STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2001
v	No. 217377 Kent Circuit Court
KELLY JOSEPH STRADER, Defendant-Appellant.	LC No. 97-008508-FC AFTER REMAND

Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.

PER CURIAM.

This case arises from the murder of Carol DeRaad in December 1993. After a jury trial, defendant was convicted of second-degree murder, MCL 750.317. The trial court sentenced defendant, a fourth habitual offender, to a term of forty to seventy-five years' imprisonment. Defendant appeals as of right, raising four issues: the denial of his motion for a mistrial, erroneous admission of evidence, ineffective assistance of counsel, and judicial interference with his right to testify. We reject defendant's claims of error and affirm.

I. Defendant's Motion for a Mistrial

Defendant first argues that this Court should reverse his conviction because the trial court erroneously denied his motion for a mistrial. Defendant contends that he was entitled to a mistrial because a prosecution witness testified that defendant committed unrelated murders. Defendant contends that this testimony was highly prejudicial and that its introduction deprived him of a fair trial. Further, defendant contends that this testimony was so inflammatory that a curative instruction would not have cured any error related to its admission and that the error cannot be considered harmless. We conclude that defendant's argument is without merit.

The test to be used for determining whether a mistrial should be declared is not whether some irregularities occurred, but whether the defendant had a fair and impartial trial. *People v Lumsden*, 168 Mich App 286, 298; 423 NW2d 645 (1988). Further, as this Court stated in *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999):

> The grant or denial of a motion for a mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted. The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice.

During the trial at issue here, Detective Buikema briefly mentioned two statements that defendant made to police concerning unrelated murders. Both references occurred while Buikema was reading a transcript of defendant's statements to police.[1] First, Buikema read a portion of the transcript where defendant apologized for leading police to believe that he had committed "a lot of killings." Second, Buikema read a portion of the transcript where police asked defendant why he wanted to confess to DeRaad's murder "and other murders."

When defense counsel objected to Buikema's first reference to "a lot of killings," both the prosecutor and the witness moved on to another issue. Because defendant did not request a mistrial at that time, he basically conceded that Buikema's first passing reference, by itself, did not warrant a mistrial. *Lumsden*, *supra* at 299. However, defense counsel requested a mistrial after Buikema's second reference to this issue. It appears from the record that Buikema's testimony involving "other murders" was unresponsive to the prosecutor's questions. Buikema was simply confused over which line of transcript he was supposed to read.[2] Generally, an unresponsive, volunteered answer to a proper question is not cause for granting a mistrial. *People v Rushlow*, 179 Mich App 172, 175; 445 NW2d 222 (1989), aff'd 437 Mich 149 (1991); *Lumsden*, *supra* at 299. This is especially true where the defendant rejects the opportunity to have the jury charged with a cautionary instruction. *Id.*[3]

Defendant cites *People v McCarver (On Remand)*, 87 Mich App 12, 15; 273 NW2d 570 (1978) and *People v Page*, 41 Mich App 99; 199 NW2d 699 (1972), for the proposition that police witnesses should be held to a different standard than lay witnesses when they provide unresponsive, volunteered answers to a prosecutor's questions. However, neither case sets forth such a stringent rule of law. In *McCarver*, *supra* at 15, this Court ruled that if a police officer "brings out the fact that a defendant has previously been convicted or charged with crime, even if the answer could be considered nonresponsive, reversible error will have occurred." In the present case, Buikema did not inform the jury that defendant had been convicted or charged with other crimes. In *Page*, *supra* at 100-101, the police officer testified that he had arrested the defendant after observing him "in front of a dope den." The officer made his inflammatory comment when there was no question pending and while the court was discussing an objection to a question designed to bring out the very information that the witness gratuitously gave from the stand. *Id*. at 101-102. In the present case, Buikema did not gratuitously volunteer inflammatory information when no question was pending. Despite defendant's argument to the contrary, the general rule regarding unresponsive, volunteered answers applies to police witness. *Lumsden*, *supra* at 296, 299.

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[1] Defendant's statements were replete with references to his prior criminal history, a polygraph examination, and other murders that defendant claimed to have committed. As a result, the prosecutor did not attempt to introduce the taped statements into evidence. Instead, the prosecutor asked Buikema to read redacted portions of defendant's statements into the record. The resulting testimony was lengthy and awkward. On two occasions, Buikema mistakenly read portions of the transcript that he should not have read.

[2] Defendant's brief implies that Buikema intentionally referenced "other murders" in an attempt to prejudice the jury against defendant. However, this argument is unsupported by the record.

[3] In the present case, defense counsel rejected the trial court's offer to read a cautionary instruction to the jury regarding Buikema's testimony.

Buikema's two references to unrelated murders that defendant discussed with police were fleeting references. This information was not repeated or emphasized during the course of trial, and none of the witnesses provided any details regarding the unrelated murders. Unlike defendant's first trial, there was no testimony that defendant actually confessed to or described these other murders.[4] We note that both references arose from a transcript of defendant's statements to police. Defendant's main trial theory was that he made numerous untrue statements to police in order to manipulate his way out of jail. Therefore, these fleeting references were actually consistent with defendant's theory of the case. Given the circumstances, we conclude that the challenged testimony was not so egregious as to deny defendant a fair trial or result in a miscarriage of justice.

Further, in order to prevail on this issue, defendant would be required to establish that a miscarriage of justice more probably than not occurred because of the error. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Viewed in light of the untainted evidence, we conclude that the challenged testimony was not outcome determinative. The untainted evidence included defendant's detailed confession to DeRaad's murder, along with numerous other incriminating statements made by defendant to various witnesses. We find it highly unlikely that the jury convicted defendant because of the fleeting references at issue, as opposed to the untainted evidence. The trial court did not abuse its discretion when it denied defendant's motion for a mistrial.

II. Evidentiary Issue

Defendant next contends that this Court should reverse his conviction because the trial court erroneously allowed a witness to discuss her belief that defendant was homosexual. Defendant argues that this testimony was extremely inflammatory and that the jury could have convicted defendant because of prejudices about homosexuality. We conclude that defendant's argument is without merit.

During the trial at issue here, Misti Clark testified that she spoke with defendant over the telephone on Sunday, December 5, 1993, between 1:00 and 4:00 p.m. Defendant called to ask whether church services would be held that evening.[5] Clark, who answered the telephone, informed defendant that no services were scheduled for that evening. According to Clark, defendant replied, "you mean I brought her all the way here for nothing?" Clark testified that she remembered defendant's reply because it struck her as unusual. She assumed that defendant was a homosexual, and she was surprised that he was with a woman.

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[4] Defendant's first trial on these charges ended in a mistrial, after a different prosecution witness testified that defendant confessed to killing DeRaad and "went on to describe another murder . . . that he had been involved in." That testimony informed the jury that defendant had described another murder in some detail, and was far more prejudicial than the testimony involved in the present case. Here, Buikema's testimony simply revealed that defendant wanted to talk to police about some unspecified murders. Given the defense theory that defendant made numerous untrue statements to police in a manipulative effort to obtain preferential treatment while incarcerated, this testimony did not deprive defendant of a fair trial.

[5] Clark's mother, Bonnie Myers, was a minister at a church that defendant sometimes attended.

On cross-examination, defense counsel grilled Clark regarding her recollection. First, defense counsel focused on Clark's failure to tell police during the initial investigation that defendant was with a woman when he telephoned. Defense counsel then engaged Clark in a detailed discussion of why she thought defendant was homosexual. On re-direct, the prosecutor sought to rehabilitate the witness by establishing that Clark sincerely believed that defendant was homosexual, and thus her explanation for recalling the telephone conversation was credible. In response to the prosecutor's questions on re-direct, Clark explained that she believed defendant was a homosexual because defendant used to talk to her mother, Bonnie Myers, about homosexual conduct that occurred in prison. During Myers' subsequent testimony, defense counsel again raised the issue of defendant's sexuality. Defense counsel attempted to discredit Clark further by eliciting Myers' testimony that she never discussed defendant's sexuality with either defendant or with Clark.[6]

The final reference to defendant's sexuality occurred during closing arguments. The prosecutor explained to the jury that the testimony about defendant's sexuality was only important in terms of judging Clark's credibility and veracity. The prosecutor further explained that Clark's recollection of the telephone call was important because it placed defendant in the company of a woman on December 5, 1993, the last day the victim was seen alive.

