STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2009
v	No. 286408 Kent Circuit Court
SCOTT BRADY COLE, Defendant-Appellant.	LC No. 07-009532-FH

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

A jury convicted defendant of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 20 to 40 years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the lower courts made certain errors regarding his waiver of trial counsel. Because this issue was not preserved, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765, 774; 597 NW2d 130 (1999).

A criminal defendant's right to represent himself or herself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by our state constitution and by statute. Const 1963, art 1, § 13; MCL 763.1. A trial court must comply with the waiver of counsel procedures set forth by our Supreme Court in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), as "a necessary antecedent to a judicial grant of the right to proceed in propria persona." *People v Adkins (After Remand)*, 452 Mich 702, 720-721; 551 NW2d 108 (1996), overruled in part on other grounds *People v Rodney Williams*, 470 Mich 634 (2004). A trial court must make three findings before granting a criminal defendant's waiver of counsel request: (1) "the waiver request must be unequivocal"; (2) "the trial court must be satisfied that the waiver is knowingly, intelligent, and voluntarily made"; and (3) "the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business." *People v Rodney Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004), citing *Anderson, supra*. Additionally, the trial court must comply with MCR 6.005. MCR 6.005(D) requires trial courts to inform a criminal defendant of the pending charges and potential penalties; to advise him or her of the risks of self-representation; and to afford him or her the opportunity to consult with retained or appointed counsel. Ultimately, proper compliance for the waiver of counsel does not require a litany approach; our case law and court

rule "are merely vehicles to ensure that the defendant knowingly and intelligently waived counsel with eyes open." *Adkins, supra* at 725. "Proper compliance requires that the court engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant." *Id.* at 721. Significantly, a trial court must substantially comply with the substantive requirements set forth by our case law and court rule. *Id.* at 726. "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id.* at 726-727.

In this case, defendant initially expressed a desire to be represented by trial counsel and the trial court appointed trial counsel. However, at defendant's preliminary examination, defendant's appointed trial counsel asserted that defendant wanted to represent himself in this matter. After a cursory colloquy, the district court made an express finding that defendant could represent himself in this proceeding.

The district court's colloquy with defendant falls short of our Supreme Court's mandate because there was little or no discussion of the substance of *Anderson, supra,* and MCR 6.005(D). *Adkins, supra* at 726-727. However, a defendant may not raise errors or irregularities relating to the preliminary examination on appeal, unless such errors or irregularities were timely raised before or at trial. *People v McKinney*, 65 Mich App 131, 134; 237 NW2d 215 (1975). Defendant did not do so. Further, reversal is not warranted on the basis of an error at the preliminary examination, where defendant received a fair trial and was not otherwise prejudiced. *People v Hall*, 435 Mich 599, 600-601, 460 NW2d 520 (1990).

Significantly, this case was not resolved in the district court. The record provides that the circuit court substantially complied with the advice requirements for self-representation, and that defendant knowingly, intelligently, and voluntarily waived his right to counsel. In several subsequent written communications to and at hearings before the circuit court, defendant asserted his right to self-representation and declined appointed trial counsel. The circuit judge acknowledged that defendant sought self-representation, and took the time, at various pretrial hearings, to explain the gravity of undertaking self-representation in this serious felony trial.

We conclude that the record reflects that the circuit court substantially complied with MCR 6.005(D). Defendant was fully apprised of the charges against him, where he was present and represented himself at the preliminary examination. Further, the circuit judge explained to defendant that he faced serious charges, and that he could face life imprisonment based on his status as an habitual offender. The circuit judge further addressed the risks of self-representations by stating that "if I had charges against me where my potential penalty was life in person, I would think I would want somebody other than just myself, and I presumably have a little more knowledge than you do, I'm not sure I would want to represent myself." Additionally, the circuit judge appointed standby counsel for defendant early in the proceedings, and standby counsel remained with defendant throughout trial. The circuit judge's advice certainly rises to a level that we previously deemed appropriate. See *People v Hicks*, 259 Mich App 518, 531; 675 NW2d 599 (2003).

Further, the record demonstrates that the circuit court substantially complied with the requirements of *Anderson, supra*. Defendant essentially argues on appeal that he did not present an unequivocal request to represent himself at trial. This argument lacks merit, where defendant

went to great lengths to act as his own counsel, and unequivocally stated that he wanted to represent himself. The test for a defendant's competency to waive counsel is whether the defendant has the ability to understand the proceedings. *Godinez v Moran*, 509 US 389, 401; 113 S Ct 2680; 125 L Ed 2d 321 (1993). Defendant's ability to understand the proceedings was evidenced at the preliminary examination, where he extensively cross-examined the victim, he asserted a defense of misidentification, and he argued that the prosecution failed to establish all of the elements of the charged offense. Moreover, defendant clearly demonstrated that he wanted to represent himself throughout the course of these proceedings. Defendant also filed a number of motions and advocated his positions at subsequent motion hearings. Defendant's assertion on appeal that these were meritless motions fails to acknowledge that the trial court ruled in defendant's favor on some of those motions. The circuit judge was satisfied that defendant could represent himself in this matter. The record demonstrates that defendant's request to represent himself was unequivocal, that that waiver was knowingly, intelligent, and voluntarily made. Further, the circuit judge was satisfied that defendant would not disrupt, unduly inconvenience, and burden the court or the administration of court business. *Rodney Williams, supra* at 642. Ultimately the record demonstrates that the circuit court substantially complied with the mandates of *Anderson, supra*, and MCR 6.005(D). *Adkins, supra* at 726-727. As such, defendant failed to establish plain error. *Carines, supra*.

Defendant also contends that the trial court failed to take defendant's waiver at every stage of the proceedings contrary to MCR 6.005(E).[1] Defendant is correct; however, reversal is not warranted. The requirements of MCR 6.005(E) are fairly minimal and can be met so long as it is apparent from the record that the trial court reaffirmed the availability of a lawyer and the defendant decided to forego one. *People v Lane*, 453 Mich 132, 137; 551 NW2d 382 (1996).

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[1] MCR 6.005(E) provides:

> If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or 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 court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel.

Subsequent waivers do not carry the same constitutional, structural, due process implications as an initial waiver. *Id.* at 138-139. After defendant properly initially waives his right to counsel, failure to comply with the subsequent requirements of MCR 6.005(E) is reviewed for actual, rather than presumed, prejudice. *Id.* at 140. The record demonstrates that defendant sought to represent himself early in these proceedings. Further, defendant had standby counsel available following one of the trial court's pretrial orders. The trial transcripts demonstrate that standby counsel was present and available to defendant at trial. Nevertheless, at each of the seven days of trial, defendant represented himself. Defendant on appeal asserts that he suffered prejudice as a result of the chaos that erupted at trial; however, the record undermines that self-serving assertion. Ultimately, there is no indication that defendant suffered actual prejudice from self-representation. *Id.* We conclude that defendant failed to establish plain error affecting his substantial rights. *Carines, supra* at 763. Next on appeal, defendant complains that the trial court was not impartial and deprived defendant of a fair trial based on its comments, conduct, and questions during the trial. We disagree. Defendant failed to object to the alleged improper comments, conduct, or questions; and, without a timely objection, reversal based on alleged judicial misconduct is only warranted if such misconduct resulted in manifest injustice. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Criminal defendants have a constitutional right to a fair and impartial trial. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). Trial courts have wide discretion and power in the matter of trial conduct; however, that power is not without limits. *Id.* at 307-308. If a trial court's conduct pierces the veil of judicial impartiality, then a defendant's conviction must be reversed. *Id.* at 308. In determining whether the challenged judicial remarks or conduct were improper, we consider whether the remarks or conduct were of such a nature as to have unduly influenced the jury, thereby depriving the defendant of his right to a fair and impartial trial. *Id.* In reviewing the challenged remarks or conduct, "[p]ortions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole." *Paquette, supra* at 340. After reviewing the challenged comments, conduct, and questions in context, we conclude that the trial court did not unduly influence the jury to the extent that it deprived defendant of a fair an impartial trial. *People v Sharbnow*, 174 Mich App 94, 99-100; 435 NW2d 772 (1989).

The record demonstrates that the trial court discerned whether points of inquiry were relevant; focused questions to ensure that the testimony remained relevant; precluded repetitious questions; prevented defendant from mischaracterizing testimony; prohibited defendant from testifying while asking witnesses questions; and properly admonished defendant for arguing with witnesses. There is no evidence of judicial bias, and reversal is not warranted. *Paquette, supra* at 340.

Finally, defendant asserts that the warrantless search of the residence of defendant's parents was illegal because the police failed to obtain valid consent to search that residence. A trial court's factual findings at a suppression hearing are reviewed for clear error, *People v John Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005), and due deference is given to the trial court's resolution of the factual issues. *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005).

The "touchstone of the Fourth Amendment is reasonableness," with reasonableness assessed by the totality of the circumstances. *Ohio v Robinette*, 519 US 33, 39; 117 S Ct 417;

136 L Ed 2d 347 (1996). "Generally, evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings." *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). To demonstrate Fourth Amendment compliance, the police must have a warrant or the search or seizure must fall within one of the narrow, specific exceptions of the warrant requirement." *Id.* Consent is the exception at issue in this case. See *People v Davis*, 442 Mich 1, 13-14; 497 NW2d 910 (1993). "[T]he consent must be unequivocal, specific, and freely and intelligently given," *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005), and, the validity of an individual's consent to search depends on the totality of the circumstances. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999).

Here, the totality of the circumstances demonstrated that defendant's mother consented to allow police to search the residence, and that consent was valid. While defendant essentially claims that the police used oppressive or deceptive tactics to secure his mother's consent to search the residence, a recording of the search that was admitted at the hearing refutes his claims. The relevant exchange between the police and defendant's mother regarding her consent to the search lasted approximately four minutes. The recording provided that the police explained that they were looking for a suspect, who may have entered her residence. Even though defendant's mother initially declined to consent to the search, a police officer explained the gravity of the situation. The police officers obviously wanted defendant's mother to reconsider, but the recording does not demonstrate that they used unduly or improper coercive tactics to do so. Nothing precluded the police from asking defendant's mother to reconsider a request for consent, where she merely gave a conditional rejection because her husband was not yet home. Although she would have preferred to have her husband present, she unequivocally, specifically, and freely and intelligently gave her consent to the police to search her residence: "Go on and do it. Go on and do it." The police officers did not inform defendant's mother that she could refuse consent; however, "knowledge of the right to refuse consent is not a prerequisite to effective consent." *Borchard-Ruhland*, *supra* at 294. Here, these facts establish an objectively reasonable basis for believing that defendant's mother's consent to search was valid. *Illinois v Rodriguez*, 497 US 177, 185-186; 110 S Ct 2793; 111 L Ed 2d 148 (1990); *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). Thus, the trial court properly concluded that, viewed in the totality of the circumstances, the consent to search was valid. *People v Marsack*, 231 Mich App 364, 378; 586 NW2d 234 (1998). Ultimately, we conclude that the trial court's determination was not clearly erroneous. *Dagwan*, *supra* at 342.

Affirmed.

/s/ Patrick M. Meter
/s/ William B. Murphy
/s/ Brian K. Zahra