STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2014
v	No. 315392 Wayne Circuit Court
ANDRE FITZGERALD JONES, Defendant-Appellant.	LC No. 12-003509-FH

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e. He was sentenced as a second habitual offender, MCL 769.10, to 20 months to 3 years' imprisonment for both convictions. We affirm.

This case arises out of sexual assaults committed by defendant against his 21-year-old adopted sister, who suffers from anxiety, depression, and bipolar disorder. The victim lived in an adult group home but was staying overnight at her adoptive mother's house, where she grew up and where defendant still resided, so she could attend a local memorial service for her godmother who had passed away.[1] After the victim went to bed on the night before the services, defendant returned home from a party and sexually assaulted the victim. That same night, defendant sexually assaulted the victim a second time, telling her that he was teaching the victim how to "become a woman" and that she had been adopted solely for the money. Following the second assault, the victim, hysterical, informed her mother and a sister, who also lived in the home, of the sexual assaults committed by defendant. The police were immediately contacted. While awaiting the arrival of the police, defendant, having been confronted about the sexual assaults, became hostile, threatening his mother, grabbing her walker out of her hands and slamming it to the ground, and destroying his mother's picture of the Pope, all the while yelling "f**k you" at her. The police arrived, interviewed the victim, and promptly arrested defendant. Defendant was convicted of two counts of CSC IV.

[1] The victim's mother is defendant's biological mother.

On appeal, defendant first argues that due process required the trial judge to recuse herself in order to avoid the appearance of impropriety, given the existence of a pertinent connection between the trial judge and the mother of the victim and defendant. At a calendar conference, the prosecutor noted that she had received a phone call from defendant's mother who indicated that she had "performed some campaigning activity for [the trial judge] in the past." The prosecutor further informed the trial judge that defendant's mother clarified that she had never met the judge "face-to-face," but the two had spoken briefly on the phone "about campaign matters." The trial judge responded that she had not engaged in an active campaign since 2002, that she did not know or have any knowledge of defendant's mother, that the mother had never spoken to the judge, and that she would be "fair and impartial." At a final conference, defense counsel stated that defendant wished for the trial judge to recuse herself, although the record contains no written motion for recusal or disqualification. At the conference, defendant himself blurted out: "Is your father Mr. . . .? I know your father, very well. My mother worked for him for 22 years, at Butzel." The trial judge responded, "Okay," and then reiterated that she did not know defendant's mother. The recusal request was denied and, that very same day, the decision was reviewed by the chief judge at a hearing. Defendant claimed that his mother had worked for the trial judge's father for 22 years and had assisted the trial judge in her bid for the bench. The prosecutor informed the chief judge of the prior phone call from defendant's mother, elaborating that the mother informed her that she had done such things as giving out lawn signs and passing out campaign materials. The prosecutor emphasized that defendant's mother acknowledged that she did not personally know the trial judge. The chief judge denied the disqualification request, finding that defendant's claims fell "far short" of overcoming the presumption of impartiality.

"'When this Court reviews a decision on a motion to disqualify a judge, the trial court's findings of fact are reviewed for an abuse of discretion, while the application of the facts to the relevant law is reviewed de novo.'" *People v Roscoe*, 303 Mich App 633, 647; 846 NW2d 402 (2014), quoting *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). We first note that with respect to a motion for disqualification, "[a]n affidavit *must* accompany the motion." MCR 2.003(D)(2) (emphasis added). Here, no affidavit was presented; we merely had, for the most part, unsupported hearsay claims being bandied about. Accordingly, the issue of disqualification was effectively waived for failure to comply with the court rule. *Davis v Chatman*, 292 Mich App 603, 615; 808 NW2d 555 (2011). Moreover, assuming the truth of the claims regarding the campaign activities of defendant's mother and her employment with the trial judge's father, they are tenuous at best for purposes of disqualification. The record simply did not establish that the trial judge was "biased or prejudiced . . . against" defendant. MCR 2.003(C)(1)(a). Nor did the record reflect that the trial judge, "based on objective and reasonable perceptions," had "a serious risk of actual bias impacting the due process rights of [defendant]

. . . as enunciated in" the United States Supreme Court's decision in *Caperton v A T Massey Coal Co, Inc*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). MCR 2.003(C)(1)(b)(i).[2] Finally, the record did not show that the trial judge, "based on objective and reasonable perceptions," had "failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." MCR 2.003(C)(1)(b)(ii).[3] The trial judge was adamant that she did not know defendant's mother, defendant's mother presumptively engaged in some minimal campaign assistance, absent any direct personal contact, and the trial judge's father allegedly employed defendant's mother, which does not necessarily create any relevant link between the trial judge and defendant's mother. Defendant has failed to "overcome the heavy presumption of judicial impartiality." *Wells*, 238 Mich App at 391. There was no abuse of discretion and reversal is thus unwarranted.

Defendant next contends on appeal that the trial court violated his due process rights by refusing to appoint substitute counsel, considering that there had been a complete breakdown of the attorney-client relationship and that counsel had not met with defendant for an amount of time that was adequate for purposes of trial preparation. At the final conference on the day before trial, defense counsel, clearly at the behest of defendant, asked to withdraw due to an alleged breakdown of the attorney-client relationship. Defendant claimed that he had not met with counsel until the day before the final conference and that there had "not been one formal consultation." Defendant asserted that he had "not discussed one thing with" counsel, and he complained that counsel had not visited the house where the alleged sexual assaults occurred. We note that defense counsel had represented defendant from the very start of the criminal proceedings, including full participation in the preliminary examination, thereby suggesting exaggeration in regard to defendant's claims. Furthermore, defense counsel stated that she had met with defendant three times, twice at the county jail, which visits were documented. Additionally, before jury selection started on the day of trial, defense counsel stated that she met with defendant the previous day at the jail as suggested by the trial court after denial of the withdrawal motion in order to discuss the case and the defense. However, defendant "refused to have any type of conversation."

"'A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion.'" *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011)

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[2] In *Caperton*, the Supreme Court of Appeals of West Virginia, in a 3-to-2 vote, had reversed a $50 million jury verdict that had been entered against a defendant coal company and its affiliates. One of the West Virginia justices in the majority denied a recusal motion, which motion had been based on the fact "that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages." *Caperton*, 556 US at 872. The United States Supreme Court reversed, basing its decision on protections afforded under the Due Process Clause relative to judicial impartiality. With respect to the risk of bias, the claims here come nowhere near those presented in *Caperton.*

[3] Canon 2 provides that a "Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities."

(citation omitted). The appointment of substitute counsel is warranted only when good cause is shown and when substitution will not unreasonably disrupt the judicial process, and good cause is established where there is a legitimate difference of opinion between counsel and a defendant in regard to a fundamental trial tactic. *Id.* Here, defendant's appellate argument is framed around the alleged failure of counsel to adequately meet with defendant and prepare a defense. However, defense counsel had already handled the preliminary examination and was emphatic that she had met three times with defendant. Moreover, when counsel attempted to discuss trial strategy with defendant before trial, he refused to engage counsel in conversation. "'A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel.'" *People v Traylor*, 245 Mich App 460, 462-463; 628 NW2d 120 (2001) (citation omitted). Additionally, the request for withdrawal or substitution, having been made the day before trial, would certainly have created an unreasonable disruption in the judicial process had it been granted. We note that an earlier trial date had been adjourned on the very day of the scheduled trial when a different trial judge recused herself. There was no effort to halt the trial at that time because of any alleged breakdown of the attorney-client relationship, so defendant must have been satisfied with counsel's level of involvement in the preparation of his defense. We view defendant's efforts below relative to the issue of substitution as having been nothing more than gamesmanship. Reversal is unwarranted.

Defendant next maintains that the trial court incorrectly scored prior record variable (PRV) 5, MCL 777.55, which concerns prior misdemeanor convictions and adjudications. This Court granted defendant's motion to remand for further development of the record with respect to several sentencing issues, including defendant's challenge of PRV 5. *People v Jones*, unpublished order of the Court of Appeals, entered December 4, 2013 (Docket No. 315392). On remand, the parties stipulated and the trial court agreed that PRV 5 had been scored incorrectly, but the court, consistent with the sentencing guidelines, imposed the same sentence. Defendant then filed a supplemental appellate brief in this Court, presenting amended sentencing arguments as based on the results of the proceedings on remand; however, defendant no longer poses any argument predicated on or related to PRV 5. Issues regarding the scoring of PRV 5 have therefore been rendered moot.

Defendant next contends, pursuant to *Alleyne v United States*, __ US __; 133 S Ct 2151; 186 L Ed 2d 314 (2013), that his constitutional rights under the Sixth and Fourteenth Amendments to a jury trial and to have the prosecution prove its case beyond a reasonable doubt were violated, given that the trial court engaged in impermissible judicial fact-finding in regard to various scoring variables. In *Alleyne*, the United States Supreme Court held that facts that increase a mandatory minimum sentence must "be submitted to the jury and found beyond a reasonable doubt." *Id.* at 2163. In *People v Herron*, 303 Mich App 392, 405; 845 NW2d 533 (2013), this Court rejected application of *Alleyne* to Michigan's sentencing scheme. In *People v Lockridge*, 304 Mich App 278; __ NW2d __ (2014), this Court acknowledged that it was bound by *Herron* and therefore concluded that *Alleyne* did not impact sentencing in Michigan, although two members of the panel voiced disagreement with *Herron*. Our Supreme Court has now granted leave in *Lockridge*, 846 NW2d 925 (2014), and is holding *Herron* in abeyance pending its ruling in *Lockridge*, 846 NW2d 924 (2014). Defendant acknowledges *Herron* and *Lockridge* and presents this issue merely for purposes of preservation. We reject defendant's argument in light of the fact that we currently remain bound by *Herron* and *Lockridge*. MCR 7.215(J)(1).

Finally, defendant maintains that the trial court impermissibly sentenced him to the top end of the guidelines as punishment for exercising his right to trial and refusing to admit guilt. In *People v Conley*, 270 Mich App 301, 314; 715 NW2d 377 (2006), this Court observed:

> A court cannot base its sentence even in part on a defendant's refusal to admit guilt. Resentencing is warranted if it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did. A defendant's Fifth Amendment right against self-incrimination is fulfilled only when a criminal defendant is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence. This guarantee extends to the sentencing phase of the trial. [Citations, quotation marks, ellipsis, and alteration brackets omitted.]

We have examined the trial court's remarks at sentencing and at the hearing on remand, and we conclude that the court did not base defendant's sentence on a refusal to admit guilt or on the assertion of the constitutional right to trial. The challenged comments made by the court are best characterized as simply admonishing or chastising defendant for his egregious and self-centered behavior, which the court found inexcusable considering the supportive and healthy environment in which he was raised. The trial court's remarks also touched on defendant's lack of remorse and the unlikelihood of rehabilitation, which are legitimate considerations in determining a sentence. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). The only comments that might conceivably support defendant's argument were the court's statements that it was time for defendant to "grow up" and "man-up." However, when read in context, the court was clearly speaking in terms of the need for defendant to start living his life responsibly in the future, rather than a demand that defendant admit guilt for the sexual assaults. Resentencing is unwarranted.

Affirmed.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot