STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 26, 1997
v	No. 170140 Oakland Circuit Court
MICHAEL P. GEOGHEGAN, a/k/a MICHAEL P. GEOGHAGAN,	LC Nos. 93-122365, 93-122382
Defendant-Appellant.	ON REMAND

Before: White, P.J., and Holbrook, Jr., and Smolenski, JJ.

PER CURIAM.

This case is before us on remand from the Michigan Supreme Court. In our earlier opinion, *People v Geoghegan*, unpublished opinion per curiam, issued November 26, 1996 (Docket No. 170140), we reversed and remanded for a new trial on the basis that the trial court failed to advise defendant of the dangers and disadvantages of self-representation. We concluded that the trial court had thus failed to substantially comply with the waiver of counsel procedures set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), and MCR 6.005(D), before granting defendant's request to proceed in propria persona.

In lieu of granting leave to appeal, the Supreme Court remanded to this Court to consider "whether waiver of the right to counsel is subject to a harmless error analysis and, if so, whether any error in advising defendant about the dangers of self-representation was harmless beyond a reasonable doubt."

We have considered the issue as directed, and conclude that a court's failure to engage in the prescribed colloquy regarding the waiver of counsel is subject to a harmless-error analysis, and that the error is harmless if it can be shown that, notwithstanding the failure, the waiver of counsel was nevertheless voluntary, knowing and intelligent. In the instant case, we conclude that the record as a whole establishes such a waiver.

I

The Sixth Amendment and the Michigan Constitution guarantee that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so. *Faretta v California*, 422 US 806; 45 L Ed 2d 562; 95 S Ct 2525 (1975).; *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996); Const 1963, Art 1, § 13. Waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case on the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Edwards v Arizona*, 451 US 477, 483-484; 68 L Ed 2d 378; 101 S Ct 1880 (1981).

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. [*Faretta, supra* at 832-833. Citations omitted.]

Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson v Zerbst*, 304 US 458, 464; 82 L Ed 2d 1461; 58 S Ct 1014 (1938).

The general rule that a constitutional error does not automatically require reversal of a conviction was adopted in *Chapman v California*, 386 US 18; 17 L Ed 2d 705; 87 S Ct 824 (1967). *Arizona v Fulminante*, 499 US 279, 306; 113 L Ed 2d 302; 111 S Ct 1246 (1991). In determining whether a harmless error analysis is appropriate, "a court must ask if the error is a structural defect in the constitution of the trial mechanism, which defies analysis by harmless-error standards." *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994), citing *Fulminante*, *supra* at 309.[1] These errors include the total deprivation of the right to counsel at trial,[2] the right to an impartial judge,[3] excluding grand jury members who are the same race as the defendant,[4] denial of the right of self-representation,[5] denial of the right to a public trial,[6] and a constitutionally improper reasonable doubt instruction. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair. *Rose v Clark*, 478 US 570, 577-578; 92 L Ed 2d 460; 106 S Ct 3101 (1986). Harmless error analysis "thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Id.* Upon finding a structural defect, a court must automatically reverse. *Anderson (After Remand)*, 446 Mich at 405; *Fulminante*, 499 US at 309-310.

At the other end of the spectrum, however, is constitutional error that does not constitute a structural defect, i.e., trial errors that occur during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether the error was harmless beyond a reasonable doubt. *People v Belanger*, 454 Mich 571; 563 NW2d 665 (1997); *Anderson (After Remand)*, 446 Mich at 405-406, citing *Fulminante*,

499 US at 307-308. This requires the beneficiary of the error to prove, and the court to determine, beyond a reasonable doubt that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. *Anderson (After Remand), supra* at 406, citing *Chapman, supra* at 23. Since *Chapman*, the United States Supreme Court has applied a harmless error-analysis to a wide range of errors and has recognized that many constitutional errors can be harmless. *Id.* at 306-307.[7]

II

A

Our initial opinion discussed the waiver of counsel procedures required of Michigan courts before a defendant's request to proceed in propria persona may be granted. See *Geoghegan, supra*, slip op at 9-11. A trial court must substantially comply with the requirements of *Anderson, supra*, and MCR 6.005(D), i.e., the court must discuss the substance of both *Anderson* and MCR 6.005(D) 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. *Adkins, supra* at 726-727. Proper compliance requires that the court engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant. *Id.* at 721.

> Application of the waiver of counsel procedures is the duty of the court. The trial judge is in the best position to determine whether the defendant has made the waiver knowingly and voluntarily. Further, the effectiveness of an attempted waiver does not depend on what the court says, but rather, what the defendant understands.[8] [*Adkins*, 452 Mich at 723.]

The operative inquiry is thus what the defendant understands. In order for the waiver to be voluntary, knowing and intelligent, the defendant must understand the dangers and disadvantages of self-representation. *Anderson, supra.* Because a defendant may understand the dangers and disadvantages of self-representation despite the court's failure to address the subject on the record, a harmless error analysis is appropriate.

We conclude that where a defendant seeks to proceed pro se, a court's failure to engage in the prescribed colloquy with the defendant is subject to a harmless-error analysis. *Adkins, supra* at 725-727 (adopting the "substantial compliance" test adopted by the United States Court of Appeals for the Sixth Circuit in *United States v McDowell*, 814 F2d 245, 248-249 [CA 6, 1987], and requiring substantial compliance and not literal adherence to the waiver of counsel procedures set forth in *Anderson*, 398 Mich 361, and MCR 6.005[D], before granting a defendant's request to proceed in propria persona); *People v Lane*, 453 Mich 132, 139; 551 NW2d 382 (1996) (citing *People v Dennany*, 445 Mich 412, 439; 519 NW2d 128 [1994], for the proposition that whether a particular departure from the court rules regulating the initial waiver of counsel justifies reversal depends on the nature of the noncompliance).

To assess whether the error is harmless beyond a reasonable doubt, it must be determined from the record as a whole[9] whether, despite the failure to engage in the prescribed colloquy, the waiver was, nevertheless, constitutionally sound, i.e., voluntary, knowing and intelligent. *Edwards v Arizona, supra* at 483-484; see also *United States v Marks*, 38 F3d 1009, 1015 (CA 8, 1994)(noting that while a specific warning on the record of the dangers and disadvantages of self-representation is not an absolute necessity, it is required that in its absence the record shows that the defendant had this required knowledge from other sources); *United States v Balough*, 820 F2d 1485, 1487-1490 (CA 9, 1987) (noting that although the preferred procedure to ensure that a waiver is knowingly and intelligently made is for the district court to discuss the charges, the possible penalties and the dangers of self-representation with the defendant in open court, a limited exception may exist "whereby a district court's failure to discuss each of the elements in open court will not necessitate automatic reversal when the record as a whole reveals a knowing and intelligent waiver."); *Fitzpatrick v Wainwright*, 800 F2d 1057, 1065-1068 (CA 11, 1986); *Hendricks v Zenon*, 993 F2d 664 (CA 9, 1993), citing *Balough, supra*.[10]

> Absent a district court's discussion of the three elements, we will look to 'the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused' to determine whether the waiver was knowing and intelligent despite the absence of a specific inquiry on the record. [*Balough, supra* at 1488.]

B

We conclude that in the instant case, the record as a whole indicates that defendant understood the dangers and disadvantages of self-representation at the time he made his choice. In *McDowell, supra*, the Sixth Circuit Court of Appeals concluded that despite the court's failure to give explicit warnings and make the determinations concerning the waiver of counsel, the record nevertheless established that the pro se defendant had validly waived his right to counsel:

> We think it a fair reading of the record as a whole that *McDowell* understood the dangers and disadvantages of self-representation at the time he made his choice. It is clear that he was not a stranger to the courts, he knew he was entitled to counsel, and he was not faced with a situation of enduring representation by counsel he considered ineffective or being forced to proceed immediately on his own (as in many of the cases cited). We conclude from the record that *McDowell* elected to defend himself at trial with his "eyes open." [*Id.* at 249.]

We find this case indistinguishable from *McDowell*. Like McDowell, defendant "was not a stranger to the courts," and "knew he was entitled to counsel." Further, this case was not the typical case where defendant was "faced with a situation of enduring representation by counsel he considered ineffective or being forced to proceed immediately on his own" to trial. *McDowell, supra; Adkins, supra* at 737 (Boyle, J., with Riley, J., concurring).

Additionally, we are satisfied that the court's compliance with *Anderson* would not have led to a different result; it is clear from the record that defendant would have insisted in representing

himself under any circumstances. Lastly, although the specific dangers of self-representation were never explained on the record, defendant stated that he understood that in representing himself he had a fool for a client.

We conclude that a harmless error analysis is appropriate in determining the consequences of a court's failure to engage in the prescribed colloquy, and that in the instant case the failure is harmless because defendant's waiver was nevertheless voluntary, knowing, and intelligent.[11]

Notwithstanding this decision, we observe that questions regarding the adequacy of a defendant's waiver can be avoided by a trial court's compliance with *Anderson* and MCR6.005(D), and urge such compliance.

Affirmed.

/s/ Helene N. White
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski

[1] The *Fulminante* Court noted:

> The common thread connecting these cases [to which a harmless-error analysis applies] is that each involved 'trial error' – error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. In applying harmless-error analysis to these many different constitutional violations, the Court has been faithful to the belief that the harmless-error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' [499 US at 306. Citation omitted.]

[2] *Gideon v Wainwright*, 372 US 335; 9 L Ed 2d 799; 83 S Ct 792 (1963).

[3] *Tumey v Ohio*, 273 US 510; 71 L Ed 749;, 47 S Ct 437 (1927).

[4] *Vasquez v Hillery*, 474 US 254; 88 L Ed 2d 598; 106 S Ct 617 (1986).

[5] *McKaskle v Wiggins*, 465 US 168, 177-178, n 8; 79 L Ed 2d 122; 104 S Ct 944 (1984).

[6] *Waller v Georgia*, 467 US 39, 49, n 9; 81 L Ed 2d 31; 104 S Ct 2210 (1984).

[7] The *Fulminante* Court then cited the following cases:

> See, e.g., *Clemons v Mississippi*, 494 US 738, 752-754, 108 L Ed 2d 725, 110 S Ct 1441 (1990)(unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Satterwhite v Texas*, 486 US 249, 100 L Ed 2d 284, 108 S Ct 17992 (1988)(admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); *Carella v California*, 491 US 263, 266, 105 L Ed 2d 218, 109 S Ct 2419 (1989)(jury instruction containing an erroneous conclusive presumption); *Pope v Illinois*, 481 US 497, 501-504, 95 L Ed 2d 439, 107 S Ct 1918 (1987)(jury instruction misstating an element of the offense); *Rose v Clark*, 478 US 570, 92 L Ed 2d 460, 106 S Ct 3101 (1986)(jury instruction containing an erroneous rebuttable presumption); *Crane v Kentucky*, 476 US 683, 691, 90 L Ed 2d 636, 106 S Ct 2142 (1986)(erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware v Van Arsdall*, 475 US 673, 89 L Ed 2d 674, 106 S Ct 1431 (1986) (restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); *Rushen v Spain*, 464 US 114, 117-118, and n 2, 78 L Ed 2d 267, 104 S Ct 453 (1983)(denial of a defendant's right to be present at trial); *United States v Hasting*, 461 US 499, 76 L Ed 2d 96, 103 S Ct 1974 (1983) (improper comment on defendant's silence at trial); *United States v Hasting*, 461 US 499, 76 L Ed 2d 96, 103 S Ct 1974 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Hopper v Evans*, 456 US 605, 72 L Ed 2d 367, 102 S Ct 2049 (1982)(statute improperly forbidding trial court's giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause); *Kentucky v Whorton*, 441 US 786, 60 L Ed 2d 640, 99 S Ct 2088 (1979)(failure to instruct the jury on the presumption of innocence); *Moore v Illinois*, 434 US 220, 232, 54 L Ed 2d 424, 98 S Ct 458 (1977)(admission of identification evidence in violation of the Sixth Amendment Confrontation Clause); *Brown v United States*, 411 US 223, 232-232, 36 L Ed 2d 208, 93 S Ct 1565 (1973)(admission of out-of-court statement of a non-testifying codefendant in violation of the Sixth Amendment Counsel Clause); *Milton v Wainwright*, 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174 (1972)(confession obtained in violation of *Massiah v United States*, 377 US 210, 12 L Ed 2d 246, 84 S Ct 1199 (1964); *Chambers v Maroney*, 399 US 42, 52-53, 26 L Ed 2d 419, 90 S Ct 1975 (1970)(admission of evidence obtained in violation of the Fourth Amendment); *Coleman v Alabama*, 399 US 1, 10-11, 26 L Ed 2d 387, 90 S Ct 1999 (1970)(denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause). [*Fulminante*, 499 US at 306-308.]

[8] In a footnote to this paragraph, the *Adkins* Court noted that "[m]erely going through the requirements without sensitivity to the defendant's reaction to these issues is insufficient." *Id.* at 723 n 22.

[9] In some cases it might be appropriate to remand to the trial court for further factual development on the record of the circumstances surrounding the waiver.

[10] See also, *Savage v Estelle*, 924 F2d 1459, 1465 n 13 (CA 9, 1990); *United States v Moya-Gomez*, 860 F2d 706, 733 (CA 7, 1988); *United States v Hafen*, 726 F2d 21, 25 (CA 1, 1984); *United States v Harris*, 683 F2d 322, 324 (CA 9, 1982); *United States v Kimmel*, 672 F2d 720, 722 (CA 9, 1982); United *States v Bird*, 621 F2d 989, 991 (CA 9, 1980); and *United States v Gillings*, 568 F2d 1307, 1309 (CA 9, 1978).

[11] Our decision makes it unnecessary to address whether a failure to obtain a voluntary, knowing and intelligent waiver of counsel, as distinguished from a failure to comply with *Anderson* and MCR 6.005(D) where the wavier is nevertheless found to be voluntary, knowing and intelligent, is properly subject to a harmless-error analysis. Thus, we do not address whether such a failure would constitute a structural defect requiring automatic reversal without regard to the quality of the self-representation or the quantum of evidence of guilt. See *United States v Salemo*, 61 F3d 214, 218 (CA 3, 1995); and *United States v Allen*, 895 F2d 1577, 1579-1580 (CA 10, 1990); but see *Richardson v Lucas*,741, F2d, 753, 757 (CA 5, 1984); and *People v Wilder*, 35 Cal App 4th 489, 494-496; 41 Cal Rptr 2d 463 (1995).