STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2004
v	No. 249571 Oakland Circuit Court
GEORGE HENRY REED, Defendant-Appellant.	LC No. 2003-188712-FC

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84, possession of a firearm by a felon, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to prison terms of four to thirty years for the assault conviction, four to twenty years for the felon in possession conviction, and to mandatory two-year terms for the felony firearm convictions. Defendant appeals as of right. We affirm.

Defendant first argues that he is entitled to a new trial because the complaining witness did not testify at the preliminary examination. MCL 766.4 requires the examination at the preliminary examination of those witnesses offered in support of the prosecution. It is well settled that the testimony of the complainant is not necessarily required at every preliminary examination if sufficient other evidence is produced. See *People v Meadows*, 175 Mich App 355, 358-359; 437 NW2d 405 (1989). Defendant does not contend that the other evidence produced was insufficient to support the bindover. Nonetheless, claims concerning the sufficiency of the evidence at a preliminary examination are rendered harmless by the presentation at trial of sufficient evidence to convict. *People v McGee*, 258 Mich App 683, 693; 672 NW2d 191 (2003).

Defendant also argues that he was denied due process of law when a polygraph examiner refused to administer a polygraph. We disagree.

Before trial, defendant demanded a polygraph test "to support his assertion that the shooting done here was in self-defense, with the aim that the charges against him would be dropped if he passed the test." The court arranged for the administration of the test. The polygraph examiner refused to administer the test, concluding after two interviews with

defendant that "defendant was not justified in shooting the victim whether he had a gun or not due to the fact that his actions did not amount to self-defense."

Defendant has cited no authority to support a conclusion that he was entitled to a polygraph examination. Although MCL 776.12(5) states that a defendant shall be given a polygraph examination if the defendant requests it, the statute by its own language applies only to defendants charged with a violation of specified criminal sexual conduct offenses. Defendant was not charged with a CSC offense. Thus, defendant had no right to a polygraph examination.[1]

Defendant further argues that trial counsel was ineffective for failure to preserve this issue. Defendant did not raise this issue in his statement of questions presented and, therefore, this argument is not preserved. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Regardless, counsel is not required to make futile objections. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Next, defendant asserts that he was denied his constitutional right to represent himself at trial. Although engaging in a de novo review of the entire record, this Court does not disturb a trial court's factual findings regarding a knowing and intelligent waiver of Sixth Amendment rights "unless that ruling is found to be clearly erroneous." The meaning of knowing and intelligent is a question of law. We review questions of law de novo. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004).

The right to counsel in a criminal proceeding is a substantive right guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 13. Conversely, the United States Supreme Court has held that the right of self-representation is implicitly guaranteed in the Sixth Amendment of the United States Constitution. *Iowa v Tovar*, 541 US ___; 124 S Ct 1379, 1387; 158 L Ed 2d 209 (2004); *Faretta v California*, 422 US 806, 819-820; 95 S Ct 2525; 45 L Ed 2d 562 (1975). The right of self-representation under Michigan law is expressly secured by both constitution and statute. Const 1963, art 1, § 13; MCL 763.1. *Williams*, *supra* at 641; *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996); *People v Dennany*, 445 Mich 412, 427; 519 NW2d 184 (1994) (opinion by Griffin, J.). However, the right to proceed without counsel, while constitutionally protected, is not absolute. *Dennany*, *supra* at 427. Rather, the determination whether self-representation is appropriate is within the discretion of the trial judge. *Adkins*, *supra* at 721 n 16, citing *People v Anderso*n, 398 Mich 361, 366; 247 NW2d 857 (1976). Before granting a defendant's request to proceed in propria persona, the trial court must determine that (1) the defendant's request is unequivocal, (2) that the defendant is knowingly, intelligently, and voluntarily asserting his right, and (3) "that the

[1] Defendant relies on *People v Reagan*, 395 Mich 306; 235 NW2d 581 (1975) and *People v Wyngaard*, 462 Mich 659; 614 NW2d 143 (2000), in support of his assertion that "due process requires at the very least Defendant is entitled to have a properly conducted examination." However, these cases do not involve the issue presented in this case and are not relevant to the issue presented.

defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Id*. at 367-368. The court should indulge every reasonable presumption against waiver of the right to counsel. *Adkins, supra* at 721. 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.

Defendant concedes that the trial court complied with MCR 6.005, but contends that the court failed to comply with *Anderson,* thus entitling him to a new trial. We disagree.