This Court reviews the trial court's admission of evidence for an abuse of discretion. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Defendant's allegations of error regarding this issue are mainly unpreserved. Defendant failed to object to Clark's initial testimony regarding the telephone call. Defendant also failed to object to the prosecutor's comments during closing arguments. Therefore, we review these unpreserved issues only for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant did raise a hearsay objection to Clark's testimony regarding what Myers told her. Therefore, we review this preserved, nonconstitutional issue to determine whether a miscarriage of justice more probably than not occurred because of the alleged error. *Lukity, supra* at 495.

Clark's initial testimony that she thought defendant was homosexual was given in response to the prosecution's question about why Clark recalled her telephone conversation with defendant. As anticipated by the prosecutor, defendant sought to discredit Clark's memory of the statement that defendant was with a woman on the night of December 5, 1993. The challenged testimony was relevant and necessary to explain Clark's recollection. Defendant has failed to demonstrate that plain error occurred with regard to this testimony. Further, it was defendant, not the prosecutor, who pursued and emphasized this issue at trial. "A defendant should not be allowed to assign error to something his own counsel deemed proper at trial," because to do so "would allow a defendant to harbor error as an appellate parachute." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Defendant's preserved allegation of error with regard to the elicitation of hearsay testimony from Clark on re-direct also lacks merit. During Clark's cross-examination, defense counsel emphasized the issue of defendant's sexuality by repeatedly asking the witness why she assumed that defendant was homosexual. Only in the face of this cross-examination did the

[6] The trial court refused to allow the prosecutor to question Myers further regarding this issue.

prosecutor seek further information about why Clark made that assumption. By eliciting this testimony, the prosecutor was not trying to prove that defendant was indeed a homosexual. Rather, he was trying to prove that Clark genuinely remembered her telephone conversation with defendant. Clark's testimony was not offered to prove the truth of the matter asserted, i.e., that defendant was a homosexual. Because Clark's testimony was not hearsay, the trial court did not abuse its discretion in admitting that testimony in the face of a hearsay objection.

Finally, the prosecutor's comments during closing argument were not improper. As our Supreme Court stated in *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995):

> Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." [Citations omitted.]

In closing, the prosecutor did not make an argument that was outside of the evidence. Clark's assumption that defendant was a homosexual was properly before the jury because it helped explain why she recalled the telephone conversation. Further, the prosecutor properly informed the jury that the testimony had limited relevance and that it should only be considered in determining Clark's credibility and veracity. The prosecutor did not engage in misconduct in commenting on this testimony.

III. Ineffective Assistance of Counsel

Defendant next contends that this Court should reverse his conviction because his trial counsel rendered ineffective assistance. Defendant argues that his trial counsel should have challenged the admissibility of various statements defendant made to police, social workers, and fellow inmates while defendant was incarcerated on an unrelated charge. Defendant contends that his arrest on that charge was unsupported by probable cause, and therefore illegal. As a result, defendant argues that his incriminating statements made during the incarceration should have been suppressed as "fruit of the poisonous tree." Because defendant's trial counsel failed to move for suppression of these statements on that basis, defendant argues that his counsel rendered ineffective assistance.

Trial counsel is "strongly presumed" to have provided constitutionally effective assistance. *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant bears a heavy burden when attempting to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). As this Court stated in *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994):

> [T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.

Further, in order to establish that counsel was ineffective, the "defendant must show that but for counsel's error there is a reasonable probability that the result of the proceeding would

have been different *and* that the result of the proceeding was fundamentally unfair or unreliable." *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original).

Defendant's ineffective assistance claim arises from his arrest by Officer Wildman of the Grand Rapids police department on January 5, 1994. Because City of Wyoming police officers suspected defendant in connection with DeRaad's murder, they sought Wildman's assistance in locating him. The Wyoming officers alerted Wildman to defendant's assaultive history and informed Wildman that defendant was suspected of using a knife in connection with DeRaad's murder.[7] While speaking with the Wyoming officers, Wildman observed defendant walking down a nearby alley. When Wildman approached defendant, he conducted a pat-down search to ensure his own safety. During that search, Wildman discovered that defendant was carrying a nine-inch knife in a sheath beneath his jacket. The knife had a five-inch handle and a four-inch single-edged blade. Based on that discovery, Wildman arrested defendant for carrying a concealed weapon ("CCW"). MCL 750.227(1).

Defendant remained incarcerated on the CCW charge between January 5 and February 9, 1994. During that time, he made incriminating statements to the following individuals: (1) jail therapist John McKay on January 5, 1994; (2) jail therapist Charles VanScoy on January 6, 1994; (3) Detective Buikema on January 5, 6, 7, and 27, 1994; (4) inmate Billy Poniatowski on February 1 and 2, 1994; and (5) inmate Homer Roomsburg on February 6-9, 1994. The district court began defendant's preliminary examination on January 18, 1994, but adjourned those proceedings and instructed the parties to brief the issue of probable cause supporting defendant's arrest. On February 9, 1994, the district court entertained further arguments. After considering the parties' briefs and arguments, the district court held that defendant's arrest was not supported by probable cause. Accordingly, the district court dismissed the CCW charges against defendant.

During defendant's trial on the instant murder charges, the prosecutor presented evidence regarding the incriminating statements that defendant made while incarcerated on the CCW charges. Defendant's trial counsel unsuccessfully moved to suppress defendant's statements to jail therapists McKay and VanScoy on privilege grounds. However, counsel did not move to suppress any of defendant's statements on the theory that they resulted from an illegal arrest. Defendant argues on appeal that trial counsel's failure to bring that motion constituted ineffective assistance.

Defendant did not file a formal motion requesting an evidentiary hearing on his ineffective assistance claim. However, under MCR 7.216, we remanded this matter to the circuit court with instructions to conduct an evidentiary hearing as provided in *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).[8] Defendant's trial counsel testified at the evidentiary hearing, explaining his knowledge of the relevant facts, his efforts on defendant's behalf, and his strategy

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[7] Defendant later confessed to striking the victim multiple times about the face and head with a hammer, as well as cutting her with a box-cutter type knife. This confession matched the wounds discovered on the victim's body.

[8] *People v Strader*, unpublished order of the Court of Appeals, entered March 12, 2001 (Docket No. 217377).

during the trial at issue here. After the evidentiary hearing, the circuit court issued a written opinion concluding that defendant's trial counsel did not render ineffective assistance. The circuit court based its ruling on two conclusions: (1) even if trial counsel had moved to suppress the evidence, that motion would have been unsuccessful, and (2) trial counsel was pursuing legitimate trial strategy when he failed to seek suppression of the challenged statements.

Trial counsel will not be deemed ineffective for failing to advocate a meritless position or failing to bring a fruitless motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Thus, if a motion to suppress the above statements would have been unsuccessful, defense counsel's failure to bring that motion cannot constitute ineffective assistance. The success of such a motion to suppress hinges, in the first instance, on the legality of defendant's CCW arrest. We agree with the circuit court that defendant's arrest on CCW charges was supported by probable cause. Therefore, defendant's resulting incarceration was legal and a motion to suppress statements resulting from that arrest would not have been successful.

