

State of New Hampshire
Supreme Court

No. 2018-0433

2019 Term
September Session

State of New Hampshire

v.

Michael Munroe

APPEAL PURSUANT TO RULE 7 OF A JUDGEMENT OF THE ROCKINGHAM
COUNTY SUPERIOR COURT

BRIEF OF THE PETITIONER MICHAEL MUNROE

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ISSUES PRESENTED

- I. Whether the court erred when it ruled that the defendant did not properly assert his right to appear pro se.
- II. Whether the court erred in not allowing defense counsel to withdraw as a result of the assertion of the defendant's right to appear pro se.
- III. Whether the court erred in requiring that defense counsel proceed by "trial in absentia."
- IV. Whether the court erred when it allowed medical personnel to testify that the individual treated was "Walter Velez" over the defense's objection that the testimony was inadmissible hearsay not covered by any exception to the hearsay requirement.
- V. Whether the court erred in denying the defendant's notice of self-defense prior to the commencement of trial.

STATEMENT OF CASE

In October, 2017, the defendant, Michael Munroe, was charged by indictment with two counts of Assaults by Prisoners; one for an alleged assault against another inmate, Walter Velez, and the other indictment alleging an assault on Corrections Officer Graham. *See* RSA 642:9 (2015). In January, 2018, the court held a final pre-trial hearing, issued a *capias* for the defendant who was in federal custody. Shortly thereafter, the State initiated paperwork under the Interstate Agreement on Detainers. The defendant waived extradition on the paperwork. On June 6th, 2018, the defendant had a two-day jury trial on these charges in the Rockingham County Superior Court (*Wageling, M. J.*). The jury found the defendant guilty on one count Assault by Prisoner, and not guilty on the other. The defendant was sentenced to 1 ½ to 3 years in the New Hampshire State Prison, stand committed, to run consecutively to the federal sentence the defendant was serving. *See* RSA 651:2, II (2014); RSA 651:6 (2006). (Sentencing Hearing, p.33). This appeal followed.

STATEMENT OF FACTS

On January 25th, 2018, a final pre-trial hearing¹ was held on this matter in the Rockingham County Superior Court. At the time, the defendant was in federal custody at the United States Penitentiary in Allenwood, Pennsylvania, and not present at the hearing. FPT1, p.2. The State requested, and the court so ordered, a *capias* for the defendant to initiate the Interstate Agreement on Detainers (IAD), so that the defendant could be tried in New Hampshire state courts. FPT1, p.2, 3.

On May 7th, 2018, a second final pre-trial hearing was held². The court was advised that the victim in the case, Walter Velez, planned on asserting his rights under the Fifth Amendment of the United States Constitution. During the hearing, it was noted that the defendant had waived the extradition process and voluntarily agreed to come back to New Hampshire for the trial. FPT2, p. 5-11. The court ordered that a “Richards³” hearing be held regarding Mr. Velez, and that counsel be appointed to represent him.

On May 25th, 2018, a third final pre-trial hearing⁴ was held. Mr. Velez asserted that he did not wish to cooperate nor testify, and was going to “do that five thing,” as he had been found guilty of his involvement in the fight underlying the assault charge by a jail disciplinary board. However, the State did not believe the conduct rose to the level of an assertion under the Fifth Amendment. Nonetheless, the State noted they would offer immunity on the charge of Assault by a Prisoner to Mr. Velez. FPT3, p.3, 4. At this third final pre-trial, the court reversed its prior order for a “Richards” hearing, however, indicated that Mr. Velez would be questioned by the court to finalize this determination. FPT3, p. 9.

¹ This Final Pre-Trial Hearing will hereinafter be referred to as FPT1.

² This Final Pre-Trial Hearing will hereinafter be referred to as FPT2.

³ State v. Richards, 129 N.H. 669 (1987)

⁴ This Final Pre-Trial Hearing will hereinafter be referred to as FPT3.

The State additionally notified the court that they had seized Mr. Velez's medical records from after the assault through a search warrant. FPT3, p. 10. As such, the State noted that a Motion to Compel the medical provider's testimony would be filed as Mr. Velez would not issue a release. FPT3, p. 10.

On June 4th, 2018, a pre-jury selection hearing commenced prior to trial⁵. The defendant was present for this hearing. PJS, p.6. The defendant asserted he did not understand the proceedings, the basis for the charges, or the court's jurisdiction as he was a federal inmate. PJS, p. 6. The defendant specifically noted he did not understand the process by which he was transferred from federal custody. PJS, p. 7. The court generally described the nature of the Interstate Agreement on Detainers as authority to transfer inmates between jurisdictions to answer pending charges. PJS, p. 8. The defendant asserted that he could not move forward intelligently and competently, decide whether he wished to proceed pro se, and to present a defense absent understanding the authority of the jurisdiction. The court noted any decision to proceed pro se would require a colloque. PJS, p. 13, 14, 20. The court noted the defendant could either be represented by counsel or have them on standby status for legal consult. PJS, p. 13. The defendant asserted that he was being denied the right to proceed on a pro se basis. PJS, p. 13-14. The defendant further noted he felt counsel appointed by the court were not considering competent arguments, and that he believed his counsel had already determined him guilty. PJS, p. 22, 23. The defendant unequivocally stated he did not wish for the assistance of counsel. PJS, p. 20. The court advised the defendant that jury selection would proceed with defense counsel. PJS, p. 22. The court ordered trial to proceed, despite the defendant's multiple objections. PJS, p. 23.

Jury selection⁶ began immediately thereafter. JS, pg. 2. Defense counsel noted the defendant had clearly stated that he did not want the assistance of counsel, and forcing him to proceed with counsel interfered with the defendant's right to represent

⁵ Hearing Pre-Jury Selection will hereinafter be referred to as PJS.

⁶ Jury selection will hereinafter be referred to as JS.

himself. JS, p. 3, T1, p,14. The court disagreed, noting that it found the defendant indecisive about if he wished to proceed pro se, and that it deemed the defendant incompetent to represent himself. JS, p. 3. The defendant advised the court that he chose not to attend the jury selection. JS, pg. 4. The court noted a further hearing on the issue of the defendant proceeding pro se could be held to determine his understanding of the rules of evidence and court procedure. JS, p. 4.

On June 5th, 2018, a Richards hearing⁷ was held regarding the Fifth Amendment assertion of Mr. Velez. RH, pg.1. Prior to the commencement of the hearing, the court asked the defendant if he wanted to continue with defense counsel. The defendant, through counsel, indicated that he wished to proceed pro se. RH, p. 3. A final inquiry was made regarding representation, to which the defendant requested a continuance, to submit a motion regarding proceeding pro se. The court denied the request for a continuance. RH, p. 7. The court then ordered defense counsel to represent the defendant. RH, p. 9. The defendant then absented himself from the proceedings, based on the court's rulings. RH, p. 11.

Defense counsel noted that the court proceeding with the defendant in absentia, when noting his wish to proceed pro se, violated his constitutional rights, and challenged the State's burden to establish by a preponderance of the evidence that the defendant had waived his presence voluntarily. RH, p. 13. The court made a finding by a preponderance of the evidence that the defendant had chosen to voluntarily absent himself from the jury selection process. RH, p. 17.

During this same hearing, the court proceeded in finding Velez a material witness, and pre-emptively held him in contempt, should he refuse transport for trial. RH., p. 30-32.

On June 6th, 2018, trial⁸ commenced in this matter. Prior to the jury convening in the courtroom, the court informed counsel that both Walter Velez and the defendant had refused to be transported to court. T1, p.3. The court issued a contempt order for

⁷ The Richards hearing will hereinafter be referred to as RH.

⁸ Day 1 of Trial will hereinafter be referred to as T1.

Mr. Velez and further noted that the defendant could “potentially” be held in contempt if he continued to refuse transport. T1, p. 3.

The State advised that although Mr. Velez had been deemed a material witness, his status could change as evidence was introduced. T1, p. 5, 6.

Defense counsel argued that the defendant remaining in absentia during trial was not a refusal to participate in his defense; but more an action driven by the Court in ordering defense counsel to represent him during the trial. T1, p. 7, 8. The Court acknowledged that the defendant had a constitutional right “up to a point” to dictate his defense. The court noted that if the defendant chose to appeal the issue that he did not want to be represented by counsel, his argument would likely be “sustained.” T1, p. 8.

The court further advised defense counsel that, based on prior experience with the defendant, he was an intelligent and sophisticated individual with great knowledge of the criminal justice system, and that it was not credible that he was now claiming to be “confused”. T1, p.9-11. This finding contradicted the court’s previous assertion that the defendant was incompetent to proceed pro se. The court noted that the defendant may be attempting to develop a record for appellate purposes. T1, p. 9-11. Defense counsel noted that the defendant had unequivocally invoked his right to appear pro se. T1, p. 14. Defense counsel further noted that the State was unable to declare, and the court to find, Mr. Velez a material witness, yet nonetheless desired to proceed with him as their last witness in the event he became a non-material witness, (RH, pg. 32, and T1, pg.6) and simultaneously note that a continuance was not necessary as Velez would not change his position regarding participation. T1, p.16-18. The Court advised counsel that no mistrial would be declared if Mr. Velez ultimately did not testify, and that the State would bear the outcome of the verdict due to the fact that they had made the decision to go forward without him. T1, p. 18.

During trial, the State called Dr. Elizabeth Andrada, as a witness in the matter. Dr. Andrada testified that she recalled treating Mr. Velez on the evening of the alleged assault. T1, p.124. Defense counsel objected on the grounds that Dr. Andrada’s

testimony was hearsay. T1, p.124. The State argued that Dr. Andrada was testifying as to her own independent recollection, and was covered by the medical records exception to the hearsay rule. T1, p.125. Defense counsel objected, stating no one had offered testimony identifying Mr. Velez as having been transported to the hospital and that the State was offering the testimony to prove the truth of the matter asserted; that the injuries were to Mr. Velez. They also argued that his name was not necessary for medical treatment. T1, p. 127. The State argued the identity of Mr. Velez was relevant for the purposes of his medical diagnosis and treatment, thereby meeting the exception. The Court overruled defense counsel's objection, ruling that the doctor could rely on medical records in order to make a diagnosis and provide treatment, including the identity of Mr. Velez. T1, p. 127,128.

Dr. Andrada proceeded to offer testimony that Mr. Velez's face was swollen, with his left eye completely swollen shut. Dr. Andrada testified that Mr. Velez was given a CAT scan of his head, which indicated multiple fractures. T1, p.135.

Prior to trial, the defendant had filed a Notice of Self Defense that was stricken by the court. T1, p. 103. Defense counsel notified the court that the defendant was prepared to argue that he was justified in defending himself from the use of non-deadly force by Mr. Velez and Officer Graham. Appendix I.

The State filed an Objection to the Notice of Self Defense, arguing that the defendant was not entitled to argue self-defense as a matter of law based upon the offer of proof in the submitted notice. Appendix II.

The court issued an order striking the defendant's Notice of Self Defense, finding the offer of proof contained within to be insufficient for lack of factual assertions regarding any pre-emptive threat or assault by either named victim. See Appendix III.

After deliberations, the jury found the defendant guilty of one count of Assault by a Prisoner, for the indictment naming Velez as the victim.

SUMMARY OF THE ARGUMENT

Defendant appeals his guilty verdict of one count of Assault by Prisoner under RSA 642:9 (2015). Defendant argues his Constitutional rights under the Sixth Amendment of the United States Constitution and Part I, Article 15 of the New Hampshire Constitution were violated when he was denied the opportunity to appear pro se. Defendant asserts the trial court erred when it allowed defense counsel to then proceed to represent him in his absence.

The Defendant further argues the Court erred in refusing to allow defense counsel to withdraw their representation, knowing Defendant had unequivocally stated he wanted to represent himself. In addition, Defendant contends the trial court erred in allowing inadmissible hearsay evidence that did not qualify for the exception to the hearsay rule.

Finally, the trial court erred in denying the Defense Notice of Self Defense and Competing Harms prior to the commencement of trial and the presentation of evidence in this matter.

ARGUMENT

Whether the trial court erred in ruling the defendant did not properly assert his right to appear pro se.

The Sixth Amendment to the United States Constitution and Part I, Article 15 of the N.H. Constitution guarantee a criminal defendant the right to counsel and the right to self-representation. State v. Sweeney, 151 N.H. 666, 670 (2005). The court in State v. Ayer, 154 N.H. 500, 516 (2006), determined that “the right to counsel and the right to self-representation are mutually exclusive; the exercise of one right nullifies the other.” In State v. Martin, NH: Supreme Court 2018, the court quoting Ayer, “to be effective, an assertion of the right to self-representation must be clear and unequivocal. This requirement is necessary to protect a defendant from inadvertently waiving the right to counsel through 'occasional musings on the benefits of self-representation.’” U.S. v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000).

During the pre-jury selection hearing, defendant informed the court he objected to the assistance of defense counsel. He requested a status of counsel hearing and answered the question of whether he wanted to represent himself with “stand up for myself.” PJS, p. 20. Defendant believed the court was “forcing counsel upon him.” PJS, p. 22. He expressed his concern to the court that defense counsel could not properly represent him because they believed he was guilty and there was conflict between them.

There is the presumption that “courts should indulge in every reasonable presumption against waiver.” Brewer v. Williams, 430 U.S. 387, 404 (1977); State v. Davis, 139 N.H. 185, 190 (1994). However, the court in Martin noted that “notwithstanding this presumption, there is no requirement that a Defendant use specific language to invoke his right to self-representation: The triggering statement in a defendant's attempt to waive his right to counsel need not be punctilious; rather, the dialogue between the court and the defendant must result in a clear and unequivocal

statement.” Sweeney, 151 N.H. at 670 (quoting U.S. v. Proctor, 166 F.3d 396, 403 (1st Cir. 1999)).

In this case, defendant's statements, “stand up for myself,” “I'm under personal appearance,” and his answer “no” to the court's question: “Would you like the assistance of counsel?” all constituted “triggering statements” that required a judicial inquiry. PJS, p. 21. In this case, defendant was very clear that he did not want the assistance of defense counsel.

The following day, at the beginning of the Richards hearing, defense counsel informed the court that the defendant asked defense counsel to “step aside.” RH, p. 3. Defendant was brought into the courtroom. After questioning, defendant requested a continuance to conduct research and submit an appropriate motion in writing. His request was denied. Defendant told the court, “I don't give consent for them to even answer on my behalf” referring to defense counsel. RH, p. 9. Defense counsel was ordered to continue their representation. Defendant disagreed with the court's decision and decided to absent himself from the proceedings.

Defendant clearly and unequivocally made his decision known that he did not want to be represented by defense counsel and that he wanted to represent himself. In addition, defendant requested a continuance to submit a written motion discussing the rejection of counsel and to conduct more research on the topic. The request was denied. Based upon the Sixth Amended and Part I, Article 15 of the N.H. Constitution, defendant's right to counsel or the right to waive counsel and represent himself was violated. This Court has ruled that no specific language is required when a defendant invokes his right to self-representation. On several occasions in the matter before the Court, defendant made statements regarding his desire to proceed pro se. The trial court also erred in not conducting a sufficient inquiry into why defendant did not want to be represented by defense counsel, and the determination that he was “incompetent” to proceed pro se was contrary to the trial court’s own assessment that he was an intelligent and sophisticated individual with great knowledge of the criminal justice system. T1, pg.9-11.

Whether the court erred in not allowing defense counsel to withdraw as a result of the assertion of the defendant's right to appear pro se.

Rule 1.16(b)(1) provides that a lawyer may withdraw if “the withdrawal can be accomplished without material adverse effect on the interests of the client.” N.H. R. PROF. CONDUCT 1.16(b)(1). In State v. Emanuel, 139 N.H. 57, 60 (N.H. 1994), the court noted that “under New Hampshire Superior Court rules, an attorney in a case that has been assigned for trial can withdraw from representation only if granted permission by the court upon a showing of good cause. SUPER. CT. R. 15. Good cause determinations are generally in the discretion of the court and depend upon such considerations as proximity of the trial date and possibility for the client to obtain other representation.” State v. Dukette, 127 N.H. 543 (1986); State v. Mikolyski, 121 N.H. 116 (1981); State v. Linsky, 117 N.H. at 880 (1977).

In this case, defense counsel had good cause to withdraw their appearance. Defendant made it clear several times to the court that he did not want defense counsel to represent him. He believed it would be prejudicial to his defense, because he held the belief that defense counsel had already determined he was guilty. In addition, defendant expressed his desire to exercise his rights under the Sixth Amendment and Part I, Art. 15 of the N.H. Constitution to appear pro se. Defense counsel noted that the defendant stated he did not want the assistance of counsel, which invoked his right to appear pro se; therefore, asking defense counsel to remain interfered with the defendant's right to self-representation. The court disagreed and proceeded to order the jury selection.

Defense counsel's concern for defendant's rights to appear pro se constituted “good cause” and would not have had a material adverse effect on the defendant, since he had unequivocally invoked his right to appear pro se. Defense counsel's reasons for wanting to withdraw their representation were rejected. Thus, the trial court was unable to properly consider the existence of good cause versus the potential prejudice to the defendant.

Whether the trial court erred in requiring defense counsel to proceed by “trial in absentia.”

Once defendant left the Richards hearing, defense counsel addressed the court by inquiring “my understanding is that the court is requiring us to proceed with defendant in absentia, with his presence waived.” RH, p. 12. Counsel cited State v. Lister, 119 N.H. 713 (1979), where the court held that “where a trial has commenced, proceeding in absentia does not violate the New Hampshire Constitution.” Defense counsel noted that in this case, defendant absented himself prior to the beginning of the trial and prior to the selection of the jury. The court in Lister refused to answer the question of whether the start of a trial was a requirement to determining whether the defendant voluntarily waived his right to be present during the proceedings. Defense counsel noted that the State had not established by a preponderance of the evidence that defendant had voluntarily waived his right to be present. Id. It was also noted that the absence of the defendant occurred prior to trial commencing, as distinguishable from Lister.

The court noted that since the defendant was in her presence when he absented himself, it was not necessary for the State to prove the he voluntarily waived his right to appear. The court made a “finding by a preponderance of the evidence” that defendant voluntarily absented himself the previous day when he left the courtroom prior to jury selection.

The State argued that the defendant’s rights had not been violated, citing State v. Davis, 139 N.H. 185, 190 (1994.)_In Davis, the defendant, indicated during a pretrial conference that he voluntarily chose not to participate in the trial. The court in Davis concluded the trial could proceed without violating defendant's rights, because he had “knowingly and intelligently” waived his right to be present during the trial. In the present case, the court informed the parties that the case was going to proceed to trial in defendant's absence.

It was never determined whether or not defendant “knowingly and intelligently” waived his right to be present during the trial. Defendant, when asked if he wanted to stay

for the proceeding or leave, stated he could “not make an appropriate decision intelligently and competently.” Defendant reminded the court that he requested “time to investigate, research, and be able to make the appropriate decision.” Going forward without affording the defendant the opportunity to make an intelligent decision as to his presence during the proceedings was a violation of the defendant's due process rights.

This case is distinguishable from Davis. In that case, “the court engaged the defendant in a discussion to ensure he understood the consequences of his decision not to participate in the trial. The defendant stated that he understood the consequences, including the potential punishment that could be imposed, if he were to be found guilty.” See Davis. In the present case defendant was never asked if he understood the consequences of not participating in the trial. In fact, when defendant did not appear the following day, the court issued a contempt order against him. Therefore, in the absence of being given a full explanation of the consequences of his absence by the trial court, defendant could not have “effectively waived his right to be present at trial by refusing to attend.” Id.

Whether the court erred when it allowed medical personnel to testify that the individual treated was “Walter Velez” over the defense’s objection that the testimony was inadmissible hearsay not covered by any exception to the hearsay requirement.

In this case, Dr. Andrada testified that the individual she treated was in fact Mr. Velez. T1, pg. 124. Defense counsel made several objections to the testimony based on Dr. Andrada lack of direct knowledge as to Mr. Velez’s identity.

The Court allowed Dr. Andrada to not only testify about injuries to an individual that she treated, but further allowed her to identify that individual as Mr. Velez. Defendant argues that “the trial court violated his state and federal constitutional rights to 'compulsory process,' 'confront his accuser,' and to due process and a fair trial,” under N.H. Constitution, Part I, Article 15. State v. Roy, 111 A. 3d 1061 - NH: Supreme Court 2015.

We accord the trial court considerable deference in determining the admissibility of evidence, and we will not disturb its decision absent an unsustainable exercise of discretion. State v. Munroe, 161 N.H. 618, 626, (2011). To demonstrate an unsustainable exercise of discretion, the defendant must show that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. Id.

In this case, the victim, Walter Velez, the State's admitted "material witness" refused to cooperate and testify in this case after having previously pleading guilty to a disciplinary action at the facility for fighting in regard to the matter before the Court. After being threatened with contempt, Mr. Velez still refused to appear in court to testify of the alleged injuries he sustained by the Defendant. Defense counsel was denied the opportunity to cross-examine Mr. Velez about the fight and the injuries he sustained. The circumvention of this requirement by allowing Dr. Andrada to testify as to the identity of her patient was improper.

"Hearsay is generally defined as an extrajudicial statement offered in court to show the truth of the matter asserted in the statement." Id. (quotation omitted); N.H. R. Ev. 801(c). Hearsay evidence is generally inadmissible, subject to certain well-delineated exceptions. Id. at 626; see N.H. R. Ev. 802. One such exception, "Statements for Purposes of Medical Diagnosis or Treatment," applies to: [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances indicating their trustworthiness. N.H. R. Ev. 803(4). The rationale for this exception is that statements made with a purpose of obtaining medical attention are usually made with the motivation to obtain an accurate diagnosis or proper treatment and, thus, they are inherently reliable because there is normally no incentive to fabricate. State v. Lynch, 169 N.H. 689 (N.H. 2017) citing Munroe, 161 N.H. at 626.

A three-part test must be met for evidence to be admissible under Rule 803(4). Id.

at 627. First " a court must find that the declarant intended to make the statements to obtain a medical diagnosis or treatment." Id. Second, " the statements must describe medical history, or symptoms, pain, sensations, or their cause or source to an extent reasonably pertinent to diagnosis or treatment." Id. Third, the court must find that the circumstances surrounding the statements support their trustworthiness. Id. Here, the defendant challenges the trial court's ruling with respect to all prongs. The identity of the patient is not part of the process for diagnosing a patient. In fact, defendant would submit that if Velez had arrived at the hospital unconscious and unidentified, the treatment and diagnosis would be identical. His identity was not part of his medical treatment.

Absent the exception to the hearsay rule, the testimony of Velez's identity violated the defendant's ability to question and cross examine Velez. In State v. Peters, 133 N.H. 791 (1991), the court noted that "under Part I, Article 15 of the N.H. Constitution, an individual accused of a crime has the right 'to meet the witnesses against him face to face.' The protection afforded by the Sixth Amendment of the Federal Constitution is 'to be confronted with the witnesses against him.' The language of the N.H. Constitution in this regard is the more precise of the two, in that it explicitly provides what the Federal Constitution has been interpreted to mean. The U.S. Supreme Court has interpreted the federal language as guaranteeing a criminal defendant 'the right physically to face those who testify against him and the right to conduct cross-examination,'" Coy v. Iowa, 487 U.S. 1012, 1017 (1988) (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987)).

The court in Coy stated that "in order to sustain an exception to a defendant's confrontation rights, there must be an individualized finding that the witness in a particular case is unavailable to testify at trial." In this case, the victim, Mr. Velez, was not "unavailable." Instead, he refused to participate in the trial, even after being threatened with contempt of court. Therefore, defendant's confrontation rights under Part I, Article 15 of the N.H. Constitution were violated by the improper admission of hearsay evidence.

Whether the trial court erred in striking the defendant's Notice of Self Defense.

Defendant submitted a Notice of Self Defense, pursuant to RSA 627:4. Under 627:4, a person is justified in using non-deadly force upon another person in order to defend himself or a third person from what he reasonably believes to be the imminent use of unlawful, non-deadly force by such other person, and he may use a degree of such force which he reasonably believes to be necessary for such purpose. *Id.* The statute goes on to state that such force is not justifiable if the actor provokes the other person, or is the initial aggressor, which the State argued the defendant was in this case. The State makes this determination by utilizing conclusions drawn by the lead investigator in this matter, Deputy Kevin Swift. See Appendix II, paragraph 6. To allow the lead investigator to draw this factual conclusion, which should be the province of the jury, is impermissible.

RSA 627:4 goes on to state an exception if “the force involved was the product of a combat by agreement not authorized by law.” As no one saw what occurred prior to the altercation, the video does not capture the defendant and Velez above the waist, there is no audio, and no statements were given by Velez or the defendant, it is the province of the jury to determine if there is any doubt as to if threats or agreements to fight, or anything could have occurred that justified self-defense. “A ‘trial court must grant a defendant’s requested instruction on a specific defense if there is some evidence to support a rational finding in favor of that defense.’” State v. Noucas 165 NH 146, 148, (2013), quoting State v. Vassar 154 NH 370, 373 (2006). The State would thus bear the burden of disproving the defense asserted beyond a reasonable doubt. RSA 627:1(a), and State v. Soucy, 149 N.H. 349, 352-353 (1995.)

The court is not permitted to test the factual validity of a notice of defense filed pursuant to Superior Court Rule 14 (b) (2) (A). see State v. Champagne, 152 N.H. 423, 425, (2005.) The court acknowledged that Mr. Velez had plead guilty to fighting during a jail disciplinary hearing. See Appendix III, pg. 3. The court, despite these facts, makes a finding that there is insufficient evidence to support the Notice pursuant to Superior Court Rule 14. Despite the decision to strike the Notice being within the sound discretion of the trial court, defendant submits that this ruling was in clear error given the conclusory factual statements relied upon by the lead investigator and the dismissal of the fact that Velez had pro-actively plead guilty in a disciplinary hearing for his role in the

fight with the defendant.

CONCLUSION

Defendant's constitutional rights under the Sixth Amendment of the United States Constitution and Part I, Article 15 of the N.H. Constitution to self-representation were violated. The court found the defendant incompetent to proceed pro se. The court made findings regarding the claimant's competence and understanding of not participating in the trial and wanting to appear pro se. On the first day of trial, the court noted, "Mr. Munroe has been in front of me a number of times. He is a sophisticated individual who has great knowledge of the criminal justice system. He is articulate. He has cited to me various sections of the federal and state constitutions" in contradiction to this ruling of inability to proceed pro se.

Ordering defense counsel to represent defendant in his absence and denying their request to withdraw as counsel and allow the defendant to proceed pro se constitutes reversible error.

In addition, it was error to allow Dr. Andrada to testify to the victim's injuries without any direct knowledge of his identity. As a result, the State failed to present sufficient evidence to prove defendant committed the crime of assault against the victim. In light of the inadmissible testimony of Velez as the person sustaining specific injuries, the defendant's constitutional right to confront the victim was also violated.

For the foregoing reasons, this Court should reverse and vacate Defendant's conviction and sentence.

CERTIFICATION

It is hereby requested that this matter be scheduled for oral argument on the 3JX docket.

Undersigned counsel hereby certifies that each of the appealed decision that is in writing is being submitted at the time of brief filing.

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