STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 286178 Wayne Circuit Court
MARLON D. MATTHEWS, Defendant-Appellant.	LC No. 07-018454

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for failure to pay child support, MCL 750.165. Defendant was sentenced to 14 to 48 months' imprisonment, with credit for two days served. We affirm.

Defendant first argues that he did not effectuate a valid waiver of counsel in the trial court. We review de novo the record, but do not disturb the trial court's findings of fact absent clear error. *People v Williams*, 470 Mich 634, 640-641; 683 NW2d 597 (2004).

A defendant's request to proceed in propria persona must be unequivocal, and his waiver of counsel must be knowing, intelligent, and voluntary. *People v Adkins* (*After Remand*), 452 Mich 702, 722; 551 NW2d 108 (1996), overruled in part on other gds *Williams*, *supra* at 641 n 7. The trial court must advise defendant of the risks of self-representation and determine whether defendant will unduly disrupt the proceedings. *Id.* In addition, the requirements in MCR 6.005(D) must be met:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
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> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
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> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

The trial court must substantially comply with the requirements set forth in both the court rule and *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), which are "merely vehicles to ensure that the defendant knowingly and intelligently waived counsel with eyes open." *Adkins*, *supra* at 725, 726.

Having reviewed the record, we conclude that the trial court substantially complied with the waiver requirements. Over the course of the January 15, 2008, pretrial hearing and before the bench trial began on February 4, 2008, the trial court advised defendant of the charge, the potential sentence, and offered him the opportunity to obtain appointed counsel. MCR 6.005(D). The record reflects that defendant was apprised of the importance of obtaining the best advice possible because he could potentially go to prison, he was informed that he had to follow the court and evidentiary rules if he represented himself, and he was questioned about whether he was familiar with the court rules and rules of evidence, and whether he would be able to apply the rules and make objections based on the rules.

The trial court also substantially complied with the requirements in *Anderson* that the waiver of defendant's right to counsel was unequivocal, knowing, intelligent, and voluntary. *Adkins*, *supra* at 722. At the January 15 hearing, defendant informed the trial court that he was proceeding in propria persona and when the trial court told defendant that the prosecution wanted another attorney appointed for him, he responded, "I don't need one." Defendant asserted that he discharged his former attorney[1] and was proceeding in propria persona. This supports a finding that defendant unequivocally requested to represent himself and that he did so voluntarily. *Id.* Further, defendant insisted that "I'm very well aware of what I'm doing" and that he "fully understand[s] what's going on today." Defendant then indicated that he would move to dismiss the case, would not assert his right to a jury trial, and argued that he never waived his right to a preliminary examination.

On February 4, defendant again asserted that he was proceeding in propria persona. He made several motions, raised several arguments, and formally waived his right to a jury trial. When the trial court began to voir dire defendant regarding the charge against him, he told the trial court that "we went through this . . . the last time I was here." Defendant also indicated that he "fully understand[s] that this is a criminal charge," and "fully understands the right of having an attorney," and he reiterated that he discharged his former attorney. Defendant brought his own copy of the court rules and rules of evidence to trial and indicated that he could apply them. Defendant's motions and arguments demonstrate his understanding of and familiarity with the criminal process. Because defendant indicated that he understood his rights and proceeded to make formal motions before the trial court, we conclude that his assertion of his right to represent himself was unequivocal, knowing, intelligent, and voluntary. See *Adkins*, *supra* at 734 (A defendant's behavior is relevant when assessing whether a waiver was made knowingly, intelligently, and voluntarily). Defendant has failed to establish that the trial court clearly erred in finding that his waiver of counsel was knowing and intelligent. *Williams*, *supra* at 640-641.

[1] The record reflects that his former counsel was permitted to withdraw.

Further, the record available supports that the trial court did not believe defendant's self-representation would disrupt or burden the proceedings because he was warned he had to comply with the court rules and did so when instructed by the trial court. *Adkins*, *supra* at 722. Moreover, although defendant argues that he does not know of any authority indicating that a valid waiver can occur over the course of two proceedings, under the present circumstances, any defect in the January 15 proceeding was subsequently cured before trial on February 4 and the record nonetheless supports that defendant energetically and insistently defended himself and made the choice "with eyes open." *Anderson*, *supra* at 370 (No error where the trial court failed to explicitly inform the defendant regarding the dangers and disadvantages of self-representation where the defendant's statements and history of involvement with the criminal justice system demonstrated that he "knew what he was doing and made his choice with eyes open.").

Defendant next argues that MCL 750.165, a strict liability crime, violates due process because the potential four-year sentence is not relatively small, and a conviction would "gravely besmirch." *People v Olson*, 181 Mich App 348, 352; 448 NW2d 845 (1989), citing *United States v Wulff*, 758 F2d 1121, 1125 (CA 6, 1985). Because he did not raise this contention in the trial court, we review the unpreserved issue for plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

To prove felony nonsupport, the prosecutor must show that defendant was required by court order to pay child support, defendant appeared or received notice by personal service of the action for support, and defendant failed to pay the support as ordered. *People v Herrick*, 277 Mich App 255, 257; 744 NW2d 370 (2007); MCL 750.165. Felony nonsupport is a strict liability offense and inability to pay is not a defense. *People v Adams*, 262 Mich App 89, 100; 683 NW2d 729 (2004).

Defendant recognizes that *Adams* held that a lack of scienter was permissible and the potential four-year jail term was not overly severe, see *id.* at 97-99, but argues that it failed to take into consideration due process considerations under both the Michigan and United States Constitutions. However, in *People v Westman*, 262 Mich App 184, 190-191; 685 NW2d 423 (2004), overruled on other grounds by *People v Monaco*, 474 Mich 48; 710 NW2d 46 (2006), this Court concluded that there was no due process violation. We also reject defendant's claim that the statute raises the specter of a debtor's prison; a judgment for child support or alimony is not considered a debt and a party may be imprisoned for failing to pay. *Toth v Toth*, 242 Mich 23, 26; 217 NW 913 (1928).

Next, defendant argues that his right to confront the witnesses against him was violated when the record keeper of the friend of the court testified that the proof of service in the file indicated that defendant was personally served with notice of the paternity action. The process server did not testify. Because defendant did not raise this objection at trial, we review the issue for plain error that affected his substantial rights. *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005). Where a testimonial statement is admitted against a defendant and the declarant is unavailable and the defendant never had an opportunity to cross-examine him, a defendant's Confrontation Clause rights are violated. *People v Bryant*, 483 Mich 132, 138-139; 768 NW2d 65 (2009), citing *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

> The [*Crawford*] Court recognized that "[v]arious formulations of this core class of 'testimonial' statements exist," such as "'pretrial statements that declarants would reasonably expect to be used prosecutorially'" and "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at 51-52 (citations omitted). [*Id.* at 139.]

Although the process server's statements were testimonial, i.e. used to prove that defendant was served, and while it would be reasonable to expect that the proof of service would be used in a prosecutorial manner in a later trial because it involved serving defendant with notice of the paternity/child support action proceeding in court against him, we conclude that under the plain error analysis, defendant has failed to establish that any error was outcome determinative because the prosecutor established that defendant actually appeared in the action. The record reflects, and defendant does not dispute, that he moved to reduce the amount of child support through that action and twice moved for a paternity test. Because the statute requires personal service *or* appearance, MCL 750.165(2), defendant's appearance in the support action was sufficient to meet this element.

Next, defendant argues that he is entitled to resentencing because the trial court failed to obtain a proper waiver of counsel at the subsequent sentencing proceeding. Neither the Michigan nor United States Constitutions require wavier be obtained at subsequent proceedings once the initial waiver is obtained. *People v Lane*, 453 Mich 132, 139; 551 NW2d 382 (1996). "[F]ailure to comply with MCR 6.005(E) is to be treated as any other trial error." *Id.* at 140. Because this is an unpreserved, nonconstitutional error, to avoid forfeiture under the plain error rule, defendant must show that plain error occurred and that it prejudiced his substantial rights, i.e. that the error affected the outcome of the lower court proceeding. *Id.*; *Carines*, *supra* at 763.

Once defendant waived his right to counsel, MCR 6.005(E) imposed an ongoing duty on the trial court to inquire whether defendant continued to exercise the right to self-representation, providing:

> If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding ([including] sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
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> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
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> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
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> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

The record reflects that at the sentencing hearing on May 16, 2008, the parties stated their appearances for the record and defendant indicated he was in propria persona. At that time, the trial court did not advise defendant of his continuing right to counsel, or ask him to reaffirm that

he did not want an attorney. Thus, we agree that there was plain error. However, defendant has failed to show that it affected his substantial rights. *Carines, supra*.

First, after the trial court sentenced defendant and advised him of his right to appeal, it stated:

> And I would strongly recommend that you request an attorney. But if he does not request an attorney for his appeal, you should not bother him with an attorney. *He asked that there be no attorney today and I found that he was competent in his request.*
>
> *And the Court advised him before that you should use an attorney . . . .*

Thus, unlike circumstances where a trial court completely fails to advise defendant of his right to counsel, it appears that the trial court did advise defendant before the sentencing hearing began, but failed to do so on the record.

Defendant argues that he was prejudiced by lack of counsel at sentencing because he erroneously moved to withdraw his plea instead of moving for a judgment notwithstanding the verdict. We disagree. First, in the very next sentence after defendant moved to withdraw his plea, he also requested "to enter a plea where a motion for JNOV." We fail to see how there can be prejudice from a lack of counsel where defendant made the motion he claims would have been made if he had counsel. Second, the record indicates that defendant moved to withdraw a plea even though the conviction was the result of a bench trial, not a plea. Therefore, the trial court did not clearly err in finding that defendant tried to mislead the court. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

Finally, the trial court based its decision to depart upward from the sentencing guidelines' recommended minimum range on several other factors besides defendant's attempt to mislead the trial court and specifically indicated that an indeterminate sentence was not appropriate because defendant would not comply based on his statements and conduct. Indeed, when the defendant asked the trial court how it could deviate from the "strict guidelines" the trial court reiterated its reasons:

> You just heard it. There's no chance for rehabilitation. There's no remorse for the crime. There's a demonstration of a continual refusal to pay child support or adhere to the instructions of the Court.
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> The Court finds that the Department of Corrections is going to be responsible for this case. I find that if there had been probation, probation ordered there would be a violation of probation the next month.
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> Your activity when given the opportunity to pay child support has been you don't do it. Instead you attack the Court, you attack the prosecutor, you attack anybody and everybody.

Thus, the trial court concluded that an intermediate sentence such as probation was inappropriate given defendant's history. These reasons are fully supported by the record and unrelated to

defendant's attempt to withdraw his nonexistent plea. There is no indication in the record that absent defendant's request to withdraw his plea, or that even had defendant been represented by counsel, the trial court would have imposed any sentence other than what it did. Defendant has failed to establish any prejudice in sentencing that resulted from the trial court's failure to strictly follow MCR 6.005(E) on the record prior to sentencing. *Carines*, *supra*.

Moreover, given defendant's numerous expressions of his desire to represent himself, it seems highly unlikely that defendant would have changed his mind. We find this particularly true in light of defendant's attempt at the January 15, 2008 pre-trial hearing to disavow any work done by counsel when he was represented, by indicating that his waiver of the preliminary exam was invalid because it "was moved forward by an attorney that I did not want representing me." As our Supreme Court held in *People v Williams*, 470 Mich 634, 645; 683 NW2d 597 (2004):

> To permit a defendant in a criminal case to indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use the very permission to defend himself in pro per as a basis for reversal of conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected. [Quotations and citations omitted.]

Lastly, defendant argues that the trial court erred in departing from the sentencing guidelines. A trial court must articulate substantial and compelling reasons to justify departing from the sentencing guidelines' recommended range. *Babcock*, *supra* at 261-262; MCL 769.34(11). A substantial and compelling reason must be objective and verifiable. *Id.* at 257.

We review the trial court's factual findings that supported the departure for clear error. *Id.* at 264. Whether the reasons for departure are objective and verifiable is a matter of law we review de novo, but the determination that those reasons are substantial and compelling enough to justify the departure and the amount of the departure is reviewed for an abuse of discretion. *Id.* at 264-265. The trial court abuses its discretion where its decision falls outside the range of principled outcomes. *Id.* at 269. This Court gives "some degree of deference" to the trial court's determination that substantial and compelling reasons warrant departure from the guidelines because of its "familiarity with the facts and its experience in sentencing." *Id.* at 268-269.

Although the trial court's consideration of defendant's lack of remorse was not objective and verifiable, *People v Daniel*, 462 Mich 1, 8, 11; 609 NW2d 557 (2000), that factor may be considered as it relates to his rehabilitative potential, *id.* at 7 n 8; *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). Further, although a trial court's finding that defendant would not comply with probation, i.e., would reoffend by failing to pay child support, was not objective and verifiable, objective and verifiable facts such as prior criminal history indicating that such efforts to rehabilitate failed to deter a defendant, can support a decision to depart and sentence the defendant to a term of imprisonment rather than an intermediate sanction. Concern that a defendant would re-offend is supported by underlying objective and verifiable factors "such as repeated offenses and failures at rehabilitation—[which] constitute an acceptable justification for an upward departure." *People v Horn*, 279 Mich App 31, 44-45; 755 NW2d 212 (2008) (citations omitted).

The record reflects that defendant had an extensive history of failing to pay child support, with the arrearage totaling over $27,000; he did not pay support in 2004, paid $370 in 2005, and

$4.17 in 2006. After he was charged with nonsupport, defendant in response filed false UCC statements against the attorney general, trial court, and two prosecuting attorneys. He was subsequently convicted of four counts of filing false UCC statements. Defendant also violated the terms of his bond. At sentencing, defendant threatened to charge the trial court under several federal laws and international treaties. The trial court's determination that defendant was "openly defiant" of the trial court, court orders, and his court-ordered obligation to pay child support, and had a low chance of rehabilitation or complying with probation was therefore objective and verifiable. Although defendant argues that his disobedience was adequately considered by OV 16, MCL 777.46(1)(b), for which defendant was scored ten points for property loss of more than $20,000, this variable did not account for defendant's other demonstrations of defiance. There is also no record support for defendant's contention that the trial court improperly considered defendant's failure to admit guilt, such as by offering him a lesser sentence if he would admit guilt. *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987).

Defendant further argues that that the trial court's determination that defendant was deliberately trying to mislead the trial court amounted to the trial court impermissibly holding the fact that defendant appeared in propria persona against him. However, this Court defers to the trial court's familiarity with the facts of the case and its sentencing experience. *Babcock, supra* at 268-269. The record does not support that the trial court departed from the guidelines because defendant represented himself, or that the trial court clearly erred in determining defendant's argument was an attempt to mislead the trial court under the circumstances.

Defendant also argues that his sentence was not proportionate. A sentence must be "proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record." *Babcock, supra* at 262. We conclude that defendant's sentence departure of five months was proportionate to the offense and offender given the circumstances and the trial court adequately articulated its reasoning. *People v Smith*, 469 Mich 247, 259; 666 NW2d 231 (2008). The trial court was very clear that it did not believe that defendant would comply with the terms of any probation or payment of child support if it chose to give defendant an intermediate sentence, based on the factors described above, and noted that defendant failed to pay support in the past when given the chance. As the trial court noted, "[i]nstead you attack the Court, you attack the prosecutor, you attack anybody and everybody."

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering