STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL EDISON SMITH,

Defendant-Appellant.

UNPUBLISHED
May 11, 2004

No. 242738
Grand Traverse Circuit Court
LC No. 02-008796-FC

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of first-degree criminal sexual conduct (CSC) against a person under thirteen years of age, MCL 750.520b(1)a. Defendant was sentenced to concurrent prison sentences of 30 to 60 years and 285 months to 60 years. On appeal defendant argues that the trial court failed to advise him of the risks of self-representation and abused its discretion in admitting certain evidence. Defendant also argues that there was insufficient evidence to support his convictions. Because the record does not support defendant's arguments, we affirm.

Defendant first argues that when he informed the trial court of his desire to represent himself on the second day of trial, the court violated the requirements of MRE 6.005(D)(1) by failing to advise defendant of the charge, the maximum sentence, or the risks of self-representation. Neither defendant nor his attorney objected to the manner the trial court advised defendant on the risks of self-representation. Issues for appeal must be preserved in the record by notation of objection. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Because this issue is not preserved, we review for plain error. *People v Carines*, 460 Mich 750, 764-765, 774; 597 NW2d 130 (1999).

A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by the Michigan Constitution and statute, Const 1963, art 1, sec 13, MCL 763.1. *Martinez v Court of Appeal of California, Fourth Appellate Dist*, 528 US 152; 120 S Ct 684, 687; 145 L Ed 2d 597, 602 (2000). In *People v Hicks*, 259 Mich App 518, 523; 675 NW2d 599 (2003), this Court described the framework for determining whether a defendant has properly waived the assistance of counsel:

> 'Proper compliance with the waiver of counsel procedures . . . is a necessary antecedent to a judicial grant of the right to proceed in propria persona. Proper

> compliance requires that the court engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant.' *People v Adkins (After Remand)*, 452 Mich 702, 720-721; 551 NW2d 108 (1996). Before a trial court grants a request for self-representation, the trial court must find (1) that the request is unequivocal; (2) that the assertion of the right of self-representation is knowing, intelligent, and voluntary, with the defendant having been made aware by the trial court of the 'dangers and disadvantages of self-representation'; and (3) that the defendant 'will not unduly disrupt the court while acting while acting as his own counsel.' *People v Ahumada*, 222 Mich App 612, 614-615; 564 NW2d 188 (1997), citing *Adkins, supra* at 706, 722; *People v Anderson*, 398 Mich 361, 366-368; 247 NW2d 857 (1976). Additionally, MCR 6.005 imposes a duty on the trial court to inform the defendant of the charge and penalty he faces, advise him of the risks of self-representation, and offer him the opportunity to consult with retained or appointed counsel. *Ahumada, supra* at 614-615.

Defendant insists the trial court did not comply with MCR 6.005(1) because the trial court did not specifically advise defendant of the charge and the maximum prison sentence at the time defendant waived his right to counsel during the second day of trial. MCR 6.005(D)(1) states:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (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

Our Supreme Court stated in *Adkins, supra*, 452 Mich at 731, that if the trial court has already expressed the nature of the charge and possible punishment to the defendant at the arraignment, "[t]he fact that the judge did not specifically address the charged offense and the range of possible punishment is not enough to defeat a finding of substantial compliance with the waiver procedures . . . ." The Supreme Court continued, stating that the requirements of MCR 6.005 are "merely vehicles to ensure that the defendant knowingly and intelligently waived counsel with eyes open. A particular court's method of inquiring into and satisfying these concepts is decidedly up to it, as long as the concepts in these requirements are covered." *Id.* at 725; citations omitted.

We find that the trial court substantially complied with the requirements of MCR 6.005(1) because although the court did not—at the time of defendant's waiver—repeat to defendant what he was charged with and the maximum prison sentence for those charges, the record indicates defendant fully acknowledged his understanding of the charges and their maximum penalty during his arraignment. His argument further demonstrated his knowledge of the charges, their severity, and punishment.

Defendant next argues that the trial court's advice concerning the risks involved in self-representation was "meager and conclusory" and did not adequately inform defendant of the disadvantages of self-representation. In support of this argument, defendant cites *People v Blunt*,

189 Mich App 643; 473 NW2d 792 (1991), where this Court held the advice from the trial court in that case was not adequate for informing a defendant of the risks of self-representation.

Defendant contends the advice was inadequate under the requirements stated in *Hicks, supra*, and MCR 6.005 because such statements that self-representation was a "bad idea," or the remark that defendant would not look good in front of the jury, were not helpful to defendant in making his decision to represent himself. But the court does not have to engage in a strict, word-for-word litany approach to giving its advice against defendants representing themselves. *Adkins, supra*, 452 Mich at 727. Rather, a court must substantially comply with the advisory requirements, engage "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." *Id.* "Further, the effectiveness of an attempted waiver does not depend on what the court says, but rather, what the defendant understands." *Id.* at 723.

We find that the record establishes the trial court substantially complied with the advice requirements for self-representation. The court engaged in a short colloquy with defendant concerning the risks of self-representation and defendant acknowledged that he understood the risks of going forward without an attorney, but stated that he wanted to proceed with the trial on his own, in his own manner. Additionally, we note that in a more recent decision, this Court in *Hicks, supra*, held that a trial judge's statements that the defendant would have to follow the rules of court, that self-representation would be "very unwise," and that "a man who represents himself has a fool for a client," adequately informed the defendant of the risks of self-representation. *Hicks, supra*, 259 Mich App at 531. The similarity of the remarks between the present case and *Hicks*, warrant a finding that the trial court did not commit error here.

Next, defendant argues his decision to represent himself was not made knowingly and voluntarily because he was not mentally competent to make such a decision. A defendant's general competence is relevant to the determination whether he has knowingly, intelligently, and voluntarily asserted his right to self-representation. *People v Bass*, 88 Mich App 793, 803; 279 NW2d 551 (1979). The test for a defendant's competency to waive counsel is whether the defendant has the ability to understand the proceedings. *Godinez v Moran*, 509 US 389, 401; 113 S Ct 2680; 125 L Ed 2d 321 (1993).

In this case, although we observe that defendant's reasons for wanting to represent himself were inarticulately conveyed, the dialogue between the court and defendant reflect defendant's knowledge of the importance of credibility. Defendant challenged the methodology of his counsel's cross-examination because the methodology did not lend itself to an attack on the victim's credibility. Defendant also repeatedly acknowledged that he understood the risks of going forward without an attorney but stated that he wanted to proceed with the trial on his own. Defendant also acknowledged that he would have to follow courtroom rules and decorum. He demonstrated a basic understanding of cross-examination when he acknowledged that he understood he could not ask the victim if she had ever had sex before on cross-examination. Therefore, we find defendant knowingly, intelligently, and voluntarily made the assertion to represent himself because he demonstrated a clear understanding of the proceedings and a clear understanding of the court's advice concerning those proceedings.

Defendant also maintains that the trial court erred by allowing testimony from the victim's mother that defendant would sometimes put a pillow over the mother's face during sex.

The trial court ruled that the mother could testify that defendant would occasionally put a pillow over her face during sex because this information was not character evidence under MRE 404(b) and because the testimony was relevant under MRE 401 in that defendant used a pillow over the victim's face.

The decision to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Use of "other acts" as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). Pursuant to MRE 404(b), evidence of other crimes or wrongs "is not admissible to prove the character of a person in order to show action in conformity therewith." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). However, MRE 404(b) is not implicated if evidence of "other acts" is logically relevant and does not involve the intermediate inference of character. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), mod 445 Mich 1205; 520 NW2d 338 (1994). The question is whether the other acts evidence is in any way relevant to a fact in issue other than to show a propensity to commit the crime charged. *Id.*

We find that the trial court did not abuse its discretion in determining that the evidence of defendant's sexual preference for covering his wife's face with a pillow during sex did not implicate MRE 404(b) because this evidence was logically relevant to rebutting defendant's claims that the victim had fabricated or "dreamed-up" her abuse by defendant. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). In this case, the trial court ruled the pillow evidence was relevant because it added to the victim's credibility because she had testified to similar incidents with a pillow during the alleged sexual abuse. And the record indicates that during defendant's cross-examination of the victim, he repeatedly attempted to insinuate that she had "dreamt up" the experiences and falsely accused others of sexual misconduct. Therefore, because this evidence was relevant to a purpose wholly separate from establishing defendant's propensity to commit the charged offense, it cannot be said that the trial court's decision was "grossly violative of fact and logic" constituting an abuse of discretion. *Hine, supra*, 467 Mich at 250.

Finally, defendant contends there was insufficient evidence to sustain his convictions. In evaluating a claim of insufficient evidence**,** this Court views the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). This Court will not interfere with the jury's determination regarding the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478 (1992). "The standard of review is deferential: a

reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In this case, the victim gave explicit testimony describing several different occasions of sexual abuse perpetrated by defendant against her. The victim described separate occasions when defendant penetrated her vagina with his penis or finger. A counselor for Ohio Child Services also testified the victim gave "extremely detailed descriptions" of sexual abuse committed by defendant on her. The victim's mother also testified the victim told her defendant abused her. Defendant never provided any rebuttal evidence to contradict the allegations and testimony provided by the victim or the prosecution's other witnesses. Viewing the evidence in a light most favorable to the prosecution, the record does not support defendant's argument that there was insufficient evidence to support his convictions.

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio