STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 14, 1999
v	No. 207104 Kent Circuit Court
ALEVANDO LAVORITE WILLIAMS, Defendant-Appellant.	LC No. 96011839 FH

Before: Hoekstra, P.J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(v). The trial court sentenced him as a fourth habitual offender, MCL 769.12; MSA 28.1084, to two to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first argues that his original trial counsel was ineffective because she failed to tell him of the time limit for accepting the proposed plea offer.[1] At his *Ginther*[2] hearing, defendant testified that defense counsel did not inform him of the Kent County administrative rule that requires defendants to accept or reject any plea offer within forty-two days. Defendant further testified that he would have accepted the plea offer had counsel informed him of the rule. The prosecutor had offered to dismiss the supplemental information in exchange for defendant pleading guilty to possession of less than twenty-five grams of cocaine.

The prosecutor testified that the plea offer required that defendant waive his preliminary examination. Because Defendant chose to go forward with the preliminary examination, the prosecutor withdrew the offer. Defendant's original counsel testified that she regularly tells her clients about the deadline for accepting plea offers, but that she did not send *written* notice of the deadline to defendant.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defense counsel also testified that defendant consistently maintained that he had no interest in a plea bargain that included an as-charged plea with no supplemental information.

When considering a claim of ineffective assistance of counsel, we presume counsel was effective, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Murray*, ___ Mich App ___; ___ NW2d ___ (#194761, issued 2/12/99) slip op p 8. A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant. *People v Carr*, 141 Mich App 442, 451; 367 NW2d 407 (1985). We have held that an attorney's failure to communicate a plea offer to a client can constitute ineffective assistance of counsel. *People v Todd*, 186 Mich App 625, 634; 465 NW2d 380 (1990), on rehearing sub nom *People v Carter*, 190 Mich App 459; 476 NW2d 436 (1991), vacated *People v Carter*, 440 Mich 870; 486 NW2d 740 (1992).

In *Todd*, we held that because the "defendant received a conviction and sentence that was substantially greater than the plea offer, he was prejudiced by the error." *Id.* at 636. On rehearing, after additional consideration, we held that the defendant could not have been prejudiced unless it was determined that he would have accepted the plea bargain. *People v Carter (On Rehearing)*, 190 Mich App 459, 462; 476 NW2d 436 (1991), vacated *People v Carter*, 440 Mich 870; 486 NW2d 740 (1992).

In the instant case the trial court considered the record and its own recollection, and it concluded that defendant would not have accepted the offer to plead guilty to possession. Throughout the trial, defendant argued that he should be allowed to plead to *use* of cocaine, MCL 333.7404; MSA 14.15(7404). After reviewing the record, we agree that defendant would not have pleaded guilty to possession; therefore, defendant was not prejudiced by his counsel's alleged ineffectiveness. *Todd, supra*.

II

Next, defendant argues that the trial court erred in excluding him from the courtroom during his trial. When determining whether a defendant's absence from a part of a trial requires reversal of his conviction, we consider whether there is any reasonable possibility of prejudice. *People v Woods*, 172 Mich App 476, 480; 432 NW2d 736 (1988). In the instant case, defendant shouted expletives at the trial judge and requested that he be allowed to leave the courtroom. The trial court honored defendant's request.

Although a criminal defendant has a statutory right to be present at his trial, MCL 768.3; MSA 28.1026, he can waive that right. *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975). Moreover, a party cannot request a certain action of the trial court and then argue on appeal that the resultant action was error. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997); *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). We find that defendant waived his right to be present during his trial, and therefore, the trial court did not err in granting defendant's request to be removed from the courtroom.

III

Next, defendant argues that the trial court erred when it denied defendant's request to represent himself at trial. When reviewing a trial court's decision not to allow a defendant to represent himself, we indulge every presumption against a proper waiver. *People v Ahumada,* 222 Mich App 612, 617; 564 NW2d 188 (1997). After the jury was impaneled but before any proofs were submitted, defendant sent the court a letter from the judge's chambers (where he was monitoring the trial via an audio hookup) requesting that he be allowed to represent himself. The trial court denied the request.

Several requirements must be met before a defendant may proceed in propria persona. *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976); *Ahumada, supra,* 616. First, a defendant's request to represent himself must be unequivocal. *Anderson, supra,* 367. Second, the trial court must determine that the defendant's assertion of his right is knowing, intelligent, and voluntary. *Id.* Third, the trial court must determine that the defendant's self-representation will not disrupt, inconvenience or burden the court. *Id.* Here, the trial court ruled that defendant's self-representation would have disrupted, inconvenienced and burdened the court. We agree. Defendant had already been removed at his own request after yelling obscenities at the trial judge and his own counsel. The trial court did not abuse its discretion in holding that defendant would unduly disrupt and burden the court if allowed to represent himself.

IV

Next, defendant argues that the trial court erred by not instructing the jury on the lesser offenses of use of cocaine and attempted possession of cocaine. The trial court has a duty to instruct the jury regarding the law applicable to the case. MCL 768.29; MSA 28.1052. A trial judge must instruct on lesser included offenses when so requested and if supported by the evidence. *People v Moore,* 189 Mich App 315, 319; 472 NW2d 1 (1991). There are two types of lesser included felony offenses: necessarily included offenses and cognate lesser offenses. *People v Marji,* 180 Mich App 525, 530; 447 NW2d 835 (1989). A necessarily included offense is one which must be committed as part of the greater offense; it would be impossible to commit the greater offense without first having committed the lesser. *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325 (1996), amended 453 Mich 1204; 551 NW2d 163 (1996). A cognate lesser offense is one which shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *People v Hendricks,* 446 Mich 435, 443; 521 NW2d 546 (1994).

Defendant argues that the trial court should have instructed the jury on the charge of using cocaine. Because it is possible to possess cocaine without using it, use cannot be a cognate lesser offense of possession. *Bailey, supra*. We agree with the trial court's finding that the record would not support a conviction on the use of cocaine.

Defendant also argues that the trial court should have instructed the jury on attempted possession of cocaine. However, the law is clear in Michigan that "an attempt is not a necessarily lesser included offense of the crime attempted, and a trial court is required to grant a requested instruction on attempt as a cognate lesser included offense only if there is evidence, or lack thereof, indicating that only

an attempt was committed." *People v Shelton*, 138 Mich App 510, 516; 360 NW2d 234 (1984). Here, defendant offered no evidence that he was merely attempting to possess cocaine. In fact, the evidence demonstrated that defendant was in possession of the cocaine before he was approached by the officers and then dropped the cocaine upon noticing the officers. For these reasons, we find that the trial court did not err when it refused to instruct the jury on either of the lesser offenses.

V

Last, defendant argues that the trial court erred in sentencing defendant as a fourth felony offender and his case should be remanded for resentencing as a third felony offender. The presentence report prepared by the probation department revealed that the habitual offender notice prepared by the prosecutor erroneously listed possession of metallic knuckles as one of defendant's prior convictions to support an habitual offender conviction. The possession of metallic knuckles charge was dismissed pursuant to a plea agreement under which defendant pleaded guilty to a charge of resisting and obstructing a police officer stemming from the same incident. Defendant argues that because the correct charge, resisting and obstructing a police officer, was not claimed in the filed habitual offender notice, defendant could only be sentenced as a third offender and be subject to a four-year enhanced maximum sentence. MCL 769.11; MSA 28.1083.

A prior conviction for resisting and obstructing a police officer, which is a misdemeanor offense punishable by a maximum of two years' imprisonment, may be used as a felony to charge defendant as an habitual offender. *People v Smith*, 423 Mich 427, 446; 378 NW2d 384 (1985). We hold that the trial court could have used the resisting and obstructing a police officer charge as the basis for the fourth felony conviction, regardless of the clerical error. Therefore, the failure to correct the error in the specific conviction charged was harmless, and defendant was not prejudiced.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Robert B. Burns

[1] Defendant's original counsel was allowed to withdraw after defendant moved the court on his own behalf requesting substitute counsel.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).