The CCW statute, MCL 750.227(1), provides:

> A person shall not carry a dagger, dirk, stiletto, a double-edged nonfolding stabbing instrument of any length, *or any other dangerous weapon*, except a hunting knife adapted and carried as such, concealed on or about his or her person, or whether concealed or otherwise in any vehicle operated or occupied by the person, except in his or her dwelling house, place of business or on other land possessed by the person. [Emphasis added.]

The parties apparently agree that the knife carried by defendant did not qualify as a "dagger, dirk, stiletto, [or] a double-edged nonfolding stabbing instrument of any length." Further, defendant does not argue that the knife fell within the statute's exception for "a hunting knife *adapted and carried as such*" (emphasis added).[9] The parties' debate centers on whether the knife qualified as "any other dangerous weapon."

Relying on *People v Vaines*, 310 Mich 500; 17 NW2d 729 (1945), the district court reasoned that a folding knife carried in a sheath did not qualify as a "dangerous weapon," per se. In *Vaines*, the defendant was carrying "a knife with a single folding blade 3-5/16 inches long." *Id*. at 502. The trial court determined that the knife was a "dangerous weapon" as defined by the concealed weapons statute in effect at that time because the knife's blade was greater than three inches in length. Our Supreme Court disagreed, holding that the trial court erred when it defined a "dangerous weapon" by the length of its blade. *Id*. at 503-504. Instead, the Court held that the Legislature intended the words "other dangerous weapon," as used in the statute, to mean:

> [A]ny concealed article or instrument which the carrier used, or carried for the purpose of using, as a weapon for bodily assault or defense. The legislature certainly did not intend to include as a dangerous weapon the ordinary type of

[9] As the circuit court noted, defendant was walking through an alley in downtown Grand Rapids when arrested by police. Officer Wildman had no reason to believe that defendant was carrying the knife for hunting purposes, and defendant never made such a claim.

> jackknife commonly carried by many people, unless there was evidence establishing that it was used, or was carried for the purpose of use, as a weapon. [*Id*. at 506.]

In the present case, the district court concluded that police had no specific information that defendant intended to use the knife to commit a crime. Therefore, it held that defendant was not carrying a "dangerous weapon," in violation of the statute, at the time of his arrest. The circuit court disagreed with the district court's analysis, holding that the knife carried by defendant did qualify as a "dangerous weapon."[10] The circuit court noted that defendant was not carrying a simple pocket knife. Rather, defendant was carrying a "Buck-like" hunting knife, a "substantial weapon . . . [that] can be used to field dress game such as deer." Further, the circuit court noted that defendant had no discernible reason for carrying the knife, other than an intent to use it as a weapon. Therefore, the circuit court concluded that probable cause existed to arrest defendant under the CCW statute.

Probable cause to arrest does not require proof beyond a reasonable doubt that the defendant has committed a crime. *People v Sizemore*, 132 Mich App 782, 788; 348 NW2d 28 (1984). Probable cause is based on the determination as to whether, at the moment of arrest, the facts and circumstances within the knowledge of the arresting officer and of which he had reasonable trustworthy information were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense. *People v Heard*, 178 Mich App 692, 701; 444 NW2d 542 (1989).

We conclude that Officer Wildman had sufficient information to support a belief that defendant was carrying the nine-inch knife for the purpose of using that weapon for bodily assault or defense. Wildman knew of defendant's assaultive history and knew that defendant was suspected of murdering a woman with a knife. Further, at the time of his arrest, defendant did not provide an innocent explanation for why he was carrying the knife.[11] Therefore, we agree with the circuit court that defendant's CCW arrest was supported by probable cause.

Given our conclusion that probable cause existed to support defendant's arrest, it is clear that any motion to suppress statements arising from that arrest, on the basis now urged by defendant, would have been unsuccessful. We therefore conclude that defendant has failed to show that the outcome of the trial would have been different had his trial counsel filed the proposed motion to suppress.[12] Defendant's trial counsel did not render ineffective assistance.

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[10] Defendant contends that the doctrine of collateral estoppel barred the circuit court from disagreeing with the district court on the issue of probable cause. However, this Court has clearly ruled that dismissal of criminal charges at a preliminary examination raises no collateral estoppel bar to a subsequent prosecution. *People v Hayden*, 205 Mich App 412, 414-415; 522 NW2d 336 (1994). Accordingly, we conclude that the doctrine of collateral estoppel does not preclude the circuit court from making its own determination regarding the existence of probable cause to support defendant's CCW arrest.

[11] After his arrest, defendant stated that he was carrying the knife in self-defense because he was in a dangerous area of town.

[12] Given our resolution of the above issue, we need not consider whether defendant's trial (continued…)

IV. Defendant's Right to Testify

Finally, defendant contends that this Court should reverse his conviction because the trial judge unduly chilled his right to testify on his own behalf. We conclude that reversal is not required.

On the last day that testimony was taken in this trial, outside the jury's presence, defense counsel informed the court that defendant planned to testify on his own behalf. Defense counsel also informed the court that defendant's decision ran contrary to counsel's advice. At that point, the trial court engaged in the following colloquy with defendant:

> *The Court*: Mr. Strader, do you still want to testify?
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> *Defendant*: Yes, I do.
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> *The Court*: You know, it's not good practice to ignore the advice of your attorney, particularly when you have a very experienced trial attorney. It's not your job to prove your innocence. All [defense counsel] has to do is create some reasonable doubt.
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> I can't tell you how many cases I've seen where reasonable doubt might exist until the defendant takes the witness stand, and all of a sudden it clears up any question of reasonable doubt. And I've seen more defendants hang themselves by testifying than I've seen win their case by testifying, and I've been doing this for over 18 years now.
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> *Defendant*: Well, I'm kind of psychologically incapable of even making up my mind which way I should go. I'm scared not to testify for all that's been said against me, as portraying me in that picture of murdering Carol DeRaad. I don't know what to do. I don't know what to do.
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> *The Court*: Listen to your attorney. The best thing I can say is listen to your attorney.

At that point, defense counsel requested an opportunity to discuss the matter with defendant in private. The record reflects that defendant and his attorney conversed for approximately twenty minutes. After that discussion, they returned to the courtroom and counsel indicated that defendant had decided not to testify. As defense counsel stated:

> The record should reflect [that] the Court considered my request to talk to Mr. Strader in private. We went to the jury room down the hall. Once again, I reiterated to Mr. Strader my legal advice and strategy in this trial. He deferred the decision to my legal advice and he will not be testifying.

(…continued)

counsel was pursuing legitimate trial strategy when he failed to seek suppression of the challenged statements.

> I want the record to be clear that that decision was based upon a conversation between both of us, and Mr. Strader is following my advice and has accepted my advice. However, he was also free to do whatever he wants in this trial, and I believe he's not going to testify.

On appeal, defendant argues that the trial court violated his constitutional rights and denied him a fair trial by unduly chilling his right to testify. We conclude that reversal is not required.

In *United States v Webber*, 208 F3d 545, 550-551 (CA 6, 2000), the Sixth Circuit discussed the constitutional dimensions of a defendant's right to testify on his own behalf:

> The right of a defendant to testify at trial is a constitutional right of fundamental dimension and is subject only to a knowing and voluntary waiver by the defendant. "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." It is a right that is "'essential to due process of law in a fair adversary process'" and thus falls under the protections of the Fifth and Fourteenth Amendments. The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor"—which, of course, would include himself. In addition, the right to testify is "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony."
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> The right to testify is personal to the defendant, may be relinquished only by the defendant, and the defendant's relinquishment of the right must be knowing and intentional. The defense counsel's role is to advise the defendant whether or not the defendant should take the stand, but it is for the defendant, ultimately, to decide. [Citations omitted.]

