

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH EDWARD MCMAHON,

Defendant-Appellant.

UNPUBLISHED

June 25, 2009

No. 285386

Macomb Circuit Court

LC No. 2007-005517-FH

Before: Owens, P.J., and Servitto and Gleicher, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree fleeing or eluding a police officer, MCL 257.602a(3), for which he was sentenced to two to five years in prison. He appeals as of right. We affirm.

Defendant first argues that he was denied the right to counsel or the right to the effective assistance of counsel. Because defendant failed to raise these issues below, our review is limited to errors apparent from the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

The Sixth Amendment directly guarantees the right to counsel in all criminal prosecutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). “It is well established that a total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal.” *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005). A critical stage generally means “a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused.” *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914 (2002). A preliminary examination is a critical stage in the proceedings. *People v Thomas*, 96 Mich App 210, 218; 292 NW2d 523 (1980). The trial itself is likewise a critical stage in the proceedings. *People v Russell*, 471 Mich 182, 187-188; 684 NW2d 745 (2004).

In *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), the Court identified three situations implicating the right to counsel in which a defendant is entitled to relief absent a showing of prejudice. One is the complete denial of counsel, i.e., counsel is absent or otherwise prevented from assisting the defendant. *Id.* at 658-659 n 25. Another is where counsel is provided but “entirely fails to subject the prosecution’s case to meaningful

adversarial testing,” i.e., does nothing at trial. *Id.* at 659. A third is where counsel is provided but the situation is such that it is extremely unlikely that any lawyer, no matter how competent, could provide effective assistance, e.g., the court requires counsel to try a highly publicized capital case with no preparation whatsoever. *Id.* at 659-661. Absent such circumstances, “there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the” verdict, i.e., defendant was denied the effective assistance of counsel. *Id.* at 659 n 26.

The record does not support defendant’s claim that he was denied his right to counsel. An attorney appointed to represent defendant appeared at the preliminary examination. Although he moved to withdraw, that motion was denied and counsel participated in the preliminary examination by cross-examining the witness and arguing against a bindover. Counsel again moved to withdraw at trial, but that motion was denied and counsel participated in the trial by cross-examining the witnesses, moving for a directed verdict, and arguing for acquittal. The crux of defendant’s claim relates to the manner in which counsel conducted jury selection at trial rather than a complete failure of counsel. Therefore, the issue is properly considered as one involving the effective assistance of counsel. *People v Frazier*, 478 Mich 231, 244; 733 NW2d 713 (2007).

To establish a claim of ineffective assistance of counsel, “defendant must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel’s assistance was sound trial strategy.” *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008).

Jurors are presumed to be competent and impartial. *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). The purpose of voir dire is to expose potential juror bias so that a defendant may be tried by a fair and impartial jury. *People Manser*, 250 Mich App 21, 24; 645 NW2d 65 (2002), overruled in part on other grounds by *People v Miller*, 482 Mich 540, 561 n 26; 759 NW2d 850 (2008); *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). “[A]n attorney’s decisions relating to the selection of jurors generally involve matters of trial strategy[.]” *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001) (O’Connell, PJ). Further, a defense attorney’s failure to challenge one or more jurors usually does not constitute ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). To succeed on a claim of ineffective assistance of counsel predicated on the failure to challenge or remove a juror, a defendant must show that the juror could have been successfully challenged for cause and that the outcome of the trial likely would have been different had the juror not participated in deliberations. Cf. *Hughes v United States*, 258 F3d 453, 458 (CA 6, 2001) (defendant must show that the juror was actually biased against him). Accord *United States v Angel*, 355 F3d 462, 470 (CA 6, 2004) (defendant must show that the juror was actually biased to prove ineffective assistance of counsel).

The record shows that defense counsel participated in jury selection, but asked few questions because he determined that the court and the prosecutor had “pretty much covered everything.” Counsel stated that he had no challenges for cause and declined to exercise any peremptory challenges. There is nothing in the record to suggest, and defendant does not

contend, that any jurors were unable to be fair and impartial. Further, while defendant takes issue with counsel's failure to ask more questions of prospective jurors, he does not identify any additional questions that counsel should have posed which might have revealed a lack of impartiality on the part of any juror. Therefore, the record does not support a finding that counsel's performance during jury selection was objectively unreasonable.

Defendant next argues that both the district court and the trial court erroneously denied defense counsel's motions to withdraw. This Court reviews a trial court's decision regarding a motion to withdraw for an abuse of discretion. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999). An abuse of discretion occurs if the trial court's decision is outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

To the extent that defendant challenges the district court's ruling, we conclude that the issue is waived because defendant expressly indicated that he wanted counsel to remain on the case and to represent him at the preliminary examination. "Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007). More specifically, "a party cannot request a certain action of the trial court and then argue on appeal that the action was error." *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

The Rules of Professional Conduct are not expressly applicable to a motion to withdraw, but do provide some guidance. *In re Withdrawal of Attorney*, *supra* at 432. MRPC 1.16(b) permits a lawyer to withdraw from representation under various circumstances, including when the client's conduct renders representation unreasonably difficult or for other good cause. MRPC 1.16(b)(5) and (6). This is consistent with case law governing a defendant's motion for substitution of counsel, which "is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Good cause will be found where there is a complete breakdown of the attorney-client relationship, *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979), or where there is an "irreconcilable bona fide dispute" regarding a substantial defense or trial strategy, e.g., a disagreement over whether to call alibi witnesses. *People v Charles O Williams*, 386 Mich 565, 576, 578; 194 NW2d 337 (1972); *People v Harlan*, 129 Mich App 769, 778; 344 NW2d 300 (1983). Reversal is not required unless a defendant can show prejudice resulting from the trial court's refusal to grant defense counsel's motion to withdraw and a continuance. *People v Wilson*, 397 Mich 76, 80-81; 243 NW2d 257 (1976).

Just before jury selection was to begin, defense counsel negotiated a plea agreement that included a favorable sentence agreement. When defendant refused to accept the agreement and insisted on going to trial, defense counsel moved to withdraw. Even if that dispute constituted an irreconcilable bona fide dispute to support the request to withdraw, there is no basis for concluding that defendant was prejudiced as a result of having counsel represent him at trial. As noted, counsel participated in the trial and defendant has not identified any errors or omissions in counsel's performance apart from that relating to jury selection. Therefore, defendant is not entitled to relief.

Defendant also briefly asserts that the trial court improperly denied an apparent request for self-representation. However, this issue is not included in defendant's statement of questions presented, and defendant does not address the merits of the issue in his brief. Therefore, the issue is abandoned and we decline to consider it. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher