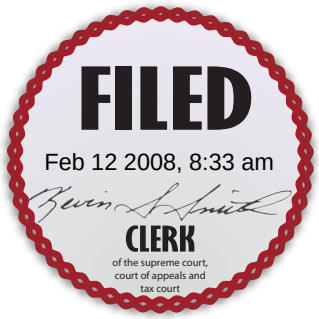

ATTORNEYS FOR APPELLANT:

JAMES H. VOYLES
JENNIFER M. LUKEMEYER
Voyles, Zahn, Paul, Hogan & Merriman
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

ROBERT C. REED,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 73A01-0704-CR-173
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Jack A. Tandy, Judge
Cause No. 73D01-0609-FC-35

February 12, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Robert C. Reed appeals his convictions, after a jury trial, on three counts of forgery, class C felonies; one count of theft and two counts of attempted theft, all class D felonies; and one count of corrupt business influence, a class C felony.

We affirm.

ISSUES

1. Whether Reed's convictions must be reversed because the record fails to reflect that he voluntarily, knowingly and intelligently made the decision to represent himself at trial.

2. Whether the charging informations provided sufficient information to apprise Reed of the nature of the offenses that the State alleged he had committed.

FACTS

In early June of 2005, Reed met with Wayne Coil and proposed that they engage in a joint venture in real estate. Specifically, Reed proposed that he locate real estate that had been the subject of foreclosure actions; Coil would finance the acquisition of those properties; Reed would then undertake the improvement of the properties; subsequently, the properties would be sold and the profits split. Coil agreed.

One property was located by Reed, with representations from him as to its value and the potential profit upon resale; the LLC formed by Coil purchased it. Within days, Reed advised Coil that he had located a buyer for the property just purchased by the LLC, and he also proposed three additional properties for purchase. With respect to Reed's proposed sale of the purchased property, Coil asked for a signed purchase agreement and earnest money from the prospective buyer. Coil produced a purchase agreement

purportedly signed by Dan Guffey and a money order. With respect to the additional properties that Reed proposed purchasing, Coil also asked for specific additional information. Coil received by fax from Reed a copy of his purported foreclosure list and deeds for two of the properties.

Subsequently, the following information came to light. At the time of Reed's initial proposal to Coil, all of these properties were owned by corporate entities of Reed's father. Since February of 2005, Guffey had been living in the house on the one property purchased by Coil's LLC (on June 17, 2005) and had been making payments to Reed to buy that property on contract. Further, the "Dan Guffy" signature on the purchase agreement given to Coil by Reed was not that of Dan Guffey. The two deeds faxed to Coil were fakes, and at least one was produced on a computer in Reed's home. The purported foreclosure list faxed to Coil had also been created by that computer.

Coil confronted Reed about the misrepresentations. Reed offered to buy the property purchased by Coil's LLC; however, Reed failed to follow through and make the purchase.

On September 8, 2006, the State filed charges, alleging that Reed had committed the seven criminal offenses noted above. An initial hearing was held on September 14, 2006. On September 25, 2006, Bryan Barrett filed his appearance as pauper counsel for Reed. On October 11, 2006, Barrett filed a motion seeking a speedy trial for Reed. On October 12, 2006, the trial court scheduled trial for December 12, 2006.

On the morning of trial, December 12, 2006, the trial court noted a letter written by Reed asking for a continuance.[1] Reed confirmed that he wanted to "continue [his] case," and explained that he did not believe his attorney was prepared for trial. (Tr. 11). Reed's counsel informed the trial court that he had met with the prosecutor, interviewed a witness, read documents, and was prepared for trial – although "[he]'d like more time." (Tr. 13). The trial court denied Reed's "request for continuance," stating that Reed had "invoked [his] right to a speedy trial," and at the December 1st pre-trial conference had "indicated [he] wished to proceed to trial" on December 12th; therefore, the trial court would not grant a continuance "at the last minute because [he'd] had a change of heart." (Tr. 15).

Reed then expressed his intention to "terminate[]" his counsel's representation. *Id.* The trial court advised Reed that he had "a right to represent [him]self," and that he should choose whether to "allow Mr. Barrett to continue to represent [him] or . . . represent [him]self." (Tr. 16, 17). Reed inquired,

> So, I don't have the right . . . you're telling me that I, on the record, that I do not have the right to obtain counsel which I've been . . .[2] which I have obtained.

(Tr. 17). The trial court responded,

> If . . . if someone's ready to come in and try your case this morning that'd be fine, but I'm not gonna continue your case because you've decided to . . . to change attorneys here at the last minute.

Id.

---

[1] The letter was not made part of the record.

[2] The transcript itself contains this ellipsis, as well as those in subsequent quotations from the transcript.

Reed stated that he "would proceed . . . representing [him]self." (Tr. 18).

The trial court then stated,

> Okay. Well, let me advise you there's some dangers in doing that, Mr. Reed. There's . . . you're not an attorney. You don't know legal procedures. You'll have difficulty in . . . I summarize you would have difficulty in presenting evidence in your case. You would have difficulty in making objections to evidence that the State offers that may not be admissible. If you choose to represent yourself you're gonna be held to the same standard as if you were an attorney in terms of knowledge of the law and . . . and evidentiary practices. So, there are certainly dangers in proceeding without an attorney. You have that right if you choose to do that, but I would advise against you doing that.

(Tr. 18). Reed stated, twice, "I understand," (Tr. 18, 19), and advised the trial court that he would "proceed pro se." (Tr. 19). The State then added its advisement to Reed that some "questions [he] ask[ed]" witnesses "or things that [he said]" might "make his prior convictions admissible." (Tr. 18, 19, 18). Reed reaffirmed his decision to proceed pro se.

Reed represented himself during the three-day jury trial. He conducted voir dire of the jury, made an opening statement, extensively cross-examined witnesses for the State, and elicited supportive testimony from a witness of his own. In his closing argument, he presented his version of what he believed the evidence had shown. Reed also noted that he "ha[d] chosen" to represent himself, a choice he "was okay with" because he "ha[d] something more powerful than the most gifted talking attorneys in the world" by "ha[ving] the truth going for [him]." (Tr. 743). Reed urged the jury to "consider the facts that have been presented" and "remember" that the State's burden was to prove the offenses beyond "reasonable doubt," a burden he "d[id]n't think they'[d]

met." (Tr. 759). On December 14, 2006, the jury returned guilty verdicts on all seven counts.

DECISION

1. Waiver of Right to Counsel

Reed argues that he "did not make a voluntary, knowing, and intelligent waiver of his right to counsel when he opted to proceed as his own attorney." Reed's Br. at 6. We cannot agree.

The rights embodied in the Sixth Amendment protect the fundamental right to a fair trial. *Poynter v. State*, 749 N.E.2d 1122, 1125 (Ind. 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 64 (1984)). In recognition of the fact that the average defendant does not have the professional legal skills to defend himself at trial, it is required that a defendant's choice to appear without professional counsel be made intelligently. *Poynter* at 1126 (citing *Johnson v. Zerbst*, 304 U.S. 458, 462-64 (1938)).

When a defendant asserts the right to self-representation, the trial court should tell the defendant of the "dangers and disadvantages of self-representation." *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)). However, "there are no prescribed talking points the court is required to include in its advisement to the defendant." *Poynter*, 749 N.E.2d at 1128. Having made the necessary advisements to the defendant, in order to accept the defendant's decision to represent himself, the trial court must "come to a considered determination that the defendant is making a voluntary, knowing, and intelligent waiver" of his right to be represented by counsel *Id.*

Indiana's Supreme Court has adopted an analysis consisting of "four factors" for an appellate court to consider when reviewing the adequacy of a defendant's waiver of representation. *Kubsch v. State*, 866 N.E.2d 726, 736 (Ind. 2007). Specifically, we consider (1) the extent of the court's inquiry into the defendant's decision; (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation; (3) the background and experience of the defendant; and (4) the context of the defendant's decision to proceed pro se. *Id.* Nevertheless, determining whether the defendant's waiver was knowing and intelligent remains dependent on the particular facts and circumstances surrounding the case. *Id.*

We are somewhat troubled by the paucity of the trial court's inquiry into Reed's decision as well as his background and experience. That said, the record does reflect that Reed had had experience with the criminal justice system. A motion in limine filed by his counsel (and discussed and granted before any discussion of Reed's desire to terminate his counsel), sought to exclude any reference to "other arrests and/or convictions" of Reed. (App. 37). Further, Reed had pleaded guilty to a federal charge in 2001 and served his sentence in a federal penitentiary. The record also reflects that Reed was not an unsophisticated individual, having previously worked in the banking and real estate industries. Finally, as reflected in our narration of Reed's actions at trial, he substantially performed in the fashion expected of counsel.

The State brings to our attention *Jones v. State*, 783 N.E.2d 1132 (Ind. 2003). In *Jones*, our Supreme Court described the trial court's advisements of Jones "regarding the potential danger" of self representation as follows:

> The Judge reminded Jones that he was not trained in the law and that his attorneys were. It cautioned him that he would be held to the same standard as a lawyer "as far as the rules of evidence and arguments go. I'm not going to cut you any slack in this regard." It warned him that if he was convicted he would not be able to claim ineffective assistance on appeal.

783 N.E.2d at 1139 (internal citations to the record omitted). The trial court then asked Jones "whether he wanted to represent himself, and Jones said he did." *Id.* Our Supreme Court found this inquiry, along with Jones' response, "adequate to establish that Jones exercised his right to represent himself pro se knowingly, willingly, and voluntarily." *Id.*

Here, the substance of the trial court's warnings to Reed nearly mirrors that of *Jones*. Moreover, the facts discussed above with respect to Reed's background support the conclusion that his decision was an informed one. This conclusion is buttressed by our review of Reed's questioning of witnesses and his arguments to the jury – which suggest that he desired to convey his version of the facts in a way that he believed only he could do. Based on the particular "facts and circumstances of this case," we conclude that Reed's "waiver was knowing and intelligent." *Kubsch*, 866 N.E.2d at 736.

2. Adequacy of Charging Informations

Reed argues that reversal of his convictions is warranted because the allegations in the charging informations were "so overbroad" that they failed to provide him with notice "of the crimes for which he stood accused." Reed's Br. at 6. Inasmuch as Indiana law requires such a deficiency to be challenged in a motion to dismiss filed "no later than 20 days prior to the omnibus date," Ind. Code § 35-34-1-4(b)(1), and that no such motion was filed here, Reed claims the matter rises to the level of "fundamental error." We disagree.

Fundamental error is error so prejudicial to the rights of the defendant as to make a fair trial impossible. *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002) (internal citation omitted). To be fundamental error, the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. *Id*. Moreover, the doctrine of fundamental error "is available only in egregious circumstances. *Brown v. State*, 799 N.E.2d 1064, 1068 (Ind. 2003).

For an alleged defect in a charging information to constitute fundamental error, it must have so prejudiced the defendant's rights that a fair trial was impossible. *Truax v. State*, 856 N.E.2d 116, 123 (Ind. Ct. App. 2006). The purpose of a charging information is to advise the accused of the particular offense charged so that he can prepare a defense. *Id.* The information should state the offense in the language of the statute, or in words that convey a similar meaning. *Id.*

Count I alleged that on or about June 21-22, 2005, Reed committed the offense of forgery, as a class C felony, when he

> with intent to defraud, did make or utter a written instrument in such a manner that it purports to have been made by another person; at another time; with different provisions, and/or by authority of one who did not give authority . . . . (App. 37, 13).

Count II alleged that on or about June 17, 2005, Reed committed the offense of theft, as a class D felony, when he

> did knowingly exert unauthorized control over the property of Wayne Coil, d/b/a W.T.C. Holding, LLD, with the intent to deprive said person of any part of the use or value of the property . . . . (App. 13A).

Count III alleged that on or about June 22, 2005, Reed committed the offense of forgery, as a class C felony, when he

> with intent to defraud, did make or utter a written instrument in such a manner that it purports to have been made by another person; at another time; with different provisions, and/or by authority of one who did not give authority . . . . (App. 13B).

Count IV alleged that on or about June 22, 2005, Reed committed the offense of attempted theft, as a class D felony, when he

> did knowingly attempt to exert unauthorized control over the property of Wayne Coil, d/b/a W.T.C. Holding, LLD, with the intent to deprive said person of any part of the use or value of the property, by knowingly taking a substantial step toward commission of theft by preparing, altering and/or presenting a false or altered document, ... (App. 14).

Count V alleged that on or about June 22, 2005, Reed committed the offense of forgery, as a class C forgery, when he

> with intent to defraud, did make or utter a written instrument in such a manner that it purports to have been made by another person; at another time; with different provisions, and/or by authority of one who did not give authority . . . . (App. 15).

Count VI alleged that on or about June 22, 2005, Reed committed the offense of attempted theft, a class D felony, when he

> did knowingly attempt to exert unauthorized control over the property of Wayne Coil, d/b/a W.T.C. Holding, LLD, with the intent to deprive said person of any part of the use or value of the property, by knowingly taking a substantial step toward commission of theft by preparing, altering and/or presenting a false or altered document, ... (App. 16).

And Count VII alleged that between June 9, 2005, and November 7, 2005, Reed did committed the offense of corrupt business influence, a class C felony, when he

> did knowingly receive proceeds, to wit: U.S. Currency, cash, funds, an interest in real estate and/or an interest in a business entity from a pattern of racketeering activity, to wit: theft, attempted theft, and/or forgery; and did use or invest said proceeds or proceeds derived from said proceeds to: acquire an interest in real property; establish an enterprise; operate an enterprise . . . . (App. 17).

The above charging informations do state the offenses in the language of the respective criminal statutes. An information is "held sufficient if it tracks the language of the statute defining the crime." *Gordon v. State*, 645 N.E.2d 25, 27 (Ind. Ct. App. 1995). Reed does not assert that he was misled by the wording of the charging informations. *Truax*, 856 N.E.2d at 123. Reed makes a series of claims about what could have been more specifically alleged in the various counts. However, such claims should be raised in a motion to the trial court – as provided by statute; we do not find them to demonstrate how the charging informations here so prejudiced his rights that a fair trial was impossible. Therefore, we find no fundamental error.

Affirmed.

BAKER, C.J., and MAY, J., concur.