The trial court engaged in colloquy with defendant before ruling that defense counsel would continue to represent defendant. When defendant's statements to the court are examined in context, it becomes evident that his request to proceed pro se was essentially an afterthought to an expressed desire that appointed defense counsel be removed from the case. When the trial court indicated that it would not appoint another attorney on the day of trial, defendant then asked that he be allowed to represent himself. On questioning by the court, defendant acknowledged that "it's a terrible thing" to represent yourself in a criminal trial. The trial court noted the seriousness of the charge and expressed his concern that defendant was not competent to represent himself. When the trial court stated that defense counsel would represent defendant, defendant stated, "okay, but I can't get a fair trial." In its colloquy with defendant, the trial court substantially complied with the *Anderson* requirements. Defendant did not unequivocally state that he wished to represent himself. Rather, it appears that defendant was suggesting that self-representation was the lesser of two evils, the other being represented by counsel that defendant did not feel was adequately representing him. Given the circumstances, the court properly indulged every reasonable presumption against waiver of the right to counsel and did not improperly deny defendant's request for self-representation. *Dennany, supra* at 446.

Defendant also maintains that the trial court erred by denying his motion to suppress his statements made while he was in the backseat of a police car that were recorded by an in-vehicle audiotape. He contends that because he was in custody and was not advised of his *Miranda*[2] rights, the statement should have been suppressed.

Even assuming defendant was "in custody" when he was conversing with his nephew while the two men were the only occupants of the police car, statements made voluntarily by persons in custody do not fall within the purview of *Miranda*. *People v Hartford*, 117 Mich App 413, 416, 324 NW2d 31 (1982). Here, the portion of the tape ruled admissible by the court did not involve interrogation by the police but, rather, defendant's conversation with his nephew and defendant's comments to an officer in response to comments the officer was making to third parties outside the car. See *Rhode Island v Innis*, 446 US 291; 100 S Ct 1682; 64 L Ed 2d (1980) (where there is no interrogation, *Miranda* is not violated).

Defendant argues in the alternative that the tape and transcript were improperly admitted into evidence because the trial court did not redact the statements of the officer that were made

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

when the officer was speaking to other individuals. This argument was not raised before the trial court. Thus, we review this unpreserved claim for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Contrary to defendant's suggestion, this case does not involve the admission of an officer's editorialized version of a defendant's statement. Cf. *People v McGillen #1*, 392 Mich 251; 220 NW2d 677 (1974). Rather, it involves the admission of a tape and transcript containing conversation made in and near a police car. While it may have been more appropriate for the statements not attributable to defendant to be redacted, defendant does not identify any manner in which he was prejudiced by admission of the tape and transcript containing the officer's conversations with third parties. Defendant has not demonstrated plain error affecting his substantial rights.

In a supplemental brief, defendant argues that the trial court erred by allowing the prosecutor to refer to defendant's prior felony conviction to establish an element of the felon in possession charge. We disagree.

The parties stipulated that defendant had a prior felony conviction and that he was not eligible or allowed to be in possession of any type of firearm. In his opening statement, the prosecutor stated that, "There will be a stipulation in this case that on January 7, 2003, the Defendant had a prior felony conviction and was not eligible to even be in possession of a firearm on that day." The stipulation was later placed on the record.

The prosecution and the defense counsel may agree to stipulate that the defendant has been convicted of an unspecified prior felony in order to minimize any prejudice to the defendant. See *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999); *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Defendant's suggestion that defense counsel failed to object to the prosecutor's statement is misplaced on the facts of this case. Had the parties not entered into the stipulation, the prosecutor would have introduced evidence of the existence and nature of the prior felony conviction. To the extent that defendant may argue that counsel was ineffective for stipulating to the prior conviction, defendant has not demonstrated a reasonable probability that, but for counsel's alleged unprofessional error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant also argues that the trial court erred by sua sponte instructing the jury on the offense of manslaughter without instructing the jury on other lesser included offenses. Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

The factual premise for defendant's argument is erroneous. Contrary to defendant's suggestion, the trial court did not instruct the jury on the offense of manslaughter. Indeed, the victim did not die and a manslaughter instruction would clearly not be warranted. Rather, the trial court instructed the jury on the charged offense of assault with intent to commit great bodily harm less than murder. The court instructed the jury in relevant part:

> For the crime of assault with intent to murder, this means that the Prosecution must prove that the Defendant intended to kill. The Defendant's

> intent may be proved by what he said, what he did, how he did it or by all the other facts and circumstances which are in evidence.
>
> The Defendant can only be guilty of the crime of assault with intent to commit murder if he would have been guilty of murder had the person he assaulted actually died. If the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died, the Defendant is not guilty of assault with intent to commit murder.

The trial court then explained the offense of manslaughter in the context of the offense of assault with intent to commit murder. The trial court did not instruct on the offense of manslaughter and, therefore, defendant's argument is misplaced.

Defendant suggests that if the jury had been instructed on the lesser offense of felonious assault it would have convicted him of this lesser offense in light of the evidence of self-defense and that defense counsel was ineffective for failing to request an instruction on felonious assault. However, a jury, or the judge in a trial without a jury, may only consider necessarily included lesser offenses, not cognate lesser offenses. *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002), citing MCL 768.32(1). Felonious assault is a cognate, not a necessarily included, lesser offense of assault with intent to commit murder. *People v Vinson*, 93 Mich App 483, 485-486; 287 NW2d 274 (1979).

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter