STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 284830 Saginaw Circuit Court
TIMOTHY DEMETRIS HOLDEN, Defendant-Appellant.	LC No. 03-023823-FH

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of insurance fraud, MCL 500.4511(1), and conspiracy to commit insurance fraud, MCL 500.4511(2); MCL 750.157a. We affirm.

Defendant's convictions arose from his attempt to collect insurance proceeds for water damage and other putative vandalism at his home. One of the purported vandals, Tarrie Sparks, gave statements to the police indicating that an acquaintance of defendant had hired him to vandalize defendant's home. Sparks further indicated that defendant asked him to recant these statements and asked him to testify that a police officer had told him to lie. At trial, however, Sparks testified that he was not involved in any vandalism, that he did not know defendant, and that a police officer had told him to lie about the vandalism.

Defendant represented himself at trial with the assistance of standby counsel. Defendant's first argument on appeal is that the trial court erred by allowing him to exercise the right of self-representation. We review for clear error the trial court's finding that a defendant has knowingly, voluntarily, and intelligently waived the assistance of counsel. *People v Williams*, 470 Mich 634, 640; 633 NW 2d 597 (2004). Issues of law, however, are reviewed de novo. *Id*.

The right of self-representation is guaranteed by federal and state law. *Iowa v Tovar*, 541 US 77, 87-88; 124 S Ct 1379; 158 L Ed 2d 209 (2004); Const 1963, art 1, § 13; see also MCL 763.1. To accept a defendant's request to represent himself, the trial court must substantially

comply with the requirements delineated in MCR 6.005(D)[1] and in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). See *People v Willing*, 267 Mich App 208, 219-220; 704 NW2d 472 (2005). In *Anderson*, our Supreme Court observed that the trial court must engage in a sufficient inquiry to ensure (1) that the defendant's request is unequivocal; (2) that the request is knowing, intelligent, and voluntary; and (3) that the request will not disrupt, unduly inconvenience, or burden the court. See *Willing*, 267 Mich App at 219-220.

In the instant case, defendant's request for self-representation came after he had discharged several retained and appointed attorneys. We find that the court substantially complied with the requirements of the court rule and *Anderson*. The record establishes that defendant was aware of the charges against him and the possible sentence. Defendant filed at least two pro se challenges to the validity of the felony complaint, to which he attached copies of the complaint that plainly listed the charges and the maximum penalties. In addition, the parties twice discussed a plea bargain in open court with defendant present.

With respect to whether defendant voluntarily and intelligently waived the right to counsel, the trial court and standby counsel both made a record concerning defendant's understanding of his request for self-representation. The court specifically asked defendant whether he understood that there were risks and dangers inherent in self-representation. Defendant acknowledged that he understood these dangers, and indicated that he believed he was competent to proceed without counsel. And while the record indicates that defendant's self-representation was somewhat disruptive, the trial court made significant efforts to accommodate defendant's request. We perceive no error in the trial court's approval of defendant's request to represent himself.

Defendant next argues that the trial court erred by refusing to allow him to rescind his request for self-representation. We find no error in the trial court's ruling on this issue. On the second day of trial, defendant stated that he was incompetent to proceed with trial and would be seeking an attorney. But this supposed incompetence arose from defendant's lack of documents and videotapes that he alleged were necessary for trial; it did not arise from any actual inability on the part of defendant to represent himself. As the trial court indicated to defendant, the court

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[1] MCR 6.005(D) provides in pertinent part:

> 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.

had already ruled that the materials defendant sought were irrelevant and inadmissible. The trial court legitimately concluded that defendant's request for an attorney was another step in a fruitless effort to present irrelevant evidence to the jury. The court's rejection of defendant's request to withdraw his earlier waiver of counsel was not erroneous.

Defendant also argues that the trial court erred by failing to re-advise him of his right to counsel on each day of trial, maintaining that MCR 6.005(E)[2] requires such re-advisements. However, the rule simply does not require repeated admonitions on each day of a multiple-day proceeding. Instead, the rule merely requires the court to advise the defendant at each *proceeding*. The rule provides examples of proceedings, which include preliminary examinations, hearings, trial, and sentencing. MCR 6.005(E). Thus, it is clear that the rule treats a multi-day trial as a single proceeding. We find no error in this regard.

Defendant next claims that the trial court violated his right to counsel and his right to be present by ruling on the prosecution's motion to strike certain evidence in defendant's absence. Defendant is correct that the complete denial of counsel at a critical stage of a criminal proceeding is structural error that requires reversal. *People v Arnold*, 477 Mich 852; 720 NW2d 740 (2006). We find, however, that the hearing on the motion to strike was not a critical stage of the proceedings. See *People v Killebrew*, 16 Mich App 624, 627; 168 NW2d 423 (1969) (observing that a "'[c]ritical stage' is understood to mean prosecutorial activity which has some effect on the determination of guilt or innocence which could properly be avoided, or mitigated, by the presence of counsel"). Defendant asserts that the hearing on the motion to strike was a

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[2] 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.
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> 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.

critical stage of the proceedings because neither he nor his counsel had an opportunity to explain to the trial court his reasons for needing the testimony of the named witnesses. However, defendant does not support this claim with any fact; nor does he offer any evidence to indicate the substance of the proposed witnesses' testimony. Absent some indication that the proposed witnesses would have provided relevant and exculpatory testimony, defendant cannot demonstrate that the motion hearing was a step in the proceedings that significantly impacted his prosecution or the determination of his guilt or innocence. See *id*. Nor has defendant shown how the presence of active counsel would have altered the court's ruling on the motion to strike. Accordingly, we conclude that the trial court did not err by ruling on the motion in the absence of counsel. Similarly, defendant has not demonstrated anything to suggest that he was prejudiced by his personal absence from the motion hearing. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995).

Defendant presents three challenges related to Sparks's testimony. We conclude that these challenges are without merit. With regard to the disclosure of a leniency agreement, the other witnesses' testimony amply established that Sparks had given his statements in exchange for an expectation of leniency. Regarding the alleged presentation of perjured testimony, there is no indication that the prosecutor knowingly presented perjured testimony from Sparks. But a prosecutor may proceed with a case even if a witness recants his testimony, and may present both the recanted testimony and the revised testimony to the jury at trial. *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995). With regard to defendant's contention that the trial court should have required a police officer to disclose the name of a confidential informant that connected the police with Sparks, we find the trial court acted within its discretion by sustaining the prosecutor's objection to disclosure at trial. See *People v Cadle*, 204 Mich App 646, 650; 516 NW2d 520 (1994), remanded on other grounds 447 Mich 1009 (1994); see also *People v Sammons*, 191 Mich App 351, 368; 478 NW2d 901 (1991).

Defendant lastly argues that the search and seizure at his home were unconstitutional. This Court rejected a nearly identical argument in defendant's prior appeal. *People v Holden*, unpublished opinion per curium of the Court of Appeals, issued June 5, 2008 (Docket No. 272633). "Under the law of the case doctrine, an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). Because the facts and law have not changed, we may not now decide this issue differently. *Id*.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood