

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD ARMSTEAD JOHNSON,

Defendant-Appellant.

UNPUBLISHED

September 27, 2002

No. 231517

Genesee Circuit Court

LC No. 00-005516-FH

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), and unarmed robbery, MCL 750.530. The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to consecutive sentences of 18 to 40 years' imprisonment for home invasion and 12-1/2 to 30 years' imprisonment for unarmed robbery. We reverse and remand for a new trial.

Defendant argues that the trial court erred by allowing him to represent himself at trial. Specifically, defendant claims that the trial court failed to substantially comply with the legal requirements for establishing an effective waiver of his right to counsel. We agree.

A criminal defendant's right of self-representation is guaranteed implicitly by the United States Constitution and explicitly by the Michigan Constitution and state statute. US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1; *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). However, this right is not absolute and creates an "unavoidable tension" with a criminal defendant's constitutional right to counsel. *Anderson, supra*; *Adkins, supra* at 720. "[A] defendant has either a right to counsel or a right to proceed in propria persona, but not both." *Adkins, supra* at 720. Thus, in order to invoke the right to self-representation, a defendant must first effectively waive the right to counsel. *Id.* at 720-721.

In *Anderson*, our Supreme Court held that before a trial court may grant a defendant's request to proceed in pro per it must determine whether: (1) the defendant's request for self-representation was unequivocal; (2) the defendant's request was made knowingly, intelligently, and voluntarily; and (3) the court would be unduly burdened or disrupted. *Anderson, supra* at 367-368. To ensure that the defendant's choice is made knowingly and intelligently, the trial court must advise the defendant of the dangers and disadvantages of self-representation. *Id.* at 368. MCR 6.005(D) furthers this goal by requiring the trial court to advise the defendant of the

charges, the maximum penalty upon conviction, and the risks associated with self-representation. The court rule also requires the trial court to provide the defendant with an opportunity to consult with counsel. MCR 6.005(D).

A trial court must substantially comply with these requirements before granting a defendant's request to proceed in propria persona. *Adkins, supra* 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." *Adkins, supra* at 726-727. Although a trial court's method of inquiring into and satisfying the *Anderson* and MCR 6.005(D) requirements is within its discretion, the substantive requirements and concepts must be covered. *Adkins, supra* at 725.

Defendant's request for self-representation in the instant case was unequivocal and the trial court properly offered him the opportunity to consult with appointed counsel. However, the presence of standby counsel alone does not legitimize a waiver of counsel inquiry. *People v Dennany*, 445 Mich 412, 446; 519 NW2d 128 (1994). Indeed, a further review of the record reveals that the trial court failed to apprise defendant of the dangers of self-representation or determine if he knowingly, voluntarily, and intelligently waived his right to counsel. See *id.* We further note that the trial court neglected to advise defendant of the charges before him and the maximum penalties for those offenses as required by the court rule. MCR 6.005(D). The fact that defendant was capable of filing motions and articulating his arguments during the trial neither proves that he was aware of the dangers inherent with self-representation, nor does it excuse the trial court's duty to comply with the standards set forth by the court rules and our Supreme Court. On this record, we find the trial court's "inquiry" into defendant's request to represent himself insufficient to establish a valid waiver of his right to counsel.

Because the trial court failed to substantively comply with the requirements of *Anderson* and MCR 6.005(D), defendant's waiver of his right to counsel was ineffective. Denial of the right to counsel is a structural error that requires automatic reversal. *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994); *People v Johnson*, 215 Mich App 658, 666-667; 547 NW2d 65 (1996).

In light of our decision, defendant's remaining issues on appeal need not be addressed.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Jane E. Markey