Defendant contends that the Michigan appellate courts have never addressed the issue of judicial interference with a criminal defendant's right to testify. However, this Court discussed the issue in *People v Hunter*, 46 Mich App 158; 207 NW2d 417 (1973). In that case, the trial court inquired, *in the jury's presence*, about whether the defendant was planning to testify. *Id*. at 159. On appeal, the defendant argued that the trial court's inquiry coerced him into testifying and therefore required reversal of his conviction. *Id*. This Court held that, although the trial court's inquiry may have been error, it did not constitute error requiring reversal because the record did not show that the defendant was coerced into taking the stand. *Id*. at 159-160. This Court noted that the defendant and his counsel had discussed whether the defendant should testify. *Id*. at 160-161. Therefore, it concluded that the "defendant's decision to take the stand was a matter of sound trial strategy arrived at only after careful consideration of the competing considerations." *Id*.

Defendant cites *United States v Leggett*, 162 F3d 237 (CA 3, 1998), and *United States v Pennycooke*, 65 F3d 9 (CA 3, 1995), in support of his argument that the trial court's actions in the present case require reversal of his conviction. However, our reading of those cases supports our decision that the trial court did not commit error requiring reversal. In *Leggett*, *supra* at 246-247, the federal appellate court repeated the general rule that a trial court's inquiry about a defendant's decision to testify is improper:

> We decided in *Pennycooke* that a trial court not only has no duty to make an inquiry but, as a general rule, *should not* inquire as to the defendant's waiver of the right to testify. We explained our reasoning as follows:
>
> "[T]he determination of whether the defendant will testify is an important part of trial strategy best left to the defendant and counsel without the intrusion of the trial court, as that intrusion may have the unintended effect of swaying the defendant one way or the other. . . ." *Pennycooke*, 65 F3d at 11 (citations omitted).
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> *See also* [*United States v*] *Van De Walker*, 141 F3d [1451 (CA 11, 1998)] at 1452 (inquiries by trial court "would unnecessarily intrude into the attorney-client relationship and could unintentionally influence the defendant in his or her choice). . . . [I]t is defense counsel's responsibility, not the trial court's, to make sure that the defendant is informed of the right to testify and that any waiver of the right is valid. *Pennycooke*, 65 F3d at 13.
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> * * *
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> Mere disagreement between defendant and counsel with regard to strategic decisions does not create a situation severe enough to compel a [trial] court to investigate whether the defendant's rights are being impinged. As long as it is clear that defense counsel has informed the defendant of the right to testify and the defendant understands that right, a [trial] court has no reason to intervene. [(Emphasis in original) (citations omitted).]

In *Leggett*, like the present case, defense counsel informed the trial court that the defendant wished to testify, against counsel's advice. *Id*. at 248. The trial court openly expressed its opinion that the defendant should not testify and urged the defendant to listen to his lawyer's advice. *Id*. After those comments, defendant elected not to testify. *Id*. The federal appellate court found that the trial court's comments were "highly inappropriate" and that "any strategic dispute" between the defendant and his counsel "should have been resolved without comment from the district court." *Id*. Nevertheless, the Court *did not* find error requiring reversal because there was no indication that the defendant "was coerced by his attorney to remain silent." *Id*.

In the present case, defendant was consistently involved in his own defense. The record reveals that, on numerous occasions, defendant instructed his counsel to ask certain questions of prosecution witnesses. After the above-quoted exchange with the trial court, defendant and his counsel had approximately twenty minutes to confer in private about this matter. Defense counsel thereafter indicated on the record that defendant's decision not to testify was based on their conversation. In making this record, counsel reiterated that defendant was aware that he was free to do what he wished. Defendant did not object, did not indicate that he was being precluded from testifying against his wishes, and did not indicate that his counsel was misrepresenting his position. Because defendant was aware of his right to testify and had a private, lengthy conversation with his counsel before finalizing his decision, we conclude that defendant was not coerced or intimidated by the trial court in waiving his right to testify.

Hunter, *supra* at 159-161; *Webber*, *supra* at 552-553; *Leggett*, *supra* at 248-249. Therefore, reversal of defendant's jury conviction is not warranted.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski