ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR07-1282

JAMES E. HORVATH APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 11, 2009 APPEAL FROM THE POPE COUNTY CIRCUIT COURT, [NO. CR-2006-97] HONORABLE F. RUSSELL ROGERS, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

James E. Horvath was convicted in a Pope County jury trial of second-degree stalking for which he received a sentence of sixty months in the Arkansas Department of Correction. On appeal, he argues that he was denied his constitutional right to represent himself. We affirm.

Because Horvath does not challenge the sufficiency of the evidence, only a brief recitation of the facts is necessary. The conduct for which Horvath was convicted consisted of taking pictures on several occasions of the alleged victim, Marvis Neal, in a vehicle that she claimed belonged to her boyfriend. Horvath had previously had a relationship with Neal, during which he had provided her with thousands of dollars, some of which was used to purchase a Lexus. At some point, the relationship soured, and Horvath successfully sued to recover money and the vehicle. Subsequent to his civil suit, Neal filed bankruptcy. She

also filed a criminal complaint against Horvath that resulted in a conviction for third-degree battery.

Prior to trial on the stalking charge, a public defender, John Burnett, was appointed to represent Horvath. Horvath was never satisfied with Burnett's representation. During pre-trial hearings on October 13, 2006, and December 15, 2006, Horvath voiced his concerns to the trial court that Burnett was not keeping him informed about the case or pursuing the strategy that Horvath thought was appropriate. However, the trial court sided with Burnett. Horvath also filed a motion dated April 9, 2007, and file marked April 12, 2007, styled " Motion to Compel John Burnett to Communicate with James Horvath and Competently Represent Him and/or Motion for John Burnett to be Immediately Relieved." (Hereinafter, the " April 12 motion.")

On the morning of Horvath's May 9, 2007, trial, Horvath again voiced his dissatisfaction with Burnett. However, Burnett remained his attorney of record. Horvath inquired of the trial court,

> So you're going to force me to trial with John Burnett, that hadn't even subpoenaed witnesses I've asked for and hadn't let me see anything yet? You're forcing me to trial with an attorney that wouldn't even talk to me? *That I fired*?[1]

[1] During the pendency of this appeal, Horvath's appointed counsel discovered that a hand-written document, styled "Notice of Firing of John Burnett as Counsel and Additionally Request for Competent Counsel to be Appointed or Alternatively James Horvath Asserts and Demands That He Will Represent Himself Instead of Being Sold Out by Appointed Counsel John Burnett," did not appear in the record. This document was dated April 23, 2007, (hereinafter the "April 23 motion") and was purportedly filed along with another motion that

(Emphasis added.) The trial judge did not entertain the possibility that Horvath could represent himself. He merely told Horvath that he would only be allowed to " talk through Mr. Burnett," and " direct any questions you have or matters to Mr. Burnett."

After the trial, Horvath filed a pro se motion for a new trial, alleging that he was denied his constitutional right to represent himself. The motion was deemed denied. Horvath subsequently filed this appeal.

On appeal, Horvath argues that the trial court erred because he was denied his constitutional right of self-representation. Citing *Pierce v. State*, 362 Ark. 491, 209 S.W.3d 364 (2005), he notes that he could invoke this right provided that (1) the request to waive the right to counsel is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. Horvath concedes that initially, he sought other appointed counsel, which, pursuant to *Jarrett v. State*, 371 Ark. 100, 263 S.W.3d 538 (2007), would not qualify as an unequivocal request to proceed pro

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Horvath forwarded to the trial court from the Pope County Jail in which he asked to appear at trial without restraints, that does appear in the record. Upon remand to settle the record, the trial judge, Russell Rogers, claimed to have "no specific recollection of this particular motion." Although he admitted that Horvath requested that Burnett be "relieved as counsel several times," and that "all of the allegations and prayers of this motion are familiar and have all been considered and rejected previously" the trial judge stated that he was not "comfortable in supplementing the record" with this document. Accordingly, the April 23 motion was not made a part of the record and therefore cannot be considered on appeal. *Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2002).

se. However, he asserts that the request he made in the April 12 motion distinguishes this case from *Jarrett*. He contends that in that motion he made a request that Burnett be relieved outright. Further, he argues that this request "triggered the trial court's responsibility to address whether he was knowingly and intelligently waiving his right to counsel." Horvath argues that since the trial court failed to make this inquiry, his right to self-representation was denied. We find this argument unpersuasive.

Although a criminal defendant has the right to represent himself, invoking this right must be unequivocal. *Id.* The supreme court has held that it is not an unequivocal request to represent onself when that request is coupled with an attempt to secure substitute appointed counsel. *Id.*; *Morgan v. State*, 359 Ark. 168, 195 S.W.3d 889 (2004); *Collins v. State*, 338 Ark. 1, 991 S.W.2d 541 (1999).

We believe the instant case is analogous to *Jarrett*. There, Jarrett made numerous complaints to the trial court about the conduct of his defense including the failure of his appointed counsel to pursue certain items of discovery. However, the motions that Jarrett filed and the arguments that he made to the trial court were primarily geared to having his counsel of record relieved so that another attorney could be appointed. The supreme court acknowledged that Jarrett responded to the trial court's inquiry as to whether he wanted to represent himself with statements such as, "Well, you're forcing me to if you won't dismiss him," "You are forcing me to represent myself," and "I guess I'll have to represent myself." 371 Ark. at 103, 263 S.W.3d at 541. However, it held that none of the

statements were " an unequivocal request to take responsibility, be held accountable, and proceed pro se." 371 Ark. at 105, 263 S.W.3d at 542.

In the instant case, contrary to Horvath' s assertion, the April 12 motion was not sufficiently unequivocal to constitute a waiver of Horvath' s right to counsel. Although the style of the motion arguably suggests that it was a request to relieve Burnett, the body of the motion undercuts this interpretation. There, Horvath complained about Burnett' s lack of communication with him, failure to locate defense witnesses, and overall trial strategy. Nowhere can we find an unequivocal request to take responsibility, be held accountable, and proceed pro se. Indeed, the most straight-forward interpretation of the motion was a request by Horvath to the trial court to order that Burnett be more responsive to his opinion of how his defense should be conducted. The arguments that Horvath made on the morning of his trial do not compel a different analysis. While he once again complained about Burnett and asserted that he had " fired" him, Horvath was nonetheless still seeking substitute counsel. Under the standard set forth in *Jarrett*, we hold that there was no error in failing to let Horvath represent himself at his trial.

Affirmed.

PITTMAN and BROWN, JJ., agree.