for the *first time* that the mere request to proceed *pro se* on the day trial is set to begin constitutes dilatory conduct. And, in my view, a dissent is a quintessential example of "an apparent conflict *** within the appellate court." Ill. S. Ct. Rule 23(a)(2). A dissent may not be "authority" as the rule contemplates, but it is evidence that the law is unsettled.

¶ 62 The Illinois Supreme Court took great strides in amending Rule 23 to allow the citation of written orders as persuasive authority. Ill. S. Ct. Rule 23(e)(1). The court should further amend Rule 23(a) to require disposition by opinion at the request of a single justice as the Court has done for oral argument. Ill. S. Ct. Rule 352 (a) ("oral argument shall be held in any case in which at least one member of the panel assigned to the case requests it.").

¶ 63 I have made this point before, see *People ex rel. Alvarez v. $59,914 United States Currency*, 2020 IL App (1st) 190922-U, ¶ 51 (collecting cases), and I hold fast to my expressed views.

Relegating a dissent or special concurrence to a written order when it meets the criteria set out in Rule 23(a) sends the misleading signal that the decision has not altered the law and lacks much value. Compare Ill. S. Ct. Rule 23(a) (binding precedent) with Ill. S. Ct. Rule 23(b) (persuasive authority). It also dampens the ability of a dissent or special concurrence to impact future panels of the appellate court or spark interest of the Illinois Supreme Court in discretionary review. This is especially harmful because the Illinois Supreme Court conditions its review on factors like the importance of the question presented or the existence of a conflict between and within the districts of the appellate court. See Ill. S. Ct. Rule 315(a) (eff. Oct. 1, 2020). There is evidence that the Supreme Court does not view written orders as creating conflict. From January 2019 through May 2021, the court granted 145 petitions for leave to appeal and of those only 20 (14%) came from unpublished orders.

¶ 64 The purpose of a dissent is to point out weaknesses and flaws in the majority opinion; to seek change in the law; to draw legal and public discussion of the issues; to invite corrective action from our Supreme Court or other branches of government; and to expand or narrow the scope of the majority's judgment. See Melvin Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue*, Pantheon Books (2015), at 5 (dissents are "the voice that says, 'listen to me. I think [my colleagues] have got it wrong. This is why, and this is what the law should be.'"); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn L. Rev. 1, 2 (2010) (dissent "signals that, in the dissenters' view, the Court's opinion is not just wrong, but grievously misguided."); William J. Brennan, *In Defense of Dissents* 37 Hastings L. J. 427, 431 (1985)(dissents in part "sow seeds for future harvest").

¶ 65 Special concurrences function analogously. As Professor Melvin Urofsky, a legal historian and commentator, explained, "Concurring opinions are not dissents, in that they set out conclusions and rationales far different from the majority, but they play a role in the dialogue that is in many ways similar to a dissent." Urofsky, *supra,* at 24.

¶ 66 Dissents and special concurrences are rare, whether in opinions or written orders. According to First District data for 2020, a dissent occurred in about 2.5% of written orders and a special concurrence occurred in about 1.5% of written orders. So a tiny number of cases would be affected by letting any panel member designate a decision as an opinion, especially because the panel usually agrees on the form of the decision.

¶ 67 Though I would find this decision merits publication under Rule 23(a)(1) or 23(a)(2), in deciding to keep the decision unpublished my colleagues are acting within the text of the rule—they are, after all, a majority. Nevertheless, for the good of the common enterprise in which the appellate court operates, I urge modifying Rule 23(a) so that in those few cases when the panel finds itself divided, the request of one justice suffices for issuance as an opinion.

¶ 68 I am reminded of what Justice Seymour Simon, whom many consider one of our greatest justices, wrote, "A dissent is more than a statement of disagreement; it provides an opportunity for the reexamination of troublesome questions. Discreet silence may foster collegiality, but it does not enhance the resolution of difficult problems." *People v. Albanese,* 104 Ill. 2d 504, 552 (Ill. 1984) (Justice Simon, concurring in part and dissenting in part). Because dissents and special concurrences "enhance the resolution of difficult problems," when a decision meets one of the criteria for an opinion, any justice should be able to confer the distinction an opinion confers.