STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KENNETH DAVID KABANUK.

PEOPLE OF THE STATE OF MICHIGAN,

Appellee,

v

KENNETH DAVID KABANUK,

Respondent-Appellant.

UNPUBLISHED
January 26, 2012

No. 301537
Oakland Circuit Court
Family Division
LC No. 2009-763779-PH

Before: JANSEN, P.J., and WILDER and K.F. KELLY, JJ.

PER CURIAM.

Respondent Kenneth David Kabanuk (Kenneth) appeals as of right following his bench trial conviction for criminal contempt after violating a personal protection order (PPO), MCL 600.2950a(23). He was sentenced to 45 days in jail. We reverse and remand for further proceedings, finding that the trial court did not comply with the requirements of MCR 6.005(D)(1) in ascertaining whether respondent's decision to represent himself was valid.

I. BASIC FACTS

Kenneth is married to Dawn Marie Kabanuk (Dawn), who, along with Kenneth, was found in criminal contempt of court following their joint bench trial.[1] The matter arises out of contentious family relations regarding the custody of Dawn's fourteen-year-old son. The two were charged with violating PPOs that had been issued on December 17, 2009, in favor of Mary Nordstrom (Mary). Mary is married to Dawn's brother, Ronald Nordstrom (Ronald). Ronald was granted guardianship over Dawn's son as a result of neglect and guardianship proceedings. Kenneth is not the boy's father, but is admittedly involved in all of the proceedings affecting his wife. The trial court judge acknowledged her familiarity with the parties and was aware that PPO's "had been flying around" between the parties for quite some time.

[1] Dawn has also appealed from her conviction (*In re Dawn Marie Kabanuk*, Docket No. 301536). The cases were submitted together for resolution.

On the day in question, Dawn and Kenneth were in court for a show cause hearing against Ronald. Dawn and her ex-husband, Kurt Traskos, claimed that Ronald was in violation of a visitation order and wrongfully denied visitation. Mary went to the courthouse that day with a dual purpose: she wanted to be there to support her husband and also wanted her sister, Jaya Wilson, to serve Kenneth with additional court papers on behalf of Patricia Nordstrom.[2] Both Mary and Jaya testified that they saw Dawn and Kenneth on the main floor of the court building, just after passing through security. Jaya approached Kenneth with the papers, but he refused service. She allowed the papers to drop at his feet. Mary and Jaya were later in the hall outside of the judge's courtroom where a fair number of other people had gathered for motion day. As the two approached the judge's courtroom, they could hear and see Kenneth speaking very loudly with a woman. Dawn was beside him. When Kenneth caught sight of Mary, he called her a "f***ing bitch" and screamed that he could not believe she was doing this to them after they had reached a settlement. Mary testified that he used profanity against her at least ten times. The woman to whom Kenneth was speaking cautioned him to settle down or she would go into the courtroom and summon a deputy. Kenneth persisted in his verbal assault and the woman disappeared into the courtroom. Mary testified that Dawn lunged forward, pointing her finger at Mary and stated, "I have one thing to say to you. You're a f***ing bitch and I hate you." The judge's law clerk, Laura McLane, heard the commotion. A female attorney came into the courtroom and reported that deputies were needed. McLane called for the deputies and then went out into the hallway, hoping to diffuse the situation. She saw Kenneth yelling at Mary. McLane told everyone that deputies had been summoned and suggested that Kenneth "take a walk" and pointed down the hallway.

The testimony of Dawn and Kenneth was in stark contrast to that of Mary, Jaya, and McLane. Dawn and Kenneth testified that at no time did they approach, confront, or use profanity against Mary. Rather, it was Mary who approached the two of them in the hallway, told them they were in violation of the PPO, and threatened to have them arrested. Kenneth merely told Mary to stop talking to them, leave them alone and reminded her that she was also in violation of a PPO they had against her. When McLane came out into the hall and suggested that Kenneth "take a walk," they took her advice and left.

The trial court held both Dawn and Kenneth in criminal contempt of court, finding that they violated the PPOs to the extent that the PPOs prohibited them from approaching or confronting Mary in a public place. Kenneth now appeals as of right.

I. SELF REPRESENTATION

Kenneth argues that the trial court failed to comply with the requirements of MCR 6.005(D)(1) in ascertaining whether his decision to represent himself was valid. Kenneth asserts in his appellate brief that he "did not ask to represent himself; it was thrust upon him. At no time did the trial court determine on the record that the decision to represent himself was voluntary." We agree that the trial court erred and that the structural error requires reversal. We review

[2] Patricia Nordstrom is the mother of Dawn and Ronald and is Mary's mother-in-law.

constitutional questions de novo. *People v Billings*, 283 Mich App 538, 541, 770 NW2d 893; 770 NW2d 893 (2009).

In determining whether a defendant waived his Sixth Amendment rights, the question is whether the waiver was knowing, intelligent, and voluntary. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). Before granting a defendant's request for waiver of the right to counsel, the trial court must make three findings. *Id.* at 642.

> First, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. To this end, the trial court should inform the defendant of potential risks. Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business. [*Id.*]

Furthermore, MCR 6.005(D)(1) prohibits a court from granting a defendant's waiver request without first advising the defendant of the charge, the maximum sentence, any mandatory minimum sentence, and the risks of self-representation. *Williams*, 470 Mich at 642-643. Pursuant to MCR 6.005(E), the trial court must advise a defendant of the continuing right to counsel at each subsequent hearing. The trial court must substantially comply with the above requirements and the court rule in order for the defendant to validly waive the right to counsel. *People v Willing*, 267 Mich App 208, 220; 704 NW2d 472 (2005).

Kenneth and Dawn failed to appear at the original show cause hearing. Bench warrants were issued and a new hearing was scheduled. On the morning of the rescheduled hearing, Kenneth first unsuccessfully attempted to have the trial court judge recuse herself. Immediately after the trial court denied the request, Kenneth moved to adjourn the proceedings in order to secure a witness. When that attempt at adjournment was unsuccessful, the following exchange took place:

> MR. STRENGER [counsel for Kenneth]: I'm sorry, your Honor. My client just indicated that he – he would like to fire me. He no longer wants me as his attorney.
>
> THE COURT: Well, that's his right but we're going forward today.
>
> MR. KABANUK: Okay. Then I guess I'll represent myself.
>
> THE COURT: Okay.
>
> MR. KABANUK: If that's what we got to do.

Realizing that Kenneth's self-representation may impact his own client, Dawn's attorney referred to some of the difficulties of self-representation and implored the trial court to allow Mr. Strenger remain as an advisor. The trial court then asked Kenneth:

> THE COURT: Mr. Kabanuk, would you like Mr. Strenger to remain so he might assist you if you need his assistance?

MR. KABANUK: Yes.

THE COURT: All right. But you would like to represent yourself?

MR. KABANUK: Yes.

The matter then proceeded to opening statement and Kenneth represented himself throughout the remainder of the hearing that day as well as on the continued date.

Although we find that Kenneth's request to represent himself was unequivocal, there is no question that the trial court failed to substantially comply with its obligations under MCR 6.005(D)(1), (E), and *Williams*. The trial court did not determine on the record that Kenneth's waiver was knowing, intelligent, and voluntary. The trial court failed to personally inform Kenneth of the potential risks of self-representation, and did not engage in any inquiry or dialogue to satisfy itself that Kenneth would not disrupt, unduly inconvenience, or burden the court. See *Williams*, 470 Mich at 642. The trial court failed to advise respondent of the maximum sentence, any minimum sentence, and the risks of self-representation. See MCR 6.005(D)(1). The trial court did not consult the court rules or engage in a dialogue with respondent testing the unequivocality or voluntariness of the waiver, or the knowing and understanding nature of his request. See *People v Brooks*, __ Mich App __; __ NW2d __ (Docket No. 298299, issued August 16, 2011) (slip op at 8). Moreover, the trial court failed to advise Kenneth of his continuing right to counsel on the second day of the contempt hearing. MCR 6.005(E).

The trial court's error in this case is not subject to a harmless error analysis.

> 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. While the harmless error doctrine is not entirely inapplicable to ineffective waivers of the right to counsel, it has been limited to cases in which the effect of the deprivation of counsel does not "pervade the entire proceeding." *Willing*, 267 Mich App at 224.

Thus, for deprivation of counsel to be deemed a structural error, the deprivation must total or complete at a critical stage of the proceedings, and must contaminate the entire proceeding. Although Kenneth was afforded stand-by counsel, there was still a "total deprivation of counsel" because counsel in an advisory capacity is not responsible for directing a defense and is not "counsel" within the meaning of the Sixth Amendment. *Id.* at 227–228. There is also no doubt that Kenneth was denied counsel at a critical stage. In fact, Kenneth represented himself from opening statements to closing arguments. Although Kenneth performed very well, even successfully objecting to certain testimony, we simply cannot overlook the fact that he was denied counsel throughout the trial.

II. JUDICIAL BIAS

Given that the matter will be remanded before the same trial court judge, we must address Kenneth's claim of judicial bias. Kenneth argues that the trial judge was biased against him and

displayed antagonism that required disqualification. He further contends, even in the absence of actual bias, disqualification was required in this case. We disagree.

In order to preserve for appellate review the issue of a denial of a motion for disqualification of a trial court judge, a party must comply with the procedure in MCR 2.003. See *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). Because respondent failed to seek review of the court's denial of his request for recusal in compliance with MCR 2.003(D)(3)(a)(i), by requesting referral to the chief judge, the issue is unpreserved. Moreover, respondent has raised different grounds for disqualification on appeal than he raised in the trial court. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Kenneth must show (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected substantial rights. *Carines*, 460 Mich at 763. The third requirement requires a showing of prejudice—that the error affected the outcome of the lower court proceedings. *Id.* Even if these three requirements are satisfied, reversal is warranted only when the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness of the judicial proceedings. *Id.* at 763-764.

To ensure a defendant's due process right to a fair trial, the presiding judge must remain impartial or "neutral and detached." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). A motion to disqualify must "be filed within 14 days after the moving party discovers the ground for disqualification." MCR 2.003(D)(1)(a). The moving party must also submit an affidavit including all grounds for disqualification that are known at the time the motion is filed. MCR 2.003(D)(2). "A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Under MCR 2.003(C)(1)(a), disqualification of a judge is warranted when the judge is biased or prejudiced for or against a party or attorney. In general, a party must show actual, personal prejudice to disqualify a judge under MCR 2.003. *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009). The bias must be personal *and* extrajudicial, having its origin in events or sources gleaned outside the judicial proceedings. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996) "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a 'deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Armstrong v Ypsilanti Charter Township*, 248 Mich App 573, 597; 640 NW2d 321 (2001) (internal quotation marks omitted), quoting *Cain*, 451 Mich at 496. Similarly, opinions formed by a judge during the course of the trial based on facts introduced or events that occur during the proceedings do not constitute bias "unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). "Comments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality." *Id.* Further, expressions of impatience and annoyance do not establish bias. *Cain*, 451 Mich at 497 n 30, quoting *Liteky v US*, 510 US 540, 555-556; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

However, there are also situations in which a showing of actual bias is not necessary. *Wade*, 283 Mich App at 470. Those situations include when the judge:

> (1) has a pecuniary interest in the outcome of the case, (2) has been the target of personal abuse or criticism, (3) is enmeshed in other matters involving the

> petitioner, or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact-finder or initial decision maker. [*Id.*]

"[E]xperience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable," and disqualification is warranted without a demonstration of actual bias. *Cain*, 451 Mich 498. Still, "disqualification on this basis is only required 'in the most extreme cases.'" *Id*.

We do not believe that the trial court was biased, nor do we believe that the trial court was so enmeshed in other matters involving Kenneth that disqualification was necessary. While the trial court may have demonstrated moments of frustration and annoyance with Kenneth, there is simply nothing in the record to support a finding of bias.

Dawn and Kenneth failed to appear at the original show cause hearing on September 21, 2010. Bench warrants were issued and on September 27, 2010, they both appeared for an arraignment on charges of criminal contempt. The trial court noted its displeasure with the failure of Dawn and Kenneth to appear at the originally scheduled show cause hearing. The trial court indicated that it was familiar with the contentious relationship between the parties, noting that there were concurrent guardianship and neglect proceedings. At the end of the hearing, the trial court stated, "And now I would like you both to quietly and calmly leave the courthouse. Because I'm – because . . . I have not held Mr. Kabanuk in contempt yet but I'm – should have done it . . . a long time ago."

When the contempt hearing began on October 5, 2010, Kenneth asked the judge to recuse herself, not on the basis of personal animus or bias, but because the judge was the assistant prosecutor during his preliminary examination in 1992. Both Kenneth's attorney and Dawn's attorney admitted that there was no real support for the motion. In denying Kenneth's request, the judge noted:

> [H]ere's the interesting thing about that, is that Mr. Kabanuk has had cases here for at least a year and he's never asked that I recuse myself before. He's had situations with PPO's and there's been – you know, PPO's that he asked for and that other people asked for and PPO's flying back and forth and he – until this – this moment he's never asked that I recuse myself. And I do not feel any personal bias against Mr. Kabanuk because if he had a preliminary exam that I was involved in in 1992 I can assure you I have no recollection of that whatsoever. So I don't know how I could be bi – biased against him.

Although 19 days had passed since the arraignment, Kenneth never moved to have the judge disqualified for personal bias. This is notable because in his brief on appeal, Kenneth argues that the trial court's comment that it should have held Kenneth in contempt on any number of prior occasions was a clear indication that she was biased against him. Yet he made no attempt to have the judge disqualified on those grounds.

During the hearing, Kenneth indicated that he suspected judicial bias long before the hearing, as indicated by the following exchanged:

MR. KABANUK: On that day, your Honor, when we were here there was a commotion in the hallway and I can see you've already made a decision.

THE COURT: You can see I've already made a decision?

MR. KABANUK: Yeah. I mean, anyway, that day in the – in the hallway there was a commotion. Before anybody found out who did what or what was said or who started it you told the deputies to remove me from the courtroom or if I resisted throw him in jail.

THE COURT: I think that you need to –

MR. ARNDT [prosecutor]: Well, facts not in evidence.

THE COURT: I think that you need to confine your comments to what was adduced on the witness stand and no one testified to that.

MR. KABANUK: Oh, but it did happen. Okay.

Again, even though Kenneth believed that the trial court pre-judged him as far back as September 8, 2010, he made no attempt to have the judge disqualified.

Kenneth also complains that the judge showed bias against him when she denied his request for an adjournment in order to present Dawn's ex-husband, Kurt Traskos, as a witness. However, as previously stated, "judicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a 'deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Armstrong*, 248 Mich App at 597. In denying Kenneth's request, the trial court stated:

The problem with that is that this is the second date. I already had a hearing date set [9/21/10] and – where they claimed they didn't know about the date and everybody was here for that date; the prosecutor, the witness, all those different people, and they didn't appear and I bench warranted them. Then they showed up [9/27/10] and I set a hearing date – I set a hearing date out and everybody seemed fine with it. I'm not willing to adjourn it again. It's – it's already been adjourned. So I'm not – I'm not willing to adjourn it again. They were aware of this witness at the time. Mr. Kabanuk has certainly learned the justice system. He's – I know he is a party in – in a number of civil lawsuits. He's familiar with subpoenaing people. I know he's familiar with filing lawsuits and coming to court and – and what's necessary. And, you know, this is the eleventh hour.

Contrary to Kenneth's assertions, the trial court's comments do not reflect bias; instead, the comments set forth sound reasoning for denying his motion to adjourn the proceedings. The motion was made just after Kenneth's motion for recusal. It was perfectly reasonable for the trial court to assume that Kenneth was "grasping at straws" in an attempt to further delay the proceedings. When it became obvious that the proceedings would not conclude on October 5, 2010, a second date of October 8, 2010, was chosen. Kenneth again complained that he needed

more time to secure Traskos as a witness. The trial court simply stated "you didn't subpoena [him] so I'm not sympathetic . . . this is your second court date. We were all here on the first one when you – you had to be bench warranted for failure to appear." Additionally, at no time did Kenneth make an offer of proof as to what Traskos' testimony would be. Although Kenneth claimed that Traskos provided an affidavit, it is not part of the lower court record.

When the contempt hearing recommenced, the trial court noted:

> I'm going to take judicial notice that there's been ongoing – and for the Record, Mr. Arndt [prosecutor], I don't mean to interrupt you, there's been ongoing animosity, there's been ongoing cases, there's a guardianship with a young man who's been caught in the middle of a guardianship and neglect case, there's been personal protection order, there's been lawsuits by Mr. Kabanuk, there's been competing personal protection orders, I've had extensive hearings about competing personal protection orders. Many were not issued, however, there are two valid personal protection orders that Mary Nordstrom has against Mr. Kabanuk and Ms. Traskos.

Contrary to Kenneth's argument, the trial court's statement does not reflect that the judge was so enmeshed with extraneous proceedings that she could no longer remain impartial. The comment provided a mere backdrop for the ensuing testimony. It was the trial court's attempt to keep Kenneth, who was representing himself, on track in terms of what testimony was critical and what testimony was irrelevant.

Finally, Kenneth argues that the trial court showed obvious bias when setting forth its findings:

> I point out that there – that Mr. – Mr. Kabanuk was not very credible in his testimony in this matter. He bounced back and forth between, I didn't call her a f***ing bitch, I only called her once, I didn't talk to them at all, they approached me, then he says I should have kept my mouth shut. His credibility is also affected by the fact that my clerk took it upon herself to run out of the courtroom because of the loudness of what was going on outside and the fact that Mr. – Mr. Kabanuk has been loud and disruptive and impulsive on just about each and every time he's been to this court, which has been at least ten times.
>
> The Nordstrom's, on the other hand, have not demonstrated disruption, at least in this courtroom. That affects his credibility.

We do not believe that the foregoing comments indicate judicial bias. There is simply nothing on the record before us that leads us to conclude the trial court judge was biased against Kenneth or that she was so enmeshed with other proceedings that she could not remain impartial.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly