STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2000
v	No. 214029 Clinton Circuit Court
DONELL JACKSON a/k/a ALVIN BELMAR, Defendant-Appellant.	LC No. 98-006470 FH

Before: Doctoroff, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

Defendant Donell Jackson appeals as of right from his conviction of receiving and concealing stolen property in excess of $100, MCL 750.535; MSA 28.803. Defendant was sentenced as a fourth habitual offender, MCL 769.11; MSA 28.1083, to seven to twenty years' imprisonment. We affirm.

I

Defendant first argues that the prosecutor improperly elicited testimony at trial regarding defendant's assertion of his right to remain silent after he was arrested. Defense counsel did not object to the question that elicited the testimony. Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object. *People v Alexander*, 188 Mich App 96, 101; 469 NW2d 10 (1991). However this Court may review an unpreserved issue involving a significant constitutional question. *Id.* We review questions of constitutional law de novo. *People v Echavarria*, 233 Mich App 356, 358; 592 NW2d 737 (1999).

In general, a defendant's post-arrest, post-*Miranda*[1] silence cannot be used as evidence against him. *Doyle v Ohio*, 426 US 610, 618-619; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v McReavey*, 436 Mich 197, 217-218; 462 NW2d 1 (1990); *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973). Here, defendant argues that evidence of his exercise of his right to remain silent was improperly admitted during the prosecutor's questioning of Sergeant Rose:

Prosecutor: All right. Now, you began to say that you questioned him more about the vehicle after you read him his rights. What did you question him about?

Sergeant Rose: I asked him where he got the vehicle, and he stated that he found it; then, I asked him – tried to ask him, you know, where did you find it at, and he stated that he wouldn't answer any more questions.

Prosecutor: All right. Did you have any further dealings with the passengers at that point?

* * *

Prosecutor: Let me stop you. Did you have any discussion in the car on the way to the jail?

Sergeant Rose: I think I asked him, you know, again, about his name. After that, I think he said – he just stated he didn't want to talk.

Prosecutor: Okay. Once you got to the jail, what did you do then?

Sergeant Rose: I did the booking information.

Because the alleged constitutional error was unpreserved, defendant can avoid forfeiture only by showing that the error was a plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A plain error is an error that was "clear and obvious." *Id.* To show that the error affected defendant's substantial rights, defendant must persuade this Court that the error was prejudicial, that is, that the error affected the outcome of the lower court proceedings. *Id.*

Here, defendant has not shown a plain error affecting his substantial rights. It is not clear that the prosecutor's questioning was a deliberate attempt to elicit improper testimony. Furthermore, the prosecutor did not mention defendant's invocation of his right to remain silent during closing arguments, see *Alexander, supra* at 104-105, and defendant himself later testified that he invoked his right to remain silent. Considering the brief and isolated references to defendant's silence in light of the weight of the evidence of defendant's guilt, we cannot conclude that the admission of the challenged testimony affected the outcome of the lower court proceeding. Thus, defendant has not avoided forfeiture of this unpreserved issue.

Defendant next contends that he was deprived of the effective assistance of counsel insofar as his counsel did not object to the prosecutor's question that ultimately revealed that defendant had exercised his rights under *Miranda*. Defendant further contends that his counsel erred in eliciting testimony from defendant regarding his exercise of his right to remain silent. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that,

but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant must overcome a strong presumption that counsel's assistance

constituted sound trial strategy. *Id.* at 687. Because defendant did not move for a *Ginther*[2] hearing, our review is limited to mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

First, defense counsel's failure to object to the admission of Sergeant Rose's testimony regarding defendant's exercise of his right to remain silent did not amount to ineffective assistance of counsel. Defense counsel may have made a strategic decision not to object to avoid drawing the jury's attention to the testimony. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995); *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996). Defendant has not overcome the presumption that defense counsel's conduct was sound trial strategy. *Stanaway, supra* at 687.

Furthermore, defendant is not entitled to relief with respect to his claim that defense counsel was ineffective because he elicited testimony from defendant regarding his invocation of his right to remain silent. While defense counsel was questioning defendant regarding his arrest, the following exchange occurred:

> *Defendant*: Well, I am saying as far as me relating to him that I told him that was Keisha – I told him the registration was in the glove compartment, which he retrieved from the glove compartment.
>
> *Defense Counsel*: He got the registration?
>
> *Defendant*: Yes.
>
> *Defense Counsel*: What happened after that?
>
> *Defendant*: Upon the request – I told him that he could let the occupants go. He came to me and said, "Okay. We have" – I saw him take the occupants; he unhandcuffed the lady, took the children in the other squad car, and left off the scene with them. He related to me at that time that they had taken the occupants to a bus station somewhere in the city and let them go.
>
> At that point, I spoke to him. He asked me, "Excuse me. Now, what did you want to tell me?" *At that point I stood on my rights not to say anything further without a lawyer.*
>
> *Defense Counsel*: Okay.
>
> *Defendant*: And then they proceeded to wrap up things by getting the car towed, and transporting me to jail.

We cannot conclude from the record that defense counsel's questioning was intended to elicit testimony regarding defendant's exercise of his right to remain silent. Defense counsel merely asked defendant "[w]hat happened after that?" when questioning him regarding events surrounding his arrest. On the basis of the record before us, we cannot conclude that defense counsel's conduct fell below an

objective standard of reasonableness. *Pickens, supra*. Furthermore, we are not convinced that, but for the alleged error, the result of the proceedings would have been different. *Stanaway, supra*.

II

Defendant next argues that the trial court denied him the right to be present at trial when the court twice removed him from the courtroom. We disagree. A trial court's decision to remove a defendant from the courtroom is reviewed for an abuse of discretion. *People v Harris*, 80 Mich App 228, 230; 263 NW2d 40 (1977).

The right of a defendant to be present at every stage of the trial, including voir dire and the jury selection process, is impliedly guaranteed by the federal and state confrontation clauses, US Const, Am VI; Const 1963, art 1, § 20. *Illinois v Allen*, 397 US 337, 338; 90 S Ct 1057; 25 L Ed 2d 353 (1970); *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984); *People v Burton*, 219 Mich App 278, 287; 556 NW2d 201 (1996). A criminal defendant also has a specific statutory right to be present at his or her trial. MCL 768.3; MSA 28.1026 ("No person indicted for a felony shall be tried unless personally present during the trial; persons indicted or complained against for misdemeanors may, at their own request, through an attorney, duly authorized for that purpose, by leave of the court, be put on trial in their absence."). However, the proper administration of justice includes maintaining dignity, order, and decorum in the courtroom, *People v Staffney*, 187 Mich App 660, 666; 468 NW2d 238 (1990); *Allen, supra* at 343, and a trial court may remove a defendant from the courtroom if the defendant repeatedly interrupts the trial with disorderly behavior, thereby making it impossible to carry on the proceedings in his presence. *Harris, supra* at 230.

Defendant contends that while a defendant may waive his right to be present at trial, the waiver must be knowing, voluntary, and intelligent. He argues that no waiver occurred because the court never advised him of his right to be present, and he never expressly waived the right on the record. Defendant's argument lacks merit. The clear import of *Allen*, *Harris*, and *Staffney* is that a defendant's misconduct, alone, is enough to effectuate a waiver of the right to be present at trial. Here, defendant established a pattern of interrupting the proceedings early in the case when he interrupted the court during a pretrial motion hearing. Moreover, defendant's removal during voir dire, as in *Allen, supra*, was preceded by a warning that any further interruption would result in his removal from the courtroom. The trial court set the tone early in the proceedings that it would not tolerate any interruption, and defendant chose to do so despite the court's warnings. Prior to both removals, defendant was warned not to interrupt the proceedings, and each time he was removed, the court allowed defendant to meet with counsel and state his objections on the record. Moreover, the trial court had the ability to assess defendant's demeanor at trial, and we find no abuse of discretion in the trial court's decision to remove defendant from the courtroom.

III

Defendant next contends that the trial court erred when it cursorily denied his request to represent himself. We disagree. We review a trial court's denial of a request to proceed in propria persona for an abuse of discretion. *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997).

A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by the Michigan Constitution and by statute. Const 1963, art 1, § 13; MCL 763.1; MSA 28.854; *Faretta v California*, 422 US 806, 832; 95 S Ct 2525; 45 L Ed 2d 562 (1975); *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996). However, the right is not absolute, and several requirements must be met before a defendant may proceed in propria persona. *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976); *Ahumada*, *supra* at 616.

First, a defendant's request to represent himself must be unequivocal. *Adkins, supra* at 722; *Anderson, supra* at 367. Second, the trial court must determine that the defendant's assertion of his right is knowing, intelligent, and voluntary. The court must make the defendant aware of the dangers and disadvantages of self-representation. *Adkins*, *supra* at 722; *Anderson*, *supra* at 368. Third, the trial court must determine that the defendant's self-representation will not disrupt, inconvenience or burden the court. *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994) (Griffin, J.); *Anderson*, *supra* at 368. Fourth, the trial court must comply with the requirements of MCR 6.005(D), which generally requires the trial court to advise the defendant of the charge, the maximum possible prison sentence, any mandatory minimum sentence, the risks of self-representation, and offer the defendant the opportunity to consult with an attorney. MCR 6.005(D). If the judge is uncertain with respect to whether any of the waiver procedures are met, he should deny the request to proceed in propria persona and note the reasons for the denial on the record. *Adkins, supra* at 727. The court should "'indulge every reasonable assumption against waiver.'" *Id.* at 721, quoting *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 2d 1461 (1938).

The facts of this case are similar to those of *People v Rice*, 231 Mich App 126; 585 NW2d 331 (1998), *rev'd* 459 Mich 896; 589 NW2d 280, *on remand* 235 Mich App 429; 597 NW2d 843 (1999), where the trial court summarily denied the defendant's request to represent himself without a showing on the record that it followed the procedures set forth in *Anderson* and MCR 6.005(D). In *Rice*, the defendant, through his counsel, brought a motion to represent himself the day before trial was to begin:

> *Defense Counsel*: Mr. Rice also asked me to ask the Court about him representing himself in this matter.
>
> *The Court:* Well.
>
> *Defense Counsel:* And at his request I'm asking the Court if he can represent himself.

> *The Court:* At this juncture, Mr. Rice, you are not going to be representing yourself. [Defense counsel] is going to represent you. You're going to be able to sit next to him and suggest questions to him that he can ask and do everything except stand up and argue the case yourself.
>
> But we are to the eve of trial here. The case is ready to go. There is – it's a – it's a very, very, very serious case. It's a felony, life maximum, automatic life without parole if it gets to be first degree. And you have very competent, very experienced counsel. And I'm not at this point about to discharge your counsel and let you try the case yourself. I would be very remiss in my duty if I did that. [*Rice, supra*, 231 Mich App at 129-130.]

On appeal, the defendant argued that he was entitled to the reversal of his convictions because the trial court failed to comply with the procedures set forth in *Anderson* and MCR 6.005(D). *Rice, supra* at 130. This Court reluctantly reversed the defendant's convictions and remanded for a new trial on the basis that the trial court failed to substantially comply with *Anderson* and MCR 6.005(D). *Id.* at 134. However, the Supreme Court reversed this Court's decision in an order stating:

> In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the judgment of the Berrien Circuit Court is reinstated. MCR 7.302(F)(1). The record does not establish that defendant made an unequivocal request to represent himself that was knowing, intelligent, and voluntary, nor did the illiterate defendant's brief mention of the subject suggest that self-representation would not be disruptive or unduly burdensome. [*People v Rice,* 459 Mich 896; 589 NW2d 280, *modified* 459 Mich 924; (1998).]

We find the facts of the instant case to be substantially similar to those of *Rice, supra.* In the instant case, defense counsel indicated during a pretrial motion hearing that, while there had been a breakdown in the attorney-client relationship, the relationship had thereafter been repaired. Subsequently, the following exchange occurred immediately before voir dire began:

> *The Court:* The defense attorney in this case who will be representing Mr. Jackson, the Defendant, is Mr. Fred Blackmond, standing before you.
>
> *Defense Counsel:* Good morning, Your Honor. Good morning, ladies and gentlemen.
>
> *The Court:* Good to see you. And the defendant in this case is named Donnell Jackson. Mr. Jackson, good to see you.
>
> *Defendant:* I will be representing myself.
>
> *The Court:* I am afraid you won't be, sir.
>
> *Defendant:* I will – fine, but I want to let the Court know that I desire to represent myself.

The Court: And should you interrupt the Court again, the Court will find ----

Defendant: You asked me a question — you asked me a question.

The Court: You are removed, sir. We will take a break. We will let Mr. Jackson leave the courtroom.

Defendant: I object to any hearing held outside of my presence.

The Court: Thank you, sir. We appreciate your being here this morning.

As in *Rice*, the record does not indicate that defendant made an unequivocal request to represent himself that was knowing, intelligent, and voluntary. We are not convinced that defendant's statement was a sincere request to represent himself rather than an attempt to disrupt and delay the proceedings. Furthermore, in light of defendant's inclination to disrupt the proceedings, the record does not suggest that defendant's self-representation would not have been disruptive or unduly burdensome. We therefore conclude that defendant is not entitled to the reversal of his convictions on the ground that he was denied the right to represent himself.

IV

Defendant next argues that the trial court erred when it denied defense counsel's motion to discover Kiesha Barksdale's bank records. We disagree. This Court reviews a trial court's grant or denial of a discovery request for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998); *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996).

Discovery of documents in a criminal case is generally governed by MCR 6.201. MCR 6.201(B)(1) provides that on request, the prosecuting attorney must provide a defendant with "any exculpatory information or evidence known to the prosecuting attorney." Under principles of due process, the prosecution is required to disclose evidence that is favorable to the defendant and material to the determination of guilt or punishment. *Fink, supra* at 454; *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). Evidence is material only if there is a reasonable probability that the trial result would have been different had the evidence been disclosed. *Fink, supra*. In addition, the trial court has discretion to grant discovery beyond that required by MCR 6.201. *People v Valeck*, 223 Mich App 48, 50; 566 NW2d 26 (1997).

Here, defendant filed a motion requesting that the court order Barksdale to produce certain bank records. Defendant alleged in the motion that Barksdale owed him money, and that the bank records would show that Barksdale withdrew money from her bank account through an automatic teller machine between January 29, 1998 and February 2, 1998. Defendant sought to use the bank records to support his defense theory that he knew Barksdale and had permission to use her car when he was arrested. However, defendant has not shown that the bank records were exculpatory. Even if the bank

records showed an automatic teller transaction on one of the specified dates, it does not follow that defendant knew Barksdale or that Barksdale gave defendant permission to use her car. Furthermore, defendant could not specify a particular date or the amount of the alleged withdrawal. The trial court did not abuse its discretion in denying defendant's motion to discover Barksdale's bank records.

V

Defendant's final contention is that the trial court erred in denying him the opportunity to allocute, and that he is entitled to resentencing. We agree. We review the sentencing transcript de novo to determine whether defendant was denied his right to allocution. See *People v Lowe*, 172 Mich App 347, 349-351; 431 NW2d 257 (1988).

Before imposing sentence, the court must give the defendant, the defendant's lawyer, the prosecutor, and the victim "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence." MCR 6.425(D)(2)(c); *People v Lugo,* 214 Mich App 699, 711; 542 NW2d 921 (1995). The court must strictly comply with the defendant's right to allocution, and must specifically ask the defendant separately whether he wishes to address the court. *People v Berry*, 409 Mich 774, 781; 298 NW2d 434 (1980); *Lugo, supra*. Generally, the inquiry should come immediately before the court imposes sentence and after the court has made its own remarks regarding the offense, the presentence report, the defendant's history, the needs of the community, and any other subject the court deems appropriate. *Berry, supra*.

Here, the trial court gave defendant the opportunity to challenge numerous aspects of his presentence investigation report, MCR 6.425(D)(2)(b), and specifically offered defense counsel the opportunity to allocate. However, the trial court failed to specifically inquire whether defendant separately wished to address the court. Therefore, defendant must be resentenced. *Berry, supra*.

Defendant's conviction is affirmed. The case is remanded for resentencing. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

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

[2] *People v Ginther*, 390 Mich 442-444; 212 NW2d 922 (1973).