STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMY D. THOMASON,

Defendant-Appellant.

UNPUBLISHED
September 19, 2000

No. 209420
Oakland Circuit Court
LC No. 97-152624-FC

Before: Gribbs, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury as charged on two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2), involving oral and penile penetration of his eleven-year-old stepdaughter. He was sentenced to twenty five to fifty years' imprisonment. We affirm.

Defendant argues on appeal that his attorney's failure to present expert testimony at trial regarding the victim's recovered memory of defendant's abuse constituted ineffective assistance of counsel. In 1996, defendant pleaded no contest to one count of second-degree criminal sexual conduct involving the same child. At that time, the victim recalled numerous incidents of defendant's sexual abuse, but did not recall all the details of the incident involved in this case. The victim later recalled that in 1992, defendant penetrated her vagina with his mouth and penis, leading to the charges in this case. At trial, the prosecution introduced the testimony of Mark Neumann, an expert on child sexual abuse, to explain how a victim can forget the details of her abuse and remember those details later when she feels safe. Defendant now claims that his attorney should have also retained an expert to dispute the validity of the victim's recovered memories. We disagree.

Review of the record shows that defendant dismissed his counsel more than two months before trial began. In fact, the court allowed the attorney to withdraw as counsel on October 30, 1997, which was a little more than two weeks after the prosecution gave notice of its intention to introduce the expert testimony of Neumann and more than two weeks before the court granted the prosecution's motion to endorse the expert. During the period from the attorney's withdrawal to the beginning of trial on January 12, 1998, defendant was representing himself and the attorney was acting only as an advisor. Defense counsel had no real opportunity to investigate or prepare this defense because defendant

dismissed him before the defense could be pursued. Further, the decision whether to call a witness at trial is presumed to be a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). There is nothing in the record to support defendant's assumption that defense counsel simply failed to even consider the defense. Defendant has not overcome the presumption that defense counsel's conduct was objectively reasonable. *Id.* at 156.

Defendant also argues that his attorney's conduct at sentencing constituted ineffective assistance of counsel. A claim of ineffective assistance of counsel is reviewed to determine whether defendant has shown that counsel's performance was deficient and if there is a reasonable probability that, but for the deficient performance, the outcome would have been different. *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000); *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). The reviewing court presumes that counsel's conduct fell within a wide range of reasonable professional assistance and the defendant bears a heavy burden to overcome this presumption. *Mitchell*, *supra* at 156.

Sentencing is a critical stage of a criminal proceeding and a defendant is entitled to effective assistance of counsel at sentencing. *People v Burton*, 44 Mich App 732, 734; 205 NW2d 873 (1973); *People v Harris*, 185 Mich App 100, 105; 460 NW2d 239 (1990). The purpose of counsel at sentencing is to present explanatory or extenuating facts, to make arguments for the mitigation of the sentence, to expose assumptions concerning the defendant's criminal record that were materially untrue, and to insure the sentence is based on reliable and trustworthy information. *Burton*, *supra* at 734. Reversal of the sentence due to counsel's ineffective assistance at sentencing is not warranted unless the defendant shows that defendant's counsel's performance fell below an objective standard of reasonableness and the representation prejudiced defendant. *Pickens*, *supra* at 309.

In this case, defense counsel was present at sentencing and did advocate for defendant. The record shows that defendant's attorney made several statements on defendant's behalf. Defendant's attorney corrected references in the PSIR, insisted that defendant's sentence be concurrent with the sentence he was already serving for second-degree CSC, argued for a minimum sentence within the guidelines, and noted that defendant has persistently professed his innocence. Defense counsel also indicated that his client incorrectly perceived that the justice system had not treated him fairly. After defendant's allocution to the effect that defense counsel did not adequately represent him, his attorney made statements regarding defendant's need to take responsibility for himself. Defense counsel fulfilled his function at sentencing by correcting errors in the PSIR and by advocating for a concurrent, minimum sentence.

Defendant also argues that he was prejudiced by defense counsel's statements because the trial court indicated its agreement with counsel. We disagree. Review of the record does not show a direct correlation between the attorney's comments and the court's sentencing. The court sentenced defendant within the guidelines, and carefully outlined its reasons for sentencing at the higher end of the guidelines, including defendant's lack of remorse, his hostility to the court, his attorney and the legal system, his characterization of himself as a victim, and his disregard for the victimization of a vulnerable child. The court also stated that, given defendant's current attitude, rehabilitation was not likely to occur

in the near future. Because defendant cannot show that counsel's statements prejudiced him, his claim is without merit.

Next, defendant argues that the trial court erred by giving a limiting instruction on other acts evidence as a part of the general jury instructions. Defendant does not contest the substance of the instruction, arguing only that the instruction should have been given at the time the evidence was introduced. Defendant failed to preserve this issue for review because he did not request an immediate instruction, or object to the court's ruling that the instruction would be given at the end of the case. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Defendant's unpreserved claim of error is reviewed for manifest injustice. *People v Rice (On Remand)*, 235 Mich App 429, 443; 597 NW2d 843 (1999). Manifest injustice occurs when the erroneous instruction pertains to a basic and controlling issue in the case. *Id.* The timing of the limiting instruction here did not involve a basic and controlling issue because defendant did not request an immediate limiting instruction, nor did he object to a delayed instruction. In addition, defendant is unable to show how the failure to give an immediate instruction prejudiced him. There is no suggestion in the record that the jury impermissibly considered the other acts in determining defendant's guilt or that the verdict would have been different but for the delay in giving a limiting instruction. *People v Kelly*, 386 Mich 330, 335, 337; 192 NW2d 494 (1971). Further, although no formal instruction was given when the evidence was introduced, counsel immediately stated the essence of the instruction in the jury's presence and the trial court agreed that counsel was correct, so the jury was aware of the limitation.

Finally, defendant argues in propria persona that he was denied his constitutional right to counsel when the trial court allowed his second appointed attorney to withdraw at defendant's request, but failed to appoint a third attorney and ordered defendant to proceed in propria persona. Whether defendant was denied his right to counsel is a mixed question of fact and law. Constitutional questions of law are reviewed de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

The right of a criminal defendant to be represented by counsel is guaranteed by both the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. An indigent defendant does not, however, have the right to be represented by the attorney of his choice. *People v Flores*, 176 Mich App 610, 613; 440 NW2d 47 (1989). A defendant is only entitled to substitution of appointed counsel where the defendant can show good cause and where the substitution would not unreasonably disrupt the judicial process. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). The trial court's decision about substitution of counsel should not be reversed absent an abuse of discretion. *Id.*

The right of self-representation is also implicitly guaranteed by the Sixth Amendment of the United States Constitution, *Faretta v California*, 422 US 806, 819-820; 95 S Ct 2525; 45 L Ed 2d 562 (1975); *People v Dennany*, 445 Mich 412, 426; 519 NW2d 128 (1994), and explicitly by Michigan constitutional and statutory law. Const 1963, art 1, § 13; MCL 763.1; MSA 28.854; *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996). In exercising the right to self-representation, a defendant necessarily waives his right to counsel. *Dennany*, *supra* at 427.

Before a trial court allows a defendant to proceed in propria persona, the court must determine whether the defendant intentionally relinquished his right to counsel. *Adkins*, *supra* at 721. The trial court must indulge every presumption against waiver and may not presume waiver from a silent record. *Id*. Three requirements must be met before the court may conclude that a defendant has waived his right to counsel and allow a defendant to proceed in propria persona: (1) the defendant's request for self-representation must be unequivocal, (2) the assertion of the right to proceed without counsel must be knowing, intelligent, and voluntary, and (3) the defendant's self-representation must not disrupt, inconvenience, or burden the court. *Dennany*, *supra* at 432; *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).

In this case, defendant asked both his first and his second appointed counsel to withdraw. He told his second attorney in a letter that he did not want to be represented by appointed counsel and that he preferred self-representation. The trial court gave defendant what he asked for. However, defendant did not petition the court to be allowed to proceed in propria persona and the court never advised defendant on the record of the dangers and disadvantages of self-representation to establish that defendant knew what he was doing and that his choice was made "with eyes open." *Adkins*, *supra* at 722; *Anderson*, *supra* at 368. Further, the court's decision to require the attorney to act as advisory or standby counsel did not legitimize the court's failure to determine whether defendant waived counsel. *People v Lane*, 453 Mich 132, 138; 551 NW2d 382 (1996).

Nonetheless, we find the trial court's error harmless on the facts of this case. Defendant was provided appointed counsel, he was provided substitute counsel when he expressed dissatisfaction with his original appointed counsel and, although he represented himself briefly prior to trial, defendant was, in fact, represented by counsel at trial. After a brief bench conference, defendant's appointed counsel was introduced to the prospective jurors as defendant's attorney, he participated in voir dire and acted as counsel throughout the entire trial. Defendant was not deprived of the right to trial counsel, *People v Anderson (After Remand)*, 446 Mich 392, 404; 521 NW2d 538 (1994), and there is no reasonable possibility that the error complained of here might have contributed to defendant's conviction. *Id.* at 406.

Affirmed.

/s/ Roman S. Gribbs
/s/ Janet T. Neff
/s/ Peter D. O'